MEMORANDUM

TO: The Commission
FROM: Chairman Sean J. Cooksey
Commissioner Allen J. Dickerson
Commissioner James E. “Trey” Trainor, III
DATE: August 8, 2024
RE: REG 2023-02 (Artificial Intelligence in Campaign Ads) – Draft NOD

Attached is a draft Notification of Disposition (“NOD”) for REG 2023-02 (Artificial Intelligence in Campaign Ads). We request that the draft NOD be placed on the agenda for the August 15th, 2024, open meeting.

Further, we recommend that the Commission: (1) approve the attached draft NOD, and (2) authorize the Office of the General Counsel to make any necessary technical and conforming edits prior to publication in the Federal Register.
ARTIFICIAL INTELLIGENCE IN CAMPAIGN ADS

AGENCY: Federal Election Commission.

ACTION: Notification of Disposition of petition for rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking filed on July 13, 2023. The Petition asked the Commission to revise existing rules on the fraudulent misrepresentation of campaign authority to make clear that the related statutory prohibition applies to deliberately deceptive campaign ads using artificial intelligence. For the reasons described below, the Commission is not initiating a rulemaking at this time.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Jennifer Waldman, Attorney, 1050 First Street, NE., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act of 1971, as amended (the “Act”), contains two narrow prohibitions against fraudulent misrepresentations in connection with federal campaigns. First, the Act prohibits a candidate, his or her employee or agent, or an organization under the candidate’s control,

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1 52 U.S.C. 30124.
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.\textsuperscript{2} Second, the Act 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.\textsuperscript{3} The Commission’s regulation implementing 52 U.S.C. 30124 essentially mirrors the statutory text.\textsuperscript{4}

On July 13, 2023, Public Citizen submitted a Petition for Rulemaking ("Petition") to the Commission, asking it 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."\textsuperscript{5} The Petition described how recent advances in artificial intelligence ("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."\textsuperscript{6} The Petition requested that the Commission initiate a rulemaking for the purpose of amending 11 CFR 110.16(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 in campaign ads or other communications

\begin{footnotesize}
\begin{enumerate}
\item 52 U.S.C. 30124(a). \textit{See also} Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76968 (Dec. 13, 2002). 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.” \textit{Id.} at 76968–69.
\item 52 U.S.C. 30124(b).
\item \textit{See} 11 CFR 110.16.
\item Petition at 1.
\item Petition at 2. Public Citizen expressed special concern that a “blockbuster deepfake video” depicting a federal candidate could “go viral” shortly before Election Day, and voters would have “no ability . . . to determine that its claims are fraudulent.” \textit{Id.}
\end{enumerate}
\end{footnotesize}
– 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.”7

On August 16, 2023, the Commission published a Notice of Availability seeking
public comment on the Petition.8 It received more than 2,000 comments in response,
including from Members of Congress, political party committees, advocacy groups 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 in campaign advertising, citing the potential misuse of deepfakes and
other AI-generated content to sow confusion in U.S. elections absent Commission
action.9 Other commenters questioned whether the agency has the underlying 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.”10 Commenters also noted the serious First Amendment
issues that would arise from any attempt by the Commission to restrict the use of AI in
campaign advertising.11

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7 Petition at 5.
9 See, e.g., Brennan Center for Justice, Comment; Campaign Legal Center, Comment.
10 Republican National Committee, Comment at 2; see also Holtzman Vogel Baran Torchinsky &
Josefiak, PLLC, Comment; Institute for Free Speech, Comment.
11 See, e.g., George Mason University, Comment; Republican National Committee, Comment.
In deciding whether to initiate a rulemaking in response to a petition, the Commission generally considers five factors: (1) the Commission’s statutory authority; (2) policy considerations; (3) the desirability of proceeding on a case-by-case basis; (4) the necessity or desirability of statutory revision; and (5) available agency resources. After considering these factors and reviewing the comments received on the petition, the Commission has decided not to initiate a rulemaking at this time.

First, and most significantly, the Commission lacks the statutory authority to promulgate the rule sought by the Petition. The Act empowers the Commission to “make, amend, or repeal such rules . . . as are necessary to carry out the provisions of [the] Act.” In rulemakings and enforcement matters, the Commission has concluded that actionable violations of 52 U.S.C. 30124(a) must involve the misrepresentation of campaign authority by a candidate or a candidate’s agents on behalf of another candidate or a political party in a damaging manner; other campaign 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 true source.

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”—go well beyond the statute.

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12 11 CFR 200.5.
13 52 U.S.C. 30107(a)(8).
14 Petition at 3.
Second, policy considerations and the desirability of case-by-case consideration counsel against a rulemaking. The Commission is ill-positioned to take on the issue of AI regulation and does not have the technical expertise required to design appropriately tailored rules for AI-generated advertising, which makes a rulemaking at this stage a poor use of agency resources. The relatively limited use of AI-generated content in federal campaigns to date means there is little evidence of significant harms that would benefit from regulation.

Lastly, the “necessity or desirability of statutory revision” weighs against pursuing the proposed rulemaking, because the changes sought by the Petition would require a statutory revision given that the Commission currently lacks authority under the Act to promulgate the rules proposed. Accordingly, after considering the comments received regarding the Petition and in consideration of each of the factors discussed, the Commission declines to initiate a rulemaking in response to the Petition.

Copies of the comments and the Petition for Rulemaking are available on the Commission’s website, http://www.fec.gov/fosers/ (REG 2023-02 Artificial Intelligence in Campaign Ads (2023)) and at the Commission’s Public Records Office, 1050 First Street NE., Washington, D.C. 20463, Monday through Friday between the hours of 9 a.m. and 5 p.m.

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15 11 CFR 200.5.
On behalf of the Commission,

Sean J. Cooksey,

Chairman,

Federal Election Commission.