MOTION PICTURE ASSOCIATION

September 19, 2024

<u>**VIA ECFS**</u>
Federal Communications Commission
45 L Street NE
Washington, DC 20554

RE: Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, MB Docket No. 24–211

Dear Chair Rosenworcel and Commissioners:

The Motion Picture Association, Inc. ("MPA")[1] respectfully submits this letter in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking regarding its proposal to require broadcast stations, cable operators, and other entities ("covered entities") to disclose the use of artificial intelligence ("AI") generated content in political ads.[2] The MPA appreciates the FCC's efforts to promote greater transparency—and rein in the use of false, misleading or deceptive material—in political ads. However, the Commission should not adopt its Proposed Rules. While they are infirm in several respects,[3] the Proposed Rules would impose labeling requirements on core political speech that disregard fundamental First Amendment guarantees and would fail judicial scrutiny by compelling disclosures of constitutionally protected expressions that are not false, misleading or deceptive.

A. The Proposed Rules Regulate Core Political Speech and Would Be Subject to Strict Scrutiny.

The Proposed Rules are immediately suspect because they seek to regulate speech on matters of public concern by requiring all political advertisements to contain disclosures labeling content as AI-generated if AI is used to create or edit the advertisement.[4] The U.S. Supreme Court ("the Court") has singled out this category of speech as deserving the highest level of protection under the First Amendment. According to the Court:

> The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, 'speech on public issues occupies the

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[1] The MPA is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting the creative ecosystem that brings entertainment and inspiration to audiences worldwide. The MPA's member companies are Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. In addition, several of the MPA's members have as corporate affiliates major news organizations (including ABC, NBC, and CBS News, and CNN) and owned-and-operated local television stations with broadcast news operations.

[2] Federal Communications Commission, *Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements*, MB Docket No. 24–211, Notice of Proposed Rulemaking, 89 Fed. Reg. 150 (Aug. 5, 2024), https://www.govinfo.gov/content/pkg/FR-2024-08-05/pdf/2024-16977.pdf ("NPRM" or "Proposed Rules").

[3] For example, MPA agrees with Commissioners Brendan Carr and Nathan Simington that the FCC lacks the statutory authority to enact the Proposed Rules. *See* NPRM, *Statements of Brendan Carr and Nathan Simington, Dissenting*. However, this letter responds to the NPRM's inquiry regarding "whether the proposed rules raise First Amendment concerns." *See* NPRM at para. 29.

[4] *Id.* at para. 17 (the required labels would read: "This message contains information generated in whole or in part by artificial intelligence" ("proposed disclosure," "proposed label," or "label").

highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'[5]

Considering the heightened level of review that speech regarding matters of public concern receives, MPA disagrees with the FCC's suggestion that its Proposed Rules are not subject to stringent judicial review.[6] Rather, as explained below, the Proposed Rules would trigger strict scrutiny—the most rigorous level of judicial review—on several grounds.

1. The Proposed Rules Would Burden Political Speech and Are Content-Based Regulations.

The Court demonstrates its special protection of political speech by treating laws that burden it with strict scrutiny,[7] and has held that "political speech must prevail against laws that would suppress it by design or inadvertence."[8] The Commission's Proposed Rules—no matter how well intentioned—indeed would burden political speech. Most American voters mistrust AI, believing that it is threatening and dangerous.[9] Because the proposed disclosure labels do not provide any context indicating whether an AI-generated political advertisement contains deceptive content, the labels could significantly distort the intended messages of any political ads that are generated with AI technologies. While the proposed labels are applicable to all AI-generated political ads, they would not apply to any non-AI generated content. For example, a harmless, non-deceptive political advertisement created or edited using AI technology would have to include an AI warning label suggesting the content is not trustworthy, while an ad that is virtually *identical* but is produced with alternative technology would not have any disclosure. 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.

Furthermore, as the proposed disclosures could undermine the messages of political advertisements, they render the Proposed Rules content-based regulations despite the Commission's intimation that they are content neutral.[10] As noted in a recent broadcast law publication:

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[5] *Snyder v. Phelps,* 562 U.S. 443, 452-53 (2011) (internal citations omitted).

[6] The Commission suggests that its Proposed Rules are content-neutral. *See* NPRM at para. 16, n. 54. It states that "content-neutral restrictions on broadcasters are subject to review under "heightened rational basis" and will be upheld if reasonably tailored to satisfy a substantial government interest." *Id.* at para. 29, n.97-98, citing *Virginia Pharmacy Bd v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("*Virginia Pharmacy Bd")*; *Ruggiero v. FCC*, 317 F.3d 239, 247 (D.C. Cir. 2003). We note that the Court's *Virginia Pharmacy Bd* decision applies to commercial speech and, unlike the Proposed Rules, does not concern the regulation of political speech. *See, e.g., Virginia Pharmacy Bd*, 425 U.S. at 760-63. Additionally, the Commission appears to support a less stringent judicial review standard for its Proposed Rules with respect to broadcasters by asserting that "the Supreme Court has described First Amendment review of broadcast regulation as "less rigorous" than in other contexts based on the spectrum scarcity rationale." *See* NPRM at para. 29, n. 99, citing *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984); *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 637 (1984) (*"Turner"*). However, the Commission's assertion is misguided. Because the spectrum scarcity rationale is applicable to broadcasters—and not cable operators—and the Proposed Rules would apply to both entities, an intermediate review standard would not apply to the Proposed Rules for any covered entity based on this rationale. Moreover, the FCC has conceded that the spectrum scarcity rationale "no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting." *See* Federal Communications Commission, Media Bureau Staff Research Paper, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (March 2005), 2005 FCC LEXIS 1708 ("The scarcity rationale is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology. It is outmoded in today's media marketplace.").

[7] The Court has held that "laws that burden political speech are subject to strict scrutiny." *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340 (2010) ("*Citizens United*") (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

[8] *Id.*

[9] *See, e.g.,* Ryan Heath, *Exclusive poll: Americans distrust AI giants*, AXIOS (Aug. 9, 2023), https://www.axios.com/2023/08/09/ai-voters-trust-government-regulation (In a bipartisan poll of American voters conducted by the Artificial Intelligence Policy Institute, "62 percent of people said they are somewhat or mostly "concerned" about AI," 86 percent "believe AI could accidently cause a catastrophic event," and "Three in Four Democrats and Republicans alike believe AI could eventually pose a threat to the human race.").

[10] NPRM at para. 29, n.97. *See also id.* at para. 16, n. 54.

> The FCC seems to gloss over the concerns that requiring the disclosures of AI in candidate ads appears to run contrary to the statutory requirement that broadcasters and local cable providers not censor a candidate's ad. The FCC points to cases saying that content neutral disclaimers may be permissible – but is a disclaimer that says that the following ad may contain content that is not real really content neutral? Given all the scary publicity that AI has received, we expect that most audience members would find such a disclaimer to raise serious questions about the reliability of the content of the ad.[11]

Indeed, the Court has held that the First Amendment does not permit the government to "restrict expression because of its message, its ideas, its subject matter, *or its content*."[12] It has also determined that "a law that is content-neutral on its face still may be deemed content-based if the law cannot be justified without reference to the content of the regulated speech,"[13] and that content-based regulations are to be reviewed with strict scrutiny.[14] The Commission's proposed disclosures clearly implicate the content of political advertisements and thus activate strict scrutiny as content-based regulations of political speech.

2. The Proposed Rules Are Compelled Disclosures.

As the Proposed Rules mandate that covered entities alter the content of political speech with compulsory language, they are also subject to strict scrutiny as compelled disclosures, which the Court has recognized as a form of content-based regulation.[15] The Court has held that "freedom of speech prohibits the government from telling people what they must say,"[16] and "when the government compels individuals to speak a particular message, it engages in content-based regulation of speech" triggering strict scrutiny.[17] As highlighted above, covered entities are statutorily prohibited from censoring political candidates' advertisements[18] and the proposed disclosures would mandate that they infringe this obligation by forcing them to include the Commission's labels on purchasers' ads.[19]

The disclosures compelled by the Proposed Rules create additional practical and First Amendment concerns. Forcing covered entities to disclose AI-generated content in political ads they did not create—instead of imposing this requirement on the advertisers creating them—is misguided as covered entities cannot independently ascertain what type of technology is used to generate an ad.[20]

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[11] David Oxenford, Broadcast Law Blog, *The FCC Proposes Requirements for Disclosures About the Use of Artificial Intelligence in Political Ads – Looking at Some of the Many Issues for Broadcasters* (Aug. 1, 2024), https://www.broadcastlawblog.com/2024/08/articles/the-fcc-proposes-requirements-for-disclosures-about-the-use-of-artificial-intelligence-in-political-ads-looking-at-some-of-the-many-issues-for-broadcasters/#more-8721 ("Broadcast Law Blog").

[12] *Police Dep't of Chicago v. Mosle*, 408 U.S. 92, 95 (1972) (emphasis added).

[13] *Reed v. Town of Gilbert,* 576 U.S. 155, 163–64 (2015).

[14] *Nat'l Inst. of Family & Life Advocates v. Becerra,* 585 U.S. 755, 766 (2018) ("*Becerra*"); All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) ("*R.A.V.")*; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991) ("*Simon & Schuster, Inc.*").

[15] *See, e.g.,* Congressional Research Service, *First Amendment Limitations on Disclosure Requirements* (April 23, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12388 ("Content-based regulations usually trigger strict scrutiny," and the Supreme Court has determined that "when the government compels "individuals to speak a particular message," it engages in content-based regulation of speech," citing *Becerra*, 585 U.S. at 766 ("CRS First Amendment Disclosure Report")).

[16] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 61 (2006).

[17] *Becerra*, 585 U.S. at 766.

[18] *See also* 47 U.S.C. § 315(a) (2024).

[19] The First Amendment allows individuals or companies not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[20] *See also* Broadcast Law Blog (noting that: "One of the lessons learned from dealing with" several "state legislative efforts to adopt AI regulation for political advertising is that the most important party to be covered by these laws is the party who creates

Furthermore, the Commission's proposed labeling requirement has troubling consequences for political speech. As a federal court has stated: "All compelled disclosure laws implicate the Free Speech Clause, but laws imposing those burdens on the media implicate a separate First Amendment right as well: the freedom of the press."[21] Because the disclosures could be enforced under the threat of harsh penalties, including license revocation,[22] the censorship mandate they place on covered entities could deter them from airing political ads[23] and create a chilling effect on political speech on their platforms.[24]

The significant restrictions on political speech imposed by the proposed disclosures, on both covered entities and advertisers, undermine the FCC's suggestions that the Proposed Rules are harmless and legally sustainable. While the Commission maintains that the Court held "disclosure is a less restrictive alternative to more comprehensive regulations of speech,"[25] it made this determination in the limited circumstance of requiring sponsors to disclose expenditures associated with election-related communications and not in the context of requiring broadcasters and other entities to disclose the technology used to generate a political advertisement's content like the Proposed Rules.[26] Additionally, the Court used a stringent standard of review to assess this requirement's constitutionality.[27] In light of the relevant Supreme Court case law, and the restrictive features of the Proposed Rules, the Commission has not provided any compelling legal precedent to demonstrate that they would be reviewed with any other treatment than strict scrutiny.[28]

B. The Proposed Rules Would Not Pass Even Intermediate Scrutiny.

Contrary to the Commission's assertion, the Proposed Rules would not pass strict scrutiny,[29]and even *assuming arguendo* that the FCC's Proposed Rules were subject only to intermediate scrutiny, they

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the ad. Only the producer of the ad truly knows whether it contains uses of artificial intelligence or other deceptive audio or video content.").

[21] *Washington Post v. McManus*, 355 F. Supp. 3d 272, 295 (2019).

[22] *See, e.g.,* 47 U.S.C. § 312 (2024). The NPRM is silent on how the Proposed Rules would be enforced, but the range of enforcement options available to the FCC include license revocation.

[23] Covered entities refusal to air political ads could stem from the fear of censoring these ads or receiving inaccurate information from advertisers about the content contained within them.

[24] *See, e.g.,* CRS First Amendment Disclosure Report (In the context of compelled speech, "the burdens associated with disclosure requirements, and any penalties for noncompliance, can chill protected speech, potentially dissuading regulated entities from speaking at all.").

[25] NPRM at para. 33, citing *Citizens United*, 558 U.S. at 369.

[26] *Citizens United*, 558 U.S., at 315-16 ("… [P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

[27] *Id.* at 366-67. *See also* n. 28, *infra*.

[28] We note that only in specific circumstances has the Court allowed the government to mandate disclosures or disclaimers associated with political communications under the First Amendment and the Court has reviewed most of these cases with stringent scrutiny. These matters generally required disclosures or disclaimers from the financial sources or sponsors of political communications (not covered entities) to ensure the public is informed about entities potentially influencing elections and prevent corruption. *See, e.g., Citizens United*, 558 U.S. at 310, 366-67 (holding that the Court subjects campaign finance disclosure requirements to "exacting" scrutiny.); *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) (in assessing the legality of the disclosure requirement, the Court said it had to determine whether the requirement burdened political speech and "if so, whether such burden is justified by a compelling state interest."); *Buckley v. Valeo*, 424 U.S. 1, 75-76 (1976) (determining that strict or "exacting" scrutiny was to be applied to the assessment of the disclosure requirement at issue). *See also* R. Randall Kelso, *Clarifying the Four Kinds of "Exacting Scrutiny" Used in Current Supreme Court Doctrine*, 127 Penn St. L. Rev. 375, 385 (2023) (noting that an "example of the Court using "exacting scrutiny" to mean strict scrutiny is found in the Court's approach to speech regarding campaign financing.").

[29] NPRM at para. 29 ("We tentatively conclude that the proposed on-air disclosure and political file requirements comport with the First Amendment right to free speech, regardless which level of scrutiny applies."). We note that the strict scrutiny test imposes stringent conditions, and it is unlikely that any content-based regulation of political speech will survive it. As the Court has stated: "It is rare that a regulation restricting speech because of its content will ever be permissible." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). To meet the requirements of the strict scrutiny test, the government must:

would still fail because they are not sufficiently tailored to the Commission's stated interest in promoting transparency in political ads.[30]

While the FCC maintains that its objective is to foster an informed electorate by stemming false, deceptive or misleading information in political advertisements,[31] there is no language in the Commission's proposed broad definition of AI-generated content[32]—or in any provision of the Proposed Rules—tailoring the disclosure requirement to intentionally false or deceptive AI-generated content, or AI-generated content that misleads by mimicking a voice or image of a person such that a reasonable person would believe it to be true. We note that such approaches are consistent with some state laws that place bright-line limits on AI-related disclosures for political ads, restricting them to "false and misleading" or "deceptive and fraudulent" content.[33]

Rather, the Proposed Rules would compel disclosures regarding the blanket creation or alteration of AI-generated content. Because they would mandate disclosure of *all* AI-generated content in political ads, they would regulate substantially more political speech than necessary to achieve the FCC's stated goal and would not materially alleviate the issue of preventing false or misleading political ads. For example, the proposed disclosures would apply to constitutionally protected expressions that are not harmful to American voters. As AI tools are integrated into widely used video editing services, the proposed disclosures would be mandatory for innocuous, minor alterations to political ads. As observed, they would apply to AI-generated sound or graphic effects to depict an event.[34] Moreover, many of these effects have been computer generated for decades without any requirement that they be disclosed, and the same effects generated with non-AI technologies in modern political advertisements would not have to be disclosed under the Proposed Rules.[35]

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(1) articulate a legitimate and compelling state interest; (2) prove that the restriction is narrowly tailored or actually serves that interest and is "necessary" (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is the least restrictive means to achieve that interest. *See Id.; R.A.V.,* 505 U.S. at 395-396; *Turner*, 512 U.S. at 664-65 (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118; *Brown v. Entm't Merch. Ass'n,* 564 U.S. 786, 799 (2011) ("*Brown"*) ("The State must specifically identify an 'actual problem' in need of solving and the curtailment of free speech must be actually necessary to the solution.") (internal citations omitted).

[30] As the Commission states: "Under the intermediate scrutiny test, restrictions are upheld when the government advances "important governmental interests unrelated to the suppression of free speech" and does not "burden substantially more speech than necessary to further those interests." NPRM at para. 29, citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997); *Turner*, 512 U.S. at 637.

[31] *See* NPRM at para. 30.

[32] "AI-generated content" is defined as "an image, audio, or video generated using computational technology or other machine-based system that depicts an individual's appearance, speech, or conduct, or an event, circumstance, or situation, including, in particular, AI-generated voices that sound like human voices, and AI-generated actors that appear to be human actors." *Id.* at para. 12.

[33] *See, e.g.,* Broadcast Law Blog; *See* also 2022 Cal AB 972 (2022) (prohibiting "a person, committee, or other entity, within 60 days of an election at which a candidate for elective office will appear on the ballot, from distributing with actual malice materially deceptive audio or visual media of the candidate with the intent to injure the candidate's reputation or to deceive a voter into voting for or against the candidate, unless the media includes a disclosure stating that the media has been manipulated, subject to specified exemptions.") (emphasis added); 2024 Bill Text AZ S.B. 1359 (prohibiting the creation or sponsorship of a synthetic media message within 90 days of in election if it is a "deceptive and fraudulent" deepfake of a "candidate or political party unless a disclosure state that the media includes content that is generated by AI.") (emphasis added); HRS § 11-A (2024) (prohibiting the distribution, between "the first working day of February in every even-numbered year through the next general election," of "materially deceptive media in reckless disregard of the risk of harming the reputation or electoral prospects of a candidate in an election or changing the voting behavior of voters in an election," unless a disclaimer is included in the media "informing the viewer that the media has been manipulated by technical means and depicts appearance, speech, or conduct that did not occur.") (emphasis added).

[34] *See, e.g.,* Broadcast Law Blog.

[35] Election law scholars have highlighted the fact that First Amendment protections "do not vary" despite technological advancements. *See, e.g.*, Federal Elections Commission, *Notification of Availability for Petition for Rulemaking: Artificial Intelligence in Campaign Ads*, Docket No. 2023-17547, Comments of the George Mason University Antonin Scalia Law School Administrative Law Clinic (Oct. 16, 2023), p. 7, ("As the Supreme Court has explained, "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First

Further underscoring how the Proposed Rules are not sufficiently tailored, the definition of AI-generated content subject to disclosure does not exclude parody and satire, which stands in stark contrast to the definitions found in several state laws regulating AI disclosures in political communications.[36] By requiring covered entities to disclose parody and satire generated with AI technologies, the Proposed Rules would burden speech that is indisputably protected by the First Amendment.[37]

Finally, MPA believes that extending the Proposed Rules to embedded advertisements, as the NPRM explores,[38] would also fail judicial scrutiny for the reasons stated above. This proposed requirement would be overly restrictive and practically difficult for covered entities to meet. Given the rapid pace of election season—and the need for broadcasters to quickly air political ad buys—it would be highly challenging for them to thoroughly and timely investigate and detect the sources of AI content in ads woven into network programming before they are aired to ensure compliance with the Proposed Rules.[39]

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MPA acknowledges the Commission's goal to restrain deception and misinformation in political advertisements through its Proposed Rules. However, by arbitrarily targeting the disclosure of all AI-generated content in these advertisements to achieve this goal, the Proposed Rules flout well-settled requirements of the First Amendment that ensure political speech is accorded the utmost protection. Based on the troubling First Amendment concerns highlighted above, MPA urges the Commission to reject the Proposed Rules. We are happy to discuss the issues raised in this letter with you or provide additional information. Should you have any questions regarding this letter, please do not hesitate to contact the undersigned.

Respectfully submitted,

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Amendment's command, do not vary when a new and different medium for communication appears," citing *Brown*, 564 U.S. at 790 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

[36] *See, e.g.,* 2022 Cal AB 972 (California's deceptive audio and visual media legislation "does not apply to materially deceptive audio or visual media that constitutes satire or parody."); A.R.S. § 16-1024 (B)(1) (2024) (Arizona's deepfakes and elections law does not apply to "media that constitutes satire or parody.").

[37] Satire and parody are protected by the First Amendment. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[38] NPRM at para. 21.

[39] We note that the FCC has acknowledged how embedded advertising can be "subtle and sophisticated." *See* Federal Communications Commission, *Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-90, Notice of Inquiry, 23 FCC Rcd 10682 (2008).