Regulating Fraud on the Marketplace of Ideas: Federal Securities Law as a Model for Constitutionally Permissible Social Media Regulation

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INTRODUCTION: SPEECH FALSITY AND DUTY UNDER U.S. LAW: COMMERCIAL V. NON-COMMERCIAL SPEECH

The advent of electronic communications in the twentieth century was said to have ushered America into the Information Age—a period in which broadcasters and government sources sought to curate and

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distribute accurate information under a duty to act in the public interest.[1] In the third decade of the twenty-first century, it might be more apt to describe our current era of user-controlled content distribution as an "Age of Disinformation." One reason for this is the absence of any duty applicable to unregulated content creators and the online social media platforms that distribute content. Disinformation, and its unintentional redistributive cousin, misinformation,[2] have weaponized political discourse in the United States, sowing confusion and leading to real-world consequences like voter suppression laws and an insurrection at the U.S. Capitol.[3]

At the same time, the scourge of disinformation that has eroded our political discourse has largely left advertising and other forms of commercial speech relatively unscathed. That is because the First Amendment to the United States Constitution treats commercial speech

1. *See generally* Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241 (2007); *see also* Julian Birkinshaw, *Beyond the Information Age*, WIRED, https://www.wired.com/insights/2014/06/beyond-information-age/ [https://perma.cc/3T8A-6UKJ]; Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 377 (1969) (stating that broadcasters have a duty to "give adequate coverage to public issues and the coverage must be fair in that it accurately reflects the opposing views") (internal citation omitted); Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554, § 515(a) (2000) (as codified at 44 U.S.C. § 3516); Memorandum from Russell T. Vought, Acting Dir. of the Off. of Mgmt. & Budget, to the Heads of Exec. Dep'ts & Agencies Improving Implementation of the Information Quality Act, (Apr. 24, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf [https://perma.cc/5R6U-AV8A].

2. Disinformation is false or misleading content expressed as fact, created, and distributed with an intent to deceive. Misinformation is false or out-of-context content expressed as fact, irrespective of an intent to deceive. *See* Meira Gebel, *Misinformation vs. Disinformation: What to Know About Each Form of False Information, and How to Spot Them Online,* BUS. INSIDER (Jan. 15, 2021), https://www.businessinsider.com/misinformation-vs-disinformation [https://perma.cc/U3MK-6E5A].

3. *See* Trump v. Thompson, 20 F.4th 10, 17–18 (D.C. Cir. 2021) (stating that "before noon on January 6th, President Trump took the stage at a rally of his supporters . . . [d]uring his more than hour-long speech, President Trump reiterated his claims that the election was 'rigged' and 'stolen,' and urged then-Vice President Pence, who would preside over the certification, to 'do the right thing' by rejecting various States' electoral votes and refusing to certify the election in favor of Mr. Biden."); *see also* United States v. Miller, No. 1:21-cr-00119 (CJN), 2022 U.S. Dist. LEXIS 45696 at *3–4 (D.D.C. May 27, 2022); United States v. Montgomery, No. 21-cr-46 (RDM), 2021 WL 6134591, at *2 (D.D.C. Dec. 28, 2021); Donald J. Trump, Rally on Electoral College Vote Certification, at 3:33:05–3:33:10, 3:33:32–3:33:54, 3:37:19–3:37:29, 3:47:20–3:47:42, 4:41:17–4:41:33, 4:42:00–4:42:32, C-SPAN (Jan. 6, 2021), https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification [https://perma.cc/QN8H-QGYA] (discussing the portions of President Trump's speech informing the crowd that the election was stolen and urging to "demand that Congress do the right thing and only count the electors who have been lawfully slated") [hereinafter January 6, 2021 Rally Speech]; *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, AM. C.L. UNION (Aug. 18, 2021), https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/ [https://perma.cc/X58M-75GN]; Ian Vandewalker, *Digital Disinformation and Vote Suppression*, BRENNAN CTR. FOR JUST. (Sept. 2, 2020), https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression [https://perma.cc/Z5GG-W9LQ].

differently from non-commercial political speech.[4] False or misleading commercial speech in any venue can be regulated or banned by a governmental authority in the United States.[5] The First Amendment, however, generally protects false or misleading speech in a non-commercial context, with limited exceptions for defamation or privacy harms.[6] In an online context, disinformation or misinformation that can be used to persuade someone to buy or sell a product or service can be regulated; conversely, disinformation or misinformation designed to persuade people to vote for a candidate or adopt a political position cannot.[7]

This distinction in actionability between commercial and non-commercial speech was born out by the United States Supreme Court in *U.S. v. Alvarez*, the so-called "Stolen Valor" case from 2012.[8] Alvarez falsely claimed to have received the Medal of Honor—the highest military service award—in violation of a federal statute, making such claims a crime.[9] In deciding for Alvarez, six justices, in two opinions concluded that falsity alone is protectable under the First Amendment.[10] Justice Anthony Kennedy, writing for a plurality of Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor, mused that it was not the proper role of government to determine what categories of falsity are actionable or not, absent an additional factor like fraud or defamation.[11] Had Alvarez used his false claim to persuade a consumer to purchase a product or service from him, the government could act to punish a fraudulent transaction. But, without a fraudulent transaction or another subsidiary harm, the government does not have the discretion to pick and choose which falsity it regulates.[12]

I. THE PROBLEM OF ONLINE DISINFORMATION

Subsidiary harms that flow in tort from falsity, such as defamation or privacy violations, are not actionable against websites and social media platforms by virtue of a broad immunity for third-party content under

4. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762–65 (1976); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980).

5. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562.

6. United States v. Alvarez, 567 U.S. 709, 729–30 (2012).

7. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 368–71 (2010).

8. *Alvarez*, 567 U.S. at 729–30 (finding that the "costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace" and that Alvarez's right to make contemptible, false statements is protected by the Constitution's guarantee of freedom of speech and expression).

9. *Id.* at 715.

10. *Id.* at 721–22.

11. *Id.* at 717–20.

12. *Id.* at 719.

Section 230 of the 1996 Communications Decency Act.[13] Thus, under the logic of *Alvarez*, the only way the state can regulate or punish social media platforms for misinformation or disinformation may be if the speech were to be deemed commercial. The limitations of the constitutional status quo were brought to stark relief in twin disinformation crises in 2021: Donald Trump's electoral "Big Lie" and antivax conspiracy theories about COVID-19. Beginning in November 2020, Trump and many of his supporters attempted to overturn his defeat at the polls by promoting baseless allegations of corruption and ballot mismanagement on social media and television.[14] Trump himself, a changing group of rogue lawyers that included Rudolph Giuliani and Sydney Powell, and allies at Fox News and on social media peddled in demonstrably false conspiracy theories about rigged voting machines, unscrupulous ballot destruction, and partisan voter suppression against Republicans.[15] An orchestrated campaign to deliberately mischaracterize the Vice President's constitutional responsibilities to certify Electoral College votes culminated in the incitement of an insurrection at the U.S. Capitol on January 6, 2021, leading to police fatalities and 140 injured police officers.[16]

Despite an orchestrated disinformation campaign that put Vice President Pence and members of Congress in imminent harm,[17] the only legal remedy so far has been defamation claims brought by Dominion Voting Systems against Giuliani, Powell, and Fox News for spreading conspiracy theories alleging leftist bias and vote tabulation rigging by the company's machines.[18] Individual electoral officials accused baselessly of

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13. Communications Decency Act of 1996, 47 U.S.C. § 230(b)(2).

14. *See* Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES, (June 14, 2022), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html [https://perma.cc/LUS4-VRGA] [hereinafter *77 Days*]; *see also* Emma Brown, Aaron C. Davis, Jon Swaine & Josh Dawsey, *The Making of a Myth*, WASH. POST (May 9, 2021), https://www.washingtonpost.com/investigations/interactive/2021/trump-election-fraud-texas-businessman-ramsland-asog/ [https://perma.cc/ZP3F-D6KN].

15. *77 Days*, *supra* note 14.

16. *See* Brian Naylor, *Read Trump's Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/RP2L-UJDE]; *see also* Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021), https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html [https://perma.cc/TE2A-PACU].

17. Ashley Parker, Carol D. Leonnig, Paul Kane & Emma Brown, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/QR8Y-K65Y].

18. *See* Lateshia Beachum & María Luisa Paúl, *Dominion's Lawsuits Against Trump Allies Can Move Forward After Judge Rejects Arguments*, WASH. POST (Aug. 12, 2021),

wrongdoing are also pursuing defamation claims.[19] But while that may mean significant liability for the individuals who spread the falsity on television and the television networks that repeated the claims, there is no remedy for the online sites that knowingly hosted the disinformation. This is especially telling because the conspiracy theories at the center of these suits originated from groups and messages on Facebook.[20] Although Trump may escape legal liability under the Federal Tort Claims Immunity Act,[21] Facebook and Twitter exercised a contractual remedy by suspending the former President's access because he promoted violence, and the U.S. House of Representatives exercised a symbolic political remedy by impeaching him.[22] Because Twitter and Facebook are currently immune from defamation liability for comments posted on their sites, they are the sole arbiters of what is acceptable or not acceptable on their platforms, and the remedies are entirely within their sole discretion.[23]

The lack of remedy for disinformation is even more troubling with respect to the other big disinformation campaign of the last two years: Coronavirus falsity.[24] A slew of false statements appeared online throughout the height of the Coronavirus pandemic.[25] These debunked false statements included assertions such as "'99%' of [all] COVID-19 cases are 'totally harmless'" and "[t]he pandemic is 'fading away.; [i]t's going to fade away[,]'" while in reality, COVID-19 left 15% of infected

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https://www.washingtonpost.com/nation/2021/08/11/dominion-powell-giuliani-lindell-lawsuits/ [https://perma.cc/PU6M-VVN2].

19. *See* Reid J. Epstein, *Two Election Workers Targeted by Pro-Trump Media Sue for Defamation*, N.Y. TIMES (Dec. 2, 2021), https://www.nytimes.com/2021/12/02/us/politics/gateway-pundit-defamation-lawsuit.html [https://perma.cc/2Z3L-3Z9H].

20. *See* Craig Silverman, Craig Timberg, Jeff Kao & Jeremy B. Merrill, *Facebook Groups Topped 10,000 Daily Attacks on Election Before Jan. 6, Analysis Shows*, WASH. POST (Jan. 4, 2022), https://www.washingtonpost.com/technology/2022/01/04/facebook-election-misinformation-capitol-riot/ [https://perma.cc/52FE-YRYF].

21. *See* Aziz Huq, *When Government Defames*, N.Y. TIMES (Aug. 10, 2017), https://www.nytimes.com/2017/08/10/opinion/government-defamation-white-house-slander.html [https://perma.cc/CY4F-TSFM]; *see also* KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 7 (2019).

22. *See* Will Oremus, *Tech Giants Banned Trump. But Did They Censor Him?*, WASH. POST (Jan. 7, 2022), https://www.washingtonpost.com/technology/2022/01/07/trump-facebook-ban-censorship/ [https://perma.cc/523A-72A9]. *See generally* Naylor, *supra* note 16.

23. *See* Mike Isaac, *Facebook Oversight Board Upholds Social Network's Ban of Trump*, N.Y. TIMES (Oct. 21, 2021), https://www.nytimes.com/2021/05/05/technology/facebook-trump-ban-upheld.html [https://perma.cc/J883-VLT4].

24. *See* Gerald E. Harmon, *Flow of Damaging COVID-19 Disinformation Must End Now*, AM. MED. ASS'N (Dec. 14, 2021), https://www.ama-assn.org/about/leadership/flow-damaging-covid-19-disinformation-must-end-now [https://perma.cc/6X67-YDKZ].

25. As of July 2022, 579 websites were identified by a media watchdog group as spreaders of COVID disinformation and misinformation. *Coronavirus Misinformation Tracking Center*, NEWSGUARD (Jan. 28, 2022), https://www.newsguardtech.com/special-reports/coronavirus-misinformation-tracking-center/ [https://perma.cc/C5LB-LJ8A].

persons severely ill, and cases grew by 20,000 infected persons per day.[26] Surely a ban from social media cannot be the only repercussion for the dissemination of false information that can result in harm a person's physical health. Yet currently, no remedy exists for such deliberate or reckless postings of political misinformation on social media. As with those who peddle election disinformation, purveyors of Coronavirus disinformation continue to post online largely unfiltered in the run-up to the 2022 Congressional midterm elections.[27]

II. ADDRESSING ONLINE DISINFORMATION IN A NON-COMMERCIAL CONTEXT

What can be done about the scourge of online disinformation—campaigns of deliberate or reckless falsity that may jeopardize American democracy and the health of American citizens? A retrenchment or repeal of Section 230 would help. Eliminating or reducing Section 230 immunity would give social media platforms like Facebook or Twitter an incentive to police and take down falsity that causes subsidiary harms, like damage to an individual's reputation. But while that might be a good thing for plaintiffs looking to hold a platform responsible for the publication and distribution of damaging falsity, changes to Section 230 would not address the social and political damage of disinformation campaigns on the body politic; the damage caused by deliberate distortions or outright lies such

26. *See* Christian Paz, *All the President's Lies About the Coronavirus*, ATLANTIC (Nov. 2, 2020), https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/ [https://perma.cc/6ES7-7J8K].

27. *See* Anjana Susarla, Dam Hee Kim & Ethan Zuckerman, *What Will 2022 Bring in the Way of Misinformation on Social Media? 3 Experts Weigh In*, SCI. AM. (Jan. 5, 2022), https://www.scientificamerican.com/article/what-will-2022-bring-in-the-way-of-misinformation-on-social-media-3-experts-weigh-in/ [https://perma.cc/79VJ-S7YQ]*; see also* Miles Park & Geoff Brumfiel, *Disinformation Fueled 2021, and 2022 Will Likely See the Same*, NPR (Jan. 2, 2022), https://www.npr.org/2022/01/02/1069739392/disinformation-fueled-2021-and-2022-will-likely-see-the-same [https://perma.cc/5WNF-KY9P].

as: Stop the Steal,[28] Pizzagate,[29] QAnon,[30] or quack COVID remedies or origin stories.[31] Compounding the problem are many of the false assertions accompanied by falsified evidence, either created to look legitimate or used in a misleading context. Indeed, the preponderance of false "evidence" online provides the predicate for the republication of disinformation through print, television, radio, and in podcasts, including outlets with a more journalistic bent.[32]

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28. Stop the Steal is a far-right advocacy group established in 2016, which contested the 2020 election after Joe Biden was named the winner. *See* Rob Kuznia, Curt Devine, Nelli Black & Drew Griffin, *Stop the Steal's Massive Disinformation Campaign Connected to Roger Stone,* CNN (Nov. 14, 2020), https://www.cnn.com/2020/11/13/business/stop-the-steal-disinformation-campaign-invs/index.html [https://perma.cc/F4DR-N8AN]. The group claimed the Democrats stole the election through voting fraud. *See id.* Stop the Steal held rallies in November and December 2020 claiming the election was stolen and that Trump was the actual winner. *Id.* Some demonstrators rioted and attacked the U.S. Capitol Building after Stop the Steal's "March to Save America" on January 5 and 6, 2021. *Id.*

29. Pizzagate is a far-right conspiracy theory tying the Clintons, other prominent Democrats, and their allies to a fictitious child sex-trafficking ring, run out of a popular Washington, D.C. restaurant. *See* Amanda Robb, *Anatomy of a Fake-News Scandal*, ROLLING STONE (Nov. 16, 2017), https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/ [https://perma.cc/3HZ5-R2D2]. This false news story began on 4chan, 8chan, and Reddit, which are anonymous message boards, before moving on to Facebook and Twitter. *See id.*

30. QAnon is a conspiracy theory that originated in 2017 in forum posts on 4chan. *See* Brian Holoyda, *QAnon: Conspiracy Theory*, BRITANNICA (May 9, 2022), https://www.britannica.com/topic/QAnon [https://perma.cc/6ELV-PWJQ]. "Conspiracy adherents believed the U.S. Pres. Donald Trump was waging a secret war against a cabal of satanic cannibalistic pedophiles within Hollywood, the Democratic Party, and the so-called 'deep state' within the United States government." *Id.* With the help of social media platforms, "the theory expanded in content and geographic reach . . . and resulted in legal protests . . . [and] violent incidents." *Id.*

31. These theories led to dangerous movements and consequences across the nation. Stop the Steal's activities and deliberate incitement towards violence and promotion of fake news culminated in the 2021 Capitol attack. *See* Robert Legare, *"Stop the Steal" Organizer Ali Alexander Testifies Before Grand Jury in Jan. 6 Probe*, CBS NEWS (June 24, 2022), https://www.cbsnews.com/news/stop-the-steal-organizer-ali-alexander-testifies-before-grand-jury-in-jan-6-probe/ [https://perma.cc/T9ZB-H8VH]. The Pizzagate conspiracy theory drove a gunman to physically endanger the patrons of a restaurant. *See* Matthew Haag & Maya Salam, *Gunman in 'Pizzagate' Shooting Is Sentenced to 4 Years in Prison*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html [https://perma.cc/26MT-KCQN]. QAnon, fanned by social media and self-politicians, has driven people in a fantasy and thorn thousands of families apart. *See* Greg Jaffe & Jose A. Del Real, *Life Amid the Ruins of QAnon: 'I Wanted My Family Back,'* WASH. POST (Feb. 23, 2021), https://www.washingtonpost.com/nation/interactive/2021/conspiracy-theories-qanon-family-members/ [https://perma.cc/95EX-VBHP].

32. *See* Eli Rosenberg, *Alex Jones Apologizes for Promoting "Pizzagate" Hoax,* N.Y. TIMES (Mar. 25, 2017), https://www.nytimes.com/2017/03/25/business/alex-jones-pizzagate-apology-comet-ping-pong.html (discussing the aftermath of the "Pizzagate" conspiracy, focusing on Alex Jones, who helped popularize and spread the fake news. It features an apology from Alex Jones and discusses the devastating impact of the shooting on the restaurant and its owner. Additionally, it notes how the conspiracy theory has survived and has been promoted beyond the shooting and discrediting.).

Although the 117th U.S. Congress held hearings on social media speech, there has been little legislative movement to address the crisis.[33] Democrats and many Republicans cannot agree on what the problem is. Progressives like Senators Amy Klobuchar, Ben Ray Lujan, Anna M. Kaplan, and Brad Hoylman have proposed measures limited to health misinformation and civil rights, but neither initiative advanced to a vote.[34] Republicans largely criticize social media platforms not for the disinformation posted by third parties, but for political bias that favors liberal speech.[35] Such criticism may be a form of disinformation itself, since there is no evidence that algorithms are deliberately privileging the left.[36] If ideologically-conservative speech is disfavored algorithmically, it may be because much of the discourse on the right has become rooted in pro-Trump, anti-vax disinformation. This political divide is also evident in proposed state laws seeking to regulate online speech. Bills in red states like Texas, Florida, North Carolina, and Utah attempt to prevent social media companies from voluntarily assuming a gatekeeper role for posted content.[37] Texas's law, HB 20, purports to be an "anti-censoring social media" legislation that protects the First Amendment rights of conservatives to freely express their political views.[38] The law was blocked by a federal judge in December 2021.[39] An appeal is pending.[40] On the merits, the law would likely be viewed as unconstitutional due to violating the speech rights of the social media companies as private citizens. The law could also run afoul of Section 230(c)(2), which immunizes websites from suits by third-party speakers for censorship.[41]

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33. *See* JASON A. GALLO & CLARE Y. CHO, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS 19 (2021).

34. *See* Press Release, U.S. Senator Amy Klobuchar, Klobuchar, Luján Introduce Legislation to Hold Digital Platforms Accountable for Vaccine and Other Health-Related Misinformation (July 22, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/7/klobuchar-luj-n-introduce-legislation-to-hold-digital-platforms-accountable-for-vaccine-and-other-health-related-misinformation [https://perma.cc/B9GA-H8B5]; *see also Hoylman Seeks to Hold Social Media Accountable for Hate Speech, Vaccine Misinfo*, VILL. SUN (Jan. 7, 2022), https://thevillagesun.com/hoylman-seeks-to-hold-social-media-accountable-for-violent-hate-speech-vaccine-misinformation [https://perma.cc/LV6F-5HA7].

35. *See generally* Bobby Allyn, *Facebook Keeps Data Secret, Letting Conservative Bias Claims Persist*, NPR (Oct. 5, 2020), https://www.npr.org/2020/10/05/918520692/facebook-keeps-data-secret-letting-conservative-bias-claims-persist [https://perma.cc/7HZU-22ZM].

36. *See id.*

37. TEX. CIV. PRAC. & REM. § 143A.002 (West); TEX. BUS. & COM. § 120.051, 120.101–104 (West); S.B. 7072, 123th Leg. (Fla. 2021); S.B. 228, 64th Leg., Gen. Sess. (Utah 2022); H.B. 832, Gen. Assemb., Reg. Sess. (N.C. 2021).

38. H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021).

39. *See generally* NetChoice, LLC v. Paxton, No. 1:21-CV-840-RP (W.D. Tex. Dec. 1, 2021).

40. *See generally* Defendant's Notice of Appeal, NetChoice, LLC v. Paxton, No. 1:21-cv-00840-RP (W.D. Tex. 2021).

41. 42 U.S.C. § 264.

There is little that courts can do to combat political disinformation under existing First Amendment jurisprudence. As a 2019 Congressional Research Service article reports in detail, the biggest obstacle is that there is no state action.[42] This is a viewpoint-neutral principle because it applies equally to attempts on the right to correct alleged progressive bias, and it also applies to efforts on the left to combat deliberate falsity and conspiracy theory-mongering by some Conservatives. Because social media platforms like Facebook, YouTube, and Twitter are privately owned, they are free to regulate the content of third parties who post content. Irrespective of viewpoints or truth, the First Amendment applies to protect these private companies from government intervention, even if it means that individual providers of content are silenced.[43] To regulate these private companies under the First Amendment, courts need to determine grounds for exceptional treatment for applying First Amendment principles to private actors.[44] One such ground is that media platforms have become so ubiquitous as to be a public forum even though privately owned—the equivalent of traditional public rights of way in a company town.[45]

Another justification for First Amendment intervention is that the internet is the equivalent of broadcasting. Though Justice Stevens expressly rejected the comparison in *Reno v. ACLU*,[46] if social media platforms were treated like broadcasters, then the government could regulate posted content in furtherance of the public's interest.[47] Although there have been narrow applications of the First Amendment to regulate private editorial decisions, the general rule, articulated in *Miami Herald v. Tornillo*, is that the state may not intrude on the editorial discretion of the newsroom.[48] Even a newspaper with anticompetitive market power, such as the one in *Miami Herald*, [49] cannot be required by the government to publish third-party content. Third parties, whether seeking to publish in a newspaper or online, are free under the First Amendment to start their own

42. *See generally* VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT (2019).

43. *See* United States v. Alvarez, 567 U.S. 709, 717–30 (2012).

44. *See id.*

45. *See generally* Marsh v. Alabama, 326 U.S. 501 (1946); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); Knight First Amend. Inst. at Colum. Univ. v. Biden, No. 18-1691-cv, WL 5548367 (2d Cir. 2021); Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

46. Reno v. Am. C.L. Union, 521 U.S. 844, 869–70 (1997).

47. Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367 (1969). *See generally* Time Warner Ent. Co. v. Fed. Commc'ns Comm'n, 93 F.3d 957 (D.C. Cir. 1996).

48. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 242 (1974).

49. *See generally id.*

printing press, even if the lack of market power means there is no audience to digest the content.[50]

In *Packingham v. North Carolina*, the Supreme Court analogized social media platforms to "the modern public square."[51] But that case applied the First Amendment to invalidate a state law.[52] The reference to the public square appears to be limited to describing the discursive power of social media in the digital age, even for registered sex offenders.[53] There was no dictum suggesting, as in *Marsh v. Alabama*, that privately owned land that operates as a traditional public space, like a sidewalk or a park, can be regulated under the First Amendment.[54] To underscore this point, Justice Alito, dissenting in *Packingham*, expressly rejects social media platforms as the virtual equivalent of "public streets and parks."[55] In 2020, the Supreme Court mooted a Second Circuit opinion in *Biden v. Knight First Amendment Institute*, which was predicated on the idea that the President of the United States could not block dissenters from accessing his Twitter account, as Donald Trump tried to do.[56] While it is important to overstate the significance of mooting, Justice Thomas, in his concurrence, stated the following about the power of social media platforms:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[57]

Justice Thomas' concurrence cites *Turner Broadcasting System, Inc. v. Federal Communications Commission*[58] to support his assertion that

50. *Id.* at 256–59.

51. Packingham v. North Carolina, 137 S. Ct. 1730, 1730, 1737 (2017).

52. *Id.* at 1738.

53. *Id.* at 1736.

54. *Compare* Marsh v. Alabama, 326 U.S. 501, 501 (1946) (holding that a company-owned town could not restrict the distribution of religious materials by an individual seeking to do so on company-owned property "freely used by the public"), *with Packingham*, 137 S. Ct. at 1732 (reasoning that "[t]oday, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds' to users engaged in a wide array of protected First Amendment activity on any number of diverse topics" (quoting *Reno*, 521 U.S. at 870) (internal citations omitted)). The High Court in *Packingham* recognized that the Internet may be "the modern public square." *Packingham*, 137 U.S. at 1737.

55. *Id.* at 1743 (Alito J., dissenting); *see also* LEWIS, *supra* note 21.

56. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021).

57. *Id.* (Thomas, J., concurring).

58. *Id.* at 1224.

digital platforms are common carriers like broadcasting or cable systems, which hold themselves out as available to anyone willing to participate. Justice Thomas also cites *PruneYard Shopping Center v. Robins*,[59] in which the Court concluded a shopping mall must allow protesters to engage in advocacy on private mall property, to support the point that some form of speech regulation on private property would not be unprecedented.[60] In doing this, Justice Thomas appears to make an argument similar to those used to justify the enjoined Texas social media bias law.

While there is no consensus by the Court that social media should be treated as a privately owned public forum, a broadcaster with public interest requirements, or a common carrier open to all speakers, such analogies are almost beside the point. Even if the First Amendment somehow reached private social media platforms, the experience of the last few years suggests that those on the right would seek to use it to champion the rights of individual posters, many of whom may be engaging in disinformation. Those on the left would continue to propose regulation that would require social media companies to take down, or otherwise prevent, disinformation by third-party users. Ultimately, if laws on the right and left use the First Amendment to advance or encourage a political agenda, these laws would likely fail strict scrutiny as impermissible content regulations.

This article asks the following question: is there a way for the state to regulate online disinformation without invalidating the law as content regulation? Political speech, after all, is at the center of the type of content that the First Amendment has historically protected.[61] It is at the heart of Alexander Meiklejohn's Marketplace of Ideas thesis— the idea that the government not punishing speakers for political views is a sign of a democracy's health.[62] Protecting political speech has been a feature of the Supreme Court's First Amendment jurisprudence, from Justice Brandeis' defense of pluralism in *Dennis v. United States*[63] to Justice Holmes' protections of "the thought we hate,"[64] to Justice Brennan's enunciation that the First Amendment offers limited protection for falsity in

59. *See generally* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

60. *PruneYard Shopping Ctr.*, 447 U.S. at 88.

61. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010); Cohen v. California, 403 U.S. 15, 23 (1971).

62. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

63. Dennis v. United States, 341 U.S. 494, 506–14 (1951) (examining J. Brandeis' rationale applied in *Whitney v. California*, 274 U.S. 357 (1927)).

64. United States v. Schwimmer, 279 U.S. 644, 655 (1929).

defamation cases.[65] It is also the backdrop that impels the Court's decision in *Alvarez* that the state cannot punish falsity without something more—a subsidiary harm.[66]

As someone with a background in journalism, this author is reluctant to argue that the First Amendment should reach to political disinformation. In a perfect world, the state should not be tasked to distinguish between what is true and what is false. There is a totalitarianism associated with such a view: a repressive orthodoxy echoed in history by Pravda, the propaganda arm of the Soviet Union, whose name means truth;[67] and in dystopian novels like George Orwell's *1984*, which introduces readers to the Ministry of Truth.[68] But there is also a cultural relativism and political tribalism that exists in 2022 that has made truth a malleable concept. Citizens today believe in the truth they want to believe in, and they have the tools to review and even create false evidence that reifies truth in an information bubble where there is little or no opportunity—or desire—to debunk false claims.

III. ASSESSING NON-TRANSACTIONAL COMMERCIAL SPEECH AS A BASIS FOR NON-COMMERCIAL DISINFORMATION REGULATION

This concern about fraud, however, may open a back door to regulation of online disinformation; government can censor or punish commercial speakers who deceive or mislead. State regulation is subject to intermediate scrutiny under the *Central Hudson* test, which asks, as a threshold question, whether the speech is misleading.[69] Commercial speech is generally defined as content that relates to a commercial transaction.[70] This lower scrutiny allows for an array of government regulations with respect to deceptive advertising and public policies to protect consumers by shielding them from fraudulent or deceptive business practices.

In the context of speech proposing or persuading a consumer to consummate a transaction, the harm is that the deception alters the bargained-for exchange. The basis of a fraud claim is the defrauded party was deprived of information or fed false information that would have been material to the party's decision to consummate the transaction. The tools used by a transacting party, including protective measures like due diligence, can be rendered useless if a fraudster, for example, submits

65. N. Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).
66. United States v. Alvarez, 567 U.S. 709, 719 (2012).
67. *See generally* ANGUS ROXBURGH, PRAVDA: INSIDE THE SOVIET NEWS MACHINE (1987).
68. *See generally* GEORGE ORWELL, 1984 (50th ed., New Am. Library 1961) (1949).
69. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).
70. *Id.* at 561.

counterfeit documents for review. It is for that reason that courts require an additional showing of fraud or injustice before allowing a third party to pierce the limited liability protections of principals controlling a business entity which has defaulted on a contract.[71] Absent fraud, contracting parties can take steps to identify and mitigate the risk of default without being duped by fake documentation or deceptive representations.

The normative rules in place to address speech fraud in commercial transactions fit nicely, though not completely, into online disinformation. At its core, much of disinformation relies on fakery of underlying assertions of evidence that can be debunked. Recipients of the speech may not have the tools, however, to evaluate fake or deceptive sources or documents.[72] The technology of cyberspace makes it possible for individuals, state actors, and non-state actors to easily create fake evidence that looks credible. Spoofing email addresses, mirroring actual websites, and setting up fake celebrity accounts, have become a staple of the types of manufactured fakery that political fraudsters have relied on in the run-ups to the 2016 and 2020 presidential elections.[73] Documents have always been susceptible to fakery; however, the ease of creating or altering authentic-looking documents is greater than it has ever been.[74] Photo-realistic images can be created or altered with commonly available photo-editing software on home computers.[75] Though it has not yet been put into wide use politically, deepfake technologies make it possible for propagandists and pranksters to graft the facial image of a politician or political candidate onto a body double to create realistic-looking video "evidence" of wrongdoing.[76]

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71. *See* Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 519, 523 (7th Cir. 1991).

72. *See generally How to Spot Real and Fake News, Critically Appraising Information,* MINDTOOLS, https://www.mindtools.com/pages/article/fake-news.htm [https://perma.cc/C7LR-8W3C].

73. *See generally Where Does Fake News Come From?*, CTR. FOR INFO. & TECH. SOC'Y: UNIV. OF CAL. SANTA BARBARA, https://www.cits.ucsb.edu/fake-news/where [https://perma.cc/3KBC-KW55]. *See also* Hunt Alcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211 (2017).

74. *See* Mark Hosenball, *FBI Examining Fake Documents Targeting Clinton Campaign*: *Sources*, THOMSON REUTERS (Nov. 4, 2016), https://www.reuters.com/article/us-usa-election-documents/fbi-examining-fake-documents-targeting-clinton-campaign-sources-idUSKBN12Y2WY [https://perma.cc/RWR6-ZPPA]; *see also* Zachary Cohen & Marshall Cohen, *Trump Allies' Fake Electoral College Certificates Offer Fresh Insights About Plot to Overturn Biden's Victory*, CNN (Jan. 12, 2022), https://www.cnn.com/2022/01/12/politics/trump-overturn-2020-election-fake-electoral-college/index.html [https://perma.cc/TC9S-U3VM].

75. *See generally The Problem with Photo Manipulation*, GCF GLOB., https://edu.gcfglobal.org/en/digital-media-literacy/the-problem-with-photo-manipulation/1/ [https://perma.cc/5TDE-87E4].

76. *See* Chris Meserole & Alina Polyakova, *The West is Ill-Prepared for the Wave of "Deep Fakes" that Artificial Intelligence Could Unleash*, BROOKINGS INST. (May 25, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/05/25/the-west-is-ill-prepared-for-the-

The main obstacle to applying fraud protections to online video protection is the absence of a commercial transaction. At first blush, this focus on the transactional consequence of fraudulent speech would seem to apply to disinformation intended to persuade citizens to vote in a certain way. In that sense, the vote would be the transaction. Though there are those who argue that the harms that result from disinformation are more significant and wide-ranging to society than speech relating to a single commercial transaction, the salient issue here is the transaction's non-commercial nature.[77] Indeed, this is typically the essential characteristic of commercial speech fraud: a fraud that induces a party into a commercial transaction. Courts typically do not divorce commercial speech cases from the context of a commercial transaction. As long as one focuses on a consequent transaction there is likely no way to develop online disinformation regulation that would survive First Amendment commercial speech scrutiny. The Supreme Court said as much in *Citizens United*.[78] Other courts have ruled that online commercial speech which has expressive non-commercial elements would not qualify for lower First Amendment scrutiny.[79]

A. Federal Securities Law as a Possible Blueprint for Non-Commercial Disinformation Regulation

There may be, however, a way to justify the use of lower First Amendment scrutiny on political disinformation without getting entangled in the lack of a commercial transaction as a bar. This method has primarily been used in federal securities law.[80] Much of the speech provisions in securities statutes and regulations address the harm as a consequent transaction, such as the purchase or sale of a security. Securities and Exchange Commission (SEC) Rule 10b-5, for example, typically requires

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wave-of-deep-fakes-that-artificial-intelligence-could-unleash/ [https://perma.cc/HM2D-QHWF] ("Earlier this year, a tool that allowed users to easily swap faces in video produced fake celebrity porn, which went viral on Twitter and Pornhub."); *see also* Simon Parkin, *The Rise of the Deepfake and the Threat to Democracy*, GUARDIAN (June 22, 2019), https://www.theguardian.com/technology/ng-interactive/2019/jun/22/the-rise-of-the-deepfake-and-the-threat-to-democracy [https://perma.cc/QR25-GMLV].

77. *See* Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 223–24 (1990); *see also* Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 470 (2020).

78. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 368 (2010).

79. *See, e.g.*, Int'l Outdoor, Inc. v. City of Troy, Michigan, 974 F.3d 690, 707–08 (6th Cir. 2020) (holding strict, not intermediate scrutiny, applies to content-based restrictions on non-commercial speech); *see also* Lone Star Security & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1198–1200 (9th Cir. 2016) (holding that unlike other types of speech, restrictions on the content of commercial speech "need only withstand intermediate scrutiny").

80. 15 U.S.C. § 77a (1933); 15 U.S.C. § 78a (1934); 15 U.S.C. § 77aaa (1934); 15 U.S.C. § 80a-1 (1940); 15 U.S.C. §§ 80b-1-80b-21. (1940).

a fraud to be committed by the buyer or seller to the other party to a transaction.[81] A purchaser's deception impacts a seller of the same stock, or a seller's deceit impacts a purchaser. This can be complicated by purchases and sales that occur on stock exchanges since the transaction is not a face-to-face bargained-for exchange, and thus lacks the immediate relationship to a transaction that common law fraud actions require.

There is a sub-category of securities law where the relationship of the speech to a consequent transaction is more tenuous. In this sub-category, the law aims to protect against fraudulent activity that taints the total mix of information in the marketplace. One such area is disclosure actions under Rule 10-b5, both as SEC enforcement and even as a private right of action.[82] Another area is Rule 14a-9, addressing enforcement against a materially misleading statement or omission in a proxy solicitation.[83] A third area is enforcement of investment advice under the Investor Advisers Act of 1940.[84] In each of these areas, the law is focused on the harm to the information marketplace rather than transactional causation.

Before considering the ways in which federal securities law regulates informational harms, it is important to reemphasize the modest scope of this article's thesis. This article does not argue that political disinformation should be regulated under existing securities law. Political disinformation is certainly not a security, as defined by the Securities Act of 1933.[85] Some argue that voting citizens are stakeholders in our democracy; however, there is no political analog to the unequal aggregation of voting power that comes with proportional ownership interests in a business. There would also be standing issues in private rights of actions, since securities law limits plaintiffs to those who actually bought or sold the security in question.[86] Standing to sue under a private right of action would simply not be possible for large groups who may have been persuaded or influenced by disinformation to vote in a certain way or to take a political action. The focus here is not on trying to fit a square peg into a round hole.

This article posits that the harm to the informational marketplace that falls under the purview of securities law is similar to the harms to the political information marketplace. Therefore, the protective measures

81. 17 C.F.R. § 240.10b-5 (2022).

82. *Id.*

83. 17 C.F.R. § 240.14a-9 (2022).

84. 15 U.S.C. §§ 80b-1–21.

85. A security is generally understood to be a passive economic interest in another's enterprise. *See* Sec. & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293, 297 (1946); Robinson v. Glynn, 349 F.3d 166, 169 (4th Cir. 2003).

86. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727, 731–32 (1975); *but see* Deutschman v. Beneficial Corp., 841 F.2d 502, 503 (3d Cir. 1988).

taken to maintain the integrity of the marketplace, measures that have survived First Amendment scrutiny, could be a predicate for regulation of disinformation in the online marketplace of ideas. Congress would, of course, need to take action and pass legislation. But this argument suggests that Congress could look to informational securities regulation as an example of regulatory speech architecture that might withstand First Amendment scrutiny. The architecture of a law that regulates online disinformation will build a vastly different house, but perhaps it can be designed to be structurally sound under the First Amendment to protect against informational harm.

A number of scholars have written about the intersection of federal securities law and the First Amendment. Some argue strongly that First Amendment protections afforded to non-commercial speech should apply to some speech regulated by securities law.[87] The argument in this article moves in the opposite direction. Indeed, to make this argument, one must turn the arguments of others on their heads. Instead of arguing that the First Amendment should liberate speech from the shackles of securities regulation, the argument is essentially that securities speech regulation provides the possibility of a blueprint for disinformation regulation that may constrain a non-commercial information marketplace. This contrarian position is not one that this author takes lightly, but many of the scholars seeking to expand First Amendment protections were writing in a different era. Today, online disinformation has become an issue that potentially affects the existence of our democracy. Though many contemporary scholars may disagree with a proposal to build a regulatory scheme that would reach to online political falsity, there are few who think that nothing should be done.[88] The harm to the information marketplace—to the marketplace of ideas—is too great.

87. *See generally* Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV 903 (2014) (arguing that First Amendment protections should be extended to the securities fraud context). *See also* Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990) (advocating that protections presently afforded to non-commercial speech should apply to securities advertising).

88. *See* Saaket Pradhan, *Combating Online Misinformation: Diverging Approaches in the United States and European Union*, COLUMBIA J. TRANSNATIONAL L. (Apr. 15, 2021), https://www.jtl.columbia.edu/bulletin-blog/combating-online-misinfo [https://perma.cc/4cKD-2CKV]; *see also* Tony Romm & Elizabeth Dwoskin, *Silicon Valley Braces for Tougher Regulation in Biden's New Washington*, WASH. POST (Jan. 18, 2021), https://www.washingtonpost.com/politics/2021/01/18/silicon-valley-tech-biden-democrats/.

B. Federal Securities Law and Speech

The federal securities law is a constellation of five statutes that were enacted in the decade leading up to World War II.[89] The principal statutes, the Securities Act of 1933 and the Securities Exchange Act of 1934, are depression-era laws that regulate the marketplace for passive business ownership units defined as securities.[90] Both were designed to root out fraud and systematize the flow of information in financial markets, problems that contributed to the stock market crash of 1929.[91] The 1933 Act sets forth a process whereby companies must register with the SEC before offering to sell securities (usually in the form of stock) to the general public.[92] The 1934 Act created the Securities Exchange Commission and requires ongoing disclosure requirements with respect to: a public company's financials, proxy solicitations and voting, tender offers, and, more broadly, fraud related to the purchase or sale of any security.[93]

From a speech standpoint, the 1933 Act generally requires prospective public offerors to make a variety of disclosures with respect to the financial health of the offeror, the identity and background of its principals, and a list of risk factors, among other things.[94] Though it has been referred to as the "truth in securities" law, it is important to note that the SEC does not vouch for the truth of disclosures contained in regulatory documents or advertising brochures, known as "prospectuses," which must be furnished to buyers with an offer.[95] In that sense, the 1933 Act offers a constructive model of a content neutral reporting regime. Prospective buyers are not presented with a government stamp of approval

89. 15 U.S.C. § 77a (1933); 15 U.S.C. § 78a (1934); 15 U.S.C. § 77aaa (1934); 15 U.S.C. § 80-1 (1940); 15 U.S.C. §§ 80b-b-21 (1940).

90. *See generally* 15 U.S.C. § 77a (1933); 15 U.S.C. § 78a (1934); 15 U.S.C. § 77aaa (1934).

91. *See* Statement of President Roosevelt of March 29, 1933, *in* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 56 (1982); 77 CONG. REC. 2918 (1933) (remarks of Rep. Rayburn) ("The purpose of this bill is to place the owners of securities on a parity, so far as is possible, with the management of the corporations, and to place the buyer on the same plane so far as available information is concerned, with the seller"); *see also* Ernst & Ernst v. Ochfelder, 425 U.S. 185, 195 (1976) (emphasizing that the primary purpose of the 1934 Securities Exchange Act is to safeguard investors from price manipulation in the stock market).

92. *The Laws That Govern the Securities Industry: Securities Act of 1933*, SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry#secact1933 [https://perma.cc/2UBG-NS5U] [hereinafter *Laws Governing Securities Industry*].

93. *Id.*

94. *Registration Under the Securities Act of 1933*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/registration-under-securities-act-1933 [https://perma.cc/D3X8-MWJC].

95. *Laws Governing Securities Industry*, *supra* note 92.

or a rating of risk; they are, however, given the information they need to make an informed decision should they take the time to navigate the disclosures. Offerors of securities have an incentive to comply with these truth requirements, as a materially misleading statement or omission on a registration statement, in a prospectus, or in any other sales communication makes an issuer strictly liable to buyers for their losses. Additionally, those who prepared or signed the disclosure may be jointly and severally liable, unless they can show they acted with due diligence.[96]

The 1934 Act regulates speech in an ongoing context. Like the 1933 Act, it holds speakers responsible for false or misleading statements or omissions.[97] Public companies, for example, are required to report truthful, accurate information in quarterly and annual statements that are made available to the public; in proxy solicitations and all communications leading up to a proxy vote; and in the implementation or defense against tender offers, a hostile takeover process in which shareholders receive offers to tender their shares directly from a buyer.[98] The 1934 Act gives the SEC the authority to discipline companies and individuals for non-compliance through agency action or civil suits.[99] Willful non-compliance of the Act may be referred to the Department of Justice for criminal prosecution.[100] Section 10b of the 1934 Act also prohibits fraud for statements or omissions made in connection with the purchase or sale of any security, not just those for widely held publicly traded companies. This omnibus anti-fraud provision, principally enforced through SEC Rule 10b-5, applies broadly to public disclosures made by companies or their agents, trading by company insiders using material non-public information, and can extend to cover individuals who receive tips and trade in violation of a fiduciary duty or duty of confidentiality. The 1934 Act requires stock exchanges, brokers, dealers, and other organizations attendant to securities trading to register with the SEC and comply with disclosure requirements, both with the SEC and with self-regulatory organizations charged with creating and enforcing rules of conduct by the trading community.[101]

Speech-related provisions in the Trust Indenture Act of 1939 and the Investment Company Act of 1940 are focused mainly on consumer

96. 15 U.S.C. § 77k(a); Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 682–83 (S.D.N.Y. 1968).

97. 17 C.F.R. § 240.10b-5 (1933).

98. 15 U.S.C. § 78n(a)-(c), 17 C.F.R. § 240.13e-4 (2008); 17 C.F.R. § 240.14e-1 (2008); 17 C.F.R. § 240.15d-13 (2018); 17 C.F.R. § 240.15d-17 (2005).

99. 15 U.S.C. §§ 80a-1–80a-64.

100. 15 U.S.C. § 80a-24; 15 U.S.C. § 78ff.

101. 15 U.S.C. §§ 80a-1–80a-64.

protections.[102] In both these acts, the speech regulations are structural, not transactional. The Trust Indenture Act lays out standards, in addition to the 1933 Act registration, for the offer of debts securities to the public. Bonds, debentures, and notes cannot be offered for sale without an accompanying trust indenture, which sets forth the terms of the debt obligation transaction.[103] From a speech standpoint, it is essentially a consumer protection regime in which the government requires offerors to create transaction documents that comply with established government guidelines. The Investment Company Act of 1940 regulates the organization and operation of firms that invest, reinvest or trade in securities, including mutual funds.[104] The main speech-related provisions relate to disclosure to the public of the structure and objectives of the fund, both at the time of sale and regularly thereafter.[105] It is also primarily a structural regulation to protect consumers. The Investment Company Act does not empower the SEC to supervise or evaluate the merits of a specific transaction being offered.[106]

The Investment Advisers Act of 1940 contains a mix of structural consumer protection regulation and anti-fraud speech regulation. As amended, the Investment Advisers Act requires firms or individuals that dispense investment advice to register with the SEC and complete regular disclosures.[107] Registration is permissive for those with assets over $25 million and required for those with assets over $100 million.[108] The Investment Advisers Act also prohibits misstatements or misleading omissions of material facts by investment advisers, whether or not registered.[109] An exception to this anti-fraud provision is given to those who act as "bona fide newspapers."[110] The line between a bona fide newspaper and an investment adviser has been subject to considerable court review over the last forty years. The U.S. Supreme Court has not addressed the First Amendment issues present in a statute that applies

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102. *See* Stanley E. Howard, *The Trust Indenture Act of 1939*, 16 JOURNAL OF LAND & PUB. UTIL. ECON. 168, 179 (1940) ("Thus the Trust Indenture Act of 1939 is legislation designed to establish certain minimum standards for the drafting of trust indentures on the basis of which certain corporation securities are prepared for issuance or sale to the investing public.").

103. *Laws Governing Securities Industry*, *supra* note 92.

104. *Id.*

105. *Id.*

106. *Id.*

107. 15 U.S.C. § 80b.

108. *Id.*

109. *General Information on the Regulation of Investment Advisers*, U.S. SEC. & EXCH. COMM'N (Mar. 11, 2011), https://www.sec.gov/divisions/investment/iaregulation/memoia.htm. [https://perma.cc/EM4N-53Q9].

110. *Id.*

against bona fide journalists, though it has limited the reach of this provision through statutory interpretation.[111]

C. Transactional v. Non-Transactional Informational Speech

In assessing the First Amendment value of anti-fraud speech provisions in federal securities law, a distinction can be drawn between transaction-specific speech and informational speech not directly connected to a transaction. Transaction-specific speech regulation is what one would typically associate with commercial speech.[112] The statute applies to a materially misleading statement or omission that caused a commercial transaction to occur, such as the buying or selling of a security.[113] This type of commercial speech is akin to common law fraud, although no face-to-face bargain is required under securities law. Deceptive advertising is a type of transaction-related speech that traditionally falls into the category of commercial speech.[114] This type of speech may be less connected to a specific transaction but asks whether a consumer would likely be misled by a material statement or omission.[115] Regulation here can provide a remedy for someone deceived into a specific transaction, or it could protect consumers before a deception occurs through disclosure requirements and corrective measures. Registration and disclosure requirements under the various securities statutes are examples of consumer protection regulations that typically fit into this category.

There is a category of commercial speech, however, in which the link to a transaction is tenuous or perhaps non-existent. In this category of speech, the harm is fully informational, a taint on the total mix of information in the marketplace or within a corporation. The speech does not need to be connected to the inducement of a commercial transaction, although it can be. It is enough to have caused informational harm through a materially misleading statement or omission. This type of non-transactional informational speech regulation appears unique to federal securities law. Informational harm is the basis for regulations relating to misstatements in a proxy solicitation under 1934 Act Rule 14a-9, in fraud

111. *See* Lowe v. Sec. & Exch. Comm'n., 472 U.S. 181, 190, 204-210 (1985) (discussed in *infra* Part IV).

112. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–62 (1980).

113. Am. Bar Assoc., Comm. on Fed. Reguls. of Sec., *Report of the Task Force on Regulation of Insider Trading: Part I: Regulation Under the Antifraud Provisions of the Securities Exchange Act of 1934*, 41 BUS. LAW. 223 (1985).

114. *E.g.*, *In re* Cliffdale Assocs., 103 F.T.C. 110, 164–65 (1984).

115. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 771 (1976).

on the market disclosure actions under 1934 Act Rule 10b-5, and in the application of Section 206 of the Investment Advisers Act of 1940.[116]

SEC Rule 14a-9 casts a wide net in its regulation of the total mix of information available in advance of a shareholder vote controlled by a corporation. The rule prohibits materially misleading statements or omissions in a "proxy statement, form of proxy, notice of meeting or other communication, written or oral."[117] In some respects, the application of Rule 14a-9 may be a model for what a constitutional regulation of online political disinformation could look like. The rule is intended to protect a shareholder vote from disinformation and misinformation. It is not necessarily about protecting consumers from a commercial transaction, although some shareholder votes could relate to a specific transaction. The rule essentially regulates the dissemination of the information as it relates to a voting process.

The SEC's list of misleading statements underscores the salience of the proxy rule as an example of a government anti-disinformation measure. In addition to banning predictions of future market values of a corporation, the SEC expressly bans "material which directly or indirectly impugns character, integrity or personal reputation."[118] It also prohibits, directly or indirectly, making "charges concerning improper, illegal, or immoral conduct or associations, without factual foundation."[119] There are also disclosure and identification requirements that would likely be constitutional in a political campaign context under *Citizens United*.[120]

To protect against a taint of information in the shareholder voting process, Rule 14a-9 may provide too much speech regulation in a political disinformation context. For one thing, the rule operates in part as a prior restraint since the SEC requires parties to submit proxy materials for review in advance of a vote.[121] Given the massive amount of content and the large population of speakers online, advance disclosure and review would likely not be practical. Creating a government prior restraint regime necessarily would put online disinformation regulation in the crosshairs of those advocating greater First Amendment freedom from government censorship, and rightfully so. Although some might argue otherwise in the aftermath of the January 6, 2021 insurrection, combating online

116. 15 U.S.C. § 80b-6; 17 C.F.R. § 240.14a-9 (2022); 17 C.F.R. § 240.10b-5 (2022).
117. 17 C.F.R. § 240.14a-9.
118. *Id.*
119. *Id.*
120. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 368 (2010).
121. *See* 17 C.F.R. § 240.14a-9.

disinformation may be less of an irreparable harm than revealing troop movements or national security secrets.[122]

The standard of liability for Rule 14a-9 violations may be too broad for an anti-disinformation regulation. While Section 4(a) does not expressly state a standard, courts have generally held that negligence is sufficient for liability under Rule 14a-9.[123] That may set too low a bar for disinformation, which typically requires scienter, the intention to deceive, or recklessness. The application of a lower negligence standard in proxy speech cases is a departure from Rule 10b-5 and the Investment Advisers Act anti-fraud provisions, which do require scienter or recklessness.[124] This departure from a scienter requirement for proxies does not fit well into established First Amendment jurisprudence. Scienter, in the form of actual malice, is the basis for standard of liability for defamation cases against government officials and public figures.[125] In *New York Times v. Sullivan*, the U.S. Supreme Court leaves deliberate and recklessly made falsehoods unprotected under the First Amendment.[126] Disinformation, by definition, is the type of deliberate or reckless falsity that would fall beyond the pale of protection under the logic of *Sullivan* and its progeny.[127] A negligence-based regime would encompass not only disinformation, but could also apply against misinformation, negligent, or honest mistakes. *Sullivan* may tolerate a lower standard for honest mistakes that causes compensatory damages for private figures, but that does not address the public harm of disinformation, which often is designed to sway public opinion or perhaps confuse the public. In the final analysis, the negligence standard used in proxy speech regulation is more speech restricted than is needed in an anti-disinformation regime. But knowing that the courts are willing to use a negligence standard may make it easier to adopt a scienter-based approach to online disinformation.[128]

SEC Rule 10b-5, the omnibus anti-fraud provision in securities regulation, does not permit actions resulting from negligence.[129] It requires

122. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); *see also* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

123. *See* Gerstle v. Gamble-Skogmo, Inc., 478 F. 2d 1281, 1298–99 (2d Cir. 1973); Gruss v. Curtis Publishing Co., 534 F.2d 1396, 1403 (2d Cir. 1976); *see also* Jeffrey J. Giguere, Note, *Negligence vs. Scienter: The Proper Standard of Liability for Violations of the Antifraud Provisions Regulating Tender Offers and Proxy Solicitations Under the Securities Exchange Act of 1934,* 41 WASH. & LEE L. REV. 1045 (1984).

124. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212–15 (1976); 15 U.S.C. § 80b-6(2).

125. Roth v. United States, 354 U.S. 476, 494 (1957) (Warren, J., concurring).

126. New York Times v. Sullivan, 376 U.S. 254, 254 (1964).

127. Gertz v. Robert Welch, Inc., 418 U.S. 323, 330–31 n.4 (1974).

128. *Ernst & Ernst*, 425 U.S. at 186.

129. *Id.* at 204.

scienter, or at least recklessness, though the U.S. Supreme Court has not spoken on the latter.[130] Promulgated under Section 10b of the 1934 Act, which itself requires deception,[131] Rule 10b-5, at first blush, looks like a good fit for an anti-disinformation regulation.[132] The scienter requirement under Rule 10b-5 is consistent with the scienter exception to First Amendment protection of the actual malice standard of liability established in *New York Times v. Sullivan*.

As an anti-fraud provision, Rule 10b-5 addresses informational harm in situations where, for example, business insiders, like officers or directors of a corporation, buy or sell securities using material, non-public information. But Rule 10b-5 has a limiting requirement that is less about correcting general harm in the informational marketplace and more about protecting transactional harm—Rule 10b-5 expressly requires a connection to the purchase or sale of any security.[133] As a general matter, a Rule 10b-5 action must be linked closely to a commercial transaction.[134] How much so can vary depending on the circumstances. Rule 10b-5 can apply to prohibit face-to-face transactions that might otherwise be actionable as common law fraud.[135] In situations where insiders buy or sell securities on a stock exchange, the connection to someone directly on the other side of the transaction is more tenuous, but that is not a bar to Rule 10b-5, because the transaction taken by the insider is sufficient to meet the in-connection requirement. One could also argue that there is a constructive commercial transaction, as the inside trader knows that there is someone using the stock exchange who is either buying the shares being sold or selling the shares being bought. Even tippee liability, under the classic fiduciary flow theory or the misappropriation theory, must be linked to someone who trades on material, non-public information.[136] The informational deception must be material to the transaction under scrutiny.

The same may also be true for Rule 10b-5 disclosure actions, if a clear connection can be established linking a material misstatement or omission made with scienter by a company representative to a party who then trades on that company's stock. The connection between the

130. *Id.* at 185.

131. 17 C.F.R. § 240.10b-5 (2022).

132. *See* Joe Mont, *SEC Renews Its Offensive Against 'Fake News,'* COMPLIANCE WK. (Apr. 18, 2017), https://www.complianceweek.com/sec-renews-its-offensive-against-fake-news/2701.article. [https://perma.cc/C7A6-SRTP].

133. 17 C.F.R. § 240.10b-5.

134. *Id.* (imposing duties with respect to the purchase and sale of securities).

135. *Id.*

136. *See generally* Salman v. United States, 580 U.S. 39 (2016) (reaffirming the standard for tippee liability first established in *Dirks v. Sec. & Exch. Comm'n*, 463 U.S. 646 (1983)). *See also* United States v. O'Hagan, 521 U.S. 642 (1997).

deceptive disclosure and a resultant transaction is evident in the causation and reliance requirements of a 10b-5 private right of action for disclosure. In a private right of action, a plaintiff must show that the defendant's material misstatement or omission caused the transaction to occur and that the plaintiff heard the misstatement and relied on it. This type of disclosure case, akin to common law fraud, directly connects the informational harm as an inducement to a commercial transaction. It is less about informational harm than fraudulent inducement, making it the type of commercial speech that would not translate well as justification for disinformation regulation online.

However, there are some disclosure actions where the connection between informational harm and an induced transaction is less direct. These are class action suits where a group of shareholders buy at too high a price or sell at a price too low as a result of a material misstatement or omission's damaging impact on the information marketplace. In these disclosure actions, members of the class do not have to prove that they relied on the misrepresentation. There is no requirement that the shareholder even knows that the statement was made. As for the causation requirement, the plaintiffs need only show that the misrepresentation tainted the total mix of information available in the public marketplace, thereby causing the price of the shares bought or sold to become tainted. This "integrity of the price" metric is a feature of the Fraud on the Market theory, first upheld by the U.S. Supreme Court in *Basic Inc. v. Levinson*[137] and reconfirmed more recently in *Erica John Fund, Inc. v. Halliburton*.[138]

Fraud on the Market theory creates a rebuttable presumption of reliance by allowing the plaintiffs to show loss causation—that the misrepresentation caused the price to become distorted—as opposed to transaction causation—the fraudulent inducement into a commercial transaction typical in anti-fraud actions. Although the Supreme Court in *Basic* gives a nod to an essential link between the misrepresentation and the transaction, Fraud on the Market effectively severs that connection.[139] Plaintiffs need only show that the misrepresentation skewed the price at the time that they traded, causing them a loss. They do not need to show that the defendant's speech induced them into the transaction. Without transaction causation, Fraud on the Market disclosure actions are not about transactional speech; they are about harm to the information marketplace.

The reason behind the Fraud on the Market theory underscores the nature of the informational harm it seeks to correct. Fraud on the Market addresses the reality of the information age: there is too much information

137. Basic Inc. v. Levinson, 485 U.S. 224 (1987).

138. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011).

139. *Basic Inc.*, 485 U.S. 224.

from too many sources. This surfeit of information means that plaintiff shareholders may not have access to the source or sources of a misrepresentation; in some cases, they may get wind of the misrepresentation through news reporting or rumors; in other instances, the shareholders may never learn of the tainted information. Most shareholders are only casually invested in closely following financial news coverage, and few are monitoring statements issued by corporate spokespeople, deceptive or not. With the Fraud on the Market theory, shareholder knowledge is irrelevant; what matters is whether the material misstatement or omission had an impact on the information that caused the price of the shares to lose its integrity in the marketplace as a whole.

Integrity of the price is a metric by which courts can assess the harm done to the information marketplace by the material misstatement or omission.[140] It presupposes that there is an accurate total mix of information—an ideal that rests on the premise that free markets behave efficiently when supported with truthful, accurate information. Economists refer to this principle as the Efficient Capital Markets Hypothesis (ECMH).[141] ECMH is a macroeconomic theory about the behavior of the marketplace as a whole, not a class of shareholders who bought or sold. It is not even about the shares of one company.[142] It is the total mix of information that forms the basis of the ECMH.

This focus on market harm may be instructive for justifying an online disinformation regulation under the First Amendment. To be sure, the ECMH is not a good fit for online political markets. For one thing, the metric for determining informational harm may be less reliable. There is no obvious correlation to the integrity of the price with online political disinformation. Even so, in an entirely digital information universe, there may be algorithms that can "contact trace" the source of disinformation that may be spreading rapidly on the internet. This type of forensic work is already being done. Perhaps one aspect of a "fraud on the political market" regulation would be to require some system to identify the source of a political fraud and various generations of disinformation repeaters that may bloom from that source.

The point here is not that we should import the ECMH or Rule 10b-5 disclosure to create an online political disinformation law. Even so, the fact that the First Amendment apparently supports a law that penalizes

140. *See id.*; *Erica P. John Fund, Inc.*, 563 U.S. 804.

141. *See* Christopher Paul Saari, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 5, 1031 (1977).

142. *See* Thom Lambert, *Halliburton and the Paradox of an Efficient Stock Market*, TRUTH ON THE MKT. (June 25, 2014), http://truthonthemarket.com/2014/06/25/halliburton-and-the-paradox-of-an-efficient-stock-market [https://perma.cc/7RWS-RBKJ].

speech based on market harm may have some correlation to the political realm. Online political disinformation shares many characteristics of the "Fraud on the Market" disclosure. A political market may not be a situs for commercial transactions, but it still operates as a marketplace. Disinformation affects the marketplace of ideas, and while many who invoke Meiklejohnian theory[143] as a price to be paid for democratizing information, there are those who argue that Meiklejohn would be at war with himself over online political disinformation, given that it may be becoming an existential threat to democracy.[144] Disinformation also affects a more economic market as well, the viability of a candidate to continue a candidacy or win an election. There may also be subsidiary harms that can occur more directly to commercial markets because of law that is passed or repealed as a consequence of disinformation. Commercial markets for products and services may also be affected. Consider, for example, consumers who buy ivermectin or hydroxychloroquine because of politically charged anti-vax disinformation or boycotts against a business because of its false association to a conspiracy theory.

The public nature of the information in the ECMH may also be instructive for a possible online disinformation law. In *West v. Prudential Securities, Inc.*, Judge Easterbrook specifically excluded private advice from the total mix of information that impels the ECMH.[145] A leading interpreter of ECMH on the bench, Easterbrook expresses his view that only publicly disseminated information contributes to the integrity of a stock price.[146] A lie told to one or more recipients in private does not filter into the information zeitgeist of the public marketplace. According to Easterbrook, the impact of private lies, even if they become publicly known, will be tamped down by stock professionals who can spot the private lie's lack of credibility.[147] Easterbrook apparently disagrees with some scholars who have argued that the total mix should include private lies because these lies may motivate more demand to buy or sell among investors who may be sensitive to any movement in a stock price. Whether or not one agrees with Easterbrook's view, the focus on public dissemination is a useful limitation on the nature of the political disinformation harm to be addressed. On social media platforms, users lie in private communications; they also create or repeat lies that are designed to infect the accuracy of the public information marketplace.

143. *See* MEIKLEJOHN, *supra* note 62.
144. Redish & Pereyra, *supra* note 77.
145. West v. Prudential Sec., Inc., 282 F.3d 935, 939 (7th Cir. 2002).
146. *Id.* at 937.
147. *Id.* at 940.

Focusing on public information harm may put an online disinformation law at odds with the logic of *Sullivan* and other First Amendment cases that parse a public-private distinction in defamation law. In *Sullivan*, for example, Justice Brennan layers the First Amendment protection of actual malice on claims made against public officials, precisely to address concerns that defamation actions might impose a chilling effect on government criticism.[148] The concern that an online political defamation law might cause a chilling effect on political speech must not be taken lightly. However, political disinformation is much like defamatory statements uttered with actual malice. Deliberate or reckless falsity does not fall within the scope of the chilling effect that *Sullivan* enlists the First Amendment to protect against. Presumably, disinformation—created and distributed with the same scienter or recklessness as actual malice—would also be outside the bounds of concern over a chilling effect in an online regulation. If *Sullivan* stands for the principle that there is no chilling effect to consider for false utterances made knowingly or recklessly in a private civil suit for defamation, the same principle should apply, with even more force, in a situation where the public information marketplace is harmed by disinformation. The greater public harm suggests that a stronger argument could be made that disinformation campaigns, and the faked content that accompanies it as "evidence," should be deemed unprotected speech under the First Amendment.

IV. THE NEED FOR A FIDUCIARY DUTY TO FASHION A REMEDY

One of the distinguishing characteristics of speech regulations under federal securities law is the existence of a trust relationship between the transmitter and recipient of the content. Officers and directors of a corporation owe a fiduciary duty to that corporation's shareholders. That position of trust lies at the heart of all Rule 10b-5 transactions and most proxy violations, as the speech involves a communication with one or more shareholders. Even 10b-5 tippee liability theories require the presence of a fiduciary duty.[149] For the classical theory, the fiduciary duty breach must flow from an insider who tips material, non-public information to an outsider. Misappropriation theory similarly requires a breach of a fiduciary duty or a duty of confidentiality between the source of the material, non-public information and the tippee who trades on the information, even if both are outsiders to the corporation whose stock is being traded upon.

148. *See* New York Times v. Sullivan, 376 U.S. 254, 283 (1964).

149. *See* Dirks v. Sec. & Exch. Comm'n., 463 U.S. 646 (1983); *see also* United States v. O'Hagan, 521 U.S. 642 (1997).

There is no equivalent fiduciary duty owed by those who post online disinformation. Speakers do not ordinarily breach a fiduciary duty when they lie, even if that lie is a disinformation campaign launched on social media. There are a couple of ways to address this. One way would be for the social media companies to require users to agree to a trust relationship in their terms of use. Could a law require a social media terms of use agreement to include a fiduciary clause? And even if the government could impose such a requirement, would it even matter? Many users who mount disinformation campaigns are not easily identifiable. Some use fake accounts to post their disinformation.

Moreover, it is not even clear that securities law always requires a fiduciary duty in speech actions. Section 206(b) of the Investment Advisers Act of 1940 has generated considerable controversy over the years because it reaches to outside professionals who may not owe a fiduciary duty. While a "bona fide newspaper" exception exists, it has not received constitutional scrutiny by the U.S. Supreme Court.[150] Justice Stevens, in *Lowe v. SEC*, decided the speech complaint on statutory grounds, choosing to avoid the First Amendment questions presented in the case's Second Circuit opinion.[151] In *Deutschman v. Beneficial Corp.*, the Third Circuit decided that corporate directors could be liable under Rule 10b-5 to option holders who traded.[152] Though the court acknowledged that corporate directors do not owe a fiduciary duty to option holders who trade in a secondary market, a special relationship does not need to exist between the speaker of the falsity and the recipient who traded on the misstatement or omission.[153]

A second way to address the absence of a fiduciary would be to have the government create one—akin to what the federal securities statutes have done. Rule 10b-5 imposes a federal fiduciary duty for insider trading in circumstances where there had been no fiduciary duty under state law.[154] The duty to abstain or disclose, whereby corporate insiders must refrain from trading unless they accurately disclose material, non-public information, does not have a corollary under state law. The Investment Company Act of 1940 expressly makes investment professionals fiduciaries.[155] Conferring a fiduciary duty on corporate insiders and

150. Lowe v. Sec. & Exch. Comm'n., 472 U.S. 181, 186–87, 211 (1985) (noting that the Second Circuit upheld its ruling under the First Amendment, but the SEC decided the issue on statutory grounds); *see also* Couture, *supra* note 87; Estreicher, *supra* note 87.

151. *Lowe*, 472 U.S. at 211.

152. *See* Deutschman v. Beneficial Corp., 841 F.2d 502 (3d Cir. 1988).

153. *Id.*

154. Secs. & Exch. Comm'n. v. Tex. Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968*); compare* Goodwin v. Agassiz, 186 N.E. 659 (Mass 1933).

155. 15 U.S.C. §§ 80a-1–80a-64.

securities industry personnel makes it easier to justify regulating them, including their speech.

In an online context, it may be that the simplest way forward would be to craft a law that would make social media companies fiduciaries. Internet platforms already get the benefit of government regulation in the form of Section 230 immunity; a law could make Section 230 immunity contingent upon a social media company accepting responsibility as a fiduciary to the public. This has already been done for broadcasting under the Communications Act of 1934.[156] Broadcasters accept public interest requirements that affect their First Amendment rights, in return for a license to use scarce airwaves that belong to the public. To be clear, this is not an argument that the internet shares the same propagation characteristics as broadcasting; it also does not presuppose that the Supreme Court would evolve from its position, articulated in *Reno v. ACLU*, that the internet is not broadcasting.[157] The point here is that a quid pro quo is possible. In exchange for assuming public interest responsibilities, social media companies would enjoy continued immunity from liability for third-party content.

One could argue that imposing a fiduciary duty is unnecessary for a social media disinformation regulation. Congress, after all, enacted the Digital Millennium Copyright Act (DMCA), which provided a take-down system for alleged copyright violations by third-party users.[158] While online disinformation could be designed to have a takedown process, it would work differently. Section 512 of the DMCA allows for a take-down in response to a copyright stakeholder's assertion of infringement by the third party.[159] The take-down regime is dependent on there being an unlawful activity—the infringing use—occurring. There is no independent public interest duty for the social media company. In the absence of a complaint from a copyright holder, the social media site has no obligation to police posted content for copyright law violations.[160] In an online disinformation context, social media companies would not be taking action on behalf of others wishing to assert their rights. There is no underlying unlawful content here. There is only speech that is harmful to the public interest. By conferring a duty upon social media, companies can act on their own behalf to remove disinformation and expel wrongdoers.

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156. 47 U.S.C. § 306-09; *see also* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 386 (1969).

157. *See* Reno v. Am. C.L. Union, 521 U.S. 844 (1997).

158. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

159. 17 U.S.C. § 512.

160. *See* Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC'Y 371 (2017).

Such a duty would extend to social media sites that operate as a haven for disinformation like Parler or Truth Social, the platform created in 2022 by a company allied with Donald Trump.[161] It might also make it harder for a new owner of a social media company to reverse the previous ownership's anti-disinformation measures, as Elon Musk suggested he would do after he announced his deal to acquire Twitter in April 2022.[162]

CONCLUSION

There is no ideal solution to the problem of online political disinformation. Securities law may give us a rough blueprint of a regulatory structure that might withstand scrutiny under the First Amendment. Even if such a law could enlist social media companies as fiduciaries willing to combat disinformation for the public good, the remedy may not go far enough to make much of a difference. Under federal securities law, it is easier to identify a wrongdoer and take corrective action. It is easier to sue them civilly or prosecute them criminally. That type of remedy may not be available against purveyors of online political disinformation. There is no paper trail to follow, as there generally is when securities are being bought and sold.

It may be that the best that the government can do would be to pass a law that requires social media companies to remove disinformation and expel those responsible for posting it. But those who engage in this type of conduct are not easy to identify. Enforcing such a law might end up like a game of Whac-a-Mole—as soon as a platform removes one account, another, or several others, will pop out. Online disinformation is nearly cost-free and easy to create. But doing something is better than doing nothing. Securities law speech regulation may give us a way forward to craft an online disinformation law that could survive the First Amendment.

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161. *See* Ryan Mac & Rosie Gray, *Parler Wanted Donald Trump on Its Site. Trump's Company Wanted a Stake*, BUZZFEED NEWS (Feb. 5, 2021), https://www.buzzfeednews.com/article/ryanmac/trump-parler-ownership; [https://perma.cc/2HKN-WKGQ]; Gareth Vipers, *What Is Truth Social? What to Know About Donald Trump's Social Network*, WALL ST. J. (Feb. 23, 2022), https://www.wsj.com/articles/what-is-truth-social-media-trump-spac-what-to-know-11645552299 [https://perma.cc/PL6D-T5Z8].

162. Brian Fung & Clare Duffy, *Elon Musk Says He Would Reverse Twitter's Trump Ban*, CNN (May 10, 2020), https://www.cnn.com/2022/05/10/tech/elon-musk-twitter-trump-ban/index.html [https://perma.cc/BV76-7EAG].