FIRE Testimony in Opposition to S 23

Chair Collamore and members of the Committee, my name is John Coleman and I'm a legislative counsel for the Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends the free speech rights of all Americans.

We oppose S 23 because it would violate the First Amendment rights of people in Vermont.

I. S 23 is unlikely to survive judicial scrutiny.

Like the printing press, the camera, and the internet, AI presents a new opportunity to enhance, or even revolutionize, communication. The First Amendment applies to expression facilitated by artificial intelligence software just as it does to those other expressive technologies. Indeed, First Amendment doctrine does not reset itself after each technological advance.

Under the First Amendment, content-based restrictions — i.e., restrictions based on the subject matter of the speech — require the strictest judicial scrutiny. By targeting so-called "deepfakes" involving election-related speech, including "candidates and political parties," S 23 would institute a content-based restriction on political expression.

A content-based speech restriction is subject to strict scrutiny, meaning that it "must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[1] The government must also prove by concrete evidence that there is a problem that needs solving, and that its regulation is "actually necessary" to serve its interest.[2]

This is a high bar, especially when the content targeted is political expression. Political expression receives strong First Amendment protection because it is essential for our system of government. The Supreme Court stated this explicitly in *Buckley v. Valeo* (1976): "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[3] That discussion and debate includes parody, satire, and caricature aimed at candidates for office—a hallmark of American political discourse dating back to the Founding Fathers and even the pre-revolution colonies.

For this reason, the government bears an especially high burden to prove by more than speculation that regulation of political speech is necessary.[4] The evidence does not presently

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[1] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 800, 813 (2000).

[2] *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799 (2011).

[3] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

[4] *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 790–91 (8th Cir. 2014) (""We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . . Such conjecture about the effects

demonstrate that "deepfakes" have created an actual problem that would justify such heavy-handed regulation. To the contrary, despite widespread concerns, such materials do not appear to have played any meaningful role in any election cycle since 2020.[5]

The lack of a demonstrable problem highlights the availability of a less restrictive means than S 23's prohibitions. Indeed, one court has already ruled that a similar law is likely unconstitutional for just that reason. Following a First Amendment challenge from a satirist who uses AI to generate parodies of political figures, the federal district court in *Kohls v. Bonta* recently enjoined a California statute aimed at "deepfakes" that regulated "materially deceptive" election-related content.[6]

In *Kohls*, the judges ruled that the law failed to satisfy strict scrutiny, concluding that while there may be a compelling interest in ensuring free and fair elections, it nevertheless failed strict scrutiny because "counter speech is a less restrictive alternative to prohibiting videos."[7] In other words, the cure for false or deceptive speech isn't government regulation, but *more* speech.

So while lawmakers might harbor "a well-founded fear of a digitally manipulated media landscape," the court explained, "this fear does not give legislators unbridled license to bulldoze over the longstanding tradition of critique, parody, and satire protected by the First Amendment."[8]

S 23, if enacted, is highly likely to meet a similar fate.

II. S 23 is ripe for abuse.

S 23 targets a person seeking to "publish, communicate, or otherwise distribute a synthetic media message that the person knows or should have known is a deceptive and fraudulent synthetic media of a candidate on the ballot."[9]

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and dangers of false statements equates to implausibility . . . because, when the statute infringes core political speech, we tend not to take chances.").

[5] *See* Mohar Chatterjee, *What AI is doing to campaigns*, Politico (Aug. 15, 2024), https://www.politico.com/news/2024/08/15/what-ai-is-doing-to-campaigns-00174285 (noting that fears of electoral disruption from AI haven't "quite panned out that way"); Tom Simonite, *What Happened to the Deepfake Threat to the Election?*, WIRED (Nov. 16, 2020), https://www.wired.com/story/what-happened-deepfake-threat-election/.

[6] *Kohls v. Bonta*, No. 2:24-CV-02527 JAM-CKD, 2024 WL 4374134 (E.D. Cal. Oct. 2, 2024).

[7] *Id*. at *1.

[8] *Id*. at *5.

[9] The bill defines "synthetic media" as "an image, an audio recording, or a video recording of an individual's appearance, speech, conduct, or environment that has been created or intentionally manipulated with the use of digital technology, including artificial intelligence, in a manner that creates a realistic but false representation of the candidate." And, according to the bill, "deceptive and fraudulent synthetic media" is defined as "synthetic media that creates a representation of an individual or individuals

But there is no general First Amendment exception for misinformation or disinformation or other false speech, even when the falsehood is intentional.[10] That's for good reason: such an exception could be easily abused to suppress dissent and criticism.

For example, if someone in Vermont merely reposted a viral AI-generated meme of a political party's presidential candidate that portrayed that candidate "saying or doing something that did not occur," the candidate could sue them to block the person from sharing it further. A state's attorney or the Attorney General could also subject the person to fines. If the candidate saw another AI-generated meme that was false but cast the candidate in a favorable light, the candidate could allow it to continue circulating, even if it had the effect of misleading voters.

S 23 would also invite misuse among political opponents. Given that the bill provides that enforcement may come from candidates themselves, the potential misuses for political advantage abound. The bill would create an avenue for political opponents to gain an unfair strategic advantage during an election cycle by making claims of violations for the purpose of subjecting a rival candidate to inquiries and investigations that take time and resources away from their campaign. This potential for abuse threatens to do more harm than good to the integrity of elections.

Imagine, for example, a candidate uses software to produce and edit a mailer criticizing an opponent for a statement actually made, but pairing that statement with an unflattering image of the candidate in a setting different from where the statement was made. Even though this act does not harm the integrity of the election, the opponent could report (or seek to enjoin) the speech as "deceptive and fraudulent" by arguing that it gives a "fundamentally different understanding or impression of the appearance, speech, conduct, or environment."

And because no reliable technology exists to detect whether media has been produced by AI, this law can easily be weaponized to challenge *all* campaign-related media that a candidate simply does not like. To cast a serious chill over electoral discourse, a motivated candidate need only file a bevy of lawsuits or complaints that raise the cost of critical expression to an unacceptable level.

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with the intent to injure the reputation of a candidate, to influence the outcome of an election, or to otherwise deceive a voter, in a manner that: (A) appears to a reasonable person to represent an individual saying or doing something that did not occur; or (B) provides a reasonable person with a fundamentally different understanding or impression of the appearance, speech, conduct, or environment that a reasonable person would have from an unaltered and original version of the image, audio recording, or video recording."

[10] *United States v. Alvarez*, 567 U.S. 709 (2012) ("Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.").

This opportunity for abuse compounds S 23's constitutional problems. In 2016, the United States Court of Appeals for the Sixth Circuit invalidated an Ohio law prohibiting certain "false statements" during an election because the process lacked adequate protections from frivolous complaints,[11] finding that the burdens the law imposed were "of particular concern" because they permitted a private party to use the complaint process for campaign advantage merely by setting into motion the agency's proceedings.[12] The Sixth Circuit noted that complainants could time their submissions so the ultimate result would come after the election while "the target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election."[13]

S 23''s lack of procedural protections invites similar burdens on candidates' speech.

III. Compelling disclosures ancillary to content also regulates and suppresses speech.

A creator of AI-generated or edited content can, of course, choose to disclose their use of AI voluntarily. But government-compelled speech—whether that coerced speech is an opinion or fact—is generally anathema to the First Amendment. That's for good reason: compelled speech undermines everyone's freedom of conscience and fundamental autonomy to control their own expression.

S 23 also demonstrates how disclosure requirements can function as a practical limitation on speech. For example, someone who comes across an AI-generated video on social media may not have the technical capabilities to add the required disclaimer. For that person, S 23 serves to prohibit them from sharing videos that portray candidates and parties inaccurately and negatively, unless they wish to risk being sued or prosecuted.

IV. Existing laws are adequate to address injurious false speech.

While there isn't a categorical exception to the First Amendment for false speech, false or deceptive speech that causes specific, targeted harm to individuals is punishable under narrowly defined First Amendment exceptions. If, for example, someone creates and distributes a deepfake that is intended to and actually does deceive others into thinking someone did something they didn't do, the depicted individual would have a claim for civil defamation if the individual incurred reputational harm.[14]

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[11] *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474 (6th Cir. 2016).

[12] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014).

[13] *Id*.

[14] *See Lent v. Huntoon*, 143 Vt. 539, 546–47, 470 A.2d 1162, 1168 (1983) ("The general elements of a private action for defamation (libel and/or slander) are: (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.").

But this doesn't require a new law. Even if this bill were limited to defamatory speech, enacting new, technology-specific laws where existing, generally applicable laws already suffice, risks sowing confusion that will ultimately chill protected speech. Such technology-specific laws are also easily rendered obsolete and ineffective by rapidly-advancing technology.

Rather than effectively banning political deepfakes, we encourage you to instead determine whether existing laws will already address your concerns about malicious uses of deepfakes.

V. Concluding Thoughts

We urge the committee to oppose S 23. Thank you for your consideration of these concerns. If you have any questions, please contact me at john.coleman@thefire.org.