TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

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October 21, 2024

The Honorable Chris Coons
Chairman, Committee on Judiciary
Subcommittee on Intellectual Property
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member, Committee on Judiciary
Subcommittee on Intellectual Property
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: NO FAKES Act, S. 4875

Dear Chairman Coons and Ranking Member Tillis,

We are deeply concerned that the NO FAKES Act would allow bad actors to abuse its proposed notice-and-takedown regime. The bill's takedown requirements would make unilateral removal of content far too easy while leaving speakers no recourse besides costly litigation—and no recourse at all if their speech involves an unauthorized replica but is protected by the First Amendment. Even well-intentioned laws can be weaponized by those who seek to suppress free speech.

Potential for abuse. NO FAKES would force online services—*e.g.*, image hosting or social media—to take down content "as soon as is technically and practically feasible"—which, in practice, will mean immediately—if they receive a single report that it could be an "unauthorized digital replica." The service must then notify the original poster that the content has been removed. There is no requirement that a website restore such removed content, even if it later concludes that the content isn't, in fact, an unauthorized deepfake. And even if the original poster alleges that their content is protected speech, *e.g.*, parody or political commentary, that won't get their content back up: after a takedown notice, only a lawsuit arguing that the content isn't an unauthorized digital replica at all could restore the content—NO FAKES leaves it up to the website.

In plain terms, if someone reports that content is an unauthorized deepfake and a website removes it, the website does not need to put it back up—*even if* the original poster shows that the content is protected speech. Speakers must hope that online services notice and care that their content is AI but protected. But websites do not have an army of expert First Amendment lawyers ready at all times to let moderators know whether content is protected parody or not. Nor do they have any real incentive to investigate such claims; indeed, their overriding incentive will be to avoid liability. Thus, websites will comply with takedown notices. Speakers will be left with no recourse. NO FAKES does not allow a speaker to sue those who abuse the bill's notice provisions if takedown notices are used against speech that includes AI deepfakes but is nevertheless protected by the First Amendment.

Nor would the ability to bring such a suit, if the bill were amended to provide for it, do much to check abuse, given the asymmetry between the costs of filing a notification under the bill (essentially zero) and the costs of filing and sustaining litigation (enormous). Court judgements against abusers, *if* they happen at all, may be unenforceable: notifications could easily come from foreign agents.[1]

We urge lawmakers to consider what options a creator who uses deepfakes to make social commentary would have under this bill: speakers would have to rely on the good will of tech platforms to keep their unpopular free speech online. And we urge you to consider what could happen if a politician or celebrity's supporters report content that isn't AI at all, but merely unflattering, genuine content. Online services would be asked to determine, for every photo, recording, or video, that the content is not a deepfake. NO FAKES imposes an "objectively reasonable" standard on that determination—a high bar to clear, and platforms tend to be risk averse. Even large tech platforms have limited moderation resources—smaller services have even fewer—and platforms are likely to take down first and ask questions later, if at all.

Chilling protected speech. We are further concerned that the bill's exceptions are too narrow and not consistent with free speech law. NO FAKES lays out exclusions under Section 2(C)(4), including a savings clause under 2(C)(4)(A)(ii)(II) and 2(C)(4)(A)(iii)—but savings clauses rarely save laws that infringe on the First Amendment.[2] Speakers who have content removed under this bill would likely assume that their content wasn't protected speech at all—after all, if it was, the platform would be exempt from liability for hosting it—and avoid speaking in similar ways in the future. And *individual speakers* who create unauthorized but protected digital replicas are themselves risking liability; they are unlikely to know whether their speech is covered under one of the act's exclusions. Upon receiving notice, their speech will be chilled: "The persons being regulated here are [speakers], not scholars of First Amendment law."[3] Individual speakers do not have the resources to go to court and prove their speech falls under an exclusion. As the Supreme Court has said, "It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."[4]

We appreciate the Committee's concern for the integrity of people's voice and likeness. But NO FAKES is a flawed approach that intrudes on the fundamental civil liberties of all Americans. We urge careful consideration of these concerns, and we stand ready to assist you in understanding the implications of this legislation. If you would like to discuss the issues in this letter further, please contact Santana Boulton at sboulton@techfreedom.org.

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[1] *See* Mike Masnick, *Vietnamese Duo Hit With Injunction After 117,000 Bogus DMCA Claims*, TechDirt (Oct. 11, 2024), https://www.techdirt.com/2024/10/11/vietnamese-duo-hit-with-injunction-after-117000-bogus-dmca-claims/.

[2] *See, e.g.*, Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 790 (2011).

[3] College Republicans at San Fran. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1021 (N.D. Cal 2007).

[4] Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

Sincerely,

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