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October 31, 2024

The Honorable Shelly Hettleman
Maryland Senate
203 James Senate Office Building
Annapolis, Maryland 21401
Via email

RE: Proposed Language for Bill Concerning Deepfakes

Dear Senator Hettleman:

You have requested advice concerning a potential bill to criminalize deepfakes, particularly false AI-generations of a person or a person's voice. Although you do not yet have a complete bill draft, you have provided a portion of the proposed language:

The act of fraudulently creating a piece of synthetic media or using artificial intelligence tools to alter real media as if genuine.

As I explain below, it is my view that this language would likely pass First Amendment scrutiny by a reviewing court to the extent it covers only fraudulent speech and/or conduct, however, without the full bill in front of me, I cannot give a definitive answer.

Laws that attempt to regulate deepfakes can run into First Amendment hurdles because even AI-generated media is a form of expression that is generally protected by the First Amendment. *See, e.g., Kohls v. Bonta*, No. 2:24-CV-02527 JAM-CKD, 2024 WL 4374134, at *1 (E.D. Cal. Oct. 2, 2024) (concluding California statute prohibiting use of "materially deceptive" AI-generated media related to elections was unconstitutional under the First Amendment). As content-based restrictions, laws regulating deepfakes would generally be reviewed by a court under strict scrutiny, which is a very difficult standard to meet. Thus, attempts to categorically ban all deepfakes would likely be unconstitutional, and laws that criminalize deepfakes are more likely to be found by a court to be unconstitutional than a law that creates a private cause of action or provides for civil penalties.

However, there are certain types of speech, such as fraud or obscenity, that are not protected by the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717-18, 723 (2012) (plurality opinion) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”); *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 803 (1988) (Scalia, J., concurring) (recognizing fraudulent misrepresentations of fact can be regulated). The State can ban these types of speech.

Forgeries are a type of fraud.¹ As you pointed out, the proposed language is similar to Black’s Law Dictionary’s definition of “forgery,” which is “the act of fraudulently making a false document or altering a real one to be used as if genuine.” In Maryland, common law forgery is “the fraudulent making of a false writing having apparent legal significance.” *Nelson v. State*, 224 Md. 374, 377-78 (1961). A deepfake or “synthetic media” that intentionally purports to be a genuine recording of another individual with intent to defraud is similar to a forged record.

Laws targeting fraudulent AI-generated material are likely to be constitutional because the First Amendment does not protect fraudulent conduct or statements, such as forgeries. *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud.”). Indeed, many criminal statutes prohibit certain speech or expressive conduct done for a fraudulent purpose or as part of a fraudulent scheme. *E.g.*, 18 U.S.C. § 471 (forging securities of the U.S. with intent to defraud); 18 U.S.C. § 912 (impersonating a federal officer); 18 U.S.C. § 1001 (knowingly and willfully making or using any false writing or document knowing it contains any materially false, fictitious, or fraudulent statement in any matter within the jurisdiction of the executive, legislative, or judicial branch of the federal government); Md. Code Ann., Crim. Law § 8-601 (counterfeiting private instruments).

In my view, the closer the proposed offense is to forgery or fraud, the more likely it will be upheld if challenged under the First Amendment. By using the words “fraudulently” and “as if genuine,” which implies an intent to deceive, the proposed language (“*fraudulently creating a piece of synthetic media... as if genuine*”) requires fraudulent intent. This would be important to a reviewing court as it would distinguish the criminalized conduct from other protected forms of expression that are done without malicious intent, such as deepfakes created for satire, parody, or education. Nevertheless, the proposed bill could be more defensible if it provides explicit exemptions for the creation or dissemination of deepfakes for certain non-malicious purposes that are clearly protected by the First Amendment, *e.g.*, exemptions for news reporting, satire, or comedy.

¹ The common law elements of a civil fraud claim include a (1) misrepresentation of a material fact; (2) knowledge that the representation is false or a reckless indifference to its truth; (3) deliberate intent or purpose to defraud someone, *i.e.*, deceive or induce reliance of another; (4) the reliance of the other person; and (4) resulting harm or injury. *See Nails v. S & R, Inc.*, 334 Md. 398, 415 (1994); *Fowler v. Benton*, 229 Md. 571, 578 (1962); *see also* FRAUD, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”).

Without the full context of a bill draft, I cannot assess the proposed language in further detail. For example, the term “synthetic media” is not defined in the proposed language provided to me, but the definition could be important in terms of the constitutionality of the potential bill. To be constitutional, the definition should not be vague, meaning it should “provide a person of ordinary intelligence fair notice of what is prohibited,” and provide sufficient standards to avoid “seriously discriminatory enforcement.” *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012). Moreover, to approximate forgery, the definition could also make clear that “synthetic media” is itself a lie, purporting to be what it is not, i.e., it is not a recording of events that actually occurred. *See State v. Reese*, 283 Md. 86, 94 (1978) (“As one scholar has phrased it, it is not enough that the writing ‘tells a lie; the writing itself must be a lie.’”) (quoting R. Perkins, *Criminal Law* 345 (2d ed. 1969)); *see also* Marc Jonathan Blitz, *Deepfakes and Other Non-Testimonial Falsehoods: When Is Belief Manipulation (Not) First Amendment Speech?*, 23 *YALE J. L. & TECH.* 160, 245-46, 300 (2020) (arguing that the First Amendment should permit regulation of deepfakes “when they pose as genuine camera footage” or “non-testimonial evidence”).

In addition, “one of the essential elements of forgery is a writing in such form as to be apparently of some legal efficacy and hence capable of defrauding or deceiving. ... If then the instrument is entirely valueless on its face and of no binding force or effect for any purpose of harm, liability or injury to anyone, all authorities agree that it cannot be the subject of forgery.” *Smith v. State*, 7 Md. App. 457, 461 (1969). Maryland has a statute listing certain types of documents that can be the subject of a forgery, including deeds, checks, bonds, and promissory notes — documents that can affect a person’s legal rights or obligations. *See* Md. Code Ann., Crim. Law § 8-601. In the context of the potential bill, this may mean “synthetic media” must definitionally be of a nature that is capable of defrauding, or actually harming, someone.

The element of harm is an important facet of laws that regulate false speech, including deepfakes. While the U.S. Supreme Court has held that false statements alone are protected speech subject to exacting scrutiny, it has recognized that “[t]he First Amendment does not preclude liability for false statements that involve ‘legally cognizable harm associated with [the] false statement.’” *United States v. Nabaya*, 765 F. App’x 895, 899 (4th Cir. 2019) (quoting *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion)). The Court explained that certain well-accepted laws that criminalize false speech do not violate the First Amendment where harm is caused by those lies; for example, the crime of perjury “undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system,” and the crimes of impersonating public officials or using the name of a federal agency without authorization harm the “integrity of Government processes.” *Alvarez*, 567 U.S. at 719-21. Drawing on this concept, the Fourth Circuit later upheld a Virginia statute forbidding impersonating law enforcement, saying,

Put simply, we decline to strike down a statute that prohibits lies **“that are particularly likely to produce harm.”** ... The statute does not proscribe all untruths about one’s occupation or accomplishments, but only lies that may trick ordinary citizens into the erroneous belief that someone is a peace officer and that may in turn “deceive[]” a person into following a harmful **“course of action he would not have pursued but for the deceitful conduct.”**

United States v. Chappell, 691 F.3d 388, 399 (4th Cir. 2012) (quoting *Alvarez*, 506 U.S. at 734-35 (Breyer, J. concurring)) (emphasis in original).

The act of creating synthetic media depicting another individual or individual's voice with an intent to defraud someone involves an intent to cause harm in one or more forms.² See *Smith v. State*, 7 Md. App. 457, 461, n.5 (1969) ("If there is a reasonable possibility that the false writing or instrument may operate to cause injury, it is sufficient to constitute forgery, even though no actual injury is caused."); see also Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753 (2019) (describing harmful uses of deepfake technology). This factor supports my view that the proposed language fits into the category of harmful false speech that the Supreme Court has signaled may be constitutionally regulated.

Ultimately, there are very few published cases addressing laws regulating deepfakes, making it difficult to predict how a court would review the proposed language. But in my view, the proposed language appears to define a new offense that would fall under the category of unprotected fraudulent speech and thus would be constitutional under the First Amendment.

I hope this letter is responsive. Please let me know if you have any further questions.

Sincerely,



Natalie R. Bilbrough
Assistant Attorney General

² It is possible a court could consider the proposed language to be overbroad if it criminalizes all types of fraudulent synthetic media regardless of the level or type of harm that could be caused. For example, a fraudulent deepfake of a parent that tricks a child into eating spinach may be intentionally deceptive, but a court may be skeptical that the level of "harm" justifies the suppression of speech in that instance. This could be mitigated by specifying levels or types of harm covered by the offense.