Analysis of Possible Constitutional Objections to the Draft Statute

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This paper analyzes three potential claims that could be raised to challenge the constitutional validity of the proposed National Endowment for Fact-Checking Act. The first one involves claims by "electronic megaphone companies" (EMCs). The next two involve claims by "persons with large electronic megaphones" (PLEMs). For the reasons explained below, I conclude that the potential claims by PLEMs would almost certainly fail. The outcome of a First Amendment claim by EMCs is more difficult to predict, but the proposed statute, if enacted, would probably survive constitutional scrutiny.

The analysis assumes familiarity with key terms defined in the statute. In particular:

- NEFC is the National Endowment for Fact-Checking, a private, nonprofit corporation that has certain statutory responsibilities under the draft statute.
- EMCs are "electronic megaphone companies," defined in section 4, para. 2.
- PLEMs are "persons with large electronic megaphones," defined in section 4, para. 3.

I. EMC's Might Challenge the Reporting Requirements

Under the proposed statute, EMCs are required to file quarterly reports to identify the persons who use their electronic amplification services who qualify as "persons with large electronic megaphones" (PLEMs). Section 5, para. 3. The FCC is required to "promulgate regulations as soon as practicable . . . to provide guidance to EMCs concerning the content of those reports." Section 5, para. 3(b). The term "PLEM" is defined in section 4, para. 3. That definition incorporates numerical thresholds that determine who qualifies as a PLEM. An important footnote indicates that Congress should conduct fact-finding to determine the appropriate numerical thresholds.

EMCs could argue that the reporting requirement in section 5, para. 3, is a type of compelled disclosure rule that violates the First Amendment. Judicial resolution of such a claim may hinge, to some extent, on the specific numerical thresholds that Congress incorporates into the definition of "PLEMs," and the specific reporting requirements that the FCC adopts in the regulations it is supposed to promulgate.

The Supreme Court recently clarified the proper First Amendment analysis of compelled disclosure rules in *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373 (2021). That case involved a California law requiring charitable organizations to "disclose to the state Attorney General's Office the identities of their major donors." *Id*. at 2379. The plaintiffs were tax-exempt charities who argued that the law's compelled disclosure requirements violated their First Amendment right to freedom of association. The Court ultimately agreed with that argument.

The Court affirmed that compelled disclosure claims are subject to the "exacting scrutiny" standard first announced in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Americans for*

Prosperity Foundation, 141 S.Ct., at 2383. Under that standard, "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id*. The Court concluded that the "substantial relation" test is not as demanding as a "least restrictive means" test. However, the exacting scrutiny standard requires governments to frame compelled disclosure requirements in a manner that is "narrowly tailored to the government's asserted interest." *Id*. at 2383-84. The California law at issue in *Americans for Prosperity Foundation* failed that test.

The main purpose of the draft statute is "to protect American democracy from the electronic amplification of dangerous lies and misinformation related to elections and public health." Section 2. Let us assume that this purpose qualifies as a "sufficiently important governmental interest" under the exacting scrutiny standard. Is the compelled disclosure requirement "narrowly tailored" to promote that interest? The draft statute is designed to achieve its main purpose by assigning to independent fact-checking organizations the responsibility to monitor "messages transmitted by PLEMs that contain election-related communications or communications related to public health" and to decide "which claims contained in such messages are false or misleading." Section 7, para. 1. Since monitoring under the statute is restricted to PLEMs, those independent fact-checking organizations (NEFC's grantees) cannot perform their monitoring responsibilities unless they know which persons qualify as PLEMs.

The compelled disclosure requirement is designed to ensure that the FCC has sufficient information to decide, under section 9, para. 2, which persons meet the statutory definition of "persons with large electronic megaphones." In sum, EMCs are required to disclose information to the FCC so that the FCC can decide which persons qualify as PLEMs so that NEFC's grantees can distinguish correctly between persons whose communications are subject to monitoring under the statute and persons whose communications are not subject to monitoring. Thus, in principle, some compelled disclosure rule would almost certainly satisfy the "narrow tailoring" standard articulated in *Americans for Prosperity Foundation*, but the precise contours of that compelled disclosure rule are important.

Consider, for example, the numerical threshold for social media accounts with a large number of followers that is incorporated into the definition of PLEMs. *See* section 4, para. 3. According to Socialtracker, as of September 2021, there are ninety-three Twitter accounts with more than 20 million followers worldwide. In the statutory definition of PLEMs, Congress could set a threshold of 20 million followers for social media accounts. That would drastically limit the scope of the compelled disclosure requirement for EMCs because EMCs are merely required to disclose the identity of "persons who use their electronic amplification services who qualify as PLEMs." Section 5, para. 3. However, a numerical threshold of 20 million followers would enable many of the most prolific and influential purveyors of lies and misinformation to evade monitoring under the statute.

Conversely, a numerical threshold of 10,000 followers would likely catch the most influential communicators of lies and misinformation on social media, but such a low threshold would arguably impose an unduly burdensome reporting requirement on EMCs and potentially expose millions of innocent social media users to unwanted monitoring by NEFC's grantees.

Moreover, the monitoring function might become administratively unmanageable if NEFC's grantees had to monitor every social media account that reaches an audience of more than 10,000 social media users. Thus, in choosing numerical thresholds for the definition of "PLEMs," Congress must strike a balance between competing concerns. Courts would likely defer to Congress's judgment on that score if there is evidence that Congress engaged in detailed fact-finding and took the First Amendment concerns seriously when it decided on numerical thresholds.

Similarly, the First Amendment analysis hinges partly on the specific regulations enacted by the FCC to govern the precise content of reports that EMCs are required to file. The draft statute requires EMCs to file reports "every three months to identify the persons who use their electronic amplification services who qualify as PLEMs." Section 5, para. 3. The Commission is authorized to promulgate rules to determine the content of those reports. Section 9, para. 7. The Commission may have good reason to demand something more than the names of the persons who qualify as PLEMs. However, a rule requiring EMCs to hand over very detailed information about such persons, and their usage of the electronic amplification services provided by EMCs, would almost certainly run afoul of the narrow tailoring analysis in *Americans for Prosperity Foundation.*

Here, it is important to understand why the statute delegates rulemaking responsibility to the FCC. The statutory definition of EMCs includes companies that provide electronic amplification services for individuals who communicate to audiences via radio, television, social media, blogs, and podcasts. Section 4, para. 2. The term "electronic amplification services" includes both content distribution and content aggregation services. Section 4, para. 1. The statutory definition of EMCs covers a broad range of technologies because empirical research demonstrates that electronic amplification of false claims is magnified by the interaction among different types of technologies, including radio, television, social media, etc. Benkler, Faris, and Roberts, Network Propaganda (2018).

One key purpose of the compelled disclosure rule is to provide NEFC and its grantees the information they need to perform the monitoring function effectively and efficiently. Given that purpose, the FCC would likely conclude that the reporting requirements for a company that provides content aggregation services for blogs differ from the reporting requirements for a company that operates a television or radio network. In other words, the types of EMCs subject to the reporting requirement are sufficiently varied that it makes sense for the FCC to establish different reporting requirements for different types of companies.

In sum, EMCs could raise a non-frivolous First Amendment challenge to the compelled disclosure rule in section 5, para. 3. However, courts would likely conclude that the statute and implementing regulations are constitutionally valid if: (a) Congress establishes reasonable numerical thresholds in section 4, para. 3 that are supported by congressional fact-finding; and (b) the FCC establishes narrowly tailored reporting requirements pursuant to its rulemaking authority in section 9, para. 7.

II. Potential Claims by PLEMs

Under the statutory definitions of PLEMs and EMCs, Tucker Carlson is a PLEM and Fox News is an EMC. On several occasions, nonpartisan fact-checking organizations have concluded that Tucker Carlson made false and/or misleading claims related to elections and public health. For example, in July 2021, Politifact found that Carlson made a false claim about alleged voter fraud in Georgia. In May 2021, Politifact found that Carlson made a false claim about people dying from the Covid vaccine. This section considers a hypothetical lawsuit by Tucker Carlson challenging the constitutionality of the proposed statute. For the sake of analytic clarity, it is helpful to analyze separately a pre-enforcement suit and a post-enforcement suit.

A. A Possible Post-Enforcement Lawsuit by Carlson

Under the statutory scheme, several events would have to occur before Carlson could file a post-enforcement lawsuit. First, Carlson would have to make a false or misleading claim related to elections or public health. Second, one of NEFC's grantees would have to issue a warning to Carlson and to Fox News. Then, Carlson would have to ignore the warning and make at least two more false or misleading statements with "the same or substantially similar content." Section 8, para. 2. Then, after a series of three warnings, NEFC would have to recommend that Fox News issue a "de-amplification order," which the statute defines as "a decision adopted voluntarily by an EMC to restrict the electronic amplification of messages transmitted by a particular PLEM for a specified time period." Section 4, para. 4.

It bears emphasis that NEFC's recommendation is merely a recommendation. Nothing in the statute requires Fox News to issue a de-amplification order based on NEFC's recommendation. If Fox News decides not to issue a de-amplification order, there is no penalty for either Carlson or Fox News. However, if Fox News decides voluntarily to issue a de-amplification order, Carlson's access to the electronic amplification services provided by Fox News would be temporarily restricted. *See* section 5, para. 5. and section 8.

Assume that Fox News issues a de-amplification order. Carlson sues both Fox News and NEFC. He may, or may not, have a valid breach of contract claim against Fox News, but he does not have a valid constitutional claim against Fox News. The Constitution constrains the government's power to regulate speech; it does not constrain the power of private actors, like Fox News, to regulate speech. Thus, the critical question is whether Carlson has a valid constitutional claim against NEFC for violation of his First Amendment right to freedom of expression. Carlson's First Amendment claim against NEFC would almost certainly fail for three reasons: Carlson lacks standing; NEFC is not a state actor; and NEFC has not violated the First Amendment. In fact, a court order restricting NEFC's activities would probably violate NEFC's First Amendment rights.

First, Carlson lacks standing to sue NEFC. Under Article III of the Constitution, plaintiffs who file claims in federal court must show that they have standing. Among other things, this means that Carlson would have to show that there is a "causal connection between the injury and the conduct complained of" (causation), and "that the injury will be redressed by a favorable

decision" (redressability). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). (The relevant "injury" is the temporary restriction of electronic amplification.) In this case, NEFC did not cause Carlson's injury because Fox News had no obligation to follow NEFC's recommendation. Fox News caused the injury by making a voluntary decision to issue a de-amplification order. Moreover, the court could not redress the injury by issuing an order directed at NEFC because NEFC has no power to terminate the de-amplification order. Only Fox News has that power. Since Carlson cannot satisfy the requirements for causation and redressability, he lacks standing to sue NEFC in federal court.[1]

Second, like Fox News, NEFC is a private actor, not a state actor. The statute states expressly: "NEFC is not an agency or establishment of the United States Government." Section 6, para. 2. Moreover, "No officer or employee of the United States Government shall have authority to hire or fire NEFC's officers, directors, or employees." *Id*. Under the statute: "Congress acknowledges that there has been established in the District of Columbia a private, nonprofit corporation" known as NEFC. Section 6, para. 1. Thus, the statute does not create NEFC; it merely recognizes NEFC's prior existence. Granted, the Supreme Court has often held that the conduct of a nominally private actor qualifies as "state action" for the purpose of analyzing a constitutional claim. *See, e.g*., *Jackson v. Metropolitan Edison Co*., 419 U.S. 345 (1974); *Adickes v. S. H. Kress & Co*., 398 U.S. 144 (1970). Thus, Carlson could argue that NEFC's conduct—specifically, recommending that Fox News issue a de-amplification order—qualifies as "state action."

Analysis of the state action issue is complicated because the Supreme Court's "cases deciding when private action might be deemed that of the state have not been a model of consistency." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)). Even so, Dean Chemerinsky provides a helpful framework for analyzing the state action issue. *See generally* Erwin Chemerinsky, Constitutional Law: Principles and Policies 542-64 (5th ed. 2015).

First, under the "public function exception," courts sometimes find that the conduct of a private actor qualifies as state action when a private entity exercises "powers traditionally exclusively reserved to the state." *Id*. at 544, quoting *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 352 (1974). The public function exception is not applicable here because NEFC is not exercising any power exclusively reserved to the state. To the contrary, by encouraging Fox News to restrict electronic amplification of Carlson's speech, NEFC is performing a function that the First Amendment may preclude the government itself from performing.

Second, under the "entanglement exception," courts sometimes find that the conduct of a private actor qualifies as state action when "the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution." Chemerinsky, *supra*, at 552. Clearly, under the proposed statute, the government is encouraging NEFC to perform its statutory

[1] The standing analysis applies only to a claim brought in federal court. State courts might impose similar requirements, but analysis of standing rules in state courts is beyond the scope of this paper.

responsibilities and facilitating NEFC's conduct. Under the statutory design, NEFC will be wholly dependent upon funding provided by the FCC, which is a government agency. Section 6, para. 7. Government funding, without more, is not sufficient to convert private action into state action for constitutional purposes. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Still, in addition to funding, the FCC also performs a variety of other tasks that assist NEFC in carrying out its statutory responsibilities. Thus, under the entanglement exception, the key question is whether any of NEFC's conduct under the statute would violate the First Amendment. In short, under the entanglement exception, the state action analysis hinges on the First Amendment analysis.

Some of the tasks assigned to NEFC under the statute are already being performed by independent fact-checking organizations, such as Factcheck.org, PolitiFact, and Snopes. It is beyond dispute that those organizations are not violating the First Amendment by monitoring public communications, making individualized determinations about which claims are false or misleading, and communicating their findings to the public. To the contrary, they are exercising their own First Amendment rights by engaging in those activities. If a court ordered them to stop engaging in such activities, the court would probably be violating their First Amendment rights.

Under the proposed statute, NEFC would be performing two kinds of tasks that existing fact-checking organizations do not typically perform: recommending to EMCs that they issue de-amplification orders; and preparing detailed reports to Congress and to the Commission. *See* section 6, para. 4; section 6, para. 6; and section 8. Notably, these are expressive activities that—when performed by non-governmental organizations—are protected by the First Amendment.[2] Indeed, existing fact-checking organizations could perform both kinds of tasks without violating the First Amendment because the First Amendment protects their right to engage in these types of expressive activities, free from government interference. Moreover, given that the First Amendment protects the right of existing fact-checking organizations to perform these types of tasks, the mere fact that the statute directs the FCC to support NEFC's activities does not mean that the First Amendment precludes NEFC from performing these tasks.

Here, it is important to emphasize what the statute does not authorize. The statute does not authorize either NEFC or the FCC to impose any direct restriction on the expressive activities of any speaker. The statute does not authorize either NEFC or the FCC to impose a penalty on a PLEM who repeatedly disseminates false or misleading claims, nor does it authorize either NEFC or the FCC to impose a penalty on an EMC that refuses to issue a de-amplification order based on NEFC's recommendation. If the statute did authorize such penalties, it would clearly trigger heightened scrutiny under the First Amendment. However, under the proposed statute, the only negative consequence for a PLEM who repeatedly disseminates false or misleading claims is that an EMC might decide to de-amplify that PLEM. Moreover, the only negative consequence for an EMC that refuses to issue a de-amplification order based on NEFC's recommendation is that NEFC will identify that EMC in its report to Congress, which

[2] If an executive branch agency issued warnings to PLEMs and/or recommended de-amplification orders, it might be violating the First Amendment. However, when a non-governmental organization engages in these types of activities, it is exercising its constitutionally protected First Amendment rights.

will be disseminated to the general public. *See* section 6, para. 6. The Supreme Court has never held that this type of "sanction" for harmful speech—if it can properly be labeled a "sanction"—violates the First Amendment. To the contrary, a court order prohibiting NEFC from disseminating such reports would likely violate NEFC's First Amendment rights.

B. A Potential Pre-Enforcement Lawsuit by Carlson

Assume that Congress enacts a law similar to the proposed statute. Before the law takes effect, Carlson and Fox News jointly file a lawsuit, arguing that the statute is facially invalid under the First Amendment because it is purposefully designed to have a chilling effect on constitutionally protected speech, and it will in fact have that effect. *See, e.g.*, *Clapper v. Amnesty Int'l*, 568 U.S. 398, 417-18 (2013) (stating "that constitutional violations may arise from the chilling effect of regulations that fall short of a direct prohibition against the exercise of First Amendment rights"). They seek an injunction to prevent enforcement of the law. They argue that, if the law takes effect, Fox News will be forced to censor Carlson's speech and he will be forced to engage in self-censorship.

This claim will likely fail for three reasons. First, the plaintiffs cannot satisfy the requirements for injunctive relief because there is no defendant against whom the court could issue an injunction. As the Court recently reiterated, "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health v. Jackson* (slip op., Sept. 1, 2021, at 1). Thus, for the plaintiffs to state a viable claim for injunctive relief, they must sue a specific defendant who is responsible for enforcing the law. Under the proposed statute, though, neither the FCC nor NEFC has any power to enforce restrictions on the free speech rights of Carlson or Fox News. Therefore, neither entity is a proper defendant in a suit for injunctive relief.

The other two reasons why plaintiffs' claim would likely fail relate to the constitutional requirements for Article III standing. To establish Article III standing, a plaintiff must satisfy three elements: injury in fact, causation, and redressability. *See Clapper*, 568 U.S. at 409. Federal courts would likely reject the claim by Carlson and Fox News because they cannot satisfy either the injury or the causation element of the standing analysis.[3]

First, consider causation. Our hypothetical case is similar to *California v. Texas*, 141 S.Ct. 2104 (2021), where plaintiffs sued to enjoin enforcement of the "minimum essential coverage" provision of the Affordable Care Act. When Congress originally passed the Affordable Care Act in 2010, it "required most Americans to obtain minimum essential health insurance coverage. The Act also imposed a monetary penalty . . . upon individuals who failed to do so." *Id*. at 2112. Congress later amended the statute in 2017, effectively eliminating "the penalty by setting its amount at $0." *Id*. Although the 2017 amendment eliminated the monetary penalty, individual plaintiffs claimed that they had suffered an "injury," within the meaning of Article III, because they spent money to purchase health insurance, as required by the statute.

[3] As noted above, the standing requirement does not apply to claims filed in state court.

The Court assumed, for the sake of argument, that an individual plaintiff's monetary expenditure "satisfies the injury element of Article III standing." *Id*. at 2114. Nevertheless, the plaintiffs lacked standing because they could not satisfy the causation element. Since the statutory provision "has no means of enforcement . . . there is no possible government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance." *Id*. at 2114. This analysis applies with equal force to the proposed National Endowment for Fact-Checking Act. Here, the alleged injury is that Fox News will censor Carlson and/or Carlson will engage in self-censorship. As in *California v. Texas*, though, "there is no possible government action that is causally connected to the plaintiffs' injury" because the proposed statute "has no means of enforcement." *Id*.

Fox News and Carlson might argue that the FCC's anticipated conduct under the statute is causally connected to their injury. The FCC is clearly a government actor. However, the FCC has no power under the statute to issue a de-amplification order (see section 9; para. 8); only EMCs can issue such orders. If Carlson engages in self-censorship because he fears a de-amplification order, then Fox News would be the proper defendant for a lawsuit because Fox News is the only EMC that could foreseeably issue a de-amplification order against Carlson.

Alternatively, Fox News and Carlson might sue NEFC under the theory that NEFC is a government actor and that NEFC's reporting obligations under the statute are causally connected to their injury. Specifically, Fox News could argue that it feels compelled to censor Carlson because Fox fears the reputational harm that would follow from NEFC's published reports if it fails to censor Carlson. This argument would likely fail because NEFC is not a state actor and because NEFC's reporting is, itself, constitutionally protected free speech. *See supra*. Even assuming that NEFC is a state actor, though, the argument would still fail because the asserted injury does not satisfy the "injury" element of Article III standing.

The Court's analysis in *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013) is instructive. In *Clapper*, plaintiffs sued the Director of National Intelligence to enjoin enforcement of Section 702 of the Foreign Intelligence Surveillance Act, which authorized the government "to acquire foreign intelligence information by . . . [conducting] surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." *Id*. at 401. Plaintiffs advanced two different arguments in an attempt to satisfy the injury requirement under Article III. The first argument relied on a "highly attenuated chain of possibilities" that, in the Court's view, did "not satisfy the requirement that *threatened injury must be certainly impending*." *Id*. at 410 (emphasis added).

Similarly, in this case, Carlson could argue that, if the statute takes effect: 1) one of NEFC's grantees will decide that some of his statements are false or misleading; 2) that grantee will then issue a warning on that basis; 3) he will ignore the warning and make additional, similar statements; 4) NEFC will then recommend that Fox News issue a de-amplification order; and 5) Fox will follow NEFC's recommendation and issue the recommended order; 6) thereby causing injury to Carlson. This is precisely the type of "highly attenuated chain of possibilities" that the Court in *Clapper* held failed to "satisfy the requirement that the threatened injury must be certainly impending." *See id*. at 410-414. As in *Clapper*, a court would surely decline "to

endorse standing theories that rest on speculation about decisions of independent actors." *Id*. at 414.

Plaintiffs in *Clapper* also advanced an alternative theory. They claimed to have "standing based on the measures that they have undertaken to avoid" the surveillance that the statute authorized. *Id*. at 415. Similarly, in this case, Carlson and Fox News could argue that they have standing based on measures that they will take—censorship (by Fox) and self-censorship (by Carlson)—to avoid the negative reporting by NEFC that the statute authorizes. The Court's response to this argument in *Clapper* is instructive: "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id*. at 416. Similarly, Carlson and Fox News cannot "manufacture standing by inflicting harm on themselves"—in this case, censorship and self-censorship—based on their fears of hypothetical future harm (i.e., negative reporting by NEFC) that may or may not materialize.

In sum, even assuming that the proposed statute might have a chilling effect on Carlson and Fox News, a pre-enforcement suit for injunctive relief would likely fail because: 1) there is no defendant against whom a court could issue an injunction; and 2) plaintiffs cannot satisfy either the causation or injury requirements for Article III standing. Moreover, for the reasons explained previously, a court order prohibiting NEFC from carrying out its statutory responsibilities would probably violate NEFC's First Amendment rights.