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The Freedom of Influencing

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Social media stars and the Federal Trade Commission ("FTC") Act are clashing. Influencer marketing is a preferred way for entertainers, pundits, and everyday people to monetize their audiences and popularity. Manufacturers, service providers, retailers, and advertising agencies leverage influencers to reach into millions or even billions of consumer devices, capturing minutes or seconds of the market's fleeting attention. FTC enforcement actions and private lawsuits have targeted influencers for failing to disclose the nature of a sponsorship relationship with a manufacturer, marketer, or service provider. Such a failure to disclose payments prominently is very common in Hollywood films and on radio and television, however. The Code of Federal Regulations, FTC notices, and press releases contain exemptions tailored to such legacy media. This Article addresses whether the disparate treatment of social media influencers and certain legacy media formats may amount to a content-based regulation of speech that violates the freedom of speech. Drawing on intellectual property law, consumer law, and securities law precedents, it argues that the more intense focus on disclosures by social media influencers infringes the freedom of influencing. It is irrational and discriminatory to impose greater obligations on influencers who are paid to mention or use products or services than on legacy media formats whose actors or directors mention or use similar products or services.

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INTRODUCTION

Should celebrities who receive a benefit from mentioning or displaying products or services on social media be liable to fines and injunctions for doing so? Social media influencers develop a form of equity or goodwill in the attention they receive, but many of the benefits from their labor flow to the websites or apps which they use to send messages or post songs, photos, memes, or videos.[1] If influencers may be fined or ordered to stop endorsing some-

[1] *See* Colgate v. Juul Labs, Inc., 402 F. Supp. 3d 728, 741–42, 760 (N.D. Cal. 2019). As noted below, influencer marketing was about a $20 billion industry in 2020 or 2021, but social media brings in at least $100 billion (Meta and YouTube alone accounting for about that much), and the overall app economy brings in nearly $200 billion a year. *See* Kenan Degirmenci, *Mobile Users' Information Privacy Concerns and the Role of App Permission Requests*, 50 INT'L J. INFO. MGMT. 261, 261 (2020); *Meta Platforms Inc.*, GURUFOCUS (2022), https://www.gurufocus.com/stock/MIL:FB/summary (last visited Dec. 15, 2022); Aaron Pressman & Danielle Abril, *YouTube's Creator Economy is Bigger and More Profitable Than Ever*, FORTUNE (June 2, 2021, 11:17 AM),

thing, is this true only when the celebrity is a paid "influencer" who would not have touted an advertiser's wares without being paid to convey a particular endorsement of those wares, or any time consumers could be deceived or harmed by buying whatever is mentioned?[2] Is speech praising a product or service shielded from regulation because similar "product placement" is allowed on other media, or if an influencer does not willfully mislead the public?[3] Is blogging with the expectation of profiting from sponsors a form of speech with limited protection?[4]

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https://fortune.com/2021/06/02/youtube-creator-economy-advertising-revenue-war-for-talent-yt-influencers/.

[2] *Cf.* United States v. Alvarez, 567 U.S. 709, 735 (2012) (Breyer, J., concurring) (plurality opinion) (suggesting that federal criminal statutes that ban falsehoods or deceptive conduct in noncommercial contexts are somewhat analogous to statutes prohibiting trademark infringement or dilution, which pass First Amendment muster because they are "focused upon commercial and promotional activities that are likely to dilute the value of a mark[]" and "typically require a showing of likely confusion, a showing that tends to assure that the feared harm will in fact take place[,]" whereas federal criminal statute at issue was not so limited and harmed freedom of speech as a result).

[3] *Cf.* Hoffman v. Cap. Cities/ABC, Inc., 255 F.3d 1180, 1183–84 (9th Cir. 2001) (importing an actual malice standard from First Amendment libel and invasion of privacy case law for use in assessing whether celebrity has a cause of action under Lanham Act against a magazine for digitally altering his or her image in order to craft a visual endorsement of a commercial product sold by a prime candidate for buying ads in said magazine); *see also* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 664–68 (1994) (asserting that even a content-neutral regulation of speech violates First Amendment if it burdens more speech "than is necessary" to achieve congressional objectives).

[4] Recent Regulation, *Internet Law — Advertising and Consumer Protection — FTC Extends Endorsement and Testimonial Guides to Cover Bloggers. — 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255)—,* 123 HARV. L. REV. 1540, 1540, 1542 (2010) [hereinafter *Internet Law*] (exploring this question); Kellen A. Hade, *Not All Lawyers Are Antisocial: Social Media Regulation and the First Amendment*, 2011 J. PROF. LAW. 133, 144 (2011) (analyzing attorney social media profiles and posts under First Amendment); s*ee also* David Carr, *FTC to Bloggers: You Better Watch Out*, N.Y. TIMES MEDIA DECODER BLOG (Dec. 2, 2009, 12:37 PM), https://archive.nytimes.com/mediadecoder.blogs.nytimes.com/2009/12/02/ftc-to-bloggers-you-better-watch-out/?searchResultPosition=1; Pradnya Joshi, *Approval by a Blogger May Please a Sponsor*, N.Y. TIMES (July 12, 2009), https://www.nytimes.com/2009/07/13/technology/internet/13blog.html.

For decades, American individuals and companies have been accepting money for product placement and native advertising, including actors, musicians, athletes, print and online publishers, editors of news and opinion, screenwriters, film and television producers and directors, and broadcast media networks.[5] Yet the Federal Trade Commission ("FTC") has targeted social media influencers and those who pay them with its "quasi-legislative" powers,[6] blaming influencers and promoters who use them for defects in the underlying products or services, and threatening all involved with massive fines unless they clearly or conspicuously disclose that a paid endorsement is made.[7] Moreover, the FTC has asserted

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[5] *See Show Me the Money: The World of Product Placement*, CBC RADIO, https://www.cbc.ca/radio/undertheinfluence/show-me-the-money-the-world-of-product-placement-1.3046933 (Aug. 25, 2015).

[6] Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935); *cf.* Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, *in* RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION 167, 170 (Daniel A. Crane ed., 2022); Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature*, *in* RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION 57–58 (Daniel A. Crane ed., 2022).

[7] *See, e.g.*, Lesley Fair, *FTC's* Teami *Case: Spilling the Tea About Influencers and Advertisers*, FED. TRADE COMM'N: BUS. BLOG (Mar. 6, 2020), https://www.ftc.gov/business-guidance/blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-and-advertisers; Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers; Press Release, Fed. Trade Comm'n, Xbox One Promoter Settles FTC Charges That It Deceived Consumers with Endorsement Videos Posted by Paid 'Influencers' (Sept. 2, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers-endorsement-videos-posted-paid; *see also* Andy Chalk, *The FTC Looks to Crack Down on Influencers and Platforms Over 'Fake and Manipulated Reviews'*, PC GAMER (May 20, 2022), https://www.pcgamer.com/the-ftc-looks-to-crack-down-on-influencers-and-platforms-over-fake-and-manipulated-reviews/; *cf.* Matthew Hall, **Massive News* Crypto Influencer Scammers to Face Jailtime?*, YOUTUBE (June 26, 2021), https://youtu.be/VJmpkmxUZaE; Emma Grey Ellis, *A Brief History of Instagram's Trouble With 'Weight-Loss Tea'*, WIRED (Mar. 6, 2020, 3:25 PM), https://www.wired.com/story/brief-history-instagram-fitness-tea-ftc-complaint/; Lior Leser, *CSGO Lotto Sued by FTC, the Government Is Watching All Content Creators and YouTubers.*, YOUTUBE (Sept. 21, 2017),

jurisdiction under the FTC Act[8] to regulate claims on social media that particular investments are likely to earn substantial returns, if, "by their nature," they are unlikely to do so.[9] In such cases, the FTC claims that a court may order equitable disgorgement of revenues and restitution or refunds of monies received, as well as rescission or reformation of contracts.[10] A company could potentially

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https://youtu.be/asyki9dFKso. *But see* It'sAGundam, *CSGO Lotto Owners Will Not Be Fined by the FTC & Keep 36 Million Dollars*, YOUTUBE (Sept. 10, 2017), https://youtu.be/lYn5bneTha8.

[8] *E.g.*, Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2010); *see also* 15 U.S.C. §§ 43, 45(a), 53(b), 56(a)(2)(A), 57b(b) (2010) (codifying laws whereby Congress prohibited unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, empowered the FTC to seek temporary restraining orders and preliminary injunctions subject to weighing of the equities and public interest by district courts, and declared nature of available relief to include rescission or reformation of contracts, refunds or restitution of transferred property, payment of damages, and public notification of violations, but not exemplary or punitive damages).

[9] While the FTC alleged in one case that the defendants "transact[] or transacted" business in the relevant judicial district and "maintained a substantial course of trade," it is possible it thinks that all influencers do the same. Complaint for Permanent Injunction & Other Equitable Relief ¶¶ 6, 10, 48, at 2, 3, 12, Fed. Trade Comm'n v. Dluca, No. 18-cv-60379 (S.D. Fla. filed Feb. 20, 2018).

[10] *See id.* at ¶ 54 (citing 15 U.S.C. § 53(b)); Complaint for Permanent Injunction & Other Equitable Relief at ¶¶ 1, 5, 32, Fed. Trade Comm'n v. Teami, LLC, No. 8:20-cv-518 (M.D. Fla. filed Mar. 5, 2020); FED. TRADE COMM'N, PROTECTING OLDER CONSUMERS 16 (2020), https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf ("When staff identifies unfair or deceptive acts or practices that harm consumers, the FTC often sues the fraudsters in federal district court, seeking injunctive relief to stop illegal business practices as well as monetary relief in the form of redress for consumers or disgorgement of ill-gotten gains. The agency can also bring cases through administrative process."). Recently, the Supreme Court limited the FTC's authority to seek disgorgement of gains under one section of the FTC Act, while assuming the validity of the authority in this area that is conferred by the other sections. *See* AMG Cap. Mgmt. v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1352 (2021) (rejecting FTC authority to seek disgorgement or restitution under section 5 of FTC Act, 15 U.S.C. § 53(b), but raising question of whether some fraudulent or bad-faith intent may need to be shown first, either under text of section 19, 15 U.S.C. § 57b, or under section 5(l), 15 U.S.C. § 45(l), by de-

lose its entire business for using influencers the wrong way, even if most purchasers like its product.[11]

The FTC risks infringing the freedom of speech in carrying out its stated agenda as to social media influencers.[12] Specifically, its public statements and guidance appear to discriminate on the basis of content between social media content on the one hand, and film or broadcast transmissions on the other.[13] This content-based regulation of speech suffers from being both overinclusive (mandating disclosures even when no one may be harmed in their absence) and underinclusive (failing to regulate similar harms).[14] Such imprecision in the construction of a regulatory framework makes it vulnerable to First Amendment review.[15] The overinclusiveness of the

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fault equitable principle that is "highly important" though not a prerequisite to disgorgement of gains as in *Romag Fasteners, Inc. v. Fossil, Inc*., 140 S. Ct. 1492, 1497 (2020)).

[11] *See* Press Release, Fed. Trade Comm'n, Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers, FTC Alleges (Mar. 6, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments-well-known-influencers-ftc-alleges (noting that order "imposes a $15.2 million judgment—the total sales of the challenged products—which will be suspended upon payment of $1 million, based on the defendants' inability to pay the full judgment.").

[12] Lauren Myers, *A Picture Is Worth a Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission's Endorsement Guides*, 66 DUKE L.J. 1371, 1371 (2017).

[13] *Id.* at 1373, 1397.

[14] *See id.* at 1385–86, 1400.

[15] This Article restricts itself to the United States and the First Amendment and a few federal statutes, in the interests of brevity. It is conceivable, if somewhat less likely, that influencer speech could be protected by free expression principles in other nations (grounded in treaty, constitution, or other sources of law), and even if it is not, that foreign instruments like the Unfair Commercial Practices Directive do not apply to social media endorsements because they are not a "commercial practice" of the social media user to advertise his or her own feed or content. *See* Ernesto Apa & Oreste Pollicino, *Free Speech and the Right of Publicity on Social Media*, *in* THE REGULATION OF SOCIAL MEDIA INFLUENCERS 22–46 (Catalina Goanta & Sofia Ranchordás eds., 2020); Rossana Ducato, *One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices*, *in* THE REGULATION OF SOCIAL MEDIA INFLUENCERS 237-43 (Catalina Goanta & Sofia Ranchordás eds., 2020); Catalina Goanta & Sofia Ranchordás, *The Regulation of Social Media Influencers: An Introduction*, *in* THE REGULATION OF SOCIAL MEDIA INFLUENCERS 1–20

rules may be fatal, as when the influencer is not making factual claims, or an online sponsorship would be just as obvious as an embedded broadcast advertisement.[16]

There are reasons to regulate influencers that are rooted in both fairness and economic efficiency.[17] Fake and manipulated reviews and testimonials may take advantage of consumers and retailers in an unfair way.[18] Consumers may feel that they have been led astray

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(Catalina Goanta & Sofia Ranchordás eds., 2020). For a similar argument under U.S. law, focusing on users' intent, *see* Myers, *supra* note 12, at 1393, 1395. On the international human rights of Internet users, *see, e.g.*, Michael L. Best, *Can the Internet Be a Human Right?*, 4 HUM. RTS. & HUM. WELFARE 23, 23–24, 30 (2004); Christian Rueckert, *Cryptocurrencies and Fundamental Rights*, 5 J. CYBERSECURITY 1, 4, 9 (2019); Hannibal Travis, *Crypto Coin Offerings and the Freedom of Expression*, 24 CHAP. L. REV. 401, 429 (2021).

[16] Myers, *supra* note 12, at 1371.

[17] *See* Brandon D. Almond, *Lose the Illusion: Why Advertisers' Use of Digital Product Placement Violates Actors' Right of Publicity*, 64 WASH. & LEE L. REV. 625, 649 (2007).

[18] *Id.* at 649 (noting that product placement creates implied endorsements at odds with actors' wishes and other deals in some cases); Kendall L. Short, *Buy My Vote: Online Reviews for Sale*, 15 VAND. J. ENT. & TECH. L. 441, 459–60 (2012) (analyzing whether generating online reviews for a share of sales or profits is a misleading practice when the financial links between the reviewers' employer or contractor and the manufacturer are not disclosed) (citing Press Release, Fed. Trade Comm'n, Firm to Pay FTC $250,000 to Settle Charges That It Used Misleading Online "Consumer" and "Independent" Reviews (Mar. 15, 2011), http://www.ftc.gov/opa/2011/03/legacy.shtm; Press Release, Fed. Trade Comm'n, Public Relations Firm to Settle FTC Charges That It Advertised Clients' Gaming Apps Through Misleading Online Endorsements (Aug. 26, 2010), http://www.ftc.gov/opa/2010/08/reverb.shtm); *see also* In re Juul Labs, Inc., Mktg. Sales Pracs. & Prods. Liab. Litig., No. 19-md-02913-WHO, 2022 WL 2343268, at *44–56 (N.D. Cal. June 28, 2022) (discussing expert reports opining that vape pen manufacturer used social media influencers to prompt teens to adopt vaping and pay more for vaping pods in marketing campaign that misleadingly failed to disclose risks while touting benefits); Curry v. Yelp Inc., No. 14–cv–03547–JST, 2015 WL 1849037, at *11–13 (N.D. Cal. Apr. 21, 2015). (dismissing securities class action based upon Yelp touting its business reviews as authentic when it allegedly knew that many were anonymous, fake, and/or manipulated); Michael Flynn, *"The Lie, the Bigger Lie, and the Biggest Lie"—Unfair and Deceptive Trade Practices of TripAdvisor and Other Online Review Websites*, 36 J.L. & COM. 23, 27, 30 (2017); Joseph M. Forgione, *Counterfeiting, Couture, and the Decline of Consumer Trust in Online Marketplace Platforms*, 61 N.Y. L. SCH. L. REV. 195, 196 (2016); Keith Wagstaff, *Amazon Files Suit Against 1,000 People for Fake Reviews*, NBC NEWS (Oct. 19, 2015, 7:29

when they learn after the fact that the celebrity who raved about a product online was actually a paid shill.[19] Many advertisers begin or end their ads with a logo or trade name, while their competitors who use "stealth marketing" may gain an unfair advantage over these more forthright advertisers.[20] Consumers may also be duped by trusted influencers into buying products or services that are dangerous or ineffective, like music festivals on islands with inadequate food or shelter; e-cigarettes that scar teens' or young chil-

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PM EDT), https://www.nbcnews.com/tech/internet/amazon-files-suit-against-1-000-people-fake-reviews-n447101.

[19] *See* Fed. Trade Comm'n, *The FTC's Endorsement Guides: What People Are Asking*, https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking (Aug. 27, 2020) (explaining how being told about the connection between an endorser and the company whose products or services are being endorsed is "important" to consumers) [hereinafter "What People Are Asking"].

[20] *See* Sonya Katyal, *Stealth Marketing and Antibranding: The Love That Dare Not Speak its Name*, 58 BUFF. L. REV. 795, 828–33 (2010) (describing how brands find it difficult to overcome consumer "cynicism" and how stealthy strategies like embedded marketing and product placement in film, as well as seeking to be associated with consumer videos or photos, can be more valuable than paid advertising); Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 736 (2010) ("There is also a persuasive advantage to using non-ad formats: . . . press releases and other promotional materials that are [reproduced in print or broadcast media] untouched are *perceived* by consumers as having survived a vetting process, and thus as being credible." (emphasis added)); *see also* Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds and Social Media*, 2012 UTAH L. REV. 607, 615–16 (2012) (characterizing the FTC's position as that public is being misled when online speakers with material connections to sponsors do not disclose these connections, or conversely when celebrities are mentioned in ads without being compensated); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 90–91, 98–101 (2006) (noting concern articulated in legislative history of amendment to 47 U.S.C. § 317 (1960), that small firms may suffer from unfair advantage enjoyed by larger ones who pay for broadcast coverage, and marketers' belief that fully disclosing the paid nature of endorsements undermines their credibility with consumers); Zahr K. Said, *Mandated Disclosure in Literary Hybrid Speech*, 88 WASH. L. REV. 419, 447 (2013) (linking FTC's regulation of undisclosed material connections between endorsers and manufacturers/service providers/ad agencies to FTC's focus on "deceptiveness: the capacity to deceive whether or not deception actually occurs").

dren's lungs; or weight loss products that do not work, that are adulterated with harmful compounds, or both.[21] Consumers may also be misled into buying excessive amounts of products or services that are effective but harm non-purchasers, like firearms.[22]

In recent years, the First Amendment has invalidated statutes or regulatory regimes providing favorable carve-outs or defenses based on the content of speech—even speech imbued with a commercial purpose.[23] The FTC has justified its differing standards for

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[21] *See* Press Release, Fed. Trade Comm'n, Tea Marketer Misled Consumers, *supra* note 11; Goodman, *supra* note 20, at 121, 124–25 (analogizing undisclosed sponsorship arrangements to political bribery, as a violation of special trust); Katherine Joy Hendricks et al., *JUULing Epidemic Among Youth: A Guide to Devices, Terminology, and Interventions*, 34 J. PEDIATRIC HEALTH CARE 395, 396 (2020) (mentioning lung scarring as a risk of vaping e-cigarettes, and to influencers as enticing youth vaping); *Fyre Festival Founder Sentenced,* FED. BUREAU OF INVESTIGATION (Nov. 5, 2018), https://www.fbi.gov/news/stories/fyre-festival-founder-sentenced-110518 (noting that many consumers had a ruined vacation and lost money when celebrities endorsed music festival with gourmet food and accommodations which were not in fact provided, calling this a wire fraud).

[22] *See* Danielle Izzo, *The Influencer Next Door is Helping Major Corporations Evade International Laws: Why Micro Influencers Pose a Unique Regulatory Problem for Consumer Protection Laws*, 20 J. INT'L BUS. & L. 50, 51–52 (2020) (making claim that influencer marketing of firearms is extraordinarily harmful); Moira Warburton & Rose Horowitch, *House Democrats Press U.S. Gunmakers on Marketing of Assault Rifles*, REUTERS (July 27, 2022, 6:59 PM), https://www.reuters.com/world/us/gunmaker-executives-testify-us-house-hearing-mass-shootings-2022-07-27/.

[23] *See, e.g.*, Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) (invalidating federal statute regulating automated phone calls on basis of whether they were for federal debt collection content-based regulation, just as a "'a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed'" (quoting Reed v. Town of Gilbert, 576 U.S. 155, 168–170 (2015))); Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2366, 2375–76 (2018) (finding underinclusiveness and imprecision of statute requiring certain health clinics, but not others, to notify patients that they lacked a specific license, violated First Amendment because it seemed to disfavor particular speakers or positions on matters of public concern); Packingham v. North Carolina, 137 S. Ct. 1730, 1737–38 (2017) (finding overbreadth of statute aimed at potential recidivist criminals violated the First Amendment, where underlying purpose could be achieved by narrower law); Sarver v. Chartier, 813 F.3d 891, 905–06 (9th Cir. 2016) (finding right of publicity legislation is content-based and must survive strict scrutiny for liability to

product placement versus social media mentions or displays by arguing that product placement does not make a particular claim, and that if it would did an endorser's opinion or testimonial, disclosure of the endorsement relationship would be required.[24] The FTC, however, has purported to regulate payments to influencers, regardless of whether an opinion or testimonial is included.[25] Product placement, meanwhile, could easily be construed as expressing an opinion by a broadcaster, filmmaker, or society in general that a brand is popular, trending, or high-quality.[26] The FTC

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be imposed on matter of public concern respecting a public figure); *see also* cases cited *infra* notes 69, 113, 155, 159.

[24] *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124 (Oct. 15, 2009) [hereinafter FTC, Endorsements and Testimonials Guidelines] (codified in pertinent part at 16 C.F.R. §§ 255.0(e) exs. 1 & 7, 255.1(c) (2022)) (suggesting that distortion and deception occur when endorsements do not reflect true beliefs of their makers, whether due to payment of consideration, editing, or some other reason); Garon, *supra* note 20, at 616–17, 641–42 (asserting that FTC is focused on honesty of representations).

[25] *See* FTC, Endorsements and Testimonials Guidelines, *supra* note 24, at 127.

[26] *See* FED. TRADE COMM'N, SELF-REGULATION IN THE ALCOHOL INDUSTRY: A REVIEW OF INDUSTRY EFFORTS TO AVOID PROMOTING ALCOHOL TO UNDERAGE CONSUMERS 5 n.11 (Sept. 1999), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-federal-trade-commission-report-congress/1999_alcohol_report.pdf. [hereinafter FTC, Self-Regulation] ("Economic theory predicts, and various empirical research studies confirm, that advertising can influence consumer demand for products . . . . An example is where alcohol ads are used to 'associate the brand with activities the target group is apt to enjoy and identify with and [so] conclude that the brand is for someone like them.'" (citing JOSEPH FISHER, ADVERTISING, ALCOHOL CONSUMPTION, AND ABUSE: A WORLDWIDE SURVEY 24 (1993))); *see also* Robert Adler, *Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 MONT. L. REV. 243, 263 (1999) ("For $500,000, actor Sylvester Stallone arranged with Brown & Williamson to incorporate the company's products into five of his proposed films, *Rhinestone Cowboy, Godfather III, Rambo, 50/50* and *Rocky IV*."); *id*. at 262 (noting that as to *Beverly Hills Cop* (1984), "American Tobacco Co. supplied more than $25,000 in Lucky Strikes and Pall Malls to the makers of this movie for a scene in which comedian Eddie Murphy poses as a smuggler with a cigarette-filled truck."); Steven L. Snyder, *Movies and Product Placement: Is Hollywood Turning Films Into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 306–07 (1992) (mentioning

also does not permit social media influencers to bury their disclosures in an obscure place, as broadcasters and filmmakers typically do, when they make sponsorship disclosures.[27] The differing treatment of product placement and influencer marketing therefore raises similar First Amendment concerns as in the case law on statutes extending content-based exceptions to broad regulations or prohibitions relating to publishing or transmitting information.[28]

The scale of influencer marketing seems to inspire efforts to regulate it.[29] By 2020, social media marketing spending had risen to nearly twenty times its 2010 amount.[30] Social influencers prevail

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how Marlboro was in *Superman,* McDonald's was in *Red Dawn,* Diet Sprite was in *Thelma and Louise,* Pepsi was in *Big,* and Coca-Cola was in *Tootsie*); Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 364 (2004) (noting that paid placements of alcohol brands were found in "eight of the 15 TV shows most popular with teens" as of late 1990s and in many PG and PG-13 films appealing to teenagers (citing FTC, Self-Regulation, *supra*)); *id.* at 366–67 (tying advertisements disguised as television programs or films to rises in teen and adult alcoholism, obesity, and smoking (citing Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (filed with Fed. Commc'n Comm'n, Sept. 30, 2003), https://www.fcc.gov/ecfs/search/search-filings/filing/5510438341)).

[27] *See* Press Release, Fed. Trade Comm'n, Tea Marketer Misled Consumers, *supra* note 11.

[28] Barr, 140 S. Ct. at 2335, 2341.

[29] Suzanne Trivette, *FTC Guidelines: Possible Civil Penalties to Deter Deceptive Influencer Marketing*, CROWELL (Mar. 2, 2020), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/FTC-Guidelines-Possible-Civil-Penalties-to-Deter-Deceptive-Influencer-Marketing.

[30] *See* KIMBERLY A. HOUSER, LEGAL GUIDE TO SOCIAL MEDIA: RIGHTS AND RISKS FOR BUSINESSES, ENTREPRENEURS, AND INFLUENCERS (2d ed. 2022). According to one 2019 projection, the increase in marketing spending in this area would amount to a fifty-fold increase between 2010 and 2020. *See* Alexandra Roberts, *False Influencing*, 109 GEO. L.J. 81, 83 (2020). More recent estimates indicate that the 2019 projection of $100 billion in influencer marketing by 2022 may have been overstated nearly fivefold, perhaps because more traditional advertising was included in the projection. *Compare id., with* Ismael El Qudsi, *The State of Influencer Marketing: Top Insights for 2022*, FORBES (Jan. 14, 2022, 7:30 AM), https://www.forbes.com/sites/forbesagencycouncil/2022/01/14/the-state-of-influencer-marketing-top-insights-for-2022/?sh=621ffc4d5c78; Global Influencer Market Size 2021, STATISTA (Oct. 18, 2022),

in every line of business; they are marketed, ranked, and tracked as if they are media networks or publications in their own right.[31] The term "influencers" became more popular around 2015, once the FTC announced that it could charge product promoters for arranging paid endorsements from influencers.[32] The Fyre Festival deceptive marketing scandal (or poor planning scandal) brought attention to the issue of holding social media endorsers liable for the unfulfilled promises or outright scams of their clients.[33] Congressional hearings and lawsuits over the marketing of addictive e-cigarettes, like Juul, to teenagers and young children revealed that manufacturers develop huge followings with influencer marketing.[34]

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https://www.statista.com/statistics/1092819/global-influencer-market-size. *Cf.* Suzanne Trivette, *supra* note 29 (reporting that the number of influencer agencies and platforms grew from 190 in 2015 to more than 1,000 in 2019).

[31] *See, e.g.*, Leah W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. & MEDIA L.J. 97, 111–12 (2011); Goanta & Ranchordás, *supra* note 15, at 6; Roberts, *supra* note 30, at 91; Mari Smith, *The Top 100 Social Media Power Influencers, 2015 Edition – Stat Social*, YOUTUBE (Feb. 12, 2015), https://www.youtube.com/shorts/-wlqFkAC3kU; *see also* Kevin Lane Skerritt, *The Top-100 Social Media Power Influencers, 2015 Edition*, FLOCK MARKETING (Feb. 12, 2015), https://www.flockmarketing.com/top-100-social-media-influencers-2015-edition/; Trivette, *supra* note 29 (reporting that the number of influencer agencies and platforms grew from 190 in 2015 to more than 1,000 in 2019).

[32] *See, e.g.*, Press Release, Fed. Trade Comm'n, Xbox One Promoter Settles FTC Charges That it Deceived Consumers with Endorsement Videos Posted by Paid 'Influencers,' *supra* note 7.

[33] *See* Josh Dickey, '*Social Influencers' Who Hyped Fyre Festival Could Be the Next Legal Target*, MASHABLE (May 13, 2017), https://mashable.com/article/fyre-festival-social-influencers-lawsuit ("With great influence comes great accountability.").

[34] *See, e.g.*, Caitlin O'Kane, *Juul Told a 9th Grade Class Their Products Were "Totally Safe," According to Teens' Testimony*, CBS NEWS (July 25, 2019, 8:53 PM), https://www.cbsnews.com/news/juul-came-to-a-9th-grade-classroom-and-told-teens-their-products-were-totally-safe-according-to-teens-testimonies/ ("We can tell you from personal experience that kids were seduced by Juul's enormous social media presence on Snapchat and Instagram and by the use of influencers who were paid to promote and give away the product."); *see also* Erin Brodwin, *See How Juul Turned Teens into Influencers and Threw Buzzy Parties to Fuel its Rise as Silicon Valley's Favorite E-cig Company*, BUS. INSIDER (Nov. 26, 2018, 9:07 AM), https://www.businessinsider.com/stanford-

A lesser-discussed category of influencers focuses on foreign policy and militarism.[35] Broadcast radio and television, especially cable television and television-related social media channels, tap former military officials and sitting members of military and State Department advisory boards for commentary. This influences the public's perception of the need to spend tens or hundreds of billions of dollars on conflicts like those in Iraq, Syria, and Ukraine, and to risk thousands or millions of lives around the world as a result.[36] Critics point out that these current or former officials stand to benefit from defense contracts (not to mention, when in office, raking in campaign contributions from defense contractors to their party/its candidates).[37] This practice seems to be unregulated.[38]

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juul-ads-photos-teens-e-cig-vaping-2018-11 (reporting that Stanford University researchers claimed, after a study of social media imagery mentioning Juul, that the company recruited influencers who fostered "'viral peer-to-peer communication among teens who basically became brand ambassadors for Juul'").

[35] Diana Ingenhoff et al., *Key Influencers in Public Diplomacy 2.0: A Country-Based Social Network Analysis*, SOC. MEDIA + SOC'Y 1, 2 (Jan. 20, 2022).

[36] *See TV News Blackout on Pentagon Pundits*, FAIR (May 5, 2008), http://fair.org/take-action/activism-updates/tv-news-blackout-on-pentagon-pundits/; Diane Farsetta et al., *Lying About War: Deliberate Propaganda and Spin by the Pentagon*, PROJECT CENSORED (May 3, 2010), https://www.projectcensored.org/lying-about-war-deliberate-propaganda-and-spin-by-the-pentagon/; DEBORAH L. JARAMILLO, UGLY WAR, PRETTY PACKAGE: HOW CNN AND FOX NEWS MADE THE INVASION OF IRAQ HIGH CONCEPT 177–178 (Indiana University Press 2009). A corollary to the undisclosed privileging of war commentators with defense contractor ties was misrepresentation of civilian death and destruction and silencing of antiwar and pro-international law commentators. *See id.* at 165.

[37] *See* Paul Farhi, *News Networks Use Retired Military Brass as War Analysts Without Disclosing Their Defense-Industry Ties*, WASH. POST (Jan. 13, 2020, 4:33 PM), https://www.washingtonpost.com/lifestyle/style/news-networks-use-retired-military-brass-as-war-analysts-without-disclosing-their-defense-industry-ties/2020/01/13/7b507bfe-323c-11ea-91fd-82d4e04a3fac_story.html. While critics often call these commentators television analysts and network contributors, they are also online influencers due to the large social media operations, especially on YouTube, of networks (Fox News, CNN, MSNBC, NBC, ABC, CBS, PBS, the BBC, etc.). *See infra* note 39 and accompanying text.

[38] *See* Farhi, *supra* note 37 (presenting issue as an ethical or public policy one, not a legal one); s*ee also* Dale Courtney, *His View: Experts Should Disclose Their Military Ties*, MOSCOW-PULLMAN DAILY NEWS (Apr. 27, 2022),

Increasingly popular foreign policy influencers push back on war propaganda and highlight the risks of arming rebels and imposing sanctions.[39]

The Gamestop/Gamestonk tale brought new light to the workings of "finfluencers."[40] Users of the social network and news aggregator Reddit, also known as Redditors, published a number of explicit (if sometimes humorous and ridiculous) calls for the public to buy Gamestop and other heavily-shorted "meme stocks." This triggered a short squeeze and caused the price of the stocks to soar. Widely distributed networks of small and independent investors then coordinated their buy-and-hold "diamond hands" strategy to force short sellers to cover their positions, which further drove up prices and inspired FOMO.[41] The influence campaign was spectacularly successful for its originators and those who piled in early enough, while investors who got in a little too late lost substantial sums, alongside the short-selling "hedgies" or hedge fund types

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https://dnews.com/opinion/experts-should-disclose-their-military-ties/article_10f0fc38-37bf-51fd-8991-af20e9d6bfbb.html.

[39] Examples include Briahna Joy Gray, Glenn Greenwald, Katie Halper, Caitlyn Johnstone, Aaron Maté, and others. This type of influencer is increasingly dividing their time between Substack and YouTube. *See, e.g.*, Aaron Mate, SUBSTACK, https://mate.substack.com (last visited Dec. 15, 2022); Briahna Joy Gray, *Bad Faith Podcast*, YOUTUBE, www.youtube.com/c/BadFaithPodcast/videos?view=0&sort=p&flow=list (last visited Dec. 15, 2022); Caitlin Johnstone, *Caitlin's Newsletter*, SUBSTACK, https://caitlinjohnstone.substack.com (last visited Dec. 15, 2022); Glenn Greenwald, SUBSTACK, https://greenwald.substack.com (last visited Dec. 15, 2022); Glenn Greenwald, YOUTUBE, https://www.youtube.com/c/GlennGreenwaldGG/videos (last visited Dec. 15, 2022); Katie Halper, *Katie's Newsletter*, SUBSTACK, https://katiehalper.substack.com (last visited Dec. 15, 2022); Briahna Joy Gray, *More Perfect Opinions*, SUBSTACK, https://briahnajoygray.substack.com (last visited Dec. 15, 2022); Katie Halper & Matt Taibbi, *Useful Idiots*, YOUTUBE, https://www.youtube.com/c/usefulidiots/featured (last visited Dec. 15, 2022).

[40] *See* Paul J. Davies, *Are Social Media "Finfluencers" Coming for Your 401(k)?*, BLOOMBERG (Sept. 17, 2021, 12:19 PM), https://www.bloomberg.com/opinion/articles/2021-09-17/finfluencers-algorithms-and-how-the-online-risks-faced-by-your-401-k#xj4y7vzkg.

[41] *See* GAMING WALL STREET (HBO Max 2022); Emily Steward, The GameStop Stock Frenzy, Explained, VOX (Jan 29, 2021), https://www.vox.com/the-goods/22249458/gamestop-stock-wallstreetbets-reddit-citron.

(one of whom was accused of colluding with trading platforms on pricing).[42] In the aftermath, regulators published scary warnings about finfluencers, and TikTok partially banned them, targeting those who promote specific financial products or services.[43] Yet the ability of the hedgies to go on CNBC or YouTube and gin up panic or exuberance for their trades remains intact.[44]

Becoming influential in the media is nothing new.[45] Authors, musicians, athletes, and artists presaged social media influencers when they went viral in media forums like newspapers, magazines, radio, film, and television, as well as in physical places like university campuses, art galleries, arenas, stadiums, and museums.[46] Mid-20th century cultural icons like Sylvia Plath, Elvis Presley, Jackie Robinson, and Frida Kahlo were often known as heroes of their domains, their brands (like the Brooklyn Dodgers, Sylvia Plath's publisher Heinemann, or the Escuela Nacional de Pintura, Escultura y Grabado), and of their countries or communities (the United States, African-Americans, women, Mexico, Mexican women, indigenous Mexican women, etc.).[47] Often, they first

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[42] *See* GAMING WALL STREET, *supra* note 41; Tyler Sonnemaker, *The Winners and Losers—so far—in Reddit Traders' War on Wall Street That Sent GameStop Share Skyrocketing*, BUS. INSIDER (Jan. 30, 2021, 9:13 AM), https://www.businessinsider.com/winners-losers-gamestop-reddit-wallstreetbets-traders-wall-street-short-squeeze-2021-1.

[43] *See* Vanessa Pombo Nartallo, *'Finfluencers': Financial Education and Regulator Surveillance*, BBVA (Oct. 8, 2021), https://www.bbva.com/en/finfluencers-financial-education-and-regulator-surveillance.

[44] *See id*. (showing that while regulators have issued warnings, no regulation has been passed against hedgies going on TV or YouTube).

[45] Peter Suciu, *History Of Influencer Marketing Predates Social Media By Centuries—But Is There Enough Transparency In The 21st Century?*, FORBES (Dec. 7, 2020) https://www.forbes.com/sites/petersuciu/2020/12/07/history-of-influencer-marketing-predates-social-media-by-centuries--but-is-there-enough-transparency-in-the-21st-century/?sh=27e4058c40d7.

[46] Brett Bernstein, *A Brief History of the Influencer*, MEDIUM (May 24, 2019) https://medium.com/@bhbern/a-brief-history-of-the-influencer-1a0ef2b36c6e.

[47] *See, e.g.*, BRONWYN POLASCHEK, THE POSTFEMINIST BIOPIC: NARRATING THE LIVES OF PLATH, KAHLO, WOOLF, AND AUSTEN (2013); DAVID R. SHUMWAY, ROCK STAR: THE MAKING OF MUSICAL ICONS FROM ELVIS TO SPRINGSTEEN 26 (2014).

gained recognition for their work in smaller venues and by word-of-mouth promotion.[48] The rise of "payola" in the radio business meant that musical entertainment on FM radio was largely a sponsored enterprise, not even counting the advertisements in between songs.[49] The "soap operas" that defined early television drama also gave way to reality television programming that is heavily reliant on product placement from soft drinks, fast food, beer, and other products with megabrands, while many films shown on television contain product placement as well.[50] Product integration, or the structuring of important parts of television show plots around brands, range from the role of the AT&T "lifelines" in *Who Wants to Be a Millionaire?* to the coveted "Coca-Cola Red Room" on *American Idol*.[51]

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[48] *See* Goanta & Ranchordás, *supra* note 15, at 4–5.

[49] *See* Lorne Manly, *How Payola Went Corporate,* N.Y. TIMES (July 31, 2005), https://www.nytimes.com/2005/07/31/weekinreview/how-payola-went-corporate.html (noting that in the 1980s, independent promoters gave radio station programming directors money, and were in turn paid by record labels, in a system designed to ensure that certain new records, including new singles by artists with recent hits, generated sales after enjoying wide airplay); Justin Jouvenal, *More Static: Independent Labels and Commercial Airplay 18 Months After the FCC Consent Decree and the "Rules of Engagement,"* FUTURE OF MUSIC COAL. (Oct. 20, 2008), http://futureofmusic.org/article/research/more-static ("Nearly half of [music industry] respondents reported that payola remains a determining factor in commercial radio airplay.").

[50] *See, e.g.*, Letter from Mary K. Engle, Assoc. Dir. For Advert. Prac., Fed. Trade Comm'n, to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005), https://web.archive.org/web/20220120045016/www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf [hereinafter FTC, Commercial Alert]; Letter from Gary Ruskin, Exec. Dir., to Donald Clark, Secretary, Fed. Trade Comm'n, Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement (Sept. 30, 2003); *"Are You Selling to Me?": Stealth Advertising in the Entertainment Industry*, WRITERS GUILD OF AM., W. & WRITERS GUILD OF AM., E. (Nov. 14, 2005), https://www.wga.org/uploadedfiles/news_and_events/public_policy/PI_Original_White%20Paper.pdf.

[51] *See, e.g.*, Letter from Mary Engle to Gary Ruskin, *supra* note 50; Wayne Friedman, *Madison + Vine: Product Integrators Tackle Learning Curve*, AD AGE (Oct. 21, 2002), https://adage.com/article/news/madison-vine-product-integrators-tackle-learning-curve/51075; Mark R. Greer, *Going Hollywood: Beverage Companies Are Dealing with Advertising Overload with Less Tradi-*

With the transition to virtual reality economies comes the virtual influencer.[52] Designers and programmers author likenesses of pop stars, bloggers, and presumably actors, who earn thousands of dollars for posts relating to fashion brands, for example, or which earn streaming revenue for their 'labels.'[53] A hybrid entity bridging the divide between record label, film studio, ad agency, fashion house, and game publisher is emerging, typified by the creators of avatars like Hatsune Miku, Eternity, Lil Miquela, or Ai-Ailynn.[54]

This Article resists prior attempts to construe statutory and regulatory frameworks extremely broadly and harshly when it comes to social media influencers.[55] It identifies a gap in the litera-

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tional Tie-Ins, BEVERAGE INDUS., May 1, 2003, at 62; Gail Bronson, *Ads in Movies? You're Already Watching Them*, U.S. NEWS & WORLD REP., Aug. 20, 1984, at 43–44; Snyder, *supra* note 26, at 307–08.

[52] *See, e.g.*, Kelly Callahan, *CGI Social Media Influencers: Are They Above the FTC's Influence?*, 16 J. BUS. & TECH. L. 361, 363, 368–69 (2021).

[53] *See* Deen-Hern Chen & Jing Xuan Teng, '*New World Order': Asia's Virtual Influencers Offer Metaverse Glimpse*, TECH XPLORE (Nov. 17, 2021), https://techxplore.com/news/2021-11-world-asia-virtual-metaverse-glimpse.html.

[54] *See id*. (referring to Ai-Ailynn); Jenna M. Drenten & Gillian Brooks, *Celebrity 2.0: Lil Miquela and the Rise of a Virtual Star System,* 20 FEMINIST MEDIA STUD. 1319, 1320 (2020) (referring to Lil Maquela); Linh K. Le, *Examining the Rise of Hatsune Miku: The First International Virtual Idol,* 16 UCI UNDERGRADUATE RSCH. J. 1, 2 (2013) (referring to Hatsune Miku); Suzanne Sng, *K-pop Girl Group Eternity to Debut with Deep-fake Virtual Idols*, STRAITS TIMES (Mar. 18, 2021, 8:53 AM), https://www.straitstimes.com/life/entertainment/k-pop-girl-group-eternity-to-debut-with-deep-fake-virtual-idols (referring to Eternity); *see also* Germaine Jay, *Pulse9 to Debut 11-member AI Girl Group Eternity*, ALLKPOP (Mar. 17, 2021), https://www.allkpop.com/article/2021/03/pulse9-to-debut-11-member-ai-girl-group-eternity.

[55] *See, e.g.*, Laura E. Bladow, Note, *Worth the Click: Why Greater FTC Enforcement is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1154 (2018) (calling on FTC to crack down on misleading influencer posts to social media); Nwanneka Victoria Ezechukwu, *Consumer-generated Reviews: Time for Closer Scrutiny?*, 40 LEGAL STUD. 630, 631–33, 643–44, 648–49 (2020) (urging European Union to harmonize national laws to impose duties on platforms to ensure they require users to disclose commercial relationships with companies they review); Lauryn Harris, Comment, *Too Little, Too Late: FTC Guidelines on "Deceptive and Misleading" Endorsements by Social Media Influencers*, 63 HOWARD L. J. 947, 970–71 (2019) (criticizing FTC guidelines as insufficiently harsh and too long in the

ture on the FTC and social influencers, which is dominated by inquiries into the nature of deceptiveness as a statutory matter, and the contours of the defense under the Communications Decency

making); Izzo, *supra* note 22, at 50–53, 71 (urging the FTC to lead global efforts to regulate the "exceptional[]" harms of micro influencer marketing); Lili Levi, *A Faustian Pact: Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 695, 702–03 (2015) (urging greater disclosure-based regulation at the corporate level of native advertising by the press); Roberts, *supra* note 30, at 89, 103–05, 108–09, 112, 117–21 (urging broad construction of Lanham Act, FTC Act, and other statutes and regulations respecting false testimonials, nondisclosures of influencer compensation, and deceptive claims); Christina Sauerborn, *Making the FTC ☺: An Approach to Material Connections Disclosures in the Emoji Age*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 571, 574–75, 577 (2018) (critiquing FTC-mandated disclosures of influencer sponsorship as insufficiently conspicuous and suggesting emoji mandates). Despite the publication of many such appeals for more FTC or Lanham Act enforcement against influencers, courts have often resisted the premise that we should equate all online commentary on products and services with commercial advertising and promotion. They have held that commercially-motivated references to businesses or products as better or more effective are excluded from regulation as opinion or puffery, and concluded that nondisclosures become actionable in false advertising suits only in connection with an affirmative factual misstatement which a disclosure is necessary to correct. *See* Roberts, *supra* note 30, at 89, 103–05, 108–09, 112, 117–121 (citing, *inter alia* Buetow v. A.L.S. Enters. Inc., 650 F.3d 1178, 1186–87 (8th Cir. 2011); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999); ThermoLife Int'l, L.L.C. v. NeoGenis Labs, Inc., 411 F. Supp. 3d 486, 501–02 (D. Ariz. 2019); Weight Watchers Int'l, Inc. v. Noom, Inc., 403 F. Supp. 3d 361, 372–73 (S.D.N.Y. 2019); Lokai Holdings LLC v. Twin Tiger USA LLC, 306 F. Supp. 3d 629, 636–39 (S.D.N.Y. 2018); Vitamins Online, Inc. v. Heartwise, Inc., 207 F. Supp. 3d 1233, 1243 (D. Utah 2016), *vacated in part on reconsideration*, Vitamins Online, Inc. v. Heartwise, Inc., No. 2:13-CV-982-DAK, 2017 WL 2733867 at *2 (D. Utah 2017); Casper Sleep, Inc. v. Mitcham, 204 F. Supp. 3d 632, 640 (S.D.N.Y. 2016); Dyson, Inc. v. Garry Vacuum, LLC, No. CV 10-01626 MMM (VBKx), 2011 WL 13268002 at *15–17 (C.D. Cal. 2011); Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139–40 (C.D. Cal. 2005); Register.com, Inc. v. Domain Registry of Am., Inc., No. 02 Civ. 6915(NRB), 2002 WL 31894625 at *14 (S.D.N.Y. 2002) ; Avon Prods., Inc. v. S.C. Johnson & Son, Inc., 984 F. Supp. 768, 797 (S.D.N.Y. 1997); Brown v. Armstrong, 957 F. Supp. 1293, 1303 (D. Mass. 1997); Truck Components, Inc. v. K-H Corp., 776 F. Supp. 405, 410 (N.D. Ill. 1991); Int'l Paint Co. v. Grow Grp., Inc., 648 F. Supp. 729, 730 (S.D.N.Y. 1986); 2 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 7.02[b] (2022)). *But see* Pegasystems, Inc. v. Appian Corp., 424 F. Supp. 3d 214, 223 (D. Mass. 2019); *Vitamins Online*, 2017 WL 2733867 at *2; Roberts, *supra* note 30, at 125.

Act section 230 for interactive computer services, including blogs.[56] Part I therefore focuses on the threshold question of when the federal government may legitimately treat one form of endorsing or influencing speech—that which is written, imaged, performed, or synthetically created on the Internet—from other forms that enjoy special defenses or safe harbors, such as product placement in film or television, narrated radio ads, and native advertising or advertorial writing in newspapers and other publications, both online and offline.[57] The targeting of paid Internet influencers for special disclosure burdens and forfeitures violates the First Amendment under either strict scrutiny or intermediate scrutiny of

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[56] *See, e.g.*, Izzo, *supra* note 22, at 53, 55–57, 60–61 (focusing on appropriate targets of FTC regulation of "dangerous and deceptive" ads); HOUSER, *supra* note 30, at 50–56 (focusing on section 230 as well as First Amendment mostly in libel or privacy actions); Carl. M. Szabo, Vice President & General Counsel, NetChoice, Comment Letter on FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 29, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0090 (arguing that even when platforms prohibit influencers from making undisclosed endorsements, they are protected as good Samaritans as well as interactive computer services hosting content of another under section 230); Roberts, *supra* note 30, at 129–31 (collecting case law on section 230 immunity); *id*. at 112–15 (analyzing case law on deceptive visual depictions and applying them to influencer speech); Malak Christian Mercho, *Intermediary Status—Social Media's Sword and Shield: Content Creators Beware,* 32 STATE BAR OF MICH. IPLS PROC., 1, 4–5 (focusing on section 230 immunity of platforms like TikTok from claims that influencers violated trademarks or other laws, without even a "notice and takedown" system like that of 17 U.S.C. § 512(c) to protect the public from trademark infringements by influencers using popular social media platforms). Prior publications focused on the First Amendment challenges confronting the FTC's guidelines have only relatively briefly touched on whether the guidelines and enforcement decisions of the agency are content-based, and largely predated the activities of the FTC with respect to influencers in gameplay videos, weight-loss product mentions, and displays of fashion brands. *See* Garon, *supra* note 20, at 617–18 (suggesting that an absence of evidence needed to justify distinction between bloggers/online authors on one hand and traditional media on the other would create First Amendment difficulties for FTC under *Turner*, 512 U.S. at 646–49); Tushnet, *supra* note 20, at 756–60 (raising issue of disfavored speakers under FTC regulatory guidance but discounting it because bloggers have greater "heterogeneity" than traditional reviewers of products or services, or producers of content displaying them in use).

[57] *See infra* Section I.

commercial speech.[58] This form of regulation is both unconstitutionally underinclusive, because it does not impose equal burdens on potentially harmful implied claims and product placements in other media, and overinclusive, because it purports to regulate both noncommercial speech and non-misleading ads and statements of pure opinion.[59]

Part II questions the FTC's well-publicized distinction between endorsers, which it says it will target for regulation, and influencers, noncommercial or smaller quasi-commercial entities it will generally leave alone.[60] Earnings and commercial motive are in-

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[58] My focus is on the substantive First Amendment, for the most part, rather than the "procedural First Amendment," other remedial limitations such as 15 U.S.C. §§ 45, 49; Ebay, Inc. v. Mercexchange, L.L.C, 547 U.S. 388 (2006) and FED. R. CIV. P. 56; 42 U.S.C. § 230 or the Communications Decency Act (CDA); or U.S. CONST. art. III, U.S. CONST. art. II, § 2, U.S. CONST. amend. V, or U.S. CONST. amend. VII. *See, e.g.*, Jacob Siegal Co. v. Fed. Trade Comm'n, 327 U.S. 608, 608, 611 (1946); Fed. Trade Comm'n v. Royal Milling Co., 288 U.S. 212, 216–18 (1933); Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643, 648–54 (1931) (analyzing section 5 of FTC Act's public interest standard); Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 451–54, 463–65 (5th Cir. 2022). (analyzing Seventh Amendment and Appointments Clause as to independent agencies with commissioners); Beneficial Corp. v. Fed. Trade Comm'n, 542 F. 2d 611, 616, 619–20 (3d Cir. 1976) (applying Section 5(c) of the Fed. Trade Comm'n Act, 15 U.S.C. § 45(c)); Evan Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful*?, 16 GEO. J. & PUB. POL'Y 27, 43–58 (2018) (critiquing judicial deference under Article III and Due Process Clause); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–98 (1998) (discussing procedural First Amendment and commercial speech); Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 518–19 (1970); Hannibal Travis, *Enjoining the Cloud: Equity, Irreparability, and Remedies,* 64 VILL. L. REV. 393, 410–21 (2019) (analyzing Rule 65, *eBay,* and civil jury right).

[59] *See generally* Bd. of Trs. of State Univ. of NY v. Fox, 492 U.S. 469, 482-83 (1989); Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 101 (2d Cir. 1998).

[60] *See* Roberts, *supra* note 30, at 129 (claiming that FTC has not named influencers in false advertising enforcement proceedings—perhaps meaning prior to *FTC v. Dluca*, or *In the Matter of CSGOLotto, Inc.,* and quoting office of an FTC Commissioner as explaining that endorsers, unlike influencers, are paid under the table with "payola"); Statement of Rohit Chopra, Commissioner, FTC, Regarding the Endorsement Guides Review Commission File No. P204500 (Feb. 12, 2020),

complete metrics with which to declare online speech enjoinable or unprofitable.[61] The premise that influencers should only be unregulated until they become endorsers does not fully account for the limiting language of the Lanham Act, which requires a false or misleading statement and certain other jurisdictional facts,[62] or of the FTC Act, which requires an unfair or deceptive act or practice and slightly different jurisdictional facts.[63] This Part explores the *statutory* freedom of influencing, a topic analyzed by scholars previously as to cryptocurrencies in attempts to analyze the limits of federal statutory frameworks governing investments, commodities, and money.[64]

I. THE FREEDOM OF INFLUENCING UNDER THE FIRST AMENDMENT

A. *First Amendment Coverage of Influencer Speech*

First Amendment scholars often separate free speech issues into two distinct questions: (1) whether free speech covers a form of conduct or communication, and (2) when and to what extent that conduct or communication is protected from regulation.[65] Initially, for example, commercial handbills were excluded from protection, even when peppered with political speech; however, according to

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https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf.

[61] *See, e.g.*, Fortres Grand Corp. v. Warner Bros. Ent. Inc., 947 F. Supp. 2d 922, 933–34 (N.D. Ind. 2013).

[62] *See* 15 U.S.C. § 1125(a)(1).

[63] *See* 15 U.S.C. § 45(a)(1) (2010).

[64] *See generally* Travis, *supra* note 15, at 450–51.

[65] *See* STANLEY EUGENE FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO 105–06 (1994); ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE, 1, 15 (2012); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617–18, 1620 (2015); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–73 (2004). *See generally* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (distinguishing the issue of whether conduct is protected or "without" protection under First Amendment from "level of protection" that results).

more recent case law, they are merely analyzed differently than pure political speech published in a newspaper, for example.[66] Indecent depictions of nudity also went from being unprotected to a tiered protection regime.[67]

Formerly, categories of speech became protectable by reference to their abilities to inform or persuade Americans of facts or ideas.[68] Today, historical analysis inquires into whether there was a principled basis for excluding a category of expression from First Amendment coverage.[69] As the Supreme Court held nearly three decades ago, "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[70] In 2022, the Court observed:

> Take, for instance, the freedom of speech in the First Amendment . . . . In that context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000); see also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. See Il-

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[66] *Compare, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 52–54 (1942), *and*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 410–31 (1993).

[67] *Compare, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931), *and* Miller v. California, 413 U.S. 15, 22–25 (1973); *see also* Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312, 1322 (D.N.J. 1973) (noting that *Miller* overruled prior doctrine); Cryan v. Hamar Theatres, Inc., 416 U.S. 954, 954 (1974) (noting probable jurisdiction).

[68] *See Barnes*, 501 U.S. at 565, 565–66, 570 (holding that erotic dancing was entitled to First Amendment coverage, as being more expressive, even if only slightly more than ballroom dancing as a mere pastime); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (extending First Amendment coverage to films, overruling *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 237 (1915)).

[69] *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 234–35 (2002) (reaching the conclusion that the Government did not provide justification for limiting freedom of speech).

[70] Turner Broad. Sys. Inc., v. FCC, 512 U.S. 622, 641 (1994).

> linois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 620, n. 9 (2003). And to carry that burden, the government must generally point to historical evidence about the reach of the First Amendment's protections. See, e.g., United States v. Stevens, 559 U.S. 460, 468–471 (2010) (placing the burden on the government to show that a type of speech belongs to a 'historic and traditional categor[y]' of constitutionally unprotected speech 'long familiar to the bar' (internal quotation marks omitted)).[71]

There is no persuasive historical evidence that social media influencing falls into a historic and traditional category of speech enjoying no First Amendment protection. To the contrary, influencer speech is like pamphleteering and distributing handbills.[72] The Supreme Court invoked the eighteenth and nineteenth century pamphleteer in heralding websites and emails as speech serving core First Amendment purposes, such as informing the public and assembling a vibrant public sphere.[73] It called handbills "historical

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[71] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022). History also informs the scope of trial rights, privacy rights, and rights to keep and bear arms. *See id.* at 2148–50 (mentioning right to bear arms under Second Amendment and right to confront one's accusers under Sixth Amendment); Carpenter v. United States, 138 S. Ct. 2206, 2213–14 (2018) (defining Fourth Amendment in part by historical understandings of privacy rights, including law of trespass); Apprendi v. New Jersey, 530 U.S. 466, 489–90 (2000) (showing Sixth Amendment right to jury trial is shaped by historical practice pertaining to guilty verdicts and sentencing); Feltner v. Columbia Pictures Tel., Inc., 523 U.S. 340, 352–55 (1998) (showing Seventh Amendment right to civil jury trial is informed by historical practice pertaining to juries in civil cases).

[72] *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 410–31 (1993).

[73] *See* Ashcroft, 535 U.S. at 246, 248–249, 256 (holding that digital depictions of sexual activity may have literary and artistic value); Ashcroft v. Am. C.L. Union, 542 U.S. 656, 679–81(2004) (Breyer, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (concluding that a variety of Internet content that may be harmful to minors due to being sexually explicit or violent may have serious artistic, literary, or political value and be protected by First Amendment); Reno v. ACLU, 521 U.S. 844, 868–70 (1997) (holding that websites and apparently listservs or email exploders as well were entitled to highest level of

weapons in the defense of liberty," and ruled that distribution of commercial handbills should be protected from overly broad prohibitions because such handbills are informative and part of the right to pursue professional and personal development.[74] Indeed, under its precedents, there should be much less regulation of social media influencers than of broadcasters and sponsors of broadcast content because broadcasting has historically been highly regulated in the public interest since its beginnings.[75]

Several cases have addressed speech analogous in some way to social media influencing and have found no commercial speech.[76] Websites containing clips or stills from films and information about how to buy tickets are not commercial speech despite the economic motivation and marketing aspect.[77] Even ads for a biopic or biographical film using a celebrity's name and likeness without permission are not commercial speech, whether or not the film sells more tickets than a film about a nobody.[78] A television show or VHS tape that touts its own revelations as the first ever to be televised on the topic is not commercial speech even if it falsely

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First Amendment protection); *see also* Hoffman v. Cap. Cities/ABC, Inc., 255 F.3d 1180, 1181–87 (9th Cir. 2001) (finding digital alteration of celebrity photographs to add unrelated fashion pieces was entitled to highest level of First Amendment protection).

[74] Schneider v. State, 308 U.S. 147, 162 (1939); *see also Discovery Network, Inc.*, 507 U.S. at 437–38.

[75] *See Reno,* 521 U.S. at 868–70 (citing Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 637–38 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399–400 (1969)).

[76] Some of these cases bear out Howard Wasserman's argument that if Oprah Winfrey criticizes beef products as threatening to infect the eater with a virus and the meat industry or ranchers respond by defending beef from the charge, neither Oprah nor the industry is engaged in commercial speech, as well as Martin Redish's argument that if Ralph Nader criticizes GM vehicles as unsafe, and GM responds, neither Nader nor GM publish commercial speech during this debate. *See* Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws,* 8 WM. & MARY BILL RTS. J. 323, 374 n.300 (2000).

[77] *See* Fortres Grand Corp. v. Warner Bros. Ent. Inc., 947 F. Supp. 2d 922, 933–34 (N.D. Ind. 2013).

[78] *See* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 862–63 (1979).

gives its producers credit for the findings of others.[79] A magazine that digitally alters a picture of a celebrity while disclosing that fact is not engaged in commercial speech even if it superimposes on the celebrity's altered body an image of an advertiser's product, like fashionable footwear.[80] The use of athletes' names in fantasy virtual sports is not strictly commercial either, but also expressive, informative, and even newsworthy.[81] A book describing purported cancer prevention strategies and, where related, where products may be bought, is not commercial speech, even if it falsely blames the plaintiff's product for causing cancer due to containing a certain molecule.[82] A newspaper that advertises a "collateral commercial product," a 1-900 number where the public can call in to vote in polls and the like, is adequately related to entertainment news and non-commercial speech to be fully protected by the First Amendment, so that the advertising newspaper is not liable for associating itself with a popular musical group without its permission.[83] And while comparative advertising may be within the general scope of the Lanham Act, a published comparison that re-

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[79] *See* Rice v. Fox Broad. Co., 330 F.3d 1170 (9th Cir. 2003).

[80] *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1181–87 (9th Cir. 2001). *Accord infra* note 129.

[81] *See* CBC Distrib. Mktg. v. Major League Baseball Advanced Media, 505 F.3d 818, 823 (8th Cir. 2007) (holding fantasy baseball used players' names for commercial advantage but also for expressive or informative purposes protected by First Amendment); *see also* Daniels v. FanDuel, Inc., 109 N.E.3d 390, 394 (Ind. 2018) (use of players' names and statistics in online fantasy sports is for commercial purpose, but newsworthy as well, suggesting hybrid speech). These findings suggest that mixing expressive content with a use of a product or service name for commercial purposes would add informative, transformative, or expressive elements that would mean that the speech is not solely to propose a commercial transaction, and therefore not simply commercial speech. *Accord Hoffman*, 255 F.3d at 1181–87.

[82] *See* Oxycal Lab'y, Inc. v. Jeffers, 909 F. Supp. 719, 724–26 (S.D. Cal. 1995) (citing Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795–96 (1988)).

[83] New Kids on the Block v. News Am. Publ'g, Inc., 745 F. Supp. 1540, 1543 (C.D. Cal. 1990), *aff'd on other grounds*, 971 F.2d 302 (9th Cir. 1992). *Accord infra* note 152; *see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.").

dounds to the comparing party's benefit is not commercial speech because information and research-based comparisons are non-commercial.[84]

1. CONTENT-BASED DISCRIMINATION IN FTC REGULATION AND THE LANHAM ACT

The FTC's speaker preference for films and broadcast media reflects a content preference. The FTC explicitly disfavors social media content by identifying it with particular risks of deception and lack of transparency, without providing any evidence for the distinction from traditional media such as advertorials, embedded advertising, product placement, etc.[85] It prominently warns influ-

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[84] *See* Ariix, LLC v. Nutrisearch Corp., 17CV320-LAB (BGS), 2018 WL 1456928, at *4 (S.D. Cal. Mar. 23, 2018) (if a product comparison prepared by someone with ties to products compared in it or to their producers intermingles the commercial aspect of its comparison with noncommercial information, criteria, or research, then the composite is not commercial speech) (citing *Oxycal Labs.*, 909 F. Supp. at 724–25, and citing *Riley*, 487 U.S. at 795–96), *rev'd*, 985 F.3d 1107, 1112, 1115–19 (9th Cir. 2021) (if product comparison is prepared entirely for purpose of boosting sales of a product, its scientific or research content does not make it noncommercial); Gordon & Breach Science Publishers v. AIP, 859 F. Supp. 1521, 1539–41 (S.D.N.Y. 1994) (rejecting argument that commercial speech "retains its commercial character when it is inextricably intertwined with otherwise fully protected speech" (quoting *Riley*, 487 U.S. at 795–96)).

[85] *Compare* 16 C.F.R. § 255.5, ex. 2 (2021) (noting that fans of films would understand that film stars may be paid $1 million or a percentage of revenue or profits to say they like a food brand), *with* 16 C.F.R. § 255.5, ex. 7 (when a gamer receives a game system free of charge and blogs about it, "his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, [so] readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his . . . . Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge"), *and* 16 C.F.R. § 255.1 (2021) (general rule that unsubstantiated claims made through endorsements give rise to advertiser liability), *and* 16 C.F.R. § 255.1, ex. 5 (blogger who recommends skin lotion is liable for failing to clearly and conspicuously disclose working with service that matches advertisers with bloggers), *and* FTC, Endorsements and Testimonials Guidelines, *supra* note 24, at 53135 (calling blogging a medium where advertiser association is unclear, without explaining why televised product placement or free movie tickets and junkets to movie reviewers are clear to newspaper readers or

encers that disclosures of sponsorships are always required, while reassuring television and film producers that they can get away without disclosure of product placements or actors' compensation levels for appearing in advertisements.[86] The FTC clearly warns

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television watchers, *and* FTC, Enforcements and Testimonials Guidelines, *supra* note 24, at 53134 (classifying all media other than television as media in which consumers are unlikely to recognize that celebrities or experts are compensated for doing so, without explaining why celebrities or experts who use or mention products or services in programming content are always likely to be recognized as benefiting from product placement relationships), *and* What People Are Asking, *supra* note 19, at 2 (calling blogging an area where it is mainly industry insiders who realize that payments are made for favorable displays or mentions or reviews), *and* Tushnet, *supra* note 20, at 756–61 (citing these assumptions and presumptions and defending them from vulnerability under the First Amendment for creating favored and disfavored classes of speakers and speech on the basis that bloggers are more heterogeneous than television or print endorsers).

[86] *Compare, e.g.*, Press Release, FTC, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (Apr. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose, *and* Izzo, *supra* note 22, at 61, *with* FTC, Commercial Alert, *supra* note 50, at 1–2, *and* FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22601 n.66 (2016), https://www.federalregister.gov/documents/2016/04/18/2016-08813/enforcement-policy-statement-on-deceptively-formatted-advertisements (noting that the FTC's "response to a petition from a consumer group to issue guidelines requiring the on-screen disclosure 'ADVERTISEMENT,' whenever paid product placement occurred in television programming" was that "such a disclosure would not generally be necessary to prevent deception and that when particular instances of paid product placement or brand integration were deceptive, they could be adequately addressed on a case-by-case basis" (citing FTC, Commercial Alert, *supra* note 50)), *and* Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22601 n.66 (2016), https://www.federalregister.gov/documents/2016/04/18/2016-08813/enforcement-policy-statement-on-deceptively-formatted-advertisements ("For example, if a branded product is included in entertainment programming in exchange for payment or other consideration from an advertiser, unless this paid product placement communicates an objective claim about a product, the fact that such advertising was included because of payment is unlikely to affect consumers' decision-making. When no objective claims are made for the product advertised, there is no claim to which greater credence can be given; thus, whether an advertiser had paid for the placement or the product appeared because of the program writer's creative judgment would not likely be material to consumers."), *and* Aaron Baar, FTC Rules Against Product Placement Disclo-

that a blogger who claims that a skin cream gets rid of eczema is liable for a misleading or unsubstantiated claim, yet it does not require disclosure of atypical results in a television advertisement showing the cream being used on eczema-free skin, or a film in which an actor uses the cream on pampered skin.[87] Substantiation of claims implied by photos or videos in corporate media—such as eczema-free skin, non-obesity, physical fitness, etc.—is not required in many instances.[88]

The FTC singles out social media influencers for particularly stringent regulation by forbidding them from using the social media equivalent of boilerplate or rolling credits to surround a disclo-

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sure, Ad Week (Feb. 10, 2005), https://www.adweek.com/brand-marketing/ftc-rules-against-product-placement-disclosure-77682/, *and FTC Declines to Take Action on Product Placement*, LOEB & LOEB, LLP (Feb. 2005), https://www.loeb.com/en/insights/publications/2005/02/ftc-declines-to-take-action-on-product-placement.

[87] *See* 16 C.F.R. § 255.1, ex. 5. The closest it comes to requiring a disclosure of atypical results is when discussing examples of weight loss claims and kitchen equipment demonstrations, 16 C.F.R. § 255.1, ex. 4; 255.2, ex. 4, but both of these examples were more suggestive of a factual claim than the common ad format that shows cream being smoothed over spotless skin, or shampoo or other hair products being used on luxurious and undamaged hair, even though large numbers of Americans have skin or hair that does not respond in the same way to creams and shampoos as in the ads.

[88] *See* FTC Policy Statement Regarding Advertising Substantiation, 48 Fed. Reg. 10471 (1984), appended in Thompson Med. Co., 104 F.T.C. 648, 839–40 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). *Compare* 16 C.F.R. § 255.5, ex. 3 (tennis star appearing on television talk show need not disclose that contract requires her to wear a particular brand of clothes at public appearances, or to substantiate implied claim that these clothes facilitate athletic prowess, and apparently talk show or network need not disclose anything about this either), *with* FTC, Endorsements and Testimonials Guidelines, *supra* note 24, at n.89 and accompanying text (there is a safe harbor for endorsers who may have atypical results from requirement not to make unsubstantiated claims of generalizable experiences with a product), *and* FTC, Endorsements and Testimonials Guidelines, *supra* note 24, at 72737–38 (noting that some endorsements serve as the substantiation of the claim by an advertiser that its product or service is beneficial), *with* 16 C.F.R. § 255.1 (general rule that unsubstantiated claims made through endorsements give rise to advertiser liability), *and* 16 C.F.R. § 255.1, ex. 5 (blogger who recommends skin lotion for curing her eczema is liable for making unsubstantiated claim, along with advertiser).

sure with other notices and hyperlinks.[89] Law firms attempting to advise social media influencers as to their obligations also notice that the FTC and the Federal Communications Commission ("FCC") have established two vastly different standards for film/broadcast and social media placements.[90] On a platform like YouTube, for example, it appears that Amblin Entertainment or Universal Pictures posting a clip from *E.T. the Extra-Terrestrial* in which Reese's Pieces appears as product placement would be regulated differently than a child influencer opening up a free bag of the candy and munching on the pieces while playing Minecraft.[91]

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[89] *See The Scoop on Social Media Influencer Disclosure Requirements*, TRUTH IN ADVERTISING (2022), https://truthinadvertising.org/resource/social-media-influencer-disclosure-requirements/ (recommending that a YouTube video, for example, use #ad in the entire video, because disclosing sponsorship in the video's description, after a hyperlink to disclosures, or in a short roll of credits that could be missed may not suffice (citing F.T.C, *Disclosures 101 for Social Media Influencers* 4 (Nov. 2019)), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf; Fed. Trade Comm'n, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising ii* (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf; What People Are Asking, *supra* note 19.

[90] *See, e.g.*, Akerman LLP, *Physicians: Beware of FTC Rules for Product Endorsements* (Jan. 25, 2021), https://www.akerman.com/en/perspectives/hrx-physicians-beware-of-ftc-rules-for-product-endorsements.html; Pfeiffer Law Corp., *Product Placement: Traditional vs. New Media* (Oct. 29, 2019), https://www.pfeifferlaw.com/entertainment-law-blog/product-placement-traditional-vs-new-media; Spear IP, *Using Influencers and Posting Sponsored Content Legally*, YOUTUBE (2019), https://www.youtube.com/watch?v=8rF60xAoiBs; Hannah Taylor & Rick Kurnit, *Prohibited and Controlled Advertising in USA*, LEXOLOGY (May 2, 2019), https://www.lexology.com/library/detail.aspx?g=2cfae636-085a-435e-99f2-49186b6f8bdd. *See also* Tom Scott, *Youtubers Have to Declare Ads. Why Doesn't Anyone Else?*, YOUTUBE (Feb. 15, 2021), https://youtu.be/L-x8DYTOv7w.

[91] *See* discussion *supra* note 88. There is an Amblin Dreamworks YouTube channel in which the original trailer as well as a new preview for the IMAX release of the film *E.T. the Extra-Terrestrial* are posted. A spilled can of Coca-Cola appears in the preview clip, as well as the handful of Reese's Pieces (without their packaging) used to entice the alien to come out into the light and into the hero's room. *See* Amblin, *E.T. The Extra-Terrestrial (1982) 2022 40th Anniversary Imax Release*, YOUTUBE (Jun. 14, 2022),

This means that the Code of Federal Regulations is content-based because in order to determine whether disclosure is mandated, the FTC "must necessarily examine the content of the message that is conveyed."[92]

Disfavoring social media influencers should trigger strict scrutiny under the First Amendment. In *Barr*, the Telecommunications Consumer Protection Act distinguished between robocalls to collect debts owed to or guaranteed by the federal government and robocalls for other purposes like to collect strictly private debts, to raise funds for political campaigns or charities, or to promote awareness of or specific views on public issues.[93] The Supreme Court concluded that this law and other "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[94] The Court did

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https://www.youtube.com/watch?v=NsvdZ_z56c0. The original trailer did not appear to include the frames with these products. *See* Amblin, *ET The Extra-Terrestrial (1982) Teaser Trailer*, YOUTUBE (Oct. 22, 2020), https://www.youtube.com/watch?v=Z2btlVncQK0&list=PLpzvMNp0Zi1mQbQc_ZE6logIAeenEO6Fc&index=2. While the candy's placement in the film did not start out as a promotion, it seems that the film's producer, Kathleen Kennedy, wanted to trade the appearance of M&Ms to "promotional tie-ins" like McDonald's offers to film studios, and that Mars balked without seeing the script, while Hershey's agreed to mention *E.T.* in $1 million in ads. Joe Bergren, *Steven Spielberg on 'E.T.'s Reese's Pieces Scene and How It Changed from Script to Screen (Flashback)*, ET (June 13, 2022, 1:44 PM), https://www.etonline.com/steven-spielberg-on-ets-reeses-pieces-scene-and-how-it-changed-from-script-to-screen-flashback; *see also* Goodman, *supra* note 20, at 93 n.52; *Reese's Pieces: E.T.'s Favorite Candy*, HERSHEY COMMUNITY ARCHIVES (July 23, 2014), https://hersheyarchives.org/encyclopedia/reeses-pieces-et-s-favorite-candy. A more recent example from Universal Pictures would be three bottles of Corona Extra being clinked together in what appears to be Vin Diesel's backyard (as Dominic Toretto) in the second official trailer for *F9* (*The Fast & the Furious 9*). *See* The Fast Saga, *F9 – Official Trailer 2*, YOUTUBE (Apr. 14, 2021), https://www.youtube.com/watch?v=fEE4RO-_jug&list=PLuq_rgCzEP_Opfr8Ep5kSjmhGnQtFIsrB.

[92] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (quoting FCC v. League of Women Voters of California, 468 U.S. 364, 383 (1984)).

[93] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346–48 (2020).

[94] *Id.* at 2347 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2014)) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) (internal quotation marks omitted)).

not examine the legislative history or enforcement patterns relating to the statute. It merely noticed that the preference for government debt calls was present on the face of the law.[95] Similarly, the FTC's written rules and explanatory guidelines express speaker preferences that display content preferences for televised ads and product placements over social media mentions.[96] Its enforcement record with respect to influencers who mention products versus films that do so removes any doubt that might remain after simply reading its guidelines and Web publications.

The FCC also admits to extending beneficial treatment to broadcasters. Despite the clear text of a statute requiring broadcasters to identify the sponsors of any programming that has paid sponsors,[97] the FCC has enacted rules for both commercial and

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[95] *See id*. at 2346–47.

[96] *See infra* note 310; *supra* note 85. Although some of its guidelines and frequently asked questions pages may lack the force of law, *see* Christensen v. Harris Cnty., 529 U.S. 576, 577 (2000) (stating in dicta that "enforcement guidelines . . . lack the force of law" and "do not warrant Chevron-style deference"), its decisions consistent with them would be laws, in the sense of "new standards of conduct" under a statute that is announced by an agency or commission in an "*ad hoc* adjudication," SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). *Cf*. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock, 783 F.2d 237, 248 (D.C. Cir. 1986) (agency adjudication constitutes an interpretation of the law and even an agency's "announcements of *general* policies may not be ripe for judicial review *until they are actually applied against specific plaintiffs*" (emphasis added)). Other courts would defer to FTC guidelines as laws entitled to *Chevron* or *Skidmore* deference in subsequent federal court decisions, although the effect of the FTC disclaiming the binding force of law for its guidelines was not fully addressed by these courts. *See* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (decided prior to Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984), and emphasizing Court's deference to FTC's decisions as to when a practice is "deceptive" under FTC Act); *see also* Jacob Siegal Co. v. F.T.C., 327 U.S. 608, 611–13 (1946) (similar, with apparent exception for overbroad orders); B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 973 (7th Cir. 1999) (similar); Martin v. OSHRC, 499 U.S. 144, 157 (1991) (*Skidmore* deference for "agency enforcement guidelines" under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980); Chevron, 467 U.S. at 865 (albeit in case involving "technical and complex" regulatory scheme, agency decision warrants deference when "the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies").

[97] 47 U.S.C. § 317.

noncommercial programming, including short-form advertisements, providing that broadcasters need not provide sponsorship identification when the sponsor's name and the likely payment in cash or in kind to the broadcaster to feature the product or service is obvious.[98] Even when the sponsorship is an undisclosed product placement in a feature film produced for theatrical release and later broadcast on television, the FCC waives the disclosure requirement.[99] The FTC has followed the FCC's lead; it announced that doctors, for example, may appear in television ads and proclaim a medication to be "the best ever" without disclosing how much they are paid in salaries or retainer agreements for making such assertions.[100]

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[98] *See* 47 C.F.R. § 73.1212(f) (2022) (merely announcing the trade name or product name of a sponsor on radio is sufficient to disclose sponsorship compensation); FCC, In the Matter of Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rulemaking, MB Docket No. 08-90 at 5 (June 26, 2008), https://docs.fcc.gov/public/attachments/FCC-08-155A1.doc (citing and explaining impact of 47 C.F.R. § 73.1212(f)); *see also* Jennifer Fujawa, *The FCC's Sponsorship Identification Rules: Ineffective Regulation of Embedded Advertising in Today's Media Marketplace*, 64 FED. COMMC'NS L.J. 549, 558–59 (2012); Ann K. Hagerty, *Embedded Advertising: Your Rights in the TiVo Era,* 9 J. MARSHALL REV. INTELL. PROP. L. 146, 149 (2009); Savare, *supra* note 28, at 361, n.204; Scott, *supra* note 90; *cf*. Gloria Dagnino, *Regulation and Co-regulation of Product Placement for OTT SVODS: The Case of Netflix*, 9 INT'L J. DIG. TEL. 203, 213–14 (2018) (author suggests that Netflix does not adequately disclose product placement as a provider of digital television, even though it is not a broadcaster); Snyder, *infra* note 157, at 307–08.

[99] *See* In the Matter of Sponsorship Identification Rules and Embedded Advertising, *supra* note 98, at 10; In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, Report and Order, 34 F.C.C. 829, 834–36 (1963); Tara Al-Kadi, *Product Placement: A Booming Industry in Search of Appropriate Regulation*, J. MKTG. RSCH. & CASE STUD., Mar. 24, 2013, at 10, https://ibimapublishing.com/articles/JMRCS/2013/561655/); Said, *supra* note 20, at 449.

[100] 16 C.F.R. § 255.5, ex. 4 (2021). The FTC, however, would require more disclosure if the physician received a cut of all sales. *See id.* Still, I do not recall ads for the George Foreman's Lean Mean Fat Reducing Grilling Machine disclosing the legendary boxer's cut of revenue or profits. *See* SuperSaturdayTapes, *1996 George Foreman's Lean Mean Fat Reducing Grilling Machine Infomercial (Part 1)*, YOUTUBE (Mar. 26, 2013), https://www.youtube.com/watch?v=9pCy1FE89KI. Mr. Foreman was not paid

One might argue that it is section 317 of the Communications Act that impermissibly discriminates against "radio station[s]" by imposing a sponsorship identification regime that does not apply to print publishers, film producers, social influencers, etc.[101] The Supreme Court, however, has distinguished between broadcast and other media for regulatory purposes because of the scarce broadcast frequencies that must be allocated in a centralized way among competing contenders who would otherwise broadcast on the same frequency.[102] This arguably imbues broadcast licenses with a public-interest aspect not similarly present in other media.[103] Moreover, the FTC adopts strict sponsorship guidelines for non-broadcast media while exempting "obvious" endorsements or sponsored content broadcast on radio from regulation, and then exempts props and other "reasonabl[e]" product placements on television, so that the result is a joint FCC-FTC exemption for a great deal of broadcast radio or television shilling and placement at the expense of social media influencers' reviews and plugs.[104]

The entire area of endorsement regulation may be content-based because it distinguishes messages with a glowing endorsement or an encouragement to seek further information from those that attack a company or its product, are neutral, or convey a strict-

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as a traditional spokesperson or actor with a salary, even of millions, but made $150 million on sales of likely more than a billion dollars from the 1990s through 2003. *See* Julie Sloan, *Gorgeous George the George Foreman Lean, Mean, Fat-Reducing Grilling Machine is More than Just a Kitchen Gadget—It's a Phenomenon*, CNN MONEY (June 9, 2003), https://money.cnn.com/magazines/fortune/fortune_archive/2003/06/09/343949/index.htm. The grill "knocks the fat out," Mr. Foreman would explain. SuperSaturdayTapes, *supra*.

[101] 47 U.S.C. § 317(a)(1).

[102] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 367–89 (1969).

[103] *See id.*; *see also League of Women Voters*, at 376–80. *See generally* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[104] *See* 47 U.S.C. § 317(a)(1) (origin of reasonableness standard for props and other property furnished for little or no money in connection with broadcasts and reasonably related to use of such property on broadcast). *See generally* What People Are Asking, *supra* note 19; Olivia Levinson, *Embedded Deception: How the FTC's Recent Interpretation of the Children's Online Privacy Protection Act Missed the Mark*, 105 MINN. L. REV. 2029-30 (2020-2021); Said, *supra* note 20, at 441–42 (discussing section 371(a) and its implementation by FCC).

ly scientific, cultural, educational, or other idea.[105] Although there does not appear to be a Supreme Court case on point, several federal courts have held that distinguishing in-person solicitation for commercial purposes from solicitation for other purposes is a content-based regulation, even if the solicitation is not further regulated based on the viewpoint or identity of the speaker or based on the mode of delivery such as music, use of visuals, etc.[106] As one of these courts explained, when a law "makes these sorts of facial distinctions, e.g., between those soliciting for religious purposes and those soliciting for commercial gain . . . it 'contemplates a distinction based on content.'"[107] As another court explained, it is a

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[105] *See* Matal v. Tam, 137 S. Ct. 1744, 1765–68 (2017) (concluding a statute that allowed registration of trademarks that praised persons, institutions, symbols, or beliefs, but not ones that denigrated them, was content and viewpoint regulation); Boos v. Mayor of District of Columbia, 485 U.S. 312, 316–17 (1988) (finding that allowing signs that praise foreign governments outside their embassies but not signs criticizing them is content-based); SEC v. Wall Street Publ'n Inst., Inc., 851 F.2d 365, 375 (D.C. Cir. 1988) (holding that regulation of "glowing terms used to describe the companies featured" would place the "SEC and the federal judiciary" into role of "content regulation of speech"); Taucher v. Brown-Hruska, 396 F.3d 1168, 1171–72 (D.C. Cir. 2005*)* (citing Lowe *v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)); Zahraa Hadi, *If Disparagement Is Dead, Dilution Must Die Too,* 33 BERKELEY TECH. L.J. 1189, 1208 (2018); Mark P. McKenna, *Dilution and Free Speech in the U.S., Reprise*, SSRN, Mar. 13, 2019, at 3352090, https://ssrn.com/abstract=3352090; *supra* note 76; *infra* note 128.

[106] *See, e.g.*, Aptive Env't, LLC v. Town of Castle Rock, 959 F.3d 961, 981–82 (10th Cir. 2020); Ohio Citizen Action v. City of Englewood, 671 F.3d 564, 570–80 (6th Cir. 2012); N.J. Citizen Action v. Edison Twp., 797 F.2d 1250, 1254, 1262 (3d Cir. 1986); City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1548 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987); Ass'n of Cmty. Orgs. for Reform Now v. City of Frontenac, 714 F.2d 813, 815 (8th Cir. 1983); *see also* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021) (applying strict scrutiny to law governing public "access[] to the commercial marketplace"), *cert. granted,* 142 S. Ct. 1106 (U.S. Feb. 22, 2022) (question presented: "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment"); *id*. at 1198–1200 (Tymkovich, J., dissenting) (chiding majority for "permissive" application of strict scrutiny to law, which majority agreed was content-based in requiring website designers to advertise that they will equally accommodate customers from all classes protected under state human-rights law) (citing Colo. Rev. Stat. § 24-34-601(2)(a)).

[107] *Aptive Env't*, 959 F.3d at 983 (quoting *Reform Now*, 744 F.2d at 749).

content-based law to mandate changes to the content of a communicative service provided to others for a fee or other consideration.[108]

Some cases conclude that trademark and copyright laws are content neutral because they only implicate who gets to speak, the manner of speaking, or compensation for speaking, rather than banning speech outright. Mark Lemley and Eugene Volokh rightly criticize this case law as being inconsistent with the Supreme Court's decisions in copyright, libel, and tax/utility cases.[109] In those cases, the Court engaged in First Amendment scrutiny of the breadth of a law or scrutiny of exceptions to it, even though the context was not a criminal prosecution (the libel, copyright, and tax cases), the law did not ban a category of speech in any venue (the tax and utility cases), the law was enforced by a regulatory commission (the utility case), or the law was being enforced by a court in a civil action between private parties (the copyright and libel cases).[110] In short, there is no "talismanic" exception to the First Amendment resulting from using a traditional label to regu-

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[108] *See 303 Creative LLC*, 6 F.4th at 1178, *cert. granted*, 142 S. Ct. 1106; *see also* NIFLA v. Becerra, 138 S. Ct. 2361, 2366, 2377 (2018); *cf.* Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.").

[109] *See* Mark A. Lemley & Eugene Volokh, *supra* note 58 (citing, *inter alia*, Arkansas Writers Project v. Ragland, 481 U.S. 221, 230 (1987)); Harper & Row, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–38 (1980); New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964). *Accord* Sarver v. Chartier, 813 F.3d 891, 905–06 (9th Cir. 2016) (holding California's right of publicity legislation is content based despite being viewpoint neutral); Dan Burk, *Patents and the First Amendment*, 96 WASH. U. L. REV. 147, 187 (2018) (some may argue that the U.S. "patent statute[] should not trigger strict scrutiny standard because patents are issued on the basis of technical criteria rather than on the basis of particular message or perspective, and so cannot be impermissibly directed to deterring or promoting particular content. But this instinctive supposition fails to distinguish between *content* neutrality and *viewpoint* neutrality" (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995))).

[110] *See Arkansas Writers Project*, 481 U.S. at 230 (tax exemption); *Harper & Row*, 471 U.S. at 558 (copyright exception); *Consolidated Edison Co*., 447 U.S. at 537–38 (utility regulation); *New York Times Co.*, 376 U.S. at 268 (civil libel action).

late speech, whether it is copyright, libel, tax, or fraud.[111] Regulatory standards that are not categorical bans may be content-based for purposes of strict scrutiny.

This analysis assumes the validity of such interest balancing in the First Amendment case law. Such balancing, however, is difficult to square with the language of the First Amendment and the results in other areas of law governing fundamental rights.[112] The First Amendment permits "no law . . . abridging the freedom of speech," leaving the federal government with "no power" to limit speech or expressive conduct because of its content or "subject matter."[113] This language leaves little room for policy balancing:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the

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[111] *Sullivan*, 376 U.S. at 269; *see also* Lemley & Volokh, *supra* note 58, at 222–24 (observing that courts recognize that the public interest in free speech means that courts cannot just "leap to the conclusion that a trademark is being infringed without a detailed consideration of the evidence," that "some cases have flatly rejected a distinction between commercial and noncommercial speech for purposes of the rule against prior restraints," and that "trademark cases involving commercial speech have applied the [First Amendment] rule against prior restraints") (citing, *inter alia*, Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, Inc., 886 F.2d 490, 497 (2d Cir. 1989) (as to the need for detailed evidentiary findings prior to enjoining book cover that may be misleading due to trademark usage)); New York Mag. v. Metro. Transp. Auth., 136 F.3d 123, 131 (2d Cir. 1998) (ruling against prior restraints applying to commercial speech); Consumers Union v. General Signal Corp., 724 F.2d 1044, 1052–53 (2d Cir. 1983) (holding prior restraints do not apply to an injunction against commercial speech).

[112] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."); *cf*. New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,* 142 S. Ct. 2111, 2176 (2022) (Breyer, J., dissenting) ("We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion.").

[113] United States v. Stevens, 559 U.S. 460, 468 (2010).

> costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[114]

James Madison, as an architect of the Bill of Rights, similarly "admonished against any 'distinction between the freedom and licentiousness of the press.'"[115] In the same vein, Thomas Jefferson wrote that, due to the First Amendment, "libels, *falsehood*, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals . . . ."[116] For this reason, Jefferson "den[ied] the power of Congress 'to controul the freedom of the press.'"[117] The press, at that time, included commercial cata-

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[114] *Id*. at 470; *see also* United States v. Alvarez*,* 567 U.S. 709, 721–22 (2012). As *Heller* stated at further length:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad . . . . The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people . . . .

Heller, 554 U.S. at 634–35.

[115] United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 133 (1973) (Douglas, J., dissenting).

[116] THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON, 464–65 (Paul Leicester Ford ed., 8th ed. 1904) (emphasis added), *quoted in* Alan J. Koshner, *The Founding Fathers and Political Speech: The First Amendment, the Press and the Sedition Act of 1798*, 6 ST. LOUIS U. PUB. L. REV. 395, 398 (1987).

[117] New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (quoting Thomas Jefferson, Letter to Abigail Adams (1804)), *quoted in* Dennis v. United States, 341 U.S. 494, 522, n.4 (1951) (Frankfurter, J., concurring). Madison also denied Congress the "power . . . [over] the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." *Id*. at 274 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION

logues and advertisers (incidentally, the word advertiser was part of the name of Framer Benjamin Franklin's newspaper), because the belief was that "a free press is the channel of communication to *mercantile and* public affairs . . . ."[118] The promises of freedom of speech and of the press was that federal courts would be "guardians of those rights" and "an impenetrable bulwark against . . . every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[119]

A superior approach to ad hoc balancing, as Justice Hugo Black once explained in a dissent joined by Chief Justice Warren and Justice William O. Douglas, is to distinguish speech from conduct and leave the former free of regulation, save in a few areas of traditional exclusions, such as libel, obscenity, fraud, incitement of imminent harm, and speech part of a criminal scheme.[120] This dis-

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528–29 (1876)). I suppose one's evaluation of that snippet of First Amendment history might depend upon whether individuals considered celebrities and business giants are "public characters," which in turn raises the definition of "public," ranging somewhere between "open, notorious, common" and thus famous, and "the body of a nation" and thus political. *See* NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 240 (1806).

[118] *See* Brief Amici Curiae of Am. Advert. Fed'n, Am. Ass'n of Advert. Agencies, Mag. Publishers of Am., and Direct Mktg. Ass'n in Support of Petitioners at 33, 35–38, 44, Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (No. 94-1140) (emphasis added) (quoting Benjamin Franklin, *An Apology for Printers*, PA. GAZETTE (June 10, 1731), *reprinted in* 2 WRITINGS OF BENJAMIN FRANKLIN, 172, 176 (Albert Henry Smyth ed., 1907), and Richard Henry Lee, *Letter XVI* (Jan. 20, 1788), *reprinted in* AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 142, 151–53 (1962)); *see also 12 200-Ft. Reels*, 413 U.S. at 132–33 (Douglas, J., dissenting).

[119] Barenblatt v. United States, 360 U.S. 109, 143 (1959) (Black, J., dissenting) (quoting 1 ANNALS OF CONG. 431–32, 439–40 (1789)).

[120] *See id*. at 141 (giving as an example of conduct something like physically blocking the street, and explaining that "I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process. [But t]here are, of course, cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct"); United States v. Nabaya, No. 3:17cr3 at § III.A.2. (E.D. Va. Apr. 19, 2017) (punishing making false statements to court not like regulating falsehoods generally under First Amendment and is not overbroad because it primarily regulates "conduct," i.e. "conduct intended to harm" government or its employees). Regarding the traditional exclusions, see United States v. Stevens, 559 U.S.

tinction would not leave the victims of false advertising on social media without any remedy. Their remedy would simply be to sue the seller for fraudulent course of conduct by selling under false pretenses, whether by directly instructing influencers to make false statements of fact or by indirectly conspiring in or abetting the influencers' false claims.[121] This conduct-based approach is superior to the prepublication regulation of influencer speech to ensure that it obeys a long list of federal mandates.[122]

460, 468–69 (2010) (collecting cases), and District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (similar).

[121] *See generally* Iancu v. Brunetti, 139 S. Ct. 2294, 2315 (2019) (finding that denying offensive or scandalous marks registered trademark protection was content-based, despite prior case law finding that deprivation of trademark registration to such marks was permissible because marks could still be used); Sara Gold, *Does Dilution 'Dilute' the First Amendment?: Trademark Dilution and the Right to Free Speech after* Tam *and* Brunetti, 59 IDEA 483, 494 (2019) (arguing that Matal v. Tam, 137 S. Ct. 1760, 1765 (2017) , and *In re Brunetti*, 877 F.3d 1330, 140 (Fed. Cir. 2017) support classification of anti-dilution law as being content based); Ned Snow, *Content-Based Copyright Denial,* 90 IND. L.J. 1473, 1480–85, 1499–1503 (2015) (analogizing fair use doctrine's sensitivity regarding a defendant's use of content to the content-related sales tax exemption in *Arkansas Writers Project*, 481 U.S. at 224, to the content-related burden on earning revenue from speaking in *United States v. National Treasury Employees Union*, 513 U.S. 454, 457 (1995), and to other cases finding First Amendment violation from denying certain benefits to writers or publishers in a viewpoint-neutral way); Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 736–40 (1992) (arguing that prior restraints should not be authorized prior to a copyright owner's showing a concrete injury, and that courts should not resolve cases in favor of or against offensive content based on the their distaste for such content and warning against prior restraints without concrete injuries to copyright owners, or restraints motivated by judicial distaste with offensive content of unauthorized use of copyrighted work) (citing Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. (BNA) 124, 137 (N.D. Ga. 1981), as requiring evidence of actual injury in context of humorous commercial use of another's trademark).

[122] Pre-publication or pre-transmission regulation is constitutionally suspect because it happens before some part of a speaker's message has even been delivered. *See* Alexander v. United States, 509 U.S. 544, 550 (1993) ("[P]rior restraint is used to describe 'administrative . . . orders forbidding certain communications when issued in advance of the time that such communications are to occur.'") (quoting MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, p. 4–14 (1984)). The FTC's orders against social media influencers or the sellers or agencies who support them are similar to the Texas public nuisance statute in

Although the FTC's rules are not necessarily a prior restraint on speech in formal terms, its rules risk chilling an influencer's commentary on products or services because influencers may hope to earn free samples, ad revenue, or endorsement deals, and to make a living just like similarly-situated Hollywood actors, directors, television producers and spokespersons, and popular musicians do.[123] Such a chill by self-censorship, without adequate substantive safeguards and opportunities to raise First Amendment protections, violates the freedoms of speech and of the press.[124]

Vance v. Universal Amusement Co. which allowed a state court judge, upon finding that obscene material had been shown in a theater, to order the theater to close for a year; the Supreme Court held that the statute was a prior restraint and noted that "*[a]ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" 445 U.S. 308, 317 (1980) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). The FTC does seek to regulate future social influencer communications upon finding that prior posts or videos have not properly disclosed endorsement payments and the like. *See* 16 C.F.R. § 255.1 (2009).

[123] Although the FTC's disgorgement awards, injunctions against deals or entire business models, and other costly remedies are civil in nature, chilling effects may be imposed by civil rather than criminal sanctions. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1951) (noting that civil damages for libel would cause newspapers to self-censor which advertisements they published depending on whether persons were referred to in a negative way in ads); *id.* at 298, 300–03 (Goldberg, J., joined by Douglas, J., concurring) (arguing that the majority's standard of actual malice in suits instituted by public officials against media organizations for statements relating to their official conduct will have the effect of constraining public debate and discourse because publishers might avoid accepting advertisements that a jury may later find to be reckless); *id*. at 293, 297 (Black, J., joined by Douglas, J., concurring) (similar). *Compare supra* note 10 (discussing FTC remedial authority), *with* What People Are Asking, *supra* note 19 (orders about money or conduct).

[124] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 383 (1973); Nat'l. Comm'n on Egg Nutrition v. F.T.C., 570 F.2d 157, 163–64 (7th Cir. 1977) (stating that FTC's restraints should be no broader than necessary to prevent deception, due to their impact on protected expression); Robert B. Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705, 736–37 (1977) (defending consumers' "freedom to obtain truthful commercial information at the least cost," and stating that "a rational policy of consumer protection would seek to avoid any 'chilling effect' upon the supply of commercial information brought about by an unnecessarily rigorous . . . disclosure requirement"); *see also* Burk, *supra* note 109, at 256 (arguing that, like government enforcement of content regulation, government

Additionally, according to recent case law and a line of scholarly commentary, the Lanham Act may unconstitutionally regulate expressive content unless a First Amendment defense applies.[125] A

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grants of patent rights may chill speakers who opt for "safer and possibly less desirable means of expression"); Eric Barendt, *Copyright and Free Speech Theory, in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 11, 24–25 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (arguing that copyright law may stifle the exercise of artistic and literary freedom in limiting secondary authors' selection and evocation of cultural symbols with which to express ideas) (citing Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978)); Neil W. Netanel, *Copyright and the First Amendment: What* Eldred *Misses—and Portends, in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 127, 148–49 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (contending that copyright imposes excessively onerous burdens on free speech when fair use is not plaintiff's burden to disprove, and citing Eleventh Circuit as challenging initial authors' control over their characters and dialogue as a prior restraint on secondary authors' speech) (citing SunTrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001)).

[125] *See, e.g.*, VIP Products, LLC v. Jack Daniel's Properties, Inc., 953 F.3d 1170, 1174-76 (9th Cir. 2020) ("A work need not be the 'expressive equal of *Anna Karenina* or *Citizen Kane*' to [express ideas or a point of view],' … and is not rendered non-expressive simply because it is sold commercially…. [A] humorous message … is protected by the First Amendment."), *aff'd,* No. 21-16969, 2022 WL 1654040 (9th Cir. Mar. 18, 2022), *cert. granted,* 143 S. Ct. 476 (2022); Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1276 (11th Cir. 2012) (holding that the defendant's artwork was deserving of full First Amendment protection, even if some consumers might confuse the defendant's artwork with University of Alabama or its trademark licensees); ETW Corp. v. Jireh Pub'g, Inc., 332 F.3d 915, 937 (6th Cir. 2003) (holding that the First Amendment protected the defendant's marketing and selling of lithographs and serigraphs that used Tiger Woods's name and likeness); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899, 906 (9th Cir. 2002) (holding that the First Amendment protected the defendant's reference to the Barbie doll in its song titled *Barbie Girl* and its lyrics because song was aesthetically relevant and not explicitly misleading); Rogers v. Grimaldi, 875 F.2d 994, 994 (2d Cir. 1989) (holding that the Lanham Act was not violated by the defendant's use of the name "Ginger" in the film's title and dialogue because it was not false advertisement); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 32–33 (1st Cir. 1987) (holding that the First Amendment protected the use of L.L. BEAN trademark and trade name in parody magazine advertisement, even if state anti-dilution law provided remedy for such use); Medina v. Dash Films, Inc., No. 15-CV-2551, 2016 WL 3906714, *4–6 (S.D.N.Y. July 14, 2016) (holding that the First Amendment protected the use of trademark LOISAIDAS in music lyrics even though its proprietor was also in music industry), *appeal docketed*, No. 16-2848 (2d Cir. Aug. 17, 2016); Louis Vuitton Malletier S.A. v. Warner Bros.

decade ago, the Second Circuit recognized the problem by refusing to hold that scientifically misleading commercial speech could be the basis of false advertising liability, at least where there was an accurate description of the data and "tentative . . . conclusions" of relevant studies, no matter how controversial the resulting claim.[126]

Ent., Inc., 868 F. Supp. 2d 172, 185 (S.D.N.Y. 2012) (holding that the First Amendment protected the appearance of counterfeit Louis Vuitton bag in feature film despite there being a potentially cognizable prima facie claim on the basis of source or sponsorship confusion); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols,* 1982 WIS. L. REV. 158, 204–05 (pointing out that absent consumer confusion or misappropriation of sponsorship value, trademark lawsuits against expressive uses of trademarks with an expectation of profit would permit control content of expression contrary to First Amendment) (citing Girl Scouts of the U.S. v. Personality Posters Mfg. Co., 394 F. Supp. 1228 (S.D.N.Y. 1969)); Gold, *supra* note 121, at 532–40 (explaining why liability for diluting famous trademarks without confusing consumers into buying misbranded goods may constitute content-based regulation of protected expression) (citing Br. of Amicus Curiae Law Professors in Supporting Defendant-Appellee, at 23, Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., 674 F. App'x 16 (2d Cir. 2016) (16-0241)); Lemley & Volokh, *supra* note 58, at 218 (noting that trademark laws and injunctions may be viewpoint neutral but are not content neutral, contrary to discussion in Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979), and assumptions in Dr. Seuss Enters. L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 n.11 (9th Cir. 1997), and Planned Parenthood Fed'n of Am., Inc., v. Bucci, 42 U.S.P.Q. 1430, 1440 (S.D.N.Y. 1997)); Robert J. Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1079–81 (1986) (arguing that trademark law restricts discussion of certain subject matter that is symbolized in popular culture with trademarks, like MCDONALD'S for uniform mass culture, and TIFFANY for superiority and wealth, etc.); Anthony Zangrillo, *The Split on the* Rogers v. Grimaldi *Gridiron: An Analysis of Unauthorized Trademark Use in Artistic Mediums,* 28 FORDHAM ARTS & ENT. L.J. 385 (2017) (exploring cases like *Rogers*, *Medina*, and *Warner Bros.*).

[126] ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 496–97 (2d Cir. 2013); s*ee also* Guardant Health, Inc. v. Natera, Inc., No. 21-cv-04062-EMC, slip op. at 8 (N.D. Cal. Jan. 18, 2022) *motion to dismiss or strike amended counterclaims denied*, (noting that district court's prior order denied to halt alleged false advertising where statements were not "clearly false" or based on manipulated data), *prior proceedings* at slip op. (N.D. Cal. temporary restraining order denied Aug. 16, 2021). The Second Circuit came to a similar conclusion when the United States tried to go beyond regulating the labels of regulated drugs to controlling, with criminal laws, what manufacturers could say to physicians regarding unapproved or "off-label" uses of their drugs. United States v.

Moreover, the Supreme Court has held that the Lanham Act may impermissibly discriminate on the basis of content, even when it is politically neutral by, for example, denying trademark protection to offensive or scandalous terms, because offense and scandal are ideas contrary to a certain set of moral or ethical ideas.[127] Previously, courts recognized that the Lanham Act's application to creative works would be unconstitutional unless it was strictly confined to explicitly misleading uses of a trademark or of a factual description or suggestion.[128] Thus, even in mere civil actions, plaintiffs may not impose civil liability for book, song, or movie/video titles that are artistically relevant and not explicitly misleading as to who made or sponsored them.

Caronia, 703 F.3d 149, 153–57 (2d Cir. 2012). The government censored the freedom of speech by discriminating against the speaker's identity and limiting the dissemination of medical and scientific information on the basis that the speaker had an interest in the new use of its drug. *See id*. at 165–67.

[127] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2315 (2019). *See generally First Amendment—Freedom of Speech—Trademarks—*Iancu v. Brunetti, 1, 133 HARV. L. REV. 292 (2019) (explaining why the Court's failure to dispute the Federal Circuit's reasoning that a lesser level of scrutiny applies to trademark law could result in ambiguity in regards to the First Amendment's application to Lanham Act's content-based rules); Lisa Ramsey, *A Free Speech Right to Trademark Protection?*, 106 TRADEMARK REP. 797, 855 (2016) (discussing how Lanham Act may have content-based rules for trademarks) (citing *In re* Tam, 808 F.3d 1321, 1368, 1370 (Fed. Cir. 2015), *rev'd sub nom.* Matal v. Tam, 137 S. Ct. 1744, 1760–64 (2017)); Lisa Ramsey, *Free Speech Challenges to Trademark Law After* Matal v. Tam, 56 HOUS. L. REV. 401, 430–31 (2018) (discussing *Brunetti* prior the Federal Circuit's decision, a challenge to First Amendment implications to "immoral" and "scandalous" bars to registration under 15 U.S.C. § 1052 (2012), and holding of Supreme Court that bar on registration of "disparaging" marks had been implemented in viewpoint-discriminatory way in violation of First Amendment) (citing *In re* Brunetti, 877 F.3d 1330, 1337 (Fed. Cir. 2017), and *In re Tam,* 808 F.3d 1321, *rev'd sub nom. Matal*, 137 S. Ct. at 1751–64 (plurality opinion)); *id.* at 1765–69 (Kennedy, J., concurring in part and concurring in the judgment); *id*. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

[128] *See* Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1189 (9th Cir. 2001); Serova v. Sony Music Entertainment, 13 Cal.5th 859, 881 (2022) (citing Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790, 797 (6th Dist. 1995)).

Being implicitly misleading is not sufficient for hybrid speech to create liability.[129] Likewise, in addressing content-based regulations of speech, courts demand the regulation be narrowly tailored to achieve the substantial government interest for the regulation. In trademark cases where the First Amendment is raised, the implicitly misleading message of the speech is not determinative; nor is it sufficient to say that any label, dialogue, lyric, or scene that creates a likelihood of confusion or a likelihood of brand dilution violates a statute.[130] This form of heightened scrutiny of the Lanham Act's application to expressive works is warranted in social media influencer contexts, because many forms of product or service mentions or endorsements are only implicitly misleading, or not misleading

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[129] *See Rogers*, 875 F.2d at 1005; *Hoffman*, 255 F.3d at 1189; s*ee also* U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200, 1206–10 (D. Colo. 2001) (holding that the magazine that used Olympic symbols to solicit consumers to buy copies was not engaged in commercial speech, and distinguishing between artistic, commercial, and "hybrid speech"); Louis Vuitton Malletier S.A. v. Warner Bros. Ent., Inc., 868 F. Supp. 2d 172, 174–81 (S.D.N.Y. 2012) (holding that the defendant's film could withstand First Amendment scrutiny because it was too indirect, confusing in a speculative way, or confusing to only a minority of persons, although a legally sufficient claim could have been pled for sponsorship confusion relating to film scenes—rather than film title); Yankee Pub. Inc. v. News Am. Pub. Inc., 809 F. Supp. 267, 280–82 (S.D.N.Y. 1992) (finding that the film title in *Rogers* and the cover of *The New Yorker* were free speech even though neither were accompanied by a disclaimer indicating their parody or unauthorized status); Br. of Amicus Curiae on Behalf of Intellectual Property Professors in Support of Appellant and in Support of Reversal, Am. Soc'y for Testing and Materials v. Public.Resource.org, Inc., 896 F.3d 437 (D.C. 2018) (No. 17-7035 and 17-7039) (urging reversal of *Am. Soc'y for Testing & Materials v. Public.Resource.org, Inc.,* No. 1:13-cv-0121, 2017 WL 473822 at *1 (D.D.C. Feb. 2, 2017), to extent that it held that use of technical standard publishers' trademarks on website making those standards available for purposes of regulatory knowledge and compliance was sufficiently commercial to be regulated under Lanham Act); Lisa Ramsey, *Increasing First Amendment Scrutiny of Trademark Law,* 61 SMU L. REV. 381 (2008).

[130] *Cf.* Rogers v. Grimaldi, 875 F.2d 99, 99 (2d Cir. 1989) (holding that speech must be explicitly misleading to be outside First Amendment's protection in trademark cases involving artistic speech or ads for it); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 3 (1st Cir. 1987) (holding that the statute rendering trademark dilution illegal was not determinative of First Amendment defense to cause of action based upon that speech and relating to fake ad in magazine).

at all, depending on how one views advertiser influence, free samples, and the like.

Strict scrutiny requires a content-based regulation to serve a compelling state interest in the least restrictive way.[131] Substantial overbreadth means that the government cannot meet its burden of showing that the least restrictive means to achieve its interests were used.[132] A law or regulation is overbroad and not narrowly tailored when "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal . . . ."[133] Underinclusiveness means the interest is not a compelling one, raising the rhetorical question why the legislator or regulator would have tolerated the problem so often if the state interest is strong.[134]

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[131] *See* Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 846 (2011); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 19 (1986).

[132] *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[133] *See* Bartnicki v. Vopper, 532 U.S. 514, 526–30 (2001) (state privacy law holding broadcaster of private telephone conversation was not least restrictive means of protecting communicative privacy, which would be to punish the persons who intercepted the call); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) (federal law banning all exposure of minors to signal bleed of adult channels was not least restrictive means of achieving its aim compared to allowing subscribers to request full blocking or scrambling of channel signals); Reno v. ACLU, 521 U.S. 844, 879 (1997) (prohibition on transmitting indecent speech without serious value over Internet was unconstitutional in light of less restrictive alternatives that would serve interest in protecting innocence of children, such as "requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet").

[134] *See* Barr v. American Ass'n of Political Consultants, 140 S. Ct. 2335, 2346 (2020) (underinclusive telephone regulation revealed content regulation); NIFLA v. Becerra, 138 S. Ct. 2361, 2375–76 (2018) (underinclusive mandate on family-planning and pregnancy centers revealed content regulation); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–02 (2011) (holding that regulation of same of violent video games to reduce youth violent behavior "is wildly underinclusive, raising serious doubts about whether the State is pursuing the interest it invokes or is instead disfavoring a particular speaker or viewpoint"); *Reed*, 576 U.S. at 170–72 (2015) (underinclusive regulation of signs alongside streets revealed content regulation); Citizens United v. Fed. Election. Comm'n, 558 U.S. 310, 361 (2020) (finding the statute in question was underinclusive because if Congress was seeking to protect dissenting shareholders it would have banned

FTC regulation of social media influencer disclosures appears to be very broad and overinclusive. Influencers and bloggers must use actual consumers of a product in every instance in which a person is depicted using a product, while actors in films or broadcast entertainment programs as well as radio announcers may use or talk about using a product for compensation without disclosing that fact.[135]

Guidelines from the FTC to influencers and their sponsors also appear to be overinclusive in comparison to the FTC's regulation of infomercials and sponsored newspaper or print articles. Influencers and their sponsors are told that they must ensure that all paid placements on social media are "prominently disclose[d]," while newspaper advertorials, paid film and televisions placements, and hedge fund chiefs need not prominently disclose their financial underpinnings and motivations.[136] With social media influencers, the FTC's approach is to target a capacity to mislead, regardless of whether deception actually occurs, whereas on television its approach seems to be to wait for proof and then maybe investigate, maybe not.[137] Rather than regulating deceptive placement on blogs or in Instagrammers' or YouTubers' accounts on a case-by-case basis as with broadcast and film, the FTC knowingly rejected this possibility by issuing blanket rules derived from print

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corporate speech in only certain media before an election); *see also* Aptive Env't., LLC v. Town of Castle Rock, Colo., 959 F.3d 961, 990–92 (10th Cir. 2020) (holding that regulation of commercial door-to-door solicitation did not materially advance the city's interest and was speculative as to its justification where noncommercial solicitors, some of whom may be criminals, were unregulated); N.Y. State Ass'n of Realtors, Inc. v. Shaffer, 27 F.3d 834, 845 (2d Cir. 1994) (striking down broad ban on harmful realtor solicitations as not being tailored to be effective, but upholding the plain language of the antiblockbusting regulation because it "in no way touches upon truthful or nonmisleading speech").

[135] *See supra* notes 87–88 and 98 for discussion of the differing regulations for social media influencers and actors or radio announcers.

[136] *See* Press Release, Fed. Trade Comm'n, Tea Marketer Misled Consumers, *supra* note 11; *see also* 47 C.F.R. § 73.1213(f), *supra* note 98; 16 C.F.R. § 255.1 (1980).

[137] *See* Said, *supra* note 20*,* at 447, 448–49.

media norms.[138] Why, the question arises, are all social media product placements treated with a broad brush, in contrast to some other media? Why is simply naming the sponsor and its product in a YouTube video or Instagram post not an obvious promotion, as it is with radio stations?[139] Why is providing a hyperlink to sponsorship disclosures insufficient when films and television do far less, and when courts recognize that a mention of a sponsorship relationship on a separate page of a website is sufficient to cure any likely deception for Lanham Act purposes?[140]

At the same time, FTC disclosure mandates are underinclusive in not applying to television, film, or radio in the same way that the FTC says they apply to social media. Contrary to the FTC's pretensions to media and content neutrality,[141] it has repeatedly reas-

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[138] *See* FTC, Endorsements and Testimonials Guidelines, *supra* note 24, at n.13 and accompanying text (citing Comments of Direct Marketing Association, at 4–5).

[139] *See* FTC*,* Endorsements and Testimonial Guidelines*, supra* note 24

[140] *See* William B. Lackey, *Can Lois Lane Smoke Marlboros?: An Examination of the Constitutionality of Regulating Product Placement in Movies*, U. CHI. LEGAL F. 275, 276–80 (1993); Savare, *supra* note 26, at 335; Casper Sleep, Inc. v. Nectar Brand, LLC, No. 18 Civ. 4459, 2020 WL 5659581, at *6 (S.D.N.Y. Sept. 23, 2020).

[141] *See* 16 C.F.R. § 255.1 (2022); FED. TRADE COMM'N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS (2019), https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers; Fed. Trade Comm'n, Request for Comment on Proposed Changes to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 Fed. Reg. 44288, (July 26, 2022), https://www.federalregister.gov/documents/2022/07/26/2022-12327/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising [hereinafter FTC Request for Comment on Guide Changes] (failing to note differential treatment of various media); FTC, Endorsements and Testimonials Guidelines, *supra* note 24, at 53125–26; Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements, *supra* note 86 (noting that FTC's "response to a petition from a consumer group to issue guidelines requiring the on-screen disclosure 'ADVERTISEMENT,' whenever paid product placement occurred in television programming" was that "FTC staff concluded that such a disclosure would not generally be necessary to prevent deception and that when particular instances of paid product placement or brand integration were deceptive, they could be adequately addressed on a case-by-case basis" (citing FTC, Commercial Alert, *supra* note 50)); *id.* at n.66 ("For example, if a branded product is included in entertainment programming in exchange for payment or other consideration from an advertiser, unless this paid product placement communi-

sured corporate media, alongside the FCC, that product placement is by its nature not an endorsement and does not require clear disclosures.[142] Disclosure of a sponsorship relationship is only necessary when film or television actors make "objective claim[s]" about products, rather than simply using them while displaying almost superhuman strength, dexterity, or speed, or being stunningly attractive, an amazing singer, or incredibly funny and charming.[143] Even objective claims made by actors in traditional television advertisements do not require disclosures because they are "obvious fictional dramatization[s]."[144]

The FTC acknowledges having no empirical support for product placement in film and television being clear and transparent as to its sponsorship. At one point, it had plans to study the issue further, but to no obvious result.[145] The FTC did not want to conduct

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cates an objective claim about a product, the fact that such advertising was included because of payment is unlikely to affect consumers' decision-making . . . . When no objective claims are made for the product advertised, there is no claim to which greater credence can be given; thus, whether an advertiser had paid for the placement or the product appeared because of the program writer's creative judgment would not likely be material to consumers."); Aaron Baar, *FTC Rules Against Product Placement Disclosure*, AD WEEK (Feb. 10, 2005), https://www.adweek.com/brand-marketing/ftc-rules-against-product-placement-disclosure-77682/; *FTC Declines to Take Action on Product Placement*, LOEB & LOEB, LLP (Feb. 2005), https://www.loeb.com/en/insights/publications/2005/02/ftc-declines-to-take-action-on-product-placement.; 16 C.F.R. § 255.1 ex. 5.

[142] *See* FTC, Commercial Alert, *supra* note 50, at 1–2; Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements, *supra* note 87 at n.66 and accompanying text.

[143] *See* Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements, *supra* note 86, at n.66; FTC, Commercial Alert, *supra* note 50, at 6 (noting that singers in *American Idol*'s Red Room, contestants on *Survivor*, etc. need not disclose why they consume Coca-Cola or Budweiser, even though such product placement like advertising boosts consumer demand for products, especially among kids, because "evaluating on a case-by-case basis whether an advertising format is deceptive appropriately protects consumers, including children, from misrepresentations").

[144] 16 C.F.R. § 255.0 ex. 2 (2022); *see also* 16 C.F.R. § 255.0 ex. 3; 16 C.F.R.§ 255.0 ex. 7. *But see* 16 C.F.R. § 255.0 ex. 4; 16 C.F.R. § 255.0 ex. 5; 16 C.F.R. § 255.0 ex. 6.

[145] *See* FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, Proposed Rules, 73 Fed. Reg. 72374, 72383 (Nov. 28, 2008)

a "costly" study as to what content was misleading on the Internet, so it relied on old studies about newspapers where the readership might have had more settled expectations as to the line between editorial speech and ads.[146] Scholars and activists provide reason to believe that product placement conveys endorsements that may be as effective as undisclosed blog sponsorships and the like:

> Many of the problems that actors might encounter in the face of increased digital product placement will arise in large part because an actor's appearance on screen with a product can create an implied celebrity endorsement of that product. For instance, "product placement can put a client['s] brand into the association with the brand that acts as a powerful and subtle endorsement of the product." Notably, although direct celebrity endorsements are relatively rare and expensive, even an indirect, yet brief, celebrity endorsement created by a product placement can be as effective as a traditional com-

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[hereinafter Proposed Rules FTC Endorsements and Testimonials Guidelines] ("The Commission acknowledges that the staff's research did not attempt to determine what messages consumers take away from testimonials and disclaimers in all media and for all products."); FTC, Commercial Alert, *supra* note 50, at 2, 5 (noting that FTC was unaware of empirical data as of 2005 regarding whether consumers react differently to sponsored product placements than to products that appear in broadcast or filmed media as result of independent decisions of writers or hosts and suggesting the matter requires further review).

[146] *See* Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements, *supra* note 86, at 22599–600. For examples of old studies, *see* Manoj Hastak & Michael B. Mazis, *The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement*, FED. TRADE COMM'N (Sept. 30, 2003), https://www.ftc.gov/es/system/files/documents/reports/effect-consumer-testimonials-disclosures-ad-communication-dietary-supplement-endorsement-booklet/030920consumerreport.pdf [hereinafter *Effects of Consumer Testimonials 2003 Report*]; Manoj Hastak & Michael B. Mazis, *Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements*, FED. TRADE COMM'N (Sep. 22, 2004), https://www.ftc.gov/es/system/files/documents/reports/effects-consumer-testimonials-weight-loss-dietary-supplement-business-opportunity-advertisements/report.pdf [hereinafter *Effects of Consumer Testimonials 2004 Report*].

> mercial. Advertisers and television studios thus have an obvious interest in creating apparent endorsements between actors and the products with which they interact. In light of the digital product placement revolution, however, the question arises of what control, if any, the actors put in this indirect endorsement situation can possibly have over their images, whether at the time of filming or after future digital insertions occur.[147]

Advertisers pay celebrity spokespersons enormous sums to appear in ads, and product placement may obtain similar results, even with actors or musicians who otherwise decline to perform endorsements.[148]

Even if the poor fit between the FTC's transparency objective and its current framework for endorsement and testimonial disclosures does not itself violate the First Amendment, the lack of a mens rea requirement in that framework probably should.[149] If, as argued above, social media influencers are engaged in noncommercial speech despite carrying advertisements as a newspaper or

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[147] Almond, *supra* note 17, at 642–43 (quoting *Benefits*, INTERNET ARCHIVE WAYBACK MACHINE: FEATURE THIS!, https://web.archive.org/web/20080310224421/http://www.featurethis.com/benefits/endo.html (last visited Nov. 21, 2022) (citing Savare, *supra* note 19, at 356)).

[148] *See* Almond, *supra* note 17, at 642–43 n.77 (citing *Benefits, supra* note 148); Amy Johannes, *TV Placements Overtake Film,* PROMO MAG. (May 1, 2005), https://web.archive.org/web/20060505115846/http://promomagazine.com/mag/marketing_tv_placements_overtake/; J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 195–96 (2d ed. 2005); Savare, *supra* note 26, at 356; *see also* 16 C.F.R. § 255.5 ex. 2 (noting that film star may be paid $1 million to state publicly that he or she likes the taste of a type of food and need not disclose the amount paid to him or her).

[149] *Cf.* The Florida Star v. B.J.F., 491 U.S. 524, 539 (1989) (refusing to rule that invasion of privacy liability could follow automatically upon the publication of certain information consistent with the First Amendment, because such a ruling would have "the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures, where liability is evaluated under a standard, usually applied by a jury, of ordinary negligence").

magazine would, their statements regarding public figures should not give rise to liability unless made maliciously.[150] At least in some circuits, the fact that an influencer is not a traditional media organization or that the Lanham Act, rather than a defamation or privacy claim, is pled should not matter.[151] In addition, even a defendant other than a media organization engaged in design or other creative work may be protected from Lanham Act liability for false statements that were not knowingly false or that were reasonable to make.[152]

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[150] *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186, 1188 (9th Cir. 2001).

[151] *See id*. at 1180 (plaintiff pled Lanham Act claim for false endorsement); Citizens United v. Fed. Election. Comm'n, 558 U.S. 310, 352 (2020) (institutional press does not have special First Amendment rights); Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1291 (9th Cir. 2014) (joining other circuits in rejecting media organization/other speaker distinction).

[152] *See* Groden v. Random House, Inc., 61 F.3d 1045, 1052 (2d Cir. 1995) (advertisement for book fully protected by First Amendment even if it made false statement about Kennedy assassination); Charles v. City of Los Angeles, 697 F.3d 1146, 1152 (9th Cir. 2012) (content of television program, as opposed to advertisement for it, fully protected by First Amendment); Serova v. Sony Music Entertainment, 13 Cal.5th 859, 882 (2022) (a portion of an expressive work, or even a reproduction of it in self-promotion, is constitutionally protected especially if truthful); New York Public Interest Research Group, Inc. v. Insurance Information Institute, 161 A.D.2d 204, 205–6 (N.Y. App. Div., 1st Dep't 1990) (paid advertisements aimed at generating "sympathy" for insurance industry on television and in magazines were protected noncommercial speech even if misleading under state law); Lacoff v. Buena Vista Publishing, Inc., 705 N.Y.S.2d 183, 189–91 (N.Y. Sup. Ct., N.Y. Cty. 2000) (misleading information in books and newsletters fully protected as noncommercial speech (citing Daniel v. Dow Jones & Co., 137 Misc. 2d 94, 102 (N.Y. Sup. Ct., N.Y. Cty. 1987))). *Cf.* Cher v. F. Int'l, Ltd., 692 F.2d 634, 639–40 (9th Cir. 1982) (claim against magazine for falsely advertising fact that celebrity consented to be interviewed by it could only survive if magazine had mens rea of knowing or reckless falsehood); William O'Neil & Co. Inc. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1120 (C.D. Cal. 2002) (claim that investment guide falsely characterized plaintiff's investing tips could only survive if author of book made knowing or reckless misrepresentations of fact); Lane v. Random House, Inc., 985 F. Supp. 141, 152 (D.D.C. 1995) (contents of a book, and even of a related newspaper ad, were fully protected under First Amendment from claim plaintiff was placed in false light); Blatty v. New York Times Co., 42 Cal. 3d 1033, 1036–38, 1048 n. 3 (Cal. 1986) (*The New York Times* bestsellers list is noncommercial speech even if the *Times* has commercial motivation to publish it); Application to File Ami-

Perhaps the strongest arguments in favor of the FTC's position on social media influencer disclosure requirements invoke the strong public interest in such regulations. The Supreme Court has repeatedly characterized misleading or deceptive speech as unprotected by the First Amendment.[153] Influencers and endorsers, it is said, have minimal legitimate interests in evading disclosure of the uncontroversial matter of who is sponsoring their work.[154] Regarding the first argument, there is a broad principle that speech related

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cus Curiae Brief and Amicus Curiae Brief of The First Amendment Coalition in Support of Defendants-Appellants, at 29–43, Serova v. Sony Music Ent., 44 Cal. App. 5th 103 (2020) (No. S260736), 2021 WL 1163205, at *42 (not only contents of books, newspapers, films, records, etc. are First Amendment protected, but so are ads for those works to extent they summarize or accurately promote that content); *id*. at *40–41 (courts "extend an advertised work's First Amendment protection to advertisements for the work" (quoting Charles v. City of Los Angeles, 697 F.3d 1146, 1153 (9th Cir. 2012))); Newcal Indus. v. Ikon Off. Sol., 513 F.3d 1038, 1052–54 (9th Cir. 2008) (defendant's knowledge is relevant to a false advertising claim where falsity and materiality of statements is based on defendant knowing or intending something at time statement was made, which in case of influencer speech might be intending to use product or to know about it).

[153] *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); Edenfield v. Fane, 507 U.S. 761, 768–69 (1993); Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–564 (1980); *In re* R.M.J., 455 U.S. 191, 203 (1982); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (plurality opinion); Pearson v. Shalala, 164 F.3d 650, 655–56 (D.C. Cir. 1999); Proposed Rules FTC Endorsements and Testimonials Guidelines, *supra* note 145, at 72385–86; *cf.* Lewis Pub. Co. v. Morgan, 229 U.S. 288, 316 (1913) (upholding, on mixture of Spending Clause/government subsidy and early commercial speech doctrine, law mandating that advertisements contained in mailed newspapers or magazines be clearly labeled as such, by reasoning that law mandates inclusion of "the names not only of the apparent, but of [real] owners of the publications, and to enable the public to know whether matter which was published was what it purported to be, or was in substance a paid advertisement," so "the publishers . . . continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges" extended by Congress in setting up postal service).

[154] *See* Proposed Rules FTC Endorsements and Testimonials Guidelines, *supra* note 145, at 72385–86, 72386 n.87, (suggesting that disclosures to prevent deception do not unconstitutionally burden speech (citing *Zauderer*, 471 U.S. at 650–51)); Tushnet, *supra* note 20, at 728–29 (citing *Zauderer*, 471 U.S. at 651).

to unlawful activities may be unprotected.[155] There is, however, a troubling lack of evidence that social media influencer disclosures are really necessary or helpful. A merely conjectural or nonspecific claim that consumers are being misled may not be sufficient to sustain official action against promotional speech.[156] The evidentiary problem is compounded by the fact that brands or their promoters may achieve a workaround of their obligations with respect to social media endorsers by arranging for product placement in film, radio, or television. Rather than paying Tom Cruise to post a selfie to social media featuring him boarding or flying on a Lear jet, Lear could pay a film studio for a product integration in which the IMF in the *Mission: Impossible* series flies to Dubai on Lear jets.[157] Rather than paying Sofia Vergara to talk about CoverGirl or Head & Shoulders products on social media, these products could

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[155] *See* Ibanez v. Fla. Dep't of Bus. & Pro. Regul., 512 U.S. 136, 137, 142, 144 (1994) (because First Amendment "'prohibits a State from excluding a person from a profession or punishing him solely because . . . he holds certain beliefs,'" the State must "build its case on specific evidence of noncompliance" (internal citation omitted)).

[156] *See id*. at 143; *id*. at 149–53 (O'Connor, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (criticizing the majority for striking down official action against advertisement that had "the potential to mislead"); Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (rejecting government's claim of adequate interest in privacy protection to prohibit harmful disclosure of private information in one medium, i.e. newspapers, but not others, i.e. oral/telephone gossip); Gulf Oil Co. v. Bernard, 452 US 89, 103–04 (1981) (in case where district court and Rule 23(d) of Federal Rules of Civil Procedure as applied to promotional speech by attorneys to class members involving "serious restraints on expression," Court required "attention to whether the restraint is justified by a likelihood of serious abuses").

[157] I mention Tom Cruise as an actor who stars in one or two of the highest-grossing movies that are released in some years. Endorsement value often correlates with success in other domains, such as cinema, television, music, or sports. The workaround might be a little more complicated in the case of endorsers known less for their acting than for their athletic or musical (video) performances, like David Beckham, Beyoncé, or Michael Jordan, but there are ample opportunities to integrate product placement into television programming or music that might feature such celebrities. Mr. Cruise was also involved in a famous case of unregulated product placement, the appearance of Ray-Ban sunglasses in *Risky Business. See* Steven L. Snyder, *Movies and Product Placement: Is Hollywood Turning Films Into Commercials*, 1992 U. ILL. L. REV. 301, 306–07 (1992).

be placed in one of her films or television programs. The placement could even vary by region of the country, with different products appearing in urban versus rural theaters, or in theaters where an ethnic or racial minority tends to account for most of the audience.[158] Such a quick method of evading regulation calls into question the strength of the federal interest in maintaining the regulation at all.[159]

The Supreme Court has previously addressed both federal regulations lacking real evidence of their desirability or benefits and regulations which are so underinclusive that there is an easy workaround.[160] Neither form of regulation is necessarily constitutional, even if there is undoubtedly some real problem in need of a solution. The irrational basis or scope of what Congress, other legislators, or regulators tried to do is fatal, even if there is some form of constitutionally permissible solution to the stated problem.

Scholars cite a variety of other cases in favor of the constitutionality of harsh disclosure mandates for social media influencers. Most of them seem not to be particularly relevant. The Supreme Court has upheld federal election laws mandating a degree of transparency relating to who is publicly boosting (or undermining) candidates for elected office as well as who is contributing to polit-

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[158] *See* Almond, *supra* note 17, at 630, 636–38 (noting the rise of digital or virtual product placement, actors' lack of copyright remedies when they work as employees or sign work-made-for-hire agreements in countries without inalienable moral rights for audiovisual performers, and possibility of varying product placement by region).

[159] *See* Barr v. American Ass'n of Political Consultants, 140 S. Ct. 2335, 2364 (2020) (law's "failure to address a wide swath of conduct implicating its supposed concern 'diminish[es] the credibility of the government's [stated] rationale for [its] restriction'" (internal citation omitted)); Citizens United v. Fed. Election. Comm'n, 558 U.S. 310, 318–19 (2020) (federal elections law that regulated distortion of political debate by corporate expenditures while exempting expenditures by media corporations and "empires" basically admitted its own weak regulatory interest); Rubin v. Coors Brewing Co., 514 U.S. 476, 478–79 (1995) (government's interest in regulating advertising of beer or other alcohol's "strength" was undermined by permitting the malt liquor category to exist).

[160] *See id.*; *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996); Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328, 342–43 (1986); Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017); *Citizens United*, 558 U.S. at 362.

ical campaigns and where the money goes.[161] Unlike FTC regulations, however, these mandates are premised upon a risk of corrupting Congress and other branches of government, which is absent in the social media contexts on which the FTC has focused its guidelines and enforcement actions.[162] Future cases may also address whether election transparency laws are also riddled with de jure exceptions that are trivially easy to utilize on the part of politicians or donors desiring a little more discretion. A significantly greater risk of corrupting the culture appears to emanate from product placement in blockbuster motion pictures, as producers and directors accept censorship of their content in order to please domestic donors of military equipment and major foreign markets in particular.

Case law recognizes that attorneys, doctors, health-care providers, drugmakers, brokers, and securities issuers may also be required to make important disclosures.[163] Unlike social media

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[161] *See* First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of [corporate advertising in political campaigns] may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *id*. ("In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed." (citing Buckley v. Valeo, 424 U.S. 1, 67 (1976))). Some scholars argue for heightened press, social media, or digital platform disclosures or transparency obligations, citing case law on political campaign disclosure regulation being constitutional even when banning the campaign contributions would not be. *See, e.g.*, Levi, *supra* note 55, at 690–95; Tushnet, *supra* note 20, at 752–53, 760–62 & nn.94, 113 (citing Doe v. Reed, 561 U.S. 186 (2010)); Meese v. Keene, 481 U.S. 465, 480–81 (1987); *Belotti,* 435 U.S. at 792 n.32; *Buckley*, 424 U.S. at 60–84; s*ee also* Goodman, *supra* note 20, at 130–37.

[162] *See Boletti*, 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts . . . .").

[163] *See* Proposed Rules FTC Endorsements and Testimonials Guidelines, *supra* note 145, at 72386 n.87 (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 650–51 (1985)); Tushnet, *supra* note 20, at 728–29. Tushnet describes attorneys, for example, as having a "right to speak" under First Amendment doctrine that is "dependent on the audience's interest." *Id.* 728 n.23 (citing *Zauderer*, 471 U.S. at 651 (1985)). Still, even attorneys', doctors', and drugmakers' disclosure obligations are not necessarily that strict, as illustrated by controversies regarding the lawyers who fail to disclose pertinent stock or fund ownership to clients, doctors' failure to disclose all known risks prior to surgery

influencers, however, they are recipients of a certain degree of trust involving persons' bodies, health, and/or financial accounts. Bank, brokerage, and credit and debit card accounts are deducted in securities sales. Such accounts, along with insurance/health savings accounts, are billed directly or indirectly by doctors, lawyers, hospitals, pharmacies, and securities brokers. Accordingly, these service providers and drugmakers create commercial and often fiduciary relationships that are absent in mere posts or videos containing company mentions or endorsements.[164] The latter are what courts

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or the many inducements they receive to prescribe specific drugs, and manufacturers of drugs or implants who do not make every risk or conflict of interest transparent to the patients. *See* Kaiser v. Johnson & Johnson, 947 F.3d 996, 1015 n.4 (7th Cir. 2020) (drugs and implants may be marketed to doctors and risks may be disclosed to them rather than to patients); *In re* Zimmer NexGen Knee Implant Prods. Liab. Litig., 884 F.3d 746, 751 (7th Cir. 2018) (manufacturer of medical device need not ensure it makes risks clear to all patients after it informs prescribing physicians of such risks); Canterbury v. Spence, 464 F.2d 772, 780–81 (D.C. Cir. 1972) (exploring debate between those who suggest physicians are liable for failing to disclose every risk of a procedure to a patient, and those who maintain that only customary or reasonable disclosures are required); Seals v. Rush Univ. Med. Ctr., 2021 IL App 200558, at ¶¶ 15–16 (Ill. App. 1st Dist. Sept. 30, 2021) (contending that pharmacists have "no duty to . . . to warn [their] customers of the potential hazards of a prescription drug"); Therese Maynard, *Ethics for Business Lawyers Representing Start-up Companies,* 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 401, 413 (2010) (attorneys do not violate duties to their clients by acquiring stock on open market that may give them an interest in a matter in which they represent clients, even if they fail to disclose that ownership stake to those clients (citing ABA Comm. on Ethics and Prof'l Resp., Formal Op. 00-418 at 5–6 (2000)); Robert V. Kahrl & Anthony T. Jacono, *Rush to Riches: The Rules of Ethics and Greed in the Dot.Com World,* 2 MINN. INTELL. PROP. REV. 51, 56 (2001)). On inducements to physicians, *see* James P. Orlowski, *The HEC and Conflicts in the Health Care Environment,* 6 HEC F. 3, 3–8 (1994). Of course, there are regulations imposed by the FDA on manufacturers who advertise drugs or implants, mandating that they disclose certain risks, often in the fine print in magazines or on websites, or in fine print and fast-talked narration on radio or television, despite what tort law says. *See, e.g.*, U.S. FOOD & DRUG ADMIN., ADVERTISING AND PROMOTION MANUAL §§ 410-490 (J.W. Schomisch, ed., Mar. 2020).

[164] Although a security is not always classified as a personal service, it has aspects of a service transaction in that the management of a business on behalf of investors and the oversight of the resulting assets for sharing with stockholders in the form of accounted-for earnings and cash flow, dividends, buybacks,

in fiduciary duty cases call "arm's length" transactions without justifiable trust in a speaker or resulting duties of good faith.[165]

Another theme of recent scholarship and lobbying is the harm from online manipulation as being distinct from those of coercion or deception and the strong federal interest in reducing unethical manipulation.[166] TikTok, Twitter, and Facebook went so far as to ban all or most political candidate and political issue advertising.[167] Journalists link these decisions to the risk of "manipulation," "misinformation," and "forcing."[168] Frank Pasquale argues that stand-

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etc. are long-term relationships of provider and beneficiary. *See* Travis*, supra* note 58, at 429–30.

[165] *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480 (1989) (noting background that "that the Securities Act was intended to protect buyers of securities, who often do not deal at arm's length and on equal terms with sellers . . ."); Taucher v. Brown-Hruska, 396 F.3d 1168, 1171–72 (D.C. Cir. 2005) ("[W]here there was no 'personal nexus between professional and client' and a speaker does not exercise judgment on behalf of that client, 'government regulation ceases to function as legitimate regulation of professional practice . . . [and] becomes regulation of speaking or publishing as such' subject to heightened scrutiny under the First Amendment.'" (quoting Lowe v. SEC, 472 U.S. 181, 232 (White, J., concurring))); Brandow Chrysler Jeep Co. v. Datascan Techs., 511 F. Supp. 2d 529, 538–39 (E.D. Pa. 2007) ("[A fiduciary] relationship exists where the parties have 'reposed a special confidence in each other to the extent that [they] do not deal with each other on equal terms.'"); *cf.* SEC v. Wall St. Pub. Inst., 591 F. Supp. 1070, 1081–82 (D.D.C. 1984) (distinguishing multi-purpose newspapers and magazines from those intended only as "investment advice," which do not receive First Amendment protection from regulatory standard of "'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation to employ reasonable care to avoid misleading its clients" (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–92, 194 (1963))), *vacatur recognized on remand,* 664 F. Supp. 554 (D.D.C. 1986), *rev'd in part,* 851 F.2d 365, 372–76 (D.C. Cir. 1988) (First Amendment might allow SEC to prove that consideration was paid "for publication of articles that the SEC regards as deceptive," which could be enjoined by courts as long as "glowing" content of articles in magazine about investable companies was not itself regulated).

[166] *See, e.g.*, Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 235, 238 (2021); Ashutosh Bhagwat, *The Law of Facebook,* 54 U.C. DAVIS L. REV. 2353, 2362–64 (2021).

[167] *See* Bhagwat, *supra* note 166, at 2363–64.

[168] Lauren Feiner, *Twitter Bans Political Ads after Facebook Refused to Do So*, CNBC (Oct. 30, 2019), https://www.cnbc.com/2019/10/30/twitter-bans-political-ads-after-facebook-refused-to-do-so.html. TikTok's announcement

ards from credit reporting and other financial laws could improve accountability for misinformation on the Internet.[169] Anupam Chander urges interventionist policies to prevent algorithms that control credit, social connections, and information feeds from being manipulated by the "viral discrimination" which produces statistical or machine-learning models trained on data sets that reflect conscious or unconscious discrimination by countless individuals

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emphasized that politics is too serious and depressing for the TikTok brand, but its timing, October 3rd, was very close to the October 8th release of the Senate Intelligence Committee's second report on Russian "influence operations" in the 2016 election. *See* Blake Chandlee, *Understanding Our Policies Around Paid Ads*, TIKTOK (Oct. 3, 2019), https://newsroom.tiktok.com/en-us/understanding-our-policies-around-paid-ads; U.S. SENATE SELECT COMM. ON INTEL., 2 S. REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION: RUSSIA'S USE OF SOCIAL MEDIA WITH ADDITIONAL VIEWS, 116th Cong., 1st Sess., at 4–5 (2019). It is fair to assume that TikTok had advance notice of the report's findings, whose publication was followed within a month by dramatic changes in political ad policies on Facebook's and Twitter's part. *See* Bhagwat, *supra* note 166, at 2364 (Facebook purports to ban all political candidate ads and political issue ads as of early November 2020); *Mark Zuckerberg Testimony Transcript: Zuckerberg Testifies on Facebook Cryptocurrency Libra*, REV (Oct. 23, 2019), https://www.rev.com/blog/transcripts/mark-zuckerberg-testimony-transcript-zuckerberg-testifies-on-facebook-cryptocurrency-libra# [hereinafter *Mark Zuckerberg Testimony Transcript*] (Facebook required proof of citizenship and location to buy political ads as of October 23, 2019); Mike Issac, *Facebook Moves to Limit Election Chaos in November*, N.Y. TIMES (Sept. 3, 2020), https://www.nytimes.com/2020/09/03/technology/facebook-election-chaos-november.html; Reuters Staff, *Chinese Video App TikTok Bans Paid Political Ads on Its Platform*, REUTERS (Oct. 4, 2019), https://www.reuters.com/article/us-tiktok-ads/chinese-video-app-tiktok-bans-paid-political-ads-on-its-platform-idUSKBN1WI2HI. *Cf.* Jennifer Daskal, *Facebook's Ban on Foreign Political Ads Means the Site Is Segregating Speech,* WASH. POST (Dec. 16, 2019), https://www.washingtonpost.com/outlook/2019/12/16/facebooks-ban-foreign-political-ads-means-site-is-segregating-speech/ (noting legal risk of carrying foreign-bought political ads in the United States after a 2017 Senate hearing brought attention to the topic); *Mark Zuckerberg Testimony Transcript, supra* (Facebook's attorneys became aware of the ban on foreign-bought political candidate ads).

[169] *See* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 61, 147–61, 282 nn.25 & 27 (2015) (arguing that traditional media had transparency that Google and other websites do not as result of greater "complexity" and "dominance").

over time.[170] Whatever the merit of these proposals, they may have similar constitutional difficulties as other regulations of noncommercial, misleading speech. They may also face challenges regarding commercial, truthful or merely subjective speech—namely, constitutional distinctions between fraud or deceptive conduct and mere opinion. There may be potential overbreadth given less restrictive alternatives to suppressing the speech or bias given safe harbors for other manipulative speech.[171]

B. *Lesser Scrutiny of Influencer Regulations*

Even under intermediate scrutiny, the overinclusiveness of the FTC's regulatory stance with respect to social media influencers places this stance in danger of violating the First Amendment. Intermediate scrutiny also contains a narrow tailoring requirement, although some authorities distinguish it from strict scrutiny's "least restrictive means" standard, which is very difficult for legislation

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[170] *See* Anupam Chander, *The Racist Algorithm?*, MICH. L. REV. 1023, 1039–42 (2018); Wonyoung So et al., *Beyond Fairness: Reparative Algorithms to Address Historical Injustices of Housing Discrimination in the US*, ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 988, 990 (2022).

[171] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 388, 425 (1992) (referencing different categories of protected speech).

to withstand.[172] Even under intermediate scrutiny, substantial over-inclusiveness makes a regulation unconstitutional.[173]

The traditional test for commercial speech regulations is often described as a form of lesser or intermediate scrutiny.[174] As set

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[172] *See, e.g.*, Thompson v. Western States Med. Ctr., 535 U.S. 357, 371 (2002) ("[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."); Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981) (plurality opinion); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 570–72 (1980); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 983 (2009); *see also* Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476–478 (1989) (prior to 1989, the Supreme Court repeatedly held that restrictions on commercial speech must be "necessary," which means not more restrictive than they could be). *But see id*. at 476–81 (opinion of the Court rejected a least-restrictive-means test in cases affecting only commercial speech, while also rejecting a rational-basis style deference to Congress or state legislatures, the latter being inconsistent with First Amendment principles of narrow tailoring and necessity "fit").

[173] *See, e.g.*, *Thompson*, 535 U.S. at 367; *Metromedia*, 453 U.S. at 569 (Burger, C.J., dissenting); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 368 (2010); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507–08 (1996) (price advertising regulation on alcohol unconstitutional because "financial incentives or counterspeech" would be less restrictive but further same interest (citing Linmark Assocs., Inc. v. Town of Willingboro, 431 U.S. 85, 97 (1977))); Edenfield v. Fane, 507 U.S. 761, 770 (1993) (referring to alternatives that more "directly and materially" serve state's interest than a "blanket" approach); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (referring to alternatives "that would prove less intrusive to the First Amendment's protections for commercial speech"); Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 356–58 (1986) (Brennan, J., dissenting) (holding a ban on advertising casino gambling to Puerto Ricans unconstitutional and referring to alternatives such as prosecuting cases of organized crime or corruption related to the casinos); *see also* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 641–42, 643–44 (1995) (Kennedy, J., dissenting); Ibanez v. Fla. Dep't of Bus. and Pro. Regul. Bd. of Acct., 512 U.S. 136, 148–49 (1994); *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S., at 477–78; Shapero v. Ky. Bar Ass'n., 486 U.S. 466, 476–77 (1988); Zauderer v. Office of Disciplinary Couns., 471 U.S. 626, 638 (1985); *In re* R.M.J., 455 U.S. 191, 207 (1982); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

[174] *See In re* Brunetti, 877 F.3d 1330, 1350 (Fed. Cir. 2017), *aff'd*, 139 S. Ct. 2294 (2019) ("[P]urely commercial speech [is] reviewed according to the intermediate scrutiny framework established in *Central Hudson*."); Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 846–47, 849 (9th Cir. 2017) (also calling

forth above, this form of scrutiny may be inappropriate for social media influencer speech because it is not purely commercial as regulated by the FTC, and because of the speaker-based discrimination with regard to broadcaster and filmmaker product-related speech. Properly understood, it should be the "*non-content-based regulation* and regulation of commercial speech — expression *solely* related to the economic interests of the speaker and its audience" that are "subject to intermediate scrutiny."[175] Social media influencer regulation falls into neither category, being content-based and encompassing speech not solely related to economic persuasion. This section, however, proceeds to analyze the FTC's rules using intermediate or lesser scrutiny, in the interests of completeness.

A glaring exemption for a similar kind of commercial activity should fail intermediate scrutiny. For example, where the government banned the advertising of beer with a high percentage of alcohol by volume but allowed malt liquor to be advertised when people know it to be stronger, the exemption prevented it from es-

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commercial speech standard intermediate scrutiny even though *Sorrell* stated that "heightened judicial scrutiny" applied (citing Sorrell v. IMS Health, Inc., 564 U.S. 552, 563–71 (2011))); Poughkeepsie Supermarket Corp. v. Dutchess Cnty., 648 F. App'x 156, 157 (2d Cir. 2016) (summary order) (similar finding to *Brunetti*); Flying Dog Brewery, LLLP. v. Mich. Liquor Control Comm'n, 597 F. App'x 342, 365 (6th Cir. 2015) ("[A]lthough *Sorrell* stated that 'heightened judicial scrutiny' applied, it reaffirmed the use of the *Central Hudson* test."); 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014) ("[W]hen a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*," which is a "commercial speech inquiry" according to *Central Hudson* (quoting *Sorrell*, 564 U.S. at 571)); Educ. Media Co. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013) ("However, like the Court in *Sorrell*, we need not determine whether strict scrutiny is applicable here, given that, as detailed below, we too hold that the challenged regulation fails under intermediate scrutiny set forth in *Central Hudson*."); United States v. Caronia, 703 F.3d 149, 164 (2d Cir. 2012) (referring to "lesser intermediate standard" that is set forth in *Central Hudson*).

[175] *Caronia*, 703 F.3d at 163; *cf.* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 803 (9th Cir. 2003) (distinguishing "commercial expectation" from commercial "purpose" under a fair use analysis because, as the Supreme Court has recognized, "even works involving comment and criticism 'are generally conducted for profit in this country.'" (quoting Harper & Row, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985))).

tablishing a sufficient interest to regulate the beermakers' commercial speech.[176] Where New York attempted to regulate "blockbusting," or soliciting listings of residential properties during times of economic distress or demographic changes, but exempted advertisements for listing properties in the same vulnerable communities if published in subscription or newsstand newspapers, the regulation failed intermediate scrutiny as being significantly underinclusive.[177] Similarly, where a New Jersey town banned "For Sale" signs outside of homes, but allowed other ugly signs, as well as more attractive signs over which people might still trip and fall, to stand its ban was unlawfully selective with respect to protecting the aesthetic impact or secondary effects of the signs.[178]

The targeting of social media influencers began as a lesser form of solicitude for bloggers than to writers for magazines, newspapers, and cable and broadcast television news shows and websites.[179] The FTC justified targeting bloggers because they

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[176] *See Rubin*, 514 U.S. at 490–91; Vugo, Inc. v. City of New York, 931 F.3d 42, 53 (2d Cir. 2019) ("A regulation may[] be deemed constitutionally problematic if it contains exceptions that 'undermine and counteract' the government's asserted interest." (quoting *Rubin*, 514 U.S. at 489))); Italian Colors Rest. v. Becerra, 878 F.3d 1165, 1177–78 (9th Cir. 2018) (citing *Rubin* for the proposition that even regulation justified by some evidence of consumer deception cannot stand if it makes broad exemptions that "undermine any ameliorative effect"); Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 99–100 (2d Cir. 1998) (state interest in regulating commercial speech may not be substantial if exemptions mean that state chose to "attack a narrow manifestation of a perceived problem," leaving the regulation a quite "limited step").

[177] N.Y. State Ass'n of Realtors, Inc. v. Shaffer, 27 F.3d 834, 844 (2d Cir. 1994).

[178] *See* Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 93–94 (1977).

[179] *See* What People Are Asking, *supra* note 19; Karen Butcher & Dana Gross, *FTC Issues Updated Guidance on Endorsements Compliance*, MORGAN LEWIS (2015), https://www.morganlewis.com/pubs/2015/06/ftc-issues-updated-guidance-on-endorsements-compliance ("Posting a video where an individual discusses a product received from a marketer or an affiliate for free constitutes an endorsement *in the same way as discussing the product on a blog,* with disclosure being required about both the relationship and the free goods." (emphasis added)); Anthony E. DiResta, Kwamina Thomas Williford, & Da'Morus A. Cohen, *Key Takeaways from FTC's "Disclosures 101 for Social Media Influencers"*, HOLLAND & KNIGHT (Nov. 6, 2019), https://www.hklaw.com/en/insights/publications/2019/11/key-takeaways-from-

lacked editors.[180] This is a characteristic that the Supreme Court has actually classified as one of the distinguishing virtues of Internet-based speakers.[181] By thus singling out bloggers and later social media influencers for additional disclosure burdens and prohibitions, the FTC's "exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"[182] The debatable public question in this case is whether disintermediated, many-to-many Internet communication is superior to—or at least should exist alongside and on equal terms with—traditional "journalism."

The FTC's speaker-based discrimination is especially harmful because Internet speech is recognized as being uniquely participatory and public, relative to broadcast, film, and print.[183] Regulating social media influencers for conflicts of interest entrenches corporate Internet gatekeepers and frustrates the aim of achieving the Web's open and decentralized potential.[184] It reinforces the policies of Facebook and Instagram, which dictate permissible user advertisements or impose differential disclosure requirements on social media influencers, unlike smaller platforms like Pinterest and Snapchat.[185] This frustrates the efforts of social media influ-

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ftcs-disclosures-101-for-social-media-influencers (noting the FTC restated its 2015 guidance for videos in 2019).

[180] *Internet Law, supra* note 4, at 1546–47.

[181] *See* Reno v. ACLU, 521 U.S. 844, 870 (1997) (noting the Internet lacks scarcity issues of broadcast media and therefore allows any individual to become a pamphleteer or deliver public addresses).

[182] City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (quoting First Nat. Bank of Boston v. Boletti, 435 U.S. 765, 785–786 (1978)); *see also* McCullen v. Coakley, 573 U.S. 464, 483 (2014).

[183] *See Reno,* 521 U.S. at 868; Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017)..

[184] *See* THE CONTRACT FOR THE WEB: PRINCIPLE 9, CONTRACT FOR THE WEB (2022), https://contractfortheweb.org/principles/principle-9-fight-for-the-web (urging Web users to "Fight for the Web . . . so the Web remains open and a global public resource for people everywhere," including by "[s]upporting startups and established companies that espouse the Web's future as a basic right and public good").

[185] *See* Felix Plücke, *Making Influencers Honest: The Role of Social Media Platforms in Regulating Disclosures, in* THE REGULATION OF SOCIAL MEDIA INFLUENCERS, 314–16 (2020). The author of this study observes that although

encers to capture a greater share of the economic value they produce in their societies.[186]

Similarly, the overbreadth of social media influencer regulations in terms of covering substantial amounts of noncommercial speech should be fatal to them in a constitutional sense. One decision explained:

> Although it is true that overbreadth analysis does not normally apply to commercial speech, . . . that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground — our reasoning being that commercial speech is more hardy, less likely to be "chilled," and not in need of surrogate litigators. Here, however, although the principal attack upon the resolution concerned its application to commercial speech, the alleged overbreadth (if the commercial-speech application is as-

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"Facebook & Instagram acknowledge that such a form of [sponsored content] advertisement is legal, they do not allow influencers to deploy this form of marketing," perhaps because "the platforms themselves would like to advertise content within videos and this might otherwise create conflicts of interests." *Id*. at 315. The differential or discriminatory requirements stem from Facebook or Instagram not requiring films, for example, to prominently disclose their paid placements, or so it seems. *Cf.* Spider-Man: No Way Home (@spidermanmovie), INSTAGRAM, (last visited Nov. 25, 2022) https://www.instagram.com/SpiderManMovie/ (no designation of *Spider-Man: No Way Home* as content sponsored by Hyundai); Ben Hsu, *Hyundai Video Plugs Ioniq 5's 'Spider-Man' Cameo*, AUTOBLOG.COM (Nov. 27, 2021), https://www.autoblog.com/2021/11/27/spiderman-hyundai-ioniq/ (observing that appearance of a Hyundai electric vehicle in *Spider-Man: No Way Home* was likely a paid placement); *Spider-Man: No Way Home (2021) Movie Product Placement (Page 1 of 2)*, PRODUCT PLACEMENT BLOG, https://productplacementblog.com/tag/spider-man-no-way-home-2021/page/2/ (last visited Nov. 25, 2022) (identifying two Hyundai vehicles and two billboards for Hyundai electric vehicles as paid placement in *Spider-Man: No Way Home*).

[186] *See* Freddie Wilkinson, *Influencers: The Modern Entrepreneur*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/influencers-modern-entrepreneur (last updated Jun. 2, 2022) ("Most influencers earn money through a combination of advertisements, company-sponsored posts, and sometimes creating their own brand of products . . . .").

> sumed to be valid) consists of its application to noncommercial speech, and that is what counts.
>
> On the record before us here, Resolution 66-156 must be deemed to reach some noncommercial speech. A stipulation entered into by the university stated that the resolution reaches any invited speech "where the end result is the intent to make a profit by the invitee . . . ." While these examples consist of speech for a profit, they do not consist of speech that *proposes* a commercial transaction, which is what defines commercial speech . . . .
>
> Quite obviously, the rule employed in as-applied analysis that a statute regulating commercial speech must be "narrowly tailored," . . . prevents a statute from being overbroad.[187]

The court remanded that case to decide whether that regulation was valid as to either commercial or noncommercial speech and, if so, whether it was overbroad and "unenforceable."[188]

The FTC's approach to influencer regulation seems to be overbroad as to noncommercial speech in several respects.[189] Advertising-supported media is not commercial speech.[190] Similarly, film reviews by newspaper columnists who receive free screenings for which many consumers would pay large sums, or even free travel

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[187] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) (citations omitted).

[188] *Id*. at 486. *Accord* Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 101 (2d Cir. 1998) (where "numerous less intrusive alternatives" could directly advance regulatory aim, broad regulations are "plainly excessive" in violation of the First Amendment).

[189] *See* Myers, *supra* note 12, at 1390–95 (unlike traditional advertisements, which are typically disseminated by the manufacturer or service product, and which often mention the price or where to engage in a transaction, social media photographs containing products that manufacturers gift to them are contained in mostly noncommercial feeds).

[190] *See id.*

to premieres and expensive hotel rooms, are not commercial speech either.[191]

Historical and categorical analysis under the First Amendment also undermines the constitutionality of the FTC-FCC framework for distinguishing social media influencers from actors and other influencers in film and broadcast media. Under a historical analysis, categories of speech such as libel, obscenity, fighting words, and copyright infringement are not shielded from prohibition or liability by the First Amendment.[192] However, if the "traditional contours" of the category are not maintained by the regulation or ban, the First Amendment is violated.[193] Thus, merely pleading libel or slander is not sufficient to evade the First Amendment's protection; if the defendant's speech lacks an essential element of libel or slander at common law, like the implication of a provably false factual claim concerning a specific individual, the First Amendment bars a libel action against the speech.[194] Similarly, if insulting or outrageous speech is too abstract to constitute individualized fighting words, civil liability for it would violate the First Amendment.[195] The category of obscenity is inapplicable and the

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[191] For the test that determines whether something is commercial, *see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Couns., Inc., 425 U.S. 748, 761 (1976); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 384 (1973); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) (revealing a mere economic motivation would clearly be insufficient by itself to turn the materials into commercial speech).

[192] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992); New York v. Ferber, 458 U.S. 747, 754, 763–64 (1982); Eldred v. Ashcroft, 537 U.S. 186, 218–19 (2003).

[193] *Eldred*, 537 U.S. at 221.

[194] *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 19–21 (1990) (collecting cases); Beauharnais v. Illinois, 343 U.S. 250, 263–66 (1952); Bible Believers v. Wayne County, 805 F.3d 228, 246 (6th Cir. 2015) (en banc); Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 672–673, 680 (7th Cir. 2008). *Cf.* Fla. Star v. B.J.F., 491 U.S. 524, 537–38, 541 (1989) (criticizing and ultimately invalidating application of law prohibiting the publishing of harmful but truthful information as lacking element of falsity as well as mens rea of negligence or worse for falsity or harm).

[195] *See* Snyder v. Phelps, 562 U.S. 443, 451–55 (2011) (no liability for highly offensive statements and epithets outside funeral that were not a disguised personal attack on anyone in particular). *Cf. id.* at 461 (Breyer, J., concurring) (suggesting that fighting words category was inapplicable); *id*. at 463–75 (Alito,

speech is allowed if it violates community standards and becomes "obscene" due to representations of violence rather than of sexual

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J., dissenting) (suggestion that liability would not violate First Amendment because defendants' speech and conduct were assaultive and akin to fighting words); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 55–57 (1988) (distinguishing outrageous words from fighting words and holding that states may impose civil liability on the latter but not former unless a key element of libel is present, i.e. implication of a fact concerning a specific person). There is an exception to this rule where persons have a special duty towards the listener or target of their words, such as employer-employee, common carrier-passenger, public accommodation-visitor, attorney-client, university-student, or the like. *See, e.g.*, *R.A.V.*, 505 U.S. at 389–90; Hishon v. King & Spalding, 467 U.S. 69, 78–79 (1984); *Pittsburgh Press Co.*, 413 U.S. at 386–91; EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1279–80 (9th Cir. 1982); Wilson v. Cable News Network, Inc., 444 P.3d 706, 721 (Cal. 2019), *remanded to* 2020 WL 548369 (Cal. App. 2d Dist. 2020); Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 33 (2018); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 119–20, 124 (2000); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. OF FREE SPEECH L. 377, 379 (2021); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 627 (1997). *But cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n, 138 S. Ct. 1719, 1731 (2018); Boy Scouts of Am. v. Dale, 530 U.S. 640, 657–59, 661 (2000); Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 561–81 (1995). The best justification for this exception seems to be a combination of "captive-audience" theory and the distinction between discriminatory offers or contracts in particular cases—as conduct—and discriminatory ideas or images in the abstract—as speech. *See* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246 (10th Cir. 1999). Another reason why liability may be imposed in some cases of racial, ethnic, religious, gender, or sexual orientation bias by businesses is that the speech relates to only the private affairs of the parties rather than to a matter of public concern, and an employer does not speak itself through the discriminatory words or conduct of the individual employees who discriminate or harass a colleague. *See* Booth v. Pasco Cnty., 757 F.3d 1198, 1212–15 (11th Cir. 2014); *Baty*, 172 F.3d at 1246. There is also an aspect of waiver upon entry into an employment, attorney-client, or common-carrier relationship, just as a university with an academic freedom policy waives its theoretical right to edit professors' or student groups' speech as a newspaper publisher would. *See* Erica R. Salkin & Colin Messke, *Opting in: Free Expression Statements at Private Universities and Colleges in the US,* 55 FIRST AMEND. STUD. 1 (2021). *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 670–72 (1991) (First Amendment does not limit contract or promissory-estoppel law as law of general applicability to all deals).

or scatological scenes.[196] Finally, imposing copyright liability for a book review or other fair use of a work, or trademark liability for a strictly descriptive or newsworthy use, would unlawfully diverge from the relevant category.[197]

The numerous departures from the traditional tort of fraud in the FTC's framework for regulating social media influencers further undermines the claim that these regulations are constitutional. As set forth in the next Part of this Article, fraud and deceit could not be pled or proven in the era in which the FTC was created unless there was an affirmative factual misstatement, not a mere failure to disclose something like a conflict of interest, with a few exceptions such as fiduciaries, doctors, and lawyers, and new facts making a prior statement false or misleading.[198] By contrast, the FTC's mandates on influencers seem to be insensitive as to whether the influencers affirmatively make a claim or purport to be objective reviewers. Likewise, fraud and deceit required proofs of facts, like effect on a purchasing decision and purchaser reliance, and did not apply to mere shifting patterns of thought, interest, or attention.[199] All this means that the traditional contours of the fraud exception to free speech have been abandoned, and the First Amendment should have an impact on the breadth and chilling effect of the FTC's rules.

The FTC has failed to carefully balance the costs and benefits of extending its public enforcement powers and expansive reme-

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[196] *See* United States v. Stevens, 559 U.S. 460, 471–72, 481–82 (2009); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792–93, 804–05 (2011).

[197] *See* Burk, *supra* note 110, at 216 (describing this conceivable constitutional violation as a form of failed tailoring of copyright law (citing Golan v. Holder, 565 U.S. 302 (2012)); *Eldred*, 537 U.S. at 186); Harper & Row, Publrs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1168–69 (2003); Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1558–62 (2007).

[198] *See* Arthur L. Goodhart*, Restatement of the Law of Torts, Volume III: A Comparison Between American and English Law*, 89 U. PA. L. REV. 265, 277–78 (1940); W. Page Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 645 (1937).

[199] *See* Goodhart, *supra* note 198, at 276–78 (citing RESTATEMENT (FIRST) OF TORTS § 538 (AM L. INST. 1938)).

dies to influencers who do not commit common-law fraud.[200] The failure is especially harmful to independent influencers given the discriminatory safe harbors extended to broadcasted and filmed product plugs.[201] These safe harbors even benefit several potentially deadly products like cigarettes, while the FTC has focused on teas, clothes, hair products, and video games.[202] This makes the FTC's infringements on influencer freedom ripe for First Amendment challenges.[203]

There is an analogy between First Amendment intermediate scrutiny of copyright expansion, whether temporally or in terms of substantive scope, and First Amendment scrutiny of administrative rules or regulations that expand the traditional law of fraud to cover implicit or hidden falsehoods. The problem with expanding cop-

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200 *See id.*

201 For example, viewing *Superman* or *Superman II* with Christopher Reeve and Margot Kidder on cable television or streaming services will likely result in the Marlboro brand continuing to benefit from its manufacturer paying tens of thousands of dollars for product placements. *See* Lackey, *supra* note 140, at 277–78. The same goes for *E.T.: The Extra Terrestrial* and even for its trailer in some cases. *See id*. at 278–79.

202 *See* Lackey, *supra* note 140, at 277–79, Myers, *supra* note 12, at 1392–93 (citation omitted); Fair, *supra* note 7; Press Release, Fed. Trade Comm'n, *supra* note 11; 16 C.F.R. § 255.1 ex. 5.

203 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 358 (2002) (holding that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so"); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (government must have "carefully calculated" the burden on speech that it imposes and "it must affirmatively establish the reasonable fit" between its regulations and its objectives); Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571 (1980) (government should have evidence that a "more limited speech regulation would be ineffective"); N.Y. State Ass'n of Realtors, Inc. v. Shaffer, 27 F.3d 834, 843–44 (2d Cir. 1994) (regulator's failure to analyze relative efficacy and burden on speech of less restrictive means of achieving its objective was constitutionally fatal to its regulatory regime); RIGHTS AND LIABILITIES IN MEDIA CONTENT § 11:17 (2d ed. 2022) ("Empirical evidence or the lack of it will often play an important role in the application of Central Hudson . . . .'Thus, the party who wants to restrict speech has the burden to prove it is misleading. [M]ost courts have become increasingly demanding in insisting that regulatory restrictions be buttressed by hard evidence supporting the necessity of such restrictions.'" (citations omitted)). *See also* Levi, *supra* note 55, at 648 (urging empirically-grounded self-regulation of ads).

yright without limit is not that copyright is unconstitutional in itself or a poor public policy in all cases.[204] It is that eventually, overbroad copyrights trample on literary and artistic freedom in order to root out speculative harms or real harms that are justifiable in context by associated benefits.[205]

The Supreme Court has also rejected attempts to regulate advertisements without adequate consideration of First Amendment interests and precedents.[206] In *Pittsburgh Press Company*,[207] a newspaper publisher argued that it was an impermissible prior restraint on speech and the press to order it, after a hearing before a municipal anti-discrimination commission, to place employment advertisements under columns designated male and female, where employers could discriminate on the basis of sex in hiring with the newspaper's aid.[208] Even though the ads were commercial speech

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[204] *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 900–01 (2002) (explaining that while some copyright speech restriction is necessary, "[a]n (impermissibly) broad version of copyright overtly limits [our freedom to speak]").

[205] *See* Floyd Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPR. SOC'Y 1, 11 (1987); Amy Adler, *Fair Use and the Future of Art,* 91 N.Y.U. L. REV. 599, 621 (2016); Baker, *supra* note 204, at 900; Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 51–52 (1998); David Lange, *Copyright and the Constitution in the Age of Intellectual Property*, 1 J. INTELL. PROP. L. 119, 133–34 (1994); LAWRENCE LESSIG, THE FUTURE OF IDEAS 187–90, 196–99 (2002); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 48–49 (2002); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROB. 147, 169–71 (2003); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 590 (2004); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 432–33 (1989); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplace and the Bill of Rights*, 33 WILLIAM AND MARY L. REV. 665, 681 (1992); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 348–49 (2004).

[206] Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 390–91 (1973).

[207] *Id.* at 377–80.

[208] *See id*. at 377–81.

with little expressive content, the Court emphasized that the First Amendment was not violated because there had not been any restraint on speech or the press "*before* an adequate determination that it is unprotected by the First Amendment."[209] The commission, having given the newspaper a hearing on the First Amendment argument and having given its order no effect before the Court, could reach its decision on the merits.[210] Analogously, in *Consolidated Edison*, the Court addressed a regulatory commission's attempt to restrict speech in the commercial interest of an electric utility on the topic of nuclear power in the aftermath of several oil price spikes.[211] Absent sufficient protections for the utility's ability to help consumers receive information about nuclear power as a potential option, or a close connection between the regulation and cost savings for electricity subscribers, the commission's order was unconstitutional.[212]

The FTC has given very little consideration to the First Amendment interests of social media influencers, advertisers, and ad agencies. Internet users' ability to cooperate on puffery, placement in images and video, and truthful reporting as to how products and services work is compromised compared to how film and television producers and directors, radio networks and their hosts, and others work with sponsors and ad agencies.[213] When influencers feature and praise products and services, they face differential and burdensome disclosure and substantiation requirements.[214] Their freedoms are not being respected.

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[209] *Id.* at 390 (emphasis added).

[210] *See id*. at 390.

[211] Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 532 (1980).

[212] *See id*. at 544.

[213] Harris, *supra* note 55, at 971.

[214] *See Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N (Nov. 2019), https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers ("If you endorse a product through social media, your endorsement message should make it obvious when you have a relationship ('material connection') with the brand . . . .As an influencer, it's your responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads." (emphasis omitted)).

II. THE STATUTORY FREEDOM OF INFLUENCING

A. *The "In Commerce" Requirement of Advertising Laws*

Speech that is not a mere advertisement for First Amendment purposes should also be outside the "use in commerce" requirements of the Lanham Act and the FTC Act.[215] Noncommercial speech, including a great deal of hybrid speech, is not "in commerce" for either constitutional or statutory purposes (these purposes are linked, of course).[216] The Lanham Act is directed to a person who uses a false or misleading statement in commercial advertising or promotion.[217] Mere praise for a product or service, even in a for-profit or advertising-supported medium like a blog

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[215] *See* § 1125; § 45.

[216] *See* Hoffman v. Cap. Cities/ABC, Inc., 255 F.3d 1180, 1183–84 (9th Cir. 2001); CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456, 461 (4th Cir. 2000); William O'Neil & Co. Inc. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002); Lane v. Random House, Inc., 985 F. Supp. 141, 146–47 (D.D.C. 1995); Said, *supra* note 20, at 421, 423. *Cf.* Rescuecom Corp. v. Google, Inc. 562 F.3d 123, 136 (2d Cir. 2009) (prior to 1989, "Section 43(a) [of the Lanham Act], eventually codified as § 1125(a), . . . *required,* as an element of the cause of action, that the infringer 'cause the [infringing] goods or services to enter into commerce'—a jurisdictional prerequisite for Congress's power to legislate in this area.") (emphasis added) (citation omitted); Fortres Grand Corp. v. Warner Bros. Ent. Inc., 947 F. Supp. 2d 922, 933–34 (N.D. Ind. 2013) (website for motion picture with instructions on where to buy tickets was not pure advertisement because creative content of movie was included on it). Even though the Lanham Act defines a "use in commerce" of a trademark, for example, to include use on "displays associated therewith or on the . . . labels affixed thereto, or . . . on documents associated with the goods or their sale," a drug store like Walgreens that places Wal-gate next to Colgate or Wal-borne next to Airborne does not use the Colgate or Airborne trademarks. *See* 1-800 Contacts, Inc. v. WhenU.com, Inc., 414 F.3d 400, 407-11 (2d Cir. 2005) (quoting 15 U.S.C. § 1125(a); 15 U.S.C § 1127). Likewise, an eye care company does not use trademarks like 1-800CONTACTS when it buys placement on pop-up window advertising networks like WhenU.com. *See id*. at 401-12. A 1989 amendment to the Lanham Act made section 1125(a) applicable to statements about a manufacturer or its products as well as a competitor or its products, but not necessarily to statements about *neither* the manufacturer's products nor the competitor's ones, such as a statement by a *consumer* praising or merely mentioning the products of a company that is happy to be featured in this way. *See* Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1052 (9th Cir. 2008); *Rescuecom*, 562 F.3d at 135–37.

[217] *In re* Elysium Health-ChromaDex Litig., No. 17-cv-7394, 2022 WL 421135, at *10 (S.D.N.Y. Feb. 3, 2022).

with medical ads, a copy of *Consumer Reports*, or a trade magazine, is not necessarily regulated by the Lanham Act's prohibition on false or misleading advertisements.[218] Even urging consumers to buy one brand rather than another on a website stocked with links and advertisements for products, to explore a brand, or to "steer clear" of others is not commercial.[219]

A decision from several years ago raises issues similar to those posed by some influencer speech.[220] An online directory of attorney profiles gave attorneys who paid it higher ratings in terms of qualifications and professional status and spotlighted glowing reviews while burying negative ones.[221] The court held that the current or former clients' reviews were subjective opinions, not commercial speech.[222] Whether or not the directory contains ads for attorneys and law firms, the attorneys are the ones making proposals that people hire them, not the directory.[223] Influencer posts and videos, like directories, magazines, and blogs, often inform or call attention to proposals to enter into commercial transactions, but they are not themselves regular advertisements.

B. *The Commercial Nexus Requirement of Advertising Laws*

A related source of communicative freedom is the Lanham Act's "commercial advertising or promotion" requirement.[224] It protects speech about products or services from false advertising claims, even if the speech is commercial in appearance or motivation. Commercial speech is not "commercial advertising or promo-

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[218] *See id.*

[219] *See* Golo, LLC v. Highya, LLC, 310 F. Supp. 3d 499, 504–05 (E.D. Pa. 2018) (citing Tobinick v. Novella, 848 F.3d 935 (11th Cir. 2017)).

[220] *See generally* Davis v. Avvo, Inc., 345 F. Supp. 3d 534 (S.D.N.Y. 2018).

[221] *See id.* at 539.

[222] *See id.* at 543.

[223] *See id*. at 540 (the badges, ratings, and reviews "might be considered in making, but do not themselves propose, a commercial transaction. [That] sponsored advertisements appear on the defendant's website does not morph the website's noncommercial features into commercial speech). *See* Vrdolyak v. Avvo, Inc., 206 F. Supp. 3d 1384, 1387-89 (N.D. Ill. 2016) (holding that sponsored listings do not "turn the entire attorney directory into commercial speech").

[224] Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348 (11th Cir. 2012).

tion" unless it is also made or delivered by a defendant "in commercial competition with [the plaintiff] . . . for the purpose of influencing consumers to buy *defendant's* goods or services" and "disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion.'"[225] Therefore, most successful false advertising cases involving online reviews relate to the dissemination of false claims about the market, the creation of purportedly independent testimonials or scientific evaluations that are not at arm's length from the producer, or both of these moves.[226]

Even if the commercial competition requirement is at odds with dicta in *Lexmark International v. Static Controls*,[227] the pur-

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[225] *Id.* at 1349 (emphasis added) (citation omitted). *See also* Ariix, LLC v. Nutrisearch Corp., 17CV320-LAB (BGS), 2018 WL 1456928, at *2 (S.D. Cal. Mar. 23, 2018) ("Until 1988, this section [1125] of the Lanham Act covered only misrepresentations regarding one's own product, and not disparagement of another company's product." The 1989 amendment to Lanham Act was not intended "to regulate consumer reports" or "'stifle criticism' of goods or services by some means other than marketing or advertising" (citation omitted)), *rev'd on other grounds*, 985 F.3d 1107, 1116–19 (9th Cir. 2021). Some lower courts have questioned this widely-endorsed standard for commercial advertising or promotion under the Lanham Act, *see id.,* on the grounds that it is inconsistent with the Supreme Court's holding in *Lexmark, Int'l v. Static Controls*, 572 U.S. 118, 118 (2014) that commercial competition is not necessary to plead an injury for false advertising. *See*, *e.g.*, Strauss v. Angie's List, Inc., 951 F.3d 1263, 1265–67 (10th Cir. 2020); Tobinick v. Novella, 142 F. Supp. 3d 1275, 1279–80 (S.D. Fla. 2015), *aff'd on other grounds,* 848 F.3d 935 (11th Cir. 2017). The Court, however, emphasized that it had not addressed the standard for commercial advertising or promotion. *See Lexmark*, 572 U.S. at 125, 125 n.1 (issue in courts below was standing, not commercial advertising/promotion); *Strauss,* 951 F.3d at 1265–67 (limiting its holding to the injury issue); *Tobinick,* 848 F.3d at 950 (reiterating pre-*Lexmark* standard for commercial advertising or promotion).

[226] *See Ariix*, 985 F.3d at 1116–19 (nutritional supplement company lavishly funded its former personnel to publish guide that not only failed to disclose its bias or financial relationships but gave misleading reviews to plaintiff's detriment); Vitamins Online, Inc. v. Heartwise, Inc., No. 2:13–CV–982–DAK, 2017 WL 2733867, at *1 (D. Utah May 11, 2017) (supplement company misstated contents of its products and then concocted consumer reviews while block voting on reviews' helpfulness to bury bad reviews); Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC, No. 08CV0442(DLC), 2016 WL 815205, at *9 (S.D.N.Y. Feb. 29, 2016) (competitor concocted bad reviews of plaintiff including horrible physical reactions to its treatments of customers' skin).

[227] *See* 572 U.S. at 118.

pose and dissemination requirements protect influencer freedom in ways that go beyond the basic requirement of a use in commerce/commercial speech. The objective of influencing consumers to buy the advertisers' or promoters' own goods and services is not present when social media influencers' purpose is to encourage their followers to consider a sponsor's goods or services.[228] Likewise, the content of creative works does not qualify as "advertising or promotion" even if the works praise themselves in a misleading or unfair way.[229] Where social media influencers embed mentions or evaluations of products in their own textual, audiovisual, or photographic stories, they do not necessarily disseminate an advertisement or promotional statement that is separate from their own creative works.[230] Despite conveying a misleading or exaggerated reassurance of objectivity or independence, an influencer's own feed of posts, photos, or videos is not the advertisement or promotion of itself.[231]

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[228] *Suntree Techs*., 693 F.3d at 1349; Roberts, *supra* note 30, at 118 (noting rule but contrary authority as well).

[229] *See* Rice v. Fox Broad. Co., 330 F.3d 1170, 1180–81 (9th Cir. 2003).

[230] *See, e.g.*, Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 424 (1st Cir. 2007) (when a search engine "might profit by encouraging others to talk about [a brand] under the [brand's] name, . . . neither that speech nor [its] providing a forum for that speech is the type of use that is subject to trademark liability"); *Rice*, 330 F.3d at 1180–81 (television special or VHS tape is not commercial advertising or promotion of itself). *Cf.* Findings of Fact and Conclusions of Law ¶ 71, at 23, *Vitamins Online, Inc.*, 2020 WL 6581050 (supplement company falsely marketed its ingredients and voted up positive reviews); *Romeo & Juliette Laser Hair Removal*, 2016 WL 815205, at *19 (hair removal company concocted fake reviews to increase its own business and harm that of competitor); Casper Sleep, Inc. v. Nectar Brand, LLC, No. 18 Civ. 4459, 2020 WL 5659581, at *13 (S.D.N.Y. Sept. 23, 2020).

[231] *See Tobinick*, 848 F.3d at 952 (website articles by Alzheimer's and back pain specialist and implying that another specialist in these conditions was a fraud and a quack, and at one point mentioning medical practice of article's author, "are not commercial speech simply because extraneous advertisements and links for memberships may generate revenue"); Semco, Inc. v. Amcast, Inc., 52 F.3d 108, 110, 113 (6th Cir. 1995) (where manufacturer makes false or misleading statement about its product in a trade journal, the court emphasized "that neither [the journal] nor its editor could be held liable under the Lanham Act"); World Wrestling Fed'n Ent. v. Bozell, 142 F. Supp. 2d 514, 530 (S.D.N.Y. 2001) ("'[T]o constitute "commercial speech" as intended by § 43(a) . . . , the challenged conduct does not only require disparagement of a service or product,

Social media influencer speech about sponsors' products should be found to be noncommercial speech in many instances. It is not commercial advertising or promotion in many instances because of another principle of the law of false advertising: this is not an area of law that regulates the origin or veracity of opinions or ideas. Misleading speech about the authorship of a work or the ideas and feelings it contains is treated completely differently than misleading speech about the origin or sponsorship of products or services.[232]A contrary ruling would make plagiarism or copyright infringement a form of false advertising, arguably distorting the policy decisions of Congress as reflected in the copyright and advertising laws.[233] Thus, creating a fictional literary persona is not false advertising as to the origin of a book or script as being the

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it additionally requires that the defendant do so . . . to promote *its own* service or product.'" (emphasis added) (quoting Sodexho USA, Inc. v. Hotel & Rest. Emps. & Bartenders Union, 989 F. Supp. 169, 172 (D. Conn. 1997))); Davis v. Avvo, Inc., 345 F. Supp. 3d 534, 539–41 (S.D.N.Y. 2018) (pretensions to objectivity of attorney directory and failure to disclose financial motivations to boost professionalism and qualifications rankings of attorneys, are not commercial conduct under Lanham Act); Lane v. Random House, Inc., 985 F. Supp. 141, 152 (D.D.C. 1995) (there is "no justification for categorizing . . . [an ad for a book, let alone the book's content] as commercial speech, nor for diminishing the constitutional safeguards to which it is properly entitled"). *Cf.* Ariix, LLC v. Nutrisearch Corp., 17CV320-LAB (BGS), 2018 WL 1456928, at *5 (S.D. Cal. Mar. 23, 2018) ("These statements are arguably commercial speech only insofar as they promote the [work], and encourage people to buy it. They do not 'propose a commercial transaction' about any other product and apply to every company and product the [work] covers, not just to some . . . .[T]hey do not meet [the 'commercial advertising or promotion' test's] fourth element that they be sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the publishing or bookselling industry."), *rev'd*, 985 F.3d 1107, 1116–19 (9th Cir. 2021) (reversing district court's opinion because statements' entire purpose was to sell affiliate's products, not simply occasionally to advertise them, and observing that "not all types of economic motivation support commercial speech . . . .Otherwise, virtually any newspaper, magazine, or book for sale could be considered a commercial publication.").

[232] *See* Jane C. Ginsburg, *Of Mutant Copyrights, Mangled Trademarks, and Barbie's Beneficence: The Influence of Copyright on Trademark Law, in* TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 481–87 (Graeme Dinwoodie & Mark Janis eds., 2008) (citing, inter alia, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)).

[233] *See id.* at 481–82; 15 U.S.C. § 1132 *et seq.*; 17 U.S.C. § 101 *et seq.*

brainchild of a heroic, hilarious, traumatized, or highly accomplished human being.[234] "Simply mislabeling and selling [a creative] work without advertising the name substitution [or mislabeling] may not constitute 'promotion,'" in other words.[235] Designating the source of a fake book as the *Harry Potter* series or Scholastic Publishers, on the other hand, qualifies more easily as "advertising or promotion."[236]

Social media influencers-sponsor relationships are similar to a number of other relationships exempted from Lanham Act liability. When third parties quote or summarize manufacturers' press releases, even those containing factual assertions concerning one or more products, neither the manufacturer nor the third party engages in conduct in connection with the promotion or sale of goods or services.[237] *The New York Times* does not become commercial

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[234] *See* Antidote Int'l Films, Inc. v. Bloomsbury Pub'g, PLC, 467 F. Supp. 2d 394, 397–98 (S.D.N.Y. 2006); GINSBURG, *supra* note 220, at 486–87; *see also* Hustlers v. Thomasson, No. 1:01–CV–3026–TWT, 2004 WL 3241667 (N.D. Ga 2004); GINSBURG, *supra* note 220, at 482–83. *But cf.* Croson v. Eislinger, 455 F. Supp. 2d 256 (S.D.N.Y. 2006).

[235] GINSBURG, *supra* note 220, at 488 (quoting 15 U.S.C. § 1125(a)(1)(B)).

[236] *See* Bach v. Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1110, 1113–14, 1127 (W.D. Wa. 2007); GINSBURG, *supra* note 220, at 482.

[237] *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 n.22 (1984) ("commercial advertiser" is usually speaking about a "product or service *he himself* provides") (emphasis in original); Ariix, LLC v. Nutrisearch Corp., 985 F.3d 1107, 1125 (9th Cir. 2021) (Collins, J., dissenting) ("We do not normally think of *third-party* product reviews or endorsements as being that person's 'commercial advertising'—at least when they are not done on behalf of the product's manufacturer or seller . . . .Indeed, the Supreme Court has 'squarely held' that third-party product reviews—favorable or unfavorable—are fully protected speech." (emphasis in original) (citations omitted)); CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456, 462–63 (4th Cir. 2000) (editorial and historical commentary about a peanut butter company was a "matter[] of public concern" and "protected") (citing Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)); Commodity Trend Serv., Inc. v. Commodity Fut. Trading Comm'n, 149 F.3d 679, 686 (7th Cir. 1998) (reviews of other parties' products are not proposals to sell those products directly) (collecting cases); Ariix, LLC v. Nutrisearch Corp., 17CV320-LAB (BGS), 2018 WL 1456928, at *7 (S.D. Cal. Mar. 23, 2018) (nutritional supplement guide's text is not commercial advertising or promotion of either supplements or of itself to booksellers or publishers), *rev'd*, 985 F.3d at 1112–19 (supplement could be sufficiently commercial if developed and manipulated by company as mere scheme to boost sales);

speech, for example, by quoting its advertisers, like Apple, as saying "Think Different" or "There's nothing like watching video on iPad . . . ."[238] Similarly, manufacturers touting the result of a third-party book, study, or press release do not transform the words they quote into an advertisement by the original author.[239] Both the trademark infringement laws and the trademark dilution amendments to these laws protect non-commercial uses of words, including descriptive or nominative uses, from trademark-related claims.[240] At least one court has held that it is a non-infringing

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Gordon & Breach Sci. Publishers v. AIP, 859 F. Supp. 1521, 1532–33 (S.D.N.Y. 1994) (independent scientific work favorable to defendants that does not disclose scientists' affiliations with them is not commercial advertising or promotion); Tushnet, *supra* note 20, at 733 n.37.

[238] *See* Stuart Elliot, *The Media Business: Advertising; Apple Endorses Some Achievers Who Think Different,* N.Y. TIMES (Aug. 3, 1998), https://www.nytimes.com/1998/08/03/business/the-media-business-advertising-apple-endorses-some-achievers-who-think-different.html.

[239] *See Gordon & Breach Sci. Publishers*, 859 F. Supp. at 1544–45; *see also Ariix*, 2018 WL 1456928, at *7, *rev'd on other grounds*, 985 F.3d at 1116–19. Some courts have recognized the possibility of principal-agent relationships making manufacturers liable for what influencers say, but that is different from ratification and the like. *See In re* Elysium Health-ChromaDex Litig., No. 17-cv-7394, 2022 WL 421135, at *40–41 (S.D.N.Y. Feb. 3, 2022) (observing that the "fact that ChromaDex might reward Albaum or any other third party for steering business ChromaDex's way does not establish that ChromaDex has the ability to exercise any control or direction over the statements that [party] might make," and holding that "in the absence of evidence that an influencer is making the statement on behalf of the defendant or at the defendant's direction or under its control rather than simply for its own benefit, the company cannot be held liable on a principal-agent theory."); *id*. ("[C]ertain allegations reference statements made by online influencers who are not defendants . . . cannot form the basis of a fraud claim' against the defendants because they are not 'attributable to defendants'" (quoting *In re* Fyre Festival Litig., 399 F. Supp. 3d 203, 213 (S.D.N.Y. 2019))). *Compare* Colgate v. JUUL Labs, Inc., 402 F. Supp. 3d 728, 760 (N.D. Cal. 2019) (manufacturer not liable for ratification of non-agent Instagrammer's promotions).

[240] 15 U.S.C. § 1115(b)(4) (trademark infringement does not occur when "the use . . . charged to be an infringement is a use, otherwise than as a mark, of . . . a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin"); § 1125(c)(3) (Trademark Dilution Revision Act of 2006 continued to provide that "[a]ny fair use, including a nominative or descriptive fair use" does not constitute actionable trademark dilution).

nominative use for people to promote themselves by emphasizing their current or former connection to a famous trademark.[241] Such uses are not subjected to regulation simply because the user has an economic motive. False advertising or promotion should involve one's own offerings or those of a competitor.[242]

The FTC Act may have a somewhat broader application than the Lanham Act. It uses the phrase "in or affecting commerce" where the Lanham Act in pertinent part refers to a "use[] in commerce" of "advertising or promotion."[243] The scope of "in or affecting commerce" is a "complicated legal question," which may be known only to "students of constitutional law."[244] Assuming that the phrase extends to the full scope of the power of Congress to regulate interstate commerce,[245] it may reach (1) commercial activity, (2) other activity having a substantial effect on commercial activity, and (3) noncommercial activity that has a substantial effect when aggregated with similar activities of others.[246]

There is a potential argument, albeit a difficult one, that social media influencing with sponsor support is not activity "in or affecting commerce" under the FTC Act. First, the Lanham Act case law discussed above—setting limits on the "use in commerce" with "advertising or promotion" requirements—could be equally applicable to the FTC Act; both sets of legislation are intended to reach the outer limits of congressional authority to regulate interstate commerce.[247] Second, at least two courts have concluded that re-

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[241] Playboy Enters., Inc. v. Welles, 279 F.3d 796, 807 (9th Cir. 2002); Carl S. Kaplan, *Case Against Playboy Model Could Set Precedent,* N.Y. TIMES (Apr. 17, 1998), https://archive.nytimes.com/www.nytimes.com/library/tech/98/04/cyber/cyberlaw/17law.html.

[242] *See* Rescuecom Corp. v. Google, Inc. 562 F.3d 123, 129–31 (2d Cir. 2009).

[243] *See* 15 U.S.C. § 45; 15 U.S.C. § 1125(a)(1)(B).

[244] Rehaif v. United States, 139 S. Ct. 2191, 2207 (2019) (Alito, J., dissenting).

[245] *See id.* at 2196 (opinion of the Court) (making this assumption as to purpose of such language, albeit in a federal criminal statute).

[246] *See* Nat'l Fed'n of Indep. Bus. v. Sibelius, 567 U.S. 519, 548–49 (2012).

[247] United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 92–93 (2d Cir. 1997); Browne v. McCain, 612 F. Supp. 2d 1125, 1132 (C.D. Cal. 2009).

ceipt of commissions from an advertiser's sales is important in determining whether or not Internet posts are "commercial," "for business purposes," or "advertising."[248] Accordingly, there may be a difference between posting content for a fee per post and doing so as part of a commission-based relationship that suggests a primarily commercial purpose or effect.[249] While one might argue

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[248] *See* Enigma Software Grp. USA, LLC v. Bleeping Comput., LLC, 194 F. Supp. 3d 263, 294 n.24 (S.D.N.Y. 2016); Handsome Brook Farm, LLC v. Hum. Farm Animal Care, Inc., 193 F. Supp. 3d 556, 559, 568–71 (E.D. Va. 2016), *aff'd*, 700 F. App'x 251 (4th Cir. 2017).

[249] *Compare Enigma Software Grp.*, 194 F. Supp. 3d at 294 n.24 and accompanying text (disparagement of software was commercial advertising/for business purposes where website earned commissions from competitors to victim of disparagement), *with* Strauss v. Angie's List, Inc., 951 F.3d 1263, 1265–67 (9th Cir. 2020) (disparagement of tree service was not commercial advertising or promotion where plaintiff alleged it occurred because plaintiff had not paid website enough in advertising fees). As one court explained, helpfully:

> The law supports the proposition that whether a statement constitutes commercial speech in the first instance and a promotion or advertisement in the second is not to be judged solely by looking at the challenged statement alone and in isolation but also by examining the entire communication in which the statement appears . . . .
>
> *The [Lanham Act] ordinarily applies where the challenged statement is made by the defendant and attributed to it; that is the clearest use in commerce.* It has been applied in a handful of cases where, even though a statement is not attributed to the defendant, it is made by an agent of the defendant . . . .There are no reported cases where Lanham Act liability is extended to a company that merely benefits from the statement and compensates the author for the statement in the absence of an agency relationship or evidence that it has exercised control over or caused the statement . . . .
>
> [T]he fact that [a company] might reward [a blogger] or any other third party for steering business [its] way does not establish that [it] has the ability to exercise any control or direction over the statements that [the blogger] might make. A whole industry exists of social media influencers, *who create their own content* touting products and receive commission on sales of those products that stem from their advertising. A claim might lie directly against such persons whether under federal law or the state law of trade defamation if they make a false

that "in or affecting commerce" is broader than the Lanham Act's "commercial" and "in commerce," the Supreme Court has also resisted efforts to stretch effects on commerce without limit.[250]

C. *The False or Misleading Statement Requirement of Advertising Laws*

Both the Lanham Act and the FTC Act are directed to false or misleading factual assertions or implications, not to questionable or baseless statements of opinion.[251] As one court explained, subjective praise for, or doubts about, a product are statements of opinion unless they purport to be based on some objective measurements or other hidden facts that might be provably false.[252]

> and misleading statement. But in the absence of evidence that an influencer is making the statement on behalf of the defendant or at the defendant's direction or under its control rather than simply for its own benefit, the company cannot be held liable on a principal-agent theory . . . .
>
> [T]he fact that the company might communicate with a person who later writes about the company or its product does not make the company liable under the Lanham Act. To so penalize the company or its executive officers based solely on a company's executives['] private communications with the company's shareholder would strain both the Lanham Act and the First Amendment.

In re Elysium Health-ChromaDex Litig., No. 17-cv-7394(LJL), 2022 U.S. Dist. LEXIS 25090, at *32–33, *35–36, *40–42 (S.D.N.Y. Feb. 3, 2022) (citations omitted). The FTC sometimes tries to point out that influencers are controlled or working for advertisers or brands because they submit proposed posts for approval, but this form of editing does not necessarily create an employment or agency relationship as *Elysium Health-ChromaDex* envisions; for example, book authors have editors and films are edited by broadcast censors without authors or directors being agents of editors or broadcasters. *See* Press Release, Fed. Trade Comm'n, *supra* note 11.

[250] *See* Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899, 906 (9th Cir. 2002).

[251] *See, e.g.*, Groden v. Random House, Inc., 61 F.3d 1045, 1051–52 (2d Cir. 1995) (collecting cases); Commodity Trend Serv., Inc. v. Commodity Fut. Trading Comm'n, 149 F.3d 679, 686 (7th Cir. 1998) (collecting cases); Ariix, LLC v. Nutrisearch Corp., 17CV320-LAB (BGS), 2018 WL 1456928, at *7 (S.D. Cal. Mar. 23, 2018), *rev'd,* 985 F.3d at 1121–22 (9th Cir. 2021).

[252] *Ariix*, 2018 WL 1456928, at *7.

Thus, that court held that a comparative guide to vitamins and minerals was not making factual assertions when it allegedly gave misleading "top quality" and "Gold Medal" ratings to products that were not sold by the author or publisher, but that were sold by a manufacturer that once employed the guide's author and still paid speaking fees to him (while encouraging its agents to purchase copies of the guide).[253] Absent such an affirmative misstatement that there is no economic relationship or that any competitor of the awardee failed to meet certain measurable criteria, displaying an "evidence" based "award" as being bestowed without any "bias" is a subjective statement that is not actionable under the Lanham Act.[254] Similarly, the gravamen of some FTC suits against companies for using influencer marketing—that an unjustified impression of impartiality was won—seems to be challenging a subjective or unproven claim: people who review things they purchased themselves are more independent and unbiased than those who received things for free.[255]

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[253] *See id*. at *6. The court explained:

> The factual allegations suggest that the *Guide* purports to review scientific literature and provide product evaluations in light of that . . . .Decisions about how criteria are selected and weighed are themselves not necessarily objective, even though the information that is being used may be.

Id. at *7 (citation omitted).

[254] *See Ariix*, 985 F.3d at 1121.

[255] *See* Complaint at 2, Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), File No 152-3181, https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmpt.pdf; Decision and Order at 3, Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), File No 152-3181, https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf; Myers, *supra* note 12, at 1393. Indeed, as Tushnet explains, the FTC assumes that everyone knows that films or books reviewed in newspapers or on television may have been gifted to the reviewer, but that no one suspects that a blogger will receive a free product to review unless that endorsement is prominently disclosed, which appears to be an example of speaker-based discrimination that is tantamount to content discrimination. Tushnet, *supra* note 20, at 757. Even if the FTC was right about consumer perceptions, there would seem to be no factual (as opposed to ethical or subjective) false advertising or deception to correct, according to some Lanham Act cases. *See, e.g.*, *Ariix*, 985 F.3d at 1121. A reviewer's love of free books or movie tickets might be outweighed by some other subjective criteria, such as hatred of superhero movies or wordy nonfiction

Influencers targeted for regulation by the FTC (and scholars who encourage the FTC to be more active against endorsers and other influencers) are typically engaged in sharing very personal and subjective opinions without disclosing that they are being paid to do so.[256] Like a book or website that ranks products or services as effective, a social media influencer's feed is not necessarily objectively true or false, even when it touts or simply mentions a sponsor.[257] In fact, most online speech that is being targeted for

books. *See* Davis v. Avvo, Inc., 345 F. Supp. 3d 534, 541 (S.D.N.Y. 2018) (noting the factors that a person believes to be important in giving an evaluation and the weight that person affords to those factors cannot be proven false).

[256] *See, e.g.*, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0(e) (examples 1 and 7), 255.1(c) (2022) (purporting to regulate beliefs and endorsements of individuals who do not produce or sell products they have beliefs about or make endorsements about); Fair, *supra* note 7 (discussing lawsuit brought by FTC against tea marketer for incentivizing influencers to share positive impressions or reactions concerning tea they do not make or sell without disclosing that they had been paid to do so); Complaint for Permanent Injunction & Other Equitable Relief, *supra* note 10, ¶¶ 20, 43–52 (claiming social media influencers should be regulated for touting potential return on investments that they had an economic interest in mentioning or praising); Press Release, Fed. Trade Comm'n, *supra* note 7 (discussing lawsuit brought by FTC against individual influencers for failing to disclose that they were being paid to use the video-game "skin" betting system they promoted); Press Release, Fed. Trade Comm'n, *supra* note 7 (discussing lawsuit brought by FTC against marketer of guitar lesson DVDs for incentivizing influencers to share "consumer" or "independent" reviews without disclosing they had been paid); Press Release, Fed. Trade Comm'n, *supra* note 18 (discussing lawsuit brought by FTC against marketer of video games for incentivizing gamers to share their opinions regarding gaming apps without disclosing they had been paid); Press Release, Fed. Trade Comm'n, *supra* note 7 (discussing lawsuit brought by FTC against video game creator for incentivizing influencers to share positive impressions of its game system or games without disclosing they were being paid for their endorsement); Short, *supra* note 18, at 459–60 (discussing FTC enforcements against video games and guitar lessons marketers for deceptive trade practice of failing to disclose financial connections between marketers and reviewers); Izzo, *supra* note 22, at 50–52 (giving examples of subjective influencer marketing); Roberts, *supra* note 30, at 125 (observing that disclosure of material benefit is necessary because consumers cannot distinguish between sponsored content and organic content based on influencers' personal experiences).

[257] *See Avvo, Inc.*, 345 F. Supp. 3d at 541–42 (finding defendant's use of "highly qualified," "the right," or the "best" in its advertisement to be nonactionable puffery because they are subjective statement that "cannot be proven

regulation is much less verifiable or scientific-sounding than a purportedly neutral directory of products or services, which courts have found to be subjective.[258]

Some scholars defend the extension of disclosure requirements to endorsers' non-factual statements by arguing that the statements influence consumers, otherwise sponsors would not pay for them.[259] This conclusion seems difficult to reconcile with the principle that paid advertising containing subjective or unverifiable statements is not actionable as false advertising under federal or state law despite being carried in exchange for money.[260] Money, in short, does not convert pure opinion into fact.[261]

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true or false"); *In re* Juul Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litg., 497 F. Supp. 3d 552, 626 (N.D. Cal. 2020) (suggesting it would be nonactionable puffery for influencers to call Juul e-cigarettes "the best" or a "smoother" electronic nicotine delivery system compared to its competitors, but also "quantifiabl[e]" claims would not be).

[258] *See Ariix,* 985 F.3d at 1121 (finding statements evaluating products sold by a close affiliate of the author are not "actionable" when they are "simply statements of opinion about the relative quality of various . . . products," such as when the author "purports to rely on scientific and objective criteria" but is free to decide how to select and weigh such criteria); *Avvo*, 345 F. Supp. 3d at 540–41 (holding attorney directory on website too subjective to be false or misleading, even if it was seemingly neutral and independent from attorneys themselves).

[259] *See* Tushnet, *supra* note 20, at 754–55 (arguing that the potential for deception and distortion of consumer decisions justifies a disclosure requirement).

[260] *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731–32 (9th Cir. 1999); *Avvo*, 345 F. Supp. 2d at 543 (holding even if attorney directory was paid to feature certain attorneys and knowingly boosted positive reviews of its sponsoring attorneys while burying negative reviews in collusion with sponsoring attorneys, this was not illegal false advertising).

[261] *See Avvo*, 345 F. Supp. 3d at 541–42 (holding defendant who was paid to promote certain attorneys as being a "Pro[,]" "highly qualified," "the right," or the "best," was voicing nonactionable opinions). A mixed opinion, or an opinion which implies a provably false fact, may still be actionable. *See Coastal Abstract*, 173 F.3d at 731–32 (citing Dial A Car, Inc. v. Transp., Inc., 82 F.3d 484, 488–89 (D.C. Cir. 1996)). *Compare* Aviation Charter, Inc. v. Aviation Res. Grp./US, 416 F.3d 864, 870 (8th Cir. 2005) (safety rating as subjective opinion), *and* Wall & Assocs., Inc. v. Better Bus. Bureau of Cent. Va., Inc., No. 1:16-cv-119, 2016 WL 3087055, at *3 n.2 (E.D. Va. May 31, 2016), *aff'd*, 685 Fed. Appx. 277 (4th Cir. 2017) (business rating as subjective opinion), *with Ariix,* 985 F.3d at 1122 (holding that failing to grant a candidate a medal may be ac-

One court has concluded that for Lanham Act purposes, creating fake reviews or hiding the true source of reviews is not sufficiently false to impose a remedy *unless* the defendant intended to deceive customers, there is empirical evidence of consumer confusion from surveys etc., or both of these facts exist.[262] Thus, a plaintiff could go to trial on claims that fake reviews harmed its sales. This is in contrast to prior cases where there was no evidence that fake reviews were false because they were not provable one way or another, even when a producer of a product or service was biased and reviewed it well, or reviewed a competitor negatively without pretending to be independent consumers.[263] Together, these cases suggest that where a social media influencer really uses a product and either displays that fact or reviews it favorably for pay, there is no literal or implied falsity unless the influencer intends to lie and/or actual deception is proven.

The FTC Act uses different language from the Lanham Act.[264] The statutory text may have a broader application, as with the "in or affecting commerce" versus "uses in commerce . . . advertising or promotion" issue.[265] Section 45 of the Act applies to "deceptive acts or practices," and Section 52 defines an advertisement as such a deceptive act or practice that is made for the "purpose of inducing, or which is likely to induce, directly or indirectly, the purchase

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tionable under Lanham Act if it implies provably false assertion that candidate did not pass FDA or other laboratory quality tests), *and* U.S. Structural Plywood Integrity Coal. v. PFS Corp., 524 F. Supp. 3d 1320, 1335 (S.D. Fla. 2021) (noting that a quality stamp is a provably true or false fact, not an opinion).

[262] *See* Vitamins Online, Inc. v. Heartwise, Inc., No. 13-cv-00982, 2019 WL 6682313, at *9–10, 18–20 (D. Utah Sept. 24, 2019).

[263] *See id.* at *11–12 (citing Nunes v. Rushton, 299 F. Supp. 3d 1216, 1222–23 (D. Utah 2018)); Romeo & Juliette Laser Hair Removal. Inc. v. Assara I LLC, No. 08CV0442(DLC), 2016 WL 815205, at *7 (S.D.N.Y. Feb. 29, 2016); *Nunes,* 299 F. Supp. 3d at 1222–23; s*ee also* Vincent v. Utah Plastic Surgery Soc'y, 621 Fed. App'x 546, 550 (10th Cir. 2015); Merck Eprova AG v. Gnosis S.P.A., 760 F.3d 247, 256 (2d Cir. 2014); Zoller Lab'ys., LLC v. NBTY, Inc., 111 F. App'x 978, 982 (10th Cir. 2004); Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 316 (1st Cir. 2002); William H. Morris Co. v. Grp. W, Inc., 66 F.3d 255, 258 (9th Cir.), *aff'd in part, rev'd in part*, 67 F.3d 310 (9th Cir. 1995).

[264] *See* Weight Watchers Int'l, Inc. v. Noom, Inc., 403 F. Supp. 3d 361, 372–73 (S.D.N.Y. 2019).

[265] *See id.*

in or having an effect on commerce [etc.]."[266] Still, in a case where egg producers formed a commission to publicize that eggs are nutritious and argued that they had merely offered their opinions on a matter of public concern, the court held that the FTC's remedy against them was consistent with the First Amendment because the commission's statements (1) "were not phrased as statements of opinion"; (2) "categorically and falsely denied the existence of evidence that in fact exists"; and (3) "were made for the purpose of persuading [readers] to buy eggs."[267] It may follow that if one of these factors is absent, for example, if an influencer merely offers an obvious opinion, does not state provably false facts or deny provably true ones, or does not actually care whether anyone buys whatever the influencer is paid to mention, then the speech is a pure opinion. A subjective opinion cannot be legally deceptive, and purposes affect whether words are advertising.[268] It is also questionable whether a merely negligent misstatement constitutes "deceit" or a "deceptive" act.[269]

D. *The Materiality Requirement of Advertising Laws*

Materiality in advertising law, as in securities law, recognizes that not every false or misleading statement induces actual or justi-

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[266] 15 U.S.C. §§ 45, 52.

[267] Nat. Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 163 (7th Cir. 1977); *see also* Beneficial Corp. v. Fed. Trade Comm'n, 542 F.2d 611, 618–21 (3d Cir. 1976)) (citing Elliott Knitwear, Inc. v. Fed. Trade Comm'n, 266 F.2d 787, 790 (2d Cir. 1959)) (finding that although commercial speech is protected by First Amendment, precluding rational basis review of FTC action on deceptive claims and false factual implications as to financial consequences of an "offering" of a "service" may be enjoinable by FTC).

[268] *See* Groden v. Random House, Inc., 61 F.3d 1045, 1051–52 (2d Cir. 1995); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731–32 (9th Cir. 1999); Commodity Trend Serv., Inc. v. Commodity Fut. Trading Comm'n, 149 F.3d 679, 686 (7th Cir. 1998); 15 U.S.C. § 52(a) (defining dissemination of false advertisements).

[269] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 205–14 (1976) (quoting S. REP. NO. 73-792, at 6 (1934)) (holding that law intended "to prevent 'manipulative and deceptive practices which . . . fulfill no useful function'" could not be applied to negligent conduct).

fiable reliance on the part of its recipient.[270] Under the Lanham Act, there must be a "specific representation" that is communicated in such a manner "as to 'deceive[] a significant portion of the recipients.'"[271] A deceptive statement or practice must be likely to affect a consumer's actual *decisions* and not just their thoughts or fleeting impressions.[272]

Several courts have questioned whether influencer speech made materially false or misleading assertions. For example, in one case, a court found that a Facebook ad bought by a weight-loss company in which a purported user of company's system lost a remarkable amount of weight and gave the system five stars was not actionable under the Lanham Act because, like other reviews on websites and mobile apps, the user "is not identified as having special expertise in weight loss or some other status that would afford her special deference."[273] It explained that even the FTC's substantiation guidelines provide "that when testimonials describe personal, subjective opinions from a small number of people, consumers are more likely to understand such statements as subjective."[274] Another court held that social media posts stating "[s]o far 100% of People have lost weight on our #Keto #BulaFIT Program" or "[w]hile we can't say that 100% of the people will get results, so far we do have 20 out of 20 that have lost weight" are not likely to mislead consumers unless there is evidence that these people did not lose the weight or keep it off.[275] A third court concluded that a

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[270] *See, e.g.*, Nat'l. Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997) (finding the inaccuracy in the statement not material because it would not influence consumers).

[271] Prager Univ. v. Google LLC, 951 F.3d 991, 1000 (9th Cir. 2020) (quoting William H. Morris Co. v. Grp. W, Inc., 66 F.3d 255, 258 (9th Cir. 1995)).

[272] Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1250 (11th Cir. 2002) (quoting Cashmere & Camel Hair Mfrs., Inst. v. Saks Fifth Ave., 284 F.3d 302, 311 (1st Cir. 2002)); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997).

[273] Weight Watchers Int'l, Inc. v. Noom, Inc., 403 F. Supp. 3d 361, 371 (S.D.N.Y. 2019).

[274] *Id.* at 372 (citing 16 C.F.R. § 255.2(c)).

[275] Youngevity Int'l v. Smith, No. 16-CV-704-BTM-JLB, 2019 U.S. Dist. LEXIS 112926, at *41–42 (S.D. Cal. July 5, 2019). Similarly, another court stated in dicta that social media posts claiming that a concussion test was the "First Complete Online" test of its kind "for all Sports and Levels," when it was

doctor's video testimonial that a nutritional supplement is the best (or has the best technology out of hundreds of options) was nonactionable puffery or a subjective claim on which a reasonable consumer would not rely in making a purchasing decision, even though it draws attention.[276] Merely being unsubstantiated or improbable does not make influencer hype false and material.[277]

It is a general principle under the Lanham Act that a failure to disclose is not actionable absent an affirmative misrepresentation.[278] As one court succinctly held, a "failure to disclose compensation to celebrities and influencers for promoting its products is not actionable under the Lanham Act."[279] The practice may one day be so common as to not result in an appreciable advantage over a competitor.[280] In one case where the plaintiff relied heavily

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not even FDA approved or proven to be effective, were likely to be too subjective to qualify as false advertising. *See* Impact Applications, Inc. v. Concussion Mgmt., LLC, No. GJH-19-3108, 2021 U.S. Dist. LEXIS 49225, at *21–22 (D. Md. Mar. 16, 2021).

[276] *See* ThermoLife Int'l, L.L.C v. NeoGenis Labs, Inc., 411 F. Supp. 3d 486, 501–02 (D. Ariz. 2019). *See generally* Roberts, *supra* note 30, at 89, 103–05, 108–10, 112, 117–22 (noting existence of such case law on falsity and materiality).

[277] *Youngevity Int'l*, 2019 U.S. Dist. LEXIS 112926, at *40–43 ("Plaintiffs . . . must establish falsity, not simply that the weight loss claims are unrealistic or unsubstantiated."); *see ThermoLife Int'l*, 411 F. Supp. 3d at 501–02; *Weight Watchers Int'l*, 403 F. Supp. 3d at 371–73; Prager Univ. v. Google LLC, 951 F.3d 991, 1000 (9th Cir. 2020).

[278] *See* Roberts, *supra* note 30, at 123 ("When an influencer shills for a brand without disclosing they were paid to do so, then, some courts may find the omission fails to satisfy the requirements of Section 43(a)(1)(B).").

[279] Lokai Holdings, LLC v. Twin Tiger USA LLC, 306 F. Supp. 3d 629, 640 (S.D.N.Y. 2018); *see also* Liqwd, Inc. v. L'Oreal USA, Inc., No. 17-14-JFB, 2019 U.S. Dist. LEXIS 233247, at *29 (D. Del. June 25, 2019) (finding no duty to disclose sponsorship relationship between celebrity and brand).

[280] *See* Manning Int'l Inc. v. Home Shopping Network, Inc., 152 F. Supp. 2d 432, 438 (S.D.N.Y. 2001) (quoting Warren Corp. v. Goldwert Textile Sales, Inc., 581 F. Supp. 897, 900 (S.D.N.Y. 1984)) (holding that in Lanham Act cases about false advertising of "attributes of a competing product" the "Plaintiff must show that the allegedly false description provides a competitor with an inappropriate advantage." (internal quotation marks omitted)). This might be because everyone will use influencers in the future, or because even those who do not do so could use other social media ads, product placement on streaming services' music or movies or shows, in-game avatars, etc.

on a mattress influencer's violations of FTC endorsement guidelines, the court held that repeated failures to disclose the existence or amount of a sponsorship deal are "simply not false or plausibly misleading."[281] Setting up a "sham" website to praise or attack services or products also is not always misleading, despite the failure to disclose everything about the website's origin.[282] Even a failure

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[281] Casper Sleep, Inc. v. Mitcham, 204 F. Supp. 3d 632, 638 (S.D.N.Y. 2016).

[282] *See* Casper Sleep, Inc. v. Nectar Brand, LLC, No. 18 Civ. 4459, 2020 WL 5659581, at *6–7 (S.D.N.Y. Sept. 23, 2020) (finding plaintiff's allegation that defendant's website is deceptive because it appears independent from a mattress company, but is not, and is used to advertise those mattresses is not actionable under the Lanham Act); GOLO, LLC v. HighYa, LLC, 310 F. Supp. 3d 499, 503, 507 (E.D. Pa. 2018) (alleging false and misleading statements in "sham review" website not actionable as commercial speech). *But cf.* Ariix, LLC v. NutriSearch Corp. 985 F.3d 1107, 1122 (9th Cir. 2021) (remanding for decision as to whether book with "rigged" supplement rankings conceived by former employee of defendant to boost its sales was commercial advertising or promotion); Grasshopper House, LLC v. Clean & Sober Media, LLC, 394 F. Supp. 3d 1073, 1095 (C.D. Cal. 2019) (finding that defendant's review of plaintiff's facility did not meet the requirements to constitute commercial advertising), *aff'd in part, rev'd in part, and remanded,* No. 19-56008, 2021 WL 3702243 (9th Cir. Aug. 20, 2021); PharmacyChecker.com, LLC v. Nat'l Ass'n Bd. of Pharm., 530 F. Supp. 3d 301, 355 (S.D.N.Y. 2021) (citing Enigma Software Grp. USA v. Bleeping Comput. LLC, 194 F. Supp. 3d 263, 294 (S.D.N.Y. 2016)) (holding disparaging competitor on a website could be commercial advertising or promotion, as might even be "promoting affiliates' products as superior to the products of the affiliates' competitor"); Vitamins Online, Inc. v. Heartwise, Inc., No. 2:13-cv-00982-DAK, 2019 WL 6682313, at *2, *17 (D. Utah Sept. 24, 2019) (holding block up-voting reviews of one's own products on Amazon and claiming not to give away free products for reviews while actually doing so could be actionable, especially if products were mislabeled as to ingredients and clinical data); GOLO, LLC v. Higher Health Network, LLC, No. 18-CV-2434, 2019 WL 446251, at *8–9 (S.D. Cal. Feb. 5, 2019) (holding false or misleading statements in a product review that provides a hyperlink for buying competing products could be actionable); Pegasystems, Inc. v. Appian Corp., 424 F. Supp. 3d 214, 223 (D. Mass. 2019) (holding falsely claiming to be a leading market research group might be actionable on part of agent of producer in market or party commissioned by it); Cannella v. Brennan, No. 12-cv-1247, 2014 WL 3855331, at *9 (E.D. Pa. Aug. 5, 2014) (holding disparaging competitor on an anonymous website could be false advertising); NTP Marble, Inc. v. AAA Hellenic Marble, Inc., No. 09-cv-5783, 2012 WL 607975, at *9–10 (E.D. Pa. Feb. 27, 2012) (holding posting disparaging reviews anonymously about a competitor on websites could be false commercial advertising).

to disclose something much more significant than payment for placement on a blog or social media feed, like the side effects of a drug that "'doctors recommend most,'" is not necessarily actionable as false advertising, unless the drug company makes an affirmative safety claim.[283] Likewise, failure to disclose FDA nonapproval or the existence of a more effective product than one's own may not be actionable.[284]

The same principle should apply under the FTC Act. Congress used the word "deceptive" in the Act, and according to contemporaneous case law and the original *Restatement of Torts*, the tort of deceit does not occur by a mere failure to disclose information.[285] Accordingly, neither the First Amendment nor the FTC Act justifies a mandate to disclose something unless the failure to disclose is deceptive.[286] Therefore, the FTC has construed its authority over

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[283] *See* McNeilab, Inc. v. Am. Home Prods. Corp., 501 F. Supp. 517, 532 (S.D.N.Y. 1980).

[284] *See* Sandoz Pharms. Corp. v. Richardson-Vicks Inc., 902 F.2d 222, 229–30 (3d Cir. 1990); Merck & Co. Inc. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402, 417 (S.D.N.Y. 2006); Avon Prods., Inc. v. S.C. Johnson & Son, Inc., 984 F. Supp. 768, 796–98 (S.D.N.Y. 1997); Braintree Labs. Inc. v. Nephro-Tech, Inc., No. 96-2459-JWL, 1997 WL 94237, at *6 (D. Kan. Feb. 26, 1997), *subsequent proceedings at* 31 F. Supp. 2d 921, 922 (D. Kan. 1998).

[285] *See* Fegeas v. Sherrill, 147 A.2d 223, 226 (Md. Ct. App. 1958) (citing RESTATEMENT (FIRST) TORTS §§ 550–51 (AM. L. INST. 1939)) (holding without a duty of fiduciary or insurer to consumer that triggers trust-related obligations, seller has no duty to disclose defects to buyer under law of fraud); *id.* at 225 (citing RESTATEMENT (FIRST) RESTITUTION § 8 (AM. L. INST. 1936)) (holding that diverting attention of buyer from defect, without misrepresentation or intention to mislead, is not actionable via restitution for wrongful concealment); Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808, 808 (Mass. 1942) (similar); Keeton, *supra* note 198, at 645 (mentioning the traditional "rule of non-liability for non-disclosure" under law of fraud and deceit in tort, with exceptions for relationships of trust and confidence, non-disclosure of information which makes a prior affirmative statement one made untrue, and some others); W. Page Keeton, *Fraud—Concealment and Non-Disclosure,* 15 TEX. L. REV. 1, 1 (1936) (discussing case law on concealment). By contemporaneous I mean the late 1930s rather than 1914, because the words "unfair or deceptive acts or practices" were added to "unfair methods of competition" in 1938. Wheeler-Lea Act of 1938, Pub L. No. 75-447, § 3, 52 Stat. 111 (1938); *see* FTC v. Sperry-Hutchinson Co., 405 U.S. 233, 244 (1972).

[286] *See* Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 162–64 (7th Cir. 1977).

"deceptive acts or practices" as being limited to those that are deceptive in a material respect and are likely to affect decisions or conduct and not simply ideas.[287]

An interesting parallel issue arises under securities laws. Plaintiffs who bought the EthereumMax cryptocurrency alleged that social media influencers mentioning the token on social media had violated securities laws.[288] The court dismissed Securities Act and Exchange Act claims because the Defendants who had promoted the token, boxer Floyd Mayweather and musician DJ Khaled, had neither successfully solicited the plaintiffs to buy the token nor created the market for the tokens.[289] While it is possible that the Supreme Court or another court will reject the premise that a defendant involved in a securities fraud must have been essential for the misleading offering to be successful, the opinion illustrates that the elements of fraud, such as reliance, may be read into "fraud *or* deceit" in a federal statute.[290] Courts may refuse to assume that

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[287] *See* FTC Policy Statement on Deception, *appended to* FTC v. Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984). Courts are inconsistent in the amount of judicial consideration they give the FTC's policy delegations. *See* Martin v. OSHRC, 499 U.S. 144, 157 (1991) (noting enforcement guidelines have no legal force, but deserve judicial consideration); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)) (suggesting that an agency may fill statutory gaps and Supreme Court may not second-guess its policy judgments in doing so); B. Sanfield, Inc., v. Finlay Fine Jewelry Corp., 168 F.3d 967, 973 (7th Cir. 1999) (deferring to FTC). *But see* Amrep Corp. v. FTC, 768 F.2d 1171, 1178 (10th Cir. 1985) (holding policy statements are no more binding on anyone "than press releases"); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law.").

[288] Rensel v. Centra Tech. Inc., No. 17-24500, 2019 WL 2085839, at *2 (S.D. Fla. May 13, 2019).

[289] *See id.*

[290] *Id*. at *5–7 (quoting 17 C.F.R. § 240.10b-5 (2021)) (emphasis added); *see also* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341 (2005); Ross v. Bank South, N.A., 885 F.2d 723, 738 (11th Cir. 1989). *But see* Pinter v. Dahl, 486 U.S. 622, 652 (1988) ("[N]o congressional intent to incorporate tort law doctrines of reliance . . . into § 12(1) [of the Securities Act] emerges from the language or the legislative history of the statute.").

everyone who loses money or buys a bad product or service necessarily has online influencers to blame for that decision.[291]

E. *The Major Questions Doctrine, Separation of Powers, and Speech on the Internet*

The overextension of FTC and Lanham Act principles into domains of "hybrid" commercial-noncommercial speech also raises separation of powers concerns.[292] Alexander Hamilton famously resisted a Bill of Rights with a freedom of speech or free exercise clause in *The Federalist Papers.*[293] His stated reason was not that speech or religious belief is unimportant or controllable at the discretion of Congress, but that Congress lacked an enumerated pow-

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[291] *See* Def. Kim Kardashian's Notice of Motion and Motion to Dismiss the Consol. Class Action, at 4–6, 24–25, In re EthereumMax Investor Litig., No. CV 22-163 MWF (C.D. Cal. brief filed July 29, 2022) [hereinafter *Kim Kardashian's Motion to Dismiss*] (arguing that Kim Kardashian's Instagram Stories about cryptocurrency were not actionable as unfair or deceptive advertising because she did not sell the tokens and Stories did not induce reasonable reliance and did not cause purchases); *id.* at 6–18 (arguing that the Stories were not actionable because they made no affirmative misstatement). *See generally* Gordon v. Lipoff, 320 F. Supp. 905, 910, 913 (W.D. Mo. 1970) (quoting 17 C.F.R. § 240.10b-5) (noting for purposes of regulation proscribing an "act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security," both the Second and the Eighth "Circuits are agreed that the device employed by the defendants [to defraud investors] must be, . . . 'of a sort that would cause reasonable investors to rely thereon, and in connection therewith, so relying, *cause them to purchase or sell a corporation's securities.*'" (emphasis added)). Rule 10b-5 was promulgated under a statute that is worded similarly to the FTC Act, prohibiting "any manipulative *or deceptive* device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (emphasis added).

[292] *See* Andrew Boutros et al., *Major Decision for Major Questions: Supreme Court Reins In Federal Regulatory Authority*, JDSUPRA (July 21, 2022), https://www.jdsupra.com/legalnews/major-decision-for-major-questions-9372195/.

[293] *See* THE FEDERALIST NO. 84, at 512–13 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

er under the Constitution that could help it infringe free speech or religious exercise.[294]

The major questions doctrine helps confine Congress to its proper constitutional domain by requiring it to speak clearly and follow transparent procedures when overhauling large swaths of life or the economy.[295] The underlying premise of the major questions doctrine is that separation of powers and limited executive power are reinforced when Congress legislates in a focused way on weighty economic or social issues, rather than administrative agencies invoking ambiguous terms in statutes to erect new quasi-legislative schemes.[296] Thus, while nicotine is literally a drug, and the FDA can prohibit the marketing of unsafe drugs, Congress would not have expected the FDA to ban cigarettes and other traditional products.[297]

The FTC policing all conflicts of interest (without factual misstatements in the promotion of the speaker's own offerings) is like the FDA regulating the practice of medicine or the SEC regulating all manner of frauds even without stocks, notes, or other securities. Courts have declined to bridge large gaps between what Congress originally aimed to do and what the agency, commission, or private party invoking the food and drug or securities and exchange laws wanted courts to do.[298] Respect for the separation of powers and

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[294] *See id.* 513–14 ("[A bill of rights] would contain various exceptions to powers not granted . . . . Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?").

[295] *See* Boutros et al., *supra* note 292.

[296] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2605–06 (2022); NFIB v. OSHA, 142 S. Ct. 661, 662–63, 665 (2022); Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000); Brnovich v. Biden, 562 F. Supp. 3d 123, 153 (D. Ariz. 2022).

[297] *See Brown & Williamson Tobacco*, 529 U.S. at 125–26.

[298] *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 350 (2001) (describing FDA's role as to regulate drugs and medical devices without "directly interfering in the practice of medicine"); Marine Bank v. Weaver, 455 U.S. 551, 55–56 (1982) (holding Securities Act is not a broad federal protection from all fraud, or even all financial or consumer fraud); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849–51 (1974) (holding although people might profit from buying real-estate units, securities laws do not cover stock in such units as not falling within "ordinary concept of a security," a sharing principally of divi-

legislative intent advises against using focused statutory texts on very different problems.[299]

Overexpansion of the FTC's jurisdiction relating to social media influencers threatens to revolutionize its role and rewrite aspects of the FTC Act and commercial speech doctrine. At least one judge has expressed concern that in abandoning the "common-sense rule" that a speaker must refer to its own products or services to engage in commercial advertising or promotion, the courts may create "uncertainty as to the scope of First Amendment protection for product reviews . . ." and take the Lanham Act over its "constitutional limits."[300] The majority in that case acknowledged that a mere failure to disclose bias or conflicts of interest in speaking about products or services is not commercial speech or advertising, but it insisted that paid placement of a product on a social media influencers' feed can be regulated.[301] The majority's opinion shares the same defect as other nonsensical applications of statutes

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dends from corporate profits (citation omitted)); United States v. Caronia, 703 F.3d 149, 166–68 (2d. Cir. 2012) (suggesting that if FDA is concerned about misprescribing of medicines for "off-label" use, it should focus on voluntary education of physicians, mandatory regulation of drugmakers, or as a last resort and in "exceptional" cases a ban on specific off-label prescriptions by doctors of approved medicines); *id*. at 179–80 (Livingston, J., dissenting) (noting that majority had not bridged gap between FDA statutes regarding approval and labeling of drugs and practice of medicine generally, even though latter often involves drugs).

[299] *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–35 (2003) (suggesting that Congress should regulate attribution of ideas and creative material directly rather than courts utilizing Lanham Act's regulation of the origin of goods and services to do so with potentially surprising and doctrinally disruptive results); *Forman*, 421 U.S. at 850–52 (suggesting that Congress should consider protection of investors in apartments, co-ops, and condominium units itself rather than the Court overextending ordinary meaning of securities and stocks to cover such properties); Teleprompter Corp. v. Columbia Broad. Sys. Inc., 415 U.S. 394, 412–14 (1974) (stating that although the Copyright Act of 1909 regulated reproducing and performing creations for profit, as well as manner of such reproduction, cable television was too far afield from what Congress had in mind in 1909, before cable was invented, and Congress should adjust the relations between cable systems and copyright holders itself rather than the courts stepping in with unexamined legislation).

[300] Ariix, LLC v. Nutrisearch Corp., 985 F.3d 1107, 1119, 1125–26 (9th Cir. 2021) (Collins, J., dissenting).

[301] *See id*. at 1115–17 (majority opinion).

to regulate conduct far from what Congress originally had in mind: it grants litigants a roving charge to police ordinary speech like praise, criticism, inspiration, imitation, and the like.[302] Rather than a Federal *Trade* Commission, we get a Biased *Speech* Commission.[303] This is not what Congress had in mind in passing or amending the FTC Act.[304]

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[302] *See* Youngevity Int'l v. Smith, No. 16-CV-704-BTM-JLB, 2019 U.S. Dist. LEXIS 112926, at *40–43 (S.D. Cal. July 5, 2019); Weight Watchers Int'l, Inc. v. Noom, Inc., 403 F. Supp. 3d 361, 372–73 (S.D.N.Y. 2019). For example, allowing advertising law to control the titles of creative works, including unauthorized biographies, would limit artistic freedom. *See* Rogers v. Grimaldi, 875 F.2d 994, 999–1000 (2d Cir. 1989); . Allowing advertising law to regulate plagiarism and the source of content would erode the public domain and mangle copyright doctrine. *See Dastar Corp.*, 539 U.S. at 35–37; *see also* GINSBURG, *supra* note 220, at 487. Additionally, allowing advertising law to regulate consumers' reviews and nominative uses of trademarks tramples on the freedom of expression while limiting information that may be in the public interest. *See* Bose Corp. v. Consumers Union of U.S., Inc. 466 U.S. 485, 511–13 (1984); *Youngevity Int'l*, 2019 U.S. Dist. LEXIS 112926, at *18–21; Castleman v. Internet Money Ltd., 546 SW 3d 684, 685–86, 690–91 (Tex. 2018) (concluding that concept of commercial speech "applies only to *certain* communications related to a good, product, or service in the marketplace—communications made not as a protected exercise of free speech by an individual, but as 'commercial speech which does "no more than propose a commercial transaction"'" and that "statements in [one's] status as a customer or consumer of . . . services" are "protected speech warning those customers about the quality of [those] services, not pursuing business for himself," even if statements about services are made by a businessperson and online seller who was demanding a refund from a service provider via "personal blog, YouTube, and social media" (quoting Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986))).

[303] The problem with this is analogous to the one that would arise if the FDA transformed into a Federal Medical Truth Agency without the necessary reforms to its mission statement, statutes, and structures. *Cf.* Caronia, 703 F.3d at 166–69 (warning that such a misinterpretation of the Federal Food, Drugs, and Cosmetics Act's misbranding provisions to cover manufacturer speech urging physicians to prescribe for off-label uses would "unconstitutionally restrict free speech" and inhibit dissemination of accurate and lifesaving information in health care); *see also* Brief of *Amici Curiae* Cato Institute et al. in Support of Petitioners at 9–10, Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014) (No. 13-193) (questioning whether governments have capacity to distinguish between false facts and disfavored opinions).

[304] *See* Fed. Trade Comm'n v. Royal Milling Co., 288 U.S. 212, 216 (1933) (stating that for FTC to order a seller to desist from using a method of competition, "mere misrepresentation and confusion on the part of purchasers or even

The FTC's conflict of interest rules go far beyond what the courts, the FCC, and the FTC itself have determined to be adequate disclosures to prevent promotional efforts from being deceptive.[305] For courts, it is enough that there is disclosure of a sponsorship or affiliate relationship somewhere on a website.[306] Even as to websites that do not disclose their sponsors or affiliates, if the sponsorship or affiliate relationship does not distort the website's content, there is no plausible claim of deception.[307] A competitor lacks standing if the failure to disclose the relationship does not cause direct injury to its revenue or reputation,[308] but the FTC does not find it enough that a consumer can click on a link under a YouTube video or alongside an Instagram post and access a disclosure of sponsorship or affiliation.[309] It is imposing transparency mandates even when there is no provable deception to correct, and when comparable product placements on film, radio, or television

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that they have been deceived is not enough"); Fed. Trade Comm'n v. Klesner, 280 U.S. 19, 24, 27–28 (1929) (stating that it is not enough to show some members of public were deceived; rather, the FTC must show some harm to competition, "flagrant oppression of the weak by the strong," or "serious and widespread" impact unlikely to be allayed by private litigation). *See generally* Federal Trade Commission Act, 15 U.S.C. §§ 57a (2010).

[305] *See generally* Press Release, Fed. Trade Comm'n, *supra* note 11.

[306] *See* Casper Sleep, Inc. v. Nectar Brand, LLC, No. 18 Civ. 4459 (PGG), 2020 WL 5659581 at 11–13, 19 (S.D.N.Y. Sept. 23, 2020) (citing GOLO, LLC v. HighYa, LLC, 310 F. Supp. 3d 499, 506 (E.D. Pa. 2018)); *see also* Casper Sleep, Inc. v. Mitcham, 204 F. Supp. 3d 632, 639 (S.D.N.Y. 2016).

[307] *See Casper Sleep, Inc.*, 2020 WL 5659581, at *9–10 (referring to websites Mattress Nerd and Sleep Sherpa, which unlike Sleepopolis, had not disclosed their relationship to counterclaim defendant, not even on a separate page); *see also GOLO,* 310 F. Supp. 3d at 505–06 (stating that the website which disclosed its relationship to Bowflex somewhere could not be held liable for negative review of plaintiff's diet program, even though the review did not mention the Bowflex deal).

[308] *See* Liqwd, Inc. v. L'Oréal USA, Inc., No. 17-14-JFB, 2019 U.S. Dist. LEXIS 233247, at *29–30 (D. Del. June 25, 2019). *Cf.* Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625, 635 (S.D.N.Y. Dec. 29, 2008) (quoting Cecere v. R.J. Reynolds Tobacco Co., No. 98 Civ.2011(RPP), 1998 WL 665334, at *2 (S.D.N.Y. Sept. 28, 1998)) (stating that a plaintiff "'may not rely on the purely dignitary, non-commercial harm that might arise from being associated with defendants or defendants' products' when asserting a Lanham Act claim").

[309] *See* Press Release, Fed. Trade Comm'n, *supra* note 11.

can have no or small disclosures.[310] Cardi B cannot simply include in an Instagram post #thankyou[sponsor] and #[sponsor]partner even though radio or television shows, movie theaters, and streaming services do far less when they mention sponsors.[311]

CONCLUSION

Social media influencers are engaged in constitutionally meaningful public debates.[312] Their pictures, stories, and videos may

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[310] *See* Tushnet, *supra* note 20, at 756–57. It is noteworthy that despite a statute and regulations apparently requiring early or prominent disclosure of sponsored imagery or dialogue on television, the FCC is not enforcing this norm, leading to films lacking visible credits containing their product placements or affiliations when shown on television, as well as shows like *Survivor* or *American Idol* not disclosing in advance whether sponsors paid them for appearances or mentions. *See id.* at 756–58, 158 n.109 (attempting to show that online and traditional media are treated similarly but noting that the FCC has only "occasionally enforced its rules against failure to disclose"); Goodman, *supra* note 20, at 97 (noting regulations for radio and TV have loopholes for unpaid promotion, and donated products and services of low value); Scott, *supra* note 90.

[311] *See* Press Release, Fed. Trade Comm'n, *supra* note 11 (explaining how influencers' disclosures must be "clear," "conspicuous," and viewable without having to click a "more" link); *Tina's Take: FTC Lets 'Detox Tea' Influencers Off with a Warning*, TRUTH IN ADVERT. (Mar. 9, 2020), https://truthinadvertising.org/articles/tinas-take-ftc-lets-detox-tea-influencers-off-with-a-warning-for-now/.

[312] *See* Connick v. Myers, 461 U.S. 138, 164 n.4, 165 n.5 (1983) (noting First Amendment is not restricted to "political expression or comment" but "must embrace all issues about which information is needed or appropriate to enable the members of society to cope" with their time (internal citations and quotation marks omitted)); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147–48 (1967) (holding arts, morals, and sciences should receive as much First Amendment protection as political speech); CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456, 462–63 (4th Cir. 2000) (finding First Amendment protected commentary on peanut butter brand and its trademark); Goodman, *supra* note 20, at 118–19 (discussing First Amendment protection of social commentary and how the line from political commentary is blurred in any event); Martin Redish & Howard Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression,* 66 GEO. WASH. L. REV. 235, 237 (1998) ("[C]ommentators who oppose constitutional protection for corporate speech have incorrectly ignored the numerous ways in which such expression actually fulfills the values served by the constitutional guarantee of free speech."); Wasserman, *supra* note 78, at 381 ("The idea that criticism of government policies

have commercial value, but they also help the rest of us decide how to live, where to go, what to see, and sometimes, how to think about the world. People find websites and social media useful to try to bring about change by sharing their personal stories and perspectives, even if it is only to change how others are entertained, clothed, nourished, and housed.

Theoretically, some scholars believe that political speech is more important than artistic, cultural, scientific, or commercial speech, and there is abundant evidence from the drafting, ratification, and early history of the First Amendment to support this view.[313] As a matter of legal history, however, we are now in a doctrinal or jurisprudential phase in which the ad-hoc balancing of speech interests and the dismissal of some speech as "low value" should not occur.[314] Courts continue to apply tests that aid in inter-

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or proposed government policies could provide the basis for a civil cause of action is entirely inconsistent with the modem system of free expression.").

[313] *See, e.g.*, Goodman, *supra* note 20, at 130 ("Under contemporary free speech jurisprudence, it is the job of the First Amendment to promote public discourse and to protect public debate and the public expression of ideas." (internal quotation marks omitted)); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 558 (2006) ("[C]ommercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values[.]" (internal quotation marks omitted) (alterations adopted)); Tushnet, *supra* note 20, at 728 (explaining how commercial speech is not protected as strongly as political speech).

[314] *See* United States v. Alvarez*,* 567 U.S. 709, 718–19 (2012) (rejecting government's premise that "false statements have no value and hence no First Amendment protection" because its citations for the contention "all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."); *see also* Edenfield v. Lane, 507 U.S. 761, 767 (1993) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."); Susan B. Anthony List v. Driehaus, 814 F.3d 466, 472 (6th Cir. 2016) (noting Supreme Court has warned that recognizing new categories of low-value false speech that are not fraudulent or libelous would be more dangerous to public discourse than beneficial); Wasserman, *supra* note 78, at 403 ("Free speech, however, demands a weighted balance in favor of leaving unchilled and available the greatest amount of speech possible. Much free speech doctrine reflects that weighted balance, taking into consideration the possible consequences of speech but erecting broad protections for it.").

est balancing, but these tests should limit the amount of speech that is regulated or deterred.[315]

Structured interest-balancing makes sure that regulations are actually necessary and do not reach too far. Simply emphasizing the government interest in regulating misleading speech is not adequate. The historically relevant categories, such as libel and fraud, were not simply about misleading statements. The categorical and historical analyses of First Amendment problems indicate that rather than denying First Amendment protection to speech that is vaguely similar to fraud or libel, courts should pay attention to the traditional requirements for regulating fraud or libel and add on another layer of requirements to ensure that speech on public matters is not chilled. Congress paralleled the traditional requirements for fraud in the FTC Act and the Lanham Act by imposing deceptiveness and commerciality standards. These standards are not typically met by an allegation that someone omitted to list all their sponsors on the Internet, or that they had a hidden conflict of interest that they were not transparent about. Rather, there should be a false factual statement or implication on which someone might typically rely to their detriment, and which is designed to cause a rise in the sales of the speaker's own offerings, even if only as a reseller.[316] These requirements are important in preventing federal

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[315] Wasserman, *supra* note 78, at 403 ("Free speech, however, demands a weighted balance in favor of leaving unchilled and available the greatest amount of speech possible. Much free speech doctrine reflects that weighted balance, taking into consideration the possible consequences of speech but erecting broad protections for it.").

[316] It is significant in this regard that retailers may not be held liable for false advertising of the products they carry, despite earning the retailer's margin on them. *See* In re Outlaw Lab'y, LP Litig., 424 F. Supp. 3d 973, 976, 981 (S.D. Cal. 2019) (holding gas stations, liquor stores etc. not liable for false advertising of male "enhancement" products); Outlaw Lab'y, LP v. Shenoor Enter., Inc., 371 F. Supp. 3d 355, 359, 368 (N.D. Tex. 2019) (granting defendant's motion to dismiss for failure to state a claim because plaintiff failed to show that defendant, who sold products with false advertising, was responsible for the false advertising). A related principle is that an athlete or other endorser may not be liable under the FTC Act for unknowingly repeating the false advertising claims devised by a manufacturer, video ad producer, and their officials. *See* FTC v. Garvey, No. 00-9358, 2002 WL 31744639, at *6 (C.D. Cal. Nov. 25, 2002) ("To be held liable under section 5(a) of the FTC Act, Garvey must have either "controlled" or "participated in" the creation and/or dissemination of unlawful adver-

advertising laws from regulating third-party reviews, mentions, and lists.[317] Like social media speech, books, and newspapers influence people by mentioning products or services that exist in the world, and often by praising the best.

tising claims."). Why, then, should a video game reviewer be pursued under the FTC Act for truthfully or subjectively describing an experience with a video game console delivered for free by its manufacturer, when Best Buy or Amazon might not be accountable for false claims on the console packaging itself, and paid actors would not be accountable for delivering false claims in television ads?

[317] State advertising laws may be broader, and this Article does not address them.