

ASSEMBLY COMMITTEE SUBSTITUTE FOR
ASSEMBLY BILL NO. **3540**
(Second Reprint)

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am returning Assembly Committee Substitute for Assembly Bill No. 3540 (Second Reprint) with my recommendations for reconsideration.

This bill creates a new criminal offense if an individual generates or discloses "deceptive audio or visual media." "Deceptive audio or visual media" is defined as any video recording, motion picture film, sound recording, electronic image, photograph, any technological representation of speech or conduct substantially derivative thereof, or any forgery or facsimile of a document or writing, that appears to a reasonable person to realistically depict any speech, conduct, or writing of a person who did not in fact engage in the speech, conduct, or writing, and the production of which was substantially dependent upon technical means, rather than the ability of another person to physically or verbally impersonate the person. This deceptive media is more commonly referred to or known as "deepfakes."

The bill establishes a crime if a person, without license or privilege to do so, discloses a work of deceptive audio or visual media that the person knows or should reasonably know was created in violation of the provisions of this bill without clearly identifying it as a work of deceptive audio or visual media. The bill further provides that a person could be civilly liable to the individual depicted in the deceptive audio or visual media, who may bring a civil action. The bill also provides that criminal and civil penalties imposed pursuant to the bill only apply to the news media or a news agency if the news media or agency broadcasts or publishes a work of deceptive audio or visual media that the

news media or agency knows was created in violation of the bill, and fails to clearly identify the work as deceptive audio or visual media.

I applaud the proponents of this bill who rightly recognize and seek to mitigate the potential for lasting harms to individuals and for misleading the public at large due to the ease and prevalence of computer technologies that allow for the creation of deceptive media, or "deepfakes." Our criminal code establishes a framework of laws of general application that address a wide range of conduct, but sometimes needs to be more focused to better address particular and nuanced types of undesirable behavior. This is one such area, as those who exploit nascent "deepfake" technology may not be subject to sufficient criminal or civil penalties or deterrence, leaving the public vulnerable and not appropriately safeguarded from the use of "deepfake" audio or visual media for nefarious purposes.

That said, there are ways that this bill can be strengthened to reduce potential First Amendment concerns, such as including an explanation of the intended purpose of the legislation and its underlying rationale for achieving its goal of minimizing the inappropriate or deceptive use of this type of sophisticated technology. As has been mentioned in discussions about this bill, in order for it to be implemented effectively and as intended, we must ensure the language of the bill is sufficiently precise to combat fraudulent, deceptive, or exploitative uses of "deepfakes" without running afoul of constitutional precept, especially as similar legislation enacted in other states has already been challenged under First Amendment arguments.

Therefore, I herewith return Assembly Committee Substitute for Assembly Bill No. 3540 (Second Reprint) and recommend that it be amended as follows:

Page 2, Title, Line 1:

After "establishing" insert
"civil and"

Page 2, Section 1, Line 8:

After "1." insert "The
Legislature finds and declares
that:

a. Technological advances in artificial intelligence have resulted in widespread accessibility to sophisticated "deepfake" technology, which can be used to manipulate audio and visual content to create deceptive audio and visual media depictions that often cannot be distinguished from reality.

b. Digitally altered media generated with this technology can produce false and deceptive, but completely realistic and convincing, media depicting events that never happened, interactions that never took place, conduct that never occurred, and statements that were never made.

c. While there are numerous valid and appropriate uses for this sophisticated technology, such as criticism, comment, satire, parody, news reporting, teaching, scholarship, or research, it may also be used inappropriately, to deceive, humiliate, or violate the privacy of individuals who are portrayed in deceptive audio and visual media without their consent.

d. It is manifest that lawbreakers will use all available tools to subvert the law, and "deepfake" technology, which may be readily accessed through the Internet or computer software programs, can be a powerful tool to accomplish illicit ends. Utilizing "deepfake" technology, bad actors may engage in a broad range of criminal or unlawful conduct such as creating audio and visual media depictions of sexual abuse and sexual exploitation involving children or non-consenting adults, creating false, misleading, and misattributed political advertising and campaign materials, and targeting individuals and corporate entities for harassment, damaging

reputations and ruining lives. Punishment for committing a crime using "deepfake" technology should be cumulative, as the impact of the underlying criminal conduct is amplified through the insidious use of "deepfake" technology as the means to break the law.

e. With the readily available amplifiers of the Internet and social media, digital media can be both ubiquitous and enduring, and the harm to a person falsely depicted in a "deepfake" image or visual or audio recording can result in widespread and pervasive emotional distress, reputational damage, and indelible harm to that person's personal and professional relationships.

f. There is a compelling State interest in fostering the appropriate use of "deepfake" technology and deterring the inappropriate application of this technology to commit illicit conduct, in a way that safeguards the health, safety, and welfare of the public without unduly infringing on the First Amendment rights of content creators. Similarly, the State has a compelling interest in protecting the privacy and reputational interests of residents who might otherwise be falsely depicted through "deepfake" technology, and in providing them a meaningful mechanism through which to obtain appropriate redress.

g. While civil liability and enforcement may to some extent prevent the misuse of this technology in furtherance of criminal activity, the relative ease with which this technology may be accessed and deployed, measured against the magnitude of the indelible and long-lasting harms its use can inflict upon victims and their families, warrants more severe consequences to more effectively punish and deter the inappropriate use of "deepfake" technology.

h. Accordingly, the Legislature finds that it is necessary and proper to establish robust specific criminal penalties to punish

and deter the use of "deepfake" technology to generate or create works of deceptive audio or visual media for the purpose of attempting or furthering the commission of a crime or offense, or to solicit, disclose, or use a work of deceptive audio or visual media for that purpose, and by providing the aggrieved victims of such conduct a civil recourse by which they may seek appropriate recompense.

2."

- Page 2, Section 1, Line 22: After "make" insert "externally"
- Page 3, Section 1, Lines 2-3: Delete "with the intent that it be used as a part of a plan or course of conduct to commit" and insert "for the purpose of attempting or furthering the commission of"
- Page 3, Section 1, Line 3: After "offense," insert "or with the knowledge that the work is to be used by another for such purpose,"
- Page 3, Section 1, Lines 18-23: Delete in their entirety
- Page 3, Section 1, Lines 26-27: Delete "as part of a plan or course of conduct to commit" and insert "for the purpose of attempting or furthering the commission of"
- Page 3, Section 1, Line 27: After "offense," insert "or with knowledge that the work is to be used by another for such purpose,"
- Page 3, Section 1, Line 31: Delete "third" and insert "fourth"
- Page 3, Section 1, Line 32: After "person" insert "knowingly or recklessly"
- Page 3, Section 1, Lines 33-34: Delete "that the person knows or reasonably should know was"
- Page 4, Section 1, Line 7: After "shall" insert "also"
- Page 4, Section 1, Line 10: After "each" insert "knowing or reckless"
- Page 4, Section 1, Line 12: Delete "or reckless"
- Page 4, Section 1, Line 34: Delete "constitutes" and insert "a reasonable viewer or listener would understand to constitute"
- Page 4, Section 1, Line 35: Delete "or research" and insert "research, or to any content"

Page 5, Section 1, Line 9:

Before "telecommunications"
insert "or"

Page 5, Section 1, Line 9:

Delete "or television
station,"

Page 5, Section 1, Line 10:

After "any" insert "television
station,"

Page 5, Section 1, Line 45:

After "media;" insert "to a
school administrator,
attorney, family member, or
other advocate for purposes of
reporting conduct that may
constitute a violation of this
section;"

Page 6, Section 2, Line 4:

Delete "2." and insert "3."

[seal]

Respectfully,

/s/ Philip D. Murphy

Governor

Attest:

/s/ Kate E. McDonnell

Chief Counsel to the Governor