NOTE

Holding Influencers Accountable: When Election Disinformation Turns Criminal

*Regina Postrekhina**

ABSTRACT

The harm that social media influencers and their election disinformation pose to American democracy may be novel to United States courts, but the damage has already been done. An influencer in the 2016 election manipulated almost 5,000 people into texting a number in place of a ballot, potentially scamming those people out of a vote. The public's perception of United States election integrity has suffered in the wake of the post-2020 election disinformation campaign, which has threatened the safety of the election administrators across the country and the ultimate survival of United States democratic systems. The protection of freedom of speech under the First Amendment, although essential to democracy and a defense for those influencers peddling election disinformation, should not be applied to perpetuate the illegal infringement on the right to vote. This Note analyzes the relevant First Amendment case law regarding falsehoods in the electoral speech context and proposes three limiting principles to target only speech that (1) falls into a specific subset of election disinformation, (2) imposes a legally cognizable harm, and (3) is promulgated by social media influencers rather than lay persons. These limiting principles address the tensions between preserving the freedom of speech necessary to a flourishing democracy while restricting speech that threatens its survival. When the issue of social media election disinformation and the regulation of influencers, in particular, inevitably come to the Supreme Court, this Note argues that the application of these three limiting principles will allow the restriction of such speech to survive strict scrutiny.

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* J.D. 2025, The George Washington University Law School; B.S. 2014, University of Central Florida. I would like to extend thanks to the staff of *The George Washington Law Review* for their thoughtful edits to this piece.

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INTRODUCTION

If the weather is bad on election day, you can vote the day after. That is a lie. It is similar to the lie tweeted by social media influencer Douglas Mackey that led to his arrest in 2021.[1] Not unlike the slew of disinformation floating around what was then called Twitter,[2] Mackey's lie[3] had an ulterior motive—to stop Hillary Clinton supporters from voting in the 2016 presidential election.[4] After collaborating with other individuals "on the best wording, formatting, content, and images"[5] to achieve their goal, Mackey tweeted a meme[6] with the following text: "Avoid the Line. Vote from Home. Text '[Hillary]' to 59925[.]"[7] That, too, was a lie.

Mackey's attention to detail in an effort to make the meme believable[8] paid off: About 4,900 people texted the number from Mackey's meme.[9] That is 4,900 people, conceivably, tricked into believing

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1 *See* United States v. Mackey (*Mackey I*), 652 F. Supp. 3d 309, 321–22 (E.D.N.Y. 2023).

2 *Exposure to Russian Twitter Campaigns in 2016 Presidential Race Highly Concentrated, Largely Limited to Strongly Partisan Republicans*, N.Y.U. (Jan. 9, 2023) https://www.nyu.edu/about/news-publications/news/2023/january/exposure-to-russian-twitter-campaigns-in-2016-presidential-race-.html [https://perma.cc/8PAW-AH97] (noting the 2016 election saw a "massive effort to influence the presidential race on social media . . . .").

3 The lie described in this introduction is one of many that Mackey and like-minded Twitter users "creat[ed] . . . 'for the sole purpose of disparaging Hillary Clinton'" using memes and retweets of viral content. United States v. Mackey (*Mackey II*), No. 21-cr-80, 2023 WL 6879613, at *2 (E.D.N.Y. Oct. 17, 2023). Their "tweets were designed to 'spread like wild fire [sic] . . . as far as it could go . . . .'" *Id.* at *3 (alterations in original).

4 *See Mackey I*, 652 F. Supp. 3d at 321.

5 *Id.*

6 This is one of many memes intended to trick voters that Mackey and his co-conspirators created and tweeted using three of Mackey's different Twitter accounts. *See* Mackey Complaint and Affidavit in Support of an Arrest Warrant ¶¶ 20–35, *Mackey II*, 2023 WL 6879613 (No. 21-cr-80) [hereinafter Mackey Complaint].

7 *Mackey I*, 652 F. Supp. 3d at 321 (alterations in original) (quoting *id.* ¶ 32). To increase believability, Mackey's meme had "fine print stating 'Must be 18 or older to vote. One vote per person. Must be a legal citizen of the United States. Voting by text not available in Guam, Puerto Rico, Alaska or Hawaii. Paid for by [Hillary Clinton] for President 2016.'" *Id.* (quoting Mackey Complaint, *supra* note 6, ¶ *32)*.

8 Technology has since rapidly evolved, giving people like Mackey the ability to create extremely realistic material. *See infra* notes 258, 267.

9 *See Mackey I*, 652 F. Supp. 3d at 321.

they were exercising their right to vote.[10] The law recognized Mackey's infringement on the right to vote as a legally cognizable injury under 18 U.S.C. § 241, Conspiracy Against Rights.[11] This federal criminal statute prohibits "two or more persons [from] conspir[ing] to injure, oppress, threaten, or intimidate any person in . . . the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[12] Under § 241, election disinformation, or false speech, is the direct cause of the injury and therefore the crime itself.[13] Mackey, and influencers like him, should not be allowed to continue intentionally spreading election disinformation under the guise of constitutionality because their speech causes legally cognizable harm to thousands—if not millions—of people.

Although the Supreme Court has answered questions regarding the First Amendment's protections of political speech,[14] it has not yet answered whether the government may regulate social media election disinformation.[15] In deciding the constitutionality of government regulation of falsehoods, the Supreme Court has indicated that "limiting principle[s]"[16] must be part of the framework: criminal penalties to the average person without some limiting principles—even for intentional

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10 The government's complaint against Mackey did not state whether any or all of the 4,900 people who texted the number failed to cast a ballot. *See* Mackey Complaint, *supra* note 6, ¶ 36. It did, however, allude to this conclusion by removing any doubt that the texts came as a result of the Tweet, because the texts came only after Mackey tweeted the number. *Id.* Furthermore, the *Mackey I* court recognized the act of texting in response to the Tweet as a potential injury on the right to vote. *See Mackey I*, 652 F. Supp. 3d at 348.

11 In 2021, years after tweeting that meme, a grand jury indicted "Mackey with a conspiracy to violate rights under 18 U.S.C. § 241." *Mackey I*, 652 F. Supp. 3d at 321. In the motion to dismiss the indictment, Mackey argued that § 241 as applied to his act of tweeting was unconstitutional under the First Amendment. *Id.* at 340.

12 18 U.S.C. § 241.

13 *See Mackey I*, 652 F. Supp. 3d at 345. Mackey's speech was "a vehicle or means for illegal conduct, and . . . the statute—even as applied—is targeting that aspect of Mr. Mackey's behavior, rather than a free-floating crime of speech. Treason is still treason if it is spoken aloud." *Id.* at 344.

14 *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam))).

15 *See* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 First Amend. L. Rev. 367, 391 (2018) ("The Supreme Court has never considered whether lies in campaign speech can be regulated without violating the expressive rights of speakers."). The Supreme Court's 2024 docket included a related question—at the preliminary injunction stage—of whether state governments can prevent social media companies from regulating speech on their platforms. *See generally* Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (vacating and remanding for review based on a new test set forth by the Court and noting that "[t]he government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey").

16 *See* United States v. Alvarez, 567 U.S. 709, 723 (2012) ("[W]hether shouted from the rooftops or made in a barely audible whisper, [a statute criminalizing lies] would endorse

disinformation—would likely be considered too broad to survive strict scrutiny and could result in the chilling of free speech.[17] By incorporating some limiting principles in speech regulation, courts can address the tension between allowing governments to regulate speech that can cause wide-scale harm[18] while protecting the freedom to criticize the government and engage in public discourse. Freedom of speech is essential to democracy, but this freedom should not be utilized to protect lies that can ultimately—and with sweeping efficiency—obliterate democracy.

This Note argues that a subset of election disinformation that creates a legally cognizable harm[19] is not political speech.[20] Furthermore, the Supreme Court should find that the application of § 241 to this subset of election disinformation survives strict scrutiny under the First Amendment because it is closely tailored to the government's interest in protecting democracy when applied only to influencers[21] who bring about a legally cognizable harm. Part I of this Note examines applicable First Amendment case law regarding government restrictions on false speech, harms associated with election disinformation, and the interplay of § 241 with speech as the criminal penalty. Part II of this Note argues that a subset of election disinformation is not political speech, despite being politically adjacent. Part II proposes a way to interpret current First Amendment case law[22] in light of social media technology without stripping the right to free speech that our democracy depends on by narrowly tailoring § 241's application. Part III of this Note suggests that although this question is not currently in front of the Supreme Court, given the consistent and rabid proliferation of social

government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle.").

17 *See id.* at 733 (Breyer, J., concurring) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974))).

18 *See infra* Section II.C.

19 *See infra* Section II.C.

20 Scholars have made similar arguments, but this Note analyzes and proposes solutions applicable in the age of social media's proliferation and sets forth a clear test for denoting the difference between political and procedural speech. *See, e.g.*, Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 MONT. L. REV. 53, 70–71 (2013) (analyzing the potential for regulating false campaign speech post-*Alvarez* and arguing four types of laws regulating such speech should survive constitutional scrutiny, including laws "target[ing] . . . false election speech aimed at disenfranchising voters"); *see also infra* Section II.B.

21 *See infra* Section II.D.

22 Catherine Ross, a First Amendment scholar, has argued alternatively that the First Amendment poses an almost insurmountable hurdle to regulating "deceptive" campaign or electoral speech. *See* Ross, *supra* note 15, at 406. Ross's discussion, however, did not consider the difference between traditional political speech and speech that is politically adjacent, or procedural, as is presented in this Note. *Id.*

media disinformation,[23] the imminent danger it poses to the survival of our democracy, and the popular attention to the issue from President Donald J. Trump's District of Columbia indictment,[24] it is likely that the Court will face this pressing issue in due time. When the time comes, the Court should adopt the strict scrutiny analysis laid out in Part II.[25]

I. Background

Mackey used freedom of speech as a defense to argue that his lies—whether admittedly false or not—are protected under the First Amendment.[26] Although the Supreme Court has held that lying alone—without a harm or something more—is protected under the First Amendment, lies that create a legally cognizable harm do not typically benefit from those protections.[27] The Supreme Court has explicitly held that some lies, such as those producing defamation or fraud, lack protection under the First Amendment.[28] The recent rise in election disinformation on social media presents the question of whether those falsehoods should also fall in an explicitly unprotected category.

A. The Defense: Freedom of Speech

In *United States v. Alvarez*,[29] a Supreme Court plurality held that the First Amendment[30] protects blatant lies.[31] The *Alvarez* plurality did not, however, agree on the proper test courts should apply in analyzing

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23 *See* Stephen Orbanek, *Study Shows Verified Users Are Among Biggest Culprits When It Comes to Sharing Fake News*, Temple Now (Nov. 9, 2021), https://news.temple.edu/news/2021-11-09/study-shows-verified-users-are-among-biggest-culprits-when-it-comes-sharing-fake [https://perma.cc/32WX-LL67].

24 Indictment at 45, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-cr-257). The indictment has received widespread press coverage. *See, e.g.*, Isaac Stanley-Becker & Spencer S. Hsu, *Trump Is Charged Under Civil Rights Law Used to Prosecute KKK Violence*, Wash. Post (Aug. 1, 2023, 7:12 PM), https://www.washingtonpost.com/politics/2023/08/01/trump-indictment-civil-rights-law/ [https://perma.cc/2NHV-S92M].

25 *See* Ross, *supra* note 15.

26 *Mackey I*, 652 F. Supp. 3d 309, 340 (E.D.N.Y. 2023); *see also* President Trump's Motion to Dismiss the Indictment on Constitutional Grounds & Memorandum in Support at 3–17, *Trump*, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-cr-257).

27 United States v. Alvarez, 567 U.S. 709, 718–19 (2012) (listing cases allowing the prohibition of certain speech when the cases "[discuss] defamation, fraud, or some other legally cognizable harm associated with a false statement").

28 *See id.* at 717–18.

29 567 U.S. 709 (2012).

30 The First Amendment prohibits the federal government from "abridging the freedom of speech." U.S. Const. amend. I; *see also Alvarez*, 567 U.S. at 716 ("[T]he First Amendment means . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (quoting Ashcroft v. Am. C.L. Union, 535 U.S. 564, 573 (2002))). *But see Alvarez*, 567 U.S. at 717–18 (listing categories of speech that the Court has recognized as unprotected).

31 *See Alvarez*, 567 U.S. at 729–30.

government speech regulation.[32] In a later decision, *Reed v. Town of Gilbert*,[33] the Court held that content-based restrictions on speech are automatically subject to strict scrutiny.[34] Similarly, content-based restrictions in electoral contexts have historically been subject to the highest degree of scrutiny stemming from the deference granted to political speech.[35] Not all courts, however, have viewed all speech relating to elections as inherently political.[36]

1. Alvarez: *Freedom to Lie*

Freedom of speech today includes the freedom to lie—though not unconditionally.[37] Despite a common misconception, prior to 2012,[38] the Supreme Court had not yet answered whether intentional lies that could be substantiated through verifiable facts were protected by the First Amendment.[39] The plurality in the landmark case *Alvarez* held that mere false statements—without a "legally cognizable harm"[40]—were protected by the First Amendment.[41]

Before addressing the constitutionality of a federal statute that banned anyone from falsely stating they had a Federal Medal of Honor,[42] the *Alvarez* Court attempted to determine the appropriate test with which to conduct its analysis.[43] Justice Kennedy, writing the plurality opinion, reasoned that speech not included in one of the explicit exception categories[44] should be examined using an "exacting

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32 *See id.* at 724 (applying "exacting," or strict, scrutiny); *id.* at 730–31 (Breyer, J., concurring) (suggesting intermediate scrutiny under certain circumstances would be appropriate).

33 576 U.S. 155 (2015).

34 *See id.* at 165–66.

35 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (noting "a politically controversial viewpoint—is the essence of First Amendment expression" and that "[n]o form of speech is entitled to greater constitutional protection than" political speech).

36 *See Mackey I*, 652 F. Supp. 3d 309, 344 (E.D.N.Y. 2023) (noting courts have differentiated speech that "related to politics only in so far as it proscribes the procedures governing elections"); *see also* Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 122 (S.D.N.Y. 2023) (noting that falsehoods spread by robocalls about mail-in voting were "not inherently political" because the lies did "not relate[] to the actual substance of . . . public policy issues, candidate backgrounds and positions, or other pieces of legislation").

37 *See* United States v. Alvarez, 567 U.S. 709, 717–18 (2012) (noting the Court has held that the First Amendment does not protect the categories of fighting words, defamation, and false words used to state a crime).

38 *See id.* at 719; Catherine Ross, A Right to Lie? 21 (2021) ("[M]ore than one hundred federal statutes punished intentional falsehoods when *Alvarez* reached the Supreme Court.").

39 *See* Ross, *supra* note 38, at 20.

40 *Alvarez*, 567 U.S. at 718–19.

41 *See id.* at 729–30.

42 *Id.* at 715–16.

43 The plurality did not agree on the correct test to use but came to the same conclusion nevertheless. *See id.* at 730 (Breyer, J., concurring).

44 *Id.* at 717–18 (majority opinion).

scrutiny"[45]—i.e., strict scrutiny. To survive strict scrutiny, a restriction or regulation must satisfy two prongs: (1) It must be narrowly tailored to (2) a compelling state interest.[46] If a restriction or regulation captures events or circumstances not specifically intended to serve the stated compelling interest, the Court would typically consider it not narrowly tailored.[47] In his concurrence, Justice Breyer agreed that some speech regulation should be subject to strict scrutiny.[48] Where restrictions seek to ban falsehoods that can be easily fact-checked and do not concern "false statements about philosophy, religion, history, the social sciences, [and] the arts,"[49] Justice Breyer considered intermediate scrutiny[50] more appropriate because it is less likely that such falsehoods would suppress contributions to public policy or debate.[51]

Despite disagreeing whether strict or intermediate scrutiny applied, both Justice Kennedy and Justice Breyer were concerned that the statute in question was too far reaching to be upheld under the First Amendment.[52] The statute lacked a limiting principle:[53] Anyone who lied, whether in public or in private, would be subject to liability for lying.[54] Less restrictive measures also existed to address the government's goal.[55] Additionally, and of equal import, both opinions agreed that statutes seeking to preserve the government's ability to function[56]

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45 *Id.* at 724–27 (noting that the plurality's exacting scrutiny test considered (1) the importance of the government's objectives and (2) whether the least restrictive means were used to promote the government's interest).

46 *See* Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).

47 *See id.* at 171–72.

48 *Alvarez*, 567 U.S. at 731–32.

49 *See id.* at 731 (Breyer, J., concurring).

50 Under the intermediate scrutiny test, courts consider (1) the seriousness and materiality of the likely harm, (2) the importance of the government's objective, (3) the extent to which the law or application meets that objective, and (4) whether less restrictive measures could be used to further the government's goal. *See id.* at 730.

51 *Id.* at 732 (noting that "dangers of suppressing valuable ideas are lower" in such instances).

52 *See id.* at 722 (majority opinion); *see also id.* at 736 (Breyer, J., concurring) (noting the Stolen Valor Act was too far reaching to survive even intermediate scrutiny because of the statute's "breadth"). *But see id.* at 734–35 (listing statutes that fell outside the First Amendment's protection in part because they had limiting principles).

53 *Id.* at 723 (majority opinion); *id.* at 736 (Breyer, J., concurring).

54 *Id.* at 722–23 (majority opinion) ("The statute seeks to control and suppress all false statements . . . in almost limitless times and settings.").

55 *Id.* at 725–26.

56 *Id.* at 721 (noting statutes that "prohibit falsely representing that one is speaking on behalf of the Government . . . protect the integrity of Government processes" and are therefore different from those that "merely restrict[] false speech"); *see also id.* at 734 (Breyer, J., concurring) (noting statutes targeting falsehoods, such as perjury, that "work particular and specific harm by interfering with the functioning of a government department" are appropriately implemented).

and striking at speech "caus[ing] legally-cognizable harm tend not to offend the Constitution."[57]

2. *Content-Based Speech Restrictions—Strict vs. Intermediate Scrutiny Application*

Three years after *Alvarez*, the Court clarified in *Reed* which test must be applied when speech is restricted.[58] In *Reed*, the Court held that laws restricting "specific subject matter"[59]—regardless of the content's stance or perspective[60]—are considered content based, which is "presumptively unconstitutional."[61] Thus, content-based restrictions, as opposed to content-neutral restrictions that do not target a particular subject matter,[62] automatically require the application of strict scrutiny.[63]

a. *Strict Scrutiny Automatically Applies to Content-Based Speech Regulations*

In *Reed*, the Court found that a law imposing restrictions on signs "directing the public to church or some other 'qualifying event'" was "content based on its face" because the law placed unequal restrictions on different categories of signs, depending on their subject matter.[64] The Court held that this restriction was therefore automatically subject to strict scrutiny.[65]

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57 Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1232 (10th Cir. 2021) (citing *id.* at 734–36); *see also Alvarez*, 567 U.S. at 721 (listing cases where the Court has found speech restrictions were constitutional where the speech "implicate[d] fraud or speech integral to criminal conduct").

58 *See* Reed v. Town of Gilbert, 576 U.S. 155 (2015).

59 *Id.* at 156, 169 (noting that "regulated speech by particular subject matter" triggers strict scrutiny).

60 *Id.*

61 *Id.* at 163.

62 *See id.* at 166.

63 *See id.* at 163, 165–66 (holding that even if the government's motivation for the speech restriction is "innocuous" or compelling, it does not shift the test from strict to intermediate scrutiny if the restriction is content based). *But see Mackey I*, 652 F. Supp. 3d 309, 341 n.19 (E.D.N.Y. 2023) ("The court has opted to conduct . . . [intermediate scrutiny] analysis under the assumption that the speech in question is content-based.").

64 *See Reed*, 576 U.S. at 164. Some courts have suggested that if the content of the speech had to be examined "to determine whether a violation has occurred," the law would be considered content based. *See* Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1228 (10th Cir. 2021) (quoting McCullen v. Coakley, 573 U.S. 464, 479 (2014)). In 2022, however, the Supreme Court rejected the notion that simply having to read the speech qualified the speech as content based. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 72 (2022) (suggesting that "some evaluation of the speech" can occur with content-neutral restrictions).

65 *Reed*, 576 U.S. at 163, 165–66.

Courts have considered laws banning falsehoods in campaign or electoral speech to be content-based restrictions.[66] Although most courts have found a compelling interest in these restrictions,[67] most bans have failed to satisfy the narrow tailoring requirement.[68] Although strict scrutiny typically means courts will strike down a speech ban given this high bar, it is not a death sentence; some courts in the electoral speech context have upheld restrictions even after applying strict scrutiny when the restrictions were very narrowly tailored to the government's interest in carrying out democratic processes.[69]

b. Intermediate Scrutiny Applies to Content-Neutral Restrictions on Speech

If a law applies content-neutral restrictions on speech, then the less exacting intermediate scrutiny test applies.[70] According to *City of Austin v. Reagan National Advertising of Austin*,[71] a recent Supreme Court opinion interpreting its earlier *Reed* ruling, a law that does not target a particular topic or idea for "differential treatment" is likely

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66 *See, e.g.*, Susan B. Anthony List v. Driehaus, 814 F.3d 466, 472–73 (6th Cir. 2016) (applying a strict scrutiny analysis to Ohio's law "govern[ing] speech about political candidates during an election" because it was content based); Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 118 (S.D.N.Y. 2023) (holding that bans prohibiting false speech that threatens or coerces voters against voting are content-based speech restrictions subject to strict scrutiny).

67 *See, e.g.*, Commonwealth v. Lucas, 34 N.E.3d 1242, 1252 (Mass. 2015) (finding the state had a compelling interest in "fair and free elections"); *Wohl*, 661 F. Supp. 3d at 121 (noting that "protecting voting rights and maintaining 'the integrity of [the] election process'" is a sufficiently compelling reason under strict scrutiny (quoting Burson v. Freeman, 504 U.S. 191, 206, 208 (1992))); *see also* United States v. Trump, 91 F.4th 1173, 1198 (D.C. Cir. 2024) (reasoning in part that the public's interest in "democratically selecting its President" was important enough to subject a former president to criminal liability), *vacated*, 603 U.S. 593 (2024).

68 *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (holding that a statute limiting the amount of money one can contribute to a candidate for office was "poorly tailored to the Government's interest" and therefore unconstitutional); 281 Care Comm. v. Arneson, 766 F.3d 774, 788 (8th Cir. 2014) (reversing the district court's holding that a statute criminalizing false statements about ballot initiatives was constitutional, in part because the statute was not narrowly tailored to the stated government interest).

69 *See, e.g.*, John Doe No. 1 v. Reed, 561 U.S. 186, 198–99 (2010) (holding a law requiring "public disclosure of referendum petitions" was sufficiently tailored to the "State's interest in preserving electoral integrity"); Burdick v. Takushi, 504 U.S. 428, 441 (1992) (upholding a ban on write-in ballots as narrowly tailored to the state's interest).

70 *See Reed*, 576 U.S. at 166; City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 76–77 (2022). Despite this, some courts have still applied Justice Breyer's intermediate scrutiny test where "false statements about philosophy, religion, history, the social sciences, [and] the arts" were not involved even in restrictions that could be considered content based. *See Wohl*, 661 F. Supp. 3d at 119 (quoting United States v. Alvarez, 567 U.S. 709, 732 (2012)).

71 596 U.S. 61 (2022).

content neutral.[72] In essence, content-neutral restrictions do not touch the expression or actual messaging of speech.[73]

3. Electoral Speech Case Law

Courts have granted political speech, described by the Supreme Court as "[d]iscussion of public issues and debate on the qualifications of candidates,"[74] the highest degree of protection throughout United States history.[75] Not all speech regarding elections, however, has been viewed by courts as inherently political.[76] When Mackey, the influencer, moved to dismiss his indictment with a First Amendment defense, the court denied the motion.[77] The court found the election disinformation that Mackey disseminated related to the process of voting—where, when, and how to cast a ballot—and was therefore different from political speech relating to the substance of what might be *on* a ballot.[78]

Another example of a court's treatment and application of electoral speech and strict scrutiny includes the 1995 Supreme Court case *McIntyre v. Ohio Elections Commission*.[79] The Ohio state legislature sought to ban residents from distributing flyers without author attribution for the purpose of preventing the dissemination of lies or fraudulent election information.[80] Although the Court found this goal "legitimate,"[81] it did not find the goal narrowly tailored enough to survive strict scrutiny, in part because the law covered material that was both true and false.[82] Similarly, in a 2016 Sixth Circuit case, *Susan B. Anthony List v. Driehaus*,[83] Ohio's law banning false statements about politicians' voting records survived the first, but not the second, prong of strict scrutiny because its application was too broad.[84] There, the court found the law at issue was insufficiently tailored because the regulation sought to restrict false speech even if it was not defamatory, fraudulent, or any other kind of explicitly unprotected—or "material"—speech.[85]

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72 *See id.* at 71.

73 *See* Project Veritas v. Ohio Election Comm'n, 418 F. Supp. 3d 232, 258 (S.D. Ohio 2019).

74 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976)).

75 *See id.*; *see also Mackey I*, 652 F. Supp. 3d 309, 345 (E.D.N.Y. 2023) (acknowledging First Amendment political speech protections).

76 *See supra* note 36.

77 *See Mackey I*, 652 F. Supp. 3d at 349.

78 *See id.* at 346.

79 514 U.S. 334 (1995).

80 *See id.* at 348.

81 *Id.* at 351.

82 *See id.*

83 814 F.3d 466 (6th Cir. 2016).

84 *Id.* at 473–75.

85 *See id.* at 473–76.

B. Speech Resulting in Legally Cognizable Harm Is Not Protected by the First Amendment

In analyzing *Alvarez*, courts recognize that the Supreme Court did not consider lies that resulted in harm to be protected by the First Amendment.[86] One such harm the *Alvarez* Court was concerned with was impairing the "integrity of Government processes."[87] Justice Breyer further expanded on this point by suggesting that actual victims of the harm may need to be identified as a heightened requirement.[88]

Political lies, as Justice Breyer noted, have the potential to affect people's voting choices.[89] Traditional political lies may garner unwarranted votes for a candidate when, for example, the candidate claims they are an incumbent when they are not;[90] political lies may dissuade voters from voting for a candidate when, for example, an opponent claims the candidate voted for an unpopular bill.[91] These types of political lies have been challenged in the past under defamation laws, but these challenges have generally failed because the standard required to succeed in cases involving public figures—especially in the campaign setting[92]—is very high.[93] On the other hand, lies that relate to the time, place, and voter qualifications for casting a vote—lies that have a legally cognizable harm under § 241 or the Voting Rights Act[94]—may have altogether different consequences.[95]

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86 *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1199 (9th Cir. 2018); *see also* Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1234 (citing United States v. Alvarez, 567 U.S. 709, 719, 723 (2012)); Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 119 (S.D.N.Y. 2023).

87 *Alvarez*, 567 U.S. at 721.

88 *See id.* at 734 (Breyer, J., concurring).

89 *Id.* at 738 (comparing the defendant's lie about holding a Federal Medal of Honor to political lies). Political lies may also affect people's behavior, which can have nondefamatory legally cognizable harms that are out of scope of this Note. *See* Yvonne Wingett Sanchez, *Election Officials Go on Offense to Prevent Disruptions of 2024 Vote*, WASH. POST (Feb. 9, 2024, 7:16 AM) https://www.washingtonpost.com/politics/2024/02/09/election-worker-voting-preparation/ [https://perma.cc/GE8U-7TMP] (highlighting the violent effect election fraud lies have had on election officials since 2020).

90 *See* Cook v. Corbett, 446 P.2d 179, 183–84 (Or. 1968).

91 *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 153–54 (2014).

92 *See, e.g.*, Reed v. Gallagher, 204 Cal. Rptr. 3d 178, 196 (Cal. Ct. App. 2016) ("[C]ampaign rhetoric is protected speech and, as such, recovery by a candidate is highly unusual.").

93 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding public figures must show "actual malice" in order to succeed in a defamation claim).

94 Voting Rights Act (VRA) of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

95 *See* Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 118–19 (S.D.N.Y. 2023) (holding falsehoods were "true threats" that are not entitled to First Amendment protection when defendants sent out about 85,000 robocalls to "threaten voters for exercising their right to vote," violating the Voting Rights Act and the Ku Klux Klan Act of 1870); *see also Mackey I*, 652 F. Supp. 3d 309, 344, 345 (E.D.N.Y. 2023) (finding that misleading would-be voters about voting methods is a cognizable harm).

1. Voting Rights Infringement as a Legally Cognizable Harm Under Conspiracy Against Rights

Politically adjacent—or procedural—speech can give rise to legally cognizable harms when the speech itself is a "criminal conspiracy."[96] The Conspiracy Against Rights statute, 18 U.S.C. § 241, does not ban any particular kind of speech.[97] Instead, it is a federal criminal statute[98] that prohibits "two or more persons [from] conspir[ing] to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[99] Under § 241's application, which requires at least two people to conspire,[100] election disinformation is the direct cause of the injury and therefore the crime itself.[101] To establish a § 241 violation, the government must show intent and knowledge to enter the conspiracy to injure someone else's right[102]—in this case, the right to vote.[103]

The use of § 241 to restrict election disinformation is a novel approach; according to scholar Catherine Ross, "[t]he Supreme Court has never considered whether lies in campaign speech can be regulated without violating the expressive rights of speakers."[104] In addition to Mackey's election disinformation efforts, however, President Trump faced the same § 241 charge in his District of Columbia indictment before the government dropped it following his re-election to office.[105] The indictment alleged, among other things, that President Trump's lies regarding the 2020 election intended to "subvert the legitimate election results and change electoral votes,"[106] which would have "disenfranchise[d] millions of voters."[107]

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96 *See Mackey I*, 652 F. Supp. 3d at 345 ("Government seeks to prosecute only lies associated with the 'legally cognizable harm' resulting from criminal conspiracy to injure voting rights." (quoting Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 785–86 (8th Cir. 2021))).

97 18 U.S.C. § 241.

98 18 U.S.C. § 241 was passed during the Reconstruction era to protect Black citizens' political participation. *See* United States v. Price, 383 U.S. 787, 801–05 (1966) (describing the historical context of § 241's passage following the Civil War).

99 18 U.S.C. § 241.

100 *Id.*; s*ee also infra* notes 289–94 and accompanying text.

101 *See Mackey I*, 652 F. Supp. 3d at 344.

102 *See Mackey II*, No. 21-cr-80, 2023 WL 6879613, at *14 (E.D.N.Y. Oct. 17, 2023) ("The government had to prove that the defendant knowingly and intentionally joined the conspiracy with the intent to further that objective.").

103 *See* Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("[A]ll qualified voters have a constitutionally protected right to vote . . . .").

104 Ross, *supra* note 15, at 391.

105 *See* Indictment, *supra* note 24, at 45; Government's Motion to Dismiss at 1, United States v. Trump, No. 23-cr-257 (D.D.C. Nov. 25, 2024).

106 Indictment, *supra* note 24, at 5.

107 *Id.*; *see also infra* Section II.E (examining an exception to the rule that all three limiting principles should be met for 18 U.S.C. § 241 to be sufficiently narrowly applied).

2. *Voting Rights Infringement as a Legally Cognizable Harm Under Other Statutes*

In addition to § 241, other statutes restrict speech that infringes on the right to vote.[108] For example, in 2023, the United States District Court for the Southern District of New York found false statements disseminated via robocalls were not protected by the First Amendment in *National Coalition on Black Civic Participation v. Wohl*.[109] The court reasoned that the lies were "true threat[s]" and therefore had the legally cognizable harm of infringing on voting rights in violation of 52 U.S.C. § 10307(b).[110] The robocalls[111] were intended to scare voters of color in various states from voting by mail.[112] The calls falsely claimed that if they voted by mail, the voters' private information would be collected and provided to government authorities to force COVID-19 vaccinations and uncover old arrest warrants.[113] In *Wohl*, plaintiffs brought claims under a number of statutes, including § 10307(b), a content-based restriction[114] that prohibits threatening someone for voting or attempting to vote.[115]

3. *Defamation as a Legally Cognizable Harm*

Beyond the electoral context, there are categories of speech left explicitly out of First Amendment protections; defamation is one such category.[116] In the landmark defamation opinion, *New York Times Co. v. Sullivan*,[117] the Supreme Court established the "actual malice" standard, which requires a public official seeking damages for defamatory criticism of their official conduct to show the critic acted knowingly or "with reckless disregard" of the truth.[118] The Court reasoned that free criticism

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108 *See* Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 112, 124 (S.D.N.Y. 2023).

109 661 F. Supp. 3d 78 (S.D.N.Y. 2023).

110 *See id.* at 119.

111 Robocalls have been used to disseminate election disinformation as recently as early 2024. *See* Meryl Kornfield, *Fake Biden Robocalls Urge Democrats Not to Vote in New Hampshire Primary*, Wash. Post (Jan. 22, 2024, 1:50 PM), https://www.washingtonpost.com/politics/2024/01/22/biden-robocall-new-hampshire-primary/ [https://perma.cc/L5R4-NXSF]. With the emergence of artificial intelligence ("AI") technology, however, the legitimacy of the information is becoming remarkably difficult to determine. *See* Zach Montellaro, *America's Election Chiefs Are Worried AI Is Coming for Them*, Politico (Mar. 11, 2024, 5:01 AM), https://www.politico.com/news/2024/03/11/secretary-state-ai-election-misinformation-00146137 [https://perma.cc/3FSQ-TQJE].

112 *See Wohl*, 661 F. Supp. 3d at 92.

113 *See id.* These two lies were among others not listed in this Note. *Id.*

114 *See id.* at 119.

115 *See id.* at 112.

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

117 376 U.S. 254 (1964).

118 *Id.* at 279–80.

of public officials is critical to society, and in order to avoid chilling this type of speech, a high standard was appropriate to overcome the First Amendment's protections.[119] The Court in *Curtis Publishing Co. v. Butts*[120] later extended the actual malice standard in defamation lawsuits brought by public officials to public figures, or any person who has, voluntarily or involuntarily, positioned themselves to influence the public.[121]

C. The Spread of Disinformation Through Social Media

An estimated 5.17 billion people use social media today.[122] And although courts have dealt with cases involving social media influencers, courts have not yet defined the term *influencer*.[123] The marketing industry, however, has generally categorized influencers by a set of factors, including the number of followers, which ranges from "nano"[124] to "mega"[125] status. With over sixty-four million Instagram influencers as of 2023,[126] some have played a major role in the rise and spread of disinformation.[127]

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119 *See id.* at 279.

120 388 U.S. 130 (1967).

121 *See id.* at 155; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (noting that people who "occupy positions of such persuasive power and influence . . . are deemed public figures for all purposes").

122 *How Many People Use Social Media in 2024?*, Oberlo, https://www.oberlo.com/statistics/how-many-people-use-social-media [https://perma.cc/DXF3-PA6A].

123 Much of the legal landscape involving social media influencers concerns Federal Trade Commission ("FTC") guidelines and false advertising concerns, copyright infringement issues, or run-of-the-mill contract and job disputes—none of which are relevant to instances of election disinformation where influencers are not endorsing a consumer product, copying intellectual property, or performing a job for which they are paid. *See, e.g.*, Pop v. Lulifama.com LLC, No. 22-cv-2698, 2023 WL 4661977, at *4 (M.D. Fla. July 20, 2023) (involving a social media influencer who allegedly failed to abide by FTC guidelines); Sony Music Ent. v. Vital Pharms., Inc., No. 21-cv-22825, 2022 WL 4771858, at *5 (S.D. Fla. Sept. 14, 2022) (involving copyright infringement); Influential Network, Inc. v. Darkstore, Inc., No. 21-cv-7162, 2023 WL 2372060, at *2 (C.D. Cal. Feb. 14, 2023) (involving a contract dispute).

124 *See* Werner Geyser, *What Is an Influencer? – Social Media Influencers Defined [Updated 2024]*, Influencer Mktg. Hub, https://influencermarketinghub.com/what-is-an-influencer/ [https://perma.cc/AV3S-DPZW] ("[N]ano-influencers" are generally thought to "have between 1,000 and 10,000 followers."); Andrii, *How Many Influencers Are There in 2023*, TrendHero (June 23, 2023), https://trendhero.io/blog/how-many-influencers-are-there/ [https://perma.cc/R9S7-EMJV].

125 *See* Geyser, *supra* note 124.

126 *See* Andrii, *supra* note 124.

127 *See* Elizabeth Dwoskin & Jeremy B. Merrill, *Trump's 'Big Lie' Fueled a New Generation of Social Media Influencers*, Wash. Post (Sept. 20, 2022, 6:32 AM), https://www.washingtonpost.com/technology/2022/09/20/social-media-influencers-election-fraud/ [https://perma.cc/H8ZD-WXQQ] (noting seventy-seven of the most effective offenders in the 2020 election disinformation campaign).

1. *Influencer Defined by the Courts*

As social media continues to play a central role in every facet of modern life, the case law involving influencers continues to grow. This area of law, however, is still quite novel. Cases involving social media influencers run the gambit from contract disputes,[128] to Federal Trade Commission and related state violations,[129] to copyright infringement claims.[130] Courts' definitions of the term influencer from these cases are as varied as the causes of action under which they were brought.[131] Accepting the parties' definition of the term influencer as "someone with a reach of 50,000 to 150,000 people," one court used the number of followers to define an influencer.[132] Other courts adopted generalized definitions, including one from the marketing industry which defines anyone "who has 'access to a large audience and can persuade others'"[133] as an influencer, and another from *Webster's Dictionary*, which defines the term influencer as anyone "able to generate interest in something (such as a consumer product) by posting about it on social media."[134] Finally, a magistrate judge amended a party's definition in a discovery dispute by defining influencers as "individuals who were offered compensation directly or indirectly or were offered free product in exchange for wearing the product [at issue in the case] on Instagram."[135] The definition of influencer was not central to the holding of any of these cases, and none of these cases involved an appellate level ruling.[136]

2. *Influencer Defined by the Industry*

Much like the courts, the marketing industry has not delineated a clear-cut definition for the term influencer, but it has laid out some criteria for what might be considered in creating a definition.[137] Because

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128 *See, e.g.*, *Darkstore*, 2023 WL 2372060, at *2.

129 *See, e.g.*, Colceriu v. Barbary, 543 F. Supp. 3d 1277, 1279 (M.D. Fla. 2021); Pop v. Lulifama.com LLC, No. 22-cv-2698, 2023 WL 4661977, at *1 (M.D. Fla. July 20, 2023).

130 *See, e.g.*, Sony Music Ent. v. Vital Pharm., Inc., No. 21-cv-22825, 2022 WL 4771858, at *3–5 (S.D. Fla. Sept. 14, 2022).

131 *See infra* notes 138–43.

132 *See Darkstore*, 2023 WL 2372060, at *5 (pointing to the Statement of Work from the disputed contract to define the term).

133 *Colceriu*, 543 F. Supp. 3d at 1279 n.1 (quoting *What is a Social Media Influencer?*, Emplifi, https://www.pixlee.com/definitions/definition-social-media-influencer [https://perma.cc/3PWH-SXEH]).

134 Jones v. Hollywood Unlocked, Inc., No. 21-cv-7929, 2022 WL 18674460, at *1 n.3 (C.D. Cal. Nov. 22, 2022) (quoting *Influencer*, Webster's Dictionary, https://www.merriam-webster.com/dictionary/influencer [https://perma.cc/W9YC-7T6G]).

135 Pop v. Lulifama.com LLC, No. 22-cv-2698, 2023 WL 3584095, at *2 (M.D. Fla. May 22, 2023).

136 *See supra* notes 133–35.

137 *See infra* notes 141–44 and accompanying text.

of the advertising nature of social media influencers,[138] many of these definitions concern advertisement and brand partnerships.[139] These definitions can, however, be applied more generally to those influencers growing in the noncommercial niches.[140]

In the marketing industry, the few factors that tend to make up a social media influencer include (1) the ability to build trust[141] with followers, which is then used to affect followers' behavior and purchasing decisions;[142] (2) the number of followers;[143] and (3) the consistent stream of new content creation.[144] Although these factors tend to be a generalized approach to defining influencers, some nuances are important to note. For example, the number of followers is not always an indicator of how influential a person is; a smaller number of followers in a particular niche[145] can still mean the influencer has a great deal of impact.[146] So even the fifty-eight million nano-influencers currently on social media, with 1,000 to 10,000 followers,[147] can exude a significant amount of influence

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138 *See* Catalina Goanta & Sofia Ranchordás, The Regulation of Social Media Influencers 1 (2020) ("[A] job which consists in sharing moments of their daily lives, offering advice in different areas . . . and while doing so, endorsing consumer goods and services."); Jacinda Santora, *Highest Paid TikTok Influencers of 2024*, Influencer Mktg. Hub (July 16, 2024), https://influencermarketinghub.com/tiktok-highest-paid-stars/ [https://perma.cc/U488-4LPU].

139 When political campaigns pay influencers to promote their campaign without disclosing that the endorsement was paid for, there could be potential FTC or Federal Election Commission implications that are outside the scope of this Note. *See* Elizabeth Culliford, *Paid Social Media Influencers Dip Toes in U.S. 2020 Election*, Reuters (Feb. 10, 2020, 9:13 PM), https://www.reuters.com/article/us-usa-election-influencers/paid-social-media-influencers-dip-toes-in-u-s-2020-election-idUSKBN2042M2/ [https://perma.cc/QQ97-W5EE].

140 *See Disinformation and the Role of Influencers in Times of Conflict*, Aspen Inst. Ger., https://www.aspeninstitute.de/digital-program/digitalization-and-democracy/disinformation-and-the-role-of-influencers-in-times-of-conflict/ [https://perma.cc/3JNB-5Z6R].

141 *See What Is a Social Media Influencer? And How to Become One*, Coursera (Dec. 10, 2024), https://www.coursera.org/articles/social-media-influencer [https://perma.cc/8XHN-Q4JZ]; *What Is a Social Influencer?*, Grand Canyon Univ. (May 26, 2022), https://www.gcu.edu/blog/performing-arts-digital-arts/what-social-influencer [https://perma.cc/9LCJ-784A].

142 *See* Goanta, *supra* note 138, at 6; Geyser, *supra* note 124; Coursera, *supra* note 141; Neil Patel, *What Is an Influencer?*, NeilPatel, https://neilpatel.com/blog/guide-to-influencer-targeting [https://perma.cc/ZSK7-4HSS].

143 *See* Patel, *supra* note 142; Geyser, *supra* note 124.

144 *See* Goanta, *supra* note 138, at 6; Coursera, *supra* note 141; Grand Canyon Univ., *supra* note 141.

145 Influencers do not necessarily stick to one niche. Recently there has been a niche creep where an influencer begins to create content outside of their niche—healthy-living influencers who post about masks, for example. *See* Jana Kasperkevic, *The "Next Frontier of Propaganda": Micro-Influencers Are Paid to Spread Political Messages, Disinformation*, ProMarket (Jan. 13, 2021), https://www.promarket.org/2021/01/13/propaganda-influencers-paid-spread-political-disinformation/ [https://perma.cc/X8BS-2JGP].

146 *See* Patel, *supra* note 142; Geyser, *supra* note 124.

147 Andrii, *supra* note 124.

depending on their niche.[148] But currently, the attention appears to be on the over five million micro-influencers,[149] with 10,000 to 100,000 followers, who have been dubbed the "influencers of the future."[150]

3. Influencers' Method of Collaboration and Growth

One way by which influencers grow their social media presence is through collaborations with other influencers.[151] For example, one influencer interviewing another influencer and posting the content[152] is a form of collaboration. This kind of cooperation is made easier when influencers choose to live and make content together in what is sometimes referred to as "collaborative houses"[153] or "content houses."[154] For example, during the 2020 election, politically minded influencers lived and created content in politically leaning "hype houses"[155] to provide election-related information.[156] There is a gradient to how influencers collaborate with one another. Mackey, for example, did not live in a content house, but he spent a great deal of time in "Group DMs,"[157] or chat rooms.[158] "War Room"[159] and "Fed Free Hatechat"[160] were the names of two such groups. There, Mackey and his co-conspirators brainstormed content, shared their ideologies,[161] and discussed "how best to influence the [e]lection."[162]

Another way influencers grow their social media presence is by promulgating disinformation.[163] According to a *Washington Post* analysis, seventy-seven of the most influential election disinformation

148 *See* Patel, *supra* note 142; Geyser, *supra* note 124.

149 Andrii, *supra* note 124.

150 *See* Geyser, *supra* note 124.

151 *See Influencer Collaborations: Tips to Collab with Other Influencers*, Sidewalker Daily, https://sidewalkerdaily.com/influencer-collaborations [https://perma.cc/5WT4-DVVQ].

152 *See id.*

153 Jacob v. Lorenz, 626 F. Supp. 3d 672, 679 (S.D.N.Y. 2022).

154 Jacinda Santora, *What Is a Content House? (+ Content House Examples!)*, Influencer Mktg. Hub (June 21, 2022), https://influencermarketinghub.com/what-is-a-content-house/ [https://perma.cc/PB7H-FTNN].

155 Taylor Lorenz, *The Political Pundits of TikTok*, N.Y. Times (Feb. 27, 2020), https://www.nytimes.com/2020/02/27/style/tiktok-politics-bernie-trump.html [https://perma.cc/S7MW-3NKH] (describing conservative, liberal, and bipartisan houses).

156 *See id.*

157 Mackey Complaint, *supra* note 6, ¶ 13.

158 *See id.* ¶¶ 14–19.

159 *Id.* ¶ 13.

160 *Id*.

161 *Id.* ¶¶ 14–19.

162 *Id.* ¶ 15.

163 *See* Dwoskin & Merrill, *supra* note 127 (showing graph titled "[s]preading election fraud claims helped Kyle Becker become an influencer").

influencers in the post-2020 election era were able to grow their following exponentially by repeating election fraud lies.[164]

4. Example of Election Disinformation on Social Media

As recently as January 2024, Elon Musk, the owner of social media platform X,[165] formerly known as Twitter, and an influencer in his own right, made false posts that United States elections are unsafe.[166] For example, in January 2024, Musk reposted a Tweet that claimed the "deep state" knew there were issues with mail-in voting and elections.[167] In another post from that same month, Musk spread misinformation with the post, "[i]n the USA, you don't need government issued ID to vote."[168] As of March 2025, Musk is followed by 220 million accounts.[169]

II. Election Disinformation Criminalized Under Section 241 Survives a Strict Scrutiny Analysis

Democracy depends on voters having accurate information about how, when, and where they can cast their vote[170]—the same way democracy depends on the free exchange of ideas,[171] which includes risking the free exchange of lies. When applied in limited circumstances, 18 U.S.C. § 241 can be used as a tool to strike that balance by restricting a subset of election disinformation that causes legally cognizable harms and is spread by those social media users who wield a disproportionate amount of power. Because this kind of restriction is (A) likely to be considered content based, it will be subject to strict scrutiny.[172] Given the precedential deference to democratic interests, the first prong of

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164 *See id.*

165 Prior to Musk's takeover, Twitter was attempting to moderate the spread of harmful disinformation—efforts Musk has abandoned. *See* Jim Rutenberg & Kate Conger, *Elon Musk Is Spreading Election Misinformation, but X's Fact Checkers Are Long Gone*, N.Y. Times (Jan. 29, 2024), https://www.nytimes.com/2024/01/25/us/politics/elon-musk-election-misinformation-x-twitter.html [https://perma.cc/KX97-83SW].

166 *See id.*

167 Elon Musk (@elonmusk), X (Jan. 22, 2024, 9:16 PM), https://twitter.com/elonmusk/status/1749617078590464322 [https://perma.cc/P29J-FVGA].

168 *See* Elon Musk (@elonmusk), X (Jan. 8, 2024, 6:16 PM), https://twitter.com/elonmusk/status/1744498282141786473 [https://perma.cc/54QE-Z55U]; *see also Voter Identification Laws by State*, BallotPedia, https://ballotpedia.org/Voter_identification_laws_by_state [https://perma.cc/D5EN-V6JW] (showing thirty-four out of fifty states require identification to vote).

169 Elon Musk (@elonmusk), X (Mar. 21, 2025, 4:04 PM), https://twitter.com/elonmusk [https://perma.cc/Z55A-XMY5].

170 *See* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 Mont. L. Rev. 53, 56 (2013).

171 *See, e.g.*, McIntyre v. Ohio Elections Comm'n., 514 U.S. 334, 346 (1995).

172 *See infra* Section II.A.

strict scrutiny[173] is unlikely to be a tough hurdle for the government to overcome.[174] And the second prong of strict scrutiny[175] can be met with three proposed limiting principles: (B) procedural, politically adjacent speech;[176] (C) speech that causes legally cognizable harm;[177] and (D) speech promulgated by social media influencers.[178]

A. Application of Section 241 Is Likely to Be Content Based and Subject to Strict Scrutiny

Holding influencers accountable for lies relating to the time, place, and method of voting should survive the strict scrutiny analysis by addressing *Alvarez*'s main concerns: narrowness and harm.[179] Although the decision in *United States v. Mackey* ("*Mackey I*")[180] frames the issue for courts to consider how these novel facts can be applied to First Amendment precedent, the court inaccurately applied an intermediate scrutiny analysis while acknowledging that "the speech in question [was] content-based"[181] in a single footnote.[182] There, the court engaged in an in-depth analysis of *Alvarez* without granting much weight to *Reed*'s holding that strict scrutiny automatically applies for content-based speech restrictions.[183]

Regulation of election disinformation on social media under § 241[184] is likely to be considered content based because it is impossible to regulate such speech without discerning the subject matter of the speech. Under *Reed*'s precedent, such discrimination of subject matter—to determine whether the speech is procedural versus political, for example—would render the restriction content based.[185] Although *Mackey I* noted that the indictment only targeted speech that was used

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173 A compelling government interest must exist. *See* Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).

174 *See infra* notes 191–96 and accompanying text.

175 The restriction must be narrowly tailored. *See Reed*, 576 U.S. at 171.

176 *See infra* Section II.B.

177 *See infra* Section II.C.

178 *See infra* Section II.D.

179 *See* United States v. Alvarez, 567 U.S. 709, 736 (2012).

180 652 F. Supp. 3d 309 (E.D.N.Y. 2023).

181 *Id.* at 341 n.19.

182 *See id.*

183 *See supra* note 63.

184 Without federal legislation addressing election disinformation, litigation is the only practical legal avenue to fight this phenomenon. Given the ineffectual state of Congress, any new legislation—especially one that is perceived as covering a partisan topic like voting rights—is unlikely to pass any time soon. *See* Joe LoCascio, Benjamin Siegel & Ivan Pereira, *118th Congress on Track to Become One of the Least Productive in US History*, ABC NEWS (Jan. 10, 2024, 7:30 PM), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/4LTZ-ZBTP].

185 *See* Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015).

as a "vehicle"[186] for the actual crime of conspiring to injure and therefore was not restricting pure speech,[187] restriction of speech based on its content still requires a First Amendment analysis. The restriction, whether pure or incidental, still targets speech in the case of election disinformation on social media. Additionally, most courts are likely to be extremely wary of drawing this distinction and lessening the degree of scrutiny for speech in the political arena because, as the *McIntyre* Court noted, "[n]o form of speech is entitled to greater constitutional protection than"[188] speech involving elections and politics.[189] Therefore, the majority of courts are likely to apply strict scrutiny on § 241's application to social media election disinformation, which, when narrowly tailored, can and should survive strict scrutiny.[190]

The first prong of strict scrutiny, requiring a compelling government interest,[191] is unlikely[192] to be difficult to meet when the interest is to preserve the structural and functional integrity of the United States' democratic systems.[193] This interest has been applied to reasoning in recent cases at both the district and circuit levels.[194] As recently as 2023, a district court quoted a 1992 Supreme Court opinion acknowledging that "protecting voting rights and maintaining 'the integrity of [the] election process'"[195] was a sufficiently compelling interest. Additionally, although not applying strict scrutiny, in February 2024, the D.C. Circuit reasoned that the public's interest in "democratically selecting its President"[196] was, in part, important enough to set a precedent[197] by subjecting a former president to criminal liability.[198] So here too: Democracy

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186 *Mackey I*, 652 F. Supp. 3d at 344.

187 *See id.* at 347 ("[T]he core unlawful act in this case is the formation of a conspiracy to injure a right. The Deceptive Tweets are simply the *means* through which the injury was conspired to take place.").

188 McIntyre v. Ohio Elections Comm'n., 514 U.S. 334, 347 (1995).

189 *See Mackey I*, 652 F. Supp. 3d at 345.

190 *See supra* note 69 and accompanying text. In the case that a court does apply intermediate scrutiny, the following arguments will still be applicable.

191 *See* Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).

192 That is not to say some judges may conclude this is not a compelling interest.

193 *See Mackey I*, 652 F. Supp. 3d at 347.

194 *See infra* notes 195–96 and accompanying text. *See, e.g.*, Frank v. Lee, 84 F.4th 1119, 1144 n.21 (10th Cir. 2023) (holding Wyoming had a compelling interest in regulating electioneering because protecting voters from undue influence preserves the integrity of elections).

195 Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 121 (S.D.N.Y 2023) (quoting Burson v. Freeman, 504 U.S. 191, 206, 208 (1992)); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting) ("[N]o justification for regulation is more compelling than protection of the electoral process.").

196 United States v. Trump, 91 F.4th 1173, 1198 (D.C. Cir. 2024), *vacated*, 603 U.S. 593 (2024).

197 This precedent was later vacated and remanded. *See* Trump v. United States, 603 U.S. 593, 642 (2024).

198 *See id.* at 1199–200; *supra* note 67 and accompanying text.

is likely important enough to subject harmful speech to restriction and, therefore, to survive the first prong of strict scrutiny.

The second prong of strict scrutiny can be met by narrowly tailoring the restriction to speech that is procedural as opposed to political,[199] speech that causes a legally cognizable harm,[200] and speech that comes from social media influencers.[201] In order to "'avoid unnecessary abridgement' of First Amendment rights,"[202] all three limiting principles should be applied. In a few rare circumstances, however, only limiting the restriction to speech that causes a legally cognizable harm disseminated by a social media influencer may be sufficiently narrow to survive strict scrutiny.[203]

B. Narrow Application Only to Procedural, or Politically Adjacent, Speech, Not Political Speech

The first of three ways to narrow the application of § 241's scope and therefore satisfy the second prong of strict scrutiny[204] is to only restrict procedural election disinformation. The difference between traditional political speech and politically adjacent procedural speech boils down to the question the speech answers:[205] how to vote versus who to vote for or why to vote for them.[206] Social media election disinformation regarding how people can vote, such as Mackey's text-to-vote Tweet, does not relate to what Justice Breyer considered valuable public policy topics such as "philosophy, religion, history, the social sciences, the arts, and the like,"[207] but instead concerns information *Mackey I* described

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199 *See infra* Section II.B.

200 *See infra* Section II.C.

201 *See infra* Section II.D.

202 McCutcheon v. FEC, 572 U.S. 185, 199 (2014) (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

203 *See infra* Section II.E (discussing the exception to the proposed rule of applying all three limiting principles).

204 This would also address the *Alvarez* Court's narrowness concern. *See* United States v. Alvarez, 567 U.S. 709, 722 (2012) ("[T]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment.").

205 *See infra* Section II.B.1.

206 Scholars have proposed similar frameworks to distinguish this kind of speech. *See* James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 222 (2018). Weinstein proposed defining political speech as any speech that adds to the political discourse or that provides "the public with useful information and perspectives." *Id.* By contrast, procedural speech, as it is referred to in this Note, should be considered speech that falls in the government's "domain to promote fair and efficient elections." *Id.* This Note proposes a simpler and more straightforward approach to provide clearer guidance.

207 *See Alvarez*, 567 U.S. at 731 (Breyer, J., concurring).

as "indubitably false, with 'no room to argue about interpretation or shades of meaning.'"[208]

Procedural lies are likely to impair the "integrity of [g]overnment processes"[209] because they strike at the very process of administering elections;[210] lies that strike at *how* to vote can cause confusion and impair the proper functioning of an election.[211] An example of such confusion could be imagined if one of the 220 million Musk followers on X[212] saw and believed Musk's post falsely claiming that identification is not required to vote in any state.[213] If that voter then proceeded to go to the polls on election day in a state like Florida,[214] for example, only to wait in line for hours[215] and be told an ID *is* required,[216] it is not hard to imagine that voter feeling frustrated and confused.[217]

There is no gray area regarding a polling place's hours of operation.[218] There is no gray area for the days a person can vote.[219] There is no

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208 *See Mackey I*, 652 F. Supp. 3d 309, 345 (E.D.N.Y. 2023) (quoting *id.* at 715 (majority opinion)).

209 *Alvarez*, 567 U.S. at 721.

210 There is no doubt that traditional political lies—such as those about prevalent election fraud used to drum up supporters—can also impair governmental functions, but traditional political lies are subject to more protections. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995). Additionally, traditional political lies can bleed into procedural lies, such as when a politician claims election fraud to persuade voters not to use vote-by-mail. *See infra* Section II.B.1.a.

211 *See Alvarez*, 567 U.S. at 735 (Breyer, J., concurring).

212 Musk, *supra* note 169.

213 *See* Musk, *supra* note 168.

214 *See* FLA. STAT. § 101.043 (2024) (requiring photo identification to vote in Florida).

215 *See* Richard Wolf & Kevin McCoy, *Voters in Key States Endured Long Lines, Equipment Failures*, USA TODAY (Nov. 9, 2016, 1:09 AM), https://www.usatoday.com/story/news/politics/elections/2016/11/08/voting-polls-election-day/93201770/ [https://perma.cc/Q96M-7Y26].

216 This example applies to the majority of the states that require some form of identification to vote. *See* BALLOTPEDIA, *supra* note 168.

217 The chaos that election fraud disinformation has caused for election administrators across the country is important to highlight, but because this particular set of disinformation does not address how a voter can cast a ballot, it is not addressed directly in this Note. *See* Sanchez, *supra* note 89; *see also* Michael Waldman, *The Great Resignation . . . of Election Officials*, BRENNAN CTR. FOR JUST. (Apr. 25, 2023), https://www.brennancenter.org/our-work/analysis-opinion/great-resignation-election-officials [https://perma.cc/R5XZ-VHEF].

218 *See* U.S. CONST. art. I, § 4 (requiring that state and local governments dictate the "[t]ime, [p]lace[s] and [m]anner of [] [e]lections . . . ."). The Elections Clause of the United States Constitution delegates this power to each state, except when Congress decides to step in. *See id.* Local election officials then follow the election laws determined by the state legislatures and are responsible for carrying out the logistics of elections. *See Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 22, 2023), https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels [https://perma.cc/94UC-9JBC]. Where, when, and how elections take place are determined by these governmental officials and, therefore, are not up for debate. *See id.*

219 *See Mackey I*, 652 F. Supp. 3d 309, 344 (E.D.N.Y. 2023) (finding the statement that people could vote by text was "indubitably false"); NAT'L CONF. OF STATE LEGISLATURES, *supra* note 218. *See generally Want to Vote Early? Check Your State's Early Voting Dates*, U.S. VOTE FOUND.,

gray area regarding the ability to vote by text.[220] As the *Mackey I* court suggested, the black-and-white nature of procedural, politically adjacent lies should be the speech subject to § 241.[221]

1. *The Test: How to Vote vs. Who to Vote for or Why to Vote for Them—Political vs. Procedural Speech*

Election disinformation on social media specifically is of special import because billions of people are susceptible[222] to seeing and immediately spreading false information that can render their ability to vote void.[223] Given how widespread made-up realities and fake news have become on social media,[224] it may seem overinclusive to consider any speech that invites debate political. That definition can almost certainly involve everything under the social media sun. Politically adjacent, procedural speech, however, is not so difficult to spot.

To distinguish between traditional political speech and politically adjacent, procedural speech, the test should be[225] the question the speech answers. If the speech answers the question of who to vote for or why to vote for a candidate or ballot measure,[226] then that speech is traditionally political. For example, the *Driehaus* opinion dealt with lies regarding a candidate's voting record, which were presumably used to motivate votes for an opponent.[227] If, on the other hand, the speech answered the question of how a person should cast their ballot, that speech would be politically adjacent, procedural speech. For example,

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https://www.usvotefoundation.org/early-voting-dates [https://perma.cc/U55E-N9E3] (listing election dates for each state).

220 *See* U.S. CONST. art. I, § 4.; NAT'L CONF. OF STATE LEGISLATURES, *supra* note 218.

221 *See Mackey I*, 652 F. Supp. 3d at 344–46. These are the most obvious examples—other examples of straightforward, black-and-white truths may be applicable.

222 *See* OBERLO, *supra* note 122.

223 *See Mackey I*, 652 F. Supp. 3d at 321–22. With a click of a button, influencers can reach thousands or millions of followers—plus any nonfollowers who may view the post via suggested content or discovery modes—with disinformation; the damage is instantaneous and grows exponentially with each share. *See* OBERLO, *supra* note 122. Radio personalities, television hosts, and news publications are unlikely to have the potential to cause as much harm in as little time.

224 *See, e.g.*, Dwoskin & Merrill, *supra* note 127.

225 The language of this test is inspired by scholars and courts that have previously discussed the distinction between procedural and political speech. *See, e.g.*, Hasen, *supra* note 20, at 59; *Mackey I*, 652 F. Supp. 3d at 348. Similar, less concrete definitions have already been proposed; other scholars, for example, have defined this type of speech as "aimed at disenfranchising voters." *See* Hasen, *supra* note 20, at 71. Additionally, the *Mackey I* court suggested that procedural speech goes to the "integrity of Government processes," but this qualifier can readily be hijacked by governments to regulate traditional political speech. *See Mackey I*, 652 F. Supp. 3d at 348 (quoting United States v. Alvarez, 567 U.S. 709, 721 (2012)). The government can argue dissonant speech in some way harms its ability to perform government processes, which can open the door to abuse.

226 *See Mackey I*, 652 F. Supp. 3d at 345.

227 *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473–75 (6th Cir. 2016).

Wohl dealt with lies intended to scare voters out of casting ballots by claiming that voting by mail would result in government enforced, mandatory COVID-19 vaccinations.[228]

a. Political Speech—The Why to Vote

The Supreme Court has long held that "[n]o form of speech is entitled to greater constitutional protection than" political speech.[229] If the defendant in *Alvarez* had lied about receiving the Congressional Medal of Honor during his election for local government, that could have been considered political speech because the speech would have reflected his qualifications as a candidate.[230] Traditional political speech relates to the "*substance* of what is (or may be) on the ballot."[231] Lies or not, this traditional political speech answers the question *why* someone should vote for a candidate and is essential to any democracy.[232] It should therefore not be caught in § 241's application.

Politicians, their supporters, and anyone else should have the right to lie about substantive topics because otherwise, as Justice Breyer suggested in *Alvarez*, the government may weaponize their power to persecute those with opposing views.[233] Without the ability to lie, we lose our ability to speak the truth.[234] Fear of retribution should not be allowed to stand in the way of open discussions[235] required for a democracy to persist.[236]

When politicians or their supporters claim widespread election fraud despite all credible evidence to the contrary,[237] such statements could potentially be considered political speech[238] under the

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228 *See* Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 114–15 (S.D.N.Y. 2023).

229 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

230 *See Alvarez*, 567 U.S. at 713–14.

231 *Mackey I*, 652 F. Supp. at 345.

232 Speech does not always fit into a neat category, no matter how simple the test may be. *See infra* Section II.B.2.

233 *See Alvarez*, 567 U.S. at 734 (Breyer, J., concurring).

234 *Id.* at 728 (majority opinion).

235 *Id.*

236 *See Civil Discourse - What You Need to Know*, League of Women Voters, https://my.lwv.org/california/diablo-valley/article/civil-discourse-what-you-need-know [https://perma.cc/9SA8-UM5N].

237 *See* Robert Yoon, *Trump's Drumbeat of Lies About the 2020 Election Keeps Getting Louder. Here Are the Facts*, Associated Press (Aug. 27, 2023, 9:43 AM), https://apnews.com/article/trump-2020-election-lies-debunked-4fc26546b07962fdbf9d66e739fbb50d [https://perma.cc/GC6N-NHG5] (discussing President Trump's false claims regarding the 2020 election); *see also* Jan Wolfe, *Trump's False Claims Debunked: The 2020 Election and Jan. 6 Riot*, Reuters (Jan. 6, 2022, 6:23 AM), https://www.reuters.com/world/us/trumps-false-claims-debunked-2020-election-jan-6-riot-2022-01-06/ [https://perma.cc/BV76-BXUS] (same).

238 Political speech in some cases can still be restricted. *See infra* Section II.E. For example, Fox News settled a $787 million defamation suit for the network's statements regarding the

proposed test.[239] If politicians build platforms on election fraud lies and use these lies as rationale for *why*—not *how*—people should vote for them, the politicians, by criticizing the government, would be engaging in the kind of political discourse Justice Breyer considered valuable and worthy of protection.[240] Similarly, when politicians peddle COVID-19 hoaxes,[241] that, too, is political speech because it reflects a viewpoint that can be tied to the politician's or a political party's platform, which speak to *why* candidates should be chosen. However harmful these lies may be, courts should approach restrictions to even potentially political speech with great caution[242] because democracy demands the greatest level of protection for political discourse.[243]

b. Procedural Speech—The How to Vote

The First Amendment has protected political speech at the highest level in part because courts have not viewed the government as the correct entity to decide what is true and what is not.[244] Courts feared that allowing the government to determine truth risked tyranny; instead courts left each individual the task of deciphering what is true and what is false as "watchm[e]n for truth."[245] But speech relating to where a polling place is located, when an election is to be held, and what documents are required to vote is in the government's sole purview of truth because the answers to these questions originate from the government—the government *alone* decides when and how voters can cast their ballots.[246] There is no debating this information.[247] Allowing the government to

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security of Dominion voting machines. *See* David Bauder, Randall Chase & Geoff Mulvihill, *Fox, Dominion Reach $787M Settlement over Election Claims*, Associated Press (Apr. 18, 2023, 8:32 PM), https://apnews.com/article/fox-news-dominion-lawsuit-trial-trump-2020-0ac71f75acfacc52ea80b3e747fb0afe [https://perma.cc/5LYF-LLBE].

239 *See supra* Section II.B.1.

240 *See Alvarez*, 567 U.S. at 731–32 (Breyer, J., concurring).

241 *See* Philip Bump, *Why Do Republicans Disproportionately Believe Health Misinformation?*, Wash. Post (Aug. 22, 2023, 1:44 PM), https://www.washingtonpost.com_politics/2023/08/22/republicans-vaccines-polls/.pdf [https://perma.cc/LK9L-94ZD].

242 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

243 *See supra* notes 74–75 and accompanying text.

244 *See* Meyer v. Grant, 486 U.S. 414, 419–21 (1988).

245 *See id.* (quoting Grant v. Meyer, 828 F.2d 1446, 1455 (10th Cir. 1987)).

246 *See supra* note 218.

247 *See supra* note 223. This is not to say that anything the government says is absolute truth. The eligibility of polling places for a particular voter or poll operating hours are decisions made solely by the government without input from any other entities. *See supra* note 218. This is distinguished from information created by the government with the input of other entities. For example, the winner of an election—although ultimately *called* by the government—is determined by the cooperation between the government, in the form of election officials, and voters. The amount or type of information that the government is solely responsible for, and is therefore unquestionable, is extremely rare.

regulate information that it alone distributes and controls carries little risk of tyranny. This speech answers the question of *how* to cast a ballot.

By narrowing the application to procedural versus traditional political speech, not only is free speech preserved, but the second prong of strict scrutiny is more likely to be satisfied because the application narrows the scope of the restriction to the government's interest in safeguarding democracy. Unlike in *Driehaus* and *McIntyre*, where the statutes restricting electoral speech failed the second prong because they failed to distinguish between different categories of speech,[248] here the application is narrowed to a particular kind of speech that answers one simple question: *how* to vote. For instance, if election fraud lies are used to manipulate *how* voters cast their ballots—to avoid voting by mail, for example—such falsehoods would be considered procedural under the proposed test because they answer the question of *how* to vote.

2. *Handling the Gray Areas—Courts Should Err on the Side of Political Speech Permissibility*

When speech does not appear to answer either the *why* or *how* someone should vote, courts should err on preserving freedom of speech by defaulting to a political versus procedural speech designation. This will prevent governmental abuse.[249] The goal of the proposed procedural speech test is to provide courts a clear-cut standard on restrictions to electoral speech the same way courts have distinguished fraudulent speech from protected speech in the past.[250] Electoral speech, however, will not always neatly fit into either the political or procedural category. For example, what happens when someone peddles the lie that a candidate has dropped out of a campaign?[251] This lie seems to implicate little debate—someone has either dropped out or not—but it answers neither the *why* nor the *how* questions. In such gray areas, to err on the side of protecting speech, as the Supreme Court has done,[252] this lie should be considered political because it does not answer the question of *how* someone can cast their ballot.

If the lie could conceivably answer both questions, then procedural speech is still fair game. For example, if Musk's election fraud lie[253] was

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248 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 351–52 (1995); Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473–74 (6th Cir. 2016).

249 *See Meyer*, 486 U.S. at 419.

250 *See* United States v. Alvarez, 567 U.S. 709, 718–19 (2012).

251 *See* Alex Marquardt & Paul P. Murphy, *Fake Texts and YouTube Video Spread Disinformation About Republican Primary Candidate on Election Day*, CNN (Aug. 18, 2020, 7:30 PM), https://www.cnn.com/2020/08/18/politics/byron-donalds-fake-texts-florida-republican-primary/index.html [https://perma.cc/C7HY-7C6H].

252 *Meyer*, 486 U.S. at 420.

253 *See* Musk, *supra* note 167.

used to motivate people to vote for Trump and simultaneously to avoid voting by mail, that speech answers both the *why* and the *how* questions. In that case, the procedural speech limitation can still be used to narrow the scope of the speech restriction and should therefore still be applicable.

C. Narrow Application to Speech That Implicates a Legally Cognizable and Concrete Harm

Procedural speech, unlike political speech, infringes on citizens' right to vote. Therefore, in addition to narrowing the application of § 241—which prohibits infringement of any federal right—to procedural speech, the second prong of strict scrutiny can be further satisfied by narrowing the application to speech that implicates legally cognizable harms.[254] Courts have not given the same degree of deference to restrictions on speech that inflict harm as those that are free from such inflictions.[255] One of the reasons the *Alvarez* Court was not convinced that the verifiable lie should be subject to restrictions was the lack of harm it inflicted.[256] Unlike the lie about having a Federal Medal of Honor in *Alvarez*, however, which had no concrete victim and imposed no tangible harm,[257] election disinformation results in discernable people suffering distinct harms. At best, falsehoods about where, when, and how to vote can cause confusion[258] amongst the electorate, which can slowly erode people's willingness to participate in the political process.[259] At worst, election disinformation has the potential to infringe on people's constitutional right to vote,[260] degrading democratic systems in the process.

Election disinformation's *legally cognizable* harms under § 241 serve as an additional limiting principle.[261] Election disinformation under § 241 causes the same legally cognizable harm as threats made about voting

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254 Some advocates have also argued that the term "injure" in § 241 implicates tortious harms, which takes it out from under the First Amendment's protections. *See* Amicus Curiae Brief of Professor Richard Hasen in Support of Appellee and Affirmance at 9–29, United States v. Mackey, No. 23-cr-7577 (2d Cir. Feb. 12, 2024).

255 *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1199 (9th Cir. 2018).

256 *See* United States v. Alvarez, 567 U.S. 709, 736 (2012) (Breyer, J., concurring).

257 *See id.* at 734.

258 *See* Rachel Leingang, *'Disinformation on Steroids': Is the US Prepared for AI's Influence on the Election?*, THE GUARDIAN (Feb. 26, 2024, 7:00 AM), https://www.theguardian.com/us-news/2024/feb/26/ai-deepfakes-disinformation-election [https://perma.cc/3E3M-SDWP] (highlighting AI's ability to "mak[e] imagery that looks real enough to create confusion for voters").

259 *See Election Misinformation Overview*, THE BRENNAN CTR., https://www.brennancenter.org/election-misinformation [https://perma.cc/A4PC-9Y4P].

260 *See* Reynolds v. Sims, 377 U.S. 533, 554 (1964); Ian Vandewalker, *Digital Disinformation and Vote Suppression*, THE BRENNAN CTR. (Sept. 2, 2020), https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression [https://perma.cc/3AFF-X84N].

261 *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1199 (9th Cir. 2018).

under 52 U.S.C. § 10307(b):[262] Both types of speech have the potential to impede a person's right to vote.[263] And so, like in *Wohl*, where the court decided that lies regarding the voting process disseminated via robocalls were unprotected because they infringed on the right to vote under § 10307(b),[264] lies about the voting process that infringe on the right to vote under 18 U.S.C. § 241 should also be without First Amendment protection. Mackey's Tweet did not just presumably upset the Clinton campaign, her supporters, and anyone with a stake in democracy; Mackey's Tweet infringed on 4,900 people's right to vote[265] and in doing so engaged in legally harmful behavior.[266] And as artificial intelligence technology makes it far more difficult to distinguish fictitious content from reality or falsehoods from truth,[267] bad actors will be able to cause this injury on a mass scale—exponentially increasing the harm.

D. Narrow Application Only to Actual Social Media Influencers vs. Lay People

The final proposed limiting principle in § 241's application is to subject only social media influencers to criminal liability instead of everyone with a social media account. This last principle addresses the *Alvarez* Court's concerns of a speech restriction indiscriminately applied to the general public,[268] many of whom use social media.[269] The immense amount of power and influence that comes from the trust followers have in an influencer qualifies social media influencers as public figures[270] subject to public criticism and concern. Under *Sullivan*, public officials—and public figures as extended by *Butts*—must endure a higher bar of censure because public figures subject themselves to the public eye and therefore to criticism.[271] Thus, public figures' statements should be held to a higher standard because having a larger bully pulpit subjects their messaging to the public's critique.

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262 *See* Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 114 (S.D.N.Y. 2023).

263 *See id.* at 112; *Mackey I*, 652 F. Supp. 3d 309, 347, 349 (E.D.N.Y. 2023).

264 *See Wohl*, 661 F. Supp. 3d at 114, 118–19.

265 *See supra* notes 6–10 and accompanying text.

266 *See supra* note 13 and accompanying text.

267 For example, during the 2024 presidential primary in New Hampshire, voters received robocalls using AI to mimic Joe Biden's voice compelling them to avoid going to the polls. *See* Kornfield, *supra* note 111. Compared with Mackey's meme, new AI technology has the potential to inflict exponentially more harm. If Mackey's meme could convince almost 5,000 people to text a number to vote, *see supra* notes 9–10 and accompanying text, then the effect on voters of the president saying election day has moved to Wednesday in a video could conceivably be detrimental.

268 *See* United States v. Alvarez, 567 U.S. 709, 723, 736 (2012).

269 *See* Oberlo, *supra* note 122.

270 *See supra* note 121.

271 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

1. Proposed Definition of Influencer

Because case law involving social media is still novel and courts' definitions of the term influencer are not uniform,[272] in coming to a legal definition, courts should consider practicality, the industry's factors for defining influencers, and the need to narrow § 241's scope. The threshold for defining influencer under § 241's application should be anyone with 10,000 followers or more for four discrete reasons: (1) the 10,000 threshold would avoid catching the general public;[273] (2) the 50,000 threshold, as one court applied,[274] ignores the industry's focus on smaller communities' significant power;[275] (3) the use of monetary involvement, as another court used,[276] ignores the noncommercial reality of influencers like political content creators;[277] and (4) the use of vague and generalized definitions, as some courts have utilized,[278] would be too difficult and impractical to apply consistently.

The 10,000-follower threshold balances the *Alvarez* Court's concern that speech restrictions must not be so broad as to ensnare regular, unwitting people with the industry's definitions of influencer.[279] Although some people may technically fall into the "nano-influencer" definition set by the marketing industry, people with just 1,000 or even 5,000 followers are unlikely to be sufficiently powerful to be considered public figures[280] under *Gertz v. Robert Welch, Inc.*[281] On the other hand, setting the threshold at 50,000[282] would ignore the significance of those the marketing industry views as the next frontier in social media's influence.[283] Additionally, by using a follower count to define influencers, as

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272 These definitions stem from dicta and are not yet disputed at the appellate levels. *See supra* Section I.C.1.

273 *Instagram Statistics: Key Demographic and User Numbers*, Backlinko (Jan. 30, 2024), https://backlinko.com/instagram-users#average-number-of-instagram-followers [https://perma.cc/XL8B-Y55Z].

274 *See* Influential Network, Inc. v. Darkstore, Inc., No. 21-cv-7162, 2023 WL 2372060, at *5 (C.D. Cal. Feb. 14, 2023).

275 *See supra* notes 145–50 and accompanying text.

276 *See* Pop v. Lulifama.com LLC, No. 8:22-cv-2698, 2023 WL 3584095, at *2 (M.D. Fla. May 22, 2023).

277 *See* Lorenz, *supra* note 155.

278 *See supra* notes 133–34 and accompanying text.

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

280 This proposal is for the sake of narrowing the scope, despite the industry's recognition that nano-influencers may still carry sway amongst their followers because the smaller following leads to a more genuine connection between the influencer and the community that they have created. *See* Geyser, *supra* note 124; Goanta, *supra* note 138 at 8.

281 418 U.S. 323 (1974); *see infra* notes 296–98 and accompanying text.

282 *See, e.g.*, Influential Network, Inc. v. Darkstore, Inc., No. 21-cv-7162, 2023 WL 2372060, at *5 (C.D. Cal. Feb. 14, 2023).

283 *See* Geyser, *supra* note 124; *supra* notes 145–50.

opposed to financial gain,[284] courts will avoid ignoring the subset of people using social media to influence attitudes and nonconsumer behavior. With 58,000 followers,[285] Mackey, for example, did not use his account for monetary gain, but was considered more influential in the 2016 election than some traditional news outlets and some popular celebrities.[286] People with 10,000 followers—unlike the general public—have the power to control behavior,[287] attitudes, and public debate.[288]

The built-in limiting principle of § 241 is the requirement that perpetrators actually conspire.[289] That means there must be at least two people involved.[290] Many influencers with the kind of sway and power that would qualify them for § 241's application are unlikely to be lone wolves; they team up to create content[291] and in some instances go so far as to live with one another for the exact purpose of creating content.[292] Although some influencers choose to live with one another, others collaborate online[293]—as in Mackey's case. He chose to spend a great deal of time collaborating with like-minded individuals in a chat room affectionately referred to as the "War Room."[294]

2. *Influencers Are Public Figures Who Should Be Subject to Higher Standards*

Social media influencers fit the definition of public figures under *Gertz*.[295] As their title suggests, influencers have the potential to change thousands, if not millions, of followers' behavior in seconds.[296] The Supreme

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284 *See, e.g.*, Pop v. Lulifama.com LLC, No. 8:22-cv-2698, 2023 WL 3584095, at *2 (M.D. Fla. May 22, 2023).

285 *See Mackey I*, 652 F. Supp. 3d 309, 319 (E.D.N.Y. 2023).

286 *See* Mackey Complaint, *supra* note 6, ¶ 11 (noting that Mackey's account was "ranked . . . as the 107th most important influencer of the then-upcoming Election, ranking it above more widely known outlets and individuals"); William Powers, *Who's Influencing Election 2016?*, MEDIUM (Feb. 23, 2016), https://medium.com/@mitccc/who-s-influencing-election-2016-8bed68ddecc3#.e6ttb042q [https://perma.cc/XAU6-GESY]. *See generally* Mackey Complaint, *supra* note 6.

287 *See* GOANTA & RANCHORDÁS, *supra* note 138, at 6; Geyser, *supra* note 124; COURSERA, *supra* note 141; Patel, *supra* note 142.

288 *See* Dwoskin & Merrill, *supra* note 127.

289 18 U.S.C. § 241.

290 *Id.*

291 *See* SIDEWALKER DAILY, *supra* note 151.

292 Jacob v. Lorenz, 626 F. Supp. 3d 672, 679 (S.D.N.Y. 2022); Santora, *supra* note 154; Lorenz, *supra* note 155.

293 *Jacob*, 626 F. Supp. 3d at 679; Santora, *supra* note 154; Lorenz, *supra* note 155.

294 Mackey Complaint, *supra* note 6, ¶ 13. So long as one individual sufficiently meets influencer status, the other individuals should not necessarily need to be considered influencers for § 241 to apply.

295 *See infra* notes 297–98 and accompanying text.

296 *See* GOANTA & RANCHORDÁS, *supra* note 138, at 6; Geyser, *supra* note 124; COURSERA, *supra* note 141; Patel, *supra* note 142.

Court found that public figures who hold a great deal of "power and influence"[297] over the public are subject to the same actual malice standard as public officials because they "invite attention and comment."[298] Influencers therefore logically fit under this definition of public figures.

Butts, *Gertz*, and *Sullivan* all sought to hold public figures accountable concerning defamatory statements;[299] influencers who are in the public eye should therefore be subject to a different standard than a typical lay person with a social media account. Because the actual malice standard from *Sullivan* exists in part for the benefit of holding public officials accountable to the people,[300] the application of a higher standard *on* public officials would serve the same purpose to hold these people accountable. And after *Butts*, this accountability extends to public figures[301] who, without pledging an oath, also owe a responsibility to the public. Thus, if *Sullivan*'s purpose of holding public officials—or, in this case, public figures—accountable to the people is to be carried out, social media influencers' statements must be subject to a higher standard.[302]

Conclusion

In March 2023, a jury of Mackey's peers convicted him under § 241;[303] Mackey was then sentenced to seven months imprisonment,[304] after which he filed a notice of appeal to the Second Circuit, which is now pending.[305] Election disinformation has grown exponentially since 2016 and will continue to be an ever-present threat to democracy. Holding social media influencers criminally liable for a subset of election disinformation is just one way for prosecutors to fight for and courts to uphold democratic systems. When § 241 is used and the issue is brought before the courts, it should survive strict scrutiny given the proposed limiting principles in this Note.

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297 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (finding that people who "occupy positions of such persuasive power and influence . . . are deemed public figures for all purposes").

298 *See id.*

299 *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967); *Gertz*, 418 U.S. at 336; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

300 *See Sullivan*, 376 U.S. at 281–83 (explaining the actual malice standard is appropriate because public officials "serve" the general public, who should be free to criticize their official acts); *see also id.* at 296–97 (Black, J., concurring) (noting public officials owe a responsibility to the general public, which is held in check through public discourse and criticism).

301 *See Butts*, 388 U.S. at 155.

302 *See* Aspen Inst. Ger., *supra* note 140 ("Since social media influencers can consciously or subconsciously reinforce disinformation campaigns, they bear a special responsibility as public opinion leaders in countering disinformation.").

303 *See Mackey II*, No. 21-cr-80, 2023 WL 6879613, at *1 (E.D.N.Y. Oct. 17, 2023).

304 *See* Judgment in a Criminal Case at 2, *Mackey II*, No. 21-cr-80 (E.D.N.Y. Oct. 25, 2023).

305 *Mackey II*, 2023 WL 6879613 (E.D.N.Y. Oct. 17, 2023), *appeal docketed*, No. 23-cr-7577 (2d Cir. Oct. 25, 2023).