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Internet Service Provider Liability for Disseminating False Information About Voting Requirments and Procedures

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**INTERNET SERVICE PROVIDER LIABILITY FOR
DISSEMINATING FALSE INFORMATION ABOUT
VOTING REQUIREMENTS AND PROCEDURES**

WILLIAM P. MARSHALL*

CONTENTS

I.	INTRODUCTION.....	670
II.	FALSE SPEECH ABOUT VOTING REQUIREMENTS AND PROCEDURES.....	675
III.	OVERVIEW OF THE ARGUMENTS FOR AND AGAINST FALSE CAMPAIGN SPEECH REGULATION.....	677
IV.	THE CURRENT CONSTITUTIONAL STATUS OF FALSE CAMPAIGN SPEECH REGULATION	682
V.	HOLDING INTERNET SERVICE PROVIDERS LIABLE.....	689
VI.	CONCLUSION	699

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I. INTRODUCTION

These are not good times for those who care about truth in politics. False postings about political candidates inundate the Internet.¹ Foreign governments actively spread false information in order to influence elections.² Political actors are increasingly brazen in advancing false and deceptive assertions.³ Even robots have gotten into the act, having become major tools for the spread of false political information.⁴ Meanwhile, parts of the electorate itself does not seem to care,⁵ seemingly preferring deliberate lies over objective truth when misinformation reinforces their pre-existing prejudices.⁶

Much of this (robots aside) is not new. People have lied in political campaigns for as long as there have been political campaigns.⁷ But there is no question that the severity and impact of false campaign speech has been exacerbated by the Internet.⁸ As has been well-

¹ Dawn C. Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1528-29 (2019).

² *Id.* at 1528.

³ Drew Harwell, *Doctored Images Have Become a Fact of Life for Political Campaigns. When They're Disproved, Believers 'Just Don't Care,'* WASH. POST (Jan. 14, 2020, 7:00 AM), <https://www.washingtonpost.com/technology/2020/01/14/doctored-political-images/> [<https://perma.cc/297T-2RJB>].

⁴ Nunziato, *supra* note 1, at 1528.

⁵ Harwell, *supra* note 3.

⁶ See Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & POL'Y 57, 68-69 (2017) (noting that the public has trouble recognizing false political information online and stating that this confusion “exacerbates the natural human tendency toward confirmation bias”).

⁷ Elaine Kamarck, *A Short History of Campaign Dirty Tricks Before Twitter and Facebook*, BROOKINGS (July 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/07/11/a-short-history-of-campaign-dirty-tricks-before-twitter-and-facebook/> [<https://perma.cc/AH5N-CX5P>].

⁸ Nunziato, *supra* note 1, at 1528-29 (stating that today’s “online marketplace of ideas is fraught with unique problems,” including echo chambers, election interference from foreign actors, automated bots and trolls, and the wide reach of “fake election news stories”).

documented, false information spreads across online platforms with disturbing speed,⁹ often outpacing the spread of truthful information.¹⁰ At the same time, most Americans now use the Internet as their primary source for political news.¹¹ PEW Research Center, for example, recently found that fifty-five percent of Americans get their news from social media often or sometimes, with over half using Facebook as a news source.¹² Moreover, although some studies indicate that many of us are skeptical about what we see on social media,¹³ there seems to be little question that the rampant spread of false information nevertheless is harming democracy by fostering increasing distrust of candidates and campaigns.¹⁴

Internet service providers, however, have been at best half-hearted in expressing the will or desire to stem the tide of false political information distributed on their websites.¹⁵ Rather, they offer a host of

⁹ *Id.* at 1529 (noting that “fake election news stories on Facebook generated more engagements than the top stories from major news outlets” leading up to Election Day in 2016).

¹⁰ Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 *SCIENCE* 1146, 1148 (2018) (finding that rumors on Twitter travel six times faster than truth).

¹¹ Nunziato, *supra* note 1, at 1528-29.

¹² Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RES. CTR. (Oct. 2, 2019), <https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news> [<https://perma.cc/JEZ2-MSNS>].

¹³ Elisa Shearer & Katerina Matsa, *News Use Across Social Media Platforms 2018*, PEW RES. CTR. (Sept. 10, 2018), <https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/#most-social-media-news-consumers-are-concerned-about-inaccuracy-but-many-still-see-benefits> [<https://perma.cc/V7KR-3X7H>] (finding that 57% of respondents indicated that “they expect the news they see on social media to be largely inaccurate”).

¹⁴ See Rebecca Green, *Counterfeit Campaign Speech*, 70 *HASTINGS L.J.* 1445, 1461 (2019).

¹⁵ Recently, Facebook has undertaken some efforts to combat false political information, including partnering with third-party fact-checkers, deprioritizing content that is determined to be false, removing fake accounts, and providing more transparency about information sources. Nunziato, *supra* note 1, at 1538-39. According to Nunziato, these efforts are largely modeled after the marketplace of ideas theory. *Id.* at 1546. Twitter has undertaken “less extensive” efforts to combat

reasons why they should not get involved. At times, the providers attempt to situate themselves as defenders of the American tradition of free expression, suggesting that their inaction is consistent with the long-held First Amendment theory that it is the marketplace of ideas,¹⁶ and not regulatory bodies, which provides the appropriate mechanism to separate truth from falsity.¹⁷ At times, they claim that policing the Internet for false political speech is simply beyond their capabilities.¹⁸ At times, they suggest that their policing false information would be a solution worse than the problem itself.¹⁹ As Mark Zuckerberg stated, “while I certainly worry about an erosion of truth, I don’t think that most people want to live in a world where you can only post things that tech companies judge to be 100 percent true.”²⁰

The task of regulating false campaign speech, therefore, is one that, if it is to occur at all, will likely fall to the government. And states have picked up the mantle, having enacted numerous and diverse statutes proscribing particular categories of false campaign speech. One category of regulation, for example, makes it a crime to make “false statement[s] concerning a candidate” or “the voting record of a candidate,”²¹ such as asserting that a candidate was in favor of tax-

false information on its platform. *Id.* at 1554. Twitter’s efforts have largely focused on deleting fake accounts and demoting content from bad actors. *Id.* at 1549.

¹⁶ *Abrams v. United States*, 250 US 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

¹⁷ Steven Levy, *Zuckerburg Doubles Down on Free Speech – The Facebook Way*, WIRED (Oct. 17, 2019, 4:26 PM), <https://www.wired.com/story/zuckerberg-doubles-down-free-speech-facebook-way/> [<https://perma.cc/Y6RS-TL5X>].

¹⁸ See Bill Wasik, *The Internet Dream Became a Nightmare. What will Become of it Now?*, N.Y. TIMES MAG. (Nov. 13, 2019), <https://www.nytimes.com/interactive/2019/11/13/magazine/internet-future.html> [<https://perma.cc/3Y6Z-3ZJG>] (“Phenomenal size had allowed Facebook and its fellow American tech giants to become the center of online life, but now they could not correct the most toxic problems of online spaces without wielding even more unsettling levels of power.”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See, e.g., OHIO REV. CODE ANN. § 3517.21(B) (West 2019) (held unconstitutional by *Magda v. Ohio Elections Comm’n*, 58 N.E.3d 1188 (Ohio Ct. App. 2016)).

funded abortions when he was not.²² A second category prohibits lying about a candidate's party affiliation or incumbency status, such as falsely claiming that one is an incumbent.²³ A third prohibits false statements about endorsements, such as claiming that a candidate has received an endorsement from a person or organizations when she has not.²⁴ A fourth proscribes false statements with respect to ballot measures, such as falsely asserting what a ballot proposition entails.²⁵ A fifth, which is the specific focus of this Article, prohibits false statements regarding voting mechanics or procedures, such as when persons are misdirected to the polls or falsely told they are ineligible to vote because they lack certain qualifications.²⁶ The list is not exhaustive.

Yet governmental regulation of false campaign speech also faces severe obstacles—most notably the First Amendment. In *United States v. Alvarez*,²⁷ the Court held that false statements of fact may receive First Amendment protection even when those statements are uttered with knowledge of falsity or reckless disregard to their truth.²⁸ As commentators writing since *Alvarez* have noted, the decision casts doubt on many of the laws that regulate certain kinds of false campaign speech.²⁹ And, in fact, a number of court decisions both pre-

²² See *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 470 (2016).

²³ See, e.g., CAL. ELEC. CODE §18350(a) (West 2020).

²⁴ See, e.g., N.H. REV. STAT. ANN. § 666:6 (2019); see also TENN. CODE ANN. § 2-19-116(a) (West 2020).

²⁵ See, e.g., LA. STAT. ANN. §18:1463(c)(1) (2019); see also MINN. STAT. ANN. §211B.06 (West 2019).

²⁶ See, e.g., HAW. REV. STAT. ANN. §19-3(12) (West 2019); see also VA. CODE ANN. § 24.2-1005.1 (2019).

²⁷ 567 U.S. 709 (2012).

²⁸ *Id.* at 719 (“The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.”).

²⁹ See Green, *supra* note 14, at 1483; see also Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56 (2013); Joshua Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 149-50 (2018); James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 179 (2018); Jason Zenor, *A Reckless*

³⁰ and post-³¹ *Alvarez* have struck down false campaign speech measures under the First Amendment, indicating that the constitutional concerns raised by the commentators are very well placed.

There may, however, be a slight dent in the First Amendment armor. Recently, the Court in *Minnesota Voters Alliance v. Mansky*³² hinted in a footnote that certain types of false campaign speech could constitutionally be proscribed. Specifically, the *Mansky* footnote suggested that laws prohibiting “messages intended to mislead voters about voting requirements and procedures” would be upheld.³³ *Mansky* thus appears to greenlight proposed laws like the Deceptive Practices and Voter Intimidation Prevention Act of 2019, which would outlaw practices such as knowingly providing false information regarding “the time, place, or manner of holding [an] election” or false information concerning “the qualifications for or restrictions on voter eligibility for” voting in an election.³⁴ And it would suggest that existing state laws that prohibit such practices are constitutional as well.³⁵

Disregard for the Truth? The Constitutional Right to Lie in Politics, 38 CAMPBELL L. REV. 41, 71-72 (2016).

³⁰ Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691, 699 (Wash. 1998) (en banc).

³¹ *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016); *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014); *Magda v. Ohio Elections Comm’n*, 58 N.E.3d 1188, 1206 (Ohio Ct. App. 2016).

³² 138 S. Ct. 1876 (2018).

³³ *Id.* at 1889 n.4; *see also* Hasen, *supra* note 29, at 71 (predicting that such a law would survive First Amendment scrutiny).

³⁴ S.1834, 116th Cong. § 3(a)(2) (2019). The Act also prohibits false statements regarding public endorsements. *Id.* § 3(a)(3). An analysis of that provision is outside the scope of this Article.

³⁵ See CAL. ELEC. CODE §18543(a) (West 2020) (prohibiting “fraudulently advis[ing] any person that [he] is not eligible to vote or is not registered to vote”), CONN. GEN. STAT. ANN. § 9-363 (West 2019) (prohibiting “incorrect instructions . . . as to the manner of voting”), FLA. STAT. ANN. § 104.0615 (West 2019) (prohibiting the use of “knowingly us[ing] false information to (a) [c]hallenge an individual’s right to vote”), HAW. REV. STAT. ANN. § 19-3(12) (West 2019) (prohibiting knowingly distributing “false information about the time, date, place, or means of voting”); VA. CODE ANN. § 24.2-1005.1 (2019) (prohibiting the communication of false information “about the date, time, and place of the election or the voter’s precinct, polling place, or voter registration status”) for a few examples of state laws

Mansky, of course, is not the last word on the subject, as the constitutionality of laws proscribing deceptive campaign practices has yet to come directly before the Court. But if the Court upholds deceptive campaign practices acts, these acts would provide at least one possible weapon against the flood of false information inundating the Internet. Moreover, they could also be a particularly important tool in combating voter suppression, as false information about voting places and voting qualifications has often been specifically targeted at minority communities.³⁶

This Article will examine the constitutionality of deceptive campaign practices acts under the First Amendment. It will also take the analysis one step further by analyzing whether Internet service providers may be held liable for the deceptive campaign messages posted by their customers and users, similar to the way that providers can be held liable for instances of copyright infringement posted by their customers and users.

II. FALSE SPEECH ABOUT VOTING REQUIREMENTS AND PROCEDURES

Like false campaign speech generally, false campaign speech messages intended to “mislead voters about voting requirements and procedures”³⁷ are not new. Disseminating false statements about “the time, place, or manner of holding election[s]” and about “the qualifications for or restrictions on voter eligibility” are tactics that have been commonly used to suppress voter turnout.³⁸ In the 2016 presidential race, for example, memes styled to look like official “Hillary for America” campaign materials circulated on Twitter, telling voters that they could avoid long lines on Election Day and

with provisions similar to the proposed Deceptive Practices and Voter Intimidation Prevention Act of 2019.

³⁶ Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 349 (2010).

³⁷ *Mansky*, 138 S. Ct. at 1889 n.4.

³⁸ Daniels, *supra* note 36, at 349, 354-55.

“[v]ote from home” by texting “‘Hillary’ to 59925.”³⁹ A similar set of memes, some featuring celebrities, also appeared on Facebook.⁴⁰

In previous elections, other tactics were used, many of which were specifically targeted at minority communities.⁴¹ For example, one stratagem was to circulate false information claiming that, because of heavy voting, Republicans were instructed to vote on Tuesdays while Democrats should vote on Wednesdays.⁴² Similarly, another ploy was to spread false information that voters could lose certain benefits if they voted incorrectly or that a voter could only vote in one election per year.⁴³

The problem of misinformation about voting requirements and procedures, like the problem of false campaign information generally, may be getting worse. By 2018, for example, the practice had become so widespread that *The New York Times* published an Article outlining the various ways in which misinformation was designed to create confusion on Election Day in 2016 and warning readers to “beware” of similar efforts in 2018.⁴⁴ According to *the Times*, this misinformation includes everything from “suspicious” text messages telling voters

³⁹ Madison Kircher, *Don't Believe Those Memes About Texting to Vote for Hillary From Home*, INTELLIGENCER (Nov. 2, 2016), <http://nymag.com/intelligencer/2016/11/fake-meme-ads-are-telling-people-to-text-to-vote-for-clinton.html> [<https://perma.cc/U7RD-43F3>]; see also Matt Ford, *Is Lying About an Election Free Speech or Fraud?*, NEW REPUBLIC (July 27, 2018), <https://newrepublic.com/article/150265/lying-election-free-speech-fraud> [<https://perma.cc/ZM7U-CMNB>].

⁴⁰ Ford, *supra* note 3; see also Kurt Wagner, *These are Some of the Tweets and Facebook Ads Russia Used to Try and Influence the 2016 Presidential Election*, VOX RECODE (Oct. 31, 2017, 8:05 P.M.), <https://www.vox.com/2017/10/31/16587174/fake-ads-news-propaganda-congress-facebook-twitter-google-tech-hearing> [<https://perma.cc/8RVM-4BCX>].

⁴¹ Daniels, *supra* note 36, at 349.

⁴² *Id.* at 343.

⁴³ *Id.* at 353.

⁴⁴ Kevin Roose, *6 Types of Misinformation to Beware of on Election Day. (And What to Do if You Spot Them.)*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/us/politics/misinformation-election-day.html> [<https://perma.cc/K4J2-7SF4>].

their absentee ballots weren't counted, to memes circulated on social media incorrectly informing voters they could text in their vote, to doctored photos depicting long lines and false rumors that ICE agents were monitoring polling places.⁴⁵

There is obviously nothing to be said in favor of these types of tactics. They are unbridled and pernicious attempts to suppress voter turnout and manipulate election results. That said, the case for regulating this type of speech is far more complex than it may initially appear, because the case for regulating false campaign speech generally is not straightforward. It is therefore necessary to briefly review the arguments both in support and opposition of the regulation of false campaign speech.

III. OVERVIEW OF THE ARGUMENTS FOR AND AGAINST FALSE CAMPAIGN SPEECH REGULATION

In a previous Article examining the constitutionality of false campaign speech regulation,⁴⁶ I set forth a series of arguments that supported and opposed false campaign speech regulation. Because others have followed that framework,⁴⁷ a brief canvass of the points set forth in that paper may be an appropriate place to begin our analysis.

a. The Arguments in Favor of False Campaign Speech Regulation

The arguments supporting false campaign speech regulation are substantial. First, and most obviously, false statements distort the electoral process.⁴⁸ A voter fed false information may end up voting

⁴⁵ *Id.*

⁴⁶ William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285 *passim* (2004).

⁴⁷ Hasen, *supra* note 29, at 63-64 (presenting persuasive advantages as well as disadvantages to regulation of false campaign speech).

⁴⁸ As the Court stated in *Garrison v. Louisiana*, “the use of the known lie as a tool is at odds with the premises of democratic government and with the orderly manner in

for somebody antagonistic to their interests instead of a candidate who supports their agenda.⁴⁹ Further, if the lies are sufficiently widespread, they could influence an entire election and not just a handful of voters' ballots.

Second, false statements debase campaign discourse.⁵⁰ An election beset by lies can quickly degenerate into charges and countercharges on veracity. The result misleads and distracts the voters, and perhaps the candidates, from more serious and substantive campaign issues.⁵¹

Third, false statements may weaken democracy by fostering voter cynicism.⁵² An alienated electorate is one ripe for manipulation.⁵³ An electorate that does not trust the integrity of the political system may become disengaged and indifferent to its own responsibilities of self-governance.⁵⁴

Fourth, unrestrained false statements inflict reputational and emotional injuries on existing political actors and can deter qualified individuals from entering the political fray.⁵⁵ These harms, moreover, are not only exacted on individual targets. As many have argued, unmitigated

which economic, social, or political change is to be effected." 379 U.S. 64, 75 (1964).

⁴⁹ See Green, *supra* note 14, at 1457-58 (a voter who has been misled not only has had her own vote nullified but also has her vote turned against her).

⁵⁰ Zenor, *supra* note 29, at 47; see also Evan Richman, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667, 670 (1998) (Deceit in political advertising "lowers the level of political conversation").

⁵¹ Zenor, *supra* note 29, at 47-49.

⁵² Green, *supra* note 14, at 1460.

⁵³ *Whitney v. California*, 247 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁵⁴ Green, *supra* note 14, at 1461 ("If the voting public is defrauded by morphed campaign speech, our system of elections is effectively destroyed. Rampant and unchecked counterfeit campaign speech undermines faith in candidates and political campaigns, causing voters to distrust anything any candidate says or does that they do not witness in person. The damage to the democratic electoral process is existential.").

⁵⁵ *Id.* at 1466.

falsehoods about political leaders undermines the fabric of communities in addition to injuring the leaders themselves.⁵⁶

Fifth, false speech about voting requirements and procedures raises another, more specific, harm.⁵⁷ As Gilda Daniels notes, “the distribution of misinformation regarding the time, place, and manner of elections” often seeks to “misinform unwanted minority, elderly, disabled, and language-minority voters in an effort to” cause confusion and depress democratic participation.⁵⁸ Accordingly, such speech is akin to voter suppression and intimidation and, therefore, directly implicates the right to vote.⁵⁹

Finally, there is a sixth rationale that, unfortunately, has only become more apparent since my earlier Article was written—the need to protect truth itself. As some observers have noted, we have moved into a “post-truth” era where the value of truth itself has come under attack.⁶⁰ In this new era, what a person desires to be true has, for some, become the only truth that matters—with the result that the normative distinctions between truth and lies have been significantly damaged.⁶¹ Laws, in whatever form, that seek to reinforce the value of truth may therefore be justified as necessary to combat this erosion.⁶²

⁵⁶ See Robert H. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 745 (1986) (“To a considerable degree the reputation of a community is reflected in the reputation of its representative figures. Indeed, it is the founders and heroes of a community that to a considerable extent give it its identity, and it is the memory of the sufferings and achievements of exemplary figures that constitutes a community as a community of memory and keeps that community alive.”); see also Gerald Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1094 (2012).

⁵⁷ This harm was not addressed in my previous article.

⁵⁸ Daniels, *supra* note 36, at 348-49.

⁵⁹ *Id.* at 348-52.

⁶⁰ LEE MCINTYRE, POST TRUTH 5 (2018).

⁶¹ *Id.*

⁶² On the value of truth generally, see John M. Finnis, *Skepticism, Self-Refutation and the Good of Truth*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF HLA HART 247, 250 (PMS Hacker & J. Raz, eds., Clarendon Press 1977) 247, 250. On the value of truth in First Amendment jurisprudence see, William P. Marshall, *In*

b. The Arguments Against

The arguments against regulating false campaign speech are also substantial.⁶³ First, the harms to the voters caused by false campaign speech may be overly exaggerated.⁶⁴ Voters are often already skeptical about what they hear on the campaign trail so they may not be as vulnerable to false assertions as one might initially assume.⁶⁵ As Rick Hasen points out, “most voters don’t expect honesty from their politicians.”⁶⁶ Further, false claims seldom go unchallenged in the campaign arena because there is generally an opponent ready to expose the deception.⁶⁷ Thus, it is possible that, as Justice Breyer has optimistically argued, “in this area more accurate information will normally counteract the lie.”⁶⁸

Second, regulating campaign speech is troublesome because of the inherent nature of campaign discourse. Campaigns are volatile and vitriolic, and they inevitably involve constant attacks and counterattacks. In such a heated atmosphere, there is more than a mere possibility that a candidate will misrepresent, overstate, and/or deliberately lie.⁶⁹ Allowing for the sanctioning of false statements uttered in the heat of battle, therefore, runs up against political reality.

Defense of the Search for Truth as a First Amendment Justification, 30 GA. L. REV. 1 (1995).

⁶³ Marshall, *supra* note 46, at 293-300.

⁶⁴ Hasen, *supra* note 29, at 63-64.

⁶⁵ *Id.*

⁶⁶ *Id.* at 77 n.115 (citing Jack Schafer, *Looking for Truth in All the Wrong Places*, REUTERS (Aug. 31, 2012), <http://blogs.reuters.com/jackshafer/2012/08/31/looking-for-truth-in-all-the-wrong-places/>).

⁶⁷ See *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

⁶⁸ *United States v. Alvarez*, 567 U.S. 709, 738 (2012) (Breyer, J., concurring). The accuracy of Justice Breyer’s observation is of course questionable given the current state of political discourse.

⁶⁹ The actual malice standard comes from *New York Times Co. v. Sullivan*, 376 U.S. 254. In that case the Court ruled that protecting falsehoods uttered without knowledge of falsity or reckless disregard was necessary in order to assure that speakers were not chilled in exercising their First Amendment rights. *Id.* at 279-81.

Third, prosecuting false campaign speech may not be an effective way of informing the voters because the process of resolving the action is likely to take longer than the election cycle itself. That means that, unless officials upend an election result, the resolution of whether a campaign statement was true or false will not occur until it is too late to affect a voter's decision.⁷⁰

Fourth, campaign speech regulation is a tool that actors can weaponize for political gain.⁷¹ Charging an individual with disseminating false statements is not always only about correcting the record.⁷² It is often a political stratagem in and of itself. As the Court recognized in *Susan B. Anthony List v. Driehaus*,⁷³ the “practical effect” of a false statement scheme can be “to permit a private complainant . . . to gain a campaign advantage without ever having to prove the falsity of a statement.”⁷⁴

Last, and certainly most importantly, regulating false campaign speech raises serious First Amendment concerns.⁷⁵ To begin with, any regulation of political speech necessarily faces a high barrier because, as the Court has frequently noted, political speech lies at the heart of the First Amendment.⁷⁶ Accordingly, any regulation of political speech must necessarily be subject to the most exacting scrutiny.⁷⁷

⁷⁰ *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474 (6th Cir. 2016) (noting that under Ohio's false political speech law “there is no guarantee the administrative or criminal proceedings will conclude before the election”).

⁷¹ *See* 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014) (stating that complaints under Minnesota's false campaign speech law can be carefully timed to “inflict[] political damage”); *see also Driehaus*, 814 F.3d at 475 (explaining that Ohio's false campaign speech law fails to eliminate “frivolous complaints” that could be used as a political weapon).

⁷² *Driehaus*, 814 F.3d at 475 (noting that complaints can be timed to “achieve maximum disruption”).

⁷³ 573 U.S. 149 (2014).

⁷⁴ *Id.* at 165.

⁷⁵ Marshall, *supra* note 46, at 308.

⁷⁶ *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of political affairs.”); *see also Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. San Francisco Cty. Democratic Central*

Moreover, regulating false campaign speech is especially problematic under the First Amendment because it places the government in the business of evaluating what is true and false in politics. This regulation not only raises the practical concern that arises from allowing potentially self-interested political actors (government officials) to become the foxes charged with supervising the political henhouse, but it also raises the theoretical objection that in a democracy it should be the people, not the government, who are the judges of political truth. As the Court has stated, “every person must be his watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”⁷⁸

IV. THE CURRENT CONSTITUTIONAL STATUS OF FALSE CAMPAIGN SPEECH REGULATION

Given these concerns, my previous Article concluded that the case for upholding the constitutionality of laws proscribing false campaign speech was ambiguous at best.⁷⁹ This ambiguity was so even though Supreme Court decisions at that time had indicated that false statements uttered with actual malice, that is, with knowledge of falsity or reckless disregard for the truth, were not constitutionally protected.⁸⁰ My conclusion, however, was neither surprising nor novel. The United States Supreme Court had previously indicated that any regulation of campaign speech would face serious obstacles,⁸¹ and the

Comm., 489 U.S. 214, 222-223 (1989) (“Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.”)).

⁷⁷ U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (leaving open the possibility that laws restricting political processes may be subject to “more exacting judicial scrutiny”); *see also* Citizens United v. FEC, 558 U.S. 310, 366 (subjecting disclaimer and disclosure requirements to exacting scrutiny because they burden political speech).

⁷⁸ Thomas v. Collins, 324 U.S. 516, 545 (1945).

⁷⁹ Marshall, *supra* note 46, at 308.

⁸⁰ Garrison v. Louisiana, 379 U.S. 64, 75 (1964); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988); Herbert v. Lando, 441 U.S. 153, 129, 171 (1979); Brown v. Hartlage, 456 U.S. 45, 60-61 (1982).

⁸¹ *Brown*, 456 U.S. 45 at 56.

Washington State Supreme Court had already struck down a false campaign statute on First Amendment grounds.⁸²

If there was any doubt, however, then two United States Supreme Court cases decided since I wrote my previous Article have placed false campaign speech regulation on even more precarious grounds. First, and most notably, the Supreme Court in *United States v. Alvarez*⁸³ held for the first time that a deliberate lie, that is a statement uttered with actual malice, was protected under the First Amendment.⁸⁴ In so holding, the Court undermined the most obvious defense of a false campaign speech statute, i.e., that deliberate falsity does not merit constitutional protection. In *Alvarez*, however, as Justice Alito explained in his dissent, the Court departed from its long-held rule “that false statements of fact merit no First Amendment protection in their own right.”⁸⁵

At issue in *Alvarez* was the constitutionality of the Stolen Valor Act (“Act”), which criminalizes false representations claiming that one has “been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”⁸⁶ The defendant, Xavier Alvarez, falsely claimed he had earned the Congressional Medal of Honor,⁸⁷ and was accordingly prosecuted under the Act.⁸⁸ Alvarez pled guilty but reserved his right to appeal the conviction on the grounds that the application of the Stolen Valor Act violated his First Amendment rights.⁸⁹ On appeal, a divided Supreme Court agreed.⁹⁰ Justice

⁸² *State of Washington v. 119 Vote No! Comm.*, 957 P.2d 691, 699 (1998).

⁸³ 567 U.S. 709 (2012).

⁸⁴ *Id.* at 724.

⁸⁵ *Id.* at 748-49 (Alito, J., dissenting).

⁸⁶ 18 U.S.C. § 704(b) (2018) (invalidated by *Alvarez*, 567 U.S. at 724).

⁸⁷ *Alvarez*, 567 U.S. at 713 (plurality opinion). The defendant also claimed he had played for the Detroit Red Wings and dated a Mexican starlet. *Id.*

⁸⁸ *Id.* at 714. The Stolen Valor Act also has enhanced penalties for false claims about the Congressional Medal of Honor, stating that “the offender shall be fined under this title, imprisoned not more than 1 year, or both.” 18 U.S.C. § 704(c)(1).

⁸⁹ *Alvarez*, 567 U.S. at 714 (plurality opinion).

⁹⁰ *Id.* at 730.

Kennedy's opinion for himself, the Chief Justice, and Justices Ginsburg and Sotomayor applied strict scrutiny and found the Act unconstitutional.⁹¹ Justice Breyer, writing for himself and Justice Kagan, reached the same result but rested on intermediate, rather than strict scrutiny.⁹² Justice Alito dissented and was joined in his opinion by Justices Scalia and Thomas.⁹³

Justice Kennedy's primary rationale in striking down the Act was one that we have already visited—the problem with the government's policing truth. As Kennedy wrote,

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.⁹⁴

To be sure, Justice Kennedy did not suggest that deliberate falsity must always be protected. Rather, he suggested that crimes like perjury or falsely claiming to be a government officer were actions that could still be proscribed.⁹⁵ But his opinion made clear that the types of false speech that could permissibly be prohibited would be a strictly limited category.⁹⁶

Justice Kennedy's *Alvarez* opinion did not address false campaign speech regulation, although it had obvious implications for that subject. Justice Breyer, however, made the connection in his

⁹¹ *Id.* at 715.

⁹² *Id.* at 730-31 (Breyer, J., concurring).

⁹³ *Id.* at 739 (Alito, J., dissenting).

⁹⁴ *Id.* at 723 (plurality opinion) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (Centennial ed. 2003)).

⁹⁵ *Id.* at 719-20.

⁹⁶ *Id.*

concurrence.⁹⁷ After first recognizing the harms that false campaign speech can engender, such as “leading the listeners to vote for the speaker,”⁹⁸ Breyer nonetheless went on to express serious doubt that such laws could avoid constitutional invalidation without significant narrowing.⁹⁹ As he explained, “criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.”¹⁰⁰ Further, Breyer continued, because of the nature of the political process, “in this area more accurate information will normally counteract the lie.”¹⁰¹

The second Supreme Court case shedding doubt on the constitutionality of false campaign regulations was *Susan B. Anthony List v. Driehaus*.¹⁰² *Driehaus* was a direct attack on a state’s (Ohio’s) false campaign speech law,¹⁰³ but the actual question addressed by the Court was whether a pre-enforcement challenge to the statute was ripe for review and not whether the statute itself violated the First Amendment.¹⁰⁴ Nevertheless, a fair reading of *Driehaus* also indicates that the Court holds strong reservations about the validity of false campaign speech regulation. For example, in finding the case ripe, the Court relied on the likelihood of the use of false campaign statutes as a

⁹⁷ *Id.* at 738 (Breyer, J., concurring).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Notably, Breyer’s opinion cited two examples of cases in which sanctions of campaign speech were upheld, but he refused to express an opinion as to whether he agreed with those results. The examples were *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F. 3d 86, 93 (2nd Cir. 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization) and *Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox*, 150 Mich. App. 617, 389 N.W. 2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). *Id.* (case parentheticals provided by Justice Breyer).

¹⁰² 573 U.S. 149 (2014), *remanded to* 814 F.3d 466 (6th Cir. 2014).

¹⁰³ Ohio Rev. Code Ann. §3517.21(B)

¹⁰⁴ *Id.* at 167-68. On remand, the Sixth Circuit found the law to be unconstitutional. *Driehaus*, 814 F.3d at 476.

tool of political weaponry rather than as a vehicle to separate truth from falsity in campaign discourse.¹⁰⁵ As the Court explained:

The credibility of [the threat of enforcement] is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency. Instead, the false statement statute allows “any person” with knowledge of the purported violation to file a complaint. Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents.¹⁰⁶

Alvarez and *Driehaus* thus echoed the objections to false campaign regulations noted above. False campaign speech regulation is problematic because 1) it allows government to police political truth (*Alvarez* plurality opinion¹⁰⁷); 2) it ignores the First Amendment principle that the answer to false speech is more speech and that, in the context of political campaigns especially, lies will seldom go unanswered (Breyer’s *Alvarez* concurrence¹⁰⁸); and 3) it is potentially harmful because it can be used for political weaponry (*Driehaus*¹⁰⁹). Accordingly, it is not surprising that since these cases were decided, lower courts have also found false campaign speech regulations to be unconstitutional.¹¹⁰

¹⁰⁵ *Driehaus*, 573 U.S. at 164.

¹⁰⁶ *Id.* (citations omitted); see also 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014) (“Complaints can be filed at a tactically calculated time so as to divert the attention of an entire campaign . . . thus inflicting political damage.”).

¹⁰⁷ See *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion).

¹⁰⁸ See *id.* at 738 (Breyer, J., concurring).

¹⁰⁹ See *Driehaus*, 573 U.S. at 165.

¹¹⁰ See, e.g., *Driehaus*, 814 F.3d at 476 (invalidating Ohio false campaign speech statute); see also *Arneson*, 766 F.3d at 785 (invalidating Minnesota statute prohibiting false campaign speech about a ballot initiative); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015) (invalidating Massachusetts false campaign speech statute); *Magda v. Ohio Elections Comm’n*, 58 N.E.3d 1188, 1206 (Ohio Ct. App. 2016) (invalidating Ohio false campaign speech statute in light of

Given this background, it might be considered unexpected that the Court in *Minnesota Voter Alliance v. Mansky* suggested that false speech about voting requirements and procedures could be proscribed.¹¹¹ *Mansky* itself concerned a Minnesota law that forbade voters from wearing “a political badge, political button, or anything bearing political insignia inside a polling place on Election Day.”¹¹² The law, at least on its face, had nothing to do with false campaign speech. Rather, the central purpose of the law, as explained by the State, was to prevent disruption around polling places.¹¹³

The State had also argued, however, that the law served the interest of preventing voter confusion because certain political apparel, such as “Please I.D. Me” buttons worn by some voters, could be used “to confuse other voters about whether they needed photo identification to vote.”¹¹⁴ The Court rejected this argument on grounds that the statute, by its terms, was not directed at avoiding voter confusion¹¹⁵ but was aimed instead at last-minute electioneering about the issues and candidates before the voters in the current election.¹¹⁶ Nevertheless, the Court in a footnote addressed the State’s point about combating voter confusion, stating that it had no doubt “that the State may

Alvarez and *Driehaus*). *But see* *Linert v. MacDonald*, 901 N.W.2d 664, 670 (Minn. Ct. App. 2017) (holding that Minnesota’s law prohibiting false statements about endorsements was not unconstitutionally overbroad); *City of Grant v. Smith*, No. A16–1070, 2017 WL 957717, at *8 (Minn. Ct. App. March 13, 2017) (holding that Minnesota’s law prohibiting false statements about endorsements was narrowly tailored and did not violate the First Amendment). In *Linert*, the Minnesota Court of Appeals distinguished the United States Supreme Court’s decision in *Alvarez* by stating that, while the Supreme Court was unconvinced that counterspeech could not remedy false statements about military awards, the Minnesota Court of Appeals had previously “concluded that counterspeech is not an effective and less-restrictive means” to remedy false statements about endorsements. *Linert*, 901 N.W.2d at 669–70.

¹¹¹ Notably, however, Rick Hasen had earlier predicted this result. Hasen, *supra* note 29, at 71.

¹¹² *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1882 (2018).

¹¹³ *Id.* at 1887–88.

¹¹⁴ *Id.* at 1889 n.4.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1887.

prohibit messages intended to mislead voters about voting requirements and procedures.”¹¹⁷ The Court did not offer any reason why this might be so.

In fact, there are reasons why false campaign speech regulation about voting requirements and procedures can be distinguished from false campaign speech regulation laws that more broadly proscribe false speech about candidates or issues. First and undoubtedly most importantly, false campaign speech about voting requirements and procedures can directly interfere with the right to vote.¹¹⁸ A voter misdirected to the polls or a voter misled into believing that she needs particular qualifications or documents to vote may end up never exercising the franchise. As such, false campaign speech of this type is akin to voter suppression and voter intimidation and thus implicates the state’s interests of the highest order.¹¹⁹ Second, as Rick Hasen points out, information about voting requirements and procedures are immediately verifiable and not subject to the same sorts of partisan interpretation that statements about candidates might be.¹²⁰ Third, because much of this type of speech occurs on or close to Election Day, there is often no time for truthful counter-speech to remedy the false speech.¹²¹ Fourth, there is little concern that such prohibitions would, or could, deter legitimate speech.¹²²

Whether these distinctions should actually make a difference for constitutional analysis, however, is debatable. For example, the state interest in assuring that voting is not suppressed is surely of the highest

¹¹⁷ *Id.* at 1889 n.4.

¹¹⁸ Hasen, *supra* note 29, at 7; *see also* Daniels, *supra* note 36, at 350.

¹¹⁹ Daniels, *supra* note 36, at 350 (making the tie-in to voter suppression).

¹²⁰ Hasen, *supra* note 29, at 71. As Hasen points out, however, the question of whether a particular statement about voting requirements is true or false is not always clear cut. *Id.* at 71-72. Thus, Hasen raises the example of a poster circulated at the University of Wisconsin that stated: “Vote at the polling place of your choice” as an instance where a potentially misleading direction about voting is not necessarily false. *Id.* at 72.

¹²¹ *Id.*

¹²² *Id.*

concern, but it should also be noted that the harm in deterring a person from voting is, in some ways, a lesser harm than that caused by misleading the person into voting for the wrong candidate. Deterring a Candidate Smith supporter costs Candidate Smith one vote, but misleading a Candidate Smith supporter into voting for Candidate Jones costs Candidate Smith two votes—the vote not given to her and the vote given instead to her opponent.¹²³

Additionally, the other harms associated with false speech about voting requirements and procedures may not distinguish that type of false speech from other forms of false speech as might be presumed. Some false claims about candidates, for example, can be easily verifiable, such as an assertion that a candidate was arrested and/or convicted of a crime.¹²⁴ Similarly, like false assertions about voting requirements or procedures, some false claims about candidates are also disseminated when there is not time for truthful speech to combat the lie.¹²⁵

V. HOLDING INTERNET SERVICE PROVIDERS LIABLE

Nevertheless, taking the Court at its word, let us assume that false assertions about voting requirements and procedures can be constitutionally proscribed. Yet, even if this were so, there is a serious

¹²³ See Green, *supra* note 14, at 1457-58 (“Imagine a voter who views multiple counterfeited speeches of a candidate and decides to vote for that candidate based on the falsified positions Imagine further that the candidate she has voted for in fact holds views dramatically opposed to her own. Her right to vote has been nullified; worse, it has been turned against her.”).

¹²⁴ For example, in September 2019, false posts circulated on social media asserting that Democratic presidential candidate Beto O’Rourke is “a felon who is not allowed to possess a firearm of any type” after O’Rourke proposed a mandatory gun buyback program. Amanda Seitz, *False Claim Suggests Beto O’Rourke Was Convicted of a Felony*, ASSOCIATED PRESS (Sept. 18, 2019), <https://apnews.com/afs:Content:7467080601> [<https://perma.cc/P4SJ-KB43>].

¹²⁵ See generally Green, *supra* note 14, at 1488; see also Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1776 (2019) (explaining that deep fakes can harm society through “[a] fake audio clip [that] ‘reveal[s]’ criminal behavior by a candidate on the eve of an election,” for example).

question as to how effective such a regulation would be. At best, given the reality of how false campaign information is disseminated, sanctioning only the individuals who are responsible for authoring the false information would address only part of the problem.

To begin with, there is a question of deterrence. Because much of false campaign speech tends to be anonymous, its perpetrators may be hard to find, leading to the question of whether such a statute can provide meaningful deterrence. More importantly, because spreading false information manually is difficult—leaflets and posted signs are not the most efficient methods of communication—anybody seeking to widely spread false information effectively is likely to seek other methods of distribution. Enter the Internet. Internet service providers both protect anonymity and can more widely disseminate false messages. They are thus primed to be the vehicles of choice for those wanting to distribute the false information.¹²⁶

For the exact same reasons, it makes sense to prioritize Internet service providers as prosecutorial targets. First, they are not anonymous, meaning the threat of prosecution could have a real deterrent effect, as potential defendants will not be able to hide behind anonymity.¹²⁷ Second, because of their ability to disseminate messages widely, Internet service providers can cause the greater harm.¹²⁸ Third, holding Internet service providers liable would have effects that would go beyond a single election cycle, meaning that even if sanctioning the provider might not always be timely enough to affect the election in which the false information was disseminated (because presumably the

¹²⁶ This is particularly true given the automated nature of content dissemination on Internet platforms. For example, the technology put in place by Internet service providers often allows nonhuman bots to flood hashtags with false information or make false information “trend” on social media. Madeline Lamo & Ryan Calo, *Regulating Bot Speech*, 66 UCLA L. REV. 988, 999-1000 (2019).

¹²⁷ *Cf.* MGM Studios Inc., v. Grokster, Ltd, 545 U.S. 913, 1003 (2005) (noting with respect to copyright, “it may be impossible to enforce rights in the protected work effectively against all [copyright] infringers” on a widely used service. and that “the only practical alternative [may be] to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.”).

¹²⁸ *See* Lamo & Calo, *supra* note 126 and accompanying text.

charge might not be fully adjudicated before the election is over),¹²⁹ it could still provide effective disincentive against the provider's spreading false information in future elections. Further, a formal decision that a particular representation was false (such as an assertion that a voter will lose certain benefits if she votes twice in a year)¹³⁰ would have the additional benefit of undermining a similar false assertion if one were advanced in a future election.

The conclusion that it makes sense from a policy perspective to subject Internet service providers to liability for spreading false information, however, leads to the obvious next question. Would holding them liable be legally permissible even in light of the *Mansky* footnote? Three issues arise. First, can an Internet service provider be held liable when it is not the source of the objectionable material? Second, if so, what should be the scienter requirement for triggering liability? Third, what mechanisms should be put in place that would allow the requisite scienter to be established?

The first issue, whether an Internet service provider can be held liable when it is not the source of the objectionable material, can be readily resolved. The law is clear that so-called "communications intermediaries" may be held liable for the communications of others, at least in certain circumstances.¹³¹ The fact that Internet service providers may only carry information and are not the source of the

¹²⁹ This is not to deny that there could be benefits within the election cycle itself. A prosecution for disseminating false information about voting requirements and procedures could immediately serve to alert the voters about the potentially deceptive tactics.

¹³⁰ Daniels, *supra* note 36, at 353.

¹³¹ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. A. L. REV. 373, 396-98 (2010) (noting a communications intermediary who "publishes a statement by another bears the same liability for the statement as if he or she had initially created it," while a communications intermediary who distributes information is held liable if "they know or have reason to know" of the nature of the information).

messages themselves, then, does not automatically immunize them from liability.¹³²

Copyright law, for example, routinely imposes liability upon intermediaries.¹³³ In copyright law, liability may be imposed on a communications intermediary when the defendant 1) has the “right and ability to supervise the infringing conduct”¹³⁴ and 2) has “an obvious and direct financial interest in the exploitation of copyrighted materials.”¹³⁵ Significantly, although knowledge is required for a defendant to be found contributorily liable, knowledge of the infringement is not required to trigger vicarious liability.¹³⁶

Another example is obscenity law. Obscenity law permits the sanctioning of intermediaries who sell obscene material, not just those who originate the obscene material.¹³⁷ Further, the intermediaries only need to have notice of the character and nature of the content to be subject to penalty. They do not need to know the materials are actually obscene in order to incur liability.¹³⁸

¹³² *But see* Wash. Post Co. v. McManus, 944 F.3d 506, 523 (4th Cir. 2019) (indicating reluctance to subject third-party internet service providers to laws designed to promote election accountability). In *McManus*, the Fourth Circuit held that Maryland’s requirements that online platforms hosting political advertisements maintain publicly accessible records about the ads that they run and provide records about those ads to the Maryland State Board of Elections upon request were unconstitutional as applied to a group of media plaintiffs. *Id.* Specifically, the Fourth Circuit concluded that the requirements unconstitutionally compelled the plaintiffs to engage in political speech. *Id.* at 514-15.

¹³³ *MGM Studios Inc., v. Grokster, Ltd*, 545 U.S. 913, 930 (2005) (“One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it.”).

¹³⁴ M. B. NIMMER & D. NIMMER, 3 NIMMER ON COPYRIGHT §12.04(2) (2019).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See Hamling v. United States*, 418 U.S. 87, 121-22 (1974).

¹³⁸ It is unclear whether the Supreme Court means “notice” to be “knowledge” or actual notification. In *Smith v. California*, the Supreme Court invalidated a California statute which held booksellers liable for possessing obscene material without scienter because the statute punished booksellers “even though they had not

Defamation law offers another example. In common law defamation, a republisher, defined as one who has the “knowledge, opportunity, and ability to exercise editorial control over the content of its publications;” or, in other words, one who “cooperate[s] actively in the publication”¹³⁹ could be held liable for disseminating libelous material, even if the republisher was not the source of the information.¹⁴⁰ This was true, moreover, even if the republisher was not aware of the defamatory content.¹⁴¹

To be sure, First Amendment law has altered common law defamation rules affecting communications intermediaries in some important respects. *New York Times Co. v. Sullivan* requires that a republisher act with actual malice, meaning with knowledge of falsity or reckless disregard for the truth, in order to be held liable, at least with respect to defamatory actions brought by public figures regarding matters of public concern.¹⁴² Further, *Gertz v. Welch* held that even in the case of a libel action brought by a private figure, some degree of scienter was required.¹⁴³ However, *Sullivan* and *Gertz* left the basic republication

the slightest notice of the character of the books they sold.” 361 U.S. 147, 153-55 (1959). In *Hamling v. United States*, the Supreme Court clarified the holding in *Smith*, rejecting the argument that it is constitutionally required for a defendant to know materials are obscene to be held liable: “[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and he knew the character and nature of the materials.” 418 U.S. 87, 123 (1974).

¹³⁹ Ardia, *supra* note 131, at 397; *see also* Restatement (Second) of Torts §581 cmt. g (1977).

¹⁴⁰ Ardia, *supra* note 131, at 397.

¹⁴¹ *Id.* at 397-98; *see also* Restatement (Second) of Torts §581 cmt. d-e.

Additionally, at common law, a mere distributor, which is distinguishable from a publisher because it is under no duty to examine the content it intermediates, could also be held liable if it had notice of the defamatory content. Ardia, *supra* note 131, at 398.

¹⁴² *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). In *Gertz v. Welch* the Court ruled that although a private figure plaintiff need not show actual malice in order to prevail in a defamation action, it would at least have to show negligence. 418 U.S. 323, 350 (1974). *Gertz* was a direct action against the source of the defamation and did not involve a communications intermediary. *Id.* at 325.

¹⁴³ *Gertz*, 418 U.S. at 347-48.

rule in place—communications intermediaries can be held liable for the defamatory content of the original speaker.¹⁴⁴

It is also true that current law grants Internet service providers specific *statutory* protections that other communications intermediaries do not enjoy. Section 230 of the Communications Decency Act (“CDA”), for example, provides that “[n]o 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,” thus effectively protecting Internet service providers from republication liability.¹⁴⁵ Thus, Section 230, in its current form, would likely shield Internet service providers from liability for disseminating false information about voting requirements and procedures that was not propagated by the Internet service provider itself. Accordingly, any attempt to regulate Internet service providers for disseminating false speech presupposes that the CDA be amended.¹⁴⁶

¹⁴⁴ See also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (holding that a speaker may be subject to strict liability when the speech does not involve a public figure and a matter of public concern).

¹⁴⁵ 47 U.S.C.S. § 230(c)(1) (2018). Section 230 does not, however, immunize providers from copyright law. *Id.* § 230(e)(2).

¹⁴⁶ Whether CDA 230 should be more broadly amended to reduce Internet service provider immunity is, of course, currently a matter of substantial debate. It is notable, however, that the provision has recently been amended to weaken Internet service provider immunity to address sex trafficking concerns. 47 U.S.C. § 230(e)(5). Other revisions have also been proposed. For example, Danielle Keats Citron and Benjamin Wittes recommend granting immunity only to a service actor who “takes reasonable steps to prevent or address unlawful uses of its services once warned about such uses.” Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 467-72 (2018); cf. Ryan Gerdes, *Scaling Back §230 Immunity: Why the Communications Decency Act Should Take a Page From the Digital Millennium Copyright Act’s Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 673 (2012) (suggesting Congress should adopt an “opt-in requirement” where users are required to provide personal information in order to eliminate anonymity as well as a “notice” requirement where providers can be held liable if they know the content is defamatory); Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U.L. REV. 369, 411 (2013) (proposing a “notice-and-takedown provision” where a neutral FCC division evaluates complaints and

Copyright law also insulates internet service providers, although to a lesser degree. Although Section 230 does not apply to copyright law,¹⁴⁷ Section 512 of the Digital Millennium Copyright Act provides an internet service provider with a safe harbor if, after receiving notice of infringing content on their platforms, it “expeditiously” takes down the material in accordance with the proper statutory procedure.¹⁴⁸ Additionally, the Internet service provider is not liable if it removes content that is ultimately determined to be non-infringing or if it puts content back up after receiving counter-notice that the material is non-infringing.¹⁴⁹ Nevertheless, to reemphasize, both Sections 230 and 512 are only statutory protections, and neither disrupts the basic understanding that communications intermediaries can be subject to liability for the content of the original speaker.

Having established, then, that communications intermediaries such as Internet service providers can be held liable, the next question is what level of scienter should be required? Should knowledge be required as

determines whether the Internet service provider should remove the content; a failure to remove the content once notified would result in a forfeiture of § 230 immunity).

Some have also suggested that Section 230 should simply be reinterpreted to limit Internet service provider immunity in certain situations. Citron and Wittes, for example, suggest an interpretive shift in the precedent, suggesting “courts should not apply Section 230’s safe harbor unless the claims relate to the publication of user-generated content.” Citron & Wittes, *supra* note 146, at 467-72; *see also* Yaffa A. Meeran, Note, *As Justice So Requires: Making the Case for a Limited Reading of § 230 of the Communications Decency Act*, 86 GEO. WASH. L. REV. 257, 278 (2018) (proposing courts adopt a two-part test in order to determine the scope of § 230 immunity: (1) “whether the cause of action treats the interactive computer service as a publisher or speaker of third-party content” and (2) if the service provider is neither a publisher nor speaker, “the court must then determine whether the interactive computer service is *also* acting as an information content provider—if it is, § 230’s immunity protections do not apply”); Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 203 (2018) (“propos[ing] that courts scrutinize the manner in which providers in each case elicit user content and the extent to which they exploit that data in secondary or ancillary markets.”).

¹⁴⁷ See 47 U.S.C. § 230(e)(2) (2018).

¹⁴⁸ 17 U.S.C. § 512(c)(1)(C) (2018).

¹⁴⁹ *Id.* § 512(g)(4).

is the case with obscenity¹⁵⁰ or defamation, or is liability without knowledge possible as is the case with copyright? The more likely answer is that a court would find the copyright example inapposite. To begin with, the case law establishes that the First Amendment is not as rigorously applied in the context of copyright infringement as it is in other areas.¹⁵¹ More importantly, *Alvarez* strongly suggests that if false statements are to be punishable at all, a requirement that the speaker act with actual malice would appear to be a bare minimum.¹⁵²

The copyright example, however, might be helpful in providing an illustration as to how to respond to our third issue, the types of mechanisms that could be put in place to allow the state to establish the scienter requirement. Recall that Section 512 imposes liability on Internet service providers if they do not take down the offending material once they have received notice of the infringement.¹⁵³ In order to make this system work, 512 requires that the provider have an agent designated to receive notice of possible copyright violations.¹⁵⁴ A similar mechanism could be used with respect to false information about voting requirements and procedures. An Internet service provider could be required to have a designated agent to whom complaints about false campaign speech regarding voting requirements and procedures should be sent. If the Internet service provider does not take down the offending material in response to the notice of the false

¹⁵⁰ As explained earlier, a communications intermediary cannot be liable if she does not have knowledge of the character of the disseminated materials even if she does not know the materials are legally obscene. *See supra* note 138.

¹⁵¹ Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147, 165 (1998) (concluding granting preliminary injunctions is more favorable in copyright claims than most other cases).

¹⁵² *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion) (“[T]he Court has been careful to instruct that falsity alone may not suffice to bring speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”).

¹⁵³ 17 U.S.C. § 512 (c)(1)(C) (2018).

¹⁵⁴ *Id.* § 512(c)(2).

information, it could then be deemed as acting with actual malice; i.e., knowledge of falsity or requisite disregard for the truth.¹⁵⁵

To be sure, there is a significant First Amendment hurdle standing in the way of this approach. In *St. Amant v. Thompson* the Court held that failure to investigate was not itself indicia of actual malice.¹⁵⁶ Accordingly, an Internet service provider could argue, in light of *St. Amant*, that even after it received notice of a potential violation, it did not act with the requisite actual malice if it did not investigate.

This argument is not unsubstantial. However, holding that an Internet service provider acts with actual malice if it receives notice of falsity yet refuses to take down the offending material is not outside the mark. In *Harte-Hanks Communications v. Connaughton*, the Court held that a speaker who deliberately avoids learning the truth about a story can be

¹⁵⁵ This is not to suggest that all aspects of Section 512 should be included in a law that regulates false information about voting requirements and procedures. For example, 17 U.S.C. § 512(g)(4) provides that an Internet service provider who continues to display the allegedly infringing material is nevertheless immune from an infringement action if, after receiving notice of a purported infringement, it receives a counter notification claiming the material does not violate the copyright laws even if it is later determined that material was an infringement. Whether a similar immunity should be granted to an Internet service provider who disseminates false information about voting requirements and procedures, however, is debatable because offering that immunity would de-incentivize the provider from taking down the false information. Rather, it would allow the Internet service provider (without the threat of liability) to continue to display false information even when the counter-notice claiming the posted information is true was itself actually shown to be false. At the same time, including a provision like 17 U.S.C § 512(g)(1) could be beneficial. Unlike Section 512(g)(4), which protects providers when they continue to display offending material, 512(g)(1) shields Internet service providers from liability when they take down allegedly copyright infringing material “regardless of whether the material or activity is ultimately determined to be infringing.” Providing similar protections to Internet service providers for taking down allegedly false information regarding voting requirements and procedures makes similar sense because it removes a disincentive for taking down false material.

¹⁵⁶ *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) (“Failure to investigate does not itself establish bad faith.”).

held liable for reckless disregard.¹⁵⁷ Under *Connaughton*, then, it follows that a party can be found to have presumptively acted with actual malice (reckless disregard) if it continues to disseminate false information about voting requirements and procedures after being notified that the information is untrue.¹⁵⁸ If so, then the case is a strong one that holding Internet service providers liable for disseminating false information about voting requirements and procedures is consistent with the First Amendment. The *Mansky* footnote, in short, can then be construed as opening the door to internet service provider liability as well as to the liability of the individual actors who fabricate the false information in the first place.

This is not to say that holding internet service providers liable for disseminating false information about voting requirements and procedures will stem the flood of false political information inundating the internet. Deliberate lies about voting requirements and procedures, after all, comprise only a fraction of campaign misrepresentations. But it is a start; and in that respect, it is notable that while this Article was in publication, YouTube agreed to take down false information of the type described here.¹⁵⁹ More importantly, upholding such regulation

¹⁵⁷ *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 692-93 (1989) (“Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category This evidence of an intent to avoid the truth was not only sufficient to convince the plurality that there had been an extreme departure from professional publishing standards, but it was also sufficient to satisfy the more demanding *New York Times [Co.]* standards”).

¹⁵⁸ Different jurisdictions have suggested that notification, or lack thereof, could be indicative of whether the defendant had actual malice. *See Colombo v. Times-Argus Ass’n*, 135 Vt. 454, 457 (1977) (“There is no evidence in the record . . . to support a finding that the defendants had knowledge of any falsity in the articles in question . . . Defendant . . . denied any *notice* that the statements were false.”) (emphasis added); *Yeager v. TRW Inc.*, 984 F. Supp. 517, 524 (E.D. Tex. 1997) (“There can be no question that the defendant lacked the requisite intent, when the defendant ‘was not even put on *notice* that its report contained inaccurate information until [a date after its original publication.]’”) (emphasis added).

¹⁵⁹ Davey Alba, *YouTube Says It Will Ban Misleading Election-Related Content*, N.Y. TIMES (Feb. 3, 2020), <https://www.nytimes.com/2020/02/03/technology/youtube-misinformation->

would send an important message—the Internet is not an untouchable haven for deliberate lies. As such, the regulatory attempt may be worth the effort even if it only scratches the surface. Finally, and perhaps most significantly, to the extent such a law prevents voters from being deceived into voting at the wrong place or time or tricked into not voting at all, it accomplishes one of the government’s most important functions—protecting the right to vote.¹⁶⁰ Internet service providers should not be immune when they knowingly disseminate false information that interferes with that basic right.

VI. CONCLUSION

Although the proliferation of false campaign speech, particularly on the Internet, poses a serious risk to the integrity of the electoral process, its regulation also presents serious policy and First Amendment concerns. After all, the contention that in a democracy the government should not be the arbiter of political truth is a powerful one. Recently, however, the Supreme Court indicated that at least one form of false campaign speech could appropriately be subject to government sanction.¹⁶¹ According to the Court, a law that proscribed “messages intended to mislead voters about voting requirements and procedures” would be upheld.¹⁶²

This Article proposes to take the Court’s assertion regarding false information about voting requirements and procedures one step further. Not only should false information about voting requirements and procedures be proscribed but, more controversially, sanctions should be extended to internet service providers who disseminate the

election.html [<https://perma.cc/HP4U-WJ9S>]. Similarly, according to Facebook, the company will increase its efforts to remove misinformation about voting requirements and procedures ahead of the 2018 midterm elections. *Helping to Protect the 2020 U.S. Elections*, FACEBOOK (Oct. 21, 2019), <https://about.fb.com/news/2019/10/update-on-election-integrity-efforts/> [<https://perma.cc/X2YL-WCE9>].

¹⁶⁰ See *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote.”).

¹⁶¹ *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018).

¹⁶² *Id.*

false information. No doubt this measure standing by itself would not transform the Internet. But it would accomplish two important goals. First, it would help combat voter suppression. Second, it would send the message to internet service providers that they are players with duties and responsibilities, and not just bystanders, in the democratic process. Given the current state of our democracy, both goals are worthy of serious pursuit.