Thursday, January 16, 2025

Dear Members of the House Government and Veterans Affairs Committee,

Introduction

I am writing to provide feedback on House Bill No. 1167 ("HB 1167"), which proposes to require disclaimers for political communications containing content generated by artificial intelligence. I support the bill, but suggest five modifications to increase its effectiveness.

First, I would like to share a little bit of my background to contextualize my comment. I currently reside in Kirkland, Washington and in August 2024 completed by Masters in Science in Social Science of the Internet from Oxford University in Oxford, England. My thesis was entitled *States Legislating Against Digital Deception: A Comparative Study of Laws to Mitigate Deepfake Risks in American Political Advertisements* and it examined 10 state laws that mandated if a political advertisement used AI-generated conduct, it had to include a label.[1] In this respect, these laws are similar to HB 1167. Usually these come in the form of "deepfakes" which are artificially created, lifelike visual and audio representations of people. My thesis asked the question "are these new laws necessary?", which I answered by assessing if existing laws could address the same issues legislators intended the laws to address. I found that for the most part, they are: existing laws do not address the risks new laws were meant to address. To ascertain the intent of the new laws, I found, transcribed, and analyzed 25 hearings across the country. As such, I'm familiar with the arguments made by legislators across the country, including in Florida, Washington, Indiana, and Idaho.

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[1] A pdf copy is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4912795. An article based on this work is forthcoming in the spring 2025 edition of the Notre Dame Journal on Emerging Technology. See Hayden Goldberg, *States Legislating Against Digital Deception*, 6 NOTRE DAME J. ON EMERGING TECH. ___ (2025).

I continue to track and write about state deepfake laws nationally, and have two related ongoing research projects. Additionally, in September I submitted a more detailed public comment to a July 2024 rules proposal mandating labels in campaign ads for federal candidates from the Federal Communications Commission.[2] (MB 24-211). The rest of comment draws on my experience and knowledge from research and writing my thesis, and working on related projects.

The premise of HB 1167 should be commended

With this background in mind, I am fully supportive of the intent behind HB 1167. Deepfakes have the potential to deceive people into thinking a video or audio is real, even though it isn't. This can be really harmful to the information environment; so much of our current society is based on the idea that a video is bedrock proof; if something is on video, then it happened. No "ifs", "ors", or "buts". But deepfakes threaten to undermine this,[3] and in high stakes areas like elections, it is critical that their threat be mitigated.

This is where labeling comes in. Labeling allows people to get more information or context about something they are viewing, and then make their own decisions using that information. Just like a nutrition label, labels on a campaign ad would provide voters more information about the product (in this case, an ad or political communication) and its origin. Moreover, this follows

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[2] This was in response to docket MB-24-211: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements. My comments are available at https://www.fcc.gov/ecfs/document/10915126216559/1. However, this proposed rule only applies to federal candidates, while HB 1167 should apply to state and local candidates as well.

[3] *See e.g.* Don Fallis, *The Epistemic Threat of Deepfakes*, 34 PHIL. & TECH. 623, 625 (2021) ("The main epistemic threat is that deepfakes can easily lead people to acquire false beliefs. That is, people might take deepfakes to be genuine videos and believe that what they depict actually occurred."). A related version of this problem is known as the Liar's Dividend. This is where someone can claim that a video is false even if it is true. *See* Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1785-1786 (2019).

in the path of existing laws that mandate disclosure of the sponsor or funder of ads.[4] Under HB 1167 – and label requirements in general - voters retain agency over what they do with the information. This balance - ensuring people have adequate information without restricting speech - is reached with a requirement to label campaign ads and other political communications. Accordingly, I support the premise of the bill.

Five Suggested Modifications

However, I believe it can be improved in five key areas to enhance its clarity, enforceability, and alignment with existing laws.

First, North Dakota Century Code § 16.1-10-04 (part of the chapter the HB 1167 amends) already prohibits publishing political advertisements that are materially false or misleading with knowing or reckless disregard for the truth. HB 1167 should explicitly clarify that compliance with its new requirements does not absolve liability under § 16.1-10-04. For example, if an AI-generated political ad includes a disclaimer but is otherwise false or misleading, it should still be subject to sanctions under the existing law.[5]

This situation is analogous to Wisconsin. There, hearings on Assembly Bill 664 ("AB 664"),[6] recognized Wis. Stat. Ann. § 12.05, which states in full "No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election." AB 664 specifically stated

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[4] *See e.g.* N.D.C.C. 16.1-10-04.1 ("Every political advertisement… must disclose on the advertisement the name of the person, as defined in section 16.1-08.1-01, or political party paying for the advertisement.").

[5] The Supreme Court has blessed laws like § 16.1-10-04 that prohibit false statements about voting processes and procedures. *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018) ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.").

[6] *See Hearing on A.B. 664 Before the Assemb. Comm. on Campaigns & Elections*, 2023-2024 Reg. Sess. (Wis. 2024) (January 9, 2024) (statement of Rep. Clinton Anderson). This bill was implemented as WIS. STAT. ANN. § 11.1303.

"[c]ompliance with this subsection does not create an exemption from any civil or criminal liability, including for violations of § 12.05." I encourage an amendment to HB 1167 to produce a similar effect. This would avoid creating a loophole.

Second, the current language mandating that disclaimers "must prominently state" the AI disclosure could be made more precise. Adding language such as "in a manner that a reasonable person would take to be prominently stated" would strengthen the bill and provide clearer guidance to courts and juries. Without this addition, there is a small risk that disclaimers in barely visible print or at the very bottom of a screen might satisfy the letter of the law while failing to inform voters effectively.

Third, the bill should include a civil cause of action for candidates, individuals depicted in noncompliant advertisements, the state Attorney General, and local governments. This addition would enable these parties to seek injunctions prohibiting the continued airing of advertisements that violate the law. By "local governments" I mean local prosecutors, county attorneys, and city attorneys.[7] These actors are more in tuned with local politics than the state Attorney General, and I believe the harms of deepfakes could be exacerbated in local elections where citizens tend to be less informed about candidates. Just like a negative mailer that distorts the truth can be effective in absence of correction from the local media, so too could a deepfake swing voters in a local race. The people likely to be aware of such a mailer are the candidates in the race themselves, those depicted in the communication, and attorneys in local government. But local campaigns might not have the budget to afford an attorney for this matter, so local government can step in.

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[7] This follows the mold of laws enacted in Oregon and Minnesota. See OR. REV. STAT. § 260.345 (granting the attorney general and local prosecutors enforcement power); MINN. STAT. ANN. § 609.771 (granting standing to the attorney general, county attorney, city attorney, depicted individual, and "a candidate for nomination or election to a public office who is injured or likely to be injured by dissemination."); cf <add case name> (declining to grant a preliminary injunction enjoining the enforcement of MINN. STAT. ANN. § 609.771.

Moreover, an injunction would provide a short-term remedy to stop the communication. Voters are being harmed when they see an unlabeled ad with AI-generated content. So, while the criminal penalty provided in this chapter would penalize the creator and hold them accountable, it does not remedy the harm to voters.[8] To stop this harm from continuing, an injunction preventing the continued airing of the ad or other political communication is necessary.

Fourth, I also recommend limiting the requirement for disclaimers to within 30–45 days of an election, whether general, primary, or special. This narrower application would better align the law with the constitutional requirement that restrictions on political speech to be "narrowly tailored" to serve a compelling state interest.[9] As written, this bill does not restrict speech but rather provides voters with valuable information about the origin of content. However, applying the disclaimer requirement closer to elections would reduce the likelihood of challenges based on overbreadth or undue burdens on political communication.

Fifth and finally, I want to highlight a potential drafting error on page 1, line 12 of the bill. The text appears to read, "content generated by artificial intelligence." I believe the word "is" should be inserted between "content" and "generated".

Concluding Thoughts

By incorporating these five suggestions, HB 1167 can more effectively achieve its goal of ensuring transparency in political advertising while avoiding unintended consequences or enforcement difficulties. I urge this committee to consider these amendments as it moves forward with this important legislation.

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[8] *See* N.D.C.C. 16.1-10-08 ("Any person violating any provision of this chapter, for which another penalty is not specifically provided, is guilty of a class A misdemeanor.").
[9] *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

To that end, I will conclude with the words two of state legislators who powerfully evoked the motivations passing bills like HB 1167. One said, "I think we can all agree with the premise that voters have a right to know when video, audio, and images that they are being shown have been manipulated and do not represent reality to try to influence their vote in an upcoming election."[10] The goal is for "people [to] have confidence in what they hear and have some faith that the information they're being given when they see a candidates face and voice, they can know that that is what the person really said and did."[11] Passing HB 1167 will help make this possible.

Thank you for your time and consideration,

Hayden Goldberg

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[10] *Hearing on A.B. 730 Before the S. Elections & Constitutional Amendments Comm.*, 2019-2020 Reg. Sess. (Cal. 2019) (statement of Assemb. Marc Berman).
[11] *Hearing on H.B. 664 Before the H. State Affairs Comm.*, 2024 Reg. Sess. (Idaho 2024) (statement of Rep. Ilana Rubel, H. Min. Leader).