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## Disinformation and the First Amendment: Fraud on the Public

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## Disinformation and the First Amendment: Fraud on the Public

Wes Henricksen

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## ARTICLES

### DISINFORMATION AND THE FIRST AMENDMENT: FRAUD ON THE PUBLIC

WES HENRICKSEN<sup>†</sup>

*[T]his is the greatest threat to our republic ever. Not the Depression, not World War II, not the Civil War. This is it . . . lying and misinformation and paranoia and conspiracy. This is the pill that will kill us unless we do something.*<sup>1</sup>

*Ken Burns,  
Filmmaker*

*Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful.*<sup>2</sup>

*Catharine A. MacKinnon,  
University of Michigan Law School*

#### I. HARMFUL DISINFORMATION PRESENTS A DIFFICULT FIRST AMENDMENT ISSUE

Following the 2020 presidential election, the losing candidate, Donald Trump, along with most of the Republican Party,<sup>3</sup> spread the false claim that the election had been stolen by

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<sup>†</sup> Associate Professor of Law, Barry University School of Law. Thank you to Claudia Haupt, John Kruzel, Wendy Parmet, Lawrence Solum, and Wayne Unger for helpful feedback and support, and to Giovanni Fumei and the Thesis podcast for providing a forum to discuss the article. Special thanks to Dean Leticia Diaz and Barry University School of Law for their support for this article. Thanks to Beatrice Adelufosi, Alyssa Gonzalez, Sonia Herrera, Samantha Huffman, Rachel Karden, and Lisa Mohamed for excellent research assistance.

<sup>1</sup> Alyssa Rosenberg, *Opinion: Ken Burns Is an Optimist. But He's Very Worried About America*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/opinions/2021/06/24/ken-burns-is-an-optimist-hes-very-worried-about-america/> [https://perma.cc/NTL4-BCLK].

<sup>2</sup> Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, in THE FREE SPEECH CENTURY 140, 140 (Geoffrey R. Stone & Lee C. Bollinger eds., 2019).

<sup>3</sup> For example, Attorney General William Barr claimed in a CNN interview in September 2020 that someone in Texas was indicted for filling out 1,700 ballots for other people, but this never happened. Matt Zapotosky, *No, a Texas Man Was Not*

Democrats.<sup>4</sup> Joe Biden, so the claim went, had not been legitimately elected, and was therefore an illegitimate President and needed to be removed.<sup>5</sup> This profitable falsehood<sup>6</sup> became known as the “Big Lie.”<sup>7</sup> It was not only baseless, but it was in fact made in spite of and in direct conflict with the overwhelming evidence debunking it.<sup>8</sup> This did not stop people from believing it. Millions bought into the Big Lie,<sup>9</sup> which has caused numerous harms. A few of them are worth noting here to illustrate the problem posed by harmful disinformation.<sup>10</sup> One harm caused by

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*Indicted for Filling Out 1,700 Mail-In Ballots, Despite What Attorney General William Barr Said*, TEX. TRIB. (Sept. 4, 2020), <https://www.texastribune.org/2020/09/04/texas-william-barr-mail-in-voting/> [<https://perma.cc/AB5J-3C26>].

<sup>4</sup> Hope Yen et al., *AP FACT CHECK: Trump's Claims of Vote Rigging Are All Wrong*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5> [<https://perma.cc/RRW4-JN3R>].

<sup>5</sup> See, e.g., Bill McCarthy, *On Inauguration Day, Rush Limbaugh Falsely Claims Joe Biden Didn't 'Legitimately' Win*, POLITIFACT (Jan. 21, 2021), <https://www.politifact.com/factchecks/2021/jan/21/rush-limbaugh/inauguration-day-rush-limbaugh-falsely-claims-joe-/> [<https://perma.cc/2XLH-EQS6>]; Ella Lee, *Fact Check: Joe Biden Legally Won Presidential Election, Despite Persistent Contrary Claims*, USA TODAY (Dec. 15, 2020), <https://www.usatoday.com/story/news/factcheck/2020/12/15/fact-check-joe-biden-legally-won-presidential-election/6537586002/> [<https://perma.cc/KP6C-G8GU>].

<sup>6</sup> As used in this article, the term “profitable falsehood” means a false or misleading statement made by one who stands to gain, either financially or otherwise, from others believing it.

<sup>7</sup> See, e.g., Katelyn Polantz, *Election Technology Company Dominion Sues Giuliani for \$1.3 Billion Over 'Big Lie' About Election Fraud*, CNN POL. (Jan. 25, 2021), <https://www.cnn.com/2021/01/25/politics/dominion-lawsuit-giuliani/index.html> [<https://perma.cc/7RM3-LCNM>]. The term “Big Lie” was first used in the House Impeachment Committee during Trump’s second trial on February 10, 2021, by U.S. Representatives Jamie Raskin (D-Md.) and Joe Neguse (D-Colo.), who served as House impeachment managers at the trial. *Impeachment Trial Day 2 Highlights: Prosecution Recreates Capital Riot Using Explicit, Never-Before-Seen Video*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/live/2021/02/10/us/impeachment-trial> [<https://perma.cc/9X9J-PB7T>].

<sup>8</sup> Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 6, 2021), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html> [<https://perma.cc/T5XQ-THPW>].

<sup>9</sup> *60% View Joe Biden's 2020 Presidential Victory As Legitimate, Quinnipiac University National Poll Finds; 77% of Republicans Believe There Was Widespread Voter Fraud*, QUINNIPIAC UNIV. POLL (Dec. 10, 2020) [hereinafter *Quinnipiac Poll*], <https://poll.qu.edu/poll-release?releaseid=3734> [<https://perma.cc/S9U3-HFST>].

<sup>10</sup> Disinformation, for the purposes of this Article, is defined as “false or misleading information that is spread deliberately to deceive.” Sascha-Dominik Dov Bachmann et al., *COVID Information Warfare and the Future of Great Power Competition*, FLETCHER F. WORLD. AFF., 2020, at 11, 15. Others have put forth more nuanced and complex definitions. See, e.g., COMMC’N FROM THE COMM’N TO THE EUR. PARLIAMENT, THE COUNCIL, THE EUR. ECONOMIC AND SOCIAL COMM. AND THE

the Big Lie was that it prompted Republicans in dozens of states to attempt to pass hundreds of voter suppression laws to combat nonexistent voter fraud.<sup>11</sup> The irony of these laws is that, while the motivation behind them was a *fictional* threat to the electoral process, the effect of the laws is a *real* threat to the electoral process: disenfranchisement of American voters.<sup>12</sup> The laws are designed to disenfranchise those voters Republicans view as likely to vote for someone other than the Republican candidate, a voting bloc that includes minority groups, college students, college graduates, and those living in and around cities.<sup>13</sup>

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COMM. OF THE REGIONS, TACKLING ONLINE DISINFORMATION: A EUR. APPROACH (Apr. 26, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0236&from=EN> [<https://perma.cc/C2F9-JNC8>] (defining disinformation as “verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm”). Misinformation, unlike disinformation, includes false information “spread by those who believe it to be true.” Jason Pielemeier, *Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?*, 2020 UTAH L. REV. 917, 919 (2020). Fake news is even broader and more vague, and therefore less helpful for a First Amendment discussion. See, e.g., Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 245 (2017) (“The term ‘fake news’ has no single definition because it refers to a wide variety of things.”).

<sup>11</sup> *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021> [<https://perma.cc/RH3Y-9WUA>].

<sup>12</sup> See generally *id.*

<sup>13</sup> Georgia, for example, passed the Election Integrity Act of 2021, supposedly to address widespread voter fraud, but which actually disenfranchises African Americans and other voters Republicans saw as political opponents. Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html> [<https://perma.cc/48HV-BQV4>]. Key elements of this voter suppression law include imposing more restrictive voter ID requirements for mail-in ballots; banning the practice of giving food or water to voters in line at polling stations; giving the Republican-controlled state legislature more power to control voting operations if problems are reported; limiting the number of “drop boxes” in which people can place their absentee votes, meaning many will have to travel further; and shortening the early-voting period for all runoff elections. Fredreka Schouten, *Here’s Why Voting Rights Activists Say Georgia’s New Election Law Targets Black Voters*, CNN (Mar. 26, 2021), <https://www.cnn.com/2021/03/26/politics/georgia-voting-law-black-voters/index.html> [<https://perma.cc/VGF4-DDZW>]. Independent observers and, notably, even corporate leaders, have roundly condemned the aim and effect of these measures as an attempt to suppress votes of those Republicans see as opponents—namely, those likely to vote Democrat, including minorities and people living in and around cities. The point of the law can be seen in its effect: disenfranchisement. Zachary B. Wolf, *How Trump’s Election Fraud Lie Turned into Law in Georgia*, CNN (Mar. 26, 2021), <https://www.cnn.com/2021/03/26/politics/trump-election-fraud-lie-georgia/index.html> [<https://perma.cc/7P48-GB4F>]; Jessica Bursztynsky & Kevin Stankiewicz, *Major*

In addition to an attack on voting rights, the Big Lie also caused the January 6, 2021, attack on the U.S. Capitol.<sup>14</sup> After weeks of false claims in the media of widespread election and voter fraud, the “Stop the Steal” rally was organized in Washington, D.C.<sup>15</sup> There, after a string of speakers spread inflammatory rhetoric to the gathered crowd of thousands,<sup>16</sup> Trump took the stage and told those in attendance he would “never concede” the election, which he called “stolen.”<sup>17</sup> In the speech, Trump called on Vice President Mike Pence to overturn the election results.<sup>18</sup> Trump’s speech contained falsehoods that inflamed the crowd, calling on those in attendance to go to the Capitol stating, “if you don’t fight like hell, you’re not going to have a country anymore,”<sup>19</sup> while at the same time calling Biden “an illegitimate president.”<sup>20</sup> Other Republicans also inflamed

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*U.S. Companies Take Aim at Georgia’s New Voting Restrictions*, CNBC (Mar. 31, 2021), <https://www.cnbc.com/2021/03/31/major-us-companies-take-aim-at-georgias-new-voting-restrictions.html> [<https://perma.cc/H663-GS9N>]. Weeks later, Texas passed its own voter suppression law, which is being called one “of the country’s strictest voting laws.” Many other Republican-controlled state legislatures have followed suit. Nick Corasaniti, *Texas Senate Passes One of the Nation’s Strictest Voting Bills*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/05/29/us/politics/texas-voting-bill.html> [<https://perma.cc/2892-5654>].

<sup>14</sup> See Steven A. Ramirez, *Race in America 2021: A Time to Embrace Beauharnais v. Illinois?*, 52 LOY. U. CHI. L.J. 1001, 1001–02 (2021) (noting the connection between the Big Lie and the January 6, 2021 Capitol attack).

<sup>15</sup> Tina Nguyen, *MAGA Marchers Plot Final D.C. Stand on Jan. 6*, POLITICO (Jan. 4, 2021, 4:30 AM), <https://www.politico.com/news/2021/01/04/maga-marchers-trump-last-stand-454382> [<https://perma.cc/R52T-6Y8R>].

<sup>16</sup> See *infra* note 21 and accompanying text.

<sup>17</sup> Annie Karni & Maggie Haberman, *Trump Openly Condone Supporters Who Violently Stormed the Capitol, Prompting Twitter to Lock His Account*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-protesters.html> [<https://perma.cc/4S6P-SLEB>].

<sup>18</sup> *Id.*

<sup>19</sup> Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html> [<https://perma.cc/JP3W-F3XF>].

<sup>20</sup> Philip Rucker, *Trump’s Presidency Finishes in ‘American Carnage’ as Rioters Storm the Capitol*, WASH. POST (Jan. 6, 2021, 10:08 PM), [https://www.washingtonpost.com/politics/trump-rioters-incite/2021/01/06/0acfc778-5035-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-rioters-incite/2021/01/06/0acfc778-5035-11eb-bda4-615aaefd0555_story.html) [<https://perma.cc/WA3L-LVUN>]; see also D’Angelo Gore et al., *Trump’s Falsehood-Filled ‘Save America’ Rally*, FACTCHECK.ORG (Jan. 6, 2021), <https://www.factcheck.org/2021/01/trumps-falsehood-filled-save-america-rally/> [<https://perma.cc/FE2B-35F8>] (discussing some of the falsehoods Trump asserted at the rally); David Z. Morris, *‘We Will Never Concede’: How Donald Trump Incited an Attack on America*, FORTUNE (Jan. 7, 2021, 1:45 PM), <https://fortune.com/2021/01/07/trump-speech-capitol-attack-riots-pence-we-will-never-concede-maga-rally/> [<https://perma.cc/7JKW-HQT5>] (discussing how Trump’s falsehoods incited the attack on the Capitol); Aaron Blake, *What Trump*

the crowd.<sup>21</sup> Following the rally, the crowd marched on the Capitol, overwhelmed the police, and broke into the building.<sup>22</sup> In addition to property damage and stolen items from the Capitol, five people died during the storming of the Capitol, including a Capitol Police officer.<sup>23</sup> At least 138 police officers were injured, including fifteen hospitalized with severe injuries.<sup>24</sup> For example, one D.C. Metro police officer “was hit six times with a stun gun,” suffered a heart attack, and “lost the tip of” one of his fingers.<sup>25</sup> Another officer suffered “two cracked ribs and two smashed spinal discs,” another lost an eye, another “lost three fingers,” another was impaled “with a metal fence stake,” and a large number of officers suffered brain trauma, including several with concussions.<sup>26</sup>

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*Said Before His Supporters Stormed the Capitol, Annotated*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/annotated-trump-speech-jan-6-capitol/> [<https://perma.cc/NJG7-YHEL>] (giving a more comprehensive account of the language Trump used while speaking to the crowd prior to the attack on the Capitol).

<sup>21</sup> Matthew Choi, *Trump Is on Trial for Inciting an Insurrection. What About the 12 People Who Spoke Before Him?*, POLITICO (Feb. 10, 2021, 4:30 AM), <https://www.politico.com/news/2021/02/10/trump-impeachment-stop-the-steal-speakers-467554> [<https://perma.cc/5JGM-2DPA>].

<sup>22</sup> Evan Perez et al., *No One Knew What We Were Supposed to be Doing There.* *Inside the Law Enforcement Chaos at the Capitol*, CNN POL. (Jan. 6, 2021), <https://www.cnn.com/2021/01/06/politics/capitol-riots-what-happened/index.html> [<https://perma.cc/H58R-TB5V>].

<sup>23</sup> Khadeeja Safdar et al., *Police Identify Five Dead After Capitol Riot*, WALL ST. J. (Jan. 8, 2021, 5:23 PM), <https://www.wsj.com/articles/police-identify-those-killed-in-capitol-riot-11610133560> [<https://perma.cc/R99Z-GUHY>].

<sup>24</sup> Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [<https://perma.cc/C58P-5VSV>]; ArLuther Lee, *2 Capitol Hill Police Officers Suspended over Riot*, ATLANTA J. CONST. (Jan. 11, 2021), <https://www.ajc.com/news/breaking-2-capitol-hill-police-officers-suspended-over-riot/XHWWHNA7EZHSNF32QREJROESQI/> [<https://perma.cc/XHP2-MH53>].

<sup>25</sup> Peter Hermann & Julie Zauzmer Weil, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers During Assault on U.S. Capitol*, WASH. POST (Jan. 11, 2021, 7:22 PM), [https://www.washingtonpost.com/local/public-safety/police-capitol-injuries-trump/2021/01/11/ca68e3e2-5438-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/local/public-safety/police-capitol-injuries-trump/2021/01/11/ca68e3e2-5438-11eb-a08b-f1381ef3d207_story.html) [<https://perma.cc/6NLU-YEUZ>].

<sup>26</sup> Luke Broadwater, *The Capitol Police Union Says Nearly 140 Officers Were Injured During the Riot*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/live/2021/01/27/us/biden-trump-impeachment#the-capitol-police-union-says-nearly-140-officers-were-injured-during-the-riot> [<https://perma.cc/8EYC-HCVZ>]; Jeremy Tanner, *DC Police Seek Man Suspected of Crushing Officer in Doorway*, WGN-TV (Jan. 15, 2021, 8:21 PM), <https://wgntv.com/news/dc-police-seek-man-suspected-of-crushing-officer-in-doorway/> [<https://perma.cc/FLT2-BUX5>]; Bart Jansen et al., *'Bring Out Pence.' Managers at Trump Trial Reveal New Video of*

The Big Lie's harmful consequences extended beyond the Capitol. For example, Dominion Voting Systems incurred significant reputational and financial damages as a result.<sup>27</sup> In the effort to spread the false claim that the election was stolen, several prominent Republican leaders and their allies made accusations against Dominion Voting Systems, a company that makes and sells electronic voting hardware and software, including voting machines and tabulators.<sup>28</sup> In the 2020 election, its devices and technology were used to process votes in twenty-eight states, including several swing states.<sup>29</sup> Fox News and other conservative media outlets served as a platform for individuals associated with Trump and the Republican Party to spread false allegations about Dominion.<sup>30</sup> These included, but were not limited to, the accusation that the company was founded and run by (dead) former Venezuelan President Hugo Chávez, the votes it tabulated were counted overseas, the company was owned by radical-left extremists affiliated with Antifa, the company had switched millions of votes from Trump to Biden, and the company was largely responsible for stealing the election away from Trump, and that its employees bragged about rigging the election in favor of Biden.<sup>31</sup> Rightwing media

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*Capitol Riot That Shows Threat to VP, Lawmakers*, USA TODAY (Feb. 22, 2022, 6:10 PM), <https://www.usatoday.com/story/news/politics/elections/2021/02/10/impeachment-trial-managers-trump-fueled-rage-capitol-riot/6702506002/> [<https://perma.cc/CSU4-EBFT>].

<sup>27</sup> Jen Wieczner, *Big Lies vs. Big Lawsuits: Why Dominion Voting is Suing Fox News and a Host of Trump Allies*, FORTUNE (Apr. 2, 2021, 6:30 AM), <https://fortune.com/longform/dominion-voting-lawsuits-fox-news-trump-allies-2020-election-libel-conspiracy-theories/> [<https://perma.cc/ZCV8-7BUR>].

<sup>28</sup> *Id.*; *Dominion Voting Systems Corp.*, BLOOMBERG, <https://www.bloomberg.com/profile/company/3614901Z:CN> [<https://perma.cc/WVY9-HHCZ>] (last visited Jan. 13, 2023).

<sup>29</sup> Meghan Roos, *Dominion Voting Systems 'Categorically Denies' Election Tech Glitches Following Trump Accusations*, NEWSWEEK (Nov. 13, 2020, 7:22 PM), <https://www.newsweek.com/dominion-voting-systems-categorically-denies-election-tech-glitches-following-trump-accusations-1547405> [<https://perma.cc/EM5E-HCHZ>].

<sup>30</sup> Wieczner, *supra* note 27.

<sup>31</sup> Ali Swenson, *Smartmatic Does Not Own Dominion Voting Systems*, AP NEWS (Nov. 17, 2020), <https://apnews.com/article/fact-checking-9740535009>; David Bauder, *Networks Airing Side Firms in Fraud Claims*, ARK. DEMOCRAT GAZETTE (Dec. 23, 2020, 4:56 AM), <https://www.arkansasonline.com/news/2020/dec/23/networks-airing-side-firms-in-fraud-claims/> [<https://perma.cc/KDM5-7RY3>]; Glenn Kessler, *Giuliani's Fantasy Parade of False Voter-Fraud Claims*, WASH. POST (Nov. 16, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/11/16/giulianis-fantasy-parade-false-voter-fraud-claims/> [<https://perma.cc/7TZQ-ERGK>]; Dan MacGuill, *Did a Dominion Voting Systems Employee Brag About Rigging the Election Against Trump?*, SNOPE



greatly amplified these claims and repeated them, rather than debunking, fact-checking, or even questioning them.<sup>32</sup>

The disinformation campaign against Dominion led to its employees being “stalked, harassed and receiv[ing] death threats.”<sup>33</sup> This alone caused the company to spend hundreds of thousands of dollars on security.<sup>34</sup> The resulting damage to Dominion’s reputation more broadly, however, amounted to much more—millions of dollars, according to Dominion.<sup>35</sup>

Unlike most of the other harms caused by the Big Lie, like the attack on voting rights and the undermining of faith in the country’s electoral system and institutions, the harm to Dominion was more clearly tied to the disinformation that caused it, which arguably presented a cognizable claim against those who spread the Big Lie: defamation.<sup>36</sup> Dominion filed defamation claims against Fox News, Rudy Giuliani, Trump lawyer Sidney Powell, and My Pillow CEO and Trump supporter Mike Lindell, among others.<sup>37</sup> Dominion’s defamation lawsuits against Powell and Giuliani asked for \$1.3 billion in damages from each, and accused each lawyer of waging a “viral disinformation campaign” against the company involving “demonstrably false” claims.<sup>38</sup>

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(Dec. 29, 2020), <https://www.snopes.com/fact-check/eric-coomer-dominion-trump/> [<https://perma.cc/E4WV-UHAN>].

<sup>32</sup> Wieczner, *supra* note 27.

<sup>33</sup> Emma Brown, *Dominion Sues Pro-Trump Lawyer Sidney Powell, Seeking More than \$1.3 Billion*, WASH. POST (Jan. 8, 2021, 9:08 AM), [https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney-powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney-powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1_story.html) [<https://perma.cc/6NFV-RTTN>].

<sup>34</sup> Ian Millhiser, *Why the Defamation Lawsuits Against Fox News Could Seriously Hurt the Company*, VOX (Mar. 30, 2021, 10:48 AM), <https://www.vox.com/22352213/dominion-fox-news-1-6-billion-tucker-carlson-lou-dobbs-maria-bartiro-mo-defamation-first-amendment> [<https://perma.cc/6JAW-S8RK>].

<sup>35</sup> Grace Panetta, *Dominion Projects \$600 Million Loss over Next 8 Years Due to ‘Severity, Pervasiveness, and Permanence of the Viral Disinformation Campaign’ About 2020 Election*, INSIDER (Mar. 26, 2021, 12:46 PM), <https://www.businessinsider.com/dominion-projects-600-million-loss-over-8-years-election-disinformation-2021-3> [<https://perma.cc/5S67-J6QU>].

<sup>36</sup> *Id.*; see *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257, 2021 WL 5984265, at \*1 (Del. Super. Ct. 2021) (denying Fox’s motion to dismiss).

<sup>37</sup> Merrit Kennedy & Bill Chappell, *Dominion Voting Systems Files \$1.6 Billion Defamation Lawsuit Against Fox News*, NPR (Mar. 26, 2021, 11:14 AM), <https://www.npr.org/2021/03/26/981515184/dominion-voting-systems-files-1-6-billion-defamation-lawsuit-against-fox-news> [<https://perma.cc/3U4Z-AVB7>].

<sup>38</sup> Nick Corasaniti, *Rudy Giuliani Sued by Dominion Voting Systems over False Election Claims*, N.Y. TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/01/25/us/politics/rudy-giuliani-dominion-trump.html> [<https://perma.cc/AV9Q-GXGD>]; Brown, *supra* note 33; Polantz, *supra* note 7.

Powell's defense raised eyebrows; not only did she not deny spreading false claims, but she asserted her claims of election stealing were so false that "no reasonable person would conclude that the statements were truly statements of fact."<sup>39</sup> Pause a moment to ponder what this means. Under the law, admitting you purposefully spread demonstrably false claims on national TV about nonexistent widespread voter fraud, undermining the legitimacy of a presidential election and causing millions to believe a sitting President had "stolen" the election, was raised as a *defense* to a defamation claim. Therefore, not only is it legal to knowingly spread false claims to the public on matters of national importance and which cause widespread physical and economic harm, but admitting to doing so may actually shield you from liability. Moreover, the falser the information you spread—for example, if "[n]o reasonable person" would believe it—the more legal it may be to spread.<sup>40</sup> With the defamation claims pending, it is far from clear what liability, if any, will be imposed on those who purposefully spread the Big Lie.

But even the harm to Dominion is far from the end of the story regarding the damage caused by the Big Lie. For example, the Big Lie has significantly undercut public faith in the electoral system, integrity of election results, and democratic institutions.<sup>41</sup> It increased distrust in perceived political opponents.<sup>42</sup> It worsened divisions between political, ethnic, and racial groups.<sup>43</sup> In short, those who spread the Big Lie convinced

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<sup>39</sup> Mot. to Dismiss at 27–28, *U.S. Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. Mar. 22, 2021); Jane C. Timm, *Sidney Powell's Legal Defense: 'Reasonable People' Wouldn't Believe Her Election Fraud Claims*, NBC NEWS (Mar. 23, 2021, 11:23 AM), <https://www.nbcnews.com/politics/donald-trump/sidney-powell-s-legal-defense-reasonable-people-wouldn-t-believe-n1261809> [<https://perma.cc/Z6Z6-XGQF>]. By her own admission, Sidney Powell admitted to not believing the claims herself, which means she purposefully spread misleading and false information to millions of people. Charlotte Klein, *Sidney Powell's Defamation Defense: Nobody in Their Right Mind Would Believe My Election Fraud Claims*, NBC NEWS (Mar. 23, 2021), <https://www.vanityfair.com/news/2021/03/sidney-powells-defamation-defense-nobody-in-their-right-mind-would-believe-my-election-fraud-claims> [<https://perma.cc/3B28-TVF3>].

<sup>40</sup> Timm, *supra* note 39, at 2.

<sup>41</sup> Brittany Shepherd, *Americans' Faith in Election Integrity Drops: POLL*, ABC NEWS (Jan. 6, 2022, 6:01 AM), <https://abcnews.go.com/Politics/americans-faith-election-integrity-drops-poll/story?id=82069876> [<https://perma.cc/JM7G-AQQE>].

<sup>42</sup> Elizabeth Drew, *The Big Lie and Its Consequences*, PROJECT SYNDICATE (May 17, 2021), <https://www.project-syndicate.org/commentary/trump-big-lie-threat-to-constitution-by-elizabeth-drew-2021-05> [<https://perma.cc/SSS5-TEGA>].

<sup>43</sup> *Id.*

millions of people to believe that a blatantly false thing was true,<sup>44</sup> and, like any other kind of fraudulent scheme, the falsehood was told with the aim of profiting off of misleading others—in this case, by attempting to overturn the election.<sup>45</sup> Although the election was not overturned, the Big Lie nevertheless obtained fruitful results; it has excited rightwing voters to distrust Democrats, journalists, and other perceived opponents who attempted to fact check or otherwise not go along with the Big Lie.<sup>46</sup> Republicans continue to spread the Big Lie even now, well over a year after the 2020 election.<sup>47</sup> Indeed, new false claims are now being spread that support or build on top of earlier lies; the Republican Party and rightwing media now blame Nancy Pelosi, the Democratic Speaker of the House, for the January 6 attack on the U.S. Capitol.<sup>48</sup> This claim, which is baseless and provably false, is now widely circulated and supported by Republican leaders.<sup>49</sup> For instance, Representative Elise Stefanik told a crowd and TV audiences that “[t]he American people deserve to know the truth—that Nancy Pelosi bears responsibility, as speaker of the House, for the tragedy that occurred on Jan. 6.”<sup>50</sup>

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<sup>44</sup> *Quinnipiac Poll*, *supra* note 9, at 1.

<sup>45</sup> As part of this attempt to overturn the election, Trump had an executive order prepared dictating that the Department of Defense seize voting machines in swing states. Ed Pilkington, *Draft Trump Order Told Defense Chief to Seize Swing-State Voting Machines*, *GUARDIAN* (Jan. 21, 2022, 8:54 PM), <https://www.theguardian.com/us-news/2022/jan/21/donald-trump-voting-machines-draft-executive-order> [https://perma.cc/4SJR-F6CM].

<sup>46</sup> Daniel Dale, *The Long Tail of Trump’s Big Lie: 9 Ways It Continues to Affect American Politics*, *CNN* (May 23, 2021, 10:14 AM), <https://www.cnn.com/2021/05/23/politics/trump-big-lie-impact/index.html> [https://perma.cc/4892-QQ6K].

<sup>47</sup> Patrick Reilly, *Trump Repeats Claims that 2020 Election Was Stolen at First Rally of New Year*, *N.Y. POST* (Jan. 16, 2022, 3:02 AM), <https://nypost.com/2022/01/16/ex-president-donald-trump-claims-2020-election-was-stolen-at-first-rally-in-arizona/> [https://perma.cc/VG7M-FZZS].

<sup>48</sup> Mike Lillis, *House GOP Blames Pelosi—Not Trump—for Jan. 6*, *THE HILL* (July 27, 2021, 9:51 AM), <https://thehill.com/homenews/house/564988-house-gop-blames-pelosi-not-trump-for-jan-6> [https://perma.cc/QQL4-JKHV].

<sup>49</sup> Robert Farley, *Republicans’ Shaky, No Evidence Attempt to Cast Blame on Pelosi for Jan. 6*, *FACTCHECK.ORG* (July 29, 2021), <https://www.factcheck.org/2021/07/republicans-shaky-no-evidence-attempt-to-cast-blame-on-pelosi-for-jan-6/> [https://perma.cc/GMU9-FTWK].

<sup>50</sup> Joshua Solomon, *Stefanik Blames Pelosi for Jan. 6 Insurrection*, *TIMES UNION* (July 27, 2021, 5:21 PM), <https://www.timesunion.com/news/article/Stefanik-blames-Pelosi-for-Jan-6-insurrection-16343023.php> [https://perma.cc/9AWS-RULR]. As of this writing, Donald Trump also continues to push the Big Lie. In a political rally in Arizona on January 17, 2022, Trump pushed a baseless conspiracy theory that posited that the January 6, 2021 insurrection and attack on the Capitol was

Some have noted the similarity between the way the Big Lie was (and still is) spread and the way doublespeak was described by George Orwell in his novel *1984*.<sup>51</sup> In both cases, those in power spread profitable falsehoods that were not only false but, in fact, the exact opposite of the truth—akin to claiming that war is peace, or that ignorance is strength<sup>52</sup>—and these falsehoods are peddled to the public as unimpeachable fact. The public, because they rely on the limited sources of information they have access to, are essentially forced to believe the falsehood to be true. The deception benefits those who spread the falsehood. Finally, those who peddle the Big Lie cited, as evidence of its truth, the fact that so many bought into the falsehood.<sup>53</sup>

Regardless of the harm it caused, the Big Lie was perfectly legal, with the possible exception of Dominion's defamation claims. There is no law against going on TV and claiming a presidential election was stolen by your opponent through massive fraud, even if you claim this without evidence or bases for believing it to be true. This is true even if you know it to be false and by doing so you cause massive and widespread harm to people, property, and democratic institutions. With few exceptions,<sup>54</sup> disinformation is protected speech.<sup>55</sup> The Big Lie

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organized and led by the FBI or some other government agency. *See* Jonathan Allen, *In Arizona, Ground Zero for 2024, Trump Spins Lies and Conspiracy Theories*, NBC NEWS (Jan. 17, 2022, 9:45 AM), <https://www.nbcnews.com/politics/politics-news/ground-zero-2024-trump-spins-lies-conspiracy-theories-n1287586> [https://perma.cc/JSZ6-C4SB]; *see also* Linda Qiu, *Trump's Covid and Election Falsehoods at Arizona Rally*, N.Y. TIMES (Jan. 16, 2022), <https://www.nytimes.com/2022/01/16/us/politics/fact-check-trump-arizona-rally.html> [https://perma.cc/R5PM-4DHK].

<sup>51</sup> *See* Peter Bauer, *Elise Stefanik Is Lying to Us*, ADIRONDACK ALMANACK (Jan. 5, 2021), <https://www.adirondackalmanack.com/2021/01/opinion-elise-stefanik-is-lying-to-us.html> [https://perma.cc/AP2A-49W5] (calling the manner in which Rep. Stefanik cited the fact people bought into the lies as evidence for their truth “Orwellian”).

<sup>52</sup> *See generally* GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Secker & Warburg eds., 1949).

<sup>53</sup> *See, e.g.*, Bauer, *supra* note 51 (noting that Republican U.S. Rep. Elise Stefanik went on numerous rightwing media outlets and “cite[d] as evidence for the truth of her lies the fact that some people believe her lies”).

<sup>54</sup> The exceptions include the torts of defamation and false light, and civil and criminal claims for securities fraud. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301–02 (1964) (Goldberg, J., concurring) (“The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.”); *Time, Inc. v. Hill*, 385 U.S. 374, 386–88 (1967) (holding that the tort of false light is consistent with First Amendment provided there is a finding of actual malice, knowledge of the falsity, or of reckless disregard of the truth); *United States v. Motz*, 652 F. Supp. 2d 284, 294 (E.D.N.Y. 2009)

serves as one example, but others abound; they can be found easily by turning on the news or scrolling a social media feed.<sup>56</sup> We are bombarded constantly by disinformation from a myriad of sources. All this disinformation demonstrates the contradiction under the law whereby it is illegal to defraud one person, but legal, with a few narrow exceptions,<sup>57</sup> to defraud millions.<sup>58</sup>

That is, where one deceives another for profit in a way that harms the victim, it is generally categorized as a fraud of some kind,<sup>59</sup> which constitutes both a crime and a tort.<sup>60</sup> But if one deceives a great number of people for profit in a way that harms many people, or that harms the public at large, the environment, or democratic institutions, it is only deemed criminal or tortious if it fits within one of the narrowly defined areas prohibiting such misrepresentations.<sup>61</sup> There are exceptions.<sup>62</sup> But this generally holds true. Thus, although the lawyers who pushed the Big Lie before a federal court in Michigan were sanctioned by the presiding judge for attempting to mislead the court, the judge there clarified that spreading falsehoods to push an agenda *outside* of court is permitted.<sup>63</sup> There, Judge Linda Davis held

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(holding that the criminal securities fraud statute does not implicate a defendant's rights under the First Amendment).

<sup>55</sup> United States v. Alvarez, 567 U.S. 709, 722 (2012).

<sup>56</sup> Amy Watson, *Fake News in the U.S. – Statistics and Facts*, STATISTA (June 21, 2022), <https://www.statista.com/topics/3251/fake-news/> [<https://perma.cc/FQZ5-7JAG>] (“Fake news is an insidious and widespread issue in the news industry.”).

<sup>57</sup> See discussion *supra* note 54.

<sup>58</sup> See Reilly, *supra* note 47 (reporting Trump's continued claim to large crowds and to TV networks that the 2020 presidential election was “stolen,” despite there being no credible evidence to support the claim).

<sup>59</sup> See discussion *infra* note 81.

<sup>60</sup> See discussion *infra* note 81.

<sup>61</sup> *Id.*

<sup>62</sup> In some tobacco litigation cases, courts have specifically held that the elements of fraud may be met even where the representations were made to the public. See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86, 140 (E.D.N.Y. 2002), order confirmed (Oct. 15, 2002) (“It is not necessary that the misrepresentation be made directly to the party claiming to be defrauded. . . . Misrepresentations made to the public at large may give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations.” (citation omitted)); *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183, 193 (S.D. Ga. 1982) (“Even ‘where (the) representations are made to the public at large, or to a particular class of persons,’ as long as they are given ‘with the intention of influencing any member of the public or of the class to whom they may be communicated, any one injured through the proper reliance thereon may secure redress.’”). Other courts have also made similar holdings. See *Obenski v. Brooks*, 7 Pa. D. & C.3d 253, 260 (C.P. 1978) (holding that “misrepresentations intended for the general public alone constitute a proper basis for actionable fraud”).

<sup>63</sup> *King v. Whitmer*, 556 F. Supp. 3d 680, 688 (E.D. Mich. 2021).

Individuals may have a right (within certain bounds) to disseminate allegations of fraud unsupported by law or fact in the public sphere. But attorneys cannot exploit their privilege and access to the judicial process to do the same. And when an attorney has done so, sanctions are in order.<sup>64</sup>

So, while attorneys may not spread disinformation in court, people are free, with narrow exceptions,<sup>65</sup> to spread disinformation, regardless of the harm caused.

But disinformation exacts a heavy toll on society. For example, disinformation spread by the sugar industry has caused epidemics of obesity and diabetes.<sup>66</sup> Disinformation spread by the fossil fuel industry hid the causes and certainty of global warming, and covered up the fact that fossil fuel pollution is killing 8.7 million people per year.<sup>67</sup> The opioid industry's disinformation campaign has caused hundreds of thousands of overdose deaths.<sup>68</sup> Anti-vaccination disinformation spread by rightwing politicians and media outlets has resulted in hundreds of thousands of additional infections and deaths in the COVID-19 pandemic.<sup>69</sup> The problem of harmful disinformation is immense, and growing.<sup>70</sup> Social media, email, and other digital advances

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<sup>64</sup> *Id.*

<sup>65</sup> See discussion *supra* note 54.

<sup>66</sup> Gary Taubes & Cristin Kearns Couzens, *Big Sugar's Sweet Little Lies*, MOTHER JONES, <https://www.motherjones.com/environment/2012/10/sugar-industry-lies-campaign/> [<https://perma.cc/7AGM-SJTF>] (last visited Jan. 28, 2023).

<sup>67</sup> JOHN COOK ET AL., AMERICA MISLED: HOW THE FOSSIL FUEL INDUSTRY DELIBERATELY MISLED AMERICANS ABOUT CLIMATE CHANGE 3 (2019), <https://www.climatechangecommunication.org/america-misled/> [<https://perma.cc/X6UC-H5VK>]; Eric Roston, *Fossil Fuel Pollution Kills 8.7 Million a Year, Twice Previous Estimate*, BLOOMBERG (Feb. 9, 2021, 2:55 AM), <https://www.bloomberg.com/news/articles/2021-02-09/fossil-fuel-pollution-kills-millions-more-than-scientists-knew> [<https://perma.cc/GTP8-ECDA>].

<sup>68</sup> See generally Elaine Silvestrini, *Profiting From Pain*, DRUGWATCH (Sept. 24, 2021), <https://www.drugwatch.com/featured/opioid-crisis-big-pharma/> [<https://perma.cc/ZK8A-CHA4>].

<sup>69</sup> See Linda Qiu, *No, Covid-19 Vaccines Are Not Killing More People than the Virus Itself*, N.Y. TIMES (May 7, 2021, 5:55 PM), <https://www.nytimes.com/live/2020/2020-election-misinformation-distortions#no-covid-19-vaccines-are-not-killing-more-people-than-the-virus-itself> [<https://perma.cc/BKW4-7QR6>]; Maggie Astor, *No, Other People's Covid Vaccines Can't Disrupt Your Menstrual Cycle*, N.Y. TIMES (Apr. 29, 2021, 12:34 PM), <https://www.nytimes.com/2021/04/29/technology/covid-vaccine-period-conspiracy.html> [<https://perma.cc/QN4T-UG66>].

<sup>70</sup> Victoria Smith Ekstrand & Ashley Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 J. LEGIS. 81, 81 (2021) ("The problem of disinformation in online political advertising is growing.").

and technologies have allowed disinformation to spread faster than ever before.<sup>71</sup>

Disinformation cannot generally be regulated without infringing on First Amendment rights.<sup>72</sup> If Congress or a state passed a law curtailing disinformation in general, or any significant category within it, such a broad content-based regulation would not survive a First Amendment challenge under strict scrutiny.<sup>73</sup> One of the primary reasons for this is that disinformation, like terms such as fake news, propaganda, and misinformation, are vague and overbroad, and clearly encompass both protected and unprotected speech.<sup>74</sup>

Accordingly, discussing regulation of “disinformation,” or of any other such broad category of speech, is not pragmatic.<sup>75</sup> Not only would such an overbroad regulation fail to pass constitutional muster, but it would also run a grave risk of over-

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<sup>71</sup> See Wayne Unger, *How the Poor Data Privacy Regime Contributes to Misinformation Spread and Democratic Erosion*, 22 COLUM. SCI. & TECH. L. REV. 308, 309–10 (2021) (“While misinformation is not new, rapid and widespread dissemination of misinformation has only recently been made possible by technological developments that enable mass communication and persuasion never seen before.” (footnote omitted)).

<sup>72</sup> See, e.g., James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 345 (2018) (wherein the author argued that “the First Amendment bars any legal action based on ExxonMobil’s deceiving the public about the causes or the likely effects of climate change for the purpose of defeating climate legislation”); Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2633 (2019) (“Although fake news presents a number of threats to democracy, it is protected by the First Amendment.”). *But see generally* Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809 (2022) (noting that disinformation spread by the government may be regulable because government speech is not protected by the free speech clause of the First Amendment).

<sup>73</sup> See Weinstein, *supra* note 72, at 354; Manzi, *supra* note 72, at 2636; see also Fernando Nuñez, Note, *Disinformation Legislation and Freedom of Expression*, 10 U.C. IRVINE L. REV. 783, 789 (2020) (concluding that a regulation of disinformation would fail under strict scrutiny).

<sup>74</sup> See Dov Bachmann et al., *supra* note 10, at 15; see also Weinstein, *supra* note 72, at 346; Manzi, *supra* note 72, at 2625.

<sup>75</sup> See Pielemeier, *supra* note 10, at 919. Any regulation of disinformation would be content-based, and therefore required to be “narrowly tailored to promote a compelling Government interest,” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000), but given the fact the Court does not favor creating new First Amendment carve-outs, it is highly unlikely that a broad and vaguely-defined category of “disinformation” would pass strict scrutiny. See *id.*

censoring speech and inviting government overreach and abuse.<sup>76</sup> Other government attempts to regulate misinformation, disinformation, or fake news demonstrate the dangers this poses.<sup>77</sup> Here, my argument is far narrower; I argue that speech that qualifies as “fraud on the public,” as defined in the Article, is a narrow subset of disinformation that today is treated as protected speech but should, under longstanding principles and precedent,<sup>78</sup> be deemed unprotected fraudulent speech. This category is a subset of disinformation, but much of the speech that constitutes disinformation would not meet the elements of fraud on the public. Speech that qualifies as fraud on the public is not merely *false*—i.e., untrue—but *fraudulent* in that it is communicated for the purpose of gaining profit or advantage by deceit and causes harm as a result of people buying into the lie. In this way, fraud on the public is distinct from, and worse than, other kinds of disinformation.<sup>79</sup> This Article sets forth elements that must be met to qualify as fraud on the public.<sup>80</sup> This is a category of speech delineated by the elements set forth in Part II. It is not, however, a proposal to establish any particular tort or crime, such as any of the other long-established categories of fraudulent speech, like civil and criminal deceit, securities fraud, or false advertising.<sup>81</sup> Fraud on the public, defined in Part II, is

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<sup>76</sup> See Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1790–91 (1999) (noting that the Supreme Court “is more interested in protecting political speech than it is in giving lawmakers wide latitude to regulate or punish speech that may do some harm” in the context of regulating “misinformation and deceit” in the media).

<sup>77</sup> See, e.g., Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions Around the World*, POYNTER, <https://www.poynter.org/ifcn/anti-misinformation-actions/> [<https://perma.cc/XFW3-F3L4>] (last visited Jan. 28, 2023).

<sup>78</sup> See discussion *supra* note 62.

<sup>79</sup> Compare, for example, the spreading of provably false and misleading COVID-19 disinformation, which causes a great number of physical harms, see Zapan Barua et al., *Effects of Misinformation on COVID-19 Individual Responses and Recommendations for Resilience of Disastrous Consequences of Misinformation*, 8 PROGRESS IN DISASTER SCI. 2 (2020), with a candidate for local political office falsely claiming to have been awarded the Congressional Medal of Honor, see *United States v. Alvarez*, 567 U.S. 709, 713 (2012).

<sup>80</sup> See *infra* Part II.

<sup>81</sup> *Heyser v. Noble Roman's Inc.*, 933 N.E.2d 16, 19 (Ind. Ct. App. 2010) (“Actual fraud [under Indiana law] consists of five elements: 1) the fraud feisor must have made at least one representation of past or existing fact; 2) which was false; 3) which the fraud feisor knew to be false or made with reckless disregard as to its truth or falsity; 4) upon which the plaintiff reasonably relied; 5) and which harmed the plaintiff.”); see *United States v. Okun*, 453 F. App'x 364, 368 n.2 (4th Cir. 2011) (“The elements of mail fraud are: (1) the existence of a scheme to defraud and (2) the use of mails to perpetrate that scheme. The elements of wire fraud are: (1) the



carried out in the same manner as fraud on the individual, and the harm it causes to individuals, society, and the environment is at least as destructive as that resulting from fraud on the individual. Accordingly, fraud on the public, like other kinds of fraud, runs counter to the aims of the Free Speech provision.<sup>82</sup> It should not be protected speech. Continuing to treat it as protected speech will, in the future, result in the continued growth and spread of destructive disinformation, further damaging public health and the environment, poisoning political discourse, and generating further attacks on democracy.

Others have recognized this. Authors have recently explored ways to regulate climate change disinformation,<sup>83</sup> COVID-19 disinformation,<sup>84</sup> and “government propaganda.”<sup>85</sup> Indeed, lawmakers in some states have proposed bills to counteract some harmful disinformation. Washington Senate Bill 5843 “would

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existence of a scheme to defraud and (2) the use of wire communication in furtherance of that scheme.”); *Keodalah v. Allstate Ins. Co.*, 449 P.3d 1040, 1047 (Wash. 2019) (“To establish a [claim under Washington’s Consumer Protection Act], a plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) affects trade or commerce and (3) impacts the public interest, and (4) the plaintiff sustained damage to business or property that was (5) caused by the unfair or deceptive act or practice.”); *In re Gold Res. Corp. Sec. Litig.*, 776 F.3d 1103, 1108 (10th Cir. 2015) (“To properly state a claim for securities fraud, a plaintiff’s complaint must allege facts supporting the following: (1) the defendant made an untrue or misleading statement of material fact, or failed to state a material fact necessary to make statements not misleading; (2) the statement complained of was made in connection with the purchase or sale of securities; (3) the defendant acted with scienter, that is, with intent to defraud or recklessness; (4) the plaintiff relied on the misleading statements; and (5) the plaintiff suffered damages as a result of his reliance.”).

<sup>82</sup> *Alvarez*, 567 U.S. at 717; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

<sup>83</sup> See Weinstein, *supra* note 72, at 344; William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 *ECOLOGICAL L.Q.* 831, 851–53 (2012) (arguing that a concerted effort to deceive the public into not supporting climate legislation is arguably punishable as criminal fraud under various statutes and urging that those who perpetuated this fraud be prosecuted); see also James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 *ENV’T L. REP.* 11098, 11111 (2013) (urging the creation of a narrow federal civil cause of action for the fraudulent misrepresentation of climate science).

<sup>84</sup> Haupt & Parmet, *supra* note 72, at 136.

<sup>85</sup> Caroline M. Corbin, *The Unconstitutionality of Government Propaganda*, 81 *OHIO ST. L.J.* 815, 815, 817, 882 (2020) (arguing that “[g]overnment propaganda,” which the author defines as “the government’s deliberate dissemination of false claims on matters of public interest” should not be deemed protected speech under the First Amendment).

make it a gross misdemeanor for elected officials or candidates to lie about election results if those lies lead to violence.”<sup>86</sup>

Given the harm caused by recent disinformation campaigns,<sup>87</sup> as well as social science discoveries about our inability to distinguish truthful from false speech,<sup>88</sup> we must consider what value, if any, fraud on the public adds to the “marketplace of ideas.”<sup>89</sup> The assumption that truth prevails over lies in the public square has been widely criticized,<sup>90</sup> and for good reason.<sup>91</sup> Too often, false and misleading claims, spread for the purpose of deceiving, win out over truth. In fact, the harmful disinformation defined in Part II as “fraud on the public” is one of the greatest threats to the search for truth, a fundamental purpose of the Free Speech provision of the First Amendment.<sup>92</sup>

The Article proceeds as follows. Part II coins the term “fraud on the public,” and sets forth the elements to be met for a conduct to be deemed fraud on the public. Part II also discusses how politicians, the media, and corporations purposefully disseminate disinformation to mislead the public for profit in ways that may satisfy the elements for fraud on the public. They do this not only for financial profit, but for political advantage, to increase viewership, and to obtain other economic and noneconomic benefits. This Part also addresses some of the harms caused by fraud on the public, demonstrating the need to address this growing problem. Part III argues that fraud on the public should not be deemed protected speech under the First Amendment.

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<sup>86</sup> Joseph O’Sullivan, *Inslee, Washington Democrats Push Election Bills, as They Weigh Threats to Democracy*, SEATTLE TIMES (Jan. 17, 2022, 6:00 AM), <https://www.seattletimes.com/seattle-news/politics/inslee-washington-democrats-push-election-bills-as-they-weigh-threats-to-democracy/> [https://perma.cc/5SWT-Y7PM]. In Washington, a gross misdemeanor can carry “a fine of up to \$5,000 and confinement in county jail for up [to] 364 days.” *Id.*

<sup>87</sup> These include the false claims that the COVID-19 pandemic is a hoax perpetrated by the Democratic Party, that global warming is not real, that opioids are safe, and that a U.S. presidential election was stolen through widespread voter fraud. *See* discussion *supra* notes 35–37.

<sup>88</sup> *See, e.g.*, TIMOTHY R. LEVINE, DUPED: TRUTH-DEFAULT THEORY AND THE SOCIAL SCIENCE OF LYING AND DECEPTION 9–11 (2020).

<sup>89</sup> *See* discussion *infra* note 172.

<sup>90</sup> C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12 (1989) (noting that “the plausibility of the belief that the marketplace leads to truth, or even to the best or most desirable decision” has been undermined).

<sup>91</sup> *See infra* Section III.B.

<sup>92</sup> *See* ERWIN CHERMERINSKY, THE FIRST AMENDMENT 7–9 (2d ed. 2021); Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 381 n.12 (2017).

Precedent and policy favor categorizing fraud on the public as fraud, which is unprotected speech. Alternatively, if fraud on the public is deemed protected speech, it should enjoy less protection than other kinds of truthful or honest speech, and should be subject only to intermediate or rational basis scrutiny.

## II. DEFINING FRAUD ON THE PUBLIC

This Article argues that, as a general policy, we should not allow those with access to our eyes and ears to purposefully fill our heads with false and misleading information that profits the liar but causes significant harm to the public. Put another way, though false speech enjoys some First Amendment protection,<sup>93</sup> fraudulent speech enjoys none<sup>94</sup>; we should, therefore, endeavor to address harmful frauds wherever they arise, whether aimed at one person or at one hundred million. Of course, proposals to regulate speech must generally pertain to speech already recognized as unprotected, or must pass constitutional muster by not being vague or overbroad, and, if content-based, survive strict scrutiny.<sup>95</sup> The category of speech I define here is not a proposed regulation, but could be used by a court or a legislature to craft one. Conceptually, fraud on the public can be thought of as a narrow subset of disinformation. One's conduct and words constitute fraud on the public where they (1) purposefully disseminate a message to the public (2) that contains verifiably false or misleading information (3) with actual malice (4) to obtain profit, benefit, or advantage, or to intentionally mislead the public, (5) which results in, or likely will result in, substantial harm, and (6) such harm was reasonably foreseeable.<sup>96</sup> While this definition is novel, its elements reflect

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<sup>93</sup> *United States v. Alvarez*, 567 U.S. 709, 722 (2012).

<sup>94</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

<sup>95</sup> See CHEMERINSKY, *supra* note 92, at 13–64.

<sup>96</sup> This definition is tailored to conform to precedent, including that from the Supreme Court, *see Alvarez*, 567 U.S. at 723 (holding that “evidence that the speech was used to gain a material advantage” is a factor in favor of false speech being regulable under the First Amendment), and substantially mirrors the definitions of common law fraud, in the tort context, and wire fraud, in the criminal law context. *See, e.g.*, *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355, 1360–61 (1992) (listing the Illinois common law fraud elements); *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013) (listing the elements of wire fraud); *see also Pielemeier, supra* note 10, at 919 (discussing disinformation, a concept also incorporated into my definition of fraud on the public); Dean Jackson, *Issue Brief: Distinguishing Disinformation from Propaganda, Misinformation, and “Fake News”*, NAT'L ENDOWMENT FOR

widely accepted components of fraud, deceit, and fraudulent misrepresentation.<sup>97</sup> Below, I will first discuss each element briefly. Then, I will discuss recent examples of possible fraud on the public.

A. *The elements of fraud on the public*

*Element 1: purposefully disseminate a message to the public.* This element both (a) draws from common law deceit, by adding an intent element similar to that in fraud, and (b) distinguishes this doctrine from common law deceit because it requires the false or misleading information be communicated purposefully to the public at large, rather than targeted at any particular individual or small group. Conduct that would satisfy this element would include, for example, publishing an op-ed in a newspaper, saying something in a TV interview, displaying a message on a billboard, purposefully sending an email to a listserv with thousands of email recipients, or someone with a substantial social media following posting a message to their thousands of followers. It would not include sending a false or misleading message by email to a small number of recipients. It would not include an individual who has fifty Twitter followers posting a message to their Twitter account. It would not address the kinds of communications most people carry out normally. The kinds of false and misleading messages we are worried about when it comes to harmful disinformation are not those spread by individuals who are acting in their own individual capacity, unless they are public figures or officials, or any other kind of person on whom the public depends for truthful information. Rather, the problem is when those on whom the public depends for truthful information, those who speak to the public, use their platform to spread knowingly false and misleading messages in

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DEMOCRACY (Oct. 17, 2017), <https://www.ned.org/issue-brief-distinguishing-disinformation-from-propaganda-misinformation-and-fake-news/> [<https://perma.cc/SLL2-SQLT>]; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Online Disinformation: A European Approach*, EUR. COMM'N (Apr. 26, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0236&from=EN> [<https://perma.cc/U44F-PYQZ>]; *EU Code of Practice on Disinformation*, EUR. COMM'N (June 16, 2022), [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=54454](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454) [<https://perma.cc/4GFX-KBSW>]; Corbin, *supra* note 85, at 834–36.

<sup>97</sup> See, e.g., authorities cited *supra* note 96.

order to profit off of others buying into the false or misleading claims.

Thus, if Person A, who is not a public official and has no substantial fame or following, posts something on their social media account, and Person B, who is the governor of a state, re-shares the post, thereby disseminating it to millions of people, the dissemination of the message would satisfy the first element with regard to Person B, but not with regard to Person A.

*Element 2: that the message contain verifiably false or misleading information.* Disinformation misinforms rather than informs. This is its defining characteristic; it communicates an idea or claim that is untrue or misleading. This has long been incorporated into the definition of the largely analogous terms propaganda and disinformation, as well as the legal definition of common law fraud.<sup>98</sup> A court must be able to determine the message was false or misleading. Thus, an opinion, view, or belief, if genuinely held, would not satisfy this element. For example, if a movie reviewer publishes a review calling a movie “really good” when in fact the reviewer considered the movie “terrible,” this would not satisfy this element because it is a subjective opinion that cannot be verified. Thus, even if the reviewer made the claim in bad faith, expressing a view they did not hold, it could not serve as the basis of a claim for fraud on the public (also, a plaintiff in such a case would have difficulty satisfying other elements, such as harm). On the other hand, if the President claims that COVID-19 is “no more serious than the flu,” this assertion can be verified or falsified. It can be compared with the then-known scientific knowledge on that topic.<sup>99</sup> The

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<sup>98</sup> See, e.g., Corbin, *supra* note 85, at 830 (defining one element of propaganda being that “the statement must be a verifiably false or misleading statement of fact”). But see G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1068–69 (2020) (noting that propaganda must merely manipulate, which frequently arises when “the communication contains false information (offered as true) or omits germane, true information (without noting its absence),” and exists in “more subtle variations [that] include misleading implications carried by a communication in virtue of its source or its form”); *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355, 1360 (Ill. App. Ct. 1992) (stating the common law fraud elements in Illinois as “(1) a statement by defendant; (2) of a material nature as opposed to opinion; (3) that was untrue; (4) that was known or believed by the speaker to be untrue or made in culpable ignorance of its truth or falsity; (5) that was relied on by the plaintiff to his detriment; (6) made for the purpose of inducing reliance; and (7) such reliance led to the plaintiff’s injury.”).

<sup>99</sup> See generally Wes Henricksen, *Scientific Knowledge Fraud*, 97 OR. L. REV. 307, 329–50 (2019) (setting out a framework for how to determine if an assertion

question of whether the President knew or should have known the falsity of the assertion, or was reckless in ignoring the truthfulness or falsity of the statement, is addressed in element three.

*Element 3: that the false or misleading message be disseminated with actual malice.* To satisfy this third element, the false or misleading information must be spread knowingly or recklessly. This distinguishes disinformation from misinformation, which may be spread accidentally or unknowingly. Actual malice “should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.”<sup>100</sup> Rather, it means that the speaker made a statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>101</sup> The Supreme Court has explained that reckless disregard means “entertain[ing] serious doubts as to the truth of [the statement]”<sup>102</sup> or “purposeful avoidance of the truth.”<sup>103</sup> Actual malice, while perhaps an “unfortunate” phrase, given that it poses the risk of confusing jurors, has the advantage of there being well-developed case law interpreting and applying the phrase, particularly in claims for defamation,<sup>104</sup> “false light invasion of privacy,”<sup>105</sup> “intentional

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pertaining to a matter of scientific knowledge, such as the deadliness of COVID-19 versus the flu, is true or false for the purposes of fraud).

<sup>100</sup> *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991).

<sup>101</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *see also* Corbin, *supra* note 85, at 834–35 (noting that actual malice “means that the speaker must have intended to lie or acted with reckless disregard as to whether their statement was true or not” (citing *Sullivan*, 376 U.S. at 280)).

<sup>102</sup> *Masson*, 501 U.S. at 510 (“[T]he plaintiff must demonstrate that the author ‘in fact entertained serious doubts as to the truth of his publication . . . .’”) (citation omitted); *see also* *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964) (“[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.”).

<sup>103</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (“Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.” (citation omitted)); *see also id.* (“[T]he newspaper’s inaction”—such as failing to listen to available tapes and interview a known key witness—“was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity” and amounted to actual malice).

<sup>104</sup> Corbin, *supra* note 85, at 835; *see also Sullivan*, 376 U.S. at 279–80 (establishing the rule that a public official cannot “recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”); *Masson*, 501 U.S. at 511.

<sup>105</sup> Corbin, *supra* note 85, at 835; *see also Time, Inc. v. Hill*, 385 U.S. 374, 378, 387–88 (1967) (involving a Time Magazine news story that misrepresented a family’s

infliction of emotional distress,”<sup>106</sup> and regulation of false campaign advertising.<sup>107</sup> In short, actual malice means that the speaker intended to lie or acted with reckless disregard as to whether the statement they disseminated to the public was true or not.

*Element 4: that the message be disseminated to obtain profit, benefit, or advantage, or to intentionally mislead the public.* The disinformation we are bombarded with, causing widespread harm, is disseminated with some end goal in mind. The end goal may vary from speaker to speaker. The two most common end goals are likely economic profit and political advantage.<sup>108</sup> These two aims, of course, overlap significantly with one another. They should, therefore, not be interpreted as being mutually exclusive. Nor should they be deemed exhaustive. Any motivation to personally benefit from the spread of false or misleading information to the public, or to knowingly and purposefully mislead the public, should fulfill this element. Thus, where Trump’s lawyer, Sidney Powell, spread the false claim on numerous media outlets that the 2020 presidential election was “stolen” by the Democrats, that Joe Biden was not the legitimate President-Elect, and that Dominion voting machines had been hacked and millions of ballots switched from Trump to Biden, even if there is not direct pecuniary benefit to Powell herself, the false claims were certainly spread for personal political gain, either by attempting to swing the results to her boss, Trump, or

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experience as hostages); Nat Stern, *The Force of a Legal Concept: The Steady Extension of the Actual Malice Standard*, 12 FIRST AMEND. L. REV. 449, 456 (2014) [hereinafter Stern, *The Force*] (“[T]he Court ruled that recovery of damages for ‘false reports of matters of public interest’ required proof that the defendant published the report with actual malice.”).

<sup>106</sup> Corbin, *supra* note 85, at 835; see also *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48, 56 (1988) (involving *Hustler Magazine’s* parody ad of televangelist Jerry Falwell); see also discussion Stern, *The Force*, *supra* note 105, at 456 (“[T]he Court ruled that a public figure like Falwell could recover for IIED in such circumstances only by demonstrating that the defendant had made a false statement of fact about that figure with actual malice.” (footnote omitted)).

<sup>107</sup> Corbin, *supra* note 85, at 835 (citing Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 902 (2008) (“The Court, in *Brown v. Hartlage*, apparently imported the actual malice standard to state regulation of false campaign advertising.”).

<sup>108</sup> See Maxime Lepoutre, *Can “More Speech” Counter Ignorant Speech?*, 16 J. ETHICS & SOC. PHIL. 155, 155 (2019) (discussing political misinformation); Wes Henricksen, *Deceive, Profit, Repeat: Public Deception Schemes to Conceal Product Dangers*, 42 CARDOZO L. REV. 2395, 2414–23 (2021) (discussing corporate misinformation).

to further build support for the idea the election was stolen, thereby helping her political party by painting the opponents as corrupt and evil. However, even if Powell was deemed to be seeking neither economic nor political gain, she was certainly purposefully misleading the public, as was later revealed in her own Motion to Dismiss Dominion's defamation claim against her.<sup>109</sup>

*Element 5: that the dissemination of the message results in, or likely will result in, substantial harm.* This is a but-for causation requirement, ensuring that the fraud on the public only applies where there was actual and substantial damage. This is necessary so that the conduct covered here is the kind of conduct we are most worried about and need to protect ourselves against. In short, to satisfy this element, the disinformation must cause substantial harm to persons, property, or the environment; if the false or misleading information causes no harm, or the harm is de minimis, it should enjoy greater First Amendment protection and there is, correspondingly, less reason to regulate it under the First Amendment. Of course, the harm need not necessarily be economic. But the precise contours of the substantial harm requirement will, as with any legal doctrine, be further defined and applied once the doctrine is adopted.

*Element 6: that the harm was reasonably foreseeable.* This is a proximate causation requirement, which ensures that even if the disinformation is a but-for cause of the resulting harm, liability or fault for the speaker should only be imposed if the harm was foreseeable at the time of dissemination.

*B. Different ways fraud on the public may be carried out*

The schemes that arguably satisfy the elements above involve a broad array of ways people, organizations, and governments attempt to defraud the public. I briefly discuss four major categories of such conduct. The first involves schemes to deceive the public for economic gain. The second involves schemes to deceive the public for political gain. The third involves schemes to deceive the public to evade justice, sometimes deployed by police departments to cover up crimes committed by police officers. The fourth involves falsifying history, which has been done, for instance, in school curricula. In

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<sup>109</sup> See discussion *supra* note 39.



any scheme, the conduct must satisfy all six elements to be deemed fraud on the public.

### 1. Fraud on the public for profit

A fraud on the public for profit is where a person or entity spreads disinformation for the purpose of making a profit. There are many known and conceivable different ways a scheme to defraud the public for profit can be structured. However, there are at least two well-documented categories of schemes to defraud the public for profit, which are mentioned here. One encompasses those who spread harmful disinformation to conceal dangers posed by a product. These are termed public deception schemes to conceal product dangers, or PDCPD Schemes, in prior scholarship.<sup>110</sup>

PDCPD Schemes include the opioid industry's misleading of the public to hide the dangers and addictiveness of opioid painkillers, the fossil fuel industry's misleading of the public to hide the existence and causes of global warming, and the sugar industry's misleading of the public to hide the health dangers of sugar and to redirect the public's attention to fat.<sup>111</sup> There are many others. But these three provide representative examples.

The other well-documented category of fraud on the public for profit consists of those who spread disinformation to increase viewership or readership. These schemes could be called public deception schemes to capture audience, or PDCA Schemes. These include Rush Limbaugh's claim that Hurricane Irma was a hoax and telling radio listeners not to heed warnings just hours before fleeing his Florida home to escape its path,<sup>112</sup> Fox News

<sup>110</sup> Henricksen, *supra* note 108, at 2401.

<sup>111</sup> *Id.* at 2396–401.

<sup>112</sup> In 2017, as Hurricane Irma approached Florida, Rush Limbaugh, a rightwing radio host based in Palm Beach, Florida, told his 13 million listeners that it was all a liberal hoax. The media coverage of the storm, he added, was part of the progressive agenda:

So there is a desire to advance this climate change agenda, and hurricanes are one of the fastest and best ways to do it. You can accomplish a lot just by creating fear and panic. You don't need a hurricane to hit anywhere. All you need is to create the fear and panic accompanied by talk that climate change is causing hurricanes to become more frequent and bigger and more dangerous, and you create the panic, and it's mission accomplished, agenda advanced.

Well, the TV stations begin reporting this, and the panic begins to increase. And then people end up going to various stores to stock up on water and whatever they might need for home repairs and batteries, and all this that they're advised to get, and a vicious circle is created. You have these

pumping out reporting that the 2020 presidential election was stolen through massive fraud,<sup>113</sup> Breitbart claiming Hillary Clinton's campaign was funded by Saudi Arabia,<sup>114</sup> CNN reporting that Trump aide Anthony Scaramucci was involved in a Russian hedge fund under Senate investigation,<sup>115</sup> Slate claiming that Trump created a secret internet server to covertly communicate with a Russian bank,<sup>116</sup> and rightwing radio host Hal Turner claiming that people with the COVID-19 vaccine "Are Being TRACKED in Real Time via 5G Cellular, and all that data can be hacked-into to track YOU."<sup>117</sup>

Any other scheme to spread disinformation to the public to profit from it might also fit under this broad category: fraud on the public for profit.

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various retail outlets who spend a lot of advertising dollars with the local media.

Angie Drobnic Holan, *In Context: What Rush Limbaugh Said About Hurricane Irma Before Evacuation*, POLITIFACT (Sept. 10, 2017), <https://www.politifact.com/article/2017/sep/10/context-what-rush-limbaugh-said-about-hurricane-ir/> [https://perma.cc/Z7A4-5HXT]. Shortly after telling his listeners not to heed the warnings, Limbaugh fled from his home and radio studio in Palm Beach to escape from the storm. See also Mike Snider, *Rush Limbaugh, Ann Coulter Facing Blowback on Hurricane Irma Comments*, USA TODAY (Sept. 13, 2017, 9:21 AM), <https://www.usatoday.com/story/money/2017/09/12/rush-limbaugh-ann-coulter-facing-blowback-hurricane-irma-comments/654353001/> [https://perma.cc/U2N3-YGP6].

<sup>113</sup> Jonah E. Bromwich, *Smartmatic Says Disinformation on Fox News About the Election Was 'No Accident.'*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/04/12/business/media/smartmatic-fox-news-lawsuit.html> [https://perma.cc/CH4Y-SGNJ].

<sup>114</sup> Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php> [https://perma.cc/ZK92-784F]; see also Tiffany Hsu, *Conservative News Sites Fuel Voter Fraud Misinformation*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/10/25/business/media/voter-fraud-misinformation.html> [https://perma.cc/BH4E-7X57].

<sup>115</sup> Paul Farhi, *The Story Behind a Retracted CNN Report on the Trump Campaign and Russia*, WASH. POST (Aug. 17, 2017), [https://www.washingtonpost.com/lifestyle/style/the-story-behind-a-retracted-cnn-report-on-the-trump-campaign-and-russia/2017/08/17/af03cd60-82d6-11e7-ab27-1a21a8e006ab\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-story-behind-a-retracted-cnn-report-on-the-trump-campaign-and-russia/2017/08/17/af03cd60-82d6-11e7-ab27-1a21a8e006ab_story.html) [https://perma.cc/ZS7J-DSWP].

<sup>116</sup> Rowan Scarborough, *Hillary Clinton Operatives Pushed Now-Debunked Trump-Alfa Server Conspiracy, Testimony Reveals*, WASH. TIMES (Jan. 23, 2019), [https://m.washingtontimes.com/news/2019/jan/23/hillary-clinton-operatives-pushed-now-debunked-tru/?utm\\_source=onesignal&utm\\_campaign=pushnotify&utm\\_medium=push](https://m.washingtontimes.com/news/2019/jan/23/hillary-clinton-operatives-pushed-now-debunked-tru/?utm_source=onesignal&utm_campaign=pushnotify&utm_medium=push) [https://perma.cc/4CYZ-8YPD].

<sup>117</sup> Andy Nguyen, *No, a Video Doesn't Prove the COVID-19 Vaccines Allow People to Be Tracked Through a 5G Network*, POLITIFACT (May 28, 2021), <https://www.politifact.com/factchecks/2021/may/28/hal-turner-radio-show/no-video-doesnt-prove-covid-19-vaccines-allow-peop/> [https://perma.cc/G8BZ-XWDM].

## 2. Fraud on the public for political gain

Often, when people think of someone lying to the public for personal gain, they think of politicians. A fraud on the public for political gain is where a person or entity disseminates disinformation for the purpose of obtaining political advantage from the public believing or buying into the false message.<sup>118</sup> This happens frequently. The political advantage could be winning an election, gaining support for a particular policy or agenda, or increasing support for a political party, platform, or candidate more broadly. Examples include Donald Trump and his allies claiming the 2020 presidential election was stolen through massive fraud and that Joe Biden was not the legitimate President-Elect;<sup>119</sup> the Republican chair for Bexar County, Texas,

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<sup>118</sup> Critics of the idea of regulating political speech raise at least two objections. The first is the political question doctrine. See Elizabeth E. Beske, *Political Question Disconnects*, 67 AM. U. L. REV. F. 35, 36–39 (2018) (explaining the origin and parameters of the doctrine). Many, however, question the doctrine’s very existence. See, e.g., Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005) (concluding that numerous scholars have concluded that the political question doctrine is “in serious decline, if not fully expired”); Beske, *supra*, at 39 (noting that the “vacillating fortunes of the political question doctrine have led some commentators to declare the doctrine dead”). Even if the doctrine exists, however, it does not necessarily limit regulating political speech in any way inconsistent with my fraud on the public definition. Indeed, “[t]he application of the doctrine depends not at all on whether an issue is political—few statutory and constitutional issues are not at least in some sense political—but rather on whether an issue is committed to another branch of government and therefore outside the judiciary’s authority to address.” *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 253 (Tex. 2018). As noted by the Supreme Court, “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 210 (1962). It is beyond the scope of this Article, and I will leave it for others to explore. The second objection is the idea that prohibiting false and misleading political speech, where such speech satisfies the elements of fraud on the public, might effectively include virtually all political speech. This is an interesting point. For if virtually all political speech amounts to fraud on the public, it is because such speech is permitted and, therefore, required to win elections. If a truthful candidate confronts one who peddles deceit, the outcome is easy to predict. This is an argument for regulating fraud on the public, not *against* it.

<sup>119</sup> Hope Yen et al., *AP Fact Check: Trump’s Claims of Vote Rigging Are All Wrong*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5> [<https://perma.cc/V5U9-4JF7>]; Jane C. Timm, *Sidney Powell’s Legal Defense: ‘Reasonable People’ Wouldn’t Believe Her Election Fraud Claims*, NBC NEWS (Mar. 23, 2021, 11:23 AM), <https://www.nbcnews.com/politics/donald-trump/sidney-powell-s-legal-defense-reasonable-people-wouldn-t-believe-n1261809> [<https://perma.cc/9JZN-874Y>]; see also ALIASGHAR ABBASI & ARMAN DERAKHTI, AN EXPLORATORY STUDY ON DISINFORMATION AND FAKE NEWS ASSOCIATED WITH THE U.S. 2020 PRESIDENTIAL ELECTION 2 (2020), <https://www.researchgate.net/publication/>

telling an audience and TV viewers that the COVID-19 pandemic was a Democratic hoax and imploring everyone to take their protective masks off;<sup>120</sup> Senator Marco Rubio claiming that President Barack Obama wants to “take away our guns”;<sup>121</sup> President George W. Bush and his administration claiming that Iraq possessed weapons of mass destruction as one of the pretexts for the American invasion of Iraq;<sup>122</sup> and Joe Biden claiming in September 2020, “If the president [Trump] had done his job, had done his job from the beginning, all the people would still be alive . . . All the people. I’m not making this up. Just look at the data. Look at the data.”<sup>123</sup> Of course, the reasons leaders defraud the public for political gain are nearly infinite, from enabling one of history’s worst genocides<sup>124</sup> to invading neighboring countries.<sup>125</sup> The fact the end goal is not pecuniary

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347944044\_An\_Exploratory\_Study\_on\_Disinformation\_and\_Fake\_News\_Associated\_with\_the\_US\_2020\_Presidential\_Election [https://perma.cc/34 FN-DETU].

<sup>120</sup> Sanford Nowlin, *At Rally, Bexar County Republican Chair Cynthia Brehm Claims Coronavirus Is a Democratic Hoax*, SAN ANTONIO CURRENT (May 23, 2020, 7:55 AM), <https://www.sacurrent.com/news/at-rally-bexar-county-republican-chair-cynthia-brehm-claims-coronavirus-is-democratic-hoax-23690141> [https://perma.cc/4R 52-85PZ]; *see also* Timothy Burke (@bubbaprog), TWITTER (May 22, 2020, 5:00 PM), <https://twitter.com/bubbaprog/status/1263937751872868353> [https://perma.cc/7HE9-YL9T] (“Absolutely bizarre. The Bexar County GOP chair concludes this rally by stating that the coronavirus is a hoax perpetuated by Democrats, tells people to take off their masks, and then everyone hugs each other.”). The attached video to the tweet shows the chairperson saying, “Why is this happening today? And I’ll tell you why. All of this has been promulgated by the Democrats to undo all the good that President Trump has done for our country, and they are worried. So, take off your mask. Exercise your constitutional rights. Stand up, speak up, and vote Republican.” *Id.*

<sup>121</sup> Michelle Y. Hee Lee, *Marco Rubio’s Claim That Obama Wants to ‘Take Away our Guns’*, WASH. POST (Jan. 7, 2016, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/01/07/marco-rubios-claim-that-obama-wants-to-take-away-our-guns/> [https://perma.cc/RZ22-DDLW].

<sup>122</sup> Dylan Matthews, *No, Really, George W. Bush Lied About WMDs*, VOX (July 9, 2016, 10:00 AM), <https://www.vox.com/2016/7/9/12123022/george-w-bush-lies-iraq-war> [https://perma.cc/F4DD-SUJA].

<sup>123</sup> Bill McCarthy, *Joe Biden Wrongly Claims Trump Could’ve Prevented Every COVID-19 Death*, POLITIFACT (Sept. 18, 2020), <https://www.politifact.com/factchecks/2020/sep/18/joe-biden/joe-biden-wrongly-claims-trump-couldve-prevented-e/> [https://perma.cc/J27M-5YPC].

<sup>124</sup> *See* TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 199, 201–02 (2010) (when discussing the ways that Germany deceived German, Eastern European, and Soviet Jews to make themselves available to be massacred, the author noted that “[d]isinformation was the key to the entire operation”).

<sup>125</sup> *See* Julian E. Barnes, *U.S. Exposes What It Says Is Russian Effort to Fabricate Pretext for Invasion*, N.Y. TIMES (Feb. 3, 2022), <https://www.nytimes.com/2022/02/03/us/politics/russia-ukraine-invasion-pretext.html> [https://perma.cc/XF2U-

does not make these frauds any less dangerous. Nevertheless, whether any such scheme should be regulable depends on whether it qualifies as fraud under my, or any other, elements.

### 3. Fraud on the public to inhibit justice

Another form of fraud on the public we see frequently consists of the spreading of disinformation to cast a false light on, to cover up, or to otherwise influence how a court would rule on a criminal or tortious act. These are frauds on the public to inhibit justice. Some of the most well-known involve police departments and spokespersons disseminating false information about actions by police officers who injured or killed civilians.<sup>126</sup> Examples include the Minneapolis police department releasing a statement claiming George Floyd had “physically resisted officers” and that he had died in a medical emergency, when in fact he was murdered by Police Officer Derek Chauvin,<sup>127</sup> and the Tacoma Police Department releasing a statement claiming that Manuel Ellis, who died while being arrested, had attacked police officers and that no officer placed a knee on his head or neck, statements which directly contradict three witnesses who saw the encounter.<sup>128</sup> In fact, in the case of Mr. Ellis, it has now come to light that evidence shows a police officer put a knee on his neck until Ellis died of asphyxiation, and Ellis’s last words were, “I can’t breathe, sir!”<sup>129</sup>

Additionally, statements by leaders that interfere with justice could also fall into this category.<sup>130</sup> Of course, the

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AYP6] (exposing a plot by Russian President Vladimir Putin to create a fake video of Ukraine attacking Russian soldiers to justify an invasion of Ukraine).

<sup>126</sup> Bill McCarthy, *What the First Police Statement About George Floyd Got Wrong*, POLITIFACT (Apr. 22, 2021), <https://www.politifact.com/article/2021/apr/22/what-first-police-statement-about-george-floyd-got/> [https://perma.cc/R4RT-838H].

<sup>127</sup> *Id.*

<sup>128</sup> *Tacoma Police Charged with Murder in Case Where Black Man Said He Couldn’t Breathe*, NPR (May 27, 2021, 3:11 PM), <https://www.npr.org/2021/05/27/1000968917/tacoma-police-murder-manuel-ellis> [https://perma.cc/5P24-LKUS].

<sup>129</sup> *Id.*

<sup>130</sup> For example, several statements to the public by Donald Trump while he ran for or served as President could conceivably, if all elements were met, be schemes to defraud the public to influence justice. These include instances where Trump: (1) praised Navy SEAL Edward Gallagher who was on trial for war crimes, of which Gallagher was later convicted and then pardoned by Trump, see George Petras, *Timeline: How Trump Intervened in the Navy SEAL Eddie Gallagher’s War Crimes Case*, USA TODAY (Dec. 15, 2019, 9:52 PM),

determinization of whether any particular conduct amounts to fraud on the public would ultimately depend on all six elements being met.

#### 4. Fraud on the public to falsify history

For most of the twentieth century, public school children throughout the American South were taught the Civil War had virtually nothing to do with slavery.<sup>131</sup> Indeed, students learned in school that slavery barely existed in the South, that slavery was really not all that bad, that, under slavery, Blacks “were the happiest set of people on the face of the globe—free from care or thought of food, clothes, home, or religious privileges,” and that whites were the superior race.<sup>132</sup> The entire curriculum covering American history was sanitized to glorify Southern white culture and slaveholding, and conflated white indentured servitude with the African slave trade.<sup>133</sup>

These demonstrably false assertions grew out of a decades-long effort by Southerners to rewrite history following the Civil War.<sup>134</sup> This has been deemed the “Cult of the Lost Cause,” which “had its roots in the Southern search for justification and

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depth/news/politics/2019/11/27/timeline-gallahers-war-crimes-trump-intervention/4305986002/ [https://perma.cc/547G-DLWK]; (2) pressured the military to seek retribution against an Army officer, Lt. Col. Alexander Vindman, who told the truth under oath about Trump, see Leo Shane III, *Trump Suggests Army Should Punish Officer Who Testified in Impeachment Inquiry*, MILITARYTIMES (Feb. 11, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/02/11/trump-suggests-army-should-punish-officer-who-testified-in-impeachment-inquiry/> [https://perma.cc/G48D-NPR5]; Kyle Cheney, *Impeachment Witnesses Ousted Amid Fears of Trump Revenge Campaign*, POLITICO (Feb. 7, 2020, 9:22 PM), <https://www.politico.com/news/2020/02/07/donald-trump-pressure-impeachment-witness-alexander-vindman-111997> [https://perma.cc/WV45-46AY]; and (3) bullied U.S. District Judge Gonzalo Curiel, who ruled against Trump in a fraud case involving Trump University, by calling the judge “Mexican” and saying, “They ought to look into Judge Curiel.” Scott Lemieux, *Donald Trump’s Judge-Bashing Crosses a Line*, GUARDIAN (June 2, 2016, 2:04 PM), <https://www.theguardian.com/commentisfree/2016/jun/02/donald-trump-bully-race-bait-judge-gonzalo-curiel-trump-university> [https://perma.cc/SY2U-JHDW].

<sup>131</sup> Greg Huffman, *Twisted Sources: How Confederate Propaganda Ended Up in the South’s Schoolbooks*, FACING S. (Apr. 10, 2019), <https://www.facingsouth.org/2019/04/twisted-sources-how-confederate-propaganda-ended-souths-schoolbooks> [https://perma.cc/JW6T-VC6S].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Mitch Landrieu, *How I Learned About the “Cult of the Lost Cause”*, SMITHSONIAN MAG. (Mar. 12, 2018), <https://www.smithsonianmag.com/history/how-i-learned-about-cult-lost-cause-180968426/> [https://perma.cc/Y45N-D5G3] (referencing the language provided on applications to the National Register of Historic Places).

the need to find a substitute for victory in the Civil War.”<sup>135</sup> As one author observed:

In attempting to deal with defeat, Southerners created an image of the war as a great heroic epic. A major theme of the Cult of the Lost Cause was the clash of two civilizations, one inferior to the other. The North, “invigorated by constant struggle with nature, had become materialistic, grasping for wealth and power.” The South had a “more generous climate” which had led to a finer society based upon “veracity and honor in man, chastity and fidelity in women.” Like tragic heroes, Southerners had waged a noble but doomed struggle to preserve their superior civilization. There was an element of chivalry in the way the South had fought, achieving noteworthy victories against staggering odds. This was the “Lost Cause” as the late nineteenth century saw it, and a whole generation of Southerners set about glorifying and celebrating it.<sup>136</sup>

Although the Lost Cause was glorified in a number of ways, including by erecting thousands of statues and other monuments to Confederate heroes and to the Lost Cause, one of the most pernicious ways this was accomplished was by enshrining false narratives in textbooks used throughout the American South until the late twentieth century.<sup>137</sup> These were called Lost Cause textbooks.<sup>138</sup>

It is difficult to know what harm the spreading of this falsified version of history might have caused or are causing today. It is clear, however, that it has had a radical effect on Americans’ understanding (or misunderstanding) of race and history.<sup>139</sup> For instance, in one Pew Research Center poll taken in 2011, it was found that 48% of Americans thought the Civil War “was mainly about states’ rights”—including 60% of those under age 30—while only 38% thought it was primarily about

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; see also Jessica Owley et al., *Private Confederate Monuments*, 25 LEWIS & CLARK L. REV. 253, 259 (2021).

<sup>137</sup> Huffman, *supra* note 131.

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., Rex Springston, *Fighting Myths, Misconceptions and Misunderstandings About Race, Slavery and the Civil War*, VA. MERCURY (May 23, 2019, 7:55 PM), <https://www.virginiamercury.com/2019/05/23/fighting-myths-misconceptions-and-misunderstandings-about-race-slavery-and-the-civil-war/> [https://perma.cc/Y45N-D5G3] (debunking misunderstandings some Americans have bought into as a result of the Lost Cause myth).

slavery.<sup>140</sup> These opinions do not square with reality—the Confederate states' and leaders' own words show slavery was the central issue of contention between the Southern and Northern states, and the motivating cause for succession and war<sup>141</sup>— but the poll results are understandable given that Southern students were fed Lost Cause propaganda for generations.

This was just one of many instances where those motivated to erase or rewrite history have purposefully spread lies about the past in order to benefit themselves in one way or another. Falsifying history, of course, overlaps with other kinds of fraud on the public, such as “for profit” and “for political gain.” For instance, if an oil company attempted to mislead the public into believing that scientists were “divided” on the global warming question in the 1990s,<sup>142</sup> this would be both an attempt to defraud the public “for profit” and “to falsify history.” If a politician spread the same climate science doubt as part of a political campaign, then it would be both an attempt to defraud the public “for political gain” and “to falsify history.”

It is important to keep in mind, however, that the only way any of these examples would qualify as fraud on the public under my definition would be if all six elements are satisfied.<sup>143</sup> The wrongdoer must have purposefully or recklessly deceived the public and caused actual, foreseeable harm.

### III. WHY FRAUD ON THE PUBLIC SHOULD BE DEEMED UNPROTECTED FRAUDULENT SPEECH UNDER THE FIRST AMENDMENT

On rare occasions, those who defraud the public have been held criminally liable, such as the tobacco industry defendants in *United States v. Philip Morris USA Inc.*,<sup>144</sup> or agreed to pay civil

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<sup>140</sup> Russell Heimlich, *What Caused the Civil War?*, PEW RSCH. CTR. (May 18, 2011), <https://www.pewresearch.org/fact-tank/2011/05/18/what-caused-the-civil-war/> [<https://perma.cc/349W-KASV>].

<sup>141</sup> See, e.g., Ta-Nehisi Coates, *What This Cruel War Was Over*, THE ATLANTIC (June 22, 2015), <https://www.theatlantic.com/politics/archive/2015/06/what-this-cruel-war-was-over/396482/> [<https://perma.cc/5YNN-HK2R>] (quoting the words of Confederate leaders and Confederate states' declaration of secession).

<sup>142</sup> See Tucker, *supra* note 83, at 844 (“[B]y the early 1990s a clear consensus was emerging among climate scientists that human-caused global warming was underway and posed a threat to humankind.”).

<sup>143</sup> See *supra* Section II.A.

<sup>144</sup> See generally *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 919, 937–38 (D.D.C. 2006) (holding Defendants criminally liable after engaging in and executing, and continuing to engage in and execute, a massive 50-year scheme



penalties, such as Purdue Pharma.<sup>145</sup> On other occasions, civil and criminal liability for those who defrauded the public has been at least considered, as with the fossil fuel industry.<sup>146</sup> But these are exceptions. Far more often, those who defraud the public outside narrowly defined parameters—e.g., securities fraud—face no recourse. Why? In short, because whether one can be held liable for defrauding the public presents a complex and difficult First Amendment question.<sup>147</sup> Although the First Amendment does not protect fraudulent speech, the kinds of speech deemed to fit within the fraud category are normally confined to long-established civil and criminal fraud doctrines, such as common law deceit, mail fraud, securities fraud, and false advertising.<sup>148</sup>

#### A. *United States v. Alvarez*

The Supreme Court’s most recent guidance on the question of fraud and the First Amendment comes from *United States v. Alvarez*.<sup>149</sup> There, Xavier Alvarez, a candidate in the election for the Water District Board in California, claimed in a public hearing to be a combat veteran, to have been wounded many times, and to have received the Congressional Medal of Honor.<sup>150</sup>

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to defraud the public, including consumers of cigarettes, in violation of RICO), *affd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), *order clarified*, 778 F. Supp. 2d 8 (D.D.C. 2011).

<sup>145</sup> Jan Hoffman et al., *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> [<https://perma.cc/G55X-X42A>] (Purdue Pharma “agreed to pay \$225 million in civil penalties”).

<sup>146</sup> See, e.g., Tucker, *supra* note 83, at 853 (arguing that a concerted effort to deceive the public into not supporting climate legislation is arguably punishable as criminal fraud under various statutes and urging that those who perpetuated this fraud be prosecuted); see also Parker-Flynn, *supra* note 83, at 11099 (urging the creation of a narrow federal civil cause of action for the fraudulent misrepresentation of climate science); Weinstein, *supra* note 72, at 344 (“[C]ommentators have urged that the perpetrators of the alleged disinformation campaign be criminally prosecuted or be held civilly liable for deceiving the public about climate change [and] the United States Department of Justice has asked the Federal Bureau of Investigation to consider whether ExxonMobil should be prosecuted for violating the Racketeer Influence and Corrupt Organizations Act.” (footnote omitted)).

<sup>147</sup> See, e.g., Weinstein, *supra* note 72, at 365 (“[W]hether any fraud liability can, consistent with the First Amendment, be imposed on ExxonMobil based on their alleged disinformation campaign presents both an interesting and difficult First Amendment issue.”).

<sup>148</sup> See discussion, *supra* note 81.

<sup>149</sup> See generally *United States v. Alvarez*, 567 U.S. 709 (2012).

<sup>150</sup> *Id.* at 714.

None of the claims were true.<sup>151</sup> Alvarez was convicted of violating the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals, and provided an enhanced penalty if the Congressional Medal of Honor is involved.<sup>152</sup> He appealed his conviction, and the U.S. Court of Appeals for the Ninth Circuit reversed.<sup>153</sup> The Supreme Court granted certiorari.<sup>154</sup> In his plurality opinion, Justice Kennedy stated “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”<sup>155</sup>

Kennedy’s plurality opinion, as far as it appears to impose some kind of material gain requirement on content-based regulable fraudulent speech, is difficult to square with longstanding jurisprudence on this point. Indeed, fraud itself imposes no material gain requirement.<sup>156</sup> Nor did it impose such a requirement at the time of the passage of the First Amendment.<sup>157</sup> Fraud has, since the first case that established the tort in 1789 in the case of *Pasley v. Freeman*, never possessed any requirement that the fraudulent conduct was used to gain a material advantage.<sup>158</sup> The defendant in that case, for instance, gained no material advantage by way of the deceit.<sup>159</sup> Kennedy acknowledged fraud as one of the “historic and traditional categories [of expression] long familiar to the bar” for which

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 715.

<sup>153</sup> *United States v. Alvarez*, 617 F.3d 1198, 1218 (9th Cir. 2011).

<sup>154</sup> *Alvarez*, 567 U.S. at 714.

<sup>155</sup> *Id.* at 723 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“[N]oting that fraudulent speech generally falls outside the protections of the First Amendment.”)).

<sup>156</sup> *See, e.g., Ardis v. Cox*, 431 S.E.2d 267, 269 (S.C. Ct. App. 1993) (listing South Carolina’s fraud elements, with no material gain requirement: “In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury.”); *Garcia v. Vera*, 342 S.W.3d 721, 725 (Tex. App. 2011) (listing Texas’s fraud elements, with no material gain requirement: “The elements of fraud are (1) a material false representation, (2) that was made with knowledge or recklessness as to its falsity, (3) with the intent to induce reliance, and (4) that the other party ‘actually and justifiably relied upon,’ causing him injury.”).

<sup>157</sup> *See Pasley v. Freeman* (1789) 100 Eng. Rep. 450, 450 (KB).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 455, 3 Term. Rep. at 61.

content-based restrictions on speech have been permitted.<sup>160</sup> Thus, when it comes to the historic and traditional category of content-based regulable speech called fraud, Kennedy’s requirement that the fraud be “used to gain a material advantage” must be construed narrowly to apply only to the law in question in that case, the Stolen Valor Act.<sup>161</sup>

Justice Breyer’s concurring opinion offers a different basis for striking down the Stolen Valor Act.<sup>162</sup> After conceding “that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful,” Justice Breyer states that those prohibitions, however,

tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.<sup>163</sup>

By way of example, Breyer states, “[f]raud statutes, for example, typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.”<sup>164</sup> The key word here is “typically.” For example, the Martin Act—New York’s blue-sky law that imposes liability for securities fraud—does not require actual or justifiable reliance, damages, or even scienter or knowledge of the falsity.<sup>165</sup>

Breyer’s overarching point, however, pertains not to any particular requirement of any particular statute or common law doctrine; rather, his focus was on the fact that “few statutes, if any, simply prohibit without limitation the telling of a lie,” but rather they typically require “proof of injury” to “narrow the statute to a subset of lies where specific harm is more likely to

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<sup>160</sup> *Alvarez*, 567 U.S. at 717 (alteration in original) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

<sup>161</sup> *Id.* at 723.

<sup>162</sup> *Id.* at 730–39 (Breyer, J., concurring).

<sup>163</sup> *Id.* at 734.

<sup>164</sup> *Id.*

<sup>165</sup> See *New York v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep’t 1995) (“[T]he fraudulent practices targeted by the statute need not constitute fraud in the classic common law sense, and reliance need not be shown in order . . . to obtain relief.”); *People v. Barysh*, 408 N.Y.S.2d 190, 193 (Sup. Ct. N.Y. Cnty. 1978) (holding that the Martin Act requires neither reliance nor scienter); *People v. Royal Sec. Corp.*, 165 N.Y.S.2d 945, 949 (Sup. Ct. N.Y. Cnty. 1955) (holding reliance and damages are not needed for Martin Act violation).

occur.”<sup>166</sup> These limitations, according to Breyer, help ensure that liability or criminal punishment are not imposed for “the telling of [a] lie in contexts where harm is unlikely or the need for the prohibition is small.”<sup>167</sup>

Accordingly, the *Alvarez* opinion gives some guidance, albeit not from a majority opinion, on what kinds of parameters a content-based false speech regulation must adhere to. In short, such a regulation cannot “simply prohibit without limitation the telling of a lie,” but instead must narrow the scope of the regulation to require “proof of injury” in order to “narrow the statute to a subset of lies where specific harm is more likely to occur.”<sup>168</sup> This helps ensure the regulation is adequately narrow to avoid imposing liability or criminal punishment for the telling of lies “in contexts where harm is unlikely or the need for the prohibition is small.”<sup>169</sup>

Notably, both the plurality and concurring opinions reject the Stolen Valor Act as an impermissible regulation of false speech because it lacks many of the hallmarks of fraud, amounting instead to a kind of regulation of “falsity alone.”<sup>170</sup>

*B. Democratic self-governance, the search for truth, individual autonomy, and the marketplace of ideas*

Three of the “most commonly invoked reasons for protecting speech” under the First Amendment are advancing democratic self-governance, furthering the search for truth, and promoting individual autonomy.<sup>171</sup> Central to these three aims is the marketplace of ideas metaphor, which first appeared in Supreme Court jurisprudence in Justice Oliver Wendell Holmes Jr.’s dissent in *Abrams v. United States* in 1919.<sup>172</sup> In *Alvarez*, Justice

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<sup>166</sup> *Alvarez*, 567 U.S. at 736.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 736.

<sup>170</sup> *Id.* at 719.

<sup>171</sup> See Chen, *supra* note 92; CHEMERINSKY, *supra* note 92, at 5–10 (explaining that self-governance, discovering truth, and advancing autonomy are the primary reasons freedom of speech is a fundamental right).

<sup>172</sup> This belief traces its origins back centuries. In 1644, John Milton wrote in his book *Areopagitica* that restricting speech is not necessary because “in a free and open encounter” the truth will prevail. JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* 69 (The Floating Press 2009) (1644). John Stuart Mill made similar claims in his 1859 book *On Liberty*. JOHN STUART MILL, *ON LIBERTY* 38–39 (Dover Publications, 1st ed. 2002). The sentiment is echoed by philosophers and leaders, including Thomas

Kennedy adopted this metaphor, albeit indirectly, stating that “[t]he remedy for speech that is false is speech that is true.”<sup>173</sup> While such deference to truth may have been useful when it was pioneered in the 1600s by John Milton,<sup>174</sup> today the belief that, in the marketplace of ideas, the truth will win out is not only quaint but also dangerously naïve. Truth, we now know, often gets demolished by lies in the marketplace of ideas.<sup>175</sup> A team of MIT researchers, for instance, recently examined 126,000 stories on Twitter that were cumulatively tweeted by about three million people more than four and a half million times.<sup>176</sup> The researchers found that falsehoods, lies, and baseless conspiracy theories travel “farther, faster, deeper, and more broadly than the truth.”<sup>177</sup> They also discovered falsehoods are 70% more likely to be retweeted on Twitter than the truth, and that falsehoods reach their first 1,500 people six times faster than truthful reports.<sup>178</sup> Falsified stories also had more staying power, carrying onto more “cascades,” or unbroken re-tweet chains, they found.<sup>179</sup> The speed of lies online increases even more with political news and information that with other kinds of

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Jefferson. THOMAS JEFFERSON, *First Inaugural Address*, in WRITINGS, 492, 493 (Merrill D. Peterson, 1984). President Thomas Jefferson argued that it is necessary to tolerate “error of opinion . . . where reason is left free to combat it.” *Id.* In 1919, Justice Oliver Wendell Holmes Jr. extolled the “free trade in ideas” within “the competition of the market.” *Abrams v. United States*, 250 U.S. 616, 630 (1919). The actual phrase “market place of ideas,” however, first appeared in a concurring opinion by Justice William O. Douglas in *United States v. Rumely* in 1953: “Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.” 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

<sup>173</sup> *Alvarez*, 567 U.S. at 727.

<sup>174</sup> MILTON, *supra* note 172, at 5–6.

<sup>175</sup> See Wayne Unger, *How the Poor Data Privacy Regime Contributes to Misinformation Spread and Democratic Erosion*, 22 COLUM. SCI. & TECH. L. REV. 308, 334–35 (2021) (“[M]isinformation overwhelms the marketplace of ideas when the misinformation is prioritized because it is more ‘interesting and engaging,’ and ‘taint[s] the marketplace of ideas.’”).

<sup>176</sup> Peter Dizikes, *Study: On Twitter, False News Travels Faster than True Stories*, MIT NEWS (Mar. 8, 2018), <https://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308> [<https://perma.cc/H9CS-KRS8>].

<sup>177</sup> *Id.* See generally Gordon Pennycook, Tyrone D. Cannon & David G. Rand, *Prior Exposure Increases Perceived Accuracy of Fake News*, 147 J. EXPERIMENTAL PSYCH. 1865, 1865 (2018); Soroush Vosoughi, Deb Roy, & Sinan Aral, *The Spread of True and False News Online*, 359 SCI. 1146, 1146 (2018).

<sup>178</sup> Vosoughi, *supra* note 177, at 1448; see also Sara Brown, *MIT Sloan Research About Social Media, Misinformation, and Elections*, MIT (Oct. 5, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/mit-sloan-research-about-social-media-misinformation-and-elections> [<https://perma.cc/K39B-JLMQ>].

<sup>179</sup> See Vosoughi, *supra* note 177, at 1146.

information.<sup>180</sup> The researchers noted that bots spread true and false information at the same rates, which means that people are largely the ones hitting retweet on false information.<sup>181</sup> People are poor arbiters of truthful information.

There are well-understood reasons for this. For starters, a number of the cognitive biases people possess push them more strongly to false information than to truthful claims, including confirmation bias and anchoring bias.<sup>182</sup> Moreover, people are hardwired to believe as true the great majority of the information they see, read, and hear, regardless of whether it is actually truthful or not.<sup>183</sup> Decades of deception detection research make clear we are not only not the best judges of what is true and what is not, but we are actually close to worthless at making this distinction.<sup>184</sup> A coin toss is about as accurate as human skill, perception, and intuition.<sup>185</sup> This is why we have civil and criminal fraud laws in the first place. Those who deceive to benefit themselves at the expense of others too often succeed at it, if they are allowed to.<sup>186</sup> Fraudsters have little trouble deceiving us because human weaknesses and biases are well-understood, not only by scientists who study them, but by those who stand to profit off this knowledge. That is why we have fraud laws at all. But the need for protection against deception is no less true for fraud on the public than it is for personal fraud.

In short, fraud on the public does not further any legitimate First Amendment aims because fraud on the public is, by its nature, a bad faith attempt to pass off a false idea as true, and does not involve any true idea, opinion, or belief. It does not, for instance, advance democratic self-governance. It inhibits this goal. Fraud on the public results in a less-informed public by giving free reign to those who wish to manipulate public opinion and interfere with the democratic process.<sup>187</sup> Fraud on the public also does not facilitate the search for truth. Just the opposite. It

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<sup>180</sup> See *id.* at 1149.

<sup>181</sup> *Id.* at 1150 (“[W]e conclude that human behavior contributes more to the differential spread of falsity and truth than automated robots do.”); see also Brown, *supra* note 178.

<sup>182</sup> Vosoughi, *supra* note 178, at 1150.

<sup>183</sup> See Timothy R. Levine, *Truth-Default Theory (TDT): A Theory of Human Deception and Deception Detection*, SAGE J. (2014).

<sup>184</sup> See Levine, *supra* note 88, at 10.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 9–10.

<sup>187</sup> See Vosoughi, *supra* note 177.

stops people from access to the truth on topics of great public interest and central to the democratic process, such as whether an election was stolen or if a presidential candidate is running a child pedophile ring.<sup>188</sup> It is not just that truth loses out too often to lies in the marketplace, as discussed above, but that a falsehood simply has no place in the marketplace of ideas to begin with because it is not an idea, opinion, or belief. It is the opposite of these things. There are valid reasons to protect some falsehoods, as noted by the Court,<sup>189</sup> but dangerous falsehoods that mislead the public and cause widespread harm cannot be part of the marketplace of ideas because their purpose is to manipulate in bad faith rather than to extoll a sincerely held idea, opinion, or belief. Finally, fraud on the public does not promote individual autonomy; it destroys it. Lies, by their nature, whether made to one person or to one million, are an attack on the autonomy of the one lied to.<sup>190</sup>

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<sup>188</sup> See, e.g., *Most Republicans Still Believe 2020 Election Was Stolen from Trump–Poll*, GUARDIAN (May 24, 2021, 6:29 PM), <https://www.theguardian.com/us-news/2021/may/24/republicans-2020-election-poll-trump-biden> [https://perma.cc/7HMM-ZRM2]. A whopping 53 percent of Republicans continue to believe the election was won by Donald Trump, and that he, not Joe Biden, is the “true president.” *Id.* An alarming number of people also believe the baseless conspiracy theory that Hillary Clinton and other Democrats operated, or continue to operate, a pedophile ring. Moira Donegan, *QAnon Conspiracists Believe in a Vast Pedophile Ring. The Truth Is Sadder*, GUARDIAN (Sept. 20, 2020, 6:40 AM), <https://www.theguardian.com/commentisfree/2020/sep/20/qanon-conspiracy-child-abuse-truth-trump> [https://perma.cc/4W2Y-VUVC].

<sup>189</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) (“False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.”).

<sup>190</sup> See, e.g., Christine M. Korsgaard, *What’s Wrong with Lying?*, in *PHILOSOPHICAL INQUIRY: CLASSIC AND CONTEMPORARY READINGS* 577, 577 (Jonathan E. Adler & Catherine Z. Elgin eds., 2007); CASS R. SUNSTEIN, *LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION* 31 (Oxford Univ. Press 2021); see also Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 *PHIL. & PUB. AFFS.* 325, 331–39 (1996). See generally SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* (2014)

C. *Under longstanding First Amendment precedent and policy, fraud on the public should be deemed fraudulent speech*

There is no place within the First Amendment's protections for fraudulent speech. Indeed, under *Alvarez*, false speech, fraudulent or not, calculated to "secure moneys or other valuable considerations, say offers of employment," is also regulable "without affronting the First Amendment."<sup>191</sup> Today, harmful disinformation purposefully disseminated to mislead the public presents a danger never before faced in history. The question we must answer is what to do about it. Should the Free Speech doctrine protect those who deceive the public to gain advantage while harming others, or should it protect the public being deceived? It cannot protect both.

Longstanding fraud law defines fraudulent speech as that which centers on harmful dishonest conduct.<sup>192</sup> This has been the focus of fraud law from its inception.<sup>193</sup> The concurring opinion in *Alvarez* acknowledges that harm is the touchstone inquiry into the regulability of false speech under the First Amendment.<sup>194</sup> Those who engage in fraudulent speech can be held liable civilly and punished criminally because their conduct causes harm that outweighs any First Amendment rights infringed by regulating the speech.

Moreover, fraud has been unprotected speech since the passage of the First Amendment.<sup>195</sup> And for good reason. Fraudulent speech furthers none of the significant policy justifications for free expression under the First Amendment: "advancing democratic self-governance, facilitating the search for 'truth,' and promoting individual autonomy."<sup>196</sup>

The six-element fraud on the public definition set forth in Part II above is designed to conform with the guidance in the *Alvarez* decision,<sup>197</sup> other Supreme Court precedent on fraud

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<sup>191</sup> *Alvarez*, 567 U.S. at 723.

<sup>192</sup> See Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENV'T L. REV. 566, 579 (2014) ("When misrepresentations are criminalized as fraud by a statute, they do not require all of the elements of common law fraud. It is undisputed that false speech can only be considered fraudulent if it has the potential to cause some harm." (footnote omitted)).

<sup>193</sup> See discussion *supra* note 96.

<sup>194</sup> *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring).

<sup>195</sup> *United States v. Stevens*, 559 U.S. 460, 468 (2010).

<sup>196</sup> CHEN, *supra* note 92 at 381.

<sup>197</sup> *Alvarez*, 567 U.S. at 723–34; *id.* at 746–48 (Alito, J., dissenting).



under the First Amendment,<sup>198</sup> and longstanding policy underpinnings of the law on free expression.<sup>199</sup> Once again, one engages in conduct amounting to fraud on the public where they (1) purposefully disseminate a message to the public (2) that contains verifiably false or misleading information (3) with actual malice (4) to obtain profit, benefit, or advantage, or to intentionally mislead the public, (5) which results in, or likely will result in, substantial harm, and (6) such harm was reasonably foreseeable.

These elements substantially mimic those of other fraud-based claims, such as common law fraud, but with an important, but necessary, difference. First, instead of imposing a requirement that the speaker intend to mislead a particular individual, fraud on the public requires that the speaker purposefully spread false or misleading information *either* to intentionally mislead the public *or* to obtain profit, benefit, or advantage. These two alternatives are not mutually exclusive; rather, they are tailored to capture the distinct ways some who defraud the public spread their false and misleading messages. This keeps the definition narrowly focused only on the kinds of disinformation of greatest concern, those where the one spreading it does so with a wrongful intent. It should be noted that, while the first part of the fourth element (to obtain profit, benefit, or advantage) speaks directly to Justice Kennedy's concern that regulable false statements be those where speech is used "to gain a material advantage,"<sup>200</sup> the second part of the fourth element (or to intentionally mislead the public) is actually more analogous to other fraud and fraud-based claims, such as common law deceit, mail and wire fraud, consumer protection laws, and securities fraud.<sup>201</sup>

Most importantly, the definition of fraud on the public ensures that conduct that meets the elements is purposefully false and misleading speech calculated to deceive in a way that causes foreseeable substantial harm. This takes fraud on the public far outside the core discussion in *Alvarez*, which analyzed the regulation of mere falsehoods, which not only might not be calculated to acquire material gain but also need not necessarily

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<sup>198</sup> See, e.g., authorities cited *infra* note 203.

<sup>199</sup> See, e.g., authorities cited *infra* note 203.

<sup>200</sup> *Alvarez*, 567 U.S. at 723.

<sup>201</sup> See authorities cited *supra* note 81.

result in any harm whatsoever, let alone foreseeable substantial harm.<sup>202</sup>

This makes fraud on the public particularly regulable given that the Supreme Court has repeatedly “recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”<sup>203</sup> Pursuant to this considerably weakened First Amendment protection, numerous laws prohibiting and punishing false speech have been upheld.<sup>204</sup> Some of these laws prohibit and punish false speech that was proscribed at the time of the First Amendment’s adoption, such as fraud, defamation, and perjury.<sup>205</sup> Other laws prohibit and punish false speech that was not proscribed at the time of the First Amendment’s

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<sup>202</sup> *Alvarez*, 567 U.S. at 746–47 (Alito, J., dissenting).

<sup>203</sup> *Id.*; see also *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (“Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.”); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (“[F]alse statements may be unprotected for their own sake . . . .”); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) (“There is ‘no constitutional value in false statements of fact.’” (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974))); *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 743 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech . . . .”); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (“Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.”); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); *Gertz*, 418 U.S. at 340 (“[T]he erroneous statement of fact is not worthy of constitutional protection . . . .”); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against calculated falsehood without significant impairment of their essential function.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”).

<sup>204</sup> See, e.g., 18 U.S.C. § 709 (making it a crime to knowingly use, without authorization, the names of certain federal agencies); *id.* § 912 (making it a crime to falsely impersonate a federal officer); see also *Alvarez*, 567 U.S. at 748 (Alito, J., dissenting) (“[T]here are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern.”).

<sup>205</sup> See, e.g., *Donaldson v. Read Mag., Inc.*, 333 U.S. 178, 190 (1948) (explaining that the government’s power to protect against fraud “has always been recognized in this country and is firmly established”); *United States v. Dunnigan*, 507 U.S. 87, 97 (“[T]he constitutionality of perjury statutes is unquestioned.”); *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952) (noting that the “prevention and punishment” of libel “have never been thought to raise any Constitutional problem”).

adoption, such as intentional infliction of emotion distress by means of a false statement and false-light invasion of privacy.<sup>206</sup>

Indeed, over 100 federal statutes prohibit telling a lie to the government, on behalf of the government, or involving the government under certain enumerated circumstances.<sup>207</sup> Many of these statutes—such as 18 U.S.C. § 1001, which prohibits “knowingly and willfully” making any “materially false, fictitious, or fraudulent statement or representation” in “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States”<sup>208</sup>—are “not limited to statements made under oath or before [a court].”<sup>209</sup> Any lie that fits the description is prohibited. These laws almost uniformly do not impose any requirement that there be resulting damage. It is deemed illegal under these laws simply to lie under the circumstances proscribed.<sup>210</sup>

Given (1) the low First Amendment protections afforded to false statements generally; (2) the well-established carveout for fraudulent speech; and (3) the grave harm caused by some disinformation, those who disseminate false and misleading messages in a manner that satisfies the elements of fraud on the public should not escape recourse for their actions under the First Amendment. That, however, is exactly what is happening today. Those who defraud the public use the First Amendment as a weapon. This flies in the face of its purpose and intent, which is to be a shield wielded by those targeted for their ideas, opinions, and beliefs. Those using the First Amendment as a weapon do so to protect speech that furthers none of the amendment’s aims: advancing democratic self-governance, facilitating the search for truth, and promoting individual autonomy.<sup>211</sup> Fraud on the public flies in the face of these aims and actively works against them. Accordingly, fraud on the

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<sup>206</sup> See *Falwell*, 485 U.S. at 56 (intentional infliction of emotional distress by means of false statement); *Hill*, 385 U.S. at 390 (false-light invasion of privacy); see also *Alvarez*, 567 U.S. at 747 (Alito, J., dissenting).

<sup>207</sup> See *United States v. Wells*, 519 U.S. 482, 505–07 nn. 8–10 (1997); *Alvarez*, 567 U.S. at 747–48 (Alito, J., dissenting).

<sup>208</sup> 18 U.S.C. § 1001(a)(2).

<sup>209</sup> *Alvarez*, 567 U.S. at 748 (Alito, J., dissenting).

<sup>210</sup> See, e.g., 18 U.S.C. § 1001 (The Act empowers the SEC with broad authority over all aspects of the securities industry).

<sup>211</sup> See CHEMERINSKY, *supra* note 91, at 5–10 (enumerating the three principal justifications underpinning the First Amendment).

public should be deemed unprotected fraudulent speech under the First Amendment.

#### CONCLUSION

Jean Rostand famously wrote, "Kill a man, one is a murderer; kill a million, a conqueror; kill them all, a God."<sup>212</sup> The principle observed by Rostand, that wrongful conduct becomes acceptable, or even rewarded, if done on a large scale, has long been well-known. Writing in the fifth century A.D., St. Augustine recounted the story of a pirate captured by Alexander the Great. Alexander angrily asked the pirate why he was "infesting the sea."<sup>213</sup> To which the pirate replied, "The same as you . . . when you infest the whole world; but because I do it with a little ship I am called a robber, and because you do it with a great fleet, you are an emperor."<sup>214</sup> The same thing happens with deceit today. If you defraud one person, you may be found guilty of a crime. You can be sent to prison. If you defraud millions, however, you often stand to gain wealth, platform, or political office. This is the problem, which is easy enough to articulate. To solve it, however, presents a greater challenge.

The definition I propose for fraud on the public in this Article should be taken as a category, or subcategory, of unprotected speech. It is a starting point, not an end in itself. To be implemented in practice a state legislature or Congress would need to craft civil or criminal prohibitions of fraud on the public. Thus, although my proposed unprotected speech category is not itself a proposed civil or criminal law, it could be used to help tailor such a law. Furthermore, my definition of fraud on the public could be used by courts and legislators wrestling with this issue, which I argue must be flipped on its head. We should approach harmful disinformation not as automatically protected speech in need of a First Amendment exception to fit into; rather, it should be analyzed as potentially fraudulent speech that might be, from the outset, unprotected under the First Amendment, and therefore outside of its parameters. In short, fraud on the public should be handled the same way as other actionable fraud.

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<sup>212</sup> JEAN ROSTAND, *THE SUBSTANCE OF MAN* 68 (Irma Brandeis trans., Greenwood Press 1962) (1939).

<sup>213</sup> AUGUSTINE OF HIPPO, *THE CITY OF GOD AGAINST THE PAGANS* 148 (R.W. Dyson ed., trans., 1998) (1998).

<sup>214</sup> *Id.*

To draw the line between unprotected fraudulent speech on one hand, and protected merely false speech on the other, it is helpful to keep in mind the four-factor framework set out by Professor Cass Sunstein: state of mind, magnitude of harm, likelihood of harm, and timing of harm.<sup>215</sup> As pointed out by Sunstein, the line-drawing between protected and unprotected false speech must involve a balancing of several competing factors.<sup>216</sup>

That said, there are various parts of a bigger solution that I would like to propose here which will, I hope, be expanded on by future scholarship. First, the courts and legislators should call fraud on the public what it actually is by calling it “fraud” or “fraud on the public.” It should be classified and prosecuted as a fraud like any other. As long as those on whom we rely to inform us are allowed legally to mislead us for profit, they will do so. To stop them, we should impose legally-binding obligations to be honest which may include utilizing the speech category definition I propose in Part II. Fraud on the public, as long as it is carefully and narrowly tailored, could be made tortious, criminal, or, ideally, both. This will help stop the most harmful kinds of fraud on the public.

Second, we need to de-weaponize the First Amendment. This can be accomplished by either interpreting (correctly, I argue) that fraud on the public fits within the fraud exception to the First Amendment, or carving out a new exception to the First Amendment for fraud on the public.<sup>217</sup> This is necessary because, today, the First Amendment is too often used as a weapon rather

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<sup>215</sup> See SUNSTEIN, *supra* note 190, at 12–17.

<sup>216</sup> *Id.*; see also discussion *infra* note 216.

<sup>217</sup> See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051 (2000) (“[T]he Supreme Court and even lower courts can create new First Amendment exceptions or broaden existing ones . . .”). This has been accomplished, for example, in *New York v. Ferber* where the Court identified child pornography as a category of speech fully “outside the protection of the First Amendment.” *New York v. Ferber*, 458 U.S. 747, 763 (1982). The bar for carving out new exceptions, however, is high. See *Keefe v. Adams*, 840 F.3d 523, 530 (8th Cir. 2016) (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)) (“[T]he Supreme Court does not favor creating new First Amendment exceptions that could be used to restrict protected speech.”). The Supreme Court has clarified that exceptions to the First Amendment cannot be arrived at by a mere cost-benefit analysis; rather, for all categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck.” *Ferber*, 458 U.S. at 763–64.

than as a shield. The wealthy and powerful use the First Amendment to mislead and deceive the public for profit while inflicting widespread damage. Politicians wield the First Amendment to defraud their way to public office. Elections are now who can lie bigger contests. Truth is effectively irrelevant. Things look very much the same in the private sector. Numerous industries lie about the causal connection between what they sell (like oil, sugar, and opioids) and the harm it causes (global warming, obesity and diabetes, addiction, and death). All of this is accomplished by spreading disinformation. They may do it under the First Amendment's protections for conmen. I argue that those who defraud the public should not enjoy the same First Amendment protections as those expressing sincerely held beliefs, views, or opinions, particularly where such fraud on the public causes substantial, foreseeable harm.

Third, Congress could enact one or more new laws to stop fraud on the public and punish those who commit it. Today, those who are in a position to profit off deceiving the public do so largely without recourse. To stop this, we must pass laws that ensure the investigation and prosecution of those who defraud the public. This has been done before—regarding securities fraud. For 150 years, U.S. law handled securities fraud cases under common law fraud.<sup>218</sup> But fraud law was ill-equipped to address claims involving securities,<sup>219</sup> which, by their nature, are a kind of fraud on the public. In such cases, a corporation or securities dealer makes false or misleading statements to the public at large, some of whom rely on the statements and invest in the securities.<sup>220</sup> These kinds of claims failed in court for a

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<sup>218</sup> See Mark A. Helman, *Rule 10b-5 Omissions Cases and the Investment Decision*, 51 *FORDHAM L. REV.* 399, 399–400 (1982) (explaining that a securities fraud cause of action was originally based on common law fraud); Jill E. Fisch, *The Trouble with Basic: Price Distortion After Halliburton*, 90 *WASH. U. L. REV.* 895, 900 (2013) (“[C]ommon law fraud . . . served as the initial source of the elements of federal securities fraud.”).

<sup>219</sup> See Paul N. Edwards, *Compelled Termination and Corporate Governance: The Big Picture*, 10 *J. CORP. L.* 373, 427 (1985) (“Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions . . .”); see also Wes Henricksen, *Fraud Law and Misinformation*, 5 *UTAH L. REV.* 1229, 1249–50 (2021) (discussing the growth of securities fraud cases brought under common law doctrine at the end of the 1800s and beginning of the 1900s).

<sup>220</sup> See James Chen, *Securities Fraud*, *INVESTOPEDIA* (June 9, 2022), <https://www.investopedia.com/terms/s/securities-fraud.asp> [https://perma.cc/SQA6-552D] (“Securities fraud . . . is a type of serious white-collar crime that can be

number of reasons.<sup>221</sup> After the stock market crash of 1929, Congress recognized that allowing corporate insiders to defraud the public in the securities market was disastrous, and, as a result of this and other factors, established the Securities and Exchange Commission (SEC), an independent government agency in charge of investigating and prosecuting securities fraud.<sup>222</sup> This worked well for securities. But the problem of fraud on the public by corporate and political elites goes well beyond the stock market. It is pervasive in the political, media, and corporate sectors.<sup>223</sup> Given what we now know about human gullibility, how utterly inept we are at protecting ourselves from deceit, we should prohibit fraud on the public in the same way we do for personal fraud. And like we did with securities fraud, we should furthermore allocate resources to the fraud-on-the-public problem to ensure investigation and prosecution of the worst offenders.

The fourth and final proposal is that we enact rules and regulations to hold media platforms liable for knowingly spreading disinformation, and that these fit within the First Amendment carveout for fraud on the public. Like political

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committed in a variety of forms but primarily involves misrepresenting information investors use to make decisions.”).

<sup>221</sup> See, e.g., Michael L. D'Ambrosio, *Virtual Currency Regulation: From the Shadows of the Internet to the Floor of Congress*, 19 WAKE FOREST J. BUS. & INTELL. PROP. L. 249, 255 (2019) (“Over the course of history, federal agencies have been established out of necessity, whether based on innovation or catastrophic events. Take for example the establishment of the U.S. Securities Exchange Commission (SEC) in 1934 following the stock market crash of 1929 . . . .” (footnote omitted)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170–71 (1994) (stating that the crash of 1929, along with “reports of widespread abuses in the securities industry,” prompted the passage of securities laws); Securities Exchange Act of 1934, ch. 2B, 48 Stat. 881 (codified as amended at 15 U.S.C. § 77h–j (2021)) (noting that the securities laws were enacted as a response by Congress with the intent of protecting investors from fraud); *Causes of the Crash 1919-1929*, ENCYCLOPEDIA.COM (June 17, 2021), <https://www.encyclopedia.com/education/news-and-education-magazines/causes-crash-1919-1929> [https://perma.cc/M8RE-DXK9] (noting that one of the causes of the 1929 stock market crash was that “[i]nvestors were not protected from fraud or hype”).

<sup>222</sup> See Michael J. Chmiel, *The Insider Trading and Securities Fraud Enforcement Act of 1988: Codifying A Private Right of Action*, 1990 U. ILL. L. REV. 645, 647 (1990) (“Through the Securities Act of 1933 . . . and the 1934 [Securities Exchange] Act, Congress created and empowered the SEC as well as the ‘securities plaintiff’ to curb market abuses through a series of statutes and rules imposing liability on those who fraudulently manipulate securities markets.” (footnotes omitted)); Securities Exchange Act of 1934, ch. 2B, 48 Stat. 881 (codified as amended at 15 U.S.C. § 77h–j (2021)).

<sup>223</sup> See generally discussion *supra* Part I.

speech, the First Amendment provides special protections to the press.<sup>224</sup> While breathing room is particularly important for the media, the breathing room now given them results in a significant amount of fraud on the public. This should not be confused with the “fake news” and “enemy of the people” attacks on the media as a whole; I believe the vast majority of those in the media are honorable and truthful. Nevertheless, those who are not honorable or truthful have had a disproportionate impact on public discourse and public policy, as well as elections.<sup>225</sup> Moreover, although the Federal Communications Commission has a policy against distorting the news or misleading viewers,<sup>226</sup> in practice the news distortion doctrine is never applied.<sup>227</sup> As a result, the untruthful members of the media, who are surely a small minority, are able to disseminate unfettered disinformation, a phenomenon familiar to anyone who reads or

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<sup>224</sup> See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 928 (1992) (noting that Supreme Court jurisprudence reflects the Court's “willingness to interpret the First Amendment as affording the press a broad range of freedom from restraints on publication”) (first citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991); then citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37–38 (1984) (Brennan, J., concurring); then citing *Herbert v. Lando*, 441 U.S. 153, 155 (1979); then citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 381–82 (1973); then citing *Associated Press v. United States*, 326 U.S. 1, 19–20 (1945); and then citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781–82 (1978)).

<sup>225</sup> See *supra* note 177.

<sup>226</sup> See THE MEDIA BUREAU FCC, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION, at 14 (2019) (The news distortion doctrine has four elements: “The Commission will investigate a station for news distortion if it receives documented evidence of such rigging or slanting, such as testimony or other documentation, from individuals with direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news. Of particular concern would be evidence of the direction to employees from station management to falsify the news.”); Charles L. Bonani, Note, *Weapons of Mass Distortion: Applying the Principles of the FCC's News Distortion Doctrine to Undisclosed Financial Conflicts of Interest in Corporate News Media's Military Coverage*, 27 WASH. & LEE J.C.R. & SOC. JUST. 231, 237 (2020) (“The FCC will only find news distortion if there is (1) an allegation ‘of deliberate intent to distort the news or mislead the audience,’ (2) extrinsic evidence (in addition to the broadcast itself) to support the allegation, (3) evidence ‘that the distortion was initiated by or known to the licensee’ or management personnel, and (4) an implication of a ‘significant event, rather than an incidental part of the news.’”).

<sup>227</sup> See Bonani, *supra* note 225, at 238 (“The Doctrine is effectively dormant today, given the high standard of evidence needed to trigger an FCC investigation and the absence of a prescribed regulation.”); Joel Timmer, *Potential FCC Actions Against “Fake News”: The News Distortion Policy and the Broadcast Hoax Rule*, 24 COMM. L. & POL'Y 1, 22 (2019) (“[I]t is very difficult and uncommon for the requirements of the news distortion policy to be satisfied.”).



watches the news. Social media presents a distinct, but related, problem. Section 230 of the Communications Act provides immunity for providers and users of an “interactive computer service,” which includes platforms like Facebook and Twitter.<sup>228</sup> Accordingly, these platforms, which are able to manipulate our choices, behaviors, and thoughts, sell access to our eyes, ears, and minds to the highest bidder.<sup>229</sup> This has allowed those aiming to mislead millions even greater access to the tools of public deception.<sup>230</sup> New rules and regulations must be implemented that rein in all media platforms, old and new, so that even if someone with the means to do so sets out to spread disinformation, the media necessary to reach the masses cannot, without consequence, profit off of knowingly or recklessly spreading the disinformation on behalf of others.

My analysis and proposals are, according to some, radical. I am well-aware of the difficulty incumbent in making the changes I propose. Nevertheless, I see the problem of fraud on the public as sufficiently urgent to merit radical solutions. My hope, albeit surely naïve, is that in twenty years’ time we will have a framework in place that prohibits fraud on the public and punishes those who carry it out. It is illegal and tortious to defraud *someone*; it should be equally illegal and tortious to defraud *everyone*.

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<sup>228</sup> See 47 U.S.C. § 230 (1998) (“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.”); see also Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230’s Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 2 (2016) (discussing Section 230’s scope and history).

<sup>229</sup> See Sean Illing, *There’s a War for Your Attention. And You’re Probably Losing It*, VOX (Feb. 18, 2018, 12:40 PM), <https://www.vox.com/conversations/2016/11/17/13477142/facebook-twitter-social-media-attention-merchants> [<https://perma.cc/A26F-H2B7>]; Paul Lewis, *‘Our Minds Can Be Hijacked’: The Tech Insiders Who Fear a Smartphone Dystopia*, GUARDIAN (Oct. 6, 2017, 1:00 PM), <https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia> [<https://perma.cc/36XM-UFDK>]; SOCIAL DILEMMA (Netflix 2020).

<sup>230</sup> See 47 U.S.C. § 230 (1998); Kosseff, *supra* note 228, at 3, 7–16.