

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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

REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF  
BROADCASTERS  
1 M St, SE  
Washington, DC 20003  
(202) 429-5430  
Rick Kaplan  
Jerianne Timmerman  
Erin Dozier

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**I. INTRODUCTION AND SUMMARY**

As explained in our initial comments, the National Association of Broadcasters (NAB)<sup>1</sup> understands the FCC's goal in this proceeding and appreciates its attempt to grapple with the challenges of addressing political deepfakes.<sup>2</sup> However, NAB urged the Commission to allow Congress to take the lead here, given a variety of substantial hurdles, including the FCC's lack of authority over political advertisers/ad creators;<sup>3</sup> a lack of authority to mandate inquiries and disclosures about the content of political ads;<sup>4</sup> audience confusion that would arise from requiring disclosures on all (or nearly all) political advertising only when appearing on broadcast stations;<sup>5</sup> various First Amendment issues,<sup>6</sup> including those that led the

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<sup>1</sup> NAB is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> *Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements*, Notice of Proposed Rulemaking, MB Docket No. 24-211, FCC No. 24-74 (July 25, 2024) (Notice).

<sup>3</sup> Comments of NAB, MB Docket No. 24-211 (Sept. 19, 2024), at 45-46; 70-73.

<sup>4</sup> NAB Comments at 45-56.

<sup>5</sup> NAB Comments at 22-23, 42-45, 57-58.

<sup>6</sup> NAB Comments at 58-66.

Commission to focus on the use of AI technology rather than its true target (false, misleading or deceptive deepfakes); and additional First Amendment and Administrative Procedure Act (APA) issues that arise because the proposed rules do not materially alleviate concerns about deepfakes or enhance the public’s ability to evaluate political ads’ “substance and reliability.”<sup>7</sup> And even beyond these insurmountable legal impediments, the Commission has no authority to regulate deepfakes on social media or other online platforms where the overwhelming majority of them are shared and repeatedly redistributed.<sup>8</sup>

The record in this proceeding underscores many of the challenges NAB highlighted in our initial comments. These reply comments focus on just two of those areas: the flailing and insufficient legal analyses attempting to support the FCC’s approach and proposals to modify the definition of the material in political ads that would be the subject of inquiries and disclosures. First, commenters supporting the proposal either failed to grapple with the statutory, APA, or First Amendment issues at all, simply echoed the FCC’s inadequate initial analysis, or made their own analytical missteps, none of which will withstand judicial scrutiny. Second, several of the strongest supporters of the proposed rules also have urged the Commission to significantly modify its proposed definition of what content should trigger a disclosure (and, in some instances, what that disclosure should state). These proposals have significant implications for the FCC’s next steps, if any, in this proceeding.

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<sup>7</sup> Notice at ¶¶ 33, 35; NAB Comments at 56-58, 62-63.

<sup>8</sup> NAB Comments at 11-13; 17-19; 45-46; 70-73.

## II. THE RECORD FURTHER UNDERSCORES THE LEGAL OBSTACLES IMPEDING THE FCC'S REGULATORY EFFORTS

In its initial comments, NAB explained at length that the Commission lacks statutory authority to adopt the proposed rules, that the rules would not meet applicable APA standards, and that they would not pass a reviewing court's First Amendment scrutiny.<sup>9</sup> A range of commenters strongly support NAB's legal analyses, agreeing that the FCC did not possess the authority to impose its proposals and/or that the rules would not pass Constitutional muster.<sup>10</sup>

Notably, some commenters supporting the FCC's proposals (or at least the FCC's general regulatory effort, if not all the specifics of the proposed rules) declined to address

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<sup>9</sup> NAB Comments at 45-66.

<sup>10</sup> See, e.g., Comments of Am. Civil Liberties Union, MB Docket No. 24-211 (Sept. 19, 2024), at 1-3; Comments of the Found. for Individual Rights and Expression (FIRE), MB Docket No. 24-211 (Sept. 19, 2024), at 4-27; Comments of the Motion Picture Ass'n (MPA), MB Docket No. 24-211 (Sept. 19, 2024), at 1-6; Comments of Nexstar Media Inc., MB Docket No. 24-211 (Sept. 19, 2024), at 9-20; Comments of Gray Local Media, Inc., MB Docket No. 24-211 (Sept. 19, 2024), at 18-29; Comments of TechFreedom, MB Docket No. 24-211 (Sept. 19, 2024), at 11-22, 28-45; Comments of Nat'l Republican Senatorial Committee (NRSC), MB Docket No. 24-211 (Sept. 19, 2024), at 4-19; Comments of NCTA—The Internet & Television Ass'n, MB Docket No. 24-211 (Sept. 19, 2024), at 3-24; Comments of Am. for Prosperity, MB Docket No. 24-211 (Sept. 18, 2024), at 2-13; Comments of Am. Ass'n of Political Consultants (AAPC), MB Docket No. 24-211 (Sept. 19, 2024), at 3-4; Comments of People United for Privacy Found., MB Docket No. 24-211 (Sept. 17, 2024), at 1-8; Comments of Taxpayers Protection Alliance, MB Docket No. 24-211 (Sept. 19, 2024), at 2-3; Comments of Inst. for Free Speech, MB Docket No. 24-211 (Sept. 19, 2024), at 3-8, 10; Comments of The Free State Found., MB Docket No. 24-211 (Sept. 19, 2024), at 3-8; Comments of Abundance Inst., MB Docket No. 24-211 (Sept. 19, 2024), at 17-18; Comments of CMG Media Corp., MB Docket No. 24-211 (Sept. 19, 2024), at 8-9; Comments of E.W. Scripps Co., MB Docket No. 24-211 (Sept. 19, 2024), at 3-4, 7.

the fundamental statutory and Constitutional questions.<sup>11</sup> Only a limited number of commenters contended that the Commission possessed the requisite authority under the Communications Act of 1934 (Act) to promulgate the proposed rules and/or that those rules comported with the First Amendment. These commenters' legal analyses, however, were cursory and flawed, ignoring basic precepts of administrative law and First Amendment jurisprudence, or were not "analyses" at all, as they merely repeated back the Notice's claims that the FCC had the necessary authority and that the proposed regulations would pass First Amendment scrutiny.

Most comments defending the FCC's authority to adopt its proposals can be summarized as follows: Because the proposals will serve the public interest, then the Commission has authority to adopt them under Section 303(r) of the Act.<sup>12</sup> That is error.

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<sup>11</sup> See, e.g., Comments of the Nat'l Hispanic Media Coalition, WC (sic) Docket No. 24-211 (Sept. 4, 2024); Comments of Access Now, MB Docket No. 24-211 (Sept. 19, 2024); Comments of the Texas Civil Rights Project, MB Docket No. 24-211 (Sept. 18, 2024). Other commenters defended the FCC's proposals under the First Amendment but were silent as to the FCC's authority to adopt the proposals in the first place. See, e.g., Comments of Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), MB Docket No. 24-211 (Sept. 4, 2024); Comments of Screen Actors Guild-American Fed'n of Television and Radio Artists (SAG-AFTRA), MB Docket No. 24-211 (Sept. 5, 2024).

<sup>12</sup> See, e.g., Comments of Public Citizen, MB Docket No. 24-211 (Sept. 19, 2024), at 1, 4 (citing "harms from deceptive deepfakes" and offering a one-sentence justification that § 303(r)'s public interest standard thus provides authority for the FCC's proposals); Comments of Campaign Legal Center (CLC), MB Docket No. 24-211 (Sept. 19, 2024), at 2, 4 (asserting that, due to AI's threat to democracy, the proposed rules are in the "public's interest" and that the FCC therefore has authority to promulgate them under § 303(r)); Comments of Priorities USA, MB Docket No. 24-211 (Sept. 4, 2024), at 2 (quoting the Notice's quotation of § 303(r) and asserting that the FCC has "broad" authority under this section); Comments of Public Knowledge, MB Docket No. 24-211 (Sept. 19, 2024), at 6-7 (quoting § 303(r), asserting that the FCC has "broad" powers under it, and claiming that regulating AI-generated political ads falls within § 303(r)'s mandate to ensure that broadcasting serves the public interest because use of AI can alter the way information is presented to voters).

Section 303(r) is not an unbounded grant of authority permitting the Commission to adopt any and all rules it believes may serve the public interest. Such a view of Section 303(r) would give the FCC virtually unlimited authority to regulate as it pleased, contrary to law.

As NAB explained,<sup>13</sup> “no matter how important” the issue, an “agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”<sup>14</sup> More specifically, the “FCC cannot act in the ‘public interest’” if it does not otherwise have authority to promulgate the regulations at issue; rather, it “must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r).”<sup>15</sup> The Notice did not identify any provision of the Act delegating such authority to adopt the proposed rules,<sup>16</sup> and neither did commenters.<sup>17</sup>

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<sup>13</sup> NAB Comments at 46-49. *Accord*, e.g., FIRE Comments at 5-7; Gray Local Media Comments at 19-20 & n.27 (stressing that FCC must act pursuant to delegated authority).

<sup>14</sup> *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

<sup>15</sup> *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis in original).

<sup>16</sup> See NAB Comments at 48-53 (explaining why various provisions of the Act cited in the Notice, including Sections 1, 4(i), 303(b), 307(a), 309(a), 309(k)(1), 312(a)(7), 315, and 317, failed to provide authority for imposition of the proposed rules on broadcasters that affect the speech of candidates and other political speakers). *Accord*, e.g., FIRE Comments at 7-12; Free State Found. Comments at 3-6.

<sup>17</sup> The Leadership Conference paraphrased the equal opportunity and reasonable access provisions of Sections 315 and 312(a)(7) but made no effort to explain how or why these provisions gave the FCC authority to impose the proposed rules. Comments of The Leadership Conf. on Civil and Human Rights (LCCHR), MB Docket No. 24-211 (Sept. 4, 2024), at 3-4; see also Comments of Brennan Center for Justice (Brennan Center), MB Docket No. 24-211 (Sept. 19, 2024), at 8 (agreeing with LCCHR without explanation). But these two provisions simply have nothing to do with the proposed (or any) on-air disclosures by broadcasters. See, e.g., NAB Comments at 51-52; FIRE Comments at 8-11. Public Knowledge cited Sections 315 and 317, but could only claim that adoption of the FCC’s proposals would “extend[]” the “principles,” “uphold” the “intent,” or “align[] with the

The Commission also must dismiss any assertion that it may adopt its proposals because it “is not prohibited” from doing so under the Act.<sup>18</sup> “The FCC may only take action that Congress has *authorized*,” and a theory that an agency may act “so long as Congress has not *prohibited*” the action in question is “backwards as a matter of basic separation of powers and administrative law.”<sup>19</sup> And given that the Commission lacks authority to approve the proposed disclosure requirements, it certainly lacks authority to adopt certain commenters’ additional proposals to require broadcasters to investigate third parties’ “credible” complaints that political ads with AI did not include the requisite disclosures and even to “take some kind of corrective action” against uncooperative advertisers.<sup>20</sup> Neither the FCC nor broadcasters have any authority over advertisers.

Commenters’ contentions that the proposed rules comport with the First Amendment are similarly unconvincing. Some parties just repeated and agreed with the FCC’s tentative conclusion that its proposals comport with the Constitution.<sup>21</sup> Others, in a vain attempt to avoid the strictest levels of First Amendment scrutiny, incorrectly claimed that the proposed disclosure regulations are “content-neutral.”<sup>22</sup> The proposed rules clearly are content-based

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objectives” of these provisions. Public Knowledge Comments at 7-8. In other words, even Public Knowledge tacitly admitted that these provisions do not *authorize* the proposals.

<sup>18</sup> Priorities USA Comments at 2.

<sup>19</sup> NAB Comments at 53, quoting *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017) (Kavanaugh, J.) (emphases in original).

<sup>20</sup> CLC Comments at 7. See NAB Comments at 26-28 (explaining why requiring broadcasters to conduct additional investigations would be unworkable and likely abused by third parties).

<sup>21</sup> SAG-AFTRA Comments at 9-10; Priorities USA Comments at 3; Brennan Center at 8.

<sup>22</sup> Public Knowledge Comments at 8-9; Public Citizen Comments at 10.



because they apply on their face only to *political* advertisements with AI-created content and not to any other ads or programming with (or without) AI content.<sup>23</sup>

In any event, commenters simply ignored inconvenient Supreme Court precedent and failed to establish that the proposed regulations would satisfy any level of First Amendment review, whether strict, exacting, or intermediate, because they did not – and could not – show that proposals regulating *broadcasters* would alleviate real harms stemming from deepfakes in a direct, material, and narrowly tailored way.<sup>24</sup> These same commenters’ deficient First Amendment “analyses” also failed to recognize, let alone address, the

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<sup>23</sup> NAB Comments at 59, citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163-165 (2015) (finding a town’s “sign code” an unconstitutional content-based restriction because it placed differing regulation on signs depending on their topic/content, e.g., “directional,” “political,” or “ideological” signs). Claims by Public Knowledge and Public Citizen, *supra* n.22, that the proposed regulations are content neutral because they do not discriminate based on “viewpoint” ignore Supreme Court precedent making clear that a regulation may be an unconstitutional content-based speech restriction even if it does *not* discriminate among viewpoints. NAB Comments at 59 n.133, citing *Reed*, 576 U.S. at 168-169. Facially content-based laws are subject to strict scrutiny, “regardless of the government’s benign motive” or “content-neutral justifications.” NAB Comments at 60 & n.137, citing *Reed*, 576 U.S. at 165-66. See *also*, e.g., FIRE Comments at 17; Nexstar Comments at 15-16; Gray Local Media Comments at 25; MPA Comments at 2-3; People United for Privacy Found. Comments at 5 (agreeing that the proposed rules are content based, citing *Reed* and other cases).

<sup>24</sup> See NAB Comments at 62-63 (explaining how the proposed regulations failed to meet these First Amendment standards, as they do not address political advertising in most cable/satellite programming or especially online, where deepfakes thrive and spread, yet would apply to essentially every broadcast political ad, regardless of their veracity or benign usage of AI, thus making the proposals both under- and over-inclusive). *Accord*, e.g., FIRE Comments at 20-26; MPA Comments at 5-6; Gray Local Media Comments at 27-29; Nexstar Comments at 17-20. The cursory First Amendment discussions of commenters supporting the FCC’s proposals did not attempt to explain how proposals limited to broadcasters would effectively address deepfakes or how those proposals were appropriately tailored. See SAG-AFTRA Comments at 9-10; Lawyers’ Committee Comments at 14-15; LCCHR Comments at 4-5; Priorities USA Comments at 2-3; Public Citizen Comments at 8-10. At best, commenters made conclusory claims that they were properly tailored. Public Knowledge Comments at 9.

proposed rules' burdens on broadcasters, candidates, and other speakers.<sup>25</sup> In short, commenters did virtually nothing to demonstrate that the FCC's proposals would satisfy strict, exacting, or intermediate scrutiny or even rational basis review.<sup>26</sup>

Other attempts to justify the proposed rules under the Constitution are inapposite or nonsensical. Mushing erroneous statutory-related arguments together does not create a convincing or even coherent First Amendment argument.<sup>27</sup> And a commenter's assertion that disclosure requirements can survive "exacting scrutiny" under inapposite Supreme

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<sup>25</sup> See NAB Comments at 63-66 (identifying and discussing these burdens, including inhibiting political speakers' use of AI in broadcast ads and their use of broadcast stations as their platform of choice to speak, as well as decreasing the number of political ads able to be aired in stations' fixed blocks of advertising time and the usable "real estate" for political ads to convey their messages). *Accord*, e.g., Gray Local Media Comments at 11-13, 23-24; AAPC Comments at 3; NRSC Comments at 5-7; E.W. Scripps Comments at 4-7.

<sup>26</sup> See NAB Comments at 61 (pointing out that the current proposals, which are practically devoid of meaning because they would apply to every (or almost every) political ad aired on broadcast stations, would not survive rational basis review).

<sup>27</sup> The Leadership Conference claims that the proposed rules somehow comply with the First Amendment because they combine the framework of the "payola rules" requiring disclosures and the recordkeeping requirements under § 315(e) of the Act. See LCCHR Comments at 4-5. But sponsorship identification is irrelevant here, because the proposed AI disclosures go well beyond the identity of the sponsor (*i.e.*, the person paying), which is all § 317 of the Act requires. See NAB Comments at 50-51; FIRE Comments at 8. LCCHR's assertion (at 4) that the "record-keeping burden" here is "not heavy" is also irrelevant. The proposed on-air disclosure requirement is not mere recordkeeping, but a content-based, compelled speech mandate that burdens stations' and political speakers' First Amendment rights. See NAB Comments at 52. And LCCHR's reference to *McConnell v. FEC*, 540 U.S. 93 (2003), is inapposite, given that the case only addressed and narrowly upheld, against a facial challenge, the specific record-keeping requirements mandated by Congress in § 315(e), not the FCC's disclosure and recordkeeping proposals now at issue. As NAB previously explained, moreover, this portion of *McConnell* stands on flimsy ground for several reasons, making it vulnerable to as-applied challenges, especially if the FCC tried to expand § 315's recordkeeping requirements. See Reply of NAB, MB Docket No. 19-363 (Jan. 28, 2020), at 7-8 & n.20-21; Petition for Reconsideration and Clarification of NAB, *et al.*, MB Docket No. 19-363 (Nov. 15, 2019), at 11-12.

Court precedent does not show that the FCC’s proposals would comport with the First Amendment.<sup>28</sup> The feeble statutory and First Amendment analyses offered by those supporting the proposed regulations thus further expose the limits of the FCC’s legal authority here and again show that Congress should take the lead in addressing political deepfakes, to the extent action is needed.

### **III. IF THE COMMISSION CHOOSES TO MOVE FORWARD, IT SHOULD SEEK FURTHER COMMENT GIVEN THE WIDE-RANGING PROPOSALS IN THE RECORD**

As explained below, many supporters of the FCC’s proposed rules have proposed modifications to the definition of what content in a political ad triggers a disclosure and/or what the disclosure language should say. Changes to these basic aspects of the proposed regulations could raise additional, different issues from the FCC’s original proposals.

Although NAB continues to strongly encourage the Commission to close this proceeding, if

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<sup>28</sup> Public Citizen (comments at 9) pointed to *Citizens United v. FEC*, 558 U.S. 310 (2010), upholding statutory on-air disclaimer requirements (2 U.S.C. § 441d) that applied to electioneering communications funded by non-candidates. The Court explained that disclosures could be justified based on a governmental interest in providing the electorate with information “about the sources of election-related spending.” *Id.* at 366-67. The proposed disclosures here have nothing to do with *identifying election spending sources*; in any event, § 317 of the Act and FCC rules already ensure that the sponsors of political ads on broadcast stations are disclosed. *Citizens United*, moreover, involved disclosures by actual participants in the political process – the supporters of and contributors to candidates and campaigns – not to the media platforms delivering their messages. That is a crucial difference. See *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019) (finding Maryland’s disclosure and recordkeeping laws pertaining to certain political ads contrary to First Amendment). The Fourth Circuit stressed that the state’s laws had created a distinct “constitutional infirmity” by burdening “platforms rather than political actors,” and that Maryland could have accomplished its goals via “better fitting means,” *i.e.*, by applying the disclosure requirements to “direct participants in the political process” – the ad purchasers – rather than “neutral third-party platforms.” *Id.* at 515-517, 523 (emphases in original). The FCC’s current proposals applicable to third-party broadcast platforms, rather than advertisers, suffer from similar constitutional infirmities.

the FCC remains interested in pursuing any version of the proposed rules, it should proceed with caution and seek additional comment on any changes to the definition of AI and the delineation of the content in political ads that will be the subject of broadcasters' mandatory inquiries and compelled speech under the rules.

**A. Even Commenters Supporting the FCC's Proposals Acknowledge that Their Scope Is Overly Broad or Otherwise Problematic and Offer Differing Fixes to These Problems**

Even commenters generally supporting the proposed regulations often do not support the FCC's definition of AI-generated content subject to those rules, and also do not agree among themselves on how to define what content should be covered by the rules and/or what the mandated disclosures should state. For example, although Public Citizen supports Commission-mandated disclosures, it believes the benefits of the disclosure will be lost if the disclosure requirement is overbroad.<sup>29</sup> Citing concerns that nearly all ads will soon contain AI-generated content under the definition in the Notice, Public Citizen proposes a narrower definition.<sup>30</sup>

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<sup>29</sup> Public Citizen Comments at 5.

<sup>30</sup> Public Citizen Comments at 7. Public Citizen would define AI-generated content as: "an image, audio, or video that has been completely or primarily generated or significantly edited using computational technology or other machine-based systems that depict an individual's appearance, speech, or conduct, or an event, circumstance, or situation, including an image, audio, or video in which:

- The primary subjects are portrayed doing something they didn't do or in realistic looking scenes that did not occur or which have been substantially altered;
- The primary subjects are portrayed saying something they didn't say;
- The appearance of the primary subjects has been substantially altered in a realistic looking manner (e.g., a person is realistically depicted wearing a T-shirt with a slogan that they did not wear)."

The Brennan Center observes that the proposed rules are both overinclusive and underinclusive in terms of which ads will require disclosure.<sup>31</sup> It explains that the broad definition in the Notice would result in disclosures for far too many ads, “essentially rendering the requirement meaningless.”<sup>32</sup> To address this, the Brennan Center suggests that the FCC limit disclosures 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.”<sup>33</sup> To cure what it views as the under-inclusiveness of the proposals, the Brennan Center urges the Commission to expand the definition to be technology-neutral so that deceptive content created using simpler tools also would be disclosed, and to make conforming changes to the disclosure announcement.<sup>34</sup>

Public Knowledge urges the FCC to modify its proposal to require disclosures only for “potentially deceptive AI-generated content,” noting that the breadth of the proposed definition could lead to either under-reporting or over-reporting.<sup>35</sup> Public Knowledge

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Public Citizen does not, however, propose changes to the on-air or online public inspection file (OPIF) disclosure language, so it is not clear that audiences would be made aware of the narrower definition under its proposal.

<sup>31</sup> Brennan Center Comments at 6-7.

<sup>32</sup> Brennan Center Comments at 6-7.

<sup>33</sup> Brennan Center Comments at 7.

<sup>34</sup> Brennan Center Comments at 7. It proposes the following disclosure language: “This message contains information substantially manipulated in whole or part by artificial intelligence or other technical means.” *Id.*

<sup>35</sup> Public Knowledge Comments at 3-5. This proposal would define “potentially deceptive AI-generated content” as “an image, audio, or video that depicts an individual’s appearance,

cautions that such over-reporting could result in audience fatigue, reduced effectiveness of disclosures, and general public cynicism about the authenticity of communications.<sup>36</sup>

Several other commenters that support FCC adoption of rules offer additional, different modifications.<sup>37</sup> Significantly, none of the proposals in the record would make the same changes to the Notice's proposals, and not all of them even address the same issues, yet again illustrating the practical and legal impediments facing the FCC's regulatory efforts.

**B. If the Commission Moves Forward, It Should Seek Further Comment on the Issues Raised by any Potential Modifications to its Proposals**

The wide-ranging array of commenters' proposed changes, even among the most ardent supporters of FCC regulatory action, further highlights the unique challenges presented by attempting to regulate deepfakes in political advertising on broadcast radio

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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." Public Knowledge does not propose changes to the language of the on-air or OPIF disclosures consistent with this proposed definition, although it does suggest other changes to the disclosure language. *Id.* at 5.

<sup>36</sup> Public Knowledge Comments at 5.

<sup>37</sup> See Comments of the Electronic Privacy Information Center, MB Docket No. 24-211 (Sept. 4, 2024), at 3-5 (expressing concerns that the proposed disclosure is not sufficiently granular and does not tell the public which aspects of a political ad are inauthentic). SAG-AFTRA proposes clarifications aimed at entirely different issues based on a different reading of the proposed definition, urging the FCC to remove the term "actor" and replace it with "likenesses or performances," and proposing edits to ensure that the definition in the rules "includes content that has been substantially modified, not just generated," but excludes non-material alterations "typically done in post-production." SAG-AFTRA Comments at 4-5. See also Lawyers' Committee Comments at 10-11 (proposing a new definition of AI-generated content and stating that the definition in the Notice would likely encompass all images, audio and video because nearly all of them involve use of computers and even purely analog media such a tape recorder or film camera would likely meet the definition of a "machine-based system").

and television. NAB continues to believe that the Commission should not move forward in this proceeding. None of the commenters' proposed changes would cure the most significant problems with the FCC's proposals, because no modifications can address the FCC's lack of authority to regulate either the advertisers who develop and deploy political ads, including deepfakes and cheapfakes, or the online platforms where deepfakes are overwhelmingly found.<sup>38</sup> And although some of the proposals would narrow the scope of the content that requires a disclosure, those modifications are not sufficient to overcome the First Amendment problems inherent in all these proposals, which are content-based regulations of highly protected political speech, as discussed in Section II., *supra*, and in detail in NAB's initial comments.<sup>39</sup> Several of the commenters' proposals, while more directly targeting the fake and deceptive content of real concern, present new difficulties not raised by the technology-oriented approach proposed in the Notice.<sup>40</sup> As a procedural

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<sup>38</sup> See NAB Comments at 45-56 (also explaining in detail why the FCC lacks authority to impose its proposed rules on broadcast stations). Significantly, commenters supporting the FCC's proposals acknowledge the potential harms likely to arise from asymmetric regulation of deepfakes in political advertising. CLC, for example, stated that if the FCC does not regulate all platforms *within* its jurisdiction, "savvy political operatives may very well migrate their AI-generated, deceptive campaign ads to those outlets that do not require transparency regarding the use of AI in campaign ads, reducing the impact of the proposed regulation." CLC Comments at 6. Obviously, the FCC's inability to regulate online platforms, which are *outside* its jurisdiction, also would drive additional political content to those platforms, to the detriment of consumers and broadcasters. See NAB Comments at 41-45.

<sup>39</sup> NAB Comments at 58-66.

<sup>40</sup> For example, attempting to more directly target the false, deceptive, and misleading content truly concerning the FCC raises other First Amendment problems, given the subjectivity and vagueness inherent in defining what content is "deceptive" and in applying such a standard. Rules based on restricting false, deceptive, or misleading political ads would be highly vulnerable to both facial and as-applied constitutional challenges.

matter, moreover, each of the proposed approaches for regulating AI-generated content could raise different challenges in terms of informing audiences, practical implementation, and legal compliance.

If the Commission opts to modify its proposed definition of the AI-generated content subject to regulation and/or the language of the disclosure announcement to accommodate some of the commenters' suggested changes or to make other alterations, NAB urges it to seek comment via a further rulemaking notice on the specific revised definition and announcement language under consideration. These are basic issues upon which broadcasters and other stakeholders should be permitted to comment.

#### **IV. CONCLUSION**

For all the practical, legal, and constitutional reasons set forth above and in NAB's earlier comments, the Commission should close this proceeding without approving final rules. Given the insurmountable problems stemming from its lack of legal authority, the Commission cannot hope to enact rules effectively promoting the public's ability to assess the substance and reliability of false, deceptive, and misleading AI-generated political ads, particularly the online deepfakes that should be the focus of any proposed regulation. Only Congress can address AI-generated political deepfakes across platforms and reach the advertisers creating political ads and thus should be the entity to take the lead in considering any needed regulatory action.



Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

1 M St, SE  
Washington, DC 20003  
(202) 429-5430



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Rick Kaplan  
Jerianne Timmerman  
Erin Dozier

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