



2-20-2024

## Misinformation, Social Media, and Opportunities for Content-Based Regulation Within the Constraints of the United States Constitution's Free Speech Guarantee

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### Recommended Citation

Leslie G. Jacobs, *Misinformation, Social Media, and Opportunities for Content-Based Regulation Within the Constraints of the United States Constitution's Free Speech Guarantee*, 55 U. PAC. L. REV. 277 (2024). Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol55/iss2/13>

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# Misinformation, Social Media, and Opportunities for Content-Based Regulation Within the Constraints of the United States Constitution’s Free Speech Guarantee

Leslie Gielow Jacobs\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	277
II. THE DOCTRINE OF THE FREE SPEECH GUARANTEE .....	279
III. EXISTING BOUNDARIES OF FALSE SPEECH REGULATION.....	280
A. <i>New York Times v. Sullivan</i> .....	280
B. <i>United States v. Alvarez</i> .....	280
C. <i>Section 230 of the Communications Decency Act</i> .....	281
IV. CONTENT-BASED REGULATIONS OF FALSE SPEECH .....	282
A. <i>Defamation</i> .....	283
B. <i>Professional Discipline</i> .....	284
C. <i>Commercial Speech and Fraud</i> .....	285
D. <i>Election Speech</i> .....	287
V. CONCLUSION .....	288

## I. INTRODUCTION

Misinformation causes public harms. Like the printing press centuries ago, modern innovations like the internet, smartphone, and social media have revolutionized the way information is disseminated and assimilated. Online platforms provide communication services cost-free to users, from the palm of their hands, vastly expanding access to information at a rate that has not been verified according to traditional scientific or journalistic ethical standards. To profit, platforms utilize and develop algorithms to advance third-party advertising revenue by encouraging users to stay online longer based on user preferences to

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increase likes, clicks, and shares. This dynamic makes for the perfect environment for false speech to spread, often more widely than speech that is true.<sup>1</sup>

False speech—misinformation, disinformation, and so-called fake news—has always been a source of great social harm.<sup>2</sup> Racist and anti-Semitic rhetoric dating back to the Middle Ages spurred hate and violence. Health misinformation related to COVID-19 and election misinformation during the 2020 presidential election provide more recent examples of highly dangerous false speech.<sup>3</sup> But for the same reasons that false speech causes great harm—it involves public issues and is disseminated widely as part of public debate—it is also very difficult to regulate within the constraints of the United States Constitution.

Democratic institutions make laws to address social harms, while constitutional rights limit the laws the institutions may make. European courts and the United States Supreme Court interpret the balance between the discretion of democratically elected officials to address false speech harms by restricting speech and the right of individuals to utter falsehoods differently. This difference allows for a broader scope of content-based regulations of false speech and of social media platforms in Europe than in the United States. Still, permissible restrictions under United States constitutional doctrine may capture some instances of publicly disseminated misinformation and help to prevent the harms that come from its spread. It is important for regulators in and outside the United States to understand where this space exists. This short paper sketches the doctrine and provides some recent examples of this overlap.<sup>4</sup>

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<sup>1</sup> Pame la Madrid, *USC Study Reveals The Key Reason Why Fake News Spreads On Social Media*, USC NEWS (Jan. 17, 2023), <https://news.usc.edu/204782/usc-study-reveals-the-key-reason-why-fake-news-spreads-on-social-media/> (on file with the *University of the Pacific Law Review*) (citing Gizem Ceylan, Ian A. Anderson & Wendy Wood, *Sharing of Misinformation Is Habitual, Not Just Lazy Or Biased*, 120 P.N.A.S. (2023), <https://doi.org/10.1073/pnas.2216614120>).

<sup>2</sup> Steven Poole, *Before Trump: The Real History of Fake News*, GUARDIAN (Nov. 22, 2019), [www.theguardian.com/books/2019/nov/22/factitious-taradiddle-dictionary-real-history-fake-news](http://www.theguardian.com/books/2019/nov/22/factitious-taradiddle-dictionary-real-history-fake-news); Steven Poole, *Has Dominic Raab Been Spreading 'Disinformation'?*, GUARDIAN (June 19, 2019), [www.theguardian.com/books/2019/jun/19/dominic-raab-disinformation](http://www.theguardian.com/books/2019/jun/19/dominic-raab-disinformation) (on file with the *University of the Pacific Law Review*).

<sup>3</sup> Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535/> (on file with the *University of the Pacific Law Review*).

<sup>4</sup> This Paper provides a broad, descriptive overview of U.S. law to that effect with some examples of modern applications. For a more comprehensive overview, see Leslie Gielow Jacobs, *Freedom of Speech and Fake News*, 70 AM. J. COMP. L. 278 (2022), <https://doi.org/10.1093/ajcl/avac010>.

## II. THE DOCTRINE OF THE FREE SPEECH GUARANTEE

The Free Speech Clause of the First Amendment states, “Congress shall make no law. . . abridging the freedom of speech, or of the press.”<sup>5</sup> The Court has interpreted the free speech guarantee liberally to apply to government at all levels<sup>6</sup> and to embrace all communicative expression.<sup>7</sup> Yet the Court qualifies its seemingly absolute command in certain respects, having stated that “invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”<sup>8</sup>

The Court applies means-end analysis to determine the constitutionality of a speech restriction with the level of scrutiny triggered by whether the law aims to restrict speech because of its message.<sup>9</sup> Content-based restrictions of protected speech receive strict scrutiny, which requires the government to prove that its regulation is narrowly tailored to fulfill a compelling purpose and that no alternate means exist to address the harm the government seeks to redress by restricting speech. Rather than restricting speech, counter-speech by the government or other speakers is the preferred means for redressing speech harms.<sup>10</sup>

The Court has applied a categorical approach to identify the circumstances in which the government may restrict speech because of its content. Early in the Court’s free speech jurisprudence, it identified content-based categories of so-called unprotected speech that had historically been within government authority to regulate.<sup>11</sup> Today those categories include: speech integral to crime, incitement, fighting words, fraud, defamation, true threats, obscenity, and child pornography. Each of these categories corresponds to a legally cognizable and particularized harm the government addresses by restricting a particular scope of speech, included within the Court’s definition of the category. Over time the Court has narrowed the speech that falls within the categories, finding fewer and fewer speech restrictions consistent with constitutional doctrine.<sup>12</sup> Notably, false speech is not a category<sup>13</sup> and the Court has made clear that it is not inclined to identify new categories.<sup>14</sup>

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<sup>5</sup> U.S. CONST. amend. I.

<sup>6</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>7</sup> 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308–12 (2023) (discussing the scope of speech as including spoken and written words as well as silence, expressive conduct and compelled speech); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342–43, 467 (2010) (holding that the Constitution protects corporations’ non-commercial speech to the same extent as that of individual speakers and that expressive conduct includes the payment of money).

<sup>8</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>9</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 167–69 (2015) (explaining that a regulation is content-neutral when, according to its language and operation, it puts limits on the time, place, and manner of speech without singling out a specific viewpoint, subject matter, or speaker for different treatment).

<sup>10</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

<sup>11</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>12</sup> *Reed*, 576 U.S. at 155.

<sup>13</sup> *United States v. Alvarez*, 567 U.S. 709, 724 (2012).

<sup>14</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010).

### III. EXISTING BOUNDARIES OF FALSE SPEECH REGULATION

Two key cases and a federal statute identify the existing boundaries of false speech regulation.

#### A. *New York Times v. Sullivan*

The common law imposed strict liability for defamation, requiring only a publication, either spoken or written, that had reputation-harming effects with falsity and damages being presumed.<sup>15</sup> In *New York Times v. Sullivan*, the Court narrowed the instances in which state law could permit individuals to recover damages for false speech. It held that defamation of a public official regarding official duties required proof by clear and convincing evidence that the defendant acted with either knowledge of falsity or reckless disregard of the truth.<sup>16</sup> The “actual malice” standard for recovering defamation damages implements “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”<sup>17</sup> Later on, strict liability was expressly overruled for even private plaintiffs and the actual malice standard was extended to public figures.<sup>18</sup>

The Court has also held that speech by candidates during elections requires the “breathing space” afforded by the “actual malice” liability threshold. Reviewing application of a state statute that would have removed a winning candidate from office for a false statement made in good faith and quickly retracted, the Court noted the “chilling effect [that] such absolute accountability for factual misstatements in the course of political debate” would impose and observed that because “[i]n a political campaign, a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. . . the preferred First Amendment remedy of ‘more speech, not enforced silence,’ thus has special force.”<sup>19</sup>

#### B. *United States v. Alvarez*

The most recent case addressing false speech arose from the prosecution of Xavier Alvarez under the Stolen Valor Act, which made it a crime for a person to falsely claim, orally or in writing, “to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”<sup>20</sup> Alvarez acknowledged that he lied about having received such an award but claimed that he could not constitutionally be convicted under the statute. The Court disposed of *United States v. Alvarez* in three opinions, none of which garnered a

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<sup>15</sup> Restatement (Second) of Torts, § 580B cmt. b., § 621 cmt. b. (AM. L. INST. 1977).

<sup>16</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>17</sup> *Id.* at 270.

<sup>18</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

<sup>19</sup> *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

<sup>20</sup> *Alvarez*, 567 U.S. at 732.

five-justice majority. In two separate opinions, six justices agreed with Alvarez. Three justices dissented.

Although the split decision makes it difficult to identify clear rules, overlap among the opinions shows principles on which a majority of the justices on the Court at the time of the decision agreed. Most fundamentally, the Constitution does not exclude false statements of fact as a general category from protection under the free speech guarantee.<sup>21</sup> To regulate false statements because they are false, the government must link its restriction to preventing a harm that it has the authority to avoid. Even with such linkage, whether the Constitution protects false statements of fact from regulation depends upon the circumstances and the terms of the regulation.<sup>22</sup> On one hand, the justices agreed that many criminal false statement laws requiring intent and narrowed to avoid harm or significant risk of harm to government entities or processes are consistent with the free speech guarantee.<sup>23</sup> On the other hand, the justices also agreed that “restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like”<sup>24</sup> would “present a grave and unacceptable danger of suppressing truthful speech,”<sup>25</sup> meaning no law targeting these public-issue realms of speech could withstand constitutional scrutiny. The reasons offered by the Court for this broad protection include the often-ambiguous determination of falsity with this type of speech, the potential value of even verifiably false speech in honing public issue debate, the extraordinary potential that government prosecutors would abuse the power to restrict false speech to achieve political ends, and the likelihood that government actions would chill protected speech.<sup>26</sup>

### C. Section 230 of the Communications Decency Act

Section 230 of the Communications Decency Act, enacted as part of a larger overhaul of telecommunications law in 1996, provides special legal protection to internet service providers from liability for content created by others. The core purposes of section 230 are “to promote the continued development of the internet and other interactive computer services” and “to preserve the vibrant and competitive free market that presently exist[ed] for the internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>27</sup>

Section 230 has two main provisions. Section (c)(1) states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>28</sup> This provision shields internet service providers and platforms from liability for hosting or otherwise facilitating the transmission of false statements, or other communications with content that may form the basis for a legal claim, so long as

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<sup>21</sup> *Id.* at 733.

<sup>22</sup> *Id.* at 735 (plurality opinion); *id.* at 736 (Breyer, J., concurring).

<sup>23</sup> *Id.* at 719 (plurality opinion); *id.* at 734–36 (Breyer, J., concurring); *id.* at 747–48 (Alito, J., dissenting).

<sup>24</sup> *Id.* at 731 (concurrence); *id.* at 751 (dissent).

<sup>25</sup> *Id.* at 732 (concurrence); *id.* at 751 (dissent).

<sup>26</sup> *Id.* at 734 (concurrence); *id.* at 752 (dissent).

<sup>27</sup> 47 U.S.C. § 230(b) (2021).

<sup>28</sup> 47 U.S.C. § 230(c) (2021).

the content was created by others.<sup>29</sup> This immunity applies to computer service users as well as providers, such as persons who forward or repost content, so long as they did not exercise significant control over the content.<sup>30</sup>

Section (c)(2) states that providers are not liable for “any action voluntarily taken in good faith to restrict access to or availability of “content the providers determine to be objectionable “whether or not such material is constitutionally protected.”<sup>31</sup> This second provision enables internet hosts to edit and otherwise restrict the content they transmit, which includes removing false content or forbidding purveyors of false information from using their services. According to its sponsor’s statement, this section was designed to encourage “computer Good Samaritans” to assist computer service customers, particularly parents, to control what online content comes into their homes and what their children see.<sup>32</sup>

As the Court has noted recently, Section 230’s immunity is likely broader than Congress intended.<sup>33</sup> The ever-growing reach of internet giants and recognition of the harms speech they host causes have spurred proposals to limit the statute’s protections for hosting and editing speech content. Although Congress has held hearings, it has enacted little law. So, for the most part, internet hosts remain immune from liability for the content of the speech they publish. What content-based restrictions the Constitution permits must be imposed on speakers directly.

#### IV. CONTENT-BASED REGULATIONS OF FALSE SPEECH

Although the scope of permissible content-based restrictions of false speech is narrower in the United States than in European countries, some room for regulation exists. This section provides examples where false speech regulation within existing doctrine aimed at private harms may also capture and restrict the spread of misinformation in the public sphere.

Tort law provides the theoretical basis for legal injuries resulting from false speech. When false speech has reputation-harming effects to persons or products, defamation and the false-light tort provide causes of action; imputations of criminal conduct are defamatory *per se*.<sup>34</sup> If false speech, including nondisclosure, causes pecuniary loss or other legal detriment, fraud may be pled for money damages or various other contract remedies. False speech that satisfies the elements of these torts may likewise form the basis for criminal liability or other public action in many jurisdictions with the result being imprisonment, fines, professional discipline, or a combination of these consequences. In general, these torts have heightened *mens rea* requirements and burdens of proof beyond the

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<sup>29</sup> Section 230 does not shield online services from liability for intellectual property violations, copyright infringement, or criminal liability for sex trafficking. 47 U.S.C. § 230(e) (2021).

<sup>30</sup> Ashley Johnson & Daniel Castro, *The Exceptions to Section 230*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted-section-230> (on file with the *University of the Pacific Law*) (contrasting cases to illustrate the degree of control over content necessary to qualify as a content provider).

<sup>31</sup> 47 U.S.C. § 230(c)(2) (2021).

<sup>32</sup> 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).

<sup>33</sup> *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1226 (2023).

<sup>34</sup> Restatement (Second) of Torts § 571 (AM. L. INST. 1977).

typical preponderance standard to bring them in line with the Constitution or other American values.<sup>35</sup>

### A. Defamation

Although the *New York Times* actual malice standard erects a high bar for plaintiffs to recover damages for false speech about public issues, recent events show that it is not impossible to clear. Sometimes, false speech about private individuals or entities may also be misinformation about public issues that causes public harms. In these instances, the damages private actors obtain from their lawsuits for harm to their reputations also helps to remedy and deter the dissemination and spread of misinformation that causes widespread public harms.

After former President Trump's loss in the 2020 presidential election cycle, he and his supporters, including his team of attorneys, made baseless public statements that voting machines provided by Dominion Voting Systems and Smartmatic were used in a conspiracy to change election results and defraud the American people. These statements were then amplified by conservative media outlets Fox News and Fox Business, and to a somewhat lesser degree Newsmax. After refusals to retract the false allegations, Dominion and Smartmatic filed defamation suits against these networks, Trump attorneys Rudy Giuliani and Sidney Powell, and more.<sup>36</sup> Dominion's case against Fox resolved in a historic settlement and acknowledgment by Fox of the court's ruling that claims it aired were false.<sup>37</sup>

In a related case, two Georgia election workers sued Giuliani for defamation in the District of Columbia after he made statements specifically identifying them for mishandling ballots.<sup>38</sup> Giuliani's motion to dismiss was rejected over arguments that the plaintiffs had failed to prove actual malice as public figures.<sup>39</sup> He filed a declaration with the court admitting that his statements were "defamatory per se," "false," and "actionable," which was disseminated through the press.<sup>40</sup>

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<sup>35</sup> *Alvarez*, 567 U.S. at 733–36 (Breyer, J., concurring).

<sup>36</sup> Alison Durkee, *Fox News Defamation Settlement: Here's Where Dominion And Smartmatic's Other Lawsuits Stand Now*, FORBES (Apr. 19, 2023), <https://www.forbes.com/sites/alisondurkee/2023/04/19/fox-news-defamation-settlement-here-are-where-dominion-and-smartmatics-other-lawsuits-stand-now/> (on file with the *University of the Pacific Law Review*) (listing cases with short descriptions).

<sup>37</sup> *US Dominion, Inc. v. Fox News Network, Inc.*, 293 A.3d 1002, 1063 (Del. Super. Ct. 2023).

<sup>38</sup> *Freeman v. Giuliani*, 2022 U.S. Dist. LEXIS 197768 (D.D.C. Oct. 31, 2022).

<sup>39</sup> *Id.* at 34 (finding that Giuliani's statements that the plaintiff's had criminal histories of election fraud amounted to at least recklessness).

<sup>40</sup> Alan Feuer, *Giuliani Concedes He Made False Statements About Georgia Election Workers*, N.Y. TIMES (July 26, 2023), <https://www.nytimes.com/2023/07/26/us/politics/giuliani-georgia-election-workers.html> (on file with the *University of the Pacific Law Review*).



*B. Professional Discipline*

Professional discipline provides another limited opportunity to restrict false speech that causes public harms.<sup>41</sup> This type of regulatory intervention aims to weed from professional communities those who are unfit for practice, either to bring them in line with professional standards or remove them entirely. In the legal and medical professions, professional advice may contain false statements regarding public issues that violate the standard of care.

Action has been taken against many of the attorneys who spread misinformation about the 2020 presidential election. These regulatory interventions include disbarment, suspension, fines, sanctions, compelled testimony, and limitations on the content of legal arguments. For example, the judge hearing Dominion’s defamation case against Fox “barred Fox from arguing to the jury that there was news value in broadcasting the claims of election fraud made by Trump lawyers.”<sup>42</sup> In the Georgia election workers’ defamation case, the judge granted plaintiffs’ motion to compel and reserved other requested relief after finding Giuliani’s lawyers were recalcitrant; Giuliani’s above-mentioned declaration was filed days later.<sup>43</sup> Panels from both the New York and D.C. bar determined that Giuliani’s public statements and his filing of the Pennsylvania election fraud suit violated professional regulation laws governing lawyers; his New York law license was subsequently suspended, and the D.C. bar temporarily suspended his license there and recommended him for disbarment.<sup>44</sup> Trump’s lawyer, John Eastman, faces potential disbarment in California for his involvement in events on and leading up to the January 6<sup>th</sup> attack on the Capitol with one federal court opining that his conduct likely constitutes criminal conspiracy for which Trump was recently indicted.<sup>45</sup> Several of Trump’s other lawyers have faced similar regulatory intervention, while still others pursue counter-speech to assert that their statements were lawful.<sup>46</sup> Still, only one has been officially disciplined, receiving public censure and a \$275 administrative fee.<sup>47</sup> The long-term effects of these cases are unknown for now, but Trump’s legal team has been allegedly hard to staff, and fewer election fraud suits have since been filed in the courts.<sup>48</sup>

Similarly, health misinformation related to COVID-19 has been regulated through the professional discipline of the medical profession. Like lawyers who are regulated by state bar associations, state medical boards regulate medical professionals; however, the medical profession has maintained a more localized

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<sup>41</sup> Nat’l Inst. of Family & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (refusing to recognize professional speech as a category for content-based regulation).

<sup>42</sup> Jeremy Barr, *Judge Bars Dominion from Mentioning Jan. 6 Riot in Fox Defamation Trial*, WASH. POST (updated Apr. 11, 2023), <https://www.washingtonpost.com/media/2023/04/11/fox-dominion-jan6-ruling/> (on file with the *University of the Pacific Law Review*).

<sup>43</sup> Freeman v. Giuliani, No. 21-3354 (BAH), 2023 U.S. Dist. LEXIS 129605 (D.D.C. July 13, 2023).

<sup>44</sup> Ankush Khardori, *Trump’s ‘Elite Strike Force Team’ Falls on Hard Times*, POLITICO (July 26, 2023), <https://www.politico.com/news/magazine/2023/07/26/trump-lawyers-65-project-00108120> (on file with the *University of the Pacific Law Review*).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

standard of care and is more insulated than the legal profession, which has a more national presence. Though most COVID-19 related misinformation is spread on social media by lay persons, state medical boards have received hundreds of complaints regarding medical advice provided to patients that was contrary to the recommendations of the Centers for Disease Control and Prevention or authorized by the Food and Drug Administration.<sup>49</sup> Of these complaints, at least twenty doctors were disciplined, five of whom lost their medical licenses.<sup>50</sup>

### C. Commercial Speech and Fraud

False or misleading commercial speech falls outside the free speech guarantee, so the government may restrict false statements of fact or require additional information in commercial advertising and product labels to prevent consumer confusion or deception.<sup>51</sup> Fraud is a category of unprotected speech.<sup>52</sup> Fraud may occur in the form of false commercial advertising but is more broadly defined as false representations of matters of fact that deceive and are intended to deceive others so that they will act upon it to their legal injury.<sup>53</sup> False statements of fact aimed at inducing commercial transactions or otherwise obtaining something of value from the recipient may overlap with misinformation about public issues. When this overlap is present, enforcement of false speech regulations in the commercial sphere provides an opportunity to restrict the spread of misinformation about public issues.

Federal and state governments impose regulations on product vendors and service providers consistent with the commercial speech doctrine that restrict false statements of fact or require disclosure of additional information in commercial advertising and product labels to prevent consumer confusion or deception.<sup>54</sup> At the federal level, the Federal Trade Commission (FTC) administers laws prohibiting unfair competition and deceptive practices; and the Food and Drug Administration (FDA) polices ingested goods, including food and nutrition products, prescription pharmaceuticals and over-the-counter drugs. Similar agencies exist at the state level and many states have adopted the Uniform Deceptive Trade Practices Act (UDPTA), which bars misrepresentation, product disparagement, bait-and-switch advertising, and other deceptive practices.

The COVID-19 pandemic inspired the commercial ambitions and health opinions of many. Much misinformation related to COVID-19 was spread through

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<sup>49</sup> Lena H. Sun, Lauren Weber & Hayden Godfrey, *Doctors Who Put Lives at Risk with Covid Misinformation Rarely Punished*, WASH. POST (July 26, 2023), <https://www.washingtonpost.com/health/2023/07/26/covid-misinformation-doctor-discipline/> (on file with the *University of the Pacific Law Review*) (reporting on Post study, which asked medical boards in fifty states to identify doctors disciplined or under investigation with thirty-six responding; to provide data on the number of complaints received with thirteen responding; reviewed medical board websites, news releases and disciplinary files).

<sup>50</sup> *Id.*

<sup>51</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 604–05 (1980).

<sup>52</sup> *Alvarez*, 567 U.S. at 717.

<sup>53</sup> *Fraud*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/fraud> (last visited Nov. 23, 2021) (on file with the *University of the Pacific Law Review*).

<sup>54</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 771–72; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 604–05.

the non-commercial speech of lay persons, but health care professionals and other vendors have likewise contributed. Vaccines, convalescent plasma, drugs and non-vaccine biological products, and medical devices to treat COVID-19 were authorized for commercial use by the FDA under Emergency Use Authorizations (EUAs),<sup>55</sup> which preclude commercial advertising to consumers altogether and explains why there has been little after-market regulation to that effect.<sup>56</sup> Still, at least one state attorney general has announced an investigation of COVID-19 vaccine manufacturers for engaging in fraudulent and misleading public speech related to the research and efficacy of these vaccines under its version of the UDPTA.<sup>57</sup>

The FDA sent hundreds of warning letters to vendors for selling fraudulent COVID-19 products.<sup>58</sup> These vendors made claims about the efficacy of colloidal silver, essential oils, cannabidiol (CBD), homeopathic drugs, herbal products, Ayurvedic and Chinese medicine, salt therapy, nasal and body sprays, vitamins and other minerals, honey, human umbilical cord and blood, amniotic fluid, protein vaccines, iodine products, home testing kits, non-alcohol hand sanitizer and wipes, niacin, blessed water and more.<sup>59</sup> Vendors consistently attempted to retail these products throughout the pandemic despite FDA issuance of warning letters to other vendors for similar products, publicly available information on the FDA's website, illustrating that this type of speech for commercial gain is highly durable. In addition to regulating vendors, the FDA engages in counter-speech to address health misinformation by issuing public statements regarding trending misinformation.<sup>60</sup>

When approval processes, monitoring, and warning letters are ineffective at stemming the flow of harmful commercial speech to the legal injury of others, justice departments at both the state and federal level assist these agencies by prosecuting commercial speakers for criminal fraud. The federal Department of Justice (DOJ) indicted a Thai national under two counts of mail fraud and three counts of wire fraud for the fraudulent sale of chloroquine phosphate as treatment for COVID-19 and for malaria after the Center for Disease Control (CDC) reported

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<sup>55</sup> *Emergency Use Authorization*, FED. DRUG ADMIN., <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#vaccines> (last visited Aug. 3, 2023) (on file with the *University of the Pacific Law Review*).

<sup>56</sup> 21 U.S.C. § 360bbb-3 (West 2022).

<sup>57</sup> Press Release, Attorney General of Texas, Paxton Launches Investigation into Gain-of-Function Research and Misrepresentations by Covid-19 Vaccine Manufacturers (May 1, 2023), <https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-gain-function-research-and-misrepresentations-covid-19-vaccine> (on file with the *University of the Pacific Law Review*).

<sup>58</sup> *Fraudulent Coronavirus Disease 2019 (COVID-19) Products*, FED. DRUG ADMIN., <https://www.fda.gov/consumers/health-fraud-scams/fraudulent-coronavirus-disease-2019-covid-19-products> (last visited Aug. 2, 2023) (on file with the *University of the Pacific Law Review*).

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., *Why You Should Not Use Ivermectin to Treat or Prevent COVID-19*, FED. DRUG ADMIN., <https://www.fda.gov/consumers/consumer-updates/why-you-should-not-use-ivermectin-treat-or-prevent-covid-19> (last visited Aug. 2, 2023); *Understanding the Regulatory Terminology of Potential Preventative and Therapeutic Drugs for COVID-19*, FED. DRUG ADMIN., <https://www.fda.gov/consumers/consumer-updates/understanding-regulatory-terminology-potential-preventative-and-therapeutic-drugs-covid-19> (last visited Aug. 2, 2023) (on file with the *University of the Pacific Law Review*).

two deaths under similar circumstances;<sup>61</sup> the United States filed for the defendant's extradition the same day.<sup>62</sup> In another case, the DOJ sought similar charges against a California-licensed naturopathic doctor for her alleged scheme to sell homeoprophylaxis immunization pellets and falsify COVID-19 vaccination cards who later pled guilty.<sup>63</sup> Malaria treatments and homeopathic remedies were the content of much COVID-19 related misinformation spread online during the pandemic.

#### *D. Election Speech*

The government's ability to restrict false speech to prevent the spread of election-related misinformation is severely limited. Laws restricting false speech about the candidates or issues before voters likely cannot be crafted to survive strict scrutiny review. By contrast, governments may restrict false statements about the procedures for voting.<sup>64</sup> Both the federal government and states do so.<sup>65</sup> Election procedure false-statement laws aim only at a narrow class of election-related misinformation. However, such laws prevent the spreading of information that is particularly dangerous to the effective operation of democratic processes. In one application, the federal DOJ charged a social media influencer for attempting to defraud Twitter users of their right to vote by disseminating disinformation about the time, place, and manner for voting in the 2016 presidential election. The jury convicted him, and the court sentenced him to up to ten years imprisonment.<sup>66</sup> In another, voter suppression laws were successfully used to compel truthful speech days prior to the 2020 election to redress disinformation intended to dissuade voting by mail-in-ballots.<sup>67</sup> Governments may also achieve the purpose of full and

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<sup>61</sup> Indictment, *United States v. Chunhasomboon*, No. 3:21-CR-93 LEXIS (M.D. Penn. filed Mar. 30, 2021).

<sup>62</sup> *Aff.*, *United States v. Chunhasomboon*, No. 3:21-CR-93 LEXIS (M.D. Penn. filed Mar. 31, 2021).

<sup>63</sup> *United States v. Mazi*, No. 22-cr-00036-CRB-1, 2022 U.S. Dist. LEXIS 122180 (N.D. Cal. July 11, 2022).

<sup>64</sup> *Minnesota v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018).

<sup>65</sup> David Ardia, Evan Ringel & Allysan Scatterday, *State Regulation of Election-Related Speech in the U.S.: An Overview and Comparative Analysis*, UNC CTR. MEDIA L. & POL'Y (Aug. 4, 2021), <https://medialaw.unc.edu/wp-content/uploads/2021/08/State-Regulation-of-Election-Related-Speech.08.04.2021.pdf> (on file with the *University of the Pacific Law Review*).

<sup>66</sup> *United States v. Mackey*, No. 21-CR-80-NGG, 2023 U.S. Dist. LEXIS 40796 (E.D.N.Y. Mar. 10, 2023) (hearing motions *in limine*); Associated Press, *Far-Right Influencer Convicted In Voter Suppression Scheme*, POLITICO (Mar. 31, 2023), <https://www.politico.com/news/2023/03/31/far-right-influencer-convicted-in-voter-suppression-scheme-00090042> (on file with the *University of the Pacific Law Review*).

<sup>67</sup> Mark Hicks, *Conservative Activists Accused in Hoax Voting Robocalls Ordered to Make New, "Curative" Message*, DETROIT NEWS (Oct. 28, 2020), <http://www.detroitnews.com/story/news/local/michigan/2020/10/28/conservative-activists-hoax-voting-robocalls/6063506002>.

truthful speech about elections indirectly by spending limits, within the constraints interpreted by the Court,<sup>68</sup> or transparency requirements.<sup>69</sup>

In extreme cases, when speakers commit crimes by means of false speech about elections, criminal law enforcement provides a remedy for the public harms caused by the spread of misinformation. The DOJ successfully pursued election conspiracy charges related to the 2016 and 2020 presidential election cycles.<sup>70</sup> It recently indicted Former President Trump on four counts of conspiracy for efforts to subvert the 2020 presidential election results,<sup>71</sup> and he is still under investigation in Georgia for election-related matters there. His statements made on broadcast and social media claiming widespread voter fraud and other private speech, investigated by the House Select Committee on the January 6th attack, which recommended the DOJ prosecution, form the basis for the complaint.

## V. CONCLUSION

The spread of information in this age of the internet and social media inflicts great public harms that governments must seek to address. Options for content-based regulation of false speech are fewer in the United States than in European countries. Still, they exist. Enforcement of laws crafted to address private harms within the confines of United States free speech doctrine provide opportunities to capture some instances of misinformation about public issues. Recent examples illustrate this overlap. Laws that aim directly at restricting false speech are not the only way to address the harms caused by the spread of misinformation. But they are one way to accomplish the objective. As regulators in and outside the United States consider options to address the harms caused by the spread of misinformation, it is important to recognize that some space to restrict false speech directly exists within the doctrine of the United States free speech guarantee.

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<sup>68</sup> See *Federal and State Campaign Finance Laws*, FED. ELECTION COMM'N (Oct. 1995), [https://transition.fec.gov/pages/brochures/fed\\_state\\_law\\_brochure.pdf](https://transition.fec.gov/pages/brochures/fed_state_law_brochure.pdf); *Making Electioneering Communications*, FED. ELECTION COMM'N, <http://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneerin-g-communications> (last visited Nov. 27, 2021); *Coordinated Communications*, FED. ELECTION COMM'N, <http://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications> (last visited Nov. 27, 2021) (on file with the *University of the Pacific Law Review*).

<sup>69</sup> *Campaign Finance Law: Disclosure and Disclaimer Requirements for Political Campaign Advertising*, CONG. RES. SERV. (Dec. 30, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11398> (one file with the *University of the Pacific Law Review*).

<sup>70</sup> See, e.g., *United States v. Nordean*, No. 21-175 (TJK), 2022 U.S. Dist. LEXIS 222712 (D.D.C. Dec. 11, 2022).

<sup>71</sup> *Complaint, United States v. Trump*, No. 1:23-cr-00257-TSC (D.D.C. filed Aug. 1, 2023), [https://www.justice.gov/storage/US\\_v\\_Trump\\_23\\_cr\\_257.pdf](https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf).