AN EPIDEMIC OF LIES: A CALL FOR BOLD FCC ACTION TO RETURN TRUTH TO THE NEWS

Chancelor Wahl[*]

TABLE OF CONTENTS

I. INTRODUCTION

January 6, 2021. To a majority of Americans, it was an assault on the very foundations of democracy.[1] "[A] landmark stain on American democracy," as one analyst described it.[2] To others, the date elicits memories of the "beautiful day" that many "patriots" and "peaceful people" were forced into action to save their country.[3] As Donald Trump put it in a speech given at a rally outside the White House, the patriots of the day needed to "fight like hell," warning them, "if you don't fight like hell, you're not going to have a country anymore."[4] The January 6 insurrection is an event that will live in infamy—a lasting reminder of

[*] J.D. Candidate, May 2025, Rutgers Law School–Camden. My sincerest thanks to Professor Adam Crews for the invaluable guidance that helped save this Note from a certain death. My gratitude is immeasurable.

1. Kayla Epstein, *January 6: The Day That Still Divides America, Three Years On*, BBC (Jan. 5, 2024), https://www.bbc.com/news/world-us-canada-67889403. *See generally* Brendan Williams, *Divided We Fall: The Concerted Attack on U.S. Democracy*, 59 WILLAMETTE L. REV. 121, 144 (2023) (finding that on the eve of the 2022 midterms seventy-one percent of voters believed democracy was at risk).

2. Rob Kuznia, *Assault on Democracy: Paths to Insurrection*, CNN (June 2021), https://www.cnn.com/interactive/2021/06/us/capitol-riot-paths-to-insurrection/.

3. Epstein, *supra* note 1.

4. Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial.

the deep political division that has infected this country in recent years.[5] In fact, one need not look any further than the data regarding American opinion on the January 6 insurrection. According to one poll, eighty-six percent of Democrats believe the insurrection should never be forgotten, while seventy-two percent of Republicans believe that it's "time to move on" from the day rioters stormed the Capitol and threatened the lives of our elected representatives.[6]

Regardless of which side of the aisle any person lands, it is undeniable that the myth of election interference that was promulgated by Donald Trump,[7] frivolously litigated in courts throughout the United States,[8] and further disseminated by right-wing media outlets spurred the insurrection.[9] Although a variety of conservative media outlets like Newsmax and One America News Network played important roles in spreading the Big Lie,[10] no media outlet made as significant of an impact as Fox News.[11] As the most popular source of television news in the United States,[12] Fox News faced the greatest repercussions for its role in

5. *See* Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/.

6. Rachel Weiner et al., *Republican Loyalty to Trump, Rioters Climbs in 3 Years After Jan. 6 Attack*, WASH. POST (Jan. 2, 2024, 6:00 AM), https://www.washingtonpost.com/dc-md-va/2024/01/02/jan-6-poll-post-trump/; *see also* William A. Galston, *Polls Show Americans Are Divided on the Significance of January 6*, BROOKINGS (Jan. 6, 2023), https://www.brookings.edu/articles/polls-show-americans-are-divided-on-the-significance-of-january-6/.

7. *See* David T. Canon & Owen Sherman, *Debunking the "Big Lie": Election Administration in the 2020 Presidential Election*, 51 PRESIDENTIAL STUD. Q. 546, 546 (2021).

8. *See, e.g.*, Trump v. Wis. Elections Comm'n, 983 F.3d 919, 927 (7th Cir. 2020); Trump v. Biden, 2020 WI 91, ¶¶ 28–32, 395 Wis.2d 629, 951 N.W.2d 568; King v. Whitmer, 505 F.Supp.3d 720, 739 (E.D. Mich. 2020) ("In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek . . . and more about the impact of their allegations on People's faith in the democratic process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.").

9. *See generally* Helen Coster & Jan Wolfe, *Insight: Conservative News Outlets, Accused of Election Falsehoods, Air Disclaimers*, REUTERS, https://www.reuters.com/business/media-telecom/conservative-news-outlets-accused-election-falsehoods-air-disclaimers-2021-03-26/ (Mar. 26, 2021, 2:19 PM) ("[C]onservative media continue to make Trump, the most powerful voice in the Republican Party, a focal point of their coverage.").

10. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 219, 268 (2022). *See generally* Coster & Wolfe, *supra* note 9; Canon & Sherman, *supra* note 7, at 547.

11. Williams, *supra* note 1, at 175.

12. *Id. But see* John Andrew Mieras, *NetChoice: Media, Technology, and the Future of the First Amendment*, 25 TUL. J. TECH. & INTELL. PROP. 281, 290 (2023) (highlighting the

spreading the election fraud myth, agreeing to a settlement of $787.5 million with Dominion Voting Systems in a defamation lawsuit over its coverage of the election conspiracy.[13] Fox News' legal issues would not be limited to this lawsuit, however.

On July 3, 2023, the Media and Democracy Project ("MAD") filed a petition to deny the broadcast license renewal application submitted by FOX29 Philadelphia, WTXF-TV.[14] In its petition, MAD sought "an evidentiary hearing into FOX's egregious conduct in willfully broadcasting false news about the 2020 presidential election that contributed to civil unrest in the country, in particular, the events of January 6, 2021, in Washington, D.C."[15] As the grantor of broadcast licenses, the Federal Communications Commission ("FCC") has a duty to ensure that they grant licenses to stations that have "served the public interest, ha[ve] not committed any serious violations of the Communications Act or the FCC's rules, and ha[ve] not committed other violations which, taken together, would constitute a pattern of abuse."[16] The argument follows that, as a result of willfully broadcasting the election theft myth that significantly contributed to the January 6 insurrection, Fox has failed to serve the public interest.[17] Fox's argument against MAD's petition focuses on the difference between Fox News and FOX29 WTXF-TV.[18]

MAD's petition takes issue with the content of "Fox News Sunday," which is broadcast on all Fox stations across the country, while FOX29 is just the broadcast affiliate for the Philadelphia area.[19] With that being said, Fox News as an entity is beyond the scope of the FCC's regulatory authority because the basis for this authority is premised on the

ever-increasing role of social media in keeping citizens informed and engaged with current events).

13. Jeremy W. Peters & Katie Robertson, *Dominion-Fox News Trial: Fox News Settles Defamation Suit for $787.5 Million, Dominion Says*, N.Y. TIMES, https://www.nytimes.com/live/2023/04/18/business/fox-news-dominion-trial-settlement (Oct. 24, 2024).

14. Petition to Deny at 1, Application of FOX Television Stations, LLC for Renewal of License of WTXF-TV, Philadelphia, Pennsylvania, LMS File No. 0000213362 (filed July 3, 2023), https://enterpriseefiling.fcc.gov/dataentry/public/tv/pleadingDetails.html?pleadingFileNumber=0000217493.

15. *Id.* at 1.

16. *The Public and Broadcasting*, FCC, at 7, https://www.fcc.gov/sites/default/files/public_and_broadcasting_0.pdf (Sept. 13, 2022).

17. Petition to Deny, *supra* note 14, at 9.

18. *See* Nadia Dreid, *Fox Station Touts Letter from Lawmakers in License Dispute*, LAW360 (Aug. 25, 2023, 9:30 PM), https://www.law360.com/articles/1715246/fox-station-touts-letters-from-lawmakers-in-license-dispute.

19. *Id.*

government's control of the airwaves themselves.[20] While Fox News exists outside this regulatory framework, FOX29 is the Fox affiliate that must be licensed to use the public airwaves.[21] MAD is capitalizing on this opportunity to bring this challenge to FOX29's broadcast of Fox News's dissemination of false information.

The battle over FOX29's broadcast license has reached a massive scale. In August 2023, the FCC converted the dispute into "permit-but-disclose ex parte status," which allows parties to directly communicate with agency officials; the content of meetings must then be disclosed to the public.[22] For months following this, FOX29 and MAD traded barbs in letters to the FCC.[23] These letters all essentially say the same thing: FOX29 argues that they have not violated the principles stated in the FCC's character policy statement,[24] and MAD argues that FOX29 knowingly contributed to the public uproar leading to the January 6 insurrection by spreading the Big Lie, thus acting in violation of the FCC's public interest requirement.[25]

Several public officials from Pennsylvania and the greater Philadelphia area from both sides of the political spectrum expressed their support for FOX29, including the Mayor of Camden, Victor Carstarphen, and Pennsylvania Congressmen Brendan Boyle and Brian Fitzpatrick.[26] Pennsylvania Senators Robert Casey Jr. and John Fetterman have also pledged support to FOX29's cause.[27] Additionally,

20. *See What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do (last visited Nov. 3, 2024); *Broadcast News Distortion*, FCC, at 1, https://www.fcc.gov/sites/default/files/broadcast-news-distortion.pdf (July 18, 2024).

21. *See* Glenn Daigon, *Fox Faces Scrutiny from the FCC*, PROGRESSIVE MAG., (Sept. 7, 2023, 2:07 PM), https://progressive.org/latest/fox-faces-scrutiny-from-the-fcc-daigon-230907/.

22. Nadia Dreid, *FCC OKs Talks with Officials About Fox License Challenge*, LAW360 (Aug. 24, 2023, 5:13 PM), https://www.law360.com/articles/1714719/fcc-oks-talks-with-officials-about-fox-license-challenge.

23. *See* Nadia Dreid, *Fox, Advocacy Group Back At It Over Jan. 6 Doc Disclosure*, LAW360 (Oct. 24, 2023, 8:04 PM), https://www.law360.com/articles/1735804/fox-advocacy-group-back-at-it-over-jan-6-doc-disclosure.

24. Christopher Cole, *FCC Must Grant Renewal of Fox Philly Station, Co. Says*, LAW360 (Sept. 8, 2023, 7:42 PM),
https://www.law360.com/articles/1719541/fcc-must-grant-renewal-of-fox-philly-station-co-says. ("The FCC's character policy statements indicate it would consider only adjudicated 'fraudulent representations to governmental units,' 'criminal misconduct involving false statements or dishonesty,' and 'broadcast-related violations of antitrust or other laws dealing with competition,' as well as 'evidence of any conviction for misconduct constituting a felony.'").

25. *See* Dreid, *supra* note 23.

26. Dreid, *supra* note 18.

27. Letter from Robert Casey Jr. and John Fetterman, U.S. Senators, to Marlene H. Dortch, Sec'y, FCC (Feb. 23, 2024), https://www.fcc.gov/ecfs/document/1022316943568/1.

on June 3, 2024, three of Philadelphia's major sports teams—the 76ers, Phillies, and Flyers—filed comments voicing their support for FOX29.[28] The broad, bipartisan support for FOX29 surely weighs heavily in favor of its license renewal, but MAD's argument continues to gain momentum as well. Fox's defamation lawsuit with Dominion Voting Systems, as well as a similar defamation lawsuit with Smartmatic, unearthed a plethora of documents in discovery that, according to MAD, depict Fox's blatant disregard for the truth in its election theft coverage.[29] MAD is requesting that the FCC demand that Fox produce these documents for its review, as many of them are only partially available for viewing.[30] At the time of this writing, MAD has requested the FCC conduct a hearing to make a determination on FOX29's broadcasting license renewal,[31] but no such hearing has been granted yet.

The FCC's authority to grant these licenses comes from the Communications Act of 1934, which grants the FCC the authority to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter."[32] Specifically, § 303(l) of the Communications Act grants the FCC its licensing authority.[33] The FCC follows this directive in its broadcast licensing determinations.[34]

This Note will seek to chart a course for the FCC to return truth to American news media. Part II of this Note will assess the difficulty that arises in making these broadcast licensing decisions and the crucial balance the FCC must strike between serving the public interest and respecting the First Amendment rights of broadcasters. This is becoming an especially pertinent issue with the dawning of the "post-truth era," a

28. Letter from Lara Price, Chief Operating Officer, Philadelphia 76ers, to Marlene H. Dortch, Sec'y, FCC (undated), https://t.co/4RzSEiWFKq; Letter from Bonnie Clark, Vice President, Commc'n & Senior Advisor to the Managing Partner, Philadelphia Phillies, to Marlene H. Dortch, Sec'y, FCC (May 23, 2024); Letter from Todd Glickman, Exec. Vice President, Chief Revenue Officer, Philadelphia Flyers, to Marlene H. Dortch, Sec'y, FCC (undated).

29. Christopher Cole, *FCC Urged to Demand Trove of Fox Lawsuit Discovery Docs*, LAW360 (Oct. 10, 2023, 7:13 PM), https://www.law360.com/articles/1731000/fcc-urged-to-demand-trove-of-fox-lawsuit-discovery-docs; Jared Foretek, *Philly Station Calls Smartmatic Suit Irrelevant to FCC License*, LAW360 (Feb. 1, 2024, 9:24 PM), https://www.law360.com/articles/1792810/philly-station-calls-smartmatic-suit-irrelevant-to-fcc-license.

30. Cole, *supra* note 29.

31. Dreid, *supra* note 23; Nadia Dreid, *Advocacy Group Pushes FCC For Hearing on Fox TV License*, LAW360 (July 25, 2024, 6:43 PM), https://www.law360.com/articles/1862019/advocacy-group-pushes-fcc-for-hearing-on-fox-tv-license.

32. Communications Act of 1934 § 303(f), 47 U.S.C. § 303(f).

33. 47 U.S.C. § 303(l).

34. *The Public and Broadcasting*, *supra* note 16, at 5.

concept that Part II will intimately explore. Part III will analyze the FCC's licensing authority in the broader administrative law context, especially at such a time when the federal judiciary is hamstringing agency power at every opportunity. Part IV will thrust the FCC into the spotlight with a rejuvenated sense of authority in a post-*Chevron* world. Part IV will also reflect on the FCC's history as a progressive agency inclined to act in the public interest well ahead of most governmental entities. Part V will seek to call upon the FCC and the government as a whole to capitalize on FOX29's broadcast license renewal application to usher American society out of the post-truth era. But what is the "post-truth era," anyway?

II. THE FIRST AMENDMENT IN THE POST-TRUTH ERA

Post-truth was a term first used in 1992 by Steve Tesich in his scathing article entitled *A Government of Lies*, in which he lambasted the Reagan administration for its departure from the truth.[35] Tesich's usage of the term is spectacular, and his message feels all too familiar:

> We are rapidly becoming prototypes of a people that totalitarian monsters could only drool about in their dreams. All the dictators up to now have had to work hard at suppressing the truth. We, by our actions, are saying that this is no longer necessary, that we have acquired a spiritual mechanism that can denude truth of any significance. In a very fundamental way, we, as a free people, have freely decided that we want to live in some post-truth world.[36]

Tesich's work on developing the concept of the post-truth era was picked up in 2004 by Ralph Keyes in his book *The Post-Truth Era: Dishonesty and Deception in Contemporary Life*.[37] Keyes's book explores how much the habit of deception has permeated daily life.[38] Unsurprisingly, this new era coincided with the development of the groundbreaking new cable news format pushed forth by Fox News in 1996.[39] Designed to provide a refreshing break from the biased

35. Steve Tesich, *A Government of Lies*, NATION, Jan. 6, 1992, at 12–13.
36. *Id.* at 13.
37. *See generally* RALPH KEYES, THE POST-TRUTH ERA: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE (2004).
38. *Id.* at 3–19.
39. SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY 147 (2019).

mainstream (liberal) news media, Fox News quickly became an inflammatory echo chamber for the political right.[40]

While the truth was quietly being deteriorated over the course of the early twenty-first century, Tesich and Keyes's work laid dormant for approximately a decade. Lying on the news and to each other in our everyday lives was nothing more than a harmless yet inescapable feature of the society we lived in. American society became content with the fact that we were being fed fiction, so what was the point in trying to fight it? This all changed with Donald Trump's rise to the apex of American politics.[41]

Over four years of his presidency, Donald Trump told, on average, twenty-one false or misleading claims per day, totaling approximately 30,573 lies.[42] From relying on "alternative facts" in exaggerating the size of his inauguration crowd[43] to underplaying the mortality rate of COVID-19[44] to claiming that "[t]here is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent,"[45] Donald Trump's presidency was characterized by its abandonment of the truth. Trump's impressive string of spouting alternative facts day in and day out culminated in the biggest lie of his presidency, appropriately labeled the Big Lie.[46]

Trump's total abandonment of the truth stunned political analysts and inspired many to pick up a pen to document the astonishing effect Trump was having on a substantial sector of the American public.[47] It was truly remarkable how Trump could appeal to the masses. Playing on

40. *Id.*

41. The term "post-truth" became so popular that Oxford Dictionaries deemed it the 2016 "word of the year." Amy B. Wang, *'Post-Truth' Named 2016 Word of the Year by Oxford Dictionaries*, WASH. POST (Nov. 16, 2016, 9:16 AM), https://wapo.st/3MONelI.

42. *See* Glenn Kessler et al., *In Four Years, President Trump Made 30,573 False or Misleading Claims*, WASH. POST, https://www.washingtonpost.com/graphics/politics/trump-claims-database/ (Jan. 20, 2021).

43. *See* Aaron Blake, *Kellyanne Conway Says Donald Trump's Team Has 'Alternative Facts.' Which Pretty Much Says It All.*, WASH. POST (Jan. 22, 2017, 11:38 AM), https://wapo.st/3Tu9NzO.

44. Sarah Al-Arshani & Lauren Frias, *Trump Argues 3.4% Death Rate from Coronavirus is 'False,' Citing a 'Hunch' in Claiming It's Far Lower*, BUS. INSIDER (Mar. 4, 2020, 11:38 PM), https://www.businessinsider.com/trump-claim-death-rate-coronavirus-word-health-organization-2020-3.

45. Donald J. Trump (@realDonaldTrump), X (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392.

46. *See* Hayley Miller, *Trump Claimed Election 'Rigged' or 'Stolen' Over 100 Times Ahead of Capitol Riot*, HUFFPOST https://www.huffpost.com/entry/trump-rigged-stolen-capitol-riot_n_602188e2c5b6173dd2f88c4f (Feb. 9, 2021).

47. *See, e.g.*, BROOKE GLADSTONE, THE TROUBLE WITH REALITY: A RUMINATION ON MORAL PANIC IN OUR TIME 47–48 (2017); ROSENFELD, *supra* note 39, at 134–35.

their fears of the establishment and their distrust of politicians, Trump established himself as totally isolated from the control of the secret society puppeteering the government, going so far as to tell others that he'd always made decisions "with very little knowledge other than the knowledge I [already] had, plus the words 'common sense,' because I have a lot of common sense and I have a lot of business ability."[48] By convincing his followers that he was detached from the political system, Trump fostered a widespread distrust in the government and an even greater distrust in experts.[49] Trump's crusade against the truth was not done alone, however. Fox News played its own crucial role in spreading falsehoods on its stations, resulting in the hyper-radicalization of American politics.

Fox News is the only televised mainstream news source that caters to the right-wing audience.[50] Because of this unique position in the American political sphere, Fox News is consistently considered to be one of the most biased mainstream media outlets.[51] In an amusing depiction of the polarization of American politics, a series of surveys conducted by Business Insider showed that Republicans surveyed believed almost every media source besides Fox News to hold heavy biases, while Democrats surveyed had a more balanced view of where the biases lie.[52] Thriving in this position due to the constant funnel of Republican eyes to its programs,[53] Fox News has nearly perfected its formula for captivating

48. Marc Fisher, *Donald Trump Doesn't Read Much. Being President Probably Wouldn't Change That.*, WASH. POST (July 17, 2016, 6:57 PM) (alteration in original), https://www.washingtonpost.com/politics/donald-trump-doesnt-read-much-being-president-probably-wouldnt-change-that/2016/07/17/d2ddf2bc-4932-11e6-90a8-fb84201e0645_story.html?noredirect=on&utm_term=.f6bc17c03ba9.

49. *See* Dominic Arjuna Ugarte et al., *Public Attitudes About COVID-19 in Response to President Trump's Social Media Posts*, JAMA NETWORK OPEN (Feb. 1, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2775658.

50. *See* Elisa Sherer & Amy Mitchell, *Broad Agreement in U.S.—Even Among Partisans—On Which News Outlets Are Part of the 'Mainstream Media,'* PEW RSCH. CTR. (May 7, 2021), https://www.pewresearch.org/short-reads/2021/05/07/broad-agreement-in-u-s-even-among-partisans-on-which-news-outlets-are-part-of-the-mainstream-media/; *AllSides Media Bias Chart*, ALLSIDES, https://www.allsides.com/media-bias/media-bias-chart (last visited Nov. 3, 2024).

51. *See AllSides Media Bias Chart*, *supra* note 50; s*ee also* Pat Ralph & Eliza Relman, *These Are the Most and Least Biased News Outlets in the US, According to Americans*, BUS. INSIDER (Sept. 2, 2018, 2:52 PM), https://www.businessinsider.com/most-biased-news-outlets-in-america-cnn-fox-nytimes-2018-8.

52. *See* Ralph & Relman, *supra* note 51 (showing the majority of Republicans surveyed believed only Fox News and the Wall Street Journal to be unbiased).

53. *See* Dominick Mastrangelo, *Fox News Top-Rated Cable Channel for Eighth Straight Year*, HILL (Dec. 14, 2023, 3:08 PM), https://thehill.com/homenews/media/4360708-fox-news-top-rated-cable-news-channel/ ("Fox has been the top-rated cable news channel for more than two decades.").

its audience. Sophia Rosenfeld described it best in her book *Democracy and Truth, A Short History*:

> In all cases, the idea was not to suggest actual impartiality but rather a counter-weight to the allegedly skewed "fake news" of the liberal establishment.[] And to keep audiences listening and watching—and thus advertisers happy—for hour after hour, the leading cable TV hosts, like their radio counterparts, worked hard at riling up their fans. The key was found to lie in constantly recycling tales of outrage at the events of the day, employing attack-dog talking heads to amplify these points often in mock-debate format, and relentlessly selling a one-sided, often vitriolic political storyline along with various consumer products.[54]

Polarization in American politics is at an all-time high, and Fox News has played a substantial role in dividing the country along party lines.[55]

The main strength of Fox News comes in its ability to shape the way the right wing of the political sphere perceives the world. Because Fox News dominates right-wing media, it is unique in that it can determine what half the country sees, and how they think about it. For example, during the COVID-19 pandemic, a majority of media sources focused heavily on coverage of the pandemic and the actions President Trump took to combat the spread of the coronavirus.[56] Fox News, on the other hand, focused its coverage on the dangers of extremist liberal views on race[57] as well as the supposed dangers of mail-in voting.[58] Fox News knows that the best ratings come from outrage and scare tactics, and that's why they played so heavily into the election theft conspiracy theory.

54. ROSENFELD, *supra* note 39, at 147.

55. *See* Steven Arrigg Koh, *Prosecution and Polarization*, 50 FORDHAM URB. L.J. 1117, 1121 (2023); Lili Levi, *Disinformation and the Defamation Renaissance: A Misleading Promise of "Truth"*, 57 U. RICH. L. REV. 1235, 1308 (2023); DeSilver, *supra* note 5.

56. *See* Philip Bump, *The Unique, Damaging Role Fox News Plays in American Media*, WASH. POST (Apr. 4, 2022, 11:23 AM), https://www.washingtonpost.com/politics/2022/04/04/unique-damaging-role-fox-news-plays-american-media/.

57. *Id.*; Tucker Carlson famously espoused the theory of white replacement, warning that white people were being systematically eradicated from society. *See* Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html.

58. Bump, *supra* note 56. *See generally* Nicholas Riccardi, *Here's the Reality Behind Trump's Claims About Mail Voting*, AP NEWS (Sep. 30, 2020, 12:08 PM), https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348ce3719d4bc7182146b582.

Fox News also has the privilege of access to "mass amplification" of its speech, which, simply put, is the ability to broadcast its message to the greatest amount of people possible because they are a high-traffic media platform.[59] First Amendment protections are afforded to all speakers regardless of the amplification of the message in order to preserve the twin aims of the Free Speech Clause: serving the interests of the speaker, and serving the interests of democratic discourse as a whole.[60] Two of the fundamental freedoms guaranteed by the Constitution are the freedom of speech and the freedom of the press.[61] However, as Erin Miller argued in her article *Amplified Speech*, "[a]s speech reaches larger and larger audiences, it has a smaller impact on the speaker's own interests, properly understood, and has a greater impact on democratic discourse."[62] Combined with Fox's near monopoly on right-wing media, Fox News's speech is amplified so extensively that the viewpoints dominate the right-wing political sphere. This domination is problematic because it serves to overpower the "marketplace of ideas" perception of First Amendment values.[63] In the marketplace of ideas, "ideas, rather than products and services, compete against one another for acceptance. And truth is thought to be more likely to emerge through this competition."[64] By dominating right-wing media, Fox News's speech lies uncontested, allowing its viewpoints (or the viewpoint of the dominant conservative figurehead) to suppress the truth and literally warp an entire half of the country's perception of the world. Unfortunately, there is no incentive for Fox to promote diverse and antagonistic viewpoints in its broadcasts, so without action, the truth will continue to be suppressed.

The First Amendment imposes a rather restrictive limit on the extent to which the FCC can limit what is broadcast on the news.[65] Section 326 of the Communications Act further restricts the FCC's ability to limit what is said on the news, stating:

> Nothing in this [Act] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the

59. *See* Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 11–12 (2021).
60. *Id.* at 4.
61. U.S. CONST. amend. I.
62. Miller, *supra* note 59, at 5 (emphasis omitted).
63. *See id.* at 6, 30–31.
64. *Id.* at 31.
65. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

> Commission which shall interfere with the right of free speech by means of radio communication.[66]

With these two restrictions, it is difficult to see how the FCC could have any influence over what is presented on the news.

However, these restrictions do not entirely eliminate the FCC's ability to prevent dangerous speech in news broadcasts. For those operating on the public airwaves, such as FOX29, "[t]he FCC prohibits broadcasting false information about a crime or a catastrophe if the broadcaster knows the information is false and will cause substantial 'public harm' if aired."[67] The FCC further prohibits distortion of the news, and "may act on complaints if there is documented evidence of such behavior from persons with direct personal knowledge."[68]

The picture painted by MAD becomes clearer if FOX29's broadcast of Fox News Sunday is considered sufficient to hold FOX29 accountable. After all, Dominion's lawsuit against Fox exposed an abundance of evidence that demonstrated Fox's belief that the tales of election theft were "shockingly reckless."[69] The difficulty arises when the regulation of cable broadcasting is implicated. Freedom of speech in cable news is an especially difficult subject to grapple with because the content of cable news is outside the FCC's regulatory authority.[70] Fox News is a cable network, and thus, the FCC's authority becomes severely restricted because the regulation of cable television is outside the scope of its regulatory powers, which are predicated on the government's control of public airwaves.[71]

66. 47 U.S.C. § 326. This section has been construed to include all forms of over-the-air broadcast communications. *See The FCC and Speech*, FCC, https://www.fcc.gov/sites/default/files/fcc-and-speech.pdf (Aug. 31, 2022).

67. *Broadcasting False Information*, FCC, https://www.fcc.gov/sites/default/files/broadcasting_false_information.pdf (Jan. 8, 2021). The FCC's rules state specifically that the "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." *Id.*

68. *Id.*

69. Olivia Rubin & Lucien Bruggeman, *Fox News Hosts Called 2020 Election Fraud 'Total BS' in Private, New Dominion Court Filing Says*, ABC NEWS (Feb. 16, 2023, 6:37 PM), https://abcnews.go.com/US/fox-news-hosts-called-2020-election-fraud-total/story?id=97261751 ("From the top down, Fox knew 'the Dominion stuff' was 'total BS.' Yet despite knowing the truth—or at minimum, recklessly disregarding that truth—Fox spread and endorsed these 'outlandish voter fraud claims' about Dominion even as it internally recognized the lies as 'crazy,' 'absurd,' and 'shockingly reckless.'").

70. *The FCC and Speech*, *supra* note 66.

71. Domenico Montanaro, *The Truth Is There's Little the Government Can Do About Lies on Cable*, NPR (Mar. 16, 2023, 5:01 AM), https://www.npr.org/2023/03/16/1163505593/tucker-carlson-regulate-cable-jan-6-security-tapes; *see also* 47 U.S.C § 301 ("It

In order to foster a healthy relationship with the truth in American society, Fox News cannot be allowed to escape its confrontation with MAD and the FCC unscathed. Fox News, like all entities under the United States Constitution, has a fundamental right to the protections of the First Amendment. With that being said, certain categories of speech are largely unprotected, such as obscenity and defamation.[72] Seeing the damage caused by Fox's intentional dissemination of the election fraud myth, the government would be justified in stepping in to correct the course of American media broadcasting. I believe the FCC is the perfect candidate to take the first step.

III. ASSAULT ON THE ADMINISTRATIVE

While the FCC's broadcast licensing authority was briefly discussed earlier,[73] it would be beneficial to piece together a broad overview of how the FCC slots into administrative law as a whole. Once a sufficient overview is in place, a return to the FCC's broadcasting authority will serve to set the stage for the FCC to valiantly usher America into a new age beyond post-truth. First, as the name suggests, the Federal Communications Commission is responsible for regulating the wide spectrum of communications law in the United States.[74]

At the simplest level of administrative law in the United States, Congress delegates authority to administrative agencies through statutes that define the scope of their power.[75] The most basic function of these administrative agencies is to carry out the policies of the executive branch.[76] These agencies get their power through legislative statutes, which are, by and large, intentionally vague.[77] Many of the statutes that are subject to the greatest scrutiny are those that established administrative agencies and designated their authority as an initial matter.[78] These are known as organic statutes.[79] The FCC's organic statute grants it the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of

is the purpose of this chapter . . . to maintain the control of the United States over all the channels of radio transmission[.]").

72. VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 2 (2024).

73. *See supra* text accompanying notes 32–34.

74. *What We Do*, *supra* note 20.

75. BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R44954, CHEVRON DEFERENCE: A PRIMER 1 (2023).

76. ILAN WURMAN, ADMINISTRATIVE LAW: THEORY AND FUNDAMENTALS 7 (2d ed. 2024).

77. *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1641 (2019).

78. *See id.*

79. WURMAN, *supra* note 76, at 8.

this [Act]."[80] Notably, this is a relatively broad grant of authority, which the court has repeatedly recognized and reaffirmed.[81] In delegating authority to agencies, Congress' intent or the particular extent to which a power is construed can appear ambiguous or unclear to the agencies. In these instances, agencies must make decisions on how to put these powers into action, which often raises issues in the courts to determine whether the agency's interpretations or constructions were permissible. Until recently, this series of events would ultimately lead the courts to apply what is known as the *Chevron* framework.[82]

Chevron deference was widely considered to be one of the most important principles in American administrative law.[83] The *Chevron* framework would come into the picture when an agency's interpretation or construction of a congressional statute was challenged.[84] The *Chevron* framework was established in the seminal 1984 Supreme Court decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[85] In *Chevron*, the Supreme Court was faced with a challenge to an Environmental Protection Agency regulation arising from the enactment of the Clean Air Act of 1977 ("CAA") in which the EPA required states that had not achieved the air quality standards established by the CAA to implement permit programs regulating certain stationary sources of air pollution.[86] According to the National Resources Defense Council, the EPA diverged from the clear path with its interpretation of the term "stationary source" from Congress' enacted statute, and was thus impermissibly acting outside the authority designated to it by the Clean

80. 47 U.S.C. § 201(b).

81. *See*, *e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 218 (1943) (holding the FCC's promulgation of regulations that encouraged the larger and more effective use of radio in the public interest a valid exercise of its authority); AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 377–78 (1999) ("Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934 . . . the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions.").

82. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

83. *See, e.g.*, Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 938 (2018) (referring to Chevron as an "icon of administrative law"); Steven D. Schwinn, *Should the Federal Courts Defer to an Administrative Agency's Interpretation of an Ambiguous Federal Statute?,* PREVIEW U.S. SUP. CT. CASES, Jan. 8, 2024, at 34 ("*Chevron* is a bedrock of modern administrative law."); Sunstein, *supra* note 77, at 1615 ("*Chevron* . . . has a strong claim to being the most important case in all of administrative law.").

84. *See* BARCZEWSKI, *supra* note 75, at 4.

85. 467 U.S. 837 (1984).

86. *Chevron*, 467 U.S. at 839–40.

Air Act.[87] The D.C. Circuit set aside the EPA's action as "contrary to law" under the Administrative Procedure Act.[88] Faced with this challenge, the Supreme Court reached a unanimous decision upholding the regulation and reversing the decision of the D.C. Circuit.[89]

The legacy of *Chevron* flowed not from the Court's ruling on this particular regulation but from the legal doctrine that was established in its holding. As determined by the Court in *Chevron*—but later overruled by *Loper Bright Enterprises v. Raimondo*[90]—judicial review of the permissibility of an agency's interpretation or construction of a federal statute was required to consider two questions.[91] The first consideration for the court, as well as the agency, was whether the intent of Congress was clear.[92] As stated by the Court, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[93] The second inquiry was whether the agency's interpretation of Congress' silence on the issue at hand was permissible.[94] This two-step process was the fundamental basis for the *Chevron* framework, a framework that guided administrative law for nearly four decades.

Later, in the *Chevron* opinion, the Court elaborated on the reasons as to why judicial deference to agency interpretation of statutes is a sensible practice. First, the Court implored the agencies to read between the lines of the statutes to uncover implicit legislative intent.[95] In the words of the Court: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[96] If, as the Court determined here, the agency's interpretation reasonably filled in the gaps left by the legislature, the judiciary would leave it undisturbed.[97] Reasonability is difficult to convey as a matter of guiding principle, as

87. *Id.* at 859.

88. *See id.* at 841–42; BARCZEWSKI, *supra* note 75, at 1 (explaining how the APA empowers courts to "'set aside agency action' that is 'not in accordance with law' or 'in excess of statutory jurisdiction, authority, or limitations.'" (quoting 5 U.S.C. § 706(2)(A), (C))).

89. *Chevron*, 467 U.S. at 866. The ruling was 6–0 as three judges did not participate. *Id.*

90. *See infra* notes 122–41 and accompanying text.

91. *Chevron*, 467 U.S. at 842.

92. *Id.* at 842–43.

93. *Id.*

94. *Id.* at 843.

95. *See id.* at 843–44; *see also* BARCZEWSKI, *supra* note 75, at 3.

96. *Chevron*, 467 U.S. at 843–44.

97. *Id.* at 845.

each inquiry into reasonable agency interpretation was heavily context-sensitive.[98]

Second, the Court argued for judicial deference through the lens of agency expertise.[99] Each administrative agency is comprised of highly specialized professionals who work intimately with intensely complex regulatory schemes.[100] Operating with a knowledge of these complex frameworks and schemes, it seems natural that the experts in the field would have control of the regulatory realm in which they exist. That is essentially the argument of the Court in *Chevron*: "[T]he regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[101] Judges should not be policymakers, whereas the fundamental purpose of the administrative sector is to administer the policies of the executive branch.

Lastly, related to the policymaking aspect of the administrative agencies, the Court briefly argued that political accountability is an essential characteristic of interpreting legislative intent and, thus, should be left to the agencies who exist in the political sphere.[102] As the Court pointed out, the federal judiciary has no constituency and, thus, no political accountability.[103] "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[104]

Another step in the *Chevron* framework that was developed in the year 2000 was referred to by analysts as "Step Zero."[105] Step Zero is the federal judiciary's initial question of whether the agency action in question needs to be considered under the *Chevron* framework at all.[106] While this was an exceptionally complex and hotly contested aspect of an exceptionally complex and hotly contested judicial doctrine, the most simple way to understand this Step Zero inquiry is to observe whether Congress had delegated authority to the agency to make rules carrying the force of law and whether the agency action "speak[s] *with the force of*

98. *See* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 659–60 (2020) (describing the reasonable standard to be the opposite of "arbitrary and capricious").

99. *Chevron*, 467 U.S. at 865; *see also* BARCZEWSKI, *supra* note 75, at 3.

100. *See Chevron*, 467 U.S. at 865.

101. *Id.*

102. *See id.* at 865–66.

103. *Id.* at 866.

104. *Id.*

105. *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006). *See generally* Christensen v. Harris County, 529 U.S. 576 (2000).

106. Sunstein, *supra* note 105, at 191. *See generally* Christensen v. Harris County, 529 U.S. 576 (2000).

law."[107] Most often, this inquiry would be informed by the rulemaking procedure instituted by the agency, with formal procedures being afforded *Chevron* deference, while informal procedures, like the opinion letter presented in *Christensen v. Harris County*, generally did not rise to the level of qualifying for *Chevron* deference.[108]

The *Chevron* framework was a fundamental aspect of American administrative law for approximately forty years.[109] Despite its position as a bedrock principle of administrative law, the *Chevron* framework was under assault since the beginning.[110] In recent years, these attacks have progressed into an all-out war on the doctrine.[111] In fact, as alluded to in the preceding pages, the Supreme Court reached the climax of its assault on the administrative state in its 2023–2024 term by eliminating the *Chevron* framework in its entirety with its ruling in *Loper Bright Enterprises v. Raimondo*.[112] *Loper Bright* concerned the Secretary of Commerce's interpretation of a statute regarding the presence of third party conservation monitoring personnel on fishing boats and who is required to pay them.[113] Several of these fishery operations joined together to file suit against the Secretary of Commerce, challenging the requirement promulgated by the agency to require the fisheries to pay the third-party monitors.[114] This challenge was dismissed in the lower courts and appealed to the Supreme Court, which granted certiorari.[115]

The petitioners' argument explicitly called for the Court to overturn *Chevron*.[116] The first prong of their argument suggested that the Court impermissibly transfers the powers of the judiciary and the legislature to the executive agencies when the Court allows the agencies to interpret the ambiguous statutes of the legislature.[117] The assumption that silence by Congress delegates interpretive power by the agencies was a particularly sensitive point for *Chevron* critics.[118] The petitioners then

107. BARCZEWSKI, *supra* note 75, at 5; United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

108. 529 U.S. 576, 587 (2000).

109. *See* BARCZEWSKI, *supra* note 75, at 1.

110. Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1397 (2017).

111. *See* BARCZEWSKI, *supra* note 75, at 17.

112. 144 S. Ct. 2244, 2273 (2024).

113. Schwinn, *supra* note 83, at 32–33.

114. *Id.* at 33.

115. Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 372 (D.C. Cir. 2022) (affirming grant of summary judgment to the agency), *cert. granted*, 143 S. Ct. 2429 (2023).

116. Reply Brief for Petitioners at 2, Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

117. *Id.* at 7–9.

118. *See id.* at 9–10.

argued that *Chevron* violated Due Process considerations, stating, "*Chevron* forces judges to prefer the government over the citizenry, which offends basic fairness."[119] The second prong of the argument alleged a fundamental violation of the Administrative Procedure Act ("APA"), in both a textual and historical sense.[120]

At the very end of the Supreme Court's 2023–2024 term, the Court issued an opinion in *Loper Bright* that may potentially throw administrative law into turmoil. In a 6–3 decision, the Supreme Court demolished forty years of precedent with a simple statement delivered in its holding: "*Chevron* is overruled."[121] Chief Justice Roberts authored the opinion, beginning by putting special emphasis on the intent of the Framers in his writing.[122] Chief Justice Roberts then gives a brief history of the judiciary's ability to exercise independent judgment in questions of law leading up to and through the New Deal Era[123] before settling on a lengthy discussion of the requirements of the APA.[124] Per the text of the APA, the reviewing courts are responsible for "decid[ing] all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning or applicability of the terms of an agency action."[125] According to the Court in *Loper Bright*, "[t]he APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury* [*v. Madison*]: that courts decide legal questions by applying their own judgment."[126] The Court finds "no deferential standard[s] for courts to employ in answering those legal questions," placing the responsibility in the lap of the judiciary alone.[127]

The Court makes clear in its opinion, however, that courts need not decipher statutory puzzles alone. According to the Court, "courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes," relying on the "body of experience and informed judgment to which courts . . . may properly resort for guidance."[128] Looking at the full context of what Congress intended with enacting statutes delegating power to administrative agencies allows the judiciary to give each statute its best reading by

119. *Id.* at 10.
120. *Id.* at 11–12.
121. Loper Bright Enterprises. v. Raimondo, 144 S.Ct. 2244, 2273 (2024).
122. *Id.* at 2257.
123. *Id.* at 2257–60.
124. *Id.* at 2261–63.
125. 5 U.S.C. § 706.
126. *Loper Bright*, 144 S. Ct. at 2261.
127. *Id.*
128. *Id.* at 2262 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

"recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."[129]

On *Chevron*'s point of implicit delegation to agencies, the Court argues that even *Chevron* itself acknowledged that ambiguities in statutes may arise when Congress is unable to provide a straightforward answer to the question at hand, or even from a failure to consider the question at all.[130] The complexity of any system of government inevitably gives rise to ambiguities in the statutes, as "no language is so copious as to supply words and phrases for every complex idea."[131] Regardless of these ambiguities, however, Chief Justice Roberts stresses in his opinion what seems to be a sort of judicial supremacy, claiming that courts are the sole arbiters of determining each statute's single, best meaning.[132] Rather than claiming a party's (or agency's) interpretation as "permissible," courts must "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[133]

Regarding the perceived issue of judicial policymaking and the judiciary exercising its independent judgment on matters outside its expertise, Chief Justice Roberts highlights the judicial process, explaining that "[c]ourts, after all, do not decide such [technical statutory] questions blindly."[134] Reviewing courts are presented with an abundance of information rooted in highly technical subject matter, allowing them to be guided and informed by the parties and amici.[135] Further, while unable to bind the courts with its statutory interpretations, agencies can be powerful persuading forces in the interpretive process.[136] In the picture Chief Justice Roberts paints, reviewing courts are well informed in the subjects they are presented with.

And thus, the Court dismantles several generations of administrative law, put most aptly with the following quote:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its

129. *Id.* at 2263 (alterations in original) (citation omitted) (first quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); then quoting Michigan v. E.P.A., 576 U.S. 743, 750 (2015)).

130. *Id.* at 2265.

131. *Id.* at 2266 (quoting THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961)).

132. *See id.*

133. *Id.*

134. *Id.* at 2267.

135. *Id.*

136. *Id.*

> statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.[137]

Loper Bright is too fresh to fully grasp how it will impact administrative law going forward. The battle fought before the Supreme Court in *Loper Bright* was the final blow in the war waged over *Chevron* for decades. Accordingly, that conflict spawned a great deal of legal scholarship over the decades through which near-countless scholars raised up arms in defense of their preferred view of *Chevron* doctrine. What I find most amusing about the fight is the sheer breadth of the positions taken by the scholars. To some, *Chevron* was fine as is, and critics were simply misguided in their judgment.[138] To others, *Chevron* was an abomination that usurped the powers of the legislative branch and judiciary and thrust it upon the agencies, forcing citizens to live in eternal fear of the tyranny of the executive.[139] To those who fall somewhere between these two poles, *Chevron* didn't deserve to die, but it didn't need to continue to exist in its current form either.[140]

As is clear from the ruling in *Loper Bright*, a majority of the current Supreme Court justices fall on the harsher side of the *Chevron* debate. Analysts widely predicted that the Court, continuing its recent trend of diminishing the authority of administrative agencies,[141] would overturn or, at a minimum, severely diminish *Chevron*.[142] These efforts were spearheaded by several of the conservative-leaning justices.[143] One

137. *Id.* at 2273.

138. *See* Siegel, *supra* note 83, at 992; Sunstein, *supra* note 105, at 246–47.

139. *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795–97 (2010); *see also* Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 484 (2015) (criticizing the lack of consistency in how and whether courts apply *Chevron*).

140. *See* Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1909 (2015); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 556 (2009).

141. Schwinn, *supra* note 83, at 35 ("So far the Court has overwhelmingly sided with the opponents of the administrative state, and sharply limited its power.").

142. *Id. See also* Barczewski, *supra* note 75, at 17; Wayne D'Angelo & Zachary Lee, *Where Justices Stand On* Chevron *Doctrine Post-Argument*, LAW360 (Jan. 23, 2024, 5:43 PM), https://www.law360.com/articles/1788764/?from_lnh=true.

143. *See* Cass R. Sunstein, Chevron *Without* Chevron, 2018 SUP. CT. REV. 59, 60; D'Angelo & Lee, *supra* note 142.

aspect that has survived the destruction of *Chevron* is the recently developed "major questions doctrine," laid out in 2022 by Chief Justice Roberts in *West Virginia v. EPA*.[144]

Major questions doctrine was another dagger thrust through the heart of agency power in administrative law. Under major questions doctrine, federal courts are instructed to presume that Congress had not delegated authority to agencies on matters of "major national significance," which typically involves those with any political or economic significance.[145] In the case of *West Virginia v. EPA*, the Court determined that the EPA's attempt to implement "generation shifting" mechanisms in order to regulate the emissions of power plants was a violation in excess of its congressionally delegated authority.[146] According to the Court, such mechanisms would have "substantially restructure[d] the American energy market," and the EPA's reliance on its interpretation of a "gap filler"[147] provision of the Clean Air Act gives reason to "hesitate before concluding that Congress" intended this provision to grant the EPA such extreme authority.[148] While this is a gross oversimplification of the acrobatic maneuvers undertaken by the majority to reach its desired outcome in *West Virginia v. EPA*,[149] the major questions doctrine has nonetheless sprung forth from its holding and has marked yet another indication that the Supreme Court is becoming ever-more skeptical of agency power.

It appears (at least to some analysts) that administrative law as we know it will experience a grand upheaval in the wake of *Chevron*'s defeat.[150] Naturally, that would mean reverberating impacts throughout all of the administrative agencies, including the FCC. The loss of *Chevron*, however, is perhaps not the end of the world for agency power. In fact, perhaps the loss of *Chevron* will lead to a regulatory framework

144. 597 U.S. 697, 732 (2022).

145. *See* KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10745, THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS 1 (2022).

146. West Virginia v. EPA, 597 U.S. at 732–35.

147. *Id.* at 724.

148. *Id.* at 725 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

149. *See id.* at 766 (Kagan, J., dissenting) ("The majority claims it is just following precedent, but that is not so. The Court has never even used the term 'major questions doctrine' before."); *see also id.* at 779 ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.").

150. Schwinn, *supra* note 83, at 35. Other experts believe that overturning *Chevron* will have relatively little effect. *See, e.g.*, Lisa Schultz Bressman & Kevin M. Stack, Chevron *is a Phoenix*, 74 VAND. L. REV. 465, 466 (2021); Bednar & Hickman, *supra* note 110, at 1397–98.

that encourages detailed analyses of statutory delegations of regulatory authority, correcting the wrongs of the Supreme Court in *Chevron* and resulting in a broader conception of agency authority.[151]

IV. THE CRITICAL ROLE OF THE FCC IN A POST-*CHEVRON* WORLD

John Duffy, through an exceptionally insightful and scathing critique of the *Chevron* decision, sheds light on a potentially positive outcome of the loss of *Chevron*.[152] One of the fundamental issues with the *Chevron* opinion is its failure to cite section 706 of the Administrative Procedure Act.[153] This section of the APA, entitled "Scope of Review" for purposes of clarity and understandability, provides clear guidance to the judiciary in the very first sentence: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[154] While this seems to answer the question of judicial review of statutory interpretation rather directly, neither party's argument in *Chevron* nor the published opinion by a unanimous Court felt it necessary to cite to section 706.[155] The absence of section 706 is not the only issue with the *Chevron* decision, however. As John Duffy argues, the EPA had clear, explicitly delegated authority under the Clean Air Act, so the Court had no reason to read any implicit delegation into the agency's actions.[156] Further, the Court articulated a policy-centered argument, asserting that agencies possess the necessary "expertise" and "political accountability" to be the appropriate authority on the highly specialized issues under their purview.[157] While this is a fundamentally sound point to make, Duffy points out that the Court's subsequent history has not reflected a commitment to these proffered rationales.[158] Duffy's final point about the fallacy of the *Chevron* decision rests upon the focus of the EPA's "interpretive superiority rather than an agency's exercise of

151. *See* John F. Duffy, Chevron*, De Novo: Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 543–44 (2024).

152. *See id.* at 542–45.

153. *Id.* at 545.

154. 5 U.S.C. § 706.

155. It is perhaps important to note that three of the justices—Marshall, Rehnquist, and O'Connor—took no part in the decision of the case, resulting in a six-justice unanimous decision. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

156. Duffy, *supra* note 151, at 547.

157. *Id.*

158. *Id.* at 547–48. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 221, 234–35 (2001) (refusing *Chevron* deference to the United States Customs Service, an agency with sufficient expertise and political accountability).

statutorily delegated lawmaking power."[159] The EPA was not merely interpreting a vague word here or there in the statutory language; rather, the EPA was exercising the authority delegated to it by Congress to fill in the gaps intentionally left by Congress in promulgating the statute.[160]

With *Chevron*'s destruction, administrative law is headed for stormy, uncharted waters. Perhaps this might not be as dire as it seems, however. Perhaps a more formalistic approach to agency delegation might serve to better encompass the intended purpose of the administrative state. Duffy presents a revamped approach to *Chevron*-type issues, describing it as a "rigorous statutory approach."[161] Reviews of congressional delegations of authority, with section 706 of the APA appropriately applied at the first step, allow the Court to determine the extent to which Congress has delegated authority to the agencies upfront.[162] Requiring such oversight by the judiciary reveals the full scope of the rulemaking authority of the administrative agencies.[163] This is a particularly pertinent aspect of this approach with regard to the FCC's delegated authority. In fact, a thorough analysis of the FCC's delegated authority reveals instances of "super-rulemaking" power,[164] such as section 203(b)(2) of the Communications Act, which allows the FCC to modify the statute to better suit its needs.[165] Continuing along this statutory approach, the judiciary would then be required to determine if the agency had acted within the boundaries of its delegated authority.[166] The final step in Duffy's statutory approach is an application of the arbitrary-and-capricious test as required by section 706(2) of the APA.[167] If the decision is reasonable and the means to get there reasonable too, the work for the courts would be finished.[168]

To contextualize this statutory approach to the world of the FCC and the intensifying epidemic of deceit on the news, consider the following application of the statutory approach to the FCC's licensing authority. The plain text of the Communications Act directs the FCC to "[m]ake such regulations not inconsistent with law as it may deem necessary to

159. Duffy, *supra* note 151, at 548.

160. *Id.* at 549–50. Duffy also makes a point about the "*Chevron-Mead* framework" (or Step Zero) restricting the *Chevron* framework to actions carrying the rule of law and not merely informal interpretive rules. *Id.* at 550–51, 555.

161. *Id.* at 543.

162. *Id.* at 551.

163. *Id.*

164. *Id.* at 553.

165. 47 U.S.C. § 203(b)(2) (authorizing the FCC to "modify any requirement made by . . . this [statutory] section").

166. Duffy, *supra* note 151, at 553.

167. *Id.* at 554.

168. *See id.* at 554–55.

prevent interference between stations and to carry out the provisions of this chapter."[169] The FCC is further directed to ensure that its broadcast licensing decisions serve the "public interest, convenience, and necessity."[170] Critically, as mentioned previously, the Communications Act's public interest standard has been consistently construed to grant a broad scope of authority to the FCC.[171] These statutory provisions appear to delegate a rather expansive authority to carry out the intended goals of the Act, which includes serving the public in its broadcast licensing determinations. In a perfect world, the FCC could use this delegation to douse the flames of falsehood on the news by imposing restrictions and penalties on those who willfully broadcast false information, which in this case would be FOX29, even though they are a mere subsidiary of the Fox conglomerate. FOX29 is on the airwaves, and the FCC has a duty to only grant licenses to those who serve the public interest, convenience, and necessity. Case closed.

But this is no perfect world, and the judiciary would immediately eviscerate the FCC's attempt at revitalizing the truth. They would undoubtedly refer to the First Amendment and the emphasis placed on disallowing censorship in its determination, and the rule would be stricken from history. So how, then, can the FCC fulfill its destiny of saving American society? The answer may lie in the past.

In the wake of the Civil Rights Movement of the 1950s and 1960s, executive action, especially that of the Kennedy administration in the early 1960s, began to reflect a shift toward equal opportunity policies in the federal government.[172] The FCC accordingly followed suit, pursuing aggressive anti-discrimination policies in the exercise of its broadcast licensing authority.[173] Relying on both constitutional and statutory rationales,[174] FCC attorneys argued for the implementation of a non-discrimination clause into the FCC's licensing power.[175] The steps the FCC took to enact these policies were not explicitly authorized by the federal judiciary; in fact, the FCC attorneys needed to carefully construct

169. 47 U.S.C. § 303(f).

170. *The Public and Broadcasting*, *supra* note 16, at 5.

171. *See* 47 U.S.C. § 201(b); Nat'l Broad. Co. v. United States, 319 U.S. 190, 217 (1943).

172. Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 811–12 (2010).

173. *Id.* at 813–14.

174. *Id.* at 813, 815 ("The FCC attorneys first asserted that granting a license to an applicant who practiced racial discrimination 'would be tantamount to the sanctioning of the discriminatory practices.'"); *id.* at 816 ("The FCC attorneys concluded by pointing out that the FCC could avoid these 'serious constitutional questions' by interpreting the Communications Act's public interest standard to prohibit discrimination by FCC licensees.").

175. *See id.* at 816.

their arguments to creatively weave constitutional legitimacy into the FCC's delegated authority.[176] As a result of their legal gymnastics, the FCC established the ability for itself to regulate not only who could broadcast on the public airwaves, but also the ability to "provid[e] ongoing regulation of broadcast content to ensure that it met community needs and standards."[177] The Communications Act provided the FCC with the authority to regulate in the public interest, and the FCC exercised this authority to the fullest extent, calling upon the Constitution to further justify its actions.

The FCC pursued the implementation of civil rights protections ahead of the curve of other government entities, and it pursued them aggressively.[178] This type of agency action was exceptionally bold and deftly enacted, and there is sufficient reason to believe that similar action in the modern day could produce tremendously impactful results in the contemporary understanding of First Amendment protections for the media.

In our newfound post-*Chevron* world, the FCC should take the opportunity to exercise its delegated authority to impose restrictions on the tragically common practice of the media peddling dangerously false information. The FCC has taken bold, unprecedented measures in the past in the spirit of public interest, and the conflict arising from the renewal of FOX29's broadcast license presents an opportunity to take another transformative step. The difference here, however, is that this action is not entirely unprecedented. In fact, the FCC has been able to advance certain public interests by engaging with the scope of the First Amendment rights of its broadcast licensees in the past, notably with the implementation of the "Fairness Doctrine" in the mid-twentieth century.[179]

The Fairness Doctrine stated that licensees were "under an obligation to insure [sic] that opposing points of view will also be presented" in their discussions of controversial topics, which, at the time, was an essential rule to foster an adequately informed public.[180] The

176. *Id.*

177. *Id.* at 816–17.

178. *See id.* at 834–35 ("As with broadcasters, the FCC asserted that it was compelled to implement a broad national policy against discrimination that transcended 'the specific provisions of the Civil Rights Act.'").

179. Paul Matzko, *The Sordid History of the Fairness Doctrine*, REASON (Jan. 30, 2021, 7:00 AM), https://reason.com/2021/01/30/the-sordid-history-of-the-fairness-doctrine/.

180. *See id.*; *see also* Victor Pickard, *The Fairness Doctrine Won't Solve Our Problems—But it Can Foster Needed Debate*, WASH. POST (Feb. 4, 2021, 6:00 AM) https://www.washingtonpost.com/outlook/2021/02/04/fairness-doctrine-wont-solve-our-problems-it-can-foster-needed-debate/.

FCC was especially concerned with the broadcast monopolization of the three major networks in the early twentieth century: NBC, ABC, and CBS.[181] This concern gave rise to the enactment of the Fairness Doctrine and, thus, a substantive condition placed upon the First Amendment rights of the broadcast licensees.[182] This doctrine lost favor in the 1980s and beyond as the diversity of broadcasters increased, and its implementation in modern media would likely result in a less diverse, politically divided society.[183] The point is not to inject a new sort of Fairness Doctrine into contemporary media; rather, the Fairness Doctrine serves as a key indicator that the FCC possesses both the statutory and constitutional authority to influence the content of what is broadcast in the media.

I do not intend to present myself as a champion of censorship. In my view, the world as a "marketplace of ideas" serves to diversify viewpoints and promote thoughtful political discourse. My seemingly restrictive stance on speech in the media is based purely on what I've witnessed: The intentional spread of false information on the news is an inherently dangerous practice, and the FCC should exercise its authority to curtail such activity in the spirit of public interest. While the dangerous potential of lying on the news has only been realized on a massive scale relatively recently with the January 6 insurrection, lying on the news has been increasing in frequency for decades.[184] We've found ourselves firmly entrenched in the post-truth era, and now serious action must be taken to revitalize truth in American society.

V. SOLUTIONS

It's been established that lying on the news is a serious issue. It leads to distrust, polarization, violence, and the destabilization of the country, especially in instances where media superpowers are prioritizing their bottom line over depicting reality in a factual portrayal.[185] It's against the core values of the United States to quell the First Amendment right to free speech, but perhaps the loss of *Chevron* and a revamped realm of administrative law may provide an opportunity for the government to set the mold for news broadcasting in the future.

181. *Reagan Library Topic Guide—Fairness Doctrine*, REAGAN LIBR., https://www.reaganlibrary.gov/public/2020-09/fairdoct.pdf (Aug. 8, 2024).

182. *Id.*

183. *See* Matzko, *supra* note 179.

184. *See supra* text accompanying notes 9–13, 40–55.

185. *See supra* text accompanying notes 40–55.

To return to the previous discussion of statutory agency delegation, the FCC can and should, under its delegated authority, deny, or at least impose some form of restriction or penalty on, FOX29's broadcast license application. Whether its authority is couched in its statutory obligations, its constitutional obligations, or any mixture of its obligations, the FCC cannot ignore the fact that FOX29's broadcast of Fox News Sunday contributed significantly to the January 6 insurrection.[186] It would be an affront to the FCC's operative goal of serving the public interest to allow Fox to escape unscathed after such a blatant display of misconduct. In the past, the FCC has been afforded broad discretion to act in the public interest.[187] The FCC should channel this discretion into a vision of the First Amendment that treats the amplification of knowingly false speech as against the public interest. The FCC's history of being at the forefront of addressing constitutional issues in American society, including on issues of First Amendment rights,[188] demonstrates the agency's ability to do so again here.

Fox News recognized that Donald Trump was embarking upon a campaign that would threaten the very foundations of democracy, and they played right into it.[189] Fox News purposefully fanned the flames of the election theft hysteria, and now they're facing the possibility that their actions may have consequences.[190] The FCC has the ability to send a serious message to Fox News and all media outlets across the spectrum with the pending challenge to FOX29's broadcasting license.

As it currently stands, the FCC has given very limited indication as to how it will decide the issue. With seemingly bipartisan support of FOX29,[191] it's difficult to see a situation in which the FCC will deny the license renewal of a subsidiary of the most powerful news media company in the nation. In the event that MAD's argument persuades the agency, whether that be through the bounty of documents produced in discovery by Fox in the other lawsuits or through the sheer power of its argument, FOX29 and the greater Fox Television Stations would continue the fight. In any event, the FCC has the opportunity to capitalize on this challenge to guide American society back toward the truth. The FCC needn't act alone, however.

Congress has the ability to create legislation regarding the intentional broadcast of misinformation on cable news. MAD's challenge

186. *See supra* text accompanying notes 11–13, 57–59.
187. *See supra* text accompanying notes 173–79.
188. *See supra* text accompanying notes 179–82.
189. *See supra* note 69.
190. *See supra* text accompanying notes 9–14.
191. *See supra* text accompanying notes 26–27.

to FOX29's license renewal in response to Fox News spreading lies about the 2020 election may allow for especially effective legislation due to the nature of the FCC's ability (or rather inability) to regulate what is broadcast on cable news under the current statutory structure. The FCC can only regulate the public airwaves themselves, which is why the licensing is implicated here.[192] Congress might also have the experience necessary to recognize the importance of such legislative action, considering a horde of bloodthirsty "patriots" had descended upon them and cornered them in their chamber just a few years ago.[193] With Congress forced into the fold and with the evidence of the January 6 insurrection inescapable, it presents the opportunity for laws to be made to assess government penalties against those who contribute to the distribution of dangerous misinformation. Misinformation is an epidemic,[194] and it would benefit the public if Congress forced cable news broadcasters to properly vet the content they are choosing to put on the air, or at the very least ensure that intentionally lying on the news is curbed.

The world has seen the danger of knowingly peddling false information on the news firsthand,[195] and now the FCC is confronted with a golden opportunity to send a message. Fox's arguments and MAD's arguments each have their merits, but to be honest, it's difficult to imagine a world where the FCC would make such a bold stand against the most notorious media outlet in the country. With that being said, it would be a travesty if the FCC doesn't attempt to draw attention to the dangerous conduct that put Fox in this situation in the first place. Fox may have forfeited nearly a billion dollars in civil suits for its role in the January 6 insurrection, but that is hardly a punishment for a company that generates several billion dollars of revenue every year.[196] The FCC and the American government as a whole need to send a message to Fox and set the standard for media broadcasting across the board.

192. *The FCC and Speech*, *supra* note 66, at 4.

193. *See supra* text accompanying notes 1–6.

194. *See supra* Part II.

195. *See supra* Parts I, II.

196. *Fox Reports Fourth Quarter Fiscal 2023 Revenues of $3.03 Billion, Net Income of $369 Million, and Adjusted EBITDA of $735 Million*, PR NEWSWIRE (Aug. 8, 2023, 8:00 AM), https://www.prnewswire.com/news-releases/fox-reports-fourth-quarter-fiscal-2023-revenues-of-3-03-billion-net-income-of-369-million-and-adjusted-ebitda-of-735-million-301895630.html.

VI. CONCLUSION

January 6, 2021, will forever stain the history of the United States of America. Through rabble-rousing and a malicious campaign of misinformation, the American people were stirred into a frenzy and unleashed upon the lawmakers in the Capitol. The FCC has been confronted with one of the culprits substantially responsible for inciting the insurrection, and yet the FCC's ability to address this sinister wrongdoer faces a litany of obstacles, with none greater than the federal judiciary's attempts to clip the wings of administrative agency power. And though *Chevron* has fallen, and agency authority may continue to be neutered by judicial doctrine such as the major questions doctrine, the FCC will not fade quietly into the darkness. Rather, the FCC and other agencies will be reborn in the new era of administrative law, properly empowered by the authority delegated to them by the statutes enacted by the legislature. In this new era, the FCC may be able to return to its historical trend of administering bold regulations to address the most pressing issues of the day. Or perhaps Congress could legislate on its own, either inspired by the FCC's actions or entirely of its own accord. In whatever form the action comes in, the government, for the sake of the American people, must do something to ensure that we are not trapped in the soul-crushing vacuum of the post-truth era.