

NCSL Testimony for the Kansas House Committee on Elections

WENDY UNDERHILL AND ADAM KUCKUK | FEBRUARY 1, 2024

Good afternoon, Mr. Chair and members of the committee, and I thank you for the opportunity to speak with you today. I am Wendy Underhill, the director of elections and redistricting at the National Conference of State Legislatures. You might like to know I received my MPA from Wichita State University many years ago.

I am here with my colleague, Adam Kuckuk, to provide an overview of recent legislation on artificial intelligence as it applies to campaigning.

For those of you are not familiar with NCSL, please know that we are the nation's bipartisan organization supporting the work of both legislators and legislative staff throughout the states and territories. We believe in the importance of the legislative institution and we know that when states are strong, our nation is strong.

NCSL provides a number of services, including nonpartisan research and analysis. Any requests for information are handled on a confidential basis, so please feel free to reach out to any of us at NCSL at any time. Assisting you is our bread and butter. Adam and I can pass along questions to our peers who cover other subject areas.

Before I dive in, I want to take a minute to go over our agenda for the next 15 minutes. First, I will offer a quick overview explaining the changing information and disinformation landscape. Then, I've got a couple of slides on how AI works and on vocabulary. Finally, we'll highlight state legislative action and touch on federal legislation as well.

The overall theme is Uncertainty. That's because AI is evolving rapidly and states must try to respond appropriately and quickly even though the landscape is changing.

To be clear, misleading or downright false information in the political arena is not new. In 1800, a political journalist, James Callender, made himself famous for attacking presidential candidate John Adams, saying Adams wanted to become king and start a war with France. He did this on behalf of Thomas Jefferson.

As technology for campaigning shifted from paper to radio, TV and the internet, the incentives for misleading or lying to voters did NOT change.

What is new is that artificial intelligence can make it easier and quicker to spread both good information and falsehoods. And, knowing that there is a heightened likelihood of falsehoods makes people not trust real images either; if people cannot tell the difference, they trust less and less.

One reason that AI-generated false information matters is that programs such as ChatGPT or Midjourney are available to anyone, and using these programs requires little skill. I have experimented with ChatGPT twice, and I can assure you I am not technically oriented!

You could think of generative AI as Photoshop on steroids, in that Photoshop has long provided the ability to clean up images or remove extraneous things from the background. AI does it faster, with far more flexibility, and with just word prompts from the user.

Already, over half of Americans believe AI will increase false and misleading information in campaigns. That comes from a recent survey from the University of Chicago, and it is no surprise.

Before we move on to legislation, it may help to look at definitions.

A deepfake is a realistic image, video or audio clip generated with artificial intelligence (AI) technology. Deepfake technology uses AI machine learning to manipulate audio or video to create a false (but realistic) product that looks like a recording of individuals doing or saying things they did not actually do or say.

For example, a person's face can be swapped with another's, and lip syncing can be added. Adam made the image on the left using a form of AI called Microsoft Image Creator.

Some synonyms for AI-generated deepfakes are "synthetic media," "deceptive media" and "doctored media." We are going with "deepfakes" at NCSL.

One of our colleagues, Heather Morton, is tracking AI legislation broadly, not just deepfakes in campaigning. We will be happy to connect you with her if you'd like.

From Heather, I have this definition of how AI works: "Deepfakes are created through what are called generative adversarial networks (GANs). Two neural networks are trained in competition against each other, where the first network, called the generator, creates counterfeit data—photos, audio or video—that replicates the properties of the actual, real data set. The second network, known as the discriminator, identifies the counterfeit data. Based on the results, the generator neural network will adjust to create increasingly realistic data until the discriminator neural network is unable to distinguish between the real and counterfeit data."

In the news, we hear more about how deepfakes are used for nefarious purposes, such as scam calls. There are beneficial uses, too. For example, medical researchers use GANs to create fake medical images that can be “trained” to detect diseases. In this context, using deepfakes is helpful in medical training.

Overall, as deepfakes are ever-more rapidly and cheaply made, they raise issues for artistic expression, free speech, national security and public trust. You can see how this development is creating an impetus for new legislation!

Back to AI in campaigning.

We have two examples of how deepfakes have been used in campaigning. The first made big news about two weeks ago, as a robocall used what sounded like President Biden’s voice telling New Hampshire Democrats not to vote—and it included a real phone number for a real person in the Maine Democratic party to contact. It was a fake.

The second example is from last year. It is about content produced by DeSantis’ campaign that used a fake image of Trump embracing Fauci, something he did not do.

While there are ways that AI can intersect with elections themselves, so far states have focused on AI in campaigns. The goal has been to put guardrails around the use of AI—or at least to find ways to let voters know when they are looking at something that has been made with AI.

Tracking AI legislation broadly is new to NCSL; 2023 was the first year that our elections team tracked it at all.

Last year, 10 states introduced legislation on the use of AI-generated materials in campaigns. You can see those states on this slide.

As of this morning, 23 states have introduced legislation in 2024, including Kansas as I’m sure you’re aware. This spike is no surprise—AI is the hot topic broadly in legislatures this year.

As for enactments, there have been just five in total: three last year in Michigan, Minnesota and Washington, and two from 2019, in Texas and California.

While each law is unique, we have put them in two buckets. Blue on this slide means the state has established a disclosure requirement for the use of AI-generated content. Red means the state has prohibited the use of AI for campaigning for a specific period of time prior to an election.

On prohibitions, Texas makes it a crime to create a deepfake video “with the intent to injure a candidate or influence the result of an election” within 30 days of an election. In Minnesota, the approach is similar, but it takes effect 90 days before an election.

For disclosure on AI, it may help to think of these as parallel to the disclosure requirements you are already used to that put “This ad is paid for by the XYZ committee” on most electioneering materials.

California, Michigan and Washington are all requiring it on electioneering materials where AI has generated the content. If it is video content, anything made with AI content must be disclosed in text that is no smaller than the largest text on the screen and must appear for the duration.

For audio usages, a disclosure must be stated at the beginning and end of the content—and depending on the state, in the middle if the piece is over two minutes.

So far states have followed one of those two ways to control AI-generated materials that aim to influence an election result.

Another idea is to look to the past. In Wisconsin, a 1973 statute already prohibits knowingly making a false representation. That may be sufficient protection—and is a reminder that faking images is not new. Still, Wisconsin had legislation last year that was more specific, and likely will again this year.

We have not yet dug in to see if other states also have longstanding laws that might apply, but I believe half the states have prohibitions on specific types of false statements in the political sphere. We will soon have more definitive information on this topic.

As for this year, one new approach comes from Colorado: it’s recently introduced bill would require the metadata associated with any ad to include that a deepfake was used, and when and with what tool it was created.

What is metadata, you may ask. It is something behind virtually everything we touch on a screen: it describes the data owner, data type, file creation date, when and who modified it, that kind of thing.

Before I close, please know that in 2023, there were two bills in Congress to address misleading campaign practices based on AI. One was specific to voice fraud, and one that is broader.

With that, Mr. Chair, I would like to reiterate that uncertainty abounds on the topic you are undertaking. I am ready to take questions, although with uncertainty in mind, I can’t promise to have answers. Thank you again!