



May 14, 2024

Chairwoman Amy Klobuchar  
Senate Committee on Rules and  
Administration  
425 Dirksen Senate Office Building  
Washington, DC 20510

Ranking Member Deb Fischer  
Senate Committee on Rules and  
Administration  
448 Russell Senate Office Building  
Washington, DC 20510

**Re: S. 2770, The Protect Elections from Deceptive AI Act**

Dear Chair Klobuchar, Ranking Member Fischer, and Members of the Committee:

We, the undersigned organizations, write in advance of Wednesday's markup to express serious concerns about S. 2770, the "Protect Elections from Deceptive AI Act." This bill would create a sweeping, content-based prohibition of core political speech that cannot be squared with the First Amendment, which has its "fullest and most urgent application to speech uttered during a campaign for political office."<sup>1</sup> While nobody can credibly argue that deceptive political speech is desirable, false speech is generally protected by the First Amendment.<sup>2</sup>

Because this law would prohibit speech before it happens, it constitutes a prior restraint, and thus faces a heavy presumption of constitutional invalidity.<sup>3</sup> Only in exceptional cases will the government be able to demonstrate the urgency required to sustain this "most extraordinary remedy," but no such urgency exists here. Rather, S. 2770 regulates an issue

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<sup>1</sup> *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).

<sup>2</sup> *United States v. Alvarez*, 567 U.S. 709 (2012).

<sup>3</sup> *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

debated since the founding of our nation: truth and falsity in common political expression. And even if S. 2770 did not constitute a prior restraint, because of the heightened risks posed by government efforts to legislate what is true or acceptable in the context of political speech, the First Amendment mandates that such efforts be subject to strict scrutiny—an exceedingly demanding test that S. 2770 cannot survive.

**Available evidence does not support the necessity of a ban on “political deepfakes.”** To justify a content-based speech restriction, “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 its regulation.<sup>4</sup> Little evidence currently suggests that generative artificial intelligence (GAI) poses a serious threat to elections. To the contrary, GAI appears *not* to have had a significant effect on elections domestically or abroad,<sup>5</sup> and growing awareness of GAI’s capabilities has led to the rapid identification, discussion, and refutation of nearly all political deepfakes of note.<sup>6</sup>

Moreover, current research on disinformation, political ads, and deepfakes suggests that GAI’s ultimate impact may remain limited. Multiple studies have found that deepfakes are not significantly more credible, persuasive, or emotionally manipulative than deceptive

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<sup>4</sup> *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799 (2011).

<sup>5</sup> Mark Scott, *Deepfakes, distrust and disinformation: Welcome to the AI election*, POLITICO (Apr. 16, 2024, 6:30 AM), <https://www.politico.eu/article/deepfakes-distrust-disinformation-welcome-ai-election-2024/>; 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/>.

<sup>6</sup> *Id.* See also, e.g., Katherine Zehnder, *Walker campaign denounces alleged deepfake video*, CAROLINA JOURNAL (Feb. 28, 2024), <https://www.carolinajournal.com/walker-campaign-denounces-alleged-deepfake-video/>; Katrina Manson, *How Investigators Solved the Biden Deepfake Robocall Mystery*, BLOOMBERG (Feb. 7, 2024, 12:00 PM), <https://www.bloomberg.com/news/newsletters/2024-02-07/how-investigators-solved-the-biden-deepfake-robocall-mystery>; Roshan Abraham, *NYC Mayor Casually Announces He’s Deepfaking Himself, Experts Horrified*, VICE (Oct. 17, 2023), <https://www.vice.com/en/article/xgw78a/nyc-mayor-casually-announces-hes-deepfaking-himself-experts-horrified>; Alex Isenstadt, *DeSantis PAC uses AI-generated Trump voice in ad attacking ex-president*, POLITICO (Jul. 17, 2023), <https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695>; Shannon Bond, *DeSantis campaign shares apparent AI-generated fake images of Trump and Fauci*, NPR (Jun. 8, 2023), <https://www.npr.org/2023/06/08/1181097435/desantis-campaign-shares-apparent-ai-generated-fake-images-of-trump-and-fauci>; Emanuel Maiberg, *Republican AI Ad Uses Cutting Edge Tech to Tell Age Old Lies*, VICE (Apr. 25, 2023, 7:52 AM), <https://www.vice.com/en/article/bvjz9a/republican-ai-ad-gop-beat-biden>.

media produced without GAI.<sup>7</sup> A review of current research also finds that the persuasive impact of misinformation and political ads in general appears to be relatively minor.<sup>8</sup>

Concern that the proliferation of deceptive GAI-created media might eventually reverse these trends is insufficient to justify S. 2770's broad prophylactic rule. Courts have expressly rejected assertions that "common sense" can establish that a law prohibiting false election-related speech is "actually necessary" to prevent voter deception that might impact election results.<sup>9</sup> While it is true that GAI technology is advancing and becoming more widely available, the First Amendment does not permit sweeping speech regulations based on conjecture about its future impact.

**S. 2770 is not narrowly tailored.** Even if some actual problem could be shown, this bill is plainly overbroad, restricting far more speech than is necessary to address it. Most troubling is that S. 2770 prohibits expression that is substantively *true*—a result foreclosed by the First Amendment.<sup>10</sup> 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.<sup>11</sup>

The bill would also prohibit in GAI-created expression the types of selective editing and decontextualization that are rampant, yet unregulated, in political expression *not* utilizing GAI. To illustrate: In May 2022, North Carolina congressional candidate Bo Hines demanded that several media outlets stop airing an ad created by his opponent in the primary election, which contained a deepfake video of Hines saying, "I'm a lot more liberal on certain social issues."<sup>12</sup> They were indeed Hines's own words—published as part of a quote in a 2017

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<sup>7</sup> See Soubhik Barari et al., *Political Deepfakes Are As Credible As Other Fake Media And (Sometimes) Real Media* at 7–9 (Apr. 16, 2021), available at <https://osf.io/cdfh3/download>. See also Scott Babwah Brennen & Matt Perault, *The new political ad machine: Policy Frameworks for political ads in an age of AI*, CENTER ON TECHNOLOGY POLICY AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL at 14 (Nov. 8, 2023), <https://techpolicy.unc.edu/wp-content/uploads/2023/11/GAI-and-political-ads.pdf> (citing studies).

<sup>8</sup> Brennen, *supra* note 7 at 12–13.

<sup>9</sup> See *281 Care Comm. v. Arneson*, 766 F.3d 774, 790–91 (8th Cir. 2014).

<sup>10</sup> 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).

<sup>11</sup> 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)).

<sup>12</sup> *Hines' Challenge raises question: If a robot quotes accurately, is an ad deceitful?*, WRAL NEWS (May 11, 2022), <https://www.wral.com/story/hines-challenge-raises-question-if-a-robot-quotes-accurately-is-an-ad-deceitful/20277622>.

article<sup>13</sup>—but because the candidate’s own words were conveyed by technical falsity utilizing GAI, this video would be prohibited by S. 2770. Contrast that with recent deceptively edited media created *without* the use of GAI: A 2020 Biden campaign video spliced out more than a dozen sentences from a Trump speech to make it appear as if he had called COVID-19 a “hoax.” Also in 2020, Congressman Steve Scalise was accused of deceptively editing a video of a conversation between an activist and President Biden to make it appear as if Biden had agreed to a request by the activist to defund police departments. Both of these allegedly misleading edits would remain outside S. 2770’s prohibition, despite posing substantially the same harm that the bill seeks to prevent.

This bill restricts far more speech than necessary in two other respects, each of which has proven fatal to other laws aimed at restricting false election-related speech. First, it regulates expression that poses little risk of harm: S. 2770 prohibits *anyone* from disseminating materially deceptive GAI content *at all*, treating communication between family and friends the same as mass-distributed expression by campaigns.<sup>14</sup> Second, it regulates all expression about a candidate from the moment their pursuit of federal office is announced—a hallmark of overbreadth in electoral speech regulations.<sup>15</sup>

The sheer breadth of S. 2770’s prohibitions are enough to render it obviously unconstitutional. But it suffers from still another fatal infirmity—one at the heart of our democracy:

**S. 2770 fails to account for the prototypical less restrictive alternative: counterspeech.**

The government may not impose a content-based restriction on speech when a less-restrictive alternative is available.<sup>16</sup> The First Amendment demands that “[i]f there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more

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<sup>13</sup> *Id.*

<sup>14</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 351 (1995) (“It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources.”); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1255 (Mass. 2015) (“It 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 in a local pub.”)

<sup>15</sup> See *McIntyre*, 514 U.S. at 352 (“It applies not only to leaflets distributed on the eve of an election, when the opportunity to reply is limited, but also to those distributed months in advance.”); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016) (noting the similarities between Ohio’s “political false-statements laws” and the law struck down in *McIntyre*); *Lucas*, 34 N.E.3d at 1254–55 (“It may be invoked as soon as one announces his or her candidacy—not merely on the eve of the election.”).

<sup>16</sup> *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004).

speech, not enforced silence.”<sup>17</sup> When a law regulates core political speech, the state bears an exceptionally high burden of proving that true speech cannot effectively counter falsity: “Statutes broadly suppressing false statements about candidates . . . 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.”<sup>18</sup>

S. 2770’s regulation of political deepfakes, whether they are disseminated a year or a day before an election, proves by itself that the bill is not the least restrictive means of achieving the government’s objective.<sup>19</sup> Present reality reinforces this conclusion: as noted above, the vast majority of political deepfakes are being swiftly detected, reported upon, and debunked. Counterspeech is not merely a plausible and less restrictive alternative to S. 2770; it is *already working*. Congress is not free to ignore the proven efficacy of counterspeech and unnecessarily intrude upon the public’s right to freely discuss matters at the heart of democratic self-governance based on speculative fears about GAI.

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The preservation of free and fair elections is of utmost importance. But free and unfettered political discourse has been the lifeblood of our democracy, and it has set the United States apart from much of the world. If we sacrifice that fundamental liberty and discard the tried and true wisdom that the best remedy for false or bad speech is true or better speech, no law will be able to save our democratic institutions—they will already have been lost.

If you have any questions or would like to discuss this letter further, please contact Ari Cohn at [acohn@techfreedom.org](mailto:acohn@techfreedom.org).

Sincerely,

American Civil Liberties Union  
California Policy Center  
Competitive Enterprise Institute  
Electronic Frontier Foundation  
Foundation for Individual Rights and Expression  
TechFreedom

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<sup>17</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). *See also* *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.”).

<sup>18</sup> *Lucas*, 34 N.E.3d at 1255. *See also* 281 Care Comm., 766 F.3d at 793 (noting that “there is no greater arena wherein counterspeech is at its most effective” than in the context of politics and elections).

<sup>19</sup> *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*, 514 U.S. at 351–52) (internal quotation marks omitted).