PEOPLE UNITED *for* PRIVACY FOUNDATION

September 17, 2024

Via Electronic Comment Filing System

Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Notice of Proposed Rulemaking; "Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements" (FCC 24-74)

Dear Commissioners,

People United for Privacy Foundation[1] ("PUFPF") writes to express its concerns regarding the above-referenced Notice of Proposed Rulemaking (the "NPRM"). The NPRM proposes to require candidate advertising and "issue ads" disseminated on broadcast, cable, and satellite media to carry an additional disclaimer if such ads contain any content generated by artificial intelligence ("generative AI").

For nonpartisan, nonprofit organizations like PUFPF, the proposed disclaimer requirement singles out issue advertising for regulation without any adequate justification. The proposed rule would, in practice, impose a significant burden on the core First Amendment rights of issue advertisers, whose interests the NPRM entirely ignores.

Not only does the Federal Communications Commission ("FCC" or "Commission") lack the statutory authority to adopt such a rule, but the rule's content-based trigger is not narrowly tailored to the Commission's regulatory interest and is therefore unconstitutional.

I. The Commission has no statutory authority for the proposed rule.

The NPRM asks if the Commission has statutory authority to adopt the proposed rule.[2] It does not.

"Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line."[3] "Where the statute at issue is one that confers authority upon an administrative agency, that [agency's statutory construction] must be shaped . . . by the nature of the question presented—whether

[1] People United for Privacy Foundation's vision is an America where all people can freely and privately support ideas and nonprofits they believe in so that all sides of a debate will be heard, individuals do not face retribution for supporting important causes, and all organizations have the ability to advance their missions because the privacy of their donors is protected.
[2] NPRM ¶ 27. Available at: https://docs.fcc.gov/public/attachments/FCC-24-74A1.pdf (Aug. 5, 2024).
[3] *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (internal quotation marks, brackets, and citation omitted).

Congress in fact meant to confer the power the agency has asserted."[4] Courts routinely strike down agency regulations that exceed the agency's statutory authority.[5]

In line with all agencies' limited powers, the Commission does *not* have "general authority" or "general rulemaking powers"[6] under the Communications Act of 1934 (the "Act"), as amended, to regulate broadcast, cable, and satellite content however it sees fit. As the FCC itself has acknowledged, "while the Commission's statutory authority is indeed broad, *it is certainly not unlimited*."[7]

The NPRM purports to rely upon several provisions of the Act. However, none of these provisions justifies the proposed rule:

- 47 U.S.C. § 312(a)(7)[8] – This provision guarantees access for candidates to use airtime (often called the "candidate use" requirement). The provision says nothing about issue ads sponsored by non-candidates, nor does it say anything about disclaimers.

- 47 U.S.C. § 315[9] – This provision pertains primarily to candidate content:

    - It guarantees "equal opportunities" for opposing candidates to "use" a broadcasting station;[10]
    - It guarantees "lowest unit charge" for certain candidate advertising;[11]
    - It requires special disclaimers for certain candidate advertising;[12] and
    - It requires stations to maintain what is commonly known as a "public file" for candidate and issue advertising.[13]

    Insofar as Section 315's public file requirement applies to issue ads, it requires basic information about the advertiser and "the issue to which the communication refers." The statute does not authorize the Commission to require stations to collect any additional information about the means and methods by which an advertisement is created or produced.

    As the NPRM explains, the "objective" of the public file "requirement is to preserve the audience's right to know *by whom* it is being persuaded."[14] The Act does not authorize the Commission to further require recordkeeping on *how* the audience is being persuaded (*e.g.*, whether by paid actors, paid testimonials, animation, computer-generated imagery, or, as relevant here, by generative AI).

- 47 U.S.C. § 317[15] – This provision simply requires FCC-regulated stations to ensure that *all* paid advertising identifies the sponsor.

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[4] *Id*. at 721 (internal quotation marks and citation omitted).
[5] *Id*. at 721-22 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Alabama Assn. of Realtors v. Dept. of Health and Human Servs.*, 141 S. Ct. 2485 (2021); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022)).
[6] *Cf.* NPRM n.78.
[7] *Children's Television Report and Policy Statement*, 50 F.C.C. 2d at 1 (Nov. 6, 1974) ¶ 9 (emphasis added).
[8] NPRM ¶ 4 & n.13.
[9] *Id*. ¶¶ 4-5.
[10] 47 U.S.C. § 315(a).
[11] *Id*. § 315(b)(1)(A).
[12] *Id*. § 315(b)(2)(C).
[13] *Id*. § 315(e).
[14] NPRM ¶ 6 (emphasis added) (internal quotation marks, brackets, and citation omitted).
[15] NPRM ¶ 6.

This "sponsorship identification rule"[16] is no more than that. It is not a general grant of authority for the Commission to prescribe whatever disclaimer requirement it sees fit simply because advertising is disseminated over broadcast, cable, or satellite media. Nor has the Commission, to our knowledge, ever taken such a broad position until now. Nor does the NPRM cite any judicial authority to support such sweeping disclaimer authority.

Insofar as Congress has prescribed advertising disclaimer requirements beyond mere sponsorship identification, it has conferred authority to *other agencies* to implement such disclaimers based upon the regulatory authority of the agency to which the advertising's subject matter pertains. This demonstrates that "Congress [did not] in fact mean[] to confer the power the [FCC] has asserted"[17] here to require disclaimers beyond those it has been empowered specifically by the Act to implement.

For example:

- Advertising by investment advisers may be subject to certain disclaimer requirements issued by the Securities and Exchange Commission pursuant to that agency's organic statute.[18]

- Prescription drug advertising is subject to certain disclaimer requirements issued by the Food and Drug Administration pursuant to that agency's organic statute.[19]

- Advertising for commercial products generally is subject to certain disclaimer requirements issued by the Federal Trade Commission pursuant to that agency's organic statute.[20]

- Advertising by FDIC-member banks is subject to certain disclaimer requirements issued by the Federal Deposit Insurance Commission pursuant to that agency's organic statute.[21]

- And, of particular relevance here, political advertising is subject to certain disclaimer requirements issued by the Federal Election Commission pursuant to that agency's organic statute.[22]

Moreover, where Congress has specified additional disclaimer requirements for advertisements on broadcast, cable, or satellite media, it has said so explicitly in those other agencies' organic statutes.[23]

Surely, the Commission cannot rely upon the sponsorship identification requirement under 47 U.S.C. § 317 to justify supplementing these other agencies' disclaimer requirements merely

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[16] "Sponsorship Identification Rules," Federal Communications Commission. Available at: https://www.fcc.gov/consumers/guides/sponsorship-identification-rules (Jan. 13, 2021).
[17] *West Virginia*, 597 U.S. at 723.
[18] *See* 17 C.F.R. § 275.206(4)-1.
[19] *See* 21 C.F.R. § 202.1.
[20] *See*, *e.g.*, 16 C.F.R. § 255.0 *et seq*.
[21] *See* 12 C.F.R. § 328.6.
[22] *See* 11 C.F.R. § 110.11.
[23] *See*, *e.g.*, 52 U.S.C. § 30120(d).

because advertising pertaining to these subjects appears on FCC-regulated media. In the same vein, simply because there is no existing statute governing advertising using generative AI, the Commission may not pluck out of thin air the authority to require disclaimers on such advertising merely because it is disseminated through FCC-regulated media.

- 47 U.S.C. § 303(r)[24] – This provision authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary *to carry out the provisions of this chapter* . . . ." (emphasis added)

  As demonstrated above, no "provisions of this chapter" (*i.e.*, the Act) authorize the Commission to adopt the proposed rule. The NPRM purports that this provision gives the Commission broad authority to adopt any rule in "the public interest."[25] Not so. The NPRM cites two Supreme Court authorities for this proposition, both of which only addressed the Commission's power to *license* broadcasters[26] – a power that is plainly stated in the Act.[27] Requiring advertising to disclose the use of generative AI is wholly unrelated to the Commission's licensing function.

The only other judicial authority the NPRM relies upon is a U.S. Court of Appeals for the Second Circuit decision holding that the Commission "does possess the power to issue such regulations in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community."[28] However, that decision also was rooted in the Act – specifically, a provision authorizing the Commission to facilitate access to wire and radio communication services "without discrimination on the basis of race, color, religion, national origin, or sex."[29] Again, the proposed rule is wholly unrelated to this statutory mandate.

Indeed, the NPRM itself implicitly underscores how the proposed disclaimer requirement is inappropriate for agency action when it cites *39* measures regulating the use of generative AI in political advertising that have already been enacted or are under consideration at the state level. Tellingly, as the NPRM notes, *all* of those measures have been in the form of "*legislation*."[30] The NPRM cites not a single measure that has been enacted by a regulatory agency, even though states generally have campaign finance agencies that regulate state-level political advertising and campaign practices.

The NPRM also betrays its shocking failure to give due deference to the legislative branch by omitting any mention at all of the *dozens and dozens* of bills that are pending in Congress that would address this very issue.[31] By failing to mention Congress even once in the context of regulating content featuring generative AI, the NPRM reflects an imperial bureaucracy mindset.[32]

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[24] NPRM ¶ 27.
[25] *Id*.
[26] *See National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978) ("this general rulemaking authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest *licensing standard*") (emphasis added); *Nat'l Broadcasting Co. v. U.S.*, 319 U.S. 190, 215 (1943) ("The criterion governing the exercise of *the Commission's licensing power* is the public interest, convenience, or necessity") (emphasis added) (internal quotation marks omitted).
[27] 47 U.S.C. § 307.
[28] *Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 529, 531 (2nd Cir. 1977).
[29] *Id*. (citing *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976)); *NAACP*, in turn, cited 47 U.S.C. § 151.
[30] NPRM ¶ 7 (emphasis added).
[31] *See*, *e.g.*, S. 3875 (118th Cong.), S. 2770 (118th Cong.), S. 1596 (118th Cong.), H.R. 8668 (118th Cong.), H.R. 8384 (118th Cong.), H.R. 4611 (118th Cong.), H.R. 3044 (118th Cong.). PUFPF's citation of these bills does not imply its endorsement.
[32] While Chairwoman Rosenworcel's statement accompanying the NPRM appears to at least give a nod to Congress, it is a contemptuous nod nonetheless. She contrasts the "obfuscating" that is "delay[ing] action in Washington" with the legislation that has been enacted at the state level. She assumes that the more deliberative legislative process in Congress

The fact that the FCC has leapfrogged Congress in the past is not a compelling justification for adopting the proposed rule. The NPRM cites the Commission's enactment of restrictions on advertising in children's television programming prior to Congress enacting a law to address this issue.[33] There, the Commission cited children's "immaturity and their special needs" to justify its regulation of "programs which will serve the unique needs of the child audience."[34] The Commission, presumably, is not proposing in this rulemaking to treat the entire American electorate as "immature[]" infants in need of the agency's protection.

Respectfully, the decision to impose special disclaimer requirements on speech about political matters and controversial issues of public importance is one that must be made by our elected representatives and not unelected bureaucrats. Separation of powers demands it.

II. The proposed rule violates the First Amendment.

A. The rule is subject to strict scrutiny.

As the Supreme Court has held, "[c]ontent-based laws—those that target speech based on its communicative content—are *presumptively unconstitutional* and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"[35] (*i.e.*, "strict scrutiny").[36]

As the Court has further explained:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, [such as] defining regulated speech by particular subject matter . . . .[37]

The Commission's proposed rule is indisputably content-based insofar as the proposed disclaimer only applies to "any ad by or on behalf of a legally qualified candidate for public office and any issue ad."[38] The rule would define an "issue ad" based on whether it "communicates a message relating to any political matter or controversial issue of public importance"[39] – *i.e.*, "the topic discussed or the idea or message expressed" and the "particular subject matter" of the speech.[40]

Citing *Turner Broadcasting System, Inc. v. FCC*, the NPRM posits that, "[w]hile a content-based regulation of speech is typically subject to strict scrutiny, the Supreme Court has described First

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is a bug rather than a feature and that the Commission should therefore bypass Congress altogether. Meanwhile, she also sees no significance in the fact that, by her own account, "Nearly half of the States in this country have enacted *laws*" (not agency rulemakings) to address this issue (emphasis added).

[33] NPRM n.78.

[34] *Children's Television Report and Policy Statement*, 50 F.C.C. 2d 1 ¶ 16.

[35] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citations omitted) (emphasis added).

[36] NPRM ¶ 29.

[37] *Reed*, 576 U.S. at 163 (internal citations omitted).

[38] NPRM ¶ 16.

[39] *Id*. n.56.

[40] *Reed*, 576 U.S. at 163.

Amendment review of broadcast regulation as 'less rigorous' than in other contexts based on the spectrum scarcity rationale."[41] However, the Supreme Court specifically has rejected this reading of *Turner Broadcasting*. As the Court has explained, "reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation."[42] Here, the proposed rule is decidedly *not* a content-neutral regulation.

Moreover, even if *Turner Broadcasting* categorically set a lower First Amendment standard for broadcast regulation – and it did not – the proposed rule plainly would also apply to ads disseminated on cable television.[43] Insofar as the NPRM would like to rely upon *Turner Broadcasting*, that case specifically held that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it,[44] *does not apply in the context of cable regulation*."[45]

B. The rule is not narrowly tailored.

A government speech regulation fails the narrow tailoring required by strict scrutiny where, as here, it is both vastly underinclusive and overinclusive.[46]

The NPRM purports "that the Commission has a compelling interest in providing greater transparency regarding the use of AI-generated content in political advertising."[47] However, this misidentifies the Commission's statutory mandate and regulatory authority. By its own account, "the Commission is the federal agency responsible for implementing and enforcing America's communications law and regulations."[48] The Commission has no particular authority – or expertise – to regulate political advertising. The FCC is not the FEC.

Elsewhere, the NPRM more appropriately justifies the proposed rule based upon the Commission's authority to require broadcast, cable, and satellite licensees "to take all reasonable measures to eliminate any false, misleading, or deceptive matter."[49] When viewed in this light, however, the proposed rule is both underinclusive and overinclusive.

The NPRM cites several reports purporting to show how advertising concerning candidates using generative AI presents a particular threat of misinformation to the electorate.[50] However, the NPRM fails to explain why advertising that runs on broadcast, cable, and satellite media using generative AI doesn't present a similar threat to the public with respect to other subject matters.

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[41] NPRM n.99 (citing *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 637 (1994)).
[42] *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011) (emphasis added).
[43] NPRM ¶ 22.
[44] The phrase "whatever its validity" in *Turner Broadcasting* further undermines the NPRM's reading of this authority. The Supreme Court was actually questioning the "validity" of the proposition that "a less rigorous standard of First Amendment scrutiny" should be applied to broadcast regulation, rather than endorsing this proposition (as the NPRM claims).
[45] *Turner Broadcasting*, 512 U.S. at 637 (emphasis added).
[46] *Brown*, 564 U.S. at 805 (a speech regulation subject to strict scrutiny must be "neither seriously underinclusive nor seriously overinclusive"); *see also Reed*, 576 U.S. at 172 ("In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest.").
[47] NPRM ¶ 30.
[48] "About the FCC," Federal Communications Commission. Available at: https://www.fcc.gov/about/overview (2024).
[49] NPRM ¶ 3 (citing *Programming Inquiry*, Report and Statement of Policy, 44 F.C.C. 2303, 2313 (1960)).
[50] *Id*. n.39; *see also id*. ¶ 30 ("Recent advancements in generative AI technologies have led to their widespread use, and AI is expected to play a growing role in the future production of political ads.").

For example:

- a car manufacturer could just as easily use generative AI to produce an advertisement that falsely depicts a competitor's product as critically failing a crash test;
- a mobile device manufacturer could just as easily use generative AI to produce an advertisement that misleadingly depicts a competitor's product as catching fire spontaneously;
- a purveyor of gold bars could just as easily use generative AI to produce an advertisement that deceptively depicts a nationwide run on banks to portray gold as a safer investment.

Just as generative AI is being used in political ads, it is also being used in ads for commercial products and services.[51] All of the above examples are plausible ways in which generative AI can be used. Yet, they are not covered by the proposed rule, even though they are not only "false, misleading, or deceptive,"[52] but they also could result in public panic (especially the last example) comparable to the "confusion and distrust" among the public that the NPRM claims as justification for the proposed rule.[53]

The proposed rule is substantially *underinclusive* by focusing specifically on advertising on behalf of candidates and "issue ads" to the exclusion of advertising concerning all other matters. The rule's focus on regulating political and issue speech and not commercial speech is also particularly misplaced because the former is *more protected* under the First Amendment than is the latter.[54]

At the same time, the proposed rule also is substantially *overinclusive*. To wit, all of the evidentiary authorities the NPRM cites for the proposed rule raise concerns about the use of generative AI in ads concerning *candidates*.[55] Yet, the proposed rule also would regulate "issue ads," which are defined specifically as ads that do *not* concern candidates.[56]

Issue ads are an important activity for many nonprofit organizations whose interests People United for Privacy Foundation seeks to advance. The NPRM cites no evidence for why issue ads should be swept in under the proposed rule. Unless other comments provide the FCC with such record evidence, it will be unable to defend the constitutionality of its regulation of issue ads here.[57]

The NPRM also repeatedly characterizes the rule's burdens as "modest."[58] However, the NPRM focuses exclusively on the burdens the rule would impose on FCC licensees and completely ignores the burdens on ad sponsors. Those speech burdens would not be insignificant or "modest," especially for radio ads that are 30 or even 15 seconds in length.

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[51] *See*, *e.g.*, Julia Boorstin, "Generative A.I. is creating custom advertisements for marketing brands," CNBC Television. Available at: https://www.youtube.com/watch?v=yKWQMOqYV-k (April 13, 2023).
[52] *See* note 49, *supra*.
[53] NPRM ¶ 1.
[54] *FCC v. League of Women Voters of California*, 468 U.S. 364, 375-76 (1984) ("the expression of editorial opinion on matters of public importance . . . is entitled to *the most exacting degree of First Amendment protection*.") (emphasis added); *compare id*. *with Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) ("certain types of restrictions might be tolerated in the commercial speech area because . . . speech proposing a commercial transaction [] occurs in an area traditionally subject to government regulation").
[55] NPRM n.39.
[56] NPRM n.56.
[57] *See*, *e.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 378-79 (2000) (requiring "empirical evidence" and not "mere conjecture" to sustain a First amendment burden).
[58] NPRM ¶¶ 19, 32, 33, 35, 36.

The proposed rule would require affected ads to state that:

> "The following message contains information generated in whole or in part by artificial intelligence," or
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> "This message contains information generated in whole or in part by artificial intelligence."[59]

For radio ads, the disclaimer must be read "orally in a voice that is clear, conspicuous, and a speed that is understandable."[60]

In practice, this means that at least five to six seconds of a radio ad must be devoted to this disclaimer. When combined with the existing sponsorship identification "paid for by" disclaimer, this means that sponsors of issue ads will lose more than 1/3 of a 30-second ad to disclaimers, and 15-second ad formats will be practically off-limits.[61]

When combined with the underinclusivity and overinclusivity concerns discussed above, the rule's significant burdens on core First Amendment-protected speech further call into question its constitutionality.

III. Conclusion

Safeguarding democracy is an important interest for the government as a whole. However, there are many important governmental interests that may be affected by advertising on cable, broadcast, and satellite media that simply are not within the Commission's purview, such as protecting public safety or ensuring a sound financial system. The Commission's proposed frolic and detour into regulating candidate and issue advertising is beyond its statutory authority. The proposed rule's lack of narrow tailoring also betrays the Commission's lack of expertise regulating in this area.

Like the 39 state legislatures cited in the NPRM that have enacted or considered legislation addressing generative AI in political advertising, Congress is the only governmental body with authority to prescribe the proposed disclaimer requirement. The FCC may not usurp Congress' authority simply because certain members of the Commission are impatient with the pace at which Congress acts.

Sincerely,

Matt Nese
Vice President
People United for Privacy Foundation

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People United for Privacy Foundation

[59] NPRM ¶ 17.
[60] *Id*.
[61] In all likelihood, radio stations will not exempt time devoted to these disclaimers from an advertiser's paid air time.