CREW

CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Federal Election Commission
Lisa J. Stevenson, Office of General Counsel
1050 First Street, NE
Washington, D.C. 20463

October 16, 2023

Re: Rulemaking on 11 C.F.R. §110.16

Dear Ms. Stevenson:

Citizens for Responsibility & Ethics in Washington ("CREW") respectfully supports the petition requesting the Federal Election Commission ("FEC" or the "Commission") conduct a rulemaking pursuant to 11 C.F.R. §200.1 et seq. on the subject of "fraudulent mi srepresentation" regarding deliberately misleading campaign communications generated through the use of artificial intelligence ("AI"). The petition, submitted by Public Citizen on July 13, 2023, requests the FEC conduct a rulemaking to clarify the meaning of "fraudulent misrepresentation" within 11 C.F.R. § 110.16.

Artificial intelligence is progressing quite quickly and is being used more and more to create convincing audio, video and image hoaxes known as deepfakes. Political campaigns have already used deep fakes, and their use is only likely to increase as the technology becomes more sophisticated and widespread.

- Donald Trump's presidential campaign released an audio clip using deepfaked voices of rival presidential candidate Ron DeSantis, Adolf Hitler, Elon Musk and George Soros.[1]
- An account associated with Ron DeSantis's presidential campaign released an ad attacking Donald Trump using AI-generated images of Trump embracing Dr. Anthony Fauci.[2]

While experts are generally still able to distinguish between authentic media and deepfakes, they can be quite convincing and can conceivably mislead voters who have far less expertise. In fact, in January 2019, then-U.S. Director of National Intelligence, Dan Coats, warned that deepfakes or similar fake media will likely be among the tactics used by people who want to disrupt elections.[3] In the future, it is possible that deepfakes will become so sophisticated that even experts will have a difficult time distinguishing between real and artificially generated media.

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[1] Mack DeGeurin, *Trump Trolls DeSantis and Musk With a Hitler Deepfake*, Gizmodo (May 25, 2023), https://gizmodo.com/desantis-trump-musk-twitter-hitler-deepfake-campaign-1850475254.

[2] James Vincent, *DeSantis attack ad uses fake AI images of Trump embracing Fauci, The Verge* (June 8, 2023), https://www.theverge.com/2023/6/8/23753626/deepfake-political-attack-ad-ron-desantis-donald-trump-anthony-fauci.

[3] Rachel Metz, *The fight to stay ahead of deepfake videos before the 2020 US election*, CNN (April 26, 2019), https://www.cnn.com/2019/04/26/tech/ai-deepfake-detection-2020/index.html.

In addition, the lack of regulations around the use of AI in campaign advertisements makes it easier for candidates to falsely claim that an unflattering or disadvantageous video of themselves in an opponent's campaign advertisement is a deepfake. This too can be used as a tactic to disrupt elections. If the FEC provides clarity on the legality of using deepfakes in campaign advertisements, the public will be less susceptible to such false claims.

Given these developments, CREW encourages the FEC to conduct the rulemaking requested by Public Citizen. Federal law already forbids candidates for federal office or their agents from fraudulently misrepresenting themselves as speaking or acting for or on behalf of another candidate or political party on a matter damaging to the other candidate or party.[4] By its very terms, this provision would appear to apply to deepfakes as well.

A deepfake audio or video clip by a campaign that claims to show an opponent saying or doing something they did not say or do appears to violate this provision of the law. As outlined above, campaigns and political committees have already begun to use deepfakes in misleading ways, and CREW strongly urges the FEC to clarify that the law, and specifically the regulation implementing the law, 11 C.F.R. § 110.16, applies to the misleading use of deepfakes without sufficient disclaimers.

A candidate or their agent disseminating a deepfake of an opponent saying or doing something they did not do in an advertisement would constitute the candidate speaking or acting on behalf of their opponent. As the petition explains, the candidate would be putting words into their opponent's mouth, thus misrepresenting the identity of the speaker.[5] The candidate's actions would be distinct from simply lying about an opponent: when a candidate lies about an opponent, they are still representing themselves, but a candidate who uses a video or image that appears to be of their opponent but is, in fact, an AI alteration is effectively taking on their opponent's identity. The use of deepfakes may be a new method of fraudulent misrepresentation, but the outcome is the same and should be regulated similarly.

To be clear, the petitioner has not requested a rulemaking on the use of artificial intelligence in campaign advertisements broadly, nor have they suggested that all uses of deep fakes should be considered fraudulent misrepresentation. It is possible that campaigns can lawfully use deepfakes in the case of clear satire and parody or in the presence of sufficient disclosure. Any FEC rulemaking on the topic should be done in accordance with the First Amendment and the Commission should consider these and other potential exceptions in exercising its authority to regulate the use of deepfakes in campaign advertisements.

As the commission is well aware, the First Amendment is not absolute. The Supreme Court has repeatedly ruled that certain types of speech can be regulated, such as obscenity,
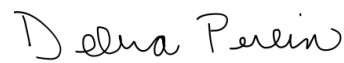
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[4] 52 U.S.C. §30124

[5] Public Citizen, Second Submission: Petition for Rulemaking to Clarify that the Law Against "Fraudulent Misrepresentation" (52 U.S.C. § 30124) Applies to Deceptive AI Campaign Communications, https://sers.fec.gov/fosers/showpdf.htm?docid=423502___.

defamation, incitement and fraud. [6] For example, in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, the Supreme Court ruled unanimously that states can pursue fraud charges against fundraisers who use misrepresentation to deceive voters without violating the First Amendment, stating that "the First Amendment does not shield fraud."[7] The use of deepfakes in campaign advertisements in most cases would likely be considered fraud and in some cases may be considered defamation. First Amendment concerns related to regulating AI should certainly be considered. To that end, the FEC should regulate the use of deepfakes in campaign advertisements in accordance with the First Amendment similar to how the Federal Trade Commission and Federal Communications Commission regulate deceptive commercials, such as by sending cease-and-desist letters to false advertisers.[8]

As artificial intelligence and deepfake technology advance, it is crucial that our elections are not compromised by misleading and deceptive communications, and that federal agencies ensure that their practices, guidance and regulatory and enforcement regimes keep up.

Sincerely,

Debra Perlin
Policy Director

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[6] *United States v. Hansen*, 599 U.S. 762 (2023); *Donaldson v. Read Magazine, Inc*, 333 U.S. 178 (1948); *Central Hudson Gas & Elec. v. Public Svc. Comm'n*, 447 U.S. 557 (1980).

[7] *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

[8] Valerie C. Brannon, Cong. Rsch. Serv., IF12180, False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation (2020), https://crsreports.congress.gov/product/pdf/IF/IF12180.