Antonin Scalia Law School
Administrative Law Clinic
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October 16, 2023

VIA ELECTRONIC SUBMISSION

Federal Election Commission
1050 First Street NE
Washington, DC 20463
Attn: Docked ID No. 2023-17547

Re: Notification of Availability for Petition for Rulemaking: Artificial Intelligence in Campaign Ads; Document ID No. 2023-17547

The Administrative Law Clinic at the Antonin Scalia Law School submits this comment in response to the Notification of Availability of Petition for Rulemaking that the Federal Election Commission posted on August 16, 2023. The Clinic consists of law students studying the practice of administrative law under the supervision and direction of law-school faculty. The Clinic participates in rulemakings and other agency proceedings to promote best regulatory practices and ensure that agency actions are consistent with the agency's organic legislation, the Administrative Procedure Act, and the Constitution. After studying the Petition for Rulemaking to regulate artificial intelligence in campaigns, the Clinic opposes any effort by the FEC to undertake such a rulemaking.

The Commission lacks authority to regulate so-called "deepfakes" in the manner Public Citizen proposes. The Federal Election Campaign Act gives the Commission no power to regulate fraudulent misrepresentation in campaigns—except in the specific context of fraudulent misrepresentation of campaign authority. The statute's plain language, FEC enforcement decisions, and case law all confirm this reading. Recent congressional attempts to introduce new legislation that would give the FEC broader authority to regulate AI indicate that the FEC does not yet hold that power. And because this issue is one of vast political and economic significance, it is a major question reserved to Congress alone. Finally, FEC regulation of artificial intelligence in campaign advertisements implicates significant First Amendment concerns that the Commission cannot overlook.

I. The Federal Election Campaign Act does not authorize the FEC to regulate artificial intelligence in the expansive manner proposed by Public Citizen.

A. Section 30124 provides limited authority: to regulate misrepresentations of campaign authority or of who sponsors the message.

In response to a flurry of fraudulent activity in the 1972 presidential election, the Senate Select Committee on Presidential Campaign Activities made a series of recommendations to Congress. *See* The Final Report of the Select Comm. on Presidential Campaign Activity, S. Rep. No. 93-981, at 211-13 (Feb. 7, 1973). During the election, there were "numerous cases" of misleading mailers, door-to-door canvassing, and phone calls "to voters 'on behalf' of a candidate." *Id.* at 213. Attempts to undermine support for particular candidates even included "late night calls to voters of a State from a nonexistent group purporting to support a particular candidate." *Id.* Because these "kinds of misrepresentation" had "no place in Federal campaigns," the Committee recommended that Congress "make it unlawful for any individual to fraudulently misrepresent by telephone or in person that he is representing a candidate." *Id.*

Congress amended the Federal Election Campaign Act (FECA) to include such a prohibition. *See* 52 U.S.C. §30124. That law provides:

> No person who is a candidate for Federal office or an employee or agent of such a candidate shall (1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof.

Id. By its text, §30124 penalizes only misrepresentation of campaign authority or who has sponsored the message. While the statute prohibits a person from fraudulently representing that he or she works for another candidate (using AI or otherwise), it does not extend to fraud more generally. Put simply, "[t]he offense prohibits misrepresentation of *oneself* (or a candidate's agents) but does not anticipate deep fake counterfeited candidate speech." Rebecca Green, *Counterfeit Campaign Speech*, 70 Hastings L.J. 1445, 1470 (2019). As one FEC Commissioner has explained, "The statute is carefully limited and is directed at fraudulent agency. In other words, it is directed at fraudulently pretending that you, yourself represent or work for another candidate. It does not reach fraudulently claiming that your opponent said or did something that he or she did not do. It would be news to many to learn that the FEC may police telling lies about their opponents." *See* FEC, *Open Meeting* (Aug. 10, 2023) (statement of Vice Chair Allen Dickerson), bit.ly/46eYMHf; *see also* FEC, Policy

Statement of Commissioner Lee E. Goodman at 5 (2018) (explaining that §30124 "prohibits misrepresentations about one subject: the identity of the solicitor").

This view is consistent with the FEC's prior enforcement actions. For example, in 2021, the Commission declined to pursue a political action committee under §30124 for raising $400 and spending those funds on personal items. *See In the Matter of Americans for Sensible Solutions PAC and David Garrett*, 7140 MUR 1 (Apr. 2, 2021). In a statement of reasons, Commissioners explained that "[s]ection 30124(b) requires the fraudulent misrepresentation of *identity* or *agency*." *In the Matter of Americans for Sensible Solutions PAC and David Garrett*, 7140 MUR at 4 (Apr. 5, 2021) (Dickerson & Traynor statement of reasons). In this case, the committee misrepresented how the funds would be used and used a candidate's name and likeness without his permission. *Id.* at 4, 6. But because it did "not appear that the Committee's solicitations misrepresented its identity *as an agent* of a candidate or political party," there was "no evidence that the Committee's solicitations actually misled potential donors with respect to the identity of the solicitor." *Id.* at 5 (emphasis added). Thus, the Commission "lack[ed] a legislative mandate" to pursue it. *Id.* at 4.

Case law confirms this view. Though cases applying §30124 are limited,[1] courts have consistently interpreted the statute to prohibit only misrepresentation of campaign authority. For example, in *FEC v. Novacek*, the FEC brought an action against the owner of a telemarketing company who fraudulently "stat[ed] or impl[ied] that [she] was raising money for the Republican Party." 739 F. Supp. 2d 957, 959 (N.D. Tex. 2010). Because she falsely presented her group, the Republican Victory Committee, as an agent of the Republican National Committee in telemarketing fundraising calls, her conduct fell under the statute. *Id.*

Nearly a decade later, a federal court again confirmed that the statute applies only to misrepresentation of a campaign's authority. In *United States v. Prall*, the FEC charged a defendant with a "straightforward fraud scheme" for mail and wire fraud, money laundering, false statements, and falsification of records after he solicited contributions from the public for multiple political committees. No. 1:19-CR-13-RP, 2019 WL 1643742 at *1 (W.D. Tex. Apr. 16, 2019). He represented that the money would support candidates in the presidential election, but he used the money for personal expenditures. *Id.* The defendant objected to the fraud charges, arguing he should have instead been prosecuted under §30124 of FECA. *Id.* at *2. The court rejected that argument, explaining that "[t]he Government could not have charged [him] under §30124" because that statute "does not govern 'fraudulent misrepresentations and solicitations of funds' generally; it governs fraudulent misrepresentation of campaign authority." *Id.*

[1] *See* Green, *supra*, at 1489 n.137 (noting that "[p]rosecutions under this law have largely focused on a portion of the law … relating to fraudulent solicitation of funds").

Finally, that Congress has introduced legislation to give the FEC broader power to regulate artificial intelligence reaffirms that the FEC currently lacks that authority. Technological advances and certain deepfakes might be concerning, but Congress has not yet passed legislation addressing those specific concerns. Importantly, "[t]hat was Congress's choice." Dickerson Statement, *supra*. Indeed, the Commission has "unanimously asked" Congress to "revisit that choice" and to "grant [them] broader authority to punish fraud by campaigns." *Id.* "[B]ut as is Congress's right, it has chosen to ignore that request." *Id.*

Both the House and the Senate have, however, recently introduced legislation that would allow the Commission to regulate all uses of AI. In the House, the Candidate Voice Fraud Prohibition Act seeks to amend FECA to prohibit the distribution of political communications containing materially deceptive audio generated by AI. *See* H.R. 4611, 118th Cong. (2023) (introduced on July 13, 2023, and referred to the House Committee on House Administration). The amendment would authorize the Commission to enact regulations to determine when audio is considered "satire or parody" governed by §325(b) of FECA and what constitutes a "clear, conspicuous, and overt disclaimer" needed to avoid falling within the Act's ban on distribution with actual malice.

Similarly, in the Senate, the Protect Elections from Deceptive AI Act seeks to amend the FECA by prohibiting the knowing distribution of deceptive AI content with the intent to influence elections or solicit funds. *See* S. 2770 Protect Elections from Deceptive AI Act, 118th Cong. (2023) (introduced on September 12, 2023, and referred to the Senate Committee on Rules and Administration). And the REAL Political Advertisements Act would amend FECA by adding a section that requires a disclaimer of the use of AI in campaign advertisements. S. 1596 REAL Political Advertisements Act, 118th Cong. (2023) (introduced on May 5, 2023, and referred to the Senate Committee on Rules and Administration). Under the Act, the Commission would establish criteria to determine whether a campaign advertisement contains content from generative AI, requirements for contents of a required disclaimer, and a forward-looking definition of content generated through AI.

Each of those bills would be unnecessary if FECA already gives the Commission the power to regulate AI as Public Citizen wants. Instead, they all confirm that the Commission currently lacks that authority. At bottom, "not all misrepresentations are fraudulent" under FECA, and the Commission may not unilaterally declare otherwise. Goodman, *supra*, at 8.

B. Whether to regulate AI as fraudulent misrepresentation is a "major question" reserved to Congress alone.

Whether to regulate AI as fraudulent misrepresentation is a "major question" reserved to Congress. The Supreme Court "applie[s] the major questions doctrine … to ensure that the government does not inadvertently cross constitutional lines." *West*

Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (internal quotations omitted). An FEC rulemaking like the one Public Citizen proposes here would bulldoze that line. Congress has given the FEC the authority to regulate fraudulent misrepresentation *of speaker agency*. It has not authorized the FEC to regulate misrepresentations generally. The Supreme Court "typically greet[s] assertions of extravagant statutory power" "with skepticism." *Id.* at 2609 (majority opinion) (internal quotations omitted). In such "extraordinary cases," the agency must "point to clear congressional authorization to regulate" in a given area. *Id.* at 2614. The FEC cannot do so here.

A rulemaking like the one Public Citizen proposes here has all the hallmarks of a major questions case. First, such a rule would have "vast economic and political significance," *Ala. Ass'n of Realtors v. Dept. of Health & Human Serv.*, 141 S. Ct. 2485, 2489 (2021) (internal quotations omitted), and would affect "a significant portion of the American economy," *West Virginia*, 142 S. Ct. at 2608 (citing *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). The practice of campaigning for political office dates back to the beginning of our nation. *See* Roosevelt House, *The Origins of Modern Campaigning 1860–1932*, bit.ly/46wRj6e. Once political parties emerged, critical advertisements, symbols, cartoons, and songs were used to solicit votes. *Id.*

These methods remain staples of the modern-day campaign. As technology has evolved, new mediums of campaigning have emerged—from radio to television and now social networking apps. Candidates campaign across all platforms, reaching hundreds of thousands of viewers. And an immense amount of money is spent on campaign speech every year. In the upcoming 2024 election cycle, total spending on political advertisements is estimated to reach $10.2 billion, an increase from the record-breaking 2020 election cycle where spending totaled $9 billion. Bill Allison & Gregory Korte, *Political Ad Spending Set to Reach Record $10.2 Billion in 2024 Campaign Cycle*, Bloomberg (Sept. 12, 2023), bit.ly/3ttdWdc. Even in 2022, a non-presidential election year, spending on campaign ads reached $7.8 billion across all platforms. *See* Bridget Bowman, *Ad Spending Reached $7.8 Billion for Midterms*, NBC News (Dec. 7, 2022), bit.ly/45y0ouf. Regulation of campaign ads unquestionably constitutes an issue of vast economic and political significance that Congress alone should decide. And any action by the Commission now would upend Congress's current "earnest and profound debate" about the value and effects of regulating AI. *West Virginia*, 142 S. Ct. at 2614 (majority opinion) (quoting *Gonzalez v. Oregon*, 546 U.S. 243, 267-68 (2006)).

Because the major questions doctrine applies, the FEC must show "clear congressional authorization" to undertake such a rulemaking. *Id.* It cannot do so here. Congress has not spoken at all—much less clearly—to authorize this kind of action, and the "'lack of historical precedent,' coupled with the breadth of authority" the Commission would have to claim, "is a 'telling indication' that the [action] extends beyond the agency's legitimate reach." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor,*

Occupational Safety & Health Admin., 595 U.S. 109, 119 (2022). The fraudulent misrepresentation doctrine is limited and directed at prohibiting fraudulent agency or misrepresentation of campaign authority. By its terms, that prohibition does not contemplate anything like "deepfakes." Indeed, the use of AI does not materially alter the type of fraud contemplated within the prohibition. To cover "deepfakes," the FEC would have to expand its authority beyond the scope of the statute. Even if the FEC could conjure a "plausible textual basis" for the proposed rule, *West Virginia*, 142 S. Ct. at 2609, it simply "strains credulity to believe that this statute grants the [FEC] the sweeping authority" that Public Citizen asks it to assert here. *Ala. Realtors*, 141 S. Ct. at 2486.

II. The FEC's regulation of AI in campaign advertisements implicates significant First Amendment concerns.

As Commissioner Dickerson has recognized, there are "serious First Amendment concerns lurking in the background of this effort." Dickerson Statement, *supra*. The Commission must keep those concerns forefront when regulating in this space.

The First Amendment "has its fullest and most urgent application" in the context of political campaigns. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). "Discussion of public issues and debate on the qualification of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). For this reason, expressions in service of political campaigns receive the First Amendment's "broadest protection." *Id.* And when a law "burden[s] political speech," it is subject to "strict scrutiny." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

"Citizens must be free to use new forms … for the expression of ideas." *Id. at* 372. Individuals, especially in the context of political campaigns, speak in an ever-increasing variety of mediums. They may write articles in newspapers, record TV or radio interviews, employ tools like Photoshop to create lifelike images, or even hire actors to closely approximate real-life figures. *See*, *e.g.*, Michelle Lauren, *How to Create Realism in Photoshop*, Medium (Oct. 23, 2018), bit.ly/3RP06vY; Joey Nolfi, *Joanne Rogers, Marielle Heller on the Cameos and Catharsis of* A Beautiful Day in the Neighborhood, Entertainment Weekly (Nov. 22, 2019), bit.ly/3ts4834 (quoting the wife of Fred Rogers saying that Tom Hanks looked just like her late husband in a movie); Saturday Night Live, *First Debate Cold Open – SNL*, YouTube (Oct. 4, 2020), bit.ly/3rRJIjO.

Artificial intelligence is chief among these "new forms" of expression. In particular, "generative AI" "refers to deep-learning models that can generate high-quality text, images, and other content." John Villasenor, *Does the First Amendment Confer a 'Right to Compute'? The Future of AI May Depend on It*, Scientific American (Sept. 26, 2023), bit.ly/3rQ9wwL. These systems "commonly produce expressive

content—often images and writing." *Id.* Indeed, "a key application of generative AI is to help produce prose, imagery, music and video." *Id.* And the "robust debate regarding who should have rights to the images and other works produced by generative AI is itself evidence that those works have expressive value." *Id.*

Those new forms are entitled to the same protections and limits as any other medium. As the Supreme Court has explained, "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Like "protected books, plays, … movies," and video games, new mediums "communicate ideas—and even social messages—through many familiar literary devices … and through features distinctive to the medium." *Id.* Even computer programs "are not exempted from the category of First Amendment speech simply because their instructions require use of a computer." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001). Indeed, "[a] recipe is no less 'speech' because it calls for the use of an oven, and a musical score is no less 'speech' because it specifies performance on an electric guitar." *Id.*; *see also Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."). The communication of ideas "suffices to confer First Amendment protection." *Brown*, 564 U.S. at 790.

At bottom, the Commission must be careful not to infringe on the First Amendment rights of candidates or their agents.

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For all these reasons, the Antonin Scalia Law School Administrative Law Clinic opposes any effort by the FEC to undertake a rulemaking like the one proposed here.

Sincerely,
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