THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America

TO: Honorable Cyrus Western
Honorable Chris Rothfus
Select Committee on Blockchain, Financial Technology & Digital Innovation Technology

RE: Synthetic Media Bill Working Draft version 24LSO-0236 Working Draft 0.6

We appreciate the opportunity to share our concerns about the amended version of Wyoming Synthetic Media bill to be considered November 21, 2023 by the Select Committee. While we applaud the changes to the previous version of the legislation, we remain concerned that it may violate the First Amendment rights of creators and distributors of First Amendment protected speech. We are also concerned that the bill could invite frivolous lawsuits against them. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Wyoming: authors, publishers, booksellers and librarians, producers and retailers of films, home video and video games.

The draft bill would create a civil cause of action if a person "knowingly and intentionally" distributes "synthetic media" without a label or disclaimer with the intent to mislead others about the acts of the natural person. "Synthetic media" is defined as an image, audio or video record of a natural person's appearance, speech or conduct that has been intentionally manipulated or generated with the use of "generative adversarial network techniques" or other digital technology in a manner to create a realistic but false representation a reasonable person would believe is of a real natural person's appearance, action or speech, which did not actually occur.

We understand the legislature's concern about "synthetic media" that falsely depicts a person but we must caution that any legislation intended to address this problem must be carefully drawn to focus on bad actors while respecting First Amendment rights.

The U.S. Supreme Court has already held that an attempt to ban or regulate false or misleading speech must be linked to a specific harm or a malicious intent to cause the harm. If the law is not carefully tailored, it is likely to be overbroad. As Justice Breyer wrote in his concurrence in a plurality decision, "[A] more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm." *United States v. Alvarez*, 132 S. Ct. 2537, 2556 (2012).

These guardrails are especially important if the speech being regulated is on matters of public concern. Such speech has been deemed important enough to be worthy of substantial First Amendment protection even if it is false or inaccurate, let alone merely misleading. In his dissent in *Alvarez*, Justice Alito found that "[A]ny attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws

restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat." *Id.* at 751 (Alito, J. dissenting).

In the current draft of the bill, section (b) of the proposed draft of synthetic media bill is not limited to addressing a specific harm or requiring a showing of intent to cause the harm. The draft bill only requires that the "synthetic media" be intended to mislead the person who sees or hears it. There is no requirement that there be a specific harm, or even that a harm occur other than someone being misled. This is in contrast to section (g) that is limited to a malicious intent to cause a specific harm, influencing an election.

The lack of a clear definition for the term "mislead" may make the bill unconstitutional for vagueness and overbreadth. "Mislead" lacks the necessary specificity to provide fair warning as to what speech is illegal. "Mislead" does not require actual falsity. It can be misleading to communicate something that is substantially true but conveyed through a technical falsity such as communicating a candidate's youth and energy despite their true age by making their hair less gray. In movies and photos, the creators often seek to suspend belief as part of the experience so an audience is absorbed in what is happening on the screen. The filmmaker may want the audience to believe that a character performed a daring stunt or survived on Mars. They may want the audience to believe that a character met many historical figures or presents an alternate version of history. Even if a reasonable person believed such content was real, it should not make the content subject to a civil suit because an audience member considered it misleading.

It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Winters v. New York*, 333 U.S. 507, 509 (1948). Law must be sufficiently clear to be understood by the common person. The requirement of clarity is especially stringent when a law infringes on First Amendment rights. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").

Due to the lack of other narrowing elements in the legislation, the use of the term "mislead" may also make the legislation unconstitutionally overbroad since it would cover fiction and non-fiction entertainment. It would could also apply to minor changes in an image or audio to make a crowd look bigger or the speaker sound more intelligible. The Constitution "gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). A law is "overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. at 473 (citation omitted).

This potentially broad definition will inevitably invite frivolous lawsuits against media for using technology such as CGI in a way that is so believable it is considered misleading. A moviegoer who thought all the death-defying stunts by the lead actor was real could be prompted to file a suit if they found out that some were done using technology. The current exemption section (h)

limited to material protected by the First Amendment is inadequate to fend off such lawsuits at the earliest stages of the litigation. To spare producers and distributors of media the burden and expense of suits that target their exercise of their First Amendment rights, the bill should include unambiguous and robust safeguards for expressive works.

Finally, we believe that the labeling requirement in the draft bill could be unconstitutional as compelled speech. It bars publication of video or audio without "a clear and conspicuous" notice or disclosure that the material is "synthetic media." This forces producers and distributors of content to put the government's message regardless of whether the speaker agrees with that message. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). The First Amendment allows individuals or companies not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Pub Util's Comm'n*, 475 U.S. 1 (1986) (Government cannot require a private electric company to include environmentalists' inserts in its monthly bills).

We would welcome the opportunity to work with the committee to address the concerns we raise here. If you would like to do so, please contact David Horowitz, executive director, at horowitz@mediacoalition.org or by phone at 212-587-4025.