(SYNTHETIC) STUMP SPEECH: CRAFTING GENERATIVE AI DISCLOSURE REGULATIONS FOR POLITICAL ADVERTISEMENTS

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Synthetic media, or content generated using artificial intelligence, has begun to infect political advertising. Federal legislation has spent most of its time stalled in committees, but states and online platforms have rapidly implemented regulations. Although synthetic media may pose harms through voter manipulation and democratic distortion, it also can lower campaign costs and more vividly illustrate conceptions of a political choice's consequences. Some governments and commentators have sought to prohibit the most harmful forms, while others have focused more on transparent approaches to regulation. In the face of yet another contentious election cycle, the question of how to ensure choices are made based on belief and not manipulation looms large.

This Note assesses the current regulatory landscape for synthetic media in political advertising to analyze the benefits and drawbacks of greater regulation. Based on current and emerging regulatory approaches, this Note examines how governments and private actors have limited synthetic media usage within existing First Amendment jurisprudence. Although initial prohibitions served a necessary role, this Note proposes that transparency enforcement is the best approach and should be built upon by creating a repository that contains information on an advertisement's synthetic content.

INTRODUCTION

Fake news is an American political tradition, albeit an unfortunate one. General George Washington's "spurious letters" claimed that he believed the Revolutionary War to be a mistake, which, despite his cries of fake news, haunted him into his presidency.[1] President Lyndon B. Johnson's "Daisy" advertisement painted candidate Barry Goldwater as a warmonger amid Cold

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    1. *See* Gregory S. Schneider, *The Fake News That Haunted George Washington*, WASH. POST (Apr. 10, 2017, 8:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2017/04/10/the-fake-news-that-haunted-george-washington/ [https://perma.cc/F7H5-HEME].

War fears.[2] And President Barack Obama's presidency was plagued by erroneous claims that he was not born in the United States.[3]

But what happens when, by using generative artificial intelligence (AI), faked source material becomes so realistic that voters have no reason to doubt its authenticity? In April 2023, the Republican National Committee released an AI-generated video depicting a dystopian world following a 2024 victory by President Biden, complete with fabricated news clips of a Chinese invasion of Taiwan, financial collapse, and other purported horrors.[4] In June 2023, the then presidential candidate Ron DeSantis's campaign distributed an advertisement that included an AI-generated image of President Donald J. Trump hugging Dr. Anthony Fauci.[5] And India's 2024 election was "awash in deepfakes."[6]

The foregoing examples have not seriously undermined campaigns. But consider an AI-generated video of a candidate that purports to be a secret video of them calling their supporters foul names and disavowing their most popular policy positions. Such a video, released on the eve or morning of Election Day and virally charged or microtargeted, could sway the outcome and leave the candidate without sufficient time to debunk the claims.[7]

Knowing that such an event lies within the realm of possibilities, regulators have begun to enact limits and safeguards on synthetic media usage in political advertisements.[8] The federal government has been slow to

2. Ashley Killough, *Lyndon Johnson's 'Daisy' Ad, Which Changed the World of Politics, Turns 50*, CNN (Sept. 8, 2014, 9:42 AM), https://www.cnn.com/2014/09/07/politics/daisy-ad-turns-50/index.html [https://perma.cc/QZK9-W4L2].

3. *See* Anthony Zurcher, *The Birth of the Obama 'Birther' Conspiracy*, BBC (Sept. 16, 2016), https://www.bbc.com/news/election-us-2016-37391652 [https://perma.cc/4H22-PF S4]. The "birther" conspiracy also led to a 2010 deepfake video of President Obama claiming that he was born in Kenya. *See* Philip Marcelo, *Video Altered to Suggest Obama Admitted He Was Born in Africa*, AP NEWS (July 20, 2023, 6:14 PM), https://apnews.com/article/fact-check-obama-trump-birther-kenya-091716039186 [https://perma.cc/G57Y-329L].

4. GOP, *Beat Biden*, YOUTUBE (Apr. 25, 2023), https://www.youtube.com/watch?v=kLMMxgtxQ1Y&t=32s [https://perma.cc/5PUW-DXYD]. Notably, this video included the disclaimer "[b]uilt entirely with AI imagery" in small print in the top corner throughout the video. *Id.*

5. *See* Shannon Bond, *DeSantis Campaign Shares Apparent AI-Generated Fake Images of Trump and Fauci*, NPR (June 8, 2023, 3:59 PM), https://www.npr.org/2023/06/08/1181097435/desantis-campaign-shares-apparent-ai-generated-fake-images-of-trump-and-fauci [https://perma.cc/3U3H-MRP9]. A pro-DeSantis political action committee (PAC) also circulated an advertisement that contained AI-generated speech of President Trump. *See* Alex Isenstadt, *DeSantis PAC Uses AI-Generated Trump Voice in Ad Attacking Ex-president*, POLITICO (July 17, 2023, 6:21 PM), https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695 [https://perma.cc/NLY3-H4BQ].

6. *See* Vandinika Shukla & Bruce Schneier, *Indian Election Was Awash in Deepfakes – But AI Was a Net Positive for Democracy*, THE CONVERSATION (June 10, 2024, 8:38 AM), https://theconversation.com/indian-election-was-awash-in-deepfakes-but-ai-was-a-net-positive-for-democracy-231795 [https://perma.cc/A55T-7V87].

7. *See, e.g.*, Martin-Pieter Jansen & Nicole C. Krämer, *Balancing Perceptions of Targeting: An Investigation of Political Microtargeting Transparency Through a Calculus Approach*, PLOS ONE Dec. 7, 2023, at 1, 1–2 (noting that political advertisers use social media data to "narrowly target[] [users] with specific messages . . . [designed] to resonate most effectively"); *see also infra* Part II.B.

8. *See infra* Part I.C.1.

act, leaving online platforms and the public to step in by flagging content and requiring disclaimers.[9]   States, however, have increasingly passed laws targeting the issue directly,[10] and large online platforms have been quick to label or ban such content.[11]   These mixed regulatory approaches and the potential for a more expansive synthetic environment require a greater look at how regulators can properly address synthetic media without overly burdening First Amendment rights.

This Note discusses regulatory approaches to synthetic media in political advertising. Given the existing patchwork of regulations, this Note examines whether proposed and enacted legislation, and their First Amendment justifications, are adequate to meet future developments in synthetic media. To answer this question, this Note defines the current technological, legal, and regulatory landscape to compare existing approaches. It then discusses how regulation can be crafted to promote synthetic media's benefits while mitigating its harms.

Part I provides relevant background on AI, the First Amendment, and current regulatory efforts. Part II discusses how scholars have sought to craft regulation within First Amendment constraints while balancing synthetic media's benefits and harms.   Part III asserts that current regulatory approaches are inadequate, so future regulation must combine a political advertisement repository with private efforts to address the existing shortcomings.

I. SYNTHETIC MEDIA'S CURRENT TECHNOLOGICAL AND LEGAL STATUS

This Part provides an overview of the existing legal landscape surrounding generative AI and synthetic media.   Part I.A discusses the technical background of different forms of AI and synthetic media. Part I.B surveys First Amendment issues that complicate regulatory efforts. Part I.C provides an overview of current regulatory efforts at the federal, state, and private level.

A. Manipulated Media: Before and Since AI

The information age gave rise to new capabilities for altering media. Initially, new technologies allowed actors to manually edit media to distort the original, true material using consumer software like Photoshop.[12]   The ability to manually distort media led to a greater presence of "shallowfakes," which are alterations that reframe but do not change the media's content,

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9. *See, e.g.*, Bond, *supra* note 5 (screenshot of photographs of President Trump and Dr. Fauci containing a fact-checking notice under the images).

10. *See infra* Part I.C.1.

11. *See infra* Part I.C.3.

12. *See* Samuel D. Hodge, Jr., *Don't Always Believe What You See: Shallowfake and Deepfake Media Has Altered the Perception of Reality*, 50 HOFSTRA L. REV. 51, 53 (2021).

such as by altering a video's speed or providing false context.[13] For example, actors created a video of the then house speaker Nancy Pelosi appearing drunk during a speech by slowing down the real video so it appeared she was slurring her words.[14]

Falsified media creators have generally preferred using shallowfakes given their lower technical requirements and general ease of use compared with more advanced manipulation techniques.[15] Yet, although shallowfaked media can be more easily perceived as inauthentic, such media is still widely used.[16] Generative artificial intelligence's recent boom, however, may affect a shift away from shallowfakes.

1. AI: Development and Types

The field of artificial intelligence, which began to emerge after World War II, is concerned with developing a system that thinks and/or acts either rationally or humanly.[17] A "weak" form of AI exists where the machine performs specific tasks and thus acts as if it were intelligent.[18] A "strong" form exists where the machine is actually thinking.[19] Current technologies utilize "weak AI," or AI trained to perform specific tasks that acts as if the model were intelligent.[20] However, weak AI's capabilities have evolved in recent years due to developments in machine learning.[21]

Machine learning is a subsidiary application of AI that relies on mathematical models to allow a system to learn on its own.[22] Although "traditional machine learning models need[ed] human intervention" to go beyond their initial training constraints, newer artificial neural networks now

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13*. See, e.g.*, Toluse Olorunnipa & Adriana Usero, *How Republicans Used Misleading Videos to Attack Biden in a 24-Hour Period*, WASH. POST (June 11, 2024, 5:00 AM), https://www.washingtonpost.com/politics/2024/06/11/biden-videos-republicans-cheap-fake-d-day/ [https://perma.cc/Y3JE-HB4H].

14*. See Fact Check: "Drunk" Nancy Pelosi Video is Manipulated*, REUTERS (Aug. 3, 2020, 1:23 PM), https://www.reuters.com/article/uk-factcheck-nancypelosi-manipulated/fact-check-drunk-nancy-pelosi-video-is-manipulated-idUSKCN24Z2BI [https://perma.cc/3M9X-ED63].

15*. See* James R. Ostrowski, *Shallowfakes*, 72 THE NEW ATLANTIS 96, 96–97 (2023) (arguing that synthetically generated media is too costly and onerous for bad actors to create when shallowfakes are available).

16*. See, e.g.*, *id.* at 97.

17. STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 1 (3d ed. 2016).

18*. Id.* at 1020.

19*. Id.*

20*. Id.*

21*. See* RAVIL I. MUKHAMEDIEV, YELENA POPOVA, YAN KUCHIN, ELENA ZAITSEVA, ALMAS KALIMOLDAYEV, ADILKHAN SYMAGULOV, VITALY LEVASHENKO, FARIDA ABDOLDINA, VIKTORS GOPEJENKO, KIRILL YAKUNIN, ELENA MUHAMEDIJEVA & MARINA YELIS, REVIEW OF ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING TECHNOLOGIES: CLASSIFICATION, RESTRICTIONS, OPPORTUNITIES AND CHALLENGES 1, 2 (2022).

22. RUSSELL & NORVIG, *supra* note 17, at 693.

allow machines to "simulate how the human brain processes information."[23] Generative AI, which is one such deep learning model, generates "statistically probable outputs" based on a raw data set.[24] ChatGPT, for example, uses generative AI to create text outputs like writing essays, summarizing articles, and providing ideas for weekend activities.[25]

Generative AI also can be used to create images, videos, and sound,[26] which fall under the broad label of "synthetic media."[27] For political campaigns, AI and synthetic media can be used to quickly generate fundraising emails, increase voter outreach, improve effective messaging, and reduce costs.[28]

However, these positive uses have somewhat fallen into the background given fears over potential disingenuous and manipulative utilization, with some scholars advocating for regulations that focus on the media's effects rather than the technology itself.[29]

2. Deepfakes

Deepfakes, a subset of synthetic media, utilize deep learning to create media depicting fake events.[30] By feeding a model data of an individual, such as photographs and clips of their voice, a person can create video or audio that seems real but is completely fabricated.[31] One of the initial instances arose in a 2017 video depicting President Obama speaking on the dangers of deepfakes, a video that was itself a deepfake.[32]

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23. IBM Data and AI Team, *Understanding the Different Types of Artificial Intelligence*, IBM (Oct. 12, 2023), https://www.ibm.com/think/topics/artificial-intelligence-types [https://perma.cc/HKV9-SA8F].

24. *See What is Artificial Intelligence (AI)?*, IBM, https://www.ibm.com/topics/artificial-intelligence [https://perma.cc/CDR8-PNR7] (last visited Aug. 31, 2024).

25. *See generally ChatGPT Overview*, OPENAI, https://openai.com/chatgpt/ [https://perma.cc/SVV5-VGRK] (last visited Aug. 31, 2024).

26. *See* Marco Ramponi, *Recent Developments in Generative AI for Audio*, ASSEMBLYAI (June 27, 2023), https://www.assemblyai.com/blog/recent-developments-in-generative-ai-for-audio/ [https://perma.cc/LL2F-E3J6].

27. Jon Bateman, *Deepfakes and Synthetic Media in the Financial System: Assessing Threat Scenarios* 4–5 (Carnegie Endowment for Int'l Peace, Cybersecurity & the Fin. Sys., Working Paper No. 7, 2020), https://carnegieendowment.org/research/2020/07/deepfakes-and-synthetic-media-in-the-financial-system-assessing-threat-scenarios?lang=en [https://perma.cc/YDY3-SLS9].

28. *See* Antoinette Siu, *Agencies Weigh the Pros and Cons of Generative AI as Political Advertising Grows*, DIGIDAY (Aug. 15, 2023), https://digiday.com/media-buying/agencies-weigh-the-pros-and-cons-of-generative-ai-as-political-advertising-grows/ [https://perma.cc/MKU2-CJJ3]; Courtney Subramanian, *Nervous About Falling Behind the GOP, Democrats Are Wrestling with How to Use AI*, AP NEWS (May 6, 2024, 3:26 PM), https://apnews.com/article/ai-biden-campaign-democrats-2024-election-520f22de269ba1eff24d1544ca38d569# [https://perma.cc/6U2N-XR24].

29. *See* Yola Verbruggen, *Synthetic Media: Lawmakers Urged to Focus on Harms, Not Technology Itself*, INT'L BAR ASS'N (Feb. 9, 2023), https://www.ibanet.org/Synthetic-media-Lawmakers-urged-to-focus-on-harms-not-technology-itself [https://perma.cc/VK82-NH9A].

30. *See* Bateman, *supra* note 27, at 4–5.

31. *See id.*

32. *See* BBC News, *Fake Obama Created Using AI Video Tool*, YOUTUBE (July 19, 2017), https://www.youtube.com/watch?v=AmUC4m6w1wo [https://perma.cc/Z4V6-

Deepfake images and videos are developed through generative adversarial networks (GANs) in which one generator generates random images while another judges the image's authenticity.[33] Essentially, the generators "play two adversarial roles like a forger and a detective" until the image appears extremely real.[34] By feeding the model images of a certain political candidate and other context, a person can train the model to create lifelike images of a candidate that are completely fabricated.[35]

For videos, an individual can prompt a deep learning model with context, like a President Harry S. Truman speech on cable news based on an uploaded script, to create a lifelike fabrication.[36] Voice cloning works in a similar way, where a deep learning model is fed large amounts of either real audio clips or real text, in turn generating a realistic sounding audio clip that mimics a person's voice.[37] With more data and better technology, deepfake creators can develop extremely realistic content.[38]

Moreover, previous factors mitigating against widespread deepfake usage have eroded.[39] Barriers to creating deepfake content, such as equipment costs, access to a sufficient raw data set, and technical know-how have been eclipsed by widely accessible and cheap platforms "available to everyday consumers."[40] What could take months can now be accomplished in hours or days,[41] and in the political context, access to sufficient data sets is not a major obstacle because candidates generate ample publicly available content.[42] This increased access to deepfake creation also appears poised to

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UL9Y]. This video relied on an impersonation of President Obama paired with AI, but current technology would not require any creator to themselves provide audio or visual impersonation to appear realistic. *Id.*

33. *See* TODD C. HELMUS, RAND CORP., ARTIFICIAL INTELLIGENCE, DEEPFAKES, AND DISINFORMATION 3–6 (2022), https://www.rand.org/content/dam/rand/pubs/perspectives/PEA1000/PEA1043-1/RAND_PEA1043-1.pdf [https://perma.cc/SL6B-62PK].

34. *See id.* (quoting TIANXIANG SHEN, RUIXIAN LIU, JU BAI & ZHENG LI, NOISELAB, 'DEEP FAKES' USING GENERATIVE ADVERSARIAL NETWORKS (GAN) 2 (2018), http://noiselab.ucsd.edu/ECE228_2018/Reports/Report16.pdf [https://perma.cc/H7XR-JWWD]).

35. *See id.* at 4–5.

36. *See id.* at 3.

37. *See id.* at 4.

38. This is especially concerning for deepfake videos. *See id.* at 7 (noting that a 2021 study "found that deepfake videos are more likely than fake news articles to be rated as vivid, persuasive, and credible" by audiences). *But see* Sarah Shawky El Mokadem, *The Effect of Media Literacy on Misinformation and Deep Fake Video Detection*, 35 ARAB MEDIA & SOC'Y 115, 130–31 (2023) (agreeing in part with the 2021 study but also finding new results "indicat[ing] that audiences view written messages as more accurate, convincing, and persuasive," which could be explainable based on the audience's personal biases and preexisting beliefs).

39. *See* Helmus, *supra* note 33, at 8–10.

40. Stuart A. Thompson, *Making Deepfakes Gets Cheaper and Easier Thanks to A.I.*, N.Y. TIMES (Mar. 12, 2023), https://www.nytimes.com/2023/03/12/technology/deepfakes-cheapfakes-videos-ai.html [https://perma.cc/FPL9-BG4Y].

41. *See* Jisu Huh, Michelle R. Nelson & Cristel Antonia Russell, *ChatGPT, AI Advertising, and Advertising Research and Education*, 52 J. ADVERTISING 477, 477 (2023).

42. *See* Prajakta Pradhan, *AI Deepfakes: The Goose is Cooked?*, U. ILL. L. REV. ONLINE (Oct. 4, 2020), https://illinoislawreview.org/blog/ai-deepfakes/ [https://perma.cc/4ADF-594J].

cause a shift away from shallowfakes, which were previously more prevalent.[43]

Ultimately, shallowfakes, synthetic media, and deepfakes are poised to inundate the public through political advertising in coming election cycles. In light of this impending wave, regulators must weigh the benefits as well as the harms posed by such technology within legal constraints.[44]

B. First Amendment Hurdles and the Marketplace of Ideas

The First Amendment poses the greatest hurdle to regulating synthetic media in political advertising. The U.S. Supreme Court has stressed the unique protections afforded to political speech,[45] and it frequently defers to protecting the marketplace of ideas over government regulation.[46] This marketplace of ideas theory posits that the free, unrestricted exchange of ideas is the best framework for arriving at the truth, so the government must tread carefully whenever it seeks to restrain private speech.[47] As Justice Oliver Wendell Holmes, Jr. put it, "[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[48]

Although the Court has not yet considered laws regulating synthetic media in politics, its preference for unrestricted political speech has guided discussion on First Amendment boundaries for regulation.[49] The relevant First Amendment boundaries include content restrictions, permissible falsehoods, compelled speech, and advertising disclosure jurisprudence.[50]

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43. *See* Sam Gregory, *Shallowfakes Are Rampant: Tools to Spot Them Must Be Equally Accessible*, THE HILL (Aug. 26, 2022, 4:00 PM), https://thehill.com/opinion /technology/3616877-shallowfakes-are-rampant-tools-to-spot-them-must-be-equally-accessi ble/ [https://perma.cc/9MZK-R4TS].

44. *See infra* Parts II.A–B.

45. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) ("The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

46. *See* United States v. Alvarez, 567 U.S. 709, 718–22 (2012) (rejecting government prohibition on false Medal of Honor claims); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 803–05 (2011) (rejecting age restrictions on violent video games); McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 347 (1995) (rejecting prohibition on anonymous political pamphleteering).

47. *See* Jared Schroeder, *The Marketplace of Ideas and the Problem of Networked Truths*, 54 U. TOL. L. REV. 27, 29 (2022). Although the marketplace theory has guided the Court's jurisprudence, it has received substantial criticism. *See* David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 285–93 (2022) (surveying criticisms).

48. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

49. *See generally* Marc Jonathan Blitz, *Deepfakes and Other Non-testimonial Falsehoods: When is Belief Manipulation (Not) First Amendment Speech?*, 23 YALE J.L. & TECH. 160, 169 (2020); Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-truth" World*, 64 ST. LOUIS U. L.J. 535 (2020); Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445 (2019).

50. *See Brown*, 564 U.S. at 790 ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like

First, regulating synthetic media in advertisements could face the presumptive unconstitutionality of content-based restrictions if the law targets only political advertisements.[51] Content-based restrictions "target speech based on its communicative content," such as an advertisement's topic, idea, or message.[52] In contrast, content-neutral restrictions are "justified without reference to the content of the regulated speech."[53] Content-based restrictions on neutral third parties are subject to strict scrutiny and are thus frequently struck down, whereas restrictions that only target political participants are reviewed under exacting scrutiny.[54]

The Court marked a boundary for content neutrality in *City of Austin v. Reagan National Advertising of Austin, LLC*,[55] holding that an advertising regulation that distinguished based on whether the sign was on-site or off-site was content neutral.[56] The Court rejected the U.S. Court of Appeals for the Fifth Circuit's interpretation of *Reed v. Town of Gilbert*,[57] which would have made any regulation automatically content based if a reader was merely required to identify both the speaker and what the speaker is saying.[58]

Moreover, the Court recently ruled on two related cases: *NetChoice, LLC v. Paxton*[59] and *Moody v. NetChoice, LLC*.[60] Both cases concern state laws aimed at large social media platforms that would generally (1) prohibit discrimination based on a user's views and (2) require the platforms to publish information about their content moderation policies.[61] Both state bills were passed to protect against perceived political bias.[62] However, the Court vacated and remanded the cases based on insufficient analysis of the First Amendment issues.[63]

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

51. *See generally* Wash. Post v. McManus, 944 F.3d 506, 513–14 (4th Cir. 2019) (applying strict scrutiny to neutral third-party disclosure obligations); *see also* Hasen, *supra* note 49, at 545.

52. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

53. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

54. *See McManus*, 944 F.3d at 515–17 (discussing disclosure requirements' lower First Amendment bar when targeting "*direct political participants*" as opposed to neutral third parties) (emphasis added).

55. 142 S. Ct. 1464 (2022).

56. *Id.* at 1471.

57. 576 U.S. 155 (2015).

58. *City of Austin*, 142 S. Ct. at 1471.

59. 142 S. Ct. 1715 (2024) (mem.).

60. 144 S. Ct. 2383 (2024).

61. *See* Brief for Petitioners at 8–11, *NetChoice*, 142 S. Ct. 1715 (No. 22-555); Brief for Respondents at 8–11, *Moody*, 144 S. Ct. 2383 (No. 22-277).

62. *See* Brief for Petitioners, *supra* note 61, at 7 ("In Texas's view, certain websites do not do enough to promote 'conservative' speech."); Brief for Respondents, *supra* note 61, at 6–7 (asserting that the Florida bill's purpose is to protect conservative speech from media bias).

63. *Moody*, 144 S. Ct. 2383.

Second, the First Amendment generally protects a person's right to make false statements,[64] so proscriptive laws against false representations in synthetic media would be subject to heightened scrutiny.[65] In *United States v. Alvarez*,[66] an individual challenged the Stolen Valor Act[67] (the "Act") after he was indicted for falsely claiming at a local board meeting that he received the Congressional Medal of Honor.[68] In a plurality opinion, Justice Anthony M. Kennedy determined the Act was a content-based restriction and, applying exacting scrutiny, found that the Act's restrictions were not sufficiently necessary to achieve the federal government's purpose of broadly protecting the integrity of the military.[69] Instead, these interests could be protected by less restrictive means, such as a government database.[70] Ultimately, Justice Kennedy noted that "[t]he remedy for speech that is false is speech that is true."[71]

Justice Alito, echoing the free market approach, contrasted narrow proscription of false statements on some matters of public concern, such as defamation of a public official,[72] with other matters of public concern, such as "false statements about philosophy, religion, history, the social sciences, the arts, and other matters."[73] For the latter, attempts to penalize those areas "would present a grave and unacceptable danger."[74]

Based on this distinction, the dissent argued that the Act was constitutional given its protection against "only knowingly false statements about hard facts directly within a speaker's personal knowledge" in a narrow area of proper governmental interest.[75] Ultimately, the *Alvarez* opinions reflect a high bar for political speech regulation.[76]

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64. *See* United States v. Alvarez, 567 U.S. 709, 719–22 (2012) (plurality opinion). False speech may be restricted when confined to the few "historic and traditional categories [of expression] long familiar to the bar [such as defamation and fraud]." *Id.* at 717 (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).

65. *See* McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny.'"); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340, 366–67 (2010) (explaining the application of both strict and exacting scrutiny); *Alvarez*, 567 U.S. at 715 (plurality opinion) (explaining the application of exacting scrutiny "[w]hen content-based speech regulation is in question"); *id.* at 732 (Breyer, J., concurring) (indicating a preference for intermediate scrutiny).

66. 567 U.S. 709 (2012) (plurality opinion).

67. Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266, *invalidated by Alvarez*, 567 U.S. 709 (2012).

68. *See Alvarez*, 567 U.S. at 713–14.

69. *Id.* at 724–26.

70. *Id.* at 729.

71. *Id.* at 727. Justice Stephen G. Breyer echoed a similar view. *Id.* at 738 ("[I]n this area [of the political arena,] more accurate information will normally counteract the lie.") (Breyer, J., concurring). Justice Breyer applied intermediate scrutiny but still found the statute to be insufficiently narrow. *See id.*

72. *See id.* at 750 (Alito, J., dissenting).

73. *Id.* at 751–52.

74. *Id.* ("The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.").

75. *Id.* at 739.

76. *See generally id.*; *see also* Hasen, *supra* note 49, at 548; Blitz, *supra* note 49, at 169.

Third, disclosure and labeling requirements, although interpreted as less restrictive than prohibitions, still face heightened scrutiny.[77] In *Brown v. Entertainment Merchants Ass'n*,[78] the Court held a California law that prohibited violent video game sales to minors and required such games to be labeled "18" was an impermissible content-based restriction.[79] Applying strict scrutiny, the Court found that California's interest in preventing minors from becoming more aggressive lacked sufficient evidence to justify the restriction.[80]

Moreover, the law was both overinclusive and underinclusive. The law was overinclusive by prohibiting sales to minors whose parents did not care if the minor purchased the violent game.[81] The law was also underinclusive by permitting minors to be exposed to violence in other media, such as on television, and by allowing parents to purchase the game for their child.[82] In striking down the law, the Court indicated its preference for the private gaming industry's proactive labeling efforts over a government-mandated approach.[83]

In the political context, the Court's transparency jurisprudence has focused mainly on disclosure requirements for advertisements' funding sources. The landmark decision in *Citizens United v. Federal Election Commission*[84] upheld a regulation requiring a clear and conspicuous disclaimer, identifying who paid for an advertisement and whether it was authorized by the candidate, for some political advertisements.[85] The Court reasoned that the "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending"[86] and the "person or group who is speaking" was sufficient. Additionally, the regulation was less restrictive than more comprehensive alternatives.[87]

Fourth, a First Amendment concern lies in the government compelling speech, as freedom of speech has been interpreted to include the right to

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77. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340, 366–67 (2010) (explaining the application of both strict and exacting scrutiny); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (exacting scrutiny).

78. 564 U.S. 786 (2011).

79. *Id.* at 789, 799.

80*. See id.* at 799.

81*. See id.* at 804.

82. See *id.* at 802–03.

83. Justice Antonin Scalia noted that "[t]he video-game industry [already] has in place a voluntary rating system designed to inform consumers about the content of games" to guide parental decisions. *Id.* at 803.

84. 558 U.S. 310 (2010). The lawsuit involved an as-applied challenge to an FEC regulation that required Citizens United to identify the source of funding and candidate authorization for short advertisements of a movie that it sought to air before an election. *Id.* at 320–21.

85. *Id.* at 366–67.

86*. Id.* at 367 (quoting Buckley v. Valeo 424 U.S. 1, 66 (1976)).

87. *Citizens United*, 558 U.S. at 368. The opinion concluded by stating that "[c]itizens must be free to use new forms, and new forums, for the expression of ideas." *Id.* at 372 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring)). The *NetChoice* cases will likely inform future interpretations of *Citizens United. See supra* notes 61–62 and accompanying text.

speak and to not speak.[88] Given the right to not speak, the government may not "compel[] individuals to speak a particular message."[89] In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[90] the Court upheld an Ohio law requiring legal advertisements that offered contingency fee rates to disclose the client's liability to pay costs if they do not win.[91] The Court noted that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, . . . [but nondeceptive or true commercial speech] may be restricted only in the service of a substantial governmental interest."[92]

More recently, the Court in *National Institute of Family & Life Advocates v. Becerra*[93] considered two California laws concerning notice requirements for pregnancy-focused medical facilities, finding that both laws unconstitutionally compelled speech.[94] The first law required medically licensed facilities to provide an on-site notice informing patients of free or low-cost access to comprehensive family planning services.[95] The Court held that the requirement was a form of compelled speech because it required petitioners, who focused on dissuading patients from obtaining abortions, to make a state-mandated message.[96] The second law required nonlicensed facilities which primarily provided pregnancy-related services to use a "government-drafted statement," both on-site and in any advertising material, stating that the facility was unlicensed.[97] The Court held that the notice requirement was "unjustified and unduly burdensome under *Zauderer*" as it "target[ed] speakers, not speech, and impose[d] an unduly burdensome disclosure requirement that will chill [the unlicensed facilities'] protected speech."[98]

In sum, regulating synthetic media in political advertising requires a careful consideration of First Amendment protections. Depending on whether regulation takes a prohibitory or transparency approach, some of these First Amendment doctrines will be more of a challenge than others.

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88. Janus v. Am. Fed'n of State, Cnty., and Mun. Emps. Council 31, 138 S. Ct. 2448, 2463 (2018) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

89. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018); *see also* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2313–15 (2023) (rejecting state statute that would require website designer to make wedding websites for same-sex couples). *But see* John Doe No. 1 v. Reed, 561 U.S. 186, 190–91 (2010) (upholding a Washington state law permitting public disclosure of signatories to referendum petition). *See generally* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018) (providing an overview of the Supreme Court's compelled speech jurisprudence).

90. 471 U.S. 626 (1985).

91. *Id.* at 652.

92. *Id.* at 638 (internal citations omitted).

93. 138 S. Ct. 2361 (2018).

94. *Id.* at 2368–70.

95. *Id.* at 2369–70.

96. *Id.* at 2372.

97. *Id.* at 2370.

98. *Id.* at 2378. The Court discussed the issue under a *Zauderer* analysis but did not decide whether *Zauderer* applied. *Id.* Moreover, the requirement was unduly burdensome as, for example, a billboard "that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 languages." *Id.*

C. The Current Domestic
Regulatory Landscape

This part explores efforts to regulate the use of synthetic media in political advertising. The federal government has been unsuccessful despite multiple proposed bills over the years. However, states and the private sector have seen greater progress.[99] Part I.C.1 discusses current governmental regulatory efforts. Part I.C.2 provides an overview of federal agency jurisdiction to regulate synthetic media. Part I.C.3 summarizes current synthetic media regulatory efforts by some large internet platforms.

1. State and Federal Regulatory Efforts

At the state and federal level, synthetic media legislation varies with respect to several key categories: statutory definitions, coverage, intent, disclosure or labeling requirements, timing, remedies, and standing. The following sections focus on these categories to compare proposed and enacted legislation and note both near-universal practices as well as material variations by regulators.

a. Defining Synthetic Media

Statutes define synthetic media with reference to the technological means for creation as well as the effect that such media has on viewers. Generally, synthetic media is defined as an image, audio, or video of an individual's appearance, speech, or conduct intentionally created or manipulated using artificial intelligence.[100] There is notable variation in statutes over the term used for synthetic media, with some using "materially deceptive media"[101] or "deepfake"[102] and others using "synthetic media" in conjunction with the specific technology used to create it.[103] Florida's statute only defines media as that created using generative AI;[104] in comparison, Mississippi uses the term digitization.[105]

Despite variations in terminology, most states require that the media: (1) produce a depiction that a reasonable individual would take to be authentic but is not and (2) would cause a reasonable individual to have a

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99. *See* David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 FIRST AMEND. L. REV. 291, 298–99, 371–72 (2022).

100. *See, e.g.*, WASH. REV. CODE ANN. § 42.62.020(1) (West 2023).

101. *See, e.g.*, CAL. ELEC. CODE § 20010(e) (West 2023); *see also* MICH. COMP. LAWS ANN. § 168.932f(10)(c) (West 2024) (defining materially deceptive media as media produced by AI); MICH. COMP. LAWS ANN. § 169.202(1) (West 2024) (defining AI).

102. *See, e.g.*, TEX. ELEC. CODE ANN. § 255.004(d) (West 2019); *see also* 2024 Colo. Legis. Serv. 3–4 (West) (defining deepfake as AI-generated content, AI-generated content as media substantially created or modified using generative AI, and generative AI).

103. *See, e.g.*, WIS. STAT. ANN. § 11.1303(2m)(a)(2) (West 2024) (defining synthetic media as media created using generative artificial intelligence); *id.* § 42.62.020(1) (use of generative adversarial network techniques or other digital technology); 2024 Ariz. Legis. Serv. 1–2 (West) (requiring synthetic media to be a deceptive and fraudulent deepfake).

104. *See* FLA. STAT. ANN. § 106.145(1)–(2) (West 2024).

105. *See* 2024 Miss. Legis. Serv. 1–5 (West).

fundamentally different understanding or impression than they would if they were seeing or hearing the original.[106]

b. Who Is Covered

Enacted statutes have generally sought to implement a broad restriction for deceptive synthetic media creators or disseminators while providing a carveout for large social media platforms and other entities.[107] By focusing on the creators and disseminators, legislators have targeted the source of synthetic media while sidestepping the many risks associated with regulating distributive platforms.[108]

However, some have provided a caveat for distribution mediums if the medium removes a label or alters the content to qualify as synthetic media.[109] This caveat recognizes that an online platform becomes an active advertiser when it editorially engages synthetic media's presentation to an audience, instead of merely distributing the original.[110]

Beyond medium liability, some regulators have restricted potential liability to those who paid for or sponsored the communication.[111] Given *Citizens United* and federal regulation concerning transparency for advertisements' funders, these efforts have sought to advance synthetic media restrictions under precedent that permits disclosure related to the funding sources of an advertisement.[112]

Additionally, legislators have also sought to except a few important categories. First, most states provide an exception for parody and satire.[113] Existing law clearly recognizes this exception, and broad regulations that attempt to stifle parody and satire are all but certain to be struck down. Second, some states exempt media that are traditionally considered shallowfakes, which seems to be a direct response to immediate AI concerns while seeking to narrowly tailor potential legislation.[114] Third, some jurisdictions explicitly require the media to be made without the consent of the depicted individual or candidate,[115] while others seem to imply this given the statute applies to an "injured" candidate,[116] indicating that consensual synthetic media is permissible.

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106. *See, e.g.*, IDAHO CODE ANN. § 67-6628A(2)(c) (West 2024); 2024 Or. Laws Ch. 0062, § 1(b). New York's statute omits reference to a "reasonable individual" in its second prong. *See* N.Y. ELEC. LAW § 14-106(5)(a)(i)(2) (McKinney 2024).

107. *See, e.g.*, ELEC. § 20010(d).

108. *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1795–801 (2019).

109. *See, e.g.*, § 67-6628A(9); H.R. 3230, 116th Cong. § 2(f)(1)(B) (2019).

110. *See* § 67-6628A(9).

111. *See, e.g.*, UTAH CODE ANN. § 20A-11-1104(2)(a) (West 2024).

112. *See* Citizens United v. FEC, 558 U.S. 310, 320–31 (2010); *see also* S. 1596, 118th Cong. § 4(a) (2023).

113. *See, e.g.*, N.Y. ELEC. LAW § 14-106(5)(b)(iii)(1) (McKinney 2024).

114. *See, e.g.*, MINN. STAT. ANN. § 609.771(1)(c) (West 2024).

115. *See, e.g.*, IND. CODE ANN. § 3-9-8-3(1) (West 2024).

116. *See* TEX. ELEC. CODE ANN. § 255.004(d)–(e) (West 2019).

c. Intent

Most legislation has required some degree of intent for a synthetic media creator or disseminator to be liable. Imposing liability based on the creator or disseminator's intent has generally included the intent to injure a candidate,[117] deceive voters,[118] or influence the outcome of an election.[119]

Intent has also been extended to cover advertisements that seek to deter a person from voting,[120] whereas some states, such as Indiana, broadly apply such restrictions to include anyone who solicits campaign contributions.[121] Moreover, some jurisdictions require knowledge by the creator or disseminator that the media is fabricated or require the act to be done with actual malice.[122] Some impose liability under an intent regime, whereas others have ditched intent to create a blanket, affirmative obligation for advertisers and synthetic media creators to either not distribute or disclose advertisements containing synthetic media.[123]

d. Disclosure or Label Requirements

Although some states prohibit deceptive synthetic media in advertisements outright,[124] the majority either affirmatively require a label[125] or provide an affirmative defense if a label is attached.[126]

States have differed somewhat over what the label must contain. Some require the label to say the advertisement "contains content generated by AI,"[127] whereas other states require it to say "[t]his [image, audio, or video] has been manipulated" with some appending a variation of "by artificial intelligence" to the end.[128] Most states require the disclaimer to be in readable font or clearly spoken, either for the entire advertisement or for a portion thereof.[129] Some states require the disclaimer to be in each language

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117. *See, e.g.*, FLA. STAT. ANN. § 106.145(2) (West 2024).
118. *See, e.g.*, CAL. ELEC. CODE § 20010(a) (West 2023).
119. *See, e.g.*, WIS. STAT. ANN. § 11.1303(2m)(a)(1) (West 2024).
120. *See, e.g.*, 2024 MISS. Legis. Serv. 1–5 (West).
121. *See, e.g.*, IND. CODE ANN. § 3-9-8-5 (West 2024).
122. *See* ELEC. § 20010(a).
123. *Compare* § 11.1303(2m), *with* WASH. REV. CODE § 42.62.020 (2023).
124. TEX. ELEC. CODE ANN. § 255.004(d) (West 2019); MINN. STAT. § 609.771 (2023). Texas and Minnesota do not explicitly discuss a labeling requirement or defense, but it may be a defense insofar as a plaintiff would be unable to meet the requirement that the synthetic media "caused a person to believe" the content was authentic.
125. *See, e.g.*, N.Y. ELEC. LAW § 14-106(5)(b)(i) (McKinney 2024).
126. *See, e.g.*, IDAHO CODE ANN. § 67-6628A(5) (West 2024).
127. *See, e.g.*, UTAH CODE ANN. § 20A-11-1104(4) (West 2024).
128. MICH. COMP. LAWS ANN. § 168.932f(2)(a) (West 2024). The Defending Each and Every Person from False Appearances by Keeping Exploitation Subject to Accountability Act of 2019 ("DEEP FAKES Accountability Act") would require an embedded digital watermark for media containing a "moving visual element." H.R. 3230, 116th Cong. § 2 (2019). Notably, the DEEP FAKES Accountability Act would require software manufacturers to ensure their software (1) permitted watermarking and (2) required users to "affirmatively acknowledge their general awareness of their legal obligations." *Id.* § 3.
129. *See, e.g.*, FLA. STAT. ANN. § 106.145(3) (West 2024).

used in the advertisement.[130]   Notably, Florida requires disclaimers on internet advertisements to be viewable without the user taking any further action.[131]

At the federal level, the Honest Ads Act,[132] reintroduced in 2023, would require "any qualified internet or digital communication" to provide the name of who paid for the communication if it is disseminated through a medium that makes it impossible to include all the information required.[133] Moreover, the bill would require online platforms to maintain a record with (1) a digital copy of the political ad; (2) a description of the audience that received the ad, the number of views, and the first and last date on which the ad was displayed; (3) information on how much the ad costs; and (4) the politician, office, or legislative issue referenced.[134]

e. Timing, Remedies, and Standing

First, some states require the advertisement to be distributed within thirty,[135] sixty,[136] or ninety[137] days before the election.   Second, for remedies, states generally impose misdemeanor violations for a first offense and felony violations for subsequent offenses.   Most states provide for injunctive or other equitable relief.[138]   Third, states vary on standing requirements.   Some states permit anyone to bring a claim,[139] whereas others limit standing to the injured candidate or person depicted.[140]   Others permit the attorney general or an organization representing the interest of voters who are likely to be deceived.[141]   In most jurisdictions, courts are asked to review the matter expeditiously.[142]

2. Federal Agency Jurisdiction

Any federal legislation will need to apply within the appropriate jurisdictional scope.   Currently, the Federal Trade Commission (FTC), Federal Communications Commission (FCC), and Federal Election Commission (FEC) are the likeliest candidates to enforce synthetic media regulations.

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130. *See, e.g.*, N.Y. ELEC. LAW § 14-106(5)(b)(ii)(1)–(2) (McKinney 2024).

131. *See* § 106.145(3)(c); *see also* S. 486, 118th Cong., § 10 (2023).

132. S. 486, 118th Cong. (2023).

133. *Id.* § 7. The bill also requires a way for the communication's recipient to access the rest of the excluded information with "minimal effort and without receiving or viewing any additional material other than such required information." *Id.*

134. *Id.* § 8.

135. *See* N.M. STAT. ANN. § 1-19-26(Q)(3)(c) (LexisNexis 2024).

136. *See, e.g.*, CAL. ELEC. CODE § 20010(a) (West 2023); WASH. REV. CODE § 42.17A.005(21)(a)(ii) (2023).

137. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.932f(1)(b) (West 2024).

138. *See, e.g.*, 2024 Or. Laws Ch. 0062.

139. *See* FLA. STAT. ANN. § 106.145(4)(b) (West 2024).

140. *See, e.g.*, 2024 Miss. Legis. Serv. 1–5 (West).

141. *See, e.g.*, § 168.932f(1)(d).

142. *See, e.g.*, WASH. REV. CODE § 42.62.20(6) (2023).

The FTC is charged with preventing the use of "unfair methods of competition . . . and unfair or deceptive acts or practices" relating to commerce.[143] The FTC prohibits broadcast television networks from discriminately airing advertisements from a candidate based on the advertisement's content,[144] but the FTC does not have authority to regulate political advertisements.[145]

The FCC regulates "interstate and foreign commerce in communications."[146] Its jurisdiction extends to political advertising, but only through a narrow focus on structural access for political advertisers using broadcast media.[147] Under FCC regulation, broadcasters are required to maintain a publicly available "political file."[148] These files include information about requests to purchase broadcast time on behalf of candidates; requests to purchase broadcast time by issue advertisers that contain a message "relating to any political matter of national importance"; and free air time for candidates.[149] However, the FCC does not review political ad content before it airs, ensure the accuracy of statements, or require broadcasters to provide all sides of a controversial issue.[150] Thus, the FCC's focus on structural access provides a limited avenue to address concerns about the synthetic content in political advertisements.[151]

The FEC is "charged with administering and enforcing federal campaign finance law."[152] It focuses on efforts to increase transparency about advertising sponsors and funding for political advertisements,[153] recently extending these efforts to internet communications.[154] The FEC does not consider the truth of any campaign-related statement in fulfilling its directive.[155]

Recently, proponents of synthetic media regulation have sought to expand the FEC's prohibition on fraudulent misrepresentation to include

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143. 15 U.S.C. § 45(a)(1)–(2) (2022).

144. John A. Barrett, Jr., *Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in a Post-truth World*, 94 St. John's L. Rev. 615, 640 (2020).

145. *See FTC's Endorsement Guides: What People Are Asking*, FTC (June 2023), https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking [https://perma.cc/PF99-AUQ2].

146. 47 U.S.C. § 151 (2021). Regulatory jurisdiction extends to "radio, television, wire, satellite and cable." *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/S6BX-SH8C] (last visited Aug. 31, 2024).

147. The FCC does not regulate political advertising on the internet. *Political Programming*, FCC, https://www.fcc.gov/media/policy/political-programming [https://perma.cc/N3ZP-JHN2] (last visited Aug. 31, 2024).

148. 47 C.F.R. § 73.1943 (2022).

149. *Id.*

150. *See Political Programming*, *supra* note 147.

151. *See supra* notes 147–50 and accompanying text.

152. *Mission and History*, FEC, https://www.fec.gov/about/mission-and-history/# [https://perma.cc/M9FZ-FAYJ] (last visited Aug. 31, 2024).

153. *See* Chesney & Citron, *supra* note 108, at 1807.

154. *See* 11 C.F.R. § 100.26 (2024). Public political communications now include internet communications "placed or promoted for a fee on another person's website, digital device, application, or advertising platform." *Id.*

155. *See* Chesney & Citron, *supra* note 108, at 1807.

deepfakes.156 Under the current regulation, candidates for federal office and their agents are prohibited from fraudulently misrepresenting themselves as acting in any capacity on behalf of another candidate or party in a damaging manner.157   It is not clear whether this regulation would extend to AI-generated images or videos rather than misrepresentations by the offending candidate themselves.158 Further, the regulation "does not cover actions of third parties," which means that unaffiliated political groups or other entities could circulate content without running afoul of the law.159

However, Public Citizen, a nonprofit consumer advocacy group, petitioned the FEC to clarify the law against fraudulent misrepresentation and its applicability to deceptive AI in campaign ads.160 The petitioner's request is narrower than the Require the Exposure of AI-Led (REAL) Political Advertisements Act,161 as the latter would apply to all AI-generated content in political ads162 whereas the former seeks to clarify potential liability should an advertisement fail to include a disclosure.163 Public comments were generally supportive of the expanded interpretation,164 but even if the FEC moves forward, the regulation would target only those communications within its jurisdiction that amount to fraud.165

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156. 11 C.F.R § 110.16(a) (2002).

157. *Id.*

158. *See* Rebecca Green, *supra* note 49, at 1469–70 (noting that the Federal Election Campaign Act was a post-Watergate reform enacted after incidents such as Donald Segretti mass mailing a letter insinuating that one candidate was falsely accusing senators of "sexual improprieties").

159. *Id.* at 1470.

160. Letter from Robert Weissman, President, Pub. Citizen & Craig Holman, Gov't Affs. Lobbyist, Pub. Citizen, to Lisa J. Stevenson, Gen. Counsel, FEC (May 16, 2023), https://www.citizen.org/wp-content/uploads/Petition-for-Rulemaking-52-USC-30124.pdf [https://perma.cc/J23Z-XSQ7]. The FEC ruled three to three to not advance the first petition based mainly on concerns that it lacked the statutory authority, but it advanced the second petition. *See* Artificial Intelligence in Campaign Ads, 88 Fed. Reg. 55606, 55606 (proposed Aug. 16, 2023).

161. S. 1596, 118th Cong. (2023).

162. *See id.* § 4.

163. *See* Letter from Robert Weissman, President, Pub. Citizen & Craig Holman, Gov't Affs. Lobbyist, Pub. Citizen, to Lisa J. Stevenson, Gen. Counsel, FEC (July 13, 2023), https://www.citizen.org/wp-content/uploads/2nd-Submission-FEC-petition-30124-final-2.pdf [https://perma.cc/5G4G-CFRG].

164. *See, e.g.*, Stanford Internet Observatory, Comment Letter on Petition for Rulemaking to Clarify Law Against "Fraudulent Misrepresentations" (Oct. 16, 2023), https://sers.fec.gov/fosers/ [https://perma.cc/G48N-U6LK]; Democratic National Committee, Comment Letter on REG 2023-02 Artificial Intelligence in Campaign Ads (Oct. 16, 2023), https://sers.fec.gov/fosers/showpdf.htm?docid=423822 [https://perma.cc/6YQ5-S7HV]; Harvard Cyberlaw Clinic & Election Law Clinic, Comment Letter on REG 2023-02 (Oct. 16, 2023), https://clinic.cyber.harvard.edu/wp-content/uploads/2023/11/FEC-Comment-Joint-Cyberlaw-Election-Law-FINAL.pdf [https://perma.cc/BW2N-9LPH]. Some public comments, however, were unsupportive. *See* Republican National Committee, Comment Letter on REG 2023-02, Artificial Intelligence in Campaign Ads (Oct. 16, 2023), https://sers.fec.gov/fosers/ [https://perma.cc/65BT-F22W].

165. *See supra* note 156 and accompanying text.

3. Private Internet Platforms

Private actors have also sought to plug the regulatory gap, which could provide insight for future regulation and augment limits on government power. In 2023, the Biden administration obtained voluntary commitments from leading AI companies to manage risks posed by the new technology, including a commitment to "develop[] robust technical mechanisms to ensure their users know when content is AI generated."[166]

In September 2023, Google said that it would update its "[p]olitical content policy to require that all verified election advertisers . . . prominently disclose when their ads contain synthetic content that inauthentically depicts real or realistic-looking people or events."[167] The notice provides an exemption for ads in which the synthetic content is inconsequentially altered.[168]

X—the social media platform formerly known as Twitter—announced in April 2023 that it would allow political candidates and parties to advertise on the platform, reversing the company's ban.[169] The platform's synthetic media policy prohibits "synthetic, manipulated, or out-of-context media that may deceive or confuse people and lead to harm."[170] Misleading media includes content that is "significantly and deceptively altered, manipulated, or fabricated" or is deceptively shared and that is "likely to result in widespread confusion on public issues, impact public safety, or cause serious harm."[171] Violations result in: post deletion; labels providing a warning, further context, or reducing interactions on the post; or an account lock.[172]

Ultimately, the various approaches to regulation at the federal, state, and private levels evidence efforts to balance the benefits and drawbacks posed by synthetic media in light of a rapidly changing market for truth. These efforts have led to a debate over which approach does best in balancing the benefits and harms while contending with legal and practical constraints.

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166. *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence*, WHITE HOUSE (Oct. 30, 2023), https://www.whitehouse. gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-exec utive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ [https://perma.cc/Q39Y-2ERT].

167. *Updates to Political Content Policy (September 2023)*, GOOGLE (Sept. 2023), https://support.google.com/adspolicy/answer/13755910?hl=en&ref_topic=29265 [https://perma.cc/33LZ-7SQ5].

168. *Id.* Minor alterations include "image resizing, cropping, color or brightening corrections, defect correction . . . or background edits that do not create realistic depictions of actual events." *Id.*

169. *See* Kari Paul, *Twitter Allows US Political Candidates and Parties to Advertise in Policy Switch*, THE GUARDIAN (Sept. 1, 2023, 6:10 AM), https://www.theguardian.com/ technology/2023/aug/29/twitter-x-political-ads-us-policy-misinformation [https://perma.cc/P H7S-NCVC]. The company had already lifted a ban in January 2023 on cause-based advertising, like those raising awareness of broader policy issues. *See id.*

170. *Synthetic and Manipulated Media Policy*, X (Apr. 2023), https://help.twitter.com/en/ rules-and-policies/manipulated-media [https://perma.cc/HZT7-EPR8].

171. *Id.* One of the specific harms X considers when enforcing the policy includes "voter suppression or intimidation." *Id.*

172. *Id.*

II. Issues with Balancing Synthetic Media's Benefits and Harms Under the First Amendment

Recently, synthetic media's greater accessibility, paired with contemporary discussions of "fake news," have expanded the regulatory focus to the political arena. This discussion has sought to address the harms posed by the technology while balancing its benefits.[173] Part II.A surveys some benefits of synthetic media. Part II.B surveys some of its harms. Part II.C provides an overview of current regulatory proposals by scholars.

A. Benefits

Synthetic media can benefit campaigns and candidates in three ways. First, campaigns can reduce costs by utilizing synthetic media for everything from campaign posters to advertising videos.[174] Major campaigns rely on advertising agencies to create and direct advertising efforts, and synthetic media reduces those costs by lessening the human labor required to produce campaign art and videos.[175] Additionally, a large amount of advertising expense is attributable to the fees paid to place an ad on TV or social media, so reducing content-generation costs allows campaigns to redirect funds toward reaching voters.[176]

Second, campaigns can more effectively respond in real time to voter concerns and issues.[177] Candidates can quickly generate advertisements that represent a candidate's stance on a particular issue.[178] It is easy to imagine a new, hot-button issue based on a current event, such as how a candidate responds to a viral video of police brutality. With synthetic media, a video of the candidate can be generated within hours and reach voters while the issue is still front and center.[179] Moreover, a speech writer could quickly generate a script, focusing their efforts on editing, and subsequently feed the script into a voice cloning system to mimic the candidate.[180]

Third, campaigns can utilize synthetic media to narrowly tailor advertising campaigns to discreet demographics, resulting in greater voter awareness which could translate into greater turnout.[181] These benefits could also

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173. *See generally* Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 Okla. L. Rev. 59 (2018); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 Tex. L. Rev. 83 (2006).

174. *See, e.g.*, GOP, *supra* note 4.

175. *See, e.g.*, Steven Shepard, *Top Biden Strategists Launch New Advertising Firm*, Politico (Apr. 4, 2022, 8:01 AM), https://www.politico.com/news/2022/04/04/joe-biden-strategists-advertising-firm-00022472 [https://perma.cc/Q8GW-W92L].

176. Discussion of advertising costs has mainly focused on the costs overall, with much less on relative expenditure by specific campaigns in creating those advertisements.

177. *See* Siu, *supra* note 28.

178. *See id.*

179. *See* Thompson, *supra* note 40.

180. *See, e.g.*, *id.*

181. *See* Katherine Haenschen, *The Conditional Effects of Microtargeted Facebook Advertisements on Voter Turnout*, 45 Pol. Behav. 1661, 1675–77 (2023); Nathan Canen & Gregory J. Martin, *How Campaign Ads Stimulate Political Interest*, 105 Rev. Econ. & Stat. 292, 292–94, 309 (2023).

decrease resource disparities between campaigns, benefiting smaller candidates and issues that are often pushed aside by larger advertising budgets.182 At a higher level of generality, campaigns can use synthetic media to connect with voters and convey the implications of a voter's choice on a candidate or issue.183

B. Drawbacks

Although synthetic media has beneficial applications, the technology poses a slew of risks.184 First, dissemination of realistic deepfakes harms democratic discourse broadly by "allow[ing] individuals to live in their own subjective realities," blurring the line between fact and falsehood.185 When voters are no longer able to agree on basic facts, democratic discourse suffers so that an inability to define the discussion's basic parameters forecloses substantive policy disputes.186

Second, deepfakes can increase specific voters' susceptibility to manipulation.187 Although political discourse has historically grappled with falsehoods, deepfakes pose a unique problem, as they seem realistic and are more difficult to debunk.188 For elections, this manipulation poses concerns as to both timing and scope. A well-timed deepfake can influence voters who face a "narrow window[] of time during which irrevocable decisions are made," such as on the eve of an election.189

As to scope, advances in voter targeting can obscure the breadth of deepfake dissemination. Microtargeting, for example, poses an issue where a well-funded and strategic campaign can message discreet population segments that can be hard for a rival to identify and counter.190 Moreover,

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182. *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/VW73-XCM9].

183. *See infra* Part II.C.1.

184. Chesney & Citron, *supra* note 108, at 1776–86.

185. *Id.* at 1778; *see also* Green, *supra* note 49, at 1459–60.

186. Chesney & Citron, *supra* note 108, at 1777–78.

187. *See* Hasen, *supra* note 49, at 543.

188. *See* Green, *supra* note 49, at 1457–60 (arguing that deceptive media threatens the right to vote where a voter supports a candidate at the polls based on media leading them to believe the candidate supports policy X when the candidate actually supports Y); *see also supra* note 38 and accompanying text.

189. Chesney & Citron, *supra* note 108, at 1778; *see also* Green, *supra* note 49, at 1488–89 (discussing the "election-eve problem").

190. Although recent studies have indicated that microtargeting is not the doomsday scenario some might imagine, those studies still indicate that microtargeting does work better than other popular campaign advertising tactics. *See* Peter Dizikes, *Study: Microtargeting Works, Just Not the Way People Think*, MIT NEWS (June 21, 2023), https://news.mit.edu/2023/study-microtargeting-politics-tailored-ads-0621 [https://perma.cc/TA9Z-K5F7] (discussing a 2023 MIT study that found "targeted political ads still have an advantage [over other popular advertising forms but] . . . obtain[ing] reliable information about voter attitudes and voting decisions . . . mak[es] it very difficult to effectively microtarget political ads at scale"); Haenschen, *supra* note 181, at 1678 (finding that "[l]ongitudinal exposure to microtargeted issue-oriented Facebook ads has an impact on voter turnout, however effects are conditional on the alignment of message, audience, and electoral salience").

access to large volumes of data allows some actors to create accurate voter profiles to inform political campaigning and advertising.[191] This was evident in the aftermath of the Cambridge Analytica scandal, where the firm utilized data from fifty million Facebook profiles to "predict and influence choices at the ballot box."[192]

Democratic distortion and voter manipulation give way to broader harms posed by unchecked synthetic media. For example, deepfakes can erode trust in public and private institutions.[193] The American public has already experienced firsthand the effect of labeling a real news story as "fake news," causing voters to shift their media consumption habits.[194] Moreover, a faked recording of lawyers plotting a politically motivated prosecution could increase distrust of the Department of Justice, in turn hampering trust in the judicial system.[195]

Such erosion coincides with widening social divisions. Increases in identity politics render the public more susceptible to falsehoods—or to anger over what the other side is purportedly advocating for—which could boil into actual confrontations.[196] Social divisions, and anger or distrust of the other side, are not novel; rather, the novelty arises from deepfakes that can exacerbate such divisions.[197] Further harms from deepfakes can be envisioned, such as those to public safety, diplomacy, national security, and news reporting.[198]

Emphasis on the harms of synthetic media in political advertising is reasonable given the vast potential for abuse. However, the race to regulate the technology can take a wrecking ball to an issue more appropriately addressed with mindful precision.

C. The Issue of Regulating Synthetic Media in Politics

The benefits and harms of synthetic media give way to regulations that balance those concerns to varying degrees. At one end, synthetic media can be extremely harmful to democracy, distorting issues and manipulating

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191. *See* Cristiano Lima-Strong, *Facebook Knew Ads, Microtargeting Could Be Exploited by Politicians. It Accepted the Risk*, WASH. POST (Oct. 26, 2021, 9:20 AM), https://www.washingtonpost.com/politics/2021/10/26/facebook-knew-ads-microtargeting-could-be-exploited-by-politicians-it-accepted-risk/ [https://perma.cc/25RX-2CXV].

192. Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018, 6:03 PM), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election [https://perma.cc/Q5RP-TN9V].

193. *See* Chesney & Citron, *supra* note 108, at 1779.

194. *See, e.g.*, *id.* at 1785–86 (discussing the "liar's dividend" problem). A related concern is voter disillusionment, where voters faced with an onslaught of fake news may decide the effort to discern the "truth" is greater than what it is worth. *See* Green, *supra* note 49, at 1460.

195. *See* Chesney & Citron, *supra* note 108, at 1779.

196. *See id.* at 1780–81.

197. *See id.*

198. *See id.* at 1781–85.

voters to believe in a fabricated reality.[199] At the other end, it can provide unique benefits by enriching democratic discourse, conveying abstract messages in an accessible form to evoke greater awareness.[200] Regulatory balancing has thus generally focused either on prohibiting only the harmful kind[201] or on labeling all synthetic media.[202] Part II.C.1 discusses three different conceptions of synthetic media that exemplify current regulatory approaches. Part II.C.2 considers arguments in favor of narrow prohibitions. Part II.C.3 considers arguments in favor of transparency approaches to regulation.

1. Regulatory Approaches Based on Synthetic Media's Characterization

Synthetic media's beneficial and harmful applications demonstrate how the technology can be used both artistically and deceitfully.[203] First, synthetic media can be viewed as creating fabricated realities in which they emulate "proxies for our perception—but then feed our perceptions false information about the world by making us see what is not there."[204] Second, synthetic media can be viewed as creative fictions, allowing people access to "vivid fictional worlds" in much the same way oral storytelling, books, and movies provided for in the past.[205] Third, a hybrid of the previous two uses, synthetic media can be viewed as false testimony that "offers a fiction" but is presented "as an accurate record."[206]

These three delineations demonstrate the contemporary concern—that viewers have a reduced ability to verify external sources of evidence.[207] The political process relies on an environment in which a voter can evaluate different arguments by referencing, in part, an argument's connection to that individual's experienced reality.[208] Where voters lack an immediate connection to primary sources, they must rely on secondary sources to evaluate a claim's validity.[209] In the context of synthetic media, secondary

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199. *See supra* Part II.B.

200. *See supra* Part II.A.

201. *See infra* Part II.C.2.

202. *See infra* Part II.C.3.

203. *See* Blitz, *supra* note 49, at 171–72.

204. *See id.* at 202–03.

205. *Id.* at 203.

206. *Id.* The three approaches reflect the varying weights given to synthetic media's believability and impact on society. For further discussion of a believability/impact framework, see Anna Yamaoka-Enkerlin, Comment, *Disrupting Disinformation: Deepfakes and the Law*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 725, 745–48 (2020) (discussing the "Disinformation Disruption Framework" which considers a deepfake's believability and impact on society as part of a framework to guide actions regulating deepfakes).

207. *See infra* Parts II.C.2–3.

208. *See* Schroeder, *supra* note 47, at 41–42; Blitz, *supra* note 49, at 235–36; *see also supra* note 185 and accompanying text.

209. *See* Schroeder, *supra* note 47, at 36–38; *see also* Jane R. Bambauer, *The Empirical First Amendment*, 78 OHIO ST. L.J. 947, 947 (2017) (contending that most claims are empirical and should be accepted or rejected on evidentiary grounds that listeners can experience for themselves).

sources require an additional evaluation of authenticity, which may be difficult in a bot-influenced, synthetic environment.[210] If "more *accurate* information . . . [is to] counteract the lie," there must be access to that information.[211] For a fabricated ecosystem, discussion has thus focused on protecting access to accurate information by either prohibiting the most harmful forms or indicating that some content is fabricated.[212]

Current laws and proposed legislation reflect decisions giving varying weight to each of the three delineations. For example, Texas's law is centered squarely on the false testimony view, confining synthetic media to deepfake videos "created with the intent to deceive[]."[213] Washington took a slightly different approach. While using language similar to Texas's in the definition's first prong, Washington also requires that the media "would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content" than if the person saw the original, unaltered media.[214]

Moreover, some states provide an explicit caveat for synthetic media that discloses its content as such, providing greater access to the fictional world given that the harm is mitigated.[215] Lastly, the proposed REAL Political Ads Act and Wisconsin's law reflect the strongest weight given to the fictional worlds use by requiring all political advertising to include a disclosure.[216]

Additionally, some jurisdictions confine an offense to synthetic media manipulated with intent to harm a candidate or influence an election, giving greater weight to the false testimony consideration.[217] Others, in contrast, do not require media to have been made with any specific intent.[218] These approaches are reflected in the current scholarly discussion over regulation.

2. Prohibition

One approach to regulation is to implement a narrow prohibition on especially harmful deepfakes that pose the greatest risk of undermining

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210. *See* Schroeder, *supra* note 47, at 28–29; *see also* Hasen, *supra* note 49, at 558–59.

211. United States v. Alvarez, 567 U.S. 709, 738 (2012) (Breyer, J., concurring) (emphasis added).

212. *See* Schroeder, *supra* note 49, at 63–64 (arguing that the marketplace of ideas should focus on safeguarding the "*emergence* of truth" and "protect[ing] the ability of citizens to take part in human discourse"); *see also* Green, *supra* note 49, at 1458–59 (contending that it is too much to ask of voters to determine the authenticity of every instance of candidate speech, but noting that, "at least for now, people are programmed to believe speech heard from" a candidate's mouth). *But see* Guy-Uriel E. Charles, *Motivated Reasoning, Post-truth, and Election Law*, 64 St. Louis U. L.J. 595, 601 (2020) (advocating for a more libertarian approach).

213. Tex. Elec. Code Ann. § 255.004(e) (West 2019).

214. Wash. Rev. Code § 42.62 (2023).

215. *Id.*; Cal. Elec. Code § 20010 (West 2023); *see also supra* Part I.C.1.d.

216. S. 2770, 118th Cong. § 2 (2023); Assemb. B. 664, 2023–2024 Assemb. (Wis. 2024).

217. *See supra* Part I.C.1.c.

218. *See supra* Part I.C.1.c.

elections and the political process.[219]   Minnesota's and Texas's deepfake laws are clear enactments of this view.

First, a workable, narrow prohibition would extend only to synthetic media that is maliciously created or distributed with the intent to harm a candidate or influence an election.[220]   Prohibitions mainly focus on candidates, given the clearer alignment with traditional restrictions on expressive conduct, such as defamation or fraud.[221]   This narrow focus has the benefit of addressing an identifiable harm to a candidate or election while leaving room for development of the nascent technology.[222]

Second, a narrowly tailored prohibition could work within First Amendment protections. For example, Professor Rebecca Green proposes a ban on counterfeit media involving a political candidate.[223]   Professor Green's proposal would criminalize creating and disseminating synthetic media intended to "deceive voters and distort the electoral process" within a certain number of days before an election, unless the media is "clearly identified as fake."[224]   She contends that such a prohibition may survive heightened constitutional scrutiny[225] by understanding deepfakes as "knowing fraud," as opposed to "garden-variety political lies."[226] Professor Green argues that defining the deepfake problem as fraud instead of a verbal lie provides a way to overcome First Amendment barriers.[227]   State laws already reflect these prohibitory approaches, and the federal government may also adopt a requirement through the FEC.[228]   This approach presents a narrower avenue that safeguards against the greatest dangers while otherwise allowing synthetic media use.[229]

However, the First Amendment barriers would once again arise if the law were not sufficiently narrow.[230] Although a law regulating false media could align with a strong compelling interest in assuring access to true information and in determining truth-value,[231] regulations would face issues in meeting

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219. *But see* Barrett, Jr., *supra* note 144, at 617 (advocating, in the long term, for a Constitutional amendment banning "all television and digital political advertising").

220. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion).

221. *See supra* note 64 and accompanying text. For a broader overview of laws addressing election-related misinformation, see Ardia & Ringel, *supra* note 99, at 301–03.

222. *See* Green, *supra* note 49, at 1486–87.

223. *Id.* at 1449. The prohibition would not apply to policy issues or other media aimed at distorting election results. *Id.* at 1451.

224. *Id.* at 1456–57.

225. *Id.* at 1483; *see also* Blitz, *supra* note 49, at 273–74.

226. Green, *supra* note 49, at 1483.

227. *Id.* at 1484. This approach is beneficial in confining the prohibition to a category of speech (fraud) that can be subject to greater regulation given historical precedent. *See supra* note 162 and accompanying text.

228. *See supra* note 164 and accompanying text.

229. *See generally* Green, *supra* note 49.

230. *See id.* at 1486 ("[A] narrow law targeting counterfeited candidate speech produced and distributed with knowing intent to confuse voters and disrupt elections should survive First Amendment scrutiny because the harm it seeks to prevent is democratically existential.").

231. *See* Hasen, *supra* note 49, at 545 (stating that "democracy depends upon voters' ability to evaluate arguments in order to make political and electoral decisions").

the tailoring requirement.232   For example, it would be difficult for the government to define what is truthful, and prohibitions could run afoul of viewpoint discrimination or government manipulation.233

Professor Richard L. Hasen uses California's deepfake prohibition as an example of these issues. He argues that the law may be too vague and overly broad to survive a First Amendment challenge.234 In light of the very narrow, yet plausible, approach to the issue through a prohibition, scholars and courts have also relied on transparency to either supplement bans or avoid them outright.

3. Transparency

Another regulatory approach centers on transparency, either through government mandated disclosure or private solutions.235   Laws and regulatory proposals promoting transparency have taken two forms. Some laws prohibiting harmful deepfakes provide an affirmative defense if the advertisement includes a disclaimer indicating that it contains synthetic media.236 Others, such as the proposed REAL Political Ads Act, require a disclaimer but do not prohibit synthetic media.237

Transparency requirements provide three main benefits.   First, transparency laws may be beneficial insofar as they "do not dictate what speech is permissible" and thus avoid many First Amendment problems faced by content-based restrictions.238   Second, transparency about an advertisement's deceptive or misleading content promotes greater accountability for creators and distributors of false and misleading speech.239 Third, laws that require collection and disclosure of information regarding funders and distributors of political ads can prompt third party platforms, such as social media companies, to mitigate malicious uses through self-reflection and accountability.240 However, transparency laws imposing intrusive recordkeeping and disclosure requirements on private parties face possible increased scrutiny if those requirements are not narrowly tailored.241

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232. *See* Green, *supra* note 49, at 1483–86 (discussing a narrow prohibition's viability under *Alvarez*).

233. Hasen, *supra* note 49, at 546.

234. *Id.* at 552–53 ("[California's] law banning deep fakes raises vagueness and overbreadth problems by preventing the use of synthetic media when one is reckless about distributing [the deepfake]" and it is hard to "tell whether someone who is intending to influence an election using manipulated media engaged in an act of deception.").

235. *See supra* Parts I.C.1.d, I.C.3.

236. *See supra* Part I.C.1.d.; *see also* Green, *supra* note 49, at 1454 n.40.

237. S. 1596, 118th Cong. § 4 (2023).

238. Ardia & Ringel, *supra* note 99, at 374 & n.393; *see also* Blitz, *supra* note 49, at 275–82, 294–95 (arguing that "the lie and the deepfake are *not* analogous" given the latter's nontestimonial nature and noting that laws broadly requiring deepfake disclosure "may survive intermediate scrutiny").

239. Ardia & Ringel, *supra* note 99, at 374–75.

240. *Id.*

241. *See id.* at 376–79; *see also* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding

One approach to transparency laws would require social media platforms and other large websites to label synthetic media content in an advertisement or video as "altered."[242]   The law would apply broadly to any synthetic media, not just political material, but safeguarding elections appears to be the primary purpose.[243] This approach, advocated by Professor Hasen, theorizes that the problems posed by synthetic media arise from our current "post-truth era," which threatens democracy when voters lack "enough access to the truth via reliable shortcuts and intermediaries" to make informed decisions.[244]

In the election context, misinformation and synthetic media pose a threat where a flood of plausible fake information undermines the legitimate information market, or more simply, where "bad information crowds out the good information."[245] Moreover, a flood of misleading or outright false synthetic media leads to a lesser likelihood of any media being considered genuine, making truth denial easier.[246]

To satisfy heightened scrutiny, the broad labeling requirement would support the "government's interest in preventing . . . voter deception" while also addressing market concerns over what is and is not genuine content.[247] Professor Hasen argues that the labeling requirement's viewpoint neutrality avoids the issue posed by the government defining true information, because all altered media would be labeled.[248] Moreover, Professor Hasen argues that the law would avoid compelled speech problems because synthetic content is a purely factual determination, which the Court reaffirmed in *Becerra* for commercial contexts.[249] Under his proposal, websites would merely be required to label an "objectively verifiable" alteration, thus avoiding discriminatory enforcement.[250]

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that an Ohio statute prohibiting anonymous pamphleteering violated the First Amendment's right to anonymity in political speech).

242. Hasen, *supra* note 49, at 549. Professor Hasen argues that a "'manipulated' [label] is more pejorative than 'altered,' and . . . may raise a constitutional issue because the government would be putting a negative label on political speech." *Id*. at 553.

243. *See id.* at 550.

244. *Id.* at 538–40 (suggesting that, at a rough level of generality, the confluence of increasing political hyperpolarization and decline of trusted news intermediaries led to this "post-truth era"). *But see* Charles, *supra* note 212, at 605–06.

245. Hasen, *supra* note 49, at 544.

246. *Id.*

247. *Id.* at 550; *see also* Chesney & Citron, *supra* note 108, at 1785–86 (discussing the liar's dividend).

248. Hasen, *supra* note 49, at 550.

249. *Id.* at 550–51 (quoting Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018)). Professor Hasen notes that, although users "post on social media for political purposes," this does not "negate the essentially commercial nature of enterprises such as Facebook and Twitter." *Id.* at 551 n.79. *But see* Charles, *supra* note 212, at 605–06 (disputing Professor Hasen's conclusion that compelled speech of politically-oriented deepfakes are commercial, saying "deep fakes about politics and policy are core political and not commercial speech."); Blitz, *supra* note 49, at 279.

250. Hasen, *supra* note 49, at 551–52.

Others, however, have expressed doubt that Professor Hasen's commercial approach through *Alvarez* would prevail.[251] An alternative conception would provide the government with room to regulate deepfakes broadly, subject to intermediate scrutiny and viewpoint neutrality.[252] This approach relies on understanding deepfakes as nontestimonial falsehoods, or media that convey a fabricated reality while also fabricating the source of the media to present it as an accurate record.[253] By identifying deepfakes in this way, Professor Marc Jonathan Blitz argues that the fabricated reality may be protected much like a verbal lie in *Alvarez*, but the *source* falsification provides greater regulatory room for the government to impose viewpoint-neutral and content-neutral regulation.[254]

A more detailed approach would require political advertisements to be "rated" by an approved evaluator.[255] Under this proposal, a bipartisan congressional committee would approve private evaluators to "develop the different gradations for rating advertisements."[256] For political advertisements, as well as news and opinion shows, these ratings would be displayed on the screen during the program, including color coding analogous to health ratings posted on restaurant windows.[257] Such an approach, although likely facing difficulties in determining truth-value as well as content-based restrictions rejected in *Brown*, provides an additional angle for regulation.[258]

Lastly, transparency regarding the sources of political advertising has received greater discussion, especially in the wake of *Citizens United*.[259] Like the laws at issue in the *NetChoice* cases and the proposed Honest Ads Act,[260] some scholars have discussed a repository of political

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251. *See* Blitz, *supra* note 49, at 277–80 (discussing a difficulty with including political speech under *Zauderer*'s rationale by attributing to it a commercial nature through online platforms).

252. *Id.* at 265–66.

253. *Id.* at 203–04.

254. *See, e.g.*, *id.* at 175–77.

255. Barrett, Jr., *supra* note 144, at 660–61. In the long term, Barrett advocates for a constitutional amendment banning "all television and digital political advertising." *See id.* at 617.

256. *Id.* at 662–64. The rating would range from "(1) highly inaccurate, misleading, or false, (2) somewhat inaccurate, misleading, or false, (3) mostly accurate or true, and (4) highly accurate or true." *Id.* at 664.

257. *See id.* at 665.

258. *See* Mekela Panditharantne & Noah Giansiracusa, *How AI Puts Elections at Risk — and the Needed Safeguards*, BRENNAN CTR. FOR JUST. (July 21, 2023), https://www.brennan center.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards [https://perma.cc/4BVB-APHR] (noting that the Honest Ads Act "could be made even better by requiring the disclosure of information about the role of AI in generating certain political communications").

259. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

260. S. 486, 118th Cong. (2023); *see supra* notes 59–62.

communications placed online by advertisers.261 A repository would include
the ad as well as information on its cost, the candidate or political issue to
which it refers, and ad targeting.262   Regulating advertisements through
campaign finance disclosure and disclaimer regulations would be subject to
exacting scrutiny, as the regulation would "fall[] short of a ban or a limit."263
However, these proposals have not advocated for inclusion of synthetic
media as a relevant data point.

III. REGULATION SHOULD TAKE A
TRANSPARENCY APPROACH

Political advertising, with all its attendant manipulative and deceptive
uses, is nothing new.264 Politicians may make false or misleading claims
safely within the First Amendment.265 In turn, the electorate is tasked with
assessing the believability of such advertisements and the source's credibility
against their perceived reality and policy positions.266

This careful balance between influencer and influenced historically
remained steady, with journalists and opposition groups mediating the
discussion and interjecting when things did not quite add up. The balance
was not perfect, but it was securely rooted in a system where competing
campaigns' claims had to align with an individual's experienced reality to be
effective.267

Now, however, the electorate must contend with a fabricated video or
audio of politicians that appears entirely real. Analysis must take an
additional step by seeking to verify the authenticity of the secondary source.
Where the electorate previously was able to trust (with a healthy level of
skepticism) secondary material based on its source, dissemination and
consumption of fabricated, hyperrealistic content pushes voters to an
unhealthy level of skepticism over political claims. Paired with the current
media environment, foreign influence, a bot-manipulated internet, and deep
partisan alignment, fabricated content poses a serious new concern for
politics.

The concern is new because the technology is new, but crafting regulation
for the technology need not begin from scratch.268 Although the private

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261. *See* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and
Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1256–57 (2018); Andrea M. Matwyshyn
& Miranda Mowbray, *Fake*, 43 CARDOZO L. REV. 643, 740–41 (2021).

262. Wood & Ravel, *supra* note 261, at 1256–57; *see also* Pilar Gonzalez Navarrine, Note,
*Political Advertising on Free Streaming Sites: Conflicts with First Amendment and Exploring
Viability of Regulation*, 108 CORNELL L. REV. 1821, 1843–44 (2023).

263. Wood & Ravel, *supra* note 261, at 1240.

264. *See supra* notes 1–3 and accompanying text.

265. *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012).

266. *See supra* Part II.C.1.

267. *See supra* Part II.C.1.

268. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("[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 Amendment's command, do not vary' when a

sector may provide support for synthetic media identification, the government must regulate the area to provide campaigns and the electorate with sufficient guidance amid the current regulatory patchwork. Prohibitions serve as useful short-term solutions, but transparency requirements are a clearer path to address future developments. However, transparency must take the next step by creating a repository of political advertisements with information on synthetic content. This approach would reaffirm the importance of secondary source authenticity while using legal avenues advanced in *Citizens United* and *Alvarez*.

Part III.A discusses issues that make prohibitions undesirable. Part III.B advocates for a transparency approach but identifies problems with a labeling requirement. Part III.C proposes a mixed approach through a government advertisement repository paired with private sector regulation and literacy programs.

A. Issues with Prohibitions

Prohibitions address deepfakes' immediate harms, but they are not a long-term solution. At present, voters may be unaware that a candidate's likeness is being manipulated, and candidates may be unable to identify and respond to content in the days before an election.[269] Prohibitions thus provide a safeguard against voter manipulation that is sufficiently narrow, permitting political communications to reach the electorate while rightly acknowledging that fraudulent political activity is not protected.[270] However, prohibitions are practically insufficient to meet future harms and less preferable than a framework pairing transparency with speed bumps promoting voter autonomy.[271]

Prohibitions are problematic insofar as they focus too closely on a ballooning problem. For viewers, prohibiting some advertisements does not address the larger issue of voters who are already primed to skepticism, threatening to increase polarization instead of increasing access to information.[272] A prohibition may protect the voter from immediate manipulation, but it does not provide the voter with their own tools to identify synthetic manipulation when the prohibitions do not apply.[273] For creators and disseminators, prohibitions that rely on intent would be difficult to implement, especially where cases must be resolved expeditiously.[274]

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new and different medium for communication appears." (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952))).

269. *See supra* Part II.B.

270. *See supra* Part II.C.2.

271. *See* Ellen P. Goodman, *Digital Fidelity and Friction*, 21 Nev. L.J. 623 (2021) (advocating for greater transparency and friction in the digital realm to disrupt the flood of information and promote autonomy in content consumption).

272. *See* Blitz, *supra* note 49, at 189–90.

273. *See* Schroeder, *supra* note 47. Counter speech by a falsely depicted candidate, for example, would deepen the information abyss where an individual may be able to weigh the different arguments in their own mind but lack an ability to reference source material to evaluate competing claims.

274. *Compare* Green, *supra* note 49, at 1454–57, *with* Hasen, *supra* note 49, at 552–53.

Moreover, prohibitions could become unnecessary and unduly subject advertisers to liability if voters are ultimately able to identify a fake video with ease.[275]

Current state laws may be legally sound insofar as they adapt defamation and fraud to a new technology,[276] but the limits of those traditional claims render current prohibitions far too narrow to meet a growing synthetic ecosystem.[277] Moreover, remedies like injunctive relief may be an unconstitutional prior restraint.[278]

B. Transparency as the Preferred Approach

Transparency laws provide a better approach to regulation than prohibitions.[279] Addressing this new technology requires acknowledging the reality of synthetic content and beginning to provide tools to navigate the new ecosystem.[280] The long-term problem is not likely to lie in a single deepfake influencing elections, but rather in entire ecosystems of falsified content.[281] Labeling requirements are a step in the right direction,[282] but labeling alone is insufficient to meet the moment.

1. Issues with Labeling Requirements

Practically, labeling altered political ads is not likely to be a sufficient long-term solution for three reasons. First, it would not provide detail on what and how much of an advertisement is altered.[283] For example, a synthetic depiction of President Biden speaking for five seconds, included in a two-minute advertisement with otherwise real events, could be labeled as "altered" in the same manner as a two-minute, entirely synthetic ad.[284] This

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275. *See e.g.*, Ostrowski, *supra* note 15, at 97.

276. *See* Ardia & Ringel, *supra* note 99, at 317–22 (discussing defamation and fraud as the likeliest vehicles for states to regulate false speech and survive First Amendment scrutiny).

277. *See supra* note 212 and accompanying text.

278. *See* Ardia & Ringel, *supra* note 99, at 331–32. California, Minnesota, and Washington allow for injunctive relief by the candidate. *See generally* Chesney & Citron, *supra* note 108; *supra* Parts II.A–B.

279. *See* Chesney & Citron, *supra* note 108, at 1807–08 ("[A transparency] approach could have at least some positive impact on deep fakes in the electoral setting."); Hasen, *supra* note 49, at 567 ("Transparency and clarity are the best tools to build into law and into election processes."); *see also* Blitz, *supra* note 49, at 275–81 (discussing the likely constitutionality of disclosure requirements for deepfakes in general).

280. *See generally* Schroeder, *supra* note 47; Goodman, *supra* note 271.

281. *See, e.g.*, Goodman, *supra* note 271, at 634 (noting that "[b]ots enable massive messaging campaigns that disguise authorship" at a massive scale to influence public belief). For example, a synthetic video posted by a fake account can be virally circulated using a web of other bot accounts, whereas fake websites, discussion forums, and news articles can be generated to further the deception. *Id.*

282. *See supra* Part II.C.3.

283. *See supra* Part I.C.2.

284. State laws reach broadly, where the minimal alteration could be interpreted to run afoul of prohibitions. *See supra* Part I.C.1.d.

could exacerbate "truth- and trust-decay" where an altered label is drowned out amid mass use of synthetic media.[285]

Second, labels would not address concerns over advertisements appearing in new forms of media.[286] It is possible to imagine a political advertiser paying a video game or virtual reality company to include more subtle forms of advertising, such as a helpful non-player character resembling a political candidate and potentially engendering greater trust.[287]

A third major issue, which government regulation is unlikely to fully address, is political advertising from private individuals. Although the FEC has jurisdiction over some forms of online advertising,[288] the public must rely on private companies to fill the jurisdictional gaps.[289] For private platforms, labels may appear on one platform but not another, the substance of the label may differ, or the company may lack adequate technology to enforce its policies.[290] These issues demonstrate a limit on achieving greater transparency, as labels do not provide enough information nor address broader reaches of the technology to effectively inform voters.

Beyond these practical difficulties, labeling requirements face legal hurdles. Although a broad labeling requirement would not likely run afoul of viewpoint neutrality,[291] regulation for political advertising specifically would be a content-based restriction.[292] For political speech, a broad requirement that all advertisements containing synthetic media be labeled would be content based because it discriminates against political speech whereas commercial and other advertisements are left alone.[293] Thus, viable legislation would need to satisfy either exacting scrutiny if it is narrowly applicable to direct political participants or strict scrutiny if it reaches more broadly.[294]

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285. *Cf.* Hasen, *supra* note 49, at 550 (arguing that a truth-in-labeling requirement would help viewers discern real from synthetic media, promoting confidence in viewers).

286. *See, e.g.*, Scott Bloomberg, *Political Advertising in Virtual Reality*, 21 FIRST AMEND. L. REV. 167 (2023) (discussing theoretical uses of political advertising in the virtual realm and the legal issues posed by potential regulation).

287. *See id.* at 196–98.

288. *See* 11 C.F.R. § 100.26 (2024).

289. Some scholars have sought to address this issue by expanding requirements to all advertising. *See* Blitz, *supra* note 49, at 278–81; Hasen, *supra* note 49, at 551–54. Others have sought to address this issue through expansion of campaign finance requirements to online platforms. *See* Wood & Ravel, *supra* note 261, at 1256–64. This Note focuses on the narrower realm of political advertising and seeks to include synthetic media in financial disclosures while leaving aside the viability of direct requirements for large media platforms.

290. *See id.*

291. *See* Hasen, *supra* note 49, at 550. Labeling does not limit the ability of any speaker to advertise based on who is speaking or their message.

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

293. *Id.* Content neutrality would apply more to a restriction on the time, manner, or place of an advertisement.

294. A broad labeling requirement that applies to neutral third parties as well as direct political participants would be subject to strict, not exacting, scrutiny. *See* Wash. Post v. McManus, 944 F.3d 506, 515–17 (4th Cir. 2019) (discussing disclosure requirements' lower First Amendment bar when targeting "*direct political participants*" as opposed to neutral third parties) (emphasis added).

The state could advance compelling interests in regulating the area. First, there is a compelling interest in ensuring voters have adequate access to information for determining the message's speaker.[295] Second, there are tangible democratic harms posed by allowing synthetic media, especially the harmful variety, to dominate the airwaves during and in the days preceding an election.[296] This could justify acting to protect the electorate from manipulation or candidate distortion but would not support general issue advertisements due to the latter's greater complexity.[297] Third, there is a compelling interest "in preserving fair and honest elections."[298]

However, a labeling requirement may not be narrowly tailored to adequately address the problem. Regulation of all political synthetic media would be overinclusive, as a narrower approach would mitigate the harms without subjecting all advertisements to more onerous restrictions.[299] Yet only labeling harmful synthetic media may be underinclusive if a narrowly defined harm, such as fraud or defamation, does not address variations that do not rise to the requisite level for liability or appear in other mediums.[300] Moreover, regulating only malicious depictions of a candidate would exclude, for example, voter referendums,[301] or a deepfake could manipulate voting decisions better addressed by expanding regulation to also cover issue advertisements.[302]

Another problem lies in compelled speech prohibitions, as advertisers would be required to include a notice they may otherwise omit.[303] The Court's holding in *Becerra* noted the government's ability to mandate "purely factual and uncontroversial disclosures," but also stressed the permissible uses' commercial nature.[304] Thus—despite the label identifying the purely factual and uncontroversial nature of whether an advertisement

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295. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367 (2010). *But see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

296. *See supra* Part II.B.

297. *See* Green, *supra* note 49, at 1451 n.30.

298. Ardia & Ringel, *supra* note 99, at 317. The authors note that lower courts have found other compelling interests in preserving the "integrity of the electoral process," protecting "voters from confusion and undue influence," and ensuring that electoral fraud does not undermine an individual's right to vote. *Id.*

299. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 804 (2011). Like the Court's determination that the state's interest was overinclusive by the effect being "in support of what the State thinks parents *ought* to want," regulation of all political advertisements may overregulate a public that is accepting of nonfraudulent or defamatory ads. *Id.*

300. *See supra* Part I.A.2; *see also Brown*, 564 U.S. at 801–02 (California's law was underinclusive by not reaching other mediums).

301. *See* John Doe No. 1 v. Reed, 561 U.S. 186 (2010).

302. Current regulation generally exempts issue-only ads. *See* 11 C.F.R. § 100.29 (2024). But some state laws reach more broadly by including attempts to influence an election. *See supra* Part I.C.

303. *See* Blitz, *supra* note 49, at 278–81 (noting that *Zauderer*'s foundation for disclosure requirements would not extend to political deepfakes but contending that "the lie and the deepfake are *not* analogous").

304. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372, 2376 (2018).

was or was not altered—mandating synthetic labeling in political advertising could face compelled speech issues.[305]

Lastly, labels could be construed as infringing on the right of anonymity in political speech.[306] If technology were to sufficiently progress,[307] AI could be provided with some speech protections.[308] It is already possible for someone to advocate for a political position online by training a model to identify and respond to a particular issue, boosting favorable content while generating and disseminating countermedia.[309] Would the person behind the model be engaging in protected political speech and not be required to disclose their identity? If so, would strong AI bent on a political issue be permitted to remain anonymous?[310]

Ultimately, labeling requirements are a better approach than bans, but mandated disclosures for political advertisements lack the same protections as commercial advertisements.[311]

2. Mixed Transparency Enforcement Through the FEC and Private Actors

While prohibitions require government power to be effective, transparency needs to straddle the line between government and private regulation.[312] Any government-mandated transparency requirement must address the various platforms for political advertising, which necessitates private cooperation.[313]

As reflected in some federal proposals,[314] Congress should tie synthetic disclosure requirements to funding considerations, which would permit the FEC to address the issue.[315] Legislation could focus on a true-source rationale for disclosures while leaving the expressive content of the message intact.[316] Moreover, the FEC's expansion of what counts as a "public communication" provides a stronger case for FEC regulation.[317]

Yet the FEC's jurisdiction is admittedly narrow, applying only to advertisements involving candidates disseminated within sixty days before an election.[318] Although proposals exist for expanding requirements to online platforms, the Court's decision to remand the *NetChoice* cases leaves open the question as to whether current proposals are viable.[319] In the event

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305. *See* Blitz, *supra* note 49, at 279. *But see* Hasen, *supra* note 49, at 551–52.
306. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 (1995).
307. *See supra* Part I.A.
308. *See, e.g.*, James B. Garvey, Note, *Let's Get Real: Weak Artificial Intelligence Has Free Speech Rights*, 91 FORDHAM L. REV. 953 (2022).
309. *See supra* note 285 and accompanying text.
310. *See* Garvey, *supra* note 308.
311. *See supra* note 251 and accompanying text.
312. *See* Ardia & Ringel, *supra* note 99, at 383.
313. *See id. But see supra* note 290 and accompanying text.
314. *See supra* Part I.C.1.
315. *See generally supra* Part I.C.1 (discussing FEC jurisdiction).
316. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–68 (2010).
317. *See* 11 C.F.R. § 100.26 (2024).
318. *See id.* § 100.29.
319. *See supra* notes 59–63 and accompanying text.

that regulation must rely on voluntary cooperation, private efforts would avoid First Amendment pitfalls.[320]

Moreover, permitting the market to regulate has two benefits. First, the nascent synthetic landscape is rapidly evolving and will invariably continue to do so.[321] Second, the market has already demonstrated that it is willing and able to label synthetic media usage.[322] Although the technology sector has, to some extent, already called for regulation to address potential liability,[323] it could be wise to delay regulation pending further industry development.

Yet, private regulation would need guidance, as evidenced by the existing disparate policies.[324] Ideally, private platforms could work together like the video game industry's labeling requirement discussed in *Brown*.[325] Ultimately, "neither the federal nor state governments can simply legislate misinformation out of elections" but rather legislation must be part of a "comprehensive strategy" that includes the major role played by online platforms.[326]

C. Advertising Repository: An Additional Avenue for Transparency

The variety of synthetic media in the political arena makes clear that any regulation faces being overbroad by regulating without regard to different use cases and too minimal in inadequately addressing harms.[327] Mindful of First Amendment constraints, an alternative approach is to target political advertisers within the FEC's jurisdiction by tying identification of synthetic content in political advertisements to spending.[328] Because this would not reach many online advertisements, and the Court is unlikely to uphold a law requiring large online media platforms to label synthetic media, efforts to create a private oversight body with government direction are the best avenue for filling the gap at present.[329]

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320. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 803 (2011); United States v. Alvarez, 567 U.S. 709, 744–56 (2012) (Alito, J., dissenting).

321. *See supra* Part I.A.1. Rushing to regulate this space could hinder its evolution or be ineffective in a short time after passage.

322. *See, e.g.*, GOP, *supra* note 4.

323. *See supra* Part I.C.3.

324. *See* Wood & Ravel, *supra* note 261, at 1247–48 (noting the lack of uniformity and enforcement in the private sector).

325. 564 U.S. at 803.

326. *See* Ardia & Ringel, *supra* note 99, at 383.

327. *See id.*

328. *See, e.g.*, S. 1596, 118th Cong. § 4 (2023); S. 486, 118th Cong. § 2 (2023).

329. This approach is further supported by instances of technology companies voluntarily adopting policies absent legal requirements. *See supra* note 166. In addition to FEC regulation, proposals for a comprehensive solution have included an overhaul of § 230 of the Communications Decency Act of 1996, 47 U.S.C. § 307, see Chesney & Citron, *supra* note 108, at 1795–801, an independent regulatory commission, see Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M L. REV. 451, 487–94 (2021), and even a "Truth Commission," see Russell L.

For the FEC's part, it should establish a political advertisement repository that includes information on whether the advertisement incorporates synthetic media.330 This approach avoids issues posed by prohibitions while addressing concerns over labeling requirements. Variations of a repository or database have been suggested in recent years—for example, by Justice Kennedy in *Alvarez*,331 in the Honest Ads Act,332 and by scholars.333

Undoubtedly, a repository would face issues. First, as noted above, having the FEC establish the repository addresses a smaller subset of political advertising.334 Second, there are practical issues. Timing concerns, such as whether content distributed on the eve of an election could be incorporated into a database, would hinder the repository's informational value and marketplace aims.335 Moreover, depending on the extent of the disclosure, technical abilities identifying which portions of the advertisement are altered could pose a problem.336 In contrast, merely checking a box as to whether the advertisement includes synthetic media or not would face the same specificity issue as a general labeling mandate.337

Third, constitutional issues, such as whether disclosures would be an impermissible form of compelled speech, are cause for concern.338 However, *Alvarez*'s permission for most false statements is not implicated where regulation does not chill political advertisers' ability to present their content, instead it serves as a government source of information that may be otherwise impossible to obtain.339

Moreover, by applying the Court's rationale in *Citizens United*, disclosures could be justified as protecting voters' access to information about a communication's source and its speaker.340 Unlike pamphleteers distributing anonymous political speech, candidates and political advertisers

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Weaver, *Fake News (& Deep Fakes) and Democratic Discourse*, 24 J. TECH. L. & POL'Y 35, 42–48 (2020).

330. This would be a development over the FCC's current "political file." *See supra* note 148 and accompanying text; *see also* 47 C.F.R. § 73.1943 (2022).

331. *See* United States v. Alvarez, 567 U.S. 709, 729 (2012) (plurality opinion).

332. S. 486.

333. *See supra* note 261 and accompanying text; *see also* Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2240 (2020) (advertisements could be required to include a link taking one to more detailed information on the ad's source, terms, and scope).

334. *See* 11 C.F.R. § 100.29 (2024).

335. *See* Chesney & Citron, *supra* note 108, at 1807; Green, *supra* note 49, at 1488–89.

336. This may also be too onerous of a requirement for advertisers if *Becerra*'s rationale applied. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018). However, synthetic disclosures may avoid this issue as, unlike *Becerra*, advertisers are merely reporting information that they should already have within their possession. *Contra id.* This would further aid in addressing the problem of inadequate third-party technology to identify synthetic content.

337. *See supra* Part III.B.1.

338. *See supra* note 249 and accompanying text.

339. *See* United States v. Alvarez, 567 U.S. 709, 729 (2012).

340. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010). *But see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 (1995).

do not have a right to anonymity.[341] Additionally, just as voters are able to follow the money to see who is funding an advertisement and therefore speaking, they should similarly follow the data to effectively evaluate the argument.[342] A repository or other requirement could thus be tied to money spent on generating the synthetic content, on advertising costs to run an advertisement containing synthetic media, or more directly as identification of a synthetic speech's source to warrant FEC jurisdiction.[343]

Ultimately, and in light of the practical constraints, limiting a repository to a narrower class of political advertisements through the FEC is a better approach that updates a historical avenue for addressing political advertising[344] while acting as a test case for broader regulation. The FEC likely has authority if it properly ties spending on political advertisements containing synthetic media or purchasing airtime for such advertisements.

A repository, however, would not be sufficient as a stand-alone solution to the problems posed by synthetic media. To fill this gap, other efforts should be undertaken to increase information access and awareness. First, the government or a private actor should enhance awareness of synthetic media by engaging in a literacy campaign.[345] Social media companies have already added user tags that provide additional context on a post.[346] An advertising campaign could help increase voter awareness by emphasizing the importance of skepticism paired with practical tools for identification.[347] Second, businesses should continue to work with the government to develop regulations and technology that can label manipulated videos or voluntarily create repositories themselves.[348] By combining private and government efforts, the electorate would be better able to access information and make informed voting choices in light of synthetic media's benefits and harms.

CONCLUSION

Synthetic media in political advertising poses huge risks to democracy, but banning the use is a short-term fix that will not address a growing ecosystem of synthetic content. Labeling requirements are a better avenue to address the issue, but practical and legal concerns could render labels ineffective. To increase transparency and safeguard the political process, advertisers should be required to disclose synthetic media content to the FEC by tying spending on synthetic media to a disclosure requirement. Although the practical rollout requires further analysis, the current debate should devote more space

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341. So long as disclosure does not threaten to subject them to threats, intimidation, or harassment. *See Citizens United*, 558 U.S. at 367, 370.

342. *See id.* at 367.

343. A future development that combines labeling with a repository could exist where advertisements display a QR code or other link directing the viewer to the government website.

344. *See Alvarez*, 567 U.S. at 717.

345. *See* Wood & Ravel, *supra* note 261, at 1268–71.

346. *See supra* Part I.C.3.

347. *See* Wood & Ravel, *supra* note 261, at 1268–71. However, this could also create unnecessary skepticism in an already wary public. *See* Blitz, *supra* note 49, at 189.

348. *See supra* note 166.

to discussing the potential for a repository that identifies, in part, the synthetic media content in a political advertisement.