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News Reporting on Trump's COVID-19 Treatments: Should Broadcasters Have to Disclose their Being Potentially Dangerous?

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News Reporting on Trump's COVID-19 Treatments: Should Broadcasters Have to Disclose their Being Potentially Dangerous?

Cover Page Footnote

Associate Professor, Department of Film, Television and Digital Media, Texas Christian University.

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NEWS REPORTING ON TRUMP'S COVID-19 TREATMENTS:
SHOULD BROADCASTERS HAVE TO DISCLOSE THEIR BEING
POTENTIALLY DANGEROUS?

*Dr. Joel Timmer**

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ABSTRACT

During the early months of the COVID-19 pandemic in 2020, President Trump touted a number of treatments that many medical professionals considered dangerous. These treatments include hydroxychloroquine and disinfectants, which if misused could cause a patient's death. This prompted Free Press to file an emergency petition with the FCC, arguing that broadcasters who report on Trump's claims about these treatments without highlighting their dangers could be in violation of the Commission's broadcast hoax rule. Free Press also requested the FCC require that broadcasters include disclaimers when reporting on such claims. This article examines whether the broadcast hoax rule has been violated here, and whether such disclaimers should be required. The preferred approach under the First Amendment is to leave it to the marketplace of ideas to ascertain the truth of Trump's statements. This article ultimately concludes that the broadcast hoax rule is a poor fit for this case and that requiring disclaimers could chill broadcast coverage of the COVID-19 pandemic, leaving the public less informed about this important public health issue. Counterspeech, or providing accurate information to help counteract false statements, is the preferable approach here.

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INTRODUCTION

In early 2020, the COVID-19 pandemic swept the world, leaving government and medical officials seeking ways to treat and slow the spread of the disease. In March of that year, U.S. President Donald Trump, in one of many daily press briefings on COVID-19, touted the drugs hydroxychloroquine and chloroquine as potentially effective treatments in the fight against COVID-19.¹ This was in conflict with the thinking of many health officials, who were concerned about misuse of the drugs and the potential harm that could result.² Following Trump’s statement, the Food and

¹ Ken Alltucker & Elizabeth Weise, *US Coronavirus Cases Top 11,000, Trump Touts Two Potential 'Exciting' Treatments*, USA TODAY (March 19, 2020), <https://www.usatoday.com/story/news/2020/03/19/trump-touts-chloroquine-remdesevir-possible-coronavirus-treatments/2875965001/>; Elizabeth Weise, *Study of Trump-Touted Chloroquine for Coronavirus Stopped Due to Heart Problems, Deaths*, USA TODAY (April 15, 2020), <https://www.usatoday.com/story/news/2020/04/15/coronavirus-chloroquine-test-halted-drug/2983129001/>.

² Oliver Milman, *Trump Touts Hydroxychloroquine as a Cure for Covid-19*, THE GUARDIAN (April 6, 2020), <https://www.theguardian.com/science/2020/apr/06/coronavirus-cure-fact-check->

Drug Administration (FDA) warned that the two drugs had “not been shown to be safe and effective for treating or preventing COVID-19” and that their use could result in health problems, even death.³

Trump’s statement regarding hydroxychloroquine and chloroquine was but one of a number of inaccurate or misleading statements he had made concerning COVID-19 and its effects.⁴ Among those concerned about Trump’s promotion of potentially dangerous drugs was Free Press, an organization aimed at promoting Internet and press freedom.⁵ Free Press asserted that broadcast news outlets have a responsibility to inform the public of the potential inaccuracy of Trump’s statements when covering or discussing them. Otherwise, said Free Press, broadcasters could be responsible for the harm that results to those who believe and act on those statements.⁶ Free Press pointed to Trump’s promotion of chloroquine phosphate to treat COVID-19, as well as his March 19 statement, “[Hydroxychloroquine has] been around for a long time, so we know if things don’t go as planned *it’s not going to kill anybody....* It’s shown very, very encouraging early results....”⁷ Free Press alleged that the broadcast of statements such as these

hydroxychloroquine-trump.

³ Annie Karni & Katie Thomas, *Trump Says He’s Taking Hydroxychloroquine, Prompting Warning From Health Experts*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/trump-hydroxychloroquine-covid-coronavirus.html?referringSource=articleShare>; see also U.S. FOOD & DRUG ADMIN., FDA DRUG SAFETY COMMUNICATION: FDA CAUTIONS AGAINST USE OF HYDROXYCHLOROQUINE OR CHLOROQUINE FOR COVID-19 (May 24, 2020), <https://www.fda.gov/media/137250/download>.

⁴ See, e.g., *A Guide to Our Coronavirus Coverage*, FACTCHECK.ORG, <https://www.factcheck.org/a-guide-to-our-coronavirus-coverage/> (last visited May 30, 2020).

⁵ Free Press, *Media Kit*, <https://www.freepress.net/news/media-kit> (last visited May 30, 2020).

⁶ Free Press, Emergency Petition for Inquiry into Broadcast of False Information on COVID-19, at 2-7, https://www.freepress.net/sites/default/files/2020-03/free_press_petition_for_inquiry_to_fcc_re_broadcast_misinformation.pdf [hereinafter Free Press Petition].

⁷ *Id.* at 3-4 (citing CSPAN (@cspan), TWITTER (Mar. 19, 2020, 12:10 PM), <https://twitter.com/cspan/status/1240672025989001221> (emphasis added)).

“precipitated the death of an Arizona man and hospitalization of his wife ... when they ingested the drug because they said they had ‘watched televised briefings during which President Trump talked about the potential benefits of chloroquine’ and believed it was safe because ‘it was all over TV.’”⁸

The Federal Communications Commission (FCC) ruled on the Free Press petition before Trump made additional statements about potential treatments for COVID-19 that the organization would likely have found even more troublesome in their potential to cause harm. In May, Trump claimed to be taking hydroxychloroquine on a regular basis as a preventative measure against COVID-19,⁹ despite the FDA’s warnings against such use of the drug.¹⁰ In fact, Trump falsely claimed that the FDA issued no such warning.¹¹ Observers were concerned “not just of the dangers it posed for the president’s health but also of the example it set.”¹²

Trump then touted yet another potentially dangerous

⁸ *Id.* at 3 (citing David Armstrong, Ava Kofman, & Topher Sanders, *Doctors Are Hoarding Unproven Coronavirus Medicine by Writing Prescriptions for Themselves and Their Families*, PROPUBLICA (Mar. 24, 2020), <https://www.propublica.org/article/doctors-are-hoarding-unprovencoronavirus-medicine-by-writing-prescriptions-for-themselves-and-their-families>; Erika Edwards & Vaughn Hillyard, *Man Dies After Taking Chloroquine in an Attempt to Prevent Coronavirus*, NBC NEWS (Mar. 23, 2020), <https://www.nbcnews.com/health/health-news/man-dies-after-ingesting-chloroquine-attempt-prevent-coronavirus-n1167166>). *See also* Daniel Brooks, *Banner Health Experts Warn Against Self-Medicating to Prevent or Treat COVID-19*, BANNER HEALTH (March 23, 2020), <http://bannerhealth.mediaroom.com/chloroquinephosphate> (the couple apparently ingested a similar-sounding ingredient, chloroquine phosphate, as a result)

⁹ *See* Nikki Carvajal & Kevin Liptak, *Trump Says He Is Taking Hydroxychloroquine Though Health Experts Question Its Effectiveness*, CNN (May 19, 2020), <https://www.cnn.com/2020/05/18/politics/donald-trump-hydroxychloroquine-coronavirus/index.html>.

¹⁰ *Id.*

¹¹ Daniel Dale, *Fact Check: Trump Falsely Denies FDA Warning on Hydroxychloroquine, Baselessly Alleges Political Bias in Study*, CNN (May 20, 2020), <https://www.cnn.com/2020/05/19/politics/fact-check-trump-hydroxychloroquine-study/index.html>.

¹² Karni & Thomas, *supra* note 3.

treatment for the virus. In April, Trump discussed using disinfectants to treat COVID-19, stating, “and then I see the disinfectant, where it knocks it out in a minute. One minute. And is there a way we can do something like that, by injection inside or almost a cleaning. Because you see it gets in the lungs and it does a tremendous number on the lungs.”¹³ This prompted a reaction from medical and government officials warning against the use of disinfectants to treat the disease due to the associated potential dangers, including, again, death. Even the makers of Clorox and Lysol responded with warnings urging against the ingestion or injection of their products.¹⁴

The warnings were warranted. The Centers for Disease Control and Prevention reported an increase in calls to poison control centers involving exposure to disinfectants following Trump’s statement.¹⁵ Within 18 hours of the statement, New York City’s Department of Health and Mental Hygiene saw a similar increase in calls.¹⁶ A Maryland health hotline received so many calls with questions about the use of disinfectants to treat the disease that the state’s Emergency Management Agency issued “a warning that ‘under no circumstances’ should any disinfectant be taken to treat COVID-19.”¹⁷ Illinois’ Department of Public Health issued a similar warning after a person tried to gargle mouthwash mixed with bleach.¹⁸ Overall, the American Association of Poison

¹³ *User Clip: Trump on Injecting Disinfectant*, C-SPAN (April 23, 2020), <https://www.c-span.org/video/?c4871089/user-clip-trump-injecting-disinfectant>.

¹⁴ Maggie Haberman, Christine Hauser, Katie Rogers & Alan Yuhas, *Trump’s Suggestion That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (April 24, 2020), <https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html>; John Bowden, *Accidental Poisonings from Bleach and Other Disinfectants Spiked amid Coronavirus*, THE HILL (May, 12, 2020), <https://thehill.com/policy/healthcare/497312-accidental-poisonings-from-bleach-and-other-disinfectants-spiked-amid>.

¹⁵ *Id.*; see also Aris Folley, *Calls to Poison Control Centers Spike after Trump Disinfectant Comments*, THE HILL (April 26, 2020), <https://thehill.com/policy/healthcare/494744-poison-control-centers-report-increase-in-calls-pertaining-to-exposure-to>.

¹⁶ *Id.*

¹⁷ Haberman, Hauser, Rogers & Yuhas, *supra* note 14.

¹⁸ Folley, *supra* note 15.

Control Centers reported a surge in “the number of calls to poison control hotlines regarding accidental poisoning from household cleaners and disinfectants” in April 2020 to more than double those of April 2019.¹⁹

The timing of this suggests that Trump’s touting of potentially dangerous treatments for COVID-19 has led some to try those treatments, endangering the health and well-being of those who do. In its emergency petition to the FCC, Free Press also put some of the blame for this on broadcast television stations that provided “context-less coverage” of Trump’s press conferences and inaccurate statements.²⁰ According to Free Press, the coverage of this this disinformation resulted in “substantial public harm,” including the death of the Arizona man discussed previously.²¹

Free Press alleged that broadcasters who cover or repeat statements such as those Trump made about the efficacy of hydroxychloroquine without including disclaimers about the accuracy of the statements, could be in violation of the FCC’s broadcast hoax rule.²² The broadcast hoax rule allows the FCC to sanction broadcast television and radio stations that air false information in certain circumstances. One way that broadcasters can avoid violating the rule is to air disclaimers that the information presented is false or fictional.²³ This led Free Press to urge the FCC to formally recommend that “broadcasters prominently disclose when information they air is false or scientifically suspect,” even if the broadcaster is simply reporting on the president’s statements.²⁴ Said Free Press, “When the president tells dangerous lies about a public health emergency, broadcasters have a choice: don’t air them, or put those lies in context with disclaimers noting that they may be untrue and are

¹⁹ Bowden, *supra* note 14.

²⁰ Free Press Petition, *supra* note 6, at 2.

²¹ *Id.* at 3.

²² *Id.* at 1-4.

²³ See 47 C.F.R. § 73.1217 (2019). The disclaimers that Free Press pointed to are in the provision of the rule which provides that “[a]ny programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.”

²⁴ Free Press Petition, *supra* note 6, at 7.

unverified.”²⁵

Responding to the Free Press petition, the FCC observed that the request would require a “novel” and “expand[ed]” construction of the broadcast hoax rule, noting that that construction “could apply far more broadly” than requested in the current case.²⁶ It also stated that the request “misconstrues the Commission’s rules and seeks remedies that would dangerously curtail the freedom of the press embodied in the First Amendment.”²⁷ Accordingly, the FCC denied the Free Press petition, “both because the broadcast hoax rule does not support such a reading and because the relief requested raises significant First Amendment concerns.”²⁸

While the FCC declined to involve itself here, the Free Press petition does raise the questions of whether there is a role for the FCC to play with regard to broadcasters that provide inaccurate or misleading information in their coverage of Trump’s statements about COVID-19. As Free Press pointed out, the broadcast hoax rule does allow the FCC to punish broadcasters that air false information in certain circumstances.²⁹ Could the FCC use the rule to help stop the spread of misinformation about COVID-19? And should the FCC require broadcasters to air disclaimers about the potential inaccuracy of Trump’s statements?

To answer those questions, Part II examines the circumstances leading up to the FCC’s adoption of the broadcast hoax rule. Part III then discusses each of the rule’s requirements, as well as the FCC’s reasoning for including those requirements in the rule. In addition, each of those requirements are examined in conjunction with the coverage of Trump’s misinformation about treating COVID-19. Part IV then analyzes the application of the broadcast hoax rule in this situation, concluding that the rule is a

²⁵ *Id.*

²⁶ Letter from Michelle M. Carey, Chief, Media Bureau and Thomas M. Johnson, Jr., General Counsel, to Jessica J. González and Gaurav Laroia, Free Press, Federal Communications Commission, DA 20-385, April 6, 2020, at 3, <https://docs.fcc.gov/public/attachments/DA-20-385A1.pdf> [hereinafter FCC Response].

²⁷ *Id.* at 1.

²⁸ *Id.* at 3.

²⁹ Free Press Petition, *supra* note 6, at 2-3.

poor fit for these circumstances. Part V analyzes the First Amendment implications of requiring disclaimers in broadcast news coverage of Trump's inaccurate statements as requested by Free Press, concluding that such a requirement would likely be unconstitutional. Part VI then considers the implication of the rule's limitation to broadcast media. In Part VII, the article concludes that the FCC should not seek to apply the broadcast hoax rule in the manner urged by Free Press, but should rather rely on the marketplace of ideas to provide counterspeech to counteract the harms resulting from Trump's disinformation. Otherwise, broadcasters may be chilled in providing information about COVID-19, leaving the public potentially less informed about the virus than they otherwise would be.

At the outset, it should be noted that there is a significant limitation on the FCC's use of the broadcast hoax rule, in that the applies only to broadcasters, which means TV and radio stations. It does not apply to cable news networks, such as FOX News or CNN.³⁰ Nor does the rule apply to newspapers or websites.³¹ This stems from the fact that broadcasters are licensed by the FCC to use a scarce public resource: the electromagnetic spectrum, which is used for all forms of wireless communication.³² Because of "the unique physical limitations of the broadcast medium," there are fewer frequencies available for broadcast television and radio stations than there is demand for them, a concept known as "scarcity."³³ The Supreme Court has offered the following explanation of scarcity and its implication for the First Amendment rights of broadcasters:

³⁰ See, e.g., FCC Response *supra* note 26 at 3, n.19.

³¹ See, e.g., *What We Do*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/about-fcc/what-we-do> (last visited May 30, 2020); Michael O'Rielly, *FCC Regulatory Free Arena*, FEDERAL COMMUNICATIONS COMMISSION (June 1, 2018), <https://www.fcc.gov/news-events/blog/2018/06/01/fcc-regulatory-free-arena>.

³² See, e.g., *What Is Spectrum? A Brief Explainer*, CTIA (June 5, 2018), <https://www.ctia.org/news/what-is-spectrum-a-brief-explainer>.

³³ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994) (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-389, 396-399 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943)).

As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. As we said in *Red Lion*, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."³⁴

Thus, scarcity allows for greater government regulation of broadcast speech than of speech in other forms of media. One way that broadcast speech is regulated that speech in other forms of media is not is that broadcast TV and radio stations, and they alone, are subject to the FCC's broadcast hoax rule.

I. REASONS FOR ENACTMENT OF THE BROADCAST HOAX RULE

Despite having some ability to do so, as a general matter, the FCC is reluctant to involve itself in a review of broadcast program content, particularly news. There are statutory and

³⁴ *Turner Broadcasting*, 512 U.S. at 637-38 (citations omitted). It has been argued that the scarcity rationale "should be overruled because the rationale . . . has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers." *Fox v. FCC*, 567 U.S. 239, 258 (2012) (citations omitted). The Court, however, has so far declined to do this. *See id.* ("These arguments need not be addressed here.")

constitutional reasons for this. As the FCC has observed, “Section 326 of the Act prohibits the Commission from censoring radio communications, and the First Amendment to the Constitution strictly limits the Commission’s authority to interfere with the programming decisions of licensees.”³⁵ Because of this, the FCC has stated that its “role in overseeing program content is very limited.”³⁶

Despite its reluctance to involve itself in reviews of program content, in 1991, the FCC proposed adopting the broadcast hoax rule because “serious broadcast hoaxes have occurred where the stations involved fabricated stories concerning a crime or catastrophe that alarmed the public and resulted in the needless diversion of public safety or law enforcement resources.”³⁷ These “fabricated stories” include a radio station falsely airing a warning that the U.S. was under nuclear attack,³⁸ a radio station falsely reporting that an on-air host had been shot in the head in the station parking lot,³⁹ a radio station’s false report of a nearby volcanic eruption,⁴⁰ and a morning radio show on which the hosts orchestrated a false murder confession from a caller to the show.⁴¹

In its Notice of Proposed Rulemaking on the broadcast hoax rule, the FCC expressed its belief “that certain types of broadcast hoaxes are so potentially harmful that they are

³⁵ TVT License, Inc., 22 FCC Rcd. 13,591, ¶ 17 (2007) (citing 47 U.S.C. § 326, U.S. Const., amend. I).

³⁶ FCC Response, *supra* note 26, at 2 (citing FCC, THE PUBLIC AND BROADCASTING 7 (August 2019), <https://www.fcc.gov/media/radio/public-and-broadcasting>) (quotations omitted).

³⁷ Amendment of Part 73 Regarding Broad. Hoaxes, Report and Order (Proceeding Terminated), 7 FCC Rcd. 4106, ¶ 2 (1992) [hereinafter Broadcast Hoax Report & Order].

³⁸ See FCC Response, *supra* note 26, at 2-3.

³⁹ Broadcast Hoax Report & Order, *supra* note 37, at n.1 (citing Letter to WALE-AM, 7 FCC Rcd 2345 (MMB 1992)). See also FCC Response, *supra* note 26, at 2-3.

⁴⁰ Broadcast Hoax Report & Order, *supra* note 37, at n.1 (citing Letter to WCCC-AM/FM, (MMB, dated July 26, 1990)).

⁴¹ *Id.* (citing Letter to KROQ-FM, 6 FCC Rcd 7262 (1991)). See also FCC Response, *supra* note 26, at 2-3.

inconsistent with the public interest.”⁴² Under its then-existing policies, the Commission had only two options to take against broadcasters who aired hoaxes such as these: it “can either issue a letter of admonition, which may be considered on renewal or sale of the station or, in extreme cases, it can revoke a station’s license.”⁴³ The broadcast hoax rule would offer the FCC a choice between these two extremes, in that the rule would allow the Commission to fine stations for violations.⁴⁴ This option would be “less drastic than license revocation or non-renewal, but [have] more deterrence value than admonition.”⁴⁵

The FCC was mindful of crafting a rule that would address its concerns about hoaxes with the potential to cause harm without overly burdening broadcasters’ First Amendment rights or unduly chilling broadcast speech.⁴⁶ In this vein, the FCC stated that it was not seeking “to address harmless pranks, or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public health and safety.”⁴⁷ As an example, the FCC did not intend the rule to cover “incidents such as the April Fool’s joke perpetrated recently by a station, which announced that one of the stars of the city’s National Football League team had been traded. While this prank undoubtedly distressed some football fans, it is our intent to focus instead on a narrow category of cases that present the potential for substantial public harm.”⁴⁸

II. THE BROADCAST HOAX RULE AND ITS APPLICATION

In 1992, the FCC adopted the broadcast hoax rule, which states:

No licensee or permittee of any broadcast station shall

⁴² Amendment of Part 73 of the FCC’s Rules Regarding Broad. Hoaxes, Notice of Proposed Rule Making, 6 FCC Rcd. 6935, ¶ 1 (1991) [hereinafter Broadcast Hoax NPRM].

⁴³ Broadcast Hoax Report & Order, *supra* note 37, at ¶ 2.

⁴⁴ *Id.*

⁴⁵ *Id.* at ¶ 18.

⁴⁶ Broadcast Hoax NPRM, *supra* note 42, at ¶ 1.

⁴⁷ *Id.* at ¶ 2.

⁴⁸ *Id.*

broadcast false information concerning a crime or a catastrophe if:

- (a) The licensee knows this information is false;
- (b) It is foreseeable that broadcast of the information will cause substantial public harm, and
- (c) Broadcast of the information does in fact directly cause substantial public harm.

Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.⁴⁹

A note to the rule states:

For purposes of this rule, “public harm” must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. A “crime” is any act or omission that makes the offender subject to criminal punishment by law. A “catastrophe” is a disaster or imminent disaster involving violent or sudden event affecting the public.⁵⁰

The broadcast hoax rule has four prongs. First, a station must air false information concerning a crime or catastrophe. Second, the station must know that the information is false. Third, it must be foreseeable that broadcasting the false information will cause substantial public harm. Fourth, the broadcast of the false information must in fact cause immediate and substantial public harm. All four prongs must be met for the rule to be violated.⁵¹ Each prong, and their application to the Free Press request, is

⁴⁹ 47 C.F.R. § 73.1217 (2019).

⁵⁰ *Id.*

⁵¹ *Id.*

considered next. However, the FCC has rarely considered possible rule violations, and has never found a station to have violated the rule.⁵² As a result, there is little case law on the broadcast hoax rule, which makes it difficult “to predict for certain how it might be applied to factual contexts.”⁵³

A. *Prong 1: Airing False Information Concerning a Crime or Catastrophe*

The FCC decided to limit application of the rule to the broadcast of false information *concerning a crime or catastrophe*. With all four of the rule's elements, the FCC sought to target the rule narrowly to avoid infringing on broadcasters' First Amendment rights or chilling broadcast speech.⁵⁴ The limitation to crimes or catastrophes was intended to limit the rule's application to the kinds of hoaxes that had historically caused the commission the most concern, rather than harmless pranks such as the April Fool's Day joke that an NFL team's star player had been traded.⁵⁵ This prong would then apply to many of the hoaxes that prompted the FCC to adopt the rule, such as those involving a nuclear attack warning, an erupting volcano, a shot station employee, and a murder confession.⁵⁶

The COVID-19 pandemic would not seem to qualify as a crime under the rule, but it might be considered a catastrophe, as that term is generally understood. However, that does not mean it would qualify as a catastrophe under the broadcast hoax rule. The rule defines “catastrophe” as “a disaster or imminent disaster involving [a] violent or sudden event affecting the public.”⁵⁷ It

⁵² Justin Levine, *A History and Analysis of the Federal Communications Commission's Response to Radio Broadcast Hoaxes*, 52 FED. COMM. L.J. 273, 310-11 (2000); Joel Timmer, *Potential FCC Actions Against “Fake News”: The News Distortion Policy and the Broadcast Hoax Rule*, 24 COMM. L. & POL'Y 1, 30-31 (2019).

⁵³ Levine, *supra* note 52, at 311.

⁵⁴ Broadcast Hoax Report & Order, *supra* note 37, ¶ 9.

⁵⁵ Broadcast Hoax NPRM, *supra* note 42, ¶¶ 2-3.

⁵⁶ Broadcast Hoax Report & Order, *supra* note 37, at n.1; Levine, *supra* note 52, at 301-06.

⁵⁷ Broadcast Hoax NPRM, *supra* note 42, ¶ 8 n.14.

might be argued that the pandemic does not qualify as being “violent” or “sudden” as required by the rule, and with the lack of case law on the rule and its application, it is hard to know for certain how this requirement might be interpreted. In its dismissal of the Free Press petition, the FCC did refer to the pandemic as “one of the most severe public health crises in a century” and as a “national emergency.”⁵⁸ Statements such as these could lend support to the pandemic qualifying as a catastrophe under rule.

B. Prong 2: Knowing the Information to Be False

The second requirement of the broadcast hoax rule is that the station “licensee must have known that the broadcast material was false.”⁵⁹ Here, the focus is not on whether Trump knew the information was false. Rather, it is the broadcaster who airs Trump’s statements that must know that the statements are false. In addition to such knowledge by the station licensee, this requirement could also be satisfied by “various employees of the station, as well as corporate officials if the license holder is a corporate entity” with such knowledge.⁶⁰ Presumably, a broadcaster that did not know whether the statements were accurate or not would not satisfy this requirement, as it would not know that the information was false.⁶¹

The FCC addressed this requirement’s application to Trump’s statements in its dismissal of the Free Press emergency petition. There it argued that:

a broadcaster’s decision to broadcast and comment on statements made by the President, relating to one of the most severe public health crises in a century, does not amount to airing an intentional or knowing falsehood. . . . At this moment, broadcasters face the challenge of covering a rapidly-evolving, national, and international health crisis, in which new information—much of it medical or technical in

⁵⁸ FCC Response, *supra* note 26, at 3.

⁵⁹ Broadcast Hoax NPRM, *supra* note 42, ¶ 3.

⁶⁰ Levine, *supra* note 52, at 314.

⁶¹ 47 C.F.R. § 73.1217 (2019).

nature and therefore difficult to corroborate or refute in real time—is continually revealed, vetted, and verified or dismissed. In addition, we note that the President and members of the White House Coronavirus Task Force, including public-health professionals, have held daily press conferences in which they exhaustively answer critical questions from the press. Under such circumstances, it is implausible, if not absurd, to suggest that broadcasters knowingly deceived the public by airing these press conferences or other statements by the President about COVID-19.⁶²

In another context, the FCC was asked to determine whether a TV station knowingly misled the public with a news report on a drug that allegedly did not adequately highlight the dangers of the drug. In a 2007 proceeding, the FCC considered the accuracy of a TV news story on the safety of another drug, synthetic bovine growth hormone (BGH), where it was alleged that a TV station's reporting on the drug failed to highlight the dangers of the drug.⁶³ In that case, two reporters for Tampa, Florida TV

⁶² FCC Response, *supra* note 26, at 3.

⁶³ TVT License, Inc., 22 FCC Rcd. 13,591, ¶ 4 (2007). This case involved an alleged violation of the Commission's news distortion policy, rather than the broadcast hoax rule. Like the broadcast hoax rule, the news distortion policy has four conditions that must be fulfilled for the policy to be violated. First, the station must deliberately intend to distort the news or mislead the audience. Second, there must be evidence, in addition to the news story itself, that the station intended to mislead the audience. Third, station ownership or management must initiate the distortion or know about it. Fourth, the public must be deceived about a matter of some significance, rather than just an incidental part of the news. *See, e.g.*, Timmer, *supra* note 52, at 7-8. In contrast to the broadcast hoax rule, the FCC's news distortion policy does not allow the Commission to fine stations that violate the policy. Rather, the policy is applied only at a TV or radio station's license renewal, which occurs for stations every eight years. At that time, the FCC can consider whether a station has violated the policy in determining whether the station should have its license renewed. *See, e.g., id.* at 5-7. A detailed examination of the application of the news distortion policy to the broadcast of false information related to COVID-19 is beyond the scope of this article. However, given the similarities between the requirements of the broadcast hoax rule and the news distortion policy, and the First Amendment standards applicable to them, much of the analysis of the broadcast

station WTVT prepared a report highlighting the dangers of BGH. The station did not air that report, allegedly due to pressure on the station from Monsanto, the company that produces BGH.⁶⁴ The station then aired a different report on the drug, which the original reporters alleged was misleading in presenting evidence of the safety of BGH.⁶⁵

The original reporters cited one statement in the final BGH report as being “particularly troubling,” that being by “a Monsanto spokesperson who stated during an interview that milk from cows injected with BGH ‘is the same safe and wholesome product’ as milk from cows not injected with BGH.”⁶⁶ This, the reporters argued, was not true.⁶⁷ The reporters also claimed the final report contained a number of other misleading statements about the safety of BGH, and that the report failed to challenge certain statements from a Monsanto representative interviewed for the story, in particular “Monsanto’s assertion that ‘cancer experts don’t see a problem’ with BGH.”⁶⁸

The Commission was reluctant to make a determination regarding the accuracy of the challenged report, stating it “possesses ‘neither the expertise nor the desire to look over the shoulder of broadcast journalists and inquire why a particular piece of information was reported or not reported.’”⁶⁹ The FCC observed that the safety of the drug “is a matter of considerable controversy and scientific complexity.” The FCC pointed to the fact that the use of BGH had been approved by the FDA, and that “the American Medical Association (AMA), American Cancer Society, and American Dietetic Association have issued statements supporting its safety,” while other scientists and organization believed BGH to be “a public health threat.”⁷⁰

This led the FCC to conclude that: “[u]nder these

hoax rule would likewise apply to the news distortion policy.

⁶⁴ TTV License, Inc., 22 FCC Rcd. 13,591, ¶¶ 2, 4.

⁶⁵ *Id.* at ¶¶ 2, 4, 5.

⁶⁶ *Id.* ¶ 4.

⁶⁷ *Id.*

⁶⁸ *Id.* ¶ 5 (citation omitted).

⁶⁹ *Id.* ¶ 17 (citing *In Re CIA*, 58 Rad.Reg2d (P & F) 1544, 1549 (1985)).

⁷⁰ *Id.* ¶ 18 (citations omitted).

circumstances, the truth of the complained-of Monsanto statement in the final BGH report that milk from BGH-injected cows is as 'safe and wholesome' as other milk ... cannot be 'readily and definitively resolved.'"⁷¹ The Commission also stated that it would not second-guess "the type of journalistic judgment embodied in WTVT's decision not to challenge certain Monsanto statements in the report, including the assertion that 'cancer experts don't see a problem' with BGH use."⁷² The FCC concluded that this was "a legitimate editorial dispute" between the reporters and the station, rather than a deliberate effort by the station to mislead the audience.⁷³ The FCC thus found there to be no wrongdoing by the station here.

With respect to Trump's claims about hydroxychloroquine, it may be that, while there is some consensus that the drug should not be taken to treat COVID-19, there may also be some evidence to support Trump's claim. In its response to the Free Press petition, the FCC pointed to others that shared similar assessments to Trump about the potential for the drug, including the FDA and other medical professionals.⁷⁴ The appropriate time to determine knowledge about the falsity of the statement is the time that broadcasters originally covered the statement. What might be subsequently learned about the safety of the treatment is not relevant to that determination. It may be that at the time of the original coverage, the safety of using hydroxychloroquine and chloroquine, like the safety of BGH in the WTVT case, could not be "readily and definitively resolved." Trump's promotion of disinfectants to treat the virus seems to be an easier case, as the various parties that have weighed in on that issue have uniformly warned against the dangers of such a course of treatment.⁷⁵ Thus, a broadcaster reporting on Trump's suggestion that disinfectants could be used to treat COVID-19 with knowledge that that was a dangerous treatment, without providing some disclaimer to that effect, could satisfy this particular component of the broadcast

⁷¹ *Id.* (citations omitted).

⁷² *Id.* (citations omitted).

⁷³ *Id.* ¶ 19.

⁷⁴ FCC Response, *supra* note 26, at 3.

⁷⁵ *See, e.g., supra* notes 13-19 and accompanying discussion.

hoax rule.

C. Prong 3: Foreseeable that Broadcasting the False Information Will Cause Substantial Public Harm

The third component of the broadcast hoax rule is that it must be foreseeable that broadcast of the false information will cause substantial public harm.⁷⁶ This means that “the licensee could expect with a significant degree of certainty that substantial harm would occur.”⁷⁷ Here, there is a presumption “that the public will behave in a rational manner,”⁷⁸ and the FCC will “not hold broadcasters accountable for unreasonable or unpredictable public conduct.”⁷⁹ The FCC has said “that the nature of the broadcast will be the single greatest determinant of foreseeability. Thus, the more inherently unbelievable the broadcast, the more certain broadcasters can be that substantial public harm is unforeseeable.”⁸⁰

Trump’s statements would most likely be covered by broadcasters in news programming, a category of programming that would seem to be on the far end of the spectrum away from “inherently unbelievable.” However, it would be necessary to examine the specific programs themselves, and the manner in which the information was presented in the programs, to see if the false statements were presented in a believable manner such that the likelihood of harm is foreseeable. The other significant question here is whether people who take hydroxychloroquine or disinfectants because of broadcast coverage of Trump’s statements about their potential effectiveness are acting rationally. If they are considered to be acting rationally, then the harm is foreseeable. If not, the harm would not be foreseeable.

The FCC addressed this issue in its response to the Free Press petition, in the context of Free Press’ allegation that Trump’s statements on hydroxychloroquine and chloroquine led an Arizona

⁷⁶ 47 C.F.R. § 73.1217 (2019).

⁷⁷ Broadcast Hoax Report & Order, *supra* note 37, ¶ 13.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Broadcast Hoax NPRM, *supra* note 42 n.6.

man to take a similar drug, resulting in the man's death. Stating that: "this is not the kind of foreseeable harm contemplated by our rules," the FCC elaborated, "While these events are tragic, the Presidential statements in question addressed the potential federal approval and administration of hydroxychloroquine and azithromycin by medical professionals. Under the circumstances, it was not reasonably foreseeable that a broadcaster's decision to air this statement would result in viewers or listeners ingesting cleaning products to protect themselves from COVID-19."⁸¹

This element may be the most difficult to establish with regard to Trump's inaccurate statements, even with regard to those about the use of disinfectants to treat the virus. First, the FCC's just-quoted statement shows some inclination by the Commission against finding people taking the substances Trump touts as being potentially effective treatments for the disease as being foreseeable. Further, people acting in such a manner—such as ingesting or injecting disinfectants—are not acting rationally, particularly since the products would likely contain warnings against the dangers of so doing. As the FCC indicated, if the public's reaction is not rationale, then any harm that is caused would not be deemed foreseeable as required by the rule.

D. Prong 4: Broadcast of the False Information Causes Immediate and Substantial Public Harm

The final element of the rule requires that "the hoax must in fact directly cause substantial public harm."⁸² This harm can take various forms, including "damage to the health or safety of the general public, diversion of law enforcement or other public health or safety authorities from their duties, and damage to property. In all cases, the public harm must be substantial. The public harm must also begin immediately after the broadcast and result in actual damage."⁸³ To be "immediate," "the harm would have to occur contemporaneously or shortly after the broadcast."⁸⁴ For there to

⁸¹ FCC Response, *supra* note 26, at 3-4 (citations omitted).

⁸² Broadcast Hoax Report & Order, *supra* note 37, ¶ 16.

⁸³ *Id.*

⁸⁴ *Id.* at n. 27.

be “actual damage,” “there must be injury in fact; the mere threat of harm is not sufficient.”⁸⁵

The Commission included the requirement of substantial harm “to exclude cases where the harm to the public may be real, but is of such a minor nature that it does not offset the potential chilling effect of a broader rule.”⁸⁶ However, the Commission declined to specify how substantiality would be determined, preferring to determine that based on the facts of each case. It did observe, however, that hoaxes that “diverts local police and emergency resources from their duties, causes widespread public disorder or harms the health or safety of the general public, would most likely inflict substantial public harm.”⁸⁷ It contrasted this with hoaxes that only resulted in a few members of the public contacting the police or complaining to the station as unlikely to meet the substantial public harm requirement.⁸⁸

The harm allegedly caused by the broadcast of Trump’s statement—the misuse of drugs or disinfectants—seems to be substantial and actual public harm, in that misuse of these drugs can lead to severe injury and even death. However, a question here would be whether that harm was also “immediate,” as required by the rule. Did people take these drugs “contemporaneously or shortly after the broadcast”? How quickly would people need to take the drugs to qualify as having done so “shortly after the broadcast”? New York City’s Department of Health and Mental Hygiene saw a rise in calls about the misuse of disinfectants within 18 hours of Trump’s remarks on their potential efficacy.⁸⁹ Would this qualify as immediate? Without precedent on these issues, it is hard to know for certain. Nevertheless, it seems likely that there would be some cases in which the harm was immediate, although many others in which it would not. The severity of the harm here—potential death—may be enough to fulfill this requirement of the broadcast hoax rule.

⁸⁵ *Id.*

⁸⁶ Broadcast Hoax NPRM, *supra* note 42, ¶ 4.

⁸⁷ Broadcast Hoax Report & Order, *supra* note 37, ¶ 17.

⁸⁸ *Id.*

⁸⁹ Folley, *supra* note 15.

III. THE BROADCAST HOAX RULE IS A POOR FIT FOR THESE CIRCUMSTANCES

Given the foregoing analysis, it does not seem likely that broadcasters who air Trump's inaccurate statements about COVID-19 treatments without disclosing the inaccuracy of those statements would be found in violation of the broadcast hoax rule. There are several issues that may result in this situation failing to meet all the narrowing requirements of the rule. For instance, is the pandemic a "violent or sudden event affecting the public" as required to qualify as a catastrophe under the rule? Was there some basis at the time the statements were made and aired for believing that these treatments might be effective, even if there were also a significant amount of contradictory evidence, such that the FCC would be unwilling to make a judgement on whether the statements were actually false? Is it foreseeable that viewers and listeners would take these drugs or disinfectants after broadcasters aired Trump's statements about them, and are people who do so acting rationally? And did those who suffered harm from taking the drugs or disinfectant as a result of broadcast coverage of Trump's statements take them contemporaneously with or shortly after the broadcast, as required by the rule? All of these issues make it doubtful that broadcasters have fulfilled all of the requirements necessary to violate the broadcast hoax rule in these circumstances. It appears the FCC acted properly in rejecting the Free Press request to apply the broadcast hoax rule here.

Also supporting the conclusion that the FCC could not properly apply the rule here is the fact that the rule allows broadcasters a presumption against programming being deemed to pose foreseeable harm when it is accompanied by a "disclaimer that clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances."⁹⁰ The false "news reports" that led to the Commission's adoption of the rule were all fictional stories that originated with the stations themselves, rather than accurate reports of a government official's

⁹⁰ 47 C.F.R. § 73.1217 (2019).

statements on a matter of great public concern.⁹¹ All of this lends support to the FCC’s observation that the Free Press request would require it to apply the broadcast hoax rule in a “novel” and “expand[ed] . . . construction of the rule,”⁹² one which “misconstrue[d]” the rule.⁹³ Thus, applying the broadcast hoax rule in the manner urged by Free Press would greatly expand the rule beyond the narrow sets of circumstances for which it was designed, and to which it has been applied in the past.

IV. FIRST AMENDMENT ISSUES WITH MANDATED DISCLAIMERS

In addition to enforcement of its broadcast hoax rule, Free Press also urged the Commission to “immediately issue an emergency policy statement or enforcement guidance recommending that broadcasters prominently disclose when information they air is false or scientifically suspect. We recommend that television disclosures appear in writing in the lower third and orally, and that radio broadcasters correct misinformation about COVID-19 in oral reporting after press conferences and immediately following other instances when false information airs.”⁹⁴

The FCC rejected this request as being

inconsistent with the First Amendment. Requiring such disclosures would constitute compelled speech, and ‘recommending’ such disclosures through enforcement guidance or a policy statement would constitute government coercion by another name. . . [It would also] improperly involve the federal government in making editorial judgments about whether broadcasters had accurately and sufficiently evaluated claims made by the President and other government officials. Moreover, pressuring broadcasters to air such disclosures would impose significant burdens on them, burdens that could

⁹¹ See *supra* notes 37-41 and accompanying discussion.

⁹² FCC Response, *supra* note 26, at 3.

⁹³ *Id.* at 1

⁹⁴ Free Press Petition, *supra* note 6, at 7.

chill news coverage at a time when information is one of the only weapons the American public has to protect itself from a contagious and deadly virus.⁹⁵

The FCC's analysis on this point appears to be correct. Along with the First Amendment issues raised by the government requiring broadcasters to provide specified speech, such a requirement could cause a chilling effect, leading broadcasters to actually reduce their coverage of the COVID-19 crisis for fear of violating the FCC's requirements, or for even having to defend themselves in a proceeding to determine whether the rule was violated.⁹⁶ Furthermore, counterspeech can provide a less restrictive and possibly more effective alternative to the Commission's requiring disclaimers in this context.⁹⁷ Finally, such disclaimers would be significantly underinclusive in preventing the harm that Free Press intends to prevent. Each of these issues is discussed in more detail below.⁹⁸

The Supreme Court has observed that "Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁹⁹ Political speech is provided this protection to allow the public to engage in "uninhibited, robust, and wide-open debate" on public issues.¹⁰⁰ Significantly, this protection is not dependent on whether a speaker's claims are true or accurate.¹⁰¹

⁹⁵ FCC Response, *supra* note 26, at 4-5.

⁹⁶ See *infra* notes 117-40 and accompanying discussion.

⁹⁷ See *infra* notes 151-53 and accompanying discussion.

⁹⁸ See *infra* notes 141-50 and accompanying discussion.

⁹⁹ *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (citations omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Grant v. Meyer*, 828 F.2d 1446, 1455 (10th Cir. 1987) (citing *NAACP v. Button*, 371 U.S. 415, 445 (1963)). The broadcast hoax rule does not purport to punish false speech due simply to its falsity, but instead has additional requirements that narrow its applicability. As Justice Breyer has observed, laws targeting false statements that survive First Amendment scrutiny tend to contain narrowing elements that "limit the scope of their application. . . ." *U.S. v. Alvarez*,

The freedom of speech protected by the First Amendment includes “the decision of both what to say and what not to say,”¹⁰² or, in other words, “both the right to speak freely and the right to refrain from speaking at all.”¹⁰³ The Supreme Court has struck down a number of government compelled speech requirements, including one requiring New Hampshire motorists to display the state motto “Live Free or Die” on their license plates,¹⁰⁴ a North Carolina requirement that professional fundraisers disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser,¹⁰⁵ and a West Virginia requirement that all public school students and teacher salute the American flag.¹⁰⁶

Another compelled speech case is *Miami Herald v. Tornillo*, in which the Supreme Court ruled on the constitutionality of a compelled speech requirement for newspapers. s.¹⁰⁷ That case involved a Florida “right of reply” statute that gave “a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper...”¹⁰⁸ Specifically, if a newspaper attacked the personal character or official record of a political

567 U.S. 709, 734 (2012) (Breyer, J., concurring). The FCC crafted the broadcast hoax rule with several narrowing elements to avoid burdening substantially more speech than necessary to achieve its goal. In fact, Justice Breyer has cited the broadcast hoax rule as an example of a statute targeting falsity that included narrowing elements. *Id.* at 735 (Breyer, J., concurring) (“Statutes prohibiting false claims of terrorist attacks, or other lies about the commission of crimes or catastrophes, require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm.” *See, e.g.*, 47 CFR § 73.1217 (2011) (requiring showing of foreseeability and actual substantial harm).). For a detailed discussion of the constitutionality of the broadcast hoax rule, *see* Timmer, *supra* note 50, at 47-50.

¹⁰² *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 796-97 (1988).

¹⁰³ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634 (1943); *id.*, at 645 (Murphy, J., concurring)).

¹⁰⁴ *Wooley*, 430 U.S. at 717.

¹⁰⁵ *Riley*, 487 U.S. at 795-801.

¹⁰⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁰⁷ *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974).

¹⁰⁸ *Id.* at 243.

candidate, that candidate had “the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. .”¹⁰⁹

The Court viewed the right of reply requirement as “operat[ing] as a command in the same sense as a statute or regulation forbidding [a newspaper] to publish specified matter.”¹¹⁰ Given the consequences of a newspaper’s publication of any news or commentary to which the statute might apply, the Court thought that, “editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably ‘dampens the vigor and limits the variety of public debate.’”¹¹¹

The Court also discussed how the law intruded on editors’ function:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. .¹¹²

Finding the statute unconstitutional, the Court observed, “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many

¹⁰⁹ *Id.* at 244.

¹¹⁰ *Id.* at 256.

¹¹¹ *Id.* at 257 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

¹¹² *Id.* at 258.

other virtues it cannot be legislated.”¹¹³

Prior to its holding in *Miami Herald*, however, the Court came to the opposite conclusion on a similar law that applied only to broadcasters. That law was the fairness doctrine, which had two requirements: (1) that broadcasters cover controversial issues of public importance, and (2) that they cover opposing sides of those issues.¹¹⁴ In *Red Lion Broadcasting v. FCC*, Reverend Billy James Hargis, on a radio show on Pennsylvania station WGCB, attacked author Fred J. Cook, saying “that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a ‘book to smear and destroy Barry Goldwater.’”¹¹⁵ Upon learning of the broadcast, Cook demanded that the station provide him with free airtime to respond to the attack, which the station refused. The FCC determined that the station “had failed to meet its obligation under the fairness doctrine . . . to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time . . .”¹¹⁶

In ruling on the constitutionality of the fairness doctrine’s right of reply requirement, the Court considered whether the requirement would lead to a chilling effect, causing broadcasters to reduce or eliminate their coverage of controversial public issues.¹¹⁷ The Court observed that, at the time, the FCC had indicated that possibility was “at best speculative.”¹¹⁸ The Court also noted that the broadcast networks had “taken pains to present controversial issues in the past, and even now they do not assert that they intend

¹¹³ *Id.* at 256.

¹¹⁴ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969) (citing *Editorializing by Broad. Licensees*, 13 F.C.C. 1246 (1949); *United Broad. Co.*, 10 F.C.C. 515 (1945); *New Broad. Co.*, 6 P & F Radio Reg. 258 (1950)).

¹¹⁵ *Id.* at 371.

¹¹⁶ *Id.* at 372 (citing *Times-Mirror Broad. Co.*, 24 P & F Radio Reg. 404 (1962)). This was later codified by the FCC as the “personal attack” rule (47 C.F.R. § 73.123 (1968) (repealed 2000)). At the time of the incident, the right of reply requirement was considered an aspect of the fairness doctrine. *See id.* at 369-71.

¹¹⁷ *Id.* at 392-93.

¹¹⁸ *Id.*

to abandon their efforts in this regard.”¹¹⁹ Concluding that the fairness doctrine had not had a chilling effect in the past, the Court nevertheless indicated that “if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”¹²⁰

The Court in *Red Lion* also discussed how the scarcity of broadcast frequencies required a limitation on the number of TV and radio stations, and how this in turn justified a lower level of First Amendment protection for broadcasting, as opposed to other forms of media, such as newspapers, which do not suffer from such scarcity.¹²¹ Thus, due to differences in the forms of media to which the two laws applied, and the implications of those differences for the level of First Amendment protection accorded those forms of media, the Court allowed a right of reply requirement to stand for the broadcast media, while it found a similar requirement in the print media to be unconstitutional. Another significant reason why the Court allowed the requirement to stand in *Red Lion* was because it did not see a chilling effect resulting from it. Finally, and significantly, the Court indicated that if it turned out that the requirement did cause a chilling effect, its conclusion in *Red Lion* could be reconsidered.

As it turned out, the FCC later concluded that the fairness doctrine did lead to a chilling effect, leading it to eliminate the rule as being unconstitutional in 1987. Relying on a comprehensive 1985 FCC report on the fairness doctrine, the Commission concluded that “the fairness doctrine ‘chills’ speech,”¹²² by “thwart[ing] the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance ... the fairness doctrine, in operation, ‘chills’

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *supra* notes 30-34 and accompanying discussion.

¹²² *In re* Syracuse Peace Council Against TV Station WTVH Syracuse, 2 FCC Rcd. 5043, 5043 (1987) (citations omitted) (hereinafter “Fairness Doctrine Decision”).

speech.”¹²³ Specifically, the Commission determined that the fairness doctrine gave broadcasters

a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine [that broadcasters provide coverage of controversial issues of public importance]. Each time a broadcaster presents what may be construed as a controversial issue of public importance, it runs the risk of a complaint being filed, resulting in litigation and penalties, including loss of license. This risk still exists even if a broadcaster has met its obligations by airing contrasting viewpoints [the second requirement of the fairness doctrine], because the process necessarily involves a vague standard, the application and meaning of which is hard to predict. Therefore, by limiting the amount of controversial issue programming to that required by the first prong (i.e., its obligation to cover controversial issues of vital importance to the community), a licensee is able to lessen the substantial burdens associated with the second prong of the doctrine (i.e., its obligation to present contrasting viewpoints) while conforming to the strict letter of its regulatory obligations.¹²⁴

Even broadcasters who believe they have presented balanced coverage of controversial issues “may be inhibited by the expenses of being second-guessed by the government in defending a fairness doctrine complaint at the Commission, and if the case is litigated in court, the costs of an appeal.”¹²⁵ According to the FCC, this was “not merely speculative,” as the Commission had compiled in its 1985 report “numerous instances in which the broadcasters decided that it was ‘safer’ to avoid broadcasting specific controversial issue programming, such as series prepared for local news programs, than to incur the potentially burdensome administrative, legal, personnel, and reputational costs of either

¹²³ *Id.* at 5049 (citation omitted).

¹²⁴ *Id.* (citations omitted).

¹²⁵ *Id.*

complying with the doctrine or defending their editorial decisions to governmental authorities.”¹²⁶ This included stations refusing to present editorials, not accepting political and public issue advertisements, and not airing programming discussing controversial issues.¹²⁷

The FCC pointed out that the speech regulated by the fairness doctrine—“opinions on controversial issues of public importance”—was that “which the Framers of the Bill of Rights were most anxious to protect—speech that is ‘indispensable to the discovery and spread of political truth.’”¹²⁸ The Commission went on to observe “that the enforcement of the doctrine requires the ‘minute and subjective scrutiny of program content,’ which perilously treads upon the editorial prerogatives of broadcast journalists.”¹²⁹ It also forced the Commission “to undertake the dangerous task of evaluating particular viewpoints,” and “to second-guess broadcasters’ judgment on the issues they cover, as well as on the manner and balance of coverage.”¹³⁰ The FCC further pointed out that the “First Amendment was adopted to protect the people not from journalists, but from government,” giving “the people the right to receive ideas that are unfettered by government interference.”¹³¹ It acknowledged that “[t]here is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press.”¹³² All of this led the FCC to conclude that: “the fairness doctrine in operation disserves both the public’s right to diverse sources of information and the broadcaster’s interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the

¹²⁶ *Id.* at 5050 (citations omitted).

¹²⁷ *Id.*

¹²⁸ *Id.* at 5056.

¹²⁹ *Id.* at 5051 (citations omitted).

¹³⁰ *Id.* (citations omitted).

¹³¹ *Id.* at 5057 (emphasis in original).

¹³² *Id.*

editorial processes of broadcast journalists.”¹³³ The FCC thus found the Fairness Doctrine to violate the First Amendment and eliminated the rule.¹³⁴

Concern over such a chilling effect is a significant reason why even false speech is protected by the First Amendment.¹³⁵ As the Supreme Court has observed, “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”¹³⁶ The First Amendment protects speech on political issues, both that which is true and that which may not be, to promote the public’s ability to engage in “uninhibited, robust, and wide-open debate” on public issues.¹³⁷ Punishing the press for covering false statements in these situations might lead the press to avoid covering some statements on issues of public concern, even though some or all might be true, out of fear that some may turn out not be true and the station would risk prosecution or punishment. Thus, “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”¹³⁸

Allowing the press to escape punishment by proving the statements to be true does not eliminate this chilling effect. News organizations may still be concerned about the difficulty of proving all aspects of their stories true in court, or even just about the difficulties and expense of having to do so. This is a reason why defendants in libel actions cannot be required to prove the truth of their statements in order to escape liability; rather, the burden is on the plaintiff to prove the falsity of the statement.¹³⁹

¹³³ *Id.* at 5052.

¹³⁴ *Id.*

¹³⁵ *United States v. Alvarez*, 567 U.S. 709, 734 (2012) (plurality opinion) (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”).

¹³⁶ *Id.* at 718 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)).

¹³⁷ *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (citations omitted).

¹³⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974).

¹³⁹ See Mark A. Franklin & Daniel J. Bussell, *Defamation and the First Amendment: New Perspectives: The Plaintiff’s Burden in Defamation, Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 826-27 (1984) (citing

The Court offered this explanation for that requirement:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.¹⁴⁰

This same chilling effect could also result from requiring broadcasters to provide disclaimers when covering false statements made by Trump. First, such a requirement would force broadcasters covering Trump's statements about COVID-19 treatments to evaluate the accuracy of those statements while at the same time covering an unfolding news story. Broadcasters who fail to provide such disclaimers in these situations would risk being investigated and sanctioned by the government. Even if the broadcaster were to prevail in such an investigation, it would still incur the time and expense of having to defend itself, and the station's reputation may be tarnished due to its being under investigation by the FCC. In addition, it would put the FCC in the position of having to determine which of Trump's statements about COVID-19 treatments are accurate and which are not. As with the

Sullivan, 376 U.S. at 285-86).

¹⁴⁰ *Sullivan*, 376 U.S. at 279 (citations omitted).

fairness doctrine, stations may decide to reduce or eliminate their coverage of Trump's statements to avoid the possibility of being entangled in this quagmire.

V. IMPLICATIONS OF THE LIMITATION TO BROADCAST MEDIA

Even if the FCC were to do as Free Press requested and enforce the broadcast hoax rule and require broadcasters to air disclaimers, this would have limited effectiveness in countering the spread of false information, further undercutting the constitutionality of these actions. As has been previously discussed, that is because both rules apply only to broadcasters, meaning TV and radio stations.¹⁴¹ The FCC could target stations that air the newscasts of the big four broadcast networks: ABC, CBS, NBC, and FOX,¹⁴² or the local newscasts of TV stations themselves. Significantly, the broadcast hoax rule does not apply to cable news networks, newspapers, or websites.¹⁴³ Of these three major sources of news, the FCC only has authority over cable networks, and its ability to regulate cable network speech is more limited than with broadcast speech, as cable television is given greater First Amendment protection than broadcasting.¹⁴⁴

Thus, targeting broadcasters in the manner requested by Free Press would address just a portion of the flow of misinformation from Trump's inaccurate statements—that coming from broadcasters, but not that coming from cable news networks,

¹⁴¹ See *supra* notes 28-32 and accompanying discussion.

¹⁴² These broadcast networks are not licensed by the FCC; rather, the FCC licenses the individual stations that carry the broadcast networks' programs. See FCC, THE PUBLIC AND BROADCASTING 4 (2008), <https://www.fcc.gov/media/radio/public-and-broadcasting> ("We license only individual broadcast stations. We do not license TV or radio networks (such as CBS, NBC, ABC or Fox)..."). Any action would need to be targeted at the stations themselves, which would include some 200 stations for each of the big four broadcast networks, a small number of which are owned by the networks themselves, with the remainder owned by various other companies. See, e.g., *List of NBC Television Affiliates*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_NBC_television_affiliates.

¹⁴³ See *supra* notes 31-34 and accompanying discussion.

¹⁴⁴ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994).

newspapers, or websites. FCC enforcement of the rule would be of limited effectiveness in reducing the harm stemming from the misinformation, as any action against broadcasters would still allow misinformation to flow from these other major sources of news. This could further undermine the constitutionality of the broadcast hoax rule or required disclosures, as these both could be determined to be underinclusive in achieving their goal.

An example of the effect of under-inclusiveness on the constitutionality of a law targeting potentially harmful speech is provided by *Brown v. Merchants Entertainment Association*.¹⁴⁵ In that case, California passed a law prohibiting the sale or rental of violent video games to minors.¹⁴⁶ The state's interest was to prevent the harm violent video games allegedly caused minors.¹⁴⁷ However, California did not restrict minors' access to other violent media, such as Saturday morning cartoons or pictures of guns.¹⁴⁸ As the Supreme Court saw it, "California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why."¹⁴⁹ To the Court, this made the law "wildly underinclusive" in achieving its stated goal of protecting minors from the harms believed to be associated with their exposure to violent media, which, to the Court was enough for the law to be found unconstitutional.¹⁵⁰

VI. DISCUSSION AND CONCLUSION

So, how are we to handle Trump's false statements and seek to limit or eliminate the harm that might be caused by those statements? Counterspeech—additional speech which refutes the false statements—is the preferred remedy. As the Court has stated, "The remedy for speech that is false is speech that is true. This is

¹⁴⁵ 564 U.S. 786 (2011).

¹⁴⁶ *Id.* at 789 (citations omitted).

¹⁴⁷ *Id.* at 799-801.

¹⁴⁸ *Id.* at 801-02.

¹⁴⁹ *Id.* at 802.

¹⁵⁰ *Id.* at 801-02 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B. J. F.*, 491 U.S. 524, 540 (1989)).

the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”¹⁵¹ The Free Press request would require that broadcasters provide this counterspeech along with their coverage of the statements themselves. However, this is government-mandated speech, which, as has been discussed, raises significant First Amendment concerns.

The First Amendment is grounded on the theory “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹⁵² Thus, rather than allowing the government to restrict or punish false statements, we depend on the marketplace of ideas to help us sort the true from the false. We allow both true ideas and false ideas to compete in this marketplace. Under this view, the best weapon against false speech is speech that is true. Counterspeech, accurate information which counters the false, is preferred as a remedy to government action.¹⁵³

In its denial of the Free Press petition, the FCC echoed this view. The commission concluded:

[T]he antidote to the alleged harms raised by Free Press is—ironically enough—a free press. The rapid and comprehensive coverage of the present pandemic, free from burdensome disclaimers, agency investigation, or other government oversight, advances the public interest in maximizing information flow, while facilitating the vetting of statements by public officials via the ordinary journalistic process.”¹⁵⁴

The FCC thus chose to “leave to the press its time-honored and constitutionally protected role in testing the claims made by our

¹⁵¹ *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

¹⁵² *Id.* at 728 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

¹⁵³ *Id.* at 727-28.

¹⁵⁴ FCC Response, *supra* note 26, at 5.

political leaders,”¹⁵⁵ and to trust “the American public’s ability to differentiate between medical advice and political opinion.”¹⁵⁶

While not a perfect solution, reliance on the marketplace of ideas to sort accurate from inaccurate information about COVID-19 and its effects is better than doing so through FCC enforcement of the broadcast hoax rule against stations who report on Trump’s inaccurate statements without labeling them so, or through FCC requiring to accompany such reporting with disclaimers. These actions could very well have the opposite of the intended effect, instead leaving the public with less information about COVID-19 due to broadcasters deciding to limit or forego such coverage instead of risking investigation and potential sanction by the FCC. The philosophy of the First Amendment is that we allow the truth of these matters to come to light through the competition in the marketplace of ideas. While the marketplace of ideas may often function less than perfectly, this is to be preferred over the government telling the press what it cannot say, or what it must say.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 4 (citations omitted).