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VIA SERS.FEC.GOV

Federal Election Commission
Attn: Robert M. Knop, Assistant General Counsel
1050 First Street NE
Washington, DC 20463

Re: REG 2023-02, Artificial Intelligence in Campaign Ads Rulemaking Petition

Dear Commissioners:

The Republican National Committee (“RNC”), by and through counsel, submits this comment in response to the Petition for Rulemaking filed by Public Citizen (the “Petition”).¹ The Petition asks the Federal Election Commission (“FEC” or “Commission”) to amend its regulations “to clarify that the law against ‘fraudulent misrepresentation’ (52 U.S.C. § 30124) applies to deliberately deceptive AI-produced content in campaign communications.”² Specifically, the Petition proposes that the Commission amend 11 C.F.R. § 110.16(a) to prohibit “candidates or their agents [from] fraudulently misrepresent[ing] 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.”³

Although the RNC is concerned about the potential misuse of artificial intelligence (“AI”) in political campaign communications, it believes that the Petition is not a proper vehicle for addressing this complex issue for several reasons. First, Public Citizen’s proposed rule, if adopted, would exceed the Commission’s statutory authority. Second, the contemplated rule would function as a content-based speech regulation subject to strict scrutiny and would raise serious constitutional concerns under the Free Speech Clause of the First Amendment. Finally, even if it were lawful, the proposed rule would do little to resolve the policy concerns Public Citizen identifies.

¹ 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 (July 13, 2023) (hereinafter, the “Petition”).

² *Id.* at 1.

³ *Id.* at 5.

I. The Petition’s Proposed Rule Would Exceed The FEC’s Statutory Authority.

The United States Supreme Court has “stressed over and over again in recent years” that courts and agencies must “heed” “what a statute actually says.”⁴ Public Citizen’s proposed rule is inconsistent with the unambiguous statutory text it purports to elucidate, raising concerns that the proposed rule, if adopted, would exceed the Commission’s statutory authority.

Section 30124(a) of the Federal Election Campaign Act of 1971, as amended (“FECA”), provides that a federal candidate may not “fraudulently misrepresent himself . . . as speaking or writing or otherwise acting for or on behalf of any other candidate . . . on a matter which is damaging to such other candidate.” In short, Section 30124(a) prohibits *impersonation* in federal campaigns by federal candidates and their agents. It “encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent.”⁵ Congress enacted Section 30124(a) in 1974 as the “principal legislative response to the past 18 months of Watergate revelations, to . . . the problem of ‘dirty tricks.’”⁶ In one such “dirty trick,” the Nixon campaign had “distributed documents bearing the letterhead of Senator Muskie’s campaign” that “falsely accused Senators Humphrey and Jackson of the most bizarre type of personal conduct.”⁷ It was “this type of activity” Section 30124(a) was “designed to deal” with.⁸

While AI-generated deception in political campaigns is undoubtedly a serious policy concern, Section 30124(a) does not reach it absent impersonation. Contrary to Public Citizen’s assertions, Section 30124(a) is not a “law against ‘fraudulent misrepresentation’” writ large.⁹ Rather, it is a law against a *specific kind* of fraudulent misrepresentation, *i.e.*, misrepresenting oneself as speaking for or on behalf of another candidate, *i.e.*, impersonation.¹⁰ Public Citizen’s proposal focuses on the words “fraudulent misrepresentation” and attempts to read the phrase “acting for or on behalf of any other candidate” out of the statute.¹¹

One of Public Citizen’s examples illustrates its problem. Public Citizen contends that the Ron DeSantis campaign “posted deepfake images of former President Donald Trump hugging Dr.

⁴ *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

⁵ FEC, Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76962, 76968 (Dec. 13, 2002) (“2002 FEC Rule”).

⁶ 120 Cong. Rec. 10,945 (1974) (statement of Sen. Bayh).

⁷ *Id.*

⁸ *Id.*

⁹ Petition at 1.

¹⁰ See, e.g., *United States v. Prall*, 2019 WL 1643742, at *2 (W.D. Tex. Apr. 16, 2019) (“The statute does not govern ‘fraudulent misrepresentations . . .’ generally; it governs fraudulent misrepresentation of campaign authority.”); 2002 FEC Rule at 76968 (Section 30124(a) “is aimed at fraudulent representation of campaign authority.”); Policy Statement of Commissioner Lee Goodman at 5, <https://tinyurl.com/4vxt4tj2> (“Section 30124(b) prohibits misrepresentations about one subject: the identity of the solicitor.”).

¹¹ See, e.g., *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (Interpreters must give meaning to “every clause and word of a statute.”).

Anthony Fauci” and implies that Section 30124(a) prohibits that conduct.¹² But Section 30124(a) plainly does not apply in this example. Imagine that Ron DeSantis states on television that “Trump used to hug Fauci all the time.” Even if completely false, that statement does not fall within Section 30124(a)’s reach because DeSantis did not impersonate Trump or purport to speak on Trump’s behalf. And the same logic applies if the DeSantis campaign says the same thing with AI-generated images. Only if the DeSantis campaign purported to be the Trump campaign—which it did not—would Section 30124(a) apply.

Public Citizen’s contrary view is also inconsistent with the Commission’s longstanding interpretation of Section 30124(a). In light of the statutory text, the Commission “has applied § 30124(a) only in limited circumstances.”¹³ Noting Section 30124(a)’s “narrow application,” the Office of General Counsel has explained that the provision “is not a broad prohibition [even] of all fraudulent misrepresentations of *identity*.”¹⁴ The Commission has repeatedly and consistently dismissed complaints that do not fall within Section 30124(a)’s narrow reach.¹⁵

For these reasons, the RNC shares Commissioner Dickerson’s publicly expressed concerns that the Petition’s proposed rule would exceed the Commission’s statutory authority.¹⁶

II. The Petition’s Proposed Rule Would Raise Serious Free Speech Issues.

Putting aside the statutory authority concerns raised above, expanding 11 C.F.R. § 110.16(a) to reach all AI-generated misrepresentations on the campaign trail, as the Petition proposes, would raise serious concerns under the First Amendment’s Free Speech Clause. The First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.”¹⁷ A regulation based on the content of the speech is “particularly troublesome”¹⁸ and must satisfy strict scrutiny—in other words, it must serve a compelling government interest and be narrowly tailored to advance that interest.¹⁹ The Petition’s proposed expansion of 11 C.F.R. § 110.16(a) would be a content-based speech regulation unlikely to survive judicial review.

The Petition contends that “[a] deepfake audio clip or video by a candidate or their agent that purports to show an opponent saying or doing something they did not do would violate”

¹² Petition at 2.

¹³ Matthew S. Raymer, *Fraudulent Political Fundraising in the Age of Super PACs*, 66 *Syracuse L. Rev.* 239, 247-52 (2016) (citing MUR 148 (Person Unknown), MUR 227 (Mowery), MUR 2205 (Foglietta), MUR 3690 (La Rocco for Congress), MUR 4919 (Charles Ball for Congress), MUR 4735 (Bordonaro for Congress), MUR 5089 (Matta Tuchman for Congress), MUR 5886 (Democratic Voters Choice)).

¹⁴ MUR 227 (Mowery), *Factual & Legal Analysis* at 1 (Sept. 21, 1976) (emphasis added).

¹⁵ See Raymer, *Fraudulent Political Fundraising*, 66 *Syracuse L. Rev.* at 247–52.

¹⁶ FEC, Video Recording of Open Meeting, at 1:50 (Aug. 10, 2023), <https://tinyurl.com/mrx6t2kv> (remarks of Commissioner Dickerson).

¹⁷ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

¹⁸ *Pursuing Am.’s Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016).

¹⁹ *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015).

Section 30124(a).²⁰ A rule promulgated to interpret Section 30124(a) in this way would be a content-based speech regulation because it would “require enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.”²¹ Assuming that the government’s asserted interest would be to prevent voter confusion caused by AI-generated campaign communications, the Petition’s proposed rule would likely not be sufficiently tailored to achieve this objective because it is substantially underinclusive. “Although ‘the First Amendment imposes no freestanding underinclusiveness limitation,’ a law’s underinclusiveness can indicate a poor fit and can raise doubts about whether the law advances the interests invoked by the government.”²² Here, the Petition’s proposed rule would only reach communications by candidates and their agents, and FECA already requires most such communications to bear an identification disclaimer. The Petition’s proposed rule would do nothing to address deceptive deepfakes circulated by non-candidate political committees, such as political parties or independent expenditure-only political committees, let alone third-party bad actors.

Public Citizen’s reading could chill protected speech, moreover, because the line between misrepresentation and political commentary may often be difficult to draw. A DeSantis campaign tweet stating that “Trump embraced Fauci” would fall within the core of free-speech protection. A DeSantis campaign tweet of a political cartoon showing Trump hugging or embracing Fauci would too. And a DeSantis campaign tweet of an AI-generated image of Trump hugging or embracing Fauci arguably is no different. Yet on Public Citizen’s reading, the last tweet is prohibited unless it also recites a government approved disclaimer.

Although the First Amendment does not protect fraud, “false speech receives some constitutional protection.”²³ The Supreme Court has concluded that a few specific categories aside, there is no “general exception to the First Amendment for false statements.”²⁴ Otherwise, the government could “compile a list of subjects about which false statements are punishable.”²⁵ And “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation.”²⁶ Usually, “[t]he remedy for speech that is false is speech that is true.”²⁷

²⁰ Petition at 3.

²¹ *McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

²² *Ted Cruz for Senate v. FEC*, 542 F.Supp.3d 1, 17 (D.D.C. 2021).

²³ *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016); *see also id.* (holding unconstitutional a statute prohibiting persons from disseminating false information about a candidate with knowledge or reckless disregard of its falsity).

²⁴ *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality); *see id.* at 733–38 (Breyer, J., concurring in the judgment) (agreeing the First Amendment does not permit speech regulation based on falsity alone).

²⁵ *Id.* at 723.

²⁶ *Id.* at 718.

²⁷ *Id.* at 727.

Public Citizen’s interpretation of Section 30124(a) advanced in the Petition raises serious constitutional concerns, which is another reason why the Commission should decline to proceed with a rulemaking.²⁸

III. The Petition’s Proposed Rule Would Do Little To Address Deepfake Harms.

Even if the Petition’s proposed rule were lawful, it would do little to address the policy concerns Public Citizen identifies. For one, many AI-generated deepfakes would likely originate from third-party bad actors—but Section 30124(a) reaches only the speech of candidates and their agents.²⁹ Moreover, FECA and FEC regulations already require disclaimers on the vast majority of communications originating from candidates and their campaign committees.³⁰ The preexisting disclaimer requirement largely resolves concerns with voter confusion in many instances. Finally, to the extent candidates or their agents use AI-generated content to fraudulently *impersonate* an opponent in a damaging manner, Section 30124(a) and 11 C.F.R. § 110.16(a) already prohibit this conduct. These provisions do not limit their application to certain modes of communication because, as explained above, the focus is on impersonation.

IV. Conclusion

The development of generative-AI presents unique regulatory issues, particularly in the context of political campaigns and elections. The RNC is concerned about the potential misuse of AI in political campaigns, but believes that the Petition’s proposed expansion of 11 C.F.R. § 110.16(a) is not the answer. There are serious questions about the legality of the Petition’s proposed rule, and it would not address the use of AI-generated deepfakes by third-party bad actors. For these reasons, the Commission should deny the Petition and instead ask Congress to take a holistic look at AI and enact a coherent statutory framework under FECA.

Respectfully Submitted,

/s/ Michael E. Toner

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²⁸ See, e.g., *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (Constitutional-doubt canon “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”).

²⁹ See Raymer, *Fraudulent Political Fundraising*, 66 Syracuse L. Rev. at 246 (“By its plain language, [Section 30124(a)] does not prohibit fraudulent misrepresentation by individuals not in those categories or groups such as super PACs and other nonconnected political committees.” (citing Commission precedents)).

³⁰ 52 U.S.C. § 30120; 11 C.F.R. § 110.11 (requiring identification disclaimers on all “public communications” made by a political committee, mass emails of more than 500 substantially similar communications sent by a political committee, and Internet websites of political committees).