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Defamation 2.0

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DEFAMATION 2.0

*Cortelyou C. Kenney**

There is a literal prohibition in the media bar that media lawyers cannot represent plaintiffs in suits for defamation. The stated principle behind this rule—a rule that can result in excommunication from the premier media law organization if it is violated—is that playing both sides of the defamation game is disloyal to traditional media actors because any chance of victory could inadvertently distort the law of defamation to increase the risk of frivolous suits against media outlets or other innocent third parties. But has the maxim finally gone too far?

Fueled by a new model where media profits are driven by views, both the mainstream media and social media platforms have restructured their business in a way that calls for the revisitation of the prohibition. Specifically, if one examines the disturbing rise of misinformation and disinformation, the clear trend is toward knowing falsehoods by media outlets and media pundits. There are numerous recent lawsuits against the media for engaging in misinformation, including the Sandy Hook lawsuit against Alex Jones, suits by poll workers in Georgia against the Gateway Pundit and One America News Network, and of course, Dominion and Smartmatic’s suits against Fox and other media pundits for erroneous statements in the aftermath of the 2020 election.

This Article argues that “Defamation 2.0”—suits by media lawyers against media companies and media pundits that spread misinformation and disinformation—can significantly improve media accountability by seeking to obtain the truth and to push for apologies and

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corrections on equal footing with misinformation. In addition, the link between misinformation and political violence is now well-established, and defamation lawsuits offer the possibility of holding not only the media accountable but also social media platforms where the content is or has been created by the platform. In so doing, it offers the possibility of protecting democracy against erosion by forces threatening to undermine U.S. institutions and seeking to inflame and foment violence such as the January 6 insurrection or mass shootings throughout the United States.

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INTRODUCTION

You may have heard of Ray Epps, a former member of the Oath Keepers, an armed group advocating violent overthrow of the U.S. government.¹ The *New York Times* profiled Mr. Epps as a “man whose life has been ruined by a Jan[uary] 6 conspiracy theory.”² According to the *Times*, Mr. Epps, a former Marine, traveled to Washington at the urging of former President Trump on January 6, and spent the majority of the time, according to video evidence, attempting to calm other protestors and urge them to refrain from engaging in violence.³ He has testified twice to the January 6 Committee and spoken to the Federal Bureau of Investigation (FBI), which has not charged him with any crime.⁴ According to Mr. Epps, this is because once he learned that he was wanted by the FBI he called within minutes and spoke to FBI agents for nearly an hour to explain his role.⁵

But that is not where the story ends; that is merely the beginning. The fact that Mr. Epps was never arrested led him to become one of the biggest scapegoats of January 6, and central to a conspiracy theory propagated by “right-wing media figures and Republican politicians” who characterized him as a “covert government agent” behind a “false flag” operation that instigated and staged “the attack on the Capitol.”⁶ As January 6 unfolded, conspiracy theorists “sought to shift the blame for the attack away from the people who were in the pro-Trump crowd that day to any number of scapegoats,” including “antifa, the leftist activists who have a history of clashing with [former President] Trump’s backers,” and then the FBI who allegedly “planned the attack to provoke a crackdown on conservatives.”⁷

The conspiracy theories surrounding Mr. Epps originated with “[o]bscure right-wing media outlets, like Revolver News, [which] used selectively edited videos and unfounded leaps of logic to paint [Mr. Epps] as a secret federal asset in charge of a ‘breach team’

1. *Oath Keepers*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers> [https://perma.cc/CN7E-K333].

2. Alan Feuer, *A Trump Backer’s Downfall as the Target of a Jan. 6 Conspiracy Theory*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/politics/jan-6-conspiracy-theory-ray-epps.html> [https://perma.cc/E3DY-D49T].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

responsible for setting off the riot at the Capitol.”⁸ These theories were “quickly seized on by . . . Fox News host Tucker Carlson, who gave them a wider audience” and were “also echoed by Republican members of Congress” and eventually former President Trump, who “mention[ed] Mr. Epps at one of his political rallies” with the “Twitter hashtag, #WhoIsRayEpps” going viral.⁹ As a direct result of this alleged misinformation, Mr. Epps began being attacked by “[s]trangers” who called him a “coward and a traitor” and “menacingly cautioned him to sleep with one eye open.”¹⁰ In fear for his safety, Mr. Epps sold his business and his home in Arizona and he and his wife “moved into a mobile home in the foothills of the Rockies, with all of their belongings crammed into shipping containers in a high-desert meadow, a mile or two away.”¹¹ At the date of the *Times* publication, Mr. Epps was searching for a lawyer to file defamation claims against “several of the people who have spread false accounts.”¹² His motivation for the suit? “The truth needs to come out,” said Mr. Epps, “petting his dogs.”¹³

Mr. Epps’ putative defamation lawsuit—which could include media outlets such as Revolver and Fox as defendants—is part of a larger trend of defamation lawsuits being used to pop misinformation, disinformation, and conspiracy theories. Other such lawsuits include the now-famous lawsuits launched by Smartmatic and Dominion against Fox for its allegedly defamatory coverage of the 2020 election, lawsuits against specific individuals who appeared on Fox—including Rudolph Giuliani, Sidney Powell, and MyPillow CEO Mike Lindell—and similar lawsuits against One America News Network (OANN) and Newsmax.¹⁴ My colleagues at the Yale Media Freedom &

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD, 2022 WL 100820 (Del. Super. Ct. Mar. 26, 2021); *Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021 (N.Y. Sup. Ct. Mar. 8, 2022); Complaint & Demand for Jury Trial, *US Dominion, Inc. v. Giuliani*, No. 21-cv-00213-CJN (D.D.C. Jan. 25, 2021); Complaint & Demand for Jury Trial, *US Dominion, Inc. v. Powell*, 21 CV 00040 (D.D.C. Jan. 8, 2021); Complaint & Demand for Jury Trial, *US Dominion, Inc. v. My Pillow, Inc.*, No. 21-cv-00445-CJN (D.D.C. Feb. 22, 2021); Complaint & Demand for Jury Trial, *US Dominion, Inc. v. Herring Networks, Inc.*, No. 21-cv-02130 (D.D.C. Aug. 10, 2021); Complaint, *US Dominion, Inc. v. Newsmax Media, Inc.*, Case No. N21C-08-063 EMD (Del. Super. Ct. Aug 10, 2021); Complaint, *US Dominion, Inc. v. Byrne*, No. 21-cv-02131-CJN (D.D.C. Aug. 10, 2021).

Information Access Clinic in tandem with Protect Democracy’s Law for Truth Project¹⁵ in December 2021 sued for defamation and intentional infliction of emotional distress on behalf of Georgia election workers against the *Gateway Pundit*¹⁶ for “knowingly fabricat[ing] and disseminat[ing] blatantly false stories claiming that [the pollworkers] were involved in a conspiracy to commit election fraud, and continu[ing] to publish these untruths long after they were proven to be false.”¹⁷ The election workers received death threats and faced harassment, according to one lawsuit against OANN¹⁸ that settled on undisclosed terms that required the news outlet to post a 30-second clip acknowledging there was no voter fraud.¹⁹

These lawsuits are not entirely new. Older lawsuits against media actors include lawsuits against Alex Jones for his role in denying the deaths of children in the Sandy Hook school shooting,²⁰ which led to harassment of the grieving parents in the aftermath of the shooting.²¹ The parents, Neil Heslin and Scarlett Lewis, asked for \$150 million in damages—\$75 million for pain and suffering and \$75 million or \$1 for each person who is alleged to have believed the false information spread by Mr. Jones.²² The jury ultimately awarded \$4.1 million in compensatory damages, and \$45.2 million in punitive damages for Mr. Jones’s claim that the massacre was “faked by the government to

15. Ruby Freeman & Wandrea Moss v. Gateway Pundit et al., L. FOR TRUTH, <https://www.law4truth.org/freeman-moss-gp> [<https://perma.cc/2MBR-DG5D>].

16. Petition at 3–4, Freeman v. Hoft, No. 2122-CC09815 (Mo. Cir. Ct. Dec. 2, 2021).

17. Ruby Freeman & Wandrea Moss v. Gateway Pundit et al., *supra* note 15.

18. See Petition at 3–4, *supra* note 16. In the Georgia case, the *Gateway Pundit* claimed a video that showed Georgia poll workers provided evidence that they had helped steal the election, when nonpartisan viewers of the video claimed it did no such thing. As a result of the coverage, the two plaintiffs received death threats, according to the complaint. *Id.*

19. See generally Petition, Freeman v. Hoft, No. 2122-CC-09815 (Mo. Circ. Ct. Dec. 2, 2021); Adam Staten, *Trump-Backed Network Acknowledges Georgia Had ‘No Widespread Voter Fraud,’* NEWSWEEK (May 10, 2022, 2:58 PM), <https://www.newsweek.com/trump-backed-network-acknowledges-georgia-had-no-widespreadvoter-fraud-1705318> [<https://perma.cc/88M8-22GX>].

20. Heslin v. Jones, No. D-1-GN-18-001835, 2021 WL 4571198 (Tex. Dist. Ct. Sept. 27, 2021).

21. For a complete account of the Sandy Hook cases and shootings, see ELIZABETH WILLIAMSON, *SANDY HOOK: AN AMERICAN TRAGEDY AND THE BATTLE FOR TRUTH* (2022).

22. Lauren del Valle & Oliver Darcy, *Sandy Hook Parents Ask Jury to Return \$150 Million Verdict in Defamation Suit Against Alex Jones*, CNN (July 26, 2022, 10:33 PM), <https://www.cnn.com/2022/07/26/media/alex-jones-sandy-hook-texas-trial/index.html> [<https://perma.cc/YMY6-MWDU>].

tighten gun laws”²³ and that the parents were “crisis actors in a ‘false flag’ operation.”²⁴ A more recent suit in Connecticut against Jones for the Sandy Hook shootings led a court to award over \$1 billion in damages, including attorneys’ fees, punitive damages, and fees for civil rights violations.²⁵

And although many advocates believe it is blackletter law under section 230 of the Communications Decency Act (CDA) that platforms have immunity for “defamatory speech” when they act as “publishers” of information,²⁶ courts have also declined to extend immunity when websites cross the line and collaborate in the creation of defamatory content including conspiracy theories. For example, in another lawsuit against Alex Jones, *Gilmore v. Jones*,²⁷ the plaintiff was a protestor in Charlottesville, Virginia opposing “white supremacists and neo-Nazi groups participating in the ‘Unite the Right’ rally.”²⁸ He filmed the protests and released a viral video on Twitter, “captur[ing] James Alex Fields, Jr. driving into a crowd killing Heather Heyer and injuring approximately thirty-six others.”²⁹ A group of alt-right websites owned by Jones then “published articles and videos falsely portraying [the plaintiff] as a ‘deep state’ operative who conspired to orchestrate the violence in Charlottesville for political purposes.”³⁰ The plaintiff sued the owners of the websites for defamation and intentional infliction of emotional distress, which inflicted “reputational harm” and led him to fear being “oust[ed]” from his job in government.³¹ The defendants claimed they were immune from suit under

23. Jim Vertuno, *Alex Jones Ordered to Pay \$45.2M More Over Sandy Hook Lies*, AP NEWS (Aug. 5, 2022), <https://apnews.com/article/shootings-austin-texas-violence-e067a8bc031ce48be0810764c7bb3c18> [<https://perma.cc/6N8F-G9HX>].

24. Kevin Roose, *Don’t Expect Alex Jones’s Comeuppance to Stop Lies*, N.Y. TIMES: THE SHIFT (Aug. 6, 2022), <https://www.nytimes.com/2022/08/06/technology/alex-jones-conspiracy-theories.html?smid=url-share> [<https://perma.cc/N6L8-SDV9>] (noting that cases against media actors like Jones are the “exceptions, not the rule”).

25. Frankie Graziano, *Alex Jones Now Owes \$1.4 Billion in Damages for Sandy Hook Defamation Lawsuit, Judge Rules*, NPR: CONN. PUB. RADIO (Nov. 10, 2022, 2:01 PM), <https://www.ctpublic.org/news/2022-11-10/alex-jones-ordered-to-pay-473m-more-to-sandy-hook-families> [<https://perma.cc/CKA7-2BML>].

26. Christopher Cole & Gabriel Ramsey, *Insight: The Communications Decency Act Safe Harbor: Pendulum Swings in 2018*, BLOOMBERG L. (Sept. 4, 2018, 8:48 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/insight-the-communications-decency-act-safe-harbor-pendulum-swings-in-2018> [<https://perma.cc/D367-PA7W>].

27. 370 F. Supp. 3d 630 (W.D. Va. 2019).

28. *Id.* at 641–42.

29. *Id.* at 642.

30. *Id.*

31. *Id.* at 645.

section 230 because they were engaging in “normal [editorial] functions of a publisher,” but the court found that they were not immune because they were “the creator or developer, in whole or in part, of the content at issue” and “produced and ratified” the content.³²

The thesis of this Article is that lawsuits such as these—cases seeking to pop misinformation and conspiracy theories—are a vital move in protecting U.S. democratic institutions and preventing political violence. However, despite these lawsuits, there are real obstacles in the media bar that prevent the lawyers most experienced at sorting fact from fiction whose job it is to vet articles in prepublication review and specialize in rooting out defamatory statements from handling them. “A substantial number” of media lawyers are “in support of [Dominion’s] lawsuit[] against Fox” for defamation.³³ And there is a belief among the media bar that such lawsuits are beneficial because “media lawyers have a commitment to the truth”; media lawyers “have a duty to their clients and in service to their clients” to promote “accuracy” when reviewing stories; and media lawyers have “an interest in rebuilding a relationship to the public” and to “rebuild trust” when the “market [of information] is clearly corrupted.”³⁴ Respected media lawyers such as Floyd Abrams, who argued *Citizens United v. Federal Election Commission*,³⁵ take the position that “th[ese] are the sort of lawsuit[s] libel law was created to permit” and that “the First Amendment provide[s] no protection for such statements” because “this is precisely the situation in which libel litigation is most needed.”³⁶

But while there is support among media lawyers on an “intellectual level” for the Dominion lawsuit and other similar lawsuits,³⁷ there is also a significant concern that such suits could be “part of a wave [or] a trend that could launch back in the other direction” with “powerful swingback impacts of vexatious lawsuits” that could be “coopted to hurt or injure the press vindictively, especially when those parties

32. *Id.* at 661–63.

33. Telephone Interview with George Freeman, Exec. Dir., Media L. Res. Ctr. (Aug. 10, 2021) [hereinafter Freeman Interview] (indicating that large percentages of media lawyers approve of Dominion’s lawsuits).

34. See Zoom Interview with D. Victoria Baranetsky, Gen. Couns., Ctr. for Investigative Reporting (Feb. 22, 2022) [hereinafter Baranetsky Interview].

35. 558 U.S. 310 (2020).

36. *MFIA Clinic Files Suit on Behalf of Georgia Election Workers*, YALE L. SCH. (Dec. 2, 2021), <https://law.yale.edu/yls-today/news/mfia-clinic-files-suit-behalf-georgia-election-workers> [<https://perma.cc/SQ92-JPNY>].

37. Telephone Interview with Mark Jackson, former Exec. Vice President & Gen. Couns., Dow Jones & Co. (Feb. 25, 2022) [hereinafter Jackson Interview].

are not financially resourced.”³⁸ For example, powerful plaintiffs such as the likes of Johnny Depp and other men accused of domestic abuse have weaponized defamation against victims who are in lesser positions of power, and, the concern goes, powerful plaintiffs might make similar moves against the media. Specifically, if media lawyers were to play both sides of the defamation game it could be harmful to beneficial media actors such as local newsrooms, nonprofit newsrooms, or even mainstream outlets because victory might inadvertently increase the risk of frivolous suits against these outlets—just as there has been backlash throughout the “rhymes” of history.³⁹ Offensive use of defamation law could also be coopted by other lawyers seeking large judgments against their clients to expose as much personal information of the individuals being sued and to put their personal lives in the public view, just as the lawsuit Mr. Depp filed against Amber Heard so effectively did.⁴⁰

The result? Chilled speech both by the media and private individuals. Without a wide berth for defamation, the concern goes, media companies would not be able to serve as the Fourth Estate and play the crucial role of checking the government and holding government actors accountable for their misdeeds. That is because when the media condemn the government there is a strong incentive to silence these actors using the courts or illegal means such as the Nixon Administration’s bugging of reporters during Watergate. A more recent example is former President Trump’s threat to sue CNN and other outlets over

38. Baranetsky Interview, *supra* note 34; *see also* D. Victoria Baranetsky & Alexandra Gutierrez, Op-ed, *What a Costly Lawsuit Against Investigative Reporting Looks Like*, COLUM. JOURNALISM REV. (Mar. 30, 2021), https://www.cjr.org/tow_center/costly-lawsuit-against-investigative-reporting-looks-like.php [<https://perma.cc/A36E-RPB5>] (criticizing praise of the lawsuit brought by Smartmatic against Fox News as “short-sighted” when viewed in the broader historical context of defamation law and outlining “playbook” defamation that plaintiffs can use to inflict major economic damage on true investigative journalism outlets like *Reveal*); Michael M. Grynbaum, *Lawsuits Take the Lead in Fight Against Disinformation*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/02/06/business/media/conservative-media-defamation-lawsuits.html> [<https://perma.cc/N6C7-T6N9>] (quoting Yochai Benkler for the proposition that while the suits are a “useful” corrective “[w]e have to be very cautious in our celebration of these lawsuits, because the history of defamation is certainly one in which people in power try to slap down critics”).

39. Baranetsky Interview, *supra* note 34.

40. Erin Snodgrass, *Social Media Weaponizes Celebrity Defamation Trials Inside and Outside the Courtroom*, *Legal Expert Says*, INSIDER (May 23, 2022, 5:04 PM), <https://www.insider.com/social-media-weaponizes-celebrity-defamation-trials-expert-says-2022-5> [<https://perma.cc/6HDR-D AQM>].

their election coverage⁴¹ that even conservative media scholars concede is in no way defamatory.⁴²

This prohibition against media lawyers engaging in Defamation 2.0—namely the offensive use of defamation lawsuits against media companies—is enshrined in the bylaws of the premier media law organization. The Media Law Resource Center (MLRC) prohibits media lawyers from representing plaintiffs in such suits for defamation, though interestingly does not prevent media lawyers from litigating copyright claims against media defendants.⁴³ The rationale is to prevent resources and ancillary support going to lawyers who might weaken protections offered to media outlets in future cases.⁴⁴ The prohibition is also reputed to exist at the behest of insurance companies and established media law clients that exert economic pressure to prevent media lawyers from taking these suits. Finally, although there are some outliers who are willing to take on victims of defamation as clients,⁴⁵ the media bar is a close-knit world where the social pressure

41. Nicholas Reimann, *Trump Threatens to Sue CNN and Other Outlets for Dismissing His Voter Fraud Claims*, FORBES (July 27, 2022, 4:42 PM), <https://www.forbes.com/sites/nicholas-reimann/2022/07/27/trump-threatens-to-sue-cnn-and-other-outlets-for-dismissing-his-voter-fraud-claims/> [<https://perma.cc/9KFR-R6DE>].

42. See, e.g., Jonathan Turley, *Trump's Defamation Case Against CNN Is Weak but May Foreshadow His Criminal Defense*, THE HILL (July 30, 2022, 10:30 AM), <https://thehill.com/opinion/judiciary/3580729-trumps-defamation-case-against-cnn-is-weak-but-may-foreshadow-his-criminal-defense/> [<https://perma.cc/5RMP-FR28>].

43. Freeman Interview, *supra* note 33. The rule also prohibits representation against media companies for privacy lawsuits. *Id.* My personal view is that this prohibition should be lifted as well given infamous cases of paparazzi invading the privacy of public figures in the United Kingdom such as Princess Diana and the Duke and Duchess of Sussex, and even in domestic cases like the paparazzi stalking the family of former White House attorney Vincent Foster after his suicide during the Clinton Administration. Note that when I have expressed these views to other members of the media bar, I have been rebuked, as if media lawyers could not be critical of the actions of their own clients. If anything, media lawyers are perfectly positioned to raise questions of media accountability, and to train newsrooms that such behavior is illegal and unacceptable.

44. *Id.*

45. My co-counsel, Robbie Kaplan, agrees with me. According to an article in the *New York Times*, she notes, “[t]his shouldn’t be the way to govern speech in our country It’s not an efficient or productive way to promote truth-telling or quality journalistic standards through litigating in court. But I think it’s gotten to the point where the problem is so bad right now there’s virtually no other way to do it.” Grynbaum, *supra* note 38. Other First Amendment lawyers say the question is more complicated, in part because of the ubiquitous influence of social media. For example, one lawyer “who made his reputation in part by defending the speech rights of neo-Nazis and other hate groups, said that the growth of online sources for news and disinformation had made him question whether he might take on such cases today. He offered an example of a local neo-Nazi march. Before social media, ‘it wouldn’t have made much of an echo Now, if they say it, it’s all over the media, and somebody in Australia could blow up a mosque based on what somebody in New York says. It seems to me you have to reconsider the consequence of things.’” *Id.*

not to take an offensive defamation case is strong.⁴⁶ According to one source who served as the General Counsel of Dow Jones, which owns the *Wall Street Journal*, media lawyers could be “essentially shunned” for representing a plaintiff in a defamation lawsuit (even against a non-media entity) because of the perceived risk of creating bad law for media clients.⁴⁷

But has the maxim of defamation as a shield but not a sword gone too far? The days when the American public primarily received its news via mainstream outlets have greatly diminished and new studies show that a large percentage of Americans receive their news via social media such as Facebook and YouTube.⁴⁸ The impact of decentralization cannot be overstated. As alternative sources of information crop up, editorial standards employed by media outlets combined with lack of training has led to the rise of clickbait.⁴⁹ Fueled by a new model where profits are driven by views, both the mainstream media and social media have restructured their business models in a way that calls for the revisitation of the bar on suits by media lawyers and most importantly the prohibition against suing media companies.

If one examines the disturbing rise of misinformation, the clear trend is a departure not only from truth but also toward reckless disregard for the truth and even actual knowing falsehoods by major media outlets as well social media companies. According to multiple

46. As a practicing media lawyer, I personally turned down defamation plaintiffs with potentially meritorious claims due to this bar, including an individual who was seeking protection from a journalist who was posting revenge porn and a journalist who was being attacked and defamed on Twitter by President Donald Trump. The cold comfort I gave was an anti-doxing guide put together by Pen America. See *Protection from Doxing*, PEN AMERICA, <https://onlineharassmentfieldmanual.pen.org/protecting-information-from-doxing/> [<https://perma.cc/3N34-4BP6>]. I also was unable to secure counsel for an individual who revealed to me that a student newspaper article that disclosed she was Muslim and directly led to her employment discrimination after 9/11 to negotiate a change to the coverage, despite believing the newspaper had a moral duty to remove her name after the article was digitized and became the number one hit associated with her name on Google years after it had originally been written.

47. Jackson Interview, *supra* note 37.

48. Jacob Liedke & Katherine Eva Matsa, *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Sept. 20, 2022), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/> [<https://perma.cc/UUW2-PTV6>]. See generally *Mass Shootings Spark Discussions on the Dark Corners of the Internet*, CBS NEWS (Aug. 4, 2019), <https://www.cbsnews.com/video/mass-shootings-spark-discussions-on-the-dark-corners-of-the-internet/#x> [<https://perma.cc/3WDM-TLSD>] (discussing radicalization on social media platforms that allow people to have conversations that encourage violence).

49. Navene Elangovan, *The Big Read: TikTok, TikTok... Is Time Running Out for Informed Societies as Social Media Platforms Shun Hard News?*, TODAY ONLINE (Oct. 1, 2022), <https://www.todayonline.com/big-read/big-read-tiktok-tiktok-time-running-out-informed-societies-social-media-platforms-shun-hard-news-2007486> [<https://perma.cc/DXZ8-5F7H>].

nonpartisan studies, the result is that misinformation today poses a threat to the institution of democracy.⁵⁰ But what if misinformation today could also be quashed more quickly than disinformation in the town square via printed pamphlets or rumor mongers? What if today's virality could help promote truth by realigning the incentive structures that inform media companies through using media lawyers—the individuals with the most knowledge of fact from fiction and with the institutional incentives to get it right—to hold their clients accountable?

This Article advances a claim that many in the media bar secretly believe but are afraid to share: That using defamation law offensively in cases that meet the *New York Times v. Sullivan*⁵¹ standard where a media outlet or pundit is engaging in propaganda might combat the spread of misinformation, particularly if media lawyers expose the truth through information obtained in discovery. This Article postulates that Defamation 2.0—as epitomized by the voting companies' lawsuits against Fox, Newsmax, and OANN; Yale's suit on behalf of Georgia election workers against *Gateway*; the Sandy Hook families' suit against Alex Jones; and the Charlottesville lawsuit—has the potential to restore media accountability in a world that is increasingly polarized.

The cost, I posit, is overstated: If such lawsuits disseminate information obtained via discovery, does that make it more likely that politicians can sue local media or even larger media outlets? Although throughout history opponents of the press have used lawsuits to silence criticism, the most likely outcome is that both media lawyers and judges can nudge (in the words of Cass Sunstein) the media and social media to stop the spread of misinformation by exerting pressure on them to settle and issue large scale corrections, operating as a corrective device in the First Amendment's marketplace of ideas.⁵² And to the extent these lawsuits reach settlements, this creates no law or precedent that can then be used as a weapon to attack other media

50. Gabriel R. Sanchez et al., *Misinformation Is Eroding the Public's Confidence in Democracy*, BROOKINGS INST. (July 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/> [<https://perma.cc/N7UH-JZUK>] (collecting studies).

51. 376 U.S. 254 (1964).

52. See discussion *infra* Section II.A.

companies, which can use anti-SLAPP laws,⁵³ Rule 11⁵⁴ sanctions, and the networks of media defense lawyers to represent them against frivolous claims.

This Article employs qualitative research methods. It is based on interviews and conversations with numerous members of the media bar as well as journalists, including the former head of Facebook’s Election Integrity Operations and the director of the HBO docuseries *Q: Into the Storm*. Part I of the Article brings us to contemporary uses of defamation law. Media outlets have been threatened many times with lawsuits for defamation. By the same token, the media has become increasingly decentralized with many media outlets run by individuals with a political agenda and without journalistic training. Some of these outlets endorse propaganda and have made it their mission to benefit financially while influencing viewers with stories that are simply lies. This Article traces the most prominent examples in the world of media and social media: conspiracy theories and their rise.

Part II of this Article endorses a modest but heretical solution: lawsuits by media lawyers to promote media accountability and truth. It considers potential lawsuits against media outlets that purvey disinformation, and against the founders of conspiracy theories such as QAnon. It argues that media lawyers are uniquely positioned to take a new approach to defamation—not to use defamation lawsuits to bankrupt media outlets, but to induce settlements that lead to widespread corrective coverage, and to argue that it is within the inherent power of courts to release information obtained in discovery to the general public to restore the integrity of the marketplace of ideas. It also addresses the critique that these lawsuits would weaken protection for traditional media actors.

A final caveat: It is important to acknowledge the limitations of this approach. While Defamation 2.0 lawsuits are tools to protect and promote democracy by curbing the spread of misinformation and disinformation to change coverage and minds, it is important to acknowledge that media lawyers and judges cannot singlehandedly save the day. Once powerful corrective information is released to the

53. SLAPP is an acronym for “strategic lawsuits against public participation.” *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/anti-slap-laws/> [<https://perma.cc/7XNF-MWQY>] (defining anti-SLAPP laws and explaining how they provide a remedy to lawsuits that “intimidate people who are exercising their First Amendment rights”).

54. FED. R. CIV. P. 11.

public, it will be up to organizations and institutions that specialize in debunking conspiracy theories to help reorient individuals who have subscribed to inaccurate information. These organizations should treat misled members of the public with compassion and create space for them to acknowledge to themselves and others that they have subscribed to a false belief system. Luckily, there is a robust body of scholarship on conspiracy theories, and we already see former adherents coming forward to speak out and convince other members that their beliefs can and should be changed. Most recently, individuals convicted of participating in what they characterized as the potential start of a “civil war” on January 6 acknowledged that they acted as a direct result of misinformation surrounding the results of the 2020 election.⁵⁵

I. THE RISE OF MISINFORMATION AND DISINFORMATION

This part traces the contemporary moment of defamation law and shows how it is categorically different than any other era which preceded it. It is true that in the modern era, deep-pocketed plaintiffs can use libel or defamation law to suppress the speech of responsible mainstream media outlets and their journalists, with former President Trump’s litigation against his various adversaries standing as the most notable recent example. But it is equally true that many of the reforms libel scholars have pushed for years—for example attorneys’ fees awarded through anti-SLAPP laws, or law-school clinic networks and other entities that have been created to represent individuals without the means to hire representation—have come to pass, and these changes have affirmatively helped cut into some of the abuses of defamation or libel law as we know it.

It is furthermore true that some of the defamatory statements made in the contemporary era are categorically different than the statements in other eras. Today, the propagation of misinformation by actors with reckless disregard for the truth has led to large swaths of the American public—as many as 30 percent according to the *Washington*

55. Sarah D. Wire, *‘Lies, Deceit and Snake Oil’: Jan. 6 Hearing Witness Says Trump Claims Might Have ‘Started a New Civil War,’* L.A. TIMES (July 12, 2022, 5:25 PM), <https://www.latimes.com/politics/story/2022-07-12/jan-6-hearing-trump-extremism-july-12> [https://perma.cc/C56V-QU2L] (discussing the witnesses and members of extremist groups who testified during the January 6 hearings and blamed their involvement in the political violence of January 6, 2020, on the false belief that the 2020 election was stolen).

Post in August 2022—believing that the 2020 election was stolen.⁵⁶ But such misinformation has been disseminated, as was not true in prior eras, by major media outlets deemed trustworthy and by politicians who knowingly use these falsehoods to sow disunity and increase the risk of political violence.

Indeed, as of January 2022, one in three Americans has said that violence against the government is justified⁵⁷ and other experts on civil wars say the United States is at real risk of having violent extremism grow into a larger conflict.⁵⁸ While “[m]ost Americans . . . assume our democracy is too resilient” and “too robust to devolve into conflict,” this part shows that these interrelated phenomena are not “isolated incidents” but an attack on U.S. institutions many “take . . . for granted” and can “sneak up on people”⁵⁹ the way mass shootings have snuck up on schools, clubs, and grocery stores as right-wing extremists have grown more radicalized.⁶⁰ Just this past August after former President Trump’s Mar-a-Lago home was searched by the FBI, chatter on the internet called for the assassination of Attorney General Merrick Garland,⁶¹ and the federal judge who issued the search warrant was faced with so many threats that a religious service he attended had to be canceled.⁶² A man linked to January 6 who supported the Proud Boys attacked an FBI office in Ohio and was killed in a shootout with

56. Philip Bump, *We Have Reached the Apex of Election-Fraud Debunking*, WASH. POST (July 14, 2022, 1:57 PM), <https://www.washingtonpost.com/politics/2022/07/14/we-have-reached-apex-election-fraud-debunking/> [https://perma.cc/XVX6-9S2A].

57. Meryl Kornfield & Mariana Alfaro, *1 in 3 Americans Say Violence Against Government Can Be Justified, Citing Fears of Political Schism, Pandemic*, WASH. POST (Jan. 1, 2022, 5:59 PM), <https://www.washingtonpost.com/politics/2022/01/01/1-3-americans-say-violence-against-government-can-be-justified-citing-fears-political-schism-pandemic/> [https://perma.cc/S5L7-KUT2].

58. KK Ottesen, *‘They Are Preparing for War’: An Expert on Civil Wars Discusses Where Political Extremists Are Taking This Country*, WASH. POST (Mar. 8, 2022, 9:00 AM), <https://www.washingtonpost.com/magazine/2022/03/08/they-are-preparing-war-an-expert-civil-wars-discusses-where-political-extremists-are-taking-this-country/> [https://perma.cc/CV8D-8K67].

59. BARBARA F. WALTER, *HOW CIVIL WARS START AND HOW TO STOP THEM* xviii–xxx (2022).

60. David Leonhardt, *The Right’s Violence Problem*, N.Y. TIMES (May 17, 2022) <https://www.nytimes.com/2022/05/17/briefing/right-wing-mass-shootings.html> [https://perma.cc/59MD-ZYXK].

61. Margery A. Beck, *FBI Head Wray Calls Online Threats ‘Deplorable’ Following Mar-a-Lago Search*, PBS NEWSHOUR (Aug. 11, 2022, 9:52 AM), <https://www.pbs.org/newshour/politics/fbi-head-wray-calls-online-threats-deplorable-following-mar-a-lago-search> [https://perma.cc/D3QM-RUU4].

62. Louis Keene & Madeline Fixler, *Judge Who Approved Trump Search Warrant Attacked for Synagogue Involvement*, FORWARD ASS’N (Aug. 9, 2022), <https://forward.com/fast-forward/513804/judge-who-approved-trump-search-warrant-attacked-for-synagogue-involvement/> [https://perma.cc/U5DG-XNJH].

officers after leaving an internet record indicating his extremist beliefs.⁶³ Steven Bannon appeared on Alex Jones's show and said the FBI "was 'a new American Gestapo'" and compared the "present moment to the American Revolution."⁶⁴

A. *The Rise of Misinformation and the Big Lie*

Libel experts such as *New York Times* columnist Anthony Lewis, who wrote the definitive book on *New York Times v. Sullivan*,⁶⁵ and Professor Rodney Smolla, President of Vermont Law School who also is counsel on the *Dominion* case, note that despite *New York Times v. Sullivan*, the United States has witnessed "an explosion of litigation aimed against the media."⁶⁶ Professor Smolla points to celebrities such as Woody Allen, Clint Eastwood, Muhammad Ali, Ralph Nader, Norman Mailer, Elizabeth Taylor, Jerry Falwell, and Johnny Carson who sued to defend their reputations, as "the lawsuit for libel or invasion of privacy has become one of America's newest growth industries."⁶⁷ These experts point to the fact that even news outlets, which have a policy against settling defamation cases, have actually agreed to pay money to such plaintiffs, as in a rare case of the *Wall Street Journal* when it paid \$800,000 in 1983 to settle a case.⁶⁸

63. Kevin Williams et al., *Man Accused of Trying to Breach F.B.I. Office Is Killed in Standoff*, N.Y. TIMES (Aug. 11, 2022, 1:00 PM), <https://www.nytimes.com/2022/08/11/us/fbi-cincinnati-shooting.html> [<https://perma.cc/MG6A-Y9FG>].

64. Tom Dreisbach, *An Attempted Attack on an FBI Office Raises Concerns About Violent Far-Right Rhetoric*, NPR (Aug. 12, 2022, 4:54 PM), <https://www.npr.org/2022/08/12/1117275044/an-attempted-attack-on-an-fbi-office-raises-concerns-about-violent-far-right-rhe> [<https://perma.cc/F54K-52D5>].

65. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 131–32 (1991); see Anthony Lewis, *Annals of Law: The Sullivan Case*, NEW YORKER, Nov. 1984, at 52 [hereinafter Lewis, *Annals of Law*].

66. RODNEY A. SMOLLA, SUING THE PRESS: LIBEL, THE MEDIA & POWER 4 (1986); see also JOHN NERONE, VIOLENCE AGAINST THE PRESS: POLICING THE PUBLIC SPHERE IN U.S. HISTORY (1994) (providing an account of violence against the press); KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES v. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (Peter Charles Hoffer & N.E.H. Hull eds., 2011) (illustrating the legal history of *New York Times v. Sullivan*'s effect on defamation law); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (discussing the sociological background and reputational interests of defamation law).

67. SMOLLA, *supra* note 66, at 5.

68. LEWIS, *supra* note 65, at 431 ("The *Wall Street Journal* had an announced policy of refusing to settle any libel case before trial, but in 1983 it paid \$800,000 to settle one. That episode did not stop the *Journal* from continuing to do important investigative journalism. Other papers, with pockets not as deep as the *Journal*'s, may be moved by the punishment of a libel case to steer clear of controversy.").

More recently, libel suits have also been used by the former Trump Administration and its allies in an attempt to silence critics of the former President or his associates, including a suit I helped get dismissed in my capacity as the Associate Director of the Cornell Law School First Amendment Clinic.⁶⁹ In the words of one colleague and a member of the Clinic’s Advisory Board, Professor Michael Dorf, “[i]t has been known for decades that there [is] a tension between over- and under-protection of potentially false statements.”⁷⁰ The difference is that we have protections now against frivolous libel lawsuits that previously did not exist, in part because the abusive use of defamation lawsuits prompted a wave of legal reforms that our clinic uses to protect local news outlets and journalists. At the same time, “institutional mechanisms at major media outlets” are now inadequate to stop many outlets from engaging in misinformation.⁷¹

This brings us to the latest concern—changes in the structure and composition of the media that warrant the use of defamation lawsuits to promote media accountability. As the advent of social media exploded between 2009–2012, print newspapers “lost 31.5% of their share of the advertising market to online and mobile media,” and “data from the *Pew Research Center* confirms the decline of print newspaper readers in the [United States] from 41% in 2002 to 23% in 2012.”⁷² At the same time, so-called new media and social media “were making big profits at the expense of the traditional ones[,]” with Google clocking in at \$21.7 billion “in advertising revenue in 2008” without any expenditures “for the news it provide[d].”⁷³ As of May 2014, Craigslist received “about a billion visits a month, costing newspapers billions of dollars a year.”⁷⁴ The rise of new media and social media has led to what some call the democratization of the media in that anyone can publish online and therefore anyone can be a journalist.⁷⁵ This democratization has led to the rise of exciting new sites, including *The Markup*, a site committed to data journalism and watching Big

69. Memorandum of Law in Support of Liz Mair and Liz Mair Strategies LLC, *Nunes v. Twitter*, No. CL19-1715-00 (Cir. Ct. Hen. Cnty. June 17, 2021).

70. Email from Michael Dorf, Robert S. Stevens Professor of L., Cornell L. Sch., to Cortelyou C. Kenney, Acad. Fellow, Cornell L. Sch. (July 24, 2021) (on file with author).

71. Email from Michael Dorf, *supra* note 70.

72. Roumen Dimitrov, *Do Social Media Spell the End of Journalism as a Profession?*, 8 *GLOB. MEDIA J. AUSTL. ED.*, May 2014, at 1, <https://www.hca.westernsydney.edu.au/gmjau/?p=799> [<https://perma.cc/5FQJ-EC2N>].

73. *Id.* at 4.

74. *Id.*

75. Dimitrov, *supra* note 72, at 4.

Tech;⁷⁶ and *Jezebel*, a “Supposedly Feminist Website,”⁷⁷ that launched the career of writer Jia Tolentino.⁷⁸

But it has also led to the “*amateuriz[ation]* of communication”⁷⁹ and, in the view of former *Baltimore Sun* reporter and *The Wire* creator David Simon, the death of “[h]igh-end journalism.”⁸⁰ In a 2009 Senate hearing, David Simon testified to the bleak economic prospects for “mainstream news publications” due to their business models.⁸¹ Rupert Murdoch took a different view—that the “*core customer* has changed” and that the media had to “change radically to meet the needs of the new media users” who are “*digital natives* . . . replacing the old pre-internet generation who have become *digital immigrants*.”⁸² In Murdoch’s view, “[t]he younger customers want their news on demand, when it works for them, and ‘certainly do not want news presented as a gospel.’”⁸³

The new business models embraced in the wake of the rise of new media and social media has led many to call for media accountability, and the rise of former President Donald Trump as a candidate for office has heightened attention to the role of the media in covering him. According to Yaël Eisenstat, a former Cornell Tech researcher and head of Facebook’s election integrity operations, Facebook’s algorithms were intentionally designed to promote viewer “engagement.”⁸⁴ In other words, they were designed to keep members addicted to the website and to use it as much as possible.⁸⁵ Facebook found that the key to do this was to engage the emotions of its users, and that individuals became increasingly engaged when they came across polarizing content that in many cases “manipul[ated] and radicaliz[ed]”

76. THE MARKUP, <https://themarkup.org/> [<https://perma.cc/9KNC-JJ7N>].

77. JEZEBEL, <https://jezebel.com/> [<https://archive.ph/3qGRa>].

78. See JIA TOLENTINO, <https://jia.blog> [<https://perma.cc/7PXA-XYZ7>].

79. Dimitrov, *supra* note 72, at 4.

80. *The Future of Journalism: Hearing Before the Subcomm. on Comm’n, Tech., & the Internet of the S. Comm. on Com., Sci., & Transp.*, 111th Cong. 28 (2009) (statement of David Simon, former reporter, Balt. Sun & Blown Deadline Prods.).

81. *Id.*

82. Dimitrov, *supra* note 72, at 5.

83. *Id.*

84. See Yaël Eisenstat, *Dear Facebook, This Is How You’re Breaking Democracy*, TED (Sept. 24, 2020), https://www.ted.com/talks/yael_eisenstat_dear_facebook_this_is_how_you_re_breaking_democracy/transcript [<https://perma.cc/B56C-P85U>]; see also Kiran Stacey & Tim Bradshaw, *Facebook Chose to Maximise Engagement at Users’ Expense, Whistleblower Says*, FIN. TIMES (Oct. 5, 2021), <https://www.ft.com/content/41b657c8-d716-436b-a06d-19859f0f6ce4> [<https://perma.cc/G537-DUT3>] (summarizing testimony of whistleblower Frances Haugen about Facebook choosing to maximize online engagement).

85. See Eisenstat, *supra* note 84.

the American public.⁸⁶ According to Eisenstat, the economic bottom line of social media platforms such as Facebook “incentiviz[ed] the most inflammatory and polarizing voices to the point where finding common ground no longer fe[lt] possible . . . despite a growing chorus of people crying out for the platforms to change.”⁸⁷ In a 2020 exposé, the *Wall Street Journal* showed that Facebook executives intentionally ignored evidence that its algorithms led users to become increasingly divided and polarized due to fear that it would alienate the political right, which was already accusing it of bias.⁸⁸ And in October 2021, Frances Haugen blew the whistle and released thousands of internal documents to the *Wall Street Journal* and the Securities and Exchange Commission detailing this same problem.⁸⁹

The polarization of Facebook and other media companies appears to have directly affected voters’ decisions.⁹⁰ In the conservative media, former President Trump was still portrayed as a man who admitted he grabbed women by their “p****,” who laughed at John McCain for being a prisoner of war, and who did many other unsavory things, but he was also depicted as a fearless truth teller who was willing to be politically incorrect to give the country the tough medicine it needed to change.⁹¹ Thus, even though viewers received the same information, the spin on that information was dramatically different, and encouraged the siloing of the American public.⁹² This siloing, in turn, has led to different audiences on the right and on the left with certain news purveyors willing to cater to their audiences.⁹³

86. *Id.*

87. *Id.*

88. See Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020, 11:38 AM), <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499> [<https://perma.cc/QFT2-7SJD>].

89. Jeff Horwitz, *The Facebook Whistleblower, Frances Haugen, Says She Wants to Fix the Company, Not Harm It*, WALL ST. J. (Oct. 3, 2021, 7:36 PM), <https://www.wsj.com/articles/facebook-whistleblower-frances-haugen-says-she-wants-to-fix-the-company-not-harm-it-1163330412> [<https://perma.cc/444p-tbhk>].

90. Paul Barrett et al., *How Tech Platforms Fuel U.S. Political Polarization and What Government Can Do About It*, BROOKINGS INST. (Sept. 27, 2021), <https://www.brookings.edu/blog/techtank/2021/09/27/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it/> [<https://perma.cc/TSZ8-W45R>].

91. Tim Urban, *The Story of Us: A Sick Giant*, WAIT BUT WHY (Jan. 8, 2020), <https://waitbutwhy.com/2020/01/sick-giant.html> [<https://perma.cc/MF3T-C783>].

92. See Allison Chaney, *Is Personalization in Our Media Consumption Polarizing Us?*, YOUTUBE (Aug. 28, 2020), <https://www.youtube.com/watch?v=k8ggRxmvtxA> [<https://perma.cc/29GE-4FG9>] (discussing how personalization of social media increases polarization and self-segregation of content).

93. *Id.*

The rise of disinformation, misinformation, and propaganda is categorically worse than it has been in any other era of U.S. history, even though there have been other periods such as the era of yellow journalism that also involved widespread dissemination of untruths.⁹⁴ Propaganda has been used throughout history, including in the United States.⁹⁵ The change in structure of the media is unparalleled in terms of impact with prior forms of propaganda. The most obvious examples are the ability of internet platforms to influence politics around the world, including fomenting violent coups and revolutions such as the military violence in Myanmar and Ethiopia,⁹⁶ and the ability to radicalize vulnerable users by exposing them to extremist beliefs.⁹⁷ One of the culminations of those trends is the so-called “Big Lie,” which purports that former President Donald Trump won the 2020 election.

The media not only played a direct role in President Trump’s election to office in 2016, but directly contributed to the creation and propagation of the Big Lie. That is because when Fox (and to a certain extent other media outlets) attempted to tell the truth, these media outlets lost viewers who became disengaged from their news coverage.⁹⁸

94. Some scholars note that defining misinformation is difficult, especially in the wake of the COVID-19 pandemic. See Michael Karanicolas, *Even in a Pandemic, Sunlight Is the Best Disinfectant: COVID-19 and Global Freedom of Expression*, 22 OR. R. INT’L L. 1, 2–3. This Article defines misinformation and disinformation co-extensively with libel except for damages—that is, it is a false statement, made with knowledge of falsity or reckless disregard for the truth. This definition specifically exempts statements made under the category of delusion—namely false statements that members of the public believe, no matter how incredible, because of psychological manipulation, warfare, or brainwashing. To the extent that state of mind is difficult to discern, self-reported evidence from viewers made under penalty of perjury as to the sincerity of their beliefs is the test this Article employs to make allowances for the large number of persons who seem to have genuinely misunderstood the facts and were essentially sucked into a conspiracy theory innocently. This evidence can be rebutted—as in the case for Fox hosts—by credible evidence drawing into question the truth or credibility of the speaker, which, as in any other case, turns on whether there is documentary or other evidence that indicates the speaker knew the truth. Whether individuals can be punished for actions taken while in a deluded state—a defense many insurgents on January 6 have invoked to justify their behavior—is beyond the scope of this Article.

95. See, e.g., Jia-Rui Cook, *The Posters That Sold World War I to the American Public*, SMITHSONIAN MAG. (July 28, 2014), <https://www.smithsonianmag.com/history/posters-sold-world-war-i-american-public-180952179/> [<https://perma.cc/QCW4-U6TU>] (displaying and describing posters seeking to encourage enlistment into the U.S. Army for World War I).

96. See Emmanuel Akinwotu, *Facebook’s Role in Myanmar and Ethiopia Under New Scrutiny*, THE GUARDIAN (Oct. 7, 2021, 1:00 PM), <https://www.theguardian.com/technology/2021/oct/07/facebooks-role-in-myanmar-and-ethiopia-under-new-scrutiny> [<https://perma.cc/SG7T-6Y9X>].

97. CBS NEWS, *supra* note 48.

98. See Tom Brueggemann, *The Fired Fox News Political Editor Just Testified at the January 6 Hearing—and Is Still Right*, INDIEWIRE (June 13, 2022, 1:00 PM), <https://www.indiewire.com/2022/06/fox-news-ratings-drop-election-night-call-1234615188/> [<https://perma.cc/9Z45-9MBH>].

In the lead-up to the election in November 2020, Fox accurately communicated to voters that, although votes cast on election day would be tabulated on election night, a large number of by-mail votes likely would not be counted until the subsequent days and could well lean Democratic.⁹⁹ In particular, a Fox podcast published in August 2020 relayed comments from the head of the Federal Election Commission about the likelihood of a large amount of mail-in voting, either direct mail-in or absentee ballot.¹⁰⁰ Speaking on the same podcast, Arnon Mishkin, the head of the Fox News decision desk, explained that, for many key swing states, there was a strong chance that results would not be definitive on November 3 but instead would be processed over the course of several days and that these late-arriving votes could trend toward Biden because of Trump’s stance against mail-in voting.¹⁰¹ He predicted that there may be states where Trump was in the lead but that Biden might overtake him in the days that follow.¹⁰² Mr. Mishkin specifically mentioned that Arizona had a history of not completing its count of mail-in votes until after election night, pointing to a 2018 Senate race where the result flipped from the Republican to the Democratic candidate as mail-in votes came in.¹⁰³ He then mentioned that it would be a “recipe for conspiracy theorists” if the results on election night appeared different than the results after vote counting was completed.¹⁰⁴

Mr. Mishkin also noted that procedures were in place for verifying that a mail-in vote is the voter’s real vote.¹⁰⁵ He went on to explain that a number of mail-in votes—he reported, on the high end of estimates, an average of four percent of all such votes—tend to go uncounted because of the complexity of the process of voting by mail, including ballot applications and timely postmarking.¹⁰⁶ Mr. Mishkin then pointed to election officials’ view that mail-in voting is actually safer in terms of fraud prevention in part because of its direct link to voters’ addresses, and that there was no evidence of widespread voter

99. The Fox News Rundown Podcast, *Democracy Delayed: Will We Know the Winner on Election Night?*, FOX NEWS RADIO, at 01:15 (Aug. 11, 2020), <https://radio.foxnews.com/2020/08/11/the-fox-news-rundown-8-11-2020/> [<https://perma.cc/7PLX-CY5S>].

100. *See id.*

101. *Id.* at 03:30.

102. *Id.* at 04:40.

103. *Id.* at 05:55.

104. *Id.* at 07:05.

105. *Id.* at 07:50.

106. *Id.* at 09:04.

fraud that would turn or affect the election outcome.¹⁰⁷ Finally, Mr. Mishkin acknowledged that the 2020 election would be an unprecedented one because of the coronavirus pandemic and how coverage of the 2020 election would be more challenging than that of past elections; he reassured listeners that he and his team hoped to answer questions on election night and thereafter.¹⁰⁸

Yet the clarity with which Mr. Mishkin explained the likelihood of unclarity on election night appeared to do little to prevent a polarized response to voting results. Take, for example, the reaction to Fox as the first major network to call Arizona for Biden.¹⁰⁹ It was a sign of things to come. After Fox called the election for Biden, then President Trump laced into the network because of its lack of fealty to the Big Lie narrative, and viewers began fleeing Fox in favor of other news programs like Newsmax.¹¹⁰ The most visible manifestation of then-President Trump's criticism of Fox was a series of tweets. On November 10, President Trump tweeted a Breitbart article about Fox anchor Bret Baier deleting a tweet revealing "Exploding Backlash" Fox News purportedly faced.¹¹¹ Two days later, President Trump went further, unfurling a tweetstorm slamming Fox News and pushing followers to tune into different networks, proclaiming that its "daytime ratings have completely collapsed" because it forgot the "Golden Goose."¹¹² President Trump's tweet-based assault on Fox News took its toll: At day's end, Fox News's share price had fallen six percent—a plunge market analysts attributed to President Trump's support of other networks¹¹³—and within three days both daytime and primetime viewership had taken major dips.¹¹⁴

As President Trump's post-election criticism of Fox News made its mark, the network brought onto its premier opinion shows guests

107. *Id.* at 11:45.

108. *Id.* at 12:56.

109. Stephen Battaglio, *Why Fox News Analyst Arnon Mishkin Called Arizona for Biden on Election Night*, L.A. TIMES (Nov. 5, 2020, 2:28 PM), <https://www.latimes.com/entertainment-arts/business/story/2020-11-05/fox-news-arnon-mishkin-election-2020-arizona-trump-biden> [<https://perma.cc/9HWA-5GEW>].

110. Complaint & Demand for Jury Trial ¶¶ 50–55, *US Dominion, Inc. v. Fox News Network, LLC*, Nos. N21C-03-257 EMD, N21C-11-082 EMD (Del. Super. Ct. Mar. 26, 2021) [hereinafter *Complaint*, *US Dominion v. Fox News*].

111. *Id.* ¶ 50.

112. *Id.* ¶ 51 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 12, 2020), <https://twitter.com/realDonaldTrump/status/1326920264203046915> [<https://perma.cc/3JRX-NWC7>]).

113. *Id.* ¶ 54.

114. *Id.* ¶ 55.

who espoused the view that the election had been stolen from him. At times, the commentary verged on the extreme. Hours before host Lou Dobbs was to have Trump-aligned lawyer Sidney Powell on his show, he tweeted that the “Election [was] a cyber Pearl Harbor.”¹¹⁵



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In this Tweet, Dobbs made specific factual allegations that are likely the reason, among others, that Fox News was forced to cancel his segment, and in fact is now making a point of ignoring former President Trump as the lawsuits may have convinced Fox its coverage was a costly mistake.¹¹⁷ Specifically, Dobbs asserted that he had

115. *Id.* ¶¶ 106–07.

116. *Id.* at Ex. 1.

117. CNN, ‘Something Has Changed’: Stelter on Trump and Fox Relationship, YOUTUBE (Aug. 1, 2022), <https://youtu.be/NQ6FSe2POls> [<https://perma.cc/W8A4-L7NZ>].

access to “technical presentations” proving the existence of an “embedded controller in every Dominion machine[] that allows an election supervisor to move votes from one candidate to another” as well as “architecture and systems[] that show how the machines can be controlled from external sources, via the internet, in violation of voting standards[,] Federal law, state laws, and contracts.”¹¹⁸ In addition, he claimed, there was “evidence linking all these [voting-machine] companies together in legal documents, ownership structures, and sales of the companies,” including a “Chinese investment of \$400,000,000 into Dominion, just 4 weeks before the election.”¹¹⁹

Mr. Dobbs’s claims—and the claims of many other Fox hosts and guests who made similar allegations—were directly contradicted by other mainstream media outlets, including the *Wall Street Journal*, which is also owned by News Corp and Rupert Murdoch.¹²⁰ Specifically, the *Wall Street Journal* pointed to voting experts such as “J. Alex Halderman, a computer science professor at the University of Michigan who studies the security of voting systems,” who opined that “[w]hile security researchers have found bugs in electronic voting machines, there is no evidence that these problems have been exploited to change votes in any state.”¹²¹ Indeed, in one pivotal swing state, Dominion prepared for the election by “plac[ing] about 900 tech workers at . . . polling sites to address potential issues for the November election.”¹²² For his part, Republican Secretary of State Brad Raffensperger—the Georgia election official on whom then-President Trump pressed to find a sufficient number of votes to reverse that result—defended Dominion.¹²³ The *Wall Street Journal* noted the appeal of

118. US Dominion, Inc. v. Fox News Network Complaint, *supra* note 110, paras. 107–110 (citing Lou Dobbs (@LouDobbs), TWITTER (Dec. 10, 2020, 4:56 pm), <https://twitter.com/LouDobbs/status/1337154346795012098> [<https://perma.cc/N8SJ-6P2T>]).

119. *Id.*

120. *See, e.g.*, Alexa Corse, *Voting Machine Supplier Criticized by Trump in Spotlight on Election Integrity*, WALL ST. J. (Nov. 17, 2020, 9:46 AM), <https://www.wsj.com/articles/voting-machine-supplier-criticized-by-trump-in-spotlight-on-election-integrity-11605624361> [<https://perma.cc/3CQ2-XC2V>] (noting that election officials commended Dominion for its machines’ security, reporting the lack of evidence of machine-orchestrated vote manipulation, and describing as “unproven” allegations Trump made about Dominion machines switching votes to Biden and deleting Trump votes).

121. *Id.*

122. *Id.*

123. *Id.*; Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html> [<https://perma.cc/FAK9-BR T9>].

Dominion’s machines, which “print a paper copy of voters’ selections that is then electronically scanned” and the machines Georgia used in prior elections would not have allowed it to conduct a recount by hand of five million votes.¹²⁴ The claims were also directly contradicted by state election officials in the states where the results were called into question, with Republican officials using audits to demonstrate a lack of impropriety.¹²⁵ Notably, officials in Arizona and Georgia, two crucial swing states, publicly verified the accuracy of their results.¹²⁶ Fox continued to disseminate the Big Lie, supporting falsehoods notwithstanding these authoritative refutations.¹²⁷ For example, after Arizona and Georgia reaffirmed President Biden’s victories with an audit and by-hand recount, respectively, Mr. Dobbs and host Sean Hannity had Powell and Giuliani on their shows to lodge allegations that Dominion manipulated voting results.¹²⁸

The harms Fox and other news networks visited upon the country with their propagation of a fictitious election-fraud narrative, including allegations about voting-machine companies like Dominion and Smartmatic, were concrete. Dominion’s demand letter asking Fox to correct the claims it had broadcast to viewers called attention to the threats to personal safety directed at Dominion employees and their families because of Fox’s coverage; its complaint noted that employees had encountered death threats and repeated harassment, on top of the “enormous and irreparable” economic injury to Dominion itself.¹²⁹ While Fox “is expected to dispute” that the voting companies have suffered billions in damages (as it has for Smartmatic), that has not been the thrust of Fox’s defenses, discussed below.¹³⁰

Fox’s statements appear to meet the standard for defamation laid out in *New York Times v. Sullivan*—that is to say, they are false, they appear to have been made with reckless disregard or knowledge of the truth, and they caused damages to Dominion and Smartmatic. At the outset, it is worth noting that two courts in the morass of lawsuits against Fox have already found the allegations can survive a motion

124. Corse, *supra* note 120.

125. *Id.*

126. Complaint, *US Dominion v. Fox News*, *supra* note 110, ¶¶ 80, 84.

127. *Id.* at ¶¶ 75–85.

128. *Id.* at ¶ 85.

129. *Id.* at ¶ 6.

130. Jeremy W. Peters, *Defamation Suit About Election Falsehoods Puts Fox on Its Heels*, N.Y. TIMES (Aug. 13, 2022), <https://www.nytimes.com/2022/08/13/business/media/fox-dominion-law-suit-first-amendment.html> [<https://perma.cc/6LZ4-LGZP>].

to dismiss, and that the defenses presented by Fox are inappropriate at the pleading stage.¹³¹ Judge Davis of the Delaware Superior Court preliminarily determined that New York's anti-SLAPP statute does not apply, and then proceeded to apply Delaware procedural law to determine that Fox's defenses drew on facts outside the complaint because Fox had not yet answered the complaint, and therefore were inapposite at the pleading stage.¹³² And New York Supreme Court Judge David B. Cohen also allowed Smartmatic to proceed past a motion to dismiss and even indicated the case should be decided by a jury, while dismissing defendant Jeanine Pirro because her comments were not directed at Smartmatic as well as Sidney Powell for lack of personal jurisdiction given her Texas residency.¹³³ On February 14, 2023, the New York Appellate Division affirmed Powell's dismissal, reinstated the claims against Pirro, and allowed the suit against Fox News to move forward, while dismissing the claims against Fox Corporation, the parent company.¹³⁴ While there is an imperative both under New York law and more generally to dismiss defamation cases early, including at the pleading stage if the statements are not actionable,¹³⁵ this section will show they could be decided on summary judgment, which can be used as a tool to encourage settlement.

First, the statements either made or endorsed by Fox hosts are within the ambit of defamation because they are false statements of fact and can be proven false. Although it is possible that some of the statements Dominion and Smartmatic have sued for fall within the First Amendment's protection for opinion, vigorous epithets, or hyperbole, numerous statements do not fit these categories.

The first element in a defamation case is falsity of the statements made, a burden the plaintiff bears under the First Amendment—or, as

131. *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD, 2021 WL 5984265, at *21–22 (Del. Super. Ct. Dec. 16, 2021), *cert. denied*, 2022 WL 100820 (Del. Super. Ct. Jan. 10, 2022), *appeal refused*, 270 A.3d 273 (Del. 2022); *Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021, slip op. at 41 (N.Y. Sup. Ct. Mar. 8, 2022).

132. *See Fox News Network, LLC*, 2021 WL 5984265, at *20–21.

133. *Smartmatic USA Corp.*, slip op. at 41, 46, 53.

134. *Smartmatic USA Corp. v. Fox Corp.*, No. 2022-01291, 2023 WL 1974442, at *1–2 (N.Y. App. Div. Feb. 14, 2023).

135. *Immuno A.G. v. Moor-Jankowski*, 537 N.Y.S.2 129, 137 (N.Y. App. Div. 1989) (“The importance of summary adjudication in the context of libel litigation cannot be overemphasized” because libel actions are notoriously expensive to defend, and “[t]he threat of being put to the defense of a lawsuit may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself”).

in Dominion’s case against Fox, New York State law.¹³⁶ Libel plaintiffs must show that the factual assertions, as opposed to constitutionally-protected opinion, are untrue. It is not incumbent upon defendants to prove their statements are true because were that the law “would-be critics of official conduct [would] be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”¹³⁷ Media defendants’ speech about public issues receives such strong protection because there is a concern that speech will be chilled in a manner “antithetical to the First Amendment’s protection of true speech on matters of public concern.”¹³⁸ Importantly, the burden for falsity lies with the plaintiff for both pure statements of fact and any implied facts going to defamation by innuendo that make up the “core premise” of the plaintiff’s case.¹³⁹ Of course, in a case like Dominion’s, Fox is entitled to argue in rebuttal that the statements about the Big Lie its hosts made or endorsed are in fact true. And to prevail on such an argument, Fox need only demonstrate that the statements are “substantial[ly]”—not completely—true.¹⁴⁰

Defamation law imposes a heavy burden on plaintiffs to forestall frivolous suits and prevent the extension of First Amendment protection from “turn[ing] upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”¹⁴¹ This component of the doctrine is at once laudable and logical: many ideas throughout history that have been true also have been very unpopular, with the beliefs advanced during the Civil Rights Movement serving as a signal

136. *Fox News Network, LLC*, 2021 WL 5984265, at *26. Even though the case is being litigated in Delaware court, the parties have stipulated that New York substantive law governs the suit based on Delaware’s choice-of-law doctrine, since the state with the “most significant relationship” to the suit is New York, where Fox is headquartered. *See* Stipulation & Order Designating New York Law & Waiving *Forum Non Conveniens* at ¶ 1, *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD (Del. Super. Ct. Apr. 27, 2021).

137. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *see also Immuno A.G. v. Moor-Jankowski*, 567 N.E.2d 1270, 1275 (N.Y. 1991) (holding that defendants did not have to prove their statements were true because presumptions and predictions would not have been viewed by the average reader as conveying actual facts).

138. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

139. *See Immuno A.G.*, 567 N.E.2d at 1275–76.

140. *See Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 516–17 (1991).

141. *Sullivan*, 376 U.S. at 271.

example.¹⁴² Madison offered a functional justification: “Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.”¹⁴³

There are statements Fox either made or endorsed, both express and implied, that Dominion and Smartmatic can show on summary judgment or at trial are false within the meaning of defamation doctrine. One example is statements made about the company’s ownership. Dobbs had a colloquy on the air with Rudy Giuliani, who claimed that Dominion was owned by Smartmatic, and that in turn Smartmatic was formed by “three Venezuelans who were very close to, very close to the dictator, Chávez of Venezuela and it was formed in order to fix elections.”¹⁴⁴ Dobbs then endorsed this statement, stating: “It’s stunning. And they’re private firms and very little is known about their ownership, beyond what you’re saying about Dominion. It’s very difficult to get a handle on just who owns what and how they’re being operated.”¹⁴⁵ Dobbs’s account also tweeted a tweet from Giuliani stating Dominion is a “front” for Smartmatic:

142. See generally *id.* at 256–59 (describing statements from a newspaper advertisement about police action taken against students partaking in a civil rights demonstration that prompted a libel claim).

143. *Id.* at 271 (quoting 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 571 (2d ed. 1876)).

144. Complaint, *US Dominion v. Fox News*, *supra* note 110, ¶ 179(b).

145. *Id.*



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Dominion and Smartmatic are competitors and have no business relationship of any kind. Dominion alerted Fox that it had no business relationship to Smartmatic,¹⁴⁷ and Smartmatic emphasized in its complaint that the absence of this connection was readily discernible.¹⁴⁸

Moreover, US Dominion, Inc. is incorporated in Delaware and headquartered in Denver.¹⁴⁹ While Dominion can be viewed as “foreign” to the extent that one of US Dominion, Inc.’s subsidiaries, Dominion Voting Systems Corp., is incorporated and headquartered in Toronto,¹⁵⁰ the gist or implication of what Rudy Giuliani was saying is that Dominion was foreign in a distinctly different and provably false sense: that Dominion was created by Venezuelans with ties to the

146. *Id.* at Ex. 7.

147. *Id.* ¶ 79.

148. Complaint & Demand for Jury Trial ¶¶ 332–34, *Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021 (N.Y. Sup. Ct. Feb. 4, 2021) [hereinafter Complaint, *Smartmatic v. Fox*].

149. Complaint, *US Dominion v. Fox News*, *supra* note 110, ¶ 8.

150. *Id.* ¶ 10.

nation's former dictator.¹⁵¹ Similarly, while it is true that Smartmatic did business in Venezuela for a brief period, it is not true to say that it is a Venezuelan company, or that it continues to do business in Venezuela, which it pulled out of after Venezuela refused to abide by election results Smartmatic produced.¹⁵²

Other statements include host Maria Bartiromo's claim to have a "graphic of the swing states that were using" Dominion and Smartmatic software.¹⁵³ Bartiromo claimed that the following states used Dominion machines: Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.¹⁵⁴ But Dominion did not operate in most Pennsylvania counties (including having no presence in closely contested Philadelphia County and Allegheny County),¹⁵⁵ and Smartmatic only operated in Los Angeles County during the 2020 cycle.¹⁵⁶ Bartiromo's claims therefore are not "substantially true," as they must be to receive First Amendment protection in a defamation suit; they are false.

These statements by Bartiromo on her show and Giuliani on Dobbs's show are just two examples of the false statements Fox made or endorsed about Dominion and Smartmatic having rigged the election—statements it is now clear, after the January 6 Committee hearings, were contradicted by credible sources. A "chorus of advisors" close to then-President Trump told him that he had been "legitimately defeated."¹⁵⁷ Former Attorney General William P. Barr referred to the Big Lie as "bullshit," "completely bullshit," "absolute rubbish," "idiotic," "bogus," "stupid," "crazy," "crazy stuff," "complete nonsense," and "a great, great disservice to the country,"¹⁵⁸ and quit after President Trump refused to accept his loss. In a meeting with White House counsel Pat Cipollone, President Trump "became enraged that his own

151. *Id.* ¶ 179.

152. See Legal Notice & Retraction Demand Letter from J. Erik Connolly, Litig. Couns. for Smartmatic USA Corp., Litig. Grp. Managing Chair, Benesch, to Lily F. Claffee, Gen. Couns., Fox News Network, LLC 5 (Dec. 10, 2020) [hereinafter Smartmatic Counsel Letter], <https://s3.documentcloud.org/documents/20423795/legal-notice-and-retraction-demand-from-smartmatic-usa-corp-to-fox-news.pdf> [<https://perma.cc/BS6E-2XAQ>].

153. Complaint, *US Dominion v. Fox News*, *supra* note 110, ¶ 179(g).

154. *Id.*

155. *Id.* ¶ 96.

156. Complaint, *Smartmatic v. Fox*, *supra* note 148, ¶ 5.

157. Luke Broadwater & Alan Feuer, *Jan. 6 Panel Tracks How Trump Created and Spread Election Lies*, N.Y. TIMES (June 13, 2022), <https://www.nytimes.com/2022/06/13/us/politics/trump-january-6-hearings-day-2.html> [<https://perma.cc/L469-TKBP>].

158. Susan B. Glasser, *Bill Barr Calls "Bullshit" on Trump's Election Lies*, NEW YORKER (June 13, 2022), <https://www.newyorker.com/news/letter-from-bidens-washington/bill-barr-calls-bullshit-on-trumps-election-lies> [<https://perma.cc/DMG9-6WDR>].

attorney general had refused to back his fraud allegations.”¹⁵⁹ Former President Trump’s “campaign chief[, Bill Stepien,] [also] told [the January 6 Committee] that [President] Trump had ignored his election-night warning to refrain from declaring a victory he had no basis for claiming” to “raise as much as \$250 million for an entity they called the Official Election Defense Fund, which top campaign aides testified never existed.”¹⁶⁰ President Trump’s campaign and White House lawyers also informed him that he had lost the election, and “his political advisers—including his son-in-law Jared Kushner—told him this,” although Rudy Giuliani, who would later seek a Presidential pardon for his actions, insisted he had won.¹⁶¹

Despite the foregoing, President Trump listened to “allegations . . . most prominently pushed by . . . former federal prosecutor Sidney Powell” who promoted the Dominion and Smartmatic claims despite an internal memo on the Trump campaign that showed campaign staffers, at least, were aware that “some of [Ms. Powell’s] allegations were false” and that Jeffrey A. Rosen, Mr. Barr’s successor, told President Trump the allegations had been “debunked.”¹⁶² In a “90-minute conversation on Dec[ember] 27, 2021, [Deputy Attorney General] Richard . . . went one by one through the claims of fraud” with Trump, showing “based on actual investigations, actual witness interviews, [and] actual reviews of documents, [the Big Lie] allegations simply had no merit,” including theories “about Dominion voting machines having a 68% error rate in Michigan country”—a “report that was transmitted to U.S. attorneys in Michigan on Dec[ember] 14 for their awareness.”¹⁶³ Even President Trump, according to the January 6 Committee testimony of Cassidy Hutchinson, admitted privately to election defeat, expressing to his then chief of staff, Mark Meadows, how embarrassing it was, stating: “I don’t want people to know that we lost.”¹⁶⁴ Thus, it is clear Fox’s statements about Dominion and Smartmatic were false.

159. Broadwater & Feuer, *supra* note 157.

160. *Id.*

161. Glasser, *supra* note 158.

162. Broadwater & Feuer, *supra* note 157.

163. Ximena Bustillo, *DOJ Officials Pushed Back on Trump’s Baseless Election Fraud Claims*, NPR (June 23, 2022, 5:09 PM), <https://www.npr.org/2022/06/23/1107178582/doj-jan-6-committee-trump-election-fraud-claims> [<https://perma.cc/L5SF-W7KN>].

164. H.R. REP. NO. 117–663, at 20 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> [<https://perma.cc/YKW2-E6KK>].

The statements made or endorsed by Fox likely also meet the requirements for actual malice according to both Supreme Court and New York case law. Actual malice has become more difficult to prove, requiring an inquiry into the defendant's subjective mental state. "[L]iability requires proof of reckless disregard for truth, that is, that the defendant 'in fact entertained serious doubts as to the truth of his publication.'"¹⁶⁵ More specifically, under a case the Supreme Court decided four years after *Sullivan*, the defendant must have had "subjective awareness of probable falsity,"¹⁶⁶ which can be found circumstantially if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."¹⁶⁷

In *Herbert v. Lando*,¹⁶⁸ the Court ruled that the First Amendment did not protect "against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process" and allowed the application of Federal Rule of Civil Procedure 26(b), which "permits discovery of any matter 'relevant to the subject matter involved in the pending action' if it would either be admissible in evidence or 'appears reasonably calculated to lead to the discovery of admissible evidence.'"¹⁶⁹ The Court made it very clear in that case that "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances," implying, given that even the President does not have absolute power to resist discovery, the media should be subject to it as well.¹⁷⁰

Here, the sources employed by Fox were dubious at best, and Dominion's complaint painstakingly outlines the doubts Fox hosts expressed about their sources, all the while republishing and endorsing their claims as if they were true.¹⁷¹ Indeed, the facts were contradicted by Fox's very own news department.¹⁷² Take, for example, Sidney Powell, who several Fox hosts, like Lou Dobbs, interviewed and many of whose statements they endorsed.¹⁷³ Even Tucker Carlson cast doubt

165. *Herbert v. Lando*, 441 U.S. 153, 156 (1979) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

166. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974).

167. *St. Amant*, 390 U.S. at 732.

168. 441 U.S. 153 (1979).

169. *Herbert*, 441 U.S. at 157–58.

170. *Id.* at 175.

171. See Complaint, *US Dominion v. Fox News*, *supra* note 110, ¶ 79.

172. See *supra* Introduction.

173. *E.g.*, Complaint, *US Dominion v. Fox News*, *supra* note 110, ¶ 179.

on the veracity of Powell’s claims on his November 19 show.¹⁷⁴ Although Carlson invited Powell to appear on the show, he explained that “she never sent . . . any evidence, despite a lot of requests . . . not a page.”¹⁷⁵ Carlson said that when he asked for evidence “she got angry and told us to stop contacting her. When we checked with others around the Trump campaign, people in positions of authority, they told us Powell ha[d] never given them any evidence either.”¹⁷⁶ Carlson summed up his and his team’s interactions with Powell: She “never demonstrated that a single actual vote was moved illegitimately by software from one candidate to another. Not one.”¹⁷⁷ Yet despite this lack of evidence, and Carlson’s obvious doubt as to the accuracy of Powell’s claims, other Fox hosts continued to have Powell on their shows. Dobbs, for instance, invited her on the episode he promoted with the “cyber Pearl Harbor” tweet.¹⁷⁸ Moreover, according to the *Washington Post*, Dobbs had “raised questions about Powell’s claims to others,”¹⁷⁹ revealing that he had concerns about her credibility—concerns that, unlike Tucker Carlson, he never expressed on the air.¹⁸⁰

The main defense in these cases thus far has been not that the statements were true, but rather even if they are false and even if the hosts believed they were false, they are still protected by the First Amendment on the basis of a line of cases in the Second Circuit known as *Edwards v. National Audubon Society, Inc.*¹⁸¹ that protects “news-worthy” statements regardless of whether the statements made by third parties to reporters were accurate.¹⁸² According to *Edwards*, the press

174. See *Tucker: If Trump Campaign Has Voter Fraud Proof, We Need to See It*, FOX NEWS, at 09:00–10:10 (Nov. 20, 2020, 10:53 AM), <https://video.foxnews.com/v/6211087016001#sp=show-clips> [<https://perma.cc/9SU6-TVKM>].

175. *Id.*

176. *Id.*

177. *Id.*

178. US Dominion, Inc. v. Fox News Network Complaint, *supra* note 110, ¶¶ 107–10.

179. Seung M. Kim et al., *Republicans Plunge into Open Battle over Attempts to Overturn Trump’s Loss to Biden*, WASH. POST (Dec. 22, 2020, 9:40 PM), https://www.washingtonpost.com/politics/trump-republicans-election-fight/2020/12/22/fa0c2744-446b-11eb-b0e4-0f182923a025_story.html [<https://perma.cc/N624-6Z4K>].

180. And, of course, there were other reasons to doubt major Fox News sources like Rudy Giuliani, whose bar license was suspended for the false claims he made about the election, including claims that dead persons voted in Pennsylvania and that more absentee ballots had been mailed in than sent out in the state—both claims which the court found untrue. See *In re Giuliani*, No. 2021-00506, slip op. at 14–15 (N.Y. App. Div. May 3, 2021).

181. 556 F.2d 113 (2d Cir. 1977).

182. Defendant’s Reply Brief in Support of Its Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim at 7, US Dominion, Inc. v. Fox News Network, LLC, No. N21C-03-257 EMD (Del. Super. Ct. June 25, 2021) [hereinafter Defendant’s Reply Brief, US Dominion v. Fox News].

are not “required under the First Amendment . . . merely because . . . [the reporters] ha[ve] serious doubts regarding their truth” to refrain from publication because “the public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.”¹⁸³

Edwards and its progeny contain a key caveat that this defense fails to address: “[A] publisher who in fact espouses or concurs in the charges made by others . . . cannot rely on a privilege of neutral reportage.”¹⁸⁴ In *Edwards*, the court concluded that the *New York Times* “reported . . . [the Audubon Society’s] charges fairly and accurately” and “did not in any way espouse [Audubon’s] accusations” but “published the maligned scientists’ outraged reactions in the same article that contained [Audubon’s] attack” and was “the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps.”¹⁸⁵ Unlike the *Times*—which covered both sides in the same article and which contained “fair and dispassionate reporting”—the same cannot be said of Fox or any of the news outlets spreading the Big Lie. As explained *supra*, these outlets affirmatively endorsed the statements made by Trump and his allies, and “espous[ed] and concur[red] in the charges” made by them.¹⁸⁶

A second defense is that the statements would be understood by viewers as speculations and “mere *allegations* to be investigated rather than as *facts*.”¹⁸⁷ Although the Delaware court found that the statements could be characterized as “mixed” statements of opinion and facts, which are unprotected,¹⁸⁸ Fox for this proposition cites a canonical New York case, *Brian v. Richardson*,¹⁸⁹ that could prove relevant later in the proceedings. Specifically, *Brian* treated an article authored by a “former United States [a]ttorney [g]eneral” and alleged that the Department of Justice had “created a series of ‘sham’ controversies regarding [a software company’s product], leading to [the company’s]

183. *Edwards*, 556 F.2d at 120.

184. *Id.*

185. *Id.*

186. *See id.*

187. Defendant’s Reply Brief, *US Dominion v. Fox News*, *supra* note 182, at 31 (citing *Brian v. Richardson*, 87 N.Y.2d 46, 48–54 (1995)).

188. *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD, 2021 WL 5984265, at *27 (Del. Super. Ct. Dec. 16, 2021), *cert. denied*, 2022 WL 100820 (Del. Super. Ct. Jan. 10, 2022), *appeal refused*, 270 A.3d 273 (Del. 2022).

189. 87 N.Y.2d 46 (1995).

bankruptcy.”¹⁹⁰ The article in *Brian* went on to suggest that a former journalist who looked into the matter had been murdered and had not committed suicide.¹⁹¹ It concluded by attempting to “persuade Edwin Meese’s successor, Attorney General Thornburgh, to investigate” through an independent prosecutor.¹⁹²

Brian acknowledged that “distinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task” and did take into account that the section of the paper in which the article appeared was relevant, as well as “the identity, role[,] and reputation of the author” that may be “factors to the extent that they provide the reader with clues as to the article’s import.”¹⁹³ But *Brian* goes on to include two key caveats. The first is that “an article’s appearance in sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation” and does not give “an editorial page or a newspaper column . . . a license to make false factual accusations.”¹⁹⁴ The second, is that “although [the] defendant unquestionably offered his own view that these sources were credible, he also set out the basis for that personal opinion, leaving it to readers to evaluate it for themselves.”¹⁹⁵

Here, while it is likely that some of the statements could fall into this category, it is also clear that there are others that do not—such as the statements about Dominion and Smartmatic’s ownership, their location, or their operation during the election. While it is possible that some Fox reporters were calling for an investigation of the 2020 election results, the coverage did not “leave[] it to [viewers] to evaluate [these claims] for themselves” because Fox hosts did not set out the basis for their personal opinions—and indeed according to Dominion it was not the personal opinion of the Fox hosts at all, but rather a response to Trump’s attacks that caused them to make false representations about belief in the “Big Lie” in order to boost ratings. The Delaware court found in its opinion declining to dismiss the suit for failure to state a claim that:

[T]he Complaint’s allegations support the reasonable inference that Fox intended to keep Dominion’s side of the story

190. *Id.* at 48.

191. *Id.* at 49.

192. *Id.*

193. *Id.* at 51–52.

194. *Id.* at 52.

195. *Id.* at 53–54.

out of the narrative. Moreover, the Complaint alleges numerous instances in which Fox personnel did not merely ask questions and parrot responses but, rather, endorsed or suggested answers. Fox therefore may have failed to report the issue truthfully or dispassionately by skewing questioning and approving responses in a way that fit or promoted a narrative in which Dominion committed election fraud.¹⁹⁶

Still further, other New York cases make clear that “[a]ccusations of criminal activity, even in the form of an opinion, are not constitutionally protected.”¹⁹⁷ According to the New York Supreme Court, “there is a critical distinction between opinions that attribute improper motives . . . and accusations, in whatever form, that an individual has committed a crime or is personally dishonest” and “[n]o First Amendment protection enfolds false charges of criminal behavior.”¹⁹⁸ In *Cianci v. New Times Publishing Co.*,¹⁹⁹ the Second Circuit found that a newspaper established a libel claim when it accused the mayor of Providence, Rhode Island, of rape.²⁰⁰ Importantly, the newspaper “made no mention of Cianci’s claim of innocence of the charge of rape . . . save in the backhanded form of quoting [a] remark that he had called the charge a ‘shakedown’” and “said nothing of Cianci’s position . . . that the \$3,000 was paid in settlement of [the alleged rape victim’s] contemplated civil suit rather than to induce her to withdraw the criminal charge” and thus was not immunized even if the statements were statements of opinion.²⁰¹ So too here. Fox and other news outlets have accused Dominion and Smartmatic of changing the outcome of the election, and, even if these accusations are found to be opinions, they are not protected, especially considering that Fox and other outlets only rebutted their statements in a two-minute segment.

The final defense is that the statements are privileged because they reflect the position of Trump’s attorneys in lawsuits and are therefore immunized by the First Amendment.²⁰² New York courts also

196. *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD, 2021 WL 5984265, at *24 (Del. Super. Ct. Dec. 16, 2021), *cert. denied*, 2022 WL 100820 (Del. Super. Ct. Jan. 10, 2022), *appeal refused*, 270 A.3d 273 (Del. 2022).

197. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307 (N.Y. 1977).

198. *Id.*; see also *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 63–64 (2d Cir. 1980) (noting that false accusations of criminal activity are not automatically protected by the First Amendment).

199. 639 F.2d 54 (2d Cir. 1980).

200. *Cianci*, 639 F.2d at 69–71.

201. *Id.* at 69, 71.

202. Defendant’s Reply Brief, *US Dominion v. Fox News*, *supra* note 182, at 14–15.

draw on the “fair report privilege”—relied on also for the “newsworthiness defense”—that “the First Amendment and New York law recognize ‘broad protection [for] news accounts of judicial or other official proceedings.’”²⁰³ But this defense flounders for the same reason as the “newsworthy” defense. “For a report to be characterized as ‘fair and true’” the “substance . . . [must] be substantially accurate.”²⁰⁴ While it is true that Fox reported the allegations of Trump’s attorneys, equally Trump and his attorneys did not faithfully represent the evidence presented in the litigation and described affidavits that did not exist or were substantially dissimilar to the attorney work product filed in court, as a federal judge recently affirmed in a lawsuit against Trump lawyer John Eastman.²⁰⁵ And, as the Delaware court concluded in the Fox dispute, according to the complaint “Fox allegedly mischaracterized those allegations on several occasions (e.g., comments reporting that the lawsuits involved ‘kickbacks’). At this point in the proceedings, the Complaint alleges that Fox’s statements evince a substantial deviation from those proceedings’ alleged facts.”²⁰⁶ As such, the cases against Fox and other news outlets are likely to succeed on the merits—that is, if taken to trial.

B. The Rise of Conspiracy Theories and Political Violence

The democratization of the internet also led to the rise of sites like Reddit, and imageboards like 4chan, and eventually 8chan (later to become 8kun)²⁰⁷—a website formerly run out of the Philippines founded on the ethos that all speech was permissible so long as it was not illegal—that, to put it crassly, became cesspools for internet misogyny, white supremacy, and nihilism. These sites and the discussions that took place on them have been linked not only to the rise of the now-infamous movement known as QAnon, discussed in depth

203. *Id.*; see also *Cholowsky v. Civiletti*, 887 N.Y.S.2d 592, 595 (App. Div. 2009) (discussing the purpose of the fair report doctrine under Civil Rights Law § 74 and its liberal interpretation by courts).

204. *Cholowsky*, 887 N.Y.S.2d at 595–96.

205. See Order Re Privilege of Remaining Documents at 16–17, *Eastman v. Thompson*, No. 8:22-cv-00099 (C.D. Cal. Oct. 19, 2022).

206. *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD, 2021 WL 5984265, at *26 (Del. Super. Ct. Dec. 16, 2021), *cert. denied*, 2022 WL 100820 (Del. Super. Ct. Jan. 10, 2022), *appeal refused*, 270 A.3d 273 (Del. 2022).

207. See *Dimitrov*, *supra* note 72, at 4; Brandy Zadrozny & Ben Collins, *How Three Conspiracy Theorists Took ‘Q’ and Sparked QAnon*, NBC NEWS (Aug. 14, 2018, 9:25 AM), <https://www.nbcnews.com/tech/tech-news/how-three-conspiracy-theorists-took-q-sparked-qanon-n900531> [<https://perma.cc/C9SC-X5ZF>].

below, but also to mass shooters and violent extremism both in the United States and abroad.

Indeed, researchers of extremism and radicalization have opined that shooters and perpetrators of extremist actions “share a common trait”—they are immersed in an online subculture on mainstream platforms, imageboards, or more obscure services like Discord or Telegram that create an alternate reality that can include celebration of graphic violence and foster a belief that nothing is real.²⁰⁸ Researchers agree that the perpetrators of some of the most recent shootings U.S. citizens have faced, including Oxford Township, Michigan; Highland Park, Illinois; and Uvalde, Texas, share the same traits.²⁰⁹ The same traits apply to the recent Buffalo shooter who killed ten Black people after publishing a 180-page screed that contained racist “rants” about “replacement theory” inspired by Nazi forums on websites such as 4chan; another shooter who shot four other people and committed suicide while uploading to 4chan;²¹⁰ not to mention other shootings like the one in Christchurch, New Zealand, that coincide with the rise of conspiracy theories like QAnon.²¹¹ The main radicalizing factor these websites offer is to convince readers that actions do not have consequences, and to change brain chemistry by exposing viewers to stimuli such as flashing lights designed to be seen while the user takes illicit substances.²¹² These platforms often provide altered videos of graphic violence against animals or humans run through multiple filters so that it is not removed by mainstream content providers.²¹³

In turn, the speech policies on such websites, such as 8chan’s reliance on pseudonymous speech (users are still tagged with a numerical code so that they cannot impersonate each other), has allowed the rise of the movements (or what Professor Heather Cox Richardson has

208. See Stefano Kotsonis & Meghna Chakrabarti, *Online Extremism and the Digital Footprint of Mass Shooters*, WBUR, (July 11, 2022), <https://www.wbur.org/onpoint/2022/07/11/what-forms-online-subcultures-mass-shooter> [https://perma.cc/AH5S-ZYEW].

209. *Id.*

210. Jonathan Franklin, *Parts of the Buffalo Shooter’s Alleged Screed Were Copied from Other Sources*, NPR (May 18, 2022, 7:22 AM), <https://www.npr.org/2022/05/18/1099372659/parts-of-the-buffalo-shooters-alleged-screed-were-copied-from-other-sources> [https://perma.cc/8HYC-RQX8]; Justin Ling, *How 4chan’s Toxic Culture Helped Radicalize Buffalo Shooting Suspect*, THE GUARDIAN (May 18, 2022, 2:00 PM), <https://www.theguardian.com/us-news/2022/may/18/4chan-radicalize-buffalo-shooting-white-supremacy> [https://perma.cc/2CTY-25E2].

211. *Q: Into the Storm: Game Over* (HBO television broadcast 2021); Kotsonis & Chakrabarti, *supra* note 208.

212. Kotsonis & Chakrabarti, *supra* note 208.

213. *Id.*

called “cults”) that are directly linked to political violence.²¹⁴ For example, one such conspiracy theory is QAnon, a theory supported by the beliefs—gleaned from pseudonymous drops from a source known as “Q” who allegedly has access to U.S. military intelligence obtained through a Q clearance to top secret Department of Energy information—that the government is run by the “deep state” and that individuals like Hillary Clinton and her allies, including Hollywood celebrities, form a “cabal” of “Satan worshippers” who run child sex trafficking rings, and there will come a time when mass arrests occur and these global elite are taken to Guantánamo Bay where they will be executed.²¹⁵ The QAnon narrative is “complex and constantly evolving” and its story is “constantly expanding to include false information about current events—including alleged election fraud, the COVID-19 pandemic, and the dangers of 5G technology—that are then woven into the QAnon master narrative.”²¹⁶

QAnon started out as a fringe movement, but, at least as of January 6, 2021, it had forcibly ejected itself into the mainstream. In the beginning, Q started on 4chan (an imageboard started in 2003 to mirror a popular Japanese website), with a post that stated: “Hillary Clinton will be arrested between 7:45 AM–8:30 AM on Monday—the morning of Oct 30, 2017.”²¹⁷ According to the author Mike Rothschild in his book *The Storm Is Upon Us*, this “proto-Q” drop (also known as “drop 0”) would likely have been ignored, except someone ran with it and started creating a more intricate story that proclaimed:

HRC extradition already in motion effective yesterday with several countries in case of cross border run. Passport approved to be flagged 10/30 @ 12:01 am. Expect massive riots organized in defiance and others fleeing the US to occur. US M’s will conduct the investigation while NG activated. Proof

214. *QAnon, Cults, and Cutlery, Now & Then* (June 22, 2021) (downloaded using Apple Podcasts); see also *The Buffalo Supermarket Shooter Pleads Not Guilty to Federal Charges*, AP NEWS (July 18, 2022, 12:15 PM), <https://www.npr.org/2022/07/18/1112035732/the-buffalo-supermarket-shooter-pleads-not-guilty-to-federal-charges> [<https://perma.cc/ML5N-4CTX>] (describing how the Buffalo, N.Y., mass shooter posted his plans long before carrying them out).

215. MIKE ROTHSCHILD, *THE STORM IS UPON US: HOW QANON BECAME A MOVEMENT, CULT, AND CONSPIRACY THEORY OF EVERYTHING* 23 (2021); *QAnon, Cults, and Cutlery, Now & Then*, *supra* note 214.

216. THREAT ASSESSMENT, FED. BUREAU OF INVESTIGATION, *ADHERENCE TO QANON CONSPIRACY THEORY BY SOME DOMESTIC VIOLENCE EXTREMISTS* (June 4, 2021) [hereinafter FBI Report], <https://drive.google.com/file/d/1DZrVRXZUm1Qv1XsBZIObvghk6Fh8Dff8/view> [<https://perma.cc/6PDF-EUN4>].

217. ROTHSCHILD, *supra* note 215, at 19.

check: Locate a NG member and ask if activated for duty across most major cities.²¹⁸

The posts soon created a “master narrative” explaining that Robert Mueller was actually investigating the “real bad guys,” and that there would be arrests of Hillary Clinton and Huma Abedin.²¹⁹

But 4chan was too niche a location for most QAnon adherents. While it started there, “Q drops” (the information posted by the anonymous person or persons behind Q) became popular via a cottage industry of secondary sources—in particular YouTube influencers and celebrities—dedicated to explaining and unpacking the mystifying and cryptic references that were often posted, and then Q followed up with a series of Socratic questions that encouraged the believers to do their own “research” and then repost their “theories” for Q to select the ones that he, she, or they preferred and would then incorporate into a subsequent post.²²⁰ The movement first exploded when YouTuber Tracy Diaz (also known as Tracy Beanz), with loose affiliations to the alt-right, first featured it on her channel and had a hundred thousand subscribers help launched it out of obscurity and into the mainstream in an effort to monetize it, and to generate views (which were rewarded economically by the YouTube algorithm).²²¹ Diaz was then approached by two individuals who wanted to move the Q theory to Reddit, where it became part of a more mainstream community known as the “Calm Before the Storm,” allowing the movement to obtain a bigger audience.²²² The CBTS_stream on Reddit “would eventually have nearly twenty-three thousand subscribers and almost several hundred thousand posts—and it wouldn’t even be Reddit’s largest Q forum.”²²³

As QAnon took off on Reddit and YouTube, there was just one small hitch: The prophecies it predicted (specifically Hillary Clinton’s arrest and subsequent mass demonstrations) did not materialize. No matter. According to Rothschild, “[b]elievers liked what they heard and wanted more—even though they hadn’t gotten what they wanted in the first place.”²²⁴ Q’s posts then underwent a tone change: “Out

218. *Id.* at 20.

219. *Id.* at 21.

220. *Q: Into the Storm*, *supra* note 211.

221. Adrienne LaFrance, *The Prophecies of Q: American Conspiracy Theories Are Entering a New Phase*, THE ATLANTIC (May 14, 2020), <https://www.theatlantic.com/magazine/archive/2020/06/qanon-nothing-can-stop-what-is-coming/610567> [<https://perma.cc/S6BT-8UBR>].

222. ROTHSCCHILD, *supra* note 214, at 27.

223. *Id.*

224. *Id.* at 29.

went the specific dates and exact sequencing predicting what would unfold” which were replaced with “drops full of clipped mystery phrases, seemingly random pop culture references, and pat questions.”²²⁵ In other words, Q went “folksy” and “Q fans ate it up.”²²⁶ “Disinformation is necessary,” Q proclaimed in one post, “[e]ssentially . . . telling . . . followers that sometimes Q would lie to them—and it would be for their own good.”²²⁷ But then some events that Q *did* predict (however loosely) came to pass: the Saudi Crown Prince “orchestrated a mass arrest and detention of government ministers, minor royalty, and business leaders who had threatened his ascent,”²²⁸ and, more tellingly, the billionaire Jeffrey Epstein was arrested for sexual abuse of young girls (never mind that he also had links to Donald Trump), which seemed to provide the proof many Q believers needed of the child sex trafficking scheme.²²⁹

As QAnon took off, other celebrities and politicians became involved, and Trump officials took notice. Former President Donald Trump himself refused to disavow QAnon supporters despite the elements of white supremacy that were woven into the conspiracy theory. Indeed, when specifically confronted by NBC host Savannah Guthrie during a town hall about the growing numbers of QAnon supporters, President Trump appeared to wink at them, saying “I don’t know about QAnon,” and, when pressed, “What I do hear about it, they are very strongly against pedophilia.”²³⁰ Trump would retweet multiple tweets from QAnon supporters,²³¹ including a story that Osama bin Ladin had not been killed, and that then-Vice President Joe Biden and President Barack Obama had participated in a cover up.²³² Other top Trump supporters also seemed to indicate their support. Michael Flynn most famously had his entire family undertake the Q pledge in the summer of

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Q: Into the Storm*, *supra* note 211.

230. Adam Gabbatt, *Trump Refuses to Disavow QAnon Conspiracy Theory During Town Hall*, THE GUARDIAN (Oct. 15, 2020, 9:10 PM), <https://www.theguardian.com/us-news/2020/oct/15/qanon-trump-refuses-disavow-conspiracy-theory-town-hall> [<https://perma.cc/SDV4-NNZ3>].

231. Ewan Palmer, *Donald Trump Has Promoted QAnon-Linked Twitter Accounts More Than 250 Times*, NEWSWEEK (Oct. 16, 2020, 8:47 AM), <https://www.newsweek.com/qanon-trump-twitter-conspiracy-town-hall-pedophiles-1539698> [<http://perma.cc/6366-EGGM>].

232. Ewan Palmer, *Navy SEAL Attacks Trump for Tweeting QAnon bin Laden Body Double Conspiracy: ‘I Know Who I Killed,’* NEWSWEEK (Oct. 14, 2020, 8:58 AM), <https://www.newsweek.com/robert-oneill-bin-laden-double-trump-qanon-1539010> [<https://perma.cc/7C43-7GVW>].

2020²³³ and literally trademarked a related phrase to ensure a stream of profits.²³⁴ Flynn’s family members denied being members of QAnon, suing CNN for libel.²³⁵

During the 2020 election cycle, ninety-seven current or former congressional candidates embraced the movement, including two who won: Lauren Boebert of Colorado and Marjorie Taylor Greene of Georgia, who “pushed the debunked Pizzagate conspiracy theory” that a pizza parlor run out of DC where John Podesta frequently ordered pizza was allegedly the site of child sex trafficking—a theory that led an armed man to arrive at the store and threaten its employees—though both officeholders have subsequently stepped back from their involvement.²³⁶ Ms. Greene has since become infamous for her comparisons of President Biden’s administration to the Nazis, and, even after she went to the Holocaust Memorial Museum to learn and subsequently apologized for making the comparison, later claimed that President Biden’s campaign to increase vaccinations by having doctors go door to door to look for individuals who had not received them was akin to “Brown shirts”—namely members of Hitler’s Sturmabteilung, or S.A.—looking to round up Jews, a stance which Jewish groups have critiqued as trivializing the Holocaust.²³⁷

QAnon played a major role in the Capitol insurrection on January 6, 2021. Although the FBI and other intelligence organizations were

233. David Gilbert, *Michael Flynn’s Family: That QAnon Oath Video Is Just Our Family Motto*, VICE NEWS (July 7, 2021, 5:36 AM), <https://www.vice.com/en/article/akgny8/michael-flynns-family-that-qanon-oath-video-is-just-our-family-motto> [https://perma.cc/8BXT-FXSV].

234. Candace Rondeaux, *How Trump Ally Michael Flynn Nurtured—and Profited From—the QAnon Conspiracy Theory*, THE INTERCEPT (June 27, 2021, 7:00 AM), <https://theintercept.com/2021/06/27/qanon-michael-flynn-digital-soldiers/> [https://perma.cc/MC58-5XTM].

235. See Defendants’ Motion to Dismiss at 14–16, *Flynn v. Cable News Network, Inc.*, No. 21-cv-02587 (S.D.N.Y. June 21, 2021) (arguing that the claims that Flynn’s family supports QAnon are “substantially true” and thus the lawsuit must be dismissed). CNN also filed a “Rule 11” letter with the *Flynn* court, suggesting the lawsuit is so baseless that it is worthy of being awarded sanctions should it proceed. *Id.* at 1, 9.

236. Alex Kaplan, *Here Are the QAnon Supporters Running for Congress in 2020*, MEDIA MATTERS FOR AMERICA (Apr. 26, 2022, 1:00 PM), <https://www.mediamatters.org/qanon-conspiracy-theory/here-are-qanon-supporters-running-congress-2020> [https://perma.cc/4YF5-Y2EE]; Joshua Gillin, *How Pizzagate Went from Fake News to a Real Problem for a D.C. Business*, POLITIFACT (Dec. 5, 2016), <https://www.politifact.com/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/> [https://perma.cc/NDH3-3TCZ].

237. Brendan Cole, *Jewish Groups Blast Marjorie Taylor Greene’s ‘Medical Brown Shirts’ COVID Jab Comparison*, NEWSWEEK (July 7, 2021, 12:14 PM), <https://www.newsweek.com/marjorie-taylor-greene-nazi-germany-ajcongress-brown-shirts-1607540> [https://perma.cc/P36M-WA6H].

aware of the dangers posed by QAnon,²³⁸ they have repeatedly stated that many activities—including “[g]enerating, accessing, discussing, or otherwise interacting with QAnon-related content without engaging in violence or other illegal activity”—“is legal and protected by the First Amendment” and that the “FBI does not investigate, collect, or maintain information on U[.]S[.] persons solely for the purpose of monitoring First Amendment protected activities.”²³⁹ Yet, by the same token, the FBI admits that certain “domestic violent extremists . . . who are also self-identified QAnon adherents” participated in the “violent siege of the U[.]S[.] Capitol” and has “underscore[d] how the current environment likely will continue to act as a catalyst for some to begin accepting the legitimacy of violent action.”²⁴⁰ The FBI notes that “[m]ere advocacy of political or social positions, political activism, use of strong rhetoric, or generalized philosophic embrace of violent tactics may not constitute violent extremism, and may be constitutionally protected.”²⁴¹ But the FBI equally notes that QAnon adherents have been involved in political violence in addition to the Capitol insurrection, with a QAnon believer on January 8, 2021, “firing several rounds at an Oregon federal courthouse, according to court documents”²⁴² and in March 2020, according to court records, a QAnon believer derailed a train he was operating near the USNS *Mercy* hospital ship at the Port of Los Angeles to draw media attention to its presence and to “wake people up.”²⁴³

Of course, the Capitol insurrection (with other violent episodes occurring as well) has been the culmination of QAnon’s violent actions so far. According to the FBI, twenty individuals who have been arrested for the Capitol insurrection self-identify as QAnon adherents,²⁴⁴ out of the more than 900 individuals who have been arrested

238. Devlin Barrett & Matt Zapotosky, *FBI Report Warned of ‘War’ at Capitol, Contradicting Claims There Was No Indication of Looming Violence*, WASH. POST (Jan. 12, 2021, 6:40 PM), https://www.washingtonpost.com/national-security/capitol-riot-fbi-intelligence/2021/01/12/30d12748-546b-11eb-a817-e5e7f8a406d6_story.html [https://perma.cc/P679-379P].

239. FBI Report, *supra* note 216.

240. *Id.*

241. *Id.*

242. *Id.*

243. Andrew Blankstein, *Feds Charge Man with Intentionally Derailing Train Near USNS Mercy*, NBC NEWS (Apr. 1, 2020, 3:10 PM), <https://www.nbcnews.com/news/us-news/feds-charge-man-who-intentionally-derailed-train-near-usns-mercy-n1174461> [https://perma.cc/BQ2C-ANA8]; FBI Report, *supra* note 216.

244. FBI Report, *supra* note 216.

overall.²⁴⁵ Those arrested were charged with “violent entry,” “disorderly conduct in a restricted building,” and “obstruction of an official proceeding.”²⁴⁶ One QAnon believer was “fatally wounded by law enforcement after illegally attempting to gain access to a restricted area of the Capitol,” with her social media account proclaiming “the storm is here and it is descending upon DC in less than 24 hours . . . dark to light.”²⁴⁷ Other QAnon adherents seemed to share a proclivity toward violence, with a man identified as Douglas Jensen, in a Q T-shirt he wore to bolster the movement, “menacing a lone [B]lack U.S. Capitol Police officer as he led the rioters through the halls and pushed the mob deeper into the Capitol building.”²⁴⁸ And another, Cleveland Meredith Jr., “allegedly posted online about his desire to execute House Speaker Nancy Pelosi by ‘putting a bullet in her noggin on Live TV.’”²⁴⁹ Although “[h]e was late to the rally because his car broke down,” he was “armed with multiple firearms and more than 2,500 rounds of ammunition in his possession, according to prosecutors.”²⁵⁰

A June 2021 threat assessment from the FBI estimated (in what others refer to as a “CYA” estimate²⁵¹) that some QAnon adherents will claim they can no longer “trust the plan” (a reference to Q’s plan of mass arrests and executions) and that they will switch from serving as “digital soldiers” “towards engaging in real world violence—including harming perceived members of the ‘cabal’ such as Democrats and other political opposition—instead of continually awaiting Q’s

245. Madison Hall et al., *At Least 964 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All*, INSIDER (Dec. 7, 2022, 8:15 AM), <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [https://perma.cc/WEK7-KWET]. According to video footage put together by the *New York Times* in its forty-minute photojournalistic essay chronicling the events of January 6, 2021, there are clearly more than 900 individuals who broke into the Capitol. See Dmitriy Khavin et al., *Day of Rage: How Trump Supporters Took the U.S. Capitol*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/video/us/politics/100000007606996/capitol-riot-trump-supporters.html> [https://perma.cc/M9WN-TXQX]. In July 2021, FBI Director Christopher Wray stated the arrests were “far from over.” Graig Graziosi, *More Than 535 Arrested, over 300 Yet to Be Identified in Capitol Riots Case, Says DoJ*, INDEPENDENT (July 16, 2021, 10:29 PM), <https://www.independent.co.uk/news/world/americas/us-politics/capitol-riots-suspects-arrests-doj-b1885680.html> [https://perma.cc/H73W-D5YA].

246. FBI Report, *supra* note 216.

247. *Id.*

248. Olivia Rubin et al., *QAnon Emerges as Recurring Theme of Criminal Cases Tied to US Capitol Siege*, ABC NEWS (Jan. 19, 2021, 4:31 PM), <https://abcnews.go.com/US/qanon-emerges-recurring-theme-criminal-cases-tied-us/story?id=75347445> [https://perma.cc/VTU9-93HX].

249. *Id.*

250. *Id.*

251. *QAnon Anonymous, Episode 149: The January 6th FBI Inside Job Theory Feat Trevor Aaronson* (July 1, 2021) (downloaded using Apple Podcasts).

promised actions which have not occurred.”²⁵² On a brighter note the FBI assessment also suggests that “[o]ther QAnon adherents likely will disengage from the movement or reduce their involvement in the wake of the administration change,” a “disengagement [that] may be spurred by the large mainstream social media deplatforming of QAnon content based on social media companies’ own determination that users have violated terms of service, and the failure of long-promised QAnon-linked events to materialize.”²⁵³

Since the FBI threat assessment in June 2021, Q’s influence has gone mainstream—infiltrating media coverage on Fox News and other news outlets and leading “a quarter of Republicans” to agree with core Q sentiments, according to a Public Religion Research Institute poll, as well as some Democrats and Independents.²⁵⁴ According to the survey, 18 percent of Americans believe “[b]ecause things have gotten so far off track, true American patriots have to resort to violence in order to save our country.”²⁵⁵ QAnon has been deplatformed on mainstream spaces like Facebook and Twitter, but has cropped up in other venues, including Gab, Telegram, and Parler.²⁵⁶ On these platforms QAnon adherents are expressing support for Russia’s invasion of Ukraine, stating that Russia is in fact not invading but “targeting dangerous U.S. biolabs in Ukraine”—a theory that has “attracted hundreds of thousands of followers on Telegram, Substack, Gettr, and TikTok.”²⁵⁷ Tucker Carlson of Fox echoed this claim, arguing that the United States was “funding the creation of deadly pathogens” and “play[ing] clips of spokespeople for the Russian and Chinese regimes, accusing Washington of operating a bioweapons program[] in Europe.”²⁵⁸

Finally, news in the form of released text messages between Virginia Thomas—the wife of Supreme Court Justice Clarence

252. FBI Report, *supra* note 216.

253. *Id.*

254. *The Persistence of QAnon in the Post-Trump Era: An Analysis of Who Believes the Conspiracies*, PUB. RELIGION RSCH. INST. (Feb. 24, 2022), <https://www.pri.org/research/the-persistence-of-qanon-in-the-post-trump-era-an-analysis-of-who-believes-the-conspiracies/> [https://perma.cc/SY8R-MV4L].

255. *Id.*

256. Parmy Olson & Tim Culpan, Opinion, *Ukraine War: The Kremlin and QAnon Are Spinning the Same Dangerous Lies*, BLOOMBERG (Mar. 21, 2022, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2022-03-21/ukraine-war-the-kremlin-and-qanon-are-spinning-the-same-dangerous-lies> [https://perma.cc/F93W-ENKY].

257. *Id.*

258. Justin Ling, *How ‘Ukrainian Bioweapons Labs’ Myth Went from QAnon Fringe to Fox News*, THE GUARDIAN (Mar. 18, 2022, 3:00 PM), <https://www.theguardian.com/media/2022/mar/18/ukrainian-bioweapons-labs-qanon-fox-news> [https://perma.cc/KP5X-ZT4L].

Thomas—and Mark Meadows, President Trump’s former Chief of Staff—shows that even prominent Republicans outside of the Trump Administration may have fallen prey to QAnon, including messages that reference the “storm”—again the belief that key Democrats would be sent to Guantánamo Bay.²⁵⁹ More recent polling surrounding QAnon suggests that while “[p]eople really don’t identify themselves as QAnon believers anymore,” the views of the movement have gone “massively mainstream.”²⁶⁰ For example, Republican “candidates avoid talking about the idea that a cabal of pedophiles is preying on children,” but “[w]hen criticizing C[OVID]-19 restrictions, many . . . riff on QAnon’s belief that a ‘deep state’ of bureaucrats and politicians want to control Americans.”²⁶¹

After the explosive testimony of Cassidy Hutchinson, the pseudonymous poster Q revived themselves to tell adherents to “trust the plan,” and other attacks led Ms. Hutchinson and other female aides to become targets of prominent politicians, including former President Trump, and to receive death threats and ultimately to go into hiding.²⁶² And on Truth Social, former President Trump’s alternative social media platform, the former President launched attacks such as:²⁶³

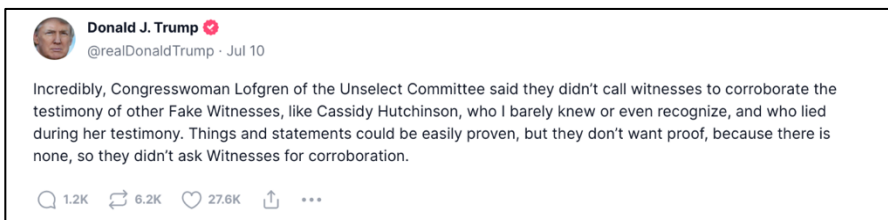
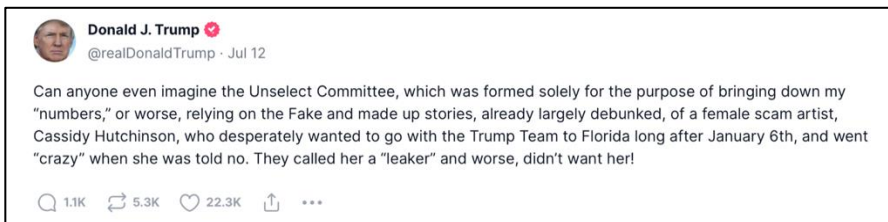
259. Jon Jackson, *Ginni Thomas Pushed QAnon Theories in Texts to Mark Meadows*, NEWSWEEK (Mar. 25, 2022, 11:00 AM), <https://www.newsweek.com/ginni-thomas-pushed-qanon-theories-texts-mark-meadows-1691855> [<https://perma.cc/QS3B-9XHG>].

260. Stuart A. Thompson, *QAnon Candidates Aren’t Thriving, but Some of Their Ideas Are*, N.Y. TIMES (July 25, 2022, 5:00 AM), <https://www.nytimes.com/2022/07/25/technology/qanon-midterms.html> [<https://perma.cc/K6W7-XD6R>].

261. *Id.*

262. Robert Draper, *Cassidy Hutchinson: Why the Jan. 6 Committee Rushed Her Testimony*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/10/us/politics/cassidy-hutchinson-jan-6-testimony.html> [<https://perma.cc/N4SU-GLLJ>]; CNN, *QAnon Returns and Targets Cassidy Hutchinson in New Post*, YOUTUBE (June 30, 2022), <https://www.youtube.com/watch?v=DA4qLxU5ZVM> [<https://perma.cc/Y7BZ-D6LQ>]; Tom Porter, *Ex-WH Aide Cassidy Hutchinson Is in Hiding with Security After Bombshell Testimony Against Trump*, NYT REPORTS, BUS. INSIDER (July 11, 2022, 3:33 AM), <https://www.businessinsider.com/cassidy-hutchinson-in-hiding-after-testimony-against-trump-nyt-2022-7> [<https://perma.cc/WJ4M-U9UY>]; Meredith McGraw, *The Secret Support System for Former Aides Taking on Trump: The Other Women*, POLITICO (July 12, 2022, 07:30 PM), <https://www.politico.com/news/2022/07/12/ladies-club-donald-trump-00045478> [<https://perma.cc/ZE4N-ZMVM>].

263 Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 12, 2022, 4:26 AM), <https://truthsocial.com/users/realDonaldTrump/statuses/108634124463758075> [<https://perma.cc/R66Y-5DFL>]; Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 10, 2022, 2:34 PM), <https://truthsocial.com/users/realDonaldTrump/statuses/108625226594185657> [<https://perma.cc/EJE8-B85M>].



Is there a way to definitively prove who Q is beyond journalistic speculation, and to thereby attempt to unwind the conspiracy theory that has been estimated to have gripped 16 percent of Americans who believe in the central tenants of QAnon and other conspiracy theories?²⁶⁴ In fact, there is. Specifically, based on the defamatory content Q posted indicating many individuals such as Hillary Clinton were members of a Satanist cabal and that they were supporting child sex trafficking and drank the blood of children, there is a basis to sue the poster Q.²⁶⁵ Not all Q drops are defamatory—many pose hypothetical (and leading) questions that the users are allegedly supposed to answer for themselves, and such question and answer strategies are usually considered protected speech under the First Amendment—but some make outright false statements.

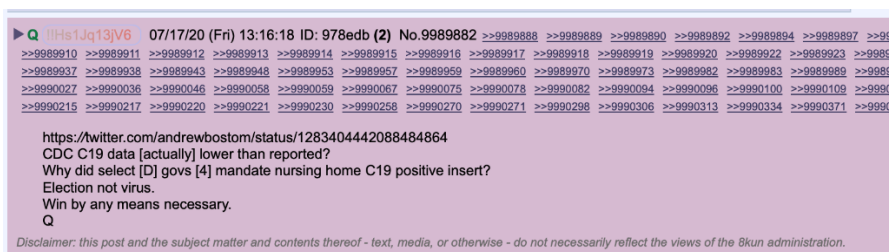
Take, for example, the Q drop on May 29, 2020, with a photo of George Soros and a quote attributed to him that “[d]estroying America will be the culmination of my life’s work.”²⁶⁶ This is a false attribution because George Soros never made such a quote and the drop was debunked by the Poynter Institute, which identified the original quote as

264. See Giovanni Russonello, *QAnon Now as Popular in U.S. as Some Major Religions, Poll Suggests*, N.Y. TIMES (Aug. 12, 2021), <https://www.nytimes.com/2021/05/27/us/politics/qanon-republicans-trump.html> [<https://perma.cc/8WZL-GWRR>]; PUB. RELIGION RSCH. INST., *supra* note 254.

265. See *QAnon, Cults, and Cutlery*, *supra* note 214.

266. Photograph of George Soros, POSTIMAGES.ORG (May 29, 2020, 2:04 PM), <https://posting.cc/ykckLCLCrj> [<https://perma.cc/7SZH-AMAQ>].

allegedly attributed to a 1979 *Newsweek* article.²⁶⁷ *Newsweek* archives do not reveal such a quote, and the Open Society Foundation has denied Soros ever said any such thing.²⁶⁸ And, of course, such a statement, which impugns the patriotism of George Soros, is certainly actionable defamation. Other drops are equally defamatory. Take another drop, made on July 17, 2020. In it, Q links to a Twitter post of a doctor who falsely claims the COVID deaths in 2020 only amounted to 3,322, or less than the number of Texans who died in by influenza, which he states as 11,917 for 2017–2018, and 10,020 in 2019–2020.²⁶⁹ The drop then goes on as follows:²⁷⁰



The clear implication of this post is that the CDC (as embodied by Dr. Fauci) and the four Democratic governors who mandated nursing homes accept patients from hospitals with COVID-19—the governors of New York, New Jersey, Pennsylvania, and Michigan²⁷¹—

267. Samantha Putterman, *No, George Soros Never Said He Made It His Life's Mission to 'Destroy the United States,'* POLITIFACT (Apr. 26, 2019), <https://www.politifact.com/factchecks/2019/apr/26/facebook-posts/no-george-soros-never-said-he-made-it-his-lifes-mi/> [https://perma.cc/C2R9-XPTT].

268. *Id.*

269. @AndrewBostom, TWITTER (July 15, 2020, 7:13 AM), <https://twitter.com/andrewbostom/status/1283404442088484864> [https://web.archive.org/web/20220328171637/https://twitter.com/andrewbostom/status/1283404442088484864]. Texas reports 31,315 deaths due to COVID from this period, significantly in excess of the 3,332 claimed by Dr. Bostom. *Texas COVID-19 Data*, TEX. HEALTH & HUM. SERVS. (2022), <https://www.dshs.texas.gov/covid-19-coronavirus-disease-2019/texas-covid-19-data> [https://perma.cc/6EAY-29WP] (follow “Case and Fatality Demographics Date–Count” hyperlink).

270. /qresearch - Q Research, 8KUN, <https://8kun.top/qresearch/res/9989752.html#9989882> [https://perma.cc/P3EU-P6J5]; see also *The QAnon Timeline: Four Years, 5,000 Drops and Countless Failed Prophecies*, BELLINGCAT (Jan. 29, 2021), <https://www.bellingcat.com/news/america/2021/01/29/the-qanon-timeline/> [https://perma.cc/G7U8-MJ23] (citing *Copy of STORM is HERE Data*, GOOGLE SHEETS, https://docs.google.com/spreadsheets/d/11MhW-P-9eI9dg_cTjut-wfiQGMfL8jfh3SOaLZSBV2g/ [https://perma.cc/ET8H-RB2C] (taken from the 8kun website)).

271. PRESS RELEASE, DEP'T OF JUST., DEPARTMENT OF JUSTICE REQUESTING DATA FROM GOVERNORS OF STATES THAT ISSUED COVID-19 ORDERS THAT MAY HAVE RESULTED IN DEATHS OF ELDERLY NURSING HOME RESIDENTS (Aug. 26, 2020), <https://www.justice.gov>

made this decision, strategically, to win the election and to use COVID-19 to do so. Although such a statement could be considered a protected opinion, opinion is not protected when it relies on false facts, as is the case here.²⁷²

Suing Q for defamation to unmask him, her, or them would not be unprecedented. Indeed, prominent scholars support unmasking lawsuits.²⁷³ Such a theory of a case is not novel, and in fact, would draw directly from the first successful cyberharassment lawsuit ever filed on behalf of two Yale Law students, Jane Doe I and Jane Doe II, who were defamed on the anonymous message board AutoAdmit.com.²⁷⁴ Thirty-nine users made sexually graphic, defamatory statements about the women.²⁷⁵ The Does' complaint was initially filed not only against thirty-nine unnamed individuals but also against the owner of AutoAdmit.com, Anthony Ciolla, for "refus[ing] to delete harassing, offensive[,] and threatening posts aimed at [Doe I and Doe II]."²⁷⁶ Ciolla was fully aware that the posts about Doe I and Doe II were causing injury, but still refused to take any steps to improve the situation.²⁷⁷

The court allowed the two Jane Does to subpoena the internet service provider to obtain IP records covering the pseudonymous users, which one user, AK47, opposed, alleging it violated his First Amendment rights.²⁷⁸ The court found there was a right to anonymous speech under First Amendment case law, and that "[i]nternet anonymity facilitates the rich, diverse, and far ranging exchange of ideas[;] . . . the constitutional rights of internet users, including the right to speak anonymously, must be carefully safeguarded."²⁷⁹ But, the court concluded, "the right to speak anonymously, on the internet or otherwise, is not absolute and does not protect speech that otherwise would be unprotected," including categories such as copyright infringement or

/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted [https://perma.cc/DCR9-KKA5].

272. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18–19 (1990).

273. *See generally* James Grimmelman, *The Unmasking Option*, 87 DENV. U. L. REV. ONLINE 23 (2010).

274. *See Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008).

275. *Id.* at 251.

276. First Amended Complaint at 4, *Doe 1 v. Ciolli*, No. 07-cv-00909-CFD (D. Conn. June 8, 2007).

277. *Id.*

278. *Individuals*, 561 F. Supp. 2d at 253, 257.

279. *Id.* at 254 (quoting *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092, 1097 (W.D. Wash. 2001)).

libel.²⁸⁰ In this case, one of the two plaintiffs, “Doe II[,] ha[d] presented evidence constituting a concrete showing as to each element of a prima facie case of libel against [AK47]” including “statement[s] that impute[d] ‘serious sexual misconduct’ to a person” and Doe II had established harm in the form of harm to her “relationships with her family, friends, and classmates at Yale Law School” which “outweigh[ed] the defendant’s First Amendment right to speak anonymously.”²⁸¹ Ultimately, according to the docket, the cases against numerous of the individual defendants who had defamed Jane Doe I and II were settled.

A suit to unmask Q or to sue their supporters could proceed similarly. First, the plaintiff (a person such as Hillary Clinton, or literally anyone who has been defamed by one of the Q drops) could sue a John Doe and subpoena the platforms that hosted Q. According to the HBO docuseries *Q: Into the Storm*, 8kun had relocated from the Philippines to the United States when its owner, Jim Watkins, was forced to sell a pig farm that was providing income to support the former incarnation of the website when it was known as 8chan.²⁸² The suit could then list Q as a defendant and could also list other users who posted defamatory content as pseudonymous defendants. Although it is possible that some of the users who posted would not meet the definition of actual malice because they believed, however delusionally, that the claims of the Satanist cult were true and thus they did not have the “subjective” state of mind required by contemporary defamation caselaw, it is highly likely based on circumstantial evidence that the original poster, Q, acted with actual malice.

Just like in the *Doe* case, based on the literal content of Q’s posts, the plaintiff could then subpoena Q’s ISP records (insofar as they still exist) and seek to unmask Q because speech that is defamatory is unprotected by the First Amendment and therefore cannot be done anonymously. The ISP provider would then provide notice to Q, who would then, as in the *Doe* case, be given an opportunity to move to quash the subpoena, and could claim various defenses, such as the notion that Q did not act with actual malice because Q was under the delusional belief that Hillary Clinton and others were engaged in such a scheme. These defenses are likely to fail, especially when we

280. *Id.*

281. *Id.* at 252 n.4, 256–57.

282. *Q: Into the Storm*, *supra* note 211.

consider the information Q gave about himself, herself, or themselves: that he, she, or they had access to classified information because they had a Q clearance, which would mean they would know the above facts were false.

The biggest defense to this theory of the case is not the question of falsity or actual malice, especially when evidence of state of mind can be educed through discovery, but the question of whether the posts on 4chan, Reddit, 8chan, or 8kun were meant to be taken literally. The HBO docuseries dedicates part of its time to exploring the question of whether the Q drops were supposed to be part of a “LARP,” in other words a “Live Action Role Play,” where various posters were essentially playing a game that started online, and then spilled over into the real world.²⁸³ If the posts were intended to be a LARP, would they then qualify as defamatory? This defense was used in the trial of several men who were part of a paramilitary group called the Wolverine Watchmen accused of plotting to kidnap Michigan governor Gretchen Whitmore. The jury acquitted these men, though other defendants pled guilty.²⁸⁴

Or suppose the posts were meant to be a form of fan fiction—that Q drops were creating an alternate reality that was not meant to be taken literally, and was instead a form of fantasy, or a way to write a serialized novel where the readers get to take part in the action. Such a defense was successfully employed in an infamous case arising out of New York. Known as the “Cannibal Cop” case, it centered on a police officer who had made posts on an online forum where he had fantasized about murdering and cannibalism which he discussed with users from Pakistan and Germany, had googled the use of chloroform, and transmitted photos of “women he knew—including his wife, her colleagues from work, and some of his friends and acquaintances”—in which he mentioned “committing horrific acts of sexual violence” including “gruesome and graphic descriptions of kidnapping, torturing, cooking, raping, murdering, and cannibalizing various women.”²⁸⁵ He was charged criminally with conspiracy to commit

283. *Id.*; Kotsonis & Chakrabarti, *supra* note 208.

284. Devlin Barrett, *Jury Acquits Two in Michigan Governor Kidnap Plot; Deadlocks on Two Others*, WASH. POST (Apr. 8, 2022, 4:27 PM), <https://www.washingtonpost.com/national-security/2022/04/08/michigan-whitmer-verdict-governor> [https://perma.cc/EN8X-QNQK].

285. *United States v. Valle*, 807 F.3d 508, 512–15 (2d Cir. 2015); *see also* Thea Johnson & Andrew Gilden, *Common Sense and the Cannibal Cop*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 313, 313–14 (2015) (detailing how the “Cannibal Cop” was convicted for conspiracy to kidnap several women based on a series of highly fictionalized conversations on a “dark fetish” fantasy

murder and was ultimately convicted by a jury that did not understand he did not mean his words literally, but rather was engaging in an extended fantasy.²⁸⁶ His conviction was ultimately reversed by the Second Circuit, which held that it was clear the acts described were fantasy because he was engaging in other activities at the time he was allegedly supposed to be doing the violence described, and also that he did not use his government computer for unauthorized purposes, since the Computer Fraud and Abuse Act, at least in the Second Circuit, is aimed at hacking.²⁸⁷

Whether Q was engaging in a role-play or extended fantasy, it would unlikely be a defense to a lawsuit for defamation since the question in any defamation case is whether the statement could bear an interpretation of making a false and defamatory statement about the plaintiff. The test used by the U.S. Supreme Court regarding First Amendment protections for fiction is established by *Hustler Magazine v. Falwell*,²⁸⁸ a case primarily about intentional infliction of emotional distress, but which also involved libel. According to the court in *Hustler*, the parody ad could not “reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated” and, drawing on the history of cartooning, the Court accepted the Court of Appeal’s finding that “the ad parody ‘was not reasonably believable.’”²⁸⁹ According to one author, *Hustler* “constitutionalizes the Tenth Circuit’s analysis” in another case, *Pring v. Penthouse*.²⁹⁰ The *Pring* case—which might come out differently in today’s #MeToo movement—took Miss Wyoming and wrote a story in which she performed “fellatio on her baton, and then upon her coach, causing all to levitate . . . lifting off the stage, to a national television audience.”²⁹¹ The court held this was not defamatory because “the charged portions in context could [not] be reasonably understood as describing the actual facts about the plaintiff or the actual events in which she participated.”²⁹²

website).

286. Johnson & Gilden, *supra* note 285, at 324–28.

287. *Valle*, 807 F.3d at 516–28.

288. 485 U.S. 46 (1988).

289. *Id.*

290. Glenn J. Blumstein, *Nine Characters in Search of an Author: The Supreme Court’s Approach to “Falsity” in Defamation and Its Implications for Fiction*, 3 UCLA ENT. L. REV. 1, 25 (1995); *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

291. Blumstein, *supra* note 290, at 26.

292. *Pring*, 695 F.2d at 442.

In *Milkovich v. Loraine Journal*,²⁹³ a case involving a newspaper article that implied a high school coach had committed perjury under oath, the Supreme Court held that the “language” or the “general tenor” of the piece in question must “negate the impression that the writer was seriously maintaining [the defendant] committed” the acts depicted.²⁹⁴ The Court specifically looked at the type of language used by the piece and noted that the article did not contain “loose, figurative, or hyperbolic language” and that the “clear impact” of the nine sentences in question was the implication that the defendant had committed perjury.²⁹⁵ Importantly, however, the Court in reaching this determination relied on evidence that was “sufficiently factual to be susceptible of being proved true or false” based on comparing testimony the plaintiff made “before the OHSAA board with his subsequent testimony before the trial court” and that “unlike a subjective assertion, the averred defamatory language is an articulation of an objectively verifiable event.”²⁹⁶

It is quite clear from examining the Q drops, not to mention the reaction of the Q community, that even though they were not “reasonably believable,” many people did believe them, that they were intended to be believed, and that they “averred defamatory language in an articulation of an objectively verifiable event.”²⁹⁷ Thus, while Q may have an argument that the posts were intended to be a LARP or fan fiction, this defense is not likely to prevail, and it is unlikely a court (as opposed to a jury) would discount the fact that millions of readers *did* take the posts literally, so literally in fact that they acted upon them to stage an insurrection. The case is likely to yield the same result as the cyberharassment case brought by the two Jane Does against Ciolla, and could lead to the unmasking of Q, at least insofar as the internet service providers have still preserved the records.²⁹⁸

As for other conspiracy theories and extremist groups such as the Oath Keepers or the Proud Boys, defamation law might be able to

293. 497 U.S. 1 (1990).

294. *Id.* at 21.

295. *Id.*

296. *Id.* at 21–22.

297. *Milkovich*, 497 U.S. at 21–22.

298. *See supra* notes 274–281 and accompanying text. Likely, plaintiff(s) in the suit might have to subpoena several defendants. 8kun is still operational, but other sites might have deleted the posts in question. An internet archive contains Q drops right near the period of the election, and the key question would be whether other sites like 4chan and Reddit still have the ISP records of Q, and whether 8chan, which became 8kun, still has its records. As of February 13, 2023, the posts still appeared on 8kun.

assist those like Mr. Epps who have been targeted with misinformation in the same way the Sandy Hook parents were, namely made the subject of wide-ranging news articles and other media concocting false stories about their identities and subjecting them to the opprobrium of the public and individuals who genuinely believe the fictitious stories planted against them. As discussed in the conclusion, perhaps the best mechanism for individuals such as this is to sue platforms in part responsible for the creation of the speech against them, and to seek, as suggested below, widespread corrections that can attempt to restore their reputations.

II. CRACKING THE CODE: DEFAMATION OFFENSE TO UNRAVEL MISINFORMATION AND DISINFORMATION

Given the spread of misinformation and disinformation through both social media and mainstream media outlets, Part I of this Article posits that it is time to stop thinking about lawsuits for defamation as solely something the media bar must respond *to*—instead of something the media bar, or at least lawyers for the media bar—can respond *with*. This part explains how defamation lawsuits are perfectly consistent with the goal of promoting what the First Amendment nudges, a concept first developed by law professors Cass Sunstein and Richard Thaler that is encapsulated by the theory of “choice architecture.”²⁹⁹ In

299. As I co-wrote in an amicus brief while at Yale Law School, “‘Choice ‘architecture’ loosely refers to the organization of the context in which people make decisions, based on the insight that people make choices ‘in an environment where many features, noticed and unnoticed, can influence their decisions.’” Brief of *Amici Curiae* Constitutional, Administrative, Contracts, & Health Law Scholars in Support of Respondents at 21–22, *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017) (No. 15-1391) (quoting Richard H. Thaler et al., *Choice Architecture* (April 2, 2010), in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* 428–39 (Eldar Shafir ed., 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583509); see RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (2008). Indeed, “research bears out the effectiveness of steering individual decisions by altering the choice architecture in which those decisions take place. For example, the institution of a cap-and-trade mechanism to control acid rain is believed to have been far more successful than a command-and-control mechanism would have been in ensuring compliance with emissions regulations, while at the same time saving hundreds of millions of dollars.” Brief of *Amici Curiae* Constitutional, Administrative, Contracts, & Health Law Scholars in Support of Respondents, *supra* note 299, at 22 (citing THALER & SUNSTEIN, *supra* note 299, at 187–88.) “Take[,] for example, mandatory opt-in/opt-out regulations. Several states have enacted laws requiring certain employers to automatically enroll employees in voluntary state-managed retirement plans and automatically deduct contributions to the plans from employees’ earnings, unless the employees explicitly opt out of the plan. Under these laws, employers must require employees to ‘opt out’ and are prohibited from presenting employees the option to ‘opt-in,’ even though ‘opting in’ and ‘opting out,’ ‘are just two ways of framing the same . . . information.” *Id.* at 24. “Other examples of framing regulations [are]

other words, these economic incentives could serve as a regulation on the “marketplace of ideas” concept, and through defamation lawsuits, media lawyers could help induce settlements on the part of media companies that would then release the “truth” in the form of meaningful corrections run on television and in other media. Further, courts have the inherent power to order the release of information obtained in discovery in the form of internal documents and emails, depositions, and responses to interrogatories, thus allowing media lawyers to use defamation lawsuits in a new way—not to suppress information, but to release it, and counterbalance the record. The overriding goal of these suits would not be a multimillion or billion-dollar award of damages. Instead, they would function as a mechanism of letting the truth out, as it were, to restore reputation, and to help combat the widespread misperception of reality among large numbers of the American populace.

This part presents a short analysis of these claims to show they are meritorious, and then suggests an original angle on the suits: That they can be used to reveal the truth through information obtained via discovery, which is likely to contain hard proof that the actors knew the statements were false at the time they made them. This part suggests that, in keeping with the First Amendment goal of promoting a marketplace of ideas, the best corrective action for potential plaintiffs is not necessarily to pursue a case for damages, but rather to seek release of discovery information as a means of using speech to counter-speech.

A. *Defamation 2.0 Mechanics*

Aside from having ideal plaintiffs, Defamation 2.0 lawsuits brought by media lawyers would differ tactically from typical defamation lawsuits that were historically designed to “economically lynch” or bankrupt media companies, and thereby censor or suppress information. The goal of Defamation 2.0 lawsuits, as characterized by this

prohibitions on offering discounts for harmful products. . . . Indeed, the First Circuit held just this in refusing to apply First Amendment scrutiny to such a prohibition designed to curb underage smoking. See *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 77–79 (1st Cir. 2013). As the First Circuit properly recognized, the law implicated important legislative prerogatives: the prerogative to protect the health and safety of adolescents. See also[] *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, 27 F.[Supp.]3d 415, 424 (S.D.N.Y. 2014) (applying no First Amendment scrutiny to ban on selling tobacco products below the merchant's stated price because the 'offers that are restricted by the ordinance are offers to engage in an unlawful activity').” *Id.* at 25.

Article, is twofold. First, they aim not to suppress truth, but to promote it, and, secondly, they rely on economic nudging tactics to regulate the marketplace of ideas.

i. Difference in Ends: The Pursuit of Truth

Defamation is often used to silence critics. The goal of many lawsuits has been to suppress true (or substantially true) information relevant to the public. The goal of the defamation lawsuits contemplated by this Article is entirely different in kind and in magnitude. First, consider by contrast, the suits against Fox described in this Article. Are the statements the suits would target either true, substantially true, or protected statements of opinion? Although misinformation may contain a minute kernel of truth (which is why it can be believed), that does not make a statement substantially true. For example, the notion that Smartmatic is a “Venezuelan company that was founded and funded by corrupt dictators from socialist and communist countries” has a *kernel of truth* to it insofar as the company has operated in Venezuela (as it has operated in many countries around the world), but it pulled out of Venezuela when the government of Venezuela refused to certify the results obtained by Smartmatic machines.³⁰⁰ We can thus see, in Smartmatic’s prior operations in Venezuela, the origin of the theory about Smartmatic’s founding and funding. But equally the statement is capable of being disproven with sources such as contracts (or lack thereof) with the Venezuelan government, testimony of company executives, and press statements made with respect to the election after which Smartmatic ceased doing business in Venezuela. The magnitude of difference between these two claims—that Smartmatic is a Venezuelan company intimately connected to corrupt dictators and that Smartmatic operated for a period of time in Venezuela before it pulled out—is cavernous.

ii. Difference in Means: Nudging by Media Lawyers

The second difference I propose in this Article is the difference in means. While defamation lawsuits have historically been used as a form of economic lynching, boycotting, or cancel culture, the suits this Article proposes would have as their underlying goal correcting the marketplace of ideas protected by the First Amendment via the choice architecture strategy that economically nudges media lawyers on the

300. See *supra* note 152 and accompanying text.

other side of the lawsuit to encourage their clients to engage in good behavior rather than seeking to cripple the media outlet outright. Namely, the defamation lawsuits against Fox or purveyors of the Big Lie would seek *not* to bankrupt media outlets, but rather to voluntarily encourage settlement or to expose information obtained via subpoenas under Federal Rule of Civil Procedure 26 or state law equivalents.

First, instead of pursuing a case for damages to economically bankrupt their opponents, media lawyers can encourage offending media companies, as part of voluntary settlements, to issue meaningful corrections that take up as much airtime as the original defamatory content. Corrections and retractions are a standard practice for traditional media outlets when they make mistakes. Take, for example, the 2014 *Rolling Stone* UVA rape case. There, *Rolling Stone* published an article entitled *A Rape on Campus* about a woman named Jackie who claimed she was the victim of a gang rape at a fraternity party, and the culture at UVA's campus that allowed her alleged rapists to escape without sanction.³⁰¹ The story soon came under fire, as holes in the victim's narrative began to surface, including the fact that on the date the rape allegedly occurred, the fraternity in question had not held a party; that the individual who had allegedly instigated the rape could not be located (after the victim failed to provide a last name); and that the friends who allegedly corroborated Jackie's story indicated they disagreed with her version of events but had not been contacted by *Rolling Stone*.³⁰² The fraternity, Psi Kappa Psi, sued *Rolling Stone* for defamation, and *Rolling Stone* not only settled the case for \$1.25 million (as opposed to the \$25 million in damages sought),³⁰³ but also issued an apology and retraction.³⁰⁴ *Rolling Stone* turned over all the story notes and archives to the Columbia Graduate School of Journalism to conduct a postmortem of how and why the magazine had erred

301. Sabrina R. Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <https://web.archive.org/web/20141119200349/http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119?page=7>.

302. Sheila Coronel et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report: An Anatomy of a Journalistic Failure*, ROLLING STONE (Apr. 5, 2015), <https://www.rollingstone.com/culture/culture-news/rolling-stone-and-uva-the-columbia-university-graduate-school-of-journalism-report-44930> [<https://perma.cc/Y7FP-NP86>].

303. Sydney Ember, *Rolling Stone to Pay \$1.65 Million to Fraternity Over Discredited Rape Story*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/business/media/rape-uva-rolling-stone-frat.html>. [<https://perma.cc/J926-8L82>].

304. Will Dana, *A Note to Our Readers*, ROLLING STONE (Dec. 5, 2014), <https://www.rollingstone.com/culture/culture-news/a-note-to-our-readers-72612/> [<https://perma.cc/UL35-UM94>] (reflecting the apology issued by *Rolling Stone*'s managing editor).

in its coverage, and then published the searing report notating all the failings in the story, and how that the story had departed from journalistic standards on *Rolling Stone's* website.³⁰⁵ The report was longer than the original story itself.³⁰⁶ *Rolling Stone* also retracted the story, took it down from its website, and issued an apology.³⁰⁷

Rolling Stone is not the lone example of media outlets issuing apologies, retractions, or corrections. For example, *Outside* in September 2017 wrote a critical feature about the *Berserk*, a Norwegian “ship that went missing in 2011 off the coast of Antarctica with three men abroad” that came close to blaming the “expedition leader, Jarle Andhoy” for their deaths.³⁰⁸ The expedition leader took issue with the article, and reached out to *Outside*, pointing to “some factual errors,” critiquing *Outside* for its portrayal of him, and alleging that “the story left out crucial information about the days before the ship’s disappearance.”³⁰⁹ As a result, *Outside's* editor in chief interviewed the ship leader with his lawyer “to better understand the new details the two have gathered” and published the account in a full-length interview with the ship leader and his lawyer that sought to answer these lingering questions.³¹⁰ It also issued corrections that ran with the original version of the story, including removing a disputed quote that was attributed to the ship leader.³¹¹ And, of course, the *Times* issued an apology in the canonical *New York Times v. Sullivan* case, admitting to its errors before it was taken to trial under an Alabama law that held the apology against the *Times*.³¹²

In contemporary cases, too, an apology appears to be a realistic possibility. In the Georgia election worker case against OANN, although OANN did not give equal coverage to the side of the election workers, it issued a thirty-second statement retracting its defamatory remarks as part of the settlement.³¹³ And on August 3, 2022, Alex

305. Coronel et al., *supra* note 302.

306. The report is about 16,000 words, and the original story is 9,000. Ember, *supra* note 303.

307. Will Dana, *supra* note 304.

308. Blair Braverman, *The Polar Expedition That Went Berserk*, OUTSIDE MAG. (Sept. 15, 2017), <https://www.outsideonline.com/outdoor-adventure/exploration-survival/rough-passage> [https://perma.cc/J23H-CHEN]; Christopher Keyes, *What Really Happened to the 'Berserk'?*, OUTSIDE MAG. (May 17, 2021), <https://www.outsideonline.com/outdoor-adventure/exploration-survival/what-really-happened-berserk/> [https://perma.cc/U9V2-P55T].

309. Keyes, *supra* note 308.

310. *Id.*

311. See Braverman, *supra* note 308.

312. Lewis, *Annals of Law*, *supra* note 65, at 53.

313. Omar Abdel-Baqui, *OAN Walks Back Voter Fraud Claims as Part of Defamation Settlement*, WALL ST. J. (May 10, 2022, 4:03 PM), <https://www.wsj.com/articles/one-america-news->

Jones as part of the damages portion of one of the Sandy Hook trials in which he was found guilty in a default judgment of defaming the parents of a child killed in the attacks, said in open court that the attacks on Sandy Hook were real, retracting years and millions of dollars' worth of coverage on his website and podcast Infowars that claimed the shooting was a hoax and that the parents were paid actors.³¹⁴

Here, the economic nudge, as conceived by this Article, would be to persuade media companies that have disseminated the Big Lie or other conspiracy theories that by issuing true and meaningful corrections for defamatory content the offending entity can avoid massive monetary liability that could crush the company and pose an existential threat to its survival. Not only that, but settlements could also avoid a lengthy appeals process where these companies are only likely to incur further lawyers' fees without changing the lower court outcome. While the offending outlets may still be obligated to pay some damages or attorneys' fees under a voluntary settlement, the main sweetener to induce agreement is that they avoid catastrophic bet-the-company outcomes which could shutter them for good.

Thus, settlement here is a win-win solution that both preserves the media company's existence and allows coverage that will lead to speech on the very networks that viewers who have misapprehensions about the Big Lie or conspiracy theories rely on, so they could then understand these theories as categorically incorrect. The importance of media lawyers to promote settlement—a completely atypical solution to a defamation lawsuit usually fought to the death—would be to use the substantial expertise of media lawyers in separating fact from fiction. Media lawyers' roles require them to vet articles, books, and movies under a process known as prepublication review where they test the content at issue to ensure it is not defamatory. Thus, given this expertise, they are perfectly positioned to persuade their in-house counterparts at media companies that rather than face a staggering judgment that could potentially bankrupt the organization, they have the alternative of issuing retractions and apologies that take up equal airtime to the content that was originally released.

walks-back-voter-fraud-claims-as-part-of-defamation-settlement-11652212946 [https://perma.cc/B7BT-KL2T].

314. 6abc Philadelphia, *Alex Jones Concedes Sandy Hook Elementary School Attack Was '100% Real,'* YOUTUBE (Aug. 3, 2022), <https://www.youtube.com/watch?v=vX5WaqfrPUw> [https://perma.cc/T4VH-UC2U].

Indeed, this is the request Smartmatic made in its demand letter to Fox. Specifically, Smartmatic demanded “a full and complete retraction of all false and defamatory statements and reports published by Fox” that “must be done with the same intensity and level of coverage” used to disseminate the information in the first place, including “tak[ing] all necessary steps to preserve communications, videos/recordings, documentation, drafts, and all other material[s]” related to the false information.³¹⁵ Thus, this approach uses the notion of the marketplace of ideas and of counterspeech in the same spirit as the Federal Communications Commission’s “equal time” rule.³¹⁶

Secondarily, media lawyers can use defamation lawsuits to release information obtained in discovery to promote counterspeech by either posting the materials themselves once they have been obtained or requesting the court adjudicating these cases to post them under its inherent power. For example, Dominion subpoenaed—specifically, using a subpoena duces tecum—Sidney Powell, Rudy Giuliani, and Mike Lindell in connection with its defamation suit against Fox.³¹⁷ These individuals will be required to divulge the contents of their emails, text messages, and any other written correspondence (including from personal accounts and apps like Telegram) to and from Fox about Dominion and the election more generally.³¹⁸ It is highly likely that these subpoenas will produce some form of a smoking gun—namely, evidence that Fox was aware that the misinformation propagated on its airwaves consisted of lies and falsehoods. Once this information is obtained by Dominion, it could theoretically be kept in Dominion’s coffers. That possibility follows naturally from the holding of a different Supreme Court case, *Seattle Times Co. v. Rhinehart*,³¹⁹ under which information obtained in discovery is not generally considered public and can be placed under a protective order through Federal Rule of Civil Procedure 26(c) (or state law equivalent).³²⁰

315. Smartmatic Counsel Letter, *supra* note 152, at 2.

316. See Andrew Serros, *All Things Not-So Equal*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2003/all-things-not-so-equal/> [<https://perma.cc/X9BX-EQT8>].

317. See Notice of Subpoenas at 1, *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD (Del. Super. Ct. June 28, 2021).

318. See, e.g., Ex. 1 to Plaintiffs’ Notice of Subpoenas, *US Dominion*, No. N21C-03-257 EMD (Del. Super. Ct. June 28, 2021) (notice of the subpoena for the Fox-Giuliani correspondence).

319. 467 U.S. 20 (1984).

320. *Id.* at 31. *Seattle Times* concerned Washington Superior Court Rule 26(c). “The Washington Rule that provides for the scope of civil discovery and the issuance of protective orders is virtually identical to its counterpart in the Federal Rules of Civil Procedure.” *Id.* at 31 n.14.

These sealing orders are commonly issued in high-profile cases—a legitimate fear that is especially prominent in libel suits. The special worry stems from the tendency of juries in libel cases to award particularly high damages. For their part, libel lawyers view as their top priority cutting off these cases before they reach discovery; and failing that, convincing appellate courts to reverse or reduce these massive damage awards.³²¹ But what if, for a hypothetical lawsuit against Fox, the key driver of the lawsuit was not to push for a massive damages award but rather to obtain and publicize damaging discovery information that would otherwise be shielded by a protective order? One prominent theory of the First Amendment is that it protects a marketplace of ideas where the best ideas ultimately prevail.³²² The marketplace of ideas theory has been greatly tested, especially by behavioral psychologists, who suggest, at the intersection of behavioral psychology and law and economics, that marketplaces can become distorted and affirmatively require regulation so as not to have a market meltdown.³²³ In this case, could not the court serve as a kind of information regulator, by—under existing law, in which judges have the inherent power to superintend their own dockets—ordering the information obtained in discovery released in view of the massive public interest at stake in the information? Courts are especially credible sources, and if the sources of information are government documents interpreted by judges, they can be used, in tandem with the media itself and with individuals committed to reach the part of the populace that has embraced misinformation and disinformation, just as the court in the

321. Professors Smolla notes that although juries in libel suits—when libel suits even make it to a jury—are prone to award large damages, they equally note that the vast majority of jury verdicts are overturned on appeal, and that damages are reduced when they are not. SMOLLA, *supra* note 66, at 6.

322. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

323. See Jeremy K. Kessler & David E. Pozen, *The Search for An Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1980, n. 127 (2018) (citing Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1163 (2015) (“[A] considerable amount of existing empirical research . . . tends . . . to justify skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones.”)); cf. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 910–11 (2010) (“[T]he persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample.”).

recent Mar-a-Lago FBI search warrant case released the warrant for public scrutiny after the FBI petitioned for it to do so.³²⁴

Ideas for reforming Federal Rule of Civil Procedure 26(c) have been bandied about for years in the context of making information obtained via discovery public that was kept private and that led to various public health and safety disasters—from manufacturing defects in automobiles to complications from faulty plastic surgery. During the same time as the Senate was considering legislation to address the problem of court secrecy, the Federal Judicial Center (FJC) considered various amendments to Rule 26(c) to get at the same issue at both a Committee and Advisory Committee level.³²⁵ The proposals included introducing standards to modify or dissolve protective orders to make them easier to lift, as well as proposals to require courts to explicitly balance the private and public interests in protective orders before entering one.³²⁶ Commenters suggested numerous other solutions, but ultimately no major changes to Rule 26(c) were adopted.³²⁷ The Committee minutes and comments reflect an inability to reach a consensus on a proposed solution, but also a belief by certain members that there was no evidence of a problem, despite the massive number of anecdotes presented by public interest organizations like Trial Lawyers for Public Justice (now, Public Justice), the Reporters Committee for Freedom of the Press, and others.³²⁸

At hearings, as in the Senate, the FJC received pushback to these anecdotal claims. The Associate Dean of the University of Michigan School of Law submitted a letter stating that:

324. See Order to Unseal at 1, *In re Sealed Search Warrant*, No. 22-8332-BER (S.D. Fla. Aug. 12, 2022).

325. See *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Fed. Jud. Conf. Civ. Advisory Comm. on Civ. Rules*, 103rd Cong. 4–8 (Apr. 1994) [hereinafter FJC Advisory Committee], https://www.uscourts.gov/sites/default/files/fr_import/CV04-1994-min.pdf [<https://perma.cc/6VX8-FKFP>] (considering proposed amendments); *Hearing on Proposed Amendments to the Federal Rules of Practice and Procedure Before the Fed. Jud. Conf. Standing Comm. on Rules of Prac. & Proc.*, 104th Cong. 7–8 (Jan. 1995) [hereinafter FJC Standing Committee], https://www.uscourts.gov/sites/default/files/fr_import/ST01-1995.pdf [<https://perma.cc/N6EM-68B2>] (reviewing proposed amendments and voting unanimously to send amendments to Judicial Conference for approval).

326. FJC Advisory Committee, *supra* note 325, at 4–7.

327. See FED. R. CIV. P. 26(c).

328. Memorandum from Hon. Patrick E. Higginbotham, Advisory Comm. on Civ. Rules Chair, to Hon. Alicemarie H. Stotler, Standing Comm. on Rules of Prac. and Proc. Chair 49–61 (May 17, 1996), https://www.uscourts.gov/sites/default/files/fr_import/ST1996-06.pdf [<https://perma.cc/G2TD-PWP6>].

There is no indication that the fruits of private discovery are a necessary means of accomplishing public information. The existence of the litigation and the underlying claims can be made public, and there many alternative means of gathering information about dangers to public health and safety. If in a rare case disclosure of discovery material is the only means of accomplishing an important addition to public knowledge, Civil Rule 26(c) does not stand in the way.³²⁹

Numerous members of the defense bar and industry experts echoed this sentiment. At one point the Committee itself sent a proposal to the Judicial Conference for approval that would have made clear that non-parties could intervene for purposes of questioning a protective order, expanded the grounds for dissolving a protective order, and provided for a protective order on stipulation of the parties,³³⁰ but it appears these changes were not adopted as they are not part of the current rules.³³¹ There was opposition by at least some members of the plaintiffs' bar, who feared that these changes might inadvertently heighten the standard necessary to dissolve a protective order, and others who feared that these changes would limit trial judges' discretion over their dockets in the case of allowing stipulated protective orders.

But these reform proposals are irrelevant to the *existing* power federal judges possess as part of the court's inherent power to superintend its docket,³³² and the solution this Article outlines, does not propose any change in existing doctrine, so much as an invitation to courts—including to the courts in the news network cases—to exercise their inherent power over the protective order seeking to keep secret the information obtained by these subpoenas duces tecum, and with respect to potential depositions by the key players at Fox and Powell, Giuliani, and Lindell. The goal would be for courts to make

329. Letter from Edward H. Cooper, Assoc. Dean, Univ. of Mich. L. Sch., to Hon. Sam C. Pointer, Jr., Dist. Judge, N. Dist. of Ala. (Oct. 23, 1992) (on file with Yale Law School).

330. FJC Standing Committee, *supra* note 325, at 7–8; see FJC Advisory Committee, *supra* note 325, at 5–7.

331. See FED. R. CIV. P. 26(c).

332. Binding Supreme Court caselaw from the media context establishes the “inherent power of a federal court to sanction a litigant for bad-faith conduct,” including when the parties have perpetrated a “fraud upon the court.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, 42 (1991). The Court went on to rule that statutory power did not displace the inherent and “implied power[.]” that “necessarily result to our Courts of justice from the nature of their institution.” *Id.* at 43. A Court’s “inherent powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Id.*

these documents public, and to do so in a way that combats misinformation. The court could order the documents released to the court docket, which would then allow the plaintiffs to broadcast the information in a manner that would reach the viewers most likely to have been misinformed. In sum, under the court's existing inherent power, the court could order information obtained in discovery to be released as part of the public interest.

B. Defamation 2.0 Defense

Finally, there are the objections put forth by media lawyers to Defamation 2.0. First, that even meritorious defamation lawsuits should not be pursued because the risk of creating bad law is substantial given the animosity, particularly by younger jurists, toward the press. Second, there is the fear that, if pursued, these lawsuits could ultimately weaken protections for the media, a cost that outweighs the societal benefit of taking down misinformation or disinformation, perhaps especially if the categories of misinformation and disinformation are enormous. Does not allowing suits as an offensive tool to combat disinformation and misinformation essentially weaponize defamation law—hence the title of this paper, “Defamation 2.0”—and turn it into something it was never intended to do? And does not the law of unintended consequences dictate that it will one day be used *against* the mainstream media to undermine the precious protections of *New York Times v. Sullivan*, which is already under attack? And furthermore, since the American public already lives in information silos anyway, who is to say that the information unearthed by the lawsuits this Article proposes could actually *reach* the intended audience or audiences—particularly given that the algorithms described by Yaël Eisenstat, the former high-ranking Facebook official, are designed to feed these users information that comports with (and does not refute) theories like the Big Lie.³³³ To sum up the dilemma with one question: Does not the cost outweigh the benefit of this new litigation strategy?

First, under existing law, there are robust protections for the press against frivolous lawsuits and their potential to produce jury awards of damages against investigative journalists and other responsible media outlets; these are fears members of the media bar have privately expressed to me. While it is true that there is a hostility among some—

333. See *supra* notes 84–87 and accompanying text.

such as Justices Thomas and Gorsuch³³⁴ and various legal academics³³⁵—who have argued *Sullivan* was wrongly decided and needs to be revisited, most legal academics and media scholars believe *New York Times v. Sullivan* helped turn the tide against frivolous suits for defamation and was correctly decided. Indeed, its fiercest critics typically are on the progressive front who argue that the suit did not go far enough and that Justice Black’s endorsement, in his *Sullivan* concurrence, of absolute immunity for the Fourth Estate should be adopted, given the constitutional import of criticizing the government and engaging in robust public debate. Other scholars have argued for an expansion of the Press Clause under the First Amendment to suggest that media, and in particular journalists of color, need still greater protections from lawsuits lobbed at them after the waves of nationwide protests during Trump’s presidency and in view of the Black Lives Matter movement.³³⁶ In response to Black Lives Matter protests, some states such as New York have increased protections for the press in the form of enacting anti-SLAPP statutes, which are designed to combat suits aimed at censoring.³³⁷ Still other states and localities are reforming their relationships with the press and are looking to streamline their guidelines over how the press is treated during times when viral videos have changed the way society communicates information, recognizing the role of the “citizen-journalists” and the increasing recognition of a

334. *McKee v. Cosby*, 139 S. Ct. 675, 676, 682 (2019) (Thomas, J., concurring) (calling for the Court to re-examine the “original meaning” of the First Amendment with a return to state control of defamation law, classifying *New York Times v. Sullivan* and its progeny as “policy-driven decisions masquerading as constitutional law,” and asserting that the Court should “reconsider [its] jurisprudence in this area”); *Berisha v. Lawson*, 141 S. Ct. 2424, 2430 (2021) (Gorsuch, J., dissenting) (expressing that the *Times* standard should be overturned in light of changes to media and disinformation).

335. Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 817–18 (1986) (arguing that *New York Times v. Sullivan* was correctly decided at the time, but that “[o]n balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does the *New York Times* rule that has replaced it”).

336. See STEPHEN GILLERS, *JOURNALISM UNDER FIRE: PROTECTING THE FUTURE OF INVESTIGATIVE REPORTING* (2018) (advocating a reinvigorated Press Clause under the First Amendment to the U.S. Constitution to prevent abuses of investigative journalists); Tyler Valeska, *A Press Clause Right to Cover Protests*, 65 WASH. U. J.L. & POL’Y 151, 166–67 (2021) (advocating for a “functional test” to decide whom the Press Clause protects in the wake of BLM protests that have resulted in violence against the media).

337. See, e.g., N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2020) (New York’s anti-SLAPP law).

so-called right to record police—which most of the odd numbered circuits have adopted.³³⁸

The main cost of libel suits, as Professor Smolla points out, is the cost of defending them—a cost that can be defrayed by the award of attorneys’ fees recoverable under anti-SLAPP laws. As of April 2022, anti-SLAPP jurisdictions comprised “32 states and the District of Columbia”³³⁹—including an aggressively protective statute passed by the media hub of the East Coast, New York.³⁴⁰ These statutes allow defendants, in most instances, to “make[] a motion to strike because it involves speech on a matter of public concern,” which then shifts the burden to the plaintiff to prove they “will prevail in the suit” because they have “evidence that could result in a favorable verdict.”³⁴¹ While these statutes vary in coverage, “[f]or the most part anti-SLAPP laws are broad enough to cover SLAPP suits aimed at silencing or retaliating against journalists or news outlets for critical reporting.”³⁴² They help SLAPP defendants secure a “quick dismissal before the costly discovery process begins, permitting defendants who win their anti-SLAPP motions to recover attorney’s fees and costs, automatically staying discovery once the defendant has filed an anti-SLAPP motion, and allowing defendants to immediately appeal a trial court’s denial of an anti-SLAPP motion.”³⁴³ Some have argued that these anti-SLAPP laws are insufficient and that a federal law is called for, particularly because defamation cases have historically taken years to resolve, wasting precious newsroom time and resources.³⁴⁴

But, in the grand scheme, while there have been episodes of both small and big media outlets being sued for defamation, in general this has not led to closure of news outlets. Even the infamous suit against the blog *Gawker*, which published excerpts of a graphic sex tape involving Hulk Hogan that led to a jury award of \$115 million, was not

338. *Recording Police Officers and Public Officials*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2021), <https://www.dmlp.org/legal-guide/recording-police-officers-and-public-officials> [<https://perma.cc/K9AJ-T3V3>].

339. Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-anti-slapp-guide/> [<https://perma.cc/8BP8-R3YE>].

340. *See* N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2020).

341. REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 53.

342. Vining & Matthews, *supra* note 339.

343. *Id.*

344. *See, e.g.*, Joe Mullin, *It’s Time for a Federal Anti-SLAPP Law to Protect Online Speakers*, ELEC. FRONTIER FOUND. (Sept. 15, 2022), <https://www EFF.org/deepinks/2022/09/its-time-federal-anti-slapp-law-protect-online-speakers> [<https://perma.cc/PF2L-G9SR>].

based on a cause of action for defamation, but rather on the torts of unwarranted invasion of privacy and intentional infliction of emotional distress.³⁴⁵ The *New York Times*, for example, has an immaculate record in defamation lawsuits.³⁴⁶ Although a case Sarah Palin recently filed proceeded to trial in front of Judge Rakoff of the Southern District of New York,³⁴⁷ the *New York Times* ultimately prevailed (though Palin has indicated she plans to appeal).³⁴⁸ The *New York Times* has not lost a libel case in over fifty years.³⁴⁹ Furthermore, even though there are frivolous libel suits against smaller outlets, including against a blogger I represented out of upstate New York who wrote critical coverage of a construction company's relationship to the town of Geneva, New York,³⁵⁰ the media defense bar has coordinated the formation of law school clinics and other organizations that help support journalists and others sued for defamation.³⁵¹ In sum, while there are frivolous suits for defamation—and under former President Trump such suits were a common tactic to silence opponents—there are also powerful countermeasures to prevent silencing, and to aid the media bar, including a network of media law clinics and the Reporter's

345. See First Amended Complaint & Demand for Jury Trial ¶¶ 17–43, *Bollea v. Clem*, No. 12012447-CI-011 (Fla. Cir. Ct. Dec. 28, 2012); Nick Madigan, *Jury Tacks On \$25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html> [https://perma.cc/Q7AH-6ZA2] (describing the jury's \$115-million-dollar award for compensatory damages plus an excess of \$25 million in punitive damages).

346. David McCraw, *How a Times Court Decision Revolutionized Libel Law*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/reader-center/libel-law-explainer.html> [https://perma.cc/P7KG-AVRU].

347. Niraj Chokshi, *Sarah Palin's Suit Against New York Times Will Go to Trial, Judge Rules*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/business/media/sarah-palin-defamation-new-york-times.html> [https://perma.cc/S2RJ-CDLL].

348. Jeremy W. Peters, *Sarah Palin's Libel Claim Against the Times Is Rejected by a Jury*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/business/media/new-york-times.html> [https://perma.cc/5AWC-GQJR].

349. McCraw, *supra* note 346.

350. James Dean, *Law Student Plays Key Role in Blogger's Defamation Defense*, CORNELL CHRON. (May 14, 2021), <https://news.cornell.edu/stories/2021/05/law-student-plays-key-role-bloggers-defamation-defense> [https://perma.cc/39QU-36NP]; Steve Buchiere, *Massa Construction Withdraws Appeals of Court Decisions Related to Defamation Suit Against Former Blogger Jim Meaney*, FINGER LAKES TIMES (Feb. 7, 2023), https://www.fltimes.com/news/massa-construction-withdraws-appeals-of-court-decisions-related-to-defamation-suit-against-former-blogger-jim/article_b1af7d45-7368-5c11-bc97-2bbe99a95d68.html [https://perma.cc/UHJ2-FJL8].

351. E.g., *About the Knight Institute*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/page/about-the-knight-institute> [https://perma.cc/ZK38-TXUD].

Committee for Freedom of the Press³⁵² that have agreed to take on these claims.

Second, there are other ideas that the media defense bar has not widely considered, almost because it seems to have forgotten about them. Rule 11 allows for the imposition of monetary sanctions in cases where there is a lack of good faith basis to bring the lawsuit in question—a measure that can and should be more aggressively pursued by media lawyers facing frivolous lawsuits.³⁵³ Consider, for example, Steven S. Biss, counsel of record for the Flynn family in its lawsuit against CNN³⁵⁴ and opposing counsel in one of my cases defending a defamation claim brought by Devin Nunes; Biss filed five “high-profile” defamation suits on Nunes’s behalf against media companies and critics.³⁵⁵ A Virginia lawyer who became a notorious player in the defamation world tied to Republican strategists, Biss has already been chided by a federal judge for filing a lawsuit on behalf of an individual he had never talked to and has been the target of complaints with the state bar, including for harassing and threatening litigation tactics.³⁵⁶ Biss has also been accused of making “unethical requests” for testimony from Biss’s “legal adversaries” and was suspended from practicing law in Virginia beginning in 2008.³⁵⁷

Rule 11 sanctions are appropriate in cases involving lawyers who employ Biss-like tactics, and many of the defamation lawsuits filed against media outlets by politicians unhappy with their coverage are tied to a cottage industry of lawyers willing to bend the rule of law to suit their clients. These lawyers, like the lawyers behind the lawsuits illegitimately seeking to prove the Big Lie, have failed. Indeed, one court has already granted Rule 11 sanctions in a lawsuit filed against Dominion on behalf of a group of individuals who sought to sue the voting machine company “on behalf of all American registered

352. See generally *What We Do*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/what-we-do/> [<https://perma.cc/G79U-UMH6>] (describing the Reporter’s Committee for Freedom’s work in courts regarding issues involving First Amendment, press freedom, and freedom of information).

353. See FED. R. CIV. P. 11.

354. See Marshall Cohen, *Michael Flynn Posts Video Featuring QAnon Slogans*, CNN (July 7, 2020, 8:37 PM), <https://www.cnn.com/2020/07/07/politics/michael-flynn-qanon-video/index.html> [<https://perma.cc/QE55-ARRM>]; Complaint at 3–7, *Flynn v. Cable News Network, Inc.*, No. 21-cv-02587 (S.D.N.Y. Mar. 25, 2021).

355. Kevin G. Hall & Kate Irby, *Unpaid Bills and Legal Discipline: Devin Nunes’ Lawyer Questioned Over Ethics in Complaints*, FRESNO BEE (Jan. 30, 2020, 9:21 AM), <https://www.fresnobee.com/news/local/article239698653.html> [<https://perma.cc/47QL-89WW>].

356. *Id.*

357. *Id.*

voters” for an alleged conspiracy between four governors, Dominion, and Facebook, and asked to nullify the results of the 2020 elections.³⁵⁸ The Court noted that in that case it was imposing sanctions not only under Rule 11, but also under the inherent power of the Court, which allowed it to impose sanctions for misconduct separate and apart from Rule 11.³⁵⁹

CONCLUSION

Some parting thoughts that a Defamation 2.0 suit should leave us with: It is not merely Fox, Alex Jones, and Q who stand to be liable, but also any platform that helped “create” defamatory speech, whether because the platform is synonymous with Q (like if Q is Ron Watkins, 8kun’s administrator³⁶⁰) or because it helped conspiracy theorists in creating the speech. Two cases against major platforms—LinkedIn and Facebook respectively—suggest this holding is not limited to smaller websites. Although not a defamation case, in *Perkins v. Linked Corporation*,³⁶¹ the plaintiffs alleged that LinkedIn “sent reminder emails to thousands of recipients making use of [their] names and likenesses as personalized endorsements for LinkedIn” and that “LinkedIn was ‘solely responsible for the creation and development of each [reminder] email,’” which was “unique content created and developed in whole or in part by LinkedIn.”³⁶² The court held these allegations were sufficient to defeat CDA immunity because the plaintiffs had sufficiently alleged LinkedIn “generated the text, layout, and design of the reminder emails and deprived Plaintiffs any opportunity to edit those emails, which Plaintiffs had no knowledge were being circulated on their behalf.”³⁶³

In *Fraleigh v. Facebook, Inc.*,³⁶⁴ the plaintiffs sued Facebook for “Sponsored Stories” and alleged that “Facebook [took] [p]laintiffs’ names, photographs, and likenesses without their consent and use[d] [the] information to create new content that it publishe[d] as endorsements of third-party products or services.”³⁶⁵ Facebook was not

358. Order Granting Defendants’ Motion for Sanctions, *O’Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 1168, 1174, 1208 (D. Colo. 2021) (No. 20-cv-03747-NRN).

359. *Id.*

360. *See Q: Into the Storm*, *supra* note 211.

361. 53 F. Supp. 3d 1222 (N.D. Cal. 2014).

362. *Id.* at 1247.

363. *Id.* at 1249.

364. 830 F. Supp. 2d 785 (N.D. Cal. 2011).

365. *Id.* at 801–03.

immune under section 230 because “the exercise of a publisher’s traditional editorial functions . . . [did] not transform an individual into a ‘content provider’ within the meaning of [section] 230” and “Sponsored Stories”—according to plaintiffs—“rearranged text and images provided by members . . . [and] transformed the character of [p]laintiffs’ words, photographs, and actions into a commercial endorsement to which they did not consent.”³⁶⁶ Thus, the court denied immunity under section 230.³⁶⁷

Should any website that hosted the Big Lie, Q, or any other conspiracy theory for that matter have taken similar actions to the ones here, there are serious questions as to whether it would be immune under section 230, opening up possibilities for holding platforms liable. For example, Mr. Epps from the Oath Keepers may have a claim not only against major networks such as Fox and Fox hosts such as Tucker Carlson but may also have a claim against any internet site that specifically targeted him if the posts were created by the administration of the website, as was true in the Alex Jones Charlottesville case where the platform was synonymous with the creator. Other putative plaintiffs like Cassidy Hutchinson may have claims against platforms like Truth Social, where former President Trump has been targeting her.

Of course, such a lawsuit would be on the cutting edge and would risk being a novel theory of liability with less chance of success than suing the individuals themselves, and there are real-world obstacles such as education among the judiciary about the above cases. But part of the goal of strategic litigation, depending on where it is brought, would be to inform judges and their law clerks about these concrete efforts that have succeeded to debunk the myth that platforms are completely immune. It is the hope of this Article to see strategic litigation help unravel conspiracy theories that are threatening the bedrock of our democratic institutions.

366. *Id.* at 802.

367. *Id.* at 801–03.