

November 6, 2023

Federal Election Commission  
Attn: Dara S. Lindenbaum, Chair  
1050 First Street, N.E.  
Washington, DC 20463

**RE: Artificial Intelligence in Campaign Ads, Notice 2023-13; 88 Fed. Reg. 55606**

Dear Ms. Lindenbaum,



**National Political  
Advocacy Department**  
915 15<sup>th</sup> Street, NW, 6<sup>th</sup> Floor  
Washington, DC 20005-2112  
aclu.org

**Deirdre Schifeling**  
National Political Director

**Anthony D. Romero**  
Executive Director

**Deborah N. Archer**  
President

The American Civil Liberties Union (“ACLU”) submits these comments in response to the Federal Elections Commission’s (“FEC’s”) above-referenced Notification of Availability of Petition for Rulemaking asking the Commission to amend its regulation on fraudulent misrepresentation of campaign authority to make clear that the related statutory prohibition applies to deliberately deceptive Artificial Intelligence campaign ads.”<sup>1</sup>

The ACLU is the nation’s premier defender of civil liberties, representing more than a million members. For over 100 years the ACLU has worked to protect free speech – a right that applies no matter the technology used. If the FEC moves forward with this rulemaking, we urge it to apply the same analysis to AI-generated speech that it applies to other instances of alleged fraudulent misrepresentation. Any amendment to the regulation should be carefully crafted to prevent infringement on First Amendment freedoms. In particular, the Commission must ensure that the regulation applies only to speech that is both objectively deceptive and intended to deceive.

**I. AI-Generated Speech Seldom Fits Within the Federal Election Campaign Act’s Fraudulent Misrepresentation Provision**

The FEC’s regulatory authority is limited to provisions that already exist within the Federal Election Campaign Act (FECA).<sup>2</sup> The FEC should not move beyond that authority, absent a Congressional mandate. Because AI-generated speech is not discussed in FECA, Public Citizen has requested that the FEC clarify when and how FECA’s prohibition on fraudulent misrepresentation applies to AI-generated campaign ads that are deliberately deceptive.

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<sup>1</sup>Artificial Intelligence in Campaign Ads, 88 Fed. Reg. 55606 (August 16, 2023).

<sup>2</sup> 52 USC Sec 30111

During a hearing on Public Citizen’s first petition for the FEC to regulate AI-generated campaign ads, Commissioners on both sides of the aisle expressed skepticism that FECA’s fraudulent misrepresentation provision was an appropriate vehicle for analysis.<sup>3</sup> According to Commissioner Dickerson, agency jurisdiction is limited to times when one candidate or their agent pretends to be the agent of another candidate.<sup>4</sup> We agree that the plain language of Section 30124(a) indicates that a speaker must impersonate their opposition, or claim to be speaking on behalf of their opposition.<sup>5</sup> Former Commissioner Lee Goodman has similarly interpreted Section 30124(b), which bars fraudulent misrepresentation in the solicitation of funds, as prohibiting “misrepresentations about one subject: the identity of the solicitor.”<sup>6</sup> Hence, under FECA, a fraudulent misrepresentation can only be found when the recipient of the communication questions the source of the communication, and not the content of the communication.

In contrast, AI-generated speech usually raises questions about the content of a communication, and not the source. For example, if a candidate includes a video of their opponent appearing to condone police brutality in their campaign ad, it would be unlikely to fit within statutory bounds because the misrepresentation goes to the content of the advertisement, rather than its source.

Only when campaigns affirmatively mislabel their ads as being from their opposition or otherwise impersonate their opposition is that ad likely to fall within the bounds of the fraudulent misrepresentation provisions of FECA. When a campaign communication about an opponent is properly labeled, a voter would be more likely to question the communication’s accuracy than its source. Accordingly, the FEC will be unable to use Sections 30124(a) and (b) to find that most AI-generated speech violates FECA.

## **II. RULES MUST PREVENT INFRINGEMENT ON FIRST AMENDMENT FREEDOM OF SPEECH**

Should the FEC move forward with a rulemaking to clarify or expand the fraudulent misrepresentation provision of FECA for AI-generated campaign ads, it must draw the line between protected AI-generated speech and impermissible fraudulent misrepresentations carefully. Any rules must not infringe upon core First Amendment freedoms, including the ability to effectively satirize one’s political opponents. Accordingly, these rules must treat AI-generated campaign ads the same as other campaign communications.

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<sup>3</sup> Jorja Siemons, *Deepfake Ads Strain Pre-AI Campaign Laws, Puzzling US Regulators*, *Bloomberg Law* (Jul 17, 2023), <https://news.bloomberglaw.com/privacy-and-data-security/deepfake-ads-rock-pre-ai-campaign-laws-puzzling-us-regulators>.

<sup>4</sup> Remarks of Federal Elections Commissioner Dickerson at Federal Election Commission Open Meeting on June 2023, <https://www.fec.gov/resources/cms-content/documents/2023062201.mp3>.

<sup>5</sup> See 52 U.S.C. § 30124 (Prohibiting a candidate from “fraudulently misrepresenting *himself*... as speaking or writing or otherwise acting for or on behalf of any candidate...”).

<sup>6</sup> *Policy Statement of Commissioner Lee E. Goodman* (Feb 16, 2018) at 5, available at [https://www.fec.gov/resources/cms-content/documents/Commissioner\\_Lee\\_E.\\_Goodman\\_Policy\\_Statement\\_-\\_Fraudulent\\_Misrepresentation.pdf](https://www.fec.gov/resources/cms-content/documents/Commissioner_Lee_E._Goodman_Policy_Statement_-_Fraudulent_Misrepresentation.pdf)

## **A. AI-Generated Campaign Communications are Protected Speech**

Campaign communications, as political speech, are “at the core of what the First Amendment is designed to protect.”<sup>7</sup> “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>8</sup> Furthermore, in order to ensure that “debate on public issues” remains “uninhibited, robust, and wide-open,” the First Amendment provides special protection to even allegedly false statements about public officials and public figures.<sup>9</sup>

AI-generated campaign communications are also entitled to these protections, unless they fall within recognized First Amendment exceptions such as libel or fraud. The “novelty of deepfake technology and the speed with which it is improving” do not justify relaxing the stringent protections afforded to political speech by the First Amendment. The Supreme Court has held that “whatever the challenges of applying the Constitution to ever-advancing technology, ‘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.”<sup>10</sup>

## **B. AI-Generated Campaign Communications Must be Treated the Same as Other Campaign Communications**

It is unclear whether this petition seeks for the FEC to merely apply its fraudulent misrepresentation analysis to AI-generated campaign ads without adequate disclosure, or whether it wants those communications to be deemed *per se* fraudulent misrepresentation. Specifically, the petition encourages the FEC to clarify that if candidates “fraudulently misrepresent other candidates or political parties through deliberately false AI-generated content in campaign ads or other communications – absent clear and conspicuous disclosure in the communication itself that the content is generated by artificial intelligence and does not represent real events – then the restrictions and penalties of the law and the Code of Regulations *are* applicable.”<sup>11</sup> (emphasis added). As described above, AI-generated campaign communications are entitled to the same protections as other speech. Accordingly, the FEC must evaluate these communications in the same way it would evaluate other campaign communications.

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<sup>7</sup>*Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)).

<sup>8</sup>*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

<sup>9</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>10</sup>*Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

<sup>11</sup>Public Citizen, *Second Submission: Petition for Rulemaking to Clarify that the Law Against “Fraudulent Misrepresentation” (52 U.S.C. §30124) Applies to Deceptive AI Campaign Communications*, (2023).

To find fraudulent misrepresentation under Section 30124, the FEC must find *both* intent to deceive and a reasonable likelihood of deceiving persons of ordinary prudence and comprehension.<sup>12</sup> Public Citizen’s petition appears to call for a presumption that AI-generated speech is published with an intent to deceive, as it states “fraudulent misrepresentation aims to damage the campaign of the deepfaked candidate.”<sup>13</sup> However, the fact that a statement could reasonably be interpreted as deceptive should not establish a presumption that the defendant published the statement with intent to deceive. The Supreme Court established in *New York Times Co. v. Sullivan* that any legal presumption of actual malice in cases involving speech about public officials or public figures is inconsistent with the First Amendment.<sup>14</sup> The FEC must, therefore, evaluate the intent of an alleged fraudulent misrepresentation on its merits.

In determining whether AI-generated campaign ad could be reasonably interpreted to convey an actual false fact about a candidate, as opposed to a satire, parody, or other protected opinion, it is insufficient to show that speech has confused just one, two, or even a group of people that may be particularly gullible.<sup>15</sup> Rather, the test must be objective: speech must be reasonably likely to deceive persons of ordinary prudence and comprehension. The reason for this becomes apparent when considering parody. “[T]he very nature of parody . . . is to catch the reader off guard at first glance, after which the ‘victim’ recognizes that the joke is on him to the extent that it caught him unaware.”<sup>16</sup> “Parody needs to mimic an original to make its point.”<sup>17</sup> Accordingly, “the First Amendment does not depend on whether everyone is in on the joke.”<sup>18</sup>

### **C. The FEC Must Not Require Disclaimers About Parodies**

As Public Citizen notes, the ability to parody or satirize an opposing candidate must not be impaired by these rules. Parody and satire are robustly protected under the First Amendment because they are critical components of political discourse.<sup>19</sup> Parody has “played a prominent role in public and political debate . . . [and] our political discourse would have been considerably poorer

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<sup>12</sup> See “fraudulent misrepresentation,” Blacks Law Dictionary (11th ed. 2019) (“A false statement that is known to be false or is made recklessly — without knowing or caring whether it is true or false — and that is intended to induce a party to detrimentally rely on it.”); see also *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010) (interpreting an analogous FECA provision, prohibiting fraudulent misrepresentation of a candidate or party for the purpose of soliciting contributions or donations, to apply only to express misrepresentations and representations “reasonably calculated to deceive persons of ordinary prudence and comprehension”).

<sup>13</sup> Public Citizen, *Second Submission: Petition for Rulemaking to Clarify that the Law Against “Fraudulent Misrepresentation” (52 U.S.C. §30124) Applies to Deceptive AI Campaign Communications*, (2023).

<sup>14</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 28384 (1964).

<sup>15</sup> See, e.g., *Farah v. Esquire Mag.*, 736 F.3d 528, 537 (D.C. Cir. 2013) (“The test . . . is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection).” (collecting cases)).

<sup>16</sup> See *San Francisco Bay Guardian, Inc. v. Super. Ct.*, 21 Cal. Rptr. 2d 464, 466 (Ct. App. 1993).

<sup>17</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994).

<sup>18</sup> *Novak v. City of Parma*, 932 F.3d 421, 427–28 (6th Cir. 2019).

<sup>19</sup> See *Hustler v. Falwell*, 485 U.S. 46 (1988) (holding that the First Amendment protects parodies of public figures from liability for intentionally inflicted emotional distress).

without them.”<sup>20</sup> Thus, “[penalizing] the publication of parody cannot be squared with the First Amendment.”<sup>21</sup>

Any rules adopted must be narrowly drawn so that parody is clearly exempted – not just from a prohibition, but from a disclaimer requirement. “A parody need not spoil its own punchline by declaring itself a parody. ‘Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).’”<sup>22</sup> As noted above, parody and satire often depend on the ability to catch the reader initially unaware before the true meaning of the statement is revealed on reflection.<sup>23</sup> Disclosure, even of the fact that a parody is AI generated, could easily jeopardize its comedic or rhetorical effect by calling attention to the fact that it is not true. The failure to include such a disclosure should not create a presumption that the communication is actually deceptive or that it was intended to deceive.

### III. Conclusion

The First Amendment provides robust protection for speech of all kinds. Speech that is false, confusing, or which presents content that some find abhorrent, can nevertheless maintain its constitutional protections as a driver of free discourse. This remains so no matter the technology used to speak. If the FEC moves forward with a rulemaking to regulate AI-generated campaign ads as fraudulent misrepresentations, it must do so with a mind towards protecting our right to free speech. Thank you for your attention to this matter. If you have any questions, please don’t hesitate to reach out to Jenna Leventoff ([JLeventoff@aclu.org](mailto:JLeventoff@aclu.org)).

Sincerely,



Christopher Anders  
Director, Democracy & Technology



Jenna Leventoff  
Senior Policy Counsel



Brian Hauss  
Senior Staff Attorney

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<sup>20</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>21</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (Byron, White, concurring).

<sup>22</sup> *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 n.17 (1994)).

<sup>23</sup> See, e.g., “Conservative Supreme Court Justices Get Matching Punisher Tattoos” *The Onion* (Oct. 11, 2023), <https://www.theonion.com/conservative-supreme-court-justices-get-matching-punish-1850917378>.