THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America

Memo in Opposition to Maryland S.B. 905

The Media Coalition is concerned that S.B. 905 allows a civil cause of action that will inevitably have a chilling effect on speakers because it can be used by those with deep pockets to impose a financial punishment on publishers merely by suing even if they are unlikely to prevail. In addition, the cause of action allows a judge to impose an injunction to prevent publication. This is a prior restraint, which is almost always unconstitutional. We are also concerned about the lack of adequate definitions for key terms could make the legislation unconstitutionally vague and will also have a chilling effect on producers and distributors of media.[1]

The bill amends the existing criminal identity fraud statute to create a crime and a civil cause of action of using a "deepfake representation" with "fraudulent intent" to "mislead." "Deepfake representation" is defined as a photographic image or video that an ordinary person would believe is an actual, identifiable person. The image itself does not have to portray the person falsely to be a "deepfake" under the bill. The terms "fraudulent intent" and "mislead" are not defined in the bill.

A violation of this section is subject to up to 5 years in prison, a fine of $10,000, or both. In addition, the bill—unlike all of the other identity fraud crimes in this section—creates a civil cause of action to allow a private suit against a person who uses a deepfake. A prevailing plaintiff is entitled to damages and injunctive relief, including an *injunction prior to publication* of the image.

The civil cause of action could lead to a publisher or distributor of a deepfake being sued for publishing (or intending to publish) an image that is intended to be deeply critical of the person depicted, if the publication would be "misleading" and potentially "misrepresent[s]" that person, even if the conduct would not be criminally fraudulent. There is a long tradition of parody, satire, commentary and other speech about matters of public interest or debate using hyperbole, exaggeration and sarcasm to criticize or condemn the powerful or wealthy.[2] In a world where

[1] Media Coalition Inc., is a trade association that engages in legislative and legal advocacy to defend the First Amendment right to create, produce and distribute books, films, home video and video games. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Maryland: authors, publishers, booksellers and librarians, producers and retailers of films, home video and video games.

[2] Notably, the First Amendment provides especially strong protections to works that constitute parody, satire, and other matters of public concern—as these are considered "core speech" worthy of protection even if it is false and misleading. In *Alvarez*, even the Justices who would have upheld a law criminalizing lying about receiving a military honor cautioned that speech about matters of public concern would still be protected. In his dissent, Justice Alito wrote: "[A]ny attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat." *U.S. v. Alvarez*, 567 U.S. 709, 751 (2012). See also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)

many people dispute what is the truth, a statute which potentially creates liability for "misleading" conduct makes the media vulnerable to being punished for publishing work that is protected by the First Amendment. S.B. 905 will cause publishers and distributers to fear that a wealthy or powerful person—unhappy that a critical, satirized representation of them being published—will bring a lawsuit to obtain an injunction against First Amendment protected speech on claims that a digitally-altered image was misleading, and imputing to the publisher a malicious intent for the distribution (or anticipated distribution) of the image. Even if a publisher prevails, a suit would cost a substantial amount of money and time. It is an increasingly common practice of those with great wealth to sue the media not to prevail but to impose a financial cost (and block, even temporarily, the publication of unflattering portrayals). Frequently, the mere threat of costly and prolonged litigation can prompt self-censorship by producers and distributors—which is an unconstitutional chilling effect. See *Baggett v. Bullitt*, 370 U.S. 360 (1964).

The potential problems raised by the civil cause of action are compounded because S.B. 905 permits a "preventative" injunction as a remedy to the civil cause of action. This is a prior restraint to speech, which is "the most serious and least tolerable infringement on First Amendment rights," and faces a "heavy presumption against its constitutional validity." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976) (citation omitted). As the Supreme Court explained in *Alexander v. U.S.*, "[t]he term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' Temporary restraining orders and permanent injunctions — *i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints." 509 U.S. 544, 550 (1993) (internal citations omitted) (emphasis added). As such, the legislature must carefully limit the courts authority to impose an injunction to speech that is illegal and, therefore, outside the protection of the First Amendment. Misleading speech, even if communicated with a malicious intent may not qualify.

The lack of clear definitions in S.B. 905 adds to publishers' fears about being sued and it raises potential constitutional vagueness concerns. The lack of stringent definitions gives potential plaintiffs greater latitude in filing lawsuits seeking to financially punish or silence speakers rather than prevailing in the suit. On the one hand, S.B. 905 could be read to require genuinely criminal intent to establish liability (for either a criminal or civil cause of action). However, that is not clear from the text of the bill. The term "mislead" is not defined in the bill, but the common definition of the term is "to deceive or lead astray." This is not an inherently criminal act, and many instances of "misleading" speech are constitutionally protected.[3] Also, the term "fraudulent intent" could be substantially more expansive and therefore impose liability for non-criminal (and constitutionally protected) speech. "Fraudulent" is not defined in the statute, and its ordinary meaning includes acts of "deceiving or mispresenting" something—and a common synonym for the term is "dishonest." Neither "deceitful" nor "dishonest" speech is inherently illegal, and could include speech such as parodies and satire that are constitutionally protected.

[3] As a core First Amendment principle, false speech is protected as long as it was not communicated to gain a tangible benefit. *U.S. v. Alvarez*, 567 U.S. 709 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society."). In *Alvarez*, the U.S. Supreme Court held that an attempt to ban or regulate false or misleading speech is impermissible unless it is linked to a specific, tangible harm or a malicious intent to cause such a harm.

Speech which is so vague so to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." *Winters v. New York*, 333 U.S. 507, 509 (1948). This doctrine mandating clear restrictions is critical to provide certainty to publishers, to avoid those enforcing speech restrictions from acting "in an arbitrary or discriminatory way," and "to ensure that ambiguity does not chill protected speech." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (internal citation omitted).[4]

In light of these concerns, we respectfully ask you to protect the First Amendment rights of all the people of Maryland and amend or defeat S.B. 905. We would welcome the opportunity to work with the legislature to address these issues. If you would like to do so, please contact me at 212-587-4025 or by email at horowitz@mediacoalition.org.

[4] *See also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").