FIRE
Foundation for Individual Rights and Expression

March 10, 2025

The Honorable Glenn Youngkin
Office of the Governor
P.O. Box 1475
Richmond, VA 23218

Dear Governor Youngkin,

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends the free speech rights of all Americans, **urges you to veto SB 775 and HB 2479.** These bills would violate the First Amendment by restricting Virginians' right to engage in political speech via edited content or content generated by artificial intelligence regarding candidates for public office.

SB 775 and HB 2479 would suppress common forms of election-related media.

SB 775 and HB 2479 would make it illegal for anyone to sponsor an "electioneering communication" containing "altered" or AI-generated images or audio recordings of identifiable candidates for public office. (The bills do not define the term "altered.") An electioneering communication includes any "message" appearing in print, TV, radio, or on an online platform that refers to an identifiable candidate, is distributed and directed at the relevant electorate within 60 days of an election, and for which anything of value was provided or disbursed. Violation carries a civil penalty of up to $25,000, and a criminal penalty of up to one year in jail. Only if a person adds a conspicuous disclaimer to the media can they avoid these penalties.

The bills do not restrict just AI-generated content, but also "altered" media if any editing creates a "fundamentally different understanding or impression of the expressive content of the image or audio." And they apply not just to candidates who sponsor an electioneering communication, but to anyone who pays to run one.

Imagine a citizen who purchases space in a newspaper to air their grievances about a candidate. That person will be potentially liable if they included an AI-generated photo depicting the candidate, even if the photo was not actually misleading.

If the person tries to play it safe by using an image they know to be genuine, they're still at risk because the bill encompasses "altered" media. Because the bills leave this key term undefined, the restriction on its face reaches alterations as innocuous as cropping a photo. For example, if the original image showed the candidate standing next to someone who

510 Walnut Street, Suite 900 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

would be of great interest to voters, cropping them out to make the image fit on the page would create a "fundamentally different ... impression of the expressive content of the image" than the original. Even though the "altered" image is not actually misleading, the bill would require the message to include a disclaimer announcing it supposedly "contains synthetic media that has been altered from its original source or artificially generated and may present conduct or speech that did not occur."

This problem arises with other benign and common forms of editing as well. At what point has one digitally touched up their appearance enough to create a different "impression" of their portrait? Or created such an "impression" by editing parts of different speeches together in a single communication?

And while the bill includes a limitation — it covers only communications on TV, radio, in print media, or promoted for a fee online, and for which "anything of value was provided or disbursed" above certain thresholds — it still sweeps in a vast amount of protected political speech. Not only would it include traditional paid campaign ads, but any political speech expressing support for or against a candidate that involves the exchange of something of value and appears in a paper, a broadcast, or is promoted online for a fee.

Insofar as many AI tools require a paid license, the bill could govern every piece of media generated using them, provided it counts as an electioneering communication as defined by the bill. The same goes for AI tools built for editing photos or video. And because many social media platforms, such as X, offer paid premium accounts, if a person with such an account uses it to share an "altered" or AI-generated image of a candidate— i.e., they promote that image via a premium X account that has extended visibility and range — they are covered by the bill. Similarly, an organization that posts political content for free but has an employee create the content as part of their compensated job duties would presumably trigger the bills.

The sheer breadth of core political expression covered by SB 775 and HB 2479 raises serious First Amendment concerns.

SB 775 and HB 2479 are unlikely to survive judicial scrutiny.

The startling breadth and ambiguity of SB 775 and HB 2479's regulation of core political speech, as illustrated above, make them unlikely to survive judicial scrutiny.

Content-based regulations of speech rarely withstand constitutional review. When challenged in court, laws that target protected speech related to elections must survive heightened scrutiny. At its highest level, this scrutiny requires the government to prove the regulation is necessary to serve a compelling state interest and is narrowly tailored to achieving that interest using the means least restrictive of speech. A court may alternatively apply "exacting scrutiny," requiring the government to show the regulation is

substantially related to a sufficiently important government interest and narrowly tailored to the interest it promotes.

Under either level of scrutiny, **SB 775 and HB 2479 are in jeopardy because they restrict far more speech than necessary to prevent voters from being deceived in ways that would have any effect on an election.**

The bills cover a broad swath of political speech that is not actually misleading, as demonstrated above. They also cover speech that may be false but nonetheless protected by the First Amendment. There are no general First Amendment exceptions for misinformation, disinformation, or other false speech. That's for good reason: A general exception would be easily abused to suppress dissent and criticism.

There is also no "artificial intelligence" exception to the First Amendment. Narrow, well-defined categories of speech not protected by the First Amendment exist — such as fraud and defamation — which the Commonwealth can and does already restrict. But SB 775 and HB 2479 are not limited to such unprotected speech.

It is unlikely the government will be able to prove this burden on protected speech is constitutionally justified when there are alternative ways to address misleading AI-generated campaign ads that would burden much less speech. For one, other speakers or candidates can (and do) simply point such ads out.

The disclaimer option does not cure SB 775 and HB 2479's constitutional defects.

The fact that speakers can avoid liability by adding a disclaimer does not cure these bills' constitutional flaws. Government-compelled speech, which includes mandatory disclaimers, is generally anathema to the First Amendment.

Government-mandated disclaimers on political speech that have survived Supreme Court scrutiny are those that identify the sponsors and sources of financing for certain election ads.[1] These are easily distinguished from SB 775 and HB 2479:

- They were upheld in large part on the basis of the government's interest in preventing corruption, which is not implicated by the use of AI-generated or "altered" content.

- They required an objective factual disclosure, whereas SB 775 and HB 2479 require speakers to add a disclaimer based on a subjective judgment that characterizes the content of their message — i.e., whether the message contains material that was "altered" enough to change its "expressive content."

[1] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976).

- Disclosure of information about campaign financing does not mislead voters, whereas SB 775 and HB 2479's mandatory disclosures easily could. If, say, a candidate takes clips of their opponent to include in a campaign ad, they will need to decide whether their presentation or editing of the clips creates a "different understanding or impression of the expressive content" of the material — quite a low bar. If the ad is not misleading but the candidate wants to err on the side of caution to avoid potential jailtime, they may include the disclaimer anyway. This would create the impression for the viewer that the ad is synthetic or potentially misleading, despite the fact that it is not.

The First Amendment safeguards expressive tools like AI, allowing them to enhance our ability to communicate with one another on political issues without facing undue government restrictions.

We urge you to veto this bill.

Regards,

John Coleman
Legislative Counsel
Foundation for Individual Rights and Expression (FIRE)
510 Walnut Street
Suite 900
Philadelphia, PA, 19106
Ph: (215) 717-3473