



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

CONCURRING STATEMENT OF CHAIRMAN SEAN J. COOKSEY ON NOTIFICATION OF DISPOSITION OF REG 2023-02: ARTIFICIAL INTELLIGENCE IN CAMPAIGN ADS

For more than a year, advocacy groups, media outlets, and Members of Congress have called on the Federal Election Commission to regulate artificial intelligence (“AI”) in political campaigns. To that end, Public Citizen filed a petition for rulemaking with the Commission in July 2023, asking the agency to issue new regulations to ban the use of AI to misrepresent candidates or political parties in campaign ads.

Today, the Commission declined to do so, and I joined in that vote. I write separately to explain the manifold reasons why. A rulemaking that attempted to limit or prohibit the use of AI in campaign communications would not only overstep the Commission’s legal authority, but it would also interject the agency into a developing technological field in which it has no expertise or experience. Moreover, clumsy Commission regulations would stifle AI’s potential as a tool to broaden public participation in the political process. And such an intrusion risks trampling on Americans’ rights to speak, and to hear others speak, about candidates and public issues—speech that the Supreme Court has recognized is “integral to the operation of the system of government established by our Constitution.”¹

I. Background & Disposition of Public Citizen’s Petition for Rulemaking

On July 13, 2023, Public Citizen petitioned the Commission to undertake a rulemaking “to clarify that the law against ‘fraudulent misrepresentation’ (52 U.S.C. § 30124) applies to deliberately deceptive AI-produced content in campaign communications.”² The Petition described how recent advances in AI, in particular the development of “deepfake technology,” have “create[d] the opportunity for political actors to deploy [AI] to deceive voters in ways that extend well beyond any First Amendment protections for political expression, opinion, or satire.”³ The Petition requested that the Commission initiate a rulemaking for the purpose of amending 11 C.F.R. § 110.6(a), in order to make clear that “if candidates or their agents fraudulently misrepresent other candidates or political parties through deliberately false AI-generated content

¹ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

² Public Citizen, Petition for Rulemaking to Clarify that the Law Against “Fraudulent Misrepresentation (52 U.S.C. § 30124) Applies to Deceptive AI Campaign Communications at 1 (July 13, 2023), REG 2023-02 (“Petition”).

³ Petition at 2. Public Citizen expressed special concern that a “blockbuster deepfake video” depicting a federal candidate saying or doing something they did not in fact say or do could “go viral” shortly before Election Day, and voters would have “no ability ... to determine that its claims are fraudulent.” *Id.*

in campaign ads or other communications – absent clear and conspicuous disclosure in the communication itself that the content is generated by artificial intelligence and does not represent real events – then the restrictions and penalties of the law and the Code of Regulations are applicable.”⁴

On August 10, 2023, the Commission voted unanimously to seek public comment on the Petition.⁵ It received more than 2,000 comments in response, including from Members of Congress, political party committees, advocacy organizations across the ideological spectrum, and individual citizens.

Commenters held a range of views about the potential uses and effects of AI in elections. Many commenters supported the Petition and urged the Commission to formulate regulations for AI, citing the potential misuse of deepfakes and other AI-generated content to sow confusion in U.S. elections absent Commission action.⁶ Other commenters questioned whether the agency has the legal authority to promulgate regulations specifically for AI-generated ads. Among other concerns, these commenters highlighted the limited reach of 52 U.S.C. § 30124 and emphasized that it does not operate as a ban on false representations in campaign communications “writ large.”⁷ They also noted the serious First Amendment concerns that would arise from any attempt by the Commission to restrict the use of AI in campaign advertising.⁸

After considering the Petition and the comments together for nearly a year, the Commission voted on a bipartisan basis to dispose of the Petition on September 19, 2024, without opening any rulemaking.⁹ There are many reasons for the Commission to do so: a lack of clear statutory authority, policy considerations such as lack of technical expertise, the desirability of case-by-case adjudication given the relatively limited use of AI-generated content in federal campaigns, and constitutional concerns. Each provides a sufficient basis to reject the Petition.

⁴ Petition at 5.

⁵ See Certification (Aug. 10, 2023), REG 2023-02 (Artificial Intelligence in Campaign Ads) - Draft Notification of Availability; Notification of Availability, 88 Fed. Reg. 55606 (Aug. 16, 2023).

⁶ See, e.g., Citizens for Responsibility and Ethics in Washington, Comment (Aug. 9, 2023), REG 2023-02; Brennan Center for Justice, Comment (Oct. 16, 2023), REG 2023-02; Campaign Legal Center, Comment (Oct. 16, 2023), REG 2023-02.

⁷ Republican National Committee, Comment at 2 (Oct. 16, 2023), REG 2023-02; see also Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Comment at 2 (Oct. 16, 2023), REG 2023-02 (“On its face, [§ 30124(a)] prohibits fraudulent misrepresentations of campaign authority. It is not a general false statements prohibition.”).

⁸ See George Mason University Antonin Scalia Law School, Administrative Law Clinic, Comment at 6–7 (Oct. 16, 2023), REG 2023-02; Republican National Committee, Comment at 3–4 (Oct. 16, 2023), REG 2023-02.

⁹ See REG 2023-02 (Artificial Intelligence in Campaign Ads) – Draft Notification of Disposition (September 10, 2024).

II. The Commission Lacks Statutory Authority to Regulate AI Advertising as Requested by the Petition

The Commission cannot prohibit “deliberately false AI-generated content in campaign ads” primarily because it lacks the legal authority to do so.¹⁰ The Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), contains two narrow prohibitions against fraudulent misrepresentations in connection with federal campaigns.¹¹ First, § 30124(a) prohibits “a candidate, his or her employee or agent, or an organization under the candidate’s control, from purporting to speak, write, or act for another candidate or political party on a matter that is damaging to the other candidate or party.”¹² Second, § 30124(b) prohibits any person from falsely representing that they are speaking, writing, or acting on behalf of a federal candidate or a political party for the purpose of soliciting contributions.¹³ The Commission’s regulation implementing § 30124 essentially mirrors the statutory text.¹⁴

Beyond those limited statutory provisions, however, the Act does not proscribe fraud in campaign communications more broadly or authorize the Commission to police fraud in federal elections. Instead, Congress empowered the Commission to “make, amend, and repeal such rules” only to the extent “*necessary* to carry out the provisions of [the] Act.”¹⁵ The Commission is bound by the statute Congress wrote, and so it cannot regulate “deceptive” content in AI advertising—or in any other media—outside the parameters of § 30124.¹⁶ Furthermore, even if the Commission did make clear via rulemaking how § 30124(a) applies to AI-generated advertising specifically, that rule still could do nothing to bar fraud or falsities in ads paid for by nonconnected committees, nonprofit organizations, and other outside groups, because the statute bars fraudulent misrepresentations only by “a candidate for Federal office or an employee or agent of such a candidate.”¹⁷ Public Citizen itself accepts that “any potential regulation that the FEC may promulgate” would have only a “limited reach,” given the narrow purview of the underlying law.¹⁸

¹⁰ Petition at 5.

¹¹ 52 U.S.C. § 30124; *see also* Policy Statement of Commissioner Lee E. Goodman on the Fraudulent Misrepresentation Doctrine at 1–2 (Feb. 16, 2018) (“Goodman Statement”).

¹² Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76962, 76968 (Dec. 13, 2002) (“Fraudulent Solicitation E&J”). The Commission has explained that “on a matter that is damaging” means “actions or spoken or written communications that are intended to suppress votes for the candidate or party who has been fraudulently misrepresented.” *Id.* at 76968–69.

¹³ *Id.* at 76968; *see also* Goodman Statement at 1 (explaining 52 U.S.C. § 30124(b) “prohibits *other persons* from misrepresenting themselves as speaking, writing, or otherwise acting for or on behalf of *any candidate* or political party for the purpose of soliciting contributions.”).

¹⁴ *See* 11 C.F.R. § 110.16.

¹⁵ 52 U.S.C. § 30107(a)(8) (emphasis added).

¹⁶ For instance, “the Commission has no statutory authority for regulating defamation.” Institute for Free Speech, Comment at 1 (Jan. 31, 2024), REG 2023-02.

¹⁷ 52 U.S.C. § 30124(a).

¹⁸ *See* Public Citizen, Comment at 3 (Oct. 11, 2023), REG 2023-02 (“[T]he law against fraudulent misrepresentation governing campaign communications, and any potential regulation that the FEC may promulgate, has limited reach. It is acknowledged that any proposed regulation addressing deepfakes in campaign communications at this point will not address abuses by outside groups.”).

Both the Commission and federal courts have long recognized that this agency’s authority over fraud in campaign ads is limited. In rulemakings and enforcement matters, the Commission has concluded that actionable violations of § 30124(a) must involve the misrepresentation of campaign authority by a candidate or his or her agents on behalf of another candidate or a political party in a damaging manner.¹⁹ Other communications that distort or even fabricate statements or actions of another candidate generally do not violate the law, so long as they include a proper disclaimer identifying the communication’s source.²⁰ Only when a campaign advertisement’s “clear intent” is “to mislead” recipients that its source is another candidate or an opposing political party—and to damage the other candidate or party in the process—has the Commission proceeded with enforcement.²¹ Similarly, a violation of § 30124(b) “requires the fraudulent misrepresentation of *identity or agency*, not misrepresentation of how the solicited funds will be used.”²² By contrast, the kinds of AI communications that the Petition asks the Commission to regulate—such as “[a] deepfake audio clip or video by a candidate or their agent that purports to show an opponent saying or doing something they did not do”²³—go well beyond the statute’s terms. Such conduct is more akin to defamation, which is subject to the jurisdiction of state courts, but not of the Commission.

In the few federal cases applying § 30124, courts have also construed the statute narrowly, consistent with the Commission’s interpretation that it “does not govern ‘fraudulent misrepresentations and solicitations of funds’ generally; it governs fraudulent misrepresentation

¹⁹ Fraudulent Solicitation E&J at 76968 (Section 30124(a) “is aimed at fraudulent representation of campaign authority. . . . [It] encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent.”); Factual & Legal Analysis at 5 (Oct. 25, 2012), MUR 6427 (Billy Long for Congress, *et al.*) (“[A] violation of Section [30124(a)] is limited to fraudulent communications of *candidates or their employees or agents*.”); Factual & Legal Analysis at 3 (Aug. 1, 2007), MUR 5886 (Democratic Voters Choice) (“To establish a violation of [52 U.S.C. § 30124(a)], there must be a communication that contains fraudulent misrepresentations by a candidate or employees or agents of a candidate.”).

²⁰ Factual & Legal Analysis at 8–9 (Sept. 23, 2014), MUR 6578 (Doug LaMalfa Committee, *et al.*) (“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.”); Factual & Legal Analysis at 4 (Aug. 6, 1993), MUR 3690 (NRCC) (concluding “there is no deceit or fraud of the type required to violate” 52 U.S.C. § 30124(a) where a “satirical” mailer falsely attributed statements to a candidate but included disclaimer that identified the mailer’s real source). *See also* Goodman Statement at 4 (“A proper disclaimer clearly and accurately identifies the person responsible for the [communication]. Therefore, it affords a strong presumption against finding misrepresentation.”).

²¹ Statement of Reasons of Vice Chair Ellen L. Weintraub and Commissioners Danny L. McDonald, Scott E. Thomas, and Michael E. Toner at 2 (Apr. 2, 2004), MUR 5089 (Matta Tuchman for Congress, *et al.*). For example, in MUR 5089 (Matta Tuchman for Congress, *et al.*), the Commission found reason to believe that the campaign of Matta Tuchman, a Republican candidate for California’s 46th Congressional District in 2000, violated the prohibition against fraudulent misrepresentation of campaign authority by circulating a letter critical of Tuchman’s Democratic opponent that prominently featured letterhead and a return address for the Orange County Democrats, while the letter’s only indication that Tuchman’s campaign had in fact mailed it was a “disclaimer placed on the back flap of the envelope in very small print.” *Id.*

²² Statement of Reasons of Vice Chair Allen J. Dickerson and Commissioner James E. “Trey” Trainor, III at 4 (Apr. 5, 2021), MUR 7140 (Americans for Sensible Solutions PAC, *et al.*). *See also* Goodman Statement at 6 (“The solicitor must misrepresent his identity for the purpose of soliciting contributions or donations. Misrepresentations for other purposes are not prohibited by Section 30124(b).”).

²³ Petition at 3.

of campaign authority.”²⁴ Notably, one federal district court found that the founder of a scam PAC, called the Republican Victory Committee, violated 52 U.S.C. § 30124(b) by falsely representing that the committee was “an official representative of the Republican Party” while raising nearly \$50,000 through fraudulent solicitations.²⁵ The court granted the Commission summary judgment on its claim that the defendant’s violations were “knowingly and willful,” as the “clear implication” of the defendant’s scheme was to deceptively hold out “that donations were being solicited for the Republican Party and/or the RNC.”²⁶

That the Commission currently has no general authority to regulate “deliberately deceptive” AI advertising is further evidenced by the rash of congressional legislation that would explicitly give this agency such authority. Several bills—including the Candidate Voice Fraud Prohibition Act and the Protect Elections from Deceptive AI Act—would prohibit certain “materially deceptive” AI-generated content in campaign communications.²⁷ Other bills would empower the FEC to issue rules specific to AI’s use in connection with federal campaigns. The REAL Political Advertisements Act, for instance, would make the Commission responsible for, among other things, defining what constitutes “content generated by artificial intelligence,” establishing criteria to determine whether political ads feature AI-generated images or video, and developing specialized disclaimer requirements for AI-generated content.²⁸ While Congress continues to debate whether or how the Commission should regulate AI, it is critical that the agency not supersede the legislative process by exercising authority it does not yet have.

Importantly, to the extent that AI-generated communications qualify as fraudulent misrepresentations within the current scope of § 30124, the Act and the Commission’s regulations already prohibit them. Other “deceptive” AI-generated communications, however, are not now proscribed by the Act, and the use of AI in a campaign ad “does not, by itself, make [its] content misleading, objectionable, or dangerous.”²⁹ As the agency charged with administering and enforcing FECA, the Commission must adhere to “what [the] statute actually says.”³⁰ And because neither § 30124 nor any other part of the Act authorizes our agency to ban or specially regulate deceptive AI-generated content, the Commission may not move forward with a rulemaking on this issue.

²⁴ *United States v. Prall*, 2019 WL 1643742 at *2 (W.D. Tex. Apr. 16, 2019).

²⁵ *FEC v. Novacek*, 739 F. Supp.2d 957, 959–60 (N.D. Tex. 2010).

²⁶ *Id.* at 965.

²⁷ See Candidate Voice Fraud Prohibition Act, H.R. 4611, 118th Cong. § 3 (2023) (prohibiting any person from distributing “materially deceptive audio generated by artificial intelligence which impersonates a candidate’s voice” under certain conditions); Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. § 2 (2023) (prohibiting any person from “knowingly” distributing “materially deceptive AI-generated audio or visual media” for the purpose of influencing an election or soliciting funds).

²⁸ S.1596, 118th Cong. § 4 (2023). Another, the Candidate Voice Fraud Prohibition Act, would require the Commission to promulgate regulations “to determine if a materially deceptive audio is clearly satire or parody.” See H.R. 4611, 118th Cong. § 3 (2023).

²⁹ Stability AI, Comment at 8 (Oct. 16, 2023), REG 2023-02.

³⁰ *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

III. The Commission Has Neither the Expertise nor the Experience Necessary to Regulate AI-Generated Communications

Notwithstanding the legal barriers, the Commission is simply ill-equipped to take on the issue of AI regulation, and it does not have the technical expertise required to design appropriately tailored rules for AI-generated advertising. Like the FEC, many other federal agencies, along with states and localities, are just beginning to understand the challenges and opportunities presented by AI's varied applications, which have grown enormously in recent years and are still expanding.³¹ But no clear consensus has formed across government on how to regulate AI within the public domain, let alone in the politically and constitutionally sensitive area of elections.³²

The relatively minimal use of AI technology in federal campaigns to date means there is little evidence on which the Commission could base the formulation of any new rules. Beyond a few widely publicized instances, which Public Citizen draws attention to in its Petition,³³ the Commission has not yet seen political committees or campaigns use AI extensively, nor has it considered any advisory opinions or enforcement matters involving AI. Despite the disproportionate media attention paid to AI's potential impact on elections, the concerns remain, for the most part, theoretical.³⁴ Much AI-generated content today is still distinguishable from media created by people; the Petition itself concedes that, "on careful examination, it is now possible to identify flaws that show [deepfakes] to be fake."³⁵ Indeed, in its potential for abuse, AI is not so different from other types of creative media editing: the employment of doctored photographs and forged materials for the purpose of swaying public opinion is "nothing new in American politics."³⁶ At the same time, poorly conceived regulations concerning this complex and

³¹ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-24-105980, ARTIFICIAL INTELLIGENCE: AGENCIES HAVE BEGUN IMPLEMENTATION BUT NEED TO COMPLETE KEY REQUIREMENTS (2023); Sorelle Friedler, Suresh Venkatasubramanian, & Alex Engler, *How California and other states are tackling AI legislation*, BROOKINGS INST. (Mar. 22, 2023), <https://www.brookings.edu/articles/how-california-and-other-states-are-tackling-ai-legislation>.

³² Laurie A. Harris, CONG. RESEARCH SERV., R47644, ARTIFICIAL INTELLIGENCE: OVERVIEW, RECENT ADVANCES, AND CONSIDERATIONS FOR THE 118TH CONGRESS 10–11 (2023) (discussing different approaches to regulating AI). See also Aneeta Mathur-Ashton, *FCC Chairwoman Pushes Plan to Tackle AI in Political Ads Amid FEC Concern*, U.S. NEWS & WORLD REPORT (June 5, 2024), <https://www.usnews.com/news/national-news/articles/2024-06-05/fcc-chairwoman-pushes-plan-to-tackle-ai-in-political-ads-amid-fec-concern>.

³³ Petition at 2.

³⁴ See Shane Goldmacher, Tiffany Hsu & Steven Lee Myers, *A.I. Promised to Upend the 2024 Campaign. It Hasn't Yet*, N.Y. TIMES (May 23, 2024), <https://www.nytimes.com/2024/05/23/us/politics/ai-technology-campaigns.html> ("With less than six months until the 2024 election, the political uses of A.I. are more theoretical than transformational, both as a constructive communications tool or as a way to spread dangerous disinformation.").

³⁵ Petition at 2. See also American Association of Political Consultants, Comment at 1 (Oct. 16, 2023), REG 2023-02 (observing that "the quality of [AI-generated content] is still where one can identify deception after careful examination").

³⁶ Public Citizen, Comment at 1 (Oct. 11, 2023), REG 2023-02. For example, shortly before the 1950 midterm election, the staff of Senator Joseph McCarthy circulated a mailer that featured a photograph purporting to show Millard Tydings, a longtime U.S. Senator from Maryland and one of McCarthy's political nemeses, conversing with Earl Browder, the former leader of the American Communist Party. While the image was quickly recognized and condemned as a fake (it was in fact a composite of two different photographs), Tydings proceeded to lose his bid for

evolving technology would risk stifling future innovations in the political marketplace and would likely place a disproportionate burden on those in the regulated community with fewer resources to comply. The Commission must therefore exercise significant caution when considering regulating against merely hypothetical dangers and singling out certain modes of expression for greater scrutiny.

Moreover, many online platforms and tech companies have already taken voluntary and proactive steps to minimize harmful AI practices.³⁷ Increasingly, the refinement of industry standards and tools, like watermarking and AI detectors, enables citizens to readily identify AI-generated content when they come across it online, so they “can make an informed decision about whether or not to trust any AI-edited content they are consuming.”³⁸ And broader efforts at self-regulation, such as the Content Authenticity Initiative and the Partnership on AI, further demonstrate that the private sector is willing to take the lead in improving transparency and safeguarding against corrosive uses of AI.³⁹

Taken together, these practical considerations weigh against a rulemaking in response to the Petition. Given both the novelty and technical complexity of AI technology, premature or half-baked efforts to construct a regulatory framework for AI-generated campaign communications would almost certainly lead to unforeseen consequences and prove to be inadequate in practice. As part of an AI rulemaking, the Commission would have to contend with difficult questions of scope, for example, in defining the boundary between unlawful misrepresentations created with AI and cases of parody, satire, or other communications that, though possibly misleading, do not amount to a violation of § 30124.⁴⁰ These are questions that the Commission is presently unprepared to answer.

reelection that year. David Fraser, *Ted Cruz Is Not the First Politician to Cause Controversy with a Doctored Photo*, TIME (Feb. 19, 2016), <https://time.com/4231131/ted-cruz-tydings-browder-photo>.

³⁷ See, e.g., White House, *FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI* (July 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai>.

³⁸ Adobe, Comment at 4 (Oct. 16, 2023), REG 2023-02 (explaining that the Content Authenticity Initiative’s Content Credentials “enable people to see whether AI was used” and “give the good actors, like candidates who want to deliver trustworthy content, a way to be believed while still allowing them to use AI to add quality and clarity to their work more easily and efficiently than ever before.”).

³⁹ See Adobe, Comment at 4 (Oct. 16, 2023), REG 2023-02 (“In just four years, the [Content Authenticity Initiative] has grown to nearly 2,000 members across industries, ranging from technology companies like Adobe and NVIDIA to gen AI developers like Stability AI to news organizations like the New York Times and the Wall Street Journal to camera companies like Nikon and Leica to academic organizations, non-profits, and more.”); Partnership on AI, Comment at 2 (Oct. 16, 2023), REG 2023-02 (“PAI is a nonprofit partnership of academic, civil society, industry, and media organizations creating solutions to ensure that AI advances positive outcomes for people and society. Today, we connect 104 partner organizations in 14 countries, uniting them toward the responsible development and deployment of AI technologies.”).

⁴⁰ Petition at 3–4.

IV. Regulating AI Implicates Significant First Amendment Interests

Finally, the Commission’s decision not to promulgate new rules for deepfakes and other AI content accords with the First Amendment’s guarantees, which have their “‘fullest and most urgent application precisely to the conduct of campaigns for political office.’”⁴¹ While AI-generated campaign advertising will undoubtedly pose administrative and enforcement challenges under the Act’s existing framework, “‘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.”⁴² That campaign speech produced through generative AI does not come directly from a human source is irrelevant to the constitutional calculus because “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁴³

Because restrictions on campaign communications “reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,”⁴⁴ they are subject to strict scrutiny—the most stringent standard of judicial review.⁴⁵ A Commission rule that banned “deliberately deceptive” AI-generated campaign advertising, even if tightly framed within the terms of § 30124(a), would not only restrict political speech, but it would do so on the basis of its content.⁴⁶ A reviewing court would likely find that such a rule failed to satisfy the “narrow tailoring” requirement of strict scrutiny in light of the availability of less restrictive alternatives.⁴⁷

Commentators have exhaustively catalogued ways in which AI could supposedly upend our democratic process, but they have paid far less attention to the upsides of artificial intelligence, which are equally impressive. Generative AI has already started to drive down the costs of digital communications, allowing virtually anyone with an internet connection to create and distribute high-quality content cheaply—and without the analog equipment, media buys, and professional

⁴¹ *Buckley*, 424 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

⁴² *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). See also *Citizens United v. FEC*, 558 U.S. 310, 353–54 (2010) (“The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.”).

⁴³ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

⁴⁴ *Buckley*, 424 U.S. at 19.

⁴⁵ See *Citizens United*, 558 U.S. at 340; *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (“[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based.”).

⁴⁶ See *Bellotti*, 435 U.S. at 784–85 (“In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”); *Citizens United*, 558 U.S. at 340 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”).

⁴⁷ *Citizens United*, 558 U.S. at 369 (“The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.”).

personnel required to produce and disseminate communications in traditional advertising formats.⁴⁸

AI offers clear benefits for political campaigns and elections. AI-powered tools like large language models can rapidly search and synthesize vast amounts of information from across the internet into a digestible format, a capability which can help voters learn more about candidates and key political issues before heading to the polls on election day.⁴⁹ Likewise, candidates and political organizers can employ AI to identify potential supporters and to “connect with voters in a more personal way, optimizing both effort and expenditure.”⁵⁰ Among the possibilities, AI can assist campaigns with strategic planning, resource allocation, data analytics, and targeting their messaging to highly specific voter blocs.⁵¹ In this respect, AI is a resource to augment engagement and participation in the democratic process, and ultimately to promote core aims of the First Amendment, which stands for “[t]he right of citizens to inquire, to hear, to speak, and to use information” as a “precondition to enlightened self-government.”⁵²

* * *

In his partial concurrence in *McConnell v. FEC*, Justice Anthony Kennedy identified a fundamental tenet of freedom of expression:

The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.⁵³

I agree. The Federal Election Commission should not regulate for the sake of regulating, especially when it comes to “new forms, and new forums” for political speech and expression. Instead, the Commission may only issue regulations that are within its legal authority, that fit its expertise, and

⁴⁸ See Adobe, Comment at 2 (Oct. 16, 2023), REG 2023-02 (“Creative professionals are using this technology to bring precision and ease to their workflows; conjure up beautiful imagery; design marketing materials, album covers, social media posts, and more. And non-professionals are using generative AI to channel their creativity in ways they never dreamed possible”); Partnership on AI, Comment at 4 (Oct. 16, 2023), REG 2023-02 (“The introduction of widely accessible text-to-image tools in 2022 has also enabled the public to create synthetic imagery with little technical expertise.”).

⁴⁹ See James Manyika & Michael Spence, *The Coming AI Economic Revolution*, FOREIGN AFFAIRS (Oct. 24, 2023), <https://www.foreignaffairs.com/world/coming-ai-economic-revolution> (“Because they are designed to respond to ordinary language and other ubiquitous inputs, [large language models] can be readily used by nonspecialists who lack technical skills. ... At the same time, the models’ use of the vast material on the Internet or any other corpus for training means that they can acquire expertise in almost any field of knowledge.”).


⁵⁰ Gino Seso, *Ethics and Transparency in AI-Powered Political Advertising*, FORBES (Aug. 25, 2023), <https://www.forbes.com/sites/forbesagencycouncil/2023/08/25/ethics-and-transparency-in-ai-powered-political-advertising/?sh=643878e64170>.

⁵¹ See Adobe, Comment at 2 (Oct. 16, 2023), REG 2023-02 (“AI done right will amplify human creativity and capabilities to new levels with deeper insights, accelerated task performance, and improved decision-making ability.”).

⁵² *Citizens United*, 558 U.S. at 339.

⁵³ *McConnell v. FEC*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in part and dissenting in part).

that comport with the First Amendment. Because Public Citizen's rulemaking proposal met none of those criteria, I supported the Notification of Disposition.



Sean J. Cooksey
Chairman

September 19, 2024
Date