

# Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

October 16, 2023

Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

**Re: REG 2023-02: Artificial Intelligence in Campaign Ads**

Dear Commissioners,

These comments are submitted by the undersigned individuals, in our personal capacities and not on behalf of any client, in response to Public Citizen’s petition for rulemaking calling on the Federal Election Commission (the “Commission”) to expand the reach of 52 U.S. § 30124 to include what Public Citizen refers to as “deliberately deceptive AI-produced content in campaign ads and other communications.” The Commission should decline this invitation.

Our opposition to Public Citizen’s petition should not be confused with support or approval of the kinds of advertising they wish to prohibit. Rather, the Commission is bound by its statute, and not everything that seems wrong or immoral is prohibited by that statute. If enough people believe that “there ought to be a law” here, then Congress has the ability to act. In fact, Congress is well aware of the issue – it has held hearings in recent weeks,<sup>1</sup> and multiple bills addressing the use of AI-generated content in campaign ads have already been introduced.<sup>2</sup> In addition, states are beginning to enact legislation addressing the issue of AI-generated advertising content.<sup>3</sup>

## **I. The Commission Lacks Statutory Authority To Regulate As Public Citizen Urges**

The petition for rulemaking argues that Section 30124, and its corresponding regulation, 11 C.F.R. § 110.16, already prohibit “deceptive deepfakes” and that the Commission merely

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<sup>1</sup> See U.S. Senate Committee on Rules and Administration, Full Committee Hearing on AI and the Future of Our Elections, Sept. 28, 2023, <https://www.rules.senate.gov/hearings/ai-and-the-future-of-our-elections>; see also Jacob Fischler, *U.S. Senate panel weighs free speech and deep fakes in AI campaign ads*, Tennessee Lookout, Sept. 28, 2023, <https://tennesseelookout.com/2023/09/28/u-s-senate-panel-weighs-free-speech-and-deep-fakes-in-ai-campaign-ads/>.

<sup>2</sup> See S. 2770 (Protect Elections From Deceptive AI Act); S.1596 (REAL Political Advertisements Act); H.R. 3044 (REAL Political Advertisements Act).

<sup>3</sup> See, e.g., Jason Torchinsky, Jessica Furst Johnson, and Jared Bauman, *Concerns over AI in politics: Washington state becomes one of the first to act*, Westlaw Today, May 31, 2023, [https://today.westlaw.com/Document/I4b97d923ffa211ed8921fbef1a541940/View/FullText.html?transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://today.westlaw.com/Document/I4b97d923ffa211ed8921fbef1a541940/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)) (“The new law – which Gov. Jay Inslee signed on May 9 and is effective as of July 23, 2023 – requires political ads to include disclosures when they contain ‘realistic but false’ synthetic media.”).

needs to make clear that is the case. Neither the plain language of the statute nor past enforcement matters support that view.

Legislation was recently introduced by Senators Klobuchar, Hawley, Coons, Collins, Bennet, and Ricketts that would prohibit the distribution of “deceptive AI-generated audio or visual material” under specified circumstances.<sup>4</sup> This legislation does not seek to pigeonhole a new prohibition into the existing Section 30124, but rather, would add new language to the Act. This proposed legislation indicates Congress’s understanding that Section 30124 does *not* currently prohibit the distribution of “deceptive AI-generated audio or visual material.”

Section 30124 provides that “[n]o 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.”<sup>5</sup> The Commission’s regulation at 11 C.F.R. § 110.16(a)(1) tracks the statutory language nearly verbatim. On its face, the provision prohibits fraudulent misrepresentations of campaign authority. It is not a general false statements prohibition.<sup>6</sup>

While the Commission does not consider Section 30124(a) cases with great frequency, there is a developed body of precedent that focuses on whether *the source of the communication* was misrepresented. In 2004, four Commissioners wrote:

OGC recommended that the Commission find no reason to believe Matta Tuchman for Congress, Buelna and Coley violated 2 U.S.C. § 441h [now 30124] based on the presence of the Matta Tuchman Committee’s disclaimer on the back flap of the envelope. In most cases, we would agree with the Office of General Counsel that “the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation, since the disclaimer discloses the source of the mailing.” GC Report at 8. However, in order for that statement to be true, the disclaimer must be effective; it cannot be placed so obscurely and be presented in such fine print that a typical reader would be likely to overlook it.

[\*\*\*]

The letterhead indicated the sender was the Orange County Democrats. The upper left corner of the envelope indicated the sender was the Orange County Democrats. The text of the letter was not satirical. In fact, the only indication that the mailing came from someone other than the Orange County Democrats was a disclaimer placed on the back flap of the envelope in very small print. **The clear**

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<sup>4</sup> See S. 2770 (Protect Elections From Deceptive AI Act).

<sup>5</sup> 52 U.S.C. § 30124(a)(1).

<sup>6</sup> See generally *U.S. v. Alvarez*, 567 U.S. 709 (2012); *Susan B Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016).

**intent, in our view, was to mislead the reader into believing that the Orange County Democrats, and not the Matta Tuchman campaign, sent the letter.**

In light of the foregoing, we voted to find reason to believe that the Matta Tuchman campaign committee and the three individuals who signed the letter violated 2 U.S.C. § 441h by fraudulently misrepresenting themselves as writing on behalf of the Orange County Democrats in order to damage opponent Sanchez and her party.<sup>7</sup>

In MUR 3690 (NRCC), the Commission considered a mailer that presented an unflattering message purportedly from an opposing candidate. The mailer included accurate disclaimers, however. In light of these disclaimers, the Commission concluded that “[i]t appears that their intent is to expose themselves as the source of the political message, not to pretend they are their opponents. Therefore, there is no deceit or fraud of the type required to violate Section 441h.”<sup>8</sup> The Commission also noted that “the post cards display the [respondent’s] post mark and return address” which further “dispel[s] any theory of fraudulent misrepresentation by the [respondent] because they notify the readers of the true identity of the senders.”<sup>9</sup> The Commission voted to find no reason to believe the respondents violated Section 441h (now Section 30124). The Commission reached the same conclusion in MUR 3700 (NRCC), which involved substantially similar allegations.

MUR 2205 (Foglietta) involved facts that are functionally quite similar to the practice at the center of Public Citizen’s petition. There, the “Complainant alleged that the campaign mailing made false negative statements concerning [Complainant] Tayoun and altered a facsimile of the Tayoun Committee’s FEC disclosure report in a manner damaging to the Tayoun campaign. Complainant alleged that these actions constitute fraudulent misrepresentation of campaign authority (2 U.S.C. § 441h).”<sup>10</sup> The Commission, however, found no reason to believe a violation of the fraudulent misrepresentation provision occurred, explaining: **“By altering the Tayoun Committee’s report in its ads, and by making negative statements about Mr. Tayoun which may or may not be accurate, the Foglietta Committee and treasurer certainly attempted to damage their opponent’s campaign. However, the advertising material is clearly printed as Foglietta material, containing the candidate’s name, the Committee’s address and the candidate’s picture. Therefore, it cannot be said that the Foglietta campaign represented itself as acting for another candidate on a matter damaging to that candidate.”**<sup>11</sup> The communication at issue also included the required disclaimers. In light of the foregoing, the Commission unanimously found no reason to believe a violation of the fraudulent misrepresentation statute occurred.

It is clear from these matters that the Commission’s understanding of the fraudulent misrepresentation provision has long focused on whether *the source* of the communication at

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<sup>7</sup> MUR 5089 (Tuchman), Statement of Reasons of Vice Chair Ellen L. Weintraub, Commissioner Danny L. McDonald, Commissioner Scott E. Thomas, and Commissioner Michael E. Toner at 2 (emphasis added).

<sup>8</sup> MUR 3690 (NRCC), Factual and Legal Analysis at 4.

<sup>9</sup> *Id.* at 4 n.1.

<sup>10</sup> MUR 2205 (Foglietta), First General Counsel’s Report at 1-2.

<sup>11</sup> *Id.* at 2 (emphasis added).

issue was misrepresented, not on whether one candidate misrepresented an opponent's statements. More recent enforcement matters involving the fraudulent misrepresentation provision reflect the same view.<sup>12</sup>

Nevertheless, Public Citizen contends that a candidate (or an agent of that candidate) who creates a “deepfake audio clip or video ... that purports to show an opponent saying or doing something they did not do [or say] would violate this provision of the law.”<sup>13</sup> According to Public Citizen, “by falsely putting words into another candidate’s mouth, or showing the candidate taking action they did not, the deepfake would fraudulently speak or act ‘for’ that candidate in a way deliberately intended to damage him or her.”<sup>14</sup> Public Citizen argues that “[t]he deepfaker misrepresents themselves as speaking for the deepfaked candidate.”<sup>15</sup> This appears to be an acknowledgement that the statutory prohibition is on “fraudulently misrepresenting” *one’s own authority*, rather than misrepresenting the words or deeds of another, but Public Citizen’s assertion is incorrect. Public Citizen conflates lying about what your opponent said with claiming to speak for your opponent, but the two are obviously very different. Most importantly, the Act only prohibits falsely claiming to speak for your opponent.

The Commission has not previously viewed Section 30124 as authorizing the agency to regulate one candidate’s speech about an opponent beyond the bounds of the misrepresentation of campaign authority that the statute contemplates. Public Citizen’s comment on its own rulemaking petition includes a hopelessly confused discussion that seeks to distinguish between the “deepfakes” it seeks to prohibit and the “[e]xaggerated campaign ads, sometimes even bordering on outright dishonesty” that are “nothing new to American politics” and which are presumably protected by the First Amendment.<sup>16</sup> Public Citizen broadly describes content that would be prohibited under its proposal, but also notes that a variety of contextual factors must be taken into account, such as the speaker’s intent to deceive (except in cases where a presumption might be rebuttable), the likelihood of a reasonable person being deceived (which may depend on the believability of the “deepfake”), whether the content is recognized as satire (as opposed to supposedly easy-to-recognize fraud), and whether disclaimers are used to adequately mitigate and overcome the deception (exactly what is disclaimed would be critical). In short, the distinction that Public Citizen suggests can be drawn between permissible and impermissible speech is so lacking in clarity that it is not consistent with what the First Amendment requires.

Public Citizen candidly admits that its proposed “rulemaking should not be viewed as a panacea to the problem of deliberately deceptive AI-content in campaign messages, but it would

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<sup>12</sup> See MUR 6578 (LaMalfa), Factual and Legal Analysis at 8-9 (“Here, the federal candidate that the website ‘damaged’ was Aanestad. To violate the prohibition on fraudulent misrepresentation of campaign authority, however, the Website would have had to misrepresent that its source was Aanestad, the targeted candidate. The Website contains no such suggestion.”); MUR 6427 (Unknown Respondents) First General Counsel’s Report at 8 (proposing an investigation to “identify ... the person(s) that sent the fake press release email and set up the fake Twitter account, both purportedly in the name of [candidate] Scott Eckersley”).

<sup>13</sup> Public Citizen Petition for Rulemaking (July 13, 2023), at 3,

<https://sers.fec.gov/fosers/showpdf.htm?docid=423502>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Public Citizen Comment on REG 2023-02 (Oct. 11, 2023), <https://www.citizen.org/wp-content/uploads/Public-Citizen-comment-REG-2023-02-Final2.pdf>.

be a very important first step,”<sup>17</sup> and “acknowledge[s] that any proposed regulation addressing deepfakes in campaign communications at this point will not address abuses by outside groups. That would be a matter of broader legislation, which already has been introduced in Congress.”<sup>18</sup> Perhaps Congress will also seek to regulate Public Citizen’s imagined “liar’s dividend” “deepfakes.” Public Citizen recognizes that the Commission lacks the ability to comprehensively regulate “deepfakes,” and under the Commission’s existing interpretation of Section 30124, the agency lacks the authority to take even the partial step that Public Citizen urges. Therefore, the Commission should decline Public Citizen’s invitation to enact a half-measure without clear statutory authority, maintain its longstanding interpretation of Section 30124, and let Congress address this developing issue.

## **II. The Commission Lacks Statutory Authority To Impose A New Disclaimer Requirement**

Certain Members of Congress submitted a letter to the Commission on October 3, 2023, encouraging the Commission to move forward with Public Citizen’s proposed rulemaking. These Members wrote: “[W]e respectfully request that the FEC explicitly clarify that prohibitions set forth in statute (52 U.S.C. §30124) apply to deliberately deceptive content in campaign advertisements created by generative AI. We further urge the Commission to require disclaimers on campaign advertisements that include content created by generative AI.”<sup>19</sup> For the reasons set forth above, Section 30124 does not support this reading. With respect to the Members’ request that the Commission also require new disclaimers, we note that the Commission does not have a license to create disclaimer requirements that are not mentioned or authorized anywhere in the existing Act.

Three of the Members who signed the letter referenced above, Senator Klobuchar, Senator Booker, and Senator Bennet, introduced legislation on May 15, 2023, to amend the Act to require a disclaimer on certain communications “contain[ing] an image or video footage that was generated in whole or in part with the use of artificial intelligence (generative AI).”<sup>20</sup> This proposed legislation is strong evidence that the Act does not currently require the disclaimer that the Members nevertheless urge the Commission to impose.

## **III. In The Absence of Congressional Action, the Commission Should Proceed With Great Caution Before It Bans Speech**

If Public Citizen’s proposal were adopted and the Commission determined that the creation and distribution of “deliberately deceptive AI-produced content in campaign ads and other communications” is a covered act of “fraudulent misrepresentation” under Section 30124, such content would be prohibited. The statutory ban is absolute.

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<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> Comment of Rep. Adam B. Schiff *et al.*, Oct. 3, 2023, [https://schiff.house.gov/imo/media/doc/public\\_comment\\_letter\\_to\\_fec\\_on\\_ai\\_use\\_in\\_campaigns.pdf](https://schiff.house.gov/imo/media/doc/public_comment_letter_to_fec_on_ai_use_in_campaigns.pdf).

<sup>20</sup> See S.1596 (REAL Political Advertisements Act).

Section 30124 is one of the few provisions remaining in the Act that bans speech directly. As the Commission is well aware, since 1976, the Act's speech bans have been steadily invalidated by the courts. Expanding the scope and application of Section 30124 would invite further scrutiny, and it seems unlikely that a new speech ban would survive challenge (assuming the Commission's regulation survived an APA challenge first).

The Commission should also be cognizant that Section 30124 is not only a speech ban, but a content-based one. Under the Act, only "fraudulent misrepresentations" that are "damaging" to another candidate are regulated. Any new regulation purporting to implement Section 30124 must necessarily incorporate this same content-based distinction. The resulting regulation of only "damaging" content would be precisely the same kind of content-based regulation invalidated in *Pursuing America's Greatness v. FEC*, 831 F.3d 500 (D.C. Cir. 2016).<sup>21</sup>

The introduction of the REAL Political Advertisements Act in both the House and Senate, which would require a disclaimer on *all* qualifying communications containing AI-generated content, also makes clear that a less-restrictive, content-neutral means of accomplishing the government's purposes is readily available.

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Thank you for your consideration.

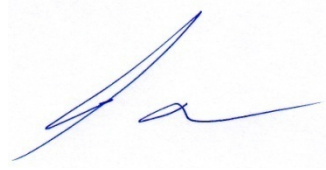
Sincerely,



Thomas J. Josefiak



Matthew S. Petersen



Jason Torchinsky



Michael Bayes



Jessica F. Johnson

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<sup>21</sup> A similar provision exists in the Commission's republication regulations, which treat the republication of campaign materials as a form of coordination while exempting republication that is incorporated into a communication that advocates the defeat of a candidate. See 11 C.F.R. § 109.23(a), (b)(2).