

## **INTRODUCTION TO DRAFT STATE STATUTE BANNING FAKE NEWS FOR DISCUSSION AND DEBATE**

The accompanying statute is a draft state law that would ban fake news. It defines fake news narrowly as (1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that cause public harm. It is intended to mirror the First Amendment protections - and the limits of those protections - set forth in *New York Times v. Sullivan*. The central questions the draft intends to raise are (1) whether we should ban fake news and (2) whether we can do so within current First Amendment jurisprudence?

The draft statute attempts to ban the following types of statements:

- Knowingly false statements by Russian bots for the purpose of disrupting and discrediting our democratic institutions;
- Knowing false statements made by internet entrepreneurs who post outrageous claim for the sole purpose of generating more clicks and greater advertising revenue;
- “Georgia election officials committed fraud when the certified Biden as the winner”; and
- “Masks don’t reduce the spread of COVID.”

Each of these statements presents slightly different problems, but the central questions remain the same.

### **Should we ban fake news?**

**Yes.** We should ban intentionally false statements of fact that cause public harm. Fake news hurts the marketplace of ideas by drowning out the truth, distorting perceptions of the truth, and damaging the credibility of all sources of future truth. The absence of a common set of public facts may be at the heart of our country’s current divisions.

**No.** In the marketplace of ideas, all speech, even false speech, has value if for no other reason than to stir debate and flush out the truth. The best antidote to false speech is more speech. Moreover, no single arbiter can determine what is true, especially not the government. Indeed, because drawing lines between truth and falsity, between facts and opinions, is so problematic, the cure is worse than the disease.

### **Can we ban fake news under current First Amendment jurisprudence?**

**Maybe.** Arguably, the First Amendment does not protect intentionally false speech that causes specific and material harm. Laws on defamation,

consumer fraud, perjury, foreign influence, election administration, and false reporting of crimes are examples of lawfully prohibiting speech to protect victims of misinformation. Recognizing that misinformation harms the public interest in many specific, tangible and material ways, may form the basis for banning intentionally false statements of fact that harm the public.

**No.** Although persistent lies about our government may affect public trust, this type of reputational harm to our institutions is qualitatively different than harms to individual reputations or specific government operations. Our institutions are resilient, and permitting speech that results in distrust is a necessary and acceptable consequence of protecting our right to freely criticize our government. Under *United States v. Alvarez*, the First Amendment protects even false speech. This statute clearly prohibits certain kinds of political speech, *e.g.*, “the election was rigged,” and it would be subject to strict scrutiny to determine whether it is narrowly tailored to serve compelling government interests. No law concerning speech has ever withstood such scrutiny. The statute is overbroad in that it could prohibit (or have a chilling effect on) many forms of protected speech from both the left and right: “The police are racist,” “Trump is a crook.” It is also underinclusive in stopping disinformation because it only prohibits knowingly false statements, despite the fact that most disinformation is spread by people believing it to be true.