

Deepfakes Remain A Threat Ahead Of 2024 Elections

By **Douglas Mirell** (September 15, 2023)

Picture this: Ron DeSantis delivers a speech dropping out of the 2024 presidential race.[1] Donald Trump kisses Dr. Anthony Fauci.[2]

These are among this electoral season's first, and will doubtless not be the last, phony videos and images created to deceive the voting public.

Absent effective safeguards to prevent or punish the promulgation of such visual disinformation, candidates for public office and their supporters are able to utilize artificial intelligence programs known as deepfakes — a portmanteau of "deep learning" and "fake" — to promote themselves by bashing their opponents.



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Deepfakes are not new. Just ask A-list actors about the adult films in which they've been made unwilling performers.[3] Concerns about the weaponization of deepfakes in the political sphere date back at least to the nation's last presidential election in 2020.

California was among the first states to try to tackle the issue of deepfakes being used to deceive voters. In 2019, California enacted A.B. 730.[4]

This legislation addresses the creation and dissemination of false or doctored descriptions of candidates for public office and other elected officials. A.B. 730 prohibits the distribution of doctored and otherwise deceptive material depicting a candidate within 60 days of an election unless accompanied by an affirmative disclosure that the material has been manipulated.

Under A.B. 730, a candidate whose voice or likeness has been used in a materially deceptive manner may sue for injunctive relief and/or damages, and the prevailing party may recover their reasonable attorney fees and costs.

The legislation defines "materially deceptive" as an "image or an audio or video recording of a candidate's appearance, speech, or conduct that has been intentionally manipulated" in a manner such that it would both "falsely appear to a reasonable person to be authentic," and "would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content" compared to the unaltered version.

A.B. 730 also prohibits less technologically sophisticated forms of deception, including campaign material in which an image of a candidate has been superimposed in a manner intended to create a false impression, absent a disclaimer that the material has been doctored.

In such cases, both the candidate depicted and the public at large have a private right of action against the distributor. The law provides for injunctive relief and, as to a candidate, damages equal to the cost of producing, distributing, publishing or broadcasting the campaign material, plus reasonable attorney fees.

A.B. 730 was originally set to sunset on Jan. 1, 2023. However, its expiration date was subsequently extended to Jan. 1, 2027.[5]

Notwithstanding this extension, there are no reported cases invoking the protections of A.B. 730 during any of the election cycles that have occurred since it initially became effective on Jan. 1, 2020.

One possible explanation for the absence of such litigation is that A.B. 730 contains too many loopholes including:

- Its limited 60-days-before-election efficacy;
- The inability to reach platforms hosting such deceptive content because of the immunity accorded them by Section 230 of the Communications Decency Act;
- The bill's intentionality requirement, which effectively creates an actual malice-type standard of liability; and
- The failure to ensure that those exposed to such deepfakes are alerted to its deceptive character.[6]

Also in 2019, Texas passed S.B. 751,[7] which sought to address the same electoral misinformation issue by enacting a criminal prohibition.

However, that legislation seeks to punish only those who are responsible for creating an electoral deepfake "with intent to injure a candidate or influence the result of an election" and who cause it to be "published or distributed within 30 days of an election."

Thus, mere creators and mere distributors face no criminal liability. Moreover, under S.B. 751, an actionable deepfake video is defined as one "created with artificial intelligence that, with the intent to deceive, appears to depict a real person performing an action that did not occur in reality."

Left unaddressed is a scenario where AI-generated printed campaign materials or still photographs are used as the vehicles for perpetrating this deception. Other states, including Illinois and New Jersey, have tried — thus far, unsuccessfully — to enact election-related prohibitions upon the use of deepfakes.

Efforts to restrict the use of deepfakes in political campaigns have fared no better in U.S. Congress. For example, in 2020, Rep. Stephen Lynch, D-Mass., introduced H.R. 6088.[8]

Dubbed the Deepfakes in Federal Elections Prohibition Act, H.R. 6088 was, in many ways, similar to California's A.B. 730 — including a limitation upon its applicability to the dissemination of deepfakes within 60 days of a federal election. It also included a provision for criminal penalties that could have yielded a fine of up to \$100,000 and/or a five-year term of imprisonment.

However, this bill never even received a hearing in any committee. And in 2021, Rep. Adam Schiff, D-Calif., included a temporally unlimited prohibition upon the use of deceptive audio or visual material in election campaigns in his omnibus H.R. 5314.[9]

This Protecting Our Democracy Act made it out of the House of Representatives on a highly partisan 220-208 vote, but stalled in the U.S. Senate.

In May of this year, Sens. Amy Klobuchar, D-Minn., Cory Booker, D-N.J., and Michael Bennet, D-Colo., tried a different approach, introducing S. 1596,[10] the REAL Political Advertisement Act, that would require a disclaimer on political ads using AI-generated images or video.

Rep. Yvette Clarke, D-N.Y., introduced companion legislation in the House, H.R. 3044.[11] Neither bill has yet been set for any committee hearings.

Given the apparent partisan divide on this issue, it is highly doubtful that either of these bills will be signed into law before the 2024 federal primary or general elections.

Finally, within the past month and at the urging of the left-leaning watchdog group Public Citizen, the Federal Election Commission took a baby step toward regulating deceptive campaign deepfakes.

The FEC finally overcame a June deadlock and unanimously agreed to seek public comment about whether current federal rules prohibiting fraudulent campaign advertising apply to ads created using artificial intelligence technology.

However, once the public comment period ends in October, it is far from clear whether the six-member commission, divided 3-3 along party lines, will agree to draft formal regulations.[12]

There remains a lack of legislative progress on this issue despite the recognition that the combination of deepfakes and elections can raise serious national security concerns.

As Sen. Marco Rubio, R-Fla., told The Associated Press in 2018:

It's a weapon that could be used — timed appropriately and placed appropriately — in the same way fake news is used, except in a video form, which could create real chaos and instability on the eve of an election or a major decision of any sort.[13]

Thus, unfortunately, as significant as the electoral deepfake problem is now — and notwithstanding how it is surely destined to become all the more pervasive — the bipartisan political effort to address this issue in a comprehensive, meaningful and readily enforceable manner remains elusive.

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[1] <https://www.forbes.com/sites/petersuciu/2023/09/02/there-is-now-a-deep-fake-video-of-ron-desantis-dropping-out-of-the-2024-race/?sh=781536107bf9>.

[2] <https://www.reuters.com/world/us/is-trump-kissing-fauci-with-apparently-fake-photos-desantis-raises-ai-ante-2023-06-08/>.

[3] <https://www.bbc.com/news/technology-42912529>.

[4] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB730.

[5] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB972.

[6] <https://www.wired.com/story/opinion-californias-anti-deepfake-law-is-far-too-feeble/>.

[7] <https://legiscan.com/TX/text/SB751/id/1902830>.

[8] <https://www.congress.gov/bill/116th-congress/house-bill/6088?q=%7B%22search%22%3A%5B%22H.R.+6088+%26+lynch%22%5D%7D&s=7&r=2/>.

[9] <https://www.congress.gov/bill/117th-congress/house-bill/5314?q=%7B%22search%22%3A%5B%22deepfake%22%5D%7D&s=9&r=7>.

[10] <https://www.congress.gov/bill/118th-congress/senate-bill/1596/actions?s=3&r=2&q=%7B%22search%22%3A%5B%22klobuchar+booker+bennet%22%5D%7D>.

[11] <https://www.congress.gov/bill/118th-congress/house-bill/3044/actions?s=5&r=1&q=%7B%22search%22%3A%5B%22yvette+clarke+political+advertisements%22%5D%7D>.

[12] <https://apnews.com/article/fec-artificial-intelligence-deepfakes-election-2024-95399e640bd1e41182f6c631717cc826>.

[13] <https://apnews.com/article/north-america-donald-trump-ap-top-news-elections-artificial-intelligence-21fa207a1254401197fd1e0d7ecd14cb>.