ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

March 27, 2017

Assemblymember Ed Chau
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0049
Tel: (916) 319-2049
Fax: (916) 319-2149

Re: A.B. 1104 – Oppose

Dear Assemblymember Chau:

We write today on behalf of the Electronic Frontier Foundation, a non-profit organization based in San Francisco that protects free speech in the digital world. Founded in 1990, EFF has over 36,000 members, including thousands in California.

EFF strongly opposes A.B. 1104, the legislation you have introduced that would make it illegal to make "false or deceptive statements" designed to influence an election, be it an election for public office or a ballot measure. This bill raises severe questions of constitutionality, threatens a wide variety of political speech, and creates opportunities for widespread abuse. In addition, it is likely unworkable on a practical level.

First and foremost, the bill cannot be squared with U.S. Supreme Court case law. "[A] State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). In *Brown*, the Court reviewed the constitutionality of a corrupt practices statute when a victorious candidate for public office as part of his campaign pledged to lower his salary if elected, which apparently was illegal at the time. Under the statute, the winner would forfeit his victory.

The Supreme Court concluded that such a pledge could not be punished consistently with the First Amendment, noting that "[t]he chilling effect of such absolute accountability for factual misstatements in the course of

815 Eddy Street • San Francisco, CA 94109 USA
voice +1 415 436 9333 fax +1 415 436 9993 web www.eff.org email information@eff.org

political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." *Id*. at 61 ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force.") (citations omitted). *See also Gertz v. Robert Welch, Inc*., 418 U.S. 323, 342 (1974) (some false factual statements receive "a measure of strategic protection" to ensure that fully protected speech is not unduly chilled).

The recent case of *United States v. Alvarez*, 132 S. Ct. 2537 (2012), makes this point even more emphatically. In *Alvarez*, the Court struck down the Stolen Valor Act, which made it a crime to lie about receiving a Medal of Honor, finding that Mr. Alvarez's lies in a public meeting about serving as a marine and receiving a Medal of Honor were protected by the First Amendment. *Id*. at 2551 (plurality opinion). Although the government's interest in protecting the integrity of the Medal of Honor was "beyond question," and Mr. Alvarez's statement that he "held the Medal was an intended, undoubted lie," the Court could not find that the restriction was actually necessary to protect that interest and reiterated "that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id*. at 2554.

In short, *Alvarez* suggests that false speech is protected if it is not defamatory and causes no harm. 132 S. Ct. at 2549 (finding Stolen Valor Act overbroad because violations of the law do not result in a cognizable harm). A.B. 1104 is likely unconstitutional under these cases.

Second, A.B. 1104, if enacted, will likely add to political controversy. The *Alvarez* Court warned: "Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable…. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." [cite]

Criminal prosecutions under A.B, 1104 would be politically controversial, because any such prosecution could itself be seen as an attempt to influence an election, and those are authorized to enforce its provisions would inevitably be accused of having partisan political motives. The roiling effects of FBI statements about alleged criminal actions of candidate Hillary Clinton in the most recent presidential election cycle are merely the most recent example.

American political speech dating back as far as the John Adams-Thomas Jefferson rivalry has involved unfair smears, half and stretched truths, and even outright lies. During the 2016 campaign alone, PolitiFact ranked 69 statements by Hillary Clinton as mostly false or false and seven as "Pants on Fire." President Donald Trump made 202 mostly false or false statements and 63 "Pants on Fire" statements. In fact, many members of the California State Assembly's Privacy and Consumer Protection Committee, whether unfairly or not, have stood accused of misleading or deceptive campaign advertisements.

No law, and certainly not A.B. 1104, will remedy this problem. This bill will fuel a chaotic free-for-all of mudslinging with candidates and committees being accused of crimes at the slightest hint of hyberbole, exaggeration, poetic license, or common error. While those accusations may not ultimately hold up, strategic prosecutions (or threat of prosecutions) may harm elections more than if the issue had just been left alone.

That's not even the worst of the potential ramifications of this legislation. By its terms, the bill only applies to statements on Internet Web sites, and not to statements made on TV, radio, or print media. Discriminating against one form of media—the Internet—also creates serious First Amendment questions.

Moreover, A.B. 1104 makes no exception for satire and parody, leaving The Onion and Saturday Night Live open to accusations of illegal content. Nor does it exempt news organizations who quote deceptive statements made by politicians in their reporting—even if their reporting is meant to debunk those claims. Conversely, if a candidate speaks on TV and then finds her remarks republished on the Internet by a political reporter, did that candidate "cause" such Internet publication to be made? And what of everyday citizens who are duped by misleading materials: if 1,000 Californians

retweeted an incorrect statement by a presidential candidate, have they all broken the law?

When political leaders are promoting "alternative facts" and branding unflattering reporting as "fake news," it is worrisome that this bill would give the government the power to punish speech that the government disagrees with.

If this legislation passes, it will open California to First Amendment lawsuits that it cannot win.

Please do not hesitate to contact us to discuss further. We may be reached by email at tien@eff.org and dm@eff.org or by phone at 415-436-9333.

Sincerely,

Lee Tien
Senior Staff Attorney and Adams Chair for Internet Rights

Dave Maass
Investigative Researcher