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Federal Election Commission
1050 First Street NE
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I. Introduction

The Cyberlaw Clinic and the Election Law Clinic jointly submit this comment to urge the Federal Election Commission to act in response to Public Citizen's petition for rulemaking, as described at 88 Fed. Reg. 55606-01. We encourage the Commission to clarify the extent of its current statutory authority to regulate the use of artificial intelligence ("AI") in election campaigns and provide guidance on its use moving forward. While the Commission's authority may not reach all of the issues that AI-generated content poses for our democracy, the Commission should exercise the full reach of its authority. It should also provide guidance on the outer bounds of that authority to inform broader efforts to secure our elections from evolving digital threats.

Harvard Law School's Cyberlaw Clinic provides pro bono legal services at the intersection of technology and social justice. It seeks to promote a robust and inclusive online ecosystem that supports free expression, privacy, equity, and inclusion. The Clinic helps clients succeed in the context of existing law and works with clients to shape the law's development.

The Election Law Clinic at Harvard Law School ("ELC") aims to build power for voters through litigation and advocacy across a range of election law areas. ELC combats distortions in democracy by fighting voter suppression and intimidation, racial and partisan gerrymandering, minority vote dilution, and campaign finance abuses, among other issues facing our democracy. ELC is committed to ensuring voters can participate effectively in their government and are accurately informed to choose their representatives.

II. Scope of the Problem

An "explosion of misinformation deliberately aimed at disrupting the democratic process" over recent years has damaged public confidence in democracy and sown

political discord.[1] Surveys indicate that most Americans "believe[] that U.S. democracy is in crisis and is at risk of failing."[2] In one recent poll, 91% of adults said that "the spread of misinformation is a problem, with 74% calling it a major problem."[3] In the same poll, 80% of Democrats and 70% of Republicans said that "misinformation increases extreme political views," and 85% of Democrats and 72% of Republicans said that "misinformation increases hate crimes, including violence motivated by gender, religion or race."[4]

Widespread access to generative AI tools threatens to exacerbate this problem. Generative AI has been described as an AI system that can "generate content based on user inputs such as text prompts."[5] Generative AI has made the creation of new text, image, video, and audio easier and more accessible than ever before.[6] This expansion has led to an uptick in the generation of fraudulent content indistinguishable from human-generated content — typically referred to as "deepfakes." While false, deceptive, or misleading media is not a new problem, with increased access to AI content generation tools, the scale of the problem is growing: DeepMedia, a pioneer in AI-powered deepfake detection technologies, has projected an estimate of approximately 500,000 deepfakes to be shared on social media in 2023.[7]

Such deceptive communications are already proliferating. For instance, a fake clip of President Biden discussing a plan to reinstate the draft to support the war in Ukraine garnered over 8 million views earlier this year.[8] While this example is not a campaign advertisement in the traditional sense, political figures resharing deceptive media online is concerning, as it can influence public opinion and electoral outcomes. Several other instances further exemplify how manipulated media has been used to deceive the public and distort political narratives:

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[1] Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is Eroding the Public's Confidence in Democracy*, BROOKINGS (July 26, 2022), https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/.

[2] *Id.*

[3] David Klepper, *Poll: Most in US Say Misinformation Spurs Extremism, Hate*, AP (Oct. 13, 2022, 12:11 AM), https://apnews.com/article/religion-crime-social-media-race-and-ethnicity-05889f1f4076709c47fc9a18dbee818a.

[4] *Id.*

[5] Elliot Jones, *Explainer: What is a Foundation Model?*, ADA LOVELACE INSTITUTE (July 17, 2023), https://www.adalovelaceinstitute.org/resource/foundation-models-explainer/.

[6] Stuart A. Thompson, *Making Deepfakes Gets Cheaper and Easier Thanks to A.I.*, N.Y. TIMES (Mar. 12, 2023), https://www.nytimes.com/2023/03/12/technology/deepfakes-cheapfakes-videos-ai.html.

[7] Alexandra Ulmer & Anna Tong, *Deepfaking It*, REUTERS (Oct. 9, 2023), https://www.reuters.com/world/us/deepfaking-it-americas-2024-election-collides-with-ai-boom-2023-05-30.

[8] Mekela Panditharatne & Noah Giansiracusa, *How AI Puts Elections at Risk — And the Needed Safeguards*, BRENNAN CENTER FOR JUSTICE (July 21, 2023), https://www.brennancenter.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards.

1. **February 2023**: An interview with Senator Elizabeth Warren was doctored to make it appear that she argued Republicans should be restricted from voting in the 2024 election, instigating discord and division among voters.[9]
2. **April 2023**: The Republican National Convention released an advertisement depicting an AI-generated dystopian world, potentially misleading viewers about whether the events depicted had actually occurred.[10]
3. **May 2023**: Former President Donald Trump shared a manipulated video of CNN anchor Anderson Cooper, sowing mistrust in the media.[11]
4. **July 2023**: A PAC supporting Republican presidential candidate Ron DeSantis used AI to fabricate former President Donald Trump's voice for use in an ad portraying Trump as making a statement that he did not make.[12] Although the audio is not actually Trump, it may as well be to the millions of voters who have no reason to believe that the "recording" of Trump is a fabrication.[13]

The rise of AI-generated deepfakes presents formidable challenges to the integrity of democratic processes, particularly in the context of elections. As it becomes easier to produce and disseminate deepfakes, the risk of misinformation and manipulation in upcoming elections increases, presenting two related problems. First, rampant use of deepfakes may decrease voter trust in our democracy and the electoral process, as voters struggle to identify which campaign communications are real. Second, deepfakes may employ inaccurate information to provoke political division and unrest.

Moreover, while deepfake audio and video clips are themselves a major concern, recent advances in AI are likely to enable other forms of misinformation. Thanks to technologies like large language models, AI-powered systems are able to generate content on the fly and hold convincing "conversations" in real time.[14] This technology raises the spectre of interactive misinformation, which may be both more convincing and harder to detect than the already troubling uses of AI.

The problem of election misinformation is too great for any one body, public or private, to address on its own. Mitigating the harms posed by misinformation generally,

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[9] Claire Conway, *Video Showing Elizabeth Warren Saying Republicans Shouldn't Vote Is Not Authentic*, MSN (Mar. 2023), https://www.msn.com/en-us/news/politics/video-showing-elizabeth-warren-saying-republicans-shouldnt-vote-is-not-authentic/ar-AA180OuB.
[10] Sara Dorn, *Republicans Launch Eerie AI-Generated Attack Ad on Biden*, FORBES (Apr. 25, 2023, 11:21 AM), https://www.forbes.com/sites/saradorn/2023/04/25/republicans-launch-eerie-ai-generated-attack-ad-on-biden/?sh=1c138a9c4bc4.
[11] Dominick Mastrangelo, *Trump Shares Fake Video of Anderson Cooper Reacting to CNN Town Hall*, THE HILL (May 12, 2023, 10:56 AM), https://thehill.com/homenews/media/4001639-trump-shares-fake-video-of-anderson-cooper-reacting-to-cnn-town-hall.
[12] Alex Isenstadt, *DeSantis PAC Uses AI-generated Trump Voice in Ad Attacking Ex-president*, POLITICO (July 17, 2023, 6:21 PM), https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695.
[13] *Id.*
[14] Kate Knibbs, *Generative AI Podcasts Are Here. Prepare to Be Bored*, WIRED (May 24, 2023, 6:00 AM), https://www.wired.com/story/generative-ai-podcasts-boring.

or even generative AI specifically, will require multiple actors to coordinate efforts. Some private actors have taken initial steps in this direction. For example, users of X (formerly Twitter) used platform tools to flag a video from the DeSantis War Room as containing a fraudulent, AI-generated video of President Trump hugging Anthony Fauci.[15] And Google recently announced that it will "mandate all political advertisements label the use of artificial intelligence tools and synthetic content in their videos, images, and audio."[16] However, voluntary efforts by private actors are only part of the answer. With Public Citizen's petition, the Commission has the opportunity to illuminate its role in regulating a specific but significant form of election misinformation: AI-generated content from one candidate that misrepresents the position of another candidate.

III. The Commission has authority to regulate some uses of generative AI.

The Commission should initiate a rulemaking and hold hearings to clarify its existing regulatory reach under the fraudulent misrepresentation provision. By providing guidelines on its statutory authority, the Commission can pave the way for other actors such as Congress to craft a more comprehensive response to the threats generative AI poses to our elections.

a. The Commission should clarify that the Federal Election Campaign Act prohibits at least some uses of AI in political advertising.

Consider a contentious presidential race. One candidate's campaign hires an operative to run false ads on a controversial topic that seemingly come from an opposing candidate. Those ads are designed to weaken their opponent's support—and they work. This exact type of "dirty trick" by Richard Nixon's 1972 campaign—namely, running fake Edmund Muskie ads supporting the Cuban government—spurred Congress's adoption of the fraudulent misrepresentation provision in the 1974 amendments to FECA.[17] By intentionally characterizing those statements as coming from the opposing campaign, an agent of the candidate (here, Richard Nixon) "fraudulently misrepresent[s]" an "organization under his control" (here, the ad-maker) as "speaking [or] acting for or on behalf . . . of [another] candidate . . . on a matter which is damaging to such other candidate."[18]

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[15] DeSantis War Room (@DesantisWarRoom), X (June 5, 2023, 3:13 PM), https://twitter.com/DeSantisWarRoom/status/1665799058303188992.
[16] Rebecca Kern, *Google to Require Disclosure of AI Use in Political Ads*, POLITICO (Sept. 6, 2023, 3:11 PM), https://www.politico.com/news/2023/09/06/google-ai-political-ads-00114266.
[17] *See* Matthew S. Raymer, *Fraudulent Political Fundraising in the Age of Super PACs*, 66 SYR. L. REV 239, 244–46 (2016). When Senator Birch Bayh introduced the fraudulent misrepresentation provision, he explained that Nixon's campaign tactics to fraudulently disparage his opponents inspired what is now 52 U.S.C. § 30124(a). *See id.*; 120 Cong. Rec. 10,945 (Apr. 11, 1974).
[18] *See* 52 U.S.C. § 30124(a).

Today's candidates could turn to generative AI to accomplish the same subterfuge. A modern-day Nixon aide could use AI to generate a video of Muskie professing his support for the Cuban government and pay for a social media network or search engine to host the video as an ad. The core facts of the situation are the same. In both cases, a campaign operative "fraudulently misrepresents" an organization under his control as speaking or acting for a candidate in a way that damages the misrepresented party. They simply swap the technology of the 1970s for the technology of today. If anything, today's example is more troubling because a viewer would see not just a printed statement, but a convincingly portrayed "Muskie" professing his support for Cuba's government.

There should be little doubt that the Commission can address these instances of fraud. Candidate deepfakes by opposing parties provide clear examples of generative AI use in campaigns that is prohibited by the text and current understanding of FECA's fraudulent misrepresentation provision. An opposing candidate or campaign that undertakes this type of sabotage is an identifiable party bound by the Commission.[19] Absent a clear indication that the content does not represent the position of the opposing candidate,[20] such deepfakes are plainly intended to deceive voters. The Commission should make clear that the use of generative AI will not insulate fraudulent misrepresentation from current regulations.

b. The Commission should further clarify that the First Amendment protects some uses of generative AI in political advertising.

Any action by the Commission regulating campaign speech must fall within the strictures of the First Amendment — a concern that has been raised when it comes to regulating AI in campaign advertising.[21] Public Citizen's petition presents three cases of protected speech that would fall outside of FECA's scope: (i) "general use" of AI in campaign communications, (ii) parody, and (iii) AI-generated content accompanied by "sufficiently prominent disclosure." The Commission should explain that these, and potentially other uses of generative AI, are protected by the First Amendment.

The first case, general use of AI, highlights the fact that the Commission cannot and should not enact a total ban on the use of generative AI in campaign materials. The second case, parody, demonstrates that even facially false speech can be protected under

[19] *See, e.g.*, MUR #148 at p.4, Fed. Elec. Comm'n, https://www.fec.gov/data/legal/matter-under-review/148/ (noting that, without an identifiable party under reach of the statute, the Commission cannot apply §30214(a)); MUR #227 at p.4, Fed. Elec. Comm'n, https://www.fec.gov/data/legal/matter-under-review/227/ (declining to apply fraudulent misrepresentation provision when the misrepresented party was not damaged by the matter).

[20] *See* MUR #3690 at p.6, Fed. Elec. Comm'n, https://www.fec.gov/data/legal/matter-under-review/3690/ (noting that the presence of a disclaimer can negate "intent to deceive," which is a necessary component of fraudulent misrepresentation).

[21] Ali Swenson, *FEC Moves Toward Potentially Regulating AI Deepfakes in Campaign Ads*, PBS NEWS HOUR (Aug. 10, 2023), https://www.pbs.org/newshour/politics/fec-moves-toward-potentially-regulating-ai-deepfakes-in-campaign-ads.

the First Amendment under the right circumstances. By delineating uses of AI that constitute protected speech, the Commission can limit its regulations to false representations of fact.[22] Such a regulation would be more likely to survive constitutional scrutiny, as it would be appropriately tailored to a serious and well-defined problem: deepfakes of candidates created or distributed by opposing campaigns.

The third case, disclaimers, provides a way for the Commission to mitigate the harms of AI-generated election misinformation. The Supreme Court has upheld FECA's other disclosure requirements as satisfying exacting scrutiny in light of the important government interests at stake, such as informing voters, deterring corruption, and providing information necessary to enforce campaign finance law.[23] The Commission could constitutionally require some form of disclaimer on some AI-generated campaign content. However, the Commission could also explain that an advertisement with a disclaimer identifying what content is AI-generated is less likely to trigger the provisions of 52 U.S.C. § 30124(a) — especially if the disclaimer also notes who has paid for the advertisement. The Commission has issued guidance along these lines before, albeit not in the context of generative AI.[24] Amending the regulations to specifically address the effect of disclaimers would provide additional clarity for candidates and campaigns using AI tools.

c. By clarifying the extent of its authority under the Federal Election Campaign Act, the Commission would enable other institutions to act.

The Commission should, at the very least, make clear that using generative AI, rather than more old-fashioned strategies, to deceive voters will not insulate candidates from liability for fraudulent misrepresentation. However, we encourage the Commission to go further and clarify the application of the fraudulent misrepresentation regulations to the new cases that AI technology raises across the board. For example, what if Nixon were to enlist an army of operatives across the country to act as fake Muskie campaign workers, spreading the word that their candidate supported the Cuban government? In 1972, pulling off a con of this magnitude would have been a heavy lift. But today, with the advent of AI-driven chatbots, such a scheme may be on the horizon.[25] Further advances in generative AI technology will likely lead to still more misuses that jeopardize the electoral process.

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[22] *See Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact.").
[23] *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010); *McConnell v. FEC*, 540 U.S. 93, 196 (2003); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).
[24] *See supra* note 20.
[25] Nathan Beauchamp-Mustafaga & Bill Marcellino, *The U.S. Isn't Ready for the New Age of AI-Fueled Disinformation—But China Is*, TIME MAGAZINE (Oct. 5, 2023, 4:00 AM), https://time.com/6320638/ai-disinformation-china.

The Commission should explain how the FECA applies to such scenarios *before* they happen. It should take this opportunity to initiate rulemaking, hold hearings that examine these complex issues, and exercise the full reach of its regulatory authority. The Commission may find that some uses of generative AI, despite being technologically novel, fall within its existing authority to regulate fraudulent misrepresentation. It may find that others are beyond its regulatory power. A full rulemaking process would allow the Commission to identify these cases and consider other complex questions about the extent of its reach in the digital era. In this evolving landscape, it is incumbent upon the Commission to define its regulatory authority. And, to the extent that the agency finds that its authority is limited in this area, it should include AI-focused proposals in its legislative recommendations to Congress.

Mitigating the risks of generative AI in elections is an all-hands-on-deck undertaking. As it stands, the Commission cannot be — and should not be — solely responsible for responding to this challenge. However, it would be particularly consequential for the Commission to clarify its authority over generative AI in elections so other actors can understand where they may play a role. For example, the *Protect Elections from Deceptive AI Act*, which has bipartisan support in the Senate, would amend FECA to explicitly prohibit a broader set of entities from distributing materially deceptive AI-generated material in political advertising.[26] Delineating the current bounds of the Commission's statutory authority on AI use for fraudulent misrepresentation would aid Congress in its efforts to address the broader concerns that deceptive AI creates for our democracy.

IV. Conclusion

Election misinformation poses an urgent threat, and generative AI tools make that threat all the more pressing. We should not wait for our democracy to suffer further from distortion and manipulation before choosing to act. The Commission should exercise the full range of its statutory authority to prohibit fraudulent misrepresentation to curtail the creation and dissemination of candidate deepfakes by opposing campaigns. The Commission should also announce its stance on novel forms of AI-powered misinformation. The use of candidate deepfakes by opposing campaigns is just one specific use case among many where generative AI may be used to the detriment of voters. The Commission should articulate where it views the limits of its authority, so that candidates, campaigns, and — most importantly — voters are not left to wonder. While rising to the challenge of this new form of media will require broader legislative, cultural, social, and technical efforts, the Commission can and should do its part to address its piece of the puzzle.

[26] Rebecca Heilweil, *Senators Discuss New Legislation Focused On Deceptive AI and Elections*, FEDSCOOP (Sept. 12, 2023), https://fedscoop.com/senators-discuss-new-legislation-focused-on-deceptive-ai-and-elections/.

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The Cyberlaw Clinic and the Election Law Clinic request that the Commission initiate a rulemaking on this urgent matter. Should the Commission choose to hold a public meeting, we request the opportunity to provide testimony through representatives.

We appreciate this opportunity to share urgent concerns regarding generative AI and elections. Please feel free to reach out to Mason Kortz (mkortz@law.harvard.edu) and Daniel Hessel (dhessel@law.harvard.edu) should you have any questions.

Sincerely,

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