Comments of Jennifer Huddleston, David Inserra, and Emma Hopp in response to Notice of Proposed Rulemaking on Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements

We appreciate the opportunity to provide comments related to the Federal Communications Commission (FCC)'s Notice of Proposed Rulemaking on "Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements." This comment does not represent the views of any particular party or special interest group, but is intended to assist regulators in considering the impact that such regulation would have on speech and the underlying concerns about the agency's authority to engage in such rulemaking.

In that regard, we seek to emphasize two key points:

- Disclosure requirements would impact a wide range of content and as a result could fail to achieve their goal of informing the public and deter the use of popular tools for beneficial purposes, restricting speech in the process;
- The Commission lacks the proper authority to engage in such rulemaking as Congress has not delegated it such authority and the issue more firmly falls within the scope of the Federal Elections Commission (FEC).

Implications for Speech

As in the case of many artificial intelligence (AI) policies, the definition in the proposed rule would cover a wide range of technologies and techniques that are increasingly common and predated the recent popularity of generative AI products. Such technology may be used for common editing practices such as removing background noise or a truck that drove through a shot, reaching a broader audience through creating auto-generated captions, or translating scripts into a foreign language. Such use of AI is not malign or manipulative, but rather benign or could even increase opportunities for improved knowledge and democratic participation. The definition also extends beyond just the depiction or voice of an individual to the depiction of "an event, circumstance, or situation." This definition is broad and will encompass nearly all imagery and sound produced by an AI technology in an election ad context regardless of whether there are any concerns that the AI is misleading or malign.

The broad nature of this definition will likely result in many ads requiring the proposed disclaimer which could undermine their effectiveness in seeking to inform the public about concerning manipulative use. If a large proportion of ads must start or conclude with a message to the effect of "[This] message contains information generated in whole or in part by artificial intelligence," many viewers will simply become fatigued or ignore the information. When

viewing an advertisement, many Americans already largely tune out the multiple notices that appear.[i] As a result, many consumers of AI-generated advertising will not associate such a notice with a reason for caution or scrutiny, even when some ads may be incredibly misleading or present "fake" depictions of a person. A warning label for everything effectively loses any meaning.

Despite what might be good intentions, there is some evidence that such efforts to warn consumers of potential misinformation or manipulated media contributes to higher levels of general skepticism, confusion, and mistrust.[ii] While the hope of this rule might be to create more informed, humble, and critical consumers of information, it may foster an unhealthy degree of mistrust towards politics and media in general. Since notices do not distinguish between benign and misleading uses of AI, viewers may adopt the same level of suspicion to both legitimate and dishonest sources. Counterproductively, such mistrust and suspicion may instead increase trust in false, misleading, or conspiratorial sources. Beyond the potential inefficacy of such widespread warnings in supporting consumer awareness, it will also make advertising more expensive. AI tools can increase efficiency and decrease costs in a range of industries and applications, including political advertising. If providers are less likely to offer AI tools or feel they must avoid them to assure consumers trust the content, such ads would likely require the use of more costly tools and more time for development. Additionally, if some of the time of each AI-generated ad needs to be dedicated to some sort of notice, then that simply leaves less time for meaningful political messaging. This means legitimate users with limited budgets may be faced with the choice to shorten their messages or to buy longer advertisements to compensate.

The proposed rule also presents a challenge to advertisers in that it imposes different and more cumbersome rules for TV and radio advertising than online or other advertising. The lack of uniform advertising regulations will complicate the production of advertisements. Advertisers wishing to use a similar ad on TV and online may need to craft and keep track of variations of the same ad, some with the notice and some without. Already, online advertising is cheaper and often better able to reach audiences than broadcast advertising. If regulation further raises the cost or prohibits the use of common tools, this may further accelerate the trend towards online advertising.

The proposal claims that it does not otherwise wish to "restrict the use of AI-generated content in political ads." However, given the prevalence of AI in a variety of media products, this proposal might deter the use of common tools by increasing the cost of advertising while failing to improve audience education. Additionally, the FCC rule would target the potential use of AI in only one context, potentially disfavoring political speech over other types of speech.

FCC Lacks Authority and Such a Rule Would Be Unlikely To Survive a Court Challenge

The FCC has had a limited role in the world of political advertising with this authority being both more clearly delegated to and interpreted in the scope of the FEC. The FEC has stated it does not intend to pass rules on the use of AI in political advertising this year.[iii] This decision not

to act does not change the traditional roles of the two agencies nor the authority Congress has granted them.

The FEC typically has authority in determining the need for disclaimers for political advertising in public communications.[iv] The definition of public communications applies to various kinds of media, including the internet as well as more traditional methods of advertising in broadcast and print media. The Federal Communication Commissions (FCC)'s rules around political programming and advertising state that the agency does not review or approve the content of political ads.[v] A requirement to disclaim a political ad's usage of AI would not fall under the jurisdiction of the FCC, but rather would function as an extension of the FEC's authority.

Recent shifts in administrative law would mean the FCC would be unlikely to successfully justify its interpretation of its authority to include such action. The 2024 case *Loper-Bright Enterprises v. Raimondo* overturned *Chevron* deference, which applied to an agency's interpretation of an ambiguous statute, including interpretations regarding its own authority.[vi] This means that the FCC's interpretation that it now has authority to regulate the disclaimers for political advertising would be unlikely to receive deference from the courts. However, given the existing FEC authority around political advertising and the existing delegations to that agency, the issue may not even meet the necessary ambiguity requirements under the prior *Chevron* test.

The FCC should be cautious of taking an expansive approach to regulation that could diminish the agency's bipartisan and measured reputation both in the eyes of the public and of Congress. Already the agency's actions around attempting to reinstate "net neutrality" have been rebuked in court as an overstep of its authority based in part on the lack of deference post *Loper-Bright* as well as the major questions doctrine.[vii] Attempting to further expand its authority once again to encompass AI and political ads would seem to be even more clearly overstepping the agency's boundaries. Continued actions could bring greater Congressional scrutiny, restraints on the agency, and public skepticism.

<u>**Conclusion**</u>

AI is an exciting and beneficial technology, but like many new communications technologies, has also been met with fears and concerns about the impact it could have when used in the context of an upcoming election. However, history has shown that through societal norms and education we often are able to overcome concerns about the potential manipulation from new technological tools and forms of media.[viii] The FCC should consider restraint, particularly given the potential impact on speech and innovation. Decisions around AI in political advertising would also expand the Commission's scope beyond what its current Congressional authority grants, raising new concerns about agency overreach into political discourse — and new technologies more generally — without a proper grant of authority.

[i] Kesten C. Green and J. Scott Armstrong, "Evidence on the Effects of Mandatory Disclaimers in Advertising," *Journal of Public Policy & Marketing* 31, (2012): 293-304.

[ii] Michael Bang Petersen, *Empowering Audiences – Against Misinformation Through "Prebunking"* (Aarhus: The Future of Free Speech, 2023) and Kesten C. Green and J. Scott Armstrong, "Evidence on the Effects of Mandatory Disclaimers in Advertising," *Journal of Public Policy & Marketing* 31, (2012): 293-304.

[iii] Ashley Gold, "Scoop: FEC Won't Act on AI in Election Ads This Year," *Axios*, August 8, 2024.

[iv] "Advertising and Disclaimers," Federal Election Commission, accessed August 29, 2024.

[v] "Political Programming," Federal Communications Commission, accessed August 29, 2024.

[vi] Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024).

[vii] Randolph J. May, "The Sixth Circuit Stays the FCC's Latest Net Neutrality Flip-Flop," *FedSoc Blog (blog)*, August 23, 2024.

[viii] Jeffrey Westling, "Are Deep Fakes a Shallow Concern? A Critical Analysis of the Likely Societal Reaction to Deep Fakes," paper presented at TPRC47: The 47th Research Conference on Communication, Information and Internet Policy 2019, July 24, 2019.