Vermont House Committee on Government Operations and Military Affairs
Testimony of Falko Schilling, ACLU of Vermont
On S.23, Use of Synthetic Media in Elections

Thank you for holding this hearing and inviting me to testify on S.23, regarding the use of synthetic media in election. I am Falko Schilling, the advocacy director of the American Civil Liberties Union of Vermont. For more than 100 years, the ACLU and its 54 state affiliates have been among the nation's premier defenders of civil rights and civil liberties, including defending longstanding protections for freedom of expression through new technological mediums.

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I am testifying today to raise concerns about S.23 about its impact on speech concerning candidates and elections, long the core of the First Amendment's most crucial protections. S.23 specifically burdens speech about candidates, unconstitutionally restricting robust political debate.

S.23 Would Prohibit Core Political Speech in Violation of the First Amendment
Speech about political candidates, public officials, and public figures is at the core of the First Amendment's protections. The purposes covered by the bill — affecting the electoral prospects of candidates for office or changing the behavior of voters — are the *exact core* of First Amendment-protected speech.[1] The Supreme Court has emphasized, "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[2]

Consequently, "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[3]

Graphic depictions of politicians and candidates are central to that political expression. As the Supreme Court has recognized: "Despite their sometimes caustic nature . . . graphic depictions and satirical cartoons have played a prominent role in public and political debate."[4] Consequently, graphic depictions, including those that depict candidates in harsh, unflattering light, have been afforded robust protection "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[5] Those protections extend to a great deal of knowingly false speech out of concern that the government will suppress core political speech,[6] and courts have consequently resisted applying theories of fraud, deception, or libel to purportedly false political speech.[7] AI-generated speech about candidates and politicians falls into this long-established tradition. For example:

- AI-generated video depicted Donald Trump kissing the feet of Elon Musk with the caption, "Long Live the Real King."[8] The political import is unmistakable — kissing of the feet is a symbol dating back to antiquity for political fealty,[9] and the

video plainly comments on perceived power imbalances between the President and Musk.

- During his presidential campaign, Florida Governor Ron DeSantis posted AI-generated images of President Trump hugging Anthony Fauci as part of a video criticizing Trump's response to the pandemic — a key issue in the 2024 Republican primary.[10]
- A TikTok video featured faked audio of President Trump threating to change the name of the "District of Columbia" to the "District of America," evidently lampooning the President's recent Executive Order renaming the "Gulf of Mexico" to the "Gulf of America." In the faked audio, the President states, "It's got nothing to do with Colombia. It's nowhere near Colombia. From now on, it will be Washington, DA. District of America. No more of this Colombia nonsense."[11]

S.23 singles out this core political speech with specific burdens, and at its heart, it engages in impermissible regulation of speech based on its content. For example, one court overturned a law punishing "derogatory" political speech, stating, "Under this statute, speakers may lie with impunity about businesspeople, celebrities, purely private citizens, or even government officials so long as the victim is not currently a" candidate.[12] "That is textbook content discrimination," subject to the highest levels of First Amendment scrutiny.[13] S.23 would also face the same demanding levels of scrutiny.

The Disclosure of Requirements in S.23 Do Not Cure the Bill's Harms, Even in the Elections Context

Moreover, the exception in S.23 for speech accompanied by a "disclosure" that it is AI-generated does not mitigate its harms — it instead introduces its own set of First Amendment concerns. Even considering the disclosure exception, the bill still specifically targets core political speech. No other category of speech — even about matters of political salience — is required to make these disclosures; consequently, the "exception" itself targets political speech with specific burdens and is subject to strict scrutiny.[14] As another court described a similar state law compelling disclosures for political speech online, "[T]he Act is a content-based law that targets political speech and compels . . . platforms[] to carry certain messages on their websites. In other words, [the] law is a compendium of traditional First Amendment infirmities."[15] These same "infirmities" apply to S.23.

In fact, the disclosure exception carries its own First Amendment implications. Government-mandated disclosures on political speech are highly suspect under the First Amendment because they compel the speaker to engage in speech they otherwise would have liked to avoid.[16] Although, the First Amendment allows the government to compel factual disclosures in the context of "commercial speech" such as advertising and product packaging,[17] it does not ordinarily permit disclosure requirements outside the commercial context, such as on art, commentary, music, or publications.[18] A broad-brush labeling

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requirement for non-commercial speech that is produced or manipulated by generative AI, subject only to narrow public interest exemptions, is unlikely to survive strict scrutiny.[19]

Even where courts have upheld disclosure requirements in the elections context, they have been limited to very specific circumstances: first, they must be paid communications placed in mass media, and second, the disclosure relates only to the identity of the *source* of the advertisement.[20]

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S.23 has neither of those limitations. First, it extends far beyond paid, mass-media communications and encompasses *all* AI-generated speech about candidates, including posts by private citizens on YouTube, a small blog, or only shown to friends. Second, the disclosure in S.23 extends beyond the "sources of election-related spending."[21] Such disclosures have been upheld because they "insure that the voters are fully informed about the person or group who is speaking."[22] Instead, these disclosures cut straight to the content of the communications, undermining the suspense and surprise[23] that make satire and parody effective political tools. As one court observed, "A parody need not spoil its own punchline by declaring itself a parody. 'Parody serves its goals whether labeled or not . . . .'"[24]

The Federal Elections Commission has similarly declined to mandate disclosures for the use of AI to create speech generally,[25] and has instead noted that existing law may apply where AI is used to mislead regarding the *source* of the communication.[26] Vermont should follow that reasoning.

S.23 Would Be Ripe for Abuse

The restrictions in S.23 are highly suspect under the First Amendment for good reason — they are ripe for abuse. The potential abuse arises from both the law's vagueness and its enforcement mechanism.

First, the bill's key terms are vague. The definition of "synthetic media" includes digital media that has been "created" or "manipulated" with "digital technology." Nothing in the bill limits its application to generative AI, and instead, ordinary tools such as Photoshop, Lightroom, and more would be caught up in its sweep.

More concerningly, the bill's key exception for "satire or parody" is unworkably vague. As described above, satire and parody are key for robust political discourse, but those terms resist easy definition. Satire and parody are "often based on exploitation of unfortunate physical traits or politically embarrassing events — an exploitation often calculated to injure the feelings of the subject of the portrayal."[27] What is clearly satire to one person is "embarrassing" and "one-sided" to another.[28] Indeed, not everyone will agree what constitutes "satire" or "parody," but "[t]he First Amendment does not depend on whether everyone is in on the joke."[29] Likewise, although satire and parody are core to

political speech, the First Amendment's protections extend to speech beyond those two categories. S.23's attempt to shoehorn protected speech into these two categories is unworkable and likely unconstitutional.

Second, the bill's enforcement mechanism is ripe for abuse. The bill expressly permits candidates to file suit for injunctive and other equitable relief — essentially a court order to halt public discourse about a candidate running for election. President Trump for instance indicated in his recent address to Congress that he intends to attack speech criticizing him. Bills like S.23 do not increase accountability but allow politicians and candidates to avoid it.

Conclusion

S.23 would impermissibly attack core political speech, chilling our national tradition of robust discourse about candidates and politicians. Better alternatives exist, such as more narrowly tailored provisions regarding intentional misrepresentations regarding the time, place, and legal consequence of voting. We look forward to working with you on this matter.

Thank you.

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1. Grimmett v. Freeman, 59 F.4th 689, 694 (4th Cir. 2023).
2. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).
3. Id. (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976)); accord Roth v. United States, 354 U.S. 476,
484 (1957).
4. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 54–55 (1988)
5. Id. at 56 (citing Time, Inc. v. Hill, 385 U.S. 374, 390 (1967); New York Times Co. v. Sullivan, 376
U.S. 254, 84 (1964)).
6. See United States v. Alvarez, 567 U.S. 709, 736-37 (2012) (Breyer, J., concurring in part)
(acknowledging that the risk is "high" that a "prohibition [on false speech] may be applied . . . in the
political arena, subtly but selectively to speakers that the Government does not like").
7. Grimmett v. Freeman, 59 F.4th 689, 694 (4th Cir. 2023); Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 775 (S.D. Ohio 2014), aff'd sub nom. Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016) ("While knowingly false speech may be an element of fraud or defamation, false political speech by itself does not implicate 'important private interests.' . . . As a result, knowingly false political speech does not fall entirely outside of First Amendment protection, and any attempt to limit such speech is a content-based restriction, subject to close review."); accord

281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014); see also Bartnicki v. Vopper, 532 U.S. 514 (2001); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
8. David Ingram & Laura Strickler, Fake Video of Trump Kissing Musk's Feet Displayed at HUD Office In Washington, NBC News (Feb. 24, 2025), https://www.nbcnews.com/politics/doge/fake-video-trump-kissing-musks-feet-displayed-hud-office-washington-rcna193503.
9. Jack Hartnell, The Middle Ages' Ultimate Sign of Loyalty, The Atlantic (Nov. 12, 2019), https://www.theatlantic.com/health/archive/2019/11/medieval-foot-amputation/601822; Psalms 2:10–12.
10. Shannon Bond, Desantis Campaign Shares Apparent AI-Generated Fake Images Of Trump And Fauci, NPR (June 8, 2023), https://www.npr.org/2023/06/08/1181097435/desantis-campaign-shares-apparent-ai-generated-fake-images-of-trump-and-fauci.
11. Donald Trump to Rename Washington DC to 'District Of America'? Fact Checking Viral Claims, MSN News (Mar. 16, 2025), https://www.msn.com/en-in/news/world/donald-trump-to-rename-washington-dc-to-district-of-america-fact checking-viral-claims/ar-AA1B2KE0; Catalina Marchant de Abreu, Is Trump Planning to Rename District of Columbia to District of America? No, France24 (Mar. 24, 2025), https://www.france24.com/en/tv-shows/truth-or-fake/20250327-is-donald-trump-planning-to-rename-district-of-columbia-to-district-of-america.
12. Grimmett v. Freeman, 59 F.4th 689, 694 (4th Cir. 2023)
13. Id.
14. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (statute compelling newspaper that prints editorial critical of a candidate to print the candidate's reply "exacts a penalty on the basis of the content of a newspaper").
15. Washington Post v. McManus, 944 F.3d 506, 513 (4th Cir. 2019).
16. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974).
17. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23 (D.C. Cir. 2014) (meat packaging); R.J.Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (cigarette packaging); cf. Ariix, LLC v. NutriSearch Corporation, 985 F.3d 1107, 1115 (9th Cir. 2021) (concluding that advertising that proposes a "commercial transaction" is merely the "starting point" for defining commercial speech).
18. Ariix, F.3d at 1117.
19. Cf. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348-352 (1995) (striking down a statute prohibiting anonymous leafletting in connection with ballot measures, because it compelled authors to reveal information they did not wish to disclose and was not narrowly tailored to the state's asserted interest in preventing fraud and deception).
20. 52 U.S.C. § 30120(a).
21. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 66 (1976)) (internal quotation marks removed).

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22. Id. at 368 (quoting Buckley, 424 U.S. at 76) (internal quotation marks removed).
23. Novak v. City of Parma, 932 F.3d 421, 424 (6th Cir. 2019) ("[The user's] page delighted, disgusted and confused. Not everyone understood it. But when it comes to parody, the law requires a reasonable reader standard, not a 'most gullible person on Facebook' standard. The First Amendment does not depend on whether everyone is in on the joke.")
24. Id. (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 n.17 (1994)).
25. Notice of Disposition, 89 Fed. Reg. 78826 (Sept. 26, 2024), https://www.federalregister.gov/documents/2024/09/26/2024-21979/artificial-intelligence-in-campaign-ads.
26. Fraudulent Misrepresentation of Campaign Authority, 89 Fed. Reg. 78785 (Sept. 26, 2024).
27. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 54, 108 S. Ct. 876, 881, 99 L. Ed. 2d 41 (1988)
28. Id.
29. Novak v. City of Parma, 932 F.3d 421, 424 (6th Cir. 2019).

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