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Bill Analysis

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Primary Sponsor: Rep. J. Miller

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SUMMARY

- Defines “deepfake media” as an image or an audio or video recording that (1) is created with the intent to deceive, and (2) appears to depict a real person speaking or acting in a manner that the person did not actually speak or act.
- Requires a person who knowingly creates and disseminates deepfake media for the purpose of influencing an election to disclose that fact in the deepfake media.
- Prescribes specific disclosure requirements for images, audio recordings, and videos.
- Prohibits any person from knowingly creating and disseminating deepfake media for the purpose of influencing the results of an election during the period beginning 90 days before the day of the election and ending on the day of the election.
- Allows a person who is harmed by a violation of the bill to sue the violator for compensatory and punitive damages, in addition to pursuing any other cause of action available under the law, such as a defamation lawsuit.

DETAILED ANALYSIS

Deepfake election materials

Definition of deepfake media

The bill defines “deepfake media” as an image or an audio or video recording that (1) is created with the intent to deceive, and (2) appears to depict a real person speaking or acting in a manner that the person did not actually speak or act.¹

¹ R.C. 3517.24(A).

The term “deepfake” usually refers to media created using artificial intelligence tools that are widely available on the Internet. These tools can make it easier for a person to create a false image, video, or sound clip, compared to other methods. Perhaps most famously, some deepfake generators allow a user to edit a video of a person by swapping the person’s face with another person’s face. Other generators enable a user to create media simply by entering a text instruction.

However, the bill also applies more widely to any type of media that is manipulated or artificially created, such as a manually retouched photo or an audio clip of an impersonator.

Disclosure requirement

The bill requires a person who knowingly creates and disseminates deepfake media, or knowingly creates and causes deepfake media to be disseminated, for the purpose of influencing an election to disclose that fact in the deepfake media as follows:²

- An **image** must be accompanied by a written statement that the image has been manipulated. The statement must be in a font size that is easily readable by a typical viewer and that is not smaller than the largest text accompanying the image.
- An **audio recording** must include a spoken statement at the beginning and end of the recording that the audio recording has been manipulated. The statement must be spoken in a manner that is easily intelligible to a typical listener. If the audio recording is more than four minutes long, the statement also must be included at least every two minutes during the recording.
- A **video** must include, for the entire duration of the video, a written statement that the video recording has been manipulated. The statement must be in a font size that is easily readable by a typical viewer and that is not smaller than the largest text accompanying the video.

Pre-election blackout period

The bill prohibits any person from knowingly creating and disseminating deepfake media, or from knowingly creating and causing deepfake media to be disseminated, for the purpose of influencing the results of an election during the period beginning 90 days before the day of the election and ending on the day of the election.³ The blackout period applies to deepfake media regardless of whether it contains a disclosure as described above. (See “**First Amendment issues,**” below.)

Enforcement

Under the bill, a person who is harmed by a violation of the bill may sue the violator for compensatory and punitive damages. (Courts impose compensatory damages to make a victim whole for financial losses the victim incurred, while they impose punitive damages in order to

² R.C. 3517.24(B).

³ R.C. 3517.24(C).

punish the violator.) This cause of action is in addition to any other cause of action available under statutory or common law (see “**Existing remedies for false campaign speech**,” below).

The bill does not impose any criminal or administrative penalty for violating the bill’s provisions. Ordinarily, a violation of the Election Law is a first degree misdemeanor unless the law specifies a different penalty. And, other provisions of the Campaign Finance Law are enforceable through an action brought before the Ohio Elections Commission.⁴

Existing remedies for false campaign speech

Defamation Law

Under continuing law, a candidate whose political campaign is harmed by a falsehood, including deepfake media as contemplated under the bill, might bring a defamation action against the person who disseminated the falsehood. Defamation is a cause of action found in the common law (that is, law originating in historical court decisions), and encompasses both libel, which involves the written word, and slander, which involves oral speech.⁵

Generally, in order for a public figure such as a candidate to prove a defamation claim, all of the following must be true:⁶

- The speaker made a false statement of fact about the candidate to a third party.
- The speaker was not covered by an applicable privilege, such as the privilege that covers a legislator who is carrying out legitimate legislative activities.
- The speaker’s actions harmed the candidate, such as by damaging the candidate’s reputation.
- The speaker acted with actual malice, meaning that the speaker knew that the statement was false or acted with reckless disregard for whether it was false. (In defamation cases not involving a public figure or a matter of public concern, the person harmed generally must prove only that the speaker acted negligently.)

In many cases, a candidate harmed by deepfake media, as defined under the bill, currently could bring a defamation action against its creator and could be awarded damages in the same manner as under the bill. The elevated “actual malice” standard probably would be met in cases covered by the bill because the bill applies only to a person who creates deepfake media with the intent to deceive.

But, the bill goes further by (1) prohibiting the dissemination of deepfake media during the 90 days before an election, (2) requiring deepfake media that is disseminated at other times

⁴ R.C. 3599.40. See also R.C. 3517.153, not in the bill.

⁵ See R.C. Chapter 2739, not in the bill; Restatement (Second) of Torts, Division 5 – Defamation (1977); and Ohio Constitution, Article II, Section 12.

⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 755 (1985); *Varanese v. Gall*, 35 Ohio St.3d 78 (1988); and *Robb v. Lincoln Publishing*, 114 Ohio App.3d 595 (12th Dist. Ct. App. 1996).

to include a disclosure, and (3) potentially restricting parody that would not be considered a false statement of fact under the Defamation Law. As is explained below under “**First Amendment issues**,” a court might examine these additional restrictions if the bill were challenged.

False Campaign Statements Law

Currently, the Revised Code prohibits any person from knowingly or recklessly disseminating a false statement about a candidate that is designed to promote the candidate’s election, nomination, or defeat, or a false statement that is designed to promote the adoption or defeat of a ballot issue. Violators are subject to an administrative fine or a criminal penalty. But, the False Campaign Statements Law is not being enforced because in 2016, a federal appeals court ruled that the law violates the First Amendment.⁷

Right of Publicity Law

Ohio’s existing Right of Publicity Law prohibits the unauthorized use of an individual’s persona if it has commercial value and is used for a commercial purpose. A person may bring a civil action to recover damages or to obtain an injunction if the person’s right of publicity is infringed. But, the Right of Publicity Law does not apply to the use of an individual’s persona (1) in connection with any political campaign and in compliance with the Election Law, or (2) in connection with any news, public affairs, sports broadcast, or account.⁸ The use of an individual’s persona for the purpose of influencing an election, as contemplated by the bill, probably would fall under those exceptions.

First Amendment issues

To the extent that the bill is more restrictive than the existing Defamation Law, the bill might be vulnerable to a challenge under the First Amendment. As mentioned above, the bill’s provisions go beyond the current Defamation Law in three areas: (1) requiring disclosure statements, (2) applying to parody, and (3) instituting a 90-day blackout period before an election.

The U.S. Supreme Court has ruled that the First Amendment applies to false statements as well as true statements. Prohibitions against false campaign speech are content-based restrictions on core political speech, and therefore are subject to strict scrutiny under the First Amendment. To be upheld, a law targeting false campaign speech must use the least restrictive means available to serve the state’s compelling interest in preventing fraud or defamation in the context of elections.⁹ A reviewing court might consider whether the bill is the least restrictive means available to address false campaign speech, or whether the existing Defamation Law is

⁷ R.C. 3517.156, 3517.21, 3517.22, and 3517.922(V), not in the bill, and *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016).

⁸ R.C. 2741.02, not in the bill.

⁹ *United States v. Alvarez*, 567 U.S. 709, 717 (2012) and *Susan B. Anthony List* at 473.

sufficient to do so. A federal court reviewing a California law on the same topic recently issued a preliminary injunction against the enforcement of the law based on this test.¹⁰

Past court decisions suggest that a reviewing court might pay special attention to the aspects of the bill that restrict parody and that prohibit speech before it is spoken, rather than punishing it later. These types of restrictions on speech have previously been ruled unconstitutional in other contexts.¹¹

HISTORY

Action	Date
Introduced	02-12-24

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¹⁰ *Kohls v. Bonta*, 2024 U.S. Dist. LEXIS 179933, Case No. 2:24-CV-02527 (E.D. Cal. October 2, 2024).

¹¹ Regarding parody, see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019); *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995); and *Corso Ventures LLC v. Paye*, 2023-Ohio-127 (10th Dist. Ct. App. 2023). Regarding prior restraints on speech, see *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *Bey v. Rasaweher*, 161 Ohio St.3d 79, 90 (2020); and *Pesttrak v. Ohio Elections Commission*, 926 F.2d 573, 578 (6th Cir. 1991).