Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Comments of TechFreedom

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WARNING:
The following comments contain information generated in whole or in part by "computational technology" which includes "images" that may "depict an individual's appearance."

September 19, 2024

Summary

The Commission seeks to regulate AI-generated political advertisements before the 2024 presidential election—less than two months away. Rushing a proceeding of this magnitude increases the risk that the final rules will be rejected by the courts, especially because the FCC aims to regulate constitutionally protected political speech. And the FCC is acting with urgency when there is no need to do so: the Federal Election Commission has responsibility over political advertising.

Any rule the FCC promulgates will face increased scrutiny from the courts. Given the Supreme Court's recent rejection of *Chevron*, the FCC should be prepared to receive less deference in the eventual cases challenging these rules. Statutory ambiguity will not save the proposed regulations. Furthermore, the FCC has limited statutory authority to regulate political advertising, and the Communications Act prohibits licensee censorship of political ads. Advertisers are likely to alter their behavior in response to the disclosure requirements proposed by the Commission—a self-censorship backdoor that the Act does not condone.

The FCC should expect not only challenges to its procedure and its authority, but to content of its regulations: the broad definition of artificial intelligence suggested by the agency would cover nearly all political advertisements. Every ad would come with a disclosure, rending the warnings useless to the American public.

In addition to undermining the proposed rules' practical viability, this overbreadth poses constitutional concerns. The First Amendment's protections are at their strongest with respect to core political speech made during campaigns for office. While disclosure requirements are less intrusive than speech restrictions, they are not immune from

constitutional scrutiny. These requirements may indeed be held to a higher level of scrutiny because they compel speech not by the political speakers themselves, but rather the intermediaries who broadcast their speech. In the absence of evidence that AI poses a concrete, demonstrable threat of misleading voters and impacting elections, and in light of the lack of similar requirements for misleading political advertisements using traditional, non-AI deceptive editing techniques, the FCC will struggle to justify these broad, untailored proposed rules.

All of this counsels caution and indicates that the Commission should slow down. There is no way this proceeding could be completed responsibly in time for a rule to be implemented this election cycle. With proper preparation and narrowed focus, the FCC could perhaps play a constructive role—by consulting with the FEC on how it could exercise its existing authority or by advising Congress about its conclusions and the potential need for legislation.

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TechFreedom, pursuant to Sections 1.415 and 1.419 of the Commission's rules,[1] hereby files these Comments in response to the Notice of Proposed Rulemaking issued by the Commission in the above-referenced proceeding on July 25, 2024.[2]

I. About TechFreedom

TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes

[1] 47 C.F.R. §§ 1.415 & 1.419.

[2] Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, Notice of Proposed Rulemaking (AI NPRM or NPRM), FCC 24-74, released July 25, 2024, https://docs.fcc.gov/public/attachments/FCC-24-74A1.pdf. The AI NPRM was published in the Federal Register on August 4, 2024, 89 Fed. Reg. 63381 (Aug. 4, 2024), and set the comment date as September 5, 2024, and the reply comment date for September 19, 2024. By order, DA 24-849, released August 22, 2024, the Commission extended the comment date until September 19, 2024, and the reply comment date until October 11, 2024. These Comments are timely filed.

the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

II. Introduction

Politics are messy. Politics are ugly. Historically, political campaigns have been full of misinformation and all manner of hyperbole that some might consider deceptive.[3] And absolutely zero of that relates to artificial intelligence. Yet the FCC declares a five-alarm emergency, determining that with unprecedented speed, the FCC must step in and combat "misleading" or "deceptive" political advertising through AI "disclosure" rules prior to a national election which is to occur in 112 days from issuance of the NPRM, 47 days from the filing of comments, and a mere 25 days from when reply comments are set to be filed. No matter how much the Commission rushes out a final order, the ink will barely be dry before the 2024 presidential election.

This proceeding has very little to do with AI and much more to do with trying to control speech. "Misleading" is used 31 times in the NPRM, and "deceptive" is used 24 times. That's what this proceeding is about, and the Commission's NPRM makes this clear:

> Are the proposed on-air disclosure and political file requirements necessary to ensure broadcasters and other regulated entities *take reasonable measures to address false, misleading, or deceptive material* and to ensure that voters have the information needed to assess the reliability and credibility of political ads in order to make informed decisions and therefore would serve the public interest?[4]

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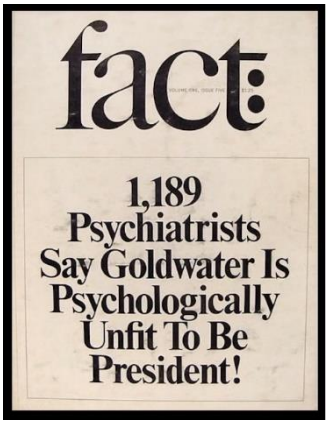
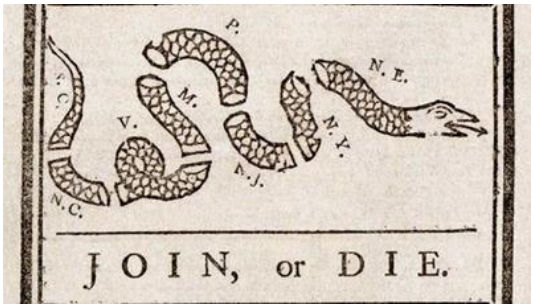
[3] *See* Goldwater v. Ginzburg, 414 F.2d 324 (1969).

[4] NPRM ¶ 27 (emphasis added). *See also id.* ¶ 31 ("As set forth above, the proposed on-air disclosure and political file requirements would further the government interest in ensuring that broadcasters and other program distributors fulfill their responsibilities regarding the material which they relay through their facilities and *take reasonable measures to address potentially false, misleading, or*

This is not about "disclosure;" it is about forcing broadcasters to "take reasonable measures to address false, misleading, or deceptive material"[5] in direct contravention of the statutory prohibition against censoring political advertising in Section 315(a) of the Communications Act, and the First Amendment.



Political advertising and advocacy pieces that cast candidates in a negative light, sometimes with unfair, untrue, or even slanderous claims, are part of our political discourse. Counter-factual statements or outright lies, hyperbolic threats and fearmongering are all part of this thing we call democracy. Should Benjamin Franklin have been sanctioned for claiming that unless



the states adopted the Constitution, we would all die? AI doesn't accentuate the problems of misleading or deceptive speech any more than the printing press was able to make such subversive texts as the Bible more widely available. Indeed, if

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deceptive material and ensuring that the public has the information they need to make informed decisions about the political ads that are carried. Disclosing the use of AI-generated content in political ads is vital to ensuring that the public can assess the substance and credibility of the information they receive. Rather than abridging the free speech rights of broadcasters and cable operators, DBS providers, and SDARS licensees that engage in origination programming, the proposed on-air disclosure and political file rules would further the goals of the First Amendment and Communication Act by ensuring broadcasters and other regulated entities *take reasonable measures to address potentially false, misleading, or deceptive political advertising* and enhancing the public's ability to evaluate political ads, thus promoting an informed electorate and improving the quality of public discourse.") (emphasis added).

[5] *Id.*

one merely substitutes "printing press" for "artificial intelligence" in the NPRM, a chilling story of government coercion and censorship emerges:

> The need for transparency about the use of [the printing press] is particularly pronounced when political ads intended to influence voters are involved. Recent advancements in [printing press] technologies have led to their widespread use, and [the printing press] is expected to play a growing role in the future production of political ads. While the use of [the printing press] to create political ads may provide benefits, it can also result in the dissemination of deceptive, misleading, or fraudulent information to voters.[6]

As we discuss more fully below, AI doesn't create such problems any more than did the printing press, or other digital tools such as Photoshop for picture editing,[7] or Audacity for sound editing.[8] The current NPRM itself can be charged with being misleading and deceptive, as it hides the ball on what the FCC is trying to accomplish: controlling speech. Not just any speech, however, the proposed rules seek to impact political speech, *the* most protected speech we have under the First Amendment.[9]

III. Why the Hurry?

As noted above, a pivotal national election will occur 112 days from issuance of the NPRM, 47 days from the filing of comments, and a mere 25 days from when reply comments are set to be filed in this proceeding.[10] The Commission rarely, if ever, moves with such alacrity.

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[6] NPRM ¶ 30 (footnotes omitted).

[7] *See Adobe Photoshop*, ADOBE, https://www.adobe.com/creativecloud/business/teams/photoshop.html.

[8] *See* AUDACITY, https://www.audacityteam.org/ (last visited Sept. 18, 2024).

[9] *See infra* § VI.

[10] The mere fact that the FCC has extended the comment date by more than two weeks undercuts the purported need for speed in this proceeding. What the extension also does is make sure that if the

A. Issuing an Order So Quickly Would be Unprecedented for the Commission

In other major rulemaking proceedings, the time between NPRM issuance and final order is usually many months, if not years. In 2024, the FCC has issued 21 orders in rulemaking proceedings, averaging 551 days between NPRM and Order as depicted in the chart below.

Proceeding	**Docket**	**NPRM**	**Order**	**Days**
Wireless Emergency Alerts	15-91	3/14/2024	8/8/2024	147
IP Captioned Telephone Service	22-408	12/22/2022	7/31/2024	587
E-rate Hot Spots	21-31	11/8/2023	7/29/2024	264
Nextgen 911	21-479	6/9/2023	7/19/2024	406
Closed Captioning	12-108	1/24/2023	7/19/2024	542
Broadband data collection	19-195	1/19/2024	7/12/2024	175
Incarcerated call rates	23-62	4/28/2023	7/22/2024	451
Regulatory fees for space stations	24-85	3/13/2024	6/13/2024	92
Cybersecurity Pilot Program	23-234	11/13/2023	6/11/2024	211
Foreign Sponsorship ID	20-299	10/6/2022	6/10/2024	613
Open Internet	23-320	10/20/2023	5/7/2024	200
FM Booster Program Origination	20-401	12/1/2020	4/2/2024	1218
IoT Cybersecurity Labeling	23-239	8/10/2023	3/15/2024	218
Supplemental Coverage from Space	23-65	3/17/2023	3/15/2024	364
EEO Form 395-B	98-204	9/2/2021	2/22/2024	903
Robocalls	02-278	6/23/2023	2/16/2024	238
Wireless Microphones	21-115	4/22/2021	2/15/2024	1029
70/80/90 GHz band	20-133	6/10/2020	1/26/2024	1325
911 Call Routing	18-64	12/22/2022	1/26/2024	400
Network Reliability in Disasters	21-346	11/5/2021	1/26/2024	812
Orbital Debris Mitigation Rules	18-313	4/23/2020	1/26/2024	1373
Average				**551**

Commission actually issues an order prior to the November 5 election, the chaos it will unleash on the political process will be massive.

In only one proceeding has the FCC been able to proceed from NPRM to order in under 100 days, and that involved setting regulatory fees for satellite stations, a completely ministerial act. In no other instance has the Commission been able to get to the order stage in under 200 days. Yet the Commission would now have us believe that it can resolve the complex legal and policy issues involved here—including the First Amendment issues—in less than 112 days. And that 112-day figure, of course, is the time between the NPRM and election day. Given that the FCC's rules apply to political advertising as early as 90 days prior to the general election,[11] the FCC would have had to issue the order in this proceeding by August 7, 2024, more than a month before comments are even due in this proceeding. In short, the Commission is already woefully late in adopting new rules in time for the upcoming election.

B. Courts Have Chastised Agencies for Moving Too Quickly in Adopting Rules

When faced with appeals of hastily issued rules, courts have overturned an agency's order as being arbitrary and capricious under the APA.[12] In *Int'l Snowmobile Mfrs. Ass'n v. Norton*,[13] for example, a federal district court in Wyoming issued a preliminary injunction against the National Park Service (NPS) and its new rule limiting snowmobiles in

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[11] *See* 47 CFR § 73.1940 (definition of legally qualified candidate applies 90 days prior to nomination); *see also* 47 CFR § 1942 (lowest unit charge rule begins to apply 60 days before the general election). *See also* NPRM ¶ 21 ("An alternative option that may reduce burdens on small entities considered in the NPRM is whether to limit the proposed on-air disclosure and political file requirements to political ads aired in the 60-day period leading up to a primary election and the 90-day period leading up to a general election."); ¶ 36 ("should we limit the proposed on-air disclosure and political file requirements to political ads aired in the 60-day period leading up to a primary election and the 90-day period leading up to a general election?).

[12] Administrative Procedure Act, § 706(2)(A), 5 U.S.C. § 555.

[13] 304 F.Supp.2d 1278 (D. Wyo. 2004).

Yellowstone National Park. Although there had been ongoing litigation and multiple environmental impact statements (EIS) issued, NPS proceeded to promulgate new rules with limited opportunity for public comment. As the Court described it:

> On December 18, 2000, the NPS issued its proposed regulations for implementing the snowcoach only alternative. The NPS gave the public until January 17, 2001 to comment. On January 18, 2001, the last day of the Clinton administration and only one day after the close of the comment period, the final regulations implementing the snowcoach rule were signed. Some 5,000 comments were received on the proposed regulations, many on the last day.[14]

In granting a preliminary injunction against implementing the new rules, the court stated:

> Given the rushed nature of this procedure and the short comment periods, this Court questions the NPS's ability to adequately review and consider all the submitted comments. The rushed nature of the NPS's actions indicates both a violation of the NEPA process and an arbitrary and capricious, predetermined decision on the part of the NPS in promulgating the 2000 Final EIS and ROD and in the implementation of the 2001 Snowcoach Rule.[15]

Similarly, in *Chamber of Commerce v. SEC*,[16] a district court was asked to overturn new SEC rules related to proxy voting advice businesses (PVABs). The court acknowledged that the rules were withing the core expertise of the SEC.[17] And while it ultimately upheld the new PVAB rules, and rejected the plaintiff's claim that allowing only a 30-day comment period violated the APA, the court found "the SEC's decision to rely on such a short comment

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[14] *Id.* at 1292.

[15] *Id.*

[16] 670 F.Supp.3d 537 (M.D. Tenn. 2023).

[17] *Id.* at 542 ("Congress included proxy solicitations among the communications governed by the SEC under the Securities Exchange Act of 1934 ('Exchange Act'). Congress, however, has elected not to regulate the fine details of proxy solicitation legislatively, but has instead opted to entrust that power to the SEC through the legislative command that it is 'unlawful for any person . . . to solicit any proxy . . . in respect of any [registered] security . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.') (citations omitted).

period, over the objections of interested parties and in apparent departure from much of the agency's usual practice, to be somewhat troubling."

In reviewing whatever rules are promulgated in this proceeding, an appellate court may be equally troubled, and may well find that the FCC has, in its haste to issue new rules just days before a presidential election, run afoul of the APA.

C. Haste is Not Warranted When the FCC Has Never Before Regulated Artificial Intelligence

In *Chamber of Commerce v. SEC* and *Int'l Snowmobile Mfrs. Ass'n v. Norton*, the subject of the rules was clearly within the agencies' statutory authority and recognized expertise. But here, the FCC's proposal to regulate the use of AI in political broadcasting is far afield from its core mission, and as we discuss below, its definition of artificial intelligence deviates wildly from other statutory definitions. Indeed, a review of comments FCC Commissioners have made in recent years shows how rapidly the agency has transformed from humble listeners eager to learn to supposed experts intent on regulating—*without* doing the heavy lifting required to gain the experience or expertise necessary to regulate in a way that is neither arbitrary nor capricious.

In a 2018 FCC Forum on Artificial Intelligence and Machine Learning, FCC Chair Ajit Pai said:

> It's important to note that this event is about discussion and demonstration. It is not about the FCC dipping its toes in the regulatory waters. These are emerging technologies. And when dealing with emerging technologies, I believe that one of the foundational principles for government should be regulatory humility. History tells us that new technologies will evolve in ways that people don't anticipate and that early intervention can forestall or even foreclose certain paths to innovation. This makes it foolish and

> counterproductive for government to micromanage—or more accurately, try to micromanage—the evolution of these technologies.[18]

In 2020, Commissioner Geoffrey Starks spoke about the increase of AI use. He rightly advocated for study and examination, but nowhere hinted that AI regulation by the FCC was close on the horizon:

> Entities throughout society, from retailers to law enforcement, are in the process of deploying systems capable of analyzing enormous datasets in real-time in order to make complex, automated decisions about us. What could possibly go wrong? That common wisecrack should serve as our sober motto in this context. We must undertake, right now and continuously, the thorough examination of all these new capabilities to decide now how we will ensure that they are all poised to serve a future that creates opportunities instead of reinforcing existing inequalities.[19]

Just a year ago, Chair Rosenworcel was bullish on the advantages AI could bring to the communications sector, advocating for further study of AI, but again, stopping short of advocating for regulating now:

> I also know the Commission's Technological Advisory Council is doing good work on this subject. It has a group dedicated to studying AI and machine learning and has already begun to look at the impact of these kind of developments.
>
> But the work of the Technological Advisory Council and this event with the National Science Foundation today are just the start. Because I have just shared with my colleagues a proposal for an inquiry to have the agency explore ways to leverage tools like AI to better understand the usage of non-Federal spectrum. We have traditionally relied on third parties for metrics regarding spectrum usage, which provides a limited picture. But if we use new tools to understand usage, we can identify new opportunities to facilitate greater

[18] Ajit Pai, Chairman, Fed. Commc'ns Comm'n, Remarks at FCC Forum on Artificial Intelligence and Machine Learning 1 (Nov. 30, 2018), https://docs.fcc.gov/public/attachments/DOC-355344A1.pdf.

[19] Geoffrey Starks, Comm'r, Fed. Commc'ns Comm'n, Remarks Before the Consumer Tech. Ass'n's Gov't Affairs Council (Jan. 6, 2020), https://docs.fcc.gov/public/attachments/DOC-361720A1.txt.

> spectrum use, enhancing spectrum sharing techniques and expanding approaches to enable co-existence among users and services.[20]

It is a far cry from "inquiry" and "explor[ing]" to issuing rules just before a presidential election, especially where the AI NPRM is utterly silent on how the FCC has gained the necessary experience or expertise in AI to promulgate the proposed rules. The only reference to either "experience" or "expertise" comes from Commissioner Carr's dissent:

> Indeed, the agency's plan fails to identify an administrable path forward. It is just straight into the thicket. What does it mean to have "AI-generated content" in a political ad? Is it everything? Is it nothing? The NPRM proposes to cover any "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."
>
> That standard is no standard at all—and, in fact*, it highlights the FCC's utter lack of institutional expertise* to deal with these issues, especially in this rushed manner. It would be difficult, in this day and age, to imagine an advertisement (political or not) that does not use a "computational technology" to "depict" an "event, circumstance, or situation." Partisan interests will undoubtedly complain that any ad contains "AI-generated content"—whether CGI, image cropping, or tools to amplify the quality of a person's voice. And lawyers will undoubtedly end up telling their clients to just go ahead and slap a prophylactic, government-mandated disclosure on all political ads going forward just to avoid liability. Whether deepfake, cheap fake, or none of the above, viewers will see these disclosures and have no more insight about what parts of the ad uses AI and which parts do not.[21]

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[20] Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Remarks at the FCC & Nat'l Sci. Found. Joint Workshop: The Opportunities and Challenges of Artificial Intelligence for Communications Networks and Consumers 2 (July 13, 2023), https://docs.fcc.gov/public/attachments/DOC-395095A1.pdf.

[21] AI NPRM, Dissenting Statement of Comm'r Carr (emphasis added, footnote omitted).

IV. The Commission's Statutory Authority Does Not Extend to Regulating AI

A. History of FCC Regulation of Political Advertising

The AI NPRM makes much of the FCC's history in regulating access to the airwaves for political advertising.[22] Of course the Communications Act of 1934 authorized such regulation. To date, the FCC has navigated these regulatory waters well; the agency's actions generally have been upheld by the courts.[23] This includes enforcement of Section 315(a)'s clear prohibition against censoring political ads.[24] Where the FCC *has* gone off the rails, especially recently, is in reading things into the Communications Act that simply aren't there. In *NAB v. FCC*, [25] for example, the D.C. Circuit struck down the FCC's attempt to read more into Section 317(c)'s requirement that broadcasters disclose the source of programming related to programming provided by foreign governments or their agents.[26] In that case, the FCC made an argument about its statutory authority and the First Amendment that is remarkably similar to the arguments in the NPRM.[27] The D.C. Circuit would have none of it:

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[22] *See* AI NPRM, ¶ 4 (discussing Section 315 and 312(a)(7)'s "equal opportunity" and "reasonable access" requirements); ¶ 5 (discussing Section 315(e)'s record keeping requirements).

[23] *See, e.g.,* CBS, Inc. v. Fed. Commc'ns Comm'n, 453 U.S. 367 (1981).

[24] 47 U.S.C. § 315(a). *See* KENS-TV, Inc. v. Farias, No. 04-07-00170-CV, 2007 WL 2253502 (Tex. App. Aug. 8, 2007) (broadcasters immunized from statements made in political ads); Becker v. Fed. Commc'ns Comm'n, 95 F.3d 75 (D.C. Cir. 1996) (broadcasters may not refuse to carry political ads even if they contain arguably indecent material).

[25] *See* Nat'l Ass'n of Broads. v. Fed. Commc'ns Comm'n, 39 F.4th 817 (D.C. Cir. 2022).

[26] 47 U.S.C. § 317(c) ("The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.").

[27] *See* In the Matter of Sponsorship Identification Requirements for Foreign Government-Provided Programming, Report and Order 36 FCC Rcd. 7702, 7734 n. 185 (2021) ("complete and accurate disclosure regarding the source of programming is critical to allowing audiences to determine the

"The FCC's verification requirement ignores the limits that the statute places on broadcasters' narrow duty of inquiry. It instead tells a broadcaster to seek information from two federal sources in addition to the two sources that the statute prescribes. That is not the law that Congress wrote."[28]

Courts are likely to say much the same in reviewing the rules proposed here.

B. The AI NPRM Ignores the Preeminence of Section 315(a)'s Clear Prohibition Against Censoring Political Ads

The entire premise of the AI NPRM is wrong:

> Recognizing the potentially beneficial use of AI in political advertisements while keeping in mind broadcasters and other regulated entities' statutory obligation to serve the public interest by taking responsibility for material—including false, misleading or deceptive material—disseminated to the public through their facilities, we initiate this Notice of Proposed Rulemaking (NPRM) to provide greater transparency regarding the use of AI-generated content in political advertising.[29]

The NPRM proposes an undefined balancing test between (a) the generalized obligation of each broadcaster to serve the public interest by taking responsibility for the material it broadcasts and (b) the Act's prohibition against refusing to carry political ads or censoring their content. The NPRM's focus is skewed: As noted above, "misleading" is used 31 times in the NPRM, "deceptive" is used 24 times, and the "obligations" of broadcasters to police

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reliability and credibility of the information they receive. We consider such transparency to be a critical part of broadcasters' public interest obligation to use the airwaves with which they are entrusted to benefit their local communities. Thus, rather than abridging broadcasters' freedom of speech rights, disclosure of sponsorship promotes First Amendment and Communications Act goals by enhancing viewers' ability to assess the involved in the sponsorship of the programming material, and that transparency to American audiences as to the sponsorship of such programming is a compelling interest.").

[28] *NAB v. FCC*, 39 F.4th at 820.

[29] AI NPRM ¶ 2.

content and abide by the Commission's political advertising rules are referenced approximately 20 times. In contrast, the clear prohibition against refusing to take ads or censoring their content contained in Section 315(a) is referenced just eight times. Moreover, no such balancing test actually exists under the Communications Act; merely reciting "obligations" more than "prohibition" doesn't tilt the scales in favor of promulgating the proposed rules. Not when the text of Section 315(a) is so clear: "such licensee shall have no power of censorship over the material broadcast under the provisions of this section."[30]

The FCC has attempted such a balancing test before when it came to political advertising, with disastrous results (for the agency). In 1994, the Commission concluded that licensees had the discretion to channel graphic ads featuring images of aborted fetuses to hours of the day when children are less likely to watch, and that such placement of ads did not violate the censorship prohibition in Section 315(a).[31] In the appeal of that decision,[32] the FCC proposed a balancing test summarized by the appeals court as follows:

> We are faced, then, with competing interests—the licensee's desire to spare children the sight of images that are not indecent but may nevertheless prove harmful, and the interest of a political candidate in exercising his statutory right of "access to the time periods with the greatest audience potential."[33]

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[30] 47 U.S.C. § 315(a).

[31] In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. 7638, 7649 (1994) ("Declaratory Ruling") ("We are not granting licensees the ability to delete political statements. We are simply recognizing that a licensee may, consistent with its public interest obligations, channel political advertisements containing graphic abortion imagery to times when, although consistent with its obligation to provide reasonable access, the likelihood that children will be in the audience is diminished. This added measure of licensee discretion does not constitute 'censorship' as that term is used in the Communications Act.").

[32] Becker v. Fed. Commc'ns Comm'n, 95 F.3d 75 (D.C. Cir. 1996).

[33] *Id.* at 80.

The court rejected a balancing analysis in favor of a plain reading of Section 315(a)'s censorship prohibition and its roots in the First Amendment:

> The Supreme Court, however, has stated that '[t]he term censorship . . . as commonly understood, connotes any examination of thought or expression in order to prevent publication of "objectionable" material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give "censorship" a narrower meaning in § 315.' In WDAY, Inc., the Court held that section 315(a) prohibited a broadcaster from removing defamatory statements from the advertisements of a legally qualified candidate. From the Court's discussion, we may discern two guiding principles: First, the basic purpose of section 315(a) is to permit the 'full and unrestricted discussion of political issues by legally qualified candidates.' Second, the section reflects Congress's 'deep hostility to censorship either by the Commission or by a licensee.'[34]

Moreover, and particularly apt here, the court warned that rules that force a candidate to alter the manner in which he or she might prepare an advertisement are just as much a form of censorship under Section 315(a) as allowing stations to reject such advertisements outright, or to channel them into lesser viewed dayparts:

> Not only does the power to channel confer on a licensee the power to discriminate between candidates, it can force one of them to back away from what he considers to be the most effective way of presenting his position on a controversial issue lest he be deprived of the audience he is most anxious to reach. This self-censorship must surely frustrate the 'full and unrestricted discussion of political issues' envisioned by Congress. . . . The FCC itself has indicated that it understands the Supreme Court's definition of censorship to be broader than it will now acknowledge. . . . [A]fter initially refusing to run a candidate's potentially defamatory advertisement, Station WPAM informed the political committee that was paying for it that 'the spot would be broadcast "as is", but stated that [the committee] would thereby risk the consequences of a later lawsuit' for defamation. As a result, the candidate revised the text of his advertisement. The Commission observed that were it not for WPAM's intimidating actions in the present case, i.e., [its] initial refusal to accept the announcement as submitted, followed by grudging acceptance coupled with a threat of subsequent legal action, the candidate would not have been required

[34] *Id.* at 82-83 (quoting Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 527 (1959)).

> by the sponsoring Committee to revise the spot. We believe that this result was reasonably foreseeable.[35]

The appeals court further cited several instances where the FCC had admonished stations for trying to impose non-content restrictions on political advertisements that amounted to censorship under Section 315(a). These included: requests for indemnification of the station for potential defamatory content,[36] prior instances of channeling ads to certain dayparts,[37] and dictating the format of the advertisement.[38]

Forcing stations to slap an AI disclaimer on advertising clearly qualifies as "censorship" under Section 315(a) in the same way that the *Becker* court interpreted the statute, especially given, as we describe below, the overly broad and completely unusable definition of AI proposed in the AI NPRM.

C. The Backdoor Censorship Envisioned in the NPRM is Still Censorship Under Section 315(a)

Consider how broadcasters, cable operators and DBS providers will implement the rules. The proposed rules say only that they "must inquire whether any political advertising scheduled to be aired on its system contains any artificial intelligence-generated content . . . in writing" to the purchaser of advertising "at the time that an agreement is reached to air the political advertising on the system."[39] Regulated entities would have essentially two

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[35] *Id.* at 83 (citing In Radio Station WPAM, 81 F.C.C.2d 492 (1980)).

[36] *Id.* at 83-84 (citing D.J. Leary, 37 F.C.C.2d 576 (1972)).

[37] *Id.* at 84 (citing Gray Communications Systems, Inc., 19 F.C.C.2d 532, 535 (1969)).

[38] *Id.* (citing In re Inquiry Concerning "Equal Time" Requirements under Section 315, 40 F.C.C. 357, 359 (1962) ("the Act bestows upon the candidate the right to choose the format and other similar aspects of the material broadcast.")).

[39] AI NPRM at 23, 25, 26.

options for how to implement this requirement. First, they could make response to such an inquiry essentially optional—that is, make it possible for the ad purchase to proceed without the purchaser answering the question. This is, surely, not what the FCC intends, but neither is it clearly barred by the text of the proposed rules. We suspect that most counsel in this situation would advise regulated entities that they should, in fact, make the question mandatory—such that the purchase order (likely to be executed in virtually all cases through an online form) simply would not conclude without responding to this question, just as it would not proceed without providing other required information. That the rules do not address this question is unlikely to change the First Amendment analysis: in practice, regulated entities will require political advertisers to answer the question.

This answer is compounded by the FCC's proposal to essentially create a private right of action for interested third parties who can bombard broadcasters with claims that a certain political ad contains AI which is not disclosed.[40] A communications lawyer not

[40] *See, e.g.*, NPRM ¶ 15 ("Additionally, there may be instances where a station is informed by a third party that a political ad contains AI-generated content where there was no previous affirmative response to the station's inquiry. In these cases, should a station be required to re-inquire with the person or entity making the request for the purchase of airtime?"); ¶ 17 ("we seek comment on the appropriate actions for stations to take in cases where a station is informed by a credible third party that a political ad contains AI-generated content where there was no previous affirmative response to the station's inquiry or the station received a negative response to its inquiry. In these circumstances, should a station be required to follow up with the purchaser of the ad and/or insert the required disclosure?" (footnote follows); n. 57 ("A 'credible third party' could, for example, be defined to include the individual depicted in the advertisement or an individual officially associated with the event depicted in the advertisement. We seek comment on other third parties who would likely be able to provide credible information as to whether a political ad contains AI-generated content."); ¶ 21 ("In cases where a station is informed by a credible third party64 that a political ad contains AI-generated content where there was no previous affirmative response to the station's inquiry, should a station be required to insert the required disclosure?").

advising its broadcast clients to require a response to the AI question likely will be inviting future malpractice lawsuits.[41]

Faced with such a requirement to respond, how will political advertisers alter their behavior? How many political candidates will "back away from what he considers to be the most effective way of presenting his position"[42] because they fear that their ad will be less effective if it includes the required disclosure? When asked if their ad was generated by AI, will political advertisers understand that answering "yes" will result only in (1) a required disclosure and (2) listing in a database? How will regulated entities assure advertisers of this? Absent such certainty, how many political advertisers will fear some other consequence of saying "yes?" For either reason, how many will change the content of their ad to avoid having to say "yes" on the form—that is, engage in self-censorship which might result in far less engaging and/or effective ads?[43] To survive a legal challenge, both under the text of Section 315(a) and under the First Amendment, which undergirds the statute, the FCC will have to answer these questions.

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[41] This reality utterly belies the claim in the NPRM that the proposed regulations are "straightforward and simple." *See* NPRM ¶ 35 ("Our proposed definition of AI-generated content is straightforward and simple to apply. Thus, the administrative burden would be modest. Finally, we tentatively conclude that the means chosen to achieve the government's objective would satisfy First Amendment review. The proposed rules would not suppress speech by preventing or inhibiting candidates and other entities that sponsor political ads from using artificial intelligence to produce their ads.").

[42] *Becker v. FCC*, 95 F.3d at 83.

[43] If, as we discuss below, even use of Photoshop to clean up or boost the resolution of images, or Audacity to remove pops and noise from audio recordings constitutes AI, will political advertising look and sound like the 1950s? Will a high-definition public even tolerate such advertisements, or run to switch channels to avoid clearly substandard content?

D. The FEC Has Primary Statutory Authority of the Content of Political Advertising

While the AI NPRM at least acknowledges that there is another cop on the beat when it comes to federal elections,[44] it fails to recognize that it is the Federal Election Commission (FEC), not the FCC, which has primary jurisdiction over the content of political advertising.[45] Commissioner Carr's dissent makes this point directly:

> Let's start with the law. Congress gave the Federal Election Commission—not the FCC—the exclusive statutory authority to interpret, administer, and enforce the Federal Election Campaign Act. That includes the authority to establish disclosures for political communications on television and radio. The courts have recognized the FEC's unique authority to regulate political disclosures, even when other agencies attempt to circumvent or supplement its rules, concluding that "the FEC is the exclusive administrative arbiter of questions concerning the name identifications and disclaimers" for political communications.[46]

And it is not as if the FEC has been sitting on its hands. As the AI NPRM acknowledges,[47] the FEC has an active proceeding looking at exactly the same issue as the FCC wishes to address here: use of AI to produce misleading or deceptive political advertising. Last year, the FCC issued the following warning:

> The Federal Election Campaign Act (the ''Act'') provides that a candidate for federal office, employee, or agent of such a candidate shall not ''fraudulently

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[44] *See, e.g.*, AI NPRM ¶ 7 ("The Federal Election Commission (FEC) currently is considering a petition for rulemaking filed by Public Citizen requesting that the FEC amend its rules to clarify that existing campaign law prohibiting fraudulent misrepresentation by candidates for federal office and their agents applies to deliberately deceptive AI-generated content in campaign ads or other campaign communications."). The AI NPRM makes the nonsensical claim that the outcome of this proceeding "is meant to supplement, not supersede, any future actions taken by the FEC." *Id.* n. 33.

[45] 52 U.S.C. § 30106(b). *See also* Fed. Election Comm'n v. NRA Policial Victory Fund, 513 U.S. 88, 91 (1994).

[46] AI NPRM, Dissenting Statement of Comm'r Carr 2 (citing 52 U.S.C. § 30120; Galliano v. U.S. Postal Serv., 836 F.2d 1362, 1368–70 (D.C. Cir. 1988) (holding that the U.S. Postal Service may not impose its own disclaimer requirements on mailers soliciting political contributions)).

[47] AI NPRM ¶ 7 (citing 88 FR 55606 (Aug. 16, 2023) ("FEC Notice")).

> misrepresent'' themselves or any committee or organization under their control ''as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof.''[48]

The Communications Act contains no such language. The FEC is not ceding the field to the FCC in this area. FEC Chair Sean Cooksey wrote FCC Chair Rosenworcel regarding the impropriety of the FCC moving forward with its own rules related to use of AI in political advertising:

> Congress vested the FEC with the sole authority to interpret, administer, and enforce the Federal Election Campaign Act of 1971, as amended. This includes the disclaimer and reporting requirements specific to political communications set out under federal law. Indeed, federal courts of appeals have upheld the FEC's unique authority to regulate political disclaimers against other agencies' attempts to circumvent or supplement our rules, concluding that "the FEC is the exclusive administrative arbiter of questions concerning the name identifications and disclaimers" for political communications. Consequently, I maintain that the FCC lacks the legal authority to promulgate conflicting disclaimers requirements only for political communications.[49]

That letter cites two cases, including the Supreme Court's decision in *FEC v. NRA Policial Victory Fund*,[50] which convincingly argue that Congress has granted primary, and perhaps exclusive, jurisdiction over the content of political advertising to the FEC. In its haste to issue rules before the upcoming presidential election, the FCC has failed to provide a convincing argument that it, and not the FEC, should be the first government agency to address the use of AI in political advertising.

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[48] FEC Notice at 55606 (citing 52 U.S.C. § 30124(a)(1)).

[49] Letter from Sean J. Cooksey, Chairman, Fed. Election Comm'n, to Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n (June 3, 2024), https://www.fec.gov/resources/cms-content/documents/FEC_Chairman_Cooksey_Letter_to_FCC_Chairwoman_Rosenworcel_June_3_2024.pdf?os=vbkn42tqhoPmKBEXtc&ref=app (footnotes and citations omitted).

[50] Fed. Election Comm'n v. NRA Policial Victory Fund, 513 U.S. 88, 91 (1994).

E. The FCC's Role Under the 2002 Bipartisan Campaign Reform Act is Limited to Collecting Data, Not Promulgating Substantive Rules

That Congress has tasked the FEC, not the FCC, with overseeing election is made plain by the language in the Bipartisan Campaign Reform Act of 2002.[51] The NPRM cites the 2002 Act as a grant of substantive authority to issue the proposed regulations on AI.[52] Yet a full analysis of the 2002 Act shows how far beyond its fundamental statutory authority the FCC is reaching. Yes, Section 504 of the 2002 did add a public record requirement on broadcast licensees that has become Section 315(e).[53] But elsewhere in that statute, Congress made abundantly clear that the FCC's role is to set up the necessary reporting mechanisms so that the FEC can oversee and regulate elections. For instance, in Section 201(b) of the 2002 Act, Congress said the following related to the FCC:

> RESPONSIBILITIES OF FEDERAL COMMUNICATIONS COMMISSION.—The Federal Communications Commission shall compile and maintain any information the Federal Election Commission may require to carry out section 304(f) of the Federal Election Campaign Act of 1971 (as added by subsection (a)), and shall make such information available to the public on the Federal Communication Commission's website.[54]

Hence, the addition of a new subsection 315(e) to Title 47 did not confer on the FCC the type of substantive regulatory authority it claims in the NPRM, but rather, was merely Congress's way of implementing the data collection, retention, and public reporting Congress desired in Section 201(b) of the Bipartisan Campaign Reform Act.

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[51] Pub. L. No. 107–155, title II, § 201(b), 116 Stat. 90 (2002).

[52] NPRM ¶ 5 ("political file obligations have been embodied in section 315(e) of the Act since 2002.)"

[53] Bipartisan Campaign Reform Act, § 504.

[54] *Id.* § 201(b).

F. Any Rule Promulgated Will Be Vulnerable to Challenge After *Loper Bright*

As we have long predicted,[55] the degree of deference the Commission will receive from a court reviewing its statutory authority has changed. The Supreme Court recently declared:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.[56]

No longer can the FCC merely gesture at general "public interest" obligations of its licensees. A vague standard adopted in 1934 is no longer enough to carry the day."

> The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing court," to "decide all relevant questions of law" and "interpret . . . statutory provisions."[57]

Even if the FCC asserts technical expertise in this area (which, as we discuss below, it can't), that is no longer sufficient under *Loper Bright*.

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[55] *See, e.g.*, Comments of TechFreedom in IB Docket No. 18-313 at 6-8, Corbin Barthold, Chevron *is Dead, Long Live* Chevron, THE FEDERALIST SOCIETY (May 10, 2023), https://fedsoc.org/commentary/fedsoc-blog/chevron-is-dead-long-live-chevron.

[56] Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 35 (June 28, 2024).

[57] *Loper Bright Enters.*, slip op. at 29 (quoting 5 U.S.C. § 706).

> But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," and courts did so without issue in agency cases before Chevron.[58]

G. Even under *Skidmore* Deference, the Proposed AI Rules Will Fail

After *Loper Bright*, the only deference agencies will get is the older, and weaker, *Skidmore* deference,[59] and the arbitrary and capricious standard in Section 706 of the APA.[60]

Loper Bright describes *Skidmore* deference as follows:

> [I]n *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. Id., at 139–140. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[61]

Here too, the Commission is likely to fail, as demonstrated herein. The FCC has zero expertise in defining AI, let alone regulating it.

V. The Overbreadth of the NPRM's Definition of Artificial Intelligence Means the Rules Would Apply to Virtually All Political Ads, Making Disclosures Useless

The NPRM claims "the administrative burden [of the proposed rules] would be modest" because the "proposed definition of AI-generated content is straightforward and

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[58] *Id.* at 24 (citing Egelhoff v. Egelhoff, 532 U. S. 141, 161 (2001) (Breyer, J., dissenting)).

[59] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[60] Administrative Procedure Act, 5 U.S.C. § 706.

[61] *Loper Bright Enters.*, slip op. at 18.

simple to apply."[62] If the FCC achieves simplicity, it is only by casting a far wider net than it might first appear: the definition captures nearly all political ads in a world where "artificial intelligence" is rapidly becoming integral to all content creation. This is a problem in both practical and, as discussed below, constitutional terms.

The Commission seeks comment on how to define "AI-generated content."[63] The NPRM, however, disclaims "adopt[ing] a specific definition of 'artificial intelligence.'"[64] Instead, the NPRM cites definitions from "various organizations and statutes," including the statutory definition set forth in the National Artificial Intelligence Initiative.[65] The NPRM states: "In general, AI can encompass a wide range of technologies and functions, and AI technologies include programs that emulate aspects of human intelligence, such as a human voice."[66]

Although the Commission at first claims not to define artificial intelligence, the NPRM then turns around and proposes an extremely broad definition of *AI-generated* content which conflates artificial intelligence with a "computational technology or other machine-based system."[67] This conception of artificial intelligence is both broader and more simplistic than definitions used by lawmakers and courts in this rapidly changing area. Because of the

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[62] AI NPRM ¶ 35.

[63] *Id.* ¶ 11.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* ¶ 12. The Commission proposes to define "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."

breadth of the FCC's proposed definition, the rules would cover far more than AI-generated deepfakes and impersonations. As written, the proposed rules would apply to even mundane edits to campaign ads created using commonplace technologies like Photoshop and video and audio editing software. Under the proposed rules, essentially *every* political advertisement would trigger an AI disclosure, rendering the disclosures worthless and unworkable.

The only guidance the NPRM provides on its broad definition of artificial intelligence is to reference two statutes. The statutory definitions of artificial intelligence, however, are far narrower and more technically detailed than the FCC's proposed understanding.

A. The NPRM's Definition of Artificial Intelligence is Broader and Less Technical than the Statutory Definitions the Commission Cites as Authoritative.

The NPRM cites statutory definitions of artificial intelligence set forth in the Defense Authorization Act of 2019[68] and the National Artificial Intelligence Initiative of 2020.[69] Perplexingly, the NPRM's proposed definition of artificial technology differs significantly from these statutory definitions, which were crafted by Congress and set forth in law. The FCC's administrative definition casts a wider net over a large set of both advanced and rudimentary technologies.

The National Artificial Intelligence Initiative Act of 2020 defines "artificial intelligence" as:

> a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such

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[68] The Defense Authorization Act of 2019 defines artificial intelligence to include:

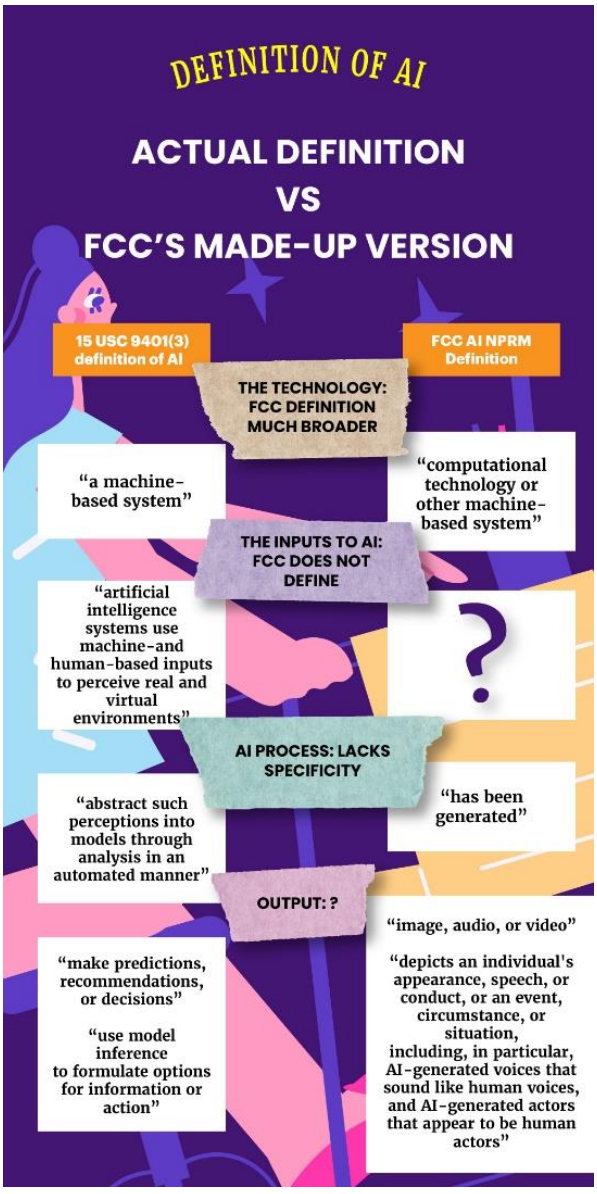
> (1) Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
>
> (2) An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
>
> (3) An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
>
> (4) A set of techniques, including machine learning, that is designed to approximate a cognitive task.
>
> (5) An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

Pub. L. No. 115–232, §238(g), 132 Stat. 1697-98 (2018).

[69] NPRM ¶ 11 (citing 15 U.S.C. § 9401(3)).

> perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action.[70]

This statutory definition is narrow and descriptive, focusing on the inputs, outputs, and processes encompassing artificial intelligence. Both the statutory definition and the NPRM define artificial intelligence as a "machine-based system." The NRPM, however, adds "computational technology," expanding the definition to cover a separate, broader category of tools.



That is where the similarity between the definitions ends. While the statutory definition of artificial intelligence includes using "machine and human-based inputs" and "objectives," the NPRM does not consider inputs, prompts, or the user—whether machine or human—at all. The statutory definition describes the process undertaken by artificial intelligence as "perceiv[ing]" information and "abstract[ing] such perceptions into models through analysis in an automated manner."[71] In contrast, the NPRM merely refers, in the passive voice, to

[70] 15 U.S.C. § 9401(3).

[71] NPRM ¶ 11.

"generat[ing]" content, without drilling down on the computational process behind the technology.[72] Whereas the statutory definition describes the outputs of artificial intelligence as "information or action,"[73] the NPRM specifies only "image, audio, or video."[74]

The FCC's proposed definition of artificial intelligence strays drastically from the statutory definition cited as authority by the NPRM. Overall, the FCC's proposed definition of artificial intelligence is broader and less technical than definitions used by lawmakers and courts.[75]

B. Effectively All Political Ads Broadcast or Carried on Cable or DBS Systems Would Have to Come with AI Disclaimers

For the purposes of the proposed rules, the NPRM proposes defining artificial intelligence as a "computational technology or other machine-based system."[76] This broad definition would cover a wide range of technologies that do not fall under the more stringent statutory definition of artificial intelligence—in particular, it sweeps in commonly used software for editing videos and photos. Virtually *all* advertisements, including political ads, use "computational technology" to generate and manipulate the contents of the media. For example, political ads splice together background images, music, text, and audio and video

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[72] *Id.* ¶ 12.

[73] *Id.* ¶ 12.

[74] *Id.* ¶ 11.

[75] *See, e.g.*, Vehicle Intelligence & Safety LLC v. Mercedes-Benz USA, LLC, No. 13 C 4417, at *6 (N.D. Ill. Sep. 18, 2014) ("An example of the application of an Artificial Intelligence system is a backward-chaining process that searches the knowledge base for rules to either verify or disprove that a patient has or doesn't have flu. The decision module will search for and apply rules in the knowledge base related to symptoms of flu. The application of those rules may verify the hypothesis or lead to other hypotheses and the application of additional rules. Also, the expert system must have a means of interfacing with a user.").

[76] NPRM ¶ 12.

of a candidates speaking via computers. Because the NPRM proposes such a broad definition of artificial intelligence, virtually all political advertisements would require a disclosure.

VI. The Proposed Rules are Unlikely to Satisfy First Amendment Scrutiny

The FCC's proposed rules apply specifically to political ads; thus, it "singles out political speech" and is, accordingly, "especially suspect."[77] If the FCC proceeds, such rules would likely be subject to "heightened scrutiny"—if not strict scrutiny, then at least exacting scrutiny. It would be difficult for the FCC to justify the proposed rules under either standard. While the NPRM suggests that some lower form of scrutiny should apply,[78] this is unlikely, and even if it did, the proposed rules would still be difficult to justify.

A. Laws Targeting Political Speech Are Presumptively Unconstitutional

In *Washington Post v. McManus* (2019), the Court of Appeals for the Fourth Circuit struck down a Maryland law that required "online platforms" to post information identifying the purchaser of political ads on their websites the individuals exercising control over the purchaser, and the total amount paid for the ad. Noting the practical necessities of implementing these requirements, the court said: "Faced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?"[79]

Political groups, the *McManus* court noted, are in the business of winning elections; they have "an organic desire to succeed at the ballot box."[80] But the operators of speech platforms have markedly different incentives: the "predominant purpose of hosting ads is to

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[77] Wash. Post v. McManus, 944 F.3d 506, 513 (4th Cir. 2019).

[78] *See* NPRM ¶ 29. *See also discussion infra* at § VI.B.

[79] *Id.* at 516.

[80] *McManus*, 944 F.3d at 516.

raise revenue."[81] This difference is crucial. Political groups' "ambition generally offsets, at least in part, whatever burdens are posed by disclosure obligations" imposed on them as "*direct participants* in the political process."[82] All regulation imposes some costs, and when the costs of disclosure requirements are on speech platforms, the effects are different: if a law "makes certain political speech more expensive to host than other speech because compliance costs attach to the former and not to the latter," it can have dramatic effects on speech: "when election-related political speech brings in less cash or carries more obligations than all the other advertising options, there is much less reason for platforms to host such speech."

This is not a hypothetical concern. Until recently, Twitter banned political advertising altogether.[83] Meta has significantly reduced the visibility of political content across Facebook and Instagram for its own reasons: "People have told us they want to see less political content, so we have spent the last few years refining our approach on Facebook to reduce the amount of political content—including from politicians' accounts—you see."[84] In general, online political advertising spending has dipped sharply.[85]

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[81] *Id.*

[82] *Id.* at 510.

[83] Kate Conger, *Twitter to Relax Ban on Political Ads*, N.Y. TIMES (Jan. 3, 2023), https://www.nytimes.com/2023/01/03/technology/twitter-political-ads.html.

[84] *Our Approach to Political Content*, META (Sept. 6, 2024), https://transparency.meta.com/features/approach-to-political-content.

[85] *Compare* Political advertising spending on Facebook and Google of selected presidential candidates in the United States between January and May 2020, Statista (July 24, 2023), https://www.statista.com/statistics/1025108/presidential-candidate-political-ad-spend-facebook-google-us/ (over $87 million between the two general election candidates); *with* Digital Ad Spending Nearly Even with TV in Presidential General Election, WESLEYAN MEDIA PROJECT (May 31, 2024),

The situation of the entities the FCC regulates might well be different; for them, political advertising might be more lucrative or they may simply more dependent on it, or they may have fewer incentives to turn it off. They may be willing to "bother" with costs, hassle and potential liability that would not be worth it for online platforms. They may, in other words, be willing to absorb costs imposed by regulation and continue to publish political ads, despite the addition of regulations like those proposed here.

But from a First Amendment perspective, the relevant question is more about compulsion than results. Here, the difference in how the law applies to online and offline hosts of political advertising is relevant. Broadcasters, DBS operators, SDARS operators, and cable operators are no less "platforms" for political speech than are social media sites—yet they are regulated differently. Only the former are subject to Section 315 of the Communications Act while Internet platforms are free to make decisions about what kind of political ads they want to take, how much they want to promote them, etc. Section 315 forces "broadcasting stations" (i.e., spectrum licensees)—a term that includes cable operators—either to carry no political ads or to carry *all* political ads, without exercising editorial judgments about them (i.e., exercising "censorship"). Online publishers, by contrast, remain free to reject some or all political ads.

Because courts have upheld Section 315,[86] the FCC may reasonably assume that its reliance on the statute rest on firm constitutional ground. But we are not so sure. Like other

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https://mediaproject.wesleyan.edu/releases-053124/ ($51.3 million in the same time frame in the current election cycle). *See also* Lauren Feiner & Jonathan Vanian, *Political advertisers shift spending from Facebook to streaming platforms ahead of midterms*, CNBC (Nov. 2, 2022), https://www.cnbc.com/2022/11/02/facebook-has-lost-political-ad-dollars-since-apple-crack-down.html.

[86] *See* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 381 F.2d 908, 920-22 (D.C. Cir. 1967).

broadcasting regulations in the Communication Act, this provision rests upon *Red Lion v. FCC* (1969). As we explain below, it is unlikely that the Supreme Court will ultimately uphold this case.[87] Here, we note only that giving broadcasters an all-or-nothing choice—either to host all political advertising or none at all—creates constitutional problems when combined with the proposed rules, whatever happens to *Red Lion*.

Even supposing that it is constitutional to bar "censorship" of political advertising for its substance—say, favoring one party's ads over the other—the proposed regulation raises a different issue because it creates a new kind of compelled speech: not the compulsion to carry all political ads regardless of their content but the compulsion to carry all political ads regardless of the tool by which they are created, and thus, effectively, to carry the disclosure required by the FCC. In other words, Section 315 continues to allow broadcasting entities to opt-out of carrying political ads altogether—but this is a financial impossibility. Given this reality, the proposed rules compel them to carry AI-generated content.

B. What Level of Scrutiny Will Apply?

The critical threshold question in litigation over the FCC's proposed rules would be what level of scrutiny applies. The FCC asserts that it will prevail regardless of what level of scrutiny applies.[88] A more prudent agency would approach the record in this case with a clear consideration of each potential levels of scrutiny.

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[87] *See infra* § VI.F.

[88] NPRM ¶ 29 ("While a content-based regulation of speech is typically subject to strict scrutiny, the Supreme Court has described First Amendment review of broadcast regulation as 'less rigorous' than in other contexts based on the spectrum scarcity rational. . . . We tentatively conclude that the proposed on-air disclosure and political file requirements comport with the First Amendment right to free speech, regardless which level of scrutiny applies.").

In *McManus*, the law at issue was a "a content-based law that targets political speech and compels newspapers, among other platforms, to carry certain messages on their websites," rendering it "a compendium of traditional First Amendment infirmities."[89] "When the government seeks to favor or disfavor certain subject-matter because of the topic at issue, it compromises the integrity of our national discourse and risks bringing about a form of soft censorship. For this reason, content-based laws are 'presumptively unconstitutional.'"[90] This presumption is "necessary to ensure that the marketplace of ideas does not deteriorate into a forum for the subjects of state-favored speech."[91]

The Fourth Circuit struck down the Maryland law without deciding "whether strict or exacting scrutiny should apply . . . because . . . the Act fails even the more forgiving standard of exacting scrutiny."[92] While "both place high hurdles before the government . . . strict scrutiny, in practice, is virtually impossible to satisfy, while exacting scrutiny is merely difficult."[93] The strict scrutiny standard is well-known: the statute "must be narrowly tailored to promote a compelling government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[94] It is exceedingly unlikely that the FCC's proposed rules could satisfy strict scrutiny, given the array of less restrictive alternatives available, such as spending taxpayer funds to educate voters about the growing potential for artificial intelligence to produce deceptive political

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[89] Wash. Post v. McManus, 944 F.3d 506, 513 (4th Cir. 2019).

[90] *McManus*, 944 F.3d at 513 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

[91] *Id.*

[92] *Id.* at 520.

[93] *Id.*

[94] United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000).

ads. Unnecessarily broad regulations "burn the house to roast the pig."[95] Under strict scrutiny, the FCC would certainly lose—"strict scrutiny leaves few survivors,"—and we do not further analyze its application here.[96]

Like campaign finance regulations, disclosure regulations are subject to exacting scrutiny, which may or may not be slightly less demanding.[97] Yet in general, "[t]he 'government may regulate in the [First Amendment] area only with narrow specificity,' and compelled disclosure regimes are no exception."[98] Exacting scrutiny requires "a 'substantial relation' between an 'important' government interest and 'the information required to be disclosed.'"[99] Sometimes, the Supreme Court has discussed exacting scrutiny in a way that suggests that it may be somewhat less demanding than strict scrutiny: it requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective."[100] But some appellate courts have seen no difference between the Supreme Court's discussion of exacting and strict scrutiny: discussing the Supreme Court's decision regarding false claims about military valors in *U.S. v. Alvarez* under an "exacting scrutiny"

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[95] Butler v. Michigan, 352 U.S. 380, 383 (1957).

[96] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002).

[97] McCutcheon v. Fed. Election Comm'n 572 U.S. 185 (2014) (plurality opinion) (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976)).

[98] Ams. for Prosperity Found. v. Bonta 141 S. Ct. 2373, 2384 (2021) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

[99] Wash. Post v. McManus, 944 F.3d 506, 520 (4th Cir. 2019) (quoting Buckley v. Valeo, 424 U.S. 1, 64-66 (1976)).

[100] *Bonta*, 141 S. Ct. at 2384.

standard, the Eight Circuit concluded that, "no matter the cloudiness of its usage in prior case law, the [plurality's application of 'the most exacting scrutiny' is interchangeable with strict scrutiny."[101] Other lower courts have seen little difference: "Both tests 'assess the fit between the stated governmental objective and the means selected to achieve that objective.'"[102] Thus, which test applies "makes no difference in the end."[103] Among legal scholars:

> Confusion remains as to what exactly is exacting scrutiny. Some posit that it is somewhere between strict and intermediate scrutiny. Others view it as synonymous with strict scrutiny. Still others view it as a type of strict scrutiny.[104]

This uncertainty bodes ill for the FCC's odds of defending its proposed rules.

C. Is There a Sufficient Government Interest?

Whatever the level of scrutiny, a court will begin its analysis by assessing the sufficiency of the government's asserted interest. The NPRM asserts that "the proposed on-air disclosure and political file rules would further the goals of the First Amendment and Communication Act by ensuring broadcasters and other regulated entities take reasonable measures to address potentially false, misleading, or deceptive political advertising and enhancing the public's ability to evaluate political ads, thus promoting an informed electorate and improving the quality of public discourse."[105] The NPRM claims that the FCC's "compelling interest" lies in "providing greater transparency regarding the use of AI-

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[101] 281 Care Comm. v. Arneson, 766 F.3d 774, 783 n.7 (8th Cir. 2014).

[102] Minn. Chamber of Commerce v. John Choi 23-cv-2015 at *12 (ECT/JFD) (D. Minn. Dec. 20, 2023) (quoting *McCutcheon*, 572 U.S. at 199).

[103] *Id.*

[104] David L. Hudson Jr., *Exacting scrutiny*, THE FIRST AMENDMENT ENCYCLOPEDIA (last updated on July 2, 2024), https://firstamendment.mtsu.edu/article/exacting-scrutiny/.

[105] NPRM ¶ 30.

generated content in political advertising, ensuring that voters have the information they need to make informed decisions about the political ads that are carried on broadcast stations and other affected facilities."[106]

The ultimate interest implicated by the NPRM is protecting the electorate from "false, misleading, or deceptive" political advertising. Indeed, the NPRM mentions "deception" or "deceptive" seventeen times. But whether the government has a compelling interest in protecting against false or deceptive political speech is not certain. In the context of laws prohibiting false campaign-related speech, where strict scrutiny has been uniformly applied, courts have expressed skepticism: one judge called such a government interest "patronizing and paternalistic . . . assum[ing] 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 . . . ."[107] And while the proposed rules are of the nature of disclosure rather than prohibition, the fact that it burdens "neutral third-part[ies] rather than direct political participants" exposes it to the potential of strict scrutiny—particularly in light of its content-based nature.[108]

But even under the lesser standard of "exacting scrutiny" typically applied to disclosure requirements imposed directly on campaign speakers, the FCC's asserted interest may not suffice. While the Supreme Court has held that "provid[ing] the electorate with

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[106] *Id.* ¶ 34.

[107] State v. 119 Vote No! Committee, 135 Wn. 2d 618, 631–32 (Wash. 1998). *See also* 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014) "([I]t is the citizenry that can discern for themselves what the truth is, not [government].").

[108] *McManus*, 944 F.3d at 512.

information"[109] 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,[110] 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.[111] 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 disclosures that she would otherwise omit."[112] 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. The majority of possible AI uses in advertisement production have no impact on truthfulness, and many non-AI production techniques may be utilized to create false or deceptive content.

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

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

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

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

D. Are the Rules Actually Necessary?

If strict scrutiny applies, the government bears yet another heavy burden: it must identify an actual, concrete problem in need of solving and demonstrate a "direct causal link" between the harm to be prevented and the restriction chosen by the government.[113]

In *281 Care Committee v. Arneson*, the U.S. Court of Appeals for the Eighth Circuit considered a challenge to a Minnesota law prohibiting the knowing dissemination of false information about a ballot question in any paid political advertising or campaign material.[114] 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.'"[115] While such an inference might be justified in protecting consumers from fraudulent *commercial* advertising under intermediate scrutiny,[116] it cannot be applied to non-commercial, political speech under strict scrutiny; and even under exacting scrutiny, such inference will not suffice in lieu of hard evidence as to causation.

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

[114] 766 F.3d 774 (8th Cir. 2014).

[115] *Id.* at 787.

[116] 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 Associates., Inc., 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

In *281 Care Committee*, the state failed to satisfy strict scrutiny; whatever the standard, said the appeals court, the Supreme Court had "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."[117] The Supreme Court, applying exacting scrutiny in *McCutcheon*, dismissed as "far too speculative" the fear motivating the hard campaign finance limits at issue in *Buckley* "that an individual might 'contribute massive amounts of money to a particular candidate through the use of unearmarked contributions' to entities likely to support the candidate,"[118] given the "the various statutes and regulations currently in effect."[119] In general, exacting scrutiny requires the government to establish a "reasonable probability" of the harms that supposedly justify regulation.

There is scant, let alone concrete, evidence that the use of AI in political advertisements poses an actual problem. In fact, the available evidence indicates the opposite: despite all the catastrophizing and hand-wringing, deceptive AI-generated campaign speech has not been prevalent in, or successful at influencing, any election cycle to date—including the current one.[120] This is no small part due to the fact that the electorate's

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[117] *281 Care Comm.*, 766 F.3d at 790-91.

[118] 572 U.S. at 188 (citing Buckley v. Valeo, 424 U.S. 1, 38 (1976)).

[119] 572 U.S. at 210.

[120] *See, e.g.*, Felix M. Simon et al., *AI's impact on elections is being overblown*, MIT TECH. REVIEW (Sept. 3, 2024), https://www.technologyreview.com/2024/09/03/1103464/ai-impact-elections-overblown/; Felix M. Simon et al., *Misinformation reloaded? Fears about the impact of generative AI on misinformation are overblown*, HARVARD KENNEDY SCHOOL MISINFORMATION REVIEW (Oct. 18, 2023), https://misinforeview.hks.harvard.edu/article/misinformation-reloaded-fears-about-the-impact-of-generative-ai-on-misinformation-are-overblown/; 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/.

awareness of AI's capabilities has ensured that such attempts are quickly and publicly discovered, refuted, and even outright mocked.

Moreover, current research on disinformation, political ads, and deepfakes suggest that AI's ultimate impact will *remain* limited. Multiple studies have found that deepfakes are not significantly more credible, persuasive, or emotionally manipulative than deceptive media produced without AI.[121] A review of current research also finds that the persuasive impact of misinformation and political ads *in general* appears to be relatively minor.[122] Given that the empirical evidence suggests the *absence* of a material threat from AI-produced campaign speech, the FCC will likely struggle to justify the necessity of its rules.

E. Are the Rules Adequately Tailored?

Even assuming the FCC can show a sufficient government interest, "the fact that an interest is 'important' in the abstract does not end the analysis. 'In the First Amendment context, fit matters.'"[123] The NPRM is likely inadequate to show that the proposed regulation is "narrowly tailored to achieve the desired objective."[124]

The NPRM asserts that the proposed rules would further the government's interest by "ensuring broadcasters . . . take reasonable measures to address potentially false, misleading, or deceptive political advertising and enhancing the public's ability to evaluate

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[121] Scott Babwah Brennen & Matt Perault, *The new political ad machine: Policy Frameworks for political ads in an age of AI*, CENTER ON TECHNOLOGY POLICE 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.

[122] *Id.* at 12–13.

[123] Wash. Post v. McManus, 944 F.3d 506, 520-21 (4th Cir. 2019) (quoting *McCutcheon*, 572 U.S. at 218).

[124] *McCutcheon*, 572 U.S. at 218.

political ads, thus promoting an informed electorate and improving the quality of public discourse."[125] It further asserts that the proposed rules are appropriately tailored because they are only triggered when the definition of "artificial intelligence" is met, and because regulated entities are entitled to rely on the representations of airtime purchasers.[126]

This analysis is woefully deficient. As a threshold matter, it is unclear whether the proposed rules in fact further the government's ostensible interest at all. If an advertisement contains AI-generated content, the broadcaster must simply disclose that the advertisement "contains information generated in whole or in part by artificial intelligence."[127] Particularly in light of the staggering breadth of the proposed rules' definition of artificial intelligence, such a generic, non-specific disclosure does little to assist the electorate in becoming better informed. The disclosure does not tell viewers or listeners which part of the advertisement is AI-generated, nor the type of AI-generated content involved. All the electorate will know is that somewhere within the advertisement, unspecified AI was used for some unidentified purpose. Viewers will be left to guess as to what, exactly, they should be on the lookout for, rendering the disclosure no more valuable than the generic statement: "this is a political advertisement and may contain false or misleading statements."

The FCC's proposed regulation also suffers from the same over- and under-inclusivity as the Maryland law, which did "surprisingly little to further its chief objective of 'combat[ting] foreign meddling in the state's elections.'"[128] There, the court found that

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[125] NPRM ¶ 31.

[126] *Id.* ¶ 32.

[127] *Id.* ¶ 17

[128] *McManus*, 944 F.3d at 521 (citing Wash. Post v. McManus, 355 F. Supp. 3d 272, 299 (D. Md. 2019)).

"foreign nationals rarely, if ever, relied on paid content to try to influence the electorate" and, in particular, that "Russian influence was achieved 'primarily through unpaid posts' on social media."[129] This was, Maryland conceded, the "primary mechanism" of supposed Russian influence, yet it was left "completely unaddressed" by the law. Further, the law did nothing about the range of content bought by foreign nationals, especially Russians, intended to sow division in America that did not qualify as "campaign material" covered by the Act. Thus, "while the Act strikes too narrowly in some respects, it also strikes too broadly in others."[130]

Likewise, the FCC's proposed regulation is both under- and over-inclusive. Above, we explain that the rules will apply to effectively all political advertising, given the breadth of its definitions.[131] The proposed rules' sweep includes countless uses of AI that pose no meaningful risk of misleading or deceiving voters—making it difficult to imagine a more over-inclusive law.

Yet, simultaneously, the law does much less than it promises. It aims to protect voters and the democratic process from false speech, but it addresses only one of many technological means for creating such speech—and does nothing to address the problem of deception of consumers by political ads more generally. 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

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[129] *McManus*, 944 F.3d at 521.

[130] *Id.*

[131] *See supra* § V at 23-25.

way,"[132] and may indicate that "a law does not actually advance a compelling government interest."[133]

The *McManus* court rejected the state's defense of a similar degree of under-inclusiveness:

> Maryland seems to grant that the Act fails to combat the lion's share of tactics used by foreign operatives in 2016. But the state seeks an indulgence, claiming the Act is the best it can do in light of "constitutional questions as to whether [Maryland] can regulate the unpaid speech of anonymous commenters on the Internet." Appellant's Opening Brief at 56. This "something is better than nothing" argument, however, is unavailing. Indeed, Maryland has offered no support for the proposition that courts should place a thumb on the exacting scrutiny scale for laws that are the "least unconstitutional" among available options. Nor could it. The First Amendment makes plain that any law burdening free speech must rise or fall on its own merits.[134]

The NPRM makes much of the purported obligation of broadcasters to "take reasonable measures to address any false, misleading, or deceptive matter."[135] But evidence of such an operationalized obligation with respect to political advertisements is hard to come by. Broadcasters need not preface political advertisements utilizing *traditional* deceptive editing methods with a disclosure, and indeed are expressly prohibited from rejecting even obviously false or misleading advertisements from qualified candidates. The proposed rules, on these facts, simply do not evince a serious, tailored effort to address an actual problem.

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

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

[134] *McManus*, 944 F.3d at 521.

[135] *See, e.g.*, NPRM ¶¶ 3, 30, 31.

F. Will a Lower Level of Scrutiny Apply?

"Although broadcasting is clearly a medium affected by a First Amendment interest," declared the Supreme Court in *Red Lion v. FCC* (1969), "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[136] The NPRM invokes it (though without citing it), suggesting that *Red Lion* applies and the standard of review would be rational basis review.[137] But the proposed regulations are obviously not content-neutral, and the NPRM concedes: "If the proposed rules are not considered content-neutral restrictions, then, with respect to broadcasters, the disclosure requirements will be reviewed under intermediate scrutiny."[138] Might intermediate—rather than exacting or strict—scrutiny apply?

Legal scholars broadly expect that it is simply a matter of time, and of choosing the right case, before the Supreme Court overrules *Red Lion*.[139] The Court has consistently refused to extend *Red Lion* to non-broadcast media.[140] Most notably, in *Turner Broad. Sys. v. FCC* (1994), the Court declared:

> the rationale for [*Red Lion*]—the dual problems of spectrum scarcity and signal interference--does not apply in the context of cable. Nor is the mere assertion of dysfunction or failure in the cable market, without more, sufficient

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[136] Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 386 (1969).

[137] *Id.* at 386-87.

[138] AI NPRM ¶ 28.

[139] *Turner Broadcasting*, 512 U.S. at 626; *see* Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1083-84 (1985); Donald E. Lively, *Modern Media And The First Amendment: Rediscovering Freedom Of The Press*, 67 WASH. L. REV. 599 (1992); Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1074-75 (1994); Lisa M. Chandler, *Turner Broadcasting System, Inc. v. Federal Communications Commission, 114 S. Ct. 2445 (1994)*, 5 DEPAUL-LCA J. ART & ENT. L. 215 (1994).

[140] *See, e.g.*, Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997) (discussing *Red Lion*, the court concluded that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

> to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media. Moreover, while enforcement of a generally applicable law against members of the press may sometimes warrant only rational basis scrutiny, laws that single out the press for special treatment pose a particular danger of abuse by the State and are always subject to some degree of heightened scrutiny.[141]

More recently, Justice Clarence Thomas aptly summarized the arguments for overruling *Red Lion* in his concurrence in *FCC v. Fox TV Stations, Inc.*:

> [*Red Lion*'s] deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional question, the Court relied on a set of transitory facts, *e.g.*, the "scarcity of radio frequencies," to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."
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> . . .
>
> Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago.
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> . . .
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> Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were.[142]

The Supreme Court has yet to revisit *Red Lion*. But across many cases in the last thirty years, the Court has consistently rejected the essential rationale of the case: it has declined to "to draw, and then redraw, constitutional lines based on the particular media or

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[141] *Turner Broadcasting*, 512 U.S. at 626.

[142] Fed. Commc'ns Comm'n v. Fox TV Stations, Inc., 556 U.S. 502, 531-33 (2009) (Thomas, J., Concurring) (citing *Red Lion*, 395 U.S. at 390; District of Columbia v. Heller, 554 U.S. 570, 634–635 (2008)).

technology used to disseminate political speech from a particular speaker."[143] "[W]hatever the challenges of applying the Constitution to ever-advancing technology," the Court said in 2011, "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[144] It is difficult, if not impossible, to reconcile this technologically neutral approach that with *Red Lion*'s denial of equal First Amendment protection to broadcasters.

VII. Conclusion

The FCC faces a steep uphill climb. Crafting a rule that has any chance of surviving legal challenges will require the agency to tailor the rules far more carefully than the NPRM does. Chiefly, this means narrowing the definition of artificial intelligence; hewing more closely to existing statutory definitions would be a good place to start. The FCC will, of course, also require firm evidence of a clear problem caused by AI-generated speech; mere conjecture about a loss of "faith in democracy" will not suffice. The FCC may be required to assess less restrictive alternatives to its proposal—and even if it is not, under some lower standard of scrutiny, thinking about the regulation in those terms would help craft a better-focused, more effective rule.

All of this counsels caution, and reinforces our principal advice: *slow down*. There is no way this proceeding could be completed responsibly in time to be implemented this election cycle, so there is no point in trying to do so. We question whether the FCC is the proper body to address this question, as may courts, but the FCC could perhaps play a

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[143] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 326 (2010).

[144] Brown v. Entertainment Merchants Assn., 564 U.S. 786, 790 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 503 (1952)).

constructive role—by consulting with the FEC on how it could exercise its existing authority or by advising Congress about its conclusions and the potential need for legislation. If the FCC could reach bipartisan consensus on at least some of the facts underlying the debate, if not specific policy recommendations, it could help both Congress and the FEC move forward.

Respectfully submitted,

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