FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Disclosure and Transparency of Artificial	)	MB Docket No. 24-211
Intelligence-Generated Content in Political	)	
Advertisements	)	

COMMENTS OF
THE FREE STATE FOUNDATION[1]

I. Introduction and Summary

These comments are submitted in response to the Commission's Notice proposing to require radio and TV broadcasters as well as cable and direct broadcast satellite (DBS) operators to include a disclaimer on all political ads that contain content generated by artificial intelligence (AI). They also would be required to include a notice in their online political files disclosing the ad's use of AI. The Commission's rush to adopt a novel AI political ad regulation is a misguided power grab – a combination of bad law and bad policy. The Commission should not adopt the proposed rule.

The agency lacks statutory authority for its proposed regulation of the content of political ads using AI. The Notice of Proposed Rulemaking cites Section 303(r) and other provisions of Title III of the Communications Act regarding the agency's power to make rules and regulations necessary to carry out the Act's provisions in the "public interest." But the Commission has no traditional regulatory authority over the content of political ads on broadcast radio or TV, and

[1] These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank. This Introduction and Summary does not contain citations to authority. Those are found in the remainder of the comments.

none of those provisions cited in the Notice contain language that reasonably may be interpreted to authorize disclaimer and disclosure mandates for political ads featuring AI-generated content.

Moreover, the FCC's proposal is likely to run afoul of the Major Questions Doctrine (MQD) as articulated in *West Virginia v. EPA* (2022) because it involves a question of "vast economic and *political* significance." Proposing for the first time to regulate the use of AI in connection with *political* advertisements appears to be a paradigmatic case meeting the MQD criteria. As such, and because Congress has not clearly granted the FCC authority to adopt the rule it proposes, it's very unlikely to survive judicial review.

By contrast, the Federal Elections Commission (FEC) is given much more explicit statutory authority to regulate significant aspects of political campaign ads under the Federal Election Campaign Act. This includes the FEC's "exclusive jurisdiction with respect to the civil enforcement" of the Act. To date, however, the FEC has never determined it has jurisdiction to regulate political ads with AI-generated content under its "materially deceptive" statute – and the FEC may lack such authority. If the FEC lacks authority to regulate political ads with AI-generated content, then *a fortiori* the FCC certainly lacks similar authority under Communications Act provisions regarding broadcast, cable, and satellite services.

Even if the FCC had the requisite legal authority, the proposal constitutes bad policy because it would apply to ads with AI-generated content that are not materially deceptive, likely causing many viewers to distrust the ads solely or primarily because of the boilerplate disclaimer or simply to "tune out" the disclaimers. Also, it would apply only to ads that are broadcast or transmitted by FCC-regulated services – and not by Internet outlets that garner an increasing share of political ads. Requiring disclaimers on ads shown by broadcast, cable, and satellite services when those same ads may be posted online to wider audiences without disclaimers will

add to the confusion, especially since materially deceptive ads are more likely to appear online. Moreover, broadcasters (and cable and DBS operators) do not have inside knowledge about how given political ads were created; yet under the proposed regulation, apparently they would shoulder the burden of having to discern when generative AI was used. By focusing on broadcasters of political ads rather than the creators, the proposed regulation deviates from a more reasonable focus on ad creators that is taken in many nascent state laws regulating the use of AI in elections.

Additionally, the proposal would put the Commission in the untenable position of making judgments about "credible third parties" who raise complaints about ads, a matter in which the agency has no expertise. Government should not assume any role in designating third parties as "credible" or not credible for purposes of deciding whether political ads should be disclaimed, disclosed, or taken down. If it were to do so, it would inevitably, and justifiably, invite suspicion that its decisions are politically motivated. The proposed overly broad definition of "AI-generated content" likely would result in broadcast, cable, and satellite services requiring disclaimers for all or nearly all political ads as a regulatory risk aversion measure, rendering such disclaimers unhelpful, if not meaningless.

II. The FCC Lacks Legal Authority to Require Disclaimers and Disclosures Regarding Political Advertisements With AI-Generated Content

The FCC lacks affirmative statutory authority to adopt its proposal. In short, none of the statutory provisions cited by the Notice provide any basis for the proposed regulation of political ads with AI-generated content.

In support of the proposed regulation, the Notice of Proposed Rulemaking[2] cites Section 303(r) of the Communications Act – which authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of Article III of the Act "as public convenience, interest, or necessity requires."[3] That provision grants the Commission means to carry out traditional regulatory functions regarding legacy broadcast services. But the Commission has no traditional regulatory authority over the content of political ads on broadcast radio or TV. Section 303(r) lacks specific language authorizing the Commission's proposal for novel regulation of political ads with AI-generated content.

The Notice also includes empty recitations referring to the Commission's public interest authority to grant or renew broadcast licenses under Section 307, 309(a), 309(k)(1)(A), its Section 335 public interest authority to impose obligations on DBS providers, and its Section 303(b) powers to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."[4] None of those provisions contain language that reasonably may be interpreted to empower the Commission to require disclaimers or disclosures regarding political ads featuring AI-generated content. This is especially true regarding cable operators as the Commission itself recognizes in paragraph 27 where it points out that cable operators that originate programming are not subject to the Commission's Section 303(r) rulemaking authority.

[2] Disclosure and Transparency of Artificial Intelligence-Generated Content in Political, Advertisements, MB Docket No. 24-211 (August 22, 2024), Notice of Proposed Rulemaking (Notice) (released July 25, 2024), at: https://www.fcc.gov/document/fcc-proposes-disclosure-rules-use-ai-political-ads.
[3] *See* Notice, at ¶ 27; 47 U.S.C. § 309(r).
[4] *See* Notice, at ¶ 27; *id*. (citing 47 U.S.C. § 303(b)).

The other provisions recited in the Notice do not have language that would authorize regulation of political ads with AI-generated content. The Commission's Section 312(a)(7) authority to impose sanctions "for willful or repeated failure to allow reasonable access to or to permit the purchase of reasonable amounts of time for the use of a broadcasting station… by a legally qualified candidate for Federal elective office on behalf of his candidacy" has nothing to do with the content of a candidate's political ads or with disclosures regarding ad content.[5] Also, Section 315(a) through (d) ensures equal opportunity for candidates to broadcast political ads and prohibits censorship of such ads but does not confer authority on the Commission to require warnings or disclaimers for AI-generated content.[6] Similarly, Section 315(e)'s political file provision contains informational requirements about rates, dates, and payment for ads by candidates – but not about how the ads were produced.[7]

Importantly, the Supreme Court's June 2024 decision in *Loper Bright Enterprises v. Raimondo* that overturned the "Chevron doctrine" precludes the Commission from expansively interpreting Section 303(r), Section 315, or other provisions in an effort to supply legal support for its proposal.[8] Post-*Chevron*, the Commission cannot simply deem those provisions as ambiguous and, therefore, as constituting implicit delegations of authority for the agency to interpret the law according to its policy preferences. If the Commission were to adopt its proposal, a court would instead seek the best reading of those statutory provisions rather than accept any agency rationales that expand or invert the limiting language in those provisions.

Moreover, the FCC's proposal is likely to run afoul of the Major Questions Doctrine (MQD) as articulated in *West Virginia v. EPA* (2022) because it involves a question of "vast

[5] 47 U.S.C. § 312(a)(7).
[6] See 47 U.S.C. § 315(a)-(d).
[7] 47 U.S.C. § 315(e).
[8] *See Loper Bright Enterprises v. Raimondo*, Sup. Ct. Case Nos. 22-1219, 22-451 (June 28, 2024).

economic and *political* significance."[9] Proposing for the first time to regulate the use of AI in connection with *political* advertisements appears to be a paradigmatic case meeting the MQD criteria. If adopted, the Commission's proposal would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind."[10] That is, the Commission's proposal would change the Article III provisions in the Communications Act relied on in the Notice – regarding the agency's authority to grant and renew spectrum licenses in the public interest and its mandate to ensure equal opportunity for candidates to broadcast political ads – into a scheme under which the agency assumes authority over the content of political ads based on technology used to create them, as well as authority to define "credible third-parties" for purposes of addressing complaints about political ads that are generated by AI but lack disclaimers.[11]

Also, while the sweep of the rule goes beyond anything authorized in those statutes, the potential scope of the agency's asserted authority over political ads shown on broadcast, satellite, and cable networks would be far more extensive. The Commission's assertion of agency authority as proposed in the Notice contains no limiting principle regarding its exercise. As such, and because Congress has not clearly granted the FCC authority to adopt the rule it proposes, it's very unlikely to survive judicial review.

Furthermore, Congress's delegation of authority to the Federal Elections Commission to regulate political campaign advertising renders the FCC's statutory authority for its proposed regulation even more doubtful. Congress has expressly directed that the FEC "shall administer, seek to obtain compliance with and formulate policy with respect to" the Federal Election

[9] 142 S.Ct. 2587.
[10] *See Biden v. Nebraska*, 143 S.Ct. 2355, 2373 (2023) (quoting *West Virginia v. EPA*, 142. S.Ct. at 2612 (internal quote omitted)).
[11] *See* Notice, at ¶¶ 17, 21.

Campaign Act.[12] This includes authority over requirements for political ads.[13] And Congress has granted the FEC "exclusive jurisdiction with respect to the civil enforcement" of the Act.[14] In *Galliano v. U.S. Postal Service*, the D.C. Circuit held that "the FEC is the exclusive administrative arbiter of questions concerning the name identifications and disclaimers of organizations soliciting political contributions."[15]

Based on those provisions of the Act and court precedents, FEC Chairman Sean Cooksey concluded in his June 3, 2024, letter to Chairwoman Rosenworcel that "the FCC lacks the legal authority to promulgate conflicting disclaimer requirements only for political communications."[16] As Chairman Cooksey pointed out in his letter:

- The Bipartisan Campaign Reform Act of 2002 (BCRA) Section 201(b), the sole provision in the Act having to with the FCC, "mandates that the FCC compile information related to electioneering communications that the FEC may require to administer the law on such communications." That provision requires the FCC to compile information only to the extent that the FEC requires it.
- "Nothing in BCRA empowers the FCC to impose its own affirmative disclaimer requirements on political communications—a form of compelled speech—whether they are forced on the speakers or on the broadcasters."
- "The FEC already maintains rigorous regulations governing required disclaimers on political communications," such as 11 C.F.R. §§ 100.26, 110.11.

Moreover, apparent limits on the FEC's statutory authority to require disclaimers on political ads with AI-generated content create an *argumentum a fortiori* – or strong basis for inferring – that the FCC similarly lacks statutory authority to impose such a requirement. In his letter, Chairman Cooksey observed that "the FEC is engaged in its own rulemaking process to consider whether or how the use of AI in political communications should be regulated."[17]

---

[12] 52 U.S.C. § 30106(b)(1).
[13] *See* 52 U.S.C. § 30120
[14] 52 U.S.C. § 30106(b)(1).
[15] 836 F.2d 1362, 1370 (D.C.Cir. 1988).
[16] Letter from Chairman Sean Cooksey, Federal Election Commission, to Chairwoman Jessica Rosenworcel, Federal Communications Commission (June 3, 2024), at: https://www.fec.gov/resources/cms-content/documents/FEC_Chairman_Cooksey_Letter_to_FCC_Chairwoman_Rosenworcel_June_3_2024.pdf.
[17] Letter from Chairman Cooksey.

Specifically, the FEC is considering a petition asking the agency to undertake a rulemaking to clarify that the statute barring "fraudulent misrepresentation" applies to deliberately deceptive AI- produced in campaign contributions.[18] The FEC's draft Notice of Disposition concludes that the FEC lacks the statutory to adopt such a rule, explaining 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" and that "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."[19] In sum, if the agency charged with the "exclusive jurisdiction" concerning the civil enforcement of the Federal Election Campaign Act lacks authority to require disclaimers on political ads with AI, the FCC's lack of similar authority based on general "public interest" provisions in Article III of the Communications Act is even more clear-cut.

Furthermore, it is not likely a coincidence that the Commission's proposed new administrative state power grab mirrors a pending proceeding at the FEC regarding the regulation of AI-generated political speech. The Commission's proposal has the unseemly appearance of being an attempted end-run around the FEC's jurisdiction and its bipartisan commission member structure that was created to encourage nonpartisan decisions regarding election matters.[20]

---

[18] 52 U.S.C. § 30124. *See* Public Citizen, Petition for Rulemaking to Clarify that the Law Against "Fraudulent Misrepresentation" Applies to Deceptive AI Campaign Communications (July 13, 2023), at: https://www.citizen.org/article/petition-for-rulemaking-to-clarify-that-the-law-against-fraudulent-misrepresentation-applies-to-deceptive-ai-campaign-communications/.

[19] FEC, Agenda Document No. 24-29-A, Memorandum Re: REG 2023-02 (Artificial Intelligence in Campaign Ads) – Draft NOD [Notice of Disposition] (August 8, 2024), 2, at: https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-29-A.pdf.

[20] *See* Federal Elections Commission, "Leadership and structure" ("By law, no more than three Commissioners can represent the same political party, and at least four votes are required for any official Commission action. This

III. The FCC's Novel Proposed Rule to Require Disclaimers and Disclosures Regarding Political Advertisements With AI-Generated Content Is Bad Policy

Even if the FCC has statutory authority for its proposed regulation of political ads with AI-generated content (which it does not), the Commission should decline to adopt the proposal because it is bad policy. Mandated disclaimers on political ads with AI-generated content could cause viewer confusion about or distrust of political ads based solely or primarily on the presence of the boilerplate disclaimer – even though the ads bearing those disclaimers are not materially deceptive. The blanket disclaimer requirement likely either would feed on public apprehensions about potentially dangerous uses of AI technologies and prompt at least some viewers of the ads to distrust them or, alternatively, cause others simply to "tune out" the disclaimers.

Another reason that the proposed regulation is likely to generate confusion is that it would apply to only part of the media landscape, and therefore apply unevenly. At the outermost, the Commission's regulation would apply only to radio and TV broadcasters, cable operators, and DBS operators.[21] But it would not apply to other media outlets, including social media sites, user-upload online platforms, and other Internet websites that have far larger viewing audiences than the FCC-regulated legacy services. This proposal comes at a time when an increasing amount of political advertising is rapidly moving online. Based on the experience so far, online political ads likely will contain more deliberately deceptive AI-generated content than on-air ads. Under the proposed regulation, the very same political ad featuring AI-generated content would

structure was created to encourage nonpartisan decisions"), at: https://www.fec.gov/about/leadership-and-structure/#:~:text=Commissioners%20are%20appointed%20by%20the,created%20to%20encourage%20nonpartisan%20decisions (last checked August 28, 2024).

[21] The Notice rightly recognizes that "cable operators engaged in origination programming are not subject to the Commission's rulemaking authority under section 303(r)." *Id*., at ¶ 28.

be subject to a disclaimer requirement if shown or transmitted on a legacy media platform but not on an online platform.

The proposed regulation would foster the perception that political ads on broadcast radio or TV, cable, or satellite are more suspect than those appearing online. Acknowledging the abundance of AI-generated content found online rather than on TV or the radio, the Future of Privacy Forum's comments filed in this proceeding similarly express concerns that "[a]n inconsistency in the treatment of online political ads on one hand, and TV or radio political ads on the other, may also create confusion, leading viewers to regard unlabeled online ads or other content less skeptically than labeled synthetic TV or radio ads."[22]

As on-air operators fight to retain viewers moving to non-regulated online streaming platforms, this new regulatory burden would be just another competitive disadvantage for legacy services. Also, broadcasters (or cable or DBS operators) do not have inside knowledge about what technologies or techniques are used to create the content contained in a given political ad. Yet under the Commission's proposal, legacy regulated services apparently would shoulder the burden of having to discern when generative AI was used.

By focusing on transmitters (whether by broadcast, cable, and satellite) of political ads rather than the creators of ads, the Commission's proposed regulation deviates from the approach contained in many state laws that regulate the use of AI technology in elections.[23] As veteran broadcasting and media law attorney David Oxenford has observed: "States have, in the vast majority of cases, placed the burden of adding disclaimers, and the penalties for not doing so,

---

[22] Comments of the Future of Privacy Forum, MB Docket No. 24-211 (August 27, 2024), at: https://www.fcc.gov/ecfs/document/108271808614486/1?utm_source=substack&utm_medium=email.

[23] See Statement of Chairwoman Jessica Rosenworcel, *Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements*, Notice of Proposed Rulemaking, MB Docket No. 24-211 ("Nearly half of the States in this country have enacted laws to regulate the use of AI technology in elections.") *See also* Public Citizen, "Tracker: State Legislation on Deepfakes in Elections" (updated August 26, 2024), at: https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/.

solely on the creator of the political message, not on the media company transmitting it."[24] Without taking an overall position on the policy merits of those state laws, it is evident that focusing on the ad creators is far more sensible than the Commission's proposed regulatory focus on the ads' broadcasters. While the Commission cannot imitate the approach taken in the state laws because the agency lacks jurisdiction over the creators of political messages, this should cause the Commission to exercise restraint rather than forge ahead with its novel proposed AI political ad regulation.

An additional problem is the proposal's requirement that broadcasters (and cable and DBS operators) take corrective action if they are informed by a "credible third party" that an ad without a disclaimer has AI-generated content.[25] The Commission should not be so naïve as to expect consensus among partisan rivals about which third-party arbiters ought to be deemed "credible." Consider, for instance, that shortly before President Joe Biden withdrew from the presidential race, the *Washington Post* echoed the Biden Administration by criticizing videos depicting his frailties as "cheap fakes." But those videos were genuine and not AI "deep fakes." For another well-known example of now widely acknowledged misplaced reliance on "credible third parties," shortly before the 2020 presidential election, major news outlets positively reported on a letter signed by 51 supposed national security experts that deemed reporting about Hunter Biden's laptop as "Russian disinformation."[26] If the Commission were to adopt its

[24] David Oxenford, "The FCC Proposes Requirements for Disclosures About the Use of Artificial Intelligence in Political Ads – Looking at Some of the Many Issues for Broadcasters," *Broadcast Law Blog* (August 1, 2024), at: https://www.broadcastlawblog.com/2024/08/articles/the-fcc-proposes-requirements-for-disclosures-about-the-use-of-artificial-intelligence-in-political-ads-looking-at-some-of-the-many-issues-for-broadcasters/#.
[25] *See* Notice, at ¶¶ 17, 21.
[26] *See* Zack Budryk, "50 former intelligence officials warn NY Post story sounds like Russian disinformation" *The Hill* (October 20, 2020), at: https://thehill.com/homenews/campaign/521823-50-former-intelligence-officials-warn-ny-post-story-sounds-like-russian/. *See also* Hailey Gomez, "Department of Justice Acknowledges Hunter Biden Laptop Content Is Legitimate For First Time," *DailyCaller* (January 16, 2024), at: https://dailycaller.com/2024/01/16/department-of-justice-doj-hunter-biden-laptop-verified/.

proposal, the agency would be inserting itself smack-dab into the election process by making third-party credibility judgments on such matters. Certainly, the Commission cannot claim administrative expertise in making such judgments. More importantly, government should not assume the role of designating third parties as "credible" or not credible for purposes of deciding whether political ads should be disclaimed, disclosed, or taken down.

The Commission's broad definition of "AI-generated content" poses further policy problems. The Notice defines "AI-generated content" as: "An image, audio, or video that has been generated using computational technology or other machine-based system that depicts an individual's appearance, speech, or conduct, or an event, circumstance, or situation, including, in particular, AI-generated voices that sound like human voices, and AI-generated actors that appear to be human actors."[27] This definition seemingly could – and most likely would – apply to any modern-day political ad. Indeed, most of today's political ads involve some use of "computational technology" or "other machine-based" systems to produce the images and audio and video components of the ads. For instance, commonly available software tools are often used to enhance a candidate's appearance or voice. If the proposed definition is adopted, a likely outcome is that broadcasters would require disclaimers to be added to all political ads, rendering the disclaimers and disclosures meaningless. That outcome would increase the over-arching problem that disclaimers for political ads with AI-generated content likely would prompt viewers to believe there is something suspect or deceptive about the ad even if the ad is not materially deceptive.

[27] Notice, at ¶ 12.

IV. Conclusion

For the foregoing reasons, the Commission should not adopt its novel AI political ad regulation.

Randolph J. May
President

Seth L. Cooper
Director of Policy Studies & Senior Fellow

Free State Foundation
P.O. Box 60680
Potomac, MD 20854
301-299-3182

September 19, 2024