

FIRST AMENDMENT LAW REVIEW

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FIRST AMENDMENT LAW REVIEW

VOLUME 20

ISSUE 3

TRANSCRIPT

KEYNOTE ADDRESS: THE FEC AND FEDERAL CAMPAIGN
FINANCE LAW

Commissioner Shana Broussard.....281

ARTICLES

FIRST AMENDMENT LIMITS ON STATE LAWS TARGETING
ELECTION MISINFORMATION

David S. Ardia & Evan Ringel.....291

ANTI-CENSORSHIP RHETORIC V. FIRST AMENDMENT
REALITIES: THE FIGHT OVER FLORIDA'S ANTI-
DEPLATFORMING STATUTE AND SOME THOUGHTS ABOUT
SPEAKER AUTONOMY, COMPELLED EXPRESSION AND
ACCESS MANDATES IN ONLINE FORA

Clay Calvert.....385

BOOK REVIEW

CHEAP SPEECH, FREEDOM OF SPEECH, AND THE WAR
AGAINST DISINFORMATION

William P. Marshall.....418

FIRST AMENDMENT LAW REVIEW

VOLUME 20

ISSUE 3

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Federal Election Commission

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**KEYNOTE ADDRESS:
THE FEC AND FEDERAL CAMPAIGN
FINANCE LAW**

Commissioner Shana Broussard

The following is a transcript of the keynote address given by Commissioner Shana Broussard at First Amendment Law Review's 2022 Symposium on Election Speech and the First Amendment.¹ The virtual event also featured three panels on (1) Regulation of the Content of Election-Related Speech, (2) Regulation of Money and Transparency in Election-Related Speech, and (3) The Role of Online Platforms in Reducing Election Misinformation.²

First, I want to say good morning to everyone, and I want to thank the *First Amendment Law Review* for inviting me to be your keynote speaker at your symposium this year.

It is an honor to participate in your symposium. As the Dean mentioned, I'm very disappointed that I could not be there in person with you. I have never had a chance to visit your campus, so I was looking forward to visiting Chapel Hill, taking a stroll down Franklin Street, and touring the Dean Dome. One of the attorneys who works for me, Jonathan Peterson, went to school at Carolina and he definitely bleeds Carolina blue, much to our annoyance at times.

So, what exactly is the Federal Election Commission (FEC), which I might refer to at times as the Commission, and what role does it play in regulating money in politics? The Commission was created through amendments to the Federal Election Campaign Act in 1974³ in the aftermath of the Watergate political scandal, which involved secret illegal donations to the Nixon campaign. Congress recognized that a properly functioning democracy requires a well-informed public, and that citizens should know how money is used to influence elections and be armed with that knowledge when they cast a vote in federal elections. I am one of six commissioners, all of

¹ This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.

² First Amendment Law Review, *Symposium: Election Speech and the First Amendment*, YOUTUBE (June 24, 2022), <https://www.youtube.com/watch?v=TaIRCyckvtM&t=26s>.

³ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 310-312, 88 Stat. 1263, 1280-83 (1974).

whom are appointed by the President and confirmed by the Senate.

The Commission has exclusive jurisdiction over the civil enforcement of federal campaign finance laws. As such, the FEC's responsibilities include disclosing campaign finance information, enforcing provisions of the Federal Election Campaign Act (FECA),⁴ and overseeing the public funding of presidential elections. The commission may issue regulations, advisory opinions, policies, and procedures, all for the guidance of compliance with the law, and we may fine persons or entities for violations of the law.

I view the mission of the FEC as strengthening our democracy and protecting the integrity of the federal campaign finance process, (1) by providing transparency to the public about money use in federal elections, and (2) by fairly enforcing and administering our federal campaign finance laws. Indeed, transparency is perhaps the most important function of this agency.

This year's symposium, Election Speech and the First Amendment, is taking place at an important moment in the nation's history. Campaign spending in the 2020 election cycle totaled nearly 14.4 billion, more than double the 6.5 billion spent in the 2016 cycle, making it by far the most expensive election ever.⁵ Nine of the ten most expensive senate races in history occurred in the 2020 cycle, as well as five of the ten most expensive house races.⁶ The other, for history's sake, occurred in 2018.⁷ Looking ahead at the midterm elections, I've seen projections of 9 billion on political spending alone, which is more than the total spending in the 2018 midterms.

⁴ Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146.

⁵ Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPEN SECRETS (February 11, 2020), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16>; Press Release, Federal Election Commission, Statistical Summary of 24-Month Campaign Activity of the 2019-2020 Election Cycle, <https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2019-2020-election-cycle/#:~:text=Presidential%20candidates%20raised%20and%20spent,2019%20through%20December%2031%2C%202020>.

⁶ Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPEN SECRETS (February 11, 2020), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16>.

⁷ *Id.*

Now while the numbers are large, I don't think these extraordinary amounts should come as a surprise to anyone. The amount of money spent on federal elections has exploded over the last decade. At the same time, the spending has created enormous challenges in the regulation of campaign finance, particularly due to outdated laws and recent court cases.

Beginning with *Buckley v. Valeo*,⁸ the Supreme Court has emphasized that federal campaign finance laws implicate core speech protected by the First Amendment. I'm always mindful of the unique relationship between the federal campaign finance laws and the First Amendment and the careful balancing act that must occur in matters that come before me, as a commissioner. Since *Buckley* was decided 45 years ago, advances in technology have changed the way in which modern campaigns and other political actors engage in election related activity. For instance, political advertising continues to shift from traditional sources, such as television and radio, to texting and online, including through social media platforms and streaming services.

As the symposium will explore, political spending on social media platforms raises important First Amendment and federal campaign finance questions. Many of these questions appear campaign finance related on their face, but even ostensibly campaign finance questions may not necessarily fall within the jurisdiction of the FEC. The FEC's jurisdiction over campaign finance is sharply limited by our statutory authority, and there's an obvious disagreement at times over the FEC's statutory authority, and whether the First Amendment protects certain activity from regulation.

Then there are those times, which we all agree that the agency lacks statutory authority to regulate certain activities. For instance, does the FEC have a role in regulating the practices of online social media platforms and, if so, what is it?

Several matters that the Commission recently closed originated with complaints against some of the largest social media companies, including Twitter and Facebook. The pervasive use and influence of these platforms, particularly as it involves politics and campaigns, is one of today's hot button issues. These companies' content moderation policies are a

⁸ 424 U.S. 1 (1976).

source of impassioned debates that often involve questions of whether they are too powerful and whether government intervention, including stricter laws, is appropriate.

Some of the complaints that we considered allege that Twitter made prohibited corporate contributions to Joe Biden and his committee during the 2020 election cycle, by suppressing negative information, for example, blocking users from tweeting links to certain news articles that Twitter determined contained false information. Some of the complaints were made by federal candidates whose own accounts were suspended or restricted, based on what the platform may have viewed as inflammatory content. Other complaints still, allege that Facebook violated the act by fact checking and limiting the distribution of post by users linked to articles critical of Biden and Harris, including labeling some of those as false information.

The Commission though, unanimously concluded that there was no reason to believe that any campaign finance violations occurred. In disposing of the complaints in these matters, the Commission concluded that the alleged actions did not result in contributions or expenditures under the act. In other words, the Commission found that the actions of the social media companies were based on permissible business considerations and were not done for the purposes of influencing any federal election. And without any evidence of coordination or an electoral purpose, there was very little debate among the Commissioners regarding how to handle these matters. FECA does not generally permit the Agency to regulate an entity's business practices, even if they have the potential for election consequences.

As I mentioned earlier, campaign finance laws often tread in very sensitive areas involving the regulation of political speech, and the First Amendment is generally the touchstone that determines whether laws that we apply cross the line and infringe on constitutional rights. However, Facebook and Twitter are not government entities that make or enforce such laws, they are for-profit corporations. But there seems to be some temptation to recast social media companies, particularly when they limit user access in response to the posting of controversial content, as quasi-government creatures trampling on the speech rights of the little guy.

Now, no one would dispute that they are among our largest and most influential entities, but wearing my commissioner hat, I look to the area of law or which our agency has jurisdiction, and our laws do not regulate their content moderation choices.

Now there's one final point that I'd like to make here given the topic of the symposium. Social media platforms' content choices could be viewed as analogous to newspapers exercising editorial control over the content they publish, which has long been recognized as a First Amendment protected right.

Does Twitter enjoy such a right? In declining to pursue enforcement in these social media matters, my republican colleagues wrote that Twitter and Facebook were acting as press entities and thus not subject to regulation under FECA. FECA exempts any news story, commentary, or editorial distributed by a broadcasting station, newspaper, magazine, or periodical publication from the definition of an expenditure, so long as they are acting in their legitimate press function, their materials are available to the general public, and the subject activity is comparable in form to those ordinarily issued by the entity.

The Commission has long recognized that an entity otherwise eligible for the press exemption does not lose its eligibility, even if the activity in question lacks objectivity, or it advocates the election or defeat of a clearly identified candidate or is tailored to its users based on their preferences. The press exemption also applies equally to Internet communications.

The press exemption is grounded in the First Amendment. In enacting FECA, the legislative history indicates that Congress did not intend to limit or burden in any way the First Amendment freedom of press and of association, providing them the unfettered right to cover and comment on political campaigns.

Now my three colleagues explained that the press exemption applies to Twitter and similar social media companies, because a sizable share, if not most, of Americans consume their news via Twitter and other social media platforms. These platforms allow the publishing and sharing of original content, they sell advertising and curate and summarize news stories, and they're available to the general public. They

also explained that, even if the press exemption did not apply to twitter's content moderation policies, those policies were protected under the First Amendment.

Three Commissioners, including myself, concluded that determining whether the press exemption applies, or whether Twitter and other social media companies enjoy the protections of the First Amendment, is unnecessary given the Commission's precedent on similar matters where we concluded that the respondents' actions were motivated by business considerations rather than efforts to influence the election.

Now, there's a lot of information, so I invite anyone who is interested in looking into this or wants to know about it to feel free to reach out to me. You can also locate this on our website under legal resources under the enforcement tab and search by keyword under MURs.⁹

I want to say that, despite our conclusion in these matters, social media company practices raise a number of other questions regarding their roles in our elections, and democracy more generally, given the pervasiveness of online campaign activities. These questions include not only their content moderation policies, but also extend to the use of their platforms for micro-targeting of political ads, the spread of misinformation through their platforms, and whether they should receive immunity under 47 U.S.C. § 230.

Whether these companies should continue to enjoy Section 230 is a question for Congress, but I will comment on the use of micro targeting and the spread of false information and political ads. During the 2016 election cycle, the Russian Federation engaged in an extensive social media campaign that included the micro-targeting of political advertising as a means of spreading disinformation to large U.S. audiences. These tactics were designed to sow discord in the U.S. political system, undermine the 2016 election, and help Donald Trump win the presidency. None of this is in dispute. Social media campaigns have been examined at length in official reports by the U.S. intelligence community, Congressional committees, and the special counsel at DOJ.

⁹ *Enforcing Federal Campaign Finance Law*, FEC.GOV, <https://fec.gov/legal-resources/enforcement>.

Following the 2016 election, the Commission has received a number of complaints alleging that the use of these and similar online tactics violate federal campaign finance laws. These tactics raise novel and complicated questions. Ordinarily, whether ads are issue ads or contain express advocacy generally determines whether they must be disclosed by non-political committees. In some cases it's clear, others not so much. This issue has been a source of wide disagreement among the Commissioners and there will certainly be a robust debate on whether, and to what extent, misinformation and micro-targeting factor into this analysis.

Does it matter whether these tactics are used by domestic or foreign actors? The Supreme Court recently issued a decision explaining that foreign individuals outside of the United States do not possess First Amendment rights.¹⁰

Regardless of how the Commission addresses these issues going forward, the use of these online tactics poses real challenges to election spending transparency.

With respect to transparency, I firmly believe that the laws that promote transparency in election spending are all the more important, given the Supreme Court's 2010 decision in *Citizens United*¹¹ and the shift to online advertising, and I think there's something profound about the fact that you're having your event today, which is the 12th anniversary of that decision.

It's hard to believe that this decision is 12 years old, but its effects cannot be overstated. *Citizens United* caused a fundamental shift in campaign finance law, ushering in a new era of explosive campaign spending. As we all know, in *Citizens United* the Court invalidated the FEC's ban on corporate and union spending by independent expenditures and overturned decades of court precedent. The Court explained that the prohibition acted as a ban on free speech in violation of the First Amendment, but at the same time, the Court linked this holding to another holding in which eight justices reaffirmed the constitutionality of disclosure obligations.

¹⁰ Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082 (2020).

¹¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

In the majority opinion, Justice Kennedy noted that the Court's ruling would lead to a new campaign finance system that pairs corporate independent expenditures with the effect of disclosure. Transparency, the Court explained, enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Now, perhaps this is the case in theory. The more information that you as a voter know about who's contributing to candidates on the ballot and in what amounts, and what super PACs are running ads for or against those candidates, the more democracy is enhanced. That's how it should be. But in the aftermath of *Citizens United*, Justice Kennedy's prediction regarding effective disclosure has not come to fruition. A significant amount of the election related spending is taking place in secret, especially on the Internet. Massive amounts of monies are flowing from wealthy donors and corporations to super PACs and other corporate entities which are masquerading as nonprofit social welfare groups but are really political committees.

The Commission is frequently confronted with issues involving whether and to what extent corporate and union spending to influence elections should be disclosed, including whether a 501(c)(4) group's political spending rises to such a level that they should be deemed a political committee under FECA. Commissioners have very different views about what the FEC can and should do on these issues.

With the decisive shift to online political advertising post *Citizens United* and the use of micro-targeting and misinformation tactics, effective disclosure is more important now than ever. Not only does micro-targeting make it easier for this information to spread and for political spenders to sow further division in our country, but political spenders can do so by concealing who they really are and who funded their ad spending. By carrying out their social media campaigns in this manner, voters are deprived of valuable information on who is seeking to influence them and why, and this prevents effective counter speech.

Now this is not to say that there's no value to online political advertising, indeed, the more speech, in my view, the better, as it contributes to a robust marketplace of ideas.

While there are a number of ways to combat microtargeting and misinformation online, effective transparency is one of the many tools that are available that could address the problems associated with misinformation and micro-targeting of political ads. This is why I believe the Commission has to do more about enforcing the existing disclosure laws. At the same time, these laws must be strengthened to respond to online political advertising in a world of rapid technological change.

For instance, public communications that expressly advocate the election or defeat of a federal candidate are subject to disclosure and disclaimer requirements, but the Commission has been unable to agree on a rationale with respect to disclaimers for ads placed on social media platforms.

Further, the commission's definition of public communications is outdated. It also doesn't explicitly capture political spending on social media and media sharing networks such as YouTube, Instagram and LinkedIn, streaming applications such as Netflix and Hulu, and other devices or applications. The Commission has been considering rulemaking on internet communication disclaimers and revising the definition of public communications since 2011. The need for having these rules in place increases in tandem with the growing use of social media as a campaign tool. These rules would ensure that the millions of Americans who view campaign ads through their computers and personal devices have the necessary information to ascertain the source of these ads.

Also, Congress should close the existing loopholes that allow political actors to run their ads online without having to disclose them to the Commission, which is effectively concealing the source of the ads and the amount spent on them. FECA requires disclosure of a certain category of communications called electioneering communications. An electioneering communication is a broadcast on cable or satellite communication that clearly refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary or 60 days of general election, and is targeted to the relevant electorate.

Entities that run such communications must disclose them in filings with the FEC, but these requirements do not apply

to online political ads. In other words, a group can spend millions of dollars funding political ads that feature federal candidates online without having to disclose them, even though they would have to do so if they ran the same ads on television. Proposed legislation such as the Honest Ads Act in HR1 would extend these reporting requirements to online ads.¹² This legislation is necessary to ensure proper disclosure of political spending in our current political environment.

To conclude, today's symposium will continue the important discourse concerning campaign finance, election spending online and through social media, and the First Amendment. These topics are not only timely, but they also involve some of the most pressing legal issues facing American democracy. Thank you very much, it's been a pleasure speaking with you today about the work of the FEC and the challenges that we face in transparency in the context of election spending.

¹² H.R. 1 Subtitle C (117th Congress)

FIRST AMENDMENT LIMITS ON STATE LAWS TARGETING ELECTION MISINFORMATION

*David S. Ardia & Evan Ringel**

INTRODUCTION	292
I. OVERVIEW OF STATE EFFORTS TO COMBAT ELECTION MISINFORMATION.....	298
<i>A. LAWS THAT TARGET FALSE ELECTION-RELATED SPEECH.....</i>	<i>301</i>
<i>B. LAWS THAT PROHIBIT INTIMIDATION OR FRAUD ASSOCIATED WITH AN ELECTION</i>	<i>305</i>
II. FIRST AMENDMENT FRAMEWORK FOR ANALYZING RESTRICTIONS ON ELECTION-RELATED SPEECH	307
<i>A. DETERMINING THE APPROPRIATE LEVEL OF JUDICIAL SCRUTINY</i>	<i>307</i>
<i>B. ONE-SIZE DOES NOT FIT ALL.....</i>	<i>316</i>
1. <i>Scope of Speech Covered.....</i>	<i>317</i>
2. <i>Fault Required.....</i>	<i>324</i>
3. <i>Procedural Safeguards</i>	<i>328</i>
III. STATE LAWS TARGETING ELECTION-SPEECH.....	333
<i>A. STATUTES THAT DIRECTLY TARGET THE CONTENT OF ELECTION-RELATED SPEECH.....</i>	<i>335</i>
1. <i>False Statements about a Candidate.....</i>	<i>336</i>
2. <i>False Statements about Ballot Measures.....</i>	<i>341</i>
3. <i>False Statements About Voting Requirements and Procedures.....</i>	<i>346</i>
4. <i>False Representations of Source, Authorization, or Sponsorship</i>	<i>351</i>
5. <i>False Statements of Endorsement.....</i>	<i>355</i>
6. <i>False Statements of Incumbency</i>	<i>359</i>
<i>B. GENERAL STATUTES THAT PROHIBIT INTIMIDATION OR FRAUD ASSOCIATED WITH AN ELECTION</i>	<i>361</i>
1. <i>Intimidation</i>	<i>363</i>
2. <i>Fraudulent or Corrupt Statements</i>	<i>366</i>
IV. THE NEED FOR A COMPREHENSIVE STRATEGY ADDRESSING ELECTION MISINFORMATION	368
<i>A. THE INTERNET BLIND SPOT.....</i>	<i>369</i>
<i>B. THE LIMITS OF LAW</i>	<i>374</i>
CONCLUSION	383

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INTRODUCTION

The last two presidential election cycles have brought increased attention to the extent of misinformation—and outright lies—peddled by political candidates, their surrogates, and others who seek to influence election outcomes. Given the ubiquity of this speech, especially online, one might assume that there are no laws against lying in politics. It turns out that the opposite is true. Although the federal government has largely stayed out of regulating the content of election-related speech,¹ the states have been surprisingly active in passing laws that prohibit false statements associated with elections.

State statutes regulating speech associated with elections are not a new phenomenon,² but the increase over the last decade in both their number—and scope of coverage—suggest that state legislatures continue to see a problem that needs to be addressed. In 2014, when the Supreme Court last took up a case addressing restrictions on the content of election-related speech in *Susan B. Anthony List v. Driehaus*,³ sixteen states had statutes that directly targeted false statements in the context of local and national elections.⁴ Today, thirty-eight states have such laws and when

¹ Regulation of the content of election-related speech at the federal level has been largely limited to the broadcast context. *See, e.g.*, Communications Act of 1934, 47 U.S.C. § 312(a)(7) (requiring broadcast license holders to “allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy”); 47 U.S.C.A. § 315(a) (requiring that if a broadcast licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he or she must afford equal opportunities to all other such candidates for that office in the use of such broadcasting station).

² The first such statutes appear to have been passed during the progressive era. *See* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 *FIRST AMEND. L. REV.* 367, 380 (2017); James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 *OKLA. L. REV.* 167, 171 (2018) (concluding that the first such law was in 1911). Ross writes that five states “appear to have enacted campaign falsehood statutes during the Progressive era: West Virginia (1908), Oregon (1909), North Dakota (1911) (limited to prohibiting payment to a newspaper to support or oppose a candidate for public office), Montana (1912), and North Carolina (1913).” Ross, *supra*, at 380 n.75.

³ 573 U.S. 149 (2014).

⁴ *See* *Susan B. Anthony List v. Driehaus*, 525 F. App'x 415, 416–17 (6th Cir. 2013), *cert. granted* 573 U.S. 149 (2014). Determining how many states have statutes that target the content of election-related speech is frustratingly difficult as there is a dearth of comprehensive studies of state efforts to regulate election speech and many state statutes that do not purport to be election statutes may nevertheless restrict the content of election-related speech. Even though the exact number of states with such statutes is difficult to precisely pin down, the number appears to be increasing. *See* Weinstein,

we include state statutes that indirectly regulate election-related speech by prohibiting fraud and intimidation in elections, the number rises to forty-eight states and the District of Columbia (Maine and Vermont are the exceptions).⁵

Despite the obvious First Amendment issues these laws raise, there are only a handful of court decisions at any level that expressly address their constitutionality and the U.S. Supreme Court, for its part, has been “erratic at best” in developing a First Amendment framework for analyzing government efforts to regulate the content of election-related speech.⁶ For example, some cases state that election-speech restrictions should be subject to the highest level of First Amendment scrutiny.⁷ Other cases, however, suggest that government efforts to improve the functioning of elections should be subject to greater judicial deference.⁸

supra note 2, at 171 (noting that in 1975 seventeen states had such laws or regulations and by 2016 the number had increased to nineteen) (first citing *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1273 (1975); and then citing Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 49 (2016)).

⁵ See DAVID S. ARDIA, EVAN RINGEL AND ALLYSAN SCATTERDAY, STATE REGULATION OF ELECTION-RELATED SPEECH IN THE U.S.: AN OVERVIEW AND COMPARATIVE ANALYSIS, U. OF N.C. CTR. FOR MEDIA LAW AND POLICY 1 (2021) [hereinafter ARDIA ET AL., STATE REGULATION OF ELECTION-RELATED SPEECH IN THE U.S.], <https://medialaw.unc.edu/wp-content/uploads/2021/08/State-Regulation-of-Election-Related-Speech.08.04.2021.pdf>.

⁶ William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 285–86 (2004) [hereinafter Marshall, *False Campaign Speech*]. We discuss these decisions *infra* in Part II.

⁷ See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (applying “strict scrutiny” to the Kentucky Corrupt Practices Act); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (applying “exacting scrutiny” to Ohio statute requiring that campaign material identify the person or organization responsible for its publication).

⁸ See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (rejecting the application of strict scrutiny and holding that “a more flexible standard applies” in evaluating a state law that forbids write-in ballots in an effort to reduce factionalism in the general election); *U.S. v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring) (suggesting that false statements in the context of “political speech” should be subject to “intermediate scrutiny”); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1804 (1999) (writing that the Court’s decision in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), which rejected a challenge to a state-owned television station’s decision to exclude a congressional candidate from a televised debate, suggests that there may be a sphere of “electoral exceptionalism” where “election-specific First Amendment principles” apply); Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 B.U. L. REV. 737, 739-40 (2002) (describing examples of election law exceptionalism).

Prompted by concern about the impact of misinformation on the American electorate,⁹ we set out to assess the extent to which existing state and federal laws limit election misinformation and the prospect that these laws will survive First Amendment scrutiny. In doing so, we reviewed more than 125 state statutes that regulate the content of election-related speech. The statutes, though mostly unenforced so far, vary widely in scope. For example, Alaska punishes false statements about a candidate “made as part of a telephone poll or an organized series of calls, and made with the intent to convince potential voters concerning the outcome of an election.”¹⁰ North Dakota’s statute, which is much broader, reads as follows:

A person is guilty of a class A misdemeanor if that person knowingly, or with reckless disregard for its truth or falsity, publishes any political advertisement or news release that contains any assertion, representation, or statement of fact, including information concerning a candidate’s prior public record, which is untrue, deceptive, or misleading, whether on behalf of or in opposition to any candidate for public office, initiated measure, referred measure, constitutional amendment, or any other issue, question, or proposal on an election ballot, and whether the publication is by radio, television, newspaper, pamphlet, folder, display cards, signs, posters, billboard advertisements, websites, electronic transmission, or by any other public means.¹¹

⁹ See, e.g., INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, GLOBAL STATE OF DEMOCRACY REPORT 15 (2021), https://www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf (concluding that Trump’s false statements questioning the legitimacy of the 2020 election results were a “historic turning point” that “undermined fundamental trust in the electoral process” in the U.S. and culminated in the Jan. 6 insurrection at the U.S. Capitol); Greg Myre & Shannon Bond, ‘Russia Doesn’t Have to Make Fake News’: Biggest Election Threat Is Closer To Home, NPR (Sept. 29, 2020), <https://www.npr.org/2020/09/29/917725209/russia-doesn-t-have-to-make-fake-news-biggest-election-threat-is-closer-to-home> (reporting on the increased threat of domestic disinformation and noting that “would-be foreign meddlers need only amplify falsehoods being spread by U.S. social media users”); RENEE DiRESTA, ET AL., THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY, NEW KNOWLEDGE 1, 99 (2019) (reporting on how Russia’s Internet Research Agency “exploited social unrest and human cognitive biases” in the 2016 election).

¹⁰ ALASKA STAT. ANN. § 15.13.095(a) (West 2021).

¹¹ N.D. CENT. CODE § 16.1-10-04 (2021).

As these examples show, state laws can target the content of election-related speech in multiple ways. Some statutes prohibit false and misleading factual statements about candidates for public office, while others target false statements about ballot measures, voting requirements, or voting procedures.¹² Several states have statutes that prohibit false statements of source or authorization in a political communication or that prohibit false statements of endorsement or incumbency.¹³ Many states have statutes that cover more than one type of content. State laws can also indirectly regulate election-related speech by prohibiting fraud and intimidation in elections.¹⁴ Although these laws are generally geared towards physical intimidation and coercion, they often contain language that is broad enough to implicate campaign and election speech.¹⁵

Because they target speech based on its content, many of these statutes could be subject to significant First Amendment challenges. Indeed, the handful of statutes that have already faced a court challenge did not fare well.¹⁶ The analysis in *Commonwealth v. Lucas* is illustrative of the First Amendment challenges many statutes are likely to face.¹⁷ The *Lucas* case involved a Massachusetts statute that attempted to regulate false campaign and election speech, stating:

¹² See *infra* Parts III.A.2 and III.A.3.

¹³ See *infra* Parts III.A.4, III.A.5, III.A.6.

¹⁴ See *infra* Part III.B.

¹⁵ At least one state attorney general has used voter intimidation laws to target false and misleading political communications. See Meryl Kornfield, *Conservative Operatives Face Felony Charges in Connection with Robocalls Seeking to Mislead Voters*, WASH. POST (Oct. 1, 2020), <https://www.washingtonpost.com/politics/2020/10/01/wohl-robocall-michigan/>.

¹⁶ See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014) (invalidating Minnesota law criminalizing the dissemination of false information pertaining to ballot initiatives); *Lair v. Murry*, 871 F. Supp. 2d 1058 (D. Mont. 2012) (holding that Montana statute prohibiting misrepresentation of a candidate's voting record is unconstitutionally vague); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking Massachusetts statute that criminalized speech relating to candidates or issues before the electorate); *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (holding Washington statute prohibiting false statements of material fact about a candidate unconstitutional in that the state's purported interest is not compelling and statute is not narrowly tailored to further that interest). Only a few cases have come out the other way. See *United States v. Tan Duc Nguyen*, 673 F.3d 1259 (9th Cir. 2012) (upholding California statute prohibiting intentional voter intimidation as a content-based restriction that regulates a true threat); *Doe v. Mortham*, 708 So. 2d 929 (Fla. 1998) (finding Florida statute prohibiting false statements of incumbency and endorsement is not overbroad and is "grounded in valid state concerns").

¹⁷ 34 N.E.3d 1242 (Mass. 2015).

No person shall make or publish, or cause to be made or published, any false statement in relation to any candidate for nomination or election to public office, which is designed or tends to aid or to injure or defeat such candidate.

No person shall publish or cause to be published in any letter, circular, advertisement, poster or in any other writing any false statement in relation to any question submitted to the voters, which statement is designed to affect the vote on said question.¹⁸

The statute was challenged by a PAC that published brochures in opposition to a state representative, who in turn brought a criminal complaint under the statute against the PAC's chairwoman.¹⁹ The Supreme Judicial Court of Massachusetts held that strict scrutiny was the appropriate standard of review, rejecting the state's argument that a more deferential standard was appropriate because the speech the statute proscribed could be characterized as fraud or defamation. As to fraud, the court wrote that most fraud statutes require a showing of materiality, an element absent in the Massachusetts statute. The court also concluded that even if the statute was intended to prohibit fraudulent speech, this would not be dispositive "because it also reaches speech that is not fraudulent."²⁰

The *Lucas* court found the state's characterization of the proscribed speech as defamatory to be "similarly flawed." First, the court noted that a defamatory statement about a candidate for public office is actionable only if it is made with "actual malice," which was not a requirement of the Massachusetts statute. Second, the court found the statute criminalized speech well outside the boundaries of defamation: "Although [the statute] is capable of reaching . . . defamatory statements, it is also capable of reaching statements regarding ballot questions and statements by a candidate about himself designed to enhance his own candidacy, i.e., statements that are clearly not defamatory."²¹

¹⁸ MASS. GEN. LAWS ch. 56, § 42 (2017).

¹⁹ *Lucas*, 34 N.E.3d at 1244.

²⁰ *Id.* at 1249.

²¹ *Id.* at 1250.

Applying strict scrutiny to the statute, the court wrote that the state's interest in the maintenance of free and fair elections was a compelling one, but given the breadth of the statute's prohibitions, the state had failed to establish that the statute was actually necessary to serve that interest. "As the facts of this case demonstrate, the danger of such breadth is that the statute may be manipulated easily into a tool for subverting its own justification," the court warned.²² The *Lucas* court also found it problematic that anyone could initiate a complaint under the statute, noting that this threatened to "create lingering uncertainties of a criminal investigation and chill political speech by virtue of the process itself."²³ As *Lucas* shows, state laws that restrict election speech will face an uphill battle under the First Amendment.

In this article we attempt to map some of the contours of this battle. Part I provides an overview of current state laws that target election misinformation. By our count, thirty-eight states have laws that directly regulate the content of election-related speech and when we include statutes that indirectly regulate such speech by prohibiting fraud and intimidation in elections, the number rises to forty-eight states and the District of Columbia. To aid in the analysis and comparison of these statutes, we created a multi-level taxonomy of the types of speech the statutes target. We then apply the taxonomy to the 125 statutes we identified and provide a summary of what these laws entail.

In Part II we explore how these statutes might fare against a First Amendment challenge. Despite the high burden the First Amendment imposes on laws regulating the content of election-related speech, some of the statutes are likely to be constitutionally permissible. It is not our aim, however, to definitively answer which statutes are constitutional. The First Amendment issues the statutes raise are doctrinally complex, as they involve evolving views regarding the treatment of false and/or fraudulent speech in the context of elections and implicate difficult questions of intent, efficacy, overbreadth, underinclusiveness, and potential partisan abuse. Instead, our goal is to identify how different statutory approaches to election misinformation might increase or diminish the likelihood of invalidation under the First Amendment.

²² *Id.* at 1255.

²³ *Id.* at 1247.

Part III applies these First Amendment heuristics to the corpus of state statutes we identified, focusing primarily on their scope of coverage, the level of fault they require, and the mechanism of enforcement and remedies they provide. In addition to cataloging the remarkable variety of state statutes that impose civil and criminal liability for election-related speech, we highlight the similarities and differences in legislative drafting between states with an eye on identifying the statutory provisions that are most likely to raise First Amendment issues.

In brief, what we found is that existing state statutes regulating election misinformation vary widely in the types of speech they target and the level of fault they require, with many statutes suffering from serious constitutional deficiencies. Statutes that target defamatory speech or speech that harms the election process, is fraudulent, or that intimidates voters are likely to be permissible, while statutes that target other types of speech that have not traditionally been subject to government restriction will face an uphill battle in demonstrating that they are constitutional. Apart from their scope of coverage, statutes that impose civil or criminal liability without regard to the speaker's knowledge of falsity or intent to interfere with an election are especially problematic. Given the need to provide "breathing space" for election-related speech, it is likely that statutes that impose strict liability for election misinformation will run afoul of the First Amendment.

We conclude in Part IV by considering how these state laws intersect with broader societal efforts to reduce the frequency and impact of election misinformation. Regardless of whether individual statutes survive First Amendment scrutiny, it is useful to survey the breadth and depth of state efforts to deal with lies, misinformation, intimidation, and fraud in elections. Furthermore, separate from government efforts to regulate the content of election-related speech, the various approaches the states have adopted can be useful to social media platforms and other intermediaries that facilitate the spread of election misinformation.

I. OVERVIEW OF STATE EFFORTS TO COMBAT ELECTION MISINFORMATION

Despite public outcry over the rise of misinformation in political campaigns, there is little federal regulation of the

content of election-related speech. Other than in the context of campaign finance,²⁴ federal law is largely absent in this space. Federal laws governing political speech focus primarily on advertising, but even with regard to advertising existing federal law is minimal and directed largely at traditional mediums of communication such as broadcast and print.²⁵ Although federal agencies like the Federal Trade Commission (FTC) have “truth in advertising” laws that target false or misleading content in advertisements, those laws apply only to advertisements affecting “commerce,”²⁶ which the FTC has interpreted as precluding its ability to regulate the content of political advertisements.²⁷

The states, however, have not held back. Beginning in at least 1893, when Minnesota criminalized defamatory campaign speech,²⁸ state legislatures have sought to enact statutes targeting false speech in elections.²⁹ Today, forty-eight states and the

²⁴ See, e.g., Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002); 52 U.S.C. § 30120(a) (requiring that election communications “expressly advocating the election or defeat of a clearly identified candidate” include a disclaimer that discloses the funding source and whether such communication has been authorized by the candidate); *id.* § 30120(d)(1) (outlining additional disclosure requirements for election communications made by radio or television).

²⁵ *Digital Political Ads*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 31, 2020), <https://www.ncsl.org/research/elections-and-campaigns/digital-political-ads.aspx> (explaining that current laws focus on the regulation of television, radio, and print ads and are not easily applied to internet ads, which now dominate campaign spending); J. SCOTT BABWAH BRENNEN & MATT PERAULT, DUKE CTR. ON SCI. & TECH. POL’Y, BREAKING BLACKOUT BLACK BOXES: ROADBLOCKS TO ANALYZING PLATFORM POLITICAL AD BANS (2021) (describing how current laws have created a “black box” around digital political advertisements and suggesting revisions to federal law that would allow researchers to assess the impacts of platform-specific political ad bans); *Oversight of Federal Political Advertisement Laws & Regulations Before the H. Comm. On Oversight & Gov’t Reform, Subcomm. on Info. Tech.*, 115th Cong. 56 (2017) (statement of Ian Vandewalker, Senior Counsel, Democracy Program, Brennan Center for Justice) (noting that despite the proliferation of political advertisements on the internet, federal laws “have not been updated for this new era, leaving much political spending on the internet unregulated”).

²⁶ 15 U.S.C. § 52.

²⁷ Edgar B. Herwick III, *Why Don’t Truth in Advertising Laws Apply to Political Ads?*, GBH (Nov. 6, 2019), <https://www.wgbh.org/news/politics/2019/11/06/why-dont-truth-in-advertising-laws-apply-to-political-ads>.

²⁸ See 281 Care Comm. v. Arneson, 638 F.3d 621, 625 (8th Cir. 2011) (“Minnesota has a long history of regulating knowingly false speech about political candidates; it has criminalized defamatory campaign speech since 1893.”).

²⁹ Although the historical record is a bit fuzzy, state efforts in this regard appear to have crystallized during the Progressive era, when five additional states enacted campaign falsehood statutes. See Ross, *supra* note 2, at 380 n.75 (writing that “[f]ive other states appear to have enacted campaign falsehood statutes during the Progressive era: West Virginia (1908), Oregon (1909), North Dakota (1911) (limited to prohibiting payment to a newspaper to support or oppose a candidate for public office), Montana (1912), and North Carolina (1913”).

District of Columbia have statutes that potentially regulate election-related speech, including but not limited to the content of political advertising. These statutes basically take one of two forms: statutes that directly target the content of election-related speech and generally applicable statutes that indirectly implicate election-related speech by prohibiting intimidation or fraud associated with an election.

Before we examine the extent to which the First Amendment may limit state efforts to regulate election misinformation, it will be helpful to get an overview of the breadth and depth of current state laws that purport to address lies, misinformation, intimidation, and fraud in elections. To aid in this assessment, we developed a multi-level taxonomy of the types of speech targeted by the various state statutes.³⁰ At the most general level, we can divide the statutes into eight categories based on the subject matter the statute regulates: speech about (1) candidates;³¹ (2) ballot measures;³² (3) voting requirements or procedures;³³ (4) source, authorization or

³⁰ For a full listing and description of our taxonomy see ARDIA ET AL., STATE REGULATION OF ELECTION-RELATED SPEECH IN THE U.S., *supra* note 5, at 9–12. Several scholars have also developed taxonomies of the many types of false speech that can arise in elections, which we found very helpful in creating our taxonomy. See, e.g., Helen Norton, (*At Least*) *Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 128–35 (2018); Ross, *supra* note 2, at 370–79. These taxonomies were focused on the lies themselves, whereas our taxonomy is focused on cataloging the state statutes that attempt to remedy such lies. Of course, one would hope to find substantial overlap between the types of false election speech people engage in and the remedial statutes that target those lies, which is largely true.

³¹ This category includes statutes that prohibit false statements about a candidate for public office that name or otherwise identify the candidate (e.g., statements about a candidate's qualifications, past actions, voting record, or policy positions). The statement must be factual in nature in order to be actionable. Pure statements of opinion would not be covered (e.g., the candidate is a “jerk”). This category is further broken down into two subcategories. The first, “Defamatory Statement About Candidate,” applies to statutes that merely confirm that defamation law (libel and slander) applies to political ads or campaign communications. The second subcategory, “Other False Statement About Candidate,” encompasses statutes that impose liability for false statements about a candidate regardless of whether the statement meets the requirements of defamation. ARDIA ET AL., STATE REGULATION OF ELECTION-RELATED SPEECH IN THE U.S., *supra* note 5, at 9.

³² This category includes statutes that prohibit false statements about a ballot measure, proposal, referendum, or petition before the electorate (e.g., statements about ballot issues before the electorate, not specific to a candidate, including contents, purpose, or effect of a proposal, referendum, amendment, or petition, including efforts to instigate recall petitions). *Id.* at 9–10.

³³ This category includes statutes that prohibit false statements about voting requirements or procedures (e.g., statements about what is required to vote or register, who can vote, when to vote, how to vote, or providing bogus ballots). *Id.* at 10.

sponsorship of political advertisements;³⁴ (5) endorsements;³⁵ and (6) incumbency;³⁶ as well speech that involves (7) intimidation;³⁷ and (8) fraud or corruption.³⁸ The top-level categories are not exclusive and many statutes fall within more than one category. We also further divided each category based on the level of knowledge or intent, if any, the statute requires before liability attaches. For example, some statutes require that the false speech be made knowingly or with reckless disregard as to the truth of the statement. Other statutes impose liability if the speaker should have known the information was false, which is often referred to as “constructive knowledge.” Still others impose liability regardless of knowledge, which is a form of “strict liability.”

A. Laws that Target False Election-Related Speech

Statutes that directly target the content of election-related speech vary widely in the types of false speech they prohibit (note that most states have more than one type of statute):

- *Sixteen states* have statutes that prohibit false statements about a candidate for public office.³⁹

³⁴ This category includes statutes that prohibit false statements about source, authorization, or sponsorship of an advertisement or a speaker's affiliation with an organization, candidate, or party (e.g., express or implied statements about who is speaking, their affiliation, or sponsorship, including “this ad approved by...”). *Id.* at 10.

³⁵ This category includes statutes that prohibit false statements that a candidate, party, or ballot measure has the endorsement or support of a person or organization (e.g., express or implied statements of endorsement by another person, organization, political party or committee). This category is distinguished from the Source, Authorization, or Sponsorship category because the endorsement is directed at a candidate, party, or ballot measure rather than endorsement of an advertisement. *Id.* at 10–11.

³⁶ This category includes statutes that prohibit false statements that a candidate held or holds a public office (e.g., express or implied statements that a candidate is the incumbent, previously held a public office, or currently holds a public office, including use of the word “re-elect . . .”). *Id.* at 11.

³⁷ This category includes statutes that prohibit statements that intimidate, threaten, or coerce a person to (or not to) vote, sign a petition, register to vote, or choose who or what to vote for (e.g., threats, including force, restraint, and economic harm, directed at a person, their family, or business). This category is distinguished from the Fraud or Corruption category because it involves the threat of force or coercion. *Id.* at 11.

³⁸ This category includes statutes that prohibit statements that deceive, defraud, or bribe a person to (or not to) vote, sign a petition, register to vote, or choose who or what to vote for (e.g., false statements, promises of bribes or rewards). This category is distinguished from the Intimidation category because it does not involve the threat of force or coercion. *Id.* at 11–12.

³⁹ See ALASKA STAT. § 15.13.090 (2021); ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021); CAL. ELEC. CODE § 20500 (West 2021); COLO. REV.

- *Fourteen states* have statutes that prohibit false statements about a ballot measure, proposal, referendum, or petition before the electorate.⁴⁰
- *Thirteen states* have statutes that prohibit false statements about voting requirements or procedures.⁴¹
- *Eleven states* have statutes that prohibit false statements about the source, authorization, or sponsorship of a political advertisement or about a speaker's affiliation with an organization, candidate, or party.⁴²
- *Nine states* have statutes that prohibit false statements that a candidate, party, or ballot measure has the endorsement or support of a person or organization.⁴³
- *Seven states* have statutes that prohibit false statements about incumbency.⁴⁴

STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021); HAW. REV. STAT. § 19-3 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MISS. CODE ANN. § 23-15-875 (2021); MONT. CODE ANN. § 13-37-131 (2021); N.C. GEN. STAT. § 163-274(9) (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OR. REV. STAT. § 260.532 (2021); TENN. CODE ANN. § 2-19-142 (2021); UTAH CODE ANN. § 20A-11-1103 (West 2021); WASH. REV. CODE § 42.17A.335 (2021); W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021).

⁴⁰ See COLO. REV. STAT. § 1-13-109 (2021); CONN. GEN. STAT. § 9-368c (2021); IDAHO CODE § 34-1714 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-57 (2021); NEV. REV. STAT. § 306.210(a) (2021); N.M. STAT. ANN. § 1-17-14(D) (2021); OHIO REV. CODE ANN. § 3599.14 (West 2021); S.D. CODIFIED LAWS § 12-13-16 (2021); TEX. ELEC. CODE ANN. § 501.029(a) (West 2021); UTAH CODE ANN. § 20A-11-901 (West 2021); UTAH CODE ANN. § 20A-11-1103 (West 2021); WIS. STAT. § 12.05 (2021).

⁴¹ See CAL. ELEC. CODE § 18543 (West 2021); CONN. GEN. STAT. § 9-135 (2021); CONN. GEN. STAT. § 9-363 (2021); HAW. REV. STAT. § 11-391 (2021); HAW. REV. STAT. § 19-3 (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); MINN. STAT. § 204C.035 (2021); MO. REV. STAT. § 115.631(7)–(26) (2021); MONT. CODE ANN. § 13-35-235 (2021); N.M. STAT. ANN. § 1-20-9 (2021); N.Y. ELEC. LAW § 3-106(d) (McKinney 2021); OKLA. STAT. tit. 26, § 16-109 (2021); 17 R.I. GEN. LAWS § 19-46 (2021); TENN. CODE ANN. § 2-19-133(a) (2021); VA. CODE ANN. § 24.2-1005.1 (2021).

⁴² See ALA. CODE § 17-5-16 (2021); ARIZ. REV. STAT. ANN. § 19-119 (2021); IOWA CODE § 68A.506 (2021); LA. STAT. ANN. § 18:1463 (2021); MONT. CODE ANN. § 13-35-235 (2021); N.H. REV. STAT. ANN. § 664:14-b (2021); N.H. REV. STAT. ANN. § 666:6 (2021); N.H. REV. STAT. ANN. § 667:7-a (2021); N.J. STAT. ANN. § 19:34-66 (West 2021); N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (2022); N.C. GEN. STAT. § 163-278.39 (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); TEX. ELEC. CODE ANN. § 255.004 (West 2021); TEX. ELEC. CODE ANN. § 255.005 (West 2021).

⁴³ See CAL. ELEC. CODE § 20007 (West 2021); FLA. STAT. § 106.143 (2021); LA. STAT. ANN. § 18:1463 (2021); MASS. GEN. LAWS ch. 56, § 41A (2021); MINN. STAT. § 211B.02 (2021); N.H. REV. STAT. ANN. § 666:6 (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); TENN. CODE ANN. § 2-19-116 (2021); UTAH CODE ANN. § 20A-11-901 (West 2021).

⁴⁴ See CAL. ELEC. CODE § 18350 (West 2021); FLA. STAT. § 106.143 (2021); IND. CODE § 3-9-3-5 (2021); MICH. COMP. LAWS § 168.944 (2021); MINN. STAT. § 211B.03 (2021); ORE. REV. STAT. § 260.550 (2021); TEX. ELEC. CODE ANN. § 255.006 (West 2021).

As this summary shows, the most common type of statute targeting the content of election-related speech prohibits false statements about candidates for public office. While a few of these statutes merely affirm that liability for defamation applies in the context of political speech, many statutes impose liability for false statements about a candidate regardless of whether the statement meets the specific requirements of defamation:

- *Three states* have statutes that affirm that defamation law (libel or slander) applies to political ads or campaign communications.⁴⁵
- *Fifteen states* have statutes that extend liability to any false statement about a candidate, even if it does not meet the requirements of defamation.⁴⁶

This highlights an important point about these statutes, as well as the other statutes that seek to limit election misinformation. In significant ways, election-speech statutes deviate from longstanding theories of liability for false speech. First, the statutes cover a broader range of speech than has traditionally been subject to government restriction: the statutes cover everything from merely derogatory statements about candidates (defamation requires false statements that create a degree of moral opprobrium) to false information about ballot measures, voting procedures, and incumbency. Apart from the liability created by these election-speech statutes, false statements regarding most of these topics would not otherwise put a speaker at risk of liability.

Second, a substantial number of statutes impose liability regardless of whether the speaker knew the information was false or acted negligently. In fact, the states varied considerably with regard to the requisite degree of fault required for liability:

⁴⁵ See ALASKA STAT. § 15.13.090 (2021); CAL. ELEC. CODE § 20500 (West 2021); WASH. REV. CODE § 42.17A.335 (2021). For example, California's statute simply states that "libel and slander are fully applicable to any campaign advertising or communication." CAL. ELEC. CODE § 20500 (West 2021).

⁴⁶ See ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021); COLO. REV. STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021); HAW. REV. STAT. § 19-3 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MISS. CODE ANN. § 23-15-875 (2021); MONT. CODE ANN. § 13-37-131 (2021); N.C. GEN. STAT. § 163-274(9) (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OR. REV. STAT. § 260.532 (2021); TENN. CODE ANN. § 2-19-142 (2021); UTAH CODE ANN. § 20A-11-1103; W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021).

- *Thirty-three states* have statutes that impose liability if the speaker knew at the time of publication that the information was false or acted with reckless disregard as to the truth.⁴⁷
- *Two states* have statutes that impose liability if the speaker should have known that the information was false, which is often referred to as “constructive knowledge.”⁴⁸
- *Seventeen states* have statutes that impose liability regardless of whether the speaker knew or should have known of the statement’s falsity, which is referred to as “strict liability.”⁴⁹

⁴⁷ ALA. CODE § 17-5-16(a) (2021); ALASKA STAT. § 15.13.095(a) (2021); ARIZ. REV. STAT. ANN. § 16-1006 (2021); CAL. ELEC. CODE § 18350 (West 2021); CAL. ELEC. CODE § 18543 (West 2021); CAL. ELEC. CODE § 20010 (West 2021); COLO. REV. STAT. § 1-13-109 (2021); CONN. GEN. STAT. § 9-363 (2021); CONN. GEN. STAT. § 9-368c (2021); FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021); HAW. REV. STAT. § 19-3 (2021); IDAHO CODE § 34-1714 (2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); IND. CODE § 3-9-3-5 (2021); IOWA CODE § 39A.2 (2021); IOWA CODE § 68A.506 (2021); LA. STAT. ANN. § 18:1461.4 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); MD. CODE ANN., ELEC. LAW § 16-201 (West 2021); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021); MINN. STAT. § 204C.035 (2021); MINN. STAT. § 211B.02 (2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-57 (2021); MISS. CODE ANN. § 23-15-875 (2021); MO. REV. STAT. § 115.631(7)–(26) (2021); MONT. CODE ANN. § 13-35-235 (2021); MONT. CODE ANN. § 13-37-131 (2021); NEV. REV. STAT. § 306.210(a) (2021); N.H. REV. STAT. ANN. § 666:6 (2021); N.J. STAT. ANN. § 19:34-66 (West 2021); N.M. STAT. ANN. § 1-17-14(D) (2021); N.M. STAT. ANN. § 1-20-9 (2021); N.Y. ELEC. LAW § 3-106(d) (McKinney 2021); N.C. GEN. STAT. § 163-274(9) (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OHIO REV. CODE ANN. § 3599.14; OHIO REV. CODE ANN. § 3517.22 (West 2021); OKLA. STAT. tit. 26, § 16-109 (2021); OR. REV. STAT. § 260.532 (2021); OR. REV. STAT. § 260.550(1) (2021); 17 R.I. GEN. LAWS § 19-46 (2021); S.D. CODIFIED LAWS § 12-13-16 (2021); S.D. CODIFIED LAWS § 12-26-12 (2021); TENN. CODE ANN. § 2-19-116 (2021); TENN. CODE ANN. § 2-19-133(a) (2021); TENN. CODE ANN. § 2-19-142 (2021); TEX. ELEC. CODE ANN. § 255.004 (West 2021); TEX. ELEC. CODE ANN. § 255.006(a)–(b) (West 2021); UTAH CODE ANN. § 20A-11-1103 (2021); VA. CODE ANN. § 24.2-1005.1 (2021); W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021).

⁴⁸ LA. STAT. ANN. § 18:1463(C) (2021); NEV. REV. STAT. § 306.210(a) (2021).

⁴⁹ ALA. CODE § 17-17-38 (2021); ARIZ. REV. STAT. ANN. § 19-119(A) (2021); CAL. ELEC. CODE § 20007 (West 2021); CONN. GEN. STAT. § 9-135(b) (2021); CONN. GEN. STAT. § 9-364a (2021); D.C. CODE § 1-1001.14 (2021); FLA. STAT. § 104.061(1) (2021); FLA. STAT. § 104.2715 (2021); FLA. STAT. § 106.143 (2021); HAW. REV. STAT. § 11-391(a)(3) (2021); HAW. REV. STAT. § 19-3(4) (2021); LA. STAT. ANN. § 18:1463(C)(1) (2021); MASS. GEN. LAWS ch. 56, § 41A (2021); MICH. COMP. LAWS § 168.944 (2021); MINN. STAT. § 211B.03 (2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-15-875 (2021); MISS. CODE ANN. § 23-17-59 (2021); MONT. CODE ANN. § 13-35-218 (2021); NEV. REV. STAT. § 306.210 (2021); N.H. REV. STAT. ANN. § 667:7-a (2021); N.J. STAT. ANN. § 19:34-29 (West 2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (2022); N.C. GEN. STAT. § 163-274(8); OHIO REV. CODE ANN. § 3517.22 (West 2021); 25 PA. CONS. STAT. § 3547 (2021); S.C. CODE ANN. § 7-25-70 (2021); TEX. ELEC. CODE ANN. § 255.004(a) (West 2021); TEX. ELEC. CODE ANN. § 255.005; TEX. ELEC. CODE ANN. § 501.029(a) (West 2021); UTAH CODE ANN. § 20A-3-502 (West 2021); UTAH CODE ANN. § 20A-11-901 (West 2021); WASH. REV. CODE § 29A.84.220 (2021); WASH. REV. CODE § 29A.84.250 (2021); W. VA. CODE § 3-8-11(a) (2021).

Statutes that create civil or criminal liability without fault are likely to raise significant First Amendment issues. In the context of defamation, the Supreme Court has held that states cannot impose liability for defamatory speech on matters of public concern without some evidence of fault on the part of the speaker,⁵⁰ and courts have applied similar fault requirements to other types of speech-based liability as well, including fraud and intimidation.⁵¹

B. Laws that Prohibit Intimidation or Fraud Associated with an Election

While the preceding laws directly target the content of election-related speech, a second set of state laws indirectly regulate election speech through the prohibition of intimidation or fraud associated with an election. Many of these laws were passed to prevent physical acts of voter intimidation. However, at least one state attorney general has used a voter intimidation statute to prosecute political operatives for the distribution of false statements relating to an election, suggesting that these laws could potentially apply to election-related speech more generally.⁵²

Thirty-eight states and the District of Columbia have laws that prohibit intimidation and/or fraud in elections (note that most states have more than one type of statute):

- *Twenty-nine states* have statutes that impose liability if the speaker made intimidating, threatening, or coercive statements with the purpose or intent of influencing or interfering with an election.⁵³

⁵⁰ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). We discuss the degree of fault required for liability under the First Amendment in Part II.B.

⁵¹ See *infra* notes 153–170 and accompanying text.

⁵² See Kornfield, *supra* note 15.

⁵³ ALA. CODE § 17-17-33 (2021); ARIZ. REV. STAT. ANN. § 16-1006 (2021); ARIZ. REV. STAT. ANN. § 16-1013 (2021); ARK. CODE ANN. § 7-1-104(5)-(6) (2021); CAL. ELEC. CODE § 18540 (West 2021); DEL. CODE ANN. tit. 15, § 3166 (a)(9)(2021); FLA. STAT. § 104.0515 (2021); FLA. STAT. § 104.061 (2021); GA. CODE ANN. § 21-2-567 (2021); HAW. REV. STAT. § 19-3(4) (2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); 10 ILL. COMP. STAT. § 5/29-18 (2021); 10 ILL. COMP. STAT. § 5/29-20 (2021); IND. CODE § 3-14-3-21.5 (2021); KAN. STAT. ANN. § 25-2415 (2021); KY. REV. STAT. ANN. § 119.155 (West 2021); LA. STAT. ANN. § 18:1461.4 (2021); MD. CODE ANN., ELEC. LAW § 16-101(a)(6) (West 2021); MD. CODE ANN., ELEC. LAW § 16-201(a)(5)–(6) (West 2021); MICH. COMP. LAWS § 168.932 (2021); MONT. CODE ANN. § 13-35-218 (2021); N.H. REV. STAT. ANN. § 659:40 (2021); N.J. STAT. ANN. § 19:34-1.1 (West

- *Seventeen states and the District of Columbia* have statutes that impose strict liability if the speaker made intimidating, threatening, or coercive statements that influence or interfere with an election, regardless of whether the individual actually intended to influence or interfere with an election.⁵⁴
- *Seven states* have statutes that prohibit statements that deceive, defraud, or bribe a person to vote, refrain from voting, sign a petition, register to vote, or choose who or what to vote for that the speaker knows to be false or corrupt.⁵⁵
- *Fifteen states and the District of Columbia* have statutes that impose liability for statements that deceive, defraud, or bribe a person to vote, refrain from voting, sign a petition, register to vote, or choose who or what to vote without any explicit mention that the speaker must know or have reason to know of the statement's falsity or corrupt nature.⁵⁶

As these descriptions show, the fraud and intimidation statutes conceivably cover a broad range of conduct and speech related to elections. And, like the statutes that target specific

2021); N.J. STAT. ANN. § 19:34-28 (West 2021); N.M. STAT. ANN. § 1-20-14 (2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); N.Y. ELEC. LAW § 17-154 (McKinney 2021); N.C. GEN. STAT. § 163-275(17) (2021); 25 PA. CONS. STAT. § 3547 (2021); 17 R.I. GEN. LAWS § 23-5 (2021); S.D. CODIFIED LAWS § 12-26-12 (2021); TENN. CODE ANN. § 2-19-115(3) (2021); WASH. REV. CODE § 29A.84.220(5) (2021); WASH. REV. CODE § 29A.84.250(4) (2021); WASH. REV. CODE § 29A.84.630 (2021); W. VA. CODE § 3-8-11 (2021).

⁵⁴ ALA. CODE § 11-46-68(l) (2021); CAL. ELEC. CODE § 18502 (West 2021); COLO. REV. STAT. § 1-13-713 (2021); CONN. GEN. STAT. § 9-364a (2021); DEL. CODE ANN. tit. 15, § 3166 (2021); D.C. CODE § 1-1001.14(b)(3)(C) (2021); FLA. STAT. § 104.061(1) (2021); IOWA CODE § 39A.2(c) (2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-59 (2021); MONT. CODE ANN. § 13-35-218 (2021); NEB. REV. STAT. § 32-1503 (2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); OKLA. STAT. tit. 26, § 16-113 (2021); S.C. CODE ANN. § 7-25-70 (2021); UTAH CODE ANN. § 20A-3-502 (West 2021); WASH. REV. CODE § 29A.84.220(5) (2021); WASH. REV. CODE § 29A.84.250(4) (2021); WASH. REV. CODE § 29A.84.630 (2021).

⁵⁵ ARIZ. REV. STAT. ANN. § 16-1006(3) (2021); CAL. ELEC. CODE § 18543 (West 2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); IOWA CODE § 39A.2(b)(5) (2021); LA. STAT. ANN. § 18:1461.4 (2021); MD. CODE ANN., ELEC. LAW § 16-201 (West 2021); S.D. CODIFIED LAWS § 12-26-12 (2021).

⁵⁶ ALA. CODE § 17-17-38 (2021); CONN. GEN. STAT. § 9-364a (2021); D.C. CODE § 1-1001.14 (2021); FLA. STAT. § 104.061(1) (2021); HAW. REV. STAT. § 19-3(4) (2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-59 (2021); MONT. CODE ANN. § 13-35-218 (2021); NEV. REV. STAT. § 306.210 (2021); N.J. STAT. ANN. § 19:34-29 (West 2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); 25 PA. CONS. STAT. § 3547 (2021); S.C. CODE ANN. § 7-25-70 (2021); UTAH CODE ANN. § 20A-3-502 (West 2021); WASH. REV. CODE § 29A.84.220 (2021); WASH. REV. CODE § 29A.84.250 (2021); W. VA. CODE § 3-8-11(a) (2021).

categories of false speech, they vary in the level of knowledge (and intent) required for a finding of liability. As a result, enforcement of these statutes is also likely to raise significant First Amendment issues.

II. FIRST AMENDMENT FRAMEWORK FOR ANALYZING RESTRICTIONS ON ELECTION-RELATED SPEECH

The Supreme Court has not directly addressed whether election-related lies (or other forms of election misinformation) can be regulated by the government without violating the First Amendment.⁵⁷ As a result, while the Court's First Amendment decisions provide a general framework for evaluating the constitutionality of state election-speech statutes, they leave a number of difficult issues unresolved, including whether election-related speech enjoys greater or lesser constitutional protection than speech in other contexts and whether the government has a sufficiently compelling—or even important—interest in curtailing or eliminating various unsavory election-speech practices. Our goal here is not to fully resolve these uncertainties, but merely to highlight the constitutional challenges current state statutes are likely to face and to potentially guide future legislative efforts in this area.

A. Determining the Appropriate Level of Judicial Scrutiny

As with so much of First Amendment law, the level of judicial scrutiny to be applied usually determines the outcome of the case, which is why so much of the criticism of the Supreme Court's election-speech jurisprudence is focused on the Court's conflicting signals regarding the appropriate level of scrutiny to be applied to statutes that restrict speech in the context of political campaigns and elections.⁵⁸ As Bill Marshall explains:

This inconsistency, while certainly not laudable, is at least understandable. The concerns on both sides of the campaign speech restriction debate are particularly powerful. On one side, unchecked excesses in campaign speech can threaten the

⁵⁷ In *Susan B. Anthony List v. Driehaus*, which we mentioned in the introduction, the Court focused on justiciability issues (mootness and standing) and did not reach the merits of the petitioners' claim that the restrictions violated their First Amendment rights. 573 U.S. 149, 157–68 (2014).

⁵⁸ Compare cases cited *supra* notes 7 with cases cited *supra* note 8.

legitimacy and credibility of the political system. On the other, regulating campaign speech is problematic because of the serious dangers and risks in allowing the government and the courts to interfere with the rough and tumble of political campaigns. Courts and commentators are therefore to be excused if they cannot find easily discernible solutions to this conflict.⁵⁹

State laws regulating election misinformation unquestionably do so based on the content of the speech. Under long-established First Amendment doctrine, content-based restrictions on speech are subject to strict scrutiny unless the speech falls within one of the few narrowly defined categories of speech that are generally considered to be outside the First Amendment's protection such as defamation, fraud, and true threats.⁶⁰ Prior to 2012, when the Supreme Court decided *United States v. Alvarez*,⁶¹ state legislatures might be forgiven for thinking that lies (at least intentional ones) also fell outside the First Amendment's protection, as some commentators and even the Supreme Court had suggested.⁶² Justice Kennedy's plurality opinion in *Alvarez*, however, made clear that government attempts to regulate false statements, even intentional ones, are not exempt from First Amendment scrutiny.⁶³

The case involved Xavier Alvarez, who while attending his first public meeting as a new board member of the Three Valley Water District Board in Claremont, California, falsely

⁵⁹ Marshall, *False Campaign Speech*, *supra* note 6, at 286.

⁶⁰ *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (citations omitted)); *Virginia v. Black*, 538 U.S. 343, 358–59 (2003) (describing categories of unprotected speech).

⁶¹ 567 U.S. 709 (2012).

⁶² *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."). *See also* *United States v. Strandlof*, 667 F.3d 1146, 1160 (10th Cir. 2012) (upholding the Stolen Valor Act and noting that "most circuit courts have . . . held that false statements of fact receive limited First Amendment protection"), *vacated*, 684 F.3d 962 (10th Cir. 2012).

⁶³ *Alvarez*, 567 U.S. at 718–19 (plurality opinion).

stated that he had been awarded the Congressional Medal of Honor.⁶⁴ In lying about receiving the medal, Alvarez violated the Stolen Valor Act, a federal statute that criminalized falsely claiming that one had been awarded a military honor.⁶⁵ In a six to three decision, the Court held that the law was incompatible with the First Amendment and set aside Alvarez's conviction.⁶⁶

The six justices who struck down the Act, however, did not all agree on what level of judicial scrutiny was appropriate for such a law. In a plurality opinion authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, Kennedy wrote that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar."⁶⁷ Kennedy noted that "[a]bsent from these few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."⁶⁸ Rejecting the government's argument that "false statements have no value and hence no First Amendment protection," Kennedy stated that "falsity alone may not suffice to bring the speech outside the First Amendment" and even knowing falsehoods are not among those few categories of expression that may be regulated because of their content consistent with the First Amendment.⁶⁹

Finding that the Stolen Valor Act "conflicts with free speech principles," Kennedy concluded that the law must satisfy "exacting scrutiny."⁷⁰ In assessing whether the Act met this standard, Kennedy conceded that the government had a "compelling interest" in protecting the "integrity of the military honors system in general, and the Congressional Medal of Honor

⁶⁴ *Id.* at 713–14. Apparently, "[l]ying was his habit," as the Court noted that Alvarez also "lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico." *Id.* at 713.

⁶⁵ 18 U.S.C. § 704.

⁶⁶ *Alvarez*, 567 U.S. at 715.

⁶⁷ *Id.* at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 469 (2010)). Kennedy's list included incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent." *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 718–19.

⁷⁰ *Id.* at 724. Kennedy quotes the Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994), for the phrase "most exacting scrutiny." *Id.* Based on Kennedy's application of the standard, it does not appear that "exacting scrutiny" is functionally distinct from strict scrutiny.

in particular.”⁷¹ He concluded, however, that the government had not met its “heavy burden” because the criminal penalty imposed by the Act was not “actually necessary” to achieve these interests since the government “had not shown, and cannot show, why counterspeech would not suffice to achieve its interest.”⁷² Kennedy also remarked that because the government could create a public database of Congressional Medal of Honor winners, the Act was not the “least restrictive means among available, effective alternatives” for protecting the integrity of the military awards system.⁷³

Concurring in the result, Justice Breyer, joined by Justice Kagan, agreed that the Stolen Valor Act violated the First Amendment.⁷⁴ Like the plurality, Breyer’s opinion rejected the notion that false statements receive no First Amendment protection. Breyer warned that “[l]aws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like” present a grave danger of suppressing truthful speech and should be subject to strict scrutiny.⁷⁵ “[T]his case did not involve such a law,” Breyer noted, but rather prohibits “false statements about easily verifiable facts that do not concern such subject matter.”⁷⁶ Reasoning that false factual statements about easily verifiable facts “are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas” and that “the government often has good reasons to prohibit such false speech,” Breyer concluded that the Act should be subject to “intermediate scrutiny,” rather than the “exacting scrutiny” the plurality applied.⁷⁷

Even under intermediate scrutiny, however, Breyer found the Stolen Valor Act deficient. Reviewing the statutes the government proffered as evidence that the First Amendment permitted criminal penalties for lying, Breyer wrote that “few statutes, if any, simply prohibit without limitation the telling of a lie.”⁷⁸ Instead, he observed that “in virtually all these instances limitations of context, requirements of proof of injury, and the

⁷¹ *Id.* at 724–25.

⁷² *Id.* at 726.

⁷³ *Id.* at 729 (quoting *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 666 (2004)).

⁷⁴ *Id.* at 730 (Breyer, J., concurring).

⁷⁵ *Id.* at 731–32.

⁷⁶ *Id.* at 732.

⁷⁷ *Id.* at 732.

⁷⁸ *Id.* at 736.

like, narrow the statute to a subset of lies where specific harm is more likely to occur.”⁷⁹ Breyer then went on to conclude that because the Stolen Valor Act “lacks any such limiting features,” it was not sufficiently “narrowly tailored” to pass First Amendment scrutiny.⁸⁰ He suggested, however, that a more “finely tailored” statute might be constitutional if it “focus[ed] its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.”⁸¹

In discussing how this narrowing might be accomplished, Breyer offered some thoughts, albeit in *dicta*, about whether the government might be able to regulate false speech in the election context:

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker), but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie.⁸²

Justice Alito, joined by Justices Scalia and Thomas, dissented. Alito started by listing the many instances when the Court had suggested, and sometimes even stated outright, that false statements of fact do not merit First Amendment protection.⁸³ Nevertheless, like the plurality and concurring justices, Alito was not willing to dump all lies into the category of unprotected speech. Alito conceded that “[w]hile we have

⁷⁹ *Id.* at 736.

⁸⁰ *Id.* at 737.

⁸¹ *Id.* at 738.

⁸² *Id.* at 738.

⁸³ *Id.* at 746–49 (Alito, J., dissenting). Some of these cases are cited *supra* in note 62.

repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to ‘exten[d] a measure of strategic protection’ to these statements in order to ensure sufficient ‘breathing space’ for protected speech.”⁸⁴ Alito concluded, however, that the risk that valuable speech would be chilled by the Stolen Valor Act was not a concern because “[i]n stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters . . . the speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect.”⁸⁵ Although it is not clear what standard of review Alito ultimately applied to the Act,⁸⁶ he writes in his penultimate sentence: “The Stolen Valor Act is a narrow law enacted to address an important problem, and it presents no threat to freedom of expression.”⁸⁷

Alvarez does not directly answer the question of what standard of review applies to state statutes that regulate election misinformation. Although the case tells us something about the scope of the First Amendment’s protections for lies generally (they are, indeed, covered), the references to speech in the election context are limited and inconclusive. As all three opinions in *Alvarez* acknowledge, the Supreme Court has intimated in the past that false statements of fact do not merit First Amendment protection for their own sake.⁸⁸ In *Brown v. Hartlage*, which both the *Alvarez* plurality and dissent cite, the Court seemed to evince little doubt on this question, remarking: “Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.”⁸⁹ Interestingly, *Brown* involved a challenge by a candidate for

⁸⁴ *Id.* at 750 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

⁸⁵ *Id.* at 752.

⁸⁶ The closest he seems to come in stating a standard is this language: “The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment’s scope. I now turn to that question.” *Id.* at 750.

⁸⁷ *Id.* at 755.

⁸⁸ See *id.* at 718–19 (plurality opinion); *id.* at 730 (Breyer, J., concurring); *id.* at 750–51 (Alito, J., dissenting).

⁸⁹ 456 U.S. 45, 60 (1982) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). The Court in *Brown*, however, went on to remark that “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 60–61 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–272 (1964)).

office of county commissioner who alleged that his opponent had violated the Kentucky Corrupt Practices Act by making improper campaign promises.⁹⁰ Although the Court ultimately applied strict scrutiny in *Brown*, like *Alvarez* the case provided “mixed signals” about whether strict scrutiny should be applied to content-based laws in all speech contexts.⁹¹ As James Weinstein writes in explaining the relevance of *Brown* to the question of the First Amendment’s application to political speech:

[D]espite the “strict scrutiny” verbiage [in *Brown*], the opinion acknowledged that some forms of electoral speech, including “some kinds of promises made by a candidate to voters, and some kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty.” While the Court found that the Kentucky law provided inadequate “breathing space” for factual misstatements made in good faith in a political campaign, it emphasized that there had been no showing that *Brown* “made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not.” This qualification seems to leave open the possibility that falsehoods made with such “actual malice” might be sanctionable.⁹²

Weinstein goes on to note that the fractured opinions in *Alvarez* “reveal[] that after thirty years and a complete change of membership since *Brown v. Hartlage*, the Court is still unsure about the constitutionality of laws prohibiting lies in political campaigns.”⁹³ Indeed, although Breyer expressly reserved judgment on the question of whether a more narrowly tailored statute targeting false speech in “political contexts” would be constitutional, he did distinguish between laws targeting false statements about “philosophy, religion, history, the social sciences, the arts, and the like” to which he would apply “strict

⁹⁰ *Id.* at 47.

⁹¹ Weinstein, *supra* note 2, at 173 (“Reflecting what may well have been the Court’s uncertainty on the subject, *Brown* sent mixed signals about whether it would be constitutional to prohibit knowing falsehoods by candidates for elective office.”).

⁹² *Id.* at 174–75 (citations omitted).

⁹³ *Id.* at 179.

scrutiny” and laws targeting false statements in “political speech” to which he would apply “intermediate scrutiny.”⁹⁴

For constitutional scholars, much of the recent debate over government efforts to restrict false campaign speech has focused on whether there is (or should be) a sphere of election activity where the standard First Amendment approach of applying strict scrutiny to content-based regulations does not apply.⁹⁵ Frederick Schauer and Richard Pildes call this idea “electoral exceptionalism,” which posits that “elections should be constitutionally understood as (relatively) bounded domains of communicative activity” where “it would be possible to prescribe or apply First Amendment principles to electoral processes that do not necessarily apply through the full reach of the First Amendment.”⁹⁶ According to Schauer and Pildes, “[i]f electoral exceptionalism prevails, courts evaluating restrictions on speech that is part of the process of nominating and electing candidates would employ a different standard from what we might otherwise characterize as the normal, or baseline, degree of First Amendment scrutiny.”⁹⁷

James Weinstein has been particularly forceful in arguing that the government should have more authority to regulate political speech to promote the fairness and efficiency of elections than it has to regulate “public discourse” generally.⁹⁸ According to Weinstein, “[w]hile government regulation of the content of speech in the domain of public discourse must be strictly limited for this domain to accomplish its core democratic purpose, in other settings, pervasive government management of

⁹⁴ *United States v. Alvarez*, 567 U.S. 709, 731, 736 (2012) (Breyer, J., concurring). James Weinstein concludes that “like Breyer’s concurring opinion, Alito’s dissent leaves open the possibility that government may have somewhat greater authority to prohibit at least some form of campaign lies than it does to punish knowingly false statements about ‘history, science, and similar matters.’” Weinstein, *supra* note 2, at 180.

⁹⁵ See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY AND MANAGEMENT* (1995); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999); Marshall, *False Campaign Speech*, *supra* note 6; Schauer & Pildes, *supra* note 8; Weinstein, *supra* note 2.

⁹⁶ Schauer & Pildes, *supra* note 8, at 1805. The idea that election speech should be treated differently from other categories of speech is part of a broader questioning by scholars of whether there exists a broader “election law exceptionalism,” where constitutional doctrines are adjusted to reflect the unique nature of democratic rights and the political process. See Gerken, *supra* note 8, at 739; Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1096 (1999).

⁹⁷ Schauer & Pildes, *supra* note 8, at 1805.

⁹⁸ Weinstein, *supra* note 2, at 214.

various activities--including speech--is essential if government is to accomplish its various functions.”⁹⁹ For Weinstein, elections are just such a government-managed domain where it “set[s] the time for an election, designat[es] polling places, design[s] the ballot, provid[es] voting apparatus, count[s] the ballots, and announc[es] the results.”¹⁰⁰

As a descriptive matter, Weinstein is surely correct that elections are highly structured domains. However, the idea that because the government is already so deeply involved in managing elections that it should therefore be given leeway to engage in content-based regulation of speech in the election domain is more contestable.¹⁰¹ Nevertheless, there is some evidence that just such a carve out already exists in the Court’s decisions upholding regulations in the election sphere that would almost certainly be impermissible if applied in the general domain of public discourse, including cases that permitted the government to set limits on who can appear on a ballot;¹⁰² how voters can express themselves at the ballot box;¹⁰³ and what types of electioneering activities can take place near polling places.¹⁰⁴

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Ross, *supra* note 2, at 406 (“I have argued that the First Amendment poses a virtually insurmountable obstacle to government regulation of deceptive campaign speech. Above all, freedom of expression means that the state cannot become the arbiter of truth, even where misleading statements are nothing more than straight-out lies.”); Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1090 (2012) (“[U]nder our constitutional free speech regime, government has no business in deciding what speech can be censored as false. The accuracy of speech within democratic self-government should be left to the electorate without official intermeddling.”). Geoffrey Stone powerfully captures the core of the argument against granting the government greater authority to prohibit the dissemination of false campaign speech:

The point is not that government does not have a legitimate interest in protecting the quality of public debate. Surely it does. It is, rather, that there is great danger in authorizing government to involve itself in the process in this manner. This danger stems from the possible effect of partisanship affecting the process at every level. The very power to make such determinations invites abuse that could be profoundly destructive to public debate.

Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 140 (1993).

¹⁰² See *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding law that excluded the names of non-party candidates from the ballot).

¹⁰³ See *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding a prohibition on write-in voting).

¹⁰⁴ See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (allowing a ban on solicitation of votes and distribution of campaign materials within 100 feet of a polling place).

Despite the Supreme Court's ambivalence about whether all content-based restrictions on speech must pass "the most exacting scrutiny,"¹⁰⁵ the vast majority of lower courts have applied strict scrutiny to government efforts to restrict election-related speech.¹⁰⁶ The Supreme Judicial Court of Massachusetts' analysis in *Commonwealth v. Lucas*, discussed in the introduction, is representative of the ways courts have batted down arguments by the states that their statutes targeting election-related falsehoods should not be subject to strict scrutiny.¹⁰⁷

B. One-Size Does Not Fit All

For a content-based regulation of speech to pass strict scrutiny, the government must demonstrate that the law is "narrowly tailored" to serve a "compelling state interest."¹⁰⁸ While it is widely assumed that the application of strict scrutiny invariably results in the restriction on speech being declared invalid,¹⁰⁹ there are situations—including in the election speech context—where courts have upheld content-based restrictions on speech.¹¹⁰ Nevertheless, even these cases make clear that only narrowly tailored laws that address concrete harms are likely to pass constitutional muster under either strict or intermediate scrutiny.

On the question of whether the government has a sufficient interest in regulating election misinformation, it should

¹⁰⁵ *United States v. Alvarez*, 567 U.S. 709, 724 (2012) (plurality opinion).

¹⁰⁶ *See, e.g.*, 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014); *Lair v. Murry*, 871 F. Supp. 2d 1058 (D. Mont. 2012); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015); *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash. 2d 618, 624 (1998). Only a few cases have applied a lesser level of scrutiny. *See United States v. Tan Duc Nguyen*, 673 F.3d 1259, 1266 (9th Cir. 2012) (refusing to apply strict scrutiny to a voter intimidation statute because the speech in question represents a true threat); *Doe v. Mortham*, 708 So. 2d 929, 931 (Fla. 1998) (applying a "less exacting" standard of scrutiny because the statute was non-censorial and did not target a particular political viewpoint).

¹⁰⁷ 34 N.E.3d 1242, 1248 (Mass. 2015) (rejecting the state's assertion that the regulated speech fell within the fraud and defamation exceptions to the First Amendment's protection).

¹⁰⁸ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

¹⁰⁹ *See, e.g.*, *Williams-Yulee v. Florida Bar*, 575 U.S. 473, 444 (2015) ("[I]t is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest."); *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (noting that strict scrutiny results in "near automatic condemnation" of the law under review); *McConnell v. FEC*, 540 U.S. 93, 314 (2003) (Kennedy, J., concurring) ("Under strict scrutiny [a law], for the most part, cannot survive.").

¹¹⁰ *See supra* notes 102–104 and accompanying text.

be noted that the Supreme Court has held that the government has a “compelling interest” in preserving fair and honest elections and in preventing foreign influence in elections.¹¹¹ A number of lower courts have also concluded that the government has a compelling interest in regulating election falsehoods in order to preserve the “integrity of the electoral process”;¹¹² to protect “voters from confusion and undue influence”;¹¹³ and to “ensur[e] that an individual’s right to vote is not undermined by fraud in the election process.”¹¹⁴

Demonstrating a compelling interest, however, is just the first hurdle the government must overcome. A state must also show that its restrictions on speech are “actually necessary” to achieve the state’s interest,¹¹⁵ and that the regulation is narrowly crafted.¹¹⁶ In other words, the state must walk a fine line in establishing “a direct causal link between the restriction imposed and the injury to be prevented,”¹¹⁷ while at the same time ensuring that its approach is neither underinclusive nor overbroad. In making these evaluations, courts will examine, among other things, the scope of speech covered by the statute; the degree of fault, if any, required before liability attaches; and the procedural safeguards the state provides.

1. Scope of Speech Covered

States are most likely to survive First Amendment scrutiny when they act to restrict false speech that falls within, or is very closely related to, one of the categories of speech that are already recognized to be outside First Amendment protection.¹¹⁸

¹¹¹ See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231–32 (1989); *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

¹¹² *281 Care Comm. v. Arneson*, 766 F.3d 774, 785–86 (8th Cir. 2014) (noting that the state “indisputably has a compelling interest in preserving the integrity of its election process”); see also *Lucas*, 34 N.E.3d at 1252 (“[A]s a general matter,” the State has a compelling interest in “free and fair elections.”).

¹¹³ *Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 699–700 (Wash. 1998) (Madsen, J., concurring).

¹¹⁴ *Seymour v. Elections Enft Comm’n*, 762 A.2d 880, 885 (Conn. 2000) (quoting *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992)); see also *Arciniega v. Feliciano*, 184 A.3d 1202, 1209 (2018) (“These procedures were imposed to prevent election fraud, a particular concern with regard to [the electoral process].”).

¹¹⁵ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

¹¹⁶ *United States v. Alvarez*, 567 U.S. 709, 710 (2012) (plurality opinion).

¹¹⁷ *Id.* at 710.

¹¹⁸ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”). This list includes incitement, obscenity, defamation, speech integral to criminal

The most fertile of these categories for our purposes are likely to be defamation, fraud, and true threats.

Defamation, which encompasses both libel and slander,¹¹⁹ is a dignitary tort directed at remedying harm to a plaintiff's reputation caused by false statements of fact.¹²⁰ As a product of state law, the elements of a defamation claim vary, but generally a plaintiff must prove that the defendant published a false and defamatory statement concerning the plaintiff to a third party; that the defendant acted negligently or with actual malice when publishing the statement; and that the statement is actionable, either because it caused special harm, *per quod*, or irrespective of special harm, *per se*.¹²¹ The *sin qua non* of a defamation claim is a false statement of fact that injures a plaintiff's reputation to such a degree that the harm justifies imposing liability for the speech. Statements of opinion are generally not actionable as defamation, regardless of their shock value or accuracy.¹²²

While a number of states have statutes that merely confirm that defamation law applies to political ads or campaign communications, other states extend liability to false statements regardless of whether the statement meets the requirements of defamation.¹²³ States in the latter category must be careful of attempting to stretch their statute's similarity to defamation law too far, as the Commonwealth of Massachusetts did in the *Lucas* case where it made what the court characterized as "the rather remarkable argument that the election context gives the government broader authority to restrict speech" that is false but not necessarily defamatory.¹²⁴

conduct, fighting words, child pornography, fraud, and true threats. See *Alvarez*, 567 U.S. at 717.

¹¹⁹ Libel covers defamatory statements that are written or communicated in such a way that they persist similar to the printed word; slander generally covers defamatory statements published orally or in a manner that is not likely to be preserved in a physical form or broadcast widely. See ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 10:6.1, xliii, §§ 2:4.1–2 (4th ed. 2010). The distinctions between the claims are not germane to the present analysis, so this Article uses the general label of defamation.

¹²⁰ See David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 277–78 (2010) [hereinafter Ardia, *Reputation in a Networked World*].

¹²¹ RESTATEMENT (SECOND) OF TORTS § 90 (AM. L. INST. 1975).

¹²² See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988).

¹²³ See *infra* notes 202–204 and accompanying text.

¹²⁴ *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015); see also *Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 698 (Wash. 1998)

In *Lucas*, the state argued that its statute, which punished false statements about ballot questions and false statements by a candidate about himself designed to enhance his own candidacy, was no different than the state's common law of defamation,¹²⁵ but the court saw those distinctions as *constitutionally meaningful*.¹²⁶ A false statement of fact that does not actually harm an individual's reputation is not defamatory; an essential function of defamation law is to protect reputation by "safeguard[ing] the dignity of citizens."¹²⁷ Indeed, defamation law has undergone more than half a century of constitutional modification since the Supreme Court held in *New York Times Co. v. Sullivan* that Alabama's libel statute violated the First Amendment.¹²⁸ In the decades that followed *Sullivan*, the Court has stated that the First Amendment requires, among other things, some level of fault on the part of the speaker and concrete harm.¹²⁹ State statutes that seek to work around the doctrines of defamation law which serve to make the law consistent with the First Amendment run a high risk of invalidation.

Another category of unprotected speech that the states may find some shelter in is fraud.¹³⁰ While there are a variety of statutory and common-law definitions for fraud,¹³¹ generally, fraud requires a false representation of a material fact made knowingly and with the intent to mislead the listener, and that

(rejecting the State's asserted interest in shielding the public from falsehoods during political campaigns as "patronizing and paternalistic").

¹²⁵ *Lucas*, 34 N.E.3d at 1250.

¹²⁶ *Id.* at 1249 (concluding that the state's "attempt to shoehorn § 42 into the exception for defamatory speech is . . . flawed").

¹²⁷ See Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 885 (2000); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (Stewart, J., concurring).

¹²⁸ 376 U.S. 254, 279–80 (1964).

¹²⁹ See, e.g., *id.* at 279–80 (holding that the First Amendment requires proof of "actual malice" before a state can impose defamation liability for a statement that libels a public official); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 349–50 (1974) (instructing that the First Amendment requires a plaintiff must prove at least that the defendant had been negligent with respect to the falsity of a defamatory statement and damages could not be presumed without proof of actual malice); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (holding that the burden is on the plaintiff to prove both falsity and fault before recovering damages for defamation).

¹³⁰ See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud.").

¹³¹ See, e.g., 15 U.S.C.A. § 78j(b) (granting the SEC authority to enact rules against "manipulative and deceptive practices" in securities trading); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (outlining the elements of "fraud (or deceit)" under Delaware common law).

the fraudulent speech or action succeeded in doing so.¹³² Fraudulent speech in the election context can create a particularly pernicious set of harms, including distortion of the electoral process; lowered quality of discourse; voter alienation and distrust; and deterrence of qualified candidates from seeking office.¹³³

Central to any finding of fraud is that the false representation is material;¹³⁴ in other words, that the information provided or omitted is likely to have “an effect on the likely or actual behavior of the recipient of the alleged misrepresentation.”¹³⁵ As the Supreme Court explained in *Universal Health Servs., Inc. v. United States*, the materiality requirement in federal fraud statutes “descends from ‘common-law antecedents’” and “[i]ndeed, ‘the common law could not have conceived of ‘fraud’ without proof of materiality.’”¹³⁶ This is not to say that there is universal agreement on what is required for a false or misleading statement to be material, especially in the context of political fraud, where “determin[ing] the likelihood that a political fraud will influence election outcomes is challenging because such inquiries are contextual and require reference to what sorts of information are relevant to the deliberative body.”¹³⁷

¹³² See *Madigan*, 538 U.S. at 620 (describing the requirements for fraud under Illinois law).

¹³³ See Marshall, *False Campaign Speech*, *supra* note 6, at 294–96.

¹³⁴ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579 (1996) (“[A]ctionable fraud requires a material misrepresentation or omission”) (citing RESTATEMENT (SECOND) OF TORTS § 538 (AM. L. INST. 1977)); *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (“[A] plaintiff must show that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.”).

¹³⁵ *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 193 (2016) (quoting 26 R. LORD, WILLISTON ON CONTRACTS § 69:12, at 549 (4th ed. 2003)). In tort law, for instance, a “matter is material” (1) “[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction”; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter “in determining his choice of action,” even though a reasonable person would not. RESTATEMENT (SECOND) OF TORTS § 538, at 80. Materiality in contract law is substantially similar. See RESTATEMENT (SECOND) OF CONTRACTS § 162(2), and Comment c, at 439, 441 (AM. L. INST. 1979) (“[A] misrepresentation is material” only if it would “likely . . . induce a reasonable person to manifest his assent,” or the defendant “knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent” to the transaction).

¹³⁶ *Universal Health Servs.*, 579 U.S. at 193 (first quoting *Kungys v. United States*, 485 U.S. 759, 769 (1988); and then quoting *Neder v. United States*, 527 U.S. 1, 22 (1999)).

¹³⁷ Martin H. Redish & Julio Pereyra, *Resolving the First Amendment’s Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 477 (2020); see also *id.* (“Although materiality as an effective constraint has become a growing

Here again, the states must be careful in pushing the analogy with fraud too far in seeking to justify statutes that regulate broad categories of false election-related speech. The fraud exception to the First Amendment applies only to behavior satisfying the elements of civil or criminal deceit, or one of the other long-established categories of fraudulent speech such as securities fraud or false advertising.¹³⁸ Martin Redish and Julio Pereyra, who argue that the government should be permitted under the First Amendment to punish some types of political fraud, warn that any exception for political fraud must be narrow:

In order to constitute political fraud for purposes of an exception to First Amendment protection, a statement must be more than simply incomplete, misleading, or the expression of only one side of an argument. To exempt such statements from First Amendment protection would undermine the essential nature of political controversy, central to a healthy democratic dialogue.¹³⁹

With regard to the government's interest in preventing fraud on the electorate, the Supreme Court has stopped short of calling the interest "compelling," but has noted that it "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large."¹⁴⁰ Lower courts have also been skeptical of the argument that false campaign speech is a form of election fraud.¹⁴¹ Echoing Justice Louis Brandeis' admonition in *Whitney v. California* that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced

consensus in regulating political fraud, significant uncertainty remains over what it means for a political fraud to be material.").

¹³⁸ Eugene Volokh suggests that because lies by candidates could be characterized as fraud aimed at "seeking a paying job," such speech is a species of financial fraud, which is outside First Amendment protection. Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, VOLOKH CONSPIRACY (June 28, 2012), <http://volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/>.

¹³⁹ Redish & Pereyra, *supra* note 137, at 472.

¹⁴⁰ McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 349 (1995).

¹⁴¹ See, e.g., *ACLU v. Heller*, 378 F.3d 979, 996–97 (9th Cir. 2004) (finding Nevada law proscribing anonymous campaign speech not narrowly tailored to further state's interest in fraud prevention); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015).

silence,¹⁴² many courts have been especially loath to allow the states to punish false election speech when they see counterspeech as an effective remedy.¹⁴³

A third category of unprotected speech that some state election statutes might fall under, particularly statutes that prohibit voter intimidation, is true threats.¹⁴⁴ “True threats” encompass situations “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁴⁵ As the Court noted in *Virginia v. Black*, “[t]he speaker need not actually intend to carry out the threat,” but instead the “prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”¹⁴⁶

The challenge of determining whether election-related speech amounts to a true threat can be a difficult one, both in terms of assessing whether the words in question are sufficiently threatening but also whether the speaker intend to convey a threat.¹⁴⁷ Explicit threats of violence aimed at stopping individuals from voting would certainly qualify, but intimidation can occur through less direct means, including following voters to, from, or within the polling place; spreading false information about voter fraud, voting requirements, or related criminal penalties; aggressively approaching voters’ vehicles or writing

¹⁴² 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁴³ See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (“In a political campaign, a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. The preferred First Amendment remedy of ‘more speech, not enforced silence,’ thus has special force.”) (quoting *Whitney*, 274 U.S. at 377); *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) (“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.”); *281 Care Comm. v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014) (“[E]specially as to political speech, counterspeech is the tried and true buffer and elixir.”); *Susan B. Anthony List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 778 (S.D. Ohio 2014), *aff’d*, 814 F.3d 466 (6th Cir. 2016); *Lucas*, 34 N.E.3d at 1253 (“*Alvarez* teaches that the criminalization of such falsehoods is unnecessary because a remedy already exists: ‘the simple truth.’”).

¹⁴⁴ See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“[T]he First Amendment also permits a State to ban a ‘true threat.’”) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (“[T]hreats of violence are outside the First Amendment”).

¹⁴⁵ *Black*, 538 U.S. at 359.

¹⁴⁶ *Id.* at 360 (quoting *R.A.V.*, 505 U.S. at 388).

¹⁴⁷ The question of what exactly must be intended for speech to qualify as a true threat has not been resolved by the Supreme Court. See *infra* notes 166–170 and accompanying text.

down voters' license plate numbers; and aggressively questioning voters about their qualifications to vote.¹⁴⁸ The Supreme Court has never stated whether threats involving something other than violence fall within the true threats doctrine. As Daniel Tokaji writes: "There is a strong argument that they should, given that non-violent threats may discourage eligible citizens from voting as much as threats of violence. However, the Court's articulated definition of true threats in *Black* refers exclusively to violence, seeming to exclude other threatened harms."¹⁴⁹

As a final note on state efforts to characterize their statutory provisions as falling under one of the established categories of unprotected speech, the Supreme Court's warning in *Bose Corp. v. Consumers Union* is worth highlighting:

In each of these areas [of speech outside First Amendment protection], the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow

¹⁴⁸ These are all examples of potential acts of voter intimidation cited by the Institute for Constitutional Advocacy at Georgetown Law, *Voter Intimidation Fact Sheet*, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/Voter-Intimidation-Fact-Sheet.pdf> (last visited Apr. 20, 2022). See also Nicquel Terry Ellis, *Guns, Lies & Ballots Set on Fire: This Is Voter Suppression in 2020*, USA TODAY (Oct. 29, 2020), <https://www.usatoday.com/story/news/nation/2020/10/29/2020-election-voter-suppression-looks-like-guns-lies-and-fires/6044702002/> (compiling "some of the most striking examples of voter suppression" during the 2020 election, including: people dressed as armed security guards at a polling location; robocalls falsely stating that residents could face "debt collection and forced vaccination" if they chose to vote by mail; and ballot boxes set on fire in Los Angeles and Boston); Brentin Mock, *How Voter Intimidation Could Get Uglier*, BLOOMBERG: CITYLAB (Oct. 7, 2020, 2:15 PM), <https://www.bloomberg.com/news/articles/2020-10-07/how-voter-intimidation-could-become-violent-in-2020> (noting the Trump Administration's threats to "commission poll watcher armies" and the potential intimidating effects of such statements, particularly on Black and Latino voters).

¹⁴⁹ Daniel P. Tokaji, *True Threats: Voter Intimidation and the Constitution*, 40 HARBINGER 101, 107 (2015); cf. *Watts*, 394 U.S. at 708 (stating that "political hyperbole" is not a true threat).

limits in an effort to ensure that protected expression will not be inhibited.¹⁵⁰

2. Fault Required

A second area of focus when assessing the constitutionality of statutes targeting election misinformation relates to the degree of fault required before sanctions can be imposed. As we noted in Part I, a substantial number of state statutes impose civil or criminal liability for election-related speech regardless of whether the speaker knew the information was false or acted negligently in distributing the information.¹⁵¹

Given the need to provide “breathing space” for election-related speech, it is likely that statutes that impose strict liability for election misinformation will run afoul of the First Amendment. In the context of defamation, for example, the Supreme Court has stated that states cannot impose liability for defamatory speech on matters of public concern without some evidence of fault on the part of the speaker, either in the form of actual malice (*i.e.*, the speaker had knowledge of falsity at the time of publication or acted with reckless disregard as to the truth) or negligence (*i.e.*, the speaker failed to act reasonably and should have known or discovered that the information was false).¹⁵² The Court has applied similar fault requirements to other types of speech-based torts as well, including the disclosure of private facts, false light, and infliction of emotional distress torts.¹⁵³

The need for fault in cases that involve one of the categories of unprotected speech might not seem obvious at first

¹⁵⁰ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504–05 (1984) (citations omitted).

¹⁵¹ *See supra* notes 47–49 and accompanying text.

¹⁵² *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974) (requiring that private figures in matters of public concern must prove at least negligence on the part of the defendant); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring that public officials suing for libel prove that the defendant acted with actual malice). It remains an open question, however, whether the First Amendment requires that private figures in matters of private concern must prove at least negligence on the part of the defendant. *See* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 84 (2013) [hereinafter Ardia, *Freedom of Speech*].

¹⁵³ *See* *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (holding that the First Amendment requires knowing or reckless falsity for false light claim); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing that the false statement of fact was made with “actual malice”).

blush. The Supreme Court explained why this is so in the seminal case of *New York Times Co. v. Sullivan*, where the Court observed that the mere fact that a state targets false speech does “not mean that only false speech will be deterred.”¹⁵⁴ Statutes regulating false speech could cause speakers to self-censor, “even though [they believe their speech] to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”¹⁵⁵ This chilling effect on valuable, factually accurate speech would impair the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁵⁶ Indeed, the Court warned that “erroneous statement is inevitable in free debate.”¹⁵⁷ In order to provide sufficient “breathing space” for the discussion of public issues, the Court concluded that “[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁵⁸

Although the Supreme Court’s caselaw is less definitive on the question of fault in fraud cases, the weight of authority suggests that a finding of fraud in the election-speech context also must be predicated on a showing of actual malice.¹⁵⁹ In *Alvarez*,

¹⁵⁴ *Sullivan*, 376 U.S. at 279.

¹⁵⁵ *Id.* at 280.

¹⁵⁶ *Id.* at 270.

¹⁵⁷ *Id.* at 271.

¹⁵⁸ *Id.* at 280–81 (“[W]here an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged.” (quoting *Coleman v. MacLennan*, 98 P. 281, 286 (Kan. 1908))).

¹⁵⁹ *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620–21 (2003) (holding First Amendment did not bar fraud claims asserted under Illinois law where state proved actual malice and noting that “[e]xacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech”) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–280 (1964)); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 (1984) (noting “kinship” between *Sullivan* standard and “motivation that must be proved to support a common-law action for deceit”). A number of scholars who have examined this issue in the context of political speech have concluded that the First Amendment requires a finding of actual malice in political fraud cases. *See* Colin B. White, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 UCLA J.L. & TECH. 1, 52 (2009); Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129, 166 (2001); Redish & Pereyra, *supra* note 137, at 473; *cf.* Wendy Gerwick Couture, *The Collision Between the*

for example, Justice Kennedy explained: “[W]hen considering some instances of defamation and fraud . . . the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”¹⁶⁰ Justice Alito, in his dissent in *Alvarez*, appears to acknowledge the same point, writing that “[w]hile we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to ‘exten[d] a measure of strategic protection’ to these statements in order to ensure sufficient ‘breathing space’ for protected speech.”¹⁶¹

The reasons for requiring actual malice as a prerequisite for a finding of fraud in the election-speech context are both doctrinal and normative.¹⁶² As Redish and Pereyra note, political fraud presents an intra-First Amendment conflict because “both regulating and not regulating political fraud creates risks to the self-governance goals of the First Amendment.”¹⁶³ Justice Breyer highlighted this tension in *Alvarez*, writing that “in the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result).”¹⁶⁴ After carefully weighing the competing First Amendment interests, Redish and Pereyra conclude that imposing a requirement that a speaker must know the information is false or act with reckless disregard as to its falsity strikes the right balance: “As the need to regulate political fraud increases, so too does the need for balance against the fear of

First Amendment and Securities Fraud, 65 ALA. L. REV. 903, 953 (2014) (arguing that liability for securities fraud should be predicated on a finding of actual malice in order to provide “sufficient breathing room for protected speech” (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012)) (Kennedy, J., plurality opinion)).

¹⁶⁰ *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (Kennedy, J., plurality opinion).

¹⁶¹ *Alvarez*, 567 U.S. at 750 (Alito, J., dissenting); see also *id.* at 751 (“And we have imposed ‘[e]xacting proof requirements’ in other contexts as well when necessary to ensure that truthful speech is not chilled. All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech.” (citations omitted) (quoting *Madigan*, 538 U.S. at 620)).

¹⁶² See Redish & Pereyra, *supra* note 137, at 473 (“While there is at least one suggestion for a negligence standard in some cases of political fraud, the predominant view is based on either accepting or adding to actual malice. Anything less than a standard demanding actual knowledge or recklessness would give rise to a prohibitive risk of chilling, as the Court in *New York Times* explicitly recognized.” (citation omitted)).

¹⁶³ Redish & Pereyra, *supra* note 137, at 485.

¹⁶⁴ *Alvarez*, 567 U.S. at 738 (Breyer, J., concurring).

chilling truthful speech. There is always a risk that a political fraud statute can create a cure worse than the disease by chilling more true speech than it suppresses false speech.”¹⁶⁵

With regard to true threats, the question of fault is unsettled. The Supreme Court has not definitively addressed whether the government must show fault in order to punish true threats, and there is a longstanding split in the circuits on this issue.¹⁶⁶ Some circuit courts have held that the First Amendment requires only that a speaker must “intend to communicate particular words—words that the fact finder later determines qualify objectively as a true threat; under this standard, the speaker need not intend to threaten or intimidate the victim(s) by speaking the words.”¹⁶⁷ Other circuits, however, have held that the First Amendment requires that the speaker must have “made the statements intending that they be taken as a threat.”¹⁶⁸ The Supreme Court could have resolved this issue in *Elonis v. United States*, a case involving a prosecution under the federal threat statute for posting “graphically violent” rap lyrics on Facebook, but unfortunately the Court remanded the case based solely on a question of statutory interpretation.¹⁶⁹ “Given our disposition” of the case, the Court concluded, “it is not necessary to consider any First Amendment issues.”¹⁷⁰

Nevertheless, it would be wise for states that seek to justify the regulation of election-related speech on the basis that the speech falls within the true threats category to include a subjective intent requirement in their statutes. The Supreme Court has been careful in circumscribing the scope of speech that falls outside the First Amendment’s protections; as we saw with the other categories of unprotected speech, that narrowing is

¹⁶⁵ *Id.*

¹⁶⁶ See Ben Cady & Tom Glazer, *Voters Strike Back: Litigation Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 177 (2015).

¹⁶⁷ Jessica Miles, *Straight Outta Scotus: Domestic Violence, True Threats, and Free Speech*, 74 U. MIAMI L. REV. 711, 727–29 (2020) (citing cases).

¹⁶⁸ *United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011); see also *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that “the threat must be made ‘with the intent of placing the victim in fear of bodily harm or death.’”); cf. *United States v. Parr*, 545 F.3d 491, 499–500 (7th Cir. 2008) (stating in dicta that it might also adopt a subjective test in an appropriate case).

¹⁶⁹ 575 U.S. 723, 726, 740 (2015); see also Petition for Writ of Certiorari at 16–20, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983), 2014 WL 645438 (highlighting a circuit split and “widespread confusion” as to whether the First Amendment requires a showing of subjective intent to threaten in addition to an objective, “reasonable speaker” showing).

¹⁷⁰ *Elonis*, 575 U.S. at 740.

achieved, in part, through heightened standards of fault.¹⁷¹ Such narrowing seems especially important for election-related speech that might fall within the true threats category, which unlike defamation and fraud, has no requirement of falsity. Statutes that make the intent of the speaker irrelevant run a serious risk of chilling protected speech, as “speakers who do not intend for their speech to be threatening will still censor themselves, fearful that a reasonable person may construe the communication as threatening.”¹⁷² Justice Marshall warned about this very problem in *Rogers v. United States*, concurring in the Court’s decision to reverse a conviction under the federal threats statute:

In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech [because it] would have substantial costs in discouraging the “uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.”¹⁷³

3. Procedural Safeguards

Even statutes that target election misinformation within an unprotected category of speech may still raise First Amendment problems if they lack adequate procedural safeguards. These safeguards are particularly important in the election-speech context, where there is already considerable tension between the need to preserve the functioning and legitimacy of the electoral system and the danger of “allow[ing] courts and/or other regulatory bodies to be used as political weapons” in the rough and tumble of election campaigns.¹⁷⁴ Procedural safeguards have long been important in ensuring that government efforts to regulate speech do not run afoul of the First Amendment.¹⁷⁵ As courts have come to understand, the

¹⁷¹ See *supra* notes 152–158 and accompanying text.

¹⁷² Paul T. Crane, “True Threats” and the Issue of Intent, 92 VA. L. REV. 1225, 1273 (2006).

¹⁷³ 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270, (1964)).

¹⁷⁴ Marshall, *False Campaign Speech*, *supra* note 6, at 300. As Marshall notes, “[b]ringing defamation or campaign practices actions against a candidate who has purportedly disseminated false statements is not always only about correcting the record or remedying injury to reputation. It is often also about inflicting political damage.” *Id.*

¹⁷⁵ In 1970, Henry Monaghan observed that “courts have lately come to realize that

First Amendment's protections "not only have a substantive dimension—defined in terms of the categories of speech that merit protection— . . . but also procedural dimensions, which mandate the procedures and 'sensitive tools' required for distinguishing categories of unprotected speech from protected speech and set forth procedures regarding how restrictions on unprotected speech should be implemented and scrutinized."¹⁷⁶ These procedural protections can take many forms. For present purposes, we will focus on three: limitations on who can initiate an enforcement action, heightened evidentiary standards, and curbs on damages and other remedies.

A threshold question for any statute regulating election-related speech is who is authorized to sue under the statute or otherwise initiate an enforcement action. Traditionally, only those who have suffered a legally cognizable injury have standing to bring a claim.¹⁷⁷ Under defamation law and other speech-based torts, for example, this usually means the individual who suffered reputational harm or other injury from the speech in question. In an effort to vindicate broader, communal interests in fair and honest elections, many of the statutes we reviewed allow anyone to file a lawsuit or initiate a claim alleging a violation of the statute.¹⁷⁸ This approach raises the risk that these laws will be used for political purposes and thus can be "immensely problematic."¹⁷⁹

procedural guarantees play an equally large role in protecting freedom of speech; indeed, they 'assume an importance fully as great as the validity of the substantive rule of law to be applied.'" Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970) (quoting *Speiser v. Randall*, 357 U.S. 513, 520 (1958)).

¹⁷⁶ Dawn C. Nunziato, *How (Not) to Censor: Procedural First Amendment Values and Internet Censorship Worldwide*, 42 GEO. J. INT'L L. 1123, 1128 (2011).

¹⁷⁷ Unlike federal courts, which are constrained by Art. III of the U.S. Constitution, state courts have broad leeway to determine their own standing requirements based on statutory or constitutional sources. *See, e.g.,* Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 705, 733 (N.C. 2021) (writing that North Carolina standing doctrine is not coincident with federal doctrine and holding that "when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action").

¹⁷⁸ *See, e.g.,* DEL. CODE ANN. tit. 15, § 5162 (2021) (allowing every "aggrieved" elector to bring suit); FLA. STAT. § 106.143 (2021) (allowing any complainant to file suit adjudicated by Florida Elections Commission); N.H. REV. STAT. ANN. § 664:14-b (2021) (allowing any person injured by another's violation of this section to bring an action "for damages and for such equitable relief, including an injunction, as the court deems necessary and proper").

¹⁷⁹ 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014) (noting that "it is immensely problematic that anyone may lodge a complaint with the [Minnesota Office of Administrative Hearings] alleging a violation of [the Minnesota Fair Campaign Practices Act]"); *see also* Commonwealth v. Lucas, 34 N.E.3d 1242, 1247

The Ohio statute at issue in *Susan B. Anthony List v. Driehaus* illustrates some of the problems that can arise when states grant the power to initiate enforcement proceedings to the public at large.¹⁸⁰ Ohio's election code at issue in *Driehaus* prohibited certain "false statement[s]" made "during the course of any campaign for nomination or election to public office or office of a political party,"¹⁸¹ and stated that "any person with knowledge of the purported violation" may file a complaint with the Ohio Elections Commission.¹⁸² In finding that the petitioner had standing to challenge the law, Justice Thomas's opinion for a unanimous court highlighted a number of procedural concerns.¹⁸³ Thomas noted that "any person" could file a complaint and warned that "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents."¹⁸⁴ Thomas also observed that the complaint that prompted the petitioner to challenge the Ohio law was not filed in a court, but rather with a commission, which "ha[d] no system for weeding out frivolous complaints."¹⁸⁵ By adopting this enforcement scheme, Thomas concluded that the state had created a situation where those "who intend to criticize candidates for political office are easy targets."¹⁸⁶ Highlighting what would clearly be a concern over chilling effects, Thomas wrote that "[i]n fact, the specter of enforcement is so substantial that the owner of the billboard refused to display SBA's message after receiving a letter threatening Commission proceedings."¹⁸⁷

(Mass. 2015) (finding it problematic that anyone could initiate a complaint under the statute and noting that this threatened to "create lingering uncertainties of a criminal investigation and chill political speech by virtue of the process itself").

¹⁸⁰ 573 U.S. 149 (2014).

¹⁸¹ OHIO REV. CODE ANN. § 3517.21(B) (West 2013). More specifically, the statute made it a crime for any person to "[m]ake a false statement concerning the voting record of a candidate or public official," § 3517.21(B)(9), or to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not," § 3517.21(B)(10).

¹⁸² OHIO REV. CODE ANN. § 3517.153(A) (Lexis Supp. 2022).

¹⁸³ See *Driehaus*, 573 U.S. at 164–65.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 165. Justice Thomas did not use the phrase "chilling effects," likely because the Court limited its analysis to standing and ripeness and did not consider whether the statute violated the First Amendment.

As this discussion suggests, a key concern when the state seeks to restrict election misinformation is that the law can be used as a political weapon. Indeed, Bill Marshall points out that initiating an action against a party for disseminating false statements in political campaigns “is not always only about correcting the record or remedying injury to reputation,” rather “[i]t is often also about inflicting political damage.”¹⁸⁸ State legislatures can reduce the risk that election-speech statutes will be misused by limiting who can initiate a claim, as discussed in the preceding paragraph, and by imposing heightened standards of proof when the violation involves speech in the election context.

Since *New York Times Co. v. Sullivan*, the Supreme Court has repeatedly recognized the need for courts to subject speech-based claims to a standard of proof more demanding than the preponderance of evidence test typically used in civil cases.¹⁸⁹ In defamation cases, for example, plaintiffs must prove knowledge of falsity or reckless disregard by a showing of *clear and convincing evidence*.¹⁹⁰ The Court has also made clear that the burden of proving falsity must be placed on the plaintiff as well.¹⁹¹ As Redish and Pereyra conclude, “[t]here is no reason to depart from this protective procedural standard in the context of suits designed to punish political fraud.”¹⁹²

The remedies a state provides can also be an important factor in whether its regulatory scheme is constitutional. Under existing First Amendment doctrine, some remedies for speech-based harms are more problematic than others. At the top of the list is injunctive relief that orders a speaker to refrain from speaking or to correct a previous statement.¹⁹³ An injunction to stop speaking is a form of prior restraint, which the Supreme

¹⁸⁸ Marshall, *False Campaign Speech*, *supra* note 6, at 300.

¹⁸⁹ See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 285–86 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

¹⁹⁰ See, e.g., *Gertz*, 418 U.S. at 342 (“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (showing of actual malice must be made with “convincing clarity”).

¹⁹¹ See *Hepps*, 475 U.S. at 776 (1986) (concluding that the First Amendment requires “that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages”).

¹⁹² Redish & Pereyra, *supra* note 137, at 484.

¹⁹³ See Ardia, *Freedom of Speech*, *supra* note 152, at 31.

Court has long held is presumptively unconstitutional.¹⁹⁴ The idea that the government can punish speech after it occurs but cannot restrict speech before it is uttered is evident in much of First Amendment jurisprudence.¹⁹⁵ As Justice Blackmun wrote in *Southeast Promotions, Ltd. v. Conrad*, “Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”¹⁹⁶

Again, we can look to an Ohio statute to illustrate the problems created by state laws that provide broad mechanisms for enforcement. In *Pesttrak v. Ohio Elections Commission*, the United States Court of Appeals for the Sixth Circuit upheld a portion of Ohio’s election code that empowered a state board to reprimand candidates for false campaign speech made with actual malice, but the court struck down parts of the law that allowed the board to impose fines and cease and desist orders.¹⁹⁷ Although the Sixth Circuit subsequently abrogated *Pesttrak’s* holding that false speech does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth,¹⁹⁸ the Sixth Circuit left standing its conclusion that the commission’s enforcement mechanisms were unconstitutional. In considering the fine and cease and desist order, the *Pesttrak*

¹⁹⁴ See *Near v. Minnesota*, 283 U.S. 697, 712 (1931); see also *Wilson v. Superior Court*, 532 P.2d 116, 118 (Cal. 1975) (holding that injunction against republication of allegedly deceptive campaign literature was an unconstitutional prior restraint of speech); *Republican Party of Fla. v. Fla. Elections Comm’n*, 658 So. 2d 653, 657 (1995) (finding injunction issued against state Republican Party for political advertisements in violation of Florida’s campaign contribution limits was an unconstitutional prior restraint); *Goodson v. Republican State Leadership Comm. – Jud. Fairness Initiative*, 2018 WL 6430825, at *3–4 (E.D. Ark. Nov. 1, 2018) (holding that injunction issued against a special interest group’s attack ad campaign containing allegedly defamatory statements about Arkansas Supreme Court candidate was an unconstitutional prior restraint, noting that “imposing any prior restraint on election-related speech should be approached with extreme caution”). A limited form of injunctive relief might be constitutional if it were applied solely to false statements on matters of private concern that a court has found after full adjudication are within a category of unprotected speech. See *Ardia, Freedom of Speech*, *supra* note 152, at 9.

¹⁹⁵ See, e.g., *Kuhn v. Warner Bros. Pictures*, 29 F. Supp. 800, 801 (S.D.N.Y. 1939) (“The decisions in our State and Federal courts have firmly established the legal principle that no injunction may issue to prevent or stop the publication of a libel.”); *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839) (stating that a court cannot issue an injunction “without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government”).

¹⁹⁶ 420 U.S. 546, 559 (1975).

¹⁹⁷ 926 F.2d 573, 575 (6th Cir. 1991) (reviewing Ohio Rev. Code § 3599.091).

¹⁹⁸ See *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016) (“*Alvarez* abrogates *Pesttrak’s* holding that knowing false speech merits no constitutional protection.”).

court wrote that “[f]irst, the Supreme Court has held that no punishment may be levied in areas trenching on the first amendment involving public figures without ‘clear and convincing evidence.’”¹⁹⁹ On the power of the commission to enjoin the speech in question, the court had this to say:

[C]ease and desist orders are a forbidden prior restraint, not a subsequent punishment. Prior restraint of speech is unconstitutional unless certain safeguards are present. We also note that “prior administrative restraint of distinctively political messages on the basis of their alleged deceptiveness is unheard of—and deservedly so.”²⁰⁰

In summary, although a number of difficult First Amendment issues remain unresolved, including whether election-related speech enjoys greater or lesser constitutional protection than speech in other contexts, the cases do provide a path forward for states to adopt laws aimed at preserving the integrity of the electoral process. These laws, however, must be narrowly crafted and the states will need to be careful in terms of the scope of speech they target, the degree of fault they require, and the procedural safeguards they provide.

III. STATE LAWS TARGETING ELECTION-SPEECH

As we noted earlier, forty-eight states and the District of Columbia have statutes that regulate the content of election-related speech; Maine and Vermont do not have such laws. The statutes take one of two general forms: (1) statutes that directly target the content of election-related speech; and (2) generally applicable statutes that indirectly implicate election-related speech by prohibiting intimidation or fraud associated with an election. We analyze each of these statutory forms in the following sections, paying particular attention to how broadly or narrowly the statutes define the speech they target and what level of fault or intent they require for liability. We also include a brief discussion of the potential legal remedies available for violations of the statute.

¹⁹⁹ *Pestak*, 926 F.2d at 578 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 285–86 (1963)).

²⁰⁰ *Id.* (citations omitted).

This table summarizes which states have statutes that fall into each of the taxonomy categories we outlined in Part I.

Table 1: Categories of Speech Targeted by State Election Laws

	Taxonomy Category							
	1: Candidate	2: Ballot Measure	3: Voting Requirements	4: Source / Sponsorship	5: Endorsement	6: Incumbency	7: Intimidation	8: Fraud / Corruption
AL				X			X	X
AK	X							
AZ				X			X	X
AR							X	
CA	X		X		X	X	X	X
CO	X	X					X	
CT		X	X				X	X
DE							X	
DC							X	X
FL	X				X	X	X	X
GA							X	
HI	X		X				X	X
ID		X						
IL							X	X
IN						X	X	
IA				X			X	X
KS							X	
KY							X	
LA	X	X		X	X		X	X
ME								
MD		X	X				X	X
MA					X			
MI						X	X	
MN		X	X		X	X	X	X
MS	X	X					X	X
MO			X					

Taxonomy Category								
	1: Candidate	2: Ballot Measure	3: Voting Requirements	4: Source / Sponsorship	5: Endorsement	6: Incumbency	7: Intimidation	8: Fraud / Corruption
MT	X		X	X			X	X
NE							X	
NV		X					X	X
NH				X	X		X	
NJ				X			X	X
NM		X	X				X	
NY			X	X			X	X
NC	X			X			X	X
ND	X							
OH		X		X	X			
OK			X				X	
OR	X					X		
PA							X	X
RI			X				X	
SC							X	X
SD		X					X	X
TN	X		X		X		X	
TX		X		X		X		
UT	X	X			X		X	X
VT								
VA			X					
WA	X						X	X
WV	X						X	X
WI	X	X						
WY							X	

A. Statutes that Directly Target the Content of Election-Related Speech

Thirty-eight states have statutes that directly target the content of election-related speech; these statutes fall within one or more of the first six taxonomy categories described in Part I

above.²⁰¹ As previously noted, statutes can fall into more than one category if they cover more than one type of false speech relating to an election.

1. False Statements about a Candidate

Sixteen states have statutes that expressly prohibit false statements about a candidate for public office (note that states can have more than one type of statute).²⁰² Some of these statutes merely confirm that defamation law applies to political ads or campaign communications,²⁰³ while other statutes extend liability to false statements about a candidate regardless of whether the statement meets the requirements of defamation.²⁰⁴

a. Scope of Speech Covered

Three states, Alaska, California, and Washington, have statutes that prohibit false statements in political ads or campaign communications that constitute defamation.²⁰⁵ These statutes expressly state that liability for defamation applies in the context of political speech. It should be recognized, however, that all fifty states and the District of Columbia permit defamation claims under either common law or statutory law.²⁰⁶ Accordingly, even

²⁰¹ See discussion of categories 1–6 *supra* in Part I (listing false statements about a (1) candidate; (2) ballot measure; (3) voting requirements and procedures; (4) source, authorization, or sponsorship; (5) endorsement; or (6) incumbency).

²⁰² See ALASKA STAT. § 15.13.090 (2021); ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021); CAL. ELEC. CODE § 20500 (West 2021); COLO. REV. STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021); HAW. REV. STAT. § 19-3 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MISS. CODE ANN. § 23-15-875 (2021); MONT. CODE ANN. § 13-37-131 (2021); N.C. GEN. STAT. § 163-274(9) (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OR. REV. STAT. § 260.532 (2021); TENN. CODE ANN. § 2-19-142 (2021); UTAH CODE ANN. § 20A-11-1103; WASH. REV. CODE § 42.17A.335 (2021); W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021).

²⁰³ See ALASKA STAT. § 15.13.090 (2021); CAL. ELEC. CODE § 20500 (West 2021); WASH. REV. CODE § 42.17A.335 (2021). For example, California's statute simply states that "libel and slander are fully applicable to any campaign advertising or communication." CAL. ELEC. CODE § 20500 (West 2021).

²⁰⁴ See ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021); COLO. REV. STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021); HAW. REV. STAT. § 19-3 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MISS. CODE ANN. § 23-15-875 (2021); MONT. CODE ANN. § 13-37-131 (2021); N.C. GEN. STAT. § 163-274(9) (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OR. REV. STAT. § 260.532 (2021); TENN. CODE ANN. § 2-19-142 (2021); UTAH CODE ANN. § 20A-11-1103; W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021).

²⁰⁵ See ALASKA STAT. § 15.13.090 (2021); CAL. ELEC. CODE § 20500 (West 2021); WASH. REV. CODE § 42.17A.335 (2021).

²⁰⁶ See, e.g., ALA. CODE § 6-5-11 (2021) (imposing civil liability for "defamation, libel and slander").

in states that do not have a statute that expressly provides that defamation law applies to political advertisements, these states will likely still apply defamation liability to false statements regarding candidates that meet the state's requirements for defamation.

The three statutes that simply apply existing defamation law to election-related speech are unlikely to raise novel questions of First Amendment law because their scope of coverage is limited to statements that meet the requirements of a defamation claim. Moreover, Washington even further limits its statute to three specific types of defamatory statements in political advertisements or electioneering communications: (1) false statements of material fact about a candidate; (2) false representations of incumbency; and (3) false statements or false implications of support or endorsement.²⁰⁷ Alaska and California refer to defamation more broadly without limiting the types of defamatory statements covered by their statutes.²⁰⁸

However, fifteen states have statutes that impose liability for false statements about a candidate, regardless of whether the statement meets the specific requirements of defamation.²⁰⁹ These laws raise potential First Amendment concerns, as the Supreme Court has refused to sustain regulations of false speech based solely on a compelling state interest in “truthful discourse” without additional fraudulent or defamatory effects.²¹⁰ Five of these fifteen states create broad liability for false statements made about a candidate in any medium of communication.²¹¹ For

²⁰⁷ See WASH. REV. CODE § 42.17A.335(1) (2021).

²⁰⁸ ALASKA STAT. § 15.13.090 (2021); CAL. ELEC. CODE § 20500 (West 2021).

²⁰⁹ See ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021); COLO. REV. STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); HAW. REV. STAT. § 19-3 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MONT. CODE ANN. § 13-37-131 (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OR. REV. STAT. § 260.532 (2021); TENN. CODE ANN. § 2-19-142 (2021); UTAH CODE ANN. § 20A-11-1103; W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021).

²¹⁰ See *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

²¹¹ See COLO. REV. STAT. § 1-13-109 (2021) (prohibiting any person from “knowingly [or recklessly] mak[ing] . . . any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office”); LA. STAT. ANN. § 18:1463(C) (2021) (prohibiting any person from publishing “any statement which he knows . . . makes a false statement about a candidate for election . . . or about a proposition to be submitted to the voters”); UTAH CODE ANN. § 20A-11-1103 (2021) (prohibiting prohibits any person from “knowingly mak[ing] or publish[ing], or caus[ing] to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure . . .”); W. VA. CODE § 3-8-11 (2021) (prohibiting any person from “knowingly mak[ing] or publish[ing], or caus[ing] to be made or published, any false statement in regards to any candidate . . .”); WIS. STAT. § 12.05 (2021) (prohibiting prohibits any person from

example, West Virginia prohibits any person from knowingly making “any false statement in regards to any candidate.”²¹² Colorado’s statute is only slightly more narrow; it prohibits any person from knowingly making “any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office.”²¹³ Nine other states require that a false statement be about a specific topic,²¹⁴ be made by a specific person,²¹⁵ be published in a specific medium,²¹⁶ or occur in a specific time frame.²¹⁷ For example, Florida has a candidate-specific prohibition on false representations of military service.²¹⁸ Mississippi prohibits false statements by any person about a candidate’s “honesty, integrity, or moral character” in their private life,²¹⁹ while North Carolina’s prohibition is not based on falsity; instead, the state prohibits the publication of any “derogatory” statement made anonymously.²²⁰

b. Fault

The Supreme Court’s decision in *New York Times v. Sullivan* “constitutionalized” defamation law by providing

“knowingly mak[ing] or publish[ing], or caus[ing] to be made or published, a false representation pertaining to a candidate or referendum . . .”).

²¹² See W. VA. CODE § 3-8-11 (2021) (emphasis added).

²¹³ See COLO. REV. STAT. § 1-13-109 (2021).

²¹⁴ See HAW. REV. STAT. § 19-3 (2021) (requiring that the false statement be about “the withdrawal of any candidate at the election”); MONT. CODE ANN. § 13-37-131 (1)-(2) (2021) (requiring that the false statement refer specifically to a candidate’s voting record); N.C. GEN. STAT. § 163-274(9) (2021) (requiring that the false statement about a candidate be “derogatory”).

²¹⁵ See FLA. STAT. § 104.271(1)-(2) (2021) (prohibiting false statements made by a candidate about an opposing candidate, both general false statements about an opposing candidate that are made with actual malice and false statements that accuse an opposing candidate of violating any provision of the state election code).

²¹⁶ See ALASKA STAT. § 15.13.095(a) (2021) (requiring that the false statement is “made as part of a telephone call or an organized series of calls”); CAL. ELEC. CODE § 20010 (West 2021) (prohibiting distribution of “materially deceptive audio or visual media” specifically in the 60-day period before an election).

²¹⁷ See CAL. ELEC. CODE § 20010 (West 2021) (prohibiting distribution of “materially deceptive audio or visual media” specifically in the 60-day period before an election).

²¹⁸ See FLA. STAT. § 104.2715 (2021).

²¹⁹ See MISS. CODE ANN. § 23-15-875 (2021) (imposing liability for statements made by any person about a candidate’s “honesty, integrity or moral character . . . so far as his or her private life is concerned, unless the charge be in fact true and actually capable of proof”).

²²⁰ See N.C. GEN. STAT. § 163-274(a)(8) (2021) (making it unlawful for “any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate’s chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge”).

limited First Amendment protection to false defamatory speech.²²¹ After *Sullivan*, a public official bringing a defamation claim must show that the defendant's statements about her were made with "actual malice."²²² The Supreme Court also requires a showing of actual malice when a defamation plaintiff is a candidate for public office.²²³

The three states that have statutes that expressly apply defamation liability to election-related speech impose two different fault standards for false statements about a candidate. Alaska and Washington apply the rule from *Sullivan* by requiring that a false statement be made with "actual malice,"²²⁴ while California requires "willful[]" or "knowing[]" behavior.²²⁵

The remaining statutes that prohibit false statements about a candidate without regard to whether the statement meets the requirements of defamation law take one of three approaches to the question of fault. Fourteen states have statutes that prohibit false statements about a candidate made knowingly or with reckless disregard as to the truth, mirroring the "actual malice" standard from *Sullivan*.²²⁶ Four states, however, have statutes that deviate from the *Sullivan* standard.²²⁷ Louisiana

²²¹ See *N.Y. Times v. Sullivan*, 376 U.S. 254, 283 (1964); see also Ardia, *Reputation in a Networked World*, *supra* note 120, at 280.

²²² See *supra* notes 154–158 and accompanying text.

²²³ See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971) (applying the actual malice standard to candidates by finding that "publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office").

²²⁴ ALASKA STAT. § 15.13.090(f) (2021); WASH. REV. CODE § 42.17A.335(1) (2021).

²²⁵ CAL. ELEC. CODE § 20501 (West 2021); see also *Beilenson v. Superior Ct.*, 52 Cal. Rptr. 2d 357, 364 (Cal. Ct. App. 1996) (analyzing the statutory requirement of "willfully and knowingly" similarly but separately from the constitutional requirement of actual malice).

²²⁶ See ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021); COLO. REV. STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021); HAW. REV. STAT. § 19-3 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MISS. CODE ANN. § 23-15-875 (2021); MONT. CODE ANN. § 13-37-131 (2021); N.C. GEN. STAT. § 163-274(9) (2021); N.D. CENT. CODE § 16.1-10-04 (2021); OR. REV. STAT. § 260.532 (2021); TENN. CODE ANN. § 2-19-142 (2021); UTAH CODE ANN. § 20A-11-1103; W. VA. CODE § 3-8-11 (2021); WIS. STAT. § 12.05 (2021); see also *N.Y. Times v. Sullivan*, 376 U.S. 254, 282–83 (1964).

²²⁷ See LA. STAT. ANN. § 18:1463(C) (2021) (prohibiting the publication of "oral, visual, or written material containing . . . a false statement about a candidate for election . . . or about a proposition to be submitted to the voters" that the speaker should reasonably know to be false); FLA. STAT. § 104.2715 (2021); MISS. CODE ANN. § 23-15-875 (2021) (imposing liability for statements made by any person about a candidate's "honesty, integrity, or moral character . . . so far as his or her private life is concerned, unless the charge be in fact true and actually capable of proof"); N.C. GEN. STAT. § 163-274(8) (2021) (making it unlawful for "any person to publish in a

imposes liability for false statements that a speaker should “reasonably know” to be false.²²⁸ Three other states have an even lower bar, imposing strict liability for certain false statements about a candidate without regard to the speaker’s level of knowledge.²²⁹

Alaska, California, Colorado and North Carolina have statutes that also require that the speaker must intend to injure a candidate, deceive voters, or affect an election before liability can be imposed.²³⁰ Such requirements likely help to insulate these statutes from a First Amendment challenge based on the failure to provide the necessary “breathing space” for speakers. For example, California requires both that the statement be “materially deceptive” and that the statement be distributed “with the intent to injure the candidate's reputation or to deceive a voter into voting for or against the candidate.”²³¹ Utah, West Virginia, and Wisconsin impose liability if the false statement is either intended to affect an election or merely has that effect.²³²

c. Remedies

Statutes prohibiting false statements about a candidate for office provide both civil and criminal remedies for violations. Available criminal punishments include imprisonment and

newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge”).

²²⁸ LA. STAT. ANN. § 18:1463(C) (2021).

²²⁹ See FLA. STAT. § 104.2715 (2021); MISS. CODE ANN. § 23-15-875 (2021); N.C. GEN. STAT. § 163-274(8) (2021).

²³⁰ See ALASKA STAT. § 15.13.095(a) (2021) (prohibiting false statements about a candidate that are “made with the intent to convince potential voters concerning the outcome of an election”); CAL. ELEC. CODE § 20010 (West 2021) (requiring that the statement be “materially deceptive” and distributed “with the intent to injure the candidate's reputation or to deceive a voter into voting for or against the candidate”); COLO. REV. STAT. § 1-13-109 (2021) (prohibiting any person from knowingly making any false statement “designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office”); N.C. GEN. STAT. § 163-274(9) (2021) (prohibiting the publication of knowingly false or reckless false “derogatory reports” about any candidate that are “calculated or intended to affect the chances of such candidate for nomination or election”).

²³¹ CAL. ELEC. CODE § 20010 (West 2021).

²³² See UTAH CODE ANN. § 20A-11-1103 (prohibiting any false statement that is “intended or tends to affect any voting” at an election); W. VA. CODE § 3-8-11 (2021) (prohibiting any false statement that is “intended or tends to affect any voting” at an election); WIS. STAT. § 12.05 (2021) (prohibiting any false statement that is “intended or tends to affect any voting” at an election).

finer,²³³ while civil remedies include the availability of damages in a lawsuit against the speaker and distributor²³⁴ or a civil penalty “deposited into [the state’s general revenue fund].”²³⁵

Notably for First Amendment purposes, California allows candidates alleging a violation of the state’s law against “materially deceptive audio or visual media” to seek injunctive relief preventing distribution of the allegedly deceptive media.²³⁶ This form of relief, because it acts as a prior restraint on speech, is likely to raise serious First Amendment concerns.²³⁷

2. False Statements about Ballot Measures

Fourteen states have statutes that prohibit false statements about a ballot measure, proposal, referendum, amendment, or petition before the electorate.²³⁸ These statutes prohibit non-candidate specific statements about ballot issues before the electorate, including statements relating to the contents, purpose, or effect of a proposal, referendum, amendment, or petition. This category also includes false statements related to efforts to instigate recall petitions.

a. Scope of Coverage

Most of these statutes define their coverage very broadly. For example, Colorado’s statute prohibits the communication of “any false statement designed to affect the vote on any [ballot] issue submitted to the electors at any election.”²³⁹ Maryland,

²³³ See, e.g., COLO. REV. STAT. § 1-13-109 (2021); FLA. STAT. § 104.271 (2021); HAW. REV. STAT. § 19-3(12) (2021).

²³⁴ See, e.g., ALASKA STAT. § 15.13.095(a) (2021); CAL. ELEC. CODE § 20010 (West 2021).

²³⁵ See FLA. STAT. § 104.271 (2021); FLA. STAT. § 104.2715 (2021).

²³⁶ See CAL. ELEC. CODE § 20010 (West 2021).

²³⁷ See *supra* notes 193–196 and accompanying text.

²³⁸ See COLO. REV. STAT. § 1-13-109 (2021); CONN. GEN. STAT. § 9-368c (2021); IDAHO CODE § 34-1714 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-57 (2021); NEV. REV. STAT. § 306.210(a) (2021); N.M. STAT. ANN. § 1-17-14(D) (2021); OHIO REV. CODE ANN. § 3599.14; S.D. CODIFIED LAWS § 12-13-16 (2021); TEX. ELEC. CODE ANN. § 501.029(a) (West 2021); UTAH CODE ANN. § 20A-11-901 (West 2021); UTAH CODE ANN. § 20A-11-1103 (West 2021); WIS. STAT. § 12.05 (2021).

²³⁹ COLO. REV. STAT. § 1-13-109 (2021); see also LA. STAT. ANN. § 18:1463(C) (2021) (prohibiting “any statement which he knows . . . makes a false statement . . . about a proposition to be submitted to the voters”); UTAH CODE ANN. § 20A-11-1103 (West 2021) (applying to “any false statement in relation to any . . . proposed constitutional amendment, or other measure”); WIS. STAT. § 12.05 (2021) (prohibiting “a false representation pertaining to a candidate or referendum which is intended or tends to

Minnesota, and Ohio use similarly broad language, but limit their coverage to false statements *about petitions* before the electorate.²⁴⁰ Other states have statutes that limit their coverage only to false statements about the purpose, contents, or effect of a petition before the electorate.²⁴¹

By definition, statutes that regulate false statements about ballot measures are not limited to speech that harms a candidate (or another person). As a result, they rest on a different government interest than the protection of reputation that has traditionally justified government restrictions on defamatory speech.²⁴² Accordingly, the government's interest is likely to be less weighty in a court's evaluation of whether the statute passes First Amendment muster.²⁴³ In *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, for example, the Washington Supreme Court affirmed the dismissal of a

affect voting at an election”).

²⁴⁰ MD. CODE ANN., ELEC. LAW § 16-401 (West 2021) (proscribing the misrepresentation of “any fact for the purpose of inducing another person to sign or not to sign any petition”); MINN. STAT. § 211C.09 (2021) (prohibiting any person from “alleg[ing] any material fact in support of [a] petition that the person knows is false or . . . with reckless disregard of whether it is false”); OHIO REV. CODE ANN. § 3599.14(1) (prohibiting any individual from “misrepresent[ing] the contents, purpose, or effect of [a] petition or declaration for the purpose of persuading a person to sign or refrain from signing the petition or declaration”).

²⁴¹ See CONN. GEN. STAT. § 9-368c (2021) (prohibiting any person from “intentionally misrepresent[ing] the contents of a petition”); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021) (prohibiting the willful and knowing misrepresentation of “any fact for the purpose of inducing another person to sign or not to sign any petition”); MISS. CODE ANN. § 23-17-57 (2021) (prohibiting anyone from obtaining a person's signature on a petition “by intentionally misleading such person as to the substance or effect of the petition, or . . . by intentionally causing such person to be misled as to the substance or effect of the petition”); N.M. STAT. ANN. § 1-17-14(D) (2021) (prohibiting “knowingly misrepresenting the purpose and effect of [a] petition or law thereby affected, for the purpose of causing anyone to sign the petition in reliance on such misrepresentation”); TEX. ELEC. CODE ANN. § 501.029(a) (West 2021) (creating an offense for anyone who “misrepresents the purpose or effect of a petition issued under” the state's election code). Idaho and Nevada's statutes apply only to recall petitions. See IDAHO CODE § 34-1714 (2021); NEV. REV. STAT. § 306.210(a) (2021). South Dakota's statute comes into play only when a person “distributes a document containing any purported constitutional amendment, question, law, or measure to be submitted to the voters[.]” S.D. CODIFIED LAWS § 12-13-16 (2021).

²⁴² See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.”).

²⁴³ See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992) (“Defamation and deception are actionable wrongs . . . [that] vindicate private rights invoked by, or at least on behalf of, private individuals. But the First Amendment precludes punishment for generalized ‘public’ frauds, deceptions, and defamation. In political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed.” (footnotes omitted)).

complaint filed by the state's Public Disclosure Commission against the 119 Vote No! Committee for false statements the committee published criticizing a ballot measure to legalize assisted suicide.²⁴⁴ In holding the underlying law unconstitutional, several justices found that the state's reliance on defamation law as a justification for "intrusion into public debate" about ballot measures misplaced in that defamation law "is designed to protect the property of an individual in his or her good name."²⁴⁵ Because the Washington law could not be justified by a compelling state interest and because it chilled political speech, a plurality of justices concluded the law was unconstitutional on its face.²⁴⁶

b. Fault

Most states regulating false statements about ballot measures impose liability only if the speaker knew at the time of publication that the information was false.²⁴⁷ However, as with state statutes penalizing false statements about candidates for office, multiple states either impose liability for constructive knowledge of falsity²⁴⁸ or apply strict liability without regard to whether the speaker knew or should have known the statement was false.²⁴⁹

Thirteen states have statutes that prohibit knowingly false statements about a ballot measure, proposal, referendum, or petition before the electorate made knowingly or recklessly.²⁵⁰

²⁴⁴ Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 693 (Wash. 1998) (invalidating Washington law that prohibited "political advertising that contains a false statement of material fact").

²⁴⁵ *Id.* at 697; *see also id.* at 699 (Madsen, J., concurring) ("I agree with the majority that RCW 42.17.530 is facially unconstitutional because it sweeps protected First Amendment activity within its provisions by penalizing political speech, even if knowingly false, regarding an initiative measure. I write separately to emphasize that I am not convinced that the same is true where a statement contains deliberate falsehoods about a candidate for public office.")

²⁴⁶ *Id.* at 699; *see also* Commonwealth v. Lucas, 34 N.E.3d 1242, 1249 (Mass. 2015) (concluding that the state's "attempt to shoehorn § 42 into the exception for defamatory speech is . . . flawed").

²⁴⁷ *See* statutes cited *infra* in note 250.

²⁴⁸ *See* LA. STAT. ANN. § 18:1463(C) (2021); NEV. REV. STAT. § 306.210(a) (2021).

²⁴⁹ *See* TEX. ELEC. CODE ANN. § 501.029(a) (West 2021); UTAH CODE ANN. § 20A-11-901 (West 2021).

²⁵⁰ *See* COLO. REV. STAT. § 1-13-109 (2021); CONN. GEN. STAT. § 9-368c (2021); IDAHO CODE § 34-1714 (2021); LA. STAT. ANN. § 18:1463(C) (2021); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-57 (2021); NEV. REV. STAT. § 306.210(a) (2021); N.M. STAT. ANN. § 1-17-14(D) (2021); OHIO REV. CODE ANN. § 3599.14; S.D. CODIFIED LAWS § 12-13-16 (2021); UTAH CODE ANN. § 20A-11-1103 (West 2021); WIS. STAT. § 12.05 (2021).

Most of these statutes require that the defendant know, at the time of publication, that the *proscribed information* is false (or act with reckless disregard as to its falsity).²⁵¹ Many statutes are poorly drafted, however, and some may impose liability if the defendant knowingly or recklessly published, broadcast, or circulated the false information, regardless of the person's state of knowledge regarding the falsity of the statement itself.²⁵² For example, Idaho prevents any person from ““knowingly printing, publishing, or delivering to any voter . . . a document” containing a misstatement of a proposed ballot measure or any false or misleading information about the ballot measure.”²⁵³

²⁵¹ See CONN. GEN. STAT. § 9-368c (2021) (prohibiting any person from “intentionally misrepresent[ing] the contents of a petition”); LA. STAT. ANN. § 18:1463(C) (2021) (forbidding any person from making a statement “which he knows . . . makes a false statement . . . about a proposition to be submitted to the voters”); MD. CODE ANN., ELEC. LAW § 16-401(a)(3) (West 2021) (preventing any person from “willfully and knowingly misrepresent[ing] any fact relating to registration”); MINN. STAT. § 211C.09 (2021) (prohibiting any person from “alleg[ing] any material fact in support of [a] petition that the person knows is false or . . . with reckless disregard of whether it is false”); MISS. CODE ANN. § 23-17-57 (2021) (prohibiting anyone from obtaining a person's signature on a petition “by intentionally misleading such person as to the substance or effect of the petition, or . . . by intentionally causing such person to be misled as to the substance or effect of the petition”); NEV. REV. STAT. § 306.210(a) (2021) (preventing a person from “knowingly or under circumstances amounting to criminal negligence [m]isrepresent[ing], attempt[ing] to misrepresent or assist or conspir[ing] with another person to misrepresent or attempt to misrepresent the intent or content of a petition for the recall of a public officer”); N.M. STAT. ANN. § 1-17-14(D) (2021) (forbidding any person from “knowingly misrepresent the purpose and effect of [a] petition [for referendum or law thereby affected]”); OHIO REV. CODE ANN. § 3599.14 (prohibiting any person from making “a false statement . . . knowing the same to be false or acting with reckless disregard of whether it was false or not”).

²⁵² See COLO. REV. STAT. § 1-13-109 (1)(a)–(2)(a) (2021) (prohibiting any person from knowingly or recklessly “mak[ing], publish[ing], broadcast[ing], or circular[ing] or caus[ing] to be made, published, broadcasted, or circulated in any letter, circular, advertisement, or poster or in any other communication any false statement designed to affect the vote on any issue submitted to the electors at any election”); IDAHO CODE § 34-1714 (2021) (preventing any person from “knowingly circulat[ing], publish[ing], or exhibit[ing] any false statement or representation concerning the contents, purport or effect of any recall petition”); S.D. CODIFIED LAWS § 12-13-16 (2021) (prohibiting any person from “knowingly printing, publishing, or delivering to any voter of this state a document containing any purported constitutional amendment, question, law, or measure to be submitted to the voters at any election, in which such constitutional amendment, question, law, or measure is misstated, erroneously printed, or by which false or misleading information is given to the voters . . .”); UTAH CODE ANN. § 20A-11-1103 (West 2021) (prohibiting any person from “knowingly mak[ing] or publish[ing], or caus[ing] to be made or published, any false statement” relating to a ballot measure); WIS. STAT. § 12.05 (2021) (prohibiting any person from “knowingly mak[ing] or publish[ing], or caus[ing] to be made or published, any false statement” relating to a ballot measure).

²⁵³ See IDAHO CODE § 34-1714 (2021) (preventing any person from “knowingly circulat[ing], publish[ing], or exhibit[ing] any false statement or representation concerning the contents, purport or effect of any recall petition”).

Moreover, some state statutes forego the requirement of specific knowledge completely. Louisiana forbids false statements about ballot measures when the speaker should be “reasonably expected to know” that the statement is false.²⁵⁴ Nevada imposes a similar standard, prohibiting the misrepresentation of the content of a ballot measure or petition “under circumstances amounting to criminal negligence.”²⁵⁵ Texas and Utah have adopted a form of strict liability for false statements about ballot measures.²⁵⁶

Like with statements about a candidate, some states impose a secondary intent requirement to regulate false statements that have the intent or effect of affecting an election. Colorado, Idaho, Maryland, New Mexico, and Ohio require that the false statement be made with the intent to affect the vote or to influence voters regarding the ballot measure.²⁵⁷ Utah and Wisconsin impose broader statutory liability, prohibiting any statement that is “intended or tends to affect” voting in an election.²⁵⁸ All of the state statutes requiring that a false statement about a ballot measure be made with the intent to affect the vote or to influence voters regarding the ballot measure also require that the statement was made with knowledge or reckless disregard of falsity.²⁵⁹

²⁵⁴ LA. STAT. ANN. § 18:1463(C) (2021) (forbidding any person from making a statement “which he . . . should be reasonably expected to know makes a false statement about . . . a proposition to be submitted to the voters”).

²⁵⁵ See NEV. REV. STAT. § 306.210(1) (2021).

²⁵⁶ See TEX. ELEC. CODE ANN. § 501.029(a) (West 2021) (punishing anyone who “misrepresents the purpose or effect of a petition issued under [Texas’ election code]”); see also UTAH CODE ANN. § 20A-11-901 (West 2021) (prohibiting the use of any statement of endorsement for a petition, regardless of falsity, without the express consent of the person who made the statement).

²⁵⁷ COLO. REV. STAT. § 1-13-109 (2021) (prohibiting knowingly or recklessly making “any false statement designed to affect the vote on any issue submitted to the electors at any election . . .”); IDAHO CODE § 34-1714 (2021) (prohibiting knowingly making “any false statement or representation . . . for the purpose of obtaining any signature to any [recall] petition[] or for the purpose of persuading any person to sign any such recall petition”); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021) (prohibiting the willful and knowing misrepresentation of “any fact for the purpose of inducing another person to sign or not to sign any petition”); N.M. STAT. ANN. § 1-17-4(D) (2021) (forbidding “knowingly misrepresenting the purpose and effect of [a] petition or law thereby affected, for the purpose of causing anyone to sign the petition in reliance on such misrepresentation”); OHIO REV. CODE ANN. § 3517.22 (2021) (preventing any person from knowingly or recklessly making a false statement “that is designed to promote the adoption or defeat of any ballot proposition or issue”).

²⁵⁸ See UTAH CODE ANN. § 20A-11-1103 (West 2021) (prohibiting any false statement “that is intended or tends to affect any voting at any primary, convention, or election”); WIS. STAT. § 12.05 (2021) (prohibiting any false statement “which is intended or tends to affect voting at an election”).

²⁵⁹ COLO. REV. STAT. § 1-13-109 (2021) (prohibiting knowingly or recklessly making

c. Remedies

Each state prohibiting a false statement about ballot measures treats a violation of the statute as a criminal matter, with the responsible party subject to potential imprisonment or criminal fines.²⁶⁰ Connecticut, Idaho, Nevada, and New Mexico classify a false statement about a ballot measure as a felony offense.²⁶¹ Utah is the only state to also treat a false statement about ballot measure as a civil infraction, creating a civil right of action for a registered voter to seek the removal of a candidate who was directly responsible for producing or disseminating the false statement.²⁶²

3. False Statements About Voting Requirements and Procedures

Thirteen states have statutes that prohibit false statements about voting requirements or procedures.²⁶³ Statutes within this category prohibit statements about what is required to vote or register, who can vote, when to vote, or how to vote.

“any false statement designed to affect the vote on any issue submitted to the electors at any election . . .”); IDAHO CODE § 34-1714 (2021) (prohibiting knowingly making “any false statement or representation . . . for the purpose of obtaining any signature to any [recall] petition[] or for the purpose of persuading any person to sign any such recall petition”); MD. CODE ANN., ELEC. LAW § 16-401 (West 2021) (prohibiting the willful and knowing misrepresentation of “any fact for the purpose of inducing another person to sign or not to sign any petition”); N.M. STAT. ANN. § 1-17-4(D) (2021) (forbidding “knowingly misrepresenting the purpose and effect of [a] petition or law thereby affected, for the purpose of causing anyone to sign the petition in reliance on such misrepresentation”); OHIO REV. CODE ANN. § 3517.22 (2021) (preventing any person from knowingly or recklessly making a false statement “that is designed to promote the adoption or defeat of any ballot proposition or issue”).

²⁶⁰ See, e.g., LA. STAT. ANN. § 18:1463 (2021) (punishing a violation with a fine of up to \$2000 or up to two years of imprisonment); S.D. CODIFIED LAWS § 12-13-16 (2021) (treating a violation as a Class 2 misdemeanor); WIS. STAT. § 12.60(b) (2021) (subjecting violators to a fine of “not more than” \$1000 or up to six months imprisonment).

²⁶¹ See CONN. GEN. STAT. § 9-368c (2021); IDAHO CODE § 34-1714(1)(d) (2021); NEV. REV. STAT. § 306.210 (2021); N.M. STAT. ANN. § 1-17-4 (2021).

²⁶² See UTAH CODE ANN. § 20A-11-901 (West 2021); UTAH CODE ANN. § 20A-11-1103 (West 2021).

²⁶³ See CAL. ELEC. CODE § 18543 (West 2021); CONN. GEN. STAT. § 9-135 (2021); CONN. GEN. STAT. § 9-363 (2021); HAW. REV. STAT. § 11-391 (2021); HAW. REV. STAT. § 19-3 (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); MINN. STAT. § 204C.035 (2021); MO. REV. STAT. § 115.631(7)–(26) (2021); MONT. CODE ANN. § 13-35-235 (2021); N.M. STAT. ANN. § 1-20-9 (2021); N.Y. ELEC. LAW § 3-106(d) (McKinney 2021); OKLA. STAT., tit. 26, § 16-109 (2021); 17 R.I. GEN. LAWS § 19-46 (2021); TENN. CODE ANN. § 2-19-133(a) (2021); VA. CODE ANN. § 24.2-1005.1 (2021).

a. Scope of Coverage

States vary in the type of false information they prohibit. California, Maryland, Minnesota, Oklahoma, Tennessee, and Virginia prohibit false information about voter registration or qualifications, targeting misrepresentations about a prospective voter's eligibility to vote in an election.²⁶⁴ Hawaii, Minnesota, Tennessee, and Virginia prohibit false information regarding the time, place, or manner of an election.²⁶⁵ These statutes target misinformation like “Republicans vote on Tuesday, Democrats vote on Wednesday” that could lead an eligible voter to show up at the wrong polling place or at the wrong time.

Missouri, Montana, and New Mexico prohibit false information about voting instructions or election procedures,²⁶⁶ while Connecticut and Rhode Island prohibit false or misleading instructions regarding the use of voting machinery that would cause a voter to either lose or incorrectly register his or her vote.²⁶⁷ Connecticut also prohibits any misrepresentation of the

²⁶⁴ See CAL. ELEC. CODE § 18543 (West 2021) (prohibiting “fraudulently advis[ing] any person that he or she is not eligible to vote or is not registered to vote when in fact that person is eligible or is registered . . .”); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021) (prohibits “misrepresent[ing] any fact relating to registration”); MINN. STAT. § 204C.035 (2021) (preventing “knowingly deceiv[ing] another person regarding . . . the qualifications for or restrictions on voter eligibility for an election . . .”); OKLA. STAT., tit. 26, § 16-109 (2021) (prohibiting “knowingly attempt[ing] to prevent a qualified elector from becoming registered, or a registered voter from voting . . .”); TENN. CODE ANN. § 2-19-133(a) (2021) (prohibiting the “false or misleading information regarding the qualifications to vote, the requirements to register to vote, whether an individual voter is currently registered to vote or eligible to register to vote, [and] voter registration deadlines . . .”); VA. CODE ANN. § 24.2-1005.1 (2021) (prohibiting knowingly false statements made about “the voter’s precinct, polling place, or voter registration status”).

²⁶⁵ See HAW. REV. STAT. § 19-3(12) (2021) (prohibiting “false information about the time, date, place, or means of voting . . .”); MINN. STAT. § 204C.035 (2021) (prohibiting “knowingly deceiv[ing] another person regarding the time, place, or manner of conducting an election . . .”); TENN. CODE ANN. § 2-19-133(a) (2021) (prohibiting “false or misleading information regarding . . . polling dates, times, and locations”); VA. CODE ANN. § 24.2-1005.1 (2021) (prohibiting knowingly false statements “about the date, time, and place of the election . . .”).

²⁶⁶ See MO. REV. STAT. § 115.631(26) (2021) (prohibiting “[k]nowingly providing false information about election procedures . . .”); MONT. CODE ANN. § 13-35-235 (2021) (prohibiting “knowingly or purposely disseminat[ing] to any elector information about election procedures that is incorrect or misleading . . .”); N.M. STAT. ANN. § 1-20-9 (2021) (prohibiting prohibits “printing, causing to be printed, distributing or displaying false or misleading instructions pertaining to voting or the conduct of the election”).

²⁶⁷ See CONN. GEN. STAT. § 9-363 (2021) (forbidding the intentional production or distribution of “any improper, false, misleading or incorrect instructions or advice or suggestions as to the manner of voting on any tabulator . . .”); 17 R.I. GEN. LAWS § 19-46 (2021) (prohibiting the intentional production or distribution of “any improper, false, misleading, or incorrect instructions or advice or suggestions of how to vote by

eligibility requirements for voting by absentee ballot,²⁶⁸ while Missouri and New Mexico forbid the publication of false information on a ballot itself.²⁶⁹ New York does not prohibit the publication of any specific false information about voting requirements or procedures but broadly prohibits “[a]ny acts intended to hinder or prevent any eligible person from registering to vote, enrolling to vote or voting.”²⁷⁰

Although these statutes do not rest on the state’s interest in protecting against reputational harms arising from defamatory falsehoods, the state does have a compelling interest in preserving fair and honest elections.²⁷¹ False statements about voting requirements or procedures can be particularly harmful to election administration and pose a serious risk of disenfranchising voters. State laws banning knowing falsehoods calculated to deceive someone about when to vote would seem to directly promote this interest. As the Supreme Court recently remarked in dicta in *Minnesota Voters Alliance v. Mansky*, “[w]e do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”²⁷²

Election law expert Richard Hasen, who has carefully examined this issue, concludes that a state “should have the

computer ballot in conjunction with the optical scan precinct count unit . . .”).

²⁶⁸ See CONN. GEN. STAT. § 9-135(b) (2021).

²⁶⁹ See MO. REV. STAT. § 115.631(7) (2021) (prohibiting prohibits anyone from “knowingly furnishing any voter with a false or fraudulent or bogus ballot . . .”); N.M. STAT. ANN. § 1-20-9(8) (2021) (prohibiting the prohibits publication of “any official ballot, sample ballot, facsimile diagram or pretended ballot that includes the name of any person not entitled by law to be on the ballot, or omits the name of any person entitled by law to be on the ballot, or otherwise contains false or misleading information or headings”).

²⁷⁰ See N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (2022).

²⁷¹ See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (noting that “[a] State indisputably has a compelling interest in preserving the integrity of its election process”); *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (concluding that the government has a “compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process”), *aff’d*, 565 U.S. 1104 (2012).

²⁷² 138 S. Ct. 1876, 1889 n.4 (2018) (holding that Minnesota’s ban on political apparel inside a polling place violated the First Amendment). Bill Marshall concludes that “*Mansky* thus appears to greenlight proposed laws [that] would outlaw practices such as knowingly providing false information regarding ‘the time, place, or manner of holding [an] election’ or false information concerning ‘the qualifications for or restrictions on voter eligibility for’ voting in an election [and] that existing state laws that prohibit such practices are constitutional as well.” William P. Marshall, *Internet Service Provider Liability for Disseminating False Information About Voting Requirements and Procedures*, 16 OHIO ST. TECH. L.J. 669, 674 (2020) [hereinafter Marshall, *Internet Service Provider Liability*].

power to criminalize” verifiably false speech such as “Republicans vote on Tuesday, Democrats vote on Wednesday.”²⁷³ For Hasen, a law prohibiting this speech “would be justified by the government’s compelling interest in protecting the right to vote.”²⁷⁴ Indeed, were such speech distributed only a few days before an election, it would be very difficult to remedy with counterspeech.²⁷⁵ Hasen warns, however, that “a law targeted at ‘deceptive’ or ‘misleading’ election speech would face greater constitutional hurdles, in part because such a law could chill legitimate speech given the elasticity of the terms ‘deceptive’ and ‘misleading.’”²⁷⁶ Hasen goes on to explain:

Consider, for example, a statement such as “bring identification with you to the polls” made in a state that does not have a voter identification requirement. While such speech could be misleading, suggesting to some voters that identification is required and perhaps deterring voters without the right i.d. from voting, what counts as “misleading” is unconstitutionally vague and in the eyes of the beholder. A statute aimed at barring such misleading speech would open up prosecutorial discretion and the potential for political gamesmanship beyond that which the courts likely would tolerate.²⁷⁷

b. Fault

Each of the thirteen states with statutes prohibiting false statements about voting requirements or procedures impose liability only if the speaker knew at the time of publication that the information was false or acted recklessly in publishing the false information.²⁷⁸ Nine of the thirteen states that prohibit false

²⁷³ Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 71 (2013); *but see* Marshall, *Internet Service Provider Liability*, *supra* note 272, at 688 (writing that it is “debatable” whether laws regulating voting requirements and procedures can be distinguished from false campaign speech laws for purposes of the First Amendment).

²⁷⁴ *Id.*

²⁷⁵ *See* United States v. Alvarez, 567 U.S. 709, 726 (2012) (noting the Court’s preference for counterspeech in remedying the harms from false speech).

²⁷⁶ Hasen, *supra* note 273, at 71–72.

²⁷⁷ *Id.* at 72.

²⁷⁸ *See* CAL. ELEC. CODE § 18543 (West 2021); CONN. GEN. STAT. § 9-363 (2021); HAW. REV. STAT. § 19-3 (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); MINN. STAT. § 204C.035 (2021); MO. REV. STAT. § 115.631(7)–(26) (2021); MONT. CODE ANN. § 13-35-235 (2021); N.M. STAT. ANN. § 1-20-9 (2021); N.Y. ELEC. LAW §

statements about voting requirements or procedures made knowingly or recklessly also require that the false statement be made with the intent to interfere with an election.²⁷⁹

No state currently has a statute that prohibits false statements about voting requirements or procedures based on the constructive knowledge of the speaker. Each state with a statutory provision prohibiting false statements about voting requirements or procedures has at least one statute requiring knowledge or reckless disregard of falsity. However, Connecticut and Hawaii have additional statutes imposing strict liability for any false statement about voting requirements or procedures regardless of whether the speaker knows or has reason to know of the statement's falsity.²⁸⁰

c. Remedies

Twelve of the thirteen states with statutes that prohibit false statements about voting requirements and procedures impose criminal liability for violations, with potential penalties including fines and imprisonment.²⁸¹ New York is the only state that also imposes civil liability for a false statement.²⁸² In

3-106(d) (McKinney 2021); OKLA. STAT. tit. 26, § 16-109 (2021); 17 R.I. GEN. LAWS § 19-46 (2021); TENN. CODE ANN. § 2-19-133(a) (2021); VA. CODE ANN. § 24.2-1005.1 (2021).

²⁷⁹ See CAL. ELEC. CODE § 18543 (West 2021); CONN. GEN. STAT. § 9-363 (2021) (requiring “intent to defraud any elector of his or her vote or cause any elector to lose his or her vote or any part thereof”); HAW. REV. STAT. § 19-3 (2021) (prohibiting the publication of false information “with the purpose of impeding, preventing, or otherwise interfering with the free exercise of the elective franchise”); MINN. STAT. § 204C.035 (2021) (requiring “intent to prevent [an] individual from voting in [an] election”); MO. REV. STAT. § 115.631(7)–(26) (2021) (prohibiting the publication of false information “for the purpose of preventing any person from going to the polls”); N.M. STAT. ANN. § 1-20-9 (2021) (requiring “intent to deceive or mislead any voter, precinct board, canvassing board or other election official”); N.Y. ELEC. LAW § 3-106(d) (McKinney 2021) (requiring “inten[t] to hinder or prevent any eligible person from registering to vote, enrolling to vote or voting”); 17 R.I. GEN. LAWS § 19-46 (2021) (requiring “intent to defraud a voter of his or her vote, or to cause a voter to lose his or her vote”); TENN. CODE ANN. § 2-19-133(a) (2021) (requiring “intent to deceive or disseminate information that [a] person knows to be incorrect”); VA. CODE ANN. § 24.2-1005.1 (2021) (requiring “inten[t] to impede the voter in the exercise of his right to vote”).

²⁸⁰ See CONN. GEN. STAT. § 9-135(b) (2021); HAW. REV. STAT. § 11-391(a)(3) (2021).

²⁸¹ See CAL. ELEC. CODE § 18543 (West 2021); CONN. GEN. STAT. § 9-363 (2021); HAW. REV. STAT. § 19-3 (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); MINN. STAT. § 204C.035 (2021); MO. REV. STAT. § 115.631(7)–(26) (2021); MONT. CODE ANN. § 13-35-235 (2021); N.M. STAT. ANN. § 1-20-9 (2021); OKLA. STAT. tit. 26, § 16-109 (2021); 17 R.I. GEN. LAWS § 19-46 (2021); TENN. CODE ANN. § 2-19-133(a) (2021); VA. CODE ANN. § 24.2-1005.1 (2021).

²⁸² See N.Y. ELEC. LAW § 3-106 (McKinney 2021).

additional to any other criminal penalties, the New York State Board of Elections may impose a civil penalty of up to \$1000 after a hearing.²⁸³

4. False Representations of Source, Authorization, or Sponsorship

Eleven states have statutes that prohibit false statements about the source, authorization, or sponsorship of a political advertisement or about a speaker's affiliation with an organization, candidate, or party.²⁸⁴ This includes express or implied statements about who is speaking, their affiliation, or sponsorship, including statements of approval in the form of "this ad approved by [insert politician or political committee]."

a. Scope of Coverage

Generally, statutes prohibiting false statements about source, authorization, or sponsorship apply broadly to any communication from a political candidate or entity. However, several states have limited the applicability of their statute based on communication medium or alleged source. Arizona and Montana limit their prohibition to communications ostensibly made by a government source or election official²⁸⁵ and New Hampshire limits liability to statements allegedly made by a candidate for office.²⁸⁶ Louisiana and New Hampshire limit liability to false representations made via telephone or automated call,²⁸⁷ while Iowa's statute applies specifically to

²⁸³ See *id.*

²⁸⁴ See ALA. CODE § 17-5-16 (2021); ARIZ. REV. STAT. ANN. § 19-119 (2021); IOWA CODE § 68A.506 (2021); LA. STAT. ANN. § 18:1463 (2021); MONT. CODE ANN. § 13-35-235 (2021); N.H. REV. STAT. ANN. § 664:14-b (2021); N.H. REV. STAT. ANN. § 666:6 (2021); N.H. REV. STAT. ANN. § 667:7-a (2021); N.J. STAT. ANN. § 19:34-66 (West 2021); N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (2021); N.C. GEN. STAT. § 163-278.39 (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); TEX. ELEC. CODE ANN. § 255.004 (West 2021); TEX. ELEC. CODE ANN. § 255.005 (West 2021).

²⁸⁵ See ARIZ. REV. STAT. ANN. § 19-119(A) (2021) (prohibiting "any document that falsely purports to be a mailing authorized, approved, required, sent or reviewed by or that falsely simulates a document from the government of this state, a county, city or town or any other political subdivision"); MONT. CODE ANN. § 13-35-235(1) (2021) (prohibiting any person from "knowingly or purposely disseminat[ing] to any elector information about election procedures that . . . gives the impression that the information has been officially disseminated by an election administrator").

²⁸⁶ See N.H. REV. STAT. ANN. § 667:7-a (2021) (prohibiting any person from "plac[ing] a telephone call during which the person falsely represents himself or herself as a candidate for office")

²⁸⁷ See LA. STAT. ANN. § 18:1463(C)(1) (2021) (prohibiting any person from "mak[ing] or caus[ing] to be made any telephone call or automated call that states or implies that

false caller identification information.²⁸⁸ A second New Hampshire statute applies only to false written signatures by a political candidate, forbidding any misrepresentation that a candidate has written or signed a letter or other document.²⁸⁹

Whether these statutes can pass First Amendment muster is an open question. Narrower statutes that merely prohibit a false representation that an advertisement or other communication is coming from a government source or an election official are likely to be permissible,²⁹⁰ but as the scope of what is prohibited expands to other subject areas, the statutes are likely to face First Amendment problems. While no lower court has weighed in directly on the constitutionality of a law in this category, in a less-discussed portion of the Supreme Court's ruling in *Citizens United v. Federal Election Commission*, the Court rejected a First Amendment challenge to federal campaign finance laws mandating disclosure of source, suggesting that transparency about the source of an election communication enables informed decision-making.²⁹¹ However, the Court's emphasis on the lack of a chilling effect "as applied in [this specific case]" suggests that more broadly worded statutes may

the caller represents any candidate, political committee, or any other person or organization unless the candidate, political committee, person, or organization so represented has given specific approval to the person paying for the call in writing to make such representation"); N.H. REV. STAT. ANN. § 667:7-a (2021) (prohibiting any person from "plac[ing] a telephone call during which the person falsely represents himself or herself as a candidate for office").

²⁸⁸ See IOWA CODE § 68A.506 (2021) (prohibiting any person from "knowingly us[ing] or provid[ing] to another person . . . [f]alse caller identification information . . . related to expressly advocating the nomination, election, or defeat of a clearly identified candidate or for the passage or defeat of a clearly identified ballot issue" or "[c]aller identification information pertaining to an actual person with that person's consent").

²⁸⁹ See N.H. REV. STAT. ANN. § 666:6 (2021) (prohibiting any person from "without authority, sign[ing] the name of any other person to any letter or other document, or falsely represent[ing] that any other has written such letter or document, knowing such representation to be false . . .").

²⁹⁰ See *U.S. v. Alvarez*, 567 U.S. 709, 721 (2012) (Kennedy, J.) (noting the constitutionality of laws that prohibit the false representation that one is speaking as a government official or on behalf of the government and noting that "[s]tatutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, protect the integrity of Government processes, quite apart from merely restricting false speech"); *id.* at 748 (Alito, J., dissenting).

²⁹¹ See *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."); see also Norton, *supra* note 30 (framing the Court's decision as valuing information about the source of political communications).

be struck down,²⁹² and the Court has struck down other campaign speech regulations based on their source-disclosure requirements.²⁹³

b. Fault

Eight states have statutes that impose liability if the speaker knew at the time of publication that the information was false or acted recklessly in publishing the false information.²⁹⁴ No state currently has a statute that would impose liability based on constructive knowledge of falsity by the speaker, but six states

²⁹² *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010) (“[T]here has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.”).

²⁹³ *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (striking down an Ohio law prohibiting the distribution of anonymous campaign literature).

²⁹⁴ *See* ALA. CODE § 17-5-16(a) (2021) (prohibiting any person from “fraudulently [] misrepresent[ing] himself or herself, or any other person or organization with which he or she is affiliated, as speaking or writing or otherwise acting for or on behalf of any candidate, principal campaign committee, political action committee, or political party, or agent or employee thereof”); ALA. CODE § 17-5-16(c) (2021) (prohibiting “misrepresent[ing], in any automated or pre-recorded communication that is a political advertisement and that is initiated via an automated telephone dialing service, the identification of the person, nonprofit corporation, entity, principal campaign committee, or political action committee that paid for such communication”); IOWA CODE § 68A.506 (2021) (prohibiting any person from “knowingly us[ing] or provid[ing] to another person . . . [f]alse caller identification information . . . related to expressly advocating the nomination, election, or defeat of a clearly identified candidate or for the passage or defeat of a clearly identified ballot issue” or “[c]aller identification information pertaining to an actual person with that person’s consent”); LA. STAT. ANN. § 18:1463(C)(4)(b) (2021) (prohibiting any person from “willfully and knowingly participat[ing] in or conspir[ing] to participate in a plan, scheme, or design to misrepresent himself or any committee or organization under his control or under the control of any other participant in the plan, scheme, or design as speaking, writing, or otherwise acting for or on behalf of any candidate, political committee, or political party, or any employee or agent thereof”); MONT. CODE ANN. § 13-35-235(1) (2021) (prohibiting any person from “knowingly or purposely disseminat[ing] to any elector information about election procedures that . . . gives the impression that the information has been officially disseminated by an election administrator”); N.H. REV. STAT. ANN. § 666:6 (2021) (prohibiting any person from “without authority, sign[ing] the name of any other person to any letter or other document, or falsely represent[ing] that any other has written such letter or document, knowing such representation to be false”); N.J. STAT. ANN. § 19:34-66 (West 2021) (prohibiting any person from “knowingly produc[ing] . . . any . . . mass communication in any medium . . . which purports to or appears to originate from, or be on behalf of, the campaign of a candidate for public office or party position . . . while failing to reveal specifically in such communication that he is acting under the instructions of, or on behalf of, another candidate or such other candidate’s paid or volunteer campaign staff”); OHIO REV. CODE ANN. § 3517.22(B)(1) (West 2021) (prohibiting any person from “[f]alsely identify[ing] the source of a statement [or] issu[ing] statements under the name of another person without authorization”); TEX. ELEC. CODE ANN. § 255.004(b) (West 2021) (prohibiting any person from “represent[ing] in a campaign communication that the communication emanates from a source other than its true source”).

have statutes that impose liability regardless of whether the speaker knew or should have known of the statement's falsity.²⁹⁵

As with other categories of direct regulation, multiple states have imposed a secondary intent requirement to limit statutory liability. Along these lines, Alabama, Iowa, New Hampshire, New Jersey, Ohio, and Texas require that the false representation be made with the intent to interfere with an election,²⁹⁶ However, Arizona, Louisiana, New Hampshire, New York, North Carolina, and Texas have statutes that prohibit false statements about the source of an advertisement or a speaker's affiliation regardless of whether the speaker knows or has reason to know of its falsity or intends to interfere with an election (New Hampshire and Texas have separate statutes that fall into both categories).²⁹⁷

²⁹⁵ See ARIZ. REV. STAT. ANN. § 19-119(A) (2021) (prohibiting mailing or delivering “any document that falsely purports to be a mailing authorized, approved, required, sent or reviewed by or that falsely simulates a document from the government of this state, a county, city or town or any other political subdivision”); LA. STAT. ANN. § 18:1463.1(C)(1) (2021) (prohibiting any person from “mak[ing] or caus[ing] to be made any telephone call or automated call that states or implies that the caller represents any candidate, political committee, or any other person or organization unless the candidate, political committee, person, or organization so represented has given specific approval to the person paying for the call in writing to make such representation”); N.H. REV. STAT. ANN. § 666:7-a (2021) (prohibiting any person from “plac[ing] a telephone call during which the person falsely represents himself or herself as a candidate for office”); N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (2022) (prohibiting any “person, political party, or committee” from “engag[ing] in . . . the preparation or distribution of any fraudulent, forged or falsely identified writing or the use of any employees or agents who falsely represent themselves as supporters of a candidate, political party or committee”); N.C. GEN. STAT. § 163-278.39 (2021) (prohibiting any print, television, or radio advertisements “bearing any legend . . . that misrepresents the sponsorship or authorization of the advertisement”); TEX. ELEC. CODE ANN. § 255.004(a) (West 2021) (prohibiting any person from “enter[ing] into a contract or other agreement to print, publish, or broadcast political advertising that purports to emanate from a source other than its true source”); TEX. ELEC. CODE ANN. § 255.005 (West 2021) (prohibiting any person from “misrepresent[ing] [a] person’s identity or, if acting or purporting to act as an agent, misrepresent[ing] the identity of the agent’s principal, in political advertising or a campaign communication”).

²⁹⁶ See ALA. CODE § 17-5-16(a) (2021) (prohibiting false information to be published “in a manner which is damaging or is intended to be damaging to [a] candidate, principal campaign committee, political action committee, or political party”); IOWA CODE § 68A.506(1)(a) (2021) (requiring “intent to defraud for purposes related to expressly advocating the nomination, election, or defeat of a clearly identified candidate or for the passage or defeat of a clearly identified ballot issue”); N.H. REV. STAT. ANN. § 666:6 (2021) (prohibiting false representations made “for the purpose of influencing votes”); N.J. STAT. ANN. § 19:34-66 (West 2021) (prohibiting false representations made “for the purpose of impeding the campaign of [a] candidate”); OHIO REV. CODE ANN. § 3517.22(B) (West 2021) (requiring “intent to affect the outcome of [a] campaign”); TEX. ELEC. CODE ANN. § 255.004(b) (West 2021) (requiring “intent to injure a candidate or influence the result of an election”).

²⁹⁷ See ARIZ. REV. STAT. ANN. § 19-119(A) (2021); LA. STAT. ANN. § 18:1463(C)(1) (2021); N.H. REV. STAT. ANN. § 666:7-a (2021); N.Y. COMP. CODES R. & REGS. tit. 9,

c. Remedies

Eight states with statutes prohibiting false statements of source, authorization, or sponsorship impose criminal penalties for a violation, with each state treating a violation as a misdemeanor offense punishable by fine or imprisonment.²⁹⁸ Arizona, New Hampshire, and New York treat a violation as a civil infraction,²⁹⁹ including one New Hampshire statute that contains both civil and criminal penalties.³⁰⁰ While each of these states imposes a civil monetary penalty, a New Hampshire statute also allows “any person injured by another’s violation” to bring an action for damages and equitable relief, including an injunction.³⁰¹

5. False Statements of Endorsement

Nine states have statutes that prohibit false statements that a candidate, party, or ballot measure has the endorsement or support of a person or organization.³⁰² This category includes express or implied statements of endorsement by another person, organization, political party, or committee.

a. Scope of Coverage

Unlike Category 4 (Source, Authorization, or Sponsorship), statutes in this category target statements of endorsement directed at a candidate, party, or ballot measure rather than statements endorsing a specific advertisement or

§ 6201.1 (2022); N.C. GEN. STAT. § 163-278.39 (2021); TEX. ELEC. CODE ANN. § 255.005).

²⁹⁸ See ALA. CODE § 17-5-16 (2021); IOWA CODE § 68A.506 (2021); MONT. CODE ANN. § 13-35-235 (2021); N.H. REV. STAT. ANN. § 666:6 (2021); N.H. REV. STAT. ANN. § 666:7-a (2021); N.J. STAT. ANN. § 19:34-66 (West 2021); N.C. GEN. STAT. § 163-278.39 (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); TEX. ELEC. CODE ANN. § 255.004 (West 2021); TEX. ELEC. CODE ANN. § 255.005 (West 2021).

²⁹⁹ See ARIZ. REV. STAT. ANN. § 19-119 (2021); N.H. REV. STAT. ANN. § 664:14-b (2021); N.H. REV. STAT. ANN. § 667:7-a (2021); N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (2022). New Hampshire has separate statutes within this category imposing civil and criminal liability.

³⁰⁰ See N.H. REV. STAT. ANN. § 666:7-a (2021).

³⁰¹ See N.H. REV. STAT. ANN. § 664:14-b (2021).

³⁰² See CAL. ELEC. CODE § 20007 (West 2021); FLA. STAT. § 106.143 (2021); LA. STAT. ANN. § 18:1463 (2021); MASS. GEN. LAWS ch. 56, § 41A (2021); MINN. STAT. § 211B.02 (2021); N.H. REV. STAT. ANN. § 666:6 (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); TENN. CODE ANN. § 2-19-116 (2021); UTAH CODE ANN. § 20A-11-901 (West 2021).

communication.³⁰³ While each statute generally prohibits false claims of endorsement, there is a high degree of variation in each statute's applicability. This distinction may be based on particular communication mediums; for example, Louisiana's statute is limited to false representations of endorsement on official or unofficial ballots containing a "photograph or likeness of any person."³⁰⁴

California's statute limits the scope of its coverage in two other ways.³⁰⁵ The statute applies only to false representations of endorsement made by a candidate herself or by a committee on her behalf,³⁰⁶ but not, as with other statutes within this category, by an individual person allegedly acting on behalf of a candidate.³⁰⁷ In addition, California's statute applies only to statements falsely suggesting that a candidate has the support of a political party's "county central committee or state central committee" but does not apply to other false statements of endorsement (i.e., false claims that a candidate has the support of another elected official).³⁰⁸

Florida, Massachusetts, and Utah impose liability regardless of whether a statement of endorsement is false. Instead, these states prohibit the use of a statement of

³⁰³ Compare statutes cited *supra* in notes 284 and 302.

³⁰⁴ See LA. STAT. ANN. § 18:1463(B)(2) (2021) (prohibiting false representations of endorsement on official or unofficial ballots that contain "a photograph, or likeness of any person which falsely alleges . . . that any person or candidate, or group of candidates in an election is endorsed by or supported by another candidate, group of candidates or other person").

³⁰⁵ See CAL. ELEC. CODE § 20007 (West 2021) (prohibiting any "candidate or committee in his or her behalf" from making certain false statements of endorsement).

³⁰⁶ See CAL. ELEC. CODE § 20007 (West 2021) (prohibiting any "candidate or committee on his or her behalf" from making certain false statements of endorsement).

³⁰⁷ See, e.g., FLA. STAT. § 106.143 (2021) (prohibiting "any candidate or person on behalf of a candidate" from "represent[ing] that any person or organization supports such candidate"); N.H. REV. STAT. ANN. § 666:6 (2021) (prohibiting any person from "us[ing], employ[ing] or assign[ing] the name of any other person, or a fictitious name on a radio or television broadcast or other means of communication, to signify endorsement of a political party, candidates or programs").

³⁰⁸ See CAL. ELEC. CODE § 20007 (West 2021) (prohibiting any candidate or committee from "represent[ing] . . . that the candidate has the support of a committee or organization that includes as part of its name the name or any variation upon the name of a qualified political party with which the candidate is not affiliated, together with the words "county committee," "central committee," "county," or any other term that might tend to mislead the voters into believing that the candidate has the support of that party's county central committee or state central committee, when that is not the case").

endorsement unless the endorsing party gives permission in writing or provides express consent.³⁰⁹

As with statutes that target false statements about ballot measures, these false endorsement statutes are not limited to rectify harms to an individual's reputation, which has traditionally justified government restrictions on defamatory speech.³¹⁰ The government's interest in truthful endorsements is likely to be less weighty in a court's evaluation of whether these statutes pass First Amendment muster.³¹¹

b. Fault

Louisiana, Minnesota, New Hampshire, and Tennessee have statutes that impose liability if the speaker knew at the time of publication that the statement of endorsement was false or acted recklessly in publishing the false endorsement.³¹² While no state imposes liability based on constructive knowledge of falsity, six states have statutes that impose liability regardless of whether

³⁰⁹ See FLA. STAT. § 106.143(4) (2021) (imposing liability “unless the person or organization so represented has given specific approval in writing to the candidate to make such representation”); MASS. GEN. LAWS ch. 56, § 41A (2021) (imposing liability for uses of a statement of endorsement “except with the express consent of such [endorser or supporter]”); UTAH CODE ANN. § 20A-11-901(5) (West 2021) (imposing liability for uses of a statement of endorsement “except with the express consent of that [endorser or supporter]”).

³¹⁰ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.”).

³¹¹ See Fried, *supra* note 243, at 238 (“[T]he First Amendment precludes punishment for generalized ‘public’ frauds, deceptions and defamation. In political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed.” (footnote omitted)).

³¹² See LA. STAT. ANN. § 18:1463(B)(2) (2021) (prohibiting false representations of endorsement on official or unofficial ballots that contain “a photograph, or likeness of any person which falsely alleges . . . that any person or candidate, or group of candidates in an election is endorsed by or supported by another candidate, group of candidates or other person”); MINN. STAT. § 211B.02 (2021) (prohibiting anyone from “knowingly mak[ing] . . . a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization”); N.H. REV. STAT. ANN. § 666:6 (2021) (prohibiting any person from “us[ing], employ[ing] or assign[ing] the name of any other person, or a fictitious name on a radio or television broadcast or other means of communication, to signify endorsement of a political party, candidates or programs”); TENN. CODE ANN. § 2-19-116 (2021) (prohibiting publication of “any facsimile of an official ballot, any unofficial sample ballot, writing, pamphlet, paper, photograph or other printed material which contains the endorsement of a particular candidate, group of candidates or proposition by an organization, group, candidate or other individual, whether existent or not”).

the speaker knew or should have known of the endorsement's falsity.³¹³

As mentioned above, Louisiana and Tennessee require the intent to misrepresent or mislead potential voters but also require that the speaker know or recklessly disregard the statement's falsity.³¹⁴ New Hampshire requires both that the speaker know or recklessly disregard the falsity of a statement relating to endorsement and that the statement be made with the intent to interfere with an election.³¹⁵

Some states also apply secondary intent standards that limit liability. Louisiana and Tennessee require that a speaker not only know or recklessly disregard the statement's falsity but also that they have the intent to *misrepresent or mislead* potential voters.³¹⁶ Similarly, New Hampshire requires that a statement be made with the intent to interfere with an election.³¹⁷

c. Remedies

³¹³ See CAL. ELEC. CODE § 20007 (West 2021) (prohibiting any “candidate or committee in his or her behalf” from “represent[ing] . . . that the candidate has the support of a committee or organization that includes as part of its name the name or any variation upon the name of a qualified political party with which the candidate is not affiliated, together with the words “county committee,” “central committee,” “county,” or any other term that might tend to mislead the voters into believing that the candidate has the support of that party's county central committee or state central committee, when that is not the case”); FLA. STAT. § 106.143 (2021) (prohibiting “any candidate or person on behalf of a candidate” from “represent[ing] that any person or organization supports such candidate”); LA. STAT. ANN. § 18:1463(C)(4)(a) (2021) (prohibits any person from “misrepresent[ing] himself or any committee or organization under his control as speaking, writing, or otherwise acting for or on behalf of any candidate, political committee, or political party, or any employee or agent thereof”); MASS. GEN. LAWS ch. 56, § 41A (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); UTAH CODE ANN. § 20A-11-901 (West 2021).

³¹⁴ See LA. STAT. ANN. § 18:1463(B)(2) (2021) (requiring “intent to misrepresent[] that any person or candidate, or group of candidates in an election is endorsed by or supported by another candidate, group of candidates or other person); TENN. CODE ANN. § 2-19-116(a) (2021) (requiring “intent that [a] person receiving such printed material mistakenly believe that the endorsement of such candidate, candidates or proposition was made by an organization, group, candidate or entity other than the one or ones appearing on the printed material”).

³¹⁵ See N.H. REV. STAT. ANN. § 666:6 (2021) (requiring a false representation to be made “for the purpose of influencing votes”).

³¹⁶ See LA. STAT. ANN. § 18:1463(B)(2) (2021) (requiring “intent to misrepresent[] that any person or candidate, or group of candidates in an election is endorsed by or supported by another candidate, group of candidates or other person); TENN. CODE ANN. § 2-19-116(a) (2021) (requiring “intent that [a] person receiving such printed material mistakenly believe that the endorsement of such candidate, candidates or proposition was made by an organization, group, candidate or entity other than the one or ones appearing on the printed material”).

³¹⁷ See N.H. REV. STAT. ANN. § 666:6 (2021) (requiring a false representation to be made “for the purpose of influencing votes”).

Seven states with statutes prohibiting false statements of endorsement impose criminal penalties for a violation, with each treating such a statement as a misdemeanor offense punishable with a fine or period of imprisonment.³¹⁸ California, Florida, and Utah impose civil penalties for a violation.³¹⁹ Florida levies a civil penalty of up to \$1000,³²⁰ while Utah creates a civil mechanism to remove violators from office.³²¹ California allows for injunctive relief, permitting any member of a political committee to bring an action in court to “enjoin misrepresentation by a candidate or committee in his or her behalf.”³²² This relief can come in the form of either a temporary or permanent restraining order or injunction.³²³

6. False Statements of Incumbency

Seven states, California, Florida, Indiana, Michigan, Minnesota, Oregon, and Texas, have statutes that prohibit false statements about incumbency.³²⁴ These statutes target false representations that a candidate currently holds or previously held public office.

a. Scope of Coverage

The primary distinction in scope among states targeting false statements of incumbency is in the breadth of the statute’s applicability. California, Michigan, Oregon, and Texas prohibit any communication that suggests or implies that a political candidate is an incumbent when they are not.³²⁵ For example,

³¹⁸ See LA. STAT. ANN. § 18:1463 (2021); MASS. GEN. LAWS ch. 56, § 41A (2021); MINN. STAT. § 211B.02 (2021); MINN. STAT. § 211B.19 (2021); N.H. REV. STAT. ANN. § 666:6 (2021); OHIO REV. CODE ANN. § 3517.22 (West 2021); TENN. CODE ANN. § 2-19-116 (2021); UTAH CODE ANN. § 20A-11-901 (West 2021).

³¹⁹ See CAL. ELEC. CODE § 20007 (West 2021); FLA. STAT. § 106.143 (2021); UTAH CODE ANN. § 20A-11-901 (West 2021).

³²⁰ See FLA. STAT. § 106.143 (2021).

³²¹ See UTAH CODE ANN. § 20A-11-901 (West 2021).

³²² CAL. ELEC. CODE § 20007 (West 2021).

³²³ See CAL. ELEC. CODE § 20006 (West 2021).

³²⁴ See CAL. ELEC. CODE § 18350 (West 2021); FLA. STAT. § 106.143 (2021); IND. CODE § 3-9-3-5 (2021); MICH. COMP. LAWS § 168.944 (2021); MINN. STAT. § 211B.03 (2021); ORE. REV. STAT. § 260.550 (2021); TEX. ELEC. CODE ANN. § 255.006 (West 2021).

³²⁵ See CAL. ELEC. CODE § 18350 (West 2021) (prohibiting any person from “[a]ssum[ing], pretend[ing], or imply[ing], by his or her statements, conduct, or campaign materials, that he or she is the incumbent of a public office when that is not the case”); MICH. COMP. LAWS § 168.944 (2021) (imposing liability for “[a]ny person who advertises or uses in any campaign material . . . or otherwise indicates, represents, or gives the impression that a candidate for public office is the incumbent, when in fact

California prohibits any false implication of incumbency by “statements, conduct, or campaign materials,”³²⁶ while Oregon prohibits any “material, statement, or publication” falsely suggesting incumbency.³²⁷

The other states have some limitation on scope. Texas, which also has a broader prohibition on “campaign communications,”³²⁸ prohibits entering into a contract to distribute false statements of incumbency in “political advertising.”³²⁹ Indiana only prohibits involvement with “paid political advertising or campaign material” containing false representations of incumbency,³³⁰ while Minnesota limits their prohibition to elections held after redistricting.³³¹ Florida’s statute applies to political advertisements but also specifically requires the use of the word “for” between a candidate’s name and the office for which the candidate is running.³³²

b. Fault

California, Indiana, Oregon, and Texas have statutes that impose liability for a false statement of incumbency if the speaker knew of or recklessly disregarded the statement’s falsity.³³³ Of

the candidate is not the incumbent”); OR. REV. STAT. § 260.550(1) (2021) (prohibiting any person from “describ[ing] a candidate as the incumbent in the office to which the candidate seeks nomination or election in any material, statement or publication supporting the election of the candidate, with knowledge or with reckless disregard that the description is a false statement of material fact”); TEX. ELEC. CODE ANN. § 255.006(b) (West 2021) (prohibiting any person from “knowingly represent[ing] in a campaign communication that a candidate holds a public office that the candidate does not hold at the time the representation is made”).

³²⁶ See CAL. ELEC. CODE § 18350 (West 2021).

³²⁷ See ORE. REV. STAT. § 260.550(1) (2021).

³²⁸ See TEX. ELEC. CODE ANN. § 255.006(b) (West 2021).

³²⁹ See TEX. ELEC. CODE ANN. § 255.006(a) (West 2021) (prohibiting any person from “knowingly enter[ing] into a contract or other agreement to print, publish, or broadcast political advertising with the intent to represent to an ordinary and prudent person that a candidate holds a public office that the candidate does not hold at the time the agreement is made”).

³³⁰ See IND. CODE § 3-9-3-5 (2021) (prohibiting any person from “knowingly or intentionally authoriz[ing], financ[ing], sponsor[ing], or participat[ing] in the preparation, distribution, or broadcast of paid political advertising or campaign material that falsely represents that a candidate in any election is or has been an officeholder”).

³³¹ MINN. STAT. § 211B.03 (2021) (prohibiting any person from “us[ing] the term “reelect” in a campaign for elective office” after redistricting unless the candidate is “the incumbent of that office and the office represents any part of the new district”).

³³² See FLA. STAT. § 106.143(6) (2021) (mandating that no political advertisement for a non-incumbent use the term “re-elect”).

³³³ See CAL. ELEC. CODE § 18350 (West 2021); IND. CODE § 3-9-3-5 (2021); OR. REV. STAT. § 260.550(1) (2021); TEX. ELEC. CODE ANN. § 255.006(a)–(b) (West 2021).

those states, only California also requires that a false statement about incumbency be made with the intent to influence an election.³³⁴ Florida, Michigan, and Minnesota prohibit false statements about incumbency regardless of whether the speaker knew or had reason to know of its falsity.³³⁵ However, Florida and Minnesota limit liability to explicit use of the term “re-elect,” meaning that Michigan is the only state that imposes strict liability for implied statements of incumbency.³³⁶

c. Remedies

Five states have statutes that criminalize false statements of incumbency, with each state imposing misdemeanor liability for a violation.³³⁷ Four states impose civil punishment for a false statement of incumbency, with Florida and Indiana creating a civil penalty of up to \$1000.³³⁸ California enables a candidate for the relevant public office to seek injunctive relief to enjoin the false statement of incumbency.³³⁹

B. General Statutes that Prohibit Intimidation or Fraud Associated with an Election

While the preceding laws explicitly target the content of election-related speech, a second set of state laws may indirectly regulate the content of election speech through the prohibition of intimidation or fraud associated with an election. Many of these laws were passed to prevent physical acts of voter intimidation. However, at least one state attorney general has used a voter intimidation statute to prosecute political operatives for the distribution of false statements relating to an election, suggesting that these laws could potentially apply to the content of digital political advertisements.³⁴⁰

³³⁴ See CAL. ELEC. CODE § 18350 (West 2021) (requiring a false statement to be made “with intent to mislead the voters in connection with [a] campaign”).

³³⁵ See FLA. STAT. § 106.143(6) (2021); MICH. COMP. LAWS § 168.944 (2021); MINN. STAT. § 211B.03 (2021).

³³⁶ See MICH. COMP. LAWS § 168.944 (2021) (imposing liability for “[a]ny person who advertises or uses in any campaign material . . . or otherwise indicates, represents, or gives the impression that a candidate for public office is the incumbent, when in fact the candidate is not the incumbent”).

³³⁷ See CAL. ELEC. CODE § 18350 (West 2021); MICH. COMP. LAWS § 168.944 (2021); MINN. STAT. § 211B.03 (2021); MINN. STAT. § 211B.19 (2021); OR. REV. STAT. § 260.550 (2021); TEX. ELEC. CODE ANN. § 255.006 (West 2021).

³³⁸ See CAL. ELEC. CODE § 18350 (West 2021); FLA. STAT. § 106.143 (2021); IND. CODE § 3-9-3-5 (2021).

³³⁹ See CAL. ELEC. CODE § 18350 (West 2021).

³⁴⁰ See Meryl Kornfield, *Conservative Operatives Face Felony Charges in Connection with*

Thirty-eight states and the District of Columbia have laws that prohibit intimidation and/or fraud in elections. These statutes can be broken into two separate but related categories. The first category, “Intimidation,” contains statutes that prohibit threats, duress, or coercion associated with an election. These statutes would likely cover statements that threaten or coerce a person to (or not to) vote, sign a petition, or register to vote. The second category, “Fraud or Corruption,” contains statutes that prohibit deception or fraudulent statements associated with an election, as well as inducement or corruption. These statutes would likely cover statements that deceive, defraud, or induce a person to (or not to) vote, sign a petition, register to vote, or choose who or what to vote for.

The main distinction between the two categories is that the “Fraud or Corruption” category would only include false or deceptive statements, while the “Intimidation” category would include statements regardless of their falsity if they constitute a threat or coercion. As with statutes that directly target the content of election-related speech, these categories are not necessarily mutually exclusive (i.e., a state statute that prohibits “coercion or any fraudulent device or contrivance” would fall into both the “Intimidation” and “Fraud or Corruption” categories).

In addition, the statutes described in the previous section that directly target specific types of false election-related speech, like statutes prohibiting false statements about voting procedures or ballot measures, would likely also fall within the “Fraud or Corruption” category which prohibits deceptive or fraudulent statements associated with an election. For purposes of this analysis, we placed statutes that broadly prohibit deceptive statements or conduct related to an election in the “Fraud or Corruption” category, while statutes that specifically identify the type of prohibited speech were placed within one of the direct-targeting categories discussed in the prior section (e.g., Statements about Ballot Measures; Statements about Incumbency).

Each statute under the “Intimidation” and “Fraud or Corruption” categories is a criminal statute creating either a

Robocalls Seeking to Mislead Voters, WASH. POST (Oct. 1, 2020), <https://www.washingtonpost.com/politics/2020/10/01/wohl-robocall-michigan/>.

misdemeanor or felony violation punishable by fine, imprisonment, or both. Accordingly, these categories will not contain a discussion of the potential remedies stemming from a statutory violation.

1. Intimidation

Thirty-eight states and the District of Columbia have statutes prohibiting intimidation, duress, or coercion associated with an election.³⁴¹ Prohibited statements include threats of force, restraint, or economic harm directed at a person, their family, or business.

a. Scope of Coverage

Each statute within this category prevents some form of voter intimidation. However, the statutes have several variations that may limit their applicability. The most common variation is in the act the statute prohibits. Though nearly every statute prohibits “intimidation,” some statutes also prohibit the use of

³⁴¹ See ALA. CODE § 11-46-68(1) (2021); ARIZ. REV. STAT. ANN. § 16-1006 (2021); ARIZ. REV. STAT. ANN. § 16-1013 (2021); ARK. CODE ANN. § 7-1-104(5)-(6) (2021); CAL. ELEC. CODE § 18502 (West 2021); CAL. ELEC. CODE § 18540 (West 2021); COLO. REV. STAT. § 1-13-713 (2021); CONN. GEN. STAT. § 9-364a (2021); DEL. CODE ANN. tit. 15, § 3166 (2021); DEL. CODE ANN. tit. 15, § 5162 (2021); D.C. CODE § 1-1001.14 (2021); FLA. STAT. § 104.0515(3) (2021); FLA. STAT. § 104.061(1) (2021); FLA. STAT. § 104.0615(2) (2021); GA. CODE ANN. § 21-2-567(a) (2021); HAW. REV. STAT. § 19-3(4) (2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); 10 ILL. COMP. STAT. § 5/29-18 (2021); 10 ILL. COMP. STAT. § 5/29-20 (2021); IND. CODE § 3-14-3-21.5 (2021); IOWA CODE § 39A.2(c) (2021); KAN. STAT. ANN. § 25-2415 (2021); KY. REV. STAT. ANN. § 119.155 (West 2021); LA. STAT. ANN. § 18:1461.4(1)-(3) (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); MD. CODE ANN., ELEC. LAW § 16-201 (West 2021); MICH. COMP. LAWS § 168.932(a) (2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-59 (2021); MONT. CODE ANN. § 13-35-218 (1)-(3) (2021); NEB. REV. STAT. § 32-1503 (2021); NEV. REV. STAT. § 293.710 (2021); N.H. REV. STAT. ANN. § 659:40 (2021); N.J. STAT. ANN. § 19:34-1.1 (West 2021); N.J. STAT. ANN. § 19:34-28 (West 2021); N.M. STAT. ANN. § 1-20-14 (2021); N.Y. ELEC. LAW § 17-102(8) (McKinney 2021); N.Y. ELEC. LAW § 17-150(1) (McKinney 2021); N.Y. ELEC. LAW § 17-154(1) (McKinney 2021); N.C. GEN. STAT. § 163-275 (2021); 25 PA. CONS. STAT. § 3547 (2021); R.I. GEN. LAWS § 17-23-5 (2021); S.C. CODE ANN. § 7-25-190 (2021); S.D. CODIFIED LAWS § 12-26-12 (2021); TENN. CODE ANN. § 2-19-115 (2021); UTAH CODE ANN. § 20A-3-502(1)(c) (West 2021); WASH. REV. CODE § 29A.84.220(5) (2021); WASH. REV. CODE § 29A.84.250 (2021); WASH. REV. CODE § 29A.84.630 (2021); W. VA. CODE § 3-8-11 (2021).

“menace,”³⁴² “undue influence,”³⁴³ or “coercion”³⁴⁴ directed towards voters. While most statutes prohibit the use of intimidation generally to prevent someone *from voting*, seven states also prohibit the use of intimidation on account of someone having voted in a certain way.³⁴⁵

Three states limit applicability for voter intimidation statutes to particular stages of the voting process.³⁴⁶ For example, Washington has three intimidation statutes: one refers to an individual’s right to vote in a primary or general election³⁴⁷ and two other statutes target voter intimidation related to a voter’s right to sign or vote for a recall petition³⁴⁸ or an initiative or referendum measure.³⁴⁹ Similarly, a Maryland statute limits

³⁴² See, e.g., ARIZ. REV. STAT. ANN. § 16-1006 (2021) (prohibiting the use of force, threats, or menaces to attempt to influence a voter); DEL. CODE ANN. tit. 15, § 3166 (2021) (preventing the use of “force, threat, menace, [or] intimidation” to influence a voter); MICH. COMP. LAWS § 168.932(a) (2021) (preventing use of menace in an attempt to influence a voter).

³⁴³ See, e.g., MONT. CODE ANN. § 13-35-218 (1) (2021) (preventing use of coercion or undue influence against any person to interfere with their right to vote); NEV. REV. STAT. § 293.710 (2021) (preventing use of intimidation, coercion, or undue influence in connection with voting); W. VA. CODE § 3-8-11 (2021) (preventing the use of threats of damage, harm or loss or any other attempts to intimidate or exert undue influence in order to induce a voter).

³⁴⁴ See, e.g., CAL. ELEC. CODE § 18540 (West 2021) (prohibiting the use or threat of intimidation or coercion to affect an individual’s vote); N.H. REV. STAT. ANN. § 659:40 (2021) (preventing the knowing use of intimidation or coercion in connection with voting); 25 PA. CONS. STAT. § 3547 (2021) (prohibiting any person or corporation from using intimidation or coercion to induce or compel any voter).

³⁴⁵ See, e.g., CAL. ELEC. CODE § 18540 (West 2021) (prohibiting the use or threat of intimidation or coercion “because any person voted or refrained from voting at any election or voted or refrained from voting for any particular person or measure at any election”); HAW. REV. STAT. § 19-3(4) (2021) (preventing intimidation “on account of [a] person having voted or refrained from voting, or voted or refrained from voting for any particular person or party”); N.Y. ELEC. LAW § 17-150(1) (McKinney 2021) (prohibiting intimidation “on account of [a] person having voted or refrained from voting in [an] election, or having voted or refrained from voting for or against any particular person or persons, or for or against any proposition [or question] submitted to voters at such election”); 25 PA. CONS. STAT. § 3547 (2021) (prohibiting intimidation “on account of [a] person having voted or refrained from voting in [an] election, or having voted or refrained from voting for or against any particular person or persons, or for or against any proposition [or question] submitted to voters at such election”).

³⁴⁶ See 10 ILL. COMP. STAT. § 5/29-20 (2021); MD. CODE ANN., ELEC. LAW § 16-101 (West 2021); WASH. REV. CODE § 29A.84.630 (2021); WASH. REV. CODE § 29A.84.220(5) (2021); WASH. REV. CODE § 29A.84.250(4) (2021).

³⁴⁷ See WASH. REV. CODE § 29A.84.630 (2021) (prohibiting use of menace or unlawful means in an attempt to influence a voter).

³⁴⁸ WASH. REV. CODE § 29A.84.220(5) (2021) (preventing the use of threats or intimidation to interfere with a voter’s right to sign or not sign a recall petition); see also MINN. STAT. § 211C.09 (2021) (prohibiting threats, intimidation, or coercion to interfere with a voter’s right to sign or not sign a recall petition).

³⁴⁹ WASH. REV. CODE § 29A.84.250(4) (2021) (prohibiting threats or intimidation to interfere with a voter’s right to sign or not sign an initiative or referendum petition).

applicability to interference with the voter registration process (rather than an individual's actual vote),³⁵⁰ while an Illinois statute applies specifically to those casting their ballots by mail.³⁵¹

There is also variation in the type of party held liable by a state under a voting intimidation statute. Though each state holds a person liable for intimidation, Delaware, New York, and Pennsylvania explicitly extend liability to corporations doing business within the state.³⁵²

b. Fault

State statutes that prohibit intimidation or fraud associated with an election differ in the level of fault they require. Twenty-nine states have statutes that impose liability if the speaker made intimidating, threatening, or coercive statements with the *purpose or intent* of influencing or interfering with an election.³⁵³ Seventeen states and the District of Columbia have statutes that prohibit statements that intimidate, threaten, or coerce a person to vote, refrain from voting, sign a petition,

³⁵⁰ See MD. CODE ANN., ELEC. LAW § 16-101(a)(6) (West 2021) (prohibiting the willful and knowing use of threat, menace, or intimidation to hinder voter registration).

³⁵¹ See 10 ILL. COMP. STAT. § 5/29-20 (2021) (preventing the knowing intimidation or undue influence of a voter by mail).

³⁵² See DEL. CODE ANN. tit. 15, § 5162 (2021) (imposing a ban on any direct or indirect threats to a voter's employment or occupation); N.Y. ELEC. LAW § 17-150(1) (McKinney 2021) (prohibiting persons or corporations from using "any . . . manner" of intimidation in order to induce or compel a voter); 25 PA. CONS. STAT. § 3547 (2021) (prohibiting any person or corporation from using intimidation or coercion to induce or compel any voter).

³⁵³ ALA. CODE § 17-17-33 (2021); ARIZ. REV. STAT. ANN. § 16-1006 (2021); ARIZ. REV. STAT. ANN. § 16-1013 (2021); ARK. CODE ANN. § 7-1-104(5)-(6) (2021); CAL. ELEC. CODE § 18540 (West 2021); DEL. CODE ANN. tit. 15, § 3166 (a)(9)(2021); FLA. STAT. § 104.0515 (2021); FLA. STAT. § 104.061 (2021); GA. CODE ANN. § 21-2-567 (2021); HAW. REV. STAT. § 19-3(4) (2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); 10 ILL. COMP. STAT. § 5/29-18 (2021); 10 ILL. COMP. STAT. § 5/29-20 (2021); IND. CODE § 3-14-3-21.5 (2021); KAN. STAT. ANN. § 25-2415 (2021); KY. REV. STAT. ANN. § 119.155 (West 2021); LA. STAT. ANN. § 18:1461.4 (2021); MD. CODE ANN., ELEC. LAW § 16-101(a)(6) (West 2021); MD. CODE ANN., ELEC. LAW § 16-201(a)(5)-(6) (West 2021); MICH. COMP. LAWS § 168.932 (2021); MONT. CODE ANN. § 13-35-218 (2021); N.H. REV. STAT. ANN. § 659:40 (2021); N.J. STAT. ANN. § 19:34-1.1 (West 2021); N.J. STAT. ANN. § 19:34-28 (West 2021); N.M. STAT. ANN. § 1-20-14 (2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); N.Y. ELEC. LAW § 17-154 (McKinney 2021); N.C. GEN. STAT. § 163-275(17) (2021); 25 PA. CONS. STAT. § 3547 (2021); 17 R.I. GEN. LAWS § 17-23-5 (2021); S.D. CODIFIED LAWS § 12-26-12 (2021); TENN. CODE ANN. § 2-19-115(3) (2021); WASH. REV. CODE § 29A.84.220(5) (2021); WASH. REV. CODE § 29A.84.250(4) (2021); WASH. REV. CODE § 29A.84.630 (2021); W. VA. CODE § 3-8-11 (2021).

register to vote, or choose whom or what to vote for, regardless of whether the speaker intends to influence an election.³⁵⁴

Unlike the statutes described in the other categories in this Article, the issue of intent here is not whether the speaker knew the statement in question was false. Rather, the focus is on whether the speaker intended that his or her speech would have the *secondary effect* of intimidation. While twenty-nine states have statutes that impose liability only when the speaker actually intends such speech to influence or interfere with an election, seventeen states and the District of Columbia have statutes that impose liability regardless of whether the speaker sought to influence or interfere with an election. In other words, this second group of statutes applies whenever the speech in question *has the effect* of influencing an election, regardless of the speaker's intent.³⁵⁵ These latter statutes impose a form of strict liability for speech that results in intimidation, which can raise serious First Amendment concerns.

2. Fraudulent or Corrupt Statements

Twenty-three states and the District of Columbia have statutes that prohibit statements that deceive, defraud, or bribe a person to (or not to) vote, sign a petition, register to vote, or choose who or what to vote for.³⁵⁶ While prior categories directly

³⁵⁴ ALA. CODE § 11-46-68(l) (2021); CAL. ELEC. CODE § 18502 (West 2021); COLO. REV. STAT. § 1-13-713 (2021); CONN. GEN. STAT. § 9-364a (2021); DEL. CODE ANN. tit. 15, § 3166 (2021); D.C. CODE § 1-1001.14(b)(3)(C) (2021); FLA. STAT. § 104.061(1) (2021); IOWA CODE § 39A.2(c) (2021); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-59 (2021); MONT. CODE ANN. § 13-35-218 (2021); NEB. REV. STAT. § 32-1503 (2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); OKLA. STAT. tit. 26, § 16-113 (2021); S.C. CODE ANN. § 7-25-70 (2021); UTAH CODE ANN. § 20A-3-502 (West 2021); WASH. REV. CODE § 29A.84.220(5) (2021); WASH. REV. CODE § 29A.84.250(4) (2021); WASH. REV. CODE § 29A.84.630 (2021).

³⁵⁵ See, e.g., CAL. ELEC. CODE § 18502 (West 2021) (prohibiting any person from “in any manner interfer[ing] with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted”); MINN. STAT. § 211C.09 (2021) (prohibiting any person from “us[ing] threat, intimidation, [or] coercion . . . to interfere or attempt to interfere with the right of any eligible voter to sign or not to sign a recall petition of their own free will”); OKLA. STAT. tit. 26, § 16-113 (2021) (imposing liability for “any person . . . who interferes with a registered voter who is attempting to vote, or any person who attempts to influence the vote of another by means of force or intimidation, or any person who interferes with the orderly and lawful conduct of an election”).

³⁵⁶ See ALA. CODE § 17-17-38 (2021); ARIZ. REV. STAT. ANN. § 16-1006(3) (2021); CAL. ELEC. CODE § 18543 (West 2021); CONN. GEN. STAT. § 9-364a (2021); D.C. CODE § 1-1001.14 (2021); FLA. STAT. § 104.061(1) (2021); HAW. REV. STAT. § 19-3(4) (2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); IOWA CODE § 39A.2 (2021)(b)(5); LA. STAT.

target specific types of false election-related speech, statutes in this category broadly prohibit deceptive statements or conduct related to an election. Unlike the intimidating speech discussed above, punishable statements under this category do not involve a threat of force or coercion.

a. Scope of Coverage

State legislatures have used varying language to prohibit speech under this category. Several statutes prohibit the use of any “fraudulent device or contrivance,”³⁵⁷ while other statutes punish speakers who use “corruption” or “corrupt means”³⁵⁸ to influence an election. Statutes within this category also vary in the stage of the electoral process they are designed to protect. Many statutes apply generally to any stage of an election, using catchall language for broad liability³⁵⁹ through phrases such as an individual’s “free exercise of their elective franchise.”³⁶⁰ These

ANN. § 18:1461.4 (2021); MD. CODE ANN., ELEC. LAW § 16-201(5)-(6); MINN. STAT. § 211C.09 (2021); MISS. CODE ANN. § 23-17-59 (2021); N.J. STAT. ANN. § 19:34-29 (West 2021); NEV. REV. STAT. § 306.210 (2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); 25 PA. CONS. STAT. § 3547 (2021); S.C. CODE ANN. § 7-25-70 (2021); S.D. CODIFIED LAWS § 12-26-12 (2021); UTAH CODE ANN. § 20A-3-502 (West 2021); WASH. REV. CODE § 29A.84.220 (2021); WASH. REV. CODE § 29A.84.250 (2021); WASH. REV. CODE § 29A.84.630 (2021); W. VA. CODE § 3-8-11(a) (2021).

³⁵⁷ *E.g.*, ARIZ. REV. STAT. ANN. § 16-1006(3) (2021); N.J. STAT. ANN. § 19:34-29 (West 2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021); S.D. CODIFIED LAWS § 12-26-12 (2021).

³⁵⁸ States typically use the terms “corruption” or “corrupt means” as a catchall term to create liability for voting-related harms that do not amount to bribery, threat, or another specifically enumerated category. *See, e.g.*, ALA. CODE § 17-17-38 (2021) (creating liability for any person “who, by bribery or offering to bribe, or by any other corrupt means, attempts to influence any elector in giving his or her vote, deter the elector from giving the same, or disturb or hinder the elector in the free exercise of the right of suffrage”); D.C. CODE § 1-1001.14 (2021) (imposing a criminal penalty on any person “who by any other corrupt means or practice . . . interferes with, or attempts to interfere with, the right of any qualified registered elector to sign or not to sign any initiative, referendum, or recall petition, or to vote for or against, or to abstain from voting on any initiative, referendum, or recall measure”); FLA. STAT. § 104.061(1) (2021) (imposing liability on any person who “by . . . other corruption whatsoever, either directly or indirectly . . . interferes with [any elector] in the free exercise of the elector’s right to vote at any election”).

³⁵⁹ *See, e.g.*, D.C. CODE § 1-1001.14 (2021) (imposing a criminal penalty on any person “who by any other corrupt means or practice . . . interferes with, or attempts to interfere with, the right of any qualified registered elector to sign or not to sign any initiative, referendum, or recall petition, or to vote for or against, or to abstain from voting on any initiative, referendum, or recall measure”); FLA. STAT. § 104.061(1) (2021) (imposing liability on any person who “by . . . other corruption whatsoever, either directly or indirectly . . . interferes with [any elector] in the free exercise of the elector’s right to vote at any election”); IOWA CODE § 39A.2 (2021)(b)(5) (prohibiting any person who “willfully . . . deprives, defrauds, or attempts to deprive or defraud the citizens of [the] state of a fair and impartially conducted election process”).

³⁶⁰ *E.g.*, N.J. STAT. ANN. § 19:34-29 (West 2021); N.Y. ELEC. LAW § 17-150

statutes apply both to a voter's decision to vote for a particular candidate or ballot issue and to a voter's decision to cast a vote (as opposed to not voting). Other narrower statutes specifically apply to voter registration and status³⁶¹ or to petitions for recall.³⁶²

b. Intent

Seven states have statutes that prohibit fraudulent or corrupt statements if the speaker knows of the statement's false or corrupt nature.³⁶³ The remaining fifteen states and the District of Columbia impose liability for fraudulent or corrupt statements without any explicit mention that the speaker must know or have reason to know of the statement's falsity or corrupt nature.³⁶⁴ Many of the statutes that do not explicitly require knowledge of falsity use the phrase "fraudulent device or contrivance" or "corrupt means" as a trigger for liability.³⁶⁵ It is possible that these terms limit liability only to those instances where the speaker has knowledge that they are engaging in fraud or corruption. However, the language in these statutes does not make this limitation clear,³⁶⁶ potentially expanding liability to otherwise constitutionally protected speech.

IV. THE NEED FOR A COMPREHENSIVE STRATEGY ADDRESSING ELECTION MISINFORMATION

Even if most of the state statutes we reviewed end up being found to be constitutional, their enforcement will not

(McKinney 2021); 25 PA. CONS. STAT. § 3547 (2021).

³⁶¹ See, e.g., CAL. ELEC. CODE § 18543 (West 2021) (imposing liability for anyone "who knowingly challenges a person's right to vote . . . on fraudulent or spurious grounds . . . solely for the purpose of preventing voters from voting or to delay the process of voting"); 10 ILL. COMP. STAT. § 5/29-4 (2021) (imposing liability for "[a]ny person who, by . . . deception or forgery, knowingly prevents any other person from (a) registering to vote").

³⁶² See WASH. REV. CODE § 29A.84.220(5) (2021) (preventing the use of "unlawful means" to interfere with a voter's right to sign or not sign a recall petition); see also MINN. STAT. § 211C.09 (2021) (prohibiting the use of "corrupt means" to interfere with a voter's right to sign or not sign a recall petition).

³⁶³ ARIZ. REV. STAT. ANN. § 16-1006(3) (2021); CAL. ELEC. CODE § 18543 (West 2021); 10 ILL. COMP. STAT. § 5/29-4 (2021); IOWA CODE § 39A.2(b)(5) (2021); LA. STAT. ANN. § 18:1461.4 (2021); MD. CODE ANN., ELEC. LAW § 16-201 (West 2021); S.D. CODIFIED LAWS § 12-26-12 (2021).

³⁶⁴ See *id.*

³⁶⁵ See, e.g., ALA. CODE § 17-17-38 (2021); D.C. CODE § 1-1001.14 (2021); FLA. STAT. § 104.061(1) (2021); N.J. STAT. ANN. § 19:34-29 (West 2021); N.Y. ELEC. LAW § 17-150 (McKinney 2021).

³⁶⁶ See statutes described *supra* notes 364–65.

eradicate lies and threats in elections, let alone eliminate the flow of misinformation that is polluting public discourse. The problem is simply too big. Any legislative approach to combatting election misinformation must be part of a broader strategy that seeks to reduce the prevalence of misinformation generally and to mitigate the harms that such speech creates.

Part of the challenge stems from the fact that we may be moving to what Richard Hasen calls a “post-truth era” for election law, where rapid technological change and hyperpolarization are “call[ing] into question the ability of people to separate truth from falsity.”³⁶⁷ According to Hasen, political campaigns “increasingly take place under conditions of voter mistrust and groupthink, with the potential for foreign interference and domestic political manipulation via new and increasingly sophisticated technological tools.”³⁶⁸ In response to these profound changes, election law must adapt to account for the ways our sociotechnical systems amplify misinformation. Furthermore, we must recognize that legislating truth in political campaigns can take us only so far; there are things that law simply cannot do on its own.

A. *The Internet Blind Spot*

One of the biggest challenges election-speech statutes face is the rise of social media, which have become the modern-day public forums in which voters access, engage with, and challenge their elected representatives and fellow citizens.³⁶⁹ Although political misinformation has been with us since the founding of the nation, it spreads especially rapidly on social media. In her

³⁶⁷ Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 536 (2020).

³⁶⁸ *Id.*

³⁶⁹ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997))). In 2019, the Pew Research Center found that over half of Americans (54%) either got their news “sometimes” or “often” from social media. Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RSCH. CTR. (Oct. 2, 2019), <https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/>. Pew also found that Facebook is far and away the social media site Americans use most for news; more than half (52%) of all U.S. adults get news there. *Id.* The next most popular social media site for news is YouTube, which is owned by Google (28% of adults get news there), followed by Twitter (17%) and Instagram (14%), which is owned by Facebook’s parent company, Meta. *Id.*

important work examining why people share false information, Alice Marwick notes that social media have several significant differences from traditional media that aid in the spread of misinformation: “(1) Anyone can produce and distribute content; (2) Content is shared through social networks and in social contexts; and (3) Social media platforms promote content algorithmically, based on complex judgments of what they think will keep you on the platform.”³⁷⁰ As her research and the research of others are showing, we tend to be attracted to information that confirms our existing biases about the world and “problematic information is prioritized on social media sites because it garners more engagement.”³⁷¹

Due in part to these technological affordances, misinformation on social media has been shown to spread faster and farther than accurate information. According to researchers at the Massachusetts Institute of Technology, false news stories, especially false political news, “diffused significantly farther, faster, deeper, and more broadly than the truth.”³⁷² At the same time, many of the traditional mechanisms of accountability that once limited the distribution of misinformation can be strategically evaded on social media. False information can be spread anonymously, and it can be precisely “microtargeted” to individuals and groups who are most likely to believe it or to continue to spread it. Unlike speech distributed through traditional media such as broadcast and print—and therefore visible to broad audiences—microtargeting delivers online content “to very specific subgroups (e.g., readers who shop at Whole Foods who are between the ages of twenty-five and forty-nine, and who have watched a certain video on YouTube) or even to specific, listed individuals (by using tools such as Facebook’s Custom Audiences).”³⁷³ Using microtargeting to

³⁷⁰ Alice E. Marwick, *Why Do People Share Fake News? A Sociotechnical Model of Media Effects*, 2 GEO. L. TECH. REV. 474, 503 (2018).

³⁷¹ *Id.* at 506.

³⁷² According to researchers at the Massachusetts Institute of Technology false news stories, especially false political news, “diffused significantly farther, faster, deeper, and more broadly than the truth.” See Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. MAG. 1146, 1146 (2018). The researchers found that falsity traveled six times faster than the truth online, and, while accurate news stories rarely reached more than 1,000 people, false news stories “routinely diffused to between 1,000 and 100,000 people.” *Id.* Similarly, a 2017 study found that the lifecycle of political misinformation on social media was longer than that of accurate factual information and political misinformation tended to reemerge multiple times. See Jieun Shin et al., *The Diffusion of Misinformation on Social Media: Temporal Pattern, Message, and Source*, 83 COMPUTS. HUM. BEHAV. 278, 279 (2018).

³⁷³ Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to*

spread misinformation through social media is the “online equivalent of whispering millions of different messages into zillions of different ears for maximum effect and with minimum scrutiny.”³⁷⁴ Perhaps not surprisingly, opportunistic actors have been adept at leveraging the affordances of social media to spread misinformation and to engage in *disinformation* campaigns targeting voters.³⁷⁵

Although the Internet plays an increasingly important role in political communication and in public discourse generally, there currently is no national strategy for dealing with online election misinformation. The federal government does not regulate the content of election-related speech anywhere other than in the broadcast context, and even as to the broadcast medium federal regulation is limited.³⁷⁶ Transparency in political advertising gets a little more federal attention, but here again the law is directed at advertising disseminated by broadcast, cable, and satellite providers.³⁷⁷ Even though more money is now spent

Combat Medical and Political Misinformation, 19 FIRST AMEND. L. REV. 32, 59 (2020) [hereinafter Nunziato, *Misinformation Mayhem*]. As Dawn Nunziato explains, microtargeting “employs and capitalizes on the social data—such as an individual’s likes, dislikes, interests, preferences, behaviors and viewing and purchasing habits—collected by social media platforms about their users and made available to advertisers to enable advertisers to segment individuals into small groups so as to more accurately and narrowly target advertising to them.” *Id.*

³⁷⁴ Kara Swisher, *Google Changed Its Political Ad Policy. Will Facebook Be Next?*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/opinion/google-political-ads.html>.

³⁷⁵ Generally speaking, disinformation is deliberately deceptive whereas misinformation is false information that is created and spread regardless of an intent to harm or deceive. See Deen Freelon & Chris Wells, *Disinformation as Political Communication*, 37 POL. COMM. 145, 145 (2020) (explaining that disinformation includes “three critical criteria: 1) deception, 2) potential for harm, and 3) intent to harm”). One of the most extensively researched disinformation campaigns on social media was conducted by Russian agents during the 2016 presidential election. See DiRESTA, ET AL., *supra* note 9, at 1, 99 (reporting on how Russia’s Internet Research Agency in the 2016 election “exploited social unrest and human cognitive biases” through social media).

³⁷⁶ See, e.g., 47 U.S.C.A. § 315(a) (known as the “equal time” rule requiring that if a broadcast licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he or she must afford equal opportunities to all other such candidates for that office in the use of such broadcasting station); 47 C.F.R. §§ 73.123, 73.300, 73.589, 73.679 (known as the “fairness doctrine” generally requiring that if a broadcaster presents a discussion of one side of a public issue, it must provide the other side a fair opportunity to state the opposing view). The Federal Communications Commission no longer enforces the fairness doctrine. See Syracuse Peace Council, 2 F.C.C. Rcd. 5043 (1987).

³⁷⁷ A number of federal statutes and agency rules impose disclosure and recordkeeping requirements on political advertisements disseminated by broadcast, cable, and satellite providers. See, e.g., Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 STAT. 81 (2002); *Advertising and Disclaimers*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/making->

on online advertising than print and television advertising combined,³⁷⁸ federal laws mandating disclosure and recordkeeping requirements do not currently apply to online political ads.³⁷⁹

With the federal government on the sidelines, the task of dealing with election misinformation has devolved to the states. While the states have been active in passing legislation to address false election speech, their efforts are piecemeal and inconsistent. As we highlighted in Part III, state statutes vary widely with regard to the types of speech they target, the levels of fault they require, and the remedies and enforcement mechanisms they provide.³⁸⁰

Complicating matters further, state efforts to reduce election misinformation on social media are limited by Section 230 of the Communications Decency Act, which prohibits the enforcement of state laws that would hold Internet platforms liable for publishing speech provided by a third party (including advertising content).³⁸¹ As a result, although the states can enforce their election-speech laws against the persons and entities who made the prohibited statements in the first place, they cannot impose either civil or criminal liability on social media companies or other internet services where such speech is

disbursements/advertising/ (last visited Apr. 20, 2022).

³⁷⁸ In 2019, online advertising spending for the first time surpassed advertising spending through traditional media. See Jasmine Enberg, *Global Digital Ad Spending 2019*, EMARKETER (Mar. 28, 2019), <https://tinyurl.com/eMarketerAds2019>.

³⁷⁹ To facilitate greater transparency around political advertising, some states have enacted laws that impose sponsorship disclosures and recordkeeping requirements for online political ads. See generally Victoria S. Ekstrand & Ashley Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 J. LEGIS. 81 (2021) (finding that between the 2016 presidential election and early 2020, eight states had passed legislation to expressly regulate online political advertising for state candidates and ballot measures). We discuss the state statutes that mandate the disclosure of source, authorization, and sponsorship *supra* in Part III.A.4.

³⁸⁰ See *supra* Part III.

³⁸¹ 47 U.S.C. § 230(c). Section 230(c)(1) states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” *Id.* The statute exempts from its coverage federal criminal law, intellectual property law, federal communications privacy law, and certain sex trafficking laws. 47 U.S.C. § 230(e). Courts have consistently interpreted Section 230 to immunize social media platforms and other internet service providers from liability for a wide range of state law claims, including defamation, negligence, gross negligence, nuisance, and harassment, as well as violations of the federal Fair Housing Act. See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 450–54 (2010). Section 230 provides no bar, however, to the enforcement of state laws against the original source of the illegal or tortious speech. See *id.* at 487.

shared.³⁸² Given the outsized role social media platforms play in distributing and amplifying election misinformation,³⁸³ this leaves a large portion of the battlefield over election speech off limits to state legislatures.³⁸⁴

Both Republicans and Democrats have called for changes to Section 230,³⁸⁵ but it seems unlikely that Congress will coalesce around legislation that carves out election-related harms from the statute's protections. Indeed, their complaints about the statute suggest that they will remain at loggerheads for the foreseeable future, with one side arguing that Section 230 is to blame for social media platforms doing too *little* moderation of harmful content,³⁸⁶ while the other side claims that Section 230 permits the platforms to engage in too *much* moderation of

³⁸² See, e.g., *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (holding that Section 230 precluded liability under state securities law and cyberstalking law because statutes would involve treating the operator “as the publisher” of the misinformation posted by third parties on its message board). Apart from Section 230, the First Amendment also likely shields social media providers from liability for the speech of third parties if the provider does not have knowledge of the criminal or tortious nature of the speech. See *Smith v. California*, 361 U.S. 147, 153–55 (1959) (invalidating California statute that held bookseller liable for possessing obscene material “even though they had not the slightest notice of the character of the books they sold”). The precise level of scienter required for liability, however, remains uncertain. Compare *Hamling v. United States*, 418 U.S. 87, 123 (1974) (clarifying the Court’s holding in *Smith* that a defendant can be punished if he “had knowledge of the contents of the materials he distributed, and he knew the character and nature of the materials,” even though he did not know the materials were in fact obscene), with *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) (requiring actual malice standard from *New York Times Co. v. Sullivan* and writing, “Failure to investigate does not in itself establish bad faith. St. Amant’s mistake about his probable legal liability does not evidence a doubtful mind on his part.”).

³⁸³ See DAVID S. ARDIA, EVAN RINGEL, VICTORIA SMITH EKSTRAND & ASHLEY FOX, U. OF N.C. CTR. FOR MEDIA LAW AND POLICY, ADDRESSING THE DECLINE OF LOCAL NEWS, RISE OF PLATFORMS, AND SPREAD OF MIS- AND DISINFORMATION ONLINE: A SUMMARY OF CURRENT RESEARCH AND POLICY PROPOSALS 21–36 (2020) (describing how Internet platforms facilitate the spread of misinformation).

³⁸⁴ This was not unintentional on the part of the drafters of Section 230 who sought to ensure that Internet services would not be subjected to a cacophony of different state regulatory approaches. See 47 U.S.C. 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

³⁸⁵ See, e.g., Elizabeth Nolan Brown, *Section 230 Is the Internet’s First Amendment. Now Both Republicans and Democrats Want to Take It Away.*, REASON (July 29, 2019), <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/>.

³⁸⁶ See, e.g., Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 418–23 (2017); Mike Masnick, *Now It’s the Democrats Turn to Destroy the Open Internet: Mark Warner’s 230 Reform Bill Is a Dumpster Fire of Cluelessness*, TECHDIRT (Feb. 5, 2021), <https://www.techdirt.com/articles/20210205/10384946193/now-democrats-turn-to-destroy-open-internet-mark-warner-230-reform-bill-is-dumpster-fire-cluelessness.shtml>.

speech motivated by anti-conservative bias.³⁸⁷ And, even if they agree on the problem they wish to solve, there is the danger that Congress's efforts to force social media companies to police election misinformation will only make the situation worse.³⁸⁸

B. The Limits of Law

Regardless of whether Congress takes the lead in regulating election speech, government efforts to combat election misinformation must be part of a multipronged strategy. As discussed in Part II, the First Amendment imposes significant constraints on the government's ability to engage in content-based regulation of speech. While the government can target narrow categories of false, fraudulent, or intimidating speech,³⁸⁹ the First Amendment sharply curtails the government's ability to broadly regulate false and misleading speech associated with elections. This is not to say that state legislatures should throw up their hands at the problem of election misinformation. Both the federal and state governments retain a range of policy levers that can reduce the prevalence and harmful effects of election misinformation. Two areas are frequently offered as holding particular promise—as well as being less likely than direct regulation to raise First Amendment issues: (1) increasing transparency about the types and extent of election misinformation that reaches voters and (2) supporting self-regulation by entities that serve as conduits for the dissemination of the speech of others, especially social media platforms.

Transparency has long been viewed as a powerful, and oftentimes preferable, approach to curtailing problematic speech. As Louis Brandeis famously stated, “sunlight is said to be the

³⁸⁷ See, e.g., Makena Kelly, *Internet Giants Must Stay Unbiased to Keep Their Biggest Legal Shield, Senator Proposes*, THE VERGE (Jun. 19, 2019), <https://www.theverge.com/2019/6/19/18684219/josh-hawley-section-230-facebook-youtube-twitter-content-moderation>; Jennifer Huddleston, *The Problem with Calls for Social Media “Fairness”*, TECH. LIBERATION FRONT (Sept. 6, 2018), <https://perma.cc/CG74-64H6>.

³⁸⁸ In 2018, Congress amended Section 230 by passing the Allow States and Victims to Fight Online Sex Trafficking Act (SESTA/FOSTA), Pub. L. No. 115-164, § 2(1), 132 Stat. 1253, 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)). The amendment removed the legal protections Internet services had under Section 230 for speech that promoted or facilitated prostitution or sex trafficking with the goal of eradicating sex trafficking. A great deal of research has examined the impact of FOSTA and the results have been mixed at best. See Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084 (2021) (summarizing recent research).

³⁸⁹ See *supra* Part II.B.1.

best of disinfectants.”³⁹⁰ In the election-speech context, efforts at increasing transparency have largely focused on political advertising.³⁹¹ Transparency requirements on political advertising take many forms, ranging from laws that require the collection and disclosure of information about who is funding and distributing political ads to laws that mandate certain disclaimers attached to “electioneering communications.”³⁹²

Transparency advocates point to several advantages transparency laws have over other regulatory approaches that target misinformation. First, because they do not dictate what speech is permissible, transparency laws avoid many of the problems content-based restrictions raise under the First Amendment.³⁹³ Second, transparency about the extent of misinformation can lead to greater accountability for those who create and distribute false and misleading speech. Indeed, as an international group of misinformation researchers recently noted, social media platforms have mostly been able to avoid public scrutiny of the extent of misinformation on their services.³⁹⁴ In response, the researchers recommend mandatory disclosure of platform moderation policies and procedures, which will “enable[] the forces of consumer choice to do their work, empowering platform users to protect themselves and to bring the pressure of public opinion to bear on social media companies.”³⁹⁵ Third, requiring the collection and disclosure of this information can itself “nudge” the entities that facilitate the

³⁹⁰ Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10, https://www.sechistorical.org/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

³⁹¹ See *supra* notes 377–379 and accompanying text.

³⁹² See Abby K. Wood, *Learning from Campaign Finance Information*, 70 EMORY L.J. 1091, 1096–97 (2021) (summarizing federal and state political advertising laws).

³⁹³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (“The Government may regulate . . . political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”). As discussed below, mandatory disclosure rules may not entirely avoid First Amendment problems. See *infra* notes 402–416 and accompanying text.

³⁹⁴ See MARK MACCARTHY, TRANSATLANTIC WORKING GROUP, TRANSPARENCY REQUIREMENTS FOR DIGITAL SOCIAL MEDIA PLATFORMS: RECOMMENDATIONS FOR POLICY MAKERS AND INDUSTRY 2, 29 (2020), https://www.ivir.nl/publicaties/download/Transparency_MacCarthy_Feb_2020.pdf.

³⁹⁵ *Id.*

spread of misinformation to reduce its prevalence by forcing them to focus on their role in its dissemination.³⁹⁶

Transparency around online political advertising is especially important because such speech largely escapes public scrutiny. Abby Wood and Ann Ravel have warned that disinformation in “[u]ntraceable online political advertising undermines key democratic values.”³⁹⁷ After cataloging the flood of false and misleading information in online political ads during the 2016 election, they argue that the government should adopt robust disclosure and disclaimer rules for online advertisements, including “a repository to facilitate real-time transparency of all online political ads as well as ex post enforcement of campaign finance rules.”³⁹⁸ They note that these transparency requirements should “have the effect of reducing the incentives to produce disinformation advertising and other divisive advertising microtargeted at small subsets of the population” and that “[k]nowing the kind of advertising (and disinformation) our fellow voters receive can help aid deliberation in democracy.”³⁹⁹

Of course, mis- and disinformation are not confined to advertising. Efforts to increase transparency in political advertising, however, can be a useful guide in addressing election misinformation generally. Transparency advocates have argued that recordkeeping and disclosure obligations should be applied broadly to online entities that serve as platforms for public discourse. For example, the Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression recommends that governments on both sides of the Atlantic pass laws to increase social media transparency by requiring, among other things, disclosure of a platform’s rules regarding content moderation; regular reports to government agencies and the public about the enforcement of these rules as

³⁹⁶ See RICHARD H. THALER, CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (describing this type of “nonintrusive” government intervention—or “nudge”—as a policy choice that “alters people’s [or platforms’] behavior in a predictable way without forbidding any options or significantly changing their economic incentives”); ARCHON FUNG, MARY GRAHAM, & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 43 (2007) (“Businesses may be forced to establish new systems of monitoring, measuring, review, and reporting . . . disclosures may change their practices in response to new knowledge as well as to public pressure.”).

³⁹⁷ Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1225 (2018).

³⁹⁸ *Id.* at 1256.

³⁹⁹ *Id.* at 1259–60.

well as aggregate statistics reflecting the operation of their content moderation programs; and access to platform data concerning the use of content-ordering techniques, including recommendation and prioritization algorithms.⁴⁰⁰ The working group also argues that “as an additional transparency measure, researchers and regulators should have access to platform data to audit the systems involved and assure the public that they are operating as intended and without unintended bias.”⁴⁰¹

However, transparency is not a panacea and there are reasons to think that as the government imposes more intrusive recordkeeping and disclosure requirements on media and technology companies, these efforts will face constitutional challenge. Eric Goldman points out that laws that require online platforms to disclose their content moderation policies and practices are “problematic because they require publishers to detail their editorial thought process [creating] unhealthy entanglements between the government and publishers, which in turn distort and chill speech.”⁴⁰² According to Goldman, transparency mandates can “affect the substance of the published content, similar to the effects of outright speech restrictions” and therefore these mandates “should be categorized as content-based restrictions and trigger strict scrutiny.”⁴⁰³ He also suggests that requiring that platforms publicly disclose their moderation and content curation practices should qualify as “compelled speech,” which is likewise anathema under the First Amendment.⁴⁰⁴

⁴⁰⁰ MacCarthy, *supra* note 394, at 3. A new law in Texas imposes similar demands on social media platforms that meet certain minimum-size thresholds, requiring, *inter alia*, that a covered platform “publicly disclose accurate information regarding its content management, data management, and business practices.” TEX. BUS. & COMMERCE CODE § 120.051(a) (2021).

⁴⁰¹ MacCarthy, *supra* note 394, at 23. In 2019, Facebook’s Data Transparency Advisory Group (DTAG), a group of independent researchers, released a report assessing Facebook’s voluntary Community Standards Enforcement Reports and concluded that Facebook should provide additional information to researchers so that its disclosures can be independently assessed for accuracy. *See* BEN BRADFORD ET AL., THE JUSTICE COLLABORATORY, YALE L. SCH., REPORT OF THE FACEBOOK DATA TRANSPARENCY ADVISORY GROUP 15–17 (2019) https://law.yale.edu/sites/default/files/area/center/justice/document/dtag_report_5.22.2019.pdf.

⁴⁰² Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. (forthcoming 2022) (manuscript at 12), <https://ssrn.com/abstract=400564712>.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 13.

The Fourth Circuit's recent decision in *Washington Post v. McManus* seems to support these concerns.⁴⁰⁵ *McManus* involved a Maryland statute that extended the state's advertising disclosure-and-recordkeeping regulations to online platforms, requiring that they make certain information available online (such as purchaser identity, contact information, and amount paid) and collect and retain other information and make it available upon request to the Maryland Board of Elections.⁴⁰⁶ In response, a group of news organizations, including The Washington Post and The Baltimore Sun, filed suit challenging the requirements as applied to them. In his opinion striking down the law, Judge Wilkinson concluded that the statute was a content-based speech regulation that also compelled speech and that these features of the law "pose[] a real risk of either chilling speech or manipulating the marketplace of ideas."⁴⁰⁷ Without deciding what level of judicial scrutiny should be applied to the law, Wilkinson concluded that "the Act fails even the more forgiving standard of exacting scrutiny."⁴⁰⁸ On this point, Wilkinson conceded that the state's interests in deterring foreign interference in its elections, informing the electorate, deterring corruption, and enforcing campaign finance requirements can be "sufficiently important" to justify disclosure-related campaign finance laws.⁴⁰⁹ He concluded, however, that disclosure and recordkeeping obligations forced on "neutral-third party platforms are . . . from a First Amendment perspective, different in kind from conventional campaign finance regulations" directed at participants in the political process, in part because they result in a chilling effect on platforms by "mak[ing] certain political speech more expensive to host than other speech."⁴¹⁰

Wilkinson remarked that if Maryland wishes to impose recordkeeping and disclosure requirements on online platforms, the state must demonstrate "that a given law is impelled by the facts on the ground."⁴¹¹ He found that Maryland had failed to produce such evidence, observing that "the state 'has not been

⁴⁰⁵ 944 F.3d 506 (4th Cir. 2019).

⁴⁰⁶ *Id.* at 512.

⁴⁰⁷ *Id.* at 515. The opinion spends little time talking about why the collection of information in this context actually functions as a restriction on expressive content.

⁴⁰⁸ *Id.* at 520 ("We decline . . . to do more than is needed to resolve the case before us. On that front, we decline to decide whether strict or exacting scrutiny should apply to a disclosure law like the one here because we hold that the Act fails even the more forgiving standard of exacting scrutiny.").

⁴⁰⁹ *Id.* at 520–21.

⁴¹⁰ *Id.* at 516.

⁴¹¹ *Id.* at 521.

able to identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or at any other time.’”⁴¹² Moreover, he concluded that “Maryland has failed to provide sufficient evidence to justify painting with such a broad brush,” noting that “the clear bulk of foreign meddling took place on websites like Facebook, Instagram, or other social media platforms that each garner millions of visitors per month” and yet the Maryland law “applies equally to *The Cecil Whig* and *The Cumberland Times-News* as it does to Facebook—notwithstanding the marked disparities between their respective reaches and past histories with foreign election interference.”⁴¹³

The *McManus* case casts a shadow over state laws that seek to impose broad recordkeeping and disclosure requirements on online platforms. More narrowly tailored transparency laws directed at election misinformation on social media platforms, however, may pass constitutional muster. The *McManus* court did not strike down the Maryland statute, but merely held that it was unconstitutional *as applied* to the plaintiff news organizations.⁴¹⁴ Moreover, as Victoria Ekstrand and Ashley Fox note, “given the unique position of the plaintiffs in the case, it is currently unclear how far this opinion will extend, if at all, to online political advertising laws that target large platforms like Facebook.”⁴¹⁵ Nevertheless, they write that “*McManus* suggests that governments will likely be unable to take a wide-approach by imposing record-keeping requirements on all or nearly all third parties that distribute online political advertising.”⁴¹⁶

Regardless of what level of First Amendment scrutiny the courts apply to mandatory recordkeeping and disclosure laws, the reality is that neither the federal nor state governments can simply legislate misinformation out of elections. Government efforts to ensure free and fair elections must account for—and should seek to leverage—the influential role online platforms, especially social media, play in facilitating and shaping public discourse. Because these private entities are not state actors, their

⁴¹² *Id.* at 521 (quoting *Washington Post v. McManus*, 355 F. Supp. 3d 272, 301 (D. Md.), *aff'd*, 944 F.3d 506 (4th Cir. 2019)).

⁴¹³ *Id.* at 522.

⁴¹⁴ *See id.* at 513 (“[O]ur holding is . . . limited by the posture of this case. While general First Amendment principles bear most definitely upon the resolution of the appeal, the ultimate issue before us is a narrower one, i.e., whether the Maryland Act as applied to these particular plaintiffs is unconstitutional. To that end, we do not expound upon the wide world of social media and all the issues that may be pertinent thereto.”).

⁴¹⁵ Ekstrand & Fox, *supra* note 379, at 99.

⁴¹⁶ *Id.*

choices to prohibit election misinformation are not subject to First Amendment scrutiny.⁴¹⁷

In fact, after initially denying that their services had played a role in the spread of misinformation in the 2016 presidential election,⁴¹⁸ the major platform providers have begun to aggressively limit election misinformation on their platforms. For example, during the runup to the 2020 election, Twitter banned all political advertising on its service.⁴¹⁹ The company also implemented measures to remove deceptively altered or fabricated content, ban users who repeatedly violate its policies on misinformation, and place warnings on certain posts.⁴²⁰ Facebook does not ban political advertising outright, but it does remove advertisers and suspends accounts of those who repeatedly distribute misinformation. Facebook also uses third-party fact checkers to identify and label misinformation across its services and has experimented with offering “related” stories that serve as factual correctives.⁴²¹ Alphabet, the parent of Google, prohibits any advertisements that contain “demonstrably false claims that could significantly undermine participation or trust” in elections.⁴²² The company also states that it will remove content from YouTube that attempts to mislead people about voting procedures or contains other false information relating to elections.⁴²³

⁴¹⁷ See Nunziato, *Misinformation Mayhem*, *supra* note 373, at 89–90.

⁴¹⁸ See Abby Ohlheiser, *Mark Zuckerberg Denies that Fake News on Facebook Influenced the Elections*, WASH. POST, (Nov. 11, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/11/11/mark-zuckerberg-denies-that-fake-news-on-facebook-influenced-the-elections/>; Don Reisinger, *Twitter Had a ‘Fake News Ecosystem’ Around the 2016 Election, Study Says*, FORTUNE (Oct. 4, 2018), <https://fortune.com/2018/10/04/twitter-2016-election-fake-news/>.

⁴¹⁹ See Kate Conger, *Twitter Will Ban All Political Ads, C.E.O. Jack Dorsey Says*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/technology/twitter-political-ads-ban.html>.

⁴²⁰ See Yoel Roth & Ashita Achuthan, *Building Rules in Public: Our Approach to Synthetic & Manipulated Media*, TWITTER BLOG (Feb. 4, 2020), https://blog.twitter.com/en_us/topics/company/2020/new-approach-to-synthetic-and-manipulated-media.html; Elizabeth Dwoskin, *Twitter’s Decision to Label Trump’s Tweets was Two Years in the Making*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/technology/2020/05/29/inside-twitter-trump-label/>.

⁴²¹ See Antonia Woodford, *Expanding Fact-Checking to Photos and Videos*, FACEBOOK NEWSROOM (Sept. 13, 2018), <https://newsroom.fb.com/news/2018/09/expanding-fact-checking>.

⁴²² Scott Spencer, *An Update on Our Political Ads Policy*, GOOGLE BLOG: THE KEYWORD (Nov. 20, 2019), <https://blog.google/technology/ads/update-our-political-ads-policy/>.

⁴²³ *How YouTube Supports Elections*, YOUTUBE OFFICIAL BLOG (Feb. 3, 2020), <https://youtube.googleblog.com/2020/02/how-youtube-supports-elections.html>.

While the actions of social media companies to combat election misinformation have been subject to considerable criticism,⁴²⁴ their approaches to mis- and disinformation continue to evolve and the overall trend, at least for the largest platforms, appears to be an increasing investment in programs and procedures to reduce the prevalence and harmful effects of election misinformation.⁴²⁵ Given strong public support for online platforms continuing to take a meaningful role in combating misinformation on their platforms,⁴²⁶ we can expect that these investments will continue.

Counterintuitively, one way that government can facilitate the efforts of online platforms to address election misinformation is by retaining Section 230's immunity provisions. These protections grant platforms the "breathing space" they need to experiment with different self-regulatory regimes addressing election misinformation.⁴²⁷ Under Section 230(c)(1), for example, Internet services can police third-party content on their sites without worrying that by reviewing this material they will have liability for it.⁴²⁸ This allows social media companies to escape the "moderator's dilemma," where any attempt to review third-party content may result in the company

⁴²⁴ See, e.g., Marshall, *Internet Service Provider Liability*, *supra* note 272, at 671 ("Internet service providers . . . have been at best half-hearted in expressing the will or desire to stem the tide of false political information distributed on their websites."); Wood & Ravel, *supra* note 397, at 1246 ("[T]he platforms' initial offerings to address disinformation advertising are paltry. It took Facebook over a year to even suggest it would reach out to other companies to 'share information on bad actors and make sure they stay off all platforms.'").

⁴²⁵ Google reportedly employs 10,000 people just to review and flag content. Casey Newton, *Google and YouTube Moderators Speak out on the Work that Gave Them PTSD*, THE VERGE (Dec. 16, 2019), <https://www.theverge.com/2019/12/16/21021005/google-youtube-moderators-ptsd-accenture-violent-disturbing-content-interviews-video>.

⁴²⁶ A March 2020 Knight Foundation/Gallup Poll found that the vast majority of Americans surveyed (81%) supported the removal of intentionally misleading information on elections or other political issues by social media companies. See FREE EXPRESSION, HARMFUL SPEECH AND CENSORSHIP IN A DIGITAL WORLD 6 (2020), https://knightfoundation.org/wp-content/uploads/2020/06/KnightFoundation_Panel6-Techlash2_rprt_061220-v2_es-1.pdf.

⁴²⁷ See Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 324 (2021) (noting that Section 230 gives "platforms the freedom to decide whether and to what extent they want to police content on their sites, and to do so in different ways"); Eric Goldman, *Content Moderation Remedies*, 47 MICH. TECH. L. REV. (forthcoming 2021) (cataloging "dozens of remedies that Internet services have actually imposed" and explaining the advantages of allowing them to balance competing interests differently).

⁴²⁸ See 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

gaining knowledge of its tortious or illegal nature and thus facing liability for everything on its service; to avoid this liability, the rational response is to forgo reviewing third-party content entirely, thus creating a strong counterincentive to moderation.⁴²⁹

Section 230(c)(2) also immunizes platforms from civil claims arising from a platform's removal of misinformation or the banning of users who post such content.⁴³⁰ Although platforms undoubtedly enjoy a First Amendment right to choose what speech and speakers to allow on their services,⁴³¹ this provision is a highly effective bar to claims brought by users of social media platforms who have been suspended or banned for violating a platform's acceptable use policies.⁴³² Indeed, after having one of his posts on Twitter labeled as misinformation,⁴³³ former president Donald Trump sought to eviscerate this very provision in an executive order aimed at limiting the ability of platforms to remove or flag controversial speech.⁴³⁴

⁴²⁹ Congress passed Section 230 to address the moderator's dilemma created by early internet cases *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that Internet service was merely a "distributor" of third-party content and could not be held liable for defamatory statements absent showing that it knew or had reason to know of the defamation), and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (finding that because Internet service controlled the content of its computer bulletin boards it had liability for defamatory content posted there). See 47 U.S.C. § 230(b) (describing the policies behind the statute).

⁴³⁰ See 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.").

⁴³¹ Platforms, as non-state actors, are not limited by the First Amendment in terms of their decisions about what content to remove, see, e.g., *Prager Univ. v. Google*, 951 F.3d 991, 997–98 (9th Cir. 2020), and they enjoy a First Amendment right themselves against government requirements that they carry third-party speech. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *NetChoice, Inc. v. Paxton*, No. 1:21-CV-840-RP, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021).

⁴³² See Eric Goldman, *Online User Account Termination and 47 U.S.C. S 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 671 (2012) ("Section 230(c)(2) provides substantial legal certainty to online providers who police their premises and ensure the community's stability when intervention is necessary.").

⁴³³ See Michael A. Cheah, *Section 230 and the Twitter Presidency*, 115 NW. U. L. REV. ONLINE 192, 193 (2020) ("Twitter appended the following to a tweet making misleading claims about mail-in voting: 'Get the facts about mail-in ballots' and a link to accurate voting information. The President's response was swift and retributive." (citations omitted)).

⁴³⁴ See Exec. Order No. 13925, 85 Fed. Reg. 34,079 (June 2, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-02/pdf/2020-12030.pdf>. The Executive Order directs the Commerce Department to file a rulemaking petition before the Federal Communications Commission (FCC) to "clarify" existing immunity under Section 230. *Id.* President Joseph Biden revoked the Executive Order on May

As the states have shown, there is no one-size-fits-all approach to addressing election misinformation. Although there are many who feel that social media providers are not doing enough to remove election misinformation on their platforms, others argue that the major platforms are too willing to restrict political discourse and to ban controversial speakers.⁴³⁵ The benefit of Section 230 is that platforms can take different approaches to navigating this challenging and contentious topic. As Mark Lemley points out, “[t]he fact that people want platforms to do fundamentally contradictory things is a pretty good reason we shouldn’t mandate any one model of how a platform regulates the content posted there—and therefore a pretty good reason to keep section 230 intact.”⁴³⁶

CONCLUSION

Political speech has long been viewed as residing at the core of the First Amendment’s protections for speech. Yet it has become increasingly clear that lies and other forms of misinformation associated with elections are corrosive to democracy. The challenge, of course, is in developing regulatory regimes that advance the interest in free and fair elections while at the same time ensuring that debate on public issues remains uninhibited, robust, and wide-open. This is no easy task. As James Weinstein has noted, the regulation of election-related speech “involves democracy on both sides of the ledger.”⁴³⁷

Although the federal government has largely stayed out of regulating the content of election-related speech, the states have been active in passing laws that prohibit false and fraudulent statements associated with elections. As we describe above, state laws on election misinformation vary widely in scope, ranging from statutes that prohibit false and misleading factual statements about candidates to laws that indirectly regulate election-related speech by prohibiting fraud and intimidation in elections. Because these statutes target broad categories of speech based on their content, and often do so

14, 2021. *See* Revocation of Certain Presidential Actions and Technical Amendment, Exec. Order No. 14029, 86 Fed. Reg. 27,025 (May 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-05-19/pdf/2021-10691.pdf>.

⁴³⁵ *See supra* notes 385–387 and accompanying text.

⁴³⁶ Lemley, *supra* note 427, at 325.

⁴³⁷ Weinstein, *supra* note 2, at 221.

without requiring knowledge of falsity, many of the statutes are likely to face significant First Amendment problems.

Even if most of the state statutes we reviewed are constitutional, however, their enforcement will not eradicate lies and threats in elections. The problem is simply too big. This is not to say that laws that punish intentional efforts to deceive voters are not important. People who knowingly spread misinformation should be held accountable, but enforcement usually takes place after the election is over, and therefore after the harm has occurred. The reality is that neither the federal nor state governments can simply legislate misinformation out of elections. Any legislative approach to combatting election misinformation must be part of a comprehensive strategy that seeks to reduce the prevalence of misinformation and to mitigate the harms it creates. In this regard, government efforts to ensure free and fair elections must account for—and should seek to leverage—the influential role online platforms, especially social media, play in facilitating and shaping public discourse.

Regardless of whether the individual statutes we analyze here survive First Amendment scrutiny, it is useful to catalog the breadth and depth of state efforts to deal with lies, misinformation, intimidation, and fraud in elections. Apart from government efforts to impose civil and criminal liability for election-related speech, these statutes can be a useful guide to social media platforms and other intermediaries that facilitate election-related speech. If nothing else, the statutes provide a partial roadmap for identifying the types of speech—and election harms—that may warrant intervention.

**ANTI-CENSORSHIP RHETORIC V. FIRST AMENDMENT
REALITIES:
THE FIGHT OVER FLORIDA’S ANTI-DEPLATFORMING
STATUTE AND
SOME THOUGHTS ABOUT SPEAKER AUTONOMY,
COMPELLED EXPRESSION AND ACCESS MANDATES IN
ONLINE FORA**

Clay Calvert*

ABSTRACT

This Article examines the challenge in *NetChoice, LLC v. Moody* to a now-enjoined Florida statute barring large and lucrative social media outlets from deplatforming candidates running for public office in the Sunshine State. The deplatforming battle in *NetChoice* provides a springboard for analyzing the tension between the editorial autonomy of social media platforms and their unenumerated First Amendment right not to be compelled to speak, on the one hand, and government-imposed access mandates that ostensibly facilitate speech and enrich public debate, on the other. The Article initially uses the scholarship of Owen Fiss and Jerome Barron to set the theoretical table for understanding the long-simmering friction between speaker autonomy and government intervention in the marketplace of ideas. It then explores how Florida Governor Ron DeSantis framed the need for his state’s anti-deplatforming law. Next, the Article scrutinizes U.S. District Judge Robert Hinkle’s June 2021 preliminary injunction in *NetChoice* blocking its enforcement. Hinkle’s analysis of First Amendment principles regarding editorial judgment, speaker autonomy, content-based laws and discrimination between speakers indicates that the statute would fail constitutional review even if it were not preempted for being inconsistent with 47 U.S.C. § 230(c)(2)(A). In brief, certain First Amendment realities, some tracing back to the U.S. Supreme Court’s 1974 decision in *Miami Herald Publishing Co. v. Tornillo*, provide a formidable bulwark against the anti-censorship rhetoric propping up compelled-access mandates in the internet

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era, particularly in what Judge Hinkle aptly called “ideologically sensitive cases.”

INTRODUCTION

More than a quarter-century ago, Professor Owen Fiss described “a complicated truth”¹ affecting the First Amendment freedom of speech.² It is “that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well.”³ That observation built upon Fiss’s earlier exploration of the tension between the First Amendment’s role in safeguarding the autonomy of speakers, on the one hand, and the possibility that government intervention in the marketplace of ideas might improve public debate, on the other.⁴ He propounded in 1986 that:

[a] commitment to rich public debate will allow, and sometimes even require the state to act in these ways, however elemental and repressive they might at first seem. Autonomy will be sacrificed, and content regulation sometimes allowed, but only on the assumption that public debate might be enriched and our capacity for collective self-determination enhanced.⁵

¹ OWEN M. FISS, *THE IRONY OF FREE SPEECH* 83 (1996) [hereinafter FISS, *THE IRONY*].

² The First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

³ FISS, *THE IRONY*, *supra* note 1, at 83.

⁴ Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986) [hereinafter Fiss, *Social Structure*].

⁵ *Id.* at 1415. Fiss was concerned that marketplace economic forces skew debate and that sometimes government intervention is necessary to counter that situation in order to benefit a democratic society. See Owen M. Fiss, *Why the State?*, 100 *HARV. L. REV.* 781, 788 (1987) [hereinafter Fiss, *The State*] (“The state is to act as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy. The purpose of the state is not to supplant the market . . . nor to perfect the market . . . but rather to supplement it.”).

In today's portmanteau parlance, Fiss seemingly suggested that the government might turn out to be a frenemy of free speech.⁶ As such, he encouraged the United States Supreme Court, when interpreting the First Amendment, to commit "to do all that it can possibly do to support and encourage the state in efforts to enrich public debate."⁷ An unfettered marketplace of ideas—a time-honored central tenet of First Amendment jurisprudence⁸—simply cannot be counted on to produce such fruitful discourse, and thus some government meddling is needed.⁹

Fiss was not the first academic to contend that such marketplace intervention might benefit what he called "[t]he democratic aspirations of the [F]irst [A]mendment."¹⁰ In the 1960s, Professor Jerome Barron directly addressed the issue of the government compelling private mass media entities to afford access to speakers.¹¹ Barron submitted that "nongoverning minorities in control of the means of communication should perhaps be inhibited from restraining free speech (by the denial of access to their media) even more than governing majorities are restrained by the [F]irst [A]mendment."¹² As with Fiss, Barron was concerned about problems generated by an unregulated marketplace of ideas.¹³ He asserted that providing speakers with

⁶ Fiss, *Social Structure*, *supra* note 4, at 1416 (contending that "[w]e should learn to recognize the state not only as an enemy, but also as a friend of speech" because "it has the capacity to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them").

⁷ *Id.* at 1424.

⁸ Justice Oliver Wendell Holmes, Jr., famously instantiated the marketplace of ideas metaphor into First Amendment law when he wrote that "the 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." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 *COMMUN. & POL'Y* 437, 437 (2019) ("The 'marketplace of ideas' metaphor in First Amendment law is usually traced to the famous dissenting opinion of Justice Oliver Wendell Holmes in *Abrams v. United States*.").

⁹ See L. A. Powe, Jr., *Scholarship and Markets*, 56 *GEO. WASH. L. REV.* 172, 180–81 (1987) (encapsulating Fiss's position regarding the need to regulate the marketplace of ideas).

¹⁰ Fiss, *Social Structure*, *supra* note 4, at 1421.

¹¹ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *HARV. L. REV.* 1641 (1967).

¹² *Id.* at 1656.

¹³ See *id.* at 1678 ("With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition."); see also Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 *COMMUN. & POL'Y* 383, 394 (2016) (noting that Barron's access theory "criticizes the marketplace approach and posits that freedom of the

a right of access to the mass media—a right secured by the First Amendment – would promote “an informed citizenry.”¹⁴ This informed-citizenry telos jibes with philosopher-educator Alexander Meiklejohn’s view that the ultimate purpose of free expression in a self-governing democracy is making voters as informed as possible so that they might vote wisely.¹⁵ To accomplish this goal, Barron contended that “the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view.”¹⁶ Viewed collectively, Fiss’s scholarship regarding government intervention in speech marketplaces to enrich public debate and Barron’s call for a First Amendment right of access to the mass media still carry force several decades later.¹⁷ That is particularly so when considering if laws mandating access to internet fora sufficiently advance First Amendment interests in promoting public debate and an informed citizenry so as to be constitutional.¹⁸

Indeed, Fiss and Barron’s writings are now likely to get another serious intellectual workout and a much closer inspection from First Amendment scholars than this

press means members of the public should have freedom to access society’s vehicles of mass communication,” and adding that Barron “contended that the marketplace approach fails because it assumes that keeping the government out of the marketplace is sufficient to create a free exchange of ideas”).

¹⁴ Barron, *supra* note 11, at 1676.

¹⁵ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) (“The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them.”); see also Ronald J. Krotoszynski, Jr., *The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation*, 2020 U. CHI. LEGAL F. 145, 169 (2020) (asserting that “[m]any, if not most, serious theories of the First Amendment place the relationship of freedom of expression to the process of democratic self-government at the epicenter of the First Amendment,” and therefore “we should be open to the idea that the First Amendment imposes not only negative limitations on the ability of the government to censor speech, but also affirmative duties to facilitate speech related to the process of democratic deliberation”).

¹⁶ Barron, *supra* note 11, at 1656.

¹⁷ See Jeremy K. Kessler & David E. Pozen, *Introduction: The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 2003 (2018) (noting how the First Amendment scholarship today of individuals such as Marvin Ammori “builds on the work of leading First Amendment theorists of media regulation,” including both Fiss and Barron).

¹⁸ See Theodore L. Glasser, *Barron, Jerome A., Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967), 25 COMM’N L. & POL’Y 340, 343 (2020) (asserting that “many of today’s access issues—from the net neutrality debate to concerns about the obligations of platforms like Facebook and Twitter to yield to local customs and mores—would come into focus in interesting and useful ways if viewed through the lens of Barron’s article”).

Introduction affords them. That is because Florida adopted a statute in 2021 which provides that “[a] social media platform may not willfully deplatform a candidate for office . . . beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.”¹⁹ In other words, social media platforms must provide access to political candidates even if the office seekers would otherwise be deplatformed for violating terms of use or service.²⁰ The anti-deplatforming measure thus amounts to a compelled-access mandate: social media platforms cannot revoke access—i.e., cannot willfully deplatform—candidates for any reason, thereby compelling them to provide candidates with a vast digital venue to post whatever content they please, free from fear of being kicked off.²¹ The Florida law breathes statutory life into former Justice Anthony Kennedy’s suggestion that the First Amendment supports a right of access to social media platforms, given their status today as “the most important places . . . for the exchange of views.”²²

Flouting Florida’s statute can prove fiscally painful, as it permits daily fines of \$250,000 for deplatforming candidates for statewide office.²³ The law only applies, however, to very large or very lucrative platforms, and it conveniently—at least for the owners of Florida-based Walt Disney World and Universal Studios Florida—exempts companies that own and operate theme parks.²⁴

¹⁹ FLA. STAT. § 106.072(2) (2021). Although Florida’s definition of a social media platform includes several components, it applies broadly to “any information service, system, Internet search engine, or access software provider that . . . [p]rovides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site.” FLA. STAT. § 501.2041(1)(g)(1) (2021).

²⁰ Florida defines “deplatform” as “the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days.” FLA. STAT. § 501.2041(1)(c) (2021).

²¹ See FLA. STAT. § 106.072(2) (2021) (“A social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.”).

²² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). In delivering the Court’s opinion in *Packingham*, Kennedy wrote that “[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Id.*

²³ See FLA. STAT. § 106.072(3) (2021) (providing that “the social media platform may be fined \$250,000 per day for a candidate for statewide office and \$25,000 per day for a candidate for other offices”).

²⁴ See FLA. STAT. § 501.2041(1)(g) (2021) (providing that a social media platform must either have “annual gross revenues in excess of \$100 million” or “at least 100 million monthly individual platform participants globally” to fall within the statute’s confines, and specifying that a social media platform, as defined the law, “does not

Does Florida's anti-deplatforming statute, the first of its ilk in the United States, breach the First Amendment speech rights of the social media platforms to which it applies?²⁵ That question was put into play in May 2021 when two trade associations, NetChoice and the Computer & Communications Industry Association ("CCIA"), filed a lawsuit in federal court in Tallahassee, Florida.²⁶ The complaint alleges that the anti-deplatforming statute, along with several other measures emanating from Florida Senate Bill 7072, unduly restricts the editorial control and judgment of social media platforms by "compel[ling] them to host speech and speakers they disagree with."²⁷ The plaintiffs emphasize that the anti-deplatforming statute "essentially immunizes any candidate from whatever content and conduct rules apply to all other users."²⁸ In other words, the statute not only requires the affected platforms to host political candidates, but allows those candidates to post whatever content they choose, regardless of the terms-of-service content policies applicable to everyone else and without

include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex").

²⁵ See David McCabe, *Florida, in a First, Will Fine Social Media Companies That Bar Candidates*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/technology/florida-twitter-facebook-ban-politicians.html> ("Florida . . . became the first state to regulate how companies like Facebook, YouTube and Twitter moderate speech online, by imposing fines on social media companies that permanently bar political candidates in the state.").

²⁶ Complaint for Declaratory and Injunctive Relief, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1084 (N.D. Fla. 2021) (No. 4:21-cv-220 RH-MAF), 2021 U.S. Dist. LEXIS 121951 [hereinafter Complaint], <https://netchoice.org/wp-content/uploads/2021/05/NetChoice-CCIA-Complaint-for-Declaratory-and-Injunctive-Relief-5.27.21.pdf>.

NetChoice describes itself as working "to make the [i]nternet safe for free enterprise and free expression." *About Us*, NETCHOICE, <https://netchoice.org/about/> (last visited Feb. 23, 2022). Its members include, among others, Amazon, Facebook, Google, Paypal, Pinterest and Twitter. *Id.* The Computer & Communications Industry Association touts itself as "a not-for-profit membership organization for a wide range of companies in the computer, internet, information technology, and telecommunications industries" that "promotes open markets, open systems, open networks, and full, fair, and open competition." *Who We Are*, COMPUT. & COMMC'N INDUS. ASS'N, <https://www.ccianet.org/about/who-we-are/> (last visited Feb. 23, 2022). Its members include, among others, Amazon, Facebook, Google, Pinterest, Twitter and Vimeo. *Members*, COMPUT. & COMMC'N INDUS. ASS'N., <https://www.ccianet.org/about/members/> (last visited Feb. 23, 2022).

²⁷ Complaint, *supra* note 26, at 5.

²⁸ Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 12, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 4:21-cv-220 RH-MAF), 2021 U.S. Dist. LEXIS 121951 [hereinafter Plaintiffs' Memorandum], https://netchoice.org/wp-content/uploads/2021/06/30_Memorandum-of-Law-ISO-Motion-for-Preliminary-Injunction.pdf.

trepidation of suspension or deletion of their accounts. Perhaps a platform could remove individual posts by candidates featuring content that violates a platform's terms of service.²⁹ There is nothing, however, to stop such candidates from repeatedly reposting the same violative content again and again, given that they cannot be deplatformed for doing so.³⁰ There is, in other words, no meaningful penalty for candidates who violate a platform's content-based, terms-of-service policies. The plaintiffs aver that this one-two punch interferes with their First Amendment "right to decide whether to host or moderate specific categories of speech and speakers."³¹

On June 30, 2021, just one day before it was scheduled to take effect, U.S. District Judge Robert Hinkle issued a preliminary injunction impeding enforcement of the anti-deplatforming statute.³² In doing so, he reasoned that the Florida statute was preempted by 47 U.S.C. § 230(e)(3) because it is inconsistent with 47 U.S.C. § 230(c)(2).³³ The latter federal provision, part of the Communications Decency Act of 1996, provides interactive computer services with immunity from civil liability when, acting in good faith, they remove material they deem objectionable, regardless of whether that content is constitutionally protected.³⁴ In other words, the statute allows social media platforms to exercise a certain degree of editorial control and judgment without fear of civil liability for their

²⁹ This is a point that the Florida defendants raise in their brief to the U.S. Court of Appeals for the Eleventh Circuit. See Opening Brief of Appellants at 33, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir. Sept. 7, 2021) ("And nothing in the Act prohibits platforms from censoring candidates; platforms are only restricted in their ability to deplatform candidates or to use algorithms to shadow ban posts by or about them during their campaigns.").

³⁰ See Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 125 (2021) (asserting that under Florida's deplatforming law, "politicians can be secure in the knowledge that the worst that can happen to them for violating platform policies is to have individual posts removed. As such, it obviously incentivizes serial violations on the hopes that some will get through the platform's enforcement mechanisms").

³¹ Plaintiffs' Memorandum, *supra* note 28, at 18.

³² See *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1096 (N.D. Fla. 2021).

³³ *Id.* at 1089.

³⁴ 47 U.S.C. § 230(c)(2)(A) (2021). There is some dispute, however, regarding the meaning that Congress intended when it used the phrase "otherwise objectionable" in 47 U.S.C. § 230(c)(2)(A). See Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(C)(2)*, 1 J. FREE SPEECH L. 175, 176-77 (2021) (suggesting that "objectionable" is limited in meaning such that a state law barring a social media platform from engaging in viewpoint discrimination would not be preempted).

decisions.³⁵ Because the Florida statute fines—i.e., imposes civil liability on—social media outlets for deplatforming candidates who post objectionable material that violates otherwise legitimate, generally applicable standards of use, it is inconsistent with 47 U.S.C. § 230(c)(2)(A).³⁶ Due to this conflict, Judge Hinkle concluded that the Florida statute is preempted by 47 U.S.C. § 230(e)(3), which bars a state from imposing civil liability under a state law that is inconsistent with 47 U.S.C. § 230.³⁷ In July 2021, Florida Attorney General Ashley Brooke Moody and the other Florida defendants filed a notice of appeal with the U.S. Court of Appeals for the Eleventh Circuit.³⁸ They filed their opening brief with the Eleventh Circuit in September 2021.³⁹ NetChoice and CCIA then filed their initial brief with the appellate court in November that year, and the Florida defendants filed their reply brief a month later.⁴⁰

What would happen if Florida’s anti-deplatforming law was not preempted due to its inconsistency with 47 U.S.C. § 230(c)(2)(A) and, instead, its fate hinged solely on whether it could pass muster under the First Amendment? That is the issue at the heart of this Article, which ultimately concludes that the statute would fail First Amendment review. Part I explores how Florida Governor Ron DeSantis publicly framed the need for this measure as an anti-censorship statute that facilitates free expression and enriches debate.⁴¹ Part II then turns to Judge Hinkle’s opinion in *NetChoice*, which offers significant clues about why the anti-deplatforming statute would be struck down

³⁵ See Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 694–98 (2017) (addressing how 47 U.S.C. § 230(c)(2)(A) has been interpreted by various courts).

³⁶ *NetChoice*, 546 F. Supp. 3d at 1090. Judge Hinkle explained that “deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2).” *Id.*

³⁷ See 47 U.S.C. § 230(e)(3) (2021) (providing, in relevant part, that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section”).

³⁸ Notice of Appeal, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir. July 13, 2021). In August 2021, Judge Hinkle stayed proceedings in his court pending the outcome in the Eleventh Circuit. Order Staying Proceedings, *NetChoice, LLC v. Moody*, No. 4:21-cv-220 (N.D. Fla. Aug. 25, 2021), <https://netchoice.org/wp-content/uploads/2021/08/Order-Granting-Stay.pdf>.

³⁹ See Opening Brief of Appellants, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir. Sept. 7, 2021); Brief for Appellees, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir. Nov. 8, 2021); Reply Brief of Defendants-Appellants, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir. Dec. 20, 2021).

⁴⁰ See *supra* note 39.

⁴¹ See *infra* notes 45–71 and accompanying text.

on First Amendment grounds.⁴² In the process, Part II assesses the continued relevance in the internet era of the U.S. Supreme Court's 1974 opinion in *Miami Herald Publishing Co. v. Tornillo*,⁴³ as well as the increasing importance of the Court's compelled-speech cases and its speaker-discrimination principle. Finally, Part III concludes that a constellation of First Amendment principles makes it extremely difficult for Florida's anti-deplatforming statute to survive constitutional review.⁴⁴

I. FRAMING THE FIGHT AGAINST DEPLATFORMING: ENHANCING SPEECH AND TAKING ON THE CENSORIAL POWERS OF BIG TECH

Shortly after the violent insurrection at the Capitol Building in Washington, D.C., on January 6, 2021, Twitter and Facebook banned then-President Donald J. Trump's personal accounts on their platforms.⁴⁵ Trump quickly fired back at the former entity, stating that "Twitter is not about FREE SPEECH. They are all about promoting a Radical Left platform where some of the most vicious people in the world are allowed to speak freely."⁴⁶ Trump later sued Twitter and Jack Dorsey, its chief executive officer, claiming they violated his First Amendment right of free speech by deplatforming him.⁴⁷ Trump's contention, of course, clashes with the fact that the First Amendment only safeguards against censorship by government entities and officials, not private ones.⁴⁸ But Trump, as his statement quoted above indicates, tried to flip the script away from government censorship in framing his own fight by claiming that the real enemy of free expression and the champion of the "Radical Left" was the private platform that unceremoniously jettisoned him.⁴⁹

⁴² See *infra* notes 72–173 and accompanying text.

⁴³ 418 U.S. 241 (1974).

⁴⁴ See *infra* notes 174–188 and accompanying text.

⁴⁵ Sarah E. Needleman, *Trump Banned from Twitter*, WALL ST. J., Jan. 9, 2021, at A1; Tony Romm & Elizabeth Dwoskin, *Trump Banned from Facebook Indefinitely as Critics Say Too Little, Too Late*, WASH. POST, Jan. 8, 2021, at A16.

⁴⁶ Kate Conger & Mike Isaac, *Citing Risk of Violence, Twitter Permanently Suspends Trump*, N.Y. TIMES, Jan. 9, 2021, at A1.

⁴⁷ Complaint for Injunctive and Declaratory Relief at 27, *Trump v. Twitter, Inc.*, No. 1:21-cv-22441 (S.D. Fla. July 7, 2021), https://www.wsj.com/media/TrumpvTwitter.pdf?mod=article_inline.

⁴⁸ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (opining "that the Free Speech Clause prohibits only governmental abridgment of speech. The Free Speech Clause does not prohibit private abridgment of speech").

⁴⁹ See Conger & Isaac, *supra* note 46 (quoting Trump's statement about Twitter).

Framing, in fact, is an important concept for defining problems, diagnosing their causes and suggesting ameliorative remedies.⁵⁰ As explicated by Professor Robert Entman, “[t]o frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.”⁵¹ Politicians use words, images and phrases to frame issues for audiences and to make clear what they see “as relevant to the topic at hand.”⁵² In short, they frequently take advantage of framing by attempting to define issues for the news media and the public.⁵³

When Florida Governor Ron DeSantis, a Republican with possible presidential aspirations,⁵⁴ held a press conference in February 2021 touting legislation that would penalize social media platforms for deplatforming candidates, he proclaimed that “[w]e’ve seen the power of their censorship over individuals and organizations, including what I believe is clear viewpoint discrimination.”⁵⁵ DeSantis referred to a “big tech oligarchy” that posed “more of a clear and present danger to the rights of free speech than the government itself.”⁵⁶ He also accused social media platforms of being biased against conservatives, asserting “[t]hey did not censor people when they were using those platforms for the rioting that occurred over the summer.”⁵⁷

DeSantis’s invocation of the phrase “clear and present danger” was shrewd. It tracks one of the U.S. Supreme Court’s most well-known articulations of when speech may lawfully be suppressed without violating the First Amendment.⁵⁸ DeSantis’s

⁵⁰ Robert N. Entman, *Toward Clarification of a Fracture Paradigm*, 43 J. COMM’N 51, 51–52 (1993).

⁵¹ *Id.* at 52.

⁵² Dennis Chong & James N. Druckman, *A Theory of Framing and Opinion Formation in Competitive Elite Environments*, 57 J. COMM’N 99, 100 (2007).

⁵³ See Lindsey Meeks, *Defining the Enemy: How Donald Trump Frames the News Media*, 97 JOURNALISM & MASS COMM’N Q. 211, 213 (2020) (“Politicians often use framing to their advantage.”).

⁵⁴ See Bret Stephens, *Liberals for DeSantis*, N.Y. TIMES, Apr. 13, 2021, at A23 (noting that in April 2021, DeSantis “became the apparent front-runner for the 2024 Republican presidential nomination”).

⁵⁵ Mary Elen Klas, *DeSantis Proposal Would Protect Candidates*, MIAMI HERALD, Feb. 3, 2021, at 6A.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Schenck v. United States, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that

use of the expression “clear and present danger” thus might resonate with some voters about when the government may permissibly act against entities engaged in expression-related enterprises.

In a nutshell, DeSantis ripped a page out of Trump’s anti-Twitter playbook when framing the need for anti-deplatforming legislation. The real threat to free speech was not “the government itself,” but a handful of private companies—an “oligarchy,” no less, a term evoking images of corrupt and despotic regimes that often is linked today with Russia⁵⁹—that engage in “censorship” of conservative views while allowing rioters to speak freely.⁶⁰ The implication, of course, is that government intervention in the social media marketplace of ideas is imperative to thwart private censorship and to level the playing field for conservative views.

Indeed, when he signed the bill into law in May 2021, DeSantis contended that “Silicon Valley is acting as a council of censors; they cancel people when mobs come after somebody. They will pull them down.”⁶¹ A sign affixed to the lectern from which he spoke that day read “STOP Big Tech Censorship.”⁶² DeSantis implied that government intervention in the form of an anti-deplatforming statute was necessary to enrich public debate, with one newspaper reporting that DeSantis “noted that ‘big tech oligarchs’ have censored debates about the pandemic and policies that officials put in place to contain the deadly virus, such as lockdowns.”⁶³

Congress has a right to prevent.”). See also Joel M. Gora, *The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate*, 29 CARDOZO L. REV. 1399, 1409 (2008) (describing the clear and present danger test as “well-known”); David L. Hudson, Jr., & Jacob David Glenn, *Fixed Stars: Famous First Amendment Phrases and Their Indelible Impact*, 15 CHARLESTON L. REV. 189, 194 (2020) (noting that Justice Oliver Wendell Holmes, Jr. “first used the terminology ‘clear and present danger’ more than a hundred years ago to help draw the line between protected and unprotected speech in *Schenck v. United States*”).

⁵⁹ See Ben Zimmer, *Word on the Street: A Term for Russia’s Elite Spurs Objections*, WALL ST. J., Aug. 11, 2018, at C2 (addressing the meaning of the term “oligarch” and how it became “so nefarious-sounding”).

⁶⁰ Klas, *supra* note 55, at 6A.

⁶¹ Ann Ceballos et al., *Social Media—DeSantis Signs Bill*, MIAMI HERALD (May 25, 2021), <https://www.miamiherald.com/news/politics-government/state-politics/article251640638.html>.

⁶² *Id.*

⁶³ *Id.*

In fact, DeSantis suggested at the signing ceremony that social media platforms skew debate in the marketplace of ideas in favor of their own beliefs and ideologies:

What we have seen in recent years is a shift away from internet platforms and social-media platforms from really being liberating forces to now being enforcers of orthodoxy. So, their primary mission, or one of their major missions, seems to be suppressing ideas that are either inconvenient to the narrative or which they personally disagree with.⁶⁴

DeSantis also raised the issue of the deplatforming of Trump and tied Florida's legislation to it as a countermeasure. Specifically, in a May 24, 2021 tweet, DeSantis wrote "Big Tech deplatformed the President of the United States but let Ayatollah Khamenei talk about killing jews. This is wrong—that's why we are protecting Floridians and fighting back against censorship."⁶⁵ Using the phrase "Big Tech" instantly brands the operators of social media platforms as the enemy, given the pejorative use of "Big" against other powerful industries such as Big Pharma, Big Tobacco and Big Ag.⁶⁶

Viewing his statements as a whole, DeSantis framed the exigencies justifying Florida's anti-deplatforming legislation in terms of counteracting the evil forces of censorship from a faraway land—namely, the Big Tech oligarchs hailing from Silicon Valley—that stifle robust debate and the conservative ideas with which they disagree. Big Tech engages, as DeSantis put it, in "viewpoint discrimination."⁶⁷ The use of that last term likely was strategic because viewpoint discrimination, when deployed by the government against private speech, is especially

⁶⁴ Jim Saunders, *Industry Groups File Federal Lawsuit Challenging Florida's New Laws Aimed at Big Tech*, MIAMI HERALD (May 27, 2021), <https://www.miamiherald.com/news/politics-government/state-politics/article251739288.html>.

⁶⁵ Governor Ron DeSantis (@RonDeSantisFL), TWITTER (May 24, 2021, 11:40 PM), <https://twitter.com/RonDeSantisFL/status/1397029716624822273>.

⁶⁶ See Will Oremus, *Big Tobacco. Big Pharma. Big Tech?*, SLATE (Nov. 17, 2017), <https://slate.com/technology/2017/11/how-silicon-valley-became-big-tech.html> (noting that "the history of the label 'Big X' suggests that society does not prepend the label 'Big,' with a capital 'B,' to an industry out of respect or admiration. It does it out of loathing and fear – and in preparation for battle," and adding that "labeling an industry 'Big X' is a prelude to a political battle").

⁶⁷ Klas, *supra* note 55, at 6A.

egregious and faces rigorous judicial review.⁶⁸ As former Justice Anthony Kennedy explained, “it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.”⁶⁹ More bluntly put by Justice Samuel Alito, “[v]iewpoint discrimination is poison to a free society.”⁷⁰ DeSantis thus suggested, *sub silentio*, that if the government may not engage in viewpoint discrimination, then surely the owners of powerful platforms from Silicon Valley, “acting as a council of censors,”⁷¹ should not be able to do so either. Thus, to prevent these corporate censors from taking such speech-deleterious actions against the views of conservative politicians, government intervention in the marketplace of ideas via a law barring the deplatforming of candidates is vital.

With Governor DeSantis’s framing in mind regarding the supposed need for anti-deplatforming legislation, the Article next turns to Judge Hinkle’s analysis of the First Amendment issues in *NetChoice*. Hinkle’s opinion, either through direct statements or via references to certain cases and concepts, illustrates that multiple free-speech principles push back forcefully against the constitutionality of the anti-deplatforming measure.

II. AN ARRAY OF FIRST AMENDMENT FORCES PITTED AGAINST FLORIDA’S ANTI-DEPLATFORMING STATUTE

Judge Hinkle did not squarely tackle the First Amendment issues raised by the anti-deplatforming law because he concluded it was preempted by a federal statute.⁷² Nonetheless, Hinkle’s analysis of First Amendment questions affecting related statutes targeting social media platforms that were spawned by the same legislation, Florida Senate Bill 7072, sheds light on the constitutional hurdles the anti-deplatforming law would need to clear. Among other things, the associated statutes at issue in *NetChoice*: 1) detrimentally affect the platforms’ ability to prioritize or suppress the placement of

⁶⁸ See *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (calling viewpoint discrimination “a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny”).

⁶⁹ *Id.*

⁷⁰ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

⁷¹ Ceballos, *supra* note 61, at 1A.

⁷² See *supra* notes 32–37 and accompanying text (addressing Judge Hinkle’s analysis of the preemption issue).

content posted by or about candidates in venues such as newsfeeds and search results,⁷³ and 2) bar platforms from limiting or eliminating a user's access to content posted by or about candidates.⁷⁴ The former measure targets post-prioritization, while the latter addresses so-called shadow banning.⁷⁵

Examining Judge Hinkle's opinion on these and other matters in *NetChoice* illustrates how a First Amendment analysis of Florida's anti-deplatforming statute might unfold in court. These items are addressed separately below.

A. *Speech and Speakers*

A threshold question addressed by Judge Hinkle was whether the operators of social media platforms engage only in non-expressive conduct or whether they also speak when operating their platforms.⁷⁶ This issue taps into the key dichotomy in First Amendment jurisprudence between conduct and speech.⁷⁷ As Justice Clarence Thomas recently wrote, the Supreme Court has “long drawn” a “line between speech and conduct.”⁷⁸ The line is significant because, as the late Justice Antonin Scalia explained, “a general law regulating conduct and

⁷³ See FLA. STAT. § 501.2041(2)(h) (2021) (providing, in key part, that “[a] social media platform may not apply or use *post-prioritization* or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate”) (emphasis added); FLA. STAT. § 501.2041(1)(e) (2021) (defining, in key part, post-prioritization as an “action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results”).

⁷⁴ See FLA. STAT. § 501.2041(2)(h) (2021) (providing, in key part, that “[a] social media platform may not apply or use post-prioritization or *shadow banning* algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate”) (emphasis added); FLA. STAT. § 501.2041(1)(f) (2021) (defining, in key part, shadow banning as an “action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform”).

⁷⁵ See *supra* notes 73–74 and accompanying text.

⁷⁶ See *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (concluding that it cannot “be said that a platform engages only in conduct, not speech”).

⁷⁷ See Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) (“From its beginning, the First Amendment speech guarantee has rested on two fundamental boundaries: speech versus conduct and liberty versus utility.”); Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1202 (noting “broad dichotomy between speech (protected) and conduct (unprotected)” in First Amendment law).

⁷⁸ *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

not specifically directed at expression . . . is not subject to First Amendment scrutiny at all.”⁷⁹

Conduct garners First Amendment protection only when it “is inherently expressive.”⁸⁰ To constitute speech within the meaning of the First Amendment, expressive conduct typically requires both an intent on the actor’s part to convey a specific message via conduct and a great likelihood that the intended message will be understood by those who view it.⁸¹ Burning a cross, for instance, may amount to symbolic expression.⁸²

Thus, if the statutes regulate only non-expressive conduct, then they are not subject to any First Amendment scrutiny.⁸³ Judge Hinkle, however, concluded this was not the situation and that the statutes therefore must survive First Amendment scrutiny to be constitutional.⁸⁴ In particular, he found that social media platforms “exercise editorial judgment,” and that the Florida statutes at issue in *NetChoice* target “the editorial judgments themselves.”⁸⁵

What is the implication of this logic for, more specifically, the anti-deplatforming statute? It is that when a social media platform adopts terms of service regarding content that it deems objectionable and thus bans, it exercises its editorial judgment, and its terms-of-service policy constitutes its own message.⁸⁶ As *NetChoice* and the CCIA explained in a brief about the kind of content-based judgments that platforms make, “[e]nforcing standards about subjects like hate speech, pornography, or disinformation expresses a message about the nature of the online community and what its moderator finds objectionable. No additional speech is needed for such expression to be

⁷⁹ *Barnes v. Glen Theatre*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring). A generally applicable law regulating conduct that is, in fact, directed at a person because of the particular message the person communicates is subject to rigorous First Amendment review. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010).

⁸⁰ *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006).

⁸¹ *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

⁸² *Virginia v. Black*, 538 U.S. 343, 360–61 (2003).

⁸³ *Cf. Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) (noting that if the ordinances at issue “restricted only non-expressive conduct, and not speech, then they would not implicate the First Amendment at all”).

⁸⁴ *See NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (holding that “neither can it be said that a platform engages only in conduct, not speech. The statutes at issue are subject to First Amendment scrutiny.”).

⁸⁵ *Id.* at 1092.

⁸⁶ *See id.* at 1090 (“The plaintiffs say—correctly—that they use editorial judgment in making these decisions, much as more traditional media providers use editorial judgment when choosing what to put in or leave out of a publication or broadcast.”)

protected.”⁸⁷ For example, Twitter’s hateful conduct policy conveys information to a platform’s users about content they are barred from tweeting.⁸⁸ Creating and conveying this information to users is protected by the First Amendment because, as the Supreme Court has held, “the creation and dissemination of information are speech.”⁸⁹

In turn, when a platform decides to ban a candidate’s account because the candidate failed to comply with its terms of service by posting objectionable content, the platform simply is enforcing its editorial-judgment policies. Eliminating a platform’s power to ban a candidate due to the candidate’s unacceptable content undermines the platform’s editorial authority and autonomy. In brief, the power to deplatform adds teeth to a platform’s content moderation policies; abolishing that capacity by statutory fiat defangs those policies. A more extensive analysis of the editorial autonomy issue appears later in Section C.

B. *Strict Scrutiny*

Because Judge Hinkle concluded that the speech rights of social media platforms were implicated by the Florida statutes, he then had to select the level of scrutiny to apply to test their validity.⁹⁰ Resolution of that question typically hinges on whether a statute is content based or content neutral, with content-based laws generally being subject to the rigorous strict

⁸⁷ Plaintiffs’ Reply Brief in Support of Motion for Preliminary Injunction at 2, *NetChoice v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 4:21cv220-RH-MAF), 2021 U.S. Dist. LEXIS 121951 [hereinafter Plaintiff’s Reply Brief] (citing *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1243–45 (11th Cir. 2018)), <https://netchoice.org/wp-content/uploads/2021/06/Reply-Brief.pdf>.

⁸⁸ For instance, Twitter enforces a hateful conduct policy that, among other things, prohibits “targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category,” and bars “content that wishes, hopes, promotes, incites, or expresses a desire for death, serious bodily harm, or serious disease against an entire protected category and/or individuals who may be members of that category.” *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Feb. 23, 2022). Violations of this policy “may eventually result in permanent account suspension.” *Id.*

⁸⁹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

⁹⁰ The scrutiny-selection phase of inquiry is standard in First Amendment cases. See R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 355 (2019) (“The preliminary decision that must be made in First Amendment free speech cases is what level of review to apply.”).

scrutiny test and content-neutral measures facing the more relaxed intermediate scrutiny standard.⁹¹

Judge Hinkle directly determined that the anti-deplatforming statute is a content-based regulation of speech.⁹² In particular, it applies only to content and ideas posted by candidates for public office in Florida, not to content and ideas posted by others.⁹³ In other words, it privileges political speech—or, at least, the speech of politicians (i.e., candidates)—over non-political speech.⁹⁴

As such, Judge Hinkle concluded that the anti-deplatforming statute, as well as the other Florida statutes challenged in *NetChoice*, must pass strict scrutiny review.⁹⁵ Strict scrutiny is “demanding” and requires a law to be “justified by a compelling government interest and [be] narrowly drawn to serve that interest.”⁹⁶ A compelling interest often is defined as one of the highest order or an overriding interest, while narrow tailoring under strict scrutiny requires that a statute embrace the least speech-restrictive means of serving that interest.⁹⁷

⁹¹ See R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 292 (2016) (noting that “for regulations of free speech in a public forum or on individual private property, the Court uses strict scrutiny for content-based regulations of speech and intermediate review for content-neutral regulations”).

⁹² See *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (“The Florida statutes at issue are about as content-based as it gets. Thus, for example, § 106.072 applies to deplatforming a candidate, not someone else; this is a content-based restriction.”).

⁹³ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (noting that a content-based law “target[s] speech based on its communicative content”).

⁹⁴ See Alan Z. Rozenshtein, *Silicon Valley’s Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 373 (2021) (interpreting Judge Hinkle’s conclusion that the anti-deplatforming law is content based as being premised on the idea that “it singles out political speech for protection”).

⁹⁵ See *NetChoice*, 546 F. Supp. 3d at 1093 (“That the statutes are content-based in these and other respects triggers strict scrutiny.”); see also *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (“Content-based laws are subject to strict scrutiny.”).

⁹⁶ *Brown v. Ent. Merchs. Ass’n.*, 564 U.S. 786, 799 (2011).

⁹⁷ Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of a Strict Scrutiny World After *Becerra* and *Janus*, and a First Amendment Interests-and-Values Alternative*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 13 (2020); see R. Randall Kelso, *The Structure of Intermediate Review*, 25 LEWIS & CLARK L. REV. 691, 700–01 (2021) (noting that under strict scrutiny, a “statute must: (1) advance compelling/overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends,” and adding that “[o]nly ‘compelling’ or ‘overriding’ interests can justify a statute at strict scrutiny”).

Judge Hinkle also suggested another reason why the anti-deplatforming law must surmount strict scrutiny: It selectively discriminates against speakers, applying to large social media platforms but not to smaller ones.⁹⁸ Specifically, it only implicates platforms that either generate “annual gross revenues in excess of \$100 million” or have “at least 100 million monthly individual platform participants globally.”⁹⁹ Furthermore, the law makes a second speaker-based distinction by exempting from its reach “any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in [Section] 509.013.”¹⁰⁰ As Judge Hinkle encapsulated it, “[t]he legislation applies only to large providers, not otherwise-identical but smaller providers, and explicitly exempts providers under common ownership with any large Florida theme park.”¹⁰¹

Treating speakers differently is constitutionally suspect.¹⁰² In 2010, the U.S. Supreme Court observed that in addition to guarding against subject-matter and viewpoint discrimination, the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”¹⁰³ As such, the Court noted that “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”¹⁰⁴ Those statements from *Citizens United v. FEC* marked “the first time [the Court] gave full-throated articulation

⁹⁸ See *NetChoice*, 546 F. Supp. 3d at 1094 (concluding that “the application of these requirements to only a small subset of social-media entities would be sufficient, standing alone, to subject these statutes to strict scrutiny”).

⁹⁹ FLA. STAT. § 501.2041(1)(g)(4) (2021).

¹⁰⁰ *Id.* See also FLA. STAT. § 509.013(9) (2021) (“‘Theme park or entertainment complex’ means a complex comprised of at least 25 contiguous acres owned and controlled by the same business entity and which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually.”).

¹⁰¹ *NetChoice*, 546 F. Supp. 3d at 1084.

¹⁰² See Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 98 (2018) (contending that the U.S. Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), “clearly hinged on the premise that speaker-based distinctions are constitutionally problematic”).

¹⁰³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

¹⁰⁴ *Id.*

to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment.”¹⁰⁵

In sum, either because it is content based or because it distinguishes between speakers, Florida’s anti-deplatforming statute needs to survive strict scrutiny review to pass First Amendment muster. The first step of this analysis entails determining if Florida possesses a compelling interest in preventing candidates running for state and local office from being deplatformed by large social media outlets.¹⁰⁶ Judge Hinkle did not directly address this question, given his conclusion that the anti-deplatforming measure was preempted by a federal statute.¹⁰⁷ What’s more, his analysis of whether Florida had a compelling interest sufficient to support its other related statutes affecting social media platforms was cursory, at best. It consisted of the lone observation that “leveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest.”¹⁰⁸ Judge Hinkle cited the Supreme Court’s ruling in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* to support that proposition.¹⁰⁹ He thus concluded that Florida’s other statutes affecting social media platforms could not survive strict scrutiny.¹¹⁰

But what about another possible interest that might support the anti-deplatforming law, were Florida to assert it? In particular, would providing Florida voters with direct and easy access to statements made on popular social media platforms by candidates running for public office in the Sunshine State—statements that might influence voting decisions about those candidates and thus affect democratic self-governance—constitute a compelling interest? If, as the Supreme Court has reasoned, “[t]he right of citizens . . . to hear . . . and to use information to reach consensus is a precondition to enlightened

¹⁰⁵ Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766 (2015).

¹⁰⁶ See *supra* notes 96–97 (addressing the compelling interest facet of strict scrutiny).

¹⁰⁷ See *supra* notes 32–37 (addressing Judge Hinkle’s analysis of the preemption issue).

¹⁰⁸ *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1095 (N.D. Fla. 2021).

¹⁰⁹ *Id.* The Supreme Court wrote in *Bennett*: “[w]e have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.” *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011).

¹¹⁰ *NetChoice*, 546 F. Supp. 3d, at 1094 (“To survive strict scrutiny, an infringement on speech must further a compelling state interest and must be narrowly tailored to achieve that interest. These statutes come nowhere close.” (citation omitted)).

self-government and a necessary means to protect it,”¹¹¹ then does not the anti-deplatforming statute, which applies only to candidates running for office, facilitate this condition? Additionally, if “speech uttered during a campaign for political office” merits full First Amendment protection,¹¹² and if the First Amendment truly embraces an unenumerated right to receive speech,¹¹³ then Florida seemingly possesses a compelling interest in informing voters about the views of candidates that would support its anti-deplatforming law. In sum, concerns about enriching public debate and facilitating democratic self-governance through government intervention in the marketplace of ideas that largely drove the work of Owen Fiss and Jerome Barron resonate decades later in the Florida law.¹¹⁴

Of course, even if this militates in favor of Florida possessing a compelling interest, it does not end the strict scrutiny inquiry. The reason for that is not simply because, as discussed later, the social media platforms’ dual interests in safeguarding their editorial autonomy and protecting their right not to be compelled by the government to speak would push back against Florida’s interest.¹¹⁵ Before even considering those issues, a court would need to determine if the law was narrowly tailored to facilitate an ostensible interest in informing voters about the views of political candidates. As noted earlier, narrow tailoring under strict scrutiny demands that a law restrict no more speech than is necessary to serve the government’s interest.¹¹⁶

At least two major obstacles would arise for Florida in clearing the narrow-tailoring hurdle: 1) an alternative mechanism for serving Florida’s interest in informing voters about candidates’ views could be adopted by the state that does not in any way impinge on the speech rights of social media platforms, and 2) the statute’s application to only very large or very lucrative social media platforms raises problems of

¹¹¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

¹¹² *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

¹¹³ *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (recognizing a right to receive speech, including information and ideas); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“This right to receive information and ideas, regardless of their social worth is fundamental to our free society.” (citation omitted)).

¹¹⁴ *See supra* notes 1–18 and accompanying text (addressing the works of Fiss and Barron).

¹¹⁵ *See infra* Part II, Sections C and D (addressing, respectively, the issues of editorial autonomy and the right not to speak that would affect the anti-deplatforming statute’s constitutionality).

¹¹⁶ *See supra* note 97 and accompanying text (addressing the meaning of narrow tailoring within strict scrutiny).

underinclusivity and red flags about both lawmakers' motives and the law's efficacy. As to the first of these hurdles, the Supreme Court has explained that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."¹¹⁷ Thus, as two scholars recently put it, "even if a law advances a compelling government interest, it will fail strict scrutiny . . . if there is any other way to advance the governmental interest that would restrict less speech."¹¹⁸

In fact, there is an alternative Florida could implement that does not impinge on the First Amendment speech rights of nongovernment-operated social media platforms. Specifically, it could create, operate and promote its own online platform. The platform would be dedicated exclusively for hosting accounts held by candidates running for public office, and it would allow citizens to post responses that everyone – candidates included – could see. The state could conduct a public-information campaign promoting this platform to educate Floridians about its existence and to encourage its use.¹¹⁹ In brief, rather than compelling the likes of Twitter and Facebook to host candidates who violate their terms of service, Florida would enter into the online marketplace of ideas and run its own platform for the benefit of its own citizens.

The anti-deplatforming law also is plagued on the tailoring front by its underinclusivity.¹²⁰ That is because it exempts from its reach social media platforms that have less than \$100 million in annual gross revenues and fewer than 100 million

¹¹⁷ *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

¹¹⁸ Dan V. Kozlowski & Derigan Silver, *Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 *COMMUN. L. & POL'Y* 191, 194–95 (2019).

¹¹⁹ The U.S. Supreme Court recently suggested that state-run, public-information campaigns provide an important and viable method for a state to inform citizens about information that it deems essential. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("Further, California could inform low-income women about its services 'without burdening a speaker with unwanted speech.' Most obviously, it could inform the women itself with a public-information campaign." (citation omitted) (quoting *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 800 (1988))).

¹²⁰ *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles."); *see also* Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 *COMMUN. L. & POL'Y* 259, 264 n.16 (2001) (noting that underinclusivity is "part of the narrow tailoring inquiry").

monthly individual platform participants globally.¹²¹ In other words, if Florida truly was concerned about candidates having unfettered access to social media platforms so that its citizens would know their views and positions, then it is doing too little to address the problem by not regulating more social media platforms.¹²² The law covers what Judge Hinkle described as “only a small subset of social-media entities.”¹²³

Why not, in other words, target social media platforms that generate \$1 million or more (rather than \$100 million) in annual gross revenue or have at least one million (rather than 100 million) individual platform participants? Such an expansion would make the law more efficacious in serving both candidates and all Floridians who want to know those candidates’ views. Indeed, underinclusion arises when “a law targets some . . . actors for adverse treatment, yet leaves untouched . . . actors that are indistinguishable in terms of the law’s purpose.”¹²⁴ For instance, the U.S. Supreme Court in 2018 held that a California statute enacted to inform women about low-cost and no-cost abortion services provided by the state was “wildly underinclusive” because it only compelled some clinics and not others to convey such information to patients.¹²⁵

In addition to underinclusive laws failing to serve their intended purpose,¹²⁶ underinclusivity may indicate an impermissible legislative motive in targeting for regulation only a select number of disfavored speakers.¹²⁷ In fact, NetChoice suggested that was the situation in Florida, alleging that the law’s:

¹²¹ See FLA. STAT. § 501.2041(1)(g)(4) (2021) (setting forth the criteria for being a “social media platform” covered by the law).

¹²² Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After Williams-Yulee*, 48 ARIZ. ST. L.J. 525, 528 (2016) (explaining that underinclusivity arises when “the government regulates too little speech to prevent or mitigate a particular type of harm”).

¹²³ NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, at 1094 (N.D. Fla. 2021).

¹²⁴ William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L. Q. 637, 637 (1993).

¹²⁵ See Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2375–76 (2018).

¹²⁶ See Williams-Yulee v. Fla. Bar, 575 U.S. 433, 449 (2015) (“Underinclusiveness can . . . reveal that a law does not actually advance a compelling interest.”).

¹²⁷ See Brown v. Ent. Merchs. Ass’n, 564 U.S. 786, 802 (2011) (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”).

undisguised singling out of disfavored companies reflects [its] true purpose, which its sponsors freely admitted: to target and punish popular online services for their perceived views and for certain content-moderation decisions that state officials opposed – in other words, to retaliate against these companies for exercising their First Amendment rights of “editorial discretion over speech and speakers on their property.”¹²⁸

Lurking *sub silentio* in that statement is the notion that the law was adopted to punish Twitter and Facebook for deplatforming former President Trump.¹²⁹ Furthermore, the statute’s exemption of social media platforms operated by the owners of theme parks in Florida – as noted earlier, this carves out the owners of Disney World and Universal Studios Florida from the law’s reach – compounds its underinclusivity.¹³⁰ As NetChoice averred, “[t]he decision to exempt those major companies confirms that the law’s true objective is to control the private speech of politically disfavored companies who have online platforms, but not to control the speech of similarly situated but politically favored companies with power and influence in the State of Florida.”¹³¹

In brief, while Florida might possess a compelling interest in serving the right of its citizens to know about the views of candidates running for public office in the Sunshine State, the anti-deplatforming law faces grave obstacles on the narrow tailoring prong of strict scrutiny.

C. *Protection of Editorial Autonomy*

A key First Amendment interest of the social media platforms impaired by Florida’s anti-deplatforming statute is their ability to freely exercise editorial judgment and control regarding content that appears on their sites via enforcement of terms-of-service policies.¹³² Because they are barred from deplatforming

¹²⁸ Complaint, *supra* note 26, at 4.

¹²⁹ See *supra* notes 45–46 and accompanying text (addressing the deplatforming of former President Trump).

¹³⁰ *Supra* note 24 and accompanying text.

¹³¹ Complaint, *supra* note 26, at 32.

¹³² See *id.* at 2–3 (contending that the Florida statutes stemming from Senate Bill 7072 “restrict the First Amendment rights of a targeted selection of online businesses by having the State of Florida dictate how those businesses must exercise their editorial judgment over the content hosted on their privately owned websites”).

political candidates who violate their terms-of-service policies, the platforms must continue to host candidates who post material that contravenes their judgment about objectionable content. Put differently, the platforms are compelled to grant access to a specific class of speakers (candidates for public office), even if those speakers repeatedly fail to abide by generally applicable terms-of-service standards regarding content and otherwise would be booted off the platforms. As Professor Ashutosh Bhagwat explains, the Florida legislation “has the direct and obvious effect of denying platforms one powerful remedy – temporary or permanent deplatforming—against users who regularly violate content policies, which in itself interferes with editorial freedom.”¹³³ He adds that the law “obviously incentivizes serial violations [of content policies by candidates] on the hopes that some [violative content] will get through the platform’s enforcement mechanisms, which in turn strips platforms of effective editorial rights with respect to this class of speakers.”¹³⁴

The key U.S. Supreme Court ruling standing against a government-coerced, right-of-access statute for political candidates is *Miami Herald Publishing Co. v. Tornillo*.¹³⁵ The Court there considered a Florida right-of-reply statute that required print newspapers that criticized the character or record of candidates running for office to give those candidates an equal amount of space—both free of charge and in as conspicuous a location as where the criticism appeared – to respond to the attacks.¹³⁶ In other words, just as with the Florida anti-deplatforming law, the statute in *Tornillo* compelled media entities to provide candidates with access in order to be able to speak. The Supreme Court declared in *Tornillo* that this “government-enforced access”¹³⁷ policy “fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”¹³⁸ By analogy, internet-based social media platforms such as Twitter and Facebook are more than passive receptacles or conduits for content; they enforce terms-of-service policies that

¹³³ Bhagwat, *supra* note 30, at 121.

¹³⁴ *Id.* at 125.

¹³⁵ 418 U.S. 241 (1974).

¹³⁶ *Id.* at 244.

¹³⁷ *Id.* at 254.

¹³⁸ *Id.* at 258.

expressly forbid certain types of content.¹³⁹ And while the print medium and the internet certainly are different, the U.S. Supreme Court held in 1997 in *Reno v. ACLU*¹⁴⁰ that speakers on the internet are entitled to the full amount of First Amendment speech protection, just as are print-medium speakers.¹⁴¹ Put another way, if the operators of social media platforms on the internet are indeed speakers, then they should be afforded the same level of editorial control and autonomy that the Court bestowed on the editors of print newspapers in *Tornillo*.

Of course, as Judge Hinkle pointed out, the editorial functions performed by print newspapers, in which human editors choose all of the content that makes it into a paper's pages, are different from the editorial judgments that social media platforms make, often using algorithms designed to enforce terms-of-service policies, regarding content posted by others on their sites.¹⁴² Yet, Hinkle indicated that the Florida statutes at issue in *NetChoice* target editorial judgments not in terms of routine content moderation, but rather in "ideologically sensitive cases."¹⁴³ Judgments about deplatforming political candidates who breach terms-of-service policies regarding objectionable content seemingly fall into this bucket of cases.

¹³⁹ For instance, Meta will "remove content that's meant to degrade or shame, including, for example, claims about someone's sexual personal activity." *Bullying and Harassment*, META, <https://transparency.fb.com/policies/community-standards/bullying-harassment/> (last visited Feb. 23, 2022). In addition, Meta "prohibit[s] the use of harmful stereotypes, which we define as dehumanizing comparisons that have historically been used to attack, intimidate, or exclude specific groups, and that are often linked with offline violence." *Hate Speech*, META, <https://transparency.fb.com/policies/community-standards/hate-speech/> (last visited Feb. 23, 2022).

¹⁴⁰ 521 U.S. 844 (1997).

¹⁴¹ *See id.* at 870 (agreeing with the district court's "conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to" the internet).

¹⁴² Judge Hinkle explained here that:

newspapers, unlike social media providers, create or select all their content, including op-eds and letters to the editor. Nothing makes it into the paper without substantive, discretionary review, including for content and viewpoint; a newspaper is not a medium invisible to the provider. Moreover, the viewpoint that would be expressed in a reply would be at odds with the newspaper's own viewpoint. Social media providers, in contrast, routinely use algorithms to screen all content for unacceptable material but usually not for viewpoint, and the overwhelming majority of the material never gets reviewed except by algorithms. Something well north of 99% of the content that makes it onto a social media site never gets reviewed further.

NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1091–92 (N.D. Fla. 2021).

¹⁴³ *Id.* at 1092.

That is because providing candidates with an online forum to disseminate their political views, ideas and beliefs rests in the balance of a social media operator's deplatforming decision. In other words, distribution of a candidate's ideologies will be thwarted by a decision to deplatform a candidate. The Florida statute, however, prevents such an editorial decision; it requires, instead, that candidates be given a platform on which they can espouse their ideologies.

Florida, however, argued to Judge Hinkle that the U.S. Supreme Court's 1980 decision in *PruneYard Shopping Center v. Robins*¹⁴⁴ was more relevant than *Tornillo*.¹⁴⁵ In *PruneYard*, the Court held that the right of individuals to engage in free speech and petition activities on the property of a privately owned shopping center—a compelled access right to engage in speech that was secured by California's constitution, not by the First Amendment—did not violate the First Amendment speech rights of the shopping center's owner to block expressive activities on its property.¹⁴⁶ The speech and petition activities in question involved distributing pamphlets and soliciting signatures.¹⁴⁷ The Supreme Court summarily distinguished *Tornillo*, reasoning that *Tornillo's* concern with intrusion into the function of newspaper editors was “obviously . . . not present” in *PruneYard*.¹⁴⁸

The Florida anti-deplatforming statute can be distinguished from *PruneYard* in at least two respects. First, it directly targets entities—social media platforms—engaged in the business of hosting and conveying speech. Platforms such as Twitter and Facebook are open to the public specifically for purposes of posting, reading and responding to speech, subject to the platforms' terms of service regarding content. The platforms' very existence is all about speech, thereby ratcheting up First Amendment frets when the government interferes with how these speech-based businesses operate and enforce, via deplatforming, their policies affecting content.

Conversely, the access mandate in *PruneYard* targeted an entity—a shopping center—that was “open to the public for the

¹⁴⁴ 447 U.S. 74 (1980).

¹⁴⁵ See *NetChoice*, 546 F. Supp. 3d, at 1092–93 (addressing Florida's reliance on *PruneYard*).

¹⁴⁶ *PruneYard*, 447 U.S. at 88.

¹⁴⁷ *Id.* at 77.

¹⁴⁸ *Id.* at 88.

purpose of encouraging the patronizing of its commercial establishments,” including “more than 65 specialty shops, 10 restaurants, and a movie theater.”¹⁴⁹ The shopping center owner was not immersed in the speech business; only the movie theater apparently was involved in a speech-centric enterprise.¹⁵⁰ Indeed, the shopping center’s policy was “not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that [was] not directly related to its commercial purposes.”¹⁵¹

Furthermore, the shopping center’s choice to ban “any publicly expressive activity”¹⁵² meant that its policy applied evenhandedly to all varieties of content “not directly related to its commercial purposes.”¹⁵³ The center’s decision, unlike the editorial choices made by social media platforms, thus did not involve assessments about which types of content to permit and which types to ban.¹⁵⁴ To wit, *PruneYard* did not involve a decision about whether to prohibit hate speech or degrading and dehumanizing speech—content that social media platforms selectively choose to ban—but rather a decision to block all speech.¹⁵⁵ At bottom, the speech-based intrusion in *PruneYard* was peripheral to the purpose of the entity in question (the shopping center) and did not interfere with judgments affecting its core shopping center business. While a social media platform may not be a newspaper, it is a speech-based business that makes editorial choices affecting the content that others may permissibly post. It is not a shopping center engaged in the business of making decisions about which stores and restaurants may secure leases to sell goods and prepare meals.

A second key difference from *PruneYard* is that the battle in *NetChoice* centers on a platform’s ability to *remove* a person

¹⁴⁹ *Id.* at 77.

¹⁵⁰ Movies are a form of speech protected by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding “that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments”).

¹⁵¹ *PruneYard*, 447 U.S. at 77.

¹⁵² *Id.* (emphasis added).

¹⁵³ *Id.*

¹⁵⁴ *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 12 (1986) (“Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner’s exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based.”).

¹⁵⁵ *See supra* notes 88 and 139 (addressing bans on speech related to these matters imposed by Twitter and Facebook).

who already has access to it. The fight is *not* about a candidate initially gaining first-time access to a platform such as Twitter or Facebook. Instead, it regards the ability of a platform to eliminate access for someone who presently has it and who has failed to obey its rules regarding objectionable content. The question, therefore, is whether, consistent with the First Amendment, a candidate must be granted enduring access to a social media platform or whether access can be lost, via deplatforming, for failure to comply with content moderation rules.

PruneYard, in contrast, involved individuals who were attempting to gain access to a venue that enforced a policy designed to block their initial access to it.¹⁵⁶ *PruneYard* thus was not about eliminating access to a venue where individuals were already permitted to engage in expressive activities. *PruneYard* was about gaining initial access; *NetChoice* is about revoking it.

D. *The Right Not to be Compelled to Speak*

Closely related to social media platforms' interest in editorial control and autonomy is their unenumerated First Amendment right not to be compelled to speak and, more specifically, their interest in not being compelled to convey the political views of candidates who have violated their terms of service and thus would otherwise be deplatformed.¹⁵⁷ The right not to speak applies to business entities as well as individuals.¹⁵⁸ The Supreme Court has remarked that "measures compelling speech are at least as threatening" to the First Amendment as are ones restricting speech.¹⁵⁹ Indeed, Vikram David Amar and Alan Brownstein recently observed that the First Amendment right not to be compelled by the government to speak "is being

¹⁵⁶ The shopping center's policy was "not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion." *PruneYard*, 447 U.S. at 77.

¹⁵⁷ See *Wooley v. Maynard*, 430 U.S. 705, 714 (2014) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

¹⁵⁸ *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

¹⁵⁹ *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018).

invoked more frequently, more widely, and more aggressively than ever before.”¹⁶⁰

For example, in the 2018 case of *Janus v. American Federation of State, County & Municipal Employees*, the Supreme Court found an Illinois law unconstitutional because it “compell[ed] [public employees] to subsidize private speech on matters of substantial public concern” by requiring non-union members to fund the speech of the union that was designated to represent them in collective bargaining with the state.¹⁶¹ Writing for the majority, Justice Alito was clear that topics such as government spending, education, child welfare, healthcare, minority rights, climate change, sexual orientation and gender identity all constitute matters of substantial public concern.¹⁶² The Court stressed that “the compelled subsidization of private speech seriously impinges on First Amendment rights.”¹⁶³

Similarly, Florida’s anti-deplatforming statute compels the hosting of private individuals’ speech—namely, the speech of candidates running for public office. The speech of those individuals, in turn, likely addresses what the Court in *Janus* called “matters of substantial public concern,”¹⁶⁴ such as candidates’ views regarding the political issues confronting them, as well as voters, in their races for office.¹⁶⁵ Specifically, candidates might express their views on some of the very same topics noted above that the *Janus* Court deemed to be of substantial public concern.¹⁶⁶ In other words, because candidates can never be deplatformed, the statute compels social media platforms to convey those candidates’ political views whenever they choose to post them. The only meaningful difference between *Janus* and *NetChoice* is that the former case deals with

¹⁶⁰ Vikram David Amir & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, U. ILL. L. REV. 1, 3 (2020).

¹⁶¹ *Janus*, 138 S. Ct. at 2460.

¹⁶² *Id.* at 2475–77.

¹⁶³ *Id.* at 2464.

¹⁶⁴ *Id.* at 2460.

¹⁶⁵ The U.S. Supreme Court has adopted a very broad definition of when speech involves a matter of public concern. *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (“Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” (citations omitted) (first quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); and then quoting *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004))).

¹⁶⁶ *See supra* note 161 and accompanying text (identifying topics of substantial public concern).

the compelled *subsidization* of speech and the latter involves the compelled *hosting* of speech. Both cases implicate speech about matters of substantial public concern.

The fact that the Florida statute compels one set of speakers—social media platforms—to host the political viewpoints of another class of speakers—candidates running for local or statewide office—is particularly troubling from a First Amendment right-not-to-speak perspective. Indeed, and as noted earlier, the Court in *Miami Herald Publishing Co. v. Tornillo*¹⁶⁷ struck down a state law compelling print newspapers to convey the viewpoints of candidates running for office in Florida.¹⁶⁸ To use Judge Hinkle’s fine phrase, the Florida law similarly involves “ideologically sensitive” matters—namely, the ideologies of candidates running for political office and whether a platform must be compelled to provide candidates with a far-reaching venue for espousing those ideologies.¹⁶⁹

In contrast, the Supreme Court is more tolerant when the speech being compelled is purely factual, uncontroversial information that relates to commercial advertising and is intended to prevent consumer deception.¹⁷⁰ In those situations, the Court has held that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers” and are not “unduly burdensome.”¹⁷¹ This test approximates the deferential level of rational basis review.¹⁷² Outside of this compelled-speech scenario and those involving informed-consent mandates incident to medical procedures, however, “strict scrutiny today is the default standard of review in compelled-speech cases.”¹⁷³ Florida’s anti-deplatforming law thus would not be immune from rigorous judicial review.

¹⁶⁷ 418 U.S. 241 (1974).

¹⁶⁸ *Id.* at 258.

¹⁶⁹ *NetChoice, LLC v. Moody*, 546 F. Supp. 1082, 1092 (N.D. Fla. 2021).

¹⁷⁰ *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

¹⁷¹ *Id.*

¹⁷² See Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 521 (2014) (“*Zauderer* has led to considerable confusion in the lower courts about what sorts of commercial speech disclosure requirements are covered by *its rational basis standard of review*” (emphasis added)); Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 505 (2018) (“Many courts and commentators have treated the *Zauderer* ‘reasonable relationship’ test as a highly deferential test similar to rational basis review.”)

¹⁷³ Calvert, *supra* note 97, at 109.

III. CONCLUSION

Owen Fiss and Jerome Barron asserted decades ago that government intervention in the marketplace of ideas might be necessary to facilitate democratic self-governance and bolster public debate.¹⁷⁴ By barring large, privately-owned social media platforms from deleting the accounts of candidates running for elected office, Florida has waded deeply into the online marketplace of ideas to manipulate its operation. The state's governor framed the need for the law in terms of fighting the forces of censorship from Silicon Valley; the danger to free speech, he suggested, was not the government, but a cadre of private businesses.¹⁷⁵

This Article contended that a more compelling interest justifying the law would be in providing Floridians with easy access to the views of candidates running for public office so they might vote in a more informed manner.¹⁷⁶ In brief, Florida citizens would be able to quickly locate the views of candidates on popular social media platforms, including candidates who might otherwise be silenced via deplatforming. This rationale would comport, in part, with Fiss's view that the First Amendment's traditional protection of speaker autonomy—the speaker here being a social media platform—from government interference must sometimes be balanced against and yield to the First Amendment's "deepest democratic aspirations"¹⁷⁷ of "enrich[ing] public debate."¹⁷⁸ Under this justification, then, the unenumerated First Amendment right of Florida citizens to receive speech from candidates is paramount and trumps a platform's right not to speak.¹⁷⁹ The logic here is that to facilitate

¹⁷⁴ See *supra* notes 1–18 and accompanying text (addressing the work of Fiss and Barron).

¹⁷⁵ See *supra* Part I (addressing how Governor Ron DeSantis framed the need for legislation targeting large social media platforms).

¹⁷⁶ See *supra* notes 111–114 (addressing whether Florida might have a compelling interest). In fact, a friends-of-the-court brief filed by several conservative-leaning states with the U.S. Court of Appeals for the Eleventh Circuit in *NetChoice* asserts a very similar interest. See Brief of the States of Texas, Alabama, Alaska, Arizona, Arkansas, Kentucky, Mississippi, Missouri, Montana, and South Carolina as Amici Curiae in Support of Defendants-Appellants at 18, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir. Sept. 14, 2021) (contending that Florida has a compelling interest in "ensuring that its citizens enjoy access to the free flow of information and ideas, unencumbered by arbitrary and erratic censorship, deplatforming, and shadow banning").

¹⁷⁷ Fiss, *Social Structure*, *supra* note 4, at 1424.

¹⁷⁸ *Id.* at 1411.

¹⁷⁹ See *supra* note 113 and accompanying text (addressing the right to receive speech).

this audience-centric right to receive speech, candidates must be given permanent access to social media platforms—i.e., they cannot be deplatformed—such that candidates would possess, as Barron put it, “a right to be heard.”¹⁸⁰

This Article illustrated, however, that multiple First Amendment interests and principles militate against the constitutionality of the anti-deplatforming statute. The First Amendment arguments against the law addressed in this Article unspool as follows. First, social media platforms exercise editorial judgment and control over speech when they decide—and create policies about – which varieties of content they will not tolerate.¹⁸¹ Second, when the platforms disseminate information about these content-moderation policies to users, they are engaging in speech.¹⁸² These first two points illustrate that social media platforms do more than simply engage in conduct; they make decisions about speech and disseminate speech-altering policies. This triggers First Amendment scrutiny of the statute.

Third, Florida’s anti-deplatforming law is subject to strict scrutiny for multiple reasons. One is that the law is a content-based regulation of speech, given that it privileges political speech – the speech of candidates running for office—over speech uttered by non-candidates who possess no statutory right not to be deplatformed.¹⁸³ A second reason is that the law embraces speaker-based discrimination because it applies only to very large or very lucrative platforms, not to others, and because it exempts from its reach platforms operated by companies that own and operate theme parks.¹⁸⁴ A third reason why strict scrutiny applies is that the law compels platforms to convey political speech, and compelled-speech obligations affecting non-commercial speech are presumptively subject to strict scrutiny.¹⁸⁵

Finally, the Article illustrated that the anti-deplatforming law would likely fail strict scrutiny even if one were to assume that Florida possessed a compelling interest in informing voters about candidates’ viewpoints on political matters. Specifically, a less speech-restrictive alternative means of conveying this

¹⁸⁰ Barron, *supra* note 11, at 1678.

¹⁸¹ *See supra* Part II, Section A.

¹⁸² *See supra* Part II, Section A.

¹⁸³ *See supra* Part II, Section B.

¹⁸⁴ *See supra* Part II, Section B.

¹⁸⁵ *See supra* Part II, Section D.

information exists: Florida can create, run and promote its own online platform dedicated exclusively to hosting candidates running for state and local office.¹⁸⁶ Florida, in short, can get into the speech business for itself; it does not need to interfere with the business models and First Amendment rights of privately owned platforms.

Additionally, the law is fatally underinclusive in serving the ostensibly compelling interest in informing voters because it applies to only a few, very large social media platforms.¹⁸⁷ This underinclusivity also suggests an impermissible, discriminatory motive behind the anti-deplatforming law—namely, to punish Twitter and Facebook for deplatforming former President Trump. Finally, the law’s interference with editorial autonomy that the Court privileged in *Tornillo* militates against its passing constitutional muster.¹⁸⁸

The anti-deplatforming law’s destiny now rests in the hands of the U.S. Court of Appeals for the Eleventh Circuit. Despite the anti-censorship rhetoric of Governor Ron DeSantis in framing the need for the statute, a host of First Amendment realities likely will seal its unconstitutional fate.

¹⁸⁶ See *supra* Part II, Section B.

¹⁸⁷ See *supra* Part II, Section B.

¹⁸⁸ See *supra* Part II, Section C.

CHEAP SPEECH, FREEDOM OF SPEECH, AND THE WAR AGAINST DISINFORMATION

William P. Marshall*

A central axiom in first amendment jurisprudence is that the remedy for bad speech is more speech.¹ More speech, it is argued, enables truth to prevail over falsity in the marketplace of ideas² and thereby avoids the need (and the risk) of government suppression of purportedly harmful speech. More speech, it is contended, also fosters self-governance, as exposure to a wide range of views enables citizens to make informed democratic decisions.³

Professor Richard Hasen's book *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR CULTURE AND HOW TO CURE IT*⁴ (hereinafter "CHEAP SPEECH") presents a follow-up inquiry to the more speech/bad speech theorem. What happens when more speech becomes the problem and not the solution?⁵ The question is well worth asking. In a world where the new information technologies have burst open the entrance to the marketplace of ideas to anyone with internet access, the assertion that truth will inevitably prevail over falsity seems hopelessly old-fashioned. Rather, as recent events have abundantly

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¹ The "more speech" maxim was first formulated by Justice Brandeis who famously wrote in *Whitney v. California*, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

³ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). The search for truth rational associated with *Abrams* and *Whitney* and the self-governance rationale associated with Meiklejohn are often set forth as two distinct justifications for freedom of speech. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1180–83 (6th ed. 2020). But although there may be some variation at the edges, the two theories substantially overlap in recognizing the importance of free speech to a healthy democracy. See Daniel P Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 586–87 (2020) (arguing that the truth and self-governance rationales were once "joined at the hip" in the early decisions of Justices Holmes and Brandeis in the *Abrams* and *Whitney* decisions).

⁴ RICHARD P. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* (2022).

⁵ See Philip M. Napoli, *What If Free Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM'NS L.J. 55, 60 (2018) (contending that the more speech/bad speech axiom should be reconsidered in light of technological changes).

demonstrated, the proliferation of so-called ‘cheap speech’⁶ via the new information technologies has inundated the marketplace of ideas with waves of disinformation and vitriol that undermine democratic institutions, facilitate demagoguery, manipulate elections, and provoke violence.⁷ In this new world, free speech, and particularly cheap speech, can be understood as an enemy of democracy rather than its facilitator.

CHEAP SPEECH is an effort to grapple with the challenges posed by this flood of disinformation to democratic governance. Its author, Richard Hasen, is well up to the job. As a leading authority on both election law and first amendment law, he is uniquely positioned to understand the relationship between the two. Moreover, as a political observer and a gifted writer, he is well-skilled in using contemporary events to illustrate his points in a manner that makes his discussion urgent and accessible. For anyone who is interested in understanding the challenges that cheap speech poses to our democracy and/or who is looking for possible solutions to the current crisis, CHEAP SPEECH is worth every penny.

CHEAP SPEECH has three complementary sections. The first demonstrates the dangers cheap speech poses to democracy. Drawing primarily (but not exclusively) from examples from the 2016 and 2020 presidential elections,⁸ Hasen graphically illustrates how dire is the threat posed by cheap speech to the democratic process.⁹ The account is chilling and persuasive.

Second, Hasen suggests possible legal reforms that might serve to address some of the concerns raised by cheap speech. These include measures as diverse as improving election administration, requiring more disclosure, taking measures to limit foreign interference with elections, limiting platform power, outlawing certain kinds of verifiable false statements

⁶ Hasen defines cheap speech as speech that is “both inexpensive to produce and often of markedly low social value.” HASEN, *supra* note 4, at 21. For a more optimistic (and early) take on the potential effects of cheap speech, see Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

⁷ For a general account of the many concerns raised by internet speech, see Dawn C. Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1527, 1528–29 (2019).

⁸ Hasen also presents several examples of disinformation disseminated by Democrats in the 2017 special Senate election between Roy Moore and Doug Jones. HASEN, *supra* note 4, at 53.

⁹ *Id.* at 30–76.

about voting requirements and procedures, and banning data driven micro-targeting.¹⁰ Many of these ideas are not novel taken piece by piece; but Hasen is to be applauded for his understanding of the interrelationships between the multi-varied ways cheap speech destabilizes democratic governance and the need to construct comprehensive solutions. He is also to be congratulated for candidly grappling with the first amendment objections that might be raised in response to his particular proposals.

Third, recognizing that law reforms alone can only accomplish so much, Hasen proposes non-legal initiatives that might be undertaken to combat the problems created by cheap speech. These include pressuring platforms to take a greater role in combatting disinformation, buttressing journalism and especially local journalism, strengthening intermediary institutions such as courts, rebuilding professional norms among attorneys and elected officials, and inculcating the values of truth, science, and the rule of law.¹¹ As with his proposals for legal reforms, Hasen's suggestions for non-legal initiatives are thoughtful and wide-ranging.

Hasen's legal and non-legal proposals all deserve serious consideration. The one I will focus upon here, however, is the inculcation of truth. I do so for three reasons. First, inculcating the value of truth is the most important of Hasen's offerings. Democracy depends on truth.¹² Second, inculcating the value of truth is the building block upon which Hasen's other proposals rest. If the public does not value truth, then measures to preserve it and protect it from disinformation would prove futile or ineffective. Third, and unfortunately, of all of Hasen's proposals, inculcating the value of truth may be the most challenging to achieve.

Consider the story that Hasen relates about the intentional fabrication that Newsmax propagated about the 2020 election:

¹⁰ *Id.* at 77–133.

¹¹ *Id.* at 134–165.

¹² As Daniel Tokaji states, “Democracy cannot function without a common belief in truth.” *See Tokaji supra* note 3, at 569 (citing TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 65–71 (2017)).

Christopher Ruddy, a Trump friend and the head of Newsmax, gave an extraordinary interview in the midst of the 2020 election controversy to Ben Smith, a media columnist for the New York Times, in which Ruddy admitted Trump had lost the election but claimed Newsmax was just feeding audience demand. “In this day and age, people want something that tends to affirm their views and opinions,” he told Smith.¹³

Hasen uses this story primarily as an example of the cynical use of disinformation for financial profit but there is another lesson to be learned here. People are not always searching for truth when they ‘shop’ the marketplace of ideas.¹⁴ In fact, truth may be further down the shopping list than first amendment theory would want us to believe. Let me offer two examples.

The first item that seemingly supersedes the demand for truth in the marketplace of ideas is evident in the Ruddy story itself. As Ruddy’s statement suggests and Hasen concludes, “[s]ome people want[] affirmance, not truth.”¹⁵ And unfortunately, however, this desire for affirmation rather than truth is not limited to the viewers of Newsmax. Instead, it reflects a so-called “post-truth” world in which, as described by commentators, evidence does not matter, people believe what they want to believe, and there is no normative distinction between truth and lies.¹⁶

This quest for affirmation,¹⁷ moreover, is not, as some might suspect, merely a new development brought on by a recent Presidency. Rather, there is considerable evidence that suggests the search for affirmation is an inextricable part of the human

¹³ HASEN, *supra* note 4, at 135.

¹⁴ Hasen, of course, well-recognizes this point. See Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535, 537–38 (2020) (“Emotions often drive views more than evidence.”).

¹⁵ HASEN, *supra* note 4, at 136.

¹⁶ See, e.g., LEE MCINTYRE, POST-TRUTH 5 (2018); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1357–59 (2019) (noting that truth matters less than it used to and is secondary to emotion, intuition and belief in shaping public opinion).

¹⁷ The search for affirmation of pre-existing beliefs is sometimes referred to as confirmation bias. See Jonathan Maloney, *Confirmation Bias & Motivated Reasoning*, INTELLIGENT SPECULATION (April 16, 2019), <https://www.intelligentspeculation.com/blog/confirmation-bias-amp-motivated-reasoning>.

condition and that it more powerfully influences how individuals process information than does exposure to what is actually true. The point is made in a recent Atlantic Magazine article by Julie Beck aptly titled *This Article Won't Change Your Mind: The Facts on Why Facts Alone Can't Fight False Beliefs*.¹⁸ As that article explains, adherence to beliefs may depend more on how those beliefs interact with our self-identity and/or our relationships with our communities than upon the 'truth' of those beliefs.¹⁹

The second item on the shopping list that appears to generate greater demand in the marketplace of ideas than does the search for truth is the pursuit of entertainment. Over thirty-five years ago, Neil Postman in his landmark book, *AMUSING OURSELVES TO DEATH*, warned that public discourse had become increasingly trivialized through the dominance of television.²⁰ Snippets of information presented in a video format, he argued, were inherently hostile to serious discourse and had undermined our ability to work through complex issues and ideas. As Postman explained, television "speaks in only one persistent voice—the voice of entertainment."²¹

To be sure, Postman laid the blame for the demeaning of public discourse on the nature of the television medium.²² According to Postman, there could be no such thing as serious television because television is inherently trivializing and

¹⁸ Julie Beck, *This Article Won't Change Your Mind: The Facts on Why Facts Alone Can't Fight False Beliefs*, THE ATLANTIC (March 13, 2017), <https://www.theatlantic.com/science/archive/2017/03/this-article-wont-change-your-mind/519093/>; see also Elizabeth Kolbert, *Why Facts Don't Change Our Minds: New Discoveries About the Human Mind Show the Limitations of Reason*, THE NEW YORKER (February 27, 2017), <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds>.

¹⁹ Beck, *supra* note 18. Indeed, some social scientists suggest that cognitive bias has been effectively pre-programmed in us through evolution. Quoting the anthropologist Pascal Boyer, Beck writes that "[h]aving social support, from an evolutionary standpoint, is far more important than knowing the truth about some facts that do not directly impinge on your life." *Id.*; see also HUGO MERCIER & DAN SPERBER, *THE ENIGMA OF REASON*, 176–86 (2017).

²⁰ NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 92 (1985); see also David M. Skover & Ronald K. L. Collins, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1088 (1990) (contending that first amendment understanding should reflect that entertainment has become the "the paradigm for most public discourse" and overshadows serious dialogue).

²¹ POSTMAN, *supra* note 20, at 92.

²² In analyzing the relationship between medium and message, Postman's work follows from previous writing of Marshall McLuhan. See MARSHALL MCLUHAN, *UNDERSTANDING MEDIA* 7–21 (1994).

incoherent.²³ Yet Postman's critique also foreshadowed the internet, which had yet to arrive. After all, snippets of information consumed for entertainment is the virtual definition of internet communication. Indeed, that we look to the marketplace of ideas for amusement rather than truth may even explain the phenomenon of why lies tend to spread faster than facts over the internet.²⁴ Lies are more entertaining.²⁵

This all leads to a troubling conclusion. If the search for truth is only of secondary or tertiary demand in the marketplace of ideas, then efforts that seek to curb or call out disinformation will likely not have the desired effects. The marketplace of ideas metaphor presumes that people are in the market for truth. But if people are seeking affirmation and/or entertainment over truth, then reforms designed to correct the market for truth will have missed the point. Truth is not what the marketplace consumers want most.

This is not to deny that the various measures Hasen proposes would have beneficial effects. Clearly they would. Some persons (or perhaps most persons at some times) actually do search for truth in the marketplace of ideas and efforts to combat the spread of false information would assist their enterprise. Further, because the plethora of false information online "exacerbates the natural human tendency toward confirmation bias,"²⁶ any step taken to combat the spread of false information might constrain that tendency, even if it cannot wholly overcome it.

The most significant takeaway from CHEAP SPEECH, however, may be less in its specific proposals than in its underlying imperative. Truth must be protected for the sake of democracy – even if to do so faces a steep uphill climb. It is a message that needs to be constantly repeated and reinforced as

²³ POSTMAN, *supra* note 20, at 92–93.

²⁴ See, e.g., Nunziato *supra* note 7, at 1529 (noting that during the 2016 election cycle "fake election news stories on Facebook generated more engagements than the top stories from major news outlets.").

²⁵ Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1149 (2018) (explaining that lies may spread faster than truth because they are more novel), cited in Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 387, 390 (2020).

²⁶ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & POL'Y 57, 68–69 (2017).

we move through a post-truth world.²⁷ Otherwise, as Dan Tokaji warns, we will effectively “concede democracy to its adversaries.”²⁸ Hasen is to be commended for offering us a full arsenal to continue the fight.

I would only add one final suggestion to Hasen’s agenda. As Hasen points out, courts serve an important truth-telling function in society;²⁹ and he therefore calls upon them to continue their role in preventing the uncontrolled spread of disinformation.³⁰ I completely agree with this sentiment; but I would also submit that there is one court in particular that should take up Hasen’s directive – the United States Supreme Court. It is time for the Court to stop pretending that “[t]he remedy for speech that is false is speech that is true.”³¹ Certainly there may be good reasons to protect false speech, at least in some circumstances;³² but claiming that falsity should be protected because truth will eventually triumph in the marketplace of ideas is not one of them. Given its disconnect from modern reality,³³ that assertion should be called out for what it actually is -- cheap speech.

²⁷ See *supra* note 4 and authorities cited therein.

²⁸ Tokaji, *supra* note 3, at 593; see also Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 442 (2019) (arguing that capitulation to post-truth would only worsen the crisis).

²⁹ HASEN, *supra* note 4, at 157.

³⁰ *Id.* at 158.

³¹ *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

³² One reason for protecting false speech, for example, is to avoid the danger of empowering the government to decide what is true. See *id.* at 723 (plurality opinion) (raising the specter of something akin to an Orwellian Ministry of Truth if the government were allowed to adjudicate falsity) (citing GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Centennial ed. 2003) (1949)).

³³ See Napoli, *supra* note 5, at 60. It is noteworthy, however, that Justice Gorsuch has signaled that he might be ready to reappraise first amendment doctrine in light of technological changes. See *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting in denial of certiorari.)