# BRENNAN CENTER
## FOR JUSTICE

September 19, 2024

The Honorable Jessica Rosenworcel
Chair
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: *MB Docket No. 24-211, Notice of Proposed Rulemaking on Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements*

Dear Chair Rosenworcel and Commissioners:

The Brennan Center for Justice at New York University School of Law (the "Brennan Center")[1] respectfully submits this Comment in response to the Notice of Proposed Rulemaking adopted on July 10, 2024, concerning disclosure and transparency of content produced by Artificial Intelligence ("AI") in political advertisements. We support the Commission's efforts to amend Parts 25, 73, and 76 of Title 47 of the Code of Federal Regulations and provide greater transparency by requiring on-air and written disclosures of AI-generated content in radio and television political advertisements pursuant to its authority under the Communications Act of 1934, although we also recommend several changes to make the proposed rules even stronger.

## I.     The growing prevalence of deepfakes in political campaigns

AI-generated and other synthetic media have advanced rapidly in recent years, becoming more prevalent in U.S. political campaigns and posing a greater risk of deceiving voters. In a recent incident, for instance, Former President Donald Trump circulated AI-generated images falsely suggesting musician Taylor Swift had endorsed his presidential

---

[1] The Brennan Center is a nonpartisan public policy and law institute that focuses on the fundamental issues of democracy and justice. For more than 25 years, the Brennan Center has studied, litigated, and drafted legislative solutions regarding money in politics, voting, and election administration. The views expressed in this comment do not reflect the views, if any, of the NYU School of Law.

campaign.[2] Trump himself has also been the target of deepfakes, including in a television ad from a super PAC supporting one of his 2024 primary opponents that featured deepfakes of the former president's voice.[3] Other notable incidents connected to the 2024 election have included numerous deepfakes of President Biden, including the infamous robocalls seeking to dissuade New Hampshire voters from voting and featuring a clone of Biden's voice,[4] a widely-circulated deepfake of Trump's deceased father denouncing his candidacy (which was labeled as such by the super PAC that disseminated it),[5] and a recent widely-disseminated deepfake of Democratic nominee Kamala Harris.[6] Deepfakes such as these are circulating in already-heightened threat environment in which online disinformation targeting voters—some of it traced back to the Kremlin and other hostile foreign actors—is proliferating.[7]

The U.S. presidential race is far from the only election in which deepfakes have become a growing threat. Down-ballot races are also frequently targeted; last year's Chicago mayoral campaign, for instance, featured a fabricated audio recording of one of the candidates, who was generally seen as pro-law enforcement. The deepfake falsely depicted the candidate as  justifying mass shootings by the police.[8] Deepfakes have also

---

[2] Dan Merica and Ali Swenson, "Trump's post of fake Taylor Swift endorsement is his latest embrace of AI-generated images," AP News, Aug. 20, 2024, https://apnews.com/article/trump-taylor-swift-fake-endorsement-ai-fec99c412d960932839e3eab8d49fd5f.

[3] Alex Isenstadt, "DeSantis PAC uses AI-generated Trump voice in ad attacking ex-president," Politico, July 17, 2023, https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695.https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695

[4] Ali Swenson and Will Weissert, "New Hampshire investigating fake Biden robocall meant to discourage voters ahead of primary," AP News, Jan. 22, 2024, https://apnews.com/article/new-hampshire-primary-biden-ai-deepfake-robocall-f3469ceb6dd613079092287994663db5.

[5] Jon Christian, "Trump's Dad Resurrected Via AI to Tell Son He's a Disgrace," Futurism, Feb. 17, 2024, https://futurism.com/the-byte/trump-dad-ai.

[6] Kat Tenbarge, "Elon Musk made a Kamala Harris deepfake ad go viral, sparking a debate about parody and free speech," NBC News, Aug. 1, 2024, https://www.nbcnews.com/tech/misinformation/kamala-harris-deepfake-shared-musk-sparks-free-speech-debate-rcna164119.

[7] Recently, for example, Russian operatives have been charged with a conspiracy to foster a network of paid online influencers disseminating Russian propaganda. *See* Stefan Becket and Melissa Quinn, "U.S. says Russia funded media company that paid right-wing influencers millions for videos," CBS News, https://www.cbsnews.com/news/russia-tenet-media-right-wing-influencers-justice-department/. The Kremlin has also been linked to fake online conspiracy theories circulating about Harris. *See* Christopher Bing, "Russia propaganda group behind fake Kamala Harris hit-and-run story, says Microsoft", The Guardian, Sept. 17, 2024, https://www.theguardian.com/us-news/2024/sep/18/kamala-harris-fake-hit-run-story-russia-propaganda-storm-1516. Other hostile state actors, such as Iran, appear to be primarily targeting Trump. *See* Dan De Luce, "Iranian cyber operation targeting the Trump campaign is likely still underway, FBI official says," NBC News, Sept. 6, 2024, https://www.nbcnews.com/investigations/iranian-cyber-operation-targeting-trump-campaign-likely-still-underway-rcna170003.

[8] Joe Concha, "The impending nightmare that AI poses for media, elections," The Hill, Apr. 23, 2023, https://thehill.com/opinion/technology/3964141-the-impending-nightmare-that-ai-poses-for-media-elections/.

become increasingly common in other countries' elections—including in Argentina, where a leading presidential candidate's campaign circulated a deepfake of his opponent endorsing the sale of human organs;[9] India, where voters have been "bombarded" with deepfakes of living candidates and deceased politicians;[10] the United Kingdom, where deepfakes circulated of the opposition leader at the time supposedly berating and hurling obscenities at his staff;[11] and Slovakia, where an infamous last-minute audio deepfake of one of the leading candidates for prime minister supposedly conspiring to commit election fraud and raise the price of alcohol may have helped sway a close national election.[12]

Deepfakes are not limited to spurious depictions related directly to candidates. Increasingly they are also used in political communications to depict fictitious events that evoke hot button issues. For instance, one ad disseminated early in the presidential campaign depicted fake scenes of urban chaos and migrants streaming across the southern border.[13] Another video that was widely-circulated online, and appears to have originated from Russia, purports to show a U.S. State Department official claiming a Russian city is a legitimate target for Ukrainian strikes using U.S. weapons.[14]

As Election Day approaches, we are especially concerned about disinformation related to the electoral process. For the last four years, the election denial movement has relentlessly pushed a false narrative undermining the legitimacy of the 2020 presidential election and encouraging baseless claims of widespread election fraud. Among other

---

[9] Kyle Hiebert, "Deepfakes Will Break Democracy," The Walrus, Feb. 26, 2024, https://thewalrus.ca/deepfakes-will-break-democracy/.

[10] Nilesh Christopher, "How AI is resurrecting dead Indian politicians as election looms," Al Jazeera, Feb. 12, 2024, https://www.aljazeera.com/economy/2024/2/12/how-ai-is-used-to-resurrect-dead-indian-politicians-as-elections-loom.

[11] Morgan Meaker, "Deepfake Audio Is a Political Nightmare," WIRED, Oct. 9, 2023, https://www.wired.com/story/deepfake-audio-keir-starmer/.

[12] Curt Devine, Donie O'Sullivan and Sean Lyngaas, "A fake recording of a candidate saying he'd rigged the election went viral. Experts say it's only the beginning," CNN, Feb. 1, 2024, https://www.cnn.com/2024/02/01/politics/election-deepfake-threats-invs/index.html.

[13] Sara Dorn, "Republicans Launch Eerie AI-Generated Attack Ad On Biden," Forbes, Apr. 25, 2024, https://www.forbes.com/sites/saradorn/2023/04/25/republicans-launch-eerie-ai-generated-attack-ad-on-biden/.

[14] Michael Crowley, Valerie Hopkins and Edward Wong, "Deepfake of U.S. Official Appears After Shift on Ukraine Attacks in Russia," N.Y. Times, May 31, 2024, https://www.nytimes.com/2024/05/31/us/politics/deepfake-us-official-russia.html?searchResultPosition=23. Russian deepfakes appear to be part of a broader disinformation campaign that aims to fuel conspiracy theories and inflame political and international tensions, similar to Russian disinformation efforts around the 2016 and 2020 presidential campaigns. See Young Mie Kim, "New Evidence Shows How Russia's Election Interference Has Gotten More Brazen," Brennan Center for Justice, Mar. 5, 2020, https://www.brennancenter.org/our-work/analysis-opinion/new-evidence-shows-how-russias-election-interference-has-gotten-more.

negative consequences, the prevalence of these conspiracies has led to the targeting of local election officials; in the Brennan Center's latest annual survey of these officials, we found that 70 percent reported that threats have increased since 2020, with election officials who serve communities of color disproportionately likely to be targeted by such attacks.[15] The growing prevalence of deepfakes and other misleading synthetic media has the potential to make an already challenging situation much worse.[16]

This is not only because of false information spread by deepfakes themselves, but also because the growing prevalence of deepfakes and other disinformation can undermine the credibility of even truthful information.[17] Bad actors take advantage of the climate of uncertainty to discredit legitimate content that disadvantages them in some way — a phenomenon known as the "liar's dividend.[18] The liar's dividend is especially harmful for the electoral process, which depends on the public's trust for legitimacy and has become the target of virtually unending conspiracy theories that can only be rebutted through the dissemination of accurate information that the public believes.[19]

Nevertheless, it is important to acknowledge that AI-generated and similar content is not always used for nefarious purposes. Indeed, sometimes it can facilitate innovative political messaging, or even serve as a lifeline in repressive regimes for opposition figures to reach their supporters.[20] Even in a comparatively stable democracy like the United States, the goal should not necessarily be to eliminate all such content from political communications. At a minimum, however, voters need to have adequate information to interpret the messages they are receiving and make informed decisions.

---

[15] Lawrence Norden and Ruby Edlin, "Election Officials in Communities of Color Face More Abuse," Brennan Center for Justice, July 17, 2024, https://www.brennancenter.org/our-work/analysis-opinion/election-officials-communities-color-face-more-abuse.

[16] Christine Fernando, "Election disinformation targeted voters of color in 2020. experts expect 2024 to be worse," Associated Press, July 29, 2023, https://apnews.com/article/elections-voting-misinformation-raceimmigration-712a5c5a9b72c1668b8c9b1eb6e0038a.

[17] Bobby Chesney and Danielle Citron, Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security, 107 CAL. L. REV. 1753, 1758 (2019).

[18] Josh A. Goldstein and Andrew Lohn, "Deepfakes, Elections, and Shrinking the Liar's Dividend," Brennan Center for Justice, Jan. 23, 2024, https://www.brennancenter.org/our-work/research-reports/deepfakes-elections-and-shrinking-liars-dividend.

[19] See Mekela Panditharatne and Noah Giansiracusa, "How AI Puts Elections at Risk — And the Needed Safeguards," Brennan Center for Justice, June 13, 2023, https://www.brennancenter.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards.

[20] Shanze Hasan, "The Effect of AI on Elections Around the World and What to Do About It," Brennan Center for Justice, June 6, 2024, https://www.brennancenter.org/our-work/analysis-opinion/effect-ai-elections-around-world-and-what-do-about-it.

## II.  The need for transparency

Policymakers in the United States have long embraced transparency as an effective means to help voters make informed decisions without unduly burdening protected speech.  As the Supreme Court has explained, disclosure does not "prevent anyone from speaking."[21] Campaign transparency rules — like requiring disclaimers on ads so that viewers know who paid for them — are also broadly popular across the ideological spectrum.[22] While transparency rules are not a silver-bullet, they are an important safeguard for voters. The Commission's proposal to requiring on-air and written disclosures of AI-generated content in radio and television political advertisements fits comfortably within the tradition of transparency for political ads in the United States.[23]

## III.  Other Regulatory Efforts

Existing rules, while helpful, are not enough. Recognizing the risks posed by deceptive synthetic media, nineteen states and the District of Columbia have enacted legislation regulating election-related deepfakes and other deceptive media.[24] While this represents important progress, piecemeal state regulation is no substitute for consistent federal rules. Moreover, several states exclude ads aired by broadcast stations in recognition of the FCC's unique responsibility to oversee their activities.[25]

One other federal agency, the Federal Election Commission (FEC), has overlapping jurisdiction in this area. Some have suggested that the FEC's role in administering the

---

[21] *McConnell v. FEC*, 540 U.S. 93, 201 (2003).

[22] Megan Poinsky, "AI Regulation Has Strong Bipartisan Approval," Forbes, Apr. 18, 2024, https://www.forbes.com/sites/cio/2024/04/18/ai-regulation-has-strong-bipartisan-approval/. Bipartisan Congress members are also working together to pass legislation to regulate AI usage in political advertising. *See* Matthew Shapanka and Samuel Klein, "As States Lead Efforts to Address Deepfakes in Political Ads, Federal Lawmakers Seek Nationwide Policies," Apr. 18, 2024, https://www.insidepoliticallaw.com/2024/04/18/as-states-lead-efforts-to-address-deepfakes-in-political-ads-federal-lawmakers-seek-nationwide-policies/.

[23] *See* Daniel I. Weiner and Lawrence Norden, "Regulating AI Deepfakes and Synthetic Media in the Political Arena," Brennan Center for Justice, Dec. 5, 2023, https://brennancenter.org/our-work/research-reports/regulating-ai-deepfakes-and-synthetic-media-political-arena.

[24] Public Citizen, "Tracker: State Legislation on Deepfakes and Elections," last accessed Sept. 19, 2024, https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/; Lawrence Norden, Niyati Narang and Laura J. Protzmann, "States Take the Lead in Regulating AI in Elections — Within Limits," Brennan Center for Justice, Aug. 7, 2024, https://www.brennancenter.org/our-work/research-reports/states-take-lead-regulating-ai-elections-within-limits.

[25] For example, Michigan state legislature recently enacted HB 5141 in November 2023, which requires a disclosure of the use of AI in political advertising but exempts broadcast stations that are paid to broadcast the political advertisement from penalties. A similar exception was included California bill AB 730 (passed October 2019) and New Hampshire bill HB 1596 (passed August 2024). Minnesota bill's HF 1370, which became effective in August 2023, is silent on broadcaster liability.

Federal Election Campaign Act (FECA)'s rules for political ads should preclude any regulatory efforts by this Commission, but these arguments ignore the FCC's long history of imposing special, concurrent safeguards for political ads aired over the communications channels it regulates.[26] Moreover, based on an interpretative rule adopted today, the only political communications containing AI-generated and similar deepfakes that FEC rules likely cover are those falling under the FECA's relatively narrow prohibition against "fraudulent misrepresentation" of candidates, which applies only when one candidate pretends to be "acting on behalf" of another or when a candidate's likeness or identity is used for fundraising.[27] The vast majority of political communications covered by the FCC's proposed rule would not fall into either category.

Ultimately, we recognize that comprehensive solutions for the challenges posed by political deepfakes will likely need to come from Congress. But the need for congressional action should not preclude this Commission from doing what it can within the bounds of the agency's existing statutory authority.

## IV.    Recommendations

While we support the Commission's overall proposal, we do have several recommended changes.

*First*, and most importantly, we are concerned that the proposed rule as currently written, which applies to all "AI-generated content," is both over and under-inclusive.[28] We agree with other commenters that requiring disclosure for any political ad that includes any element of AI manipulation is likely to result in disclosures for far too many ads, essentially rendering the disclosure requirement meaningless.[29] We suggest that any final rule be limited to ads containing content that was generated or substantially modified such that a reasonable viewer or listener would have a substantially different

---

[26] NPRM ¶ ¶ 2, 26 – 27.

[27] 52 U.S.C. § 30124 (a). The Federal Election Commission approved "REG 2023-02 (Artificial Intelligence in Campaign Ads) - Draft Interpretive Rule" during its open Commission meeting today. *See* Federal Election Commission, "September 19, 2024 open meeting," https://www.fec.gov/updates/september-19-2024-open-meeting/.

[28] The proposed rules currently define "AI-generated content" as "an image, audio, or video 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." NPRM ¶ 31.

[29] *See, e.g.,* Lawyers' Committee for Civil Rights, "Lawyers' Committee for Civil Rights Under Law Comments in Response to the Notice of Proposed Rulemaking," Sept. 4, 2024, https://www.fcc.gov/ecfs/document/1090440535233/1; NetChoice, "Comments on FCC Notice of Proposed Rulemaking: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements," Aug. 25, 2024, https://www.fcc.gov/ecfs/document/10822287829849/1.

understanding of the speech or other events depicted than what actually took place. Such a change tracks with legislation we have seen in states leading the way in combatting deceptive AI and misinformation across the country.[30]

At the same time, we also recommend expanding the new rules to cover all deceptive synthetic content, not just content that would qualify as "generative AI." Generative AI is not required to create convincing deepfakes—so called "cheapfakes" can also be generated using simpler tools like Photoshop and dubbing software. The increasing effectiveness of these more basic tools weighs in favor of including the content generated by them in any final rules.[31]

*Second*, the changes suggested above will necessitate a modified disclaimer requirement. Based on our research and experience advising other policymakers, we suggest disclaimer language such as the following: "This message contains information substantially manipulated in whole or part by artificial intelligence or other technical means."

*Third*, we recommend that the Commission require broadcasters and other regulated entities, in addition to inquiring from advertisers whether their ads have been substantially manipulated by synthetic means, also ensure that they have a policy on file requiring covered advertisers to disclose such information truthfully upon request.[32]

### V.     Balancing of Interests

We believe the proposed rules, with our suggested modifications, appropriately vindicate important public interests while posing a minimal burden for broadcasters.

Broadcasters and other content carriers regulated by the FCC are major disseminators of political advertising in the United States. Although other means of communication like social media and streaming are on the rise, traditional radio and television ads remain a major source of information for voters.[33] These communications channels have not been

---

[30] *See, e.g.* Cal. Elec. Code § 20010 (e); N.Y. Elec. Law § 14-106 (5)(a).

[31] Daniel I. Weiner and Lawrence Norden, "Regulating AI Deepfakes and Synthetic Media in the Political Arena," Brennan Center for Justice, Dec. 5, 2023, https://brennancenter.org/our-work/research-reports/regulating-ai-deepfakes-and-synthetic-media-political-arena.

[32] A useful model in this regard may be a statute recently enacted by New York. *See* N.Y. Elec. Law § 14-106 (5)(a)(iii)(3).

[33] Traditional media remains the top form of political ad spending, accounting for over 70% of political advertising spending. *See* Chavi Mehta, "US political ad spending to soar in 2024 with TV media the biggest winner – report," Reuters, Jan. 11, 2024, https://www.reuters.com/world/us/us-political-ad-spending-soar-2024-with-tv-media-biggest-winner-report-2024-01-11/.

immune to the problem of deepfakes.[34] Courts have long recognized the important public interests served by transparency in such political advertising – most notably ensuring an informed electorate.[35] The Commission has cited these precedents to justify previous rules requiring broadcasters to disclose political advertising information and make it available to the public, and we believe they apply with equal force here.[36]

Any burden on broadcasters resulting from the proposed rules, as modified by the suggestions herein, is likely to be negligible. Broadcasters are already required to include various disclosures and disclaimers when they air political advertisements. Broadcasters likewise are already required to disclose information about political ads in their political files. The addition of the disclosure and announcement requirements (as described in NPRM ¶¶ 13 and 16) regarding the use of AI-generated content, where necessary, and the political file requirement (as described in NPRM ¶ 18) therefore would add little additional marginal burden on broadcasters. The fact that the proposed rules provide standardized language (as described in NPRM ¶ 17) for the on-air disclosure further reduces any burden. The only new requirement on broadcasters would be to ask ad sponsors whether their political ad contains AI-generated content (as described in NPRM ¶ 15) and (as we have suggested) institute a policy requiring ad sponsors to truthfully disclose such information upon request. These represent modest changes to already-existing requirements.

## VI.    Other Legal considerations

We concur with other commenters who have opined that the proposed rule fits within the FCC's statutory jurisdiction and is not barred by the current jurisdiction of the FEC.[37]

We also concur that the proposed rules are likely to overcome any First Amendment free speech concerns, as explained in the NPRM.[38] The proposed rules are designed to promote transparency, aligning with the government's compelling interest in an informed

---

[34] *See, e.g.,* Alex Isenstadt, "DeSantis PAC uses AI-generated Trump voice in ad attacking ex-president," Politico, July 17, 2023, https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695;

[35] *See, e.g.*, *McConnell*, 540 U.S. at 196; *Citizens United v. FEC*, 558 U.S. 310, 368–71 (2010).

[36] *See, e.g.*, Second Report and Order, FCC 12-44, https://docs.fcc.gov/public/attachments/FCC-12-44A1.pdf.

[37] The Leadership Conference on Civil and Human Rights (The Leadership Conference), Common Cause, United Church of Christ Media Justice Ministry, et. al., "Comment Re: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, MB Docket 24-21," Sept. 4, 2024, https://www.fcc.gov/ecfs/document/109041823308125/1/; Center for American Progress, "Comment in the Matter of Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements; MB Docket 24-211," Sept. 4, 2024,  https://www.fcc.gov/ecfs/document/109042988615628/1

[38] The Commission describes the levels of scrutiny in more detail in paragraph 28 of NPRM.

electorate and strengthening trust in the electoral process. They do not limit the use of AI-generated or other synthetic content in political advertisements, they simply require that voters receive information they need to make informed choices. Political disclosure rules of this nature have long been upheld, and the proposed rules strike an appropriate balance that will foster greater transparency without unduly burdening the rights of political advertisers, broadcasters or other regulated entities.[39]

For all of the foregoing reasons, we urge the Commission to move forward with this rulemaking process.

Respectfully submitted,

/s/

_____
Daniel I. Weiner
Yasmin Abusaif
Eric Petry

---

[39] Disclosures have been found to prevent "the potential for abuse of the campaign finance system." *See McCutcheon v. FEC*, 572 U.S. 185, 223 (2014)*; see also Citizens United*, 558 U.S. at 371 (2010).