

Barry University School of Law

Digital Commons @ Barry Law

Faculty Scholarship

2023

The Stolen Election Lie and the Freedom of Speech

Wes Henricksen

Follow this and additional works at: <https://lawpublications.barry.edu/facultyscholarship>



Part of the [Election Law Commons](#), and the [First Amendment Commons](#)

The Stolen Election Lie and the Freedom of Speech

Wes Henricksen* and Broderick Betz**

One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections.¹

ABSTRACT

In an effort to overturn the 2020 presidential election, the losing candidate, Donald Trump, falsely claimed his opponent, Joe Biden, had stolen the election. This involved dozens of baseless allegations, which Trump repeated hundreds of times. These false claims were echoed and amplified by right-wing leaders and media and were endorsed as part of the political platform for hundreds of Republican candidates in the 2022 election. As a result, millions of Americans have been duped into believing the election was not “won” by Biden, but “stolen” by him. This Stolen Election Lie has severely diminished Americans’ trust in the electoral system. It caused a violent mob to attack the United States Capitol in an effort to thwart the peaceful transfer of power. It has also served as the basis for numerous efforts to disenfranchise voters. It has, in short, caused widespread harm to individuals and society alike. And yet, this brazen scheme to defraud the public has, to date, gone unpunished. In fact, those responsible for spreading it have been rewarded, and many have even won political office.

From a First Amendment perspective, the Stolen Election Lie sits at the intersection of political speech and fraudulent speech. Political speech has the highest free speech protections. Fraudulent speech has no protections. To date, courts and scholars have almost universally treated disinformation campaigns like the Stolen Election Lie as political speech. In this Article, we argue that harmful disinformation that operates as fraud on the public should instead be treated as fraudulent speech. Falsehoods

*Associate Professor of Law, Barry University Dwayne O. Andreas School of Law.

**J.D. candidate, 2023, Barry University Dwayne O. Andreas School of Law. The authors would like to thank Luke Nelson for his editorial assistance, which improved the final version of this Article.

1. Matter of Giuliani, 146 N.Y.S.3d 266, 283 (App. Div. 2021).

peddled to the public in bad faith and for personal gain should, like other kinds of fraud, enjoy no First Amendment protections.

Those who create and disseminate harmful falsehoods aimed at misleading people should not be rewarded, but punished. Fraud should be regulable, whether aimed at one victim or at millions. Although this principle is simple to articulate, crafting a workable framework of speech restrictions to capture fraud on the public poses significant challenges. Nevertheless, given the harm resulting from allowing unfettered fraud on the public, it is urgent that we find ways to close the loophole that allows people to profit off of manipulating public opinion by spreading intentionally false speech. Closing this loophole will not only further numerous important free speech policy aims; it will also help protect against future attempts to thwart democracy.

Table of Contents

| | |
|--|-----|
| I. SOME INTENTIONALLY FALSE POLITICAL SPEECH THAT CAUSES SIGNIFICANT HARM AMOUNTS TO FRAUD | 112 |
| II. FALSE POLITICAL SPEECH IS PROTECTED, BUT THOSE PROTECTIONS SHOULD NOT BE LIMITLESS..... | 118 |
| III. FRAUDULENT POLITICAL SPEECH DOES NOT DESERVE FIRST AMENDMENT PROTECTION | 122 |
| IV. CONCLUSION | 127 |

I. SOME INTENTIONALLY FALSE POLITICAL SPEECH THAT CAUSES SIGNIFICANT HARM AMOUNTS TO FRAUD

Weeks after the 2020 presidential election, as Congress was voting to certify the results, a mob attacked the United States Capitol Building as a result of Donald Trump’s false claims that the election was “stolen” from him through “massive fraud.”² This was not an off-the-cuff remark from the former President. Rather, Trump and his accomplices made hundreds of provably false statements before, during, and after the election.³ For years, Trump sowed the seeds of the myth that the election would be, and then was, stolen from him. This is the Stolen Election Lie (or the “Lie”). He claimed in 2016 that his opponent in the election that year, Hillary Clinton, received millions of “illegal votes” in California.⁴ Later, in the

2. See Steve Inskeep, *Timeline: What Trump Told Supporters for Months Before They Attacked*, NPR (Feb. 8, 2021, 2:32 PM ET), <https://n.pr/3Hk17GE>.

3. See RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* 1–13 (2022).

4. See Ed Kilgore, *Trump’s Long Campaign to Steal the Presidency: A Timeline*, N.Y. MAG.: INTELLIGENCER (July 14, 2022), <https://nym.ag/3kv35v4> (“Trump insisted in late November 2016 that he would have won the popular vote as well as the Electoral College ‘if you deduct the millions of people who voted illegally.’”).

leadup to the 2020 election, he lied repeatedly about the legitimacy of the upcoming election, spreading the idea that his opponents were planning to steal the election. “Mail ballots are a very dangerous thing for this country, because they’re cheaters,” he claimed in April 2020.⁵ “They go and collect them. They’re fraudulent in many cases.”⁶ In July 2020, he continued the drumbeat of repeating stolen election falsehoods, telling a Fox News host that “mail-in voting is going to rig the election.”⁷ Trump also refused to commit to accepting the results of the election.⁸ Instead, he cast doubt on the legitimacy of the election, alleging fraud before the election even happened.⁹

Statements like these, which are baseless and false, are not made to express a belief or viewpoint. They are not made to expose wrongdoing or to get to the bottom of some plot. Rather, the purpose of these bad faith allegations was to make people buy into a falsehood for political gain. The Stolen Election Lie was, and still is, nothing more than a ploy to defraud the public.¹⁰

And the ploy worked. The Stolen Election Lie did exactly what it was designed to do—trick voters into believing the 2020 presidential election

5. Donald Trump, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (Apr. 7, 2020).

6. *Id.*

7. Inskip, *supra* note 2.

8. See Brett Samuels, *McEnany Won’t Say If Trump Would Accept Election Result If He Loses*, THE HILL (Aug. 19, 2020, 2:12 PM ET), <https://bit.ly/3XMSmu2>; Brett Samuels, *Trump Raises Idea of Delaying Election*, THE HILL (July 30, 2020, 8:59 AM ET), <https://bit.ly/3XJb3id>.

9. See Complaint at 2, NAACP Legal Def. & Educ. Fund, Inc. v. Trump, No. 1:17-CV-05427 (S.D.N.Y. July 18, 2017) (“Both before and since his election, President Trump has made repeated statements alleging that there is widespread voter fraud throughout the United States . . .”).

10. See Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL’Y REV. 353, 355 (2022). When discussing intentionally false political speech, which Sherwin calls “anti-speech acts,” Sherwin states:

Their purpose is not to advance opinions or ideas in the service of truth or judgment; rather, their objective is to jam deliberation—to deliberately sow confusion and mistrust—by propagating demonstrably false information upon which others are meant, or are reasonably expected, to rely. Profiting from such false coinage is a fraud upon the public.

Id. Cf. *Rosenbloom v. 704 Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (“Calculated falsehood, of course, falls outside ‘the fruitful exercise of the right of free speech.’” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964))).

was stolen so they become even more motivated to fight, both metaphorically and literally, to elect Republicans. Republican leaders and right-wing media continue to disseminate the Stolen Election Lie, and a majority of Republican voters continue to embrace it as true.¹¹ Yet as the movement grows in size and supporters, no credible evidence has actually surfaced to support the allegations.¹² This has not slowed the Lie down. Millions continue to believe the falsehood.¹³ The Republican party has embraced it.¹⁴ In fact, hundreds of Republicans who ran for office in 2022 “have either said the 2020 election was stolen or cast doubt on its legitimacy, including 185 current governors, secretaries of state, attorneys general or [United States] Senate and House members, many of whom are seeking re-election this year”¹⁵ Thus, a significant portion of the electorate now believes the lie that the 2020 election was stolen.¹⁶ Given this stark fact, coupled with the January 6th attempt to stop the peaceful transfer of power, it is unsurprising many Americans have lost confidence in our electoral system.¹⁷

In 2022, many who embraced the Stolen Election Lie were elected to key federal and state offices.¹⁸ Other election deniers were defeated at the

11. Donald Trump’s website regularly releases statements from the former President which may be likened to his infamous Twitter posts, making claims of “largescale Voter Fraud and Irregularities” and “overwhelming evidence of fraud throughout the 2020 election.” *Statement by Donald J. Trump, 45th President of the United States of America*, SAVE AM.: NEWS (July 21, 2022), <https://bit.ly/3GZzFN9>; *see also Statement by Donald J. Trump, 45th President of the United States of America*, SAVE AM.: NEWS (July 27, 2022), <https://bit.ly/3iRLAV8>.

12. *See* Mike DeBonis & Jacqueline Alemany, *Trump’s Inner Circle Warned Him Election-Fraud Claims Were False*, WASH. POST (June 13, 2022, 9:49 AM EDT), <https://wapo.st/3WtNZTL>.

13. *See* Mark Murray, *Poll: 61% of Republicans Still Believe Biden Didn’t Win Fair and Square in 2020*, NBC NEWS (Sept. 27, 2022, 12:21 PM EDT), <https://nbcnews.to/3D3hxAW>.

14. *See* Steve Eder, David D. Kirkpatrick & Mike McIntire, *They Legitimized the Myth of a Stolen Election—and Reaped the Rewards*, N.Y. TIMES (Oct. 3, 2022), <https://nyti.ms/3GULuEo>.

15. Ryan Teague Beckwith, *The Real Winner of GOP’s 2022 Primaries Was Denial of 2020 Election*, BLOOMBERG (Sept. 6, 2022), <https://bloom.bg/3J4xavG>.

16. *See* Murray, *supra* note 13.

17. In a CNN poll conducted in the wake of the January 6th riot at the Capitol, 59% of people expressed some level of confidence that elections reflect the will of the people. Chris Cillizza, *Here’s the Terrible Reality: Trump’s Election Lie Is on the March*, CNN POL. (Feb. 11, 2022, 1:28 PM EST), <https://cnn.it/3XOh6SC>. In the same poll taken a little over a year later, only 44% of Americans expressed confidence in the idea of free and fair elections. *Id.*

18. *See* Jacob Rosen et al., *2022 Midterm Elections: Election Deniers Who Won and Lost*, CBS NEWS (Nov. 15, 2022, 6:32 PM), <https://cbsn.ws/3iPr1sC>.

ballot box.¹⁹ But among many election deniers who ended up losing, the margin they lost by was, in many cases, very small.²⁰

The outlook remains bleak. Coupled with the “tidal wave of restrictive voting legislation” introduced in recent years, the Stolen Election Lie is already eroding our democracy.²¹ And, even aside from potential future damage caused by election-denying candidates and restrictive voting legislation, some have suffered direct economic damage because of the Stolen Election Lie. Dominion Voting Systems, a company that makes and sells electronic voting hardware and software, along with its competitor, Smartmatic, were accused by former President Trump and several prominent Republican leaders of, among other things, hacking voting systems, “deleting” votes, and even conspiring with former Venezuelan President Hugo Chavez to “steal” the 2020 presidential election.²² Right-wing media echoed and amplified these baseless lies. As a result, these companies filed defamation lawsuits against individuals and media outlets that spread falsehoods about them.²³

Considering the sheer scope of the damage the Lie caused, together with the lack of evidence to support it, questions arise about how this could have been allowed to spiral so far out of control, and whether the continued spreading of the Stolen Election Lie should be allowed at all.²⁴ One judge

19. *See id.*

20. *See Tracking Which 2020 Election Deniers Are Winning, Losing in the Midterms*, WASH. POST, <https://wapo.st/3QWZRwc> (last updated Dec. 18, 2022, 5:05 PM ET).

21. More than 440 bills with provisions restricting voting access were introduced in the 2021 legislative sessions across the country. *See Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Dec. 21, 2021), <https://bit.ly/3D3jVaG>.

22. *See* Jen Wieczner, *Big Lies vs. Big Lawsuits: Why Dominion Voting Is Suing Fox News and a Host of Trump Allies*, FORTUNE (Apr. 2, 2021, 6:30 AM EDT), <https://bit.ly/402xm4G>; Alan Feuer, *Trump Campaign Knew Lawyers’ Voting Machine Claims Were Baseless, Memo Shows*, N.Y. TIMES (Sept. 21, 2022), <https://nyti.ms/3wjNy3D>.

23. *See* Wieczner, *supra* note 22; *see also* Alison Durkee, *Court Lets Lawsuit Against OANN Move Forward—Here’s Where Dominion and Smartmatic’s Defamation Suits Stand Now*, FORBES (Nov. 9, 2022, 5:47 AM EST), <https://bit.ly/3WscL6N>.

24. For example, one court noted:

This country is being torn apart by continued attacks on the legitimacy of the 2020 election and of our current president, Joseph R. Biden. The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society.

Matter of Giuliani, 146 N.Y.S.3d 266, 283 (App. Div. 2021).

recently ruled that such falsehoods could lead to civil liability.²⁵ But any such liability would be limited to narrow categories such as defamation.²⁶ Accordingly, civil liability—even if it applies—falls far short of addressing the scope of harm resulting from the Stolen Election Lie.

Skepticism and doubt about the government and electoral system are not new, but the circumstances surrounding the Stolen Election Lie are beyond the usual discourse between and among politicians, the news media, and the general public. Proponents of the Lie have argued that these falsehoods are necessary and “legitimate political discourse.”²⁷ This harkens to the marketplace of ideas principle: that, in political dialogue, people are the best judge of truth, not the government.²⁸ Under this view, a *laissez-faire* approach to speech is appropriate because the market for ideas is analogous to the economy; just as a hands-off approach has proven effective in the economic market for goods and services, the marketplace of ideas should likewise be left to work itself out. All viewpoints and opinions should be permitted and expressed, free of government intervention. The truth, under this principle, will prevail over falsehoods by way of people deciding what speech they prefer, the same way they select what goods and services to purchase.²⁹ In theory, then, truth wins out by allowing the marketplace of ideas to operate free of government control.

But there is a fundamental problem with this idea when applied to intentional falsehoods disseminated in bad faith. Even if the marketplace of ideas principle might arguably work in regard to speech generally—which many critics question³⁰—this principle simply does not apply to the

25. In a case against former President Donald Trump over damages from the January 6th insurrection at the Capitol, the court declared that the First Amendment was not available to Trump as a defense. *See* *Thompson v. Trump*, 590 F. Supp. 3d 46, 118 (D.D.C. 2022). The court analyzed Trump’s speech, which occurred at a rally immediately prior to the assault, under the rule of *Brandenburg v. Ohio*, finding that the speech was plausibly “directed to inciting or producing imminent lawless action and [was] likely to produce such action.” *See id.* at 115 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

26. *Thompson v. Trump* has been appealed to the United States Court of Appeals for the D.C. Circuit and is expected to eventually make its way to the United States Supreme Court. *See* Kimberly Wehle, *Civil Lawsuits Can Proceed Against Trump for His Big Lie and Jan. 6th Actions*, THE BULWARK (Feb. 22, 2022, 6:00 AM), <https://bit.ly/3Xveg5A>.

27. *See* Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse,’* N.Y. TIMES (Feb. 4, 2022), <https://nyti.ms/3WtYiqV>.

28. *See* *Abrams v. United States*, 250 U.S. 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 . . .”).

29. *See* Terri R. Day & Danielle Weatherby, *Shackled Speech: How President Trump’s Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment*, 23 LEWIS & CLARK L. REV. 311, 321 (2019).

30. *See id.* (“[T]he marketplace of ideas theory has many critics.” (citing Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909 (2010))).

Stolen Election Lie. This is because the Lie, although certainly political speech, is also a statement of verifiably false fact.³¹ That is, it does not involve an opinion or viewpoint. It is not a debatable topic like, say, what the corporate tax rate should be, what immigration policy is most advantageous, or whether universal healthcare is a good idea or a terrible one. Those issues provide plenty of room for subjective belief and engender correspondingly robust political discourse. Issues like these are open to diverse legitimate views and opinions because such issues are, by their nature, open to interpretation. But whether a particular candidate won a presidential election, or any election for that matter, is a question of fact.³² It is an objectively-verifiable, provable claim. Moreover, there are rules and procedures in place for determining election outcomes—including the United States Constitution³³—and those rules and processes provide for one winner. While a losing candidate may falsely claim to have won, the winner of the election is not a subjective matter open to interpretation.³⁴ Claiming there was massive fraud in an election is a factual claim. Claiming that voting machines switched votes is a factual claim. These are not areas of political debate or discussion. Although many members of the public certainly might hear or read these false claims and believe them, and then spread them to others in good faith, those who invented and initially disseminated these claims are not expressing a legitimate viewpoint or opinion, but rather making baseless false assertions calculated to manipulate people into believing the falsehoods are actually the truth.³⁵ Inventing a claim that an opponent “stole” an election, or alleging “massive fraud” without any credible evidence, is not

31. The distinction between assertions of opinion and assertions of fact is an important one. The two kinds of assertions are treated distinctly in a number of contexts. For instance, in a common law fraud claim, there is a “legal distinction between fraud predicated on facts and fraud predicated on opinions or predictions.” *Bryant v. Transcon. Gas Pipe Line Corp.*, 821 S.W.2d 187, 190 (Tex. App. 1991).

32. In the law of defamation, for instance, statements of fact and opinion are treated differently. “Unlike false statements of fact, expressions of opinion, no matter how insulting, are actionable only if they imply the existence of undisclosed defamatory facts on which the opinion was based.” MARVIN M. GOLDSTEIN & STANLEY L. GOODMAN, *NEW JERSEY PRACTICE, EMPLOYMENT LAW* § 12.3 (2d ed.) (quoting *Karnell v. Campbell*, 501 A.2d 1029, 1033 (N.J. Super. Ct. App. Div. 1985)).

33. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”); U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

34. *See supra* notes 31–32 and accompanying text.

35. *See Feuer, supra* note 22.

legitimate political discourse. It is a purposeful effort to deceive in order to wrongfully obtain something the speaker wants. In other words, it is fraud.

Therein lies the crux of the First Amendment problem. If the Stolen Election Lie is political speech—and there is a strong argument that it certainly is—then it should normally hold the highest speech protections.³⁶ However, if the Lie is fraudulent speech, which in many cases it also is, then it deserves no speech protection.³⁷ As the Supreme Court has repeatedly clarified, “the First Amendment does not shield fraud.”³⁸ But false political speech has, to date, been almost always analyzed, by courts and scholars alike, as a “false” speech problem rather than a “fraudulent” speech one.³⁹ This misses the mark. False speech, as held by the Supreme Court, is a speech category that encompasses all kinds of untrue statements, even those that are unintentional, harmless, and, in some cases, valuable.⁴⁰ Looking at the Stolen Election Lie through a false speech lens ensures no cure will be found because it misdiagnoses the disease. Instead, the Lie should be analyzed as a fraudulent speech problem, which more aptly describes the speech at issue. In the next two Parts, we will explore this issue within these two frameworks.

II. FALSE POLITICAL SPEECH IS PROTECTED, BUT THOSE PROTECTIONS SHOULD NOT BE LIMITLESS

Speech and debate concerning public issues has long been protected under the First Amendment to ensure the uninhibited exchange of ideas

36. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))).

37. See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (noting that “the First Amendment does not shield fraud,” and that public deception is not protected speech (citations omitted)).

38. *Id.* (citations omitted).

39. See *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011) (holding a state may regulate “false speech” in the context of a political campaign on a ballot issue only “when it satisfies the First Amendment test required for content-based speech restrictions”); William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321, 328 (2007) (“This article will examine the problem posed by false speech in the context of political campaigns, both for ballot measures and for individual candidates.”).

40. See *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1021 (D. Idaho 2014) (noting that “[f]alse statements that do not constitute defamation, fraud, or perjury are fully protected speech” and that “[e]ven a false statement may be deemed to make a valuable contribution to public debate . . .” (first citing *United States v. Alvarez*, 567 U.S. 709, 718 (2012); and then quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964))).

and bring about the political and social changes desired by the people.⁴¹ A principal rationale used by courts to protect political speech is to advance democracy by allowing the public to freely participate in deliberating issues important to decision-making in a democratic society.⁴² To this end, political speech is at the apex of the freedom of speech hierarchy.⁴³ However, like most protections offered by the Constitution, freedom of speech is not absolute, even for political speech.⁴⁴ For example, if a politician defames someone during a campaign speech, the political nature of the speech will not shield them from defamation liability.⁴⁵ Likewise, if a politician lies under oath, even if the lies are political speech, it will not shield the politician from criminal prosecution for perjury.⁴⁶ Indeed, the government is at liberty to “regulate corporate political speech through disclaimer and disclosure requirements”⁴⁷ Still, outside of unprotected speech categories, any law that burdens political speech is generally subject to strict scrutiny,⁴⁸ and laws that seek to outright suppress political speech are frequently struck down.⁴⁹ This imposes a likely insurmountable hurdle for those advocating to stop the spread of the Stolen Election Lie, so long as it is analyzed as false speech.

41. See *N.Y. Times Co.*, 376 U.S. at 270 (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

42. See David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1, 7 (2011).

43. See *id.* at 10; see also *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

44. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[T]he freedom of speech . . . does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”).

45. See *Lamb v. Sutton*, 164 F. Supp. 928, 931 (M.D. Tenn. 1958), *aff’d*, 274 F.2d 705 (6th Cir. 1960) (upholding jury award of \$25,000 against political candidate defendant who made defamatory statements in political broadcasts).

46. See Steven G. Calabresi & Gary Lawson, *Why Robert Mueller’s Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 91 n.17 (2019) (noting that Vice President Dick Cheney’s former chief of staff, Scooter Libby, was convicted of perjury, and that “President Trump pardoned Mr. Libby, more than a decade after his conviction, on April 13, 2018” (citations omitted)).

47. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319 (2010).

48. If a law is subject to “strict scrutiny,” the government entity imposing the law must prove that the restriction is narrowly tailored to achieve a compelling state interest. See *id.* at 340.

49. See *id.* at 336–37 (citations omitted).

But why should this be the case? By its nature, the Lie is the very opposite of the kind of political speech intended to be protected by the First Amendment. By allowing people to speak freely and openly, the First Amendment is meant to expose falsehoods through dialogue and discussion.⁵⁰ The idea is that people need the freedom to be wrong. Particularly in political speech, those discussing issues, policies, and candidates should be given the freedom to express all opinions, no matter how unpopular or misguided, because voters can best judge political truth, not the state.⁵¹ The Stolen Election Lie, however, corrupts the very self-governing mechanism the First Amendment was put in place to protect.⁵²

Instead of contributing to the marketplace of ideas, the Stolen Election Lie infects it like a virus. It carries no idea or viewpoint. Instead, it injects baseless falsehoods, disseminated in bad faith, which pose as ideas or viewpoints, pushing out and usurping legitimate debate on the issues and replacing it with lies. Allowing people to spread intentional falsehoods calculated to benefit the liar does not aid in the search for truth, political or otherwise.⁵³

An important line of demarcation between protected and unprotected speech in other contexts is the standard known as “actual malice.” It originates from *New York Times Co. v. Sullivan*, which addressed whether the inclusion of false statements caused otherwise protected political speech to succumb to civil liability.⁵⁴ In *New York Times*, a newspaper advertisement expressed grievances and protested a major public issue, activity which would normally qualify for constitutional protection; however, the advertisement contained inaccurate statements, thereby exposing the *New York Times* to liability for civil libel.⁵⁵ The Supreme Court expressed the importance of protecting political speech.⁵⁶ Nevertheless, it adopted a rule that a public official can recover damages arising from a defamatory falsehood when the statement is made with actual malice.⁵⁷

50. See *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

51. See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (“[T]he people lose when the government is the one deciding which ideas should prevail.”).

52. See, e.g., *Sherwin*, *supra* note 10, at 356 (“Courts that use free speech doctrine to shield those who deliberately or recklessly disseminate demonstrably false statements in pursuit of fraudulent electoral or commercial gain subvert the very values they purport to uphold.”).

53. See *Feuer*, *supra* note 22.

54. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

55. See *id.* at 256–58.

56. See *id.* at 270.

57. See *id.* at 279–80. The Court defined “actual malice” as “knowledge that [a statement] was false or with reckless disregard of whether it was false or not.” *Id.* at 280.

Actual malice requires that the speaker make the false statement either knowing it is false or with reckless disregard as to its falsity.⁵⁸ In other words, it requires either knowledge or recklessness. This is the standard that applies today in defamation and other speech-related cases.⁵⁹ However, some have discussed applying this standard in certain kinds of political speech cases unrelated to defamation. For instance, Caroline Mala Corbin proposes that a category of speech, which she calls “government propaganda,” could be regulated or banned, with one of its required elements being that the speech was expressed with actual malice.⁶⁰ Meanwhile, Claudia Haupt and Wendy Parmet argue that when public officials disseminate health-related misinformation, the First Amendment might not even require actual malice.⁶¹ Instead, a mere deviation from the applicable standard of care could, according to Haupt and Parmet, satisfy free speech concerns with regard to malpractice claims involving these kinds of falsehoods.⁶²

Likewise, Richard K. Sherwin recently argued that purposefully false and misleading campaign speech should be regulable under the First Amendment.⁶³ Sherwin defines a speech category he calls “anti-speech acts,” which are “[s]trategies of deception designed to disrupt public discourse in the electoral context”⁶⁴ The purpose of anti-speech acts “is not to advance opinions or ideas in the service of truth or judgment; rather, their objective is to jam deliberation—to deliberately sow confusion and mistrust—by propagating demonstrably false information upon which others are meant, or are reasonably expected, to rely.”⁶⁵ Sherwin argues not only that restricting anti-speech acts is consistent with free speech principles, but also that those principles *require* restricting anti-speech acts because of the harm, both potential and actual, they pose

58. *See id.* at 279–80.

59. For example, a Washington state statute provides that it shall be a civil violation “for a person to sponsor with actual malice a statement constituting libel or defamation per se” within certain kinds of political advertisements. WASH. REV. CODE ANN. § 42.17A.335(1) (West 2012).

60. *See* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 829, 834–37 (2020).

61. *See* Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809, 1841 (2022); *see also* Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, ST. JOHN’S L. REV. (forthcoming 2023) (manuscript at 24–28) (available at <https://bit.ly/3J1Y4UL>) (proposing a new unprotected category of fraudulent speech, which includes actual malice as a required element).

62. *See* Haupt & Parmet, *supra* note 61, at 1841.

63. *See* Sherwin, *supra* note 10, at 354.

64. *Id.* at 355.

65. *Id.*

in the present digital age.⁶⁶ Notably, some courts have expressed support for the view that campaign disinformation spread with actual malice should be regulable.⁶⁷

It is clear the actual malice standard, if applied to those most responsible for inventing and spreading the Stolen Election Lie, would be met.⁶⁸ This was made even clearer by documents recently uncovered, which show that before the former President even began making these claims, his legal team informed him the allegations were untrue.⁶⁹ Such documentation of bad faith is not necessary to show actual malice, but it makes the case for actual malice even stronger.⁷⁰ And if it were proven that Trump and his affiliates spread the Stolen Election Lie with actual malice, there is a compelling argument that such statements are not, and should not be, protected speech. Nevertheless, because false speech, especially false political speech, is generally protected, meeting the actual malice standard alone is likely of little help to those seeking liability or sanctions against those responsible for spreading the Stolen Election Lie.⁷¹ If, on the other hand, the falsehoods cross the line into fraudulent speech, the First Amendment picture changes significantly.

III. FRAUDULENT POLITICAL SPEECH DOES NOT DESERVE FIRST AMENDMENT PROTECTION

Despite the recent push by some to restrict the most harmful and malicious political falsehoods, such as the Stolen Election Lie, such falsehoods remain, apparently, largely protected.⁷² Some who claim such

66. *See id.* at 356, 361–64.

67. *See, e.g.,* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 349 (1995) (“[F]alse statements [made during election campaigns], if credited, may have serious adverse consequences for the public at large.”); *see also* State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691, 707 (Wash. 1998) (en banc) (Madsen, J., concurring) (“The statute [banning false campaign speech] chills only this devious liar, not free speech. In short, ‘[t]he actual malice test penalizes only the calculated falsehood.’” (internal quotation marks and citations omitted)).

68. *See, e.g.,* Feuer, *supra* note 22.

69. Prior to the press conference outlining the claims against Dominion Voting Systems and Smartmatic, an internal memo was prepared by Trump’s team which determined the allegations being made were baseless and untrue. *See id.*

70. *See* Nelson v. Pagan, 377 S.W.3d 824, 832 (Tex. App. 2012) (explaining the standard required to establish actual malice).

71. *See, e.g.,* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473 (6th Cir. 2016) (holding a state’s political false statements laws are subject to strict scrutiny because they “reach not only defamatory and fraudulent remarks, but *all* false speech regarding a political candidate, even that which may not be material, negative, defamatory, or libelous”).

72. *See, e.g.,* Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1021 (D. Idaho 2014) (“False statements that do not constitute defamation, fraud, or perjury are fully

intentionally false speech must remain protected point to the Supreme Court’s ruling in *United States v. Alvarez*.⁷³ However, in that case, neither Justice Kennedy’s plurality opinion, nor Justice Breyer’s concurring opinion, supports the idea that harmful falsehoods spread with actual malice are protected.⁷⁴ There, the Court explained that, in the pursuit of open and vigorous expression of views, some falsehoods are inevitable.⁷⁵ As such, false statements that cause no significant harm, such as claiming to have won a military medal in a city council meeting, are generally protected under the First Amendment.⁷⁶ In short, *Alvarez* dealt with pure false speech that causes no significant harm.⁷⁷ Harmful falsehoods are another matter, and are not addressed in *Alvarez*.⁷⁸

Of course, certain narrow kinds of speech aimed at deceiving the public are, under applicable law, illegal, including defamation and securities fraud.⁷⁹ The carve-out for defamation may help parties like Dominion Voting Systems or Smartmatic, who the Stolen Election Lie directly named as wrongdoers,⁸⁰ but it fails to protect most Americans from the Lie’s ripple effects. True, attempting to restrict these kinds of harmful falsehoods based purely on it being harmful disinformation presumably would not overcome the massive hurdle of strict scrutiny that

protected speech.” (citation omitted)). *But see* *United States v. Gonzalez*, 905 F.3d 165, 191–92 (3d Cir. 2018) (“[W]hile statements of personal opinion are protected under the First Amendment, . . . there is no constitutional value in false statements of fact . . . False statements of fact are not protected because [n]either the intentional lie nor the careless error materially advances society’s interest in uninhibited, robust, and wide-open debate on public issues.” (internal quotation marks and citations omitted)).

73. *See* *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion).

74. *See id.*; *see also id.* at 732–38 (Breyer, J., concurring).

75. *See id.* at 718 (majority opinion).

76. *See id.* at 719. The Court in *Alvarez* further rejected the notion that false speech is unprotected as a general category of speech. *See id.* at 722.

77. *See id.* at 719.

78. *See generally id.*

79. The exceptions include the torts of defamation and false light invasion of privacy, as well as civil and criminal claims for securities fraud. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301–02 (1964) (Goldberg, J., concurring) (“The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.”); *Time, Inc. v. Hill*, 385 U.S. 374, 387–90 (1967) (holding that the tort of false light is consistent with First Amendment, provided there is a finding of actual malice); *United States v. Motz*, 652 F. Supp. 2d 284, 294 (E.D.N.Y. 2009) (holding that the federal criminal securities fraud statute does not implicate a defendant’s First Amendment rights).

80. *See, e.g.*, Kristen Leigh Painter, *Suit Against Lindell Can Continue: Dominion Voting Systems Accuses Trump Allies of Defamation*, STAR TRIB., Aug. 13, 2021, at B3; Jeremy Barr, *Judge: Defamation Lawsuit Against Fox News over Election Claims Can Proceed*, WASH. POST, Mar. 10, 2022, at C2.

protects political speech.⁸¹ Attempts to regulate such speech would also likely be impermissibly vague and overbroad.⁸² Like “fake news” and “propaganda,” “disinformation” is an amorphous term far too vague and overbroad to be categorically unprotected.⁸³ Thus, a superior alternative is to classify harmful speech uttered with actual malice as fraud.⁸⁴

Under the First Amendment, fraud is not protected speech.⁸⁵ Generally speaking, civil fraud has four elements: a false statement, intent to deceive, reliance by the victim, and resulting damage.⁸⁶ The Stolen Election Lie arguably meets all four criteria. But, with a couple of notable exceptions, civil fraud is rarely applied to falsehoods spread to the public; instead, it typically applies to falsehoods aimed at individual victims.⁸⁷ The notion that fraud is unprotected typically operates in conjunction with long-established civil and criminal fraud doctrines, such as common law deceit, mail fraud, false advertising laws, and securities fraud.⁸⁸ Thus, considering

81. See Fernando Nuñez, Note, *Disinformation Legislation and Freedom of Expression*, 10 U.C. IRVINE L. REV. 783, 789 (2020).

82. See *United States v. Williams*, 553 U.S. 285, 304 (2008) (explaining the vagueness and overbreadth grounds for invalidating speech restrictions).

83. See, e.g., Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 245 (2017) (“The term ‘fake news’ has no single definition because it refers to a wide variety of things.”); Henricksen, *supra* note 61, at 14.

84. See WES HENRICKSEN, IN FRAUD WE TRUST: HOW POLITICIANS, THE MEDIA, AND CORPORATIONS DEFRAUD THE PUBLIC—AND HOW TO STOP THEM (forthcoming 2023).

85. See *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); see also *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (citing *Va. St. Bd. of Pharmacy*, 425 U.S. at 771).

86. See *Garcia v. Vera*, 342 S.W.3d 721, 725 (Tex. App. 2011) (“The elements of fraud are (1) a material false representation, (2) that was made with knowledge or recklessness as to its falsity, (3) with the intent to induce reliance, and (4) that the other party ‘actually and justifiably relied upon,’ causing him injury.” (citations omitted)).

87. But see *Obenski v. Brooks*, 7 Pa. D. & C.3d 253, 260 (Pa. Ct. C.P. 1978) (“[M]isrepresentations intended for the general public alone constitute a proper basis for actionable fraud.”); *In re Simon II Litig.*, 211 F.R.D. 86, 140 (E.D.N.Y. 2002) (“It is not necessary that the misrepresentation be made directly to the party claiming to be defrauded Misrepresentations made to the public at large may give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations.” (citations omitted)), *vacated*, 407 F.3d 125 (2d Cir. 2005); *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183, 193 (S.D. Ga. 1982) (“Even ‘where (the) representations are made to the public at large, or to a particular class of persons,’ as long as they are given ‘with the intention of influencing any member of the public or of the class to whom they may be communicated, any one injured through the proper reliance thereon may secure redress.” (quoting *Hines v. Wilson*, 139 S.E. 802, 804 (Ga. 1927))).

88. For common law deceit, see *Heyser v. Noble Roman’s Inc.*, 933 N.E.2d 16, 19 (Ind. Ct. App. 2010) (“Actual fraud consists of five elements: 1) the fraud feisor must have made at least one representation of past or existing fact; 2) which was false; 3) which the fraud feisor knew to be false or made with reckless disregard as to its truth or falsity; 4) upon which the plaintiff reasonably relied; 5) and which harmed the plaintiff.” (citing *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 319 (Ind. Ct. App. 1991))). For mail and wire fraud, see

fraud in general as unprotected is, ironically, a bit deceptive. Rather, there are specific civil and criminal laws aimed at curtailing certain kinds of fraudulent conduct and speech. Fraudulent conduct and speech that falls outside the scope of these laws—meaning it does not satisfy the four elements—is not a tort or a crime, and is therefore legal.⁸⁹

In *Alvarez*, the Supreme Court emphasized the idea that legally cognizable harm is paramount to a claim which would suppress false statements, but it also went a step further by suggesting that courts should consider “whether the lie was made for the purpose of material gain.”⁹⁰ Harm or damages are widely accepted as a staple element in claims for fraud, but material gain is sometimes not required.⁹¹ The Stolen Election Lie should not find protection under *Alvarez* because overturning an election to gain or retain power easily meets the standard of material gain.⁹² Indeed, landing or keeping one’s job is a material gain for the beneficiary, and that is no less true whether the job is congressperson, senator, or President of the United States. So, why has the Stolen Election Lie not been deemed fraud, and why have its proponents not been enjoined to stop spreading it? Simply put, the First Amendment generally precludes punishment for defrauding the public.⁹³ The fear is that removing the

United States v. Okun, 453 F. App’x 364, 368 n.2 (4th Cir. 2011) (“The elements of mail fraud are: (1) the existence of a scheme to defraud and (2) the use of mails to perpetrate that scheme The elements of wire fraud are: (1) the existence of a scheme to defraud and (2) the use of wire communication in furtherance of that scheme.” (citations omitted)). For consumer protection laws, see *Keodalah v. Allstate Ins. Co.*, 449 P.3d 1040, 1047 (Wash. 2019) (en banc) (“[A] plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) affects trade or commerce and (3) impacts the public interest, and (4) the plaintiff sustained damage to business or property that was (5) caused by the unfair or deceptive act or practice.”). For securities fraud, see *In re Gold Res. Corp. Sec. Litig.*, 776 F.3d 1103, 1108 (10th Cir. 2015) (“To properly state a claim for securities fraud, a plaintiff’s complaint must allege facts supporting the following: (1) the defendant made an untrue or misleading statement of material fact, or failed to state a material fact necessary to make statements not misleading; (2) the statement complained of was made in connection with the purchase or sale of securities; (3) the defendant acted with scienter, that is, with intent to defraud or recklessness; (4) the plaintiff relied on the misleading statements; and (5) the plaintiff suffered damages as a result of his reliance.” (quoting *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1095 (10th Cir. 2003))).

89. See HENRICKSEN, *supra* note 84.

90. See *Alvarez*, 567 U.S. at 723.

91. See *supra* note 88 and cases cited therein.

92. See *Win v. Cegavske*, 570 F. Supp. 3d 936, 944 (D. Nev. 2021) (noting that “false statements made for material gain or advantage in an election” constitute “speech that does not have protection under the First Amendment”).

93. See Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1120 (2006) (citing Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992)).

protection such false statements enjoy will put the government in the position of deciding “the truth or falsity of all statements in public debate.”⁹⁴ The Court in *Alvarez* shared a similar sentiment, noting that, were it otherwise, the government could compile a list of subjects about which false statements are punishable, with no clear limiting principle.⁹⁵ This also aligns with the idea of strict scrutiny: if the government seeks to regulate political speech, “the restriction must be the ‘least restrictive means among available, effective alternatives.’”⁹⁶

Given the massive amount of harm the Stolen Election Lie is now wreaking on citizens and society alike, it is time to ask whether we should treat fraudulent schemes to deceive the public the same way we do fraudulent schemes to deceive individuals. After all, why should a fraud scheme targeting one person be a crime, while a fraud scheme targeting millions be perfectly legal? If we are to restrict fraud at all—which the law has always purported to do—then we should also restrict those frauds causing the greatest harm and affecting the greatest number of people. If the existing fraud exception does not encompass the disinformation causing the greatest amount of harm, then perhaps a “fraud on the public” category of unprotected speech should supplement current law.⁹⁷

Today, however, because the Stolen Election Lie has been carried out on such a large scale, it has become its own shield against liability. The Supreme Court is unlikely to restrict the spread of this harmful falsehood because most proposals to regulate this kind of deceptive speech lack a sufficient narrowing principle. The Stolen Election Lie, after all, encompasses a wide range of speech, some of it clearly protected. Those who oppose such harmful purposeful falsehoods would be better off focusing on narrow categories of unprotected speech. Defamed individuals and companies could win their lawsuits against Trump and his allies, while the opponents of the Stolen Election Lie lay in wait, hoping that these victories and a continued lack of evidence will slowly change the minds of misled Americans. But compared to the damage these lies have done and will continue to do,⁹⁸ this would hardly feel like a “win.” Any way one looks at it, those who spread the Stolen Election Lie have already gotten away with misleading the public for their own political gain.

94. *Id.* (quoting Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 140 (1993)).

95. *See Alvarez*, 567 U.S. at 723.

96. *Id.* at 729 (quoting *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004)).

97. *See Henricksen*, *supra* note 61, at 24–28.

98. *See supra* Part I.

IV. CONCLUSION

It should be alarming that a former President can lie to millions of people by claiming in bad faith that he won an election he lost. Making a knowingly false claim that an election is rigged has the potential to destroy lives or foment a violent overthrow of the government. Indeed, the Stolen Election Lie has already fulfilled this potential. As the New York Supreme Court’s Appellate Division noted in *Matter of Giuliani*, “the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the [United States] Capitol” resulting from the Stolen Election Lie makes clear “the extent of the damage that can be done when the public is misled by false information about the elections.”⁹⁹ But not only is such speech allowed under the law; it is actively protected by it.

This *laissez-faire* approach to harmful false speech about elections is failing. Given the ways we now consume content, facilitating the purposeful manipulation of the public to the ends of those with access to a large megaphone, in combination with how much destruction such intentional falsehoods can cause, we should revisit the ironclad protections these lies have long enjoyed. To fix the problem, we should prohibit fraud at this scale, and punish those who carry it out. The future of democracy may depend on it.

99. *Matter of Giuliani*, 146 N.Y.S.3d 266, 283 (App. Div. 2021).