

**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)	

Reply Comments of TechFreedom

TechFreedom, pursuant to Sections 1.415 and 1.419 of the Commission’s rules,¹ hereby files these Reply Comments in response to the Notice of Proposed Rulemaking issued by the Commission in the above-referenced proceeding on July 25, 2024.²

I. Singling Out Political Advertisements for Unique Regulations Triggers Heightened First Amendment Scrutiny

In the inevitable appeal of whatever rules the FCC promulgates in this proceeding, the legal standard of review will be critical, as it always is in regulations that impact the First Amendment rights of speakers. We pointed out in our comments that because the proposed

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 Reply Comments are timely filed.

rules apply only to political advertising, that the rules would be subject to at least heightened, if not strict, scrutiny.³ We thought that proposition so axiomatic that little further explanation was necessary.

Several comments argue otherwise, claiming that since the rules do not directly impact the content of political ads, they are content-neutral, subject to at most intermediate scrutiny.⁴ But these commenters jump directly to the second part of the analysis, as to whether the regulation directly impact speech content, without addressing the first part: whether particular speech is being subject to regulation different from other types of speech.

The Supreme Court and lower courts have been clear: Regulations that apply only to political advertisements are clearly non-neutral and therefore subject to heightened scrutiny.⁵ This is enough to settle the question: heightened scrutiny will apply.

II. How Can Regulating AI Content to Curb Deceptive Content be Content-Neutral?

Public Knowledge's own words belie their claim that the regulations don't look to the content of the political advertisement. "Content" is everywhere in PK's comments (the term

³ Comments of TechFreedom at 28 ("TechFreedom").

⁴ See Comments of Public Knowledge at 8-9 ("As content-neutral regulations, the FCC's proposed rules are subject at most to intermediate scrutiny, which assesses whether the regulation advances a significant governmental interest and is narrowly tailored to serve that interest."). See also Comments of Public Citizen at 10.

⁵ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (emphasizing that if regulations targeted political advertisements, they would be subjected to strict scrutiny); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1403 (8th Cir. 1995) (holding that the city's ordinance was subject to strict scrutiny because it was applicable only to political signs); *Wagner v. City of Garfield Heights*, 675 Fed. Appx. 599, 607 (6th Cir. 2017) (applying strict scrutiny to a regulation because it explicitly and exclusively targeted political signs); *Matthews v. Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (finding that town bylaw that barred the posting of political signs on residential property but permitted the posting of certain commercial signs was facially unconstitutional); *People v. Middlemark*, 100 Misc. 2d 760, 764 (Dist. Ct. 1979) (holding that an ordinance which proscribed political signs but allowed other signs in residential areas was subject to strict scrutiny).

is used 50 times). According to PK, rules are necessary to curb “fabricated content,”⁶ “realistic-seeming AI-generated content has the potential to mislead voters,”⁷ and “[t]here is real potential for AI-generated content to deceive voters, and deepfakes have already been deployed deceptively for political ends.”⁸ Yet PK still claims that the proposed rules are content-neutral.⁹ PK ultimately is caught up in its own tautology: “The Commission’s focus on the use of AI-generated content—rather than the message itself—ensures the proposed rules are content-neutral.”¹⁰ And further: “Given the focus of the proposed rules on addressing potentially deceptive AI-generated content, the Commission should adopt a definition more narrowly focused on that class of problematic content.”¹¹

As we stated in our opening comments, this entire proceeding has little to do with AI, and everything to do with content, and the FCC’s attempt to control allegedly “misleading” and “deceptive” political advertising content.¹² PK and others have fallen into that exact trap.

⁶ Public Knowledge at 1.

⁷ *Id.*

⁸ *Id.* at 2. *See also id.* at 2 (“There is a need for rules mandating disclosure of potentially deceptive ai-generated content in political ads.”); 3 (“The proposed definition of ai-generated content should be narrowed to focus on ‘potentially deceptive ai-generated content.’”).

⁹ *Id.* at 3, 8 (“The proposed disclosure requirements are content-neutral because they regulate the manner of communication rather than its content.”).

¹⁰ *Id.* at 9.

¹¹ *Id.* at 4.

¹² TechFreedom at 2 (“Misleading” is used 31 times in the NPRM, and “deceptive” is used 24 times).

III. Commentors Across the Political Spectrum Agree: the NPRM’s Proposed Definition of Artificial Intelligence Is Unworkable.

The NPRM claims: “The proposed definition of AI-generated content is straightforward and simple to apply.”¹³ Commentors across the political and ideological spectrum disagree.¹⁴ Commentors unilaterally responded that the proposed definition is overbroad,¹⁵ imprecise,¹⁶ and/or ambiguous.¹⁷ In a world where “computational technology” is integral to content creation, the definition would capture virtually all political ads.¹⁸ Consequently, the definition would be “self-defeating,” undermining the effectiveness

¹³ NPRM at 63388.

¹⁴ See Comments of Abundance Institute at 10; Comments of American Association of Political Consultants at 2-3; Comments of American Civil Liberties Union at 2-3; Comments of Americans for Prosperity at 3; Comments of Center for Data Innovation at 4; Comments of Institute for Free Speech at 5-6; Comments of Motion Picture Association, Inc. at 5; Comments of National Association of Broadcasters at 3, 5, 22; Comments of NCTA - The Internet & Television Association at 20, 23; Comments of NetChoice at 5-6; Comments of Nexstar Media Inc. at 3-4; Comments of NSRC at 2; Comments of Public Citizen at 5; Comments of Public Knowledge at 3-5.

¹⁵ Comments of American Association of Political Consultants at 2-3 (“[T]he definition of AI-generated content is also overbroad due to the inclusion of any content generated ‘using computational technology or other machine-based system.’”); Comments of National Association of Broadcasters at 3 (“[T]he FCC’s proposed definition of generative AI is overbroad, encompassing virtually all of today’s audio and video production methods, even if merely used to enhance color and lighting in a television ad or reduce background noise in a radio ad.”).

¹⁶ Comments of American Civil Liberties Union at 2 (“This proposed definition is imprecise and sweeps far too broadly, encompassing a wide range of content that is not deceptive, misleading, or fraudulent.”).

¹⁷ Comments of Abundance Institute at 10 (“This proposed definition of ‘AI-generated content’ suffers from ambiguity and overbreadth, creating uncertainty in its application and enforcement.”). Comments of Public Citizen at 5 (“[W]e recommend a refinement to avoid ambiguities that may lead to an overbroad definition.”).

¹⁸ Comments of American Association of Political Consultants at 2-3 (“Today, essentially all online content is generated using some form of computational technology or some machine-based system. As such, virtually all political advertisements could be subject to the FCC’s AI disclosure requirement, thereby making truly deceptive AI-generated ads indistinguishable from an ad that simply uses an AI tool to change a candidate’s hair color.”).

of the disclosures and complicating enforcement of the proposed rule.¹⁹ The glaring overbreadth of the proposed definition begs the question: what purpose would it serve to slap an AI disclaimer on every single political advertisement?

IV. New Empirical Studies Question the Efficacy of AI Labels

We noted in our Comments that, under the FCC's proposed definition of AI, virtually all political ads would have to come with an AI label.²⁰ We also pointed out that forcing the use of widespread disclaimers could significantly impact how a politician chooses to advertise, and how best to get their message across to voters.²¹ A new study has just been released, entitled "In Disclaimers We Trust: The Effectiveness of State-Required AI Disclaimers on Political Ads,"²² in which researchers have found that the mere placement of an AI disclaimer (or label) on a political advertisement reflects negatively on the politician running the advertisement. The researchers found:

AI labels hurt candidates who used generative AI. When ads contained AI disclaimers, respondents generally rated candidates less trustworthy and less appealing, candidates' ads less accurate, and indicated that they were less likely to like and more likely to flag or report the candidate's ads on social media. This pattern held across both deceptive and more harmless uses of generative AI. These results are broadly in line with the observed effects of

¹⁹ See Comments of Institute for Free Speech at 6.

²⁰ TechFreedom at 27-28.

²¹ *Id.* at 17 ("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" because they fear that their ad will be less effective if it includes the required disclosure.") (footnotes omitted).

²² See Scott Babwah Brennan et al., *In Disclaimers We Trust: The Effectiveness of State-Required AI Disclaimers on Political Ads*, NYU CENTER ON TECH POLICY 3 (Oct. 2024), https://techpolicynyu.org/wp-content/uploads/2024/10/CTP_In-Disclaimers-we-Trust_final.pdf.

funding disclosures on political ads and AI labels on news and social media content.²³

The researchers ultimately concluded: “Our initial results indicate that AI disclaimers on political ads may have some counterproductive effects, and may not reliably increase trust in political communication. For now, the costs of requiring disclaimers may outweigh the benefits.”²⁴

Thus, as we previously predicted, if the goal of this proceeding is to curtail the use of AI in political advertising, then the FCC is certainly on the right track. If this proceeding results in the regulations proposed in the NPRM, the ultimate result will be far poorer quality political ads, full of pops, buzzes, and hisses because audio editing software can’t be used, and fuzzy pictures and videos because Photoshop will be put back on the shelf. Baby Boomers and Gen Xers might enjoy the nostalgia of such ads, but younger media consumers will continue their exodus from traditional broadcast and cable to platforms boasting 21st century production values. If that’s the case, then all we can say is: Well played, FCC.

Respectfully submitted,

_____/s/____

James E. Dunstan
Berin Szóka
Ari Cohn
Andy Jung
TechFreedom
1500 K St., NW, Floor 2
Washington, DC 20005

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²³ *Id.* at 3.

²⁴ *Id.* at 4.