Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Disclosure and Transparency of Artificial	)	MB Docket No. 24-211
Intelligence-Generated Content in Political	)	
Advertisements	)	

To: The Commission

JOINT REPLY COMMENTS OF THE STATE BROADCASTERS ASSOCIATIONS

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TABLE OF CONTENTS

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	)	
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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi

Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys in this matter, hereby file these Joint Reply Comments in the above-captioned proceeding.[1]

SUMMARY AND INTRODUCTION

The NPRM and some commenters in this proceeding characterize generative artificial intelligence ("AI")—to the extent it might be misused in broadcast political advertising to create deceptive and misleading messages—as an out-sized, existential threat to American democracy. Based on this premise, they propose requiring broadcasters to, among other things, add on-air disclosures to political advertisements that contain content generated through the use of AI, all

[1] *Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements*, Notice of Proposed Rulemaking, MB Docket No. 24-211, FCC 24-74 ("NPRM") (rel. July 25, 2024).

without regard to whether those advertisements are in fact deceptive or misleading. In each case, these advocates simply assert that the burden on broadcasters will be "negligible."[2]

However, these assertions rest on a lack of understanding of the FCC's political advertising rules, the mechanics of advertising (and broadcast advertising in particular), and ignore that there is nothing novel about each new technological development creating a risk of misuse to support deceptive political messages. They also ignore the near certainty that the vast majority of AI uses in advertising will be positive, or at worst, benign. Damning a technology rather than a particular use to which it may be put is both shortsighted and harmful to the public, candidates, and, as collateral damage here, broadcasters. Moreover, the NPRM's focus on broadcasters is misguided, as history has shown without question that the greatest risk from "deepfakes" occurs on non-broadcast platforms where the barriers to entry are low and deference to even anonymous advertisers is high. Worse, the predominantly digital platforms from which these deepfakes are distributed lend themselves to—and in fact are designed for—assisting such sensational content to go viral, greatly multiplying its impact, particularly when it is relayed to the public via a friend or family member.

In seeking to diminish the risk of deepfake political ads through the NPRM's peculiar focus on broadcasting, the Commission is fishing in a pond with its back to the ocean as the *Jaws* theme plays. Meanwhile, the broadcasters targeted by the NPRM for additional burdens and expenses—while political advertisers and their ad dollars are driven from broadcasting into the arms of digital platforms—are the entities best positioned to shed light on false and deceptive political content through their news operations. The Commission should support them in this

[2] Comments of the Brennan Center for Justice, MB Docket No. 24-211 (September 19, 2024) ("Brennan Center Comments") at 8.

mission, not obstruct their path with the unworkable and heavy burdens proposed in the NPRM or the even worse ones advocated by some commenters.

Despite the hyperbolic language used to describe the threat, the solutions proposed will not bring about the results the NPRM claims, and certainly not without causing far greater harm to the public, candidates, and broadcasters. The proposed definition of AI is so broad that it would appear to encompass nearly all political advertisements made using modern equipment and routine editing techniques. In addition, the proposed disclosure would apply to all ads using such equipment and techniques, whether the result is deceptive or not. Thus, broadcast audiences will be exposed to a deluge of disclosure announcements on-air. At best, audiences will grow numb to them and ignore them, negating any value they might have. In the middle, audiences will assume all political speech containing such disclosures is a deepfake, even when the message is completely true. At worst, they will grow accustomed to such disclosures via broadcast ads and interpret the lack of such disclosures in online deepfake ads as evidence that the government has determined that content to be accurate, eliminating the need for it to contain such a disclosure. Under any of these scenarios, the NPRM's proposals make political discourse worse, not better.

And even that ignores the overall harm here, which is that the disparity in disclosure requirements between broadcasting and *nearly every other media* will cause political advertisers to abandon broadcast advertising in favor of media platforms where their messages will not be branded with a scarlet letter. It wouldn't even matter if those advertisers are undisturbed by being so branded—the simple fact is that when they buy a thirty-second broadcast radio spot and don't get to use the full 30 seconds for their political message, they will place their advertising on non-broadcast media that don't have an "FCC speech-time tax" on them.

Quite simply, the FCC does not have jurisdiction over the necessary parties—political advertisers who create the ads and are in the best position to know whether AI was used in them, and the online and other media platforms where the risks from deepfakes are far greater—to implement an effective solution to the problem posited by the NPRM. And, as detailed in these Joint Reply Comments, a broadcaster-only solution is far worse than no solution at all.

That fact by itself is result-determinative here. But even were it not, given that the proposals set forth in the NPRM (the "Proposals") will not achieve their stated goal, the burdens they heap upon broadcasters cannot be justified. The Proposals are largely unworkable in real-world conditions, and the burdens placed on broadcasters are immense. Financially, it appears that the Proposals intend for individual broadcasters to either (a) insert the disclaimer over the spot's content, obliterating political speech, or (b) forego other ad revenue to free up the additional airtime necessary to add the required disclosures before the spots, effectively donating station airtime to campaigns and political action committees. In doing so, the NPRM overlooks the impact that would have on broadcasters' ability to comply with nearly every other political rule policed by the Commission.

While both of the above options are bad choices, operationally, there are few situations where stations can actually accommodate spots made longer than a traditional 30 or 60-second spot by the addition of a disclosure lasting four or more seconds. It would cause portions of both program content and other ads (including any legal disclaimers at the front of those ads) to be preempted in violation of a station's program and advertising contracts, with a cascading impact during political season where each ad break may contain multiple political ads. While those advertisers would be justifiably upset, the public will be livid as their favorite programs are relentlessly "clipped" by overlapping ads.

Administratively, the Proposals will exponentially increase the already heavy demands the FCC's existing political ad requirements place on broadcasters, especially the many stations with staffs as small as five or fewer employees. It is extremely burdensome to educate advertisers about the new AI requirements, produce and insert/add disclosure announcements, update Political File records upon discovery of AI use, investigate opponents' claims about AI content, and navigate legal and business disputes with political advertisers who don't spend large sums of money producing and distributing their ads only to see them mutilated by after-the-fact insertions or additions.

Finally, the partial measure of forcing only those entities over which the FCC has jurisdiction to disclose the use of *non-deceptive* AI-generated content violates the Administrative Procedure Act, exceeds the FCC's authority, and most importantly, improperly strikes at the very heart of the First Amendment, political speech. And to make that trifecta even worse, it seeks to modify the political speech *of candidates*. The Proposals are not content-neutral, and improperly both impede and compel speech, all in clear violation of controlling First Amendment precedent.

Accordingly, the State Associations join with the National Association of Broadcasters ("NAB") and others in urging the Commission to conclude the instant proceeding without adopting the proposed regulations.

I. Focusing on the Mere Presence of AI in the Production of a Political Spot Is Severely Misguided

The State Associations appreciate that the FCC seeks to grapple with a complex issue in the use of AI in political advertising and its potential to create deceptive and misleading messages. However, deceptive and misleading political messages have been part of the public discourse since before the nation was founded. And each new technological development, from

the printing press to the telegraph to the telephone to the telex to the telecopier to the Internet, and from the still camera to the movie camera to the video camera to software-based video editing, has allowed both true and deceptive political messages to spread faster and farther and with greater public impact.

The one great truism of this march of progress is that candidates and their political supporters are quick to adopt each new technology to more effectively spread their political message, whether true or false. And whether it be telling a verbal lie, airbrushing a photo, deceptively editing film footage, or manipulating video content, distributing deceptive content has become part and parcel of many a political campaign. That is an unfortunate fact, but if U.S. lawmakers and regulators have been unable to rein in political falsehoods while remaining true to the First Amendment in over two centuries, and lately have been unable to even agree on what is true, the FCC has in this proceeding inserted itself into a gunfight armed only with a fax machine that Congress hasn't authorized to dial out.

To be clear, the State Associations and their broadcast members are as concerned as anyone about this state of affairs, and in their respective states have supported (and in many cases helped draft) legislation aimed at restricting the use of deceptive AI-generated content in political advertisements, placing the responsibility for such content and any required disclosures squarely on the advertiser, regardless of the medium used to distribute that content. Placing the responsibility and liability for such content on the advertiser is essential, as a political advertiser interested in deceiving the public as effectively as possible will be equally willing to deceive the broadcaster, newspaper or website airing its ad if that is needed to avoid the ad being rejected (in

the case of non-candidate ads) or an unwelcome disclaimer added.[3] If, as the FCC proposes, the responsibility and risk is placed solely with the broadcast station, the advertiser is incentivized to conceal the use of AI in the spot from the broadcaster, secure in the knowledge that it faces no legal risk in doing so. Because the FCC has no authority over advertisers, the answer to the problem must come from Congress and apply to political advertisers across all media, not just broadcasting, if the public is to be protected from unknowingly consuming such content.

But as the Commission itself has recognized, AI, like any other tool, can be used for good or bad,[4] and as it develops over time, its good uses will almost certainly outnumber the bad ones by a large margin. This conclusion isn't based upon any pollyannaish view of human nature, but the simple fact that it will almost certainly find its way into every piece of equipment used for audio/video production. In video, this could well include camera auto-framing assist, next generation image stabilization, automatic color/brightness/contrast adjustments, as well as just about any use of a green screen to reduce production costs (spoiler alert: the advertiser didn't fly the entire production crew to Fiji to make that sunscreen ad). For audio, AI might soon play a role in background noise suppression, making that announcer sound more authoritative with a deeper baritone voice, processing audio tracks to make it far easier to understand what is said, separating individual elements of a recording (as was recently done with the Beatles' master tapes for adding and removing elements in remastering), and allowing voiceover artists to lease out their voice for local ads far too numerous for them to record personally (or economically).

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[3] *See* Comments of Locality, Inc., MB Docket No. 24-211 (September 19, 2024) ("Locality Comments") at 2-3 ("[T]he burden for reporting [AI] use should be placed on political advertisers and not on broadcasters.").

[4] NPRM at 9. *See also* Comments of Foundation for Individual Rights and Expression, MB Docket No. 24-211 (September 19, 2024) at 27-30.

Many of these developments will be used to enhance all ads, including political ads, with no deceptive intent. AI in service of deceptive political ads will be a comparatively small use of AI, though a concerning one.

Thus, the far more numerous and benign uses of AI in advertising will improve the physical quality of ads, reduce the cost to produce them, and allow Main Street businesses to cost-effectively compete on a more equal footing with their mammoth competitors in ad quality. It will similarly allow candidates with small campaign chests to produce ads equal in quality to their well-funded opponents, creating more competitive campaigns, and thereby enhancing democracy itself.[5] Kneecapping such fresh new candidates by requiring them to insert an AI disclaimer that their wealthier opponents can avoid by using more expensive traditional high-quality production elements does not benefit the public in any way—it in fact harms them by creating less competitive elections. The harmful impact is even more egregious if an individual simply decides not to run for office upon seeing that the FCC has put its thumb on the scale in favor of well-funded candidates who don't need the cost efficiencies of AI.

In other words, both the technology and the issues involved in this proceeding are complex—far too complex for the limited tools at the Commission's disposal.

II. The Proposals Will Not Achieve Their Intended Results

Even ignoring the multiple harms to candidates, political speakers, broadcasters, and the public, the Proposals fail to generate even a theoretical benefit. First, given the many positive or neutral uses that will develop for AI in the advertising production chain, notifying the public that AI was used in producing a spot will have no more meaning than a disclaimer that the ad was

[5] Locality Comments at 3.

recorded using a digital camera rather than a film camera. It is completely useless information to the public. Indeed, the Proposals here are worse, as they clearly seek to cast aspersions on political speech produced using AI,[6] even if the AI's only use was to suppress background noise in the audio. Thus, unlike the "digital vs. film" example, where one could argue the addition of a disclaimer is pointless but perhaps benign except for the time consumed, the disclaimer proposed for AI actively misleads the public into believing the content of the ad is suspect, harming political discourse and the public's ability to obtain accurate information on which to base their vote.

Second, given the breadth of the NPRM's proposed definition of AI, the proposed disclaimer would apply to all or almost all political broadcast ads, negating its usefulness to the public while sowing confusion about the disclosure and whether its absence in online political ads means that those ads have been verified to contain no deepfake material.[7] Confusing the public is never a public interest benefit, and creating the implication that online political ads lack any deepfake content is absolutely harmful to the public. That harm is then further compounded by political advertisers moving their ads to any medium *but* broadcasting, both to avoid the false connotations and interference with political speech that the proposed disclaimer creates, while taking advantage of the newfound trust the public has in online ads because they lack such a disclaimer.[8] This pressure to shift political ads away from broadcasting would apply to both

[6] *See, e.g.,* NAB Comments at 54; Comments of Motion Picture Association, MB 24-211 (September 19, 2024) ("Motion Picture Association Comments) at 2 ("Most American voters mistrust AI, believing that it is threatening and dangerous.") (citation omitted).

[7] *See* Locality Comments at 3; Comments of American Association of Political Consultants, MB Docket No. 24-211 (September 19, 2024) ("AAPC Comments") at 2.

[8] *See* Comments of CMG Media Corporation, MB Docket No. 24-211 (September 19, 2024) at 5.

advertisers making only benign use of AI in production and those actively seeking to deceive the public with AI-generated content.

As both types of advertisers shift away from broadcast ads, the impact will be to divert political dollars from broadcasting and towards every form of media that is beyond the Commission's reach. Worse, broadcast news operations can and do police political ads broadcast to the public at large, whereas online ads are fed to individuals deemed susceptible to deceptive advertising based upon data collected about them online, with the result that often only the advertiser and the viewer/listener are even aware of that deceptive ad, insulating it from scrutiny by news operations. Such ads thrive out of public view, with the press having little ability to even learn of them, much less run news stories about them. But by diverting political ad dollars from broadcasting to non-local Internet behemoths and their unregulated platforms, the FCC accelerates the weakening of local news and the accountability it creates.

A. The Proposed Definition of AI Is Too Broad to Be Useful

The FCC proposes to define "AI-generated content" for purposes of this rule as:

> The term "artificial intelligence" or "AI" has the meaning set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.

However, this definition would cover many completely benign and accepted uses of technology that are already commonplace in the industry, and many more neutral or positive uses in the production chain that will develop in the coming years. For example, even a current camera's autofocus capability would seem to fall within the above definition. The result will be a large

percentage, or possibly all, political advertisements bearing an AI disclosure when aired on broadcast radio and television.

And of course, this definition does not even attempt to distinguish between uses that are positive and those that the NPRM is targeting as deceptive and misleading. Many other commenters in this proceeding, both those that support the Proposals and those that oppose them, objected to this definition given its breadth.[9] Public Citizen would modify the definition so that it only applies to "content that is completely or predominantly generated by AI or significantly edited by AI tools."[10] The Brennan Center for Justice states that the definition is both over- and under-inclusive. The Brennan Center would narrow the definition so that it would only apply to "ads containing content that was generated or substantially modified such that a reasonable viewer or listener would have a substantially different understanding of the speech or other events depicted than what actually took place."[11] At the same time, the Brennan Center would broaden the definition "to cover all deceptive synthetic content, not just content that would qualify as 'generative AI'" because "AI is not required to create convincing deepfakes."[12]

The fact that there is no consensus with respect to the definition is telling. In this arena, involving as it does highly protected political speech, it is nearly impossible to define with objective precision what is deceptive or "different" than reality. Taken literally, all editing is different than reality, as humans don't normally perceive things from different angles, in a

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[9] *See, e.g.,* Comments of Public Citizen, MB Docket No. 24-211 (September 19, 2024) ("Public Citizen Comments") at 5 ("As AI editing tools become commonplace, we may soon reach a position where almost all ads could be said to contain AI-generated content."); AAPC Comments at 2.

[10] Public Citizen Comments at 5.

[11] Brennan Center Comments at 6-7.

[12] *Id.* at 7.

condensed time frame, or absent the "uhs" and long pauses that are often edited out. Even a more sophisticated definition that incorporates the concept of whether the change would impact the views of the electorate, as many state AI bills have attempted, has practical flaws. Where a political speech is edited into a sound bite to fit into a 30-second spot, and it contains just two sentences from the speech, editing out a sentence between those two sentences where the candidate flubbed a word or stared blankly ahead trying to remember the next line of the speech, the edit changes a voter's impression of the event; but such editing has been routine in all political spots for as long as film and video have existed.

Every definition of AI is in its own way subjective and unworkable where it can be second-guessed by the government. Broadcasters, under threat of enforcement from the Commission and lawsuits from political operatives, should not be put in the position of deciding when content has been "predominantly" created by AI or what understanding a person would take away from hearing or viewing that content.

B. The Failure to Address Higher-Risk Media Platforms or the Advertisers Producing Deceptive Political AI Content Ensures the Failure of the Proposals in Curbing Harmful Political AI

As the NAB noted in its comments, the greatest risk of harm from deceptive and misleading AI-generated political content is not in the broadcast sphere, but online where the barriers to entry are low (indeed, nonexistent) and the content can go viral easily, greatly multiplying its impact.[13] Yet the Proposals (a) would not apply to the media where the risk of deception is greatest, or (b) as noted above, regulate the advertiser that produced the AI-generated content and arranged for its distribution, who (c) has every incentive to conceal, and

[13] *See* Comments of the National Association of Broadcasters, MB Docket 24-211 (September 19, 2024) ("NAB Comments") at 17-20.

no legal responsibility to disclose, the use of AI in its political spot. Thus, a vast number of political messages containing AI, and likely the majority of such political messages, will be transmitted to the public without the proposed disclosure despite the best efforts of broadcasters. The Commission's legal inability to prevent any of the above severely undercuts any hope of warning the public about the use of AI in political advertisements. More importantly, the Proposals do not even *seek* to warn the public of deceptive AI in political ads, the only governmental interest the Commission suggests to justify this proceeding.

C. The Proposed Disclosure Sows More Confusion Than No Disclosure at All

As discussed above, regardless of the definition used, but particularly with regard to the broad definition of AI proposed, the disclaimer proposed is meaningless to the public, depriving this proceeding of any purpose. The generic language of the proposed announcement—"The following message contains information generated in whole or in part by artificial intelligence"—provides the consumer no information from which it could reach a reasonable conclusion about the truth or accuracy of the political announcement. In short, it fails in its goal of educating the consumer in any way.

Worse, because the public assumes a government-required disclaimer must have a purpose, they will seek to read into the disclaimer something nefarious that will cause them to discount that political speech even where the use of AI is benign. Indeed, the comments filed in this proceeding readily demonstrate that many commenters have leapt to the conclusion that AI in political ads is inherently deceptive,[14] apparently unaware of the many positive or neutral contributions it does or will make to the ad production chain. To expect the general public

[14] *See, e.g.*, Comments of the Leadership Conference on Civil and Human Rights, MB Docket No. 24-211 (September 4, 2024) at 3.

seeing these disclaimers to have a more knowledgeable and nuanced understanding of the productive uses of AI than the commenters in this proceeding is unrealistic.

Given this pervasive negative belief, for the vast majority of AI-assisted political ads that are not deceptive due to AI, the disclaimer will give the public a false impression of the truthfulness of the political speech, with tremendous First Amendment implications (discussed below). This proceeding must observe the corollary of Blackstone's Ratio—"it is better that ten guilty persons escape than one innocent suffer"—by rejecting the notion that falsely distorting ten political messages with a disclaimer is a valid trade for alerting the public that a random eleventh ad's use of AI might be deceptive. The fact that some ads using AI (and indeed many ads not using AI) are deceptive cannot justify the government creating a deliberately false impression of the vast majority of political ads whose sole AI crime is auto-contrast.

While causing that much public confusion is by itself a more than sufficient basis to reject the Proposals, the fact that the public will also read the absence of such disclosures in online ads to indicate the government has verified that those ads don't include deceptive AI will increase the public's confusion tenfold, and the harm to democracy of such confusion a hundredfold. Setting aside every other consideration presented in this proceeding, any action the FCC takes that even unintentionally persuades the public that online political ads are more trustworthy than they are is regulatory malpractice.

D. By Definition, a Regulation That Doesn't Accomplish Its Purpose Violates the Administrative Procedure Act

Under the Administrative Procedure Act, a rule adopted by an administrative agency can be set aside if it is found by a reviewing court to be "arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law."[15] To avoid that fate, the agency must be able to demonstrate there is a "rational connection between the facts found and the choice made."[16]

With respect to the Proposals, that showing simply cannot be made. The FCC's stated objectives for the Proposals are "enhancing the public's ability to assess the substance and reliability of political ads, thus fostering an informed electorate and improving the quality of public discourse." As shown in Sections II.A-C above and throughout these Joint Reply Comments, the Proposals will not achieve those goals and are far more likely to have the opposite effect, making the situation worse than if the FCC were to forego adopting any rule at all. Where that would be the case, it can hardly be argued that the agency has engaged in reasoned rulemaking or made decisions based on the facts presented by the record.[17]

III. The Proposals Impose a Heavy Burden on Broadcasters

A. The Added Administrative Burden Must be Viewed in the Context of Existing Broadcaster Political Ad Burdens

The process of purchasing political ad time is often complex, involving intermediaries and interactions between the station and the campaign before even the currently-required on-air disclosures and Political File records submissions can be successfully made. The process can begin months before an election, with campaigns' ad-buying agencies requesting rates and availability and providing only a skeleton of the information stations need for their Political Files because the ads have not yet even been created. Then, as the election draws near, the agencies begin to contact the stations with the precise times and dates of the ad flights they wish to buy.

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[15] 5 U.S.C. § 706(2)(A).

[16] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 295 (2016).

[17] *See* AAPC Comments at 3 ("[T]he FCC's proposed rule is arbitrary and actually exacerbates the problem it purportedly aims to solve."); NAB Comments at 56-58.

Broadcast stations must then upload, **within 24 hours**, the full information about that request to purchase airtime, including a list of all candidates mentioned and the issues addressed in any issue ad, much of which could not be included earlier because the spot had not yet been produced. Finally, the broadcast-ready spot is provided, often only hours before airtime, and the station must review it to be sure that the required sponsorship identification disclosure is made and the list of issues and candidates in the Political File is complete. Campaigns then frequently contact the station during the run of the ad flight to replace their spot with new spots to respond to ads aired by their opponents or developments in the news cycle. These new spots must also be reviewed for the required disclosures and updates to the Political File may be needed depending on the extent of the changes made since the original spot was received.[18]

Stations are under immense time pressure to meet the needs of numerous candidates at the Presidential, Congressional, state and local levels, and to update their Political Files on the Commission's one-business-day timeline. While the frenzied pace typically reaches its height in a Presidential election year such as this one and in Congressional mid-term election years, stations will also face significant political activities connected to off-year state and local primary, general, run-off and special elections. And these obligations apply equally to stations with large staffs and the many stations that operate with fewer than five full-time employees. Despite the complexity and time pressures, failure to timely complete this process almost perfectly over a station's eight-year license term has resulted in delayed license renewals and consent decrees.

Added to these responsibilities are the many hours broadcasters must spend monitoring and updating their Lowest Unit Rate for each category of advertising time sold, ensuring that candidates are charged Lowest Unit Rate and any required rebates are promptly issued,

[18] *See* Locality Comments at 2-3.

responding to Equal Opportunities and Reasonable Access claims, and monitoring BCRA disclosures in federal candidate ads to determine if a candidate has disqualified themselves from receiving Lowest Unit Rate and if so, adjusting the charges to that candidate, which will then need to be reflected in an immediate update to the station's Political File.

To this complex mix, the NPRM proposes to add the requirements that broadcasters inform political ad purchasers about the broadcaster's obligation to disclose the use of AI in political ads, inquire about the use of AI in the creation of each spot received, including swap-out spots, add a disclosure to any spot that uses AI, make any airtime scheduling adjustments the addition of a disclaimer may require, and add an associated disclosure to the station's Political File,[19] as well as respond to third parties later alleging that an ad contains AI and is therefore missing a required disclosure. After attempting to determine whether that claim is true, the broadcaster may need to then add a disclaimer to an already-airing spot and once again immediately update its Political File accordingly.

Despite what some commenters claim, these added burdens are not "negligible," and when combined with broadcasters' existing political advertising regulatory obligations, could better be described as "simply overwhelming."

1. The Additional Obligations Impose Too High of an Administrative Burden on Broadcasters

Adding the new education, inquiry, investigation, and disclosure requirements proposed in the NPRM would substantially increase the burden on stations. Facing such an increase in

[19] In the event a political AI disclosure requirement is ultimately adopted, it should not apply in the *60 days* prior to a primary election and *90 days* prior to a general election, *see* NPRM at ¶ 36, because that does not align with the 45-day period broadcasters are required to offer Lowest Unit Rate before a primary election and the 60-day period prior to a general election, creating yet more complexity and confusion for broadcasters and advertisers.

workload and potential FCC liability for even inadvertent errors, stations—especially stations with small staff sizes—may be forced to forego airing state, local and issue advertisements to the detriment of the public and the ability of state and local candidates to get their messages out. And contrary to the suggestions of some commenters,[20] broadcasters cannot relieve themselves of all administrative burdens related to political advertising by simply ceasing the sale of political ad time because they are required to give Reasonable Access to all federal candidates.[21]

The Commission cannot allow the administrative burden of complying with its expanding political ad regulations to become so onerous as to force local broadcasters to make choices that hurt them financially in the short term (foregoing political ad revenue) to avoid the significant compliance expenses and longer-term risk of FCC liability for any inadvertent failures. It should be particularly hesitant to force broadcasters into making such a tough choice—depriving state and local candidates of an outlet to reach their audiences—for a stated goal (alerting the public to AI use) that serves no cognizable public interest, and which would in fact harm the public as described throughout these Joint Reply Comments.

If there is to be a disclosure obligation, it should fall solely upon the political advertisers, who know whether AI was used in their spot, not on broadcasters. Broadcasters are victimized every bit as much as the public when a political advertiser includes false content, whether created by AI or by other means. Making them the party at risk for an AI disclaimer violation is akin to arresting the homeowner for failing to prevent their house from being burgled.

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[20] *See, e.g.*, Comments of American Civil Liberties Union, MB Docket No. 24-211 (September 19, 2024) at 1.

[21] 47 U.S.C. § 312(a)(7).

2. *Commenters Seeking to Go Even Further Than the NPRM's Proposals Present No Reason to Do So*

Broadcasters already are forced to deal with cease and desist letters from political opponents of their political advertisers demanding they stop airing a particular political ad for being false or defamatory. These political shoving matches often require stations to bring in legal counsel to assess the advertiser's claimed factual basis for the ad and to respond to the sender of the cease and desist letter, especially with respect to issue advertisements where the station is not shielded from liability for the advertiser's content. Requiring stations to undertake these same obligations with respect to a new set of claims regarding the use of AI would simply swamp station employees, especially where "highly motivated politicos . . . file a flood of complaints alleging 'AI-generated content,' not for the sake of the truth, but as a cudgel to chill opponents' speech."[22]

The obligation to investigate claims will spawn claims to investigate. It is also completely unclear what a station is supposed to do while it is investigating and evaluating these claims. If the station simply pulls the ad or adds an AI disclaimer, it risks contract (and with regard to the disclaimer, potentially defamation) litigation from the advertiser. At best, it has likely lost the advertiser as a client. Of course, if it does not pull the ad or insert an AI disclaimer, it may become the subject of an enforcement action by the FCC.

As if this diversion of station attention and resources (not to mention added financial risk) were not already bad enough, some commenters urge the Commission to go even farther. For example, Public Citizen (the entity that has twice petitioned the Federal Election Commission

[22] *See* NPRM (Carr Dissent). *See also* Comments of Public Knowledge, MB Docket 24-211 (September 19, 2024) ("Public Knowledge Comments") at 6 ("[T]hird party reports could also be weaponized to force disclosures to appear on ads in a manner that undermines their credibility.").

and failed to get the new AI rules it sought) would require broadcasters to make an inquiry of all network and syndicated program providers 120, 90, 60 and 30 days in advance of *every* primary and *every* general election about the use of AI in any political ads contained in the programming they provide to the station.[23]

Stations should not have to inquire of networks and syndicators about future political ads in the programming they provide stations. Public Citizen's suggestion is completely unworkable because campaign ads will not even have been produced 120 days in advance of each primary and each election, or even 30 days in advance of each primary and each election, so networks and syndicators will be completely unable to answer the questions being repetitively put to them before every election under that proposal. The candidates themselves likely would be unable to answer that question, not yet knowing what issues will be driving the news cycle or what the polls will indicate when their ads are later produced and aired.

Moreover, the only actions a broadcaster could take if it was told by its network that an AI-assisted ad would be included in the network program feed without a disclosure would be to black out the commercial and put its network affiliation at risk. Inserting a station ad over the blacked-out commercial would increase that risk. And of course if it is a candidate ad that was deleted, blacking it out would also put the station at risk of being fined for violating the no censorship provision of Section 315(a) of the Communications Act.[24] Thus, even if such information were available that far in advance, there is nothing an individual broadcaster could do with it.

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[23] Public Citizen Comments at ¶ 8.

[24] The NPRM tentatively concludes that the AI disclosure, like the sponsorship ID disclosure, should be considered a content-neutral disclosure and not a form of prohibited censorship, thereby allowing the broadcaster to add the disclosure without violating Section 315(a). NPRM at 11 n.54. As discussed in Section IV.B hereof, there is no basis for this conclusion.

Similarly, the FCC should ignore entirely the Brennan Center for Justice's suggestion that broadcasters should establish a policy that advertisers must provide them truthful information about the use of AI and other synthetic content.[25] Broadcasters do not have any legal authority to enforce such a policy and certainly should not be expected to use their resources to attempt litigation against advertisers that simply ignore that policy. In any event, having a policy regarding the mere existence of AI in a political spot does nothing to protect the public from fraudulent or deceptive content and simply heaps yet more obligations on broadcasters.

B. Adding Disclosures Would Significantly Harm Station Ad Revenue and Programming Continuity While Creating *Extensive* Compliance Issues Under the FCC's Other Political Rules

Commenters who blithely characterize the burden on broadcasters as slight ignore the very real financial penalty broadcasters would face were they to add the required disclosure to political ads, especially where that disclosure needs to be added to numerous political advertisements because of the breadth of the FCC's definition of AI. Political advertisers, having received rate information for airtime from stations and other media outlets in 30-second increments and purchased on that basis, will provide stations with spots produced for exactly that amount of time. In light of that, if the broadcaster decides after inquiring of the advertiser and reviewing the advertiser's 30-second spot that an AI disclosure is required, there is no "space" available for the insertion of such a disclosure, which can be no less than four seconds for TV,[26] and will be at least that long for radio given the length of the FCC's added verbiage.

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[25] Brennan Center Comments at 8.

[26] *See* 47 C.F.R. § 73.1945(d).

The NPRM asks in passing about the cost of airtime that would be sold to other advertisers that is taken up by the disclosure announcements.[27] While this problem *might* be alleviated for television stations if the FCC allows video-only disclosures, it remains an insurmountable problem for radio broadcasters. Each 30-second AI political radio spot purchased would require the station to provide the advertiser with at least 34 seconds of ad time in order to include the disclosure. It doesn't take a financial genius to understand that providing 34 seconds of ad time for the price of a 30-second spot (a 13% time "bonus") robs the station of its most valuable asset—ad time inventory. So the costs involved in inserting such disclosures are not merely the added production costs, but literally being deprived of airtime to sell to other advertisers, including other candidates.

But even that simple observation greatly understates the practical and financial impact on the station. In network or syndicated programming, a station may only have a single 30-second window in a network ad break to insert a local ad. It cannot just insert a 34-second ad that overrides the beginning of the following network ad or network programming.

And even for local programming, where a station might have more flexibility, ad breaks are routinely structured in multiples of 30 seconds. A station cannot simply insert a 34-second spot and override the beginning of the next advertiser's spot (potentially obliterating not just ad content but any legal disclosures included at the beginning of that spot) or the beginning of program content. The station will receive an angry call from the affected advertiser in the first case, and calls from many angry listeners in the second.

But all of the above still understates the practical and financial impact on a station. Not only will the broadcaster be out the value of the four or so seconds it takes to make the disclosure

[27] NPRM at ¶ 36.

announcement on each affected ad; it will also lose the value of an additional 26 seconds because no other spot will have been produced in that unique format to fill the remainder of the next 30-second spot window. The best the broadcaster can hope for is to recoup some of that revenue by selling a 15 or two 10 second spots, still leaving it in a financial hole and creating one of the greatest enemies of radio—dead air—until the next spot/program commences. Having to run multiple spots with added AI disclosures complicates life even more.[28]

Pulling ad revenue directly out of the pocket of the broadcaster while disrupting its program service and thereby turning off its listeners can hardly be dismissed as a "slight" burden. It would be even more problematic where the advertiser does not admit AI was used in the spot's production, so a disclosure announcement is not initially added to the advertisement or scheduling arrangements made for the longer time needed for a spot-with-disclosure, and a complaint is later received causing the broadcaster to attempt to add the disclosure announcement mid-flight. It may be simply impossible to accommodate the amended spot without preempting other political advertisers, particularly in proximity to the election. And the station cannot simply stop running the spot without running afoul of Section 315's anti-censorship provisions.

And of course none of this accounts for the impact on broadcasters in attempting to comply with the Commission's other political rules. First, no station (to our knowledge) sells 34-second spots to its commercial advertisers, and stations should not be forced to sell such an odd and disruptive length of spot time to political advertisers, particularly given how disruptive

[28] *See, e.g.*, Comments of Gray Local Media, Inc., MB Docket No. 24-211 (September 19, 2024) at 12 ("In a market like Charlotte, NC, this will cost WBTV an estimated $2700 in a single half-hour alone, assuming lowest unit rate spots are preempted for the disclaimers. If standard commercial ads are removed instead, the loss could be triple that.").

airing many such spots (as is likely to occur given the FCC's broad AI definition) would be to a station's programming. While a federal candidate might attempt to claim the right to such a spot length citing Reasonable Access, state and local candidates, as well as issue advertisers, could make no such claim. Having said that, if a station accepted and scheduled a state candidate's 30-second ad only to later learn that it required the addition of a disclaimer, there would be tremendous confusion as to whether the station could refuse to air the spot given Section 315's anti-censorship provisions, or if it could demand revision of the ad contract to increase the price to account for the additional time needed. Political ad sale requirements are already far too complex and burdensome to start adding unknowables to the mix.

Second, any station that simply sells a candidate a 34-second spot for the price of a 30-second spot would be creating an Equal Opportunity nightmare, with every competing candidate, including those not using AI, demanding that the station also sell it an equal number of 34-second spots at the 30-second price. Besides taking yet further revenue out of the station's pocket, and creating a multi-candidate compliance ordeal, the steadily multiplying 34-second demands would throw the station's advertising and program schedules into chaos, causing severe disruption to the program service to the public. And because Equal Opportunities is mandatory for all candidates, even state and local candidates could join in the frenzy.

Which raises the third and potentially worst impact, Lowest Unit Rate. If a station sells 30-second spots but then "bonuses" an advertiser (including any *issue* advertiser) an additional four seconds (13%) for the disclaimer, it arguably must make that same 34-second spot and rate available to *all* candidates, not just those needing an AI disclaimer or claiming Equal Opportunities against an opposing candidate. The impact on Lowest Unit Rate would likely quickly spread to all classes of station ad time and dayparts, having a substantial impact on the

station's overall advertising revenue while also leaving its program schedule in shambles because of the proliferation of these odd-length spots.

So the regulatory impact of this so-called "negligible" burden would be immense, with a substantial harmful impact on station ad revenue. To so thoroughly harm broadcasters and their service to the public merely to include an AI disclaimer that will be meaningless to the public and which serves no valid governmental purpose would be unconscionable.

C. Advertisers, Including Those Not Using AI, Will Flee Broadcasting to Unregulated Platforms

In addition to the financial harm to stations of adding AI disclaimers to any broadcast political ad that touches AI, a yet bigger financial loss will occur as political advertisers, wanting to avoid the negative connotations[29] of an AI disclosure in broadcast advertising, rush to *literally every other form of media* to avoid the need for such a disclosure. This flight from broadcast advertising will accelerate as these advertisers realize that once the public sees disclaimers in political broadcast ads but not in online political ads, the online ads will gain an unearned air of credibility as a confused public comes to believe that the absence of such disclaimers on a political ad indicates that the government has verified that the ad contains no deepfake content. Worse, the credibility of broadcast advertisements will be harmed as the public, seeing the AI disclaimers in many broadcast political ads, rushes to the same conclusion that many commenters in this proceeding have—that the mere presence of AI in a spot must mean the spot contains deepfake content.

[29] As others have credibly argued, the proposed disclosure is likely to be viewed negatively by consumers. *See, e.g.,* Motion Picture Association Comments at 2 ("Because these encumbrances on AI-generated political ads could have a pejorative effect on the political speech contained within them, they would be met with stringent scrutiny by the Court.").

As these political advertisers increasingly shift their advertising dollars from broadcast stations to online media, it will weaken the fact checkers increasingly found only in local news operations while strengthening the online behemoths that for years have been free-riding on journalists' newsgathering efforts to attract subscribers and advertisers while serving as major platforms for the spread of viral deepfake content.

This shift in revenue harms not just broadcasters, but will also leave broadcast audiences and new candidates underserved. For audiences, the impact will be felt most strongly by lower income and minority communities who rely more heavily on free over-the-air broadcasting for their news and information. For candidates, the impact will likely be most harmful to the new faces with small campaign chests that must rely on the efficiencies of AI technology to achieve the same quality of ad production that their wealthier, more established opponents can afford to do using high-end traditional production elements. Each of these is yet one more unintended consequence that arises when the burdens on broadcasters to implement this mandate are treated so lightly.

IV. The Proposals Cannot Withstand First Amendment Scrutiny

A. At Each Turn, Implementing the Proposed Disclosure Adversely Impacts Both the Advertiser's and the Broadcaster's First Amendment Rights

The thorough examination of the political time buying process set forth above reveals the myriad ways in which the proposed disclosure requirement treads upon the freedom of advertisers and broadcasters alike to express themselves as they choose in the realm of political speech—the category of speech that enjoys the greatest First Amendment protections.

1. The Proposals Suggest the Possibility of a Prior Restraint, the Form of Speech Regulation Most Disfavored by the First Amendment

The NPRM asks what broadcasters should do if they do not receive a response to their inquiry to the advertiser as to whether their spot was created using AI.[30] Given the extreme difficulty, particularly from a scheduling perspective, of adding the disclosure after the fact, it would be logical to require that the disclosure be included by the advertiser and that broadcasters should not air the spot until the disclosure has been added. However, that would be a government-imposed prior restraint on political speech, which is forbidden by the First Amendment in nearly all circumstances. This is true whether we are talking about the initial airing of the ad or suspending the ad if a complaint is received until such time as the use of AI is disproven or verified, in which case the suspension would presumably remain in place until the disclaimer is added.

The First Amendment's general prohibition on prior restraints is premised on the principle that it is better for the public to have access to speech so it may judge for itself the validity of that speech than for government to preemptively determine what is suitable for the public. The logic of this principle is that where the speech potentially violates a particular law (e.g., obscenity), there is less risk to Democracy if the public is allowed to hear that speech rather than for it to be preemptively censored by government. The solution preferred by the First Amendment in such scenarios is for the government to bring its legal case against the speaker after the speech is heard by the public, in part because the public may be incensed by the prosecution and take appropriate political action.

[30] NPRM at ¶ 15.

Besides the potential that the Proposals present for a First Amendment violation under the Prior Restraint doctrine, the scenario it presents makes clear the fundamental flaw in the Proposals, even setting aside the First Amendment violations. Because of the Commission's limited jurisdiction, the political advertiser has no legal obligation to inform the station of the use of AI, and no liability if it fails to do so. It is not subject to the rule. The result is that the ad runs without a disclaimer regardless of any use of AI to produce it. Even if the station or a third-party complainant concludes that the ad does include AI, the doctrine of Prior Restraints prohibits the station from refusing to air it until a disclaimer is added. And since the advertiser can't be prosecuted for using AI in the ad and not disclosing that fact or including a disclaimer, there is nothing the station, the FCC or the government can do about that.

The result will be that any political advertiser intent on deceiving the public with AI will of course not reveal the use of AI and will fight any effort to insert a disclaimer, meaning that the broadcaster will need to air the spot without a disclaimer due to the Prior Restraint doctrine, and the result will be that the only political ads that will include the disclaimer will be those that use AI innocently with no intent to deceive. That is precisely the opposite of the result the Proposals seek to achieve, and demonstrates yet again that simply marking AI-assisted political ads is not a governmental interest, and certainly not one that can survive even cursory First Amendment scrutiny.

2. The Proposals Seek to Impose a "Time Tax" on Certain Categories of Political Speech

The NPRM acknowledges that the proposed disclosure will be in addition to existing disclosures already required by Congressional statute and asks about the impact of having two

disclosures in one political advertisement.[31] The State Associations wish to point out that, given state legislative activity in this area, the number of disclosures in a single announcement is not limited to two, and not necessarily even to three. With each additional required disclosure, the government "speech-time tax" on political ads increases, significantly burdening political speech without an adequate government interest and without being tailored to address *only* the speech the FCC claims justifies this proceeding: AI-assisted *deceptive* political speech.

These multiplying disclosures limit the airtime available to the political advertiser to get its message across to the public in the manner it deems most appropriate, or requires them to spend more than other political advertisers to deliver the same length political message. The powerful governmental interest needed to justify such a gross interference with political speech is simply absent here.

And once again, it is worth noting that broadcasters are particularly harmed by this interference with political speech rights. Unlike an online platform, which effectively has infinite ad capacity and infinite flexibility as to the lengths of ads, broadcasters do not. Every second of broadcast airtime that an advertiser must dedicate to anything other than conveying its political message makes broadcast advertising less attractive than other media who are not time and capacity-constrained and would not even be subject to the Proposals' disclaimers. Once again, the NPRM seems intent upon diverting political advertising and political advertising dollars from broadcasting to the online platforms where deceptive content—AI-assisted or not—thrives. From either a First Amendment or public interest perspective, this is an illogical, and indeed an unconstitutional, policy choice.

[31] NPRM at ¶ 36.

3. The Proposals Seek to Compel Speech in Violation of the First Amendment

Finally, there can be no possible dispute that the Proposals seek to compel both the advertiser and the broadcaster to engage in speech that they would never engage in of their own accord. As discussed below, and particularly with regard to political ads that make only innocent or even positive use of AI, the NPRM suggests *no* valid governmental interest for compelling such speech. While the Proposals, relating as they do to protected political speech, would be unlikely to survive judicial scrutiny with regard to even AI-assisted *deceptive* political advertising, their application to spots containing non-deceptive AI are on their face an unconstitutional interference with protected speech.

B. The FCC Has Not Articulated a Sufficient Government Interest to Justify the Proposals

Given that the Proposals apply only to political speech, the category of speech that receives the highest level of protection in First Amendment analysis,[32] and more specifically, to a subset of political speech that uses AI, the disclosures are compelled speech whose trigger is not content-neutral. As such, they are subject to the highest level of judicial scrutiny under the First Amendment.[33] Under that strict scrutiny standard, the government must show that it has a compelling state interest in regulating speech, that the means by which it does so are narrowly tailored to meet that interest and, indeed, that those means are the least restrictive means by which to do so.[34] The Proposals cannot pass any aspect of this standard. Because the Proposals apply to all AI-generated content, not just deceptive and misleading AI-generated content, they

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[32] *Snyder v. Phelps*, 562 U.S. 443 (2011).

[33] *Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019).

[34] *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

burden substantially more speech than necessary. Because the disclosure will likely carry a negative connotation with audiences (indeed, that appears to be the Commission's aim here), it will have a significant chilling effect on political speakers.[35]

Yet even if the FCC heeded calls from certain commenters to narrow the category of advertisements to which the disclosure would apply to only those that are deceptive or misleading,[36] it would result in a government mandate that broadcasters engage in subjective line-drawing about which political speech is true and which is false (which is still speech entitled to some First Amendment protection).[37] If that were not by itself fatal, the fact that the FCC is then entitled to second-guess broadcasters as to which ads are true and which ads are false, and then penalize broadcasters whose line-calls the FCC disagrees with, makes clear that narrowing the reach of the Proposals will not solve their First Amendment failings. Indeed, it is hard to imagine a government action striking any closer to the heart of the First Amendment than an FCC ruling that a candidate's political speech was deceptive and fining the broadcaster who earlier reached the opposite conclusion in declining to insert an AI disclaimer.

And of course, it is very instructive in determining the weakness of the claimed governmental interest here that Congress by way of the No Censorship provision of Section 315(a) of the Communications Act has in fact prohibited the insertion by a broadcaster into

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[35] *See supra* Note 7 and accompanying text. *See also* Comments of National Republican Senatorial Committee, MB Docket No. 24-211 (September 19, 2024) at 6 ("[T]he speech being compelled would require political advertisers to denigrate their own messages.")

[36] *See supra* Note 12 and accompanying text. *See also* Public Knowledge Comments, MB Docket No. 24-211 (September 19, 2024) at 4 ("The Commission should require disclosures for "potentially deceptive AI-generated content" defined as "an image, audio, or video that depicts an individual's appearance, speech, conduct, or an event, circumstance, or situation that has been generated, in whole or in part, using computational technology or other machine-based system that emulates the structure and characteristics of input data in order to generate derived synthetic content.").

[37] Gray Comments at 9.

candidate spots of this or any other new disclosure that the FCC suddenly deems vital. The NPRM's claims to the contrary are based merely on a Media Bureau decision determining that the No Censorship provision does not prevent the insertion by a broadcaster of a sponsorship identification tag—*the presence of which is required by Congress via Section 317 of the Communications Act*.[38] Far from being a finding (as the NPRM claims) that broadcasters may legally insert any "content-neutral disclaimers", it is instead the logical result of having to harmonize two conflicting statutory provisions (No Censorship vs. Must include a sponsorship identification tag).

Here, there is no such statutory conflict, and the FCC lacks authority to overrule Congress's No Censorship edict found in Section 315 of the Communications Act. Even if the FCC's strained interpretation that since Congress permitted one type of insertion based on conflicting statutes, all insertions must be permissible as long as they are content-neutral withstood casual scrutiny, the Proposals are not content-neutral. They apply only to political speech, and indeed, only to political speech where some of the content was AI-created. That is literally a *content-based* regulation. If the ad producer used AI to drive to work that day, there is no disclaimer. It is only when the ad *content* has AI's fingerprints on it that a disclaimer is required under the Proposals.

In short, the FCC has no authority to override Congress's enactment of Section 315's No Censorship provision, the Proposals aren't content-neutral regardless, and when the governmental interest cited by the Commission to support its Proposals conflicts with a congressionally-enacted statute, there is no governmental interest to support the Proposals.

[38] 47 U.S.C. § 317.

C. While Subject to Strict Scrutiny Under the First Amendment, the Proposals Fail Even the Lowest Level of First Amendment Scrutiny

As discussed in Section IV.B above, the Proposals are a content-based regulation of political speech that is directed at a specific sub-category of political speech. It is therefore subject to strict scrutiny under the First Amendment. As is also discussed above, the Proposals clearly fail the strict scrutiny test, despite the NPRM's tentative conclusion that the Proposals would survive any level of First Amendment scrutiny.[39] But, to meet even the lowest standard, the heightened rational basis standard, the government must show that it has a substantial interest in regulating speech and that its regulation is reasonably tailored to satisfy that interest.

Here, the FCC's stated interest is "enhancing the public's ability to evaluate the substance and reliability of political ads, thus fostering an informed electorate and improving the quality of public discourse."[40] However, as discussed in Section II.C above, the generic language of the disclosure does not provide the consumer with any information to assist in evaluating the substance and reliability of the advertisement. Rather, it leaves the audience with the sense that there must be something negative about the advertisement to warrant a government label, even if the use of AI to produce the spot is entirely benign. And any governmental effort to "improv[e] the quality of public discourse" is simply Orwellian, and may win the award for "most worrisome claimed government interest ever."[41]

In any event, by requiring a disclaimer on every political ad produced with AI assistance, no matter how benign (or beneficial) the use, the Proposals lack even the most fundamental

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[39] *NPRM* at ¶ 29.

[40] *NPRM* at ¶ 35.

[41] *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407 (2024) ("On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.").

tailoring to achieve the stated government interest, much less reasonable tailoring to that interest. The question is not a close one, and the Proposals, if adopted, would clearly violate the First Amendment.

V. The FCC Lacks Any Legal Authority to Adopt the Proposals

Finally, even if the Proposals were constitutional, the result of reasoned decisionmaking, and did not conflict with Section 315 of the Communications Act, the FCC still would not have authority to enact them. While this list of defects is admittedly hard to ignore even momentarily, the Commission's lack of authority to adopt the Proposals in the first place is all too apparent. The NPRM relies primarily on Section 303(r) of the Communications Act,[42] which authorizes the Commission, as the "public convenience, interest, or necessity requires,… [to] make such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*,[43] as may be necessary to carry out the provisions of this Chapter …."[44] Based on this language, the NPRM presumes broad authority to adopt the Proposals.

But as the D.C. Circuit in *Motion Picture Association of America, Inc. v. FCC* held,[45] regulations that impact broadcast programming require more specific authority than that cited due to the potential for entanglement with First Amendment rights. "To regulate in the area of programming, the FCC must find its authority in provisions other than" such general provisions as Section 303(r).[46] In *MPAA,* Congress authorized the FCC to issue a report to Congress

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[42] NPRM at ¶ 27.

[43] As noted in Section IV.B above, the Proposals are in fact "inconsistent" with Section 315(a) of the Communications Act (no censorship of candidate ads), so the explicit terms of Section 303(r) itself make clear that it provides no authority for the Commission to adopt the Proposals.

[44] 47 U.S.C. § 303(r) (emphasis added).

[45] 309 F.3d 796 (D.C. Cir. 2002).

[46] *Id.* at 804.

regarding video description in television programming. After doing so, the FCC went on to hold a rulemaking proceeding and adopt rules requiring the insertion of video descriptions in television programs.[47] In the rulemaking process, the FCC noted the importance of video descriptions to persons with disabilities. However, the court held that, particularly where the regulation impacts programming, the FCC must find a specific grant of authority from Congress, because "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content."[48]

Here, the FCC has made a finding that it has a governmental interest in imposing disclosures on AI-generated content in political advertisements, but it cannot point to any specific grant of authority authorizing it to adopt the Proposals. And, as shown above, those Proposals clearly impact broadcast programming and protected First Amendment speech. Thus, merely finding a governmental interest in regulating AI-generated content in political advertisements does not empower the FCC in any way to act on that finding.

Indeed, the shortfall in the Commission's authority to adopt the Proposals is made even more obvious given that Congress has been statutorily very explicit in granting the FCC what authority is has with regard to political advertising. The Commission may not simply assume that Congress would have granted it this additional authority had Congress thought about it, or that this is what Congress would instruct the Commission to do if it weren't busy handling the nation's business. History demonstrates that when Congress wishes to grant specific authority to the Commission in the arena of political speech, it knows how to do so, and it has not done so here. That is also fatal to the Commission's authority to adopt the Proposals.

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[47] *Id.* at 798.

[48] *Id.* at 805.

CONCLUSION

The issues the Commission seeks to grapple with here are both vexing and complex. But, as shown in these Joint Reply Comments, the unintended consequences of the Proposals are far-reaching and harmful, while the claimed public benefits are gossamer. The potential for irreparable damage to political speakers, broadcasters, and the media-consuming public from well-intentioned but misdirected efforts to limit the impact of negative political AI use is vast. Even Congress, with all of its authority, will struggle to limit deceptive uses of political AI without running afoul of the First Amendment. The FCC has neither the authority nor the tools to attempt to stand in for Congress, and should not attempt to do so. Enacting a fragmented partial approach to the stated problem that is informed solely by the Commission's limited jurisdiction will create significant harms, including constitutional ones, without achieving any public benefit. No regulator lacking authority over advertisers and non-broadcast media has the tools necessary for the task here. The FCC is simply the wrong governmental entity to attempt a fix. For all the reasons stated above, the State Associations respectfully request that the Commission terminate this proceeding without adopting the Proposals or any similar regulations suggested by commenters in this proceeding.

Respectfully submitted,

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