FIRST AMENDMENT — SOCIAL MEDIA — EASTERN DISTRICT OF NEW YORK CONVICTS INTERNET MEME CREATOR FOR PUBLISHING FALSE VOTING INFORMATION. — *United States v. Mackey*, No. 21-CR-80, 2023 U.S. Dist. LEXIS 40796 (E.D.N.Y. Mar. 10, 2023).

Social media platforms have become the arena of choice for sarcastic, cruel, and often mean-spirited political discourse. During the 2016 election, this was particularly true of Twitter,[1] where groups of warring internet personalities sought to one-up each other by posting biting political memes with the hope of influencing voters.[2] Some commentators have cited these posters as a major force in the rise of President Donald Trump;[3] Hillary Clinton famously decried them as "deplorables."[4] One such deplorable was Ricky Vaughn, a pro-Trump far-right figure who posted hundreds of thousands of tweets during the 2016 election, many of which were supportive of then-candidate Trump.[5] Seven years later, the man behind the account would be found guilty of conspiring to injure the rights of voters for posting two memes that falsely claimed voters could submit their vote by text. Recently, in *United States v. Mackey*,[6] the indictment and subsequent conviction of one of 2016's most famous internet trolls has become a lightning rod for legal spectators.[7] And rightfully so. While many would consider the speech in question to be repellent, the precedent created by *Mackey* is a dangerous one that lessens First Amendment protections in the digital marketplace of ideas.

During the lead-up to the 2016 presidential election, Douglass

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[1] Twitter has since been rebranded to X. Lauren Feiner, *Musk Explains Why He's Rebranding Twitter to X: It's Not Just a Name Change*, CNBC (Oct. 26, 2023, 3:53 PM), https://www.cnbc.com/2023/07/25/musk-explains-why-hes-rebranding-twitter-to-x.html [https://perma.cc/5DME-FB3Q].

[2] *See* Caitlin Dewey, *How Bernie Sanders Became the Lord of "Dank Memes,"* WASH. POST (Feb. 23, 2016, 5:53 PM), https://www.washingtonpost.com/news/the-intersect/wp/2016/02/23/how-bernie-sanders-became-the-lord-of-dank-memes [https://perma.cc/J8TR-RUS9].

[3] *Cf.* J.M. Berger, *Trump Is the Glue that Binds the Far Right*, THE ATLANTIC (Oct. 29, 2018), https://www.theatlantic.com/ideas/archive/2018/10/trump-alt-right-twitter/574219 [https://perma.cc/778V-6E24].

[4] *See* John Hilliard, *With "Basket of Deplorables" Quip, Clinton Just Made a Meme*, BOS. GLOBE (Sept. 10, 2016, 8:59 PM), https://www.bostonglobe.com/2016/09/10/with-basket-deplorables-quip-clinton-just-made-meme/z3tcmJ5zeKGxCUOlo19VLP/story.html [https://perma.cc/STA3-W726].

[5] *See* Quinta Jurecic, *The Justice Department Is Prosecuting an American for Election Interference — In 2016*, LAWFARE (Jan. 30, 2021, 9:00 AM), https://www.lawfaremedia.org/article/justice-department-prosecuting-american-election-interference-2016 [https://perma.cc/P3QH-P2UD].

[6] No. 21-CR-80, 2023 U.S. Dist. LEXIS 40796 (E.D.N.Y. Mar. 10, 2023).

[7] *See, e.g.*, Eugene Volokh, *Are Douglass Mackey's Memes Illegal?*, TABLET (Feb. 9, 2021), https://www.tabletmag.com/sections/news/articles/douglass-mackey-ricky-vaughn-memes-first-amendment [https://perma.cc/7KMH-4MHX].

Mackey, also known as "Ricky Vaughn"[8] on social media, was a prolific figure in the alt-right,[9] a loose online movement associated with the rise of then-candidate Donald Trump.[10] Ricky Vaughn's account had a Twitter audience of some 58,000 followers, and Vaughn was ranked by MIT Media Lab as one of the most important influencers of the upcoming election, ahead of figures like comedian Stephen Colbert.[11] Mackey's oeuvre included far-right-wing memes and incendiary comments often aimed at figures Mackey derided as "shitlibs."[12] Described as an "indefatigable circulator of edgy memes and rah-rah Donald Trump boosterism," Mackey's account was ultimately banned in October 2016.[13] After the election, Mackey faded into obscurity for several years[14] — until he was charged by the U.S. Department of Justice in January 2021,[15] days after President Biden took office.

The complaint against Mackey was filed in the U.S. District Court for the Eastern District of New York.[16] It accused Mackey of engaging in a conspiracy to deprive people of their rights (here, the right to vote) by intentionally making false statements with the aim of tricking Clinton supporters into "voting" by text instead of casting their ballots at the polls.[17] This would violate 18 U.S.C. § 241,[18] a latter-day codification of the Enforcement Act of 1870,[19] which prohibits individuals from engaging in a conspiracy against voting rights. The complaint centered on Mackey's alleged posting of two memes in November 2016 that encouraged potential voters to "Avoid the [Voting] Line" and vote for Hillary Clinton by texting a fictitious number.[20] According to text message records, some 4,900 unique telephone numbers texted the fictitious number,[21] possibly instead of casting their legitimate ballots in

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[8] This name was a reference to actor Charlie Sheen's character in the 1989 movie *Major League*. MAJOR LEAGUE (Paramount Pictures 1989).

[9] *See* Luke O'Brien, *Trump's Most Influential White Nationalist Troll Is a Middlebury Grad Who Lives in Manhattan*, HUFFPOST (Apr. 9, 2018), https://www.huffpost.com/entry/trump-white-nationalist-troll-ricky-vaughn_n_5ac53167e4b09ef3b2432627 [https://perma.cc/CU5Q-VZT7].

[10] *See* Berger, *supra* note 3.

[11] Press Release, U.S. Att'y's Off., E. Dist. of N.Y., Social Media Influencer Charged with Election Interference Stemming from Voter Disinformation Campaign (Jan. 27, 2021) [hereinafter Public Affairs Press Release], https://www.justice.gov/usao-edny/pr/social-media-influencer-charged-election-interference-stemming-voter-disinformation [https://perma.cc/F5MT-K9YS].

[12] Memorandum & Order at 3, *Mackey*, No. 21-CR-80 [hereinafter Motion to Dismiss Denial].

[13] O'Brien, *supra* note 9.

[14] *Cf. id.*

[15] Public Affairs Press Release, *supra* note 11.

[16] Complaint and Affidavit in Support of an Arrest Warrant at 1, *Mackey*, No. 21-CR-80 [hereinafter Complaint].

[17] *See id.* at 15 (using term "Candidate" to refer to the candidate Mackey did not support, that is, Hillary Clinton).

[18] *Id.* at 1.

[19] Ch. 114, § 6, 16 Stat. 140, 141.

[20] Complaint, *supra* note 16, at 21–22 (using term "Candidate's first name" to refer to Hillary Clinton).

[21] *Id.* at 23.

person. To establish a conspiracy, the complaint included online conversations Mackey allegedly took part in with four coconspirators.[22]

Mackey was indicted in February 2021 and charged with a single count of violating 18 U.S.C. § 241.[23] Mackey filed a motion to dismiss,[24] claiming that venue was improper,[25] that the indictment violated his due process rights,[26] and that, even if § 241 applied to the tweeted memes, its use to convict Mackey would unconstitutionally interfere with his First Amendment rights.[27] His primary First Amendment assertion revolved around an interpretation of Mackey's speech as political in nature[28] and thus deserving of the First Amendment's "fullest and most urgent application."[29] Additionally, Mackey's lawyers seemed to imply that Mackey's memes were "hyperbolic crossfire."[30] Relying on this characterization of the memes, Mackey's defense team argued that Mackey was merely engaging in satire — which the Supreme Court has long held that the First Amendment protects.[31]

The court denied Mackey's motion.[32] In denying the motion, Judge Garaufis initially held that venue could be found to be proper,[33] and that Mackey was not being prosecuted for his speech, but for the injury he had caused by engaging in a conspiracy to deprive people of their right to vote.[34] He traced the expanding role of § 241, showing a general expansion in the kinds of conspiracies that satisfied the statute,[35] and arguing that this trend made § 241's use in Mackey's case proper.[36]

Judge Garaufis embarked on a First Amendment analysis, observing that content-based speech regulations typically face strict scrutiny unless the speech falls into a historically unprotected category[37] and deeming Mackey's prosecution permissible under the First Amendment.[38] Considering Mackey's protected false speech claims, Judge Garaufis applied the rulings of the landmark case *United States v. Alvarez,*[39] which

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[22] *Id.* at 7–23.

[23] Indictment at 1, *Mackey*, No. 21-CR-80.

[24] Memorandum of Law in Support of Defendant Douglass Mackey's Motion to Dismiss the Indictment at 1, *Mackey*, No. 21-CR-80.

[25] *Id.* at 6.

[26] *Id.* at 13.

[27] *Id.* at 22.

[28] *Id.*

[29] *Id.* (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)).

[30] *Id.* at 23 (quoting Ganske v. Mensch, 480 F. Supp. 3d 542, 545 (S.D.N.Y. 2020)).

[31] *See id.* at 26 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964)).

[32] Motion to Dismiss Denial, *supra* note 12, at 1.

[33] The court concluded that both overt acts in furtherance of the conspiracy and location of the intended victims provided sufficient grounds for a jury to find proper venue. *See id.* at 17–21.

[34] *Id.* at 39.

[35] *Id.* at 26–30.

[36] *See id.* at 30.

[37] *Id.* at 41.

[38] *See id.* at 39.

[39] 567 U.S. 709 (2012).

suggested that some false speech is protected by the First Amendment. In *Alvarez*, the Supreme Court evaluated the constitutionality of a statute that criminalized false claims about receiving the Congressional Medal of Honor.[40] The Court issued a fractured opinion, but held on narrow grounds that the statute violated the First Amendment.[41] The decision emphasized the importance of protecting even false statements under the First Amendment, as these statements often prove useful, and prohibiting them can lead to a "chilling" effect.[42] As Judge Garaufis believed Mackey's statements were speech aimed at election mechanisms and not highly protected political speech,[43] he applied intermediate scrutiny under the logic of the *Alvarez* concurrence.[44] But he also noted that "[e]ven if the plurality's holding in *Alvarez* wholly bound this court [and thus demanded strict scrutiny], this court would still find the instant application of the statute constitutional"[45] because Mackey's speech could fall into at least one historically unprotected category, including fraud.[46] At the end of his memo denying Mackey's motion to dismiss, Judge Garaufis considered Mackey's argument that his tweets were satirical, noting that "[i]f the jury finds that the Deceptive Tweets were satire, Defendant Mackey must be acquitted."[47]

Mackey's trial took place before Judge Donnelly,[48] as Judge Garaufis had tested positive for COVID-19,[49] during the end of March 2023.[50] On March 31, the jury returned a guilty verdict.[51] In October 2023, Mackey was sentenced to seven months in prison for "interfer[ing] with potential voters' right to vote in the 2016 [presidential] election."[52] On October 25, Mackey filed a notice of appeal.[53]

While Douglass Mackey may be a largely unsympathetic character,

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40 *Id.* at 714 (plurality opinion).

41 *Id.* at 715. *Alvarez* is an idiosyncratic opinion with no clear majority holding. As such, it is subject to the rule from *Marks v. United States*, 430 U.S. 188 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).).

42 *See Alvarez*, 567 U.S at 733 (Breyer, J., concurring in the judgment).

43 Motion to Dismiss Denial, *supra* note 12, at 50.

44 *Id.*

45 *Id.* at 51.

46 *Id.* at 52.

47 *Id.* at 55.

48 Transcript of Criminal Cause for Trial Before the Honorable Ann M. Donnelly United States District Judge Before a Jury at 1, *Mackey*, No. 21-CR-80 [hereinafter Trial Transcript].

49 *Id.* at 6.

50 *Id.* at 1.

51 Verdict Form at 1, *Mackey*, No. 21-CR-80.

52 Press Release, U.S. Att'y's Off., E. Dist. of N.Y., Social Media Influencer Douglass Mackey Sentenced After Conviction for Election Interference in 2016 Presidential Race (Oct. 18, 2023), https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-sentenced-after-conviction-election [https://perma.cc/HVW3-EV89].

53 Notice of Appeal, *Mackey*, No. 21-CR-80.

his trial and conviction raise troubling concerns regarding free speech. Whether or not his memes were satire — a factual question that the jury in *Mackey* worryingly never seems to have considered[54] — there remains a major First Amendment concern embedded in Mackey's case, centered around satirical content in the digital spaces that have emerged in the last decade. Memes are a new form of digital communication that nearly always contain unserious elements. Using memes to prove a criminal conspiracy risks chilling a vast amount of speech on social media, especially if this is done without consideration of mens rea.[55] Compounding the concerns over Mackey's conviction is the fact that the political valence of Mackey's case is impossible to ignore. The case has become a cause célèbre for right-wing political commentators, and Mackey is widely considered to have been selectively prosecuted for "post[ing] satirical memes" online.[56]

Although Judge Garaufis devoted ample space to Mackey's First Amendment arguments in his memorandum opinion denying Mackey's motion to dismiss,[57] his assertion that free speech was not at the very heart of Mackey's case[58] is deeply contestable, as Mackey's case directly concerns questions around the intersection of free speech and satire in modern online discourse. Judge Garaufis conceded that "'parody and satire are deserving of substantial freedom — both as entertainment and as a form of social and literary criticism,' and are thus protected by the First Amendment."[59] But he characterized the question of whether Mackey's memes were satire as a factual one, noting: "The question of whether a reasonable listener or reader would understand the false statements as satire or as factual assertions is one best left, at least initially, to the jury."[60] But it appears this question was not included in Judge Donnelly's jury instructions.[61]

That Mackey's primitive meme — sandwiched between thousands

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[54] *See generally* Jury Instructions, *Mackey*, No. 21-CR-80.

[55] *Cf.* Counterman v. Colorado, 143 S. Ct. 2106, 2114–17 (2023) (clarifying that a mens rea of recklessness or greater is required in true-threats analysis under the First Amendment).

[56] *E.g.*, Alana Mastrangelo, *Conservative Social Media Influencer Douglass Mackey Convicted of Election Interference*, BREITBART (Mar. 31, 2023), https://www.breitbart.com/tech/2023/03/31/conservative-social-media-influencer-douglass-mackey-convicted-of-election-interference [https://perma.cc/298S-FR38].

[57] Motion to Dismiss Denial, *supra* note 12, at 38–55.

[58] *See id.* at 39 ("This case is about conspiracy and injury, not speech.").

[59] *Id.* at 53–54 (quoting Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 493 (2d Cir. 1989) (emphasis omitted)).

[60] *Id.* at 54 (citing, inter alia, Falwell v. Flynt, 797 F.2d 1270, 1273–74 (4th Cir. 1986), *rev'd on other grounds sub nom.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988)).

[61] *See* Jury Instructions, *supra* note 54, at 26–42. To be clear, Judge Donnelly did instruct the jury to consider Mackey's intent as to furthering the criminal aim of the conspiracy. *Id.* at 30–31. A discrete consideration of Mackey's meme as satire or a consideration of the mens rea Mackey possessed when creating the meme is absent from the instructions, however. *See id.* at 26–42. Conflating the two does a disservice to the larger First Amendment question around the protected nature of satire.

of his other tweets — could have fooled American voters into believing that the 2016 election allowed voting by text does indeed strain belief. The government relied on conversations Mackey had with his co-conspirators to show conspiratorial intent,[62] but Mackey's lawyers claimed that Mackey was never present in these conversations at all.[63] Furthermore, given the intrinsic satirical nature of the meme format itself, the text-to-vote meme in Mackey's case is more akin to the raunchy article that was at the heart of *Hustler Magazine, Inc. v. Falwell*.[64] In that case, the Supreme Court considered whether famous minister Jerry Falwell could bring a tort action for a parody article printed in *Hustler* magazine that suggested Falwell had lost his virginity to his mother.[65] Denying Falwell's claim, the Court held that public figures and officials may not recover damages for intentional infliction of emotional distress due to the publication of a parody or satire without showing that the publication contained a false statement of fact made with the requisite mens rea.[66] In doing so, the Court both accepted the jury's finding that the parody could not "reasonably be understood as describing actual facts"[67] and offered a defense of political satire, noting that "[America's] political discourse would have been considerably poorer without" satirical cartoons.[68] In Mackey's case, the jury should have likewise had occasion to ponder whether the text-to-vote meme could "reasonably be understood as describing actual facts."

The decision to not consider whether Mackey's meme was satirical is a significant one. In the past decade, memes on the internet have permitted the creation of a new form of rapid visual communication on social media platforms like Twitter.[69] Memes allow for ideas and critiques to spread rapidly on digital platforms and are associated with a participatory culture that can see hundreds or thousands of individuals working and reworking images and text.[70] This was particularly true during the 2016 election, with fierce and often uncivil debates about the candidates' merits taking place through memes on Twitter.[71] That Mackey's "Avoid the Line" meme should be ripped from this context

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62 Complaint, *supra* note 16, at 11–22.

63 Trial Transcript, *supra* note 48, at 32.

64 485 U.S. 46.

65 *Id.* at 47–48.

66 *Id.* at 56.

67 *Id.* at 57.

68 *Id.* at 55.

69 *See generally* Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453 (2022) (discussing the rise of memes in digital discourse and characteristics of this communication method).

70 *See id.* at 484–85, 517.

71 *See* Douglas Haddow, *Meme Warfare: How the Power of Mass Replication Has Poisoned the U.S. Election*, THE GUARDIAN (Feb. 9, 2018, 2:03 PM), https://www.theguardian.com/us-news/2016/nov/04/political-memes-2016-election-hillary-clinton-donald-trump [https://perma.cc/EH7Y-A2A8].

and held up as a serious attempt at a conspiracy to deny some voters the right to vote is a questionable assertion at best. Without firsthand knowledge of the 2016 meme landscape, it would have been very hard for any jury to intelligently categorize Mackey's memes as satirical or not.

Mackey maintained that his meme was never meant to trick anyone about voting.[72] The tension between awful but lawful satire and criminal conspiracy evinces the wider question raised by *Mackey*: Exactly what First Amendment protections should false speech in the internet era receive? Even if the meme in *Mackey* was properly categorized as unprotected speech, the fact that there was not a discrete mens rea consideration as to whether Mackey's meme could "reasonably be understood as describing actual facts" is extremely concerning in light of First Amendment jurisprudence in other historically unprotected categories such as defamation[73] and true threats.[74] The mens rea requirement present in the analysis for those categories is to guard against the chilling effect, wherein, as Justice Kagan explained in *Counterman v. Colorado*[75]: "A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not."[76] *Mackey* makes that a very real concern for erstwhile meme lords on the internet, who may have collaborated with a few friends to create a satirical meme with false information during a particularly heated election season; memes of this style were extant on both sides of the political aisle in 2016.[77]

It is possible that Douglass Mackey's meme was intentionally created to deceive voters and his conviction is just. But then again, maybe not. Without a sufficient consideration of satire's role with respect to Mackey's mens rea, there is scant surety for the 2024 election "shitposter"[78] that she won't find the FBI knocking on her door seven years after making an edgy post on X. An inquiry into Mackey's state of mind when he created his meme would have helped clarify whether it was truly fraud or protected satire under current First Amendment jurisprudence.

Ultimately, it is conceivable a jury could have reasonably decided that Mackey's memes were satirical, especially given the paradigmatic shift in communication memes have heralded in the past decade.[79] That

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[72] *See, e.g.*, Trial Transcript, *supra* note 48, at 649.

[73] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[74] *See* Counterman v. Colorado, 143 S. Ct. 2106, 2117–19 (2023).

[75] 143 S. Ct. 2106.

[76] *Id.* at 2114–15 (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986)).

[77] *See, e.g.*, Kristina Wong (@mskristinawong), TWITTER (Nov. 8, 2016, 9:38 AM), https://twitter.com/mskristinawong/status/795999059987173377 [https://perma.cc/QH8X-DJHA].

[78] "Shitposting" is an evocative term introduced at Mackey's trial for posting things on the internet in an unserious manner. *See* Trial Transcript, *supra* note 48, at 30.

[79] *See* Adler & Fromer, *supra* note 69, at 478–79.

the trial proceeded without such a factual finding is concerning, especially considering the powerful nature of § 241. Section 241 requires the mere existence of a conspiracy, not any demonstration of actual harm.[80] As such, internet memes seem like a particularly inappropriate medium to expand § 241 to. The nature of memetic discourse online is inherently collaborative, with large groups of often anonymous individuals conspiring to "own" other groups of individuals they disagree with politically through the use of satirical images.[81] A great deal of politically charged online and offline discourse will be threatened if the conduct in *Mackey* becomes part of § 241's purview.[82] Should every internet poster who has ever taken part in creating an edgy meme during an election season — even those who intended to interfere with their political enemies by "owning" them with "Avoid the Line"–style misinformation memes — be subject to § 241 prosecution? The potential chilling effect on free speech would be high,[83] far outweighing the prevention of dubious injury in such cases. Simply put, there is a poor fit between the new-age communication method of memes and the 150-year-old Enforcement Act of 1870.[84]

Douglass Mackey can be fairly categorized as a peddler of ugly and hateful speech. Many readers of this comment are likely diametrically opposed to everything Mackey stands for, both politically and personally. But prosecuting him under § 241 for posting memes was a poor decision by the Department of Justice. The potential impacts to online political discourse are simply too high. At the very least, the jury in this case should have been instructed to consider whether the text-to-vote memes were satire. That Mackey has now been convicted and sentenced to seven months in prison — while perhaps satisfying for those who find his speech repulsive — is a blow to online speech and provides a potent precedent that could be wielded against political enemies of a future administration.

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[80] *See* 18 U.S.C. § 241.

[81] *See* Eve Peyser, *The Summer's Hottest Trend Is Owning the Libs*, ROLLING STONE (July 26, 2018), https://www.rollingstone.com/politics/politics-features/own-the-libs-meaning-703845 [https://perma.cc/N3X8-J5E3].

[82] Volokh, *supra* note 7 ("[U]nder the trial court's reasoning — that § 241 bans conspiracies 'with the specific intent to impede or prevent qualified persons from exercising the right to vote' — [advocating to shut down a get-out-the-vote effort] would in fact be a crime. Likewise, picketing outside a party's headquarters, urging party activists not to show up . . . would be a crime, too.").

[83] *See, e.g.*, John A. Barrett, Jr., *Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in a Post-Truth World*, 94 ST. JOHN'S L. REV. 615, 649 (2020) (describing the "major chilling effect" of regulating even untrue political speech).

[84] *See* Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141 (outlawing broadly similar conduct as § 241).