

HOUSE BILL REPORT

ESSB 5152

As Passed House - Amended:

April 6, 2023

Title: An act relating to defining synthetic media in campaigns for elective office, and providing relief for candidates and campaigns.

Brief Description: Defining synthetic media in campaigns for elective office, and providing relief for candidates and campaigns.

Sponsors: Senate Committee on State Government & Elections (originally sponsored by Senators Valdez, Hunt, Kuderer, Liias, Nguyen and Wilson, C.; by request of Secretary of State).

Brief History:

Committee Activity:

State Government & Tribal Relations: 3/10/23, 3/29/23 [DPA].

Floor Activity:

Passed House: 4/6/23, 67-30.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Creates a civil cause of action for candidates whose appearance, action, or speech is altered in electioneering communication through the use of synthetic media.
- Makes the inclusion of specified disclosures an affirmative defense to a cause of action brought under this act.
- Specifies situations when certain mediums may not be held liable under the act when transmitting electioneering communication.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL RELATIONS

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended. Signed by 4 members: Representatives Ramos, Chair; Stearns, Vice Chair; Gregerson and Mena.

Minority Report: Do not pass. Signed by 2 members: Representatives Abbarno, Ranking Minority Member; Christian, Assistant Ranking Minority Member.

Minority Report: Without recommendation. Signed by 1 member: Representative Low.

Staff: Desiree Omli (786-7105).

Background:

Political Advertising and Electioneering Communication.

Under campaign finance laws, a person is prohibited from sponsoring, with actual malice, a political advertisement or electioneering communication constituting libel or defamation per se when the advertisement or communication:

- contains false statements of material fact about a candidate for public office;
- falsely represents that a candidate is the incumbent for the office sought; or
- falsely states or falsely implies the support or endorsement of any person or organization.

A political advertisement (ad) includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio, television presentations, digital communication, or other means of mass communication used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.

An electioneering communication is any broadcast, cable or satellite television, radio transmission, digital communication, United States Postal Service mailing, billboard, newspaper, or periodical that:

1. clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;
2. is broadcast, transmitted electronically or by other means, mailed, erected, distributed, or otherwise published within 60 days before any election for that office in the jurisdiction in which the candidate is seeking election; and
3. either alone, or in combination with, one or more communications identifying the candidate by the same sponsor during the 60 days before an election, has a fair market value or cost of \$1,000 or more.

A violation of the prohibition on sponsoring political ads or electioneering communication constituting libel or defamation per se must be proven by clear and convincing evidence. Damages are presumed, and do not need to be proven, if a violation is found. Violations of campaign finance laws may result in civil penalties, sanctions, or criminal prosecution.

Federal Communications Act.

Under 47 U.S.C. §315, any licensee that permits a candidate for public office to use its broadcasting station must afford equal opportunities to all other candidates for the same office to use the broadcasting station. The licensee is prohibited from censoring the material broadcast by the candidate. The term "censorship" is not defined under the relevant section of federal law, but The Supreme Court of the United States has interpreted the term to mean any examination of thought or expression in order to prevent publication of objectionable material.

Summary of Amended Bill:

A new cause of action is created for candidates who are the subject of synthetic media in electioneering communication.

Synthetic media is defined as an image, audio recording, or video recording of an individual's appearance, speech, or conduct that has been intentionally manipulated with the use of generative adversarial network techniques or other digital technology in a manner to create a realistic but false image, audio, or video that produces:

1. a depiction that, to a reasonable person, is of a real individual in appearance, action, or speech that did not actually occur in reality; and
2. a fundamentally different understanding or impression of the appearance, action, or speech than a reasonable person would have from the unaltered original version of the image, audio recording, or video recording.

A candidate who is the subject of synthetic media in an electioneering communication may seek an injunction or other equitable relief prohibiting the publication of the synthetic media. Such a candidate may also bring a cause of action against the sponsor of the electioneering communication for general or special damages. The prevailing party in a cause of action for damages may be awarded reasonable attorneys' fees and costs. A candidate bringing such actions bears the burden of establishing the use of synthetic media by clear and convincing evidence.

Including a disclosure with an electioneering communication that contains synthetic media is an affirmative defense in a cause of action brought under this act if the disclosure contains the statement "This (image/video/audio) has been manipulated," and meets the following criteria:

- For visual media, the disclosure must be in a font size that is easily readable by the average viewer and no smaller than the largest font size of any other text appearing in the visual media. Disclosures in video media must also appear for the duration of the video.
- For media consisting of only audio, the disclosure must be read in a clearly spoken manner and in a pitch that can be easily heard by the average listener. The disclosure must be read at the beginning of the audio, at the end of the audio, and, if applicable,

at least every two minutes during the audio.

Courts are encouraged to determine causes of action brought under the act expediently.

Except when a licensee, programmer, or operator of a federally licensed broadcasting station transmits electioneering communication that is subject to 47 U.S.C. §315, a medium disseminating the electioneering communication may be liable in a cause of action brought under the act if it:

1. removes disclosures from the electioneering communication that would have served as an affirmative defense; or
2. alters the electioneering communication such that it then qualifies as synthetic media, unless the requisite disclosure is included.

A provider or user of an interactive computer service may not be treated as the publisher or speaker of any information provided by another information content provider, but may be liable in a cause of action brought under the act in the same way as a medium disseminating electioneering communication may be held liable. An "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. An "information content provider" is any person or entity that is responsible for the creation or development of information provided through the internet or any other interactive computer service.

The Public Disclosure Commission (PDC) must adopt rules for the purpose of this act, but a violation of the provisions of this act alone does not constitute a violation of campaign finance laws and the PDC does not have jurisdiction over violations of this act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Synthetic media is also known as "deep fakes," and this type of media should be clearly delineated for the public so that consumers of media are informed about any manipulation of images they consume. Synthetic media and misinformation are on a rise and political ads are a part of that. For example, there was a deep fake of the Ukrainian President urging the Ukrainian Armed Forces to drop their weapons.

The act should be amended to empower the PDC to determine whether a media is in fact synthetic media. This is because once campaigns go to court, the attention the campaign gets in the media multiplies the effect of the lawsuit. Therefore, instead of shutting down

the campaign, it actually multiplies its reach.

Companies are developing an open-source tool that allows consumers to see if and how an image has been manipulated. With this tool, data showing edits to the image travels with the image and an icon accompanies the image if any alterations are made. The tool therefore notifies consumers that it has been manipulated. This tool should be added as an option to serve as an affirmative defense under the bill.

(Opposed) The state already has slander and defamation laws that allow for legal action, so this additional avenue for a cause of action is not necessary. This act will have a chilling effect on what is important political discourse. There are a lot of technology changes that will happen, but as technology tools change, it is important to maintain the basic tenet of political speech. This act overreaches and regulates constitutionally protected speech.

The policy is also vague because anything could be considered "synthetic" if any filter is applied, even if it is a filter to make a color image black and white or sepia.

(Other) The PDC is agnostic to the policy. This is an area of policy that the PDC does regulate. This policy provides a private cause of action rather than speech that the government is regulating, so that should give this policy more room in terms of free speech issues.

Broadcasters are regulated by the Federal Communications Act under 47 U.S.C. §315. This prohibits broadcasters from changing candidate ads in any way, shape, or form. Amendments to the policy need to be made to make sure that it is not running afoul of the federal laws that already regulate this area of law. The definition of what it means to broadcast needs to change as well.

Persons Testifying: (In support) Senator Javier Valdez, prime sponsor; Steve Hobbs, Office of the Secretary of State; Larry Seaquist; and Matt Steuerwalt, Adobe.

(Opposed) Eric Pratt; and Joshua Hardwick.

(Other) Sean Flynn, Public Disclosure Commission; and Rowland Thompson, Washington State Association of Broadcasters.

Persons Signed In To Testify But Not Testifying: None.