



October 16, 2023

Lisa J. Stevenson
Office of General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Comment on REG 2023-02 Artificial Intelligence in Campaign Ads

Dear Ms. Stevenson:

DNC Services Corp./Democratic National Committee (“DNC”) respectfully submits this comment in support of the Petition for Rulemaking by Public Citizen, REG 2023-02 Artificial Intelligence in Campaign Ads (“Petition”). The issue raised by this Petition — the deliberately deceptive use of Artificial Intelligence (“AI”) in campaign communications — is deeply concerning for our democracy, and the Commission should take bold action to prevent such conduct. And, as explained further below, the Commission has ample authority to undertake this rulemaking and to issue regulations on the deliberately deceptive use of AI in campaign communications under the fraudulent misrepresentation statute at 52 U.S.C. § 30124.

I. The Commission Should Regulate the Deliberately Deceptive Use of AI in Campaign Communications

Political advertising is a crucial aspect of political speech and can help foster an informed electorate. As such, media companies — including social media companies — should make every effort to facilitate political advertising. Paid advertisements are unsolicited communications, however, and should be subject to the highest standards of transparency and accuracy. Integrity standards are especially important in the modern media environment, where fragmentation and microtargeting make counterspeech aimed at correcting misinformation increasingly difficult.

The FEC’s prohibitions on fraudulent misrepresentations play a key role in preventing one avenue for deception by ensuring that voters have a clear understanding of the candidate or committee responsible for a paid political communication. This prohibition is especially important in the context of generative AI — technology enabling a new level of deception by quickly fabricating hyperrealistic images, audio, and video. Given the heightened risk of voter deception via generative AI, the FEC should make it clear that its prohibition on fraudulent misrepresentations also applies in cases where this new technology is used.

While federal regulations provide a legal bare-minimum standard of integrity for political advertising, media outlets facilitating advertising must go beyond these requirements and take responsibility for their role in preventing voter deception. Media outlets — including print, TV, radio, and digital media — should adopt policies of rejecting political ads that utilize deceptive, manipulated media — including generative AI — and other provably false depictions where they are allowed to do so. In most cases, dishonest candidates and committees can subvert the will of

the electorate with paid misinformation only if media organizations are also complicit in the deception.

II. The Commission has Authority Under the Act to Regulate the Deliberately Deceptive Use of AI in Campaign Communications

The Commission has clear authority to issue regulations clarifying the application and scope of the fraudulent misrepresentation statute at 52 U.S.C. § 30124.¹ In particular, the plain language of section 30124, its legislative history, history of related regulations, Commission decisions, and interpretation of courts makes clear that the statute prohibits a covered person from creating and distributing content that holds itself out to be a communication by another covered person. This includes the use of deliberately deceptive AI-generated content just as it covers less sophisticated forms of fraud. The regulated community will benefit from clarity on this topic, just as it has from other efforts by the Commission to update the scope of its regulations to address evolving technologies.²

Under the Act, a candidate or their agent or employee may not “fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party” or its agent or employee on a matter damaging to the candidate, party, agent, or employee.³ When a candidate creates a video or other content using AI that co-opts another candidate’s *identity* and purports to be the other candidate’s *own communication*, they are holding themselves out *to be* the other candidate. Under the plain text of the statute, they have “fraudulently misrepresent[ed]” themselves “as speaking . . . on behalf of . . . [the] other candidate.” Regulating this activity under the fraudulent misrepresentation statute, which is what the Petition requests, can be distinguished from regulating content that purports to be *about* another candidate, such as a retelling (accurate or not) of what the candidate said or did, a parody about the candidate, or commentary on the candidate’s positions.

The statute has been interpreted in line with this reading. During the 1974 debate on post-Watergate campaign reforms, Senator Bayh offered the fraudulent misrepresentation language as an amendment, explaining it was needed as a response to “the problem of ‘dirty tricks’.”⁴ One of the few court opinions interpreting this law explains that “a representation is

¹ See 52 U.S.C. § 30111(a)(8).

² See, e.g., *Internet Communication Disclaimers and Definition of “Public Communication,”* 87 FR 77467 (Dec. 19, 2022) (revising Commission regulations “in light of the nuances of internet advertising and the rapid pace of technological change—to ensure that the disclaimer rule also applies appropriately to newer forms of general public political advertising over the internet.”).

³ 52 U.S.C. § 30124(a).

⁴ 120 Cong. Rec. S5845 (Apr. 11, 1974). Sen. Bayh proposed the law in response to Nixon campaign operatives who “distributed documents bearing the letterhead of Senator Muskie’s campaign which falsely accused Senators Humphrey and Jackson of some of the most bizarre type of personal conduct.” *Id.* Similar to concerns over “deepfake” campaign communications, the operatives generated false media

fraudulent if it was reasonably calculated to deceive persons of ordinary prudence and comprehension.”⁵ And the U.S. Sentencing Commission described violations of what is now § 30124 as “especially malicious in that they are *designed to confuse the electorate* to the opponent’s detriment.”⁶ A bipartisan group of Commissioners has referred to fraudulent misrepresentations as “amongst the most egregious transgressions of our Act.”⁷ Thus, from its beginnings, the focus of the law has been preventing the confusion of the electorate through deceit.

The Commission’s own description of the scope of this statute favors clarifying the regulation of deceptive AI as requested in the Petition. A 2002 Explanation and Justification of 11 C.F.R. § 110.16(a), implementing the statute, explained that the law “encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent.”⁸ Media produced using generative AI, whether images, video, or otherwise, should be treated no differently. The law encompasses a candidate who distributes content — whether “letters,” deepfake videos, or otherwise — that is damaging to an opponent, and who fraudulently attributes the content to the opponent.

The Commission has applied the fraudulent misrepresentation statute not only where the entire communication appears to come from the victim of the fraud, but also where only a part of the communication does so. In MUR 5089, a campaign mailed out a letter with letterhead and a return address purporting to come from a political party, but also included the campaign’s own disclaimer on the back of the envelope.⁹ The Commission found reason to believe that the campaign violated the fraudulent misrepresentation statute.¹⁰ Despite the identification of the true sender, the controlling commissioners explained, “The clear intent, in our view, was to mislead the reader into believing that” the party, and not the campaign, sent the letter.¹¹ Then-Commissioner Goodman later held this decision up as an example of how there can be a violation even when the person distributing the communication can be identified through an adequate disclaimer:

that held itself out to be by another campaign and distributed it as though the other campaign really was saying those things.

⁵ *Fed. Election Comm'n v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010).

⁶ U.S. Sentencing Comm’n, *Report to Congress, Increased Penalties for Campaign Finance Offenses and Legislative Recommendations* (May 2003) (emphasis added).

⁷ MUR 5089 (Matta Tuchman for Congress, et al.), Statement of Reasons of Comm’rs Weintraub, McDonald, Thomas, and Toner at 1 (Apr. 2, 2004).

⁸ 67 FR 76968 (Dec. 13, 2002).

⁹ MUR 5089 (Matta Tuchman for Congress, et al.), Statement of Reasons of Comm’rs Weintraub, McDonald, Thomas, and Toner at 1-2. While this matter related to 52 U.S.C. § 30124(b), dealing with fraudulent misrepresentation in the fundraising context, the *actus reus* is the same as in § 30124(a), “fraudulently misrepresent[ing]” oneself “as speaking, writing, or otherwise acting for or on behalf of” a covered person.

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2. The Commissioners voted to close the file for unrelated reasons.

A proper disclaimer clearly and accurately identifies the person responsible for the solicitation. Therefore, it affords a strong presumption against finding misrepresentation. That presumption may nonetheless be defeated where an *explicit* misrepresentation in the text of a solicitation countermands an otherwise accurate disclaimer.¹²

As Commissioner Goodman explained, fraudulent misrepresentation under the statute is more than just putting a logo or photo of an opponent on a communication.¹³ It looks to whether a person of “ordinary prudence and comprehension,” in the words of *Novacek*, could tell who is actually speaking.¹⁴

If the misleading use of another candidate or party committee’s letterhead or return address can be regulated under the fraudulent misrepresentation statute, even when the true sender is disclosed on the communication via a proper disclaimer, the scope of the statute should certainly cover a “deepfake” video or other AI-generated false communication that co-opts the candidate’s *identity* and purports to be from that candidate. The clear intent is to deceive, and the speech involved is held out as not coming from the actual creator/distributor but from the candidate shown in the content.

This Petition presents a narrow request related to a critical issue involving the deliberately deceptive use of AI to “fake” a candidate’s identity and authority. It does not ask the Commission to regulate lying, record distortion, or parody in campaign communications. It is the proper role of the Commission to provide clarity to the regulated community that fraudulent use of this new technology is treated the same as “dirty tricks” committed using the technology of the Watergate era. When a candidate generates and distributes content that holds itself out to be an actual communication from an opponent, and it is on a matter damaging to the opponent, it is a violation of the fraudulent misrepresentation statute.

Respectfully Submitted,

Sam Cornale
Executive Director
Democratic National Committee

¹² Fed. Election Comm’n, *Policy Statement of Commissioner Lee E. Goodman* at 4 (Feb. 16, 2018) (emphasis in original).

¹³ *Id.*

¹⁴ *Novacek*, 739 F. Supp. 2d at 961.