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False Speech and the First Amendment

THE PROBLEM WITH FREE SPEECH IN A FAKE NEWS CRISIS

“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”

—Justice Oliver Wendell Holmes, articulating the value of broad protections for free speech, 1919.¹

“Great. Most corrupt election in history, by far. We won!!!”

—Donald J. Trump, falsely tweeting to over eighty-eight million followers² in December 2020.³

INTRODUCTION

On January 6, 2021, a mob breached the US Capitol Building, the home of Congress, in Washington, DC to protest then-President Trump’s defeat in the 2020 election.⁴ After weeks of tweeting about voter fraud, Trump “urged his supporters” to gather in DC to oppose the certification of the election, which he claimed was “stolen’ from him.”⁵ Hundreds of attendees

¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

² See Tommy Beer, *Trump Suddenly Loses 220,000 Twitter Followers—First Big Drop in 5 Years*, FORBES (Dec. 5, 2020), <https://www.forbes.com/sites/tommybeer/2020/12/05/trump-suddenly-loses-220000-twitter-followers-first-big-drop-in-5-years/?sh=59a6a8467f2c> [<https://perma.cc/ZJB3-NF3J>] (showing that Trump’s Twitter account had just above eighty-eight million followers in December 2020).

³ *Trump’s Tweets: Infamous, Offensive, and Bizarre Posts by @realDonaldTrump*, SKY NEWS (Jan. 9, 2021, 3:32 PM), <https://news.sky.com/story/trumps-tweets-infamous-offensive-and-bizarre-posts-by-atrealdonaldtrump-12182992> [<https://perma.cc/YVC5-Y9SD>].

⁴ See Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> [<https://perma.cc/8FF8-XBA5>]; Madison Hall et al., *At Least 978 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All.*, INSIDER (Jan. 5, 2023, 10:20 AM), <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [<https://perma.cc/9HL6-6T64>].

⁵ Leatherby et al., *supra* note 4; *Compiling the Truth: A Resource to Refute the “Stolen Election” Lies*, CAMPAIGN LEGAL CTR. (Sept. 24, 2021), <https://campaignlegal.org/update/compiling-truth-resource-refute-trumps-stolen-election->

surrounded the Capitol building's east and west perimeters, "violently overwhelm[ed] the police" presence, and stormed the building while the Senate was in session, convening to formalize the election results.⁶ The insurrection resulted in seven deaths,⁷ over 140 injuries to police officers,⁸ and more than 950 arrests (and counting as of January 2023).⁹ Many of those who participated in the Capitol riot acted under the false belief that the election of President Joe Biden was fraudulent and that it was their duty to "#StoptheSteal."¹⁰

Millions of Americans watched in shock as their fellow citizens, emboldened by the then-President,¹¹ attempted to violently derail one of the nation's most fundamental democratic processes.¹² Still, millions of others remained convinced, despite ample evidence to the contrary,¹³ that the 2020 election was fraudulent.¹⁴ In a Quinnipiac University poll conducted in late 2020, 77 percent of Republicans reported that they believed that there was "widespread voter fraud" in the 2020 election.¹⁵

lies [<https://perma.cc/X6HS-MYVS>]; see Marianna Spring, *'Stop the Steal': The Deep Roots of Trump's 'Voter Fraud' Strategy*, BBC News (Nov. 23, 2020), <https://www.bbc.com/news/blogs-trending-55009950> [<https://perma.cc/4Q9B-QVPS>].

⁶ Leatherby et al., *supra* note 4.

⁷ Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [<https://perma.cc/H52W-8D6B>] (including two law enforcement officers who committed suicide after the attack).

⁸ Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021, 7:47 PM), https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html [<https://perma.cc/2M4A-P2U3>].

⁹ Hall et al., *supra* note 4.

¹⁰ Spring, *supra* note 5.

¹¹ During his speech, President Trump said, "if you don't fight like hell, you're not going to have a country anymore." Calvin Woodward, *AP FACT CHECK: Trump's Call to Action Distorted in Debate*, AP NEWS (Jan. 13, 2021), <https://apnews.com/article/fact-check-trump-us-capitol-remarks-221518bc174f9bc3dd6e108e653ed08d> [<https://perma.cc/RM5K-8LYR>].

¹² See U.S. CONST. art. II, § 1; see generally Aaron Blake, *Timeline: Trump's Pressure Campaign to Overturn the 2020 Election*, WASH. POST (Oct. 7, 2021, 5:14 PM), <https://www.washingtonpost.com/politics/2021/08/06/trumps-brazen-attempt-overturn-2020-election-timeline/> [<https://perma.cc/789T-7J4P>] (describing the efforts taken by President Trump to overturn the 2020 election, leading up to the Capitol riots on January 6th).

¹³ Even William Barr, the Trump appointed US Attorney General, conceded that "there were no election irregularities sufficient to change the outcome." *Common Questions and Answers About the 2020 Election Results*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/common-questions-and-answers-about-2020-election-results> [<https://perma.cc/94RV-RQZ3>].

¹⁴ Lois Beckett, *Millions of Americans Think the Election Was Stolen. How Worried Should We Be About More Violence?*, GUARDIAN (Apr. 16, 2021, 6:00 PM), <https://www.theguardian.com/us-news/2021/apr/16/americans-republicans-stolen-election-violence-trump> [<https://perma.cc/GNB9-NCTR>].

¹⁵ Christopher Keating, *Quinnipiac Poll: 77% of Republicans Believe There Was Widespread Fraud in the Presidential Election; 60% Overall Consider Joe Biden's*

Another poll, conducted by CBS, reported that 49 percent of participants who believed voter fraud was widespread, had learned about it from social media.¹⁶ Surprisingly, despite the #StoptheSteal crowd consisting mostly of Trump supporters, a Reuters and Ipsos survey from March 2021 found that “more than half of Republicans endorsed a false claim that the [January 6] attack was ‘led by violent leftwing protestors [in an effort] to make Trump look bad.’”¹⁷

It is important to note that skepticism towards US elections is not entirely new. The presidential elections of 1824, 1876, 1960, and 2000 all resulted in contested outcomes and various accusations of fraud.¹⁸ What is new, however, is the level of polarization and distrust, brought on by the never-ending influx of news information and misinformation available at our fingertips.¹⁹ Traditional broadcast media once “enabled the public to form reasoned opinions” about politics and current events, which helped guide informed democracy—a fundamental element of self-governance.²⁰ But the repeal of the Fairness Doctrine²¹ and the development of new technologies have threatened the stability and integrity of traditional news media

Victory Legitimate, HARTFORD COURANT (Dec. 10, 2020, 3:18 PM), <https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyep-story.html> [<https://perma.cc/8EYR-W5DN>].

¹⁶ Kabir Khanna & Jennifer De Pinto, *CBS News Analysis: What Drives Republican and Trump Voters’ Belief in Widespread Voter Fraud?*, CBS NEWS (July 21, 2021, 5:00 PM), <https://www.cbsnews.com/news/republicans-belief-voter-fraud-opinion-poll/> [<https://perma.cc/92KM-ZJQK>].

¹⁷ Beckett, *supra* note 14; see James Oliphant & Chris Kahn, *Half of Republicans Believe False Accounts of Deadly U.S. Capitol Riot-Reuters/Ipsos Poll*, REUTERS (Apr. 5, 2021, 6:06 AM), <https://www.reuters.com/article/us-usa-politics-disinformation-idUSKBN2BS0RZ> [<https://perma.cc/4ZH9-H6UK>].

¹⁸ Robert Mitchell, *Disputed Presidential Elections: A Guide to 200 Years of Ballot Box Ugliness*, WASH. POST (Sept. 28, 2020, 7:00AM), <https://www.washingtonpost.com/history/2020/09/28/stolen-disputed-presidential-elections-trump/> [<https://perma.cc/8SQT-T5KF>].

¹⁹ Based on a study done in September 2020, a reported 86 percent of Americans used digital devices to regularly get their news content, while only 10 percent used print news regularly. Elisa Shearer, *More than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/> [<https://perma.cc/MMZ9-GATY>]; see also Michael Dimock, *How Americans View Trust, Facts, and Democracy Today*, PEW CHARITABLE TRS. (Feb. 19, 2020), <https://www.pewtrusts.org/en/trust/archive/winter-2020/how-americans-view-trust-facts-and-democracy-today> [<https://perma.cc/V3MY-SC3Z>].

²⁰ Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2627 (2019).

²¹ See generally Audrey Perry, *Fairness Doctrine*, FIRST AMEND. ENCYCLOPEDIA (May 2017), <https://www.mtsu.edu/first-amendment/article/955/fairness-doctrine> [<https://perma.cc/TWV4-P7ZC>] (discussing the origins and decline of the Fairness Doctrine).

and ultimately undermined the public's ability to rely on the media for accurate reporting.²²

People's growing dependence on social media to access news has led to heightened sensationalism and an astronomical amount of information available online, both accurate and inaccurate, making it difficult for readers to uncover the truth.²³ According to a Pew Research Center study, "more than half . . . of [American] adults report they get news from social media" sites.²⁴ Another Pew study found that 18 percent of American adults use social media as their *primary* resource for political news.²⁵ It is intuitive that in an environment where mass-produced content is readily available, some of that content will be inaccurate or misleading. However, what is troubling is that statistics reflect the trend of consumer interaction with misleading or false news is increasing.²⁶ A NewsGuard analysis reported that in 2019, only 8 percent of engagement on "the 100 top-performing" news sources (including Facebook,²⁷ YouTube, and Twitter) was considered to be with "unreliable news;" but by 2020, the level of engagement with "unreliable news" reached 17 percent.²⁸ As the availability of and interaction with unreliable news on social media continues to grow, the public is left to make determinations about content's truthfulness based on individualized filtering methods of fact versus fiction.

²² See generally DAVID ARDIA ET AL., UNC CTR. FOR MEDIA L. & POL'Y, ADDRESSING THE DECLINE OF LOCAL NEWS, RISE OF PLATFORMS, AND SPREAD OF MIS- AND DISINFORMATION ONLINE: A SUMMARY OF CURRENT RESEARCH AND POLICY PROPOSALS 1 (2020), <https://citap.unc.edu/wp-content/uploads/sites/20665/2020/12/Local-News-Platforms-and-Mis-Disinformation.pdf> [https://perma.cc/LVT2-9HWS] (analyzing research regarding the decline of local news media as a result of increasing dependency on social media and cheap news content).

²³ See Manzi, *supra* note 20, at 2627.

²⁴ Dimock, *supra* note 19.

²⁵ Amy Mitchell et al., *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. (July 30, 2020), <https://www.pewresearch.org/journalism/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/> [https://perma.cc/4QCP-3MYW].

²⁶ Researchers at New York University found that between August 2020 and January 2021, articles containing misinformation "received six times as many likes, shares, and interactions" as legitimate news sources. Nathan Place, *Fake News Got More Engagement than Real News on Facebook in 2020, Study Says*, INDEP. (Sept. 5, 2021, 5:52 PM), <https://www.independent.co.uk/news/world/americas/fake-news-facebook-misinformation-study-b1914650.html> [https://perma.cc/GU3V-AKGT].

²⁷ In late 2021, Facebook and its apps were rebranded under the name, Meta. *Introducing Meta: A Social Technology Company*, META (Oct. 28, 2021), <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/> [https://perma.cc/DL65-ETLF].

²⁸ Emily Stewart, *America's Growing Fake News Problem, in One Chart*, VOX (Dec. 22, 2020, 2:20 PM), <https://www.vox.com/policy-and-politics/2020/12/22/22195488/fake-news-social-media-2020> [https://perma.cc/9L4A-8ADN]. Unreliable news refers to content that is dubious or intentionally misleading. *Id.*

While Americans place a strong amount of faith in their personal abilities to recognize false information, they are less confident in the ability of others to do the same.²⁹ This trend can be explained by positive illusion psychological phenomena such as “illusory superiority,” a cognitive bias where people tend to overestimate their positive qualities and underestimate their negative ones, when compared to others.³⁰ In part because of this phenomenon, many Americans doubt they “share a common set of truths and ideals” even regarding basic facts, because they believe their own understandings to be truer than others.³¹

Although the term “fake news” has different meanings based on the user and context, for the purpose of this note, “fake news” refers to “false news stories, often of a sensational nature, created to be widely shared or distributed for the purpose of generating revenue, or promoting or discrediting a public figure, political movement, company, etc.”³² A related term is “misinformation,” which refers to “false information that is spread, regardless of whether there is intent to mislead.”³³ Both can be distinguished from the term “disinformation,” which for our purposes means “deliberately misleading or biased information.”³⁴

From whatever corner of the internet a specific fake news story originates, it is clear that that every internet user, including the President of the United States, is susceptible to accepting it as truth once it goes viral.³⁵ Despite its potential for harm to democracy and threat to public health and safety,³⁶ false speech is still protected free speech under the First Amendment; as a

²⁹ Dimock, *supra* note 19.

³⁰ See Tia Ghose, *Why We're All Above Average*, LIVE SCI. (Feb. 6, 2013), <https://www.livescience.com/26914-why-we-are-all-above-average.html> [<https://perma.cc/F2U6-QS6W>].

³¹ Dimock, *supra* note 19.

³² *Fake News*, DICTIONARY.COM, <https://www.dictionary.com/browse/fake-news> [<https://perma.cc/2GGM-37W9>].

³³ *Misinformation*, DICTIONARY.COM, <https://www.dictionary.com/browse/misinformation> [<https://perma.cc/STH6-FDBR>].

³⁴ *Disinformation*, DICTIONARY.COM, <https://www.dictionary.com/browse/disinformation> [<https://perma.cc/2YKF-JJXX>].

³⁵ See Sapna Maheshwari, *10 Times Trump Spread Fake News*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/business/media/trump-fake-news.html> [<https://perma.cc/3VAF-4D37>]. President Trump was under fire throughout the course of his presidency for sharing misinformation on his social media account. Nate Rattner, *Trump's Election Lies Were Among His Most Popular Tweets*, CNBC (Jan. 13, 2021, 1:36 PM), <https://www.cnbc.com/2021/01/13/trump-tweets-legacy-of-lies-misinformation-distrust.html> [<https://perma.cc/JT5Y-K2DX>].

³⁶ For example, a 2020 study conducted by Stecula found that those who received COVID-19 vaccine-related information from social media sites were more likely to be “vaccine-hesitant” as a result of exposure to misinformation. Md Saiful Islam et al., *COVID-19 Vaccine Rumors and Conspiracy Theories: The Need for Cognitive Inoculation Against Misinformation to Improve Vaccine Adherence*, 16 PLOS ONE 1, 2 (May 12, 2021).

result, fake news is protected too.³⁷ This is ironic, because in an effort to safeguard the free exchange of ideas—a concept that is theoretically fundamental to maintaining an informed democracy—the tolerance for fake news produced in high volume and made widely available has created a “blanket of fog” that impacts the public’s ability to stay properly informed.³⁸ It has become increasingly difficult for average Americans to digest an abundance of content and discern between fact, fiction, opinion, and outright lie.³⁹ This becomes even more problematic when trusted authority figures and traditional news media amplify fake news to promote their own agendas.⁴⁰ The fake news phenomenon has left many Americans debating basic truths and, gone unfettered, will continue to drive a wedge across the nation and threaten democratic integrity and public safety.⁴¹

This note argues that the theoretical underpinnings of First Amendment jurisprudence protecting false speech cannot be reconciled with the unprecedented spread of fake news content, because the latter undermines the public’s ability to make informed decisions, which leads to dangerous consequences.⁴² Section 230 of the Communications Decency Act (CDA 230), enacted to promote the growth of the internet, creates another hurdle to overcome in combating the distribution of fake news, by insulating internet service providers—including social media platforms—from liability against unlawful content posted by users of their sites.⁴³ The statute also provides immunity from civil liabilities for those internet providers that remove or restrict content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing,

³⁷ See generally *United States v. Alvarez*, 567 U.S. 709 (2012) (holding that false statements alone do not present a grave or imminent threat to be constitutionally regulated under the First Amendment); see also *infra* Part II.

³⁸ Manzi, *supra* note 20, at 2627.

³⁹ See Dimock, *supra* note 19.

⁴⁰ For example, in a recently settled defamation lawsuit, Dominion, a voting machine company, alleged that Fox News reporters perpetuated claims about voter fraud surrounding the 2020 election, despite admitting privately that they knew them to be false. Adam Serwer, *Why Fox News Lied To Its Viewers*, ATLANTIC (Feb. 19, 2023), <https://www.theatlantic.com/ideas/archive/2023/02/fox-news-dominion-lawsuit-trump/673132/> [<https://perma.cc/D38L-7MRA>]. This was, in part, due to fear that their audience was moving to a further right-wing network. *Id.*

⁴¹ *Id.*

⁴² For example, the overwhelming circulation of misleading and inaccurate COVID-19 vaccine-related information creates a lack of confidence in its overall effectiveness and safety, thus causing people to refuse the vaccine, which in turn interferes with global control efforts. See generally Islam et al., *supra* note 36 (studying the relationship between COVID-19 vaccine conspiracies and possible interventions to increase vaccine acceptance).

⁴³ 47 U.S.C. § 230(c)(1) (1996).

or otherwise objectionable.”⁴⁴ Although social media companies like Facebook, YouTube, and Twitter have taken critical steps to reign in fake news and amplify content-moderation policies,⁴⁵ as long as all false speech remains categorically protected under the First Amendment, platforms’ self-regulation of dangerous fake news will fall short of protecting users from harm.

Because false speech is still protected under the First Amendment, any proposed content-based fake news legislation will be subject to the strict scrutiny standard and will likely fail.⁴⁶ Thus, this note imagines a new categorical exception for *harmful fake news*, which the Supreme Court should adopt, in light of the fake news crisis, to allow the government to regulate certain dangerous false speech. But, for the Supreme Court to adopt this new exception, the perfect case would need to come along. Because this note acknowledges that harms associated with fake news are likely to evolve without immediate intervention, nonlegal action is a critical step in the road towards a judicial remedy. Thus, this note posits that key industry companies, including healthcare, election, and Big Tech leaders, are well-positioned to take immediate action in the fight against fake news through anti-fake news coalitions.

Part I of this note will highlight the urgent threat to democracy implicated by the unprecedented speed and ease at which fake news is created and distributed on social media. Part II explores the current boundaries and exceptions to the First Amendment’s free speech doctrine and highlights the inherent disconnect between the theory that protects false speech and the harm underlying the fake news crisis. Part III briefly discusses how CDA 230 acts as both a shield and a sword to online social media platforms. It then evaluates the shortcomings of a legislative solution to fake news, as a result of the difficulty of overcoming the current strict scrutiny standard imposed upon government limitations of individual speech.⁴⁷ Part IV proposes

⁴⁴ *Id.* § 230(c)(2)(A); see also Section 230 of the Communications Decency Act, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/J4AZ-3XQB>].

⁴⁵ Following the January 6th insurrection, Twitter banned Trump’s account and removed over seventy-thousand accounts containing disinformation related to campaign fraud and conspiracy theories. *Twitter Blocks 70,000 QAnon Accounts After US Capitol Riot*, AP NEWS (Jan. 12, 2021), <https://apnews.com/article/twitter-blocks-70k-qanon-accounts-171a5c9062be1c293169d764d3d0d9c8> [<https://perma.cc/MSN5-VVVK>]; see also Riddhi Jain, *What Tech Companies Are Doing to Control the Spread of Fake News*, ITM (May 28, 2020), <https://itmunch.com/tech-companies-control-spread-fake-news/> [<https://perma.cc/49LR-WJ3H>] (discussing new strategies implemented by Google, YouTube and Facebook to combat fake news).

⁴⁶ See *infra* Section II.B.1 (discussing the strict scrutiny standard).

⁴⁷ The strict scrutiny standard requires a restriction to be “narrowly tailored to achieve” a “compelling government interest.” See John Samples, *How Strict Would*

an ambitious two-part solution. First, as a public policy matter, if the right case comes before the Supreme Court, the Court should choose to find a new exception to the free speech doctrine that permits government regulation of *harmful fake news*—that is, content that poses a legitimate threat to democracy, and public health and safety such that any value it has to promote the free exchange of ideas is overcome. However, in recognizing the time sensitive nature of this problem and the slowness with which the wheels of justice move, the second prong of the solution reaches beyond the bounds of the legal world. Part IV concludes by suggesting that industries most vulnerable to the harms associated with fake news should lead a more immediate charge, by forming centralized coalitions aimed at transmitting uniform, fact-based messaging about important industry developments.

I. THE HISTORICAL PROGRESSION OF A FAKE NEWS CRISIS

Undoubtedly for many, “fake news” originated with the chicanery of the 2016 presidential election. This makes sense, given that President Trump frequently used the term to dismiss unfavorable media coverage surrounding the election, pushing “fake news” claims to the forefront of public conversation.⁴⁸ But the production and distribution of fake news content and human susceptibility to believe it has deep historical roots.⁴⁹ For centuries, reporters have relied on “yellow journalism” tactics to grip the public for their monetary gain.⁵⁰ However, today, we are faced with a fake news crisis of unprecedented proportions. As the proliferation of news on social media has diluted the market for reputable news production, and those who do cover news have found new ways to exploit and manipulate content, we are

“*Strict Scrutiny*” *Be Online?*, CATO INST. (July 31, 2020, 2:38 PM), <https://www.cato.org/blog/how-strict-would-strict-scrutiny-be-online> [https://perma.cc/LR6E-2SBZ].

⁴⁸ See Peter S. Field, *Fake News Was a Thing Long Before Donald Trump—Just Ask the Ancient Greeks*, CONVERSATION (Feb. 25, 2021, 5:02 PM), <https://theconversation.com/fake-news-was-a-thing-long-before-donald-trump-just-ask-the-ancient-greeks-155867> [https://perma.cc/F2XK-JKHY]. Although President Trump’s role in perpetuating distrust in the media and government institutions is not discussed in this note, the implications of his conduct raise various constitutional concerns to be considered by legal scholars and policymakers.

⁴⁹ See generally *id.* (overviewing the global history of fake news); see also *A Brief History of Fake News*, CTR. FOR INFO. TECH. & SOC’Y, [https://perma.cc/J6MR-Q49C], <https://www.cits.ucsb.edu/fake-news/brief-history> [https://perma.cc/J6MR-Q49C].

⁵⁰ Yellow journalism refers to sensationalized stories that are rooted in self-promotion and competition. Defining characteristics include large pictures and graphics; enflamed national sentiments; and “extensive use of anonymous sources.” Cleveland Ferguson III, *Yellow Journalism*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1253/yellow-journalism> [https://perma.cc/TV9D-RPBF] (discussing the historical origins and features of yellow journalism).

left with an excess of production and dissemination of—and belief in—fake news.⁵¹

This Part discusses the historical progression of fake news to underscore that the decline in legitimate news media as a trusted source of information makes discerning the truth extraordinarily difficult and makes fake news especially dangerous today. Through the account of two modern fake news trends—the spread of QAnon ideology and COVID-19 conspiracy theories—this Part will demonstrate the harmful effects of mass fake news on our democratic institutions and public health. Without intervention, fake news will continue to undermine democracy and pose a danger to public safety.

A. *Sensationalism Sparks the Fire, Technology Fuels It*

While fake news content has been utilized both for entertainment and as a sociopolitical tool for as far back as historians can trace,⁵² the increased access to information and new modes of dissemination help to explain how fake news spreads to captivate and indoctrinate large groups of individuals. For this reason, the emergence of newspapers is a logical starting point.

During the nineteenth century, modern innovations in printing technology led to the cross-continental circulation of news—both real and fake—through newspapers and magazine.⁵³ For example, in 1835, the *New York Sun*, a “penny press” newspaper,⁵⁴ printed a series of articles claiming “the supposed discovery of [fantastic animals] on the moon.”⁵⁵ The articles, which claimed to be reprinted from the *Edinburgh Journal of Science*—a journal that was no longer in publication—drove up sales of the newspaper, as most readers were too captivated by

⁵¹ See Manzi, *supra* note 20, at 2632; see also Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1361 (2018) (arguing that the anonymity and ease of communication on social media today eliminates the nonlegal “constraints that made content-shock rare in the twentieth century”).

⁵² See *A Brief History of Fake News*, *supra* note 49.

⁵³ See Petra S. McGillen, *Techniques of 19th-Century Fake News Reporter Teach Us Why We Fall for It Today*, CONVERSATION (Apr. 5, 2017, 9:05 PM), <https://theconversation.com/techniques-of-19th-century-fake-news-reporter-teach-us-why-we-fall-for-it-today-75583> [<https://perma.cc/SA6C-8ZWH>].

⁵⁴ Penny press newspapers were early nineteenth century tabloid newspapers that were cheaply produced and sold at an inexpensive cost to make news accessible to a larger population. See Mary McMahon, *What Is a Penny Press?*, LANGUAGE HUMAN. (Dec. 6, 2022), <https://www.languagehumanities.org/what-is-a-penny-press.htm> [<https://perma.cc/8F6W-SRET>].

⁵⁵ “*The Great Moon Hoax*” Is Published in the “*New York Sun*,” HIST. (Aug. 24, 2020), <https://www.history.com/this-day-in-history/the-great-moon-hoax> [<https://perma.cc/DC2X-7K5C>].

the story to recognize the hoax.⁵⁶ Later, during World War I, two London newspapers, *The Times* and the *Daily Mail*, used a fake story known as the “Corpse Factory” to evoke anti-German sentiment and help convince China to join them in the war.⁵⁷ During World War II, the Nazi Party infamously used anti-Semitic rhetoric through print and broadcast journalism to exert political influence; for example, Nazi propaganda often depicted Jews as conspiring to provoke war.⁵⁸

As technology advanced throughout the twentieth century, print media was joined by broadcast journalism, and the ability for fake news to infiltrate the information marketplace grew. Radio broadcasting, a source of close-to-real time entertainment and news updates, became increasingly popular throughout the early 1900s.⁵⁹ By 1934, at least 60 percent of American households owned at least one radio.⁶⁰ While the access to radio broadcasts allowed for journalists and entertainers to reach a wider and more diverse audience than ever before, it also inherently meant that more people were exposed to any broadcasted fake news and thus left to their own interpretations of the truth. During a 1938 evening CBS broadcast, Orson Welles pretended to interrupt the regularly scheduled show to announce unusual explosions on Mars and an alien invasion on Earth—a theatrical version of *The War of the Worlds*.⁶¹ Welles’s broadcast, intended merely to entertain, caused listeners to call the police with claims that they had seen aliens or smoke rising.⁶² Adding to the string of sensationalized reporting, the next day, the *New York Times* printed an exaggerated story of mass hysteria across New York in response to the broadcast.⁶³ Although the broadcast had not actually created mass panic, the *New York Times* seized the “opportunity

⁵⁶ *Id.*

⁵⁷ See *The Corpse Factory and the Birth of Fake News*, BBC NEWS (Feb. 17, 2017), [https://perma.cc/PE2C-MQBL].<https://www.bbc.com/news/entertainment-arts-38995205> [https://perma.cc/PE2C-MQBL].

⁵⁸ See *Nazi Anti-Jewish Propaganda*, in U.S. HOLOCAUST MEM’L MUSEUM, 1942 (courtesy of Helmut Eschwege), <https://encyclopedia.ushmm.org/content/en/photo/nazi-anti-jewish-propaganda> [https://perma.cc/7LFZ-KEXT].

⁵⁹ Between 1921 and 1940, the number of US radio stations increased from just 5 to 765. Carole E. Scott, *The History of the Radio Industry in the United States to 1940*, ECON. HIST. ASS’N, <https://eh.net/encyclopedia/the-history-of-the-radio-industry-in-the-united-states-to-1940/> [https://perma.cc/5DL8-JBYR].

⁶⁰ *Id.*

⁶¹ Carol Holm, *Fake News 80 Years Ago*, DW (Oct. 26, 2018), <https://www.dw.com/en/the-radio-drama-that-shocked-america-80-years-ago-and-the-modern-birth-of-fake-news/a-46052965> [https://perma.cc/JU99-NQTK].

⁶² *Id.*

⁶³ *Id.*

to discredit radio” at the expense of many Americans who still believed the claims even after the report was repudiated.⁶⁴

Despite the growing prevalence of fake news, there still existed trusted, objective media sources that helped to counteract the falsities.⁶⁵ With the rise of televised news broadcasting in the mid-twentieth century raising concerns of monopolization and audience manipulation by the three major news networks (NBC, ABC, and CBS),⁶⁶ the Federal Communications Commission (FCC) established the Fairness Doctrine to ensure that broadcast licensees presented contrasting and balanced perspectives on “issues of public importance.”⁶⁷ The Fairness Doctrine was a policy that had two requirements: first, that broadcasters devote some amount of airtime to matters of public interest and second, that they also air contrasting views on those matters. “[P]redicated on the right of the public to be informed,” the Fairness Doctrine served to stabilize the objectivity of news reporting for thirty years.⁶⁸ Although enforcement was limited to broadcast licensees, news organizations broadly served an important role as the “intermediar[y] between the government and people” whose journalistic integrity rested on “fostering . . . a well-informed” public.⁶⁹ This meant that even with some false content in the information stratosphere, the public could depend on reliable news sources to provide objective reporting upon which to base their opinions and debunk the falsities.⁷⁰ Under this model, the press served a steady role in upholding democracy.⁷¹

The Fairness Doctrine was repealed in 1987, and the effects have been notable.⁷² The economic crisis in journalism brought on by new opportunities for “citizen journalism” and “parasitic journalism” in the rise of the digital era further helps

⁶⁴ *Id.*; Manzi, *supra* note 20, at 2624.

⁶⁵ See Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535/> [<https://perma.cc/CPD7-6TUJ>].

⁶⁶ *Fairness Doctrine*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Nov. 16, 2021), <https://www.reaganlibrary.gov/archives/topic-guide/fairness-doctrine> [<https://perma.cc/9GHZ-5MPH>].

⁶⁷ *Id.*; see generally *Editorializing by Broad. Licensees*, 13 F.C.C. 1246 (1949) (announcing the Fairness Doctrine through a policy statement).

⁶⁸ Ian Klein, *Enemy of the People: The Ghost of the F.C.C. Fairness Doctrine in the Age of Alternative Facts*, 42 HASTINGS COMM'NS & ENT. L.J. 45, 52 (2020).

⁶⁹ Manzi, *supra* note 20, at 2632.

⁷⁰ *See id.*

⁷¹ *Id.* at 2631.

⁷² Although the FCC repealed the doctrine in 1987, editorial and personal attack provisions remained effective until they were formally repealed by the FCC in 2011. Matt Stefon, *Fairness Doctrine*, ENCYC. BRITANNICA (Feb. 18, 2023), <https://www.britannica.com/topic/Fairness-Doctrine> [<https://perma.cc/JZQ2-MNY7>].

to explain the decline in legitimate news.⁷³ While traditional local newspapers once relished in stable business models; as technology advanced, the opportunity for online advertising made it more difficult for local newspapers to sustain profitability, and as a result, many local news companies were “forced to scale back” and “rely on third-party content.”⁷⁴

In today’s digital age, traditional media sources for news have all but been replaced by social media.⁷⁵ Particularly in the last two decades, trust in traditional media to relay accurate and truthful information has declined.⁷⁶ Although conclusive reasons behind this trend remain undetermined, this note posits that the sheer volume of information readily accessible to an infinite number of people is a key factor. While in the past, government leaders could only communicate with constituents through institutional outlets; today, virtually anyone can interact with the public directly and instantaneously through their personal and official platform-verified social media accounts.⁷⁷ Media sources no longer serve as objective middlemen between the government and the public. Instead, we are left with cheap content that is instantaneously launched into the news ecosystem to a seemingly infinite number of people through social media, which makes countering fake news with legitimate news increasingly difficult.⁷⁸

⁷³ Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM’NS L.J. 55, 69 (2018).

⁷⁴ ARDIA ET AL., *supra* note 22, at 2.

⁷⁵ See Manzi, *supra* note 20, at 2632.

⁷⁶ See Megan Brenan, *Americans’ Trust In Media Remains Near Record Low*, GALLUP (Oct. 18, 2022), <https://news.gallup.com/poll/403166/americans-trust-media-remains-near-record-low.aspx> [<https://perma.cc/3VFC-U3W2>].

⁷⁷ See Manzi, *supra* note 20, at 2632. Since 2009, official verification became common on major social media platforms such as Twitter, to certify accounts in order to protect against fraud and prevent misinformation. *id.* After Elon Musk’s 2021 purchase of Twitter, he altered the Twitter verification procedure and opened verification eligibility to those willing to pay eight dollars. Sara Morrison, *The Ridiculous but Important Twitter Check Mark Fiasco, Explained*, VOX (last updated Nov. 11, 2022, 11:50 AM), <https://www.vox.com/recode/2022/11/4/23438917/twitter-verifications-blue-check-elon-musk> [<https://perma.cc/6EWX-GH2K>]. Although relevant to the role that social media platforms play to prevent the spread of fake news and misinformation, further discussion of the evolving controversy is beyond the scope of this note.

⁷⁸ See Langvardt, *supra* note 51, at 1359 (describing that although “cheap, fast, anonymous, and platform-dependent” attributes are not new to communication, the combination of all factors are, and present broad implications).

B. *The Dangerous Impact of Fake News Today: Two Case Studies*

The evolution of the fake news crisis and its impact can be understood as a consequence of the technological advancements that depleted the market for objective, legitimate news media.⁷⁹ But when fake news pervades the marketplace for information and leaves few sources widely trusted as capable of debunking false information, unsubstantiated and radical ideas can lead to harmful effects.⁸⁰ The urgency of this dilemma is highlighted through two modern fake news trends: the rise of QAnon ideology and COVID-19 fake news. Both have spread like wildfire across the internet and have had significant consequences for democracy and public safety.

1. QAnon

“In October 2017, a post appeared on 4chan [by] an . . . account calling itself ‘Q Clearance Patriot.’”⁸¹ 4chan is a loosely moderated anonymous message board,⁸² where users can post any content that is legal under US law.⁸³ Q claimed to be a high-level government insider with close ties to President Trump and access to classified information.⁸⁴ Although Q’s identity remains unknown, many followers maintain the

⁷⁹ See Napoli, *supra* note 73, at 68–73 (discussing how technological changes undermine legitimate news sources).

⁸⁰ See *id.* at 71.

⁸¹ Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html> [<https://perma.cc/8U5Y-ZBQE>].

⁸² As per 4chan’s “global rules,” content moderation is limited to ensuring that content falls within a particular sub-board’s topic. See *Global Rules*, 4CHAN, <https://4chan.org/rules#global> [<https://perma.cc/VH8B-WKM4>]. For example, racist, grotesque, or pornographic content is permissible so long as it falls under the appropriate page. *Id.* In contrast, similar message board platforms such as Reddit are considered more heavily moderated because designated moderators regulate illegal content, “as well as objectionable behaviors such as harassment” and incitement. *Case Study: Reddit*, NEW AM., <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/case-study-reddit/> [<https://perma.cc/B5CF-3FZD>]. Further, users volunteer to moderate the content of individual subreddits. *Id.*

⁸³ See Brandy Zadrozny & Ben Collins, *How Three Conspiracy Theorists Took ‘Q’ and Sparked Qanon*, NBC NEWS (Aug. 14, 2018, 12:25 PM), <https://www.nbcnews.com/tech/tech-news/how-three-conspiracy-theorists-took-q-sparked-qanon-n900531> [<https://perma.cc/VK83-QTF6>]; see also Elyse Betters, *What Is 4chan? The Underbelly of the Internet Explained*, POCKET-LINT (Sept. 22, 2014), <https://www.pocket-lint.com/apps/news/131070-what-is-4chan-the-underbelly-of-the-internet-explained> [<https://perma.cc/MQ5C-UVUA>].

⁸⁴ Roose, *supra* note 81.

unsubstantiated belief that Q is closely connected to the former president.⁸⁵

The crux of the QAnon theory falsely alleges that America is controlled “by a cabal of Satan-worshipping pedophiles,” including high-ranking Democrats like President Joe Biden, former Democratic Presidential nominee Hillary Clinton, and former President Barack Obama.⁸⁶ The theory further claims that Donald Trump was recruited to run for the presidency to defeat this criminal activity “and bring its members to justice.”⁸⁷ While this part of the theory may be laughed off as an easily debunkable conspiracy, loyal QAnon adherents have notoriously perpetuated less outlandish theories as well, such as false claims of election fraud.⁸⁸

In the early days of QAnon, an insider group of 4chan moderators and YouTubers worked together to propagate fake Q-related news stories to a wider audience.⁸⁹ They created a Reddit board, which elevated QAnon from a fringe website to a more mainstream platform where they could reach “a larger audience of conspiracy theorists” and facilitate radical analysis of the posts.⁹⁰ Despite eventually being removed from Reddit for inciting violence,⁹¹ QAnon seeped onto other social media platforms, like Facebook, by appealing to users through the use of eye-catching memes, tantalizing captions, and trending hashtags like #WWG1WGA⁹² and #SavetheChildren.⁹³ For example, a 2019 investigation conducted by Facebook revealed that QAnon-supporting groups on the site had collectively gained over one million members.⁹⁴

⁸⁵ *See id.*

⁸⁶ *Id.* Q has been active on social media as recently as June 2022. Stuart Thompson, *The Leader of the QAnon Conspiracy Theory Returns*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/technology/qanon-leader-returns.html> [<https://perma.cc/QSQ9-4F6S>].

⁸⁷ Roose, *supra* note 81.

⁸⁸ *Id.*

⁸⁹ *See* Zadrozny & Collins, *supra* note 83.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² This hashtag refers to the phrase “where we go one, we go all,” a quote from the movie *White Squall*, which QAnon supporters frequently misattribute to a quote by the late President John F. Kennedy. The phrase is used as a rally call for QAnon. Will Rahn & Dan Patterson, *What Is the QAnon Conspiracy Theory?*, CBS NEWS (last updated Mar. 29, 2021, 3:36 PM), <https://www.cbsnews.com/news/what-is-the-qanon-conspiracy-theory/> (last visited Apr. 11, 2023).

⁹³ This hashtag refers to the perceived efforts by President Trump to stop the alleged child trafficking rings run by the democratic elite. *See* Amanda Seitz, *QAnon’s ‘Save the Children’ Morphs into Popular Slogan*, AP NEWS (Oct. 28, 2020), <https://apnews.com/article/election-2020-donald-trump-child-trafficking-illinois-morris-aab978bb7e9b89cd2cea151ca13421a0> [<https://perma.cc/8AR8-Z7PS>].

⁹⁴ Ari Sen & Brandy Zadrozny, *QAnon Groups Have Millions of Members on Facebook*, *Documents Show*, NBC NEWS (Aug. 10, 2020, 4:12 PM),

The problem with QAnon is not merely that its followers amplify baseless narratives. Rather, the issue is that through this process of internet infiltration, QAnon has gained mainstream recognition,⁹⁵ leading to harmful consequences for both democratic integrity and public safety. One Q-supporting YouTube channel, Patriots' Soapbox, which previously streamed nonstop around the clock to over forty-six thousand subscribers,⁹⁶ featured guests on their show that included Republican Congressional Representative Lauren Boebert and a campaign publicist for former President Trump.⁹⁷ In 2017, now-Congresswoman Marjorie Taylor Greene posted a lengthy video to Facebook discussing QAnon, where she claimed, "Q is a patriot, we know that for sure."⁹⁸ Preceding the 2020 election, several other congressional candidates expressed support for, or at the very least, validated, QAnon.⁹⁹ Although former President Trump denied support for the theory when asked about it during an NBC News Town Hall, by that point he had already retweeted an account linked to QAnon.¹⁰⁰ Even so, during the

<https://www.nbcnews.com/tech/tech-news/qanon-groups-have-millions-members-facebook-documents-show-n1236317> [https://perma.cc/HNV6-XKMH].

⁹⁵ Veronica Stracqualursi, *The Congressional Candidates Who Have Embraced the Baseless QAnon Conspiracy Theory*, CNN POLITICS (last updated Aug. 12, 2020, 3:55 PM), <https://www.cnn.com/2020/08/12/politics/qanon-congressional-candidates/index.html> [https://perma.cc/5RJB-CW4E].

⁹⁶ See Zadrozny & Collins, *supra* note 83. Patriots' Soapbox has since been banned from YouTube but continues to stream twenty-four hours a day on paid platforms and their own website. See Bryan Schott, *YouTube Purges QAnon Program that Utah GOP Candidate Burgess Owens Appeared on*, SALT LAKE TRIB. (Oct. 15, 2020, 3:24 PM), <https://www.sltrib.com/news/politics/2020/10/15/youtube-purges-qanon/> [https://perma.cc/3RSJ-PBZ8]; see also Alex Kaplan, *Roku Has Allowed Another Channel Dedicated to QAnon on Its Platform—and This One's Been Up for Months*, MEDIA MATTERS FOR AM. (June 4, 2020 8:54 AM), <https://www.mediamatters.org/qanon-conspiracy-theory/roku-has-allowed-another-channel-dedicated-qanon-its-platform-and-ones-been> [https://perma.cc/APC3-VHLT].

⁹⁷ Will Sommer, *GOPers Are Trying to Recruit QAnon Voters and Using this YouTube Show to Do It*, DAILY BEAST (July 16, 2020), <https://www.thedailybeast.com/gopers-are-trying-to-recruit-qanon-voters-and-using-patriots-soapbox-to-do-it> [https://perma.cc/26QE-Y5N8].

⁹⁸ Stracqualursi, *supra* note 95; Em Steck et al., *The Congressional Candidates Who Have Engaged with the QAnon Conspiracy Theory*, CNN POL. (Oct. 30, 2020), <https://www.cnn.com/interactive/2020/10/politics/qanon-cong-candidates/> [https://perma.cc/44H6-4M9C]. Ms. Greene has since deleted the video from her account, and has walked back her statements in support of QAnon. *Id.*

⁹⁹ Stracqualursi, *supra* note 95.

¹⁰⁰ NBC News, *Donald Trump Town Hall with Voters Election 2020*, YOUTUBE (Oct. 15, 2020), https://www.youtube.com/watch?v=Y5yUnUxpr_g [https://perma.cc/G5HQ-QA65]; see Maegan Vazquez, *Trump Again Refuses to Denounce QAnon*, CNN POL. (last updated Oct. 15, 2020, 11:53 PM), <https://www.cnn.com/2020/10/15/politics/donald-trump-qanon-town-hall/index.html> [https://perma.cc/PF8J-S6XR] (referring to a tweet that claimed Joe Biden orchestrated a coverup for the fake death of Osama bin Laden).

Town Hall, Trump went on to say about QAnon, “I understand they like me very much, which I appreciate.”¹⁰¹

Once these unsubstantiated theories took hold of believers, dangerous actions soon followed. In 2018, a QAnon supporter, unhappy that the Q-predicted mass arrests under President Trump never occurred, blocked a bridge near the Hoover Dam with his car, armed with “two military-style rifles, two handguns, and 900 rounds of ammunition.”¹⁰² In another incident, a QAnon adherent vandalized an Arizona church, declaring it his “mission,” because the church allegedly supported human trafficking—a popular QAnon theory.¹⁰³

The potential threat of violence in response to increasing popularity of QAnon ideology did not go unnoticed.¹⁰⁴ In 2019, FBI Director Christopher Wray issued a warning that QAnon was a potential domestic terrorist threat, due to its likelihood to promote criminal or violent acts.¹⁰⁵ Even the creator of 8chan—a message board where Q had moved his posts—called for its shutdown after a user of its site was connected to the 2019 El Paso shooting.¹⁰⁶ Nonetheless, QAnon continued to spur fake news across mainstream platforms through the 2020 election, including wide support for and participation in the election fraud claims which led to the #StoptheSteal Capitol riot of January 6th.¹⁰⁷ Despite the overtly identified and foreseeable threat of violence posed by QAnon, the theory and its internet content continues mostly ignored by law enforcement.¹⁰⁸

¹⁰¹ Vazquez, *supra* note 100.

¹⁰² Lois Beckett, *QAnon: A Timeline of Violence Linked to the Conspiracy Theory*, *GUARDIAN* (Oct. 16, 2020, 1:00 PM), <https://www.theguardian.com/us-news/2020/oct/15/qanon-violence-crimes-timeline> [<https://perma.cc/YJ7P-WDCP>].

¹⁰³ *See id.*

¹⁰⁴ Zack Budryk, *FBI Memo Warns QAnon Poses Potential Terror Threat: Report*, *HILL* (Aug. 1, 2019, 1:12 PM), <https://thehill.com/policy/national-security/fbi/455770-fbi-memo-warns-qanon-poses-a-potential-terror-threat-report> [<https://perma.cc/K4ZG-TFG2>].

¹⁰⁵ *Id.*

¹⁰⁶ *See* Kevin Roose, ‘Shut the Site Down,’ Says the Creator of 8chan, a Megaphone for Gunmen, *N.Y. TIMES* (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/technology/8chan-shooting-manifesto.html> [<https://perma.cc/ZT6S-MAV5>]; *see also* Zadrozny & Collins, *supra* note 83.

¹⁰⁷ Jacob Chansley, an insurrection participant who infamously wore a fur hat, face paint and carried a spear as he stormed the Capitol on January 6th has been referred to as the “QAnon Shaman.” *See* Kyle Cheney & Josh Gerstein, *51-Month Sentence Urged for ‘QAnon Shaman’ Jacob Chansley*, *POLITICO* (Nov. 10, 2021, 12:26 AM), [politico.com/news/2021/11/10/jan6-shaman-sentencing-recommendation-520570](https://www.politico.com/news/2021/11/10/jan6-shaman-sentencing-recommendation-520570) [<https://perma.cc/U9V7-GCMF>].

¹⁰⁸ Despite FBI Director Wray’s claim that the bureau was taking the ongoing threat of Q-Anon seriously following the January 6 Capitol riot, “he made clear” that the FBI is not actively “investigating the online movement itself.” Zachary Cohen, *FBI Director Says Bureau Is Not Investigating QAnon Conspiracy ‘in Its Own Right,’ CNN*

2. COVID-19 Fake News

Another recent example that highlights the ability of fake news to gain enough traction on the internet to eventually cause tangible, harmful impacts on society involves the “infodemic” that occurred during the COVID-19 pandemic.¹⁰⁹ In early 2020, as COVID-19 was claiming thousands of lives across the globe, misinformation and fake news was spreading quickly too. On various social media platforms, posts appeared with unsubstantiated claims of COVID-19 cures like “gargling with lemon or salt water and injecting yourself with bleach.”¹¹⁰ Other stories emerged with conspiracies regarding the virus’s origins, or that certain cellular networks could exacerbate COVID-19 symptoms.¹¹¹

Confusion and concern around the pandemic only increased as President Trump promoted several theories that were factually unsupported, including claims that hydroxychloroquine was an adequate treatment against the virus, that testing was widely available when it was not, and that wearing face coverings would increase the spread of COVID-19.¹¹² This influx of misinformation created confusion among the public about which policies to support and what health practices to implement for themselves.¹¹³ The World Health Organization (WHO) reported that in the early months of the pandemic, nearly six thousand people around the world

POL. (Apr. 15, 2021, 5:35 PM), <https://www.cnn.com/2021/04/15/politics/fbi-director-wray-qanon-threat/index.html> [<https://perma.cc/Y3UR-QS4A>].

¹⁰⁹ The WHO defined “infodemic” as an “overabundance of information,” which includes the “deliberate attempts to disseminate wrong information to undermine the public health response.” Joint Statement by WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse and IFRC, *Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation*, WORLD HEALTH ORG. (Sept. 23, 2020) [hereinafter Joint Statement], <https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation> [<https://perma.cc/YCX6-2JXL>].

¹¹⁰ Sander van der Linden et al., *Inoculating Against Fake News About COVID-19*, 11 FRONTIERS PSYCH. 1 (Oct. 23, 2020).

¹¹¹ *Id.* at 2.

¹¹² See Christian Paz, *All the President’s Lies About the Coronavirus*, ATLANTIC (last updated Nov. 2, 2020, 2:20 PM), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> [<https://perma.cc/W9XP-PXKF>].

¹¹³ See Alison Durkee, *Most Americans Back Mask Mandates Amid Surging Covid Cases, Poll Finds—but Republicans Support Them Being Banned*, FORBES (last updated Aug. 17, 2021, 9:43 AM), <https://www.forbes.com/sites/alisondurkee/2021/08/17/most-americans-back-mask-mandates-amid-surging-covid-cases-poll-finds-but-republicans-support-them-being-banned/> [<https://perma.cc/MDV7-9G8W>].

were “hospitalized because of coronavirus misinformation.”¹¹⁴ In September 2020, a joint statement by the WHO, UNICEF, and others expressed ongoing concern that the “infodemic” continued to jeopardize global efforts to control the pandemic.¹¹⁵

When the vaccine rollout began, the prospect for COVID-19 relief in the United States finally became a real possibility. However, almost immediately, a new swarm of fake news ensued, with claims that COVID-19 vaccines alter DNA, adversely affect fertility, and even that the vaccine contains microchips for government tracking.¹¹⁶ In September 2021, NewsGuard released a report about COVID-19 fake news online, which found that amongst the 6,730 websites studied, 519 had spread “false information” about COVID-19.¹¹⁷ While some sites shared fake health news, others were created specifically to spread misinformation.¹¹⁸ Notably, a comparison of websites where COVID-19 fake news most permeated revealed that the United States had significantly higher visitation rates in relation to followers from the United Kingdom, France, Germany, Italy, and others.¹¹⁹ The overwhelming amount of misinformation and fake news about the COVID-19 vaccine instilled hesitancy in millions of Americans to agree to the potentially lifesaving measure.¹²⁰

Recognizing the threat that false information was creating in the time of a public health emergency, the WHO

¹¹⁴ *Fighting Misinformation in the Time of COVID-19, One Click at a Time*, WORLD HEALTH ORG. (Apr. 27, 2021), <https://www.who.int/news-room/feature-stories/detail/fighting-misinformation-in-the-time-of-covid-19-one-click-at-a-time> [https://perma.cc/3D8H-E7MB].

¹¹⁵ Joint Statement, *supra* note 109.

¹¹⁶ Bill McCarthy, *10 Types of COVID-19 Vaccine Misinformation Swirling Online, Fact-Checked*, POLITIFACT (July 26, 2021), <https://www.politifact.com/article/2021/jul/26/10-types-covid-19-vaccine-misinformation-swirling/> [https://perma.cc/T7HZ-ENJH].

¹¹⁷ *Sizing the Infodemic: NewsGuard Analysts Have Now Found More than 500 ‘News’ Sites Peddling COVID-19 Misinformation and Identified 50 Hoaxes Relating to the COVID-19 Vaccines*, NEWSGUARD (Sept. 8, 2021), <https://www.newsguardtech.com/press/newsguard-finds-more-than-500-sites-50-covid-vaccine-myths/> [https://perma.cc/J22J-NZPR].

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *Fighting Misinformation in the Time of COVID-19, One Click at a Time*, *supra* note 114; RICHARD BRUNS ET AL., JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH, COVID-19 VACCINE MISINFORMATION COSTS AN ESTIMATED \$50 TO \$300 MILLION EACH DAY 1 (2021), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2021/20211020-misinformation-disinformation-cost.pdf [https://perma.cc/A3SC-K9DH]. Recent data shows that after FDA approval, vaccine acceptance did increase. Tamara Keith, *The Share of U.S. Adults Willing to Get Vaccinated Ticks Up, a New Poll Finds*, NPR (Sept. 3, 2021, 12:00 PM), <https://www.npr.org/2021/09/03/1033750072/the-share-of-u-s-adults-willing-to-get-vaccinated-ticks-up-a-new-poll-finds> [https://perma.cc/M497-7LD2].

rolled out various public health initiatives to control the “infodemic.”¹²¹ The Centers for Disease Control and Prevention (CDC) also recognized the harm caused by the spread of fake health news and introduced their own education programs in an attempt to counter misinformation and fake news.¹²² Despite these efforts, fake news surrounding COVID-19 and the vaccine’s effectiveness and safety circulated across social media, while the risks associated with contracting COVID-19 remained incredibly high,¹²³ preventing many Americans from receiving the vaccine.¹²⁴ Even nearly three years into the pandemic, COVID-19 conspiracies and vaccine misinformation continue to contribute to the most severe COVID-19 cases and hospitalization uptick.¹²⁵

II. THE SCOPE AND LIMITATIONS OF FREE SPEECH UNDER THE FIRST AMENDMENT

Despite the significant threat that mass dissemination of fake news poses to democracy and public health, fake news is still protected by the free speech doctrine of the First Amendment.¹²⁶ This Part examines the scope of this protection and discusses the Supreme Court’s creation of specific exceptions to the free speech doctrine. Such exceptions allow certain types of speech to be constitutionally regulated. Part II further addresses the inadequacies of the “marketplace of ideas” theory behind free speech¹²⁷ and questions the Supreme Court’s reliance on counter-

¹²¹ The WHO created a series of communication campaigns to provide accurate information to the public and to identify false information. *Fighting Misinformation in the Time of COVID-19, One Click at a Time*, *supra* note 114.

¹²² *How to Address COVID-19 Vaccine Misinformation*, CDC, <https://www.cdc.gov/vaccines/covid-19/health-departments/addressing-vaccine-misinformation.html> [<https://perma.cc/3LBH-NT4M>].

¹²³ An unsubstantiated news article about a doctor who died after receiving the COVID-19 vaccine was the most viewed link on Facebook in the first quarter of 2021. Marianna Spring, *Covid: Most Popular Facebook Link in US Spread Vaccine Doubt*, BBC NEWS (Aug. 23, 2021), <https://www.bbc.com/news/technology-58305149> [<https://perma.cc/EN3Q-G39M>].

¹²⁴ Alex Whiting, *Tone as Important as Truth to Counter Vaccine Fake News*, HORIZON MAG. (July 28, 2022), <https://ec.europa.eu/research-and-innovation/en/horizon-magazine/important-truth-counter-vaccine-fake-news> [<https://perma.cc/3VF4-SNTX>].

¹²⁵ See Tiffany Hsu, *As Covid-19 Continues to Spread, So Does Misinformation About It*, N.Y. TIMES (Dec. 28, 2022), <https://www.nytimes.com/2022/12/28/technology/covid-misinformation-online.html> (explaining that new misinformation and hoaxes surrounding COVID-19 have evolved, including conspiracies about the long-term effects of treatment and vaccines).

¹²⁶ “The First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

¹²⁷ The “marketplace of ideas” theory can be traced back to John Stuart Mill’s political theory in *On Liberty*, where he uses the free market economy as a metaphor for the free exchange of ideas and beliefs. See Jill Gordon, *John Stuart Mill and the*

speech as an effective weapon against false speech in light of the fake news crisis explained in Part I.¹²⁸ Although the Supreme Court has expressed reluctance to carve out new categories of unprotected speech, their past exceptions to rules against content-based regulation suggest that when certain categories of speech undermine the values of the Constitution or pose tangible danger, regulation can be justified and necessary.¹²⁹

A. *The Boundaries of Free Speech*

A general interpretation of the First Amendment understands “that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹³⁰ Although afforded a great deal of protection under the Constitution, free speech is not absolute; we cannot, of course, falsely shout “fire!” in a crowded theater.¹³¹ The Supreme Court has identified several major exceptions to the First Amendment to provide that some categories of speech are afforded only limited protection and some are wholly unprotected.¹³² As the doctrine stands, content-based speech restrictions and prohibitions are only permitted “when confined to the few ‘historic and traditional categories,’”¹³³ including obscenity, child pornography, incitement, speech that constitutes “fighting words or true threats,” and speech integral to criminal conduct.¹³⁴

Amongst these distinct categories, obscenity is the only classification of speech that has been denied First Amendment protection without requiring specific harm to individuals

“*Marketplace of Ideas*”, 23 SOC. THEORY & PRAC. 235, 235–36 (1997). The concept was first introduced into American jurisprudence in Justice Holmes’s dissenting opinion in *Abrams v. United States* and is now frequently used as justification for strong free speech protections. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

¹²⁸ The counter-speech doctrine “is an outgrowth” of the marketplace of ideas construct, which provides that the remedy to false speech is an informational environment that encourages as much speech as possible. Napoli, *supra* note 73, at 60 (referencing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

¹²⁹ See *infra* Section II.B.

¹³⁰ *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

¹³¹ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹³² See KATHLEEN ANN RUANE, CONG. RSCH. SERV., RL95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014) (reviewing the exceptions to the First Amendment in a report prepared for members and committees of Congress).

¹³³ *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

¹³⁴ RUANE, *supra* note 132, at 1; see also VICTORIA L. KILLON, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 2 (2019).

because of its complete lack of value to social discourse.¹³⁵ In *Roth v. United States*, Justice Brennan, writing for the majority, suggested that at the time the First Amendment was adopted, obscenity “was outside the protection intended for speech and press.”¹³⁶ Although Justice Brennan did not go so far as to establish a clear definition for obscene content,¹³⁷ he clarified that a mere “portrayal of sex” was insufficient to be classified as obscene, because sex is a “vital problem[] of human interest and public concern.”¹³⁸ In doing so, the Court acknowledged an important underlying principle of its view on what the First Amendment is meant to protect: a public, truthful discussion of matters of public concern.¹³⁹ The *Roth* Court reasoned that while all ideas of slight social importance, even controversial or hateful ones, are fully protected under the First Amendment, those that invade “more important interests” will be exempted from protection.¹⁴⁰ Justice Brennan provided that a judicial review standard of “[c]easeless vigilance” was necessary to minimize the likelihood of government intrusion upon fundamental free speech, while still allowing the possibility of regulation in the event of encroachment on “more important interests.”¹⁴¹

Another category of speech that lies beyond the scope of First Amendment protection is “fighting words.”¹⁴² In the seminal case of *Chaplinsky v. New Hampshire*, the Supreme Court held that a prohibition of “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” is constitutional under the First Amendment.¹⁴³ Based on its limited scope of application within the context of the case, the Court in *Chaplinsky* upheld a state statute which prohibited

¹³⁵ RUANE, *supra* note 132, at 2.

¹³⁶ *Roth v. United States*, 354 U.S. 476, 483 (1957).

¹³⁷ In this case, the court applied the Hicklin test for judging obscenity: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” *Id.* at 489. In a later case, the Supreme Court created a three-part test to determine obscenity, considering:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

¹³⁸ *Roth*, 354 U.S. at 487.

¹³⁹ *See id.* at 488.

¹⁴⁰ *Id.* at 484.

¹⁴¹ *Id.* at 488.

¹⁴² RUANE, *supra* note 132, at 3.

¹⁴³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

a person from using “offensive, derisive or annoying word[s] . . . with intent to deride, offend or annoy him.”¹⁴⁴

While expressions that “have a direct tendency to cause acts of violence” by the person to whom they are directed are considered “fighting words,”¹⁴⁵ defining the scope of the category has proved somewhat difficult, given that certain utterances or expletives may meet the threshold for an immediate breach of peace in some contexts, but not others.¹⁴⁶ In *Cohen v. California*, the Supreme Court found that when not directed at a particular person, the use of expletives on a t-shirt was not provocative in nature or effect to be an immediate breach of peace; however the Court acknowledged that in another context, the use of expletives may meet the threshold.¹⁴⁷ As a metaphor for its decision, the Court in *Cohen* describes free speech as a medicine in society, designed to remove restraints by government in order to give a voice to the people, for the ultimate purpose of creating “a more capable citizenry.”¹⁴⁸ Although certain speech may be inherently offensive, disturbing, or even a “distasteful abuse of a privilege,” the purpose of upholding its protection is to provide debate within and among members of society.¹⁴⁹

Most recently, in the 1982 case of *New York v. Ferber*, the Supreme Court found a new categorical exception for child pornography. Considering “the legislative interest in destroying the market for the exploitive use of children,” child pornography, even when not considered obscene, is another exception to the guarantee of free speech and may be banned outright.¹⁵⁰ In *Ferber*, the Court weighed the social value of child pornography, the state’s need to protect children, economic motivations, and the relationship between distribution of child pornography and the underlying crime of child sexual abuse, and ultimately found that the interest in protecting the physical and mental well-being of minors was compelling enough to be exempt from First Amendment protection, irrespective of whether it passes the *Miller* obscenity test, applied by earlier courts.¹⁵¹ The Court considered multiple factors that ultimately weighed in favor of giving states greater leeway to regulate child pornography.¹⁵² In

¹⁴⁴ *Id.* at 569 (quoting 1926 N.H. LAWS ch. 378, § 2).

¹⁴⁵ *Id.* at 573.

¹⁴⁶ See *Cohen v. California*, 403 U.S. 15, 26 (1971).

¹⁴⁷ See *id.* at 20.

¹⁴⁸ *Id.* at 24.

¹⁴⁹ *Id.* at 25.

¹⁵⁰ RUANE, *supra* note 132, at 3.

¹⁵¹ *New York v. Ferber*, 458 U.S. 747, 757–61 (1982); see also *supra* note 137 and accompanying text (describing the *Miller* test).

¹⁵² *Ferber*, 458 U.S. at 747–48.

defending its decision as consistent with precedent, the Court explained that “[w]hen a definable class of material . . . bears so heavily and pervasively,” it is justifiable to find those materials outside “the protection of the First Amendment.”¹⁵³

The exceptions from full protection of the First Amendment are clearly limited. However, the Supreme Court has not entirely closed the door on finding constitutional restrictions to free speech.¹⁵⁴ In *United States v. Stevens*, the Court asserted, “[w]e need not foreclose the future recognition of such additional categories [of unprotected speech].”¹⁵⁵ While rejecting a cost-benefit analysis as a mechanism to establish outright categorical exceptions to free speech,¹⁵⁶ the Court acknowledged that historically protected speech may later become unprotected.¹⁵⁷ Further, the rationale used to exclude child pornography from First Amendment protection in *Ferber* suggests that a weighted approach is in fact necessary to the inquiry.¹⁵⁸ Notably, the Court has recently revived the *Giboney* doctrine, otherwise known as “speech integral to criminal . . . conduct,” as a category of historically unprotected speech that gives some teeth to finding new exceptions for certain speech that is tied to underlying harmful conduct.¹⁵⁹ First Amendment jurisprudence indicates that only when the constitutional value of the questionable speech is so low in light of a more important societal interest that a new exception may be considered.¹⁶⁰ The Court has never defined what “more important interests” might prevail;¹⁶¹ it has only noted that where “the evil to be restricted” is so overwhelming that it outweighs the interest of expression, a new exception may be permissible.¹⁶²

B. *Constitutional Considerations for Regulating Fake News*

Under current First Amendment jurisprudence, legislative solutions proposed to regulate fake news will likely be struck down by courts for failing to meet the strict scrutiny

¹⁵³ *Id.* at 764.

¹⁵⁴ *See* *Roth v. United States*, 354 U.S. 476, 488 (1957).

¹⁵⁵ *United States v. Stevens*, 559 U.S. 460, 472 (2010).

¹⁵⁶ *See id.* at 471.

¹⁵⁷ *See id.* at 472.

¹⁵⁸ *See supra* notes 150–153 and accompanying text.

¹⁵⁹ Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 983–87 (2016) (referring to the once dormant 1949 case, *Giboney v. Empire Storage & Ice Co.*). The *Giboney* doctrine has been cited to justify “restrictions on speech such as child pornography, solicitation, [and] threats of discrimination.” *Id.* at 985–86.

¹⁶⁰ *See Stevens*, 559 U.S. at 472.

¹⁶¹ *See Roth v. United States*, 354 U.S. 476, 488 (1957).

¹⁶² *Id.* at 470.

standard.¹⁶³ While the Supreme Court and free speech advocates rely on the counter-speech doctrine as a justification for protecting false speech, this rationale ultimately fails in an era of a fake news crisis. However, given the Supreme Court's willingness to remove or diminish protection for certain types of speech, it is possible that the Court may one day limit protection for fake news that interferes with the ultimate goal of creating an informed public, capable of democratic self-governance.

1. False Speech Is Free Speech

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁶⁴ As a result, the Supreme Court has determined that the Constitution requires that content-based restrictions¹⁶⁵—even if they are based on speech's falsity—be presumed invalid, unless the government body can successfully show that the restriction is “narrowly tailored to” achieve a “compelling government interest.”¹⁶⁶ This tailoring is known as the strict scrutiny standard.¹⁶⁷

In determining that false speech is protected, the Supreme Court has acknowledged that such statements lack value. In *Hustler Magazine, Inc. v. Falwell*, the Court explained that false statements “interfere with the truth-seeking function of the marketplace of ideas.”¹⁶⁸ This echoed the same sentiment expressed earlier in *Gertz v. Robert Welch, Inc.*, where the Court explained that “[n]either the intentional lie nor the careless error materially advances society's interest ‘uninhibited, robust, and wide-open’ debate on public issues.”¹⁶⁹ However, despite the Supreme Court's recognition that false statements are usually irrelevant to

¹⁶³ See generally *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down the Stolen Valor Act for violating the First Amendment and holding that falsity alone would not bring speech outside the strict scrutiny standard).

¹⁶⁴ U.S. CONST. amend. I.

¹⁶⁵ Content-based restrictions are those that “limit speech based on its subject matter.” David L. Hudson Jr., *Content Based*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/935/content-based> [<https://perma.cc/SRA3-4BF7>].

¹⁶⁶ *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/YC76-N9RK>]; see *Alvarez*, 567 U.S. at 716–17.

¹⁶⁷ *Strict Scrutiny*, supra note 166.

¹⁶⁸ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

¹⁶⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

preserving the constitutional integrity of the free flow of ideas, they are nonetheless protected by the First Amendment.¹⁷⁰

The Supreme Court most effectively articulated the constitutional difficulty of regulating false speech in *United States v. Alvarez*, where the Court held that the Stolen Valor Act, a federal law that imposed criminal penalties for making false statements about receiving military honors, violated free speech.¹⁷¹ The plurality opinion in *Alvarez* applied the strict scrutiny standard to the Stolen Valor Act because the law was a content-based regulation, as it sought to regulate the content of a particular type of speech (military honors).¹⁷² In doing so, the Court ultimately found that the government failed to show how false claims of military honor caused actual harm.¹⁷³ In its opinion, the Court distinguished the Stolen Valor Act from other constitutionally permissible, narrowly tailored statutes restricting false speech, which require proof of specific harm to identifiable individuals.¹⁷⁴ While the government identified several cases where regulation of false speech was found to be constitutional despite the absence of specific harm, these ultimately proved unpersuasive to the Court.¹⁷⁵ The Court was especially concerned that upholding the statute in this case would establish a precedent allowing for the overly broad regulation of lies, permitting the government to identify “entire categories of false speech [as] unconstitutional.”¹⁷⁶ Thus, the Supreme Court advised “that falsity alone may not suffice to bring speech outside the First Amendment.”¹⁷⁷

One important justification that the Court in *Alvarez* used to find the statute unconstitutional under the strict scrutiny standard was that a less restrictive alternative to outright prohibition existed—counter-speech.¹⁷⁸ Thus, the Court

¹⁷⁰ This is based on the belief that in order to parse out valuable, insightful speech, speakers must be given full freedom to construct and disseminate their opinions and beliefs. See Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1160 (2003).

¹⁷¹ See *Alvarez*, 567 U.S. at 730.

¹⁷² *Id.* at 713–15.

¹⁷³ *Id.* at 725–26. However, the concurring opinion suggested that a “‘proportionality’ review” would be more appropriate because the restriction did not present an “unacceptable danger of suppressing truthful speech.” *Id.* at 730–31 (2012) (Breyer, J., concurring) (citations omitted).

¹⁷⁴ *Id.* at 720–22.

¹⁷⁵ These include the criminal prohibition of a false statement made to a government official, laws punishing perjury, and false representations that one is speaking on behalf of the government. *Id.* at 720.

¹⁷⁶ Manzi, *supra* note 20, at 2635.

¹⁷⁷ *Alvarez*, 567 U.S. at 719.

¹⁷⁸ *Id.* at 726–27. Counter-speech refers to a “direct response to hateful, harmful, or false speech” that serves the ultimate purpose of undermining it.

reasoned, the Stolen Valor Act was not necessary to achieve the government's ultimate goal of preserving the integrity of military honors.¹⁷⁹ Relying on the established jurisprudential principle that counter-speech offers a cure to any potential problems imposed by false speech, Justice Kennedy asserted, “[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society.”¹⁸⁰

While counter-speech theoretically serves as a balancing force that renders regulation of false speech unnecessary, avoiding the detrimental consequences of fake news can only be possible in an environment where its counterpart has the power to be more widely believed as true. This is a difficult task in the social media era, where misinformation runs rampant and a layperson's ability to distinguish it from fact is increasingly difficult.

2. The Marketplace Has No More Room for Counter-Speech

Although the free speech guarantee is not absolute,¹⁸¹ there remains the general First Amendment principle that government will not intrude upon open public discourse.¹⁸² Rooted in the goal of creating a self-governing democracy, the “marketplace of ideas” theory is a fundamental pillar of the First Amendment used by courts and scholars alike to justify stringent protection of free speech.¹⁸³ In essence, the marketplace of ideas theory holds that truth will emerge from the competition of ideas after free, transparent discourse; therefore, a “robust debate” free from government interference will give rise for the best solutions to societal problems.¹⁸⁴ Because “U.S. democracy ‘depends on [the public’s] joint engagement with and evaluation of competing visions,’” it logically follows that all other factors being equal, every idea should be permissible on the marketplace to allow the best ones to prevail.¹⁸⁵

It is from this theory that counter-speech emerges as a remedy to false speech: in an information environment where all

Counterspeech, DANGEROUS SPEECH PROJECT, <https://dangerousspeech.org/counterspeech/> [https://perma.cc/QG3R-JN49].

¹⁷⁹ See *Alvarez*, 567 U.S. at 727.

¹⁸⁰ *Id.*

¹⁸¹ See *infra* Section II.B.

¹⁸² U.S. CONST. amend. I.

¹⁸³ Ingber, *supra* note 127, at 2–3.

¹⁸⁴ *Id.* at 3.

¹⁸⁵ Manzi, *supra* note 20, at 2633 (internal citation omitted).

ideas are accepted, true speech will prevail over false speech.¹⁸⁶ However, for the marketplace of ideas to practically justify unregulated fake news, we must assume that people are able to discern between true and false information, just as those who participate in the consumer product market can discern “between high and low value products.”¹⁸⁷ Further, we must assume that participants in the marketplace of ideas place greater value on true information than on false information.¹⁸⁸

Unfortunately, recent research and literature in social psychology and behavioral economics shows that human tendencies lead to the acceptance of false information over accurate information.¹⁸⁹ For example, “confirmation bias,” the cognitive theory that our brains naturally filter informational input to selectively prefer those ideas that conform to our preexisting hypotheses, helps to explain why people continue to believe hoaxes and misinformation despite being presented with evidence to the contrary.¹⁹⁰ Relatedly, in a Massachusetts Institute of Technology study on Twitter, it was revealed that “false stories diffused ‘farther, faster, deeper, and more broadly than the truth in all categories,’” demonstrating a preference for fake news unique to the social media information market.¹⁹¹ Further, fake news is usually disguised as legitimate, and because humans are naturally susceptible to deception without recognizing their own error, fake news is often shared not just by those with intent to deceive or mislead, but also by well-intentioned, albeit misinformed, people.¹⁹²

Remedial effects of counter-speech are further undermined in an era without widely trusted institutional media sources to supply enough legitimate news to successfully counter the amount of fake news on the market and alter our behavioral tendencies to prefer falsehoods.¹⁹³ Brandolini’s law, otherwise known as the “Bullshit Asymmetry Principle,” articulates the difficulty of relying on counter-speech from a

¹⁸⁶ Napoli, *supra* note 73, at 61.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 66 (referring to several psychological studies that evaluate behavioral patterns such as selective exposure, confirmation bias, and mechanisms for coping with information overload).

¹⁹⁰ *See* Parmy Olson, *Why Your Brain May Be Wired to Believe Fake News*, FORBES (Feb. 1, 2017; 5:11 PM), <https://www.forbes.com/sites/parmyolson/2017/02/01/why-your-brain-may-be-wired-to-believe-fake-news/> [https://perma.cc/7SGE-3F8Z].

¹⁹¹ *See* Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 863 (2018) (internal citation omitted).

¹⁹² *See* Manzi, *supra* note 20, at 2647.

¹⁹³ *See* Napoli, *supra* note 73, at 66.

practical standpoint: the amount of time, resources, and energy “needed to refute bullshit” is far greater than what is needed to produce it in the first place.¹⁹⁴ Under this framework, it becomes difficult to reconcile counter-speech as a suitable alternative to the regulation of fake news—if humans cannot properly discern truth from falsity, then more speech will likely lead to more confusion, not clarity.

In sum, although false speech is a historically protected category of speech, the Supreme Court has yet to consider its regulation in light of the current fake news crisis that has posed a legitimate danger to democratic integrity and public safety.¹⁹⁵ Reliance on counter-speech as a justification against regulating fake news does not serve a remedial function in an information marketplace so overloaded with fake news that people are often unable to discern the truth before a harm occurs.

III. REGULATING THE INTERNET

Resting alongside the constitutional challenges discussed in Part II are the existing schemas that address social media providers who host fake news content on their sites. This Part will examine the protections afforded to internet service providers under CDA 230 and will consider the effectiveness of current efforts to monitor fake news by individual tech companies. This Part will further explain why a legislative solution would be ill-equipped to adequately solve the fake news crisis and demonstrate the need for an imaginative solution that acknowledges the unique historical moment and directly challenges the current understanding of free speech doctrine.

A. *Platforms’ Backdrop: CDA 230*

CDA 230 is a strong force for protecting “freedom of expression” on the internet.¹⁹⁶ Enacted in 1996, when the internet was a microscopic version of what it is today, the surviving provisions of CDA 230 were designed “to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene

¹⁹⁴ The theory originated in a Tweet by Italian computer programmer, Alberto Brandolini. See Alberto Brandolini (@ziobrandino), TWITTER (Jan. 11, 2013, 2:29 AM), <https://twitter.com/ziobrandino/status/289635060758507521> [<https://perma.cc/W26P-KQF5>]; see also Phil Williamson, *Take the Time and Effort to Correct Misinformation*, 540 NATURE 171, 171 (Dec. 6, 2016) (explaining why it is worth it to take the time to correct misinformation under Brandolini’s law).

¹⁹⁵ See *supra* Part I.

¹⁹⁶ Section 230 of the Communications Decency Act, *supra* note 44.

material.”¹⁹⁷ CDA 230 has allowed for the vast expansion of the internet, including the ability for “Big Tech” companies like Meta,¹⁹⁸ Google, and Twitter to take control over the digital information marketplace.¹⁹⁹

At its core, CDA 230 “shields platforms from legal liability” for the content posted by the sites’ third-party users.²⁰⁰ 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.”²⁰¹ By distinguishing between interactive computer services (e.g., online platforms like Facebook and Twitter) and information content providers (users), Congress appears to have determined that hosts of online platforms are “merely the conduit” for the content and speech posted by its users.²⁰² This interpretation effectively protects platform hosts against causes of action like defamation and libel, in the event that a user posts content that would be individually subject to such liability.²⁰³ Notably, there are statutory exceptions where platforms may face liability for violations of certain federal and state sex trafficking laws, copyright laws, and other federal criminal law.²⁰⁴ Still, this provision has recently faced criticism for “inhibit[ing] platform responsiveness to the harms posed” by various internet conduct such as harassment, hate speech and fake news.²⁰⁵ Even in cases where “platforms are designed to encourage users to post illegal content,” hosts of this content are generally protected.²⁰⁶

¹⁹⁷ The original proposed legislation included provisions that restricted internet speech and were ultimately struck down as unconstitutional. *See id.*; *see also* Farnaz Alemi & Po Yi, *Section 230 Under Assault: It’s Not Just a Big Tech Problem*, JD SUPRA (Apr. 14, 2021), <https://www.jdsupra.com/legalnews/section-230-under-assault-it-s-not-just-1029515/> [<https://perma.cc/MVQ9-C9JF>] (quoting *Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)).

¹⁹⁸ *See Introducing Meta: A Social Technology Company*, *supra* note 27.

¹⁹⁹ Alemi & Yi, *supra* note 197.

²⁰⁰ Tim Hwang, *Dealing with Disinformation: Evaluating the Case for CDA 230 Amendment 1* (Dec. 17, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089442.

²⁰¹ 47 U.S.C. § 230(c)(1).

²⁰² Alemi & Yi, *supra* note 197.

²⁰³ *See* Hwang, *supra* note 200, at 15.

²⁰⁴ *See* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 4 (2021).

²⁰⁵ Hwang, *supra* note 200, at 3.

²⁰⁶ Manzi, *supra* note 20, at 2642.

B. *The Shortcomings of CDA 230 and Self-Regulation*

Many scholars and policy makers agree that the time is ripe for a CDA 230 amendment.²⁰⁷ Although a solution aimed at imposing tort liability on the hosts *may* incentivize stricter moderation of fake news, as long as all fake news content remains protected by the First Amendment, only cases where direct harm to an individual is proven would be actionable.²⁰⁸ More generalized threats to society and democracy would not be covered, and it would be an uphill battle for plaintiffs looking to take on large, well-resourced online platforms in a meaningful way. Thus, an amendment to CDA 230 that seeks to limit platform immunization is an important step towards mitigating the harms associated with fake news but only scratches the surface at combating the problem entirely.

Some scholars have contended that because constitutional limitations do not apply to private actors,²⁰⁹ the responsibility to regulate harmful fake news should lie with social media companies themselves rather than through direct government regulation.²¹⁰ Using their CDA 230 sword, hosts of online platforms have a unique power to moderate the content that is permissible on their sites and will not be held liable for good faith removal of impermissible or objectionable content.²¹¹ In response to growing criticism about weak exercise of their discretion, online platforms have begun publicly acknowledging their responsibility as news hubs within the information marketplace.²¹²

To help ease these concerns, Big Tech companies have implemented various fact-checking and oversight policies to try

²⁰⁷ For a comprehensive list of proposed CDA 230 legislation, see Meghan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/3QK8-VKSG>]; see also Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1613–16 (2018) (evaluating competing approaches to CDA 230 regulation).

²⁰⁸ See Manzi, *supra* note 20, at 2642.

²⁰⁹ David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR. ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-social-media-first-amendment/ [<https://perma.cc/ABU5-ZUXX>].

²¹⁰ See Michael A. Cusumano et al., *Social Media Companies Should Self-Regulate Now.*, HARV. BUS. REV. (Jan. 15, 2021), <https://hbr.org/2021/01/social-media-companies-should-self-regulate-now> [<https://perma.cc/RBR3-G2PD>].

²¹¹ See 47 U.S.C. § 230(c)(2)(A) (2021).

²¹² Dr. Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 698–99 (2017); see also Langvardt, *supra* note 51, at 1357 (quoting Mark Zuckerberg: “In a lot of ways Facebook is more like a government than a traditional company.”) (footnote omitted).

to curb fake news.²¹³ For example, Facebook and Instagram have implemented algorithms that makes it easier for users to report fake news stories on the site.²¹⁴ Further, Meta has partnered “with third-party fact-checking organizations” to help indicate to users when articles are false,²¹⁵ has begun “analyz[ing] patterns of . . . reading and sharing of news articles” to help detect fake news quicker and more accurately,²¹⁶ and relies on an external Oversight Board to review appeals about content moderation decisions.²¹⁷ Similarly, Google has taken steps such as “partnering with fact-checking networks [and] launching” a news literacy initiative designed to improve and strengthen the quality of journalism and promote media comprehension.²¹⁸ In 2018, YouTube, a notorious conduit of misinformation, invested \$25 million to combat fake news by “supporting global news organizations’ video efforts . . . to improve the news experience on its platform” and highlight more authoritative sources.²¹⁹ And by 2020, YouTube shifted greater moderation attention toward removing COVID-19 misinformation content from the site.²²⁰

These interventions are certainly important, but when aimed predominately at identifying fake news as a *postexposure* remedy, these efforts to curtail fake news fall short of protecting users from tangible harm. In addition, Big Tech companies have often not used the breadth of their authority to remove fake news content from their platforms.²²¹ In a 2020 study conducted by the Center for Countering Digital Hate, of 912 posts on Instagram, YouTube, and Twitter that were flagged for misinformation,

²¹³ See, e.g., Langvardt, *supra* note 51, at 1355 (“On Facebook . . . users who leave a ‘cruel or insensitive’ comment may face a ‘cruelty checkpoint’ in which a moderator asks them to consider removing it.”).

²¹⁴ See Timmer, *supra* note 212, at 700.

²¹⁵ *About Fact-Checking on Facebook and Instagram*, META, <https://www.facebook.com/business/help/2593586717571940?id=673052479947730> (last visited Apr. 11, 2023).

²¹⁶ See Timmer, *supra* note 212, at 700.

²¹⁷ See *Appeal to Shape the Future of Facebook and Instagram*, OVERSIGHT BD., <https://www.oversightboard.com/appeals-process/> [<https://perma.cc/UVQ5-47V9>].

²¹⁸ Rachel England, *Google Explains How It’s Fighting Fake News*, ENGADGET (Feb. 19, 2019, 5:10 AM), <https://www.engadget.com/2019-02-19-google-explains-how-it-is-fighting-fake-news.html> [<https://perma.cc/W23Z-VG6G>].

²¹⁹ Michelle Castillo, *YouTube Will Use Six Popular YouTube Stars to Educate Kids About Fake News*, CNBC TECH (last updated July 9, 2018, 5:35 PM), <https://www.cnbc.com/2018/07/09/youtubes-plan-to-fight-fake-news-includes-more-support-article-links.html> [<https://perma.cc/SV63-KFPZ>].

²²⁰ See Dan Milmo, *YouTube Is Major Conduit of Fake News, Factcheckers Say*, GUARDIAN (Jan. 12, 2022), <https://www.theguardian.com/technology/2022/jan/12/youtube-is-major-conduit-of-fake-news-factcheckers-say> [<https://perma.cc/82ZE-Y2BY>].

²²¹ See Matt Binder, *How Big Tech Failed to Stop Misinformation in 2020*, MASHABLE (Dec. 28, 2020), <https://mashable.com/article/misinformation-tech-2020-fail> [<https://perma.cc/MW7C-CLDT>].

only one in twenty were ever removed by the platform.²²² While this may be, in part, attributable to the desire to uphold the integrity of free expression, as Facebook suggests,²²³ this may also be impacted by some of the financial incentives of promoting fake news, such as increased opportunity for advertising.²²⁴ There is also the hard reality that these companies are concerned with keeping costs down amid widespread layoffs in the tech industry.²²⁵ As part of those layoffs, Meta just recently culled the teams handling misinformation for both Facebook and Instagram, retaining only about fifty of those individuals who were reassigned to other safety teams.²²⁶

In the wake of the January 6 Capitol riots, Big Tech players are again under heavy fire for the ongoing responsibility they play in giving a voice to extremist content.²²⁷ The Supreme Court recently heard arguments for *Gonzalez v. Google*.²²⁸ The case—which turns on the allegation that YouTube’s recommendation algorithm allowed the terrorist group, ISIS, “to amplify its message and radicalize its followers”—will clarify the scope of CDA 230’s liability protections.²²⁹ The decision will resolve whether an internet service provider’s targeted recommendations of information constitute protected traditional editorial decisions, or if these algorithmically-powered recommendations fall outside the scope of liability

²²² *Id.*

²²³ See Timmer, *supra* note 212, at 698–99.

²²⁴ While not discussed at length here, online advertising is a notable motivator for internet service providers to permit fake news content on their sites. See Hwang, *supra* note 200, at 7. While advertiser backlash following Elon Musk’s Twitter takeover demonstrated related, yet contrary, financial disincentives of promoting fake news, the point remains that monetary and business motivations are an important factor for how private platforms will respond to fake news through self-regulation. See Matt O’Brien et al., *Musk Seeks to Reassure Advertisers on Twitter After Chaos*, AP NEWS (Nov. 9, 2022), <https://apnews.com/article/elon-musk-technology-business-d9d168951c98192ef90851085f343332> [<https://perma.cc/9VEL-WSP5>].

²²⁵ David Streitfeld, *For Tech Companies, Years of Easy Money Yield to Hard Times*, N.Y. TIMES (Jan. 30, 2023), <https://www.nytimes.com/2023/01/23/technology/tech-interest-rates-layoffs.html> [<https://perma.cc/4YFB-3544>].

²²⁶ Marvie Basilan, *Most Of Meta’s Anti-Misinformation Team Laid Off Amid Oversight Board Call Out: Report*, INT’L BUS. TIMES (Apr. 21, 2023), <https://www.ibtimes.com/most-metas-anti-misinformation-team-laid-off-amid-oversight-board-call-out-report-3688094> [<https://perma.cc/S869-DT9T>].

²²⁷ See Alemi & Yi, *supra* note 197.

²²⁸ *Oral Argument: Gonzalez v. Google*, U.S. SUP. CT., https://www.supremecourt.gov/oral_arguments/audio/2022/21-1333 [<https://perma.cc/AU3B-GJD3>].

²²⁹ Isaiah Poritz, *High Court to Probe Tech Shield in YouTube Terrorism Video Case*, BLOOMBERG L. NEWS (Oct. 3, 2022, 9:44 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/high-court-to-probe-tech-shield-in-youtube-terrorism-video-case> [<https://perma.cc/DY3J-DVU6>].

immunization.²³⁰ Irrespective of how the Court rules, the outcome will shape the way social media platforms moderate content on their sites in the future. Nonetheless, while holding the hosts of online platforms liable for the content on their sites may lead to stronger self-regulation amongst platforms, overcoming the fake news crisis demands solutions that acknowledge the underlying danger rooted in the false nature of certain speech that poses a foreseeable threat to public health and safety.

C. *The Pitfalls of a Fake News Legislative Remedy*

A legislative measure that requires social media platforms to identify, track, and remove particularly dangerous fake news content would, in theory, substantially reduce the threat to democracy and public safety. However, vehement partisan divide and the strict scrutiny standard imposed on content-based regulations renders federal legislative efforts an unworkable option to overcome the fake news crisis.

Although both Republican and Democratic lawmakers are actively engaged in the fake news conversation, there are sharp policy disagreements across partisan lines about fundamental issues such as what public interests deserve protection and from precisely what harm.²³¹ In general, Republican legislators seem concerned with protecting online users from platforms' overreaching content-moderation policies that infringe on free speech, while Democrats are focused on protecting online users from exposure to harmful content such as hate speech, incitement, and conspiracy theories that threaten public health and safety.²³² To reconcile these

²³⁰ See Sabine Neschke et al., *Gonzalez v. Google: Implications for the Internet's Future*, BIPARTISAN POLY CTR. (Nov. 29, 2022), <https://bipartisanpolicy.org/blog/gonzalez-v-google/> [<https://perma.cc/MB2R-X9MP>].

²³¹ See AJ Dellinger, *Lawmakers Seek Bipartisan Push on Big Tech Regulation. Voters' Views Indicate Censorship Content Moderation Could Be Sticking Points*, MORNING CONSULT (Jan. 31, 2023, 5:00 AM), <https://morningconsult.com/2023/01/31/lawmakers-seek-bipartisan-push-on-big-tech-regulation/> [<https://perma.cc/25HR-AQ9U>].

²³² These political differences are demonstrated through recent state-led legislative efforts. In 2021, Texas Governor Gregg Abbott signed H.B. 20, which prohibits platforms from censoring users based on viewpoint unless the content is related to the sexual exploitation of children or threats of violence and criminal activity, and further imposes a number of disclosure requirements. See H.B. 20, 87 Leg., Reg. Sess. (Tex. 2021); TEX. CIV. PRAC. & REM. CODE ANN. §§ 143A.002, 143A.006 (Westlaw, current through the end of the 2021 Reg. & Called Sess. of the 87th Leg.); TEX. BUS. & COM. CODE ANN. § 120.001 (Westlaw, current through the end of the 2021 Reg. & Called Sess. of the 87th Leg.); see also *NetChoice, LLC v. Paxton*, 49 F.4th 439, 448, 450–51, 494 (5th Cir. 2022) (upholding the Texas law on the grounds that removal of content constituted conduct). Conversely, New York state Senator Brad Hoylman proposed a bill that would

competing interests while meaningfully disrupting the marketplace for *harmful fake news* would likely prove difficult.

To be effective against fake news, meaningful federal legislation would require establishing a substantive definition of *harmful fake news*, with enough flexibility for Congress to consider ever-evolving scientific developments and social conditions to discretionarily identify content that poses a significant threat to society. Further, to mitigate concerns that an overbroad definition would lead to the chilling of speech that does not actually pose a legitimate risk to society—that is, when the popularity and acceptance on the marketplace hinders the remedial capacity of truthful counter-speech—the law must also account for the foreseeable virality of *harmful fake news*.²³³ Because assessing the potential to go viral is subjective and related to the evocative nature of the content, a uniform threshold would be difficult to establish, especially taking into consideration the relative number of users per site and each platform’s technological capabilities to share or repost content.²³⁴

Republican lawmakers would almost certainly criticize any content-based law that seeks to regulate certain fake news as impermissible censorship of minority viewpoints. A less robust legislative measure designed to appease Republican interests would not go far enough to meaningfully mitigate the fake news crisis. Both political parties would be concerned with enforcement, as it would be costly and time-consuming for the federal government to provide extensive oversight of every individual platform’s compliance or to pursue an investigation at each instance of noncompliance. Yet even under ideal circumstances where a bipartisan fake news bill was to garner enough support, social media platforms and free speech advocates would likely challenge the law as an unconstitutional content-based regulation.

Under the existing framework, the strict scrutiny standard applied to content-based regulations of false speech is not affected by the fact that the majority of such speech now

“prohibit[] the knowing and reckless promotion of unlawful or false material,” with special attention towards false medical theories that pose a threat to “the safety or health of the public.” S.B. S7568, 2021–2022 Gen. Assemb., Reg. Sess. (N.Y. 2021).

²³³ See *supra* Section I.B (discussing the foreseeable threat of fake news to infiltrate the mainstream media and its dangerous consequences).

²³⁴ See Elise Moreau, *What Does It Mean to Go Viral Online?*, LIFEWIRE (last updated Sept. 24, 2020), <https://www.lifewire.com/what-does-it-mean-to-go-viral-3486225> [<https://perma.cc/U3AD-ARPT>]. A recommendation for the precise formula to be implemented is beyond the scope of this note.

takes place on the internet.²³⁵ The Supreme Court has opined that, in general, speech on the internet has the same “constitutional protection as traditional forms of speech.”²³⁶ Based on the analysis in *Alvarez*, it is unlikely that a law restricting the production or distribution of fake news on the internet, based on its falsity and an abstract harm, will survive strict scrutiny.²³⁷ Even if courts accept the threat to democratic integrity and public health and safety as compelling government interests, they will continue to rely on the counter-speech doctrine as an effective alternative to regulation, which will ultimately lead to them striking down the law as not sufficiently tailored.

Further, the likelihood of seeing such federal legislation passed, even before a court has a chance to review it, is slim. Considering just how carefully crafted this hypothetical law must be to successfully fit into the existing legal and political landscape while also meaningfully mitigating fake news, it would be a feat to draft. The benefit of such legislation would be that it would surely face a First Amendment challenge as content-based regulation, and may even land on the Supreme Court’s docket, allowing the justices to confront this issue directly. Unfortunately, this seems more of a pipe dream than a reasonable solution to this rampant issue. While this note staunchly agrees that *harmful fake news* should be a category of regulated speech, it proposes two different, more realistic, solutions that circumnavigate the narrow confines of applicable legislation: one with a long view towards the future and the other more immediate. Time is of the essence and there are nonlegal moves that can address the threats of harmful fake news more immediately.

IV. GETTING AHEAD OF THE SPREAD: A MULTIFACETED APPROACH AGAINST THE FAKE NEWS CRISIS

The unprecedented ease and speed by which a fake news story can captivate, deceive, and potentially endanger an infinite number of people on social media today demands a solution that is equally as unprecedented. To combat the fake news crisis, this Part proposes an ambitious judicial approach coupled with a nonlegal action plan. First, this Part envisions a new categorical exception to

²³⁵ See Timmer, *supra* note 212, at 686. It has been held in lower courts that coding software is considered a language, and thus is speech, subject to First Amendment protections. Langvardt, *supra* note 51, at 1364.

²³⁶ Timmer, *supra* note 212, at 686.

²³⁷ See *supra* Section II.A.

the free speech doctrine for *harmful fake news*, to be implemented in the future when the appropriate case reaches the Supreme Court's docket. This new exception would allow the government to constitutionally regulate particularly dangerous false internet speech. Recognizing this as a long-term solution to an immediate problem, this Part also proposes that the Big Tech, healthcare, and election industries²³⁸ lead the charge against fake news by creating truth coalitions focused on preemptively producing nonpartisan, factual messaging about industry developments.

A. *A New Categorical Exception*

Without a challenge to a proposed fake news content-based regulation ripe for judicial action, this note acknowledges that final Supreme Court consideration on this issue may take time.²³⁹ Yet today, with a presidential election year fast approaching and amid several gripping global headlines,²⁴⁰ it is not difficult to imagine, or even predict, the ways in which a viral fake news story may lead to harmful consequences similar to QAnon-related shootings or the Capitol riot. Thus, it stands to reason that the Court may soon be forced to confront the underlying harm caused by fake news head on. When it does, the Court should find a new categorical exception for *harmful fake*

²³⁸ The author refers to these three industries to reflect the limited scope of this note, but this list is far from exhaustive. Election industries include companies like Dominion and Smartmatic that provide the technology and infrastructure for electronic voting and vote counting.

²³⁹ Importantly, a split between the Fifth and Eleventh Circuit involving First Amendment challenges to content moderation laws in Texas and Florida, respectively, suggests that the Supreme Court may soon take up the issue to resolve whether content moderation on social media is a form of protected editorial discretion. See Shari Claire Lewis, *Circuits Split Over States' Right to Regulate Social Media Platforms*, N.Y.L.J. (Aug. 15, 2022, 10:00 AM), <https://www.law.com/newyorklawjournal/2022/08/15/circuits-split-over-states-right-to-regulate-social-media-platforms/?slreturn=20230019114016> [https://perma.cc/C6UG-QAVA]. Both laws seek to restrict the ability for social media companies to moderate content expressing certain viewpoints and would "require platforms to provide explanations" on their choices to moderate certain content. Annelise Couderc, *Freedom to Moderate? Circuits Split over First Amendment Interpretation*, U. MINN. L. SCH.: LAWS&SCI F. (Oct. 2, 2022), <https://mjlst.lib.umn.edu/2022/10/02/freedom-to-moderate-circuits-split-over-first-amendment-interpretation/> [https://perma.cc/MLV2-VCXN]. Although this review by the Supreme Court would confront different First Amendment arguments than the proposed legislation of this note, the Court would nonetheless have an opportunity to grapple with the problem of fake news under new social and economic circumstances.

²⁴⁰ For example, in early February 2023, a train derailment in East Palestine, Ohio spurred theories across social media platforms including Twitter and Telegram that sowed seeds of distrust in the government's response. Stuart A. Thompson, *'Chernobyl 2.0'? Ohio Train Derailment Spurs Wild Speculation*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/technology/ohio-train-derailment-chernobyl.html> [https://perma.cc/SB85-2LJ4]. Some called the incident a "[p]lanned attack," while others falsely referred to it as "the largest environmental disaster in history." *Id.*

news, which would allow the government to regulate particularly dangerous false speech on the internet without being subject to the narrow confines of strict scrutiny that currently make a legislative model unworkable.

Although limited, the Supreme Court has found exceptions to the guarantee of free speech where the constitutional value, or lack thereof, of the speech cannot be reconciled with a more important societal interest.²⁴¹ Although the *Stevens* Court rejected a categorical balancing test to finding new categories of speech in favor of a historical approach, the Court has since considered competing interests, including harm to society, in its analysis when evaluating potential new categories.²⁴² Further, the Court has recently begun to rely on the once dormant *Giboney* doctrine to justify finding new exceptions for speech related to underlying criminal conduct, and to justify regulation of otherwise protected speech.²⁴³ As previously discussed, it is clear that fake news content is capable of captivating sects of the public and spreading to a wider audience to such an extent that it reduces the potential for people to ever evoke the legitimate truth. Moreover, fake news that embodies dangerous ideology by encouraging violence or extremism, or discouraging basic public health practices, threatens the integrity of democracy and poses a foreseeable risk to the public's health and safety.²⁴⁴

A new categorical exception for fake news must be “well-defined and narrowly limited,” especially to be distinguished from a blanket false speech prohibition like in *Alvarez*.²⁴⁵ *Harmful fake news* is a definable and identifiable category of speech. Because not all fake news poses a legitimate threat to society, only content which has been independently fact-checked and found to contain material falsehoods about issues pertaining to public health and safety, national security and democracy

²⁴¹ See *supra* Section II.B (discussing the categories of unprotected speech, specifically noting child pornography as a threat to important societal interests).

²⁴² See *id.*

²⁴³ See Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 985–87 (2016).

²⁴⁴ Fake news undermines democracy by targeting radical views; it seeks to create fear and divide amongst people in order to influence voting plans and challenge government authority. See Terry Lee, *The Global Rise of “Fake News” and the Threat to Democratic Elections in the USA*, 22 PUB. ADMIN. & POL’Y 15, 16 (2019). Regarding public health and safety, fake news hindered efforts by global health institutions to mitigate the spread of COVID-19 and continues to undermine vaccine initiatives. See generally Zapan Barua et al., *Effects of Misinformation on COVID-19 Individual Responses and Recommendations for Resilience of Disastrous Consequences of Misinformation*, 8 PROGRESS DISASTER SCI. 1 (2020) (analyzing the health effects of the proliferation of misinformation on social media during the COVID-19 pandemic).

²⁴⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); see *supra* Section II.B.1.

would be applicable. The scope of *harmful fake news* should be constrained to inflammatory content created and shared on social media platforms to specifically target fake news with the greatest likelihood of going viral and saturating the marketplace and to avoid chilling protected speech.²⁴⁶

Certain fake news, when widely accepted as true, fundamentally undermines the legitimacy of the marketplace of ideas rationale of free speech. In many ways, social media platforms are the new town square—necessary to promote public debate about important social and political issues. But where it would be difficult to hear all sides of the debate and make a well-informed opinion of the truth in an overcrowded town square, it is essentially impossible to do so on social media.

Should the Court find a new categorical exception for *harmful fake news* to protect the interest of a well-informed democracy and preserve public safety, critics will argue that the government's reach goes too far. Conservative lawmakers are likely to push back by advocating for policies that make it easier for individual users to challenge the removal of their content, require more stringent disclosure measures, or drastically narrow the scope of what meets the applicable *harmful fake news* standard. Still, because *harmful fake news* is a definable, identifiable, and easily trackable classification of internet speech content, bipartisan conversation about the nuances of how to regulate this new categorical exception will be important and necessary for federal change.

The line between safety regulations and censorship is a thin one, but as new technologies emerge, the threat to democracy and public wellbeing will only continue to mount without a significant shift in how the Court approaches the goals and demands of free speech in a fake news crisis. Foreseeably dangerous viral content cannot and should not be found to contribute to the public debate enough to justify its protection as free speech.²⁴⁷

²⁴⁶ See Aleksandra Atanasova, *What Makes Online Content Go Viral?* SOC. MEDIA PSYCH. (Sept. 12, 2022), <https://socialmediapsychology.eu/2022/09/12/what-makes-content-go-viral/> [<https://perma.cc/URH6-Z9TV>] (explaining that public, emotional content is the most likely to go viral on the internet).

²⁴⁷ It is important to note that this raises concerns for drastic dystopian effects on society. Although not discussed at length in this note, the author acknowledges that any solution in which censorship is considered an option poses substantial free speech concerns worth considering in further research. See generally Langvardt, *supra* note 51 (discussing the harmful implications of a solution where private tech companies hold the power to decide who can and cannot be on the internet and comparing Facebook's power to the Chinese Golden Shield).

B. *Protecting the Public Through Private Action*

Reconciling the current fake news crisis with First Amendment theory will require a direct challenge to a century's worth of free speech doctrine, and thus is forward looking. But private actors, specifically private businesses, can take immediate action to protect the public from the dangerous effects of harmful fake news by forming and investing in industry-wide truth coalitions, whose goal is to preemptively create factual, uniform, and nonpartisan messaging about specific issues. Rather than responding to fake news stories like a game of whack a mole, these strategies serve to give the power back to online users to make better informed decisions for themselves.

Private corporate leaders are well-equipped to lead the immediate charge against fake news because of their unique institutional position and financial incentives to protect their online consumers.²⁴⁸ It is estimated that fighting fake news costs the global economy \$78 billion each year, with costs to businesses including crisis evaluation, emergency response, employee training and resources, and distraction efforts.²⁴⁹ Notably, in 2022, “business” was found to be “the most trusted institution in society,” suggesting that content from corporate actors may have a more meaningful impact than that from the government and media alone.²⁵⁰ Through collective and cooperative nonpartisan messaging from businesses, entire industries can leverage trust with online consumers and provide uniform insight into public issues.

Already, there is some traction in the healthcare sector. The Coalition for Trust in Health & Science (The Coalition), which launched in March 2023, is composed of more than fifty healthcare groups from drug manufacturers to the American Medical Association working together to counteract

²⁴⁸ See Sinan Aral, *Truth, Disrupted*, HARV. BUS. REV. (July 18, 2018), <https://hbr.org/2018/07/truth-disrupted> [<https://perma.cc/8FP6-ZBUX>].

²⁴⁹ *What Is the True Cost of Disinformation?*, CESIE (Jan. 31, 2022), <https://cesie.org/en/youth/true-cost-of-disinformation-mega/> [<https://perma.cc/VK7E-6ZQB>]; see also Yi Ling Huang, *The Hidden Costs of Misinformation to Businesses*, IRESEARCH SERVS. (Dec. 21, 2021), <https://www.iresearchservices.com/blog/the-hidden-costs-of-misinformation-to-businesses/> [<https://perma.cc/94LE-MLKG>].

²⁵⁰ Lisa Seidenberg, *Authorities as Activists: How Business Leaders Can Use Their Platform to Combat Fake News*, GREENTARGET (Aug. 17, 2022), <https://greentarget.com/insights/blog/business-authorities-combat-disinformation-fake-news/> [<https://perma.cc/6S75-C4L5>] (referring to Edelman's 2022 “Trust Barometer,” which determined that audiences tend to believe businesses more than government, NGOs, and the media); see EDELMAN, EDELMAN TRUST BAROMETER 5 (2022), https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf [<https://perma.cc/AJA4-6WVF>].

misinformation that decreases trust in healthcare and public health initiatives.²⁵¹ With the assistance of third party fact-checkers and news literacy groups, the Coalition establishes a “learning laboratory” that shares information, identifies tangible solutions, and provides united health and science data for its members to disseminate in order to gain public trust in the healthcare industry.²⁵² While debunking is an important tool for the Coalition, their initiative operates less like counter-speech and more like proactive, unified content that is disseminated to the public.²⁵³

Other industries, particularly Big Tech and election industry companies, should follow suit and form truth coalitions aimed at mitigating the harms associated with fake news in their sector. Major technology companies, including Meta, Google, Apple, and YouTube should focus on establishing a unified news literacy campaign to promote reliance on objective media and increased awareness on how fake news operates.²⁵⁴ A Big Tech coalition should also proactively provide content explaining the role of emerging technologies, such as how the use of Artificial Intelligence will impact online user experience. In the election industry, companies including polling vendors and election administrators should focus coalitions on restoring confidence in the integrity of voting machine technology and increasing transparency about regulatory procedures ahead of election cycles.²⁵⁵

One notable challenge to this approach is that due to cognitive tendencies like the confirmation bias, fake news tends to

²⁵¹ Robert King, *Major Coalition of Health Groups Aims to Combat Health Misinformation*, FIERCE HEALTHCARE (Feb. 24, 2023, 11:58 AM), <https://www.fiercehealthcare.com/providers/major-coalition-health-groups-aims-combat-health-misinformation> [<https://perma.cc/AZ3W-X9UJ>]; see also *FAQ: What Is the Coalition for Trust in Health & Science?*, COAL. TR. HEALTH & SCI., <https://trustinhealthandscience.org/faq/> [<https://perma.cc/7BNL-2NV9>].

²⁵² *FAQ: What Is the Coalition for Trust in Health & Science?*, *supra* note 251.

²⁵³ See generally *Myth-Busting*, COAL. TR. HEALTH & SCI. (2023), <https://trustinhealthandscience.org/myth-busting/> [<https://perma.cc/SAG8-W6NF>] (providing independent articles about popular myths pertaining to COVID, vaccines and other health topics).

²⁵⁴ Media literacy refers to the ability to critically analyze stories presented in the media to determine their accuracy or credibility. See *What Is Media Literacy?* MEDIA LITERACY NOW, <https://medialiteracynow.org/what-is-media-literacy/> [<https://perma.cc/5HMF-QLA7>]. Although many social media platforms have taken steps to improve media literacy on their sites, this has largely been at an individual level. See, e.g., *supra* Section III.B.

²⁵⁵ See generally PENN WHARTON, ELECTION TECHNOLOGY INDUSTRY REPORT, THE BUSINESS OF VOTING (providing an overview of the election technology industry, including an analysis of the difficulties in modernizing polling in certain jurisdictions, the limitations of the competitive industry vendors and suggestions for improving the current market).

spread more quickly and deeply across the internet than truthful information, so online users may nonetheless be naturally drawn to the tantalizing fake news headlines rather than factual sources.²⁵⁶ To respond, coalitions should focus their efforts on creating a consistent and unified approach to content creation on social media, so that another psychological trend, the illusory truth effect, can take over.²⁵⁷ Because “[r]epeated information is often perceived as more truthful than novel” information, exposure to the same message, in the same general manner, may help online users more accurately filter out fake news.²⁵⁸

Although marketplace saturation with true, fact-based information may be a band-aid over a bullet hole solution to the broader fake news crisis, it is nonetheless critical that key private actors step in at this moment to proactively inhibit some of the human tendencies that make discerning fact from fabrication difficult for online users. In a way, these coalitions would serve as an objective truth source to reduce exposure to *harmful fake news* and increase preference towards true information.

CONCLUSION

Fake news is not merely a colloquial term capsulated within the confines of the Trump administration; it has been used as a political and social tool for centuries. But in the digital era, where millions of Americans regularly receive their news from social media platforms like Facebook, Twitter, and YouTube instead of from once widely trusted institutional media sources, the ability for people to spread and believe falsehoods becomes dangerously high. Guarded by the First Amendment’s guarantee of free speech, which the Supreme Court has extended to false speech, the vast majority of fake news stories on the internet are protected from government regulation, despite their legitimate threat to democracy and public health and safety. Fake news has the power to influence voters, encourage violence, undermine election integrity, and jeopardize essential global health efforts. The speed and ease by which harmful fake news infiltrates the internet today is wholly incompatible with the theory that all speech is a valuable contribution to the public debate—a fundamental justification for protecting false speech.

²⁵⁶ See *supra* Section II.B.2.

²⁵⁷ Aumyo Hassan & Sarah J. Barber, *The Effects of Repetition Frequency on the Illusory Truth Effect*, 6 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS 1 (2021).

²⁵⁸ *Id.*

Although recently many of the most popular online platforms have taken steps to curb fake news on their sites, so long as they are shielded from liability against the content posted by their users, private tech companies will be unincentivized to effectively prevent harmful fake news. And while the “perfect” case to exemplify the gravity of this issue has not yet presented itself to the Supreme Court, the evolutionary nature of the fake news crisis suggests that it eventually will. With the door to create new categorical exceptions to free speech protection left slightly ajar, the Supreme Court should seize the opportunity to kick it down to curtail the urgent threat to democracy and public safety caused by harmful fake news. But rather than stand idly by, private actors can help restore society’s faith in facts through nonpartisan, uniform communication with the public.

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