October 16, 2023

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") and Protect Democracy respectfully submit this comment on REG 2023-02, a petition for rulemaking which asks the Commission to clarify that federal campaign finance laws prohibiting fraudulent misrepresentation apply to the use of artificial intelligence (AI) in campaign communications (hereinafter, the "Petition").[1] In light of the substantial and growing threat to our elections posed by the deceptive use of AI, and because it is within the Commission's existing statutory authority to prohibit fraud in campaign communications, we respectfully urge the Commission to move forward with the rulemaking requested in the Petition.

AI presents a unique and significant danger of electoral fraud and deception.[2] Every election cycle, voters are inundated with political communications seeking to influence their vote, which candidates, PACs, and nominally independent groups spend billions of dollars to produce and disseminate. For voters to make an informed decision when casting their ballots, they must parse through these communications and decide what to believe about the candidates and issues. As such, to meaningfully participate in the democratic process, voters have to be able to evaluate the credibility and reliability of electoral messages and the underlying motivations of the people paying for them.

AI could make that task much more difficult, or even impossible, because it can be used to craft a very convincing and realistic misrepresentation of who is speaking, what is being communicated, or even whether the content being shown really happened. Anyone can use AI to easily produce and distribute "deepfake" visual and

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[1] Second Submission: Petition for Rulemaking to Clarify that the Law Against "Fraudulent Misrepresentation" (52 U.S.C. § 30124) Applies to Deceptive AI Campaign Communications (Jul. 13, 2023), https://sers.fec.gov/fosers/showpdf.htm?docid=423502.

[2] As used in this comment, the term "artificial intelligence" refers to *generative* artificial intelligence, which is "a type of artificial intelligence technology that broadly describes machine learning systems capable of generating text, images, code or other types of content, often in response to a prompt entered by a user." Owen Hughes, *Generative AI Defined: How it Works, Benefits and Dangers*, TechRepublic (Aug. 7, 2023), https://www.techrepublic.com/article/what-is-generative-ai/.

audio content that has been altered or fabricated, but which looks or sounds genuine and authentic. Voters exposed to political ads containing such content may be deceived into believing that what they are seeing or hearing is real, and might unwittingly make their voting choices based on a deliberately distorted view of reality.

Some of this is already happening; the potential misuse of AI to engage in fraud or deception is not merely theoretical. In recent months, candidates, parties, and independent groups spending money on electoral communications have used AI to create ads that present distorted and deceptively realistic content. These ads have included, *e.g.*, AI-generated fake images of former president Donald Trump hugging Dr. Anthony Fauci,[3] as well as AI-generated audio of candidates making inflammatory statements they never actually made.[4] Allowing AI to be used to create deepfakes that are intended to deceive voters is flatly incompatible with protecting voters' right to meaningfully participate in the democratic process.

Because AI could be used to undermine voters' ability to evaluate electoral communications, it could likewise frustrate candidates' and parties' efforts to effectively communicate their desired messages to voters. And in the foreseeable future, voters, being unsure that they can trust the messages they see and hear, may very well disengage from the electoral process entirely. A downward spiral of AI-based deception driving voter disengagement would be harmful to our democracy.

The threat of AI is real, and the Commission can and should confront it. The Commission has the authority, under the Federal Election Campaign Act ("FECA"), to prohibit fraudulent misrepresentation of campaign authority—*i.e.*, to prohibit a candidate, or an employee or agent of a candidate, from misrepresenting that the candidate, their campaign committee, or any other organization under their control is speaking for or on behalf of another candidate, party, or employee or agent thereof "on a matter which is damaging" to that candidate, party, or employee or agent thereof.[5] Put simply, a candidate cannot fraudulently misrepresent that another candidate is speaking to damage that candidate's electoral prospects.

The use of AI does not change the Commission's authority to combat electoral fraud. Section 30124(a), the provision of FECA that generally prohibits fraudulent misrepresentation of campaign authority, is not limited to specific tools or methods of communication. A candidate using AI to fraudulently "speak[] or writ[e] or

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[3] Steve Contorno and Donie O'Sullivan, *DeSantis campaign posts fake images of Trump hugging Fauci in social media video*, CNN (Jun. 8, 2023), https://www.cnn.com/2023/06/08/politics/desantis-campaign-video-fake-ai-image/index.html.

[4] Megan Hickey, *Vallas campaign condemns deepfake video posted to Twitter*, CBS News (Feb. 27, 2023), https://www.cbsnews.com/chicago/news/vallas-campaign-deepfake-video/.

[5] 52 U.S.C. § 30124(a).

otherwise act[] for or on behalf of" another candidate, party, or any employee or agent thereof on a damaging matter would therefore appear to fit squarely within FECA's existing prohibition, and there is value in the Commission making that explicitly clear through the rulemaking process. Indeed, numerous commissioners have previously commented that upholding principles of fairness and due process requires the Commission to clarify what the law prohibits "prior to civil enforcement—not after."[6] This rulemaking petition presents an opportunity to do just that.

It is worth noting that prohibiting fraudulent electoral communications, whether such communications use AI or non-AI tools—including, *e.g.*, Photoshop or a voice actor—is consistent with and in fact enhances the values advanced by the First Amendment. Voters have a recognized First Amendment interest in being able to assess the political messages they see and engage in the democratic process;[7] there is no countervailing First Amendment right to intentionally defraud or deceive voters.[8] A revised regulation clarifying that FECA prohibits the use of AI to fraudulently misrepresent campaign authority would rest on the firm constitutional footing that has for decades justified Section 30124's narrow prohibition.

Nor would an updated Commission rule specifically aimed at prohibiting deceptive uses of AI amount to a broad prohibition of AI in political communications, particularly if any rule provides a safe harbor for content that contains a clear and conspicuous disclosure that the content is generated by AI and does not represent

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[6]   Statement of Reasons of Vice Chair Cooksey & Comm'rs Dickerson & Trainor at 6, MUR 8062 (Garbarino), https://www.fec.gov/files/legal/murs/8062/8062_14.pdf ("The dual-candidate exception is a sorely underdeveloped feature of federal campaign finance law. The Commission has failed to draft an implementing regulation that adheres to the Act, and it has compounded that problem by offering at best ambiguous guidance on when and under what circumstances the exception applies. This lack of clarity creates significant risk for inconsistent and arbitrary enforcement against respondents, like Representative Garbarino, who are entitled to due process and fair notice about the limits of permissible conduct prior to civil enforcement—not after."); *see also* Statement of Reasons of Chairman Dickerson & Comm'rs Cooksey & Trainor at 4-5, MUR 7516 (Heritage Action for America), https://www.fec.gov/files/legal/murs/7516/7516_15.pdf ("[E]ven if the Commission could have agreed in this case on a rule for when donor disclosure for independent expenditures is required, as a matter of procedural due process, we would have declined the invitation to engage in after-the-fact rulemaking via the enforcement process.").

[7]   *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (noting the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace" (internal quotation marks omitted)); *Buckley v. Valeo*, 424 U.S. 1, 15-16 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) ("Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.").

[8]   *See* Richard L. Hasen, *U.S. v. Trump Will Be the Most Important Case in Our Nation's History*, Slate (Aug. 1, 2023), https://slate.com/news-and-politics/2023/08/trump-trial-2024-historic-jack-smith-indictment.html ("There is no First Amendment right to use speech to subvert an election, any more than there is a First Amendment right to use speech to bribe, threaten, or intimidate.").

real events. There may well be innocuous or even beneficial applications of AI in the creation and distribution of electoral communications, and wholly prohibiting such tools would be outside of the Commission's authority, and likely unconstitutional. But the Commission can issue a narrowly crafted rule that prohibits a candidate from using AI to create or disseminate content that fraudulently misrepresents what another candidate says or does to damage their electoral prospects.

To be sure, as currently written, Section 30124(a) limits the Commission's ability to comprehensively address the threat of electoral fraud using AI. The existing prohibition is limited to "a candidate for Federal office or an employee or agent of such a candidate" fraudulently misrepresenting themselves as speaking on behalf of another candidate "on a matter which is damaging" to that candidate. These qualifiers would thus appear to limit the Commission's ability to prohibit the exact same types of electoral fraud when authored by a super PAC, 501(c)(4), or other group not authorized or controlled by a candidate, or on a matter that is not "damaging" to another candidate.

These are unacceptably large gaps in the Commission's authority to prevent election fraud. In today's electoral landscape, super PACs and other outside groups—*i.e.*, groups that are not formally authorized by or affiliated with a candidate but nevertheless spend money on elections—generate a substantial proportion of electoral advocacy, and the Commission's apparent inability to prohibit deceptive uses of AI stemming from their activity is problematic. Likewise, selectively prohibiting only fraudulent messages that are "damaging" to a candidate risks overlooking other kinds of AI-powered election fraud, such as, *e.g.*, messages that deceive voters in ways that are harmful to the administration of elections. For instance, a communication that uses AI to fraudulently depict an election administrator telling voters that any prior criminal conviction permanently disqualifies them from voting could have a serious electoral impact, but would certainly not appear to be "damaging" to any particular candidate.

But only Congress can fill in these gaps in FECA, and indeed the Commission has routinely asked Congress to do so by removing the limits on Section 30124 discussed here. This would allow the Commission to better protect voters and the electoral system against fraud and deception, regardless of who is behind it—a candidate, PAC, or an independent group or individual—and irrespective of whether it concerns a matter that is damaging to a candidate.[9] At the moment, Congress is

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[9]   *E.g.*, Legislative Recommendations of the Federal Election Commission at 10 (Dec. 15, 2022), https://www.fec.gov/resources/cms-content/documents/legrec2022.pdf ("Congress should revise the prohibitions on fraudulent misrepresentation of campaign authority to encompass all persons purporting to act on behalf of candidates and real or fictitious political committees and political organizations. In addition, Congress should remove the requirement that the fraudulent misrepresentation must pertain to a matter that is "damaging" to another candidate or political party.").

deliberating what action to take regarding the use of AI in our elections, and CLC has advocated that it expand the Commission's authority to prohibit fraudulent misrepresentation, as well as passing legislation that prohibits deceptive AI and requires disclaimers for communications made with AI tools.[10]

While Congress decides how to respond to AI, however, the Commission should not wait and see; it should act. Section 30124(a) already prohibits precisely the sort of fraudulent misrepresentation that AI deepfakes could make more common, more convincing, and thus more damaging to our elections, and a Commission rule clearly stating that AI falls under the prohibition would offer clarity for the regulated community and increased protection for voters.

Accordingly, we respectfully urge the Commission to use its existing authority under FECA to clarify that the use of AI to engage in fraudulent misrepresentation of campaign authority is unlawful.

Respectfully submitted,

/s/ Saurav Ghosh

Saurav Ghosh
Shanna (Reulbach) Ports
Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005

/s/ Nicole Schneidman

Nicole Schneidman
Alexandra Chandler
Protect Democracy
2020 Pennsylvania Ave. NW, #163
Washington, DC 20006

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[10] Congressional Testimony of CLC's Trevor Potter on "AI and the Future of Our Elections" (Sep. 27, 2023), https://campaignlegal.org/document/congressional-testimony-clcs-trevor-potter-ai-and-future-our-elections.