



In the Matter of)

Disclosure and Transparency of)
Artificial Intelligence-Generated Content)
in Political Advertisements)

MB Docket No. 24-211

Comments of Americans for Prosperity

I. Introduction & Summary

Political and issue ads serve a core role in the national dialogue, connecting the public with information about candidates for office or about issues that are of public importance: Americans have a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹ Technology, as it has often done, is playing the role of disruptor with the rise of Artificial Intelligence (AI) at the forefront of international conversations. Having safe and secure elections is an important and critical endeavor that Americans for Prosperity supports. However, the current proposal put forward by this Commission regarding the use of AI in political and issue ads is deeply concerning.² As the Commission correctly recognizes, AI can play a role in “empowering smaller political campaigns with limited financial resources to reach larger audiences.”³

¹ *Buckley v. Valeo*, 421 U.S. 1 (1976), (quoting *New York Times Co. v. Sullivan*, 375 U.S. 254, 270 (1964)).

² Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, *Notice of Proposed Rulemaking* MB Docket No. 24-211, (July 25th, 2024) [“NPRM”], available at: <https://docs.fcc.gov/public/attachments/FCC-24-74A1.pdf>

³ *Id.* at 2.

However, the thrust of the proposal is couched in the fear of the potential harm the technology could cause. While the NPRM does not go as far as some Congressional proposals that would outright ban the use of AI in political and issue ads, the proposal still raises serious First Amendment concerns.⁴ Imposing broad regulations on AI-generated content will hinder this fundamental right, setting a dangerous precedent for government overreach into the realm of free expression.

Moreover, the FCC lacks the proper authority to impose such regulations. The agency's jurisdiction primarily covers telecommunications and broadcasting, not the nuanced and rapidly evolving field of AI technology. Furthermore, the responsibility of regulating disclaimers for political ads belongs to the Federal Election Commission. The FEC has determined that additional regulations are not necessary.⁵ The absence of a clear legislative mandate from Congress to regulate AI, coupled with a carefully considered analysis by the FEC that problematic use of AI in political advertising is covered by existing law demonstrates a clear case of this Commission exceeding its jurisdiction, expertise, and constitutional limitations.

The FCC lacks the expertise to effectively navigate the complexities of AI. Regulating AI in political ads requires a deep understanding of a rapidly evolving technology and its implications, something with which the FCC has not dealt. Forcing regulations onto this emerging technology will lead to unintended consequences that stifle innovation, discourage the use of AI in creative and informative ways, and ultimately harm the broader adoption of this emerging technology.

This proposal represents a classic case of a solution in search of a problem. Rather than fostering an environment where AI-generated content can be used in political discourse, the FCC's proposal risks simultaneously chilling speech, slowing adoption of useful technologies and hindering technological progress, and undermining the United States' leadership in this emerging field.

II. First Amendment Considerations

The Supreme Court has long recognized that political speech sits at the core of the First Amendment. For that reason, efforts by Congress to regulate political speech must be some of the most clear, deliberate and tailored of any statutory command. As explained below, the FCC

⁴ See e.g. S.2770 - 118th Congress (2023-2024): Protect Elections from Deceptive AI Act, S.2770, 118th Cong. (2024), <https://www.congress.gov/bill/118th-congress/senate-bill/2770>.

⁵ Gold, Ashley. "Scoop: FEC Won't Act on AI in Election Ads This Year." Axios, 8 Aug. 2024, www.axios.com/pro/tech-policy/2024/08/08/fec-ai-election-advertising-no-action.

lacks that statutory power. Put simply, the FCC’s proposal would unconstitutionally suppress political speech in the lead up to a presidential election because it is overbroad; not content neutral; and is not narrowly tailored to serve a compelling state interest. Discussion of issues cannot be suppressed simply because the issues may also be pertinent to an election. “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”⁶

A. The definitions of “AI-generated content” and “political advertising” are unconstitutionally broad and will chill protected speech.

The proposed additions to § 73.1945 include definitions of “AI-generated content” and “political advertising.” Section § 73.1945(a) defines AI-generated content as: “an image, audio, or video that has been generated using computational technology or other machine-based system that depicts an individual’s appearance, speech, or conduct, or an event, circumstance, or situation, including, in particular, AI-generated voices that sound like human voices, and AI-generated actors that appear to be human actors.” This definition would effectively apply to nearly every political or issue ad made today even with decades-old technology that, until now, was not given a second thought.

Standard audio, video, and image editing software uses “computational technology” to generate content in ads that would not be there but for that technology. That is the entire purpose of these tools. For example, this definition would apply to: photoshop tools that eliminated shadows or unsightly blemishes on the image of a candidate; sound editing software that changed the tone or timbre of an ad’s message; background editing software that imposed an American flag behind a candidate that wasn’t there during a video shoot; video-editing software that darkened the picture of an opponent to purposefully create a menacing tone; voice over tools that used an AI-generated translation to translate the ad for a desired audience. The list is endless.

From a First Amendment perspective, this is problematic. This will misinform, not inform, the public. Contemporary audiences have a basic understanding and expectation of what Artificial Intelligence is: and it does not include Photoshop. By defining AI so broadly to include tools that have been in use for decades, this proposal would have the opposite effect of its goal – it will sow confusion and not clarity and provide the public with no useful information.

Proposed § 73.1945(B), defining “political advertising,” is unconstitutionally broad: it includes “(2) issue advertising. Issue advertising is defined for purposes of this section as paid

⁶ Wisc. Right to Life at 21.

political programming that communicates a message relating to any political matter or controversial issue of public importance, but does not include advertising that is made by or on behalf of a legally qualified candidate for public office.”

The Supreme Court has made clear that the regulation of issue speech is the regulation of pure political speech and the “... First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”⁷ This Commission’s proposed definition is incapable of overcoming this presumption without much more: “[i]ssue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters heard the information and choose—uninvited by the ad—to factor it into their voting decisions.”⁸

B. The definition of AI-generated content is not content neutral.

This government-mandated message is not content neutral. The use, dangers, and regulation of AI are all hotly debated political topics, with members of Congress hardly in sync even within their respective parties. “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed **or the idea or message expressed.**”⁹ (emphasis added) This Commission, by determining beyond its jurisdiction that regulation is necessary, is adopting a position and thrusting that position on covered speakers by demanding a disclaimer. Speakers have no choice but to adopt the position that the mere use of AI is relevant to how a viewer will interpret its message—something Congress has not yet decided.

This proposed disclaimer, therefore, is neither like commercial speech disclaimers that do not carry a political message, nor like statutorily mandated political speech disclaimers that FECA demands and the appropriate agency (the Federal Election Commission) requires on *all* political ads.

C. The disclosure requirement is not narrowly tailored to serve a compelling state interest.

When it comes to mandatory disclosures the government must show both a compelling state interest and a narrowly tailored approach to furthering that interest. To date, the Supreme Court has recognized only two compelling interests when it comes to regulating political speech in the context of disclosure in disclaimers: political corruption or the appearance of corruption

⁷ Federal Election Com’n v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 3 (2007).

⁸ *Id.*, at 17.

⁹ *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

and the informational interest voters have to know who is contributing to and influencing their lawmakers.¹⁰ The use of AI technology in political ads cannot reasonably be argued to meet either standard.

The FCC doesn't attempt to justify either of these compelling interests. Instead, it relies on a generalized interest in an informed electorate, which the Supreme Court has never adopted.¹¹ There are three problems. First, the vector between the FCC's definition of AI-generated content and the popular understanding of that term is so vast that this will undoubtedly misinform, not inform, the electorate. Second, the FCC does not have a generalized statutory interest in informing the public. Third, even if this interest existed, chilling swaths of political speech cannot be considered a narrowly tailored method of informing the public of who influences their lawmakers.

Make no mistake, this rule will chill potential speech. Those looking to speak to the public about candidates or other messages that fall within the proposals definition of "political advertising" or "issue advertising" will have no clarity on whether their communications will be regulated and to what extent use of even older AI technology—Photoshop, for example—will now demand an onerous disclaimer. For some speakers, this added burden will mean simply not running radio or TV ads, which continue to be very popular mediums to communicate with the public.

Further, the chill to speech will not impact speakers equally: it will disproportionately affect a) speakers who do not have the means to use the more expensive non-AI alternatives to common political ads; and b) speakers who do not want to associate with the FCC's message – that is, they are targeting audiences who have strong beliefs about the issue of Artificial Intelligence, but want, as is their First Amendment right, to **not** speak about that issue in their ad. This targeted silencing of political messages cannot survive any level of First Amendment scrutiny.

¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 191 (1976).

¹¹ See, for example, *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 613, (2021) ("California is not free to enforce any disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives").

D. The Federal Election Commission has determined in its expertise that existing law is sufficient to curb any potential harms of AI use in political advertising

Congress has delegated the highly sensitive task of regulating political ad disclaimers to a different agency, the Federal Election Commission.¹² It has done so for good reason: the FEC is statutorily designed to demand bipartisan support in nearly all of its decisions, including enforcement matters, advisory opinions and, of course, rulemaking authority.¹³ The statutory structure of the FCC does not afford the same protections and, as has been demonstrated here in the powerful dissents of two commissioners, bipartisanship is not simply a virtue in the political speech space, it is a necessary condition for trust and legitimacy. Not only does this Commission lack statutory authority, but this proposal appears motivated by partisan politics and support and lacks support by the two Republican Commissioners in what is an already electrified election cycle.

The FEC, by contrast, after careful consideration of all of the factors, has decided not to act.¹⁴ As FEC Commissioner Cooksey wrote recently:

[The FEC] doesn't have the experience or expertise to craft effective and appropriately tailored rules. Neither do most other federal agencies, including the Federal Communications Commission, Federal Trade Commission, and Equal Employment Opportunity Commission—each of which has put out reports or proposed rules on the matter. These agencies can't even agree on a definition of AI. Defining the scope of regulatory authority is properly the job of Congress, not unelected bureaucrats.

Regulation could also have the unintended consequence of stifling AI's potential as a tool to broaden public participation in the political process. AI can make political ads more

¹² Cooksey, Sean. Letter from FEC Chairman Sean Cooksey to FCC Chairwoman Rosenworcel on Proposed Artificial Intelligence Rulemaking, 3 June 2024, www.fec.gov/documents/5405/FEC_Chairman_Cooksey_Letter_to_FCC_Chairwoman_Rosenworcel_June_3_2024.pdf.

¹³ See 52 U.S.C. § 30106(c) (requiring 4 Commissioner votes for the FEC to take action in accordance with paragraphs (6)(initiation of civil actions to enforce FECA); (7)(issue advisory opinions); (8)(rulemaking); (9)(conduct investigations) of § 30107(a).

¹⁴ Federal Election Commission. "REG 2023-02 (Artificial Intelligence in Campaign Ads) - Draft Notice of Disposition" September 10, 2024. Available at: <https://sers.fec.gov/fosers/showpdf.htm?docid=425535>

visually appealing, cheaper and more compelling. Government interference risks trampling on Americans’ rights to speak and to hear about candidates and important public issues.¹⁵

The FEC is also considering a draft Interpretative Rule—with four bipartisan co-sponsors, so presumed to pass—clarifying that existing campaign finance law is sufficient to regulate any fraudulent or misleading political advertisements that use AI: “it does not matter whether a regulated person uses any particular form of technology, including AI, in order to ‘fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf’ of another.”¹⁶ The FEC, as the regulator of political speech and disclaimers, has both the expertise and wisdom to determine that no new law is necessary to reduce the risk of harm AI might have on political speech. We implore the FCC to do the same.

III. Legal Considerations

A. The Proposed Rule Is In Excess of the FCC’s Statutory Authority (Qs. 26, 27)

As Commissioner Carr has explained: “The FCC’s attempt to fundamentally alter the regulation of political speech just a short time before a national election is as misguided as it is unlawful.”¹⁷ As Commissioner Simington put it, the FCC’s “authority to accomplish this regulation doesn’t exist.”¹⁸ Here, the FCC’s sweeping power claim implicates the major questions doctrine, requiring the FCC to establish clear congressional authorization for its actions. Even if the major questions doctrine did not apply to the FCC’s extravagant assertion

¹⁵ Cooksey, Sean. “Opinion | the FEC Has No Business Regulating AI.” Wall Street Journal, 13 Aug. 2024, www.wsj.com/opinion/the-fec-has-no-business-regulating-ai-federal-election-commission-campaign-ads-965aec33.

¹⁶ Federal Election Commission. *REG 2023-02 (Artificial Intelligence in Campaign Ads) - Draft Interpretive Rule* September 10, 2024. Available at: <https://sers.fec.gov/fosers/showpdf.htm?docid=425534>. [This Draft Interpretive Rule has four cosponsors. The FEC votes on it on Thursday, September 19th, 2024 in its open meeting.](#)

¹⁷ Statement of Commissioner Brendan Carr, Dissenting, Re: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, Notice of Proposed Rulemaking, MB Docket No. 24-211, at 1 (2024) [hereinafter “Carr Dissent”].

¹⁸ Statement of Commissioner Nathan Simington, Dissenting, Re: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, Notice of Proposed Rulemaking, MB Docket No. 24-211, at 2 (2024) [hereinafter “Simington Dissent”].

of new powers, the Rule would still be invalid.¹⁹ Because Congress did not delegate to the FCC, clearly or otherwise, the authority it purports to possess, the proposed Rule is *ultra vires*.

The FCC is a creature of statute, which possesses only those powers Congress chooses to confer upon it.²⁰ Congress need not expressly negate the FCC’s claimed powers.²¹ Nor are the FCC’s power claims entitled to deference.²² To the contrary, “[t]he more [the FCC] asks of a statute . . . the more it must show in the statute to support its rule.”²³ And under the major questions doctrine, “cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”²⁴ In those cases, “[t]he agency . . . must point to ‘clear congressional authorization’ for the power it claims.”²⁵ Applying these principles to the FCC’s Rule confirms that it is *ultra vires*.

Whether an agency action implicates the major questions doctrine is a threshold inquiry.²⁶ The Supreme Court’s “cases supply a good deal of guidance[.]”²⁷ *First*, the “Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance’ or end an ‘earnest and profound debate across the country.’”²⁸ *Second*, it “has said that an agency must point to clear congressional authorization when it seeks to regulate a significant portion of the American economy[.]”²⁹ *Third*, “the doctrine may apply when an agency seeks to intrude into an area that is the particular domain of state law.”³⁰ All apply here.

The FCC has claimed “sweeping authority” “over political speech” and asserted power “to operate as the nation’s speech police.”³¹ Regulation of political speech is a subject of vast political and economic importance and “earnest and profound debate across the country[.]”³² “Political and issue advertisements can be a critical [message sharing] channel” and are “an

¹⁹ See Carr Dissent 3.

²⁰ See *FCC v. Cruz*, 596 U.S. 289, 301 (2022); *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986).

²¹ See *Ry. Labor Executives’ Assn.’s v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

²² See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

²³ *In re: MCP No. 185*, No. 24-7000 (6th Cir. Aug. 1, 2024) (slip op., 6).

²⁴ *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

²⁵ *Id.* at 723 (quoting *Util. Air Regulatory Grp. (“UARG”) v. EPA*, 573 U.S. 302, 324 (2014)).

²⁶ See, e.g., *id.* at 720–25; see *id.* at 743 n.3 (Gorsuch, J., concurring).

²⁷ *Id.* at 743 (Gorsuch, J., concurring).

²⁸ *Id.* (Gorsuch, J., concurring) (citations omitted).

²⁹ *Id.* at 744 (Gorsuch, J., concurring) (cleaned up).

³⁰ *Id.* (Gorsuch, J., concurring) (cleaned up); see, e.g., *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

³¹ *Id.* at 3.

³² *Biden v. Nebraska*, 600 U.S. 477, 504 (2023) (cleaned up).

important form of civic engagement[.]”³³ Unsurprisingly, the FCC’s Rule has not escaped the attention of the political branches.³⁴ Tellingly, Congress has repeatedly declined to pass legislation authorizing the FCC to require disclosures in political ads.³⁵ This legislation would be superfluous if the FCC already had the regulatory authority it claims. The FCC’s proposal also affects a wide swath of the economy. Campaign speech costs money. A lot. In this election cycle, it is estimated that \$10.2 billion will be spent on political ads.³⁶ In the 2022 midterm election, \$7.8 billion was spent on campaign ads.³⁷ In addition, the FCC’s proposed Rule encroaches on an area traditionally governed under State law: state and local elections.³⁸ That, too, is a telltale sign of a major question. Indeed, Congress has not granted the FEC—the agency tasked with regulating campaigns—power to require political ad disclosures for state and local elections.³⁹

Against this backdrop, the FCC’s “claim to extravagant statutory power” should be greeted skeptically.⁴⁰ And where, as here, the major questions doctrine applies, “a colorable textual basis” is not enough to justify the agency’s assertion of power.⁴¹ Instead, “[a]t this point, the question becomes what qualifies as a clear congressional statement authorizing an agency’s action.”⁴² “*First*, courts must look to the legislative provisions on which the agency seeks to rely ‘with a view to their place in the overall statutory scheme.’”⁴³ “*Second*, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address.”⁴⁴ “*Third*, courts may examine the agency’s past interpretations of the relevant statute.”⁴⁵ “*Fourth*, skepticism may be merited when there is a mismatch between an agency’s

³³ Statement of Commissioner Anna Gomez, Re: Disclosure and Transparency of Artificial Intelligence Generated Content in Political Advertisements, Notice of Proposed Rulemaking, MB Docket No. 24-211, at 1 (July 25, 2024).

³⁴ See Letter from John Thune, Mitch McConnell, Eric S. Schmitt, & Ted Cruz, to Chairwoman Jessica Rosenworcel, Federal Communications Commission (June 6, 2024); see also Carr Dissent 1.

³⁵ See, e.g., S. 1356, 116th Cong. (2019); S. 2770, 118th Cong. (2023); S. 3875, 118th Cong. (2024); H.R. 3044, 118th Cong. (2023); H.R. 4611, 118th Cong. (2023); see also H.R. 3831, 118th Cong. (2023).

³⁶ Bill Allison & Gregory Korte, Political Ad Spending Set to Reach Record \$10.2 Billion in 2024 Campaign Cycle, Bloomberg (Sept. 12, 2023). Cf. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021).

³⁷ See Bridget Bowman, *Ad Spending Reached \$7.8 Billion for Midterms*, NBC News (Dec. 7, 2022).

³⁸ See *United States v. Smilowitz*, 974 F.3d 155, 159 (2d Cir. 2020); *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981); see also *Sackett v. EPA*, 598 U.S. 651, 679 (2023).

³⁹ See Statement of Chairwoman Rosenworcel, Re: Disclosure and Transparency of Artificial Intelligence Generated Content in Political Advertisements, Notice of Proposed Rulemaking, MB Docket No. 24-211, at 1 (July 25, 2024).

⁴⁰ *UARG*, 573 U.S. at 324.

⁴¹ See *West Virginia*, 597 U.S. at 722–23.

⁴² *Id.* at 746 (Gorsuch, J., concurring).

⁴³ *Id.* (Gorsuch, J., concurring) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

⁴⁴ *Id.* at 747 (Gorsuch, J., concurring).

⁴⁵ *Id.* (Gorsuch, J., concurring).

challenged action and its congressionally assigned mission and expertise.”⁴⁶ The FCC’s Rule independently fails all four of these tests.

To begin, Congress does not “typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.”⁴⁷ “[I]t does not, one might say, hide elephants in mouseholes.”⁴⁸ So too here. If Congress wanted to grant the FCC power to its claims, it would have clearly said so. It did not. The statutory structure Congress has enacted makes clear that Congress tasked a *different agency*—the FEC—with regulating political campaigns.⁴⁹ By contrast, the FCC bases its newly claimed power to require disclosures in political ads using AI in general statutory language in Section 303(r).⁵⁰ Nothing in that provision purports to authorize the FCC to do this.⁵¹ “[S]uch general or ‘ancillary’ authority to fill gaps in Congress’s regulatory scheme does not suffice to show that Congress clearly delegated authority to resolve a major question[.]”⁵² Nor does Section 315 authorize the Rule.⁵³ “[T]he FCC’s authority over candidate ads is limited to ensuring that broadcasters provide candidates equal access, document those ads in the stations’ public file, and disclose the ads’ sponsors.”⁵⁴

Statutory context further confirms that general rulemaking provisions, like Section 303(r), are “a wafer-thin reed on which to rest such sweeping power.”⁵⁵ Simple “common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude,”⁵⁶ underscores Congress did not grant sweeping power to regulate political ads to the FCC “in so cryptic a fashion.”⁵⁷ When Congress has wanted the FCC to have a role with respect to candidate ads, it has enacted narrow, targeted legislation, “foreclose[ing] the FCC’s attempt to expand its power by pointing to its generic statutory authority to regulate radio

⁴⁶ *Id.* at 748 (Gorsuch, J., concurring).

⁴⁷ *Id.* at 723 (majority op.) (citation omitted).

⁴⁸ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

⁴⁹ See Carr Dissent 2; *Galliano v. United States Postal Serv.*, 836 F.2d 1362, 1370 (D.C. Cir. 1988).

⁵⁰ See 89 Fed. Reg. 63,381, 63,386 (Aug. 5, 2024) (citing 47 U.S.C. § 303(r)).

⁵¹ See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality); *West Virginia*, 597 U.S. at 723.

⁵² *In re MCP No. 185*, No. 24-7000, 2024 U.S. App. LEXIS 19815, at *9 (6th Cir. Aug. 1, 2024).

⁵³ See Carr Dissent 3.

⁵⁴ *Id.* at 2 (citing 47 U.S.C. §§ 315, 317).

⁵⁵ *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489; see *Brown & Williamson*, 529 U.S. at 133.

⁵⁶ *Brown & Williamson*, 529 U.S. at 133,

⁵⁷ *Id.* at 160.

communications.”⁵⁸ For example, “the Bipartisan Campaign Reform Act merely requires the FCC to compile information on electioneering communications that the FEC may regulate.”⁵⁹

“[A]n agency’s attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.”⁶⁰ So too here. Congress amended the Communications Act to add Section 303(r) in 1937.⁶¹ And “[t]he declared purpose of the 1934 Communications Act was to regulate ‘communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]’”⁶² In short, the Rule “derives its authority from an old statute employed in a novel manner[.]”⁶³ This is yet another telltale sign the FCC has strayed from its lane. The FCC’s prior interpretations of the Acts further underscore its overreach. “[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”⁶⁴ So too here. Never before has the FCC asserted sweeping power to police political speech.⁶⁵ “This lack of historical precedent, coupled with the breadth of authority” the FCC “now claims, is a telling indication” that the Rule exceeds the FCC’s authority.⁶⁶ Indeed, the FCC’s new power claim appears to “flatly contradict[.]” the agency’s prior position.⁶⁷

“Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse.”⁶⁸ That resonates here. The Rule has nothing to do with the FCC’s mission.⁶⁹ The FCC’s lack of expertise further shows that the Rule is ultra vires.⁷⁰ Just as the CDC lacked the power to reimagine landlord-tenant law,⁷¹ OSHA lacked the power to

⁵⁸ Carr Dissent 3.

⁵⁹ *Id.* (citing Pub. L. 107–155, title II, § 201(b), 116 Stat. 90 (2002)).

⁶⁰ *West Virginia*, 597 U.S. at 747 (Gorsuch, J., concurring) (citation omitted).

⁶¹ *See* 75 Pub. L. 97, § 303(r), 50 Stat. 189, 191 (1937).

⁶² *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 621–22 (10th Cir. 1983) (quoting 47 U.S.C. § 151).

⁶³ *BST Holdings*, 17 F.4th at 617.

⁶⁴ *West Virginia*, 597 U.S. at 725 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)).

⁶⁵ *See* Simington Dissent 2; Carr Dissent 3.

⁶⁶ *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 119 (2022) (per curiam).

⁶⁷ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976); *see* FCC, *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC.2d 1476, 1984 WL 251279, at *37 (1984 ed.); Carr Dissent 3.

⁶⁸ *Nebraska*, 600 U.S. at 518 (Barrett, J., concurring).

⁶⁹ About the FCC, *The FCC’s Mission*, FCC, <https://www.fcc.gov/about/overview>.

⁷⁰ *See* Carr Dissent 4 (noting “the FCC’s utter lack of institutional expertise”).

⁷¹ *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

mandate vaccinations;⁷² the IRS lacked power to make national health policy;⁷³ and the Department of Education lacked the power to mass cancel student debt,⁷⁴ the FCC is not allowed to go on a frolic into regulating political speech.

B. If the Acts Authorized the Proposed Rule, the Acts Would Violate the Nondelegation Doctrine. Qs. 26, 27

In any event, Congress cannot constitutionally transfer to the FCC the legislative power the agency claims to possess. Under the FCC’s reading of the Acts, the FCC “would enjoy virtually unlimited power to rewrite” those statutes to accomplish whatever policy goals it wanted.⁷⁵ That cannot be right.⁷⁶ The Constitution bars Congress from transferring legislative power to other entities.⁷⁷ If the Rule is within the FCC’s statutory authority, this would mean Congress granted the FCC power to decide whether and how to operate as a national speech police. Underscoring this, the FCC did not articulate any limiting principle for its claimed power.⁷⁸ Such a grant of sweeping power to make policy choices would be unconstitutional.⁷⁹

C. The Definition of “AI Generated Content” Is Unconstitutionally Vague. Qs 10, 11

The Constitution requires the FCC to respect the due process rights of the parties it regulates. Entities regulated by an administrative agency have a due-process right to fair notice of the regulator’s requirements.⁸⁰ The agency bears the responsibility to promulgate clear, unambiguous standards.⁸¹ To provide proper notice, a regulation must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.”⁸² Regulations must also be sufficiently clear and precise so as to not authorize and encourage seriously discriminatory enforcement.⁸³ Due process requirements are heightened

⁷² See *NFIB*, 595 U.S. at 117.

⁷³ See *King v. Burwell*, 576 U.S. 473, 486 (2015).

⁷⁴ See *Nebraska*, 600 U.S. at 504.

⁷⁵ *Id.* at 502.

⁷⁶ Cf. *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021) (Thapar, J., concurring).

⁷⁷ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); U.S. Const. art. I, § 1.

⁷⁸ See Carr Dissent 4.

⁷⁹ See generally *Consumers’ Rsch. v. FCC*, No. 22-60008, 2024 WL 3517592 (5th Cir. July 24, 2024).

⁸⁰ See *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).

⁸¹ See *Marshall v. Anaconda Co.*, 596 F.2d 370, 377 n.6 (9th Cir. 1979); see also *Ga. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005–06 (11th Cir. 1994) (ascertainable certainty standard); *Wages & White Lion Invs., L.L.C. v. FDA*, 90 F.4th 357, 374–75 (5th Cir. 2024) (en banc) (same).

⁸² *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

⁸³ See *Fox TV*, 132 S. Ct. at 2317; *Giaccio v. Penn.*, 382 U.S. 399, 402–03 (1966).

where, as here, civil penalties may be imposed.⁸⁴ This means people should not be subject to civil penalties that are not clearly applicable by either statute or by regulation.⁸⁵

The FCC’s proposed definition of “Artificial intelligence (AI)-generated content” fails this test. The Commission’s proposed definition is meaningless, raising more questions than it answers. As Commissioner Carr has explained: “What does it mean to have ‘AI-generated content’ in a political ad? Is it everything? Is it nothing? The NPRM proposes to cover any ‘image, audio, or video that has been generated using computational technology or other machine-based system that depicts an individual’s appearance, speech, or conduct, or an event, circumstance, or situation.’ That standard is no standard at all[.]”⁸⁶ And as Commissioner Simington has suggested, “a lot of photo, video, and audio editing and engineering software” could potentially meet the proposed Rule’s definition of “AI-generated content.”⁸⁷ “A lot. Like, all of it.”⁸⁸ But the line is far from clear. And “[g]iven the threat of penalties . . . will broadcasters and political advertisers alike have reason to be overinclusive in their disclosures? Absolutely.”⁸⁹

In sum, the proposed rule does not allow regulated parties to know with ascertainable certainty the scope of their AI disclosure obligations. It therefore does not provide constitutionally adequate notice of required or prohibited conduct and thus violates due process.

IV. General Considerations

A. Current State of Affairs

An overview of the impact of AI on elections begs the question of whether or not the NPRM is even needed. In her statement on the NPRM, Chair Rosenworcel calls attention to the infamous robocall that voters in New Hampshire received from President Biden telling them not to vote in the states upcoming primary on January 21st, 2024.⁹⁰ This incident gathered plenty of public attention, and within 24 hours, it was discovered to likely have

⁸⁴ See *Fox TV*, 567 U.S. at 253-58; see also *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 251 (3d Cir. 2015) (“Courts appear to apply a more stringent standard of notice to civil regulations than civil statutes: parties are entitled to have ‘ascertainable certainty’ of what conduct is legally required by the regulation.”).

⁸⁵ See, e.g., *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995).

⁸⁶ Carr Dissent 4 (citation omitted).

⁸⁷ Simington Dissent 1.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1–2.

⁹⁰ Statement of Chairwoman Jessica Rosenworcel, Re: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, Notice of Proposed Rulemaking, MB Docket No. 24-211, at 1 (2024) [hereinafter “Rosenworcel Statement”].

been generated by AI.⁹¹ Within three weeks, the source of the AI robocall was determined, being tied to an operation by an individual running against President Biden in the Democratic Party's primary.⁹² Furthermore, this very Commission then proceeded to pass a declaratory ruling clarifying that AI-generated voices in robocalls were "artificial" under the existing definition in the Telephone Consumer Protection Act.⁹³

Finally, the perpetrator of this incident, Steve Kramer, is being held accountable by existing institutions under existing laws. This very Commission proposed a \$6 million dollar fine for violations of the Truth in Caller ID Act.⁹⁴ Additionally, Kramer was indicted on 13 felony counts of voter suppression and 13 misdemeanor counts of impersonation of a candidate in New Hampshire.⁹⁵

Another example is when President Biden announced his intention to seek reelection, the Republican National Committee (RNC), released an ad that painted a picture of what a second term might look like. In doing so, the ad was built with imagery that was entirely generated by Artificial Intelligence.⁹⁶ The RNC disclosed the use of AI within their ad voluntarily. It is worth noting that was a high scale production that was able to leverage the technology to put together the ad. There are countless other examples of AI video that demonstrate how far the tech still has to go.⁹⁷

Additionally, the private sector is already responding to the emerging issues surrounding AI generated content. For example, in September of 2023, Google announced that it would require disclosure of AI use in political ads.⁹⁸ Shortly thereafter, in November of 2023, Meta

⁹¹ Collier, Kevin, and Scott Wong. "Fake Biden New Hampshire Robocall Most Likely AI-Generated." nbcnews.com, NBCUniversal News Group, 23 Jan. 2024, www.nbcnews.com/tech/misinformation/joe-biden-new-hampshire-robocall-fake-voice-deep-ai-primary-rcna135120.

⁹² Seitz-Wald, Alex. "N.H. Attorney General Says He Found Source of Fake Biden Robocalls." Nbcnews.Com, NBCUniversal News Group, 6 Feb. 2024, www.nbcnews.com/politics/2024-election/nh-attorney-general-says-found-source-fake-biden-robocalls-rcna137499.

⁹³ *FCC Makes AI-Generated Voices in Robocalls Illegal*, Federal Communications Commission, 8 Feb. 2024, <https://docs.fcc.gov/public/attachments/DOC-400393A1.pdf>.

⁹⁴ "FCC Proposes \$6 Million Fine for Deepfake Robocalls Around NH Primary." Federal Communications Commission, 23 May 2024, <https://docs.fcc.gov/public/attachments/DOC-402762A1.pdf>.

⁹⁵ "Steven Kramer Charged with Voter Suppression over AI-Generated President Biden Robocalls." New Hampshire Department of Justice, 23 May 2024, <https://www.doj.nh.gov/news-and-media/steven-kramer-charged-voter-suppression-over-ai-generated-president-biden-robocalls>.

⁹⁶ "Beat Biden." YouTube, Republican National Committee, 25 Apr. 2023, www.youtube.com/watch?v=kLMMxgtxQ1Y.

⁹⁷ See e.g. <https://x.com/BasedBeffJezos/status/1832899424877781108>

⁹⁸ Kern, Rebecca. "Google to Require Disclosure of AI Use in Political Ads - Politico." Politico, 6 Sept. 2023, www.politico.com/news/2023/09/06/google-ai-political-ads-00114266.

and Microsoft announced new requirements for AI-generated content that would appear in political ads.⁹⁹ These companies, furthermore, are investing significant resources into technology to detect AI generated imagery to streamline responses to inauthentic content.¹⁰⁰

Moreover, an analysis of accusations of AI use in elections shows that AI has had a limited impact on elections not just here at home in the United States, but globally as well. When examining the landscape globally, Jacob Mchangama, the CEO of The Future of Free Speech, discussed how many of the apocalyptic predictions about the use of AI to influence elections in Europe were unsurprisingly incorrect, according to their own tracking organization.¹⁰¹

Since 2023, over 100 national elections have taken place around the world and researchers only identified 19 with “AI interference”.¹⁰² According to the researchers, the identified evidence did not demonstrate “clear signs of significant changes in elections results compared to the expected performance of political candidates from polling data.”¹⁰³ The Commission should seek to avoid replicating the mistakes in speculations about AI-enabled electoral interference made by their international peers. Mass persuasion campaigns are extremely difficult to execute, and while AI might be part of a broader strategy utilized, other factors are critical.¹⁰⁴

Here at home, the veracity of the claim that AI is influencing elections has been lacking. Outside of the New Hampshire robocall incident, the other major instance of a campaign using AI was during the Republican Primary, when Governor DeSantis’ communications arm of his presidential campaign posted a video on X, formerly known as Twitter, where they

⁹⁹ Heilweil, Rebecca. “Meta Unveils New Rules for AI-Generated Content in Political Ads.” FedScoop, 8 Nov. 2023, <https://fedscoop.com/meta-unveils-new-rules-for-ai-generated-content-in-political-ads/>; See also, Hutson, Teresa, and Brad Smith. “Microsoft Announces New Steps to Help Protect Elections.” Microsoft On the Issues, 7 Nov. 2023, <https://blogs.microsoft.com/on-the-issues/2023/11/07/microsoft-elections-2024-ai-voting-mtac/>.

¹⁰⁰ See, for example, Hutchinson, Andrew. “YouTube Develops New Processes to Detect AI Deepfakes.” Social Media Today, 5 Sept. 2024, <https://www.socialmediatoday.com/news/youtube-develops-processes-detect-ai-deepfakes/726249/>.

¹⁰¹ See, e.g. <https://x.com/JMchangama/status/1810491136156348757>

¹⁰² Simon, Felix M., et al. “AI’s Impact on Elections Is Being Overblown.” MIT Technology Review, MIT Technology Review, 3 Sept. 2024, www.technologyreview.com/2024/09/03/1103464/ai-impact-elections-overblown/?gad_source=1&gclid=CjwKCAjwufq2BhAmEiwAnZqw8jDpPFBBeAroUkjXmfdKdsSPLSO6_woTgt4u43CMuTylrqmgxJfvsORoCO58QAvD_BwE.

¹⁰³ Id.

¹⁰⁴ Id.

used AI generated images to show President Trump hugging Anthony Fauci.¹⁰⁵ Other instances that received coverage largely surrounded user AI-generated content that was traversing the digital ecosystem, such as images of President Trump posing with black voters, or Taylor Swift holding a “Trump Won” flag at the Grammy’s.¹⁰⁶

Additionally, the Department of Justice (DOJ) refused to release audio of Special Counsel Robert Hur interviewing President Biden in part around fears of the audio being altered and then distributed.¹⁰⁷ However, there is plenty of existing audio of President Biden to create such deep fakes. In fact, when President Biden called for a ban on AI impersonation during his state of the union speech, the Information Technology and Innovation Foundation released a video highlighting the problematic nature of such a proposal using President Biden’s voice.¹⁰⁸ Fears of impersonation are understandable, but that does not change the underlying fact that even impersonations are protected under the Constitution and there are existing laws in place that cover fraudulent impersonation as discussed above in the robocall incident.

B. Unintended Consequences

The proposal by the Commission has several unintended consequences. For example, as part of the NPRM, the Commission seeks comment on “appropriate actions for stations to take in cases where a station is informed by a credible third-party”.¹⁰⁹ Empowering 3rd parties in such a fashion would lead to an outcome ripe for abuse depending on what groups are considered a “credible 3rd party”. Rather than focusing on their core functions, stations would be asked to potentially set up a process to reallocate resources towards dealing with complaints from interested parties seeking to take down otherwise legal advertisements.

In the current political advertising climate, short content is king, with video and audio sometimes lasting as few as 10 seconds. Inserting the required disclaimers of this proposed rule would require that certain ads give just as much time to the various disclaimers as to the

¹⁰⁵ Chilson, Neil, et al. “The Abundance Institute AI and Elections Update.” Now + Next, 9 May 2024, <https://nowandnext.substack.com/p/the-abundance-institute-ai-and-elections>.

¹⁰⁶ Id.

¹⁰⁷ Barkley, Taylor, et al. “Part 2: The Abundance Institute AI and Elections Update.” Now + Next, 7 Aug. 2024, <https://nowandnext.substack.com/p/part-ii-the-abundance-institute-ai>.

¹⁰⁸ Castro, Daniel. Joe Biden Did Not Approve This Fake Message, Information Technology and Innovation Foundation | ITIF, 16 May 2024, <https://itif.org/publications/2024/03/08/joe-biden-did-not-approve-this-fake-message/>.

¹⁰⁹ NPRM at 11.

message itself. Such a requirement increases the cost of advertising, hindering the ability of would-be challengers, a group that by the Commission's own admission stands to benefit from being able to utilize AI, to compete as effectively against incumbents.

AI can serve as a powerful equalizer in the political and media landscape by allowing anyone—regardless of budget or resources—to produce and disseminate messages at a fraction of the cost. Traditionally, creating high-quality political ads or content required significant investment in production teams, equipment, and media placement. However, AI-powered tools can automate many of these processes, enabling challengers, individuals and smaller organizations alike to generate sophisticated content, specialize their message, and target their audiences with precision.

AI is merely the latest example of how the democratization of technology empowers voices that may have been previously drowned out by big-budget campaigns and organizations to compete on a more level playing field, enhancing diversity in political discourse and fostering more widespread participation in elections, an outcome the Commission should applaud. If the agency moves forward with the NPRM, the Commission would be erasing the primary benefits of leveraging the technology while simultaneously reducing the impact of the message of the speaker.

Furthermore, the Commission would be setting up a system that differentiates from the FEC regulations covering this subject. Often, ads are created with the intention of spreading them across multiple media mediums, and such requirements would create a bifurcated process, one for digital ads and another for traditional, discouraging individuals from utilizing radio and television for these types of innovative ads, and further shift spending that money towards the digital ecosystem, where it is more receptive.¹¹⁰ Such developments would harm the very industry the FCC is tasked with regulating—television and radio—weakening the agency's standing in the long run.

Finally, in trying to regulate AI in both political and issue ads, the FCC's proposal risks doing more harm than good by fostering a culture of distrust. The overly broad regulations being proposed could lead to a scenario where voters are left questioning the authenticity of all political messaging, whether AI-generated or not. This outcome—where people are

¹¹⁰ George, Bridget. "2023 Advertising Spend & Benchmarks: Newor Media.", 17 May 2023, <https://newormedia.com/blog/2023-advertising-spend-2023-benchmarks/>.

encouraged to trust nothing—erodes the very foundation of democratic discourse, leading to apathy and disengagement. Instead of building confidence in the electoral process, such requirements could backfire, creating an environment of suspicion and skepticism that ultimately undermines both the integrity of our elections and the innovation and benefits that AI can bring to bear.

Conclusion

It is critical to remember that the landscape around AI is moving at an extraordinary pace. Regulators may be nimbler than Congress or state legislatures to respond to developments, but they don't need new powers here. Despite the claims of some, AI is not, in fact, the wild west. Existing laws can and do apply to AI, and regulators need not seek to use existing laws in novel ways to create new rules out of thin air, especially when those rules potentially undermine fundamental civil liberties. The FCC has more pressing concerns that it should keep its focus on, such as closing the digital divide, working with Congress to restore its lapsed spectrum authority, and more.

In fact, there is an opportunity for the commission to explore ways to reduce regulatory burdens on television and radio broadcasters. In the age of the internet, the notion of scarcity being used as a justification warranting the scrutiny of government regulations in traditional media simply doesn't hold up as they once did. The world is officially in a digital era, and that requires the Commission to explore opportunities it can take to level the playing field by reducing regulatory burdens impacting the traditional media ecosystem.

At Americans for Prosperity, we believe in people. It is through this fundamental lens that we look at society that informs the way we think about policy matters that are being considered, whether they are at state houses around the country, in our nation's capital, or in the halls of executive agencies. While well-intentioned, this proposal resembles a solution in search of a problem, with a prescription that is worse than the disease itself. This NPRM represents an intrusion by a government agency into an area of law largely handled by FEC and administered by the states, running the risk of creating a regulatory regime that will undermine the trust in the very institutions responsible for safeguarding our elections.

It is for these reasons that we ask the Commission not to move forward with this proposed rulemaking. We are happy to meet with the Commission to discuss these concerns

further and will continue to work with Congress to ensure that any proposals around AI and elections strike the right balance that ensures safe and secure elections, robust public debate and discussion and maintains the U.S.'s status as a leader in technological advancement.

Respectfully Submitted

/s/

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