State and Regulatory Agency Approaches to Limiting Deepfakes in Political Advertising

ABSTRACT

With recent advancements in artificial intelligence (AI)*, regulators have turned their attention to the issue of how—and whether—to regulate the use of AI in political advertisements. While nineteen states have passed legislation regulating AI in political advertising, such regulations may be challenged as violations of the First Amendment. Furthermore, federal agencies also dispute which regulatory agency has jurisdiction to address the problem, with the Federal Election Commission (FEC) and the Federal Communications Commission (FCC) both claiming authority. Beyond issues of jurisdiction, agency action is also limited by the US Supreme Court's recent decision in* Loper Bright Enterprises v. Raimondo*.*

As deepfakes in political advertisement present the clearest threat of electoral confusion and deception, lawmakers should focus on deepfakes and craft content-neutral regulations of the manner of speech that can be used in AI-generated political advertisements. Such regulations would advance the strong government interest of preventing misrepresentation and electoral confusion. These regulations should be narrowly tailored to require labeling of deepfakes, while leaving open ample channels of alternative communication. The FCC and FEC should exercise complementary roles, with the FCC focusing on deepfakes in robocalls, television, and radio, and the FEC focusing on prohibiting fraudulent misrepresentation.

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Over the course of the 2024 election season, a number of high-profile instances of politicians sharing deepfakes caught the nation's attention. In June 2023, in the midst of the Republican presidential primary, then-candidate Ron DeSantis shared an AI-generated image of Donald Trump embracing Dr. Anthony Fauci.[1] DeSantis's campaign team shrugged off calls to take down the image, suggesting that the images were "obviously fake" and comparable to

1. Nicholas Nehamas, *DeSantis Campaign Uses Apparently Fake Images to Attack Trump on Twitter*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/us/politics/desantis-deepfakes-trump-fauci.html [https://perma.cc/ECY6-NZA4].

satirical memes.[2] In January of 2024, before the New Hampshire Democratic primary, a robocall speaker purporting to be then-President Biden told callers "[y]our vote makes a difference in November, not this Tuesday."[3] The speaker, however, was not Biden, but rather an AI-generated deepfake of his voice.[4] In August of 2024, then-candidate Trump shared an AI-generated image of Taylor Swift appearing to endorse him for president.[5] In reality, she had made no such endorsement and would later endorse his opponent.[6] Each of these instances provides an example of the hyperrealistic nature of AI-generated content—and deepfakes in particular—and how deepfakes are uniquely capable of misrepresentation and creating electoral confusion.[7]

In the lead up to the 2024 presidential election, twenty-one states passed legislation regulating the use of AI in political advertising, many pointing to state interests in preventing electoral confusion or deception resulting from extremely realistic—but fake—content.[8] However, the aforementioned examples of AI-generated content demonstrate potential weaknesses in these state regulations. State regulations aim to strike a balance between limiting the use of deceptive AI-generated content and not placing an undue burden on speech. In doing so, loopholes emerge where deceptive content remains unregulated.

First, there is a tradeoff between the need to narrowly tailor laws and the amount of content that is actually covered by the laws.

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2. *Id.*

3. Ali Swenson & Will Weissert, *New Hampshire Investigating Fake Biden Robocall Meant to Discourage Voters Ahead of Primary*, ASSOCIATED PRESS, https://apnews.com/article/new-hampshire-primary-biden-ai-deepfake-robocall-f3469ceb6dd613079092287994663db5# [https://perma.cc/2NGF-98TV] (Jan. 22, 2024, 10:32 PM) (quoting former President Biden).

4. *See id.*

5. Todd Spangler, *Donald Trump Isn't Worried Taylor Swift Will Sue Him Over Fake Endorsement Post with AI Images: Somebody Else Generated Them*, VARIETY (Aug. 22, 2024, 8:19 AM), https://variety.com/2024/digital/news/donald-trump-taylor-swift-sue-over-fake-ai-images-endorsement-1236115104/ [https://perma.cc/BWA8-4JVQ].

6. *See id.*; Madeline Halpert & Ana Faguy, *Taylor Swift Endorses Harris in Post Signed 'Childless Cat Lady'*, BBC (Sept. 11, 2024), https://www.bbc.com/news/articles/c89w4110n89o [https://perma.cc/CMQ2-2FVM].

7. *See* Christina LaChapelle & Catherine Tucker, *Generative AI in Political Advertising*, BRENNAN CTR. FOR JUST. (Nov. 28, 2023), https://www.brennancenter.org/our-work/research-reports/generative-ai-political-advertising [https://perma.cc/3TZL-LQ25].

8. *See Tracker: State Legislation on Deepfakes in Elections*, PUB. CITIZEN, https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/ [https://perma.cc/HNA4-Z78W] (Feb. 14, 2025); *infra* Appendix A; S. 2687, 32d Leg., Reg. Sess. (Haw. 2024) ("The legislature believes that regulating the use of deepfake and generative AI technologies to influence elections is necessary to protect the democratic process in the State.").

Some states appear to have attempted to narrowly tailor laws to apply only to content shared a short period of time prior to an election. However, this may result in deceptive deepfakes shared just earlier than that time period remaining unregulated. For instance, Michigan H.R. 5144 prohibits the distribution of political advertisements containing "materially deceptive" AI-generated content, unless the media contains a disclaimer identifying the use of AI.[9] Yet this requirement only applies to content shared ninety days prior to a primary election.[10] DeSantis shared the AI-generated image of Trump and Fauci more than ninety days prior to an election.[11] Therefore, H.R. 5144 would not cover DeSantis's post.[12] Second, many state regulations apply only to content designed to injure or harm a candidate and do not include content designed to benefit a candidate.[13] Yet, the deepfake Swift endorsement was shared not to "injure" Trump, but rather to benefit Trump by purporting to receive an endorsement from a hugely popular artist.[14] These two examples point to the loopholes created by balancing state regulatory interests in preventing deceptive media and free speech concerns. By attempting to narrowly tailor laws to only apply to content within a narrow period prior to elections, laws may miss deceptive content shared just beyond that time limit, and by crafting laws to apply only to content injurious to a candidate, laws may miss deceptive content designed to benefit a candidate.

In addition to states regulating deepfakes in political advertising, federal agencies have expressed an interest in regulating AI-generated content in political campaigning.[15] The Federal Communications Commission (FCC), for one, imposed a $6 million fine on the creator of the aforementioned Biden deepfake robocall.[16]

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9. *See* H.R. 5144, 102d Leg., Reg. Sess. (Mich. 2023).

10. *See id*.

11. *See* Nehamas, *supra* note 1; FLA. DIV. ELECTIONS, FLORIDA VOTER GUIDE: 2024 ELECTION CYCLE 8 (2023), https://files.floridados.gov/media/706369/voterregvotingguide-eng-2024-election-cycle-20230120-final.pdf [https://perma.cc/55N5-3AHU].

12. *See* H.R. 5144, 102d Leg., Reg. Sess. (Mich. 2023).

13. *See, e.g.*, H.R. 172, 2024 Leg., Reg. Sess. (Ala. 2024); H.R. 5144, 102d Leg., Reg. Sess. (Mich. 2023); H.R. 1432, 2024 Leg., Reg. Sess. (N.H. 2024); S. 2687, 32d Leg., Reg. Sess. (Haw. 2024).

14. *See* Spangler, *supra* note 5.

15. Press Release, Fed. Commc'ns Comm'n, FCC Takes First Step in New Transparency Effort to Disclose AI-Generated Content in Political Ads (July 25, 2024) [hereinafter Press Release, Takes First Step], https://docs.fcc.gov/public/attachments/DOC-404252A1.pdf [https://perma.cc/4AC6-HL9S].

16. Press Release, Fed. Commc'ns Comm'n, FCC Fines Man Behind Election Interference Scheme $6 Million for Sending Illegal Robocalls that Used Deepfake Generative AI Technology (Sept. 26, 2024) [hereinafter Press Release, FCC Fines Man], https://docs.fcc.gov/public/attachments/DOC-405811A1.pdf [https://perma.cc/58KF-9LWQ].

Further, the FCC expressed interest in initiating rulemaking on deepfakes and proposed a disclosure requirement on the use of AI.[17] The Federal Election Commission (FEC), however, contested the FCC's jurisdiction, instead claiming the FEC holds the exclusive authority to regulate political communications and called for the FCC to stand down.[18]

This Note examines state regulations enacted prior to the 2024 presidential election and analyzes the potential First Amendment challenges presented by state regulations imposing restrictions on political speech. Next, this Note discusses the jurisdictional dispute between the FEC and the FCC and analyzes each agency's claim for regulatory authority over deepfakes in political advertising.

In order to address the problem of misrepresentation and electoral confusion resulting from AI-generated content, state governments and federal regulatory agencies each must play a role. Both should focus on regulating deepfakes, rather than the more broadly defined AI-generated content, because of deepfakes' high degree of realism and subsequent higher potential for misrepresentation and creating confusion. State governments should focus on developing new deepfake regulations for state and local elections, while regulatory agencies should focus on deepfake regulations for federal elections. For states seeking to regulate deepfakes, states should anticipate First Amendment challenges and craft content-neutral regulations by advancing substantial election-related interests, narrowly tailoring to require labeling of deepfakes, and leaving open ample alternative channels of communication. On the agency side, the FEC should utilize the discretion granted to it in the Federal Elections Campaign Act (FECA) to promulgate rules requiring labeling of deepfake content, and the FCC should promulgate rules requiring disclosure of deepfake technology in television and radio.

I. BACKGROUND

Deepfakes, which are extremely realistic imitations of authentic audio-visual content, represent a potentially influential and deceptive

17. Press Release, Takes First Step, *supra* note 15.

18. Letter from Sean J. Cooksey, Chairman, Fed. Election Comm'n, to Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n (June 3, 2024), https://www.fec.gov/resources/cms-content/documents/FEC_Chairman_Cooksey_Letter_to_FCC_Chairwoman_Rosenworcel_June_3_2024.pdf [https://perma.cc/9J5T-MP8S].

form of content.[19] As AI technology advances, the creation of deepfakes has become more accessible.[20] Further, humans tend to overestimate their ability to detect deepfakes, which could increase their susceptibility to manipulation.[21] This is of particular concern in the context of elections, where voter deception and manipulation resulting from viewing a deepfake of a candidate could alter a voter's attitude toward the candidate.[22] Other academic works describe the potential harm arising from deepfakes in political advertisements as three-fold: harm to voters, who could be deceived by deepfakes; reputational harm to candidates; and to the integrity of elections.[23]

Effective regulation to prevent misrepresentation and electoral confusion resulting from deepfakes in political advertising implicates questions of state governments' power to limit speech of their citizens, regulatory agency discretion to promulgate rules in a post-*Chevron* era, and competing regulatory agency claims for jurisdiction. This section addresses each of these issues in turn.

A. Constitutional Limitations on Regulating Political Speech

The first hurdle that AI regulations must be able to overcome is an important one: the First Amendment. Since state regulations of AI have already been challenged as violations of the First Amendment, this section describes how the US Supreme Court analyzes speech regulations in order to understand how government actors may permissibly regulate deepfakes.[24]

Regardless of the "challenges of applying the Constitution to ever-advancing technology," the core principles of the First Amendment "do not vary."[25] The First Amendment provides that "Congress shall

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19. *See* Nils C. Köbis, Barbora Doležalová & Ivan Soraperra, *Fooled Twice: People Cannot Detect Deepfakes but Think They Can*, ISCIENCE, Nov. 19, 2021, at 1, 9, https://www.cell.com/action/showPdf?pii=S2589-0042%2821%2901335-3 [https://perma.cc/J78X-37PM].

20. *Id.* at 2.

21. *Id.* at 4.

22. Tom Dobber, Nadia Metoui, Damian Trilling, Natali Helberger & Claes de Vreese, *Do (Microtargeted) Deepfakes Have Real Effects on Political Attitudes?*, 26 INT'L J. PRESS/POL. 69, 82 (2021).

23. Nicholas Diakopoulos & Deborah Johnson, *Anticipating and Addressing the Ethical Implications of Deepfakes in the Context of Elections*, 23 NEW MEDIA & SOC'Y 2072, 2077 (2021).

24. *See, e.g.*, Order Granting Plaintiff's Motion for Preliminary Injunction at 4–7, Kohls v. Bonta, No. 2:24-cv-02527 (E.D. Cal. Oct. 2, 2024) (granting a preliminary injunction to a challenger of California A.B. 2839, which prohibited the use of "materially deceptive" AI-generated content, as a content-based violation of the First Amendment).

25. Moody v. NetChoice, LLC, 603 U.S. 707, 710 (2024) (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011)).

make no law . . . abridging the freedom of speech . . . ."[26] Freedom of speech is "protected by the due process clause of the Fourteenth Amendment from impairment by the States."[27] While protections against state impairment of speech are robust, they are not absolute.[28] Not every regulation of speech or expression "inherently triggers heightened First Amendment concern."[29] Instead, courts apply differing levels of scrutiny to regulations on speech depending on whether such regulations are "content-neutral" or "content-based," or involve compelled speech.[30]

1. Content-Based Speech and Strict Scrutiny

The Court has expressed particular skepticism over "content-based" regulations.[31] Whether a regulation is content based depends on whether the regulation "draws distinctions based on the message a speaker conveys."[32] This includes regulations that single out specific subject matter or viewpoints for differential treatment.[33] Content-based regulations are subject to strict scrutiny.[34] The government must first prove the regulation advances a substantial governmental interest unrelated to the suppression of free expression.[35] The government's asserted interest is weighed against the burden the regulation imposes on speech.[36] Second, the regulation must be narrowly tailored, meaning it is "the least restrictive means of achieving a compelling state interest."[37]

In *Reed v. City of Gilbert*, the Court considered the constitutionality of a sign regulation concerning signs directing the public to a meeting of a nonprofit group.[38] The government argued the regulation was justified by the government's interest in "preserving the Town's aesthetic appeal and traffic safety."[39] The sign regulation failed

26. U.S. CONST. amend. I.

27. Gitlow v. New York, 268 U.S. 652, 666 (1925).

28. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC., 596 U.S. 61, 73 (2022).

29. *Id.*

30. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 766 (2018).

31. *See id.*

32. Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 618 (2020) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

33. *Id.* at 618–19.

34. *Reed*, 576 U.S. at 163–64.

35. *Id.* at 164–65.

36. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

37. McCullen v. Coakley, 573 U.S. 464, 478 (2014).

38. 576 U.S. at 159.

39. *Id.* at 171.

the narrowly tailored prong.[40] The regulation was "underinclusive," which is to say the regulation included certain types of speech (temporary directional signs) while excluding other types of speech (such as ideological signs) without sufficient justification.[41] By contrast, a permissible regulation could be content neutral by imposing signage restrictions without singling out any topic for differential treatment, such as by imposing restrictions on sign size.[42] In *Reed*, however, the government did not meet its burden to prove its sign regulation was narrowly tailored to advance a compelling government interest.[43] *Reed* demonstrates the difficulty of a content-based regulation satisfying the narrow tailoring requirement of strict scrutiny.

Content-based regulations distinguish speech based on the content of a speaker's message and are subject to strict scrutiny.[44] This categorization is significant because regulations challenged under strict scrutiny are "presumptively unconstitutional" and are often struck down.[45]

2. Content-Neutral Speech and Reasonable Manner Restrictions

The Court has contrasted the analysis for "content-based" regulations with the analysis for "content-neutral" regulations.[46] "Content-neutral" regulations can be justified without reference to the content of the regulated speech.[47] For instance, governments may impose "reasonable time, place, and manner regulations on speech" without reference to the content of such speech.[48] Content-neutral

40. *Id.* at 172.

41. *Id.* at 171–72; Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 774 (2018) (holding a regulation was underinclusive because it included clinics with a primary purpose of "providing family planning or pregnancy-related services," while "exclud[ing], without explanation, federal clinics and Family PACT providers").

42. *Compare* City of Austin v. Reagan Nat'l Advert. of Austin, 596 U.S. 61, 71 (2022) (because the sign provisions did not "single out any topic or subject matter for differential treatment," the regulation was content-neutral), *with Reed*, 576 U.S. at 172 (because the government failed to show that "limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not," the regulation was underinclusive and content-based).

43. *Reed*, 576 U.S. at 172 ("Because a 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,' . . . ." (quoting Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002))).

44. *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 618 (2020).

45. *See Reed*, 576 U.S. at 163.

46. *See id.* at 165.

47. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

48. *Id.*

speech regulations are subjected to a lower level of scrutiny than content-based speech.[49] Still, content-neutral regulations must be "narrowly tailored to serve a significant state interest," including avoiding overinclusion of innocent speech, and "leave open ample alternative channels for communication."[50] Unlike content-based regulations, content-neutral regulations "need not be the least intrusive means" of serving the government's interest to be considered narrowly tailored.[51] Instead, narrow tailoring here simply requires that content-neutral regulations do not "burden substantially more speech than is necessary to further the government's legitimate interests."[52]

Unlike content-based regulations, the Court imposes a more lenient standard on content-neutral regulations.[53] For instance, in *McCullen v. Coakley*, the Court analyzed a regulation imposing a thirty-five-foot buffer zone around abortion clinics.[54] The Court first concluded the regulation was a content-neutral time, place, or manner regulation focusing not on *what* was said, but instead simply *where* it was said.[55] The fact that the regulation limited the buffer zones to abortion clinics—and thereby inevitably restricted abortion-related speech more so than speech on other subjects—did not render the regulation content-based.[56] Because the regulation aimed to protect public safety at reproductive health care facilities, it was not the case that "*[e]very* objective indication show[ed] that the provision's primary purpose [was] to restrict speech that oppose[d] abortion."[57] However, the regulation in *McCullen* was found to not be narrowly tailored because it was overinclusive, which is to say it "unnecessarily swe[pt] in innocent individuals and their speech."[58]

The Court's distinction between content-based and content-neutral regulations is significant because content-neutral

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49. *Reed*, 576 U.S. at 166 (acknowledging that if a law is "content neutral" it is "thus subject to a lower level of scrutiny"). The *Reed* majority describes the level of scrutiny as simply "lower" than strict scrutiny but does not use the phrase "intermediate scrutiny." *See id.* Justice Kagan's *Reed* concurrence, however, does characterize the test applied as intermediate scrutiny. *See id.* at 184 (Kagan, J., concurring).

50. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see* McCullen v. Coakley, 573 U.S. 464, 493 (2014).

51. *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 798).

52. *Id.* (quoting *Ward*, 491 U.S. at 799).

53. *See Reed*, 576 U.S. at 166.

54. 573 U.S. at 469.

55. *See id.* at 479, 485–86.

56. *Id.* at 480 ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.").

57. *Id.* (emphasis added) (quoting *id.* at 502 (Scalia, J., concurring)).

58. *Id.* at 492–93.

regulations are more easily defensible than content-based regulations.[59] While proponents of content-neutral regulations must show that the regulation does not unnecessarily burden innocent speech, proponents need not prove the regulation is the least intrusive means of advancing a substantial government interest.[60]

3. Compelled Speech and the *Zauderer* Test

Another relevant category of speech regulations involves "compelled speech," which is when the government "compel[s] individuals to speak a particular message," and includes disclosure requirements.[61] Compelled speech is considered content-based when it alters the content of an individual's speech.[62] As discussed in Section I.A.1, a regulation categorized as content-based receives strict scrutiny, which places a heavy burden on the government.[63] While compelled speech is considered content-based and subject to strict scrutiny, the Court recognizes a carveout for regulations that compel disclosure of purely factual information, which are not subjected to strict scrutiny.[64]

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Court upheld a state's regulations on attorney advertisements that punished an attorney for deceptive advertising.[65] The Court upheld the state's effort to regulate "purely factual" information, such as disclosures to "dissipate the possibility of consumer confusion or deception."[66] Compared to the state's interest in preventing consumer confusion or deception, the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising [was] minimal."[67] Accordingly, the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[68] By contrast, "unjustified or unduly burdensome disclosure requirements" might violate the First Amendment.[69] This carveout for purely factual

59. *See* Reed v. Town of Gilbert, 576 U.S. 155, 166 (2015).
60. Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).
61. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 766 (2018).
62. *Id.*
63. *See Reed*, 576 U.S. at 163.
64. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).
65. *Id.* at 638.
66. *Id.* at 651.
67. *Id.*
68. *Id.*
69. *Id.*

disclosures is significant in the context of deepfake regulations because, as will be discussed further in Section I.B, many state regulations require disclosure of the use of AI-generated content in political advertisements.[70]

B. Three State Approaches to Regulating AI in Political Advertising

Prior to the 2024 presidential election, twenty-one states passed laws regulating the use of AI in political advertising.[71] This comprised twenty-seven laws, which often received bipartisan support.[72] The approaches of such laws fall into three main categories: (1) the label approach (requiring disclosure of the use of AI), (2) the ban approach (prohibiting the use of AI), and (3) the hybrid approach (prohibiting the use of AI, but providing that an AI disclosure label is an affirmative defense). The different strategies employed by states are notable because each type of law is likely subject to a different level of First Amendment scrutiny.[73]

Under the label approach, content generated using AI must include a prominent disclosure. For example, Florida H.B. 919 states that political advertisements "must prominently state the following disclaimer: 'created in whole or in part with the use of generative artificial intelligence (AI).'"[74] Label approach laws often provide for only monetary remedies, rather than injunctive relief. For instance, Utah S.B. 131 limits relief to "a civil penalty not to exceed $1,000."[75] This approach was used by seven laws in six states.[76]

Under the ban approach, political media that contains AI-generated content is prohibited. For example, Minnesota H.F. 1370 states "a person who disseminates a deepfake or enters into a contract or other agreement to disseminate a deepfake is guilty of a crime."[77] Likewise, Texas S.B. 751 provides that "[a] person commits an offense" if the person creates a deepfake video.[78] While all of the laws using the ban approach purport to prohibit the use of AI-generated content, the

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70. *See* discussion *infra* Section I.B.

71. *Tracker: State Legislation on Deepfakes in Elections*, *supra* note 8. For a chart of all state laws and the approach used by each law, see *infra* Appendix A.

72. *See Tracker: State Legislation on Deepfakes in Elections*, *supra* note 8 ("State legislatures across the country are starting to pass urgently needed legislation to regulate deepfakes in elections, usually with bipartisan backing."); *infra* Appendix A.

73. *See* discussion *supra* Section I.A.

74. H.R. 919, 2024 Leg., Reg. Sess. (Fla. 2024).

75. S. 131, 65th Leg., Gen. Sess. (Utah 2024).

76. *See infra* Appendix A.

77. H.R. 1370, 93d Leg., Reg. Sess. (Minn. 2023).

78. S. 751, 86th Leg., Reg. Sess. (Tex. 2019).

laws vary in whether they actually provide injunctive relief. Minnesota H.F. 1370 follows its prohibition with the possibility for injunctive relief.[79] By contrast, Texas S.B. 751 does not extend injunctive relief.[80] Therefore, while all of these laws purport to ban AI-generated content, the provision or lack thereof of injunctive relief means these laws vary in whether they actually require removal of AI-generated content. The ban approach was used in four laws in three states, Minnesota, New Hampshire, and Texas.[81]

Finally, under the hybrid approach, some laws prohibit the use of AI in political advertising, but labeling content as AI-generated provides for an affirmative defense. For example, Idaho H.B. 664 provides that "a candidate whose action or speech is deceptively represented through the use of synthetic media in an electioneering communication may seek injunctive or other equitable relief prohibiting the publication of such synthetic media," but it is an "affirmative defense" that "the electioneering communication containing synthetic media includes a disclosure."[82] This approach was used by twelve laws in eleven states.[83]

These three categories of AI regulations are notable because the different approach of each category lends to a different degree of First Amendment scrutiny.[84] The label approach involves a compelled speech requirement, but likely qualifies for the lower *Zauderer* standard of review.[85] By contrast, the ban approach and hybrid approach would instead be analyzed under either the content-based or content-neutral standard.[86] Accordingly, the approach used by each state influences the law's likelihood of surviving constitutional scrutiny.[87]

C. Regulatory Agency Rulemaking on AI in Political Advertising

In addition to state laws, federal regulatory agencies have also advanced rules aimed at regulating AI in political advertising.[88] The challenges embedded in regulatory agency action on AI in political advertising include whether regulatory agencies may limit political

79. H.R. 1370, 93d Leg., Reg. Sess. (Minn. 2023).

80. S. 751, 86th Leg., Reg. Sess. (Tex. 2019).

81. *Id.*; H.R. 4772, 93d Leg., Reg. Sess. (Minn. 2024); H.R. 1432, 2024 Leg., Reg. Sess. (N.H. 2024); S. 751, 86th Leg., Reg. Sess. (Tex. 2019).

82. H.R. 664, 67th Leg., Reg. Sess. (Idaho 2024).

83. *See infra* Appendix A.

84. *See* discussion *supra* Section I.A; *infra* Section II.A.

85. *See* discussion *supra* Section I.A.3; *infra* Section II.A.3.

86. *See* discussion *supra* Sections I.A.1–2; *infra* Sections II.A.1–2.

87. *See* discussion *supra* Section I.A; *infra* Sections II.A.

88. *See* discussion *supra* Section I.

speech; regulatory agency authority after the Supreme Court's *Loper Bright* decision; and whether the FEC has exclusive jurisdiction, or if the FCC may exercise complementary jurisdiction.

1. Judicial Review of Regulatory Agency Rulemaking

The Supreme Court has previously approved of federal regulatory agency authority to limit political speech.[89] In *McConnell v. Federal Election Commission*, the Court examined section 311 of the Bipartisan Campaign Reform Act (BCRA) which required candidates to state their approval of the enclosed message.[90] The Court upheld section 311's disclosure requirement because the "disclosure regime b[ore] a sufficient relationship to the important governmental interest."[91] While *Citizens United v. Federal Election Commission* overruled portions of *McConnell* and BCRA, *Citizens United* upheld section 311 because the governmental interest in providing information to the electorate justified the disclosure requirement.[92] The Court approval of agency disclosure requirements is significant given the FCC's proposed rule, which seeks to impose additional labeling requirements.[93]

Notably, in 2024, the Court altered the standard under which courts review regulatory agency decisions in *Loper Bright Enterprises v. Raimondo*.[94] In *Loper Bright*, the Court overturned *Chevron* deference, which "required courts to defer to 'permissible agency interpretations of the statutes those agencies administer.'"[95] Now, courts "must exercise independent judgment."[96] At the same time, the Court recognized a modified analysis for analyzing statutes which delegate discretionary authority to an agency.[97] Statutes may do so by prescribing "rules to fill up the details of a statutory scheme," or by authorizing the agency to "regulate subject to limits imposed" by a phrase such as "appropriate," or "reasonable."[98] In such instances,

89. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 120–22 (2003) (citing Buckley v. Valeo, 424 U.S. 1, 66–68 (1976)), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

90. *See* 540 U.S. at 230–31 (discussing section 311 disclosure requirements).

91. *Id.*

92. *Citizens United*, 558 U.S. at 368.

93. Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, 89 Fed. Reg. 63381 (proposed July 25, 2024) (to be codified at 47 C.F.R. pts. 25, 73, 76); *see* discussion *infra* Section II.B.3.

94. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 391 (2024).

95. *Id.* at 377–78.

96. *Id.* at 394.

97. *Id.* at 394–95.

98. *Id.*

courts must "recogniz[e] constitutional delegations," "fix[] the boundaries of the delegated authority," and "ensur[e] the agency has engaged in 'reasoned decisionmaking' within those boundaries."[99] As regulatory agencies move to promulgate new rules relating to deepfakes, this change in standard is significant because it alters the deference given to the agencies, and therefore the likelihood of such rules withstanding judicial scrutiny.

2. Regulatory Agency Charters and Proposed Rulemaking on Deepfakes

As evidenced by *Loper Bright*, regulatory agency discretion to promulgate rules is tied closely to agency charters, and courts will grant higher levels of deference to agencies with charters that grant them discretionary authority.[100] The charters of both the FEC and FCC grant the agencies such discretion.[101]

The FEC's charter, the Federal Elections and Campaign Act (FECA), authorizes the FEC to "formulate policy" and make rules "as are necessary to carry out the provisions" of the FECA.[102] Key roles of the FEC include regulating political advertising; public communications that refer to "a clearly identified candidate for Federal office" that promotes or opposes that candidate; and campaign contributions, including "anything of value made by any person for the purpose of influencing any election for Federal office."[103] Additionally, the FECA prohibits federal candidates or their agents from fraudulently misrepresenting themselves as speaking or acting "for or on behalf of any other candidate . . . on a matter which is damaging to such other candidate."[104] These grants of authority are topical (all relating to the regulation of political campaigns) and indicate discretionary authority.[105]

The FCC's charter grants the FCC broad regulatory authority to, as "public convenience, interest, or necessity requires," "make such rules and regulations . . . as may be necessary" relating to radio, wire

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99. *Id.* at 395–96.

100. *See id.* at 394–96; discussion *supra* Section I.C.1.

101. *See* 52 U.S.C. § 30106(b); 47 U.S.C. § 303.

102. 52 U.S.C. §§ 30106(b)(1), 30107(a)(8).

103. *Id.* § 30101(20)(A)(iii), (8)(A)(i).

104. *Id.* § 30124(a) ("No person who is a candidate for Federal office or an employee or agent of such candidate shall–fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof . . . .").

105. *See* discussion *infra* Section II.B.2–3.

communications, and television.[106] Such authority includes the ability to regulate "using any automatic telephone dialing system or an artificial or prerecorded voice."[107] Under this authority, the FCC imposed a $6 million fee on the creator of the deepfake Biden robocall.[108] Considered alongside the FEC's charter, both charters grant the regulatory agencies discretionary authority.[109] The two charters differ in that the FEC's charter is topically related only to political campaigns, whereas the FCC's charter is more incidentally related to political advertising.[110] The FCC's charter grants the FCC broad authority over some of the media channels where political advertising occurs (radio and television), therefore necessarily involving the FCC in some degree in political advertising.[111]

The FCC has indicated an interest in utilizing its regulatory authority to promulgate rules relating to AI-generated content in political advertisements.[112] Accordingly, the FCC proposed a rule which would require certain broadcasters to make "on-air and political file disclosures regarding AI-generated content in political ads."[113] The FEC, however, objected to the FCC's proposed rule on the grounds that "the FEC is the exclusive administrative arbiter of questions concerning the name identifications and disclaimers for political communications."[114] Meanwhile, the FEC considered a petition to amend its fraudulent misrepresentation rule to clarify that fraudulent misrepresentation applies to "deliberately deceptive Artificial Intelligence campaign ads," but ultimately decided not to initiate rulemaking.[115] The FEC did, however, adopt an Interpretive Rule,

106. *See generally* 47 U.S.C. § 303(r); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 237 (2003) ("[T]he FCC's regulatory authority is broad."), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

107. *See* 47 U.S.C. § 227(b)(1)(A).

108. Press Release, FCC Fines Man, *supra* note 16.

109. *See* discussion *supra* Section I.C.1.

110. *Compare* 52 U.S.C. § 30106(b) (granting the FEC authority over political communications and campaign activity), *with* 47 U.S.C. § 303 (granting the FCC authority over radio, wire communications, and television).

111. *See* 47 U.S.C. § 303.

112. *See, e.g.*, Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, 89 Fed. Reg. 63381 (proposed July 25, 2024) (to be codified at 47 C.F.R. pts. 25, 73, 76).

113. *See id.* at 63386.

114. Letter from Dean J. Cooksey to Jessica Rosenworcel, *supra* note 18.

115. David Garr, *Comments Sought on Amending Regulation to Include Deliberately Deceptive Artificial Intelligence in Campaign Ads*, FED. ELECTION COMM'N (Aug. 16, 2023), https://www.fec.gov/updates/comments-sought-on-amending-regulation-to-include-deliberately-deceptive-artificial-intelligence-in-campaign-ads/ [https://perma.cc/J87X-YDGU]; David Garr,

which emphasized that fraudulent misrepresentation "may be accomplished using AI-assisted media."[116] These competing claims for regulatory agency jurisdiction indicate a potential future legal battle between the two agencies and provides an example of different manners in which agencies can exert influence over deepfakes in political advertising.

Because both states and federal regulatory agencies have indicated an interest in regulating deepfakes in political advertising, it is important to first understand the potential limitations on each actor. For states, First Amendment protections may pose legal challenges to state laws using the ban approach, but state laws using the label approach may qualify for the lower level of scrutiny for purely factual disclosure requirements.[117] For regulatory agencies, the imposition of disclosure requirements has previously been approved by the Court, suggesting this could be a successful path forward.[118] While agencies face enhanced scrutiny under *Loper Bright,* the charter of the FEC and FCC likely grant sufficient discretion to permit the agencies to regulate deepfakes in political advertisements.[119] The dispute between the FEC and FCC highlights a further potential conflict, but as Section II.B discusses, the FEC and FCC may exercise complementary authority in this area, rather than zero-sum authority.[120]

II. ANALYSIS

Despite the challenges presented by First Amendment protections and post-*Chevron* era regulatory law, state regulations of deepfakes in political advertisements are supported by precedent and are still appropriately within the domain of federal regulatory agencies.[121] This Part first argues that state deepfake regulations are permissible as either content-neutral regulations or as disclosure

Commission Approves Notification of Disposition, Interpretive Rule on Artificial Intelligence in Campaign Ads, FED. ELECTION COMM'N (Sept. 27, 2024) [hereinafter Garr, *Commission Approves Notification*], https://www.fec.gov/updates/commission-approves-notification-of-disposition-interpretive-rule-on-artificial-intelligence-in-campaign-ads/ [https://perma.cc/7QL3-PBG2].

116. Garr, *Commission Approves Notification*, *supra* note 115; Fraudulent Misrepresentation of Campaign Authority, 89 Fed. Reg. 78785, 78785 (Sept. 26, 2024) (to be codified at 11 C.F.R. pt. 110).

117. *See* discussion *supra* Section I.A.

118. *See* discussion *supra* Section I.C.1.

119. *See* discussion *supra* Section I.C.

120. *See* discussion supra Section I.C.2; *infra* Section II.B.

121. *See* McCullen v. Coakley, 573 U.S. 464, 480 (2014); Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 231, 241 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

requirements of factual information. This Part next argues that regulating deepfakes in political advertising is within the discretionary authority granted to the FEC and FCC and that the agencies may do so in a complementary fashion.

A. Constitutionality of State Deepfake Regulations

As discussed in Section I.B, state regulations use three different approaches to regulate deepfakes in political advertisements.[122] These approaches likely face different degrees of First Amendment scrutiny.[123] The following discussion analyzes a challenge to a California hybrid law as an example of the difficulty deepfake regulations will face when examined under strict scrutiny.[124] This Section next argues that the label approach is likely compelled speech of purely factual information, subject to the *Zauderer* test. This Section then argues that the ban approach and hybrid approach are likely content-neutral regulations on the manner of speech.[125]

1. State Deepfake Regulations are Unlikely to Prevail Under Strict Scrutiny

Deepfake regulations will likely be found unconstitutional if analyzed as content-based laws under strict scrutiny. Opponents of deepfake laws using the ban approach and hybrid approach may argue that such laws distinguish based on the subject matter and are therefore content based.[126] As previously discussed, under strict scrutiny, the court weighs the government's asserted interest against the regulation's burden on speech and considers if the regulation is narrowly tailored, which primarily relates to whether the regulation is overinclusive or underinclusive.[127]

The difficulty of prevailing under strict scrutiny is evidenced by a challenge to a California hybrid approach law.[128] California A.B. 2839 provides that "a person, committee, or other entity shall not" within 120 days before any election in California "with malice, knowingly distribute an advertisement or other election communication

122. *See* discussion *supra* Section I.B.

123. *See* discussion *supra* Section I.A.

124. Kohls v. Bonta, No. 2:24-cv-02527, 2024 WL 4374134, at *4–7 (E.D. Cal. Oct. 2, 2024); *see* discussion *infra* Section II.A.1.

125. *See* discussion *infra* Sections II.A.2–3.

126. *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 617, 619 (2020).

127. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986); discussion *supra* Section I.A.1.

128. *See Kohls*, 2024 WL 4374134, at *1–3.

containing materially deceptive content" of "a candidate for any federal, state, or local elected office in California portrayed as doing or saying something that the candidate did not do or say."[129] California A.B. 2839 is structured like a classic hybrid approach law: the general prohibition is followed by an exemption: "if the content includes a disclosure stating 'This [media] has been manipulated.'"[130] The suit, therefore, may be indictive of how other hybrid approach laws will fare under First Amendment challenges.

The US District Court for the Eastern District of California considered California A.B. 2839 in *Kohls v. Bonta.*[131] A YouTube creator challenged California A.B. 2839 as a violation of the First Amendment, both facially and as applied.[132] In a decision granting the plaintiff's motion for a preliminary injunction, the *Kohls* court concluded that the regulation was content-based because it "specifically targets speech within political or electoral content pertaining to candidates, electoral officials, and other election communication."[133] The *Kohls* court applied strict scrutiny: while the court recognized California's "compelling interest in protecting free and fair elections," the regulation failed on the narrowly tailored prong.[134] California A.B. 2839 offers an exemption for satire or parody only if the media includes a prominent disclaimer.[135] The *Kohls* court stated that such a requirement would "drown out the message a parody or satire video is trying to convey."[136] Notably, the *Kohls* court approvingly referenced the regulation's labeling provision: "the statute['s] attempt to implement labelling requirements . . . if narrowly tailored enough, could pass constitutional muster."[137] Still, the *Kohls* court ultimately granted the YouTube creator a preliminary injunction.[138]

The example of *Kohls v. Bonta* evidences the unlikelihood of a hybrid approach regulation being upheld under strict scrutiny.[139] While a state's interest in protecting elections is recognized as compelling, the narrow tailoring prong is a steep hurdle to overcome.[140] However, the

129. Assemb. 2839, 2023-2024 Leg., Reg. Sess. (Cal. 2024).
130. *Id.*; *see* discussion *supra* Section I.B.
131. *See* 2024 WL 4374134, at *2.
132. *Id.* at *2–3.
133. *Id.* at *4.
134. *Id.*
135. Assemb. 2839, 2023-2024 Leg., Reg. Sess., (Cal. 2024).
136. *Kohls*, 2024 WL 4374134, at *6 (internal quotations omitted).
137. *Id.* at *5.
138. *Id.* at *1.
139. *See id.* at *4–6.
140. *See id.*

Kohls court's approval of the regulation's labeling provision points to the potential that a label approach regulation would be upheld, even under strict scrutiny.[141]

2. Hybrid and Ban Approach Regulations are Content-Neutral, not Content-Based

Hybrid and ban approach deepfake regulations should be analyzed under the lower level of scrutiny granted to content-neutral regulations, rather than strict scrutiny for content-based regulations.[142] Content-neutral regulations are upheld if they are satisfy two prongs: (1) narrowly tailored to serve a significant state interest, and (2) leave open ample alternative channels of communication.[143] Deepfake regulations represent a reasonable restriction on the manner of speech and should be upheld as they avoid overinclusiveness and underinclusiveness, and leave open ample alternative channels of communication.[144] However, ban approach and hybrid approach laws may differ on their ability to satisfy the alternative channels of the communication prong.

Hybrid and label approach deepfake regulations should be analyzed as content-neutral because such regulations are a reasonable restriction on the manner of speech in political advertising.[145] While time, place, and manner analysis at first seems an unnatural fit for privately owned social media sites, the US Supreme Court has recently applied time, place, and manner analysis to a law regulating social media access.[146] It is therefore appropriate to apply time, place, and manner analysis to regulations of deepfakes on social media.[147]

The *Kohls* court erred in classifying A.B. 2839 as content-based.[148] The Court in *McCullen* made clear that the mere fact that regulations will inevitably restrict certain types of speech more so than speech on other subjects does not render the regulation

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141. *See id.* at *5 ("The safe harbor carveouts of the statute attempt to implement labelling requirements, which if narrowly tailored enough, could pass constitutional muster.").

142. *See* Reed v. Town of Gilbert, 576 U.S. 155, 166 (2015); Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 618 (2020).

143. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

144. *See* McCullen v. Coakley, 573 U.S. 464, 493 (2014).

145. *See id.* at 486.

146. *See Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

147. *See id.*

148. *See id.*; *Kohls*, 2024 WL 4374134, at *6.

content-based.[149] Here, simply because the deepfake regulation inevitably restricts election-related speech more so than other types of speech does not render it content-based.[150] Instead, deepfake regulations are a reasonable restriction on the manner of speech that focuses not on *what* was said, but instead simply *how* it was said.[151] Therefore, deepfake regulations should be considered content-neutral.

As content-neutral regulations, deepfake regulations can be justified if they are (1) "narrowly tailored to serve a significant government interest" and (2) "leave open ample alternative channels for communication of the information."[152]

For the first prong for content-neutral regulations, state deepfake regulations can meet the lower standard of narrow tailoring required of content-neutral regulations.[153] Unlike strict scrutiny analysis, content-neutral regulations "need not be the least restrictive" means of serving the government's interests.[154] Instead, narrow tailoring is met when the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[155] Certainly, the state interest in preventing misrepresentation and avoiding electoral confusion would be achieved less effectively absent regulations on the use of deepfakes.[156]

Relatedly, state bills can narrowly tailor by applying specifically to deepfakes, rather than more broadly defined AI-generated content. Some laws have broad applicability to all AI-generated content. Utah S.B. 131, for instance, focuses broadly on all content made with "any use of generative artificial intelligence in generating or modifying the substantive content."[157] Likewise, Florida H.B. 919 covers content "created in whole or in part with the use of generative artificial intelligence."[158] Such laws inevitably sweep in a broad array of content, which may result in a higher likelihood of restricting "innocent" speech unrelated to the government interest of preventing electoral

149. *McCullen*, 573 U.S. at 480; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

150. *See McCullen*, 573 U.S. at 480; *Ward*, 491 U.S at 491.

151. *See McCullen*, 573 U.S. at 479–81, 485.

152. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

153. *See id.*; *McCullen*, 573 U.S. at 486.

154. *McCullen*, 573 U.S. at 486.

155. *Ward*, 491 U.S. at 799.

156. *See* LaChapelle & Tucker, *supra* note 7.

157. S. 131, 65th Leg., Gen. Sess. (Utah 2024).

158. H.R. 919, 2024 Leg., Reg. Sess. (Fla. 2024).

confusion.[159] For example, AI may be used by low-resource campaigns to generate generic get-out-the-vote messaging used in a political ad.[160] Both Utah S.B. 131 and Florida H.B. 919 would likely include such content within the purview of their regulations.[161] However, such content is likely "innocent" speech not contrary to state interests.[162] Therefore, laws which apply to all AI risk overinclusiveness by sweeping in innocent speech.

By contrast, other state regulations that focus only on deepfakes are more narrowly tailored to focus on harmful content.[163] This is supported by *Reed*, in which the Supreme Court deemed the sign regulation at issue underinclusive because the government "offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs."[164] By contrast, states may argue that restricting the use of the deepfakes is justified because deepfakes pose a greater threat to electoral integrity than do other forms of speech.[165] Given the hyperrealistic nature of deepfakes, deepfakes are uniquely capable of misrepresentation and creating electoral confusion.[166] Therefore, focusing on deepfakes rather than AI-generated content avoids underinclusiveness by focusing on the content more likely to pose a threat to the government interest.

State bills also narrowly tailor their regulations by applying only within a period of time close to an election. For instance, many states' regulations apply only within ninety days of an election.[167] Texas S.B. 751 is even narrower, applying only within thirty days of an election.[168] By applying only within a narrow timeframe, deepfake bills have a stronger argument that they are narrowly tailored, and thus more likely to be upheld.

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159. McCullen v. Coakley, 573 U.S. 464, 492–93 (2014) (describing speech by individuals other than "the precise individuals and the precise conduct causing a particular problem" as "innocent")

160. *See* LaChapelle & Tucker, *supra* note 7.

161. *See* S. 131, 65th Leg., Gen. Sess. (Utah 2024); H.R. 919, 2024 Leg., Reg. Sess. (Fla. 2024).

162. *See* McCullen v. Coakley, 573 U.S. 464, 492–93 (2014).

163. *See, e.g.*, H.R. 1432, 2024 Leg., Reg. Sess. (N.H. 2024) (applying only to "deepfakes," defined as "a video, audio, or any other media of a person in which his or her face, body, or voice has been digitally altered so that he or she appears to be someone else, he or she appears to be saying something that he or she has never said, or he or she appears to be doing something that he or she has never done").

164. *See* Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

165. *See* Dobber et al., *supra* note 22, at 69.

166. *See id.* at 70.

167. *E.g.*, H.R. 1370, 93d Leg., Reg. Sess. (Minn. 2023); S. 2577, 2024 Leg., Reg. Sess. (Miss. 2024).

168. S. 751, 86th Leg., Reg. Sess. (Tex. 2019).

Another way state bills can be narrowly tailored to avoid overinclusiveness is by providing adequate exemptions of the kinds of speech that will not be impacted by its enforcement.[169] Many state laws share the same three exemptions: (1) when included as part of a "bona fide news," (2) when a broadcasting station is paid to distribute the content, and (3) for media that constitutes satire or parody."[170] Such exemptions avoid including innocent speech, such as journalists covering high-profile instances of deepfakes, among the content facing enforcement actions. This helps avoid the pitfall of overinclusiveness, which could result in a law being struck down.[171]

As discussed in Section II.A.1, the *Kohls* court struck down the deepfake regulation in California A.B. 2839 for failure to meet the narrowly tailored prong.[172] However, the California regulation was broader compared to the aforementioned laws.[173] Whereas many laws provide a narrow timeline of applicability of about ninety days, California A.B. 2839 applied 120 days prior to an election.[174] California A.B. 2839 was also broader in that it applied to "audio or visual media that is intentionally digitally created or modified, which includes, but is not limited to, deepfakes."[175] Likewise, California A.B. 2839's exemptions were not true exemptions, but rather categories where labels were required.[176] By contrast, other state laws provide true blanket exemptions.[177] In sum, while the *Kohls* court invalidated California A.B. 2839 on the narrowly tailored prong, this does not indicate that all deepfake regulations would similarly be invalidated.[178] Rather, other laws contain adequate methods of narrowly tailoring such that they are likely to satisfy the first prong of the content-neutral analysis.

On the second prong for content-neutral regulations, hybrid and label approach deepfake regulations leave open ample alternative

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169. *See* McCullen v. Coakley, 573 U.S. 464, 493 (2014).

170. *E.g.*, H.R. 1147, 74th Gen. Assemb., Reg. Sess. (Colo. 2024); H.R. 316, 152d Gen. Assemb., Reg. Sess. (Del. 2024).

171. *See McCullen*, 573 U.S. at 493.

172. *See* discussion *supra* Section II.A.1.

173. *Compare* Assemb. 2839, 2023-2024 Leg., Reg. Sess. (Cal. 2024), *with* H.B. 1147, 74th Gen. Assemb., Reg. Sess. (Colo. 2024), H.R. 316, 152d Gen. Assemb., Reg. Sess. (Del. 2024), H.R. 1370, 93d Leg., Reg. Sess. (Minn. 2023), S. 2577, 2024 Leg., Reg. Sess. (Miss. 2024), *and* S. 751, 86th Leg., Reg. Sess. (Tex. 2019).

174. Assemb. 2839, 2023-2024 Leg., Reg. Sess. (Cal. 2024).

175. *Id.*

176. *Id.*

177. *See, e.g.*, H.B. 1147, 74th Gen. Assemb., Reg. Sess. (Colo. 2024); H.B. 316, 152d Gen. Assemb., Reg. Sess. (Del. 2024).

178. *See* Kohls v. Bonta, No. 2:24-cv-02527, 2024 WL 4374134, at *5 (E.D. Cal. Oct. 2, 2024).

channels for communication. Here is where the analyses for ban approach and hybrid approach regulations diverge. The requirement that regulations leave open ample alternative channels for communication may call into question the ban approach because the ban approach flatly prohibits the use of deepfakes.[179] For instance, it may be arguable that, by prohibiting the dissemination of deepfakes to influence an election, Minnesota H.F. 1370 bans all manner of expression about elections through deepfakes.[180] However, Minnesota may counter that there still are ample alternative channels of communication: speakers can convey the same message in *any* way other than through the use of deepfake technology. Regardless, hybrid models have a stronger argument for meeting the requirement of leaving open ample alternative channels of communication because they do not attempt to ban the manner of communication through deepfakes and instead requiring only labeling.

In sum, contrary to the contention of the *Kohls* court, deepfake regulations should be considered content-neutral regulations because they are reasonable restrictions on the manner of speech.[181] Hybrid and label approach deepfake regulations are narrowly tailoring and avoid overinclusiveness and underinclusiveness by focusing on deepfakes, applying within a narrow timeframe, and providing adequate exemptions for innocent speech.[182] Deepfake regulations likewise satisfy the second prong of leaving open ample alternative channels for communication by permitting any other form of communication other than via deepfakes.[183] Therefore, deepfake regulations should be upheld as content-neutral regulations.[184]

3. Label Approach Regulations Compel Disclosure of Only Factual Information

Label approach regulations are permissible compelled disclosures of purely factual information.[185] These regulations fall solidly within the carveout created in *Zauderer*, which applies a lower level of scrutiny to compelled speech requirements of purely factual

179. *See* Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989).

180. *See* H.R. 1370, 93d Leg., Reg. Sess. (Minn. 2023).

181. *See* McCullen v. Coakley, 573 U.S. 464, 477 (2014); *Kohls*, 2024 WL 4374134, at *6.

182. *See McCullen*, 573 U.S. at 486.

183. *See Ward*, 491 U.S. at 802.

184. *See id.*; *McCullen*, 573 U.S. at 486.

185. *See* Nat'l. Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 768 (2018); Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

information.[186] Disclosure requirements satisfy *Zauderer* when (1) the disclosure requirement is reasonably related to the state's asserted interest and (2) does not place an undue burden on First Amendment rights.[187] First, label approach regulations only require disclosure of purely factual information—that the content was created with the use of AI.[188] Second, the regulations are reasonably related to the state's interest in preventing voter confusion or deception and are not unduly burdensome.[189]

Label approach regulations should be considered under the *Zauderer* test, rather than strict scrutiny, because they require only the disclosure of factual information.[190] A typical label approach regulation requires a disclaimer such as "created in whole or in part with the use of generative [AI]."[191] The *Zauderer* Court approved of disclosures of purely factual information to prevent the possibility of viewer confusion or deception.[192] Likewise, label approach regulations require only the statement of fact that content was created with AI and aim to prevent voter confusion or deception resulting from the realistic AI content.[193] This is significant because whereas compelled speech is typically subject to strict scrutiny, the *Zauderer* test involves a lower degree of scrutiny.[194] Therefore, regulations challenged under *Zauderer* are more likely to be upheld.[195]

Label approach regulations requirements satisfy the *Zauderer* test because they are neither unjustified nor unduly burdensome. First, label approach requirements are justifiable as necessary to prevent electoral confusion or deception.[196] Second, label approach requirements are not unduly burdensome. As the Court recognized in *Zauderer*, a state's interest in preventing voter confusion or deception outweighs the "minimal" interest an advertiser may have in not providing factual information.[197] Label approach regulations are reasonably related to this state interest because they mitigate the

186. *See Zauderer*, 471 U.S. at 651.

187. *Id.*

188. *See id.*; *supra* Section I.B.

189. *See Zauderer*, 471 U.S. at 651; *supra* Part I.

190. *See Zauderer*, 471 U.S. at 651; *supra* Section I.B.

191. *See* H.R. 919, 2024 Leg., Reg. Sess. (Fla. 2024); *see also* S. 131, 65th Leg., Gen. Sess. (Utah 2024) (requiring that the disclaimer states "[c]ontains content generated by AI").

192. *See Zauderer*, 471 U.S. at 651.

193. *See id.*; H.R. 919, 2024 Leg., Reg. Sess. (Fla. 2024); S. 131, 65th Leg., Gen. Sess. (Utah 2024).

194. *See Zauderer*, 471 U.S. at 651.

195. *See id.*

196. *See id.*; discussion *supra* Part I.

197. *See Zauderer*, 471 U.S. at 651.

chance that a viewer would think the AI-generated content is in fact authentic. Label approach requirements can further mitigate the burden imposed on speech by aforementioned measures, such as focusing narrowly on the time period immediately preceding elections.

In sum, label approach regulations should be analyzed under the *Zauderer* test as disclosures of purely factual information.[198] Label approach regulations stand a good chance of being upheld under *Zauderer* because they are justifiable measures to prevent electoral confusion or deception and impose only minimal burdens on protected speech.[199]

B. Federal Regulatory Agencies Can Exercise Appropriate and Complementary Roles in Regulating Deepfakes in Political Advertisements

This Section focuses on the potential role regulatory agencies have in regulating deepfake political advertisements. It first argues that Court precedent makes clear that agencies may permissibly impose restrictions on political speech and that *Loper Bright* does not alter agencies' ability to do so.[200] Next, it argues that both the FEC and the FCC's charters delegate discretionary authority such that each agency may regulate deepfakes in political advertisements.

1. Federal Regulatory Agencies May Permissibly Regulate Political Speech

The FEC may permissibly regulate the use of deepfakes in political advertising. As discussed in Section I.C.1, *McConnell* made clear that the FEC and FCC may permissibly impose reasonable limitations on speech.[201] The regulation at issue in *McConnell* was justified as providing the electorate with relevant information and facilitating enforcement of the agencies' charters.[202] The same interests justify the FEC and FCC's regulation of deepfakes. Such rules would provide the electorate with relevant information about the candidates, deter corruption or deception, and facilitate enforcement of each charter.

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198. *See id.*

199. *See id.*

200. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

201. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 121 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

202. *See id.* at 103.

This Court will likely continue to approve of such agency action, even following *Loper Bright*.[203] The charters for both the FEC and the FCC delegate discretionary authority.[204] Congress granted the FEC discretion to "fill up . . . a statutory scheme"[205] by authorizing the FEC to "formulate policy" and make rules "as are necessary to carry out the provisions" of the Federal Elections and Campaign Act.[206] Likewise, Congress granted the FCC the discretion to "make general rules and regulations . . . as it may deem desirable."[207] When courts review FEC and FCC regulations, *Loper Bright* directs courts to recognize constitutional delegations, fix those boundaries, and determine whether the agency has engaged in reasoned decision making within those boundaries.[208] Given the discretion apparent in both statutes, regulations promulgated by the FEC and FCC relating to deepfakes could be upheld as compatible with *McConnell* and permissible under *Loper Bright*.[209]

2. The FEC has Authority to Regulate Deepfakes in Political Advertising

The FEC can appropriately regulate deepfakes in political advertising because its charter grants it authority to regulate fraudulent misrepresentation and communications referring to candidates for federal office.[210]

First, the FECA grants the FEC the authority to regulate fraudulent misrepresentation, which occurs when a federal candidate or agent fraudulently misrepresents themselves as speaking or acting "for or on behalf of any other candidate . . . on a matter which is damaging to such other candidate."[211] As the FEC made clear in its interpretive rule (discussed in Section I.C.2), the prohibition on

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203. *See id. See generally Loper Bright Enters.*, 603 U.S. at 395.

204. *See, e.g.*, 52 U.S.C. §§ 30106(b)(1), 30107(a)(8); 47 U.S.C. § 303(j), (r).

205. *See Loper Bright Enters.*, 603 U.S. at 395.

206. *See* 52 U.S.C. §§ 30106(b)(1), 30107(a)(8).

207. 47 U.S.C. § 303(j); *see also, e.g.*, 47 U.S.C. § 303(r).

208. *Loper Bright Enters.*, 603 U.S. at 395.

209. *See id.*; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 121 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

210. *See* 52 U.S.C. § 30124(a).

211. *Id.*

fraudulent misrepresentation applies to actors using deepfake technology.[212] The prohibition on fraudulent misrepresentation applies to both candidates *and* their agents.[213] This means that, as the FEC is the agency tasked with enforcement of the prohibition on fraudulent misrepresentation, the FEC could regulate both candidates and agents who use deepfakes.

Second, the FECA grants the FEC the authority to regulate public political advertising that refers to a "clearly identified candidate for Federal office" and promote or oppose that candidate.[214] This would plainly include instances of deepfakes such as the Biden deepfake robocall, which referred to Trump, who was then a candidate for federal office.[215] Further, the FEC's authority is more expansive than just public advertisements with clearly identified candidates. The FECA also grants the FEC authority to regulate "contributions," defined broadly as "anything of value made by any person for the purpose of influencing any election for Federal office."[216] This closes a potential loophole created by the first category: deepfakes may not clearly refer to a candidate while still having a deleterious impact to that candidate. Imagine, for instance, a deepfake of a candidate's spouse or campaign manager that does not refer to that candidate by name but purports to say something contrary to that candidate's stated position or interest.[217] The creator of this deepfake would likely intend to influence the election. However, if the FEC only had the authority to regulate content which clearly identifies candidates, this would be a loophole. Such content could be addressed by the FEC as a contribution intended to influence a federal election.

The FEC's use of regulatory authority to impose disclosure requirements has previously been approved by the Court, suggesting a further attempt to impose disclosure requirements relating to deepfakes stands a greater chance of approval as well.[218] Similarly to the rationale which justified the FEC's section 311 disclosure requirement in *McConnell*, the FEC's imposition of disclosure

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212. *See* Fraudulent Misrepresentation of Campaign Authority, 89 Fed. Reg. 78785, 78785 (Sept. 26, 2024) (to be codified at 11 C.F.R. pt. 110).

213. 52 U.S.C. § 30124(a).

214. *See* 52 U.S.C. §§ 30101(20)(A)(iii), 20106(b)(1).

215. *See* Swenson & Weissert, *supra* note 3.

216. *See* 52 U.S.C. §§ 30101(8)(A)(i), 30106(b)(1).

217. *See* Diakopoulos & Johnson, *supra* note 23, at 2078 (outlining potential deepfake scenarios harmful to candidates, such as "deepfaked testimonials of individuals claiming they had an affair with the candidate").

218. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194–202, 211–13, 230–31 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

requirements for deepfakes are necessary to provide the electorate with relevant information about the candidates, deter corruption or deception, and facilitate enforcement of the FEC's charter.[219]

3. The FCC has Authority to Regulate Deepfakes in Political Advertising

The FCC has broad regulatory authority that may include regulation of deepfakes in political advertising. *McConnell* indicates that, contrary to the FEC's contention, the FCC may exercise concurrent and complementary authority in the issue of political advertisements.[220]

First, the FCC's charter very likely grants it authority to regulate deepfake phone calls.[221] The FCC may regulate the use of robocalls ("any automatic telephone dialing system or an artificial or prerecorded voice"), and calls containing "misleading or inaccurate caller identification information with the intent to defraud [or] cause harm."[222] Second, the FCC may impose disclosure requirements on broadcasters, and the FCC has broad authority to regulate for the public interest.[223] Therefore, the FCC may permissibly impose disclosure requirements for deepfakes in radio and television, as it is in the public interest to label deepfakes to reduce electoral confusion.[224]

Contrary to the FEC's contention, the FCC may—and has previously—exercised concurrent jurisdiction alongside the FEC.[225] As discussed in Section I.C.1, BCRA focused on campaign reform by granting authority to the FEC and reinforcing the FCC's authority to regulate candidates.[226] Campaign reform is plainly within the FEC's topical jurisdiction.[227] However, rather than grant the FEC exclusive jurisdiction over the topic, BCRA reinforced the FCC's complementary role to the FEC in candidate regulations.[228] Specifically, *McConnell* upheld BCRA's section 504 candidate disclosure requirements because its requirements were "virtually identical to those contained in a

219. *See id.* at 103.

220. *See id.* at 236–37.

221. *See* 47 U.S.C. § 227(b)(1)(A), (e)(1).

222. *Id.*

223. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 238–42 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

224. *See id.*; 47 U.S.C. § 303; Dobber et al., *supra* note 22 (finding that viewing a deepfake of a candidate can alter voters' attitudes toward that candidate).

225. *See McConnell*, 540 U.S. at 238–42.

226. *See, e.g.*, *id.* at 231–37.

227. *See generally* 52 U.S.C. §§ 30101, 30106(b)(1).

228. *See McConnell*, 540 U.S. at 238–42.

regulation that the [FEC] promulgated" and it would "help the FCC."[229] The mere fact that the subject matter of the disclosure requirements related to political advertisements did not dispositively mean that control was the FEC's alone.[230] Likewise, the FEC may therefore appropriately impose disclosure requirements of the use of deepfakes in political advertisements.

Given the FEC's ability to regulate deepfakes, the next question is whether the FCC's proposed rule comports with *Loper Bright*.[231] The FCC's proposed rule would require broadcasters to make on-air disclosures of the use of AI-generated content in political advertisements.[232] *Loper Bright* directs courts to consider whether the FCC has engaged in reasoned decision-making within the boundaries imposed by its charter.[233] In its notice of proposed rulemaking, the FCC argued it had "the obligation to serve the public interest by taking responsibility for material—including false, misleading, or deceptive material—disseminated to the public."[234] This argument is supported by its charter, which provides the FCC with broad authority to regulate for the public convenience.[235] The boundaries imposed by the FCC's charter are expansive: the FCC has the discretion to make rules as "public convenience, interest, or necessity requires" relating to radio, wire communications, and television.[236] Here, the FCC has engaged in reasoned decision-making and acted within the boundaries of its charter: preventing electoral confusion is akin to acting as public interest or necessity requires and the rule applies to broadcast and cable television, both of which are within the FCC's jurisdiction.

In sum, the possibility of state and regulatory agencies over deepfakes in political advertisements present both opportunities and challenges. There is an opportunity for states to require disclosure of the use of AI, or even prohibit the use of deepfakes, but such regulations face the challenge of balancing the need to be narrowly tailored to avoid

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229. 47 U.S.C. § 317.

230. *See McConnell*, 540 U.S. at 238–42.

231. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

232. *See* Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, 89 Fed. Reg. 63381, 63383 (Aug. 5, 2024) (to be codified at 47 C.F.R. pts. 25, 73, 76).

233. *See Loper Bright Enters.*, 603 U.S. at 395; 47 U.S.C. § 303.

234. Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, 89 Fed. Reg. at 63382.

235. *See* 47 U.S.C. § 303.

236. *See id.*; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 237 (2003) ("[T]he FCC's regulatory authority is broad."), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

violating the First Amendment with the need to be comprehensive.[237] Likewise, there is an opportunity for the FEC and FCC to impose fines and disclosure requirements on candidates and other actors that employ deepfakes, yet such agency action faces higher scrutiny following *Loper Bright*.[238]

III. SOLUTION

Regulating deepfakes in political advertising requires action from both state legislatures and federal agencies. State legislatures should be left to determine deepfake regulations for state and local elections, while regulatory agencies should exercise their authority to enact regulations for federal elections.

State legislatures should pass laws using the label approach, which requires the disclosure of use of deepfakes in political advertising for state and local elections. The FCC should continue to issue fines for deepfake robocalls and promulgate rules requiring the disclosure of deepfake technology in political advertisements for federal offices aired on broadcast, cable, and radio advertisements. The FEC should enforce its prohibition on fraudulent misrepresentation against actors who use deepfakes of other candidates.

A. Narrowly Tailored State Labeling Requirements

State regulations of deepfakes in political advertising can be a powerful mechanism to address the alarming issues posed by the technology, but they must be carefully tailored to avoid free speech violations.[239] As discussed in Sections II.A.2 and II.A.4, there may be a path for hybrid approach and ban approach regulations to withstand constitutional scrutiny.[240] However, label approach laws likely have the strongest argument for constitutionality as disclosures of only factual information permissible under the *Zauderer* test.[241] States should therefore pursue label approach laws rather than hybrid approach or ban approach laws.

In crafting label approach regulations, states should take additional measures to ensure the laws are narrowly tailored. First,

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237. *Cf.* McCullen v. Coakley, 573 U.S. 464, 485 (2014); Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

238. *See Loper Bright Enters.*, 603 U.S. at 395. *See generally* 47 U.S.C. § 303; 52 U.S.C. §§ 30101, 30106(b)(1).

239. *See McCullen*, 573 U.S. at 493.

240. *See* discussion *supra* Section II.A.2.

241. *See* discussion *supra* Section II.A.3.

state regulations should focus on deepfakes specifically, rather than all AI-generated content. For instance, Utah S.B. 131 targets all "content that was substantially produced generative [AI]," whereas Delaware H.B. 316 targets only deepfakes.[242] Regulations that target AI generally are ill-advised and likely too broad, as this risks sweeping in innocent uses of AI, such as less-resourced campaigns outsourcing advertising production.[243] Regulations should instead focus narrowly on deepfakes because deepfakes relate more closely to state interests in preventing misrepresentation and electoral confusion.[244]

Second, state label approach regulations can avoid overinclusiveness by providing adequate exemptions and applying only during a narrow period of time prior to elections. The *Kohls* case provided an example of a court's skepticism of a deepfake regulation's failure to provide adequate exemptions.[245] State legislatures can learn from this example and be careful about providing adequate exemptions for innocent speech that will not be impacted by these regulations, such as for satire and bona fide newscasts. Likewise, the deepfake regulation at issue in *Kohls* was broader in that it applied 120 days out from an election.[246] The relatively broad timeframe of applicability may have contributed to the sense that the statute was too broad.[247] State legislatures should consider applying only within a narrower period of time so as to further narrow the scope of the bills.

If this approach is followed, state label approach regulations of deepfakes in political advertising should be upheld as permissible regulations of state elections.

B. Complementary Regulatory Agency Action

Contrary to the FEC's contention that the FEC has exclusive jurisdiction over political communications, the FCC can and should exercise complementary authority in the area of deepfakes in political advertising.[248] BCRA and its subsequent Court approval in *McConnell* indicates that the FEC and FCC may both regulate within their charters in the area of campaign reform.[249] Specifically, the FCC's

242. *Compare* S. 131, 65th Leg., Gen. Sess. (Utah 2024), *with* H.R. 316, 152d Gen. Assemb., Reg. Sess. (Del. 2024).

243. *See* LaChapelle & Tucker, *supra* note 7.

244. *See* discussion *supra* Section II.A.2; Dobber et al., *supra* note 22.

245. *See* Kohls v. Bonta, No. 2:24-cv-02527, 2024 WL 4374134, at *6 (E.D. Cal. Oct. 2, 2024).

246. Assemb. 2839, 2023-2024 Leg., Reg. Sess. (Cal. 2024).

247. *See id.*

248. *See* discussion *supra* Section II.B.3.

249. *See* discussion *supra* Section II.B.3.

charter focuses its role on traditional media (broadcast and radio), whereas the FEC's charter is subject-based (elections), rather than media-dependent.[250] This creates an opportunity for FCC deepfake regulations to focus on traditional media, while the FEC regulates deepfakes in other media, such as digital media.[251] Doing so would facilitate a complementary role for each agency, as well as a strong charter-based argument for the exercise of authority which would be more likely to withstand a court challenge.

1. FEC Enforcement of Fraudulent Misrepresentation

While the FEC previously declined to begin rulemaking on deepfakes in political advertising, its charter makes clear that it can and should do so.[252] The FEC charter grants the FEC the authority to regulate public political advertising of clearly identified candidates and contributions, which includes "anything of value made by any person for the purpose of influencing" federal elections.[253] The FEC should use this authority to regulate deepfakes in political advertising, which often include clearly identified candidates or are created with the intent to influence federal elections. The FEC should promulgate disclosure requirements identifying the use of deepfake technology in political advertising for federal campaigns. Such disclosure requirements should focus on types of media not covered within the FCC's charter, such as digital media.[254]

Further, pursuant to its authority under the FECA, the FEC has the closest authority akin to banning certain deepfakes.[255] As the FEC's interpretive rule made clear, it is as violation of the prohibition on fraudulent misrepresentation to create deepfakes of candidates.[256] Based on the wording of the FECA's fraudulent misrepresentation clause ("no person . . . shall"), the FEC could seek injunctive relief against someone who shares a deepfake of a candidate with the intent

250. *Compare* 52 U.S.C. §§ 30101, 30106(b)(1) (granting the FEC authority over political communications and campaign activity), *with* 47 U.S.C. § 303 (granting the FCC authority over radio, wire communications, and television).

251. *See* Devin Coldewey, *Who Regulates Social Media?*, TECHCRUNCH (Oct. 19, 2020, 1:33 PM), https://techcrunch.com/2020/10/19/who-regulates-social-media/ [https://perma.cc/874N-NDPR] (suggesting the FCC is not the right agency to regulate social media).

252. *See* discussion *supra* Sections I.C.2, II.B.2.

253. *See* discussion *supra* Section I.B.2; 52 U.S.C. §§ 30101(20)(A)(iii), (8)(A)(i), 30106(b)(1).

254. *See* discussion *supra* Section I.C.2; 52 U.S.C. § 303; Coldewey, *supra* note 250.

255. *See* discussion *supra* Section I.C.2; 52 U.S.C. § 30124(a).

256. *See* Fraudulent Misrepresentation of Campaign Authority, 89 Fed. Reg. 78785, 78785 (Sept. 26, 2024) (to be codified at 11 C.F.R. pt. 110).

to misrepresent that candidate's policy position.[257] In a previous enforcement action, the FEC described the elements of the clause's "intent" requirement as the actor's "intent that the misrepresentation be relied on by the [viewer]" and "the [viewer's] ignorance of the falsity of the representation."[258] The intent requirement is likely easily satisfied in the instance of someone sharing a deepfake of a candidate expressing a policy position with which they do not agree. The viewer could reasonably rely on that statement as true indication of the candidate's position while being ignorant as to the fact that the depiction was a deepfake, rather than reality. In sum, the FECA grants the FEC authority over fraudulent misrepresentation, and deepfakes represent a violation of the prohibition on fraudulent misrepresentation. The FEC should therefore exercise its fraudulent misrepresentation authority to ban certain deepfakes.

2. FCC Imposition of Disclosure Requirements

As argued by former FCC Chairwoman Jessica Rosenworcel in the FCC's notice of proposed rulemaking on deepfake disclosure requirements, the FCC has the power to enact complementary rules alongside the FEC.[259] The FCC should promulgate rules relating only to traditional media—television and radio—to complement the FEC's other media rules.

The FCC's charter grants it broad authority to regulate television and radio stations for the public interest.[260] The FCC should enact a rule requiring disclosure of the use of deepfake technology in television and radio political advertisements for federal campaigns. This exercise of power would be comparable to previously exercised—and Court-approved—power to create disclosure requirements of payment for broadcast.[261] Additionally, the issue of deepfake robocalls falls squarely within the FCC's jurisdiction.[262] The FCC's imposition of a $6 million fine on the creator of the Biden

257. *See* 52 U.S.C. § 30124(a).

258. Fed. Election Comm'n, Policy Statement of Commissioner Lee E. Goodman 6–7 (Feb. 16, 2018), https://www.fec.gov/resources/cms-content/documents/Commissioner_Lee_E._Goodman_Policy_Statement_-_Fraudulent_Misrepresentation.pdf [https://perma.cc/AFV8-LAWZ].

259. *See* Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, 89 Fed. Reg. 63381, 63383 (Aug. 5, 2024) (to be codified at 47 C.F.R. pts. 25, 73, 76).

260. *See* 47 U.S.C. § 303.

261. *See* 47 U.S.C. § 317; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 238–42 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

262. *See* 47 U.S.C. § 227(b)(1)(A), (e)(1).

deepfake robocall is an example of how the FCC may exercise its authority to crack down on those using deceptive deepfakes in an attempt to manipulate elections.[263] The FCC should exercise its authority to continue to impose fines on future incidences of deepfake robocalls, therefore disincentivizing actors to do so.

IV. CONCLUSION

The rise of deepfake technology prevents a novel challenge which threatens to increase electoral confusion and misrepresentation.[264] However, a complementary approach of state legislatures and federal regulatory agencies can combat the potential for confusion and misrepresentation by disclosure requirements, fines, and prohibitions on fraudulent misrepresentation, while maintaining core protections for speech. Preexisting grants of statutory authority to the FEC and FCC may begin this process for federal elections, and state legislatures may focus their attention on state and local elections. Through this comprehensive approach, the threat of deepfakes—from fabricated embraces to robocalls and popstar endorsements—can be minimized.

V. APPENDIX: APPROACH USED BY EACH STATE LAW

Label Approach	**Ban Approach**	**Hybrid Approach**
AZ H.B. 2394, S.B 1359; FL H.B. 919; IN H.B. 1133; OR S.B. 1571; UT S.B. 131; WS A.B. 664	MN H.F. 4772, H.F. 1370; NH H.B. 1432; TX S.B. 751	AL H.B. 172; CA A.B. 730, A.B. 972; CO 1147; DE H.B. 316; HI S.B. 2687; ID H.B. 664; MI H.B. 5144; MS S.B. 2577; NH H.B. 1596; NM H.B. 182; NY S.B. 8631; WA S.B. 5152

Table developed by the Author as a result of the Author's independent analysis of each listed bill.

Mary Margaret Burniston[*]

263. *See* Press Release, FCC Fines Man, *supra* note 16.

264. *See* Dobber et al., *supra* note 22, at 72.

[*] J.D. Candidate, Vanderbilt University Law School, 2026; B.A., The University of Texas at Austin, 2021. The Author would like to thank the editorial staff of the Vanderbilt Journal of Entertainment & Technology for their advice and support throughout the development of this Note.