TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Testimony of

Ari Cohn[i]

TechFreedom

Before the Senate Committee on Rules & Administration

AI and the Future of our Elections

September 27, 2023

---

[i] Ari Cohn is Free Speech Counsel at TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at acohn@techfreedom.org.

TABLE OF CONTENTS

TESTIMONY OF ARI COHN

Chair Klobuchar, Ranking Member Fischer, and Honorable Members of the Committee, thank you for the opportunity to testify today. My name is Ari Cohn, and I am Free Speech Counsel at TechFreedom, a nonpartisan, nonprofit organization devoted to technology law and policy, the protection of civil liberties and the rule of law in the digital age, and the enabling of innovation that drives technological advancement to the benefit of society. I have previously served as the director of the Individual Rights Defense Program at the Foundation for Individual Rights in Education (now the Foundation for Individual Rights and Expression), and for many years I have maintained a private practice for the purpose of defending individuals against abusive defamation and other litigation intended to silence them.

In over a decade of working as a First Amendment lawyer, I have defended expressive rights of speakers without regard for whether I agree with the substance their expression. I have defended the rights of those who would use their voice for good, and the rights of those would wield their expression as weapons of hatred and discord. I have done so not out of any desire to see noxious speech gain acceptance, but rather out of twin convictions: that engaging with ideas that we find disagreeable or contrary to our deeply held beliefs ultimately benefits both individuals and society, and that constitutional limitations on speech regulations must protect all if they are to protect any.

That we are "seeing AI used as a tool to influence our democracy"[1] is no surprise. The very purpose of the AI technology that prompted this hearing, as with any advancement in communications technology, is to allow us to better, more easily, and more efficiently communicate with one another. In other words, AI promises to enhance the activity most fundamental to our democracy and liberty.

New forms of communication—new media—have always been accompanied by concerns about their impact on the political atmosphere. The invention of the printing press posed a threat to the power of secular and ecclesiastical authorities, prompting a campaign of repression.[2] Yet ultimately, the age of mass communication dawned. When people began to flock to the Internet to express themselves, fears of unlimited and unregulated spending on political speech prompted attempts to regulate even the personal political blogger sharing

---

[1] Press Release, Klobuchar, Hawley, Coons, Collins Introduce Bipartisan Legislation to Ban the Use of Materially Deceptive AI-Generated Content in Elections (Sept. 12, 2023), https://www.klobuchar.senate.gov/public/index.cfm/2023/9/klobuchar-hawley-coons-collins-introduce-bipartisan-legislation-to-ban-the-use-of-materially-deceptive-ai-generated-content-in-elections

[2] Jonny Thomson, *People destroyed the printing presses out of* fear, BIG THINK (Apr. 6, 2023), https://bigthink.com/the-past/printing-press-ai/.

his views for free with the world.[3] But in the end, we settled on a scheme that allows citizens to share their political views on the low-cost, democratized forum of the Internet free from onerous regulatory burdens. This approach has unleashed boundless new possibilities for civic engagement.[4] Advances in communications technology will ultimately enhance our ability to express ourselves and engage in civic discourse. We should be excited for, not fearful of, these expanding horizons.

That isn't to say that the good comes without any bad. Technology, like the expression it enables, can be used for nefarious ends. But fear of that possibility should not lead us to reflexively stifle innovation and new avenues for speech.

It won't surprise any of you to hear that falsehoods occasionally arise in the context of political campaigns. Our nation's earliest elections were marked by crude lies and insults that would draw gasps even today.[5]

So too, deceptive editing of media has been a regular source of political controversy since long before the existence of today's AI tools. To provide only a few recent examples:

- During the 2012 presidential campaign, the Romney campaign was accused of deceptively editing audio of a speech by then-President Obama in the infamous "you didn't build that" campaign advertisement. A portion of the speech referring to the support that infrastructure provides was spliced out, creating the impression that Obama impugned the hard work of business owners.[6]

---

[3] *See* Robert Cwiklik, *Running Into Old-Media Rules, Web Soapboxes Find Trouble*, WALL STREET JOURNAL (Nov. 11, 1999), https://www.wsj.com/articles/SB942271586660571929; Press Release, ACLU, Mr. Smith Goes to Washington.com (Oct. 13, 1999), https://www.aclu.org/press-releases/mr-smith-goes-washingtoncom-how-small-town-internet-speaker-tripped-over-campaign.

[4] *See* End of Year Statement from Chairman Lee E. Goodman, Federal Elections Commission 2 (Dec. 2014), https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/LEG_Closing_Statement_Dec_2014.pdf; Ajit Pai & Lee Goodman, *Internet Freedom Works*, POLITICO (Feb. 23, 2015), https://www.politico.com/magazine/story/2015/02/fcc-internet-regulations-ajit-pai-115399/ ("The freedom protected by the 2006 rule fostered a robust national forum for political discussion."); Uncompensated Internet activity by individuals that is not a contribution, 11 C.F.R. § 100.94 (2016).

[5] In the presidential election of 1800, supporters of Thomas Jefferson called John Adams a "hideous hermaphroditical character which has neither the force or firmness of a man, nor the gentleness and sensibility of a woman," and supporters of Adams referred to Jefferson as "the son of a half-breed Indian squaw, sired by a Virginia mulatto father." Jed Shugerman, *The Golden or Bronze Age of Judicial Selection?*, 100 IOWA L. REV. BULL. 69, 74 (2015).

[6] Rachel Weiner, *Romney releases 'You didn't build that' ad*, WASH. POST (July 20, 2012, 8:59 AM), https://www.washingtonpost.com/blogs/the-fix/post/romney-releases-you-didnt-build-that-ad/2012/07/20/gJQAbGMrxW_blog.html; Stephanie Condon, *Obama responds to "you didn't build that" attack in new ad*, CBS NEWS (July 24, 2012), https://www.cbsnews.com/news/obama-responds-to-you-didnt-build-that-attack-in-new-ad/ (Obama campaign spokesperson Jen Psaki told reporters today, "We are not going to

- In 2020, Congressman Steve Scalise was accused of deceptively editing a video of a conversation between an activist and President Biden by appending the words "for police" from another portion of the video to the end of a question about redirecting funding. Scalise spokesperson Lauren Fine claimed that such edits "for clarity" are "common practice."[7]
- In 2020, the Biden campaign was accused of deceptively editing a video of then-President Trump for a campaign ad, splicing out more than a dozen sentences from a campaign rally speech to make it appear that Trump called COVID-19 a "hoax."[8]

None of these deceptive edits required AI. While once they may have required sophisticated or expensive audio-visual equipment, now anyone with a computer can perform them with free, easy-to-use, non-AI editing software.

Put simply, AI has not created a new problem. Rather, it's just the latest iteration of a longstanding political reality. Because AI presents a difference (however little) in degree, rather than kind, it is worth carefully examining whether special treatment is warranted—and whether such treatment might pose particular constitutional problems.

The preservation of our democratic processes is surely paramount. Free and fair elections, and the peaceful transition of power, have long set the United States apart from much of the world. But a fundamental prerequisite to our prized democratic self-governance is free and unfettered discourse,[9] especially regarding political affairs and campaigns for public office. First Amendment protection is "at its zenith" for such core political speech,[10] and has its "fullest and most urgent application to speech uttered during a campaign for political office."[11]

---

stand by while Mitt Romney slices and dices and deliberately takes out of context the president's remarks on businesses.").

[7] *See* David Weigel, *Twitter flags GOP video after activist's computerized voice was manipulated*, WASH. POST (Aug. 30, 2020, 9:21 PM), https://www.washingtonpost.com/politics/2020/08/30/ady-barkan-scalise-twitter-video/; Tyler Olson, *House Dems campaign arm files ethics complaint against Scalise after controversy over Biden video edit*, FOX NEWS (Sept. 3, 2020, 1:29 PM), https://www.foxnews.com/politics/house-dems-campaign-arm-files-ethics-complaint-against-scalise-after-controversy-over-video-edit.

[8] Meg Kelly, *Biden ad manipulates video to slam Trump*, WASH. POST (Mar. 14, 2020, 3:00 AM), https://www.washingtonpost.com/politics/2020/03/13/biden-ad-manipulates-video-slam-trump/

[9] Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.").

[10] Meyer v. Grant, 486 U.S. 414, 425 (1988).

[11] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)) (internal quotation marks omitted).

Of course, speech does not become any less speech simply because it is created with the assistance of AI. Accordingly, any regulation of its use in election-related speech will face the same constitutional hurdles as regulations of non-AI speech. Because concerns about the use of AI pertain largely to the potential for the dissemination of false and misleading information, I begin with a brief overview of the jurisprudence of false speech generally and within the context of elections, and then highlight the constitutional challenges of regulating election-related AI speech specifically.

I. Constitutional Protection for False Speech

"[A]s a general matter, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[12] Only narrow categories of speech have historically been considered outside the protection of the First Amendment, such as defamation, fraud, obscenity, incitement, and true threats.[13]

The government asked the Supreme Court to add false speech to that list in *United States v. Alvarez*.[14] At issue was the Stolen Valor Act, which criminalized false representations of having been awarded any military decoration or medal.

The Court held that false speech is *not* categorically unprotected by the First Amendment: "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[15]

In so holding, the Court rejected the government's argument that existing prohibitions of false speech indicated its exclusion from First Amendment protection. While no opinion in *Alvarez* commanded a majority, both Justice Kennedy's plurality opinion and Justice Breyer's concurring opinion rebutted this proposition in similar fashion.

Both opinions noted that such prohibitions are tied to specific, legally cognizable harms to identifiable victims.[16] Fraud, for example, requires not only a showing of a knowing falsehood, but that the falsehood is material, relied upon by the victim, and causes "actual injury."[17] And notably, both opinions distinguished statutes that punish perjury, false statements to government officials, and false representations of government authority.

---

[12] Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

[13] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

[14] 567 U.S. 709 (2012).

[15] *Id.* at 718.

[16] *Id.* at 719 (plurality); *id.* at 734 (Breyer, J., concurring).

[17] *Id.* at 734 (Breyer, J., concurring).

Those statutes, wrote Justice Kennedy and Justice Breyer, "protect the integrity of Government processes"[18] and prevent the "particular and specific harm [of] interfering with the functioning of [government]."[19]

Thus, the Court's animating concern was that the Stolen Valor Act constituted a broad ban on false speech irrespective of a tangible, cognizable harm. "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government broad censorial power unprecedented in this Court's cases or in our constitutional tradition."[20]

Having decided that false speech is not categorically excluded from First Amendment protection, the *Alvarez* Court split on the level of scrutiny that should apply to regulations of false speech generally.

The plurality applied strict scrutiny as in any other case involving content-based speech regulation.[21] While acknowledging that the government had a compelling interest in protecting the Medal of Honor, the plurality found that the government had not shown that the law was "actually necessary" by way of a "direct causal link" between the harm and the proposed restriction, and that the law was not narrowly tailored: the government had not shown why counterspeech would not sufficiently address the government's interest.[22]

Justice Breyer, joined by Justice Kagan, also acknowledged the significance of the government's interest.[23] But they would have applied intermediate scrutiny. In their view, because the Stolen Valor Act regulated "false statements about easily verifiable facts" not related to "philosophy, religion, history, the social sciences, the arts, and the like," it posed a lower risk of inhibiting valuable contributions to the marketplace of ideas and thus deserved a lower level of scrutiny.[24] Nevertheless, Justices Breyer and Kagan, too, found that the law's breadth and applicability in instances posing little threat of harm rendered it unconstitutional.[25]

---

[18] *Id.* at 721 (plurality).

[19] *Id.* at 734–35 (Breyer, J., concurring).

[20] *Id.* at 723 (plurality).

[21] *Id.* at 724.

[22] *Id.* at 725–28.

[23] *Id.* at 737 (Breyer, J., concurring).

[24] *Id.* at 731–32.

[25] *Id.* at 737–38.

II. False Election Speech

While *Alvarez* did not involve election-related speech, in distinguishing permissible prohibitions on perjury and other speech that impairs government functions, the Court highlighted an important distinction between two types of election-related harms: harms to the electoral *process*, and harms to the electoral *conversation* caused by the substance of political speech (what I will refer to as "electoral substance").

A. Harms to the Electoral Process

Regulations are on firm constitutional ground when they safeguard the integrity of the electoral process and access to the ballot.[26] There is "indisputably . . . a compelling interest in preserving the integrity of [the] election process."[27] Accordingly, to protect voters against deception, confusion, intimidation, and fraud in the voting *process*, courts have upheld campaign-free zones around polling places,[28] restrictions on who may appear on the ballot,[29] bans on write-in voting during primary elections,[30] and other reasonable regulations.

Similarly, laws prohibiting voter intimidation, the purchase or sale of votes, and the like do not offend the First Amendment. These laws properly reach knowingly false statements about the electoral process itself, such as disinformation about voting procedures, places, and times.[31] Thus, a criminal prosecution for social media posts intended to mislead voters into believing they could vote by text message was held constitutional.[32] Likewise, prosecutions and a civil lawsuit for false robocalls to black neighborhoods stating that police and debt collectors would use personal information from mail-in voters were likewise held not to offend the First Amendment.[33] Indeed, because such statements involved "easily verifiable facts" and posed little risk of impacting substantive political speech, they were analyzed under the intermediate scrutiny applied by the *Alvarez* concurrence.[34]

---

[26] Burson v. Freeman, 504 U.S. 191, 199 (1992).

[27] *Id.*

[28] *Id.*

[29] American Party of Texas v. White, 415 U.S. 767 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Jenness v. Fortson, 403 U.S. 431 (1971).

[30] Burdick v. Takushi, 504 U.S. 428 (1992).

[31] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1889 n.4 (2018) ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.").

[32] United States v. Mackey, No. 21-CR-80 (NGG) (E.D.N.Y. Jan. 23, 2023).

[33] Nat'l Coal. on Black Civil Participation v. Wohl, No. 20 Civ. 8668 (VM) (S.D.N.Y. Mar. 8, 2023); People v. Burkman, No. 356600 (Mich. Ct. App. Jun. 2, 2022).

[34] Wohl, No. 20 Civ. 8668 (VM) at 78–79; Mackey, No. 21-CR-80 (NGG) at 47.

Clearly, the government has significant latitude to regulate false statements of fact regarding the electoral process itself. However, it is unlikely that AI-specific regulations are needed here; existing laws are technology-agnostic and would appear to cover any such activity, whether AI-generated or not.

B. Laws Targeting Harms to the Electoral Conversation Will Fail Strict Scrutiny

Conversely, speech restrictions are perhaps most suspect when they regulate the content of electoral substance and attempt to determine for the polity what political information is true or false. Regulation of "what is said or distributed during an election . . . goes beyond an attempt to control the process to enhance the fairness overall so as to carefully protect the right to vote."[35] Because the right, and civic duty, to evaluate such speech rests with the electorate,[36] government attempts to "enhance[e] the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."[37]

Following *Alvarez*, courts have indeed cast a wary eye on laws prohibiting false statements about candidates and ballot issues.

Such laws are generally drawn too broadly to be upheld as regulating only categories of unprotected speech. For instance, Massachusetts defended its law prohibiting false statements made about a candidate "designed or that tend[] to aid or to injure or defeat such candidate" by asserting that such statements constituted either fraud or defamation, obviating the need for First Amendment scrutiny.[38] But the Supreme Judicial Court of Massachusetts found that the law reached much further, encompassing speech that constituted neither fraud (because the law did not require a showing of reliance or damage) nor defamation (because it reached "statements regarding ballot questions and statements by a candidate about himself designed to enhance his own candidacy, i.e., statements that clearly are not defamatory.").[39] Accordingly, such laws will be subject to First Amendment scrutiny.

Because political speech receives the highest protection and because of the dangers of allowing the government to operate as a political Ministry of Truth, courts have

---

[35] 281 Care Comm. v. Arneson, 766 F.3d 774, 787 (8th Cir. 2014).

[36] United States v. Alvarez, 567 U.S. 709, 728 (2012).

[37] Anderson v. Celebrezze, 460 U.S. 780, 798 (1983).

[38] Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015).

[39] *Id.* at 1249–50.

overwhelmingly held that laws regulating electoral substance must satisfy strict scrutiny.[40] The government therefore bears an exceptionally heavy burden: it must prove that its restriction is necessary to serve a compelling government interest, is narrowly tailored to serve that interest, and is the least restrictive means of achieving its stated goal.[41]

Even on the threshold question, whether there is a legitimate government interest in protecting the public from false speech during campaigns, there is debate. To one judge, such an interest "is patronizing and paternalistic . . . . It assumes the people of this state are too ignorant or disinterested to investigate, learn, and to determine for themselves the truth or falsity in political debate . . . ."[42] On the other hand, many courts have either held or assumed that the government *does* have a compelling interest in assuring that the electorate is not led astray by false electoral substance[43]—yet have struck down such laws anyway with relative ease after finding that they are not actually necessary or narrowly tailored. A few themes, echoing the plurality opinion in *Alvarez*, recur in these courts' analyses.

1. Is the Restriction Actually Necessary?

Content-based speech restrictions must not only serve a compelling government interest, but must also be "actually necessary" to achieve that interest.[44] "The state must specifically identify an actual problem in need of solving," and demonstrate a "direct causal link" between the harm to be prevented and the restriction chosen by the government.[45]

Where the government has not demonstrated that there is an existing threat of false statements that will cause harm, such laws have been invalidated. For example, in *281 Care Committee v. Arneson*, the U.S. Court of Appeals for the Eighth Circuit considered a challenge

---

[40] *See* 281 Care Comm., 766 F.3d at 784; *see also* Alvarez, 567 U.S. at 738 (Breyer, J., concurring) ("I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena . . . the statute may have to be significantly narrowed in its applications."); Ex parte Stafford, No. 05-22-00396 at 8 (Tex. App. May 1, 2023).

[41] Burson v. Freeman, 504 U.S. 191, 198 (1992).

[42] State v. 119 Vote No! Committee, 135 Wn. 2d 618, 631–32 (Wash. 1998).

[43] *See, e.g.*, Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473 (6th Cir. 2016) ("Here, Ohio's interests in preserving the integrity of its elections, protecting voters from confusion and undue influence, and ensuring that an individual's right to vote is not undermined by fraud in the election process are compelling.") (internal quotation marks and citations omitted); 281 Care Comm., 766 F.3d at 787 ("Today we need not determine whether, on these facts, preserving fair an honest elections and preventing fraud on the electorate comprise a compelling state interest because the narrow tailoring that must juxtapose that interest is absent here."); Ex parte Stafford, No. 05-22-00396 at 8 (Tex. App. May 1, 2023) ("Stafford does not, and reasonably could not, dispute that promoting honest discourse and preventing misinformation in the political arena are compelling state interests.").

[44] United States v. Alvarez, 567 U.S. 709, 725 (2012).

[45] Brown v. Entertainment Merchants Assn., 564 U.S. 786, 799 (2011).

to a Minnesota law prohibiting the knowing dissemination of false information about a ballot question in any paid political advertising or campaign material.[46] Instead of presenting empirical evidence for the law's necessity, Minnesota simply "assert[ed] 'that common sense dictates that political advertising aimed at voters and intentionally designed to induce a particular vote through the use of false facts impacts voters' understanding and perceptions; can influence their vote; and ultimately change an election.'"[47] While such an inference might be justified in protecting consumers from fraudulent *commercial* advertising under intermediate scrutiny,[48] it cannot be applied to non-commercial, political speech under strict scrutiny. The court found that the state had not met its burden to prove that the law was actually necessary: "We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . . Such conjecture about the effects and dangers of false statements equates to implausibility . . . because, when the statute infringes core political speech, we tend not to take chances."[49]

2. Is the Restriction Overinclusive?

A law is not narrowly tailored if it "sweep[s] too broadly" and restricts more speech than necessary to achieve the government's interest.[50] Laws regulating false electoral substance have been struck down because of several variations of over-inclusivity.

First, some courts have held that a law sweeps too broadly when it prohibits even non-material falsehoods: "Thus, influencing an election by lying about a political candidate's shoe size or vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue . . . Penalizing non-material statements, particularly those made outside the political arena, is not narrowly tailored to preserve fair elections."[51] Materiality is essential, and unlike consumer protection law, which involves commercial speech,[52] the government cannot infer the materiality of claims about elections, which are non-commercial speech.

---

[46] 766 F.3d 774 (8th Cir. 2014).

[47] *Id.* at 787.

[48] Hudson Gas Elec. v. Public Serv. Comm'n, 447 U.S. 557, 567-68 (1980) ("In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."). Thus, the Federal Trade Commission has long presumed that "that express claims are material" when it polices advertising. Letter from the FTC to the Committee on Energy & Commerce, appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[49] *281 Care Comm.*, 766 F.3d at 790-91.

[50] *Id.* at 787.

[51] Susan B. Anthony List, 814 F.3d at 475.

[52] *See supra* note 48.

Second, some courts—consistent with Justice Breyer's concern about the Stolen Valor Act's breadth—have found that the law at issue restricts speech that causes minimal risk of harm: "[The law] reaches not only those statements that are widely disseminated through commercial advertisement, but also those exchanged between two friends engaged in a spirited political discussion . . . ."[53]

Finally, courts have held that false electoral substance laws are not narrowly tailored when they restrict speech over a long period of time, rather than close in time to an election.[54] The further removed from the date of an election, the more effective counterspeech can be, and the greater the availability of regulatory alternatives, as discussed below.

3. Is It the Least Restrictive Means?

Whenever the government imposes a content-based speech restriction, it must choose "the least restrictive means among available, effective alternatives."[55] When a law restricts statements of false electoral substance, that analysis will nearly always begin and end with counterspeech. "The remedy for speech that is false is speech that is true," ruled the *Alvarez* Court, adding: "That is the ordinary course in a free society."[56]

The government's burden to disprove the efficacy of counterspeech is appropriately high where it seeks to regulate core political speech. "Statutes broadly suppressing false statements about candidates or ballot questions cannot withstand strict scrutiny for the simple reason that [o]ur constitutional election system already contains the solution to the problem . . . That solution is counterspeech."[57] Indeed, courts have recognized that "there is no greater arena wherein counterspeech is at its most effective" than in the political

---

[53] Commonwealth v. Lucas, 34 N.E.3d at 1255.

[54] *See* Susan B. Anthony List, 814 F.3d at 476; Commonwealth v. Lucas, 34 N.E.3d at 1254–55.

[55] Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666 (2004).

[56] United States v. Alvarez, 567 U.S. 709, 727 (2012). *See also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.").

[57] Commonwealth v. Lucas, 34 N.E.3d at 1253.

context.[58] There are precious few circumstances where this "tried and true buffer and elixir" will be considered inadequate.[59]

Perhaps the only such hint of such circumstance in election speech jurisprudence is where a speech restriction operates in a limited time frame close to an election, where there may not be adequate time to uncover and respond to falsehoods.[60] Just how close to the election such a time frame must be is unclear, but that window is likely shrinking rather than growing: while virality may cause falsehoods to spread rapidly, it can just as easily cause counterspeech to do the same.

III. Application to AI-Created Election Speech

Nothing about speech created using AI would remove it from the constitutional analysis outlined above. As such, the clearest way to illustrate the First Amendment challenges of regulating AI election speech may be simply to analyze an existing legislative proposal.

A. The Protect Elections from Deceptive AI Act (S. 2770)

Introduced on September 12, 2023, the Protect Elections from Deceptive AI Act would ban "materially deceptive AI-generated audio or visual media" from election-related speech and political advertisements.[61]

Its prohibition reads as follows: "[A] person, political committee, or other entity may not knowingly distribute materially deceptive AI-generated audio or visual media of a [candidate

---

[58] 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014). See also Alvarez, 567 U.S. at 738 (Breyer, J., concurring) ("I would also note, like the plurality, that in [the political arena] more accurate information will normally counteract the lie."); Grimmett v. Freeman, 59 F.4th 689, 695 (4th Cir. 2023) ("Public officials and public figures . . . have a more realistic opportunity to counteract false statements.") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974)); Ex parte Stafford, No. 05-22-00396-CR at 15 (Tex. App. May 1, 2023) ("Our constitutional tradition is deeply rooted in the notion that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace") (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[59] 281 Care Comm., 766 F.3d at 793.

[60] *See, e.g.*, Susan B. Anthony List, 814 F.3d at 476 (noting that the statute was constitutionally flawed because it included statements "whether made on the eve of an election, when the opportunity to reply is limited, or months in advance.") (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 351–52 (1995)) (internal quotation marks omitted).

[61] Press Release, Klobuchar, Hawley, Coons, Collins Introduce Bipartisan Legislation to Ban the Use of Materially Deceptive AI-Generated Content in Elections (Sept. 12, 2023), https://www.klobuchar.senate.gov/public/index.cfm/2023/9/klobuchar-hawley-coons-collins-introduce-bipartisan-legislation-to-ban-the-use-of-materially-deceptive-ai-generated-content-in-elections.

for federal office], or in carrying out a Federal election activity, with the intent to—(1) influence an election; or (2) solicit funds."[62]

"Deceptive AI-generated audio or visual media" ("DAAV") is defined as:

> an image, audio, or video that—
>
> (A) is the product of artificial intelligence or machine learning, including deep learning techniques, that—
>
> > (i) merges, combines, replaces, or superimposes content onto an image, audio, or video, creating an image, audio, or video that appears authentic; or
> >
> > (ii) generates an inauthentic image, audio, or video that appears authentic; and
>
> (B) a reasonable person, having considered the qualities of the image, audio, or video and the nature of the distribution channel in which the image, audio, or video appears—
>
> > (i) would have a fundamentally different understanding or impression of the appearance, speech, or expressive conduct exhibited in the image, audio, or video than that person would have if that person were hearing or seeing the unaltered, original version of the image, audio, or video; or
> >
> > (ii) would believe that the image, audio, or video accurately exhibits any appearance, speech, or expressive conduct of a person who did not actually exhibit such appearance, speech, or expressive conduct.[63]

S. 2770 permits a candidate "whose voice or likeness appears in, or who is the subject of" a prohibited piece of media to file suit seeking injunctive relief prohibiting the distribution of the offending media, as well as for general or special damages.[64]

---

[62] Protect Elections from Deceptive Ads Act, S. 2770, 118th Cong. §2(a) (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(b)).

[63] *Id.* (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(a)(2)).

[64] *Id.* (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(d)).

Excluded from the bill's prohibitions are media outlets that issue disclosures regarding the veracity of the media,[65] and content that constitutes parody or satire.[66]

B. The Constitutionality of S. 2770

The principles discussed above reveal several constitutional infirmities in this bill. While some of these might be present in any attempt to regulate false election speech, others are caused specifically by the specific targeting of AI-created speech.

1. Does the Prohibition Implicate Protected Speech?

Only if S. 2770 regulates only unprotected speech will it escape First Amendment scrutiny altogether. But because false speech is *not* categorically excluded from constitutional protection, the speech prohibited by the bill must fall into one of the traditional categories of unprotected speech. The relevant categories here are fraud and defamation.

Fraud. Clearly, some speech prohibited by S. 2770 might constitute fraud. Perhaps most obviously, DAAV might be used falsely to portray a solicitation as coming from a candidate. But as in *Lucas*, "the fact that [S. 2770] may reach fraudulent speech is not dispositive, because it also reaches speech that is not fraudulent."[67]

Indeed, the vast majority of speech prohibited by S. 2770 is likely to *not* be fraudulent. This is particularly so because the bill does not require reliance (or intent to induce reliance) or harm to a recipient for DAAV to be prohibited. Reliance is an essential element of any common law fraud tort.[68]

Defamation. On its face, S. 2770's prohibition goes beyond only defamatory speech. Certainly, a substantial amount of DAAV may constitute actionable defamation. But much of it may not: S. 2770 does not require that DAAV be injurious to a candidate's reputation—a basic element of any defamation claim.[69]

---

[65] *Id.* (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(c)(1)–(2)).

[66] *Id.* (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(c)(3).

[67] Commonwealth v. Lucas, 34 N.E.3d at 1249.

[68] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (1977) ("One who fraudulently makes a misrepresentation of fact . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.")

[69] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974); *see also* Andrew Sebbins, Buckingham, Doolittle & Burroughs, LLC, *Elements of Defamation*, JD SUPRA (Aug. 7, 2023), https://www.jdsupra.com/legalnews/elements-of-defamation-2431458/.

But S. 2770(b) creates a wrinkle: any violation of the bill constitutes defamation per se—establishing any material DAAV as injurious.[70]

As a threshold matter, defamation is a creature of state law; there is no federal defamation law. Congress's authority to add a new category of defamation per se to each state's law is questionable at best.

In addition, this provision results in absurdity. Suppose a supporter of a candidate distributes a *flattering* yet material DAAV featuring the candidate's voice or likeness. No actual injury to the candidate's reputation has been done; to the contrary, their reputation has been *bolstered* (falsely). Nevertheless, the DAAV is considered defamatory per se. Contrast this with common law: certain statements are considered per se defamatory only because they are so *obviously and materially harmful* that injury can be presumed.[71]

In any event, S. 2770 plainly prohibits other speech that is not defamatory. For instance, a candidate is prohibited from distributing material DAAV about *himself* to influence an election or solicit funds.

Clearly, S. 2770 prohibits far more than only unprotected speech and will be subject to First Amendment scrutiny.

2. What Level of Scrutiny Applies?

Because S. 2770 broadly regulates content of electoral substance (and is therefore content-based), it is virtually certain that courts would subject it to strict scrutiny.[72] One might argue that material DAAV is closer to "easily verifiable facts," regulation of which generally poses less risk of curtailing valuable contributions to the marketplace of ideas—and that therefore S. 2770 should therefore receive only intermediate scrutiny.[73]

But that is not so for several reasons. First, the apparent premise behind the need for regulation is that material DAAV are in fact difficult to detect, which necessarily makes them more difficult to verify.

---

[70] Protect Elections from Deceptive Ads Act, S. 2770, 118th Cong. §2(b).

[71] *See* Bryson v. News America Publications, 174 Ill. 2d 77, 87 (1996).

[72] *See supra* notes 40–41 and accompanying text.

[73] *See supra* notes 23–24 and accompanying text.

Second, the premise that AI-generated media does not implicate valuable political speech is false. S. 2770's expansive definition of DAAV sweeps up a broad array of potentially valuable speech and declares it off-limits.[74]

3. Is There a Compelling Government Interest?

Whether courts will find a compelling interest ensuring only truthful speech related to elections is unclear.[75] "Society has the right and civic duty to engage in open, dynamic, national discourse,"[76] and "it is the citizenry that can discern for themselves what the truth is, not [government]."[77] But assume for the sake of argument that a court analyzing S. 2770 would at least presume such an interest to determine whether the law is narrowly tailored.

4. Is the Restriction Actually Necessary?

S. 2770's prohibition must be actually necessary to serve that interest, and it must be justified by evidence that there is a concrete problem that needs to be addressed.[78]

It is unclear that evidence of such a problem currently exists. Despite breathless warnings, deepfakes did not appear to play any meaningful role in the 2020 election.[79] We are now hearing the same warnings about the impeding election. And while it is true that generative AI is more accessible now than it was in 2020, but projections based on availability of the technology alone does not rise above the level of conjecture, which is insufficient to justify a content-based speech restriction.[80]

It is also unclear as a general matter whether there is any evidence that material DAAV actually influences voters' beliefs, and ultimate voting decisions. Indeed, it seems likely that the risk of such influence is at least somewhat overstated.[81] Our political culture is increasingly polarized, and voters tend to be skeptical of content that casts a negative light

---

[74] *See infra* notes 80–82 and accompanying text.

[75] See *supra* note 42 and accompanying text.

[76] United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality).

[77] 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014).

[78] *See supra* notes 44–44 and accompanying text.

[79] Tom Simonite, *What Happened to the Deepfake Threat to the Election?*, WIRED (Nov. 16, 2020, 7:00 AM), https://www.wired.com/story/what-happened-deepfake-threat-election/.

[80] *See supra* note 49.

[81] *How worried should you be about AI disrupting elections?*, THE ECONOMIST (Aug. 31, 2023), https://www.economist.com/leaders/2023/08/31/how-artificial-intelligence-will-affect-the-elections-of-2024.

on their candidates of choice. They are unlikely to change their vote on account of such content.

Given the paucity of data indicating that DAAV presents an actual, rather than hypothetical, problem, the government would struggle to prove the necessity of S. 2770.

5. Is the Law Narrowly Tailored?

Even if the government could satisfy its burden of showing that S. 2770 is actually necessary, the bill fails the narrow tailoring prong of strict scrutiny several times over.

Overinclusiveness. As with most non-AI related electoral substance regulations, S. 2770 is staggeringly overinclusive.

Perhaps most glaringly, S. 2770 apparently deems it DAAV even when the ultimate message produced is *true*. There is no limiting factor requiring falsity of the overall message; all that is required is that AI-produced media in any part of a message or advertisement give "a fundamentally different understanding or impression of the appearance, speech, or expressive conduct" than the original version.[82] The prohibition of true messages alone renders S. 2770 unconstitutional.[83]

In a similar vein, S. 2770 would also prohibit protected political opinion. DAAV might not always be used to convey the false impression that a candidate literally did or said what is portrayed. Rather, such media might be used as a means by which to *characterize* the positions of a candidate. To illustrate, consider the non-AI deceptively edited media examples discussed above. Both the Romney campaign advertisement and Congressman Scalise's video[84] were edited in ways that would seemingly qualify them as DAAV if done with AI. But both the Romney campaign and Rep. Scalise's office replied to criticism with the retort that, despite edits that rendered the media clips technically false, they accurately conveyed their view of the target's beliefs. While Barack Obama and Joe Biden would disagree with that assertion, government prohibition of such devices would inappropriately intrude on prototypical political discourse.

S. 2770 is also overinclusive because it prohibits much speech that poses little risk of harm. *All* individuals are prohibited from disseminating material DAAV to *anyone at all*. Thus a

---

[82] Protect Elections from Deceptive Ads Act, S. 2770, 118th Cong. §2(a) (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(a)(2)).

[83] *See* Grimmett v. Freeman, 59 F.4th 689, 694 (4th Cir. 2003) (invalidating North Carolina's criminal election libel statute in part because it permitted punishment of true statements made with reckless disregard for their truth or falsity).

[84] *See supra* notes 6-7 and accompanying text.

DAAV sent to a family member or small group of friends is just as prohibited as a campaign advertisement broadcast to millions. Whatever justification the government may assert for widespread dissemination of election falsehoods, prohibiting communications between friends or relatives that pose little if any risk of harm clearly sweeps too broadly. Whether or not enforcement is likely, the prohibition alone would unacceptably chill protected speech.

Finally, S. 2770 is overinclusive in its temporal breadth—it prohibits dissemination of DAAV at *any* time if intended to influence an election. "It may be invoked as soon as one announces his or her candidacy—not merely on the eve of the election."[85] Such a wide temporal prohibition is a hallmark of over-inclusivity in election falsehood regulations.

Underinclusivity. At the same time, S. 2770 is also *underinclusive*. "A statute can also fail strict scrutiny if it covers *too little speech*. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way."[86] Underinclusivity may indicate that "a law does not actually advance a compelling government interest."[87]

S. 2770 is underinclusive in two ways.

First, the law necessarily only reaches those within the reach of United States jurisdiction; foreign actors would remain free to disseminate all of the worst kinds of DAAV unchecked.[88] While one might reasonably argue that failure to regulate worldwide should not ordinarily be an underinclusivity concern, circumstances may dictate otherwise here. Much of the concern about deceptive election speech has been precisely that it is coming *from* foreign actors seeking to interfere with our democratic institutions. Moreover, prohibiting AI-produced media domestically while leaving foreign actors free to disseminate it may in fact aggravate precisely the harm that S. 2770 seeks to prevent. It is quite possible that, believing

---

[85] Commonwealth v. Lucas, 34 N.E.3d at 1254–55.

[86] Mont. Citizens for Right to Work v. Mangan, 580 F. Supp. 3d 911, 920–21 (D. Mont. 2022) (internal quotation marks and citations omitted).

[87] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 449 (2015).

[88] *See* Free Speech Coalition, Inc., v. Colmenero, No. 1:23-cv-00917, Order Granting Plaintiffs' Motion for a Preliminary Injunction, ECF No. 36 at 27, available at https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172751222/gov.uscourts.txwd.1172751222.36.0.pdf (finding a Texas law requiring age verification for pornographic websites underinclusive because it left "minors able to access any pornography as long as its hosted by foreign websites with no ties to the United States.").

such media are prohibited, voters will become *more* susceptible to foreign DAAV because they anticipate it less.

More fundamentally, S. 2770 is clearly underinclusive because it fails to regulate deceptively edited media produced without the use of AI. Deceptively edited media produced manually does not merely affect the purported government interest in a comparable way; it affects it in the *same* way. Moreover, in contrast to DAAV, there is a long, proven history of the use of manually edited deceptive media in campaigns—a history as long as that of the United States. That S. 2770 ignores this well-documented problem while attempting to regulate the smaller and more speculative problem of DAAV casts serious doubt on whether the bill advances any compelling interest.

6. Is S. 2770's Prohibition the Least Restrictive Means?

Even if the litany of constitutional failures above did not exist, S. 2770 would still likely be unconstitutional because counterspeech provides a less restrictive alternative. There is no obvious reason why DAAV could not be countered with true speech, in the way that manually edited deceptive media is. Indeed, the staggering breadth and temporal scope of S. 2770 indicates that no consideration has been given at all to the types of prohibited speech that might effectively be countered with more speech. The freedom to engage with a diverse array of political speech and determine for ourselves what is true and what is false is sacrosanct. The government is not free to discard this principle so easily to assuage moral panic.

7. A Final Consideration

In addition to the constitutional infirmities detailed above, S. 2770 presents an exceptionally high risk of chilling and censoring protected political expression due to its enforcement mechanism. At present, no reliable technology exists to detect whether media has been produced by AI. Not only does that put *any* edited media at risk of an unwarranted lawsuit, it also provides a weapon with which to silence critics or opponents: the impossibility of accurate AI detection would permit a candidate to bring suit against another person or entity for any media that they simply do not like. While a prevailing defendant in an action for damages may recover their attorney's fees from an abusive plaintiff,[89] the provision for injunctive actions does not include recovery of fees by the prevailing party.[90] To cast a serious chill over the electoral discourse, a motivated candidate need only file scattershot lawsuits seeking to enjoin critical expression.

---

[89] Protect Elections from Deceptive Ads Act, S. 2770, 118th Cong. §2(a) (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(d)(2)).

[90] *Id.* (adding to 52 U.S.C. 30101 et seq., a new Sect. 325(d)(1)).

The same First Amendment concerns that sharply limit prohibition of general false election speech pose a substantial obstacle to the prohibition of AI-produced media. And rather than resolving those concerns, attempts to narrowly target AI instead end up creating additional constitutional concerns. This is not to say that regulation is impossible. But in crafting such laws, Congress must take extreme care to provide the breathing room necessary for a diverse, free, and vibrant political discourse.

IV. Mandating Disclosure of AI-Produced Advertisements

Aside from regulating the use of AI, legislation has been proposed mandating disclosures that an advertisement has been produced with the use of AI. The Require the Exposure of AI-Led Political Advertisements Act (S. 1596) would require (among other things) any advertisement placed or promoted for a fee online to disclose if it "contains an image or video footage that was generated in whole or in part with the use of artificial intelligence (generative AI)."[91]

While mandatory disclosures may work less First Amendment harm than an outright prohibition on speech, they are not immune from constitutional scrutiny. Because disclosure requirements do not prevent speech, they are subjected to "exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficient government interest."[92]

While the Supreme Court has held that "provid[ing] the electorate with information"[93] is a sufficient government interest, that informational interest has not been a general one. Rather, it has been limited to campaign contribution disclosures that assist in the prevention of corruption and the appearance of corruption that undermines public confidence in the electoral process,[94] and the disclosure of the source of paid advertisements to provide the electorate with the information they need to evaluate the source and veracity of the message.[95] A requirement to disclose the use of AI in advertisement production fits neither category.

It is unclear what government interest there might be in disclosure of the means of an advertisement's production. The "simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or

---

[91] Require the Exposure of AI-Led Political Advertisements Act, S. 1596, 118th Cong. §4 (adding to 52 U.S.C. 30120 et seq., a new Sect. 325(e)(1)).

[92] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) (internal quotation marks omitted).

[93] *Id.* at 367 (quoting Buckley v. Valeo, 424 U.S. 1, 66 (1976).

[94] Fed. Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 208 (1982).

[95] First National Bank of Boston v. Bellotti, 425 U.S. 765, 790 (1978).

disclosures that she would otherwise omit."[96] That an advertisement was produced using AI says nothing more relevant than the brand of computer or video camera used. The underlying presumption seems to be that AI-produced advertisements are somehow more likely to be deceptive or harmful in some manner—but that is hardly true. Various forms of AI are used in an extraordinary percentage of media productions; color correction, noise reduction, background object removal, caption text, and a large variety of other basic production tasks enlist the use of AI. The required disclosure of any use of AI in production would destroy the value of the disclosure—if everything has a disclosure, nothing has a disclosure—and the efficacy of achieving whatever government interest is asserted along with it.

Worse yet, flooding the marketplace with such disclosures gives cover to bad actors. If virtually all advertisements end up carrying AI disclosures, purveyors of falsehoods and harmful materials will be more difficult to detect. If there is a sufficient government interest to be achieved, disclosure requirements must be drafted with the utmost care and precision to avoid perpetuating the harms sought to be protected against.

CONCLUSION

Concern for our democratic processes and institutions is well-placed. But reflexive legislation prompted by fear of the next technological boogeyman will not safeguard our democratic values. Instead, intrusions on the free and unfettered political discourse that has been the lifeblood of our democracy will ultimately subvert it. Conversely, resisting the urge to legislate about merely speculative problems will strengthen our resiliency, safeguard our fundamental liberties, and avoid repeating in a new medium the errors of years gone by.

Thank you again for inviting me to testify before you today, and I look forward to your questions.

[96] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 (1995).