

# Texas Law Could Signal More State, Federal Deepfake Bans

By [Matthew Ferraro](#)

Law360 (September 6, 2019, 3:52 PM EDT) – On Sept. 1, Texas became the first state in the nation to prohibit the creation or distribution of deepfake videos intended to harm candidates for public office or influence elections.[1] Amid rising fears of the dangers of hyper-realistic, computer-altered fake photos and videos, Texas is now only the second state to impose penalties on the creation and propagation of deepfakes in certain circumstances. Other state houses around the country, as well as Congress, may adopt additional, comparable measures targeting deepfake technology over the next year.



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The new Texas law defines a “deep fake video” as a video “created with the intent to deceive, that appears to depict a real person performing an action that did not occur in reality.”[2] It makes it a Class A misdemeanor,[3] punishable by up to a year in the county jail and a fine of \$4,000,[4] for whoever “creates” a deepfake video and “causes” that video “to be published or distributed within 30 days of an election,” if the person does so with the “intent to injure a candidate or influence the result of an election.”

Analysis by the [Texas Senate Research Center](#) acknowledged that deepfake technology “likely cannot be constitutionally banned altogether,” but concluded that “it can be narrowly limited to avoid what may be its greatest potential threat: the electoral process.”[5] The law, originally introduced by Texas Sens. Bryan Hughes, a Republican, and Royce West, a Democrat, was signed by Texas Gov. Greg Abbott on June 14 and amends Section 255.004 of the Texas Election Code.

## Similar Bills Pending in California

Texas is the first, but it is unlikely to be the last, state to regulate deepfake videos’ potential impact on voting. Lawmakers are considering comparable bills in California and in Congress.

In California, state legislators are considering two bills to restrict the influence of deepfakes on elections.

First, in February, Assembly Member Marc Berman, a Democrat, introduced a bill that would prohibit within 60 days of an election, “distributing with actual malice materially deceptive audio or visual media” of a candidate for election “with the intent to injure the candidate’s reputation or to deceive a voter,” unless the media carried a disclosure that it had been manipulated.[6]

While the bill does not address “deepfakes” per se, it defines “materially deceptive audio or visual media” to capture the same material: images, audio or video “that has been intentionally manipulated” to create a “significant likelihood” that a reasonable person would believe the media was true and unaltered. The bill would also create a private right of action to seek injunctive or equitable relief for candidates who were the subjects of the altered media and — notably — registered voters, too. The bill would provide exemptions from liability for broadcasting stations and internet websites that carried the altered media if they labeled the manipulated media as inaccurate.

Second, also in February, Assembly Member Tim Grayson, a Democrat, introduced a bill that would impose criminal penalties on those creating or using deepfakes to deceive voters before an election or to create pornography of nonconsenting persons.[7] It defines a “deepfake” broadly as “any” audio or visual media in an electronic format “that is created or altered in a manner that it would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual depicted in the recording.”

Specifically, the bill would criminalize the preparation, production and development of any deepfake created with the intent to “coerce or deceive any voter into voting for or against a candidate or measure” in an election occurring within 60 days. It would also criminalize the preparation, production, development or distribution of a deepfake that depicts a person “engaging in sexual conduct” without that person’s consent. The law would impose harsher penalties on a sexually explicit deepfake of a minor. Finally, the law would appropriate \$25 million to the University of California for research to identify and combat the inappropriate use of deepfake technology.

## Congress Targeting Deepfake Technology

Congress is also considering federal legislation that would impose wide-ranging restrictions on deepfakes, including on their impact on elections. In June, Rep. Yvette Clarke, D-N.Y., introduced the Defending Each and Every Person from False Appearances by Keeping Exploitation Subject to Accountability Act of 2019.[8] If passed, the bill would require anyone creating a deepfake image, audio or video imitating a person to label the media with a watermark, disclosing that the media has been altered.

Knowingly failing to disclose the deepfake — which the bill also calls an “advanced technological false personation record” — would result in a criminal penalty of up to five years imprisonment if the failure to disclose was done “by a foreign power, or an agent thereof, with the intent of influencing a domestic public policy debate, interfering in a Federal, State, local, or territorial election, or engaging in other acts which such power may not lawfully undertake.”

The bill would also criminalize the failure to include a disclosure if it was done knowingly with the intent: to “humiliate or otherwise harass” the target of the altered media if the media contained “sexual content”; to cause violence or physical harm; or “in the course of criminal conduct related to fraud, including securities fraud and wire fraud, false personation, or identity theft.” In addition, and similar to A.B. 730 in California, H.R. 3230 would establish a right of action for victims of altered media to sue the creators for equitable and injunctive relief.

The DEEP FAKES Accountability Act is currently under consideration by the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security.

Congress is also considering several other bills related to deepfakes, including the Deepfakes Report Act of 2019, which would direct the [U.S. Department of Homeland Security](#) to issue a report within 200 days of enactment and every 18 months thereafter on deepfake technology and to assess the artificial intelligence technologies used to create and detect deepfakes and the changes that may be needed to the laws governing such technologies.[9]

## Virginia First to Criminalize Deepfakes

Texas’s new law follows closely on the heels of the commonwealth of Virginia, which in July became the first jurisdiction to legislate against deepfakes. The Unlawful Dissemination or Sale of Images or Another Person law[10] makes the distribution of nonconsensual “falsely created” pornographic images and videos a Class 1 misdemeanor, punishable by up to a year imprisonment and a fine of \$2,500.[11] Originally introduced in January in the Virginia House of Delegates by Democrat Del. Marcus B. Simon and in the [Virginia State Senate](#) by Democrat Sen. Adam P. Ebbin and signed into law in March, the new law amends Section 18.2-386.2 of the Code of Virginia.

In particular, it imposes criminal penalties on “[a]ny person who, with the intent to coerce, harass, or intimidate, maliciously disseminates or sells any videographic or still image created by any means whatsoever, including a falsely created videographic or still image, that depicts another person who is totally nude,” or in a state of undress “where such person knows or has reason to know that he is not licensed or authorized to disseminate or sell such videographic or still image.”[12]

The law specifically exempts from liability internet service providers who enable computer access to others committing such acts.

State legislatures and Capitol Hill are considering more than a dozen different bills that would regulate or investigate deepfake technology. As the new Texas measure demonstrates, growing public alarm over the negative impacts of AI-manipulated media is resulting in increasingly aggressive legislative action in this field.

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[1] Chuck Lindell, 800 New Laws Take Effect Sunday, Glen Rose Reporter, Aug. 29, 2019, <https://www.yourglenrosetx.com/news/20190829/800-new-laws-take-effect-sunday-what-you-need-to-know>.

[2] SB 751 (Texas), <https://capitol.texas.gov/tlodocs/86R/billtext/html/SB00751F.htm>.

[3] Bill Analysis, C.S.S.B. 751, Senate Research Center, <https://capitol.texas.gov/tlodocs/86R/analysis/html/SB00751H.htm>.

[4] Tex. Penal Code Ann. § 12.21, <https://statutes.capitol.texas.gov/Docs/PE/htm/PE.12.htm>.

[5] Bill Analysis, C.S.S.B. 751, Texas Senate Research Center, <https://capitol.texas.gov/tlodocs/86R/analysis/html/SB00751H.htm>.

[6] AB-730 (California), Aug. 13, 2019 version, [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB730](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB730).

[7] AB-1280 (California), Apr. 22, 2019 version, [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB1280](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1280).

[8] H.R. 3230, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/3230/text>.

[9] Jonathan Cedarbaum, Matthew F. Ferraro, and Brent Gurney, Bipartisan Group of Legislators Unveils Bill to Address Threat of “Deepfake” Videos, WilmerHale Client Alert, July 2, 2019, <https://www.wilmerhale.com/en/insights/client-alerts/20190702-bipartisan-group-of-legislators-unveils-bill-to-address-threat-of-deepfake-videos>.

[10] HB 2678, 2019 Session, Virginia’s Legislative Information System, <http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2678>.

[11] Va. Code Ann. § 18.2-11, <https://law.lis.virginia.gov/vacode/title18.2/chapter1/section18.2-11/>.

[12] HB 2678 (Virginia), <http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2678S1>.