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Misinformation Superhighway:  
The Real-World Consequences of social  
media  
Companies Profiting off Misinformation,  
and What the Federal  
Government Can do to Address it

Caleb Sackler

## I. INTRODUCTION

If the current state of politics in America could be boiled down to done word, that word would be “polarized.” Democrats and Republicans alike are becoming increasingly divided on many of the key issues facing the country, such as the state of the economy, climate change, and racial justice.<sup>1</sup> During the 2020 election, nearly 90% of both Biden and Trump supporters believed that if the opposing candidate were to win, it would lead to lasting harm to the U.S..<sup>2</sup> This division is happening as the country is simultaneously being confronted with a once in a century pandemic in COVID-19. The virus has killed over one million people and infected over ninety million so far in the United States alone.<sup>3</sup> This death toll has surpassed that of the Spanish Flu, making COVID-19 the deadliest outbreak in U.S. history.<sup>4</sup>

Despite the fact that this pandemic has affected both Republicans and Democrats all over the country in some form or another, their views on the pandemic are polar opposites. 81.6% of Democrats approve of President Biden’s handling of the pandemic versus 18.8% of Republicans.<sup>5</sup> Conversely, 78% of Republicans approve of Former President Trump’s handling of the pandemic versus

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<sup>1</sup> Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Covid Data Tracker*, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Aug. 18, 2022).

<sup>4</sup> Berkley Lovelace Jr., *Covid is Officially America’s Deadliest Pandemic as U.S. Fatalities Surpass 1918 Flu Estimates*, CNBC (Sep. 20, 2021, 7:26 PM), <https://www.cnbc.com/2021/09/20/covid-is-americas-deadliest-pandemic-as-us-fatalities-near-1918-flu-estimates.html>.

<sup>5</sup> Jasmine Mithani et al., *How Americans View Biden’s Response to The Coronavirus Crisis*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/coronavirus-polls/> (last visited Sept. 16, 2022) (aggregation poll data updated on Aug. 31, 2022, at 9:28 AM).

only 9% of Democrats.<sup>6</sup> The same partisan trends can be seen in the rate of vaccination, with approximately 88% of Democrats being fully vaccinated versus 55% of Republicans.<sup>7</sup> Furthermore, there is a nearly 13% gap in the vaccination rates in counties that voted for Biden and those that voted for Trump.<sup>8</sup> The counties and states that have the highest vaccination rates went to Biden, while states with lowest vaccination rates went to Trump in the 2020 Presidential Election.<sup>9</sup> These partisan divides continue when analyzing trends on vaccine hesitancy, with Republicans being significantly more likely to be vaccine-hesitant compared to Democrats.<sup>10</sup> These trends, coupled with the Delta COVID-19 variant, led to a new surge in cases amongst unvaccinated individuals, who were filling up hospital beds and dying disproportionately more than vaccinated individuals.<sup>11</sup> In southern, more Republican states, ICUs were being filled to capacity and, in many

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<sup>6</sup> *Id.* (aggregation poll data from the end of Trump's presidency in Jan. 2021, updated on Aug. 31, 2022, at 9:28 AM).

<sup>7</sup> Chuck Todd et al., *NBC News Poll Shows Demographic Breakdown of the Vaccinated in the U.S.*, NBC NEWS (Aug. 24, 2021, 8:49 AM), <https://www.nbcnews.com/politics/meet-the-press/nbc-news-poll-shows-demographic-breakdown-vaccinated-u-s-n1277514>.

<sup>8</sup> Jennifer Kates et al., *The Red/Blue Divide in Covid-19 Vaccination Rates*, KEISER FAM. FOUND. (Sept. 14, 2021), <https://www.kff.org/policy-watch/the-red-blue-divide-in-covid-19-vaccination-rates/>.

<sup>9</sup> Alison Durkee, *Counties That Voted For Trump Still Lag Far Behind In Vaccinations- With 13% Fewer Vaccinated*, FORBES (Sept. 14, 2021, 4:22 PM), <https://www.forbes.com/sites/alisdurkee/2021/09/14/counties-that-voted-for-trump-still-lag-far-behind-in-vaccinations---with-13-fewer-vaccinated/?sh=f3581d869d14>; *See also* Kates et al., *supra* note 8.

<sup>10</sup> Frank Newport, *Vaccine Hesitancy and U.S. Public Opinion*, GALLUP (July 30, 2021), <https://news.gallup.com/opinion/polling-matters/352976/vaccine-hesitancy-public-opinion.aspx>.

<sup>11</sup> Danielle Ivory et al., *See the Data on Breakthrough Covid Hospitalizations and Deaths by State*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/interactive/2021/08/10/us/covid-breakthrough-infections-vaccines.html?auth=login-google>.

hospitals, even over capacity<sup>12</sup> despite overwhelming evidence that the Covid vaccines are safe, effective, and are highly effective in avoiding hospitalization or death altogether.<sup>13</sup>

Views on the results of the 2020 election are also still incredibly polarized. Approximately 70% of Republicans believe Joe Biden was illegitimately elected in 2020, according to a poll taken in June, 2022.<sup>14</sup> In comparison, 90% of Democrats, and 57% of independents who believe Joe Biden won legitimately.<sup>15</sup> This divide continues to exist despite the fact that there is no evidence that suggests widespread voter fraud altered the outcome of the 2020 election.<sup>16</sup> Similarly, 25% of Republicans, 9% of Democrats, and approximately 20% of Americans overall believe in some or all of the core tenants of Q-Anon; a conspiracy theory that the government, media, and financial worlds are controlled by a global cabal of Satan-worshipping pedophiles, and that violence may be necessary to remove them from power.<sup>17</sup>

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<sup>12</sup> Charlie Smart, *Covid Hospitalizations Hit Crisis Levels in Southern I.C.U.s*, N.Y. TIMES (Sept. 14, 2021), [https://www.nytimes.com/interactive/2021/09/14/us/covid-hospital-icu-south.html?name=stylncoronavirus&region=TOP\\_BANNER&block=storyline\\_menu\\_recirc&action=click&pgtype=Interactive&variant=1\\_Show&is\\_new=false](https://www.nytimes.com/interactive/2021/09/14/us/covid-hospital-icu-south.html?name=stylncoronavirus&region=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Interactive&variant=1_Show&is_new=false).

<sup>13</sup> Lisa Maragakis & Gabor David Kelen, *Is the Covid-19 Vaccine Safe?*, JOHNS HOPKINS MED. (Aug. 10, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/is-the-covid19-vaccine-safe>.

<sup>14</sup> Jon Greenberg, *Most Republicans Still Falsely Believe Trump's Stolen Election Claims*, POLITIFACT (June 14, 2022), <https://www.politifact.com/article/2022/jun/14/most-republicans-falsely-believe-trumps-stolen-ele/>.

<sup>15</sup> *Id.*

<sup>16</sup> Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, AP NEWS (Dec. 1, 2021), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

<sup>17</sup> PRRI Staff, *The Persistence of QAnon in the Post-Trump Era: An Analysis of Who Believes the Conspiracies*, PUB. RELIGION RSCH. INST. (Feb. 24, 2022), <https://www.prrri.org/research/the-persistence-of-qanon-in-the-post-trump-era-an-analysis-of-who-believes-the-conspiracies/>.

All of these divisions suggest that not only are Americans deeply divided, but many also exist in fundamentally different realities seemingly based largely on their political affiliations. The COVID-19 pandemic causing extensive loss of life and damage to the economy, and the lack of faith in the legitimacy of our elections, are evidence that this kind of polarization has dire implications for our future survival as a nation. This note will explore how social media companies have contributed to this polarization through allowing misinformation to spread on their platforms, and what the federal government can do to address this issue. In Section II, this note will define what misinformation and disinformation are, and will offer a historical case study in the powerful influence of disinformation campaigns and their real-world impacts. Section III will discuss how the Supreme Court has struggled historically with upholding the principles of the First Amendment and maintaining an informed population. Section IV will analyze how the government has regulated the business interest of media companies without infringing on the First Amendment. Section V will discuss Section 230 of the Communications Decency Act and how it has contributed to the rise of social media as we know it today. Section VI will describe the extent of the misinformation problem on social media today, and the incentive structures behind the problem. Finally, Section VII will discuss ways that the government can step in to address the misinformation problem if social media companies will not.

## II. WHAT IS MISINFORMATION?

First, we must define what qualifies as “misinformation” within the context of this note. Misinformation generally refers to information that is false, inaccurate, or misleading that is spread regardless of intent to deceive others.<sup>18</sup> Contrast this with “disinformation,” which is a type

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<sup>18</sup> Meira Gebel, *Misinformation v. Disinformation: What to Know About Each Form of False Information, and How to Spot Them Online*, BUS. INSIDER (Jan. 15, 2021), <https://www.businessinsider.com/misinformation-vs-disinformation>.

of misinformation created and spread deliberately to deceive the reader.<sup>19</sup> Misinformation can become disinformation if the individual or group spreading it knows it is false or misleading but spreads it anyway with the intent to deceive others.<sup>20</sup>

#### A. A Historical Case Study in the Power of Disinformation

The issue of disinformation for profit may seem to some like a recent development, but it has been one that has affected the United States for almost a century. It was commonly referred to as “yellow journalism” for much of the late 19<sup>th</sup> century.<sup>21</sup> Yellow journalism was a term coined in the late 1890s to refer to a style of news reporting that placed a much greater emphasis on sensationalizing the news rather than reporting just the facts in an effort to generate higher profits.<sup>22</sup>

This era is most commonly viewed through the lens of the rivalry between two of the most prominent media moguls of the time: Joseph Pulitzer of the *New York World* and William Randolph Hearst of the *New York Journal*.<sup>23</sup> In an attempt to make more profit than the other, the two publications began printing sensationalized headlines and exaggerated stories in order to generate more sales.<sup>24</sup> One of the most famous examples of this took place in the lead up to the Spanish-American War in 1898.<sup>25</sup> Hearst was not fond of then President McKinley’s reluctance to supporting the Cuban revolution against Spain.<sup>26</sup> In order to get the U.S. involved, Hearst sent correspondents

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. DEP’T OF STATE OFF. OF THE HISTORIAN, U.S. DIPLOMACY AND YELLOW JOURNALISM, 1895-1898, MILESTONES IN THE HIST. OF U.S. FOREIGN RELS., <https://history.state.gov/milestones/1866-1898/yellow-journalism> (notice of publication retired May 9, 2017).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Jonathan W. Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunication Acts*, 17 ST. JOHN’S J. LEGAL COMMENT. 11, 28 (2003).

down to Cuba to report on the situation in order gin up anti-Spanish sentiment within the U.S. and to pressure the government to get involved.<sup>27</sup> When the correspondents could not find anything worth reporting and requested return, Hearst told them to remain, saying “You furnish the pictures, I’ll furnish the war.”<sup>28</sup>

Hearst got his chance when an American battleship, the U.S.S. Maine, sunk after an explosion had occurred onboard while it was on its way to a diplomatic meeting with the Spanish government to discuss the Cuban revolution.<sup>29</sup> Before a formal investigation had been completed, Hearst and Pulitzer were already publishing stories accusing the Spanish of being responsible for the explosion, and thus being an imminent threat to America.<sup>30</sup> Just a few months later, anti-Spanish sentiment had become so prevalent in the U.S. that the government was forced to react.<sup>31</sup> The Spanish-American war had officially begun, despite there still being no confirmation that the Spanish were ever involved in the sinking of the Maine.<sup>32</sup> This example serves as a case study of the effectiveness of disinformation campaigns when perpetrated by those with power and influence, as well as the influence these campaigns can have on public opinion and subsequent public policy.

### **III. FIRST AMENDMENT PROTECTIONS FOR SPEECH CONCERNING GOVERNMENT & POLITICS**

In its original text, the First Amendment provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>33</sup> The law today generally tends to view “these clauses as

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<sup>27</sup> *The Spanish American War*, SMALL PLANET COMMC’NS, <http://www.smlplanet.com/imperialism/remember.html> (last visited Sept. 26, 2021).

<sup>28</sup> Ken Lawrence, “*You Furnish the Pictures and I’ll Furnish the War*,” HIST. NEWS NETWORK, <https://historynewsnetwork.org/article/173692>.

<sup>29</sup> U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, *supra* note 21.

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> U.S. CONST. amend. I.



redundant guarantees of free expression.”<sup>34</sup> However, the Supreme Court has grappled for decades with the role that the First Amendment should play when it comes to keeping an informed public, while also ensuring the free exchange of ideas and preventing censorship from the government.<sup>35</sup> This task had been growing more difficult with the rise of large, profit driven media companies in America that could be unscrupulous if it meant selling more papers.

#### **A. The First Amendment and Legislating Accurate Media**

With the rise of massive media companies, there have been attempts by the government to ensure that the information distributed by these companies is as accurate as possible. The case of *Near v. Minnesota* exemplifies the law’s struggle between protecting free expression against government overreach and ensuring the public is not misinformed.<sup>36</sup> This case concerned a statute that Minnesota passed in 1925 which provided:

Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member, or employee of a corporation, shall be engaged in business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away:

- (a) An obscene, lewd, and lascivious newspaper, magazine, or other periodical, or
- (b) A malicious, scandalous and defamatory newspaper, magazine, or other periodical,

Is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends...

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<sup>34</sup> Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO STATE L.J. 249, 250 (2004).

<sup>35</sup> See *id.* at 250-51.

<sup>36</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

Furthermore, any resumption of publication without presenting the proper defense in court is punishable as contempt of court by fine or imprisonment.<sup>37</sup>

After the passage of this statute, the County of Hennepin sought to enjoin *The Saturday Press* for publishing a number of articles about public officials including the Mayor and Chief of Police.<sup>38</sup> The paper alleged that these officials were involved in covering up a grand racketeering, gambling, and bootlegging scheme orchestrated by a mysterious Jewish gangster.<sup>39</sup> After the initial complaint was filed, the paper was enjoined by the court to cease all publication, circulation, or possession of any future editions of the paper.<sup>40</sup> The paper objected to the complaint, claiming that the County had insufficient facts to justify it, and that the statute violated their Fourteenth Amendment right to Due Process.<sup>41</sup> The case was appealed to the state's supreme court who ruled against the paper in part because "it saw no reason 'for the defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield,'" and that the "defendants had not indicated any desire 'to conduct their business in the usual and legitimate manner.'"<sup>42</sup>

The paper then appealed the decision to the U.S. Supreme Court to rule on the constitutionality of the statute.<sup>43</sup> The Court found that the nature of the statute, which allowed public officials to sue and enjoin a publication, placed the burden on the publisher to prove (1) the material is truthful and published with good intent, (2) to be subjected to possible contempt of court for an indeterminate period of time should they publish again, effectively censoring the publication.<sup>44</sup> The Court

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<sup>37</sup> 1925 MINN. SESS. LAW SERV. 358 (West).

<sup>38</sup> *Near*, 283 U.S. at 703.

<sup>39</sup> *Id.* at 704.

<sup>40</sup> *Id.* at 706.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 706-07.

<sup>43</sup> *Id.* at 707.

<sup>44</sup> *Near*, 283 U.S. at 713.

discussed the First Amendment principle of previous restraint, defined as: “government action that prohibits speech or other expression before the speech happens.”<sup>45</sup> Further, the Court reasoned that the constitutional principle of freedom of the press was so fundamental that the press should be immune from previous restraints, especially when criticizing public officials, except in times of war or when said publication would incite violence.<sup>46</sup> For to endow public officials with these abilities outside of those circumstances creates a system that is ripe for abuses, especially given the much greater size and complexity of government which allows for more prevalent corruption.<sup>47</sup> The court further emphasized: “[t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.”<sup>48</sup>

The Court states that “characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.”<sup>49</sup> Even if a hypothetical publication were chiefly devoted to publishing scandalous or salacious material, that is not relevant.<sup>50</sup> The Court feared that if this statute was allowed to stand as constitutional under the guise of punishing those who abuse the freedom of the press, then a public official could (1) sue to enjoin any publisher, regardless of the truthfulness of the material, and (2) place the burden on the publisher to prove its validity.<sup>51</sup> Since the legislature could pass statutes determining the threshold for proving such validity, it could provide the means for moving towards complete systemic censorship of dissent.<sup>52</sup>

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<sup>45</sup> LEGAL INFO. INST., *Prior Restraint*, in WEX, CORNELL L. SCH., [https://www.law.cornell.edu/wex/prior\\_restraint](https://www.law.cornell.edu/wex/prior_restraint) (last visited Sept. 22, 2022).

<sup>46</sup> *Near*, 283 U.S. at 715-16.

<sup>47</sup> *Id.* at 719.

<sup>48</sup> *Id.* at 720.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 721.

<sup>52</sup> *Near*, 283 U.S. at 721.

### **B. Libel and The First Amendment Standard**

When confronting issues of disinformation, the Court has emphasized that the constitutional safeguards of the first amendment were “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>53</sup> As Justice Brandeis famously stated in his concurring opinion in *Whitney v. California*:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>54</sup>

One of the more famous confrontations over Justice Brandeis’ stated principle took place in *New York Times Co. v. Sullivan*.<sup>55</sup> This case concerned a libel suit filed by the Montgomery Alabama Public Safety Commissioner against the New York Times after the paper published an ad in support of Martin Luther King Jr. which contained

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<sup>53</sup> Roth v. United States, 354 U.S. 476, 484 (1957).

<sup>54</sup> Whitney v. California, 274 U.S. 357, 375-76 (1927).

<sup>55</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

minor inaccuracies about actions taken by the Montgomery Police Department against local civil rights activists and King himself.<sup>56</sup> After the Times refused to retract the information, the Commissioner sued the paper for libel, claiming that because his duties included supervising the police department, the statements implicitly referred to him.<sup>57</sup> The Alabama Supreme Court ruled in favor of the Commissioner and ordered the Times to pay him monetary damages, a decision which the Times appealed to the Supreme Court.<sup>58</sup> The Court noted that the civil libel law in question imposed a fine more than one thousand times greater than the criminal statute without the safeguards of a high burden of proof, no protection against double jeopardy, and no need for the plaintiff to prove any actual pecuniary loss brought about by the defendant's conduct.<sup>59</sup> In effect, the statute created an environment in which First Amendment freedoms could not survive, as newspapers would be forced to self-censor out of fear of being dragged through endless, costly litigation.<sup>60</sup> Even with the defense of truth afforded to the defendant, the statute does not address the reality behind self-censorship of government critics due to the evidentiary burdens and costs of proving their claims in court.<sup>61</sup>

Therefore, the Court reversed the Alabama Supreme Court's decision and held that the Alabama libel law was "constitutionally deficient" and violated the first and fourteenth amendment rights of the Times and anyone else who wished to criticize public officials.<sup>62</sup> The Court would go on to state that in the future, when public officials wish to sue private entities for libel, they must prove that the statement was made with "actual malice," in that the defendant made the statement knowing it was a falsehood or with reckless disregard of whether it was

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<sup>56</sup> *Id.* at 256-63.

<sup>57</sup> *Id.* at 260-63.

<sup>58</sup> *Id.* at 263-64.

<sup>59</sup> *Id.* at 277-78.

<sup>60</sup> *Id.* at 278.

<sup>61</sup> *N.Y. Times Co.*, at 279.

<sup>62</sup> *Id.*

false or not.<sup>63</sup> This standard was initially an “official privilege” the States afforded solely to public officials who were sued for libel by private entities as a means of ensuring public officials could effectively carry out their duties without fear of facing costly civil litigation.<sup>64</sup> Now, the Court has enacted this test in the opposite direction in order to level the playing field between the parties.<sup>65</sup>

#### **IV. THE FIRST AMENDMENT AND THE MEDIA AS A BUSINESS**

While the Supreme Court has made it clear that the free flow of information is constitutionally protected, this principle has consistently been confronted with the reality that news publications are also businesses that seek to monopolize markets, which effectively inhibit the free exchange of information. This has driven a larger conversation about a “right to access” to ensure a wide variety of viewpoints can reach the public.<sup>66</sup> For example, in *Miami Herald Publ’g Co., Div. of Knight Newspapers, Inc. v. Tornillo*, the state of Florida passed a statute that incorporated a “right to reply.”<sup>67</sup> This provision stated that if a candidate for public office has their character or official record attacked by any newspaper, then said candidate has the right to compel that newspaper to print any response the candidate may have to the accusation levied at no cost to the candidate.<sup>68</sup> The reply must appear in the same location and typeface as the original accusation, and failure to do so would result in a first-degree misdemeanor for the outlet.<sup>69</sup> The Court held that the Florida statute was unconstitutional because the government was, in effect, compelling the newspaper to publish “that

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<sup>63</sup> *Id.* at 280.

<sup>64</sup> *Id.* at 282.

<sup>65</sup> *Id.* (“Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.”).

<sup>66</sup> See *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 247-48 (1974).

<sup>67</sup> *Id.* at 247.

<sup>68</sup> *Id.* at 244.

<sup>69</sup> *Id.*

which reason tells them should not be published.”<sup>70</sup> Thus, the statute was equally a command over the content of the paper as one that outright forbade the paper from publishing the material in question.<sup>71</sup>

The Court prefaces this decision by acknowledging the threat that market forces can pose to the free expression of ideas; a threat that was not as feasible in 1791 when the first amendment was ratified:

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible... The claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to ensure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.<sup>72</sup>

Furthermore, Justice Douglas, who presided over this case, had expressed his concern over newspaper monopolies a decade prior, stating:

Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but

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<sup>70</sup> *Id.* at 256.

<sup>71</sup> *Id.*

<sup>72</sup> *Miami Herald*, 418 U.S. at 251.

to inculcate in its readers one philosophy, one attitude -- and to make money.<sup>73</sup>

Despite acknowledging this threat, the Court draws a clear line between compelling a paper to publish what “reason” would tell it not to be published and engaging in antitrust action to ensure market fairness.<sup>74</sup>

The Court contrasts *Miami Herald* with *Associated Press v. United States*, in which the appellant argued that the First Amendment grants the press immunity from antitrust regulations.<sup>75</sup> The Court, however, reasoned to the contrary:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.<sup>76</sup>

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<sup>73</sup> *Id.* at 253 (quoting EARL WARREN ET AL., *THE GREAT RIGHTS* 124-25 (E Cahn ed. 1963)).

<sup>74</sup> *Id.* at 256.

<sup>75</sup> *Id.* at 251-52, 256.

<sup>76</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945).



Thus, the Court re-emphasized in *Miami Herald*, that when a state attempts to legislate a virtuous and responsible press, doing so directly conflicts with the First Amendment.<sup>77</sup>

Furthermore, in *Turner Broad. Syst. V. FCC*, the Court defined its idea of what a regulation should possess in order to not conflict with the principles of the First Amendment.<sup>78</sup> The appellant in this case challenged the constitutionality of the Cable Television Protection and Competition Act (Cable Act) on First Amendment grounds.<sup>79</sup> The Act required all cable television providers to delegate some of their channels to local broadcasting stations.<sup>80</sup> The Court, after applying intermediate scrutiny, upheld the “must-carry” provision, because it served an important government interest of providing access to local channels that would otherwise be blocked from entering the market, and did not substantially burden the free expression of the cable providers in furthering that interest.<sup>81</sup> The provision’s content-neutral and “industry-specific antitrust and fair trade” legislation demonstrated that it was narrowly-tailored to protect smaller local broadcasting stations that were being blocked out of the market by the “monopoly power in most cable systems, growing concentration in the cable industry, and concomitant risks of programming decisions driven by anticompetitive policies.”<sup>82</sup>

The Court reached this decision at around the same time as the passage of major legislation designed to regulate the media more efficiently: The Telecommunications Act of 1996.<sup>83</sup> This Act, which

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<sup>77</sup> *Miami Herald*, 418 U.S. at 256.

<sup>78</sup> *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 186-87 (1997).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 185.

<sup>81</sup> *Id.* at 185-87 (citing *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 662-63 (1994)).

<sup>82</sup> *Id.* at 186 (citing *Turner Broad. Sys. v. FCC*, 819 F. Supp. 32, 40, 45-47, *vacated and remanded*, *Turner I*, 512 U.S. 622 (1994) (D.D.C. 1993)).

<sup>83</sup> *Telecommunications Act of 1996*, FCC, <https://www.fcc.gov/general/telecommunications-act-1996> (last updated Jun. 20, 2013).

was an amendment of the Communications Act of 1934, was one of the largest regulatory overhauls of telecommunications since the original act was passed nearly sixty years prior.<sup>84</sup> Its goal was to update many of the original provisions to effectively deal with the rise of the internet with the ultimate goal of breaking up communications monopolies and encouraging market competition.<sup>85</sup> When the original act was passed in 1934, it created the Federal Communications Commission (“FCC”) to oversee and regulate the different communications industries.<sup>86</sup> One of the most important roles of the FCC following the new Act is, among other things, the regulation of obscenity and violence portrayed on the internet and television.<sup>87</sup> The 1996 Act contained what is commonly referred to as the Communications Decency Act (“CDA”), which criminalized the transmission of obscene and indecent material over the internet.<sup>88</sup>

#### V. THE IMPACT OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Most of the CDA was struck down by the Supreme Court as an unconstitutional infringement on free speech.<sup>89</sup> This was because the definitions of illegal communications were unconstitutionally broad and vague, coupled with harsh criminal penalties, the Act had too much of

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<sup>84</sup> *Id.*

<sup>85</sup> JOSEPH L. GATTUSO, THE UNITED STATES TELECOMMUNICATIONS ACT OF 1996, GLOB. COMM’NS INTERACTIVE (1998), <https://www.ntia.doc.gov/legacy/opadhome/overview.htm>.

<sup>86</sup> Bureau of Justice Assistance, *The Communications Act of 1934*, U.S. DEP’T OF JUST., <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288#the-communications-act-of-1934-47-u-s-c-%C2%A7-151-et-seq> (last visited Sept. 2, 2022).

<sup>87</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151-63); *The Communications Act of 1934*, *supra* note 86.

<sup>88</sup> 110 Stat. 133-43.

<sup>89</sup> *Supreme Court Declares Communications Decency Act Unconstitutional*, WILEY LAW (July 3, 1997), <https://www.wiley.law/printpilot-newsletter-59.pdf?1664920451>.

a chilling effect on free speech online.<sup>90</sup> However, Section 230 is one of the few CDA provisions to still remain in effect today.<sup>91</sup> When it comes to regulation of content, especially in the United States,<sup>92</sup> social media companies are largely responsible for regulating themselves with community guidelines or terms of service that establish what content is and is not allowed to be posted on the platform.<sup>93</sup> They also cannot be held legally liable for the content users post on their platforms because Section 230 of the CDA protects them.<sup>94</sup> This Section provides that no provider or user of an “interactive computer service” can be held civilly liable for the third-party content on their platforms, nor for the actions they may take to regulate content on said platform.<sup>95</sup> Exceptions exist, however, for criminal offenses, such as sex trafficking, by the provider or its users.<sup>96</sup>

#### **A. How Section 230 Led to the Rise of Social Media as we Know it**

Section 230 is considered to be the legal bedrock upon which the internet was built, and has allowed it to thrive.<sup>97</sup> In passing Section 230, Congress believed this would allow the internet to become “a forum for true diversity of political discourse, unique opportunities for cultural

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<sup>90</sup> *Id.*

<sup>91</sup> 47 U.S.C. § 230; *See also Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> (last visited Jan. 29, 2022).

<sup>92</sup> Anshu Siripurapu & William Mellow, *Social Media Companies and Online Speech: How Should Countries Regulate Tech Giants?*, COUNCIL ON FOREIGN RELS. (Feb. 9, 2021, 11:30 AM), <https://www.cfr.org/in-brief/social-media-and-online-speech-how-should-countries-regulate-tech-giants>.

<sup>93</sup> Matthew P. Hooker, Note, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J.L. TECH. & ARTS 37, 42 (2019).

<sup>94</sup> 47 U.S.C. § 203(c)(1)-(2).

<sup>95</sup> *Id.* at (c)(1).

<sup>96</sup> *Id.* at (e)(5).

<sup>97</sup> Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 2 (2017).

development, and myriad avenues for intellectual activity . . . .”<sup>98</sup> Congress certainly achieved that part of their goal, because without these protections for usage of third-party content, sites like Facebook, Twitter, and YouTube likely would never exist, let alone become the tech giants they are today. A Pew Research Survey published in 2021 found that social media has become a widespread part of daily life, with 70% of respondents saying they visit Facebook on a daily basis, followed by 54% who use YouTube and 46% who use Twitter on a daily basis.<sup>99</sup> Google is the most popular website in the world, with 45.4 billion monthly visits, followed by its subsidiary YouTube with 13.3 billion visits, and Facebook with 11.7 billion.<sup>100</sup> For comparison, Twitter comes in at just 2.4 billion monthly visits on its platform.<sup>101</sup> On these platforms, users can post virtually anything that comes to their mind, or share any source of information, provided it does not violate the respective platform’s terms of service.

### **B. How Social Media Platforms Self-Regulate**

The most common way these providers regulate their platforms is through terms of service. When a user clicks ‘agree’ to the terms and conditions posted on a website, they are also signing an agreement which they could be subject to liability for, with the provider that they will abide by those terms when using their products.<sup>102</sup> Should a user attempt to sue over these terms, courts will be more likely to uphold the contract so long as the user received adequate notice of the terms, and the terms are not illegal or unconscionable.<sup>103</sup> Despite these limitations,

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<sup>98</sup> 47 U.S.C. § 230(a)(3)-(4).

<sup>99</sup> *Seven-in-Ten Facebook Users Say They Visit Site Daily*, PEW RSCH. CTR. (Apr. 5, 2021), [https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/pi\\_2021-04-07\\_social-media\\_0-04/](https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/pi_2021-04-07_social-media_0-04/).

<sup>100</sup> J. Clement, *Leading Websites Worldwide 2021, By Monthly Visits*, STATISTA (Jan. 2022), <https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/>.

<sup>101</sup> *Id.*

<sup>102</sup> *Terms and Conditions*, A.B.A.,

[https://www.americanbar.org/groups/business\\_law/safeselling/terms/](https://www.americanbar.org/groups/business_law/safeselling/terms/).

<sup>103</sup> *Id.*

providers like social media companies have broad authority to regulate their platforms as they see fit and may amend their rules at will.<sup>104</sup> For example, recently platforms like Twitter, Facebook, and YouTube have updated their terms of service to address Covid-19, vaccine<sup>105</sup> and election<sup>106</sup> misinformation. Should a user be reported for posting such content, they can be subject to a variety of sanctions including having their content flagged, removed, or having their account suspended.<sup>107</sup> These changes have come as a response to sustained criticism against the companies for not doing more to combat misinformation on their platforms.<sup>108</sup> Yet despite these policies leading to millions of harmful posts being removed or sanctioned,<sup>109</sup> they have not adequately addressed the spread of misinformation.

## VI. The Misinformation Problem on Social Media

Following the invention of the internet, news and information became capable of traveling much farther and wider than it ever had before. Just over two decades ago, traditional news organizations were

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<sup>104</sup> *Id.*

<sup>105</sup> *Covid-19 Misleading Information Policy*, TWITTER (last updated Dec. 2021), <https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy>; Meta, *Covid-19 and Vaccine Policy Updates & Protections*, FACEBOOK, <https://www.facebook.com/help/230764881494641> (last visited Sept. 22, 2022); *Vaccine Misinformation Policy*, YOUTUBE, <https://support.google.com/youtube/answer/11161123?hl=en> (last visited Sept. 22, 2022).

<sup>106</sup> *Civic Integrity Policy*, TWITTER (Oct. 2021), <https://help.twitter.com/en/rules-and-policies/election-integrity-policy>; Meta, *Preparing for Elections*, FACEBOOK, <https://about.facebook.com/actions/preparing-for-elections-on-facebook/> (last visited Sept. 22, 2022); *Election Misinformation Policies*, YOUTUBE, <https://support.google.com/youtube/answer/10835034?hl=en> (last visited Sept. 22, 2022).

<sup>107</sup> *Civic Integrity Policy*, *supra* note 106.

<sup>108</sup> Susan Heavey & Sheila Dang, *YouTube blocks all anti-vaccine content*, REUTERS (Sept. 29, 2021, 1:16 PM), <https://www.reuters.com/technology/youtube-blocks-all-anti-vaccine-content-washington-post-2021-09-29/>.

<sup>109</sup> Siripurapu & Merrow, *supra* note 92.

effectively the gatekeepers of information and determining what was and was not disseminated to the public.<sup>110</sup> However, with the invention of social media networks like Facebook, YouTube, and Twitter, the flow of information has changed to where anybody can post anything on these sites regardless of its accuracy.<sup>111</sup> In 2019, a survey was conducted by the Centre for International Governance Innovation on behalf of Ipsos, in which 25,000 individuals in over twenty five economies were interviewed.<sup>112</sup> The results showed that nearly 90% of respondents reported having previously encountered fake news while online.<sup>113</sup> Among them, nearly 86% reported initially believing it was real before conducting further investigation.<sup>114</sup> The results seem to suggest that social media plays a significant role in the spread of misinformation, with 67% of respondents reporting encountering fake news on Facebook, 65% encountering it on social media generally, 56% on YouTube, and 51% on television.<sup>115</sup> A Pew Research study conducted in 2020 found that 68% of Americans get their information from news websites and apps, 65% from search engines like Google, and 53% from social media.<sup>116</sup>

#### A. Foreign Disinformation Campaigns on Social Media

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<sup>110</sup> Lisa Marshall, *Who Shares the Most Fake News? New Study Sheds Light*, UNIV. COLO. BOULDER (Jun. 17, 2020), <https://www.colorado.edu/today/2020/06/17/who-shares-most-fake-news-new-study-sheds-light>.

<sup>111</sup> *See id.*

<sup>112</sup> Sean Simpson, *Fake News: A Global Epidemic Vast Majority (86%) of Online Global Citizens Have Been Exposed to it, With Most (86%) Admitting to Having Fallen Victim to it*, IPSOS (June 11, 2019), <https://www.ipsos.com/en-us/news-polls/cigi-fake-news-global-epidemic>. (Ipsos is a multinational market and research firm headquartered in France).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Elisa Shearer, *More Than Eight-In-Ten Americans Get News From Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.

Disinformation campaigns from foreign governments, ranging from conspiracies about public health to politics, are also prevalent on social media. In fact, a study published in the online journal *BMJ Global Health* found that foreign disinformation campaigns on social media are “robustly associated with declines in [average] vaccination rates. The use of social media to organize offline action is highly associated with an increase in public belief in vaccines being unsafe.”<sup>117</sup> Specifically, the study found that the number of anti-vaccine posts on Twitter alone can increase by 15% in a given country due to targeted foreign disinformation campaigns.<sup>118</sup> It also discovered a preponderance of such anti-vaccine disinformation campaigns originated either within Russia or via pseudo-state actors associated with Russia.<sup>119</sup> Governments all over the world can exploit the algorithms of social media websites to engage much cheaper, quicker, more data-rich, and widespread propaganda and disinformation campaigns than at any point in the past.<sup>120</sup> Additionally, state actors can create bot-accounts that automatically post, share, and even engage with other users online to perpetuate or amplify a particular disinformation narrative.<sup>121</sup> Large networks of bots are capable of distorting conversations online by getting disinformation to trend on the platform, or even participating in targeted harassment campaigns against journalists or activists to silence dissent.<sup>122</sup>

A contemporary example of this phenomenon is the conspiracy theory that 5G cellular networks emit harmful radiation that can weaken

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<sup>117</sup> Steven L. Wilson & Charles Wiysonge, *Social Media and Vaccine Hesitancy*, *BMJ GLOB. HEALTH* (Oct. 23, 2020), <https://gh.bmj.com/content/5/10/e004206>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Samantha Bradshaw, *Influence Operations and Disinformation on Social Media*, *CTR. FOR INT’L. GOVERNANCE INNOVATION* (Nov. 23, 2020), <https://www.cigionline.org/articles/influence-operations-and-disinformation-social-media/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

the immune system, cause cancer, or can even be used to brainwash large amounts of people.<sup>123</sup> Since the outbreak of COVID-19, the theory has evolved into believing that the pandemic narrative is actually a cover-up for the symptoms of 5G exposure, or even that the 5G radio waves are spreading COVID-19 themselves.<sup>124</sup> The origins of the theory can be traced back to a report published by Dr. Bill Curry in 2000 which detailed how wireless signals can damage cells deep within the body and cause cancer.<sup>125</sup> However, Dr. Curry was incorrect, and his research has been largely debunked because it didn't account for the fact that our skin can block higher frequency radio waves associated with wireless technology.<sup>126</sup> Despite this, Dr. Curry had still been releasing studies for over fifteen years claiming 3G, 4G, and now 5G radio waves can cause cancer, all of which were widely rejected by the scientific community.<sup>127</sup>

Dr. Curry's research has been used to justify resistance to other advancements in telecommunications in recent decades, but it hadn't gained mainstream support until 2015 when Dr. Curry was interviewed by *Russia Today*, an international media outlet run by the Russian Government.<sup>128</sup> The state-run television network uncritically co-opted and distributed Dr. Curry's misinformation on its platform and on social media, likely in a coordinated disinformation campaign.<sup>129</sup> Fast forward

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<sup>123</sup> Isabella Jibilian, *The Accused Nashville Suicide Bomber Was Reportedly Paranoid About 5G Technology. Here's What We Know About the False 5G Conspiracy That Went Viral This Year*, BUS. INSIDER (Dec. 29, 2020, 5:53 PM), <https://www.businessinsider.com/anthony-quinn-warner-false-5g-conspiracy-theory-nashville-bombing-explained-2020-12>.

<sup>124</sup> *Id.*

<sup>125</sup> William J. Broad, *The 'Tumor-Inducing' 5G Health Hazard That Doesn't Exist*, INDEP. (Jul. 17, 2019, 2:47 PM), <https://www.independent.co.uk/news/health/5g-health-hazard-brain-tumour-bill-curry-wireless-radio-waves-a9008171.html>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> William J. Broad, *Your 5G Phone Won't Hurt You. But Russia Wants You to Think Otherwise*, N.Y. TIMES (May 12, 2019),



to April 2020, and several cellphone towers in the United Kingdom are set on fire amid a flurry of Facebook posts blaming 5G for the spread of the Coronavirus.<sup>130</sup> There were also a total of 56 incidents of verbal and physical attacks, fueled by 5G-coronavirus conspiracies, against cellphone tower engineers in the U.K. in April 2020 alone.<sup>131</sup> Other anti-5G protestors had hung up posters on street equipment with razor blades and needles on the backs in an effort to injure workers who tried to remove them.<sup>132</sup> Later that year on Christmas morning, a man suicide bombed the AT&T building in Nashville, Tennessee because, according to the FBI, he believed that 5G was responsible for his father's death and wanted revenge on the telecommunications industry.<sup>133</sup>

### **B. Domestic Disinformation Campaigns on Social Media**

Foreign actors are not the sole drivers of disinformation on social media, as domestic entities have engaged in disinformation campaigns for their own personal or political gain as well. A recent example of this is the disinformation campaign surrounding the 2020 presidential election. Specifically, the 'Hammer and Scorecard' conspiracy that claimed voting machines created by Dominion Voting Systems changed millions of votes for Trump into votes for Biden.<sup>134</sup> This conspiracy was traced to posts made in 2013 by someone claiming to be a former intelligence contractor about a deep state supercomputer called 'Hammer' that allowed him to hack databases and collect information on millions of Americans without presenting any evidence

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<https://www.nytimes.com/2019/05/12/science/5g-phone-safety-health-russia.html>.

<sup>130</sup> Ryan Browne, *UK Cell Towers Torched Amid Bogus Conspiracy Theories That Link 5G with Coronavirus*, CNBC (Apr. 6, 2020),

<https://www.cnbc.com/2020/04/06/coronavirus-uk-cell-towers-set-on-fire-amid-5g-conspiracy-theories.html>.

<sup>131</sup> *Coronavirus: 'Razor Blades in Anti-5G Posters' on Telegraph Poles*, BBC (May 11, 2020), <https://www.bbc.com/news/uk-england-52619350>.

<sup>132</sup> *Id.*

<sup>133</sup> Jibilian, *supra* note 123.

<sup>134</sup> Jacob Sweet, *Can Disinformation Be Stopped?*, HARV. MAG. (July 3, 2021), <https://www.harvardmagazine.com/2021/07/features-disinformation>.

to that effect.<sup>135</sup> It wasn't until 2020 that the conspiracy reappeared on a self-published blog called *The American Report*, which claimed that the same software was used to alter the 2012 election results to help Barack Obama win, and was implemented again in 2020 to help Joe Biden win.<sup>136</sup> The theory began to gain more mainstream attention when it was discussed by Donald Trump's former attorney Sidney Powell, and former Trump administration advisor Steve Bannon on Bannon's podcast *The War Room*.<sup>137</sup> From there, the theory would fully break into more mainstream conservative media outlets like *Fox News*, *Newsmax*, *One America News*, and mainstream politicians up to and including the President himself.<sup>138</sup> This helped legitimize the narrative and provide it with a wider audience to spur even more news coverage and conversation online where it continued to spread rapidly and unchecked for some time.<sup>139</sup>

Former President Trump has also played a large role in disseminating disinformation on social media on his own. An online media study conducted by Harvard University's Berkman Klein Center for Internet & Society, after analyzing millions of tweets, Facebook posts, and online media stories, concluded that President Trump has “. . . perfected the art of harnessing mass media to disseminate and at times reinforce his disinformation campaign by using three core standard practices of professional journalism.”<sup>140</sup> These core standards are 1) elite institutional focus granted by the office of the Presidency, 2) headline seeking, and 3) balance, neutrality, or the avoidance of appearing to take a side.<sup>141</sup> Through a combination of tweets, television

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Yochai Benkler et al., *Mail-In Voter Fraud: Anatomy of a Disinformation Campaign*, BERMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV. (Oct. 1, 2020), <https://cyber.harvard.edu/publication/2020/Mail-in-Voter-Fraud-Disinformation-2020>.

<sup>141</sup> *Id.*

interviews, and White House press conferences, President Trump was able to maintain control over, and provide legitimacy to, the national voter-fraud narrative leading into the 2020 general election.<sup>142</sup> The former President did not act alone, as the entire Republican National Committee, Trump campaign staff, and conservative media ecosystem consistently perpetuated and legitimized the same message, while marginalizing those who dissented from them.<sup>143</sup> The Berman Klein Center has found previously that in 2015-2018, Fox News and the Trump campaign were more effective at spreading disinformation on social media than Russian trolls or “Facebook clickbait artists.”<sup>144</sup> They went on to state in this 2020 study:

This dynamic appears to be even more pronounced in this election cycle, likely because Donald Trump’s position as president and his leadership of the Republican Party allow him to operate directly through political and media elites, rather than relying on online media as he did when he sought to advance his then-still-insurgent positions in 2015 and the first half of 2016.<sup>145</sup>

President Trump was also a major contributor to the spread of COVID-19 misinformation in 2020, as well as election misinformation. A study conducted by the Cornell University Alliance for Science concluded that between January and May of 2020, President Trump was the largest driver of COVID-19 misinformation, having been mentioned in 38% of posts made within the misinformation conversations happening on social media.<sup>146</sup>

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Sheryl Gay Stolberg & Noah Weiland, *Study Find ‘Single Largest’ Driver of Coronavirus Misinformation: Trump*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/us/politics/trump-coronavirus-misinformation.html>.

### C. How Algorithms Spread Disinformation

An algorithm's primary job on social media is to maximize per user engagement on the platform, because doing so will lead to a larger number of ad-impressions, which will in turn generate more profit for the website hosting the ads.<sup>147</sup> When presenting its users with content, all of these platforms rely on an algorithm to present the user with content based on a calculation of "relevance" rather than recency.<sup>148</sup> That is to say, these algorithms prioritize content with greater prior engagement by the user, by the sum of all the users on the platform, and the similarity of the content relative to the kind of content the user viewed in the past.<sup>149</sup> While this may be good for keeping users engaged with the platform and generating revenue, it is also exceptional at contributing to the spread of harmful misinformation.<sup>150</sup> A study conducted by MIT Researchers found that, on Twitter, misinformation spreads more rapidly than accurate information does by a substantial margin.<sup>151</sup> Surprisingly, this spread does not come about from bots, or fake accounts, but from real people spreading this information themselves through shares and retweets.<sup>152</sup> False stories are 70% more likely to be retweeted than true stories, and can spread up to six times faster.<sup>153</sup> This is because the outrage many of these stories generate encourages interaction from users, which in turn makes that information more prevalent in their newsfeeds, and so on.<sup>154</sup>

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<sup>147</sup> Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147, 149 (2017).

<sup>148</sup> Chris Meserole, *How Misinformation Spreads on Social Media - And What to do About it*, BROOKINGS INST.: ORD. FROM CHAOS (May 9, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/>.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

<sup>151</sup> Peter Dizikes, *Study: On Twitter, False News Travels Faster Than True Stories*, MIT NEWS (Mar. 8, 2018), <https://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

A 2018 internal report conducted by Facebook found that Facebook's algorithms "exploit the human brain's attraction to divisiveness."<sup>155</sup> Another internal report conducted in 2016 concluded that 64% of people who joined extremist groups on Facebook found them because of the company's algorithms.<sup>156</sup> Furthermore, a study conducted by *Cybersecurity for Democracy* concluded that politically extreme sources generate more interactions from users overall.<sup>157</sup> The study also found that far-right wing sources consistently received the highest amount of engagement per follower out of any partisan group.<sup>158</sup> Additionally, frequent purveyors of misinformation from far-right wing sources had 65% more engagement per follower than other similar pages.<sup>159</sup> Therefore, social media companies face a difficult profit incentive: more extreme content tends to garner more engagement, which encourages the spread of misinformation while also generating ad revenue for the platform.<sup>160</sup>

#### **D. Social Media Companies Are Not Doing Enough to Address the Problem**

Internal documents leaked by a former Facebook employee-turned-whistleblower in 2021 revealed that Facebook is well aware of the misinformation problem plaguing its platform, as well as the real-world damage it has caused.<sup>161</sup> These documents also showed that not

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<sup>155</sup> Ally Daskalopoulos et al., *Thinking Outside the Bubble: Addressing Polarization and Disinformation on Social Media*, CTR. FOR STRATEGIC & INT'L STUD. JOURNALISM BOOTCAMP (Sept. 27, 2021), <https://journalism.csis.org/thinking-outside-the-bubble-addressing-polarization-and-disinformation-on-social-media/>.

<sup>156</sup> *Id.*

<sup>157</sup> Laura Edelson et al., *Far-Right News on Facebook More Engaging*, CYBERSECURITY FOR DEMOCRACY (Mar. 3, 2021), <https://medium.com/cybersecurity-for-democracy/far-right-news-sources-on-facebook-more-engaging-e04a01efae90>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Daskalopoulos et al., *supra* note 155.

<sup>161</sup> Jeff Horowitz, *The Facebook Files*, WALL ST. J. (Sept. 13, 2021), <https://www.wsj.com/articles/the-facebook-files-11631713039>.

only has Facebook been well aware of the extent of this hate and misinformation problem, but the company has not been forthright with the public about the extent to which they are addressing it.<sup>162</sup> Internal research conducted by Facebook shows that in 2021, the company estimated that they would only be able to address 3%-5% of the of hate speech and only six-tenths of one percent of the violent and inciting posts on the platform.<sup>163</sup> Another leaked Facebook document states that “[w]e have evidence from a variety of sources that hate speech, divisive political speech and misinformation on Facebook and the family of apps are affecting societies around the world.”<sup>164</sup>

To address their misinformation problem, Facebook created a Civic Integrity Team charged with understanding Facebook’s impact on the world, keeping people safe, and defusing angry polarization.<sup>165</sup> The team vowed to “serve the people’s interests first, not Facebook’s.”<sup>166</sup> One month following the end of the 2020 U.S. election, Facebook dissolved their Civic Integrity Team, a choice that members working on the team disagreed with.<sup>167</sup> Just a few weeks later, on January 6<sup>th</sup>, 2021, supporters of then-President Donald Trump rioted and stormed the U.S. Capitol building.<sup>168</sup> According to prosecutors, many of those Trump supporters used Facebook groups to organize and spread conspiracy theories about the election being stolen.<sup>169</sup> The misinformation problem

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<sup>162</sup> Scott Pelley, *Whistleblower: Facebook is Misleading the Public on Progress Against Hate Speech, Violence, Misinformation*, CBS NEWS (Oct. 4, 2021) <https://www.cbsnews.com/news/facebook-whistleblower-frances-haugen-misinformation-public-60-minutes-2021-10-03/>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Billy Perrigo, *How Facebook Forced a Reckoning by Shutting Down the Team That Put People Ahead of Profits*, TIME (Oct. 7, 2021), <https://time.com/6104899/facebook-reckoning-frances-haugen/>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Alan Suderman & Joshua Goodman, *Amid the Capitol Riot, Facebook Faced Its Own Insurrection*, ASSOCIATED PRESS (Oct. 23, 2021),

on Facebook can largely be attributed to its algorithm. This algorithm prioritizes the type of content which was most recently engaged with by the user, and can direct users towards increasingly polarized pages and groups.<sup>170</sup> However, Facebook's own research demonstrates that the content that garners the most engagement is that which is emotional and divisive, such as misinformation.<sup>171</sup> Since Facebook makes more money the more content gets consumed on their platform, and some of the content that gets consumed the most is misinformation, Facebook has a financial incentive to allow for misinformation to propagate on its platform.<sup>172</sup>

According to a study conducted by the Center for Countering Digital Hate, the majority of anti-vaccine misinformation on social media is propagated by just twelve prominent accounts.<sup>173</sup> In fact, approximately 65% of anti-vaccine content on Twitter is attributable just to these twelve accounts.<sup>174</sup> On Facebook, approximately 73% of anti-vaccine content is attributable to these same twelve accounts.<sup>175</sup> Despite the fact that spreading such misinformation violates the terms of service of Facebook and Twitter, many of these twelve accounts still remain on both platforms today, and are still posting false or misleading anti-vaccine content that receives tens of millions of views in a matter of months.<sup>176</sup> In fact, across Facebook, Instagram, Twitter, and

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<https://apnews.com/article/donald-trump-technology-business-social-media-media-07124025bdbeba98a7c7b181562c3c1a>.

<sup>170</sup> *Id.*

<sup>171</sup> Perrigo, *supra* note 165.

<sup>172</sup> *Id.*

<sup>173</sup> See CTR. OF COUNTERING DIGIT. HATE, THE DISINFORMATION DOZEN 5 (Mar. 21, 2021), [https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9\\_b7cedc0553604720b7137f8663366ee5.pdf](https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_b7cedc0553604720b7137f8663366ee5.pdf) [hereinafter DISINFORMATION DOZEN].

<sup>174</sup> *Id.* at 6.

<sup>175</sup> *Id.* at 7.

<sup>176</sup> CTR. FOR COUNTERING DIGIT. HATE, DISINFORMATION DOZEN: THE SEQUEL 8 (Apr. 28, 2021), [https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9\\_6946cb0059624ec093a427552b1b2bc3.pdf](https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_6946cb0059624ec093a427552b1b2bc3.pdf) [hereinafter DISINFORMATION DOZEN: THE SEQUEL].

YouTube, each of these platforms failed to act on 95.1% of posts containing vaccine misinformation reported to them.<sup>177</sup> Of the 4.9% of reported posts that were acted on, 2.3% were labelled as false and remained on the platform, 2.3% were removed from the platform entirely, and .3% of posts belonged to accounts that were removed from their respective platform.<sup>178</sup> Some of this misinformation includes claims that vaccines are poisonous, vaccines make people sick, that COVID-19 is a false-flag operation, and that vaccines and masks are ineffective at preventing the spread of COVID-19.<sup>179</sup> The twelve most prominent anti-vaccine accounts combined have approximately 62 million followers, making them incredibly valuable to these social media companies, and incredibly influential.<sup>180</sup> Using publicly available data for the amount of revenue social media companies make per impression or per user, the Center for Countering Digital Hate estimates that these twelve accounts could generate approximately \$1.1 billion in annual revenue for social media companies.<sup>181</sup>

## **VII. How the Government Can Address Misinformation on Social Media**

The solution to the misinformation issue on social media exists at the nexus between the robust constitutional protections for free speech, the liability protections offered by Section 230, and the business interests of the private companies that run these platforms. With the severity of this issue ever increasing, and the social media companies seemingly incapable or unwilling to regulate themselves, conversations

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<sup>177</sup> CTR. FOR COUNTERING DIGIT. HATE, FAILURE TO ACT 11 (Aug. 26, 2020), [https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9\\_dbc700e9063b4653a7d27f4497f3c2c2.pdf](https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_dbc700e9063b4653a7d27f4497f3c2c2.pdf) [hereinafter FAILURE TO ACT].

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 16-20.

<sup>180</sup> CTR. FOR COUNTERING DIGIT. HATE, PANDEMIC PROFITEERS: THE BUSINESS OF ANTIVAX 4 (Jun. 1, 2021), [https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9\\_13cbbbef105e459285ff21e94ec34157.pdf](https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_13cbbbef105e459285ff21e94ec34157.pdf) [hereinafter PANDEMIC PROFITEERS].

<sup>181</sup> *Id.*



around if and how the government should step in have been becoming more commonplace among lawmakers.<sup>182</sup>

#### A. Reforming Section 230

There have been recent attempts by the United States government to revisit Section 230 protections. For instance, President Trump called to repeal the regulation outright, and even vetoed the National Defense Authorization Act in 2020 because it did not also include a provision to repeal Section 230.<sup>183</sup> President Trump's given reason for wanting to repeal the provision was to respond to the aforementioned policy changes by social media companies to address misinformation, alleging the policies were being implemented disproportionately against conservatives and thus the companies should be subject to stricter regulation.<sup>184</sup> President Biden has also expressed that he believes Section 230 protections should be revoked for Facebook among other social media companies because they are "propagating falsehoods they know to be false," and that Facebook founder and CEO Mark Zuckerberg should be held civilly liable along with his company for their role in knowingly propagating misinformation, similar to how one could sue *The New York Times* for doing the same.<sup>185</sup>

Following the January 6<sup>th</sup> Capitol riot, lawmakers began to actively pressure the Biden Administration to reform Section 230 to

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<sup>182</sup> See Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA's Mistakes*, BROOKINGS INST. (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/>.

<sup>183</sup> Amanda Macias, *Trump Vetoes Colossal \$740 Billion Defense Bill, Breaking With Republican-Led Senate*, CNBC (Dec. 24, 2020, 8:35 PM), <https://www.cnn.com/2020/12/23/trump-vetoes-740-billion-ndaa-defense-bill.html>.

<sup>184</sup> Abram Brown, *What Is Section 230-And Why Does Trump Want To Change It?*, FORBES (May 28, 2020, 2:26 PM), <https://www.forbes.com/sites/abrambrown/2020/05/28/what-is-section-230-and-why-does-trump-want-to-change-it/?sh=6687fe8e389d>.

<sup>185</sup> The Editorial Board, *The Choice: Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=nytcore-ios-share>.

address misinformation.<sup>186</sup> There have also been members of Congress who introduced legislation to limit Section 230's protections under certain conditions.<sup>187</sup> The Protecting Americans from Dangerous Algorithms Act, reintroduced by Democratic Representatives Anna Eshoo and Tom Malinowski in 2021 is one recent example.<sup>188</sup> The bill, if enacted, would narrowly amend Section 230 to remove liability immunity for content directly related to cases involving interference with civil rights,<sup>189</sup> neglecting to prevent interference with civil rights,<sup>190</sup> and acts of international terrorism.<sup>191</sup> The first two statutes were created to target coconspirators of the Klu Klux Klan,<sup>192</sup> and have been invoked in recent lawsuits filed against far right extremist organizations like the Proud Boys, the Oath Keepers, and others for their involvement in the January 6<sup>th</sup> Capitol riots.<sup>193</sup>

### **B. Implement a Notice-Takedown System**

Another potentially viable solution could be a notice and takedown system in a similar vein to the Digital Millennium Copyright Act ("DMCA"). The DMCA states that for service providers to maintain limited liability under Section 230 for copyright infringements on their

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<sup>186</sup> Nandita Bose & Jarrett Renshaw, *Exclusive: Big Tech's Democratic Critics Discuss Ways To Strike Back With White House*, REUTERS (Feb. 17, 2021, 6:21 AM), <https://www.reuters.com/article/us-usa-tech-white-house-exclusive/exclusive-big-techs-democratic-critics-discuss-ways-to-strike-back-with-white-house-idUSKBN2AH1A4>.

<sup>187</sup> Mark MacCarthy, *Back to The Future For Section 230 Reform*, BROOKINGS INST.: TECHTANK (Mar. 17, 2021), <https://www.brookings.edu/blog/techtank/2021/03/17/back-to-the-future-for-section-230-reform/>.

<sup>188</sup> Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. § 230(c) (2021).

<sup>189</sup> 42 U.S.C. § 1985.

<sup>190</sup> 42 U.S.C. § 1986.

<sup>191</sup> 18 U.S.C. § 2333.

<sup>192</sup> See Mark Fockele, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979).

<sup>193</sup> See *Thompson v. Trump*, No. 21CV00400, 2022 U.S. Dist. LEXIS 30049 at \*7-8 (D.D.C. Feb. 18, 2022).

platforms, they must remove copyrighted material after receiving notice of the infringement from the copyright owner.<sup>194</sup> The holder must provide adequate notice to the provider, identify the work being infringed, and provide a statement of good faith for the take down under penalty of perjury.<sup>195</sup> The DMCA also provides the alleged copyright infringer the opportunity to file a counter-notice, with a statement under penalty of perjury that the material removed was not used illegally.<sup>196</sup> Should the complaining party not wish to take the complaint to court, the service provider must restore the material in question.<sup>197</sup> A similar notice and takedown system could be implemented to address misinformation on social media platforms.

However, the DMCA is certainly not without problems that must be addressed to create a similar and effective anti-misinformation statute. The main issue with the DMCA is that it was implemented in 1998 when the internet was not nearly as large as it is now.<sup>198</sup> Providers today are consistently inundated with an insurmountable number of claims at one time.<sup>199</sup> Google, given its massive size, is forced to process millions of DMCA claims against them on a daily basis for links on their platform that lead to copyrighted materials.<sup>200</sup> This is far too

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<sup>194</sup> See U.S. COPYRIGHT OFF., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 SUMMARY 6, 8 (1998), <https://www.copyright.gov/legislation/dmca.pdf>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 12.

<sup>197</sup> *Id.* at 12.

<sup>198</sup> Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: Twentieth Century Solution to a Twenty-First Century Problem*, GEO. MASON UNIV. SCH. OF L. CTR FOR THE PROT. OF INTELL. PROP. 2 (2013), <https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>.

<sup>199</sup> *Google Transparency Report*, GOOGLE, <https://transparencyreport.google.com/> (last updated June 2, 2022).

<sup>200</sup> *Id.*

many claims for humans to reasonably handle, so Google implemented an algorithm to find and take down pirated content.<sup>201</sup>

Algorithmic enforcement of copyright claims has already been met with backlash due to certain issues regarding its practical applications. For example, when a provider receives a DMCA takedown request, they are compelled by the DMCA to remove or disable the disputed content expeditiously.<sup>202</sup> In many cases, this leads to content being removed inappropriately, often in cases of misidentification.<sup>203</sup> The user who posted the disputed material is typically not provided with a reason why their content has been removed.<sup>204</sup> Furthermore, the safe harbor provisions of the DMCA incentivize this sort of behavior because a provider could face dire legal consequences for allowing for copyright infringement on their platform, but they face no consequences for erroneously taking down non-copyrighted content.<sup>205</sup> Therefore, most providers opt to take down the content first and put it back up later if it was a mistake, rather than risk losing their safe harbor for knowingly hosting copyright-infringing materials.<sup>206</sup> This undermines the principle of due process for those having their content removed, and may cause unnecessary damage to those who rely on the usage of that platform for a living, as they may have to forgo income from that content for the length of the DMCA appeals process.<sup>207</sup>

A takedown system has already been self-implemented on many social media platforms for certain content. As mentioned previously, social media companies have recently changed their terms of service to

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<sup>201</sup> Michelle Roberts, *What is Google Pirate?*, EDIT BLOG (Oct. 27, 2014) <https://edit.co.uk/blog/google-pirate-algorithm/>.

<sup>202</sup> 17 U.S.C. § 512(c)(1)(C) (2013).

<sup>203</sup> Maayan Perel & Nina Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 499 (2016).

<sup>204</sup> *Id.* at 500.

<sup>205</sup> *Id.* at 501.

<sup>206</sup> *Id.* at 502.

<sup>207</sup> *Id.*

prevent the spread of COVID-19<sup>208</sup> and Election misinformation<sup>209</sup> by flagging or removing said content, as well as providing alternate sources of information for the subject matter at hand to provide important context.<sup>210</sup> However, this has been inadequate in actually addressing the problem,<sup>211</sup> runs counter to the company's profit incentive,<sup>212</sup> and has led to inconsistent enforcement of the terms of service for many larger accounts that have been flagged repeatedly.<sup>213</sup> However, this inconsistency could also be due to the fact that these companies currently are protected by Section 230 regardless of how much they do or do not address misinformation or enforce their own terms of service, as there is no legal incentive for them to do so.

Therefore, Congress could condition those Section 230 protections on the prevalence of misinformation on a given platform, in a similar fashion to the DMCA and copyrighted materials. In order to avoid many of the logistical issues associated with the DMCA, perhaps Congress should only target accounts similar to the aforementioned Disinformation Dozen, which are prolific spreaders of misinformation and repeat violators of the terms of service that continue to generate large revenue for social media companies.<sup>214</sup> That way, the social media companies would be able to focus on a more manageable number of users, and avoid punishing users who are perhaps only unwittingly spreading misinformation, instead focusing the ire on those who are originating and platforming it.

### C. Regulating Social Media as a Public Utility

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<sup>208</sup> See *Covid-19 Misleading Information Policy*, *supra* note 105.

<sup>209</sup> See *Civic Integrity Policy*, *supra* note 106.

<sup>210</sup> Joanna Geary (@JoannaG), *Bringing More Reliable Context to Conversations on Twitter*, TWITTER: CO. BLOG (Aug. 2, 2021), [https://blog.twitter.com/en\\_us/topics/company/2021/bringing-more-reliable-context-to-conversations-on-twitter](https://blog.twitter.com/en_us/topics/company/2021/bringing-more-reliable-context-to-conversations-on-twitter)

<sup>211</sup> DISINFORMATION DOZEN, *supra* note 173 at 8.

<sup>212</sup> PANDEMIC PROFITEERS, *supra* note 180 at 4.

<sup>213</sup> DISINFORMATION DOZEN, *supra* note 173 at 8.

<sup>214</sup> PANDEMIC PROFITEERS, *supra* note 180.

Social media has become more and more prevalent in our daily lives, and much of our economic, social, and political interactions have moved into the online space. Thanks to Section 230, much of the infrastructure that supports that digital space is controlled by a handful of large corporations with little to no accountability to bear.<sup>215</sup> This is why some have suggested that these companies should be treated as public utilities in order to better regulate them and stave off their negative profit incentives.<sup>216</sup> A public utility is a private or public entity that provides goods or services to the public at large.<sup>217</sup> Most public utilities share a common characteristic in that they monopolize control over a public good that is non-rival and non-excludable with high sunk costs in production.<sup>218</sup> Some common examples of public utilities include local electric power plants, telecommunications, natural gas plants, and water companies.<sup>219</sup> Although social media companies are not currently considered monopolies, the Federal Trade Commission is suing Facebook at the moment for illegally maintaining a monopoly over personal social networking services following their acquisition of Instagram and WhatsApp.<sup>220</sup> Beyond just acquiring competitors, the

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<sup>215</sup> See Dipayan Ghosh, *Don't Break up Facebook- Treat It Like a Utility*, HARV. BUS. REV. (May 30, 2019), <https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility>.

<sup>216</sup> *Id.*

<sup>217</sup> LEGAL INFO. INST., *Public Utility*, CORNELL L. SCH. [https://www.law.cornell.edu/wex/public\\_utility#:~:text=First%2C%20the%20entity%20should%20provide,the%20good%20or%20service%20that](https://www.law.cornell.edu/wex/public_utility#:~:text=First%2C%20the%20entity%20should%20provide,the%20good%20or%20service%20that) (last visited Sept. 22, 2022).

<sup>218</sup> JOSH SIMONS & DIPAYAN GHOSH, UTILITIES FOR DEMOCRACY: WHY AND HOW THE ALGORITHMIC INFRASTRUCTURE OF FACEBOOK AND GOOGLE MUST BE REGULATED, BROOKINGS INST. (Aug. 2020), [https://www.brookings.edu/wp-content/uploads/2020/08/FP\\_20200908\\_facebook\\_google\\_algorithm\\_simons\\_ghosh.pdf](https://www.brookings.edu/wp-content/uploads/2020/08/FP_20200908_facebook_google_algorithm_simons_ghosh.pdf).

<sup>219</sup> *Id.*

<sup>220</sup> Bobby Allyn, *Judge allows Federal Trade Commission's latest suit against Facebook to move forward*, NPR (Jan. 11, 2022, 5:10 PM), <https://www.npr.org/2022/01/11/1072169787/judge-allows-federal-trade-commissions-latest-suit-against-facebook-to-move->

current social media market has such a high barrier to entry because the major social media companies have already established their own intricate and proprietary physical infrastructure, cultivated preferential access to both broadband providers and content owners, or can simply copy new features from smaller platforms and incorporate it into their own.<sup>221</sup> The Supreme Court also has recently equated websites like Facebook and Google to the “modern public square” and said social media websites “can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”<sup>222</sup>

The power to define what entities qualify as public utilities and how to regulate them is a power traditionally reserved for State governments.<sup>223</sup> However, when utilities involve interstate commerce, the federal government has regulatory jurisdiction.<sup>224</sup> Furthermore, social media companies, unlike one’s local power company, provide services to billions of people all over the world. Therefore, implementing such a regulation would certainly be unprecedented, though not impossible. There are many benefits that come with a public utility designation that could be useful in addressing the misinformation problem. For example, the Federal Energy Regulatory Commission (“FERC”) regulates the wholesale sale and transmission of electricity in interstate commerce.<sup>225</sup> The FERC also issues mandatory reliability standards, monitors, and investigates electricity markets, reviews mergers and acquisitions by public utilities, and licenses and inspects

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<sup>221</sup> Ghosh, *supra* note 215.

<sup>222</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

<sup>223</sup> LEGAL INFO. INST., *supra* note 217.

<sup>224</sup> Mark F. Sundback, et. al., *Electricity in the United States: Overview*, THOMPSON REUTERS PRAC. L. (July 1, 2020),

[https://content.next.westlaw.com/Document/Ieb49d7b91cb511e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/Document/Ieb49d7b91cb511e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>225</sup> *Id.*

all public and private hydroelectric plants.<sup>226</sup> All of this is to demonstrate how designating social media companies as public utilities, and regulating them as such, can allow the federal government to ensure that they are more transparent and accountable to the public, are operating more in the public interest, and have a counter to their profit interests.

### **I. Conclusion**

It is clear that the presence of misinformation on social media has become a matter of national and global importance. The ability for both domestic and foreign entities to easily engage in widespread and effective disinformation campaigns is deeply troubling, especially when one considers that the platforms hosting that disinformation make more money the farther it spreads. Just as in the days of “yellow journalism,” having this issue remain unchecked for so long can and has resulted in disastrous real-world consequences that threaten to destabilize societies, as even Facebook themselves have acknowledged. While social media companies have made attempts to self-regulate, they have not been able to adequately address the problem and have even misled the public as to the extent that they are handling the problem. It is important that the principle of free expression be upheld, as it is the cornerstone of a free society. However, that principle should not be cynically manipulated so that a few large corporations can extract massive revenues from the radicalization of thousands of people by facilitating the rampant spread of misinformation on their platforms. Therefore, perhaps it is time for the government to step in and regulate the negative externalities created by the business models of social media companies, and ensure they are working more in the interest of the public than just themselves. Whether it be through reforming Section 230 of the CDA, implementing a notice-takedown system like the DMCA, or regulating social media as a public utility, something clearly must be done to address this pressing issue before further damage is done to the social fabric.

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<sup>226</sup> *Id.*