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Stop Electronic Amplification of Lies

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ABSTRACT

American democracy is in trouble. According to Freedom House, "the United States' aggregate Freedom in the World score has declined by 11 points," from 94 to 83, between 2010 and 2020. The Economist downgraded the United States from a "full democracy" to a "flawed democracy" in 2016. Leading scholars who have studied democratic decay in other countries warn that "the guardrails of American democracy are weakening."

Several factors have contributed to the erosion of democratic norms and institutions in the United States. The electronic amplification of lies and misinformation is a major contributing factor. The term "electronic amplification," as used here, refers to a variety of technologies—including radio, broadcast television, cable television, social media, blogs, and podcasts—that enable speakers to deliver their messages to large audiences almost instantaneously.

This essay builds on the work of other scholars who have explained how electronic amplification of lies and misinformation is eroding the quality of democratic governance in the United States and elsewhere. Instead of diagnosing the problem, my goal here is to sketch the outlines of a possible legislative solution. The proposal developed here is intentionally provocative. I do not pretend to have all the answers, but I do want to stimulate a conversation that I think is vitally important for the future of American democracy.

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INTRODUCTION

American democracy is in trouble. According to Freedom House, "the United States' aggregate *Freedom in the World* score has declined by 11 points," from ninety-four to eighty-three, between 2010 and 2020.[1] *The Economist* downgraded the United States from a "full democracy" to a "flawed democracy" in 2016.[2] Leading scholars who have studied democratic decay in other countries warn that "the guardrails of American democracy are weakening."[3]

Several factors have contributed to the erosion of democratic norms and institutions in the United States. The electronic amplification of lies and misinformation is one such factor. The term "electronic amplification," as used here, refers to a variety of technologies—including radio, broadcast television, cable television, social media, blogs, and podcasts—that enable speakers to deliver their messages to large audiences almost instantaneously.

This Essay builds on the work of other scholars who have explained how electronic amplification of lies and misinformation is eroding the quality of democratic governance in the United States and elsewhere.[4] Instead of diagnosing the problem, the goal here is to sketch the outlines of a possible legislative solution. The proposal developed here is intentionally provocative. This Essay does not pretend to have all the answers, but it is intended to stimulate a conversation that this author believes is vitally important for the future of American democracy.

The remainder of this essay consists of four parts. Part I provides an overview of potential strategies to restrict the electronic amplification of lies and explains why the task of developing a legislative solution is so challenging. Part II summarizes the proposed legislation: the Stop Electronic Amplification of Lies Act ("SEAL Act"). The SEAL Act would create a new, independent, nonpartisan organization called the National Fact-Checking Institute ("NFCI"). Part III examines NFCI in more detail. Part IV briefly addresses potential First Amendment objections to the SEAL Act.

1. SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE 10 (2021).

2. *Democracy Index 2016: Revenge of the "Deplorables",* ECONOMIST, 2017, at 37, 44.

3. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 9 (2018). *See also* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018) (discussing democratic decay in Venezuela, Thailand, Turkey, Sri Lanka, Hungary, Poland, and India).

4. *See, e.g.*, CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 4–5 (2021); SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM (Nathaniel Persily & Joshua A. Tucker eds.) (2020); PHILIP N. HOWARD, LIE MACHINES: HOW TO SAVE DEMOCRACY FROM TROLL ARMIES, DECEITFUL ROBOTS, JUNK NEWS OPERATIONS, AND POLITICAL OPERATIVES (2020).

I. THE CHALLENGE OF REGULATING ELECTRONIC MEGAPHONES

The term "electronic megaphone" refers broadly to any technology or commercial service that enables speakers to deliver messages to large audiences almost instantaneously. Proposals to restrict the use of electronic megaphones to disseminate lies and misinformation generally fall into three categories: media literacy programs, industry self-regulation, and government regulation.

Media literacy programs can potentially offer significant benefits,[5] but they are, at best, a partial solution. Empirical research demonstrates that individual consumers have difficulty discriminating between true and false claims.[6] Moreover, individual consumers of news and information tend to sort themselves into isolated filter bubbles that reinforce their preexisting beliefs,[7] regardless of whether those beliefs are true or false.

Since the insurrection at the Capitol on January 6, 2021, leading social media companies have taken significant steps to restrict dissemination of lies and misinformation on their platforms.[8] Those efforts are laudable, but private regulation will not solve the problem. Private companies have a legal duty to maximize shareholder value, a duty that sometimes conflicts with the public interest in restricting the electronic amplification of lies. Moreover, exclusive reliance on private lawmaking is inconsistent with a core tenet of democratic theory—that the laws governing our conduct should be made by our elected representatives. Additionally, there are dramatic inconsistences among company policies. Fox News has a vested interest in continuing to spread misinformation.[9] Absent government regulation, there is no realistic prospect that Fox will dramatically alter its editorial policies.

Of course, government regulation of speech presents its own dangers. Indeed, the very idea that Congress should enact legislation to restrict electronic

5. *See* Gabriel Cederberg, *Catching Swedish Phish: How Sweden is Protecting its 2018 Elections*, DEFENDING DIGIT. DEMOCRACY PROJECT (Harv. Kennedy Sch., Belfer Ctr. for Sci. & Int'l Affs.), 2018 (discussing media literacy program in Sweden).

6. *See* Srijan Kumar & Neil Shah, False Information on Web and Social Media: A Survey, at 7 (Apr. 23, 2018), https://arxiv.org/pdf/1804.08559.pdf ("False information would not have any influence if readers were able to tell that it is false. However, several research studies have conducted experiments to measure the ability of humans to detect false information . . . and have shown that humans are not particularly good at discerning false from true information."). *See also* Étienne Brown, *Free Speech and the Legal Prohibition of Fake News*, SOC. THEORY & PRAC. (forthcoming 2022), https://philpapers.org/rec/BROFSA-5.

7. *See, e.g.*, ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011); YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018).

8. *See, e.g.*, *How is Facebook addressing false information through independent fact-checkers?*, FACEBOOK HELP CTR., https://www.facebook.com/help/1952307158131536 (last visited Sept. 1, 2021); *Civic Integrity Policy*, TWITTER HELP CTR. (Oct. 2021), https://help.twitter.com/en/rules-and-policies/election-integrity-policy.

9. *See* BENKLER ET AL., *supra* note 7, at 145–87.

amplification of lies raises legitimate fears about a "Ministry of Truth" in which Big Brother is watching us. It also raises serious concerns about government censorship of minority and dissenting views. We need a fourth option: one that does not place too much reliance on either individual consumers, private companies, or the federal government to distinguish between truth and falsehood.

The SEAL Act would create a new, congressionally-chartered, nonpartisan, nonprofit organization called the National Fact-Checking Institute. Over the past several decades, Congress has created hundreds of "hybrid organizations" that are not U.S. government agencies, but that possess "legal characteristics of both the governmental and private sectors."[10] For example, the National Endowment for Democracy ("NED") receives virtually all of its funding from the federal government, but the statute creating the NED specifies that it is "not an agency or establishment of the United States."[11] Similarly, the SEAL Act would state explicitly that the NFCI is "not an agency or establishment of the United States." Whereas the core purpose of the NED is to promote democracy abroad, the core purpose of the NFCI is to protect democracy at home by identifying false and misleading claims and curbing the electronic amplification of lies.

A key premise underlying the proposed SEAL Act is that it is dangerous to grant too much power to any one organization. Indeed, a critical problem with the current arrangement is that the government's failure to regulate electronic amplification has effectively delegated unchecked rulemaking authority to large private companies, without creating any meaningful process to hold them accountable for their decisions.[12] The SEAL Act would create a system of checks and balances by dividing power among the NFCI, the Federal Communications Commission ("FCC"), and electronic megaphone companies ("EMCs"). No single pillar of that triad would exercise too much power because each of the three pillars would act as a check on the other two.

Before diving into the details of the SEAL Act, let us consider two major obstacles to the proposed legislation. First, if Congress does enact legislation like the SEAL Act, people will undoubtedly file suits to challenge its constitutionality. The final section of this essay briefly addresses constitutional objections to the SEAL Act. Here, it is worth recalling the famous words of Justice Robert Jackson: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[13] The electronic amplification of lies presents

10. KEVIN R. KOSAR, CONG. RSCH. SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS 1 (2011).

11. 22 U.S.C. § 4411(a) (2018).

12. *See, e.g.,* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

13. Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

an existential threat to the continued vitality of constitutional democracy in the United States. Notwithstanding existing judicial precedents, we can only hope that courts will not exercise their power of judicial review in a way that creates a constitutional straitjacket, preventing Congress from enacting legislation that is vitally necessary to preserve our system of democratic self-government.

Second, a note of political realism is warranted. Given Donald Trump's apparent grip on the Republican Party, the SEAL Act is unlikely to become law in the current Congress. Even so, political conditions can change rapidly. Many Republican politicians are deeply committed to protecting American democracy; they presumably recognize that electronic amplification of lies presents a significant threat to our system of democratic self-governance. This author believes that responsible politicians will ultimately free the Republican Party from the pernicious influence of Trumpism. When that day comes, legislation along the lines of the SEAL Act could potentially attract broad, bipartisan support.

II. THE SEAL ACT

To minimize the risk of government censorship, the SEAL Act includes several provisions designed to ensure that the NFCI operates independently, free from government control.[14] The Act would empower the NFCI to: (a) monitor communications that utilize electronic amplification technologies (subject to limits protecting individual privacy); and (b) label specific messages as false or misleading. The SEAL Act includes a system of positive incentives to encourage "persons with large electronic megaphones" ("PLEMs") to refrain from spreading lies and misinformation. PLEMs who repeatedly use their electronic megaphones to spread false or misleading claims would have their access to electronic megaphones temporarily suspended. However, the NFCI itself would have no power to issue suspension orders. Instead, the SEAL Act would empower (and in some cases require) the FCC and private companies to issue suspension orders based on the NFCI's factual findings that a particular PLEM repeatedly spread false or misleading claims.

A. Regulated Parties

The SEAL Act would regulate the behavior of two types of parties: "electronic megaphone companies" and "persons with large electronic megaphones." EMCs include all companies that provide electronic amplification services for individuals who want to convey messages to large audiences. There are four main categories of EMCs:

14. *See infra* text accompanying notes 36–42.

(1) companies that operate networks or syndicates that transmit audio programming through AM, FM, and/or satellite radio channels;

(2) companies that operate television networks, including both cable TV and broadcast television;

(3) companies that operate social media platforms; and

(4) companies that provide either distribution services or web-hosting services for blogs and/or podcasts.

The SEAL Act would also include a fifth, catch-all category to encompass other technologies (including potential future technologies) and other types of businesses (such as content aggregators) that provide electronic amplification services for individuals who want to convey messages to large audiences. Empirical research suggests that the interaction among speakers and listeners who use different types of electronic amplification technologies facilitates the widespread dissemination of lies and misinformation.[15] Therefore, the SEAL Act would cover EMCs in all of the main technological and commercial fields involving electronic amplification.

EMCs include both large and small companies. In contrast, the proposed SEAL Act incorporates thresholds into the definition of "PLEMs" so that the law regulates only persons with *large* electronic megaphones. Ultimately, if Congress enacts legislation like the proposed SEAL Act, it should engage in fact-finding to determine the appropriate thresholds to include in the definition of PLEMs. The thresholds included below are for illustrative purposes only. The term "persons with large electronic megaphones" includes:

(1) Radio news programs, and any person who hosts or operates a radio news program, with more than *five million* weekly listeners;

(2) Television news programs, and any person who hosts or operates a television news program (including both cable TV and broadcast television), with more than *two million* weekly viewers;

(3) Social media accounts, pages, groups, and channels, and any person who operates a social media account, page, group, or channel, with more than *ten million* likes, subscribers or followers; and

(4) Blogs and podcasts, and any person who writes or produces a blog or podcast, with more than *one million* subscribers or more than *one million* weekly readers or listeners.[16]

15. *See* BENKLER ET AL., *supra* note 7.

16. Numerical thresholds of this type invariably create counting problems. For example, a network of bots is a useful tool to generate electronic amplification. If each bot account is treated as a single speaker, it may be true that no individual bot account reaches a large enough audience to qualify as a PLEM. In that case, malicious individuals could evade the regulation by utilizing a network of bots. Therefore, Congress may wish to define the thresholds so that a network of bots counts as a single speaker. However, that approach could be difficult to administer. *See* Eric

The term "person" includes both natural and artificial persons, but the SEAL Act would explicitly exclude EMCs from the definition of the term "PLEM." Consider *World News Tonight* as an example. In that case, the term "PLEM" includes both David Muir (the host of the show) and *World News Tonight* (the show itself). However, ABC News (the company that operates the show) is not a PLEM because ABC News is an EMC.

The numerical thresholds incorporated into the definition of PLEMs serve two important goals. First, high thresholds protect the privacy of the vast majority of speakers and listeners because the SEAL Act would prohibit the NFCI from monitoring the communications of anyone who is not a PLEM. Any person who has a sufficiently large audience to qualify as a PLEM cannot legitimately object to monitoring by the NFCI because PLEMs have chosen to make their communications public by cultivating large audiences. Second, the thresholds should be high enough to ensure that the NFCI's mission is administratively feasible. The NFCI should be a relatively small organization to help ensure that its judgments in individual cases are consistent with the principle that "like cases should be treated alike." High thresholds will limit the total number of PLEMs, thereby helping to ensure that the NFCI's small staff can monitor all PLEMs efficiently and effectively. Even with fairly high thresholds, the SEAL Act would substantially reduce the harm caused by electronic amplification of lies because a fairly small number of speakers—those with the largest electronic megaphones—are primarily responsible for the dissemination of lies and misinformation to very large audiences.[17] In other words, if only a fraction of one percent of speakers qualify as PLEMs, but the Act significantly restricts the electronic amplification of their lies, then the Act would dramatically reduce the impact of electronically amplified lies, even if it does not reduce the number of lies in circulation.

The SEAL Act would grant the NFCI the authority to modify the PLEM thresholds, subject to FCC approval, after notice-and-comment rulemaking.[18]

Goldman & Jess Miers, Regulating Internet Services by Size (June 10, 2021) (Santa Clara University Legal Studies Research Paper) (exploring these types of counting problems).

17. *See* BENKLER ET AL., *supra* note 7, at 233 (explaining that the dissemination of lies and misinformation by "marginal figures . . . can only work with willing and active complicity of outlets higher up the chain—Drudge, Hannity, and the rest of the more visible members of the media ecosystem").

18. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE V.1, 557–92 (5th ed. 2010) (explaining notice-and-comment rulemaking). FCC rulemaking has been subject to numerous criticisms. *See, e.g.*, Letter from Catherine J.K. Sandoval, Professor, Santa Clara Univ. Sch. of L., to Marlene Dortch, FCC, on Reply Comments, Restoring Internet Freedom, WC Docket No. 17-108, FCC 17-60 (Aug. 30, 2017) (available at https://ecfsapi.fcc.gov/file/10831848411154/Professor%20Sandoval%20August%2030%20Reply%20Comments%20filed.pdf). The process is admittedly imperfect, but it is the least bad alternative. Assuming that the NFCI is a non-governmental organization (which it must be to preserve its independence), it would not be permissible for the NFCI to act unilaterally to create rules with the force of law. However, if the

As the NFCI gains experience in performing its fact-checking mission—and especially after it gains experience in using algorithms and artificial intelligence to assist with that mission—it should be able to lower the thresholds (thus increasing the number of PLEMs) without making its task too administratively cumbersome. Even so, the thresholds should remain relatively high to prevent the NFCI from monitoring the communications of ordinary speakers whose messages reach fairly small audiences.

B. A System of Positive Incentives

The SEAL Act includes a system of incentives to discourage PLEMs from disseminating false or misleading claims. As long as the information they disseminate is neither false nor misleading, PLEMs retain the privilege of using electronic amplification services to reach very large audiences.[19] Moreover, for those PLEMs who inadvertently disseminate false or misleading claims, the system gives them multiple opportunities to alter their behavior to avoid repetition of such claims. However, the SEAL Act does include sanctions—in the form of temporary suspension from large electronic megaphones—for PLEMs who repeatedly ignore warnings that they are spreading false or misleading claims.

If the NFCI determines that a particular message transmitted by a PLEM is false or misleading, the first step is to issue a warning to the PLEM and their associated EMC(s). The SEAL Act would employ a "three strikes and you're out system": a series of three warnings to the same PLEM would result in temporary suspension from electronic megaphones for three to six months.[20] When electronic amplification privileges are restored, the person starts over again with zero strikes. If that PLEM continues to spread false or misleading claims, the NFCI would issue additional warnings. If the same PLEM again

NFCI has to persuade Congress to enact new legislation whenever it wants to modify rules to improve the process, it would have to overcome legislative gridlock. FCC rulemaking provides a reasonable middle ground between these two worse options.

19. This statement assumes that individual access to large electronic megaphones is a privilege, not a constitutional right. Recent Supreme Court doctrine arguably grants individuals a First Amendment right to use large electronic megaphones. *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730 (2017); Reno v. ACLU, 521 U.S. 844 (1997). However, that construction of the Constitution risks converting the First Amendment into a weapon for destroying constitutional democracy. Since the central goal of the Constitution is to create and maintain a system of democratic self-government, see ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014), courts should not construe the First Amendment in a manner that subverts democratic self-government.

20. For ease of expression, the text of this Essay refers throughout to "suspension." However, EMCs would have the option of implementing "suspension orders" by limiting electronic amplification so that the PLEM who is the target of the order could continue to have access to an electronic megaphone, but the EMC would restrict the size of the audience so that the speaker would fall below the statutory threshold to qualify as a PLEM.

receives three strikes, the second suspension would be longer—for twelve to eighteen months. After a PLEM has been suspended twice, and electronic amplification privileges have been restored for a second time, they would start over again with zero strikes. As before, if that PLEM continues to spread false or misleading claims, the NFCI would issue additional warnings. If the same PLEM again receives three strikes, the third suspension would be for three to five years, with an option for permanent suspension in egregious cases. The same rules would apply to a fourth or subsequent suspension.

The preceding paragraph describes a system in which the EMCs cooperate voluntarily with the NFCI to implement suspension orders. As long as EMC cooperation is voluntary, the system does not raise any serious constitutional concerns because there is no state action. Still, the SEAL Act would create a private right of action authorizing PLEMs to file suit in federal court to challenge any suspension order issued by an EMC.[21]

What happens, though, if a recalcitrant EMC refuses to implement the NFCI's recommendation to suspend a PLEM?[22] In that case, the NFCI could file a claim before an FCC administrative law judge ("ALJ"). The SEAL Act would provide for expedited procedures before an ALJ so that such disputes could be resolved quickly.[23] The SEAL Act would also authorize the FCC to hire additional ALJs for this purpose. In proceedings before an ALJ, the EMC would have the burden of proving that the NFCI made a mistake in labeling one or more messages as "false or misleading." The EMC would have to persuade the ALJ that the NFCI's recommendation for suspension was based on one or more factual findings that are clearly erroneous.[24] If the ALJ orders suspension, that order would be immediately binding on both the EMC and the relevant PLEM. In accordance with the Supreme Court's recent decision in *United States v. Arthrex, Inc*., the FCC itself (i.e., the five-person Commission) must "have the discretion to review decisions rendered by" ALJs.[25] The SEAL Act would include strict timelines to ensure a prompt decision by the FCC. The FCC's final decision would be appealable to a federal district judge.

In sum, the system of graduated sanctions is designed to provide a positive incentive for PLEMs to refrain from spreading lies and misinformation. As long

21. See *infra* notes 26–28 and accompanying text (discussing judicial review).

22. Parler, for example, might be such a recalcitrant EMC.

23. For example, the Act could require an ALJ decision based exclusively on written submissions, without oral testimony.

24. The "typical" case would probably not involve criticism of a public figure. In such cases, the outcome of litigation before an ALJ should not hinge on the state of mind of the PLEM. However, in cases that do involve criticism of a public figure, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), would require the ALJ to make a factual finding about the PLEM's state of mind. Such cases might well require a different set of procedures, including oral testimony. *See infra* note 32 and accompanying text for more on this point.

25. 141 S. Ct. 1970, 1972 (2021).

as PLEMs tell the truth, they retain their access to large electronic megaphones. If they use those megaphones to disseminate lies and misinformation, they get multiple opportunities to correct their behavior before any suspension order issues. If they are suspended, the initial suspensions would be for a fairly short duration. Long-term or permanent suspension would be reserved for PLEMs who demonstrate by their behavior that they are unable or unwilling to stop spreading dangerous lies.

C. Judicial Review

The SEAL Act would authorize both PLEMs and EMCs to file suits in federal district court to challenge suspension orders issued by the FCC. The SEAL Act would also authorize PLEMs to file suits to challenge suspension orders issued by EMCs in cases where the FCC is not involved. In judicial proceedings where the PLEM's state of mind is not at issue,[26] courts would be required to accept the NFCI factual findings unless those findings are clearly erroneous. In such cases, the plaintiff challenging a suspension order would have the burden of proving that a NFCI factual finding was clearly erroneous.

As discussed elsewhere in this Essay, the SEAL Act would grant the FCC some rulemaking authority. New FCC rules would be subject to judicial review in accordance with standard procedures for challenging agency rulemaking.[27] In contrast, a NFCI decision to issue a warning to a PLEM would not be immediately subject to judicial review, but PLEMs could challenge the factual findings that trigger a warning in the context of challenging a suspension order. Similarly, the decision to classify a person as a PLEM (based on a factual finding that the person meets the relevant statutory threshold) would not be immediately subject to judicial review, but the PLEM could challenge that decision later in the context of challenging a suspension order.[28]

D. Separation of Powers

As noted previously, a key premise underlying the proposed SEAL Act is that it is dangerous to grant too much power to any one organization. Thus, the SEAL Act would create a system of checks and balances by dividing power among the NFCI, the FCC, and EMCs. No single pillar of that triad would exercise too much power because each of the three pillars would act as a check on the other two.

26. For a discussion of cases where the PLEM's state of mind is at issue, *see infra* note 32 and accompanying text.

27. *See* 5 U.S.C. §§ 701–06.

28. As discussed below, EMCs would make the initial decision to classify a particular person as a PLEM, subject to FCC review. *See infra* Part II.D.2. That classification decision, without more, would not impose any significant cost on individual PLEMs because those individuals have chosen to make their communications public by disseminating their messages to large audiences.

1. The NFCI

The NFCI would have primary responsibility for deciding which claims disseminated by PLEMs are false or misleading. The SEAL Act would require the NFCI to operate in accordance with the International Fact-Checking Network Code of Principles,[29] unless the NFCI adopts specific rules—approved by the NFCI Board of Directors—to authorize a departure from those principles. To enable the NFCI to perform its fact-checking function, the SEAL Act would authorize the NFCI to monitor messages transmitted by PLEMs.[30] EMCs would be obligated to cooperate with the NFCI to help it perform that monitoring task. In addition to monitoring messages, and deciding which claims are false or misleading, the NFCI would have two other statutory responsibilities: issuing warnings to PLEMS and recommending suspension orders. The NFCI would have the sole authority to issue warnings but could not unilaterally issue a suspension order. Only EMCs and the FCC would have authority to issue suspension orders.

The legislation would restrict the NFCI's mandate so that it has authority to monitor only two types of claims: medical claims (including claims related to public health) and election-related claims. The SEAL Act would authorize the FCC to enact future regulations—subject to notice-and-comment rulemaking—to add a third (or fourth) category of claims to the NFCI's mandate.

Deciding whether a particular claim is "false" is relatively straightforward. However, any decision to label a particular claim as "misleading" involves a judgment call. The SEAL Act would limit the scope of the NFCI's discretionary authority in that respect. For medical claims, the NFCI would have to determine that the claim is "contrary to the weight of scientific evidence" and that "widespread belief in that claim would pose a significant danger to public health." For election-related claims, the SEAL Act would provide a narrow definition of the term "election-related claim," drawing on the existing statutory definition of "electioneering communication."[31] Moreover, the NFCI would have to determine that a particular claim is "highly misleading" and that "widespread belief in that claim would risk undermining the integrity of the electoral process."

The NFCI should not be required or authorized to make judgments about a PLEM's state of mind. In most cases, the PLEM's state of mind is simply not relevant to the question whether a particular claim is "false or misleading." However, in cases involving criticism of a public figure that are litigated before an ALJ or a district court, *New York Times v. Sullivan* would require the ALJ or

29. *See International Fact-Checking Network fact-checkers' code of principles*, POYNTER (Dec. 23, 2021), https://www.poynter.org/ifcn-fact-checkers-code-of-principles/.

30. To reiterate, the Act would also prohibit the NFCI from monitoring communications by anyone who falls below the statutory threshold to qualify as a PLEM.

31. *See* 52 U.S.C. § 30101(f).

district judge to decide whether the PLEM's speech manifested "reckless disregard" of the truth.[32] In such cases, the fact that the NFCI had issued multiple warnings to the PLEM would support an inference that the PLEM acted with reckless disregard of the truth, but due process considerations require an opportunity for the PLEM to contest that inference. In litigation before either an ALJ or a district court, the SEAL Act would place the burden of proof on the PLEM to persuade the decision-maker that they did not act with reckless disregard.

2. EMCs

EMCs would have the initial responsibility to determine which speakers reach a sufficiently large audience to qualify as PLEMs, based on the statutory thresholds, and subject to FCC review. The SEAL Act would require EMCs to collect the data necessary to make this determination. The legislation would also require EMCs to report that data to the FCC so that the FCC could confirm the validity of all EMC decisions that a particular person does, or does not, qualify as a PLEM.

EMCs would be legally obligated to implement FCC suspension orders and would be subject to fines for any willful refusal to carry out their statutory duties. EMCs would retain the authority to issue their own suspension orders based on violations of company policies. However, the SEAL Act would prohibit EMCs from issuing any suspension order based on a finding that a PLEM transmitted a false or misleading claim, except as provided in the statute.

3. The FCC

Under the SEAL Act, the NFCI's operations would be funded entirely by fees charged to EMCs. Small EMCs would be exempt from those fees. The SEAL Act would authorize the FCC to promulgate regulations to establish the fee structure and determine which EMCs are exempt. The FCC would assess fees annually to raise sufficient funds to meet the NFCI's budgetary needs. This arrangement is similar to the current arrangement for funding the FCC itself. "Since 2009, the FCC's entire budget is derived from regulatory fees collected by the agency rather than through a direct appropriation. The fees . . . are collected from license holders and certain other entities (e.g., cable television systems) and deposited into an FCC account."[33]

The SEAL Act would prohibit the FCC from ordering the suspension of any PLEM without a prior recommendation from the NFCI (except insofar as other laws authorize the FCC to issue suspension orders for reasons unrelated to

32. 376 U.S. 254, 254 (1964).

33. PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., RL32589, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE i (2018).

concerns about lies and misinformation). With a prior recommendation from the NFCI, FCC ALJs would have authority to issue legally binding suspension orders to both PLEMs and EMCs;[34] those orders would be subject to review by the five-member Commission and subject to the possibility of judicial review. In all proceedings before ALJs, the party challenging a NFCI recommendation for suspension would have the burden of proving that the NFCI's recommendation was unwarranted. ALJs and the FCC would be required to accept the NFCI's factual findings unless they determined that a particular factual finding was clearly erroneous.

The SEAL Act would grant the FCC authority to impose fines on EMCs that willfully refuse to perform their statutory duties. Most large EMCs—companies like Google, Facebook, and CNN—can be expected to cooperate fully with the NFCI and the FCC in carrying out their statutory responsibilities. However, companies like Parler (which appears to be determined to provide electronic megaphones for individuals who repeatedly spread lies and misinformation)[35] might well resist FCC enforcement efforts. The FCC should have authority to impose fines that are sufficiently large to prevent companies like Parler from thwarting accomplishment of the goals that the SEAL Act is designed to accomplish.

III. THE NATIONAL FACT-CHECKING INSTITUTE

The NFCI has four primary functions under the SEAL Act: (1) monitoring communications by PLEMS; (2) deciding whether specific claims are false or misleading; (3) issuing warnings to PLEMs; and (4) recommending suspensions in appropriate cases. It is important for the NFCI to perform its fact-checking function in a non-partisan, non-political manner so that the American public can trust its factual findings. Therefore, the SEAL Act would include several provisions to ensure that the NFCI operates on a day-to-day basis free from control by either Congress or the Executive Branch. First, the SEAL Act would include the following provision, which is adapted from the legislation governing the National Endowment for Democracy: "Nothing in this subchapter shall be construed to make the [Institute] an agency or establishment of the United States Government or to make the members of the Board of Directors of the [Institute], or the officers or employees of the [Institute], officers or employees of the United States."[36]

34. A suspension order directed to an EMC would not be for the purpose of suspending that EMC. It would be for the purpose of securing the EMC's cooperation to suspend a PLEM.

35. *See, e.g.*, Rebecca Klar, *Parler's post-election popularity sparks misinformation concerns*, HILL (Nov. 13, 2020), https://thehill.com/policy/technology/525795-parlers-post-election-popularity-sparks-misinformation-concerns.

36. This language is copied verbatim from 22 U.S.C. § 4412(c), except that "Endowment" is replaced with "Institute."

Second, the SEAL Act would state explicitly that no person in the Executive Branch has authority to hire or fire the NFCI's officers, directors, or employees. Recent experience with the Open Technology Fund ("OTF") provides an instructive lesson in this respect. The OTF describes itself as "an independent non-profit organization committed to advancing global Internet freedom."[37] Its primary mission is "to advance internet freedom in repressive environments by supporting the research, development, implementation, and sustainability of technologies that provide secure and uncensored access to the internet to counter attempts by authoritarian governments to control the internet and restrict freedom online."[38] The OTF receives most of its funding from the U.S. Agency for Global Media ("USAGM"), an executive branch agency. In June 2020, Michael Pack—the then-CEO of USAGM—attempted to remove and replace the OTF's officers and directors. That attempt gave rise to two separate lawsuits challenging Pack's removal authority. In *Open Technology Fund v. Pack*, OTF sought to prevent Pack from removing its officers and directors; Chief Judge Howell of the D.C. District Court denied OTF's motion for a preliminary injunction.[39] However, in *District of Columbia v. Open Technology Fund*, decided three months later, Judge Matini (of the Superior Court of the District of Columbia) granted summary judgment to the D.C. government. She ordered that "the removal of Defendant's Board of Directors by Michael Pack . . . was not authorized; and . . . that the removed Board of Directors is the valid, operating Board of Directors."[40] To avoid similar controversies involving the NFCI, the SEAL Act would state explicitly that no person in the Executive Branch has authority to hire or fire the NFCI's officers, directors, or employees.

To ensure its independence, the NFCI should not be dependent upon congressional appropriations for its funding. The SEAL Act would include a one-time appropriation to fund the NFCI's start-up costs for the first two or three years. After the initial start-up phase, though, the NFCI would be funded entirely by fees charged to EMCs. The NFCI staff would be responsible for proposing an annual budget. The NFCI Board of Directors would have final authority to approve the budget. The FCC would have authority to establish a fee structure and collect sufficient fees from EMCs to fulfill the NFCI's budgetary requirements.

Although it is important for the NFCI to operate free from government control, some government oversight is appropriate. For example, the National Endowment for Democracy "must comply with the provisions of the Freedom

37. *About*, OPEN TECH. FUND, https://www.opentech.fund/about/ (last visited June 10, 2021).

38. U.S. AGENCY FOR GLOBAL MEDIA, OPEN TECHNOLOGY FUND, https://www.usagm.gov/networks/otf/ (last visited June 10, 2021).

39. Open Tech. Fund v. Pack, 470 F. Supp. 3d 8, 13 (D.D.C. 2020).

40. Order at 16, District of Columbia v. Open Tech. Fund, No. 2020 CA 003185B (D.C. Super. Ct. Oct. 14, 2020), https://oag.dc.gov/sites/default/files/2020-10/OTF-Summary-Judgment.pdf.

of Information Act. Also, while the accounts of the endowment are audited by independent firms, they are subject to review, and may be audited, by the" Government Accountability Office ("GAO").[41] The SEAL Act would include similar provisions for the NFCI. Additionally, the Act would include a requirement for the NFCI to submit an annual report to Congress.

A. The NFCI Board of Directors

The SEAL Act would establish eligibility requirements for the NFCI Board of Directors. Those eligible to serve would include only former Members of Congress or former senior Executive officials appointed by the President and confirmed by the Senate. No person who is a current Member of Congress or a current Executive Branch employee would be eligible to serve on the NFCI Board. The SEAL Act would state explicitly that Board members must be individuals with an established record of bipartisan cooperation. The Act would also provide that the Board must at all times consist of an even number of Directors, with no fewer than six Directors and no more than ten Directors. At all times, the number of Democratic Directors must be equal to the number of Republican Directors.[42] The Board would make all decisions by majority vote, thereby ensuring at least some degree of bipartisan support for all of its decisions.

To create the initial Board, the majority and minority leaders in the House and Senate at the time the SEAL Act takes effect would appoint an ad hoc committee of three Democrats and three Republicans who would have authority, acting by unanimous consent, to appoint an initial Board of six Directors. After that initial Board is created, the Board would have sole authority to appoint new Directors. Aside from appointing new Directors, the Board would have three primary tasks. First, the Board would be responsible for approving the annual NFCI budget, based on NFCI staff recommendations. Second, Board approval would be required to adopt new or amended rules and regulations governing the NFCI's operations. Third, the Board would be responsible for hiring the NFCI President and Vice Presidents. The Board would have no authority over any decision involving temporary or permanent suspension of a PLEM's access to electronic megaphones. Board Members would be required to take an oath: (1) to perform their statutory duties in a manner intended to promote the public interest in restricting the dissemination of lies and misinformation via electronic megaphones and (2) to perform those duties to the best of their abilities without any partisan bias.

41. KOSAR, *supra* note 10.

42. Again, this rule is similar to the FCC rule. The FCC is headed by five Commissioners, only three of whom may be from the same political party. 47 U.S.C. § 154(b)(5).

B. The NFCI Staff

The NFCI would be headed by one President and two Vice Presidents ("VP"). The President would have overall responsibility for managing the NFCI. One VP would be in charge of the Medical Division, which would be responsible for monitoring communications by PLEMs involving medical and public health claims. The other VP would be in charge of the Election Division, which would be responsible for monitoring communications by PLEMs involving election-related claims. If the FCC decides in the future to add a third category of claims to the NFCI's mandate, then it would need to amend the NFCI's governing regulations to add a third Vice President. The NFCI Board would appoint the President and VPs for five-year terms. The SEAL Act would preclude any individual from serving more than two consecutive five-year terms as President or Vice President. The SEAL Act would require the President and VPs to take oaths similar to the oath required for Board Members.

The President and VPs would be responsible for hiring the remaining NFCI staff, who could serve for potentially unlimited terms. Determining the appropriate size for the NFCI staff necessarily entails a balancing act. The staff must be large enough to monitor communications by PLEMs and decide which claims are false or misleading. In making those decisions, it is vitally important that the entire NFCI staff apply clear principles in a consistent manner. If the staff is too large, there is a risk that different branches of the NFCI would make inconsistent decisions about which claims are false or misleading. Given these competing considerations, an initial staff of about fifty to sixty people seems about right. The NFCI should include the following professional staff:

- Approximately twenty professional staff members in the Medical Division to perform fact-checking functions for communications by PLEMs involving medical and/or public health claims;
- Approximately twenty professional staff members in the Election Division to perform fact-checking functions for communications by PLEMs involving election-related claims;
- Approximately ten professional staff in an Information Technology department whose main job would be to purchase and operate artificial intelligence technologies and software tools to enable staff in the Medical and Election Divisions to perform their fact-checking responsibilities more efficiently and effectively; and
- Approximately five to ten other people to assist the President and Vice Presidents with internal administrative matters, legal issues, and public relations.

IV. THE FIRST AMENDMENT AS A ROADBLOCK

If Congress enacts legislation like the SEAL Act, someone will almost certainly file suit to challenge its constitutional validity on First Amendment grounds.[43] Moreover, if courts adopt a wooden, formalistic approach based on existing precedent, the SEAL Act would likely be subject to strict scrutiny, because courts would probably treat the legislative distinction between true and false claims as a content-based speech regulation.[44] The government almost always loses when courts apply strict scrutiny. However, during John Roberts' tenure as Chief Justice, the Court has decided two First Amendment cases where it upheld the constitutional validity of laws subject to strict scrutiny: *Williams-Yulee v. Florida Bar*,[45] and *Holder v. Humanitarian Law Project*.[46] Thus, the SEAL Act could potentially survive a First Amendment challenge, even under strict scrutiny. Here, though, I want to suggest that—under a First Amendment analysis that is more faithful to foundational constitutional principles—courts should apply intermediate scrutiny, not strict scrutiny, to evaluate a First Amendment challenge to the SEAL Act.[47]

In evaluating arguments for strict scrutiny versus intermediate scrutiny, courts should consider the primary goals that the First Amendment is designed to promote. Affirmatively, the First Amendment is intended to promote democratic self-government, the search for truth, and individual self-fulfillment.[48] The two primary goals of the SEAL Act are: to help ensure that truth prevails over lies in the marketplace of ideas; and to promote democratic self-government by restricting the electronic amplification of lies that are destroying the fabric of democratic self-governance in the United States.[49] Thus, the proposed SEAL Act is entirely in harmony with the goals of the First Amendment because it makes a positive contribution to two of the key objectives that the First Amendment is intended to promote.

Of course, the First Amendment also serves the important goal of constraining government power.[50] Therefore, Supreme Court Justices who focus

43. One could also imagine a separation of powers challenge or a procedural due process challenge, but those issues are beyond the scope of this short essay.

44. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 713–15 (2012) (plurality opinion) (invalidating federal law that imposed criminal penalties on individuals who claim falsely to have received a congressional medal of honor because it was a content-based regulation of speech).

45. 575 U.S. 433, 437–43 (2015) (applying strict scrutiny and upholding validity of state judicial conduct rule that prohibited judicial candidates from personally soliciting campaign funds).

46. 561 U.S. 1, 8–28 (2010) (applying strict scrutiny and upholding validity of federal criminal law banning material support to foreign terrorist organizations).

47. This approach is broadly consistent with Justice Breyer's concurring opinion in *Alvarez*. *See Alvarez*, 567 U.S. at 730–39 (Breyer, J., concurring).

48. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 763–66 (17th ed. 2010).

49. The SEAL Act has no significant relationship to the goal of individual self-fulfillment.

50. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 85–86 (1982).

primarily on the limiting function of the First Amendment might initially be inclined to apply strict scrutiny, rather than intermediate scrutiny, to evaluate the constitutionality of the SEAL Act. However, the SEAL Act is also entirely in harmony with the goal of constraining government power because it does not authorize any executive branch agency to regulate speech. Instead, it creates a regulatory system that divides power among private companies, a non-governmental organization (the NFCI), and an independent federal agency that is at least partially insulated from Presidential control (the FCC).[51] Thus, if courts apply a purposive analysis—rather than an empty, formalistic analysis—there is no valid reason to subject the SEAL Act to strict scrutiny, because the proposed legislation actually promotes the primary objectives of the First Amendment.

Furthermore, from a doctrinal perspective, there is an additional reason why courts should apply intermediate scrutiny, not strict scrutiny, to evaluate the constitutionality of the proposed SEAL Act. The Supreme Court should recognize the constitutional significance of the distinction between speech and electronic amplification of speech. Speech is an expressive activity that merits heightened protection under the First Amendment. In contrast, although electronic amplification includes an expressive element, it is primarily a commercial activity, not an expressive activity. Indeed, the commercial activity of electronic amplification generates billions of dollars of revenue per year for some of the world's largest companies. Since its landmark decision in *Virginia State Board of Pharmacy*,[52] the Supreme Court has consistently held that laws regulating commercial speech (including content-based regulations of commercial speech) are subject to intermediate scrutiny, not strict scrutiny. Although some of the Court's recent jurisprudence has arguably narrowed the scope of the commercial speech doctrine,[53] it still remains true as a doctrinal matter that content-based regulations of commercial speech are subject to intermediate scrutiny. By analogy, since electronic amplification is primarily a commercial activity, not an expressive activity, the Court should treat electronic

51. The President appoints FCC Commissioners, by and with the advice and consent of the Senate. 47 U.S.C. § 154(a). However, the President's appointment authority is limited because the Communications Act of 1934 provides that no more than three members of the five-person Commission "may be members of the same political party." *Id*. § 154(b)(5). Additionally, Commissioners serve for five-year terms, so an incoming President cannot typically replace incumbent Commissioners with his nominees until their terms expire. *Id*. § 154(c)(1). The statute does not include a "for-cause" removal provision, which is often included in the governing statutes for independent agencies. *See* Paul R. Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 WM. & MARY L. SCH. FAC. PUBL'N 779, 781 (1986). Even so, the President probably has authority to remove Commissioners for good cause, although that presumed authority has never been tested in litigation.

52. 425 U.S. 748, 770–73 (1976).

53. *See, e.g.*, Nat'l Inst. of Family & Life Advoc. v. Becerra, 138 S. Ct. 2361 (2018).

amplification like commercial speech by applying intermediate scrutiny to laws (like the SEAL Act) that restrict the electronic amplification of lies.

In sum, apart from mindless repetition of the talismanic formula that content-based speech regulations warrant strict scrutiny, there is no coherent rationale for applying strict scrutiny to laws like the SEAL Act. Moreover, courts would almost certainly hold that the proposed SEAL Act is constitutionally valid under an intermediate scrutiny test, which merely requires the government to show that the law is "substantially related to the achievement of important governmental objectives."[54]

54. United States v. Windsor, 570 U.S. 744, 812 (2013) (Alito, J., dissenting).