

Statement of Ari Cohn
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U.S. Senate AI Insight Forum: Elections & Democracy
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Majority Leader Schumer, Senators Rounds, Young, and Heinrich:

Thank you for inviting me to participate in this important conversation. My name is Ari Cohn, and I serve as Free Speech Counsel at TechFreedom, a nonprofit, nonpartisan organization devoted to technology law and policy, the protection of civil liberties and the rule of law in the digital age, and the enabling of innovation that drives technological advancement to the benefit of society.

On September 27, I testified before the U.S. Senate Committee on Rules & Administration in a hearing titled “AI and the Future of our Elections.” My written testimony in that hearing contains detailed analysis of the First Amendment issues that complicate regulation of election-related speech utilizing generative AI (GAI), as well as two current legislative proposals.¹

Protecting the integrity of our elections, and thus our democratic institutions themselves, is no doubt a matter of the highest importance. But equally important is preserving the First Amendment right to freedom of expression—a prerequisite for democratic self-governance from which our institutions derive, in large part, their legitimacy. These imperatives need not be in tension with each other, but care must be taken to ensure that we do not undermine our democracy in trying to protect it.

GAI presents exciting new opportunities for expression, with the potential to increase the quantity and quality of speech while reducing the costs of producing it—continuing the democratization of communicative means previously within reach of only the well-resourced and powerful. What once may have required a staff of writers and media professionals can now be accomplished by ordinary citizens. This democratization can make our political environment better: It can create more efficient civic engagement and increase the sophistication of everyday political discussion. It can allow candidates and public officials to communicate with diverse communities more effectively, thereby increasing a sense of

¹ AI and the Future of our Elections: Hearing Before the Senate Committee on Rules and Administration (2023) (Statement of Ari Cohn), *available at* <https://techfreedom.org/wp-content/uploads/2023/09/Testimony-on-AI-and-the-Future-of-our-Elections.pdf>.

belonging and encouraging political participation. And it can reduce the cost of campaigning, allowing upstart candidates to challenge well-established or incumbent opponents—increasing competition in the political marketplace and providing voters with a wider variety of choices at the ballot box.

As with any other tool, GAI can also be used for malicious purposes. Many have raised concerns that GAI can be used to inexpensively create massive amounts of disinformation targeted at specific segments of the population, and that deepfake video and audio is increasingly realistic enough to mislead voters and alter the outcome of elections. While concerns about GAI’s impact on our democracy are justified, our response should not be driven by fear. Rather it should result from nuanced consideration and careful thought about the impact and potential unintended consequences that could have similarly profound consequences for our society. Examining the impact of GAI that we have already seen is useful in maintaining that perspective.

Recent examples of GAI use in political speech and campaigns.

- In May 2022, North Carolina congressional candidate Bo Hines demanded that several media outlets stop airing an ad created by his opponent in the primary election, which contained a deepfake video of Hines saying, “I’m a lot more liberal on certain social issues.”² They were indeed Hines’ own words—published as part of a quote in a 2017 article—but his campaign objected to the use of an artificial video of him speaking them.³
- In July 2023, a PAC supporting Florida Governor Ron DeSantis’ presidential campaign released an ad containing deepfake audio of Donald Trump saying the words ““I opened up the Governor position for Kim Reynolds. And when she fell behind, I endorsed her. Did big rallies and she won. Now she wants to remain neutral. I don’t invite her to events.”⁴ Though the audio was artificially created, the words were indeed Trump’s—taken from his July 10 post on Truth Social.⁵

² *Hines’ Challenge raises question: If a robot quotes accurately, is an ad deceitful?*, WRAL NEWS (May 11, 2022), <https://www.wral.com/story/hines-challenge-raises-question-if-a-robot-quotes-accurately-is-an-ad-deceitful/20277622>.

³ *Id.*

⁴ *DeSantis PAC uses AI-generated Trump voice in ad attacking ex-president*, POLITICO (Jul. 17, 2023), <https://www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695>.

⁵ *Former President Trump claims credit for Iowa Gov. Reynolds’ 2018 election success*, THE GAZETTE (Jul. 10, 2023), <https://www.thegazette.com/campaigns-elections/former-president-trump-claims-credit-for-iowa-gov-reynolds-2018-election-success>.

- In June 2023, the DeSantis campaign was criticized for an ad attacking Donald Trump’s alleged support for Anthony Fauci, which contained AI-generated images of Trump embracing and kissing Fauci.⁶
- In April 2023, the Republican National Committee responded to President Biden’s reelection bid announcement with an ad that used entirely GAI-created imagery to paint a dystopian picture of the country’s “future” should he be reelected.⁷
- Most recently, in October 2023, New York City Mayor Eric Adams was criticized for using GAI to create robocalls featuring Adams conveying various messages, in his voice, to residents in multiple languages that he does not actually speak.⁸

These uses of GAI do not indicate that we are on the verge of democratic apocalypse. In one sense, quite the opposite: growing awareness of GAI’s capabilities are in large part responsible for the detection, public discussion, and refutation of these GAI deployments. Indeed, research suggests that digital literacy and political knowledge are the two factors that best predict individuals’ ability to discern deepfakes from authentic media.⁹ The imperative is obvious: **Congress should devote funding and other resources to increasing and improving digital literacy programs at the federal and state levels, and to the development of technology with the potential to aid in the identification of GAI-created material.**

Of the contemporary uses of GAI summarized above, two arguably represent *positive* (irrespective of substance) use cases for GAI in political speech. The RNC Biden reelection ad used generated imagery (labeled as such) to augment its message and increase its persuasiveness to viewers. That GAI can effectively and inexpensively increase the communicative impact of a message is profoundly beneficial to speakers of all types and persuasions.

And despite breathless consternation about Mayor Adams’ use of GAI to translate his voice into other languages, government *should* strive to communicate better with communities in which English is not the primary language. Hearing an elected official’s voice—rather than

⁶ *DeSantis campaign shares apparent AI-generated fake images of Trump and Fauci*, NPR (Jun. 8, 2023), <https://www.npr.org/2023/06/08/1181097435/desantis-campaign-shares-apparent-ai-generated-fake-images-of-trump-and-fauci>.

⁷ *Republican AI Ad Uses Cutting Edge Tech to Tell Age Old Lies*, VICE (Apr. 25, 2023), *Republican AI Ad Uses Cutting Edge Tech to Tell Age Old Lies*.

⁸ *NYC Mayor Casually Announces He's Deepfaking Himself, Experts Horrified*, VICE (Oct. 17, 2023), <https://www.vice.com/en/article/xgw78a/nyc-mayor-casually-announces-hes-deepfaking-himself-experts-horrified>.

⁹ Soubhik Barari et al., *Political Deepfakes Are As Credible As Other Fake Media And (Sometimes) Real Media at 7–9* (Apr. 16, 2021), *available at* <https://osf.io/cdfh3/download>.

an unfamiliar one—speaking in one’s primary language may in fact create a positive effect that outweighs the misimpression that he is a polyglot—a relatively harmless “deception.”

The remaining examples closer resemble fears of how GAI might impact our democracy. But they also help to illustrate some of the complexity involved in legislating a solution.

Regulating false speech—particularly political speech—is constitutionally fraught.

The government’s ability to regulate speech on the basis of falsity is limited by the First Amendment.¹⁰ This is particularly so in the context of political speech: First Amendment protections have their “fullest and most urgent application to speech uttered during a campaign for public office.”¹¹ The government therefore will bear an exceptionally heavy burden to justify regulation of election-related GAI content: it must prove that its restriction is necessary to serve a compelling government interest, is narrowly tailored to serve that interest, and is the least restrictive means of achieving its stated goal.¹²

Lack of precision and tailoring has proven fatal to several state laws prohibiting false electoral speech in the years following the Supreme Court’s decision in *Alvarez*.¹³ To avoid meeting the same end, any legislative proposals to regulate GAI-created electoral speech should be drawn as narrowly as possible with the following questions in mind.

What constitutes “deceptively edited content” or “disinformation?” Presuming for the sake of argument that *some* false election-related speech may be regulated, defining what content constitutes “deception” or “disinformation” in a way that does not infringe on constitutionally protected speech will be difficult. Take two of the real-world examples above: Both Bo Hines and Donald Trump *actually said* the very words that were then put into their digital mouths using GAI. In other words, technical falsity still conveyed substantive *truth*. The notion of restricting political speech that is substantively true is disquieting from a First Amendment perspective. That it would be restricted is produced via GAI but not if printed, produced via traditional media editing, or reenacted by a talented impersonator is unsatisfying from a logical one. The line between falsity in form and falsity in substance is fuzzy and difficult (if not impossible) to draw, and Congress must ensure that it errs on the side of more speech, not less.

¹⁰ *United States v. Alvarez*, 567 U.S. 709 (2012). *See also supra* note 1 at 4–5.

¹¹ *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)) (internal quotation marks omitted).

¹² *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

¹³ *See supra* note 1 at 7–11.

GAI content may also, while technically false, convey protected opinion: such media might be used as a means by which to *characterize* the positions of a candidate. Consider the DeSantis campaign’s Trump/Fauci ad: the pictures of Trump embracing and kissing Fauci were indisputably fabricated. But did they add a level of deception sufficient to warrant concern, or were they simply a visual device used to convey the overarching opinion-based message of the ad: that Trump was too supportive of Fauci and his work? This is, of course, a closer call—and perhaps the answer in *this* case is that it is deceptive *enough*. But the demarcation between a rhetorical or visual device and an assertion of fact will, too, often be hazy. While this is to some extent unavoidable (indeed, defamation law persists despite the occasional difficulty in separating opinion or parody from statements of fact), excessive uncertainty and the fear of enforcement actions can chill protected political expression. If Congress desires to draw such a line, it must do so with nuance and clarity to avoid this result.

Which speakers will be regulated? Courts have increasingly struck down election falsehood laws that prohibit speech posing little threat of serious harm.¹⁴ To avoid this outcome, Congress should carefully assess not just the types of speech, but also the types of *speakers* and *distribution* that pose a significant risk—rather than enacting prohibitions that apply broadly to all electoral speech. A regulation that treats GAI content shared between family members or with a small circle of friends the same as a campaign ad broadcast to millions will not likely withstand scrutiny. Conversely, a law with narrower application justified by a reasonable and evidence-based risk assessment is more likely to survive.

When will speech be regulated? Congress must also be cognizant that the threat posed by GAI-created expression—and thus whether its regulation will pass First Amendment muster—varies in part based on when the expression occurs.¹⁵

A falsehood distributed months before an election is susceptible to a less restrictive alternative than regulation: counterspeech. “The remedy for speech that is false is speech that is true,”¹⁶ particularly in the political context where counterspeech “is at its most effective.”¹⁷ To avoid usurping the curative role of “more speech,” any government

¹⁴ See *supra* note 1 at 10, 16–17.

¹⁵ See *supra* note 1 at 10–11.

¹⁶ *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

¹⁷ *281 Care Comm. v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014). See also *Alvarez*, 567 U.S. at 738 (Breyer, J., concurring) (“I would also note, like the plurality, that in [the political arena] more accurate information will normally counteract the lie.”).

intervention must be limited to a narrow time frame before an election where the marketplace of ideas has insufficient time to uncover and respond to falsehoods.

Does technology-specific regulation fail to address the feared harm? If Congress' concern is that false electoral speech will mislead voters and undermine our democracy, it is worth interrogating whether focusing intervention on the technology used to produce the speech is effective. Traditional media editing has long been used to create believable but false claims and impressions in elections.¹⁸ Regulating tools rather than outcomes risks (perhaps rapid) ineffectiveness as technology advances. Moreover, failure to address identical harms produced by other means creates vulnerability to a constitutional challenge by undermining the asserted importance of the government's interest and the efficacy of its approach.¹⁹

Does GAI pose an actual, demonstrable problem?

All the above presupposes that the government can show an "actual problem" with a "direct causal link" between the asserted harm and the regulation.²⁰ While many fear GAI's potential impact on elections, no data yet suggests that it has played the catastrophic role predicted.

Moreover, current research on disinformation, political ads, and deepfakes suggest that GAI's ultimate impact may remain limited. Multiple studies have found that deepfakes are not significantly more credible, persuasive, or emotionally manipulative than deceptive media produced without GAI.²¹ A review of current research also finds that the persuasive impact of misinformation and political ads *in general* appears to be relatively minor.²² Where political ads *are* effective, it is not in persuading voters toward a candidate, but rather in "mobilising action, like getting out the vote and improving donation rates[.]"²³

That political ads have a greater impact on mobilization illustrates one area in which Congress can and should act to protect election integrity:

¹⁸ See *supra* note 1 at 2–3 (providing examples of political and electoral speech deceptively edited using non-GAI methods).

¹⁹ See *supra* note 1 at 17–18.

²⁰ See *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799 (2011); see also *supra* note 1 at 8.

²¹ Scott Babwah Brennen & Matt Perault, *The new political ad machine: Policy Frameworks for political ads in an age of AI*, CENTER ON TECHNOLOGY POLICE AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL at 14 (Nov. 8, 2023), <https://techpolicy.unc.edu/wp-content/uploads/2023/11/GAI-and-political-ads.pdf>.

²² *Id.* at 12–13.

²³ *Id.* at 13.

Strengthening voter suppression laws. The government undoubtedly has a compelling interest in protecting the mechanics of the election process.²⁴ In 2018, the Supreme Court hinted towards the permissibility of misleading process-based speech: “We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”²⁵ Congress can and should prohibit knowingly false statements about the electoral process itself, such as disinformation about voting procedures, places, and times, and requirements.

One such prosecution, for conspiracy to violate rights under 18 U.S.C. § 241, was brought against a social media influencer for posts intended to mislead voters into believing they could vote by text message.²⁶ While the trial court rejected the defendant’s First Amendment defense and upheld the prosecution, some have argued that the government’s use of Section 241 stretches the statute too far, leaving such prosecutions vulnerable to constitutional challenge.²⁷ Congress can strengthen civil rights law, in a manner likely to withstand scrutiny, by enacting an explicit prohibition on the dissemination of false speech—whether created using GAI or not—about the process, requirements, date, or procedures of voting with the intent to obstruct a voter’s access to the ballot. Such a law, properly drafted, would pose relatively little risk of curtailing the types of protected speech that voters are entrusted to evaluate.

Attempts to prevent the “liar’s dividend” may inadvertently exacerbate it. An overarching concern about the proliferation of deepfakes and other GAI-enabled disinformation is that it creates a “liar’s dividend,” permitting individuals to claim that true information has in fact been falsely created.

Counterintuitively, attempts to protect against the liar’s dividend effect may in fact risk perpetuating them. The threat of foreign interference with our elections is a serious and widespread concern. But our laws are unlikely to meaningfully constrain malicious foreign actors against whom enforcement is all but impossible. Nor will it prevent malicious actors—wherever located—from using open-source models that may have more easily evadable safeguards. A sweeping regulation that is viewed as a “fix-all” may induce complacency and cause citizens to lower their guard, believing that the law ensures that they either will not

²⁴ *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

²⁵ *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018).

²⁶ *United States v. Mackey*, No. 21-CR-80 (NGG) (E.D.N.Y. Jan. 23, 2023).

²⁷ See Eugene Volokh, *Are Douglass Mackey’s Memes Illegal?*, TABLET (Feb. 9, 2021), <https://www.tabletmag.com/sections/news/articles/douglass-mackey-ricky-vaughn-memes-first-amendment> (arguing that under the government’s broad theory, merely advocating that a get-out-the-vote event be cancelled or boycotted could be criminalized).

encounter deceptive GAI content, or that it will be labeled if they do. This could result in an even more insidious iteration of the liar's dividend, allowing malicious actors to spread GAI-created disinformation with a veneer of truth or credibility lent by the compliance of law-abiding citizens. There is no easy solution to this problem. But if Congress intends to legislate, it should be cognizant of this risk and draft legislation in a manner that minimizes it.

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Legislation addressing new speech-enabling technologies is a complicated endeavor—but not an impossible one, as Congress has shown in the past. “Legislating fast,” like “moving fast,” carries a high risk of breaking things. Ultimately, our democratic institutions will be better protected by sober, nuanced, and carefully considered action than by reflexive and hurriedly enacted legislation. I look forward to assisting you in that process in whatever way I can.

But there are multiple commonsense steps Congress can take without the difficulties of GAI-specific legislation. Better educating citizens and strengthening voter suppression laws would safeguard the integrity of the election process and result in a more informed electorate overall, while posing little risk to innovation or freedom of expression. Congress should not allow the complexity of crafting GAI regulation to delay action on these broader protections for our democratic institutions.

Thank you again for inviting me to participate today. I look forward to our conversation.