

## Additional Questions for the Record

### Subcommittee on Elections of the Committee on House Administration

#### Hearing on "Voting Rights and Election Administration: Combating Misinformation in the 2020 Election"\* October 6, 2020

**Mr. Spencer Overton, President, Joint Center for Political and Economic Studies**

#### **Majority Questions for the Record**

1. As you mentioned in your testimony, social media platforms have rolled out new policies during this election season aimed at combating misinformation and disinformation. We have seen some companies begin labeling content or directing users to additional resources on voting.
  - a. What should we know about how effective these policies have been at reducing the proliferation of mis-and disinformation?
  - b. What more can be done to ensure these new policies are enforced uniformly?
  - c. False accounts can gain thousands of followers before they are removed from a platform, even when they are taken down quickly. Once false information begins to spread, it can be difficult to counter. Can anything be done to prevent the rapid spread of these accounts?

We do not know the extent of the effectiveness of social media companies' policies to combat misinformation and disinformation (hereinafter collectively referred to as "misinformation"),<sup>1</sup> which is a part of the problem. While platforms have policies to prevent misinformation, the American public has no real knowledge about the enforcement of those policies or their effectiveness in preventing misinformation. The public generally only receives information about coordinated disinformation schemes in a company's response to data from independent investigations by journalists and researchers. Social media companies only release information when they want to do so.

Currently, the targeting and delivery of content by social media platforms—as well as the implementation of their policies to prevent misinformation—exist in a black box. We do not know and cannot track how far misinformation has spread in a meaningful way to ask companies how

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\*Special thanks to Joint Center Director of Technology Policy Dominique Harrison for her insights that helped me develop these answers to the questions for the record.

<sup>1</sup>"*Misinformation* is 'false information that is spread, regardless of intent to mislead. . . ." *Disinformation* is "deliberately misleading or biased information; manipulated narrative or facts; propaganda. . . . disinformation is knowingly spreading misinformation." "["Misinformation" vs. "Disinformation": Get Informed on the Difference](#)," DICTIONARY.COM (last visited October 3, 2020).

they counter these posts. It is difficult for the government to monitor in real-time the proliferation of misinformation.

We know that misinformation presents significant dangers to democracy due to social media's widespread use and the speed with which misinformation is disseminated. According to the most recent Pew Research survey published on the topic, a large percentage of U.S. adults get news on social media sites such as Facebook (43 percent), YouTube (21 percent), Twitter (12 percent), and Instagram (8 percent).<sup>2</sup> Misinformation can be quickly shared among networks of friends ("go viral") before the misinformation can be rebutted — sometimes just before Election Day.<sup>3</sup>

The anonymity of "fake accounts" on social media allows fringe domestic actors to avoid responsibility for disinformation.<sup>4</sup> It allows foreign interests to pose as Americans, build trust, and later undermine American interests. Microtargeting—which gathers information about users' preferences and interests—allows those intending to deploy disinformation about elections in social media posts the opportunity to target ads at those most likely to believe the false message. Microtargeting can also steer people more likely to challenge and correct the disinformation away from false messages, thereby hardening polarization.<sup>5</sup> Social media companies should be doing more to combat misinformation.

First, platforms must consistently enforce the election integrity policies they have in place. For example, Twitter placed a warning label on one of President Trump's tweets spreading inaccurate information about mail-in-voting procedures,<sup>6</sup> but has not taken action on similar tweets he has posted on the platform.

Second, platforms must expand their policies and strategies to fully address the real challenges communities of color face by online misinformation. Various platforms—including Facebook, Twitter, and YouTube—have been very effective at preventing other objectionable content—such

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<sup>2</sup>Elisa Shearer and Katerina Eva Matsa, Pew Research Center, [News Use Across Social Media Platforms](#) 2018 (Sept. 10, 2019). See Also A.W. Geiger, Pew Research Center, [Key Findings About The Online News Landscape In America](#) (Sept. 11, 2019) (reviewing the results of a survey conducted July 30-August 12, 2018 indicating the percentage of adults who said that they *get news often* from print newspapers (16 percent), social media (20 percent), radio (26 percent), a news website (33 percent), and television (49 percent)).

<sup>3</sup>See Nathaniel Persily, Kofi Annan Found., [The Internet's Challenge to Democracy: Framing the Problem And Assessing Reforms](#) 5-6, 21-22 (2019) (discussing the velocity, virality, and anonymity of online communications, as well as the power of Google and Facebook platforms). See *id.* at 11 ("As bad as the rapid dissemination of falsehoods may be, it is compounded by the inability to timely correct or combat disinformation... A correction is unlikely to reach either the same audience. The speed of information transfer poses particular challenges for democracy, because elections occur at a certain period in time.").

<sup>4</sup>See *id.* at 16 ("For purposes of democratic discourse the pervasiveness of internet anonymity facilitates kinds of speech that are harmful to democracy, hinders audiences' capacity to discount messages by the identity of the speaker... Consequently, the speaker bears no cost for repeating lies and promoting false content.").

<sup>5</sup>See *id.* at 21-23 ("While targeted advertising is as old as advertising, microtargeting in the digital age represents an extreme difference in degree if not in kind [T]he internet enables unprecedented gathering of information on individuals (including search histories, friendship networks, and buying habits) and therefore the crafting of messages designed to appeal to their particular preferences and prejudices.").

<sup>6</sup><https://twitter.com/TwitterSafety/status/1265838823663075341>;  
<https://twitter.com/realDonaldTrump/status/1265255835124539392>; <https://www.rollingstone.com/politics/politics-news/rigged-fraud-scam-cheat-trump-against-vote-by-mail-1044177/>.

as adult pornography. Unfortunately, some of these companies do not seem to have internalized the threat misinformation and voter suppression pose to the health of our democracy—perhaps because they believe that advertisers will not pay to support adult pornography but will tolerate misinformation about elections that suppresses Black votes.<sup>7</sup> The comparative lack of effectiveness in protecting racial equity and all Americans' voting rights seems to reflect not a lack of capacity but a lack of will.

Third, there are also questions about whether existing moderators—many of whom are lower-wage, hourly, highly-stressed out contract workers—are sufficient.<sup>8</sup> While 35,000 content moderators seem weighty, Facebook has over 2.7 billion monthly active users—which works out to one content moderator per 77,000 users.<sup>9</sup>

Fourth, social media companies should provide much more transparency about coordinated disinformation schemes and provide civil rights and research organizations data about these schemes in real-time to assess threats. For example, although we knew for years about the Russian Internet Research Agency's targeting and suppression of voting by Black users, we learned in September 2020 that the 2016 Trump campaign was disproportionately categorizing Black voters for "Deterrence" targeted ads on Facebook. This research and data need to be further explored to understand the magnitude of the consequences of coordinated disinformation on Black communities in real-time.

Some researchers have started doing that work but have faced opposition from social media companies. For example, researchers at New York University's (NYU) engineering school created a tool – NYU Ad Observatory – using data from Facebook to identify trends in how ads target specific audiences. The project explores political ads, who funds each ad, and how much users spend to disseminate the posts.<sup>10</sup> In October 2016, Facebook sent a letter to the team of the NYU Tandon Online Transparency Project demanding that they cease the collection of Facebook data about its political-ad-targeting practices.<sup>11</sup> Facebook argues that the collection of this information by NYU violates its terms of service.

The American public has no real knowledge about the enforcement of companies' misinformation policies or their effectiveness. We lack a full understanding of foreign and domestic disinformation

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<sup>7</sup>See [A Country in Crisis: How Disinformation Online is Dividing the Nation](#), Hearing Before the Subcomm. On Communications and Technology and Consumer Protection and Commerce of the U.S. House Comm. on Energy and Commerce, 116<sup>th</sup> Cong. (2020) (statement of University of California, Berkeley Professor Hany Farid, Ph.D.), at 5 ("If online content providers prioritized their algorithms to value trusted information over untrusted information, respectful over hateful, and unifying over divisive, we could move from a divisiveness-fueling and misinformation-distributing machine that is social media today, to a healthier and more respectful online ecosystem. If advertisers, that are the fuel behind social media, took a stand against online abuses, they could withhold their advertising dollars to insist on real change.").

<sup>8</sup>Casey Newton, [The Trauma Floor: The Secret Lives of Facebook Moderators in America](#), The Verge (Feb. 25, 2019)

<sup>9</sup>J. Clement, [Number of Monthly Active Facebook Users Worldwide as of 2<sup>nd</sup> Quarter 2020](#), Statista, August 10, 2020 (last visited Oct. 4, 2020). David Brody of the Lawyers' Committee for Civil Rights originally made this observation.

<sup>10</sup>"New Tool to Analyze Political Advertising on Facebook Reveals Massive Discrepancies in Party Spending on Presidential Contest," New York University, September 15, 2020, <https://engineering.nyu.edu/news/new-tool-analyze-political-advertising-facebook-reveals-massive-discrepancies-party-spending>.

<sup>11</sup>Jeff Horwitz, [Facebook Seeks Shutdown of NYU Research Project into Political Ad Targeting](#), Wall Street Journal (Oct. 23, 2020).

threats before us because we rely on social media companies to release information only when they want to do so.

Social media companies should share their data with civil rights organizations, scholars, and other experts to research the implications of these company practices and services on the American public. Companies also need to be more transparent about the enforcement of their practices and policies. More transparency by social media companies would also allow lawmakers to develop better policies to hold companies accountable.

**2. You discussed during your testimony that the "free speech" argument often raised in opposition to content moderation is a false one. Could you expand upon this? Why is the argument of free speech a false one when we are discussing content moderation on social media platforms and combating false voting information?**

President Trump recently issued an executive order attempting to narrowly construe the protections of Section 230 of the Communications Decency Act in retaliation for Twitter enforcing its content moderation guidelines against the President. This executive order during an election season discourages social media companies from content moderation and poses a distinct threat to democracy.

After Twitter attached a “Get the facts about mail in-ballots” notice to President Trump’s misleading tweets about the integrity of vote-by-mail, President Trump tweeted “Twitter is completely stifling FREE SPEECH, and I, as President, will not allow it to happen!”<sup>12</sup> The following day he tweeted:

Republicans feel that Social Media Platforms totally silence conservatives [sic] voices. We will strongly regulate, or close them down, before we can ever allow this to happen. We saw what they attempted to do, and failed, in 2016. We can’t let a more sophisticated version of that . . . happen again.<sup>13</sup>

Two days after his original tweet, President Trump issued a retaliatory “Executive Order on Preventing Online Censorship,”<sup>14</sup> which attempted to narrowly construe Section 230 to discourage social media companies from removing disinformation from their platforms—undermining the very goal of the law.

Section 230 of the Communications Act of 1934 (also known as Section 230 of the Communications Decency Act) explicitly gives a social media provider the power to remove (in the words of the statute) “obscene...harassing, or otherwise objectionable” information. As a result of the Trump Administration’s executive order directing its agencies to further its “narrow purpose of the section” —that is, the section related to active moderation that might result in a significant amount of information removed or blocked—the National Telecommunications and

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<sup>12</sup>Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 4:40 PM), <https://twitter.com/realDonaldTrump/status/1265427539008380928>.

<sup>13</sup>Donald J. Trump (@realDonaldTrump), TWITTER (May 27, 2020, 4:11 AM), <https://twitter.com/realDonaldTrump/status/1265601611310739456>.

<sup>14</sup>[Exec. Order on Preventing Online Censorship](#) (May 28, 2020).

Information Administration (NTIA) petitioned the Federal Communications Commission for a rule interpreting “otherwise objectionable” as limited to “any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials.”<sup>15</sup> The Justice Department proposed a similar change through legislative amendment by replacing “otherwise objectionable” with “unlawful.”<sup>16</sup>

This effort to narrow the scope of information that social media providers can remove or delete without fear of liability has an obvious goal—to prevent responsible monitoring. The effort by the Trump Administration is clearly designed to deter companies from engaging in moderation, which is their right as private actors. It is also fair to suggest that this governmental effort may even violate the First Amendment rights of tech companies.

Narrowing the standard for the removal of online content—which NTIA and the executive order cannot actually do without further action by Congress—would result in social media companies failing to take down fake accounts and posts that provide false information about voting, discourage voting by communities of color, and facilitate racial polarization. The Trump Administration’s proposals only promote the likelihood of disinformation, discrimination, and suppression—and effectively undermine democracy. These proposals chill companies from removing destructive content due to the threat of potential litigation.

The Trump Administration claims content moderation by private social media companies stifles free speech. However, the First Amendment is supposed to serve as a check against the government—not against private entities.<sup>17</sup> As non-state actors, social media companies currently have the freedom and crucially the power to prevent misinformation resulting in voter suppression. Empowering any Administration to punish companies for removing misinformation, false information about voting practices, discriminatory tactics, and other objectionable content would be an unacceptable attack on our democracy.<sup>18</sup>

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<sup>15</sup>NTIA Rulemaking Petition at 38.

<sup>16</sup> [Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996](#), U.S. DEPARTMENT OF JUSTICE (last visited October 4, 2020) (indicating that “the Department supports replacing the vague catch-all ‘otherwise objectionable’ language in Section 230(c)(2) with ‘unlawful’ and ‘promotes terrorism’”). See also Danielle Keats Citron & Mary Anne Franks, [The Internet as Speech Machine and Other Myths Confounding Section 230 Speech Reform](#), U. CHI. L. FORUM (forthcoming) (discussing proposals to reform Section 230 on the theory that platforms should be neutral vis-à-vis online content).

<sup>17</sup>In asserting that Twitter and Facebook provide “an important forum to the public for others to engage in free expression and debate,” the President’s Executive Order compares the platforms to shopping malls in citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980); [Exec. Order on Preventing Online Censorship](#), Sec. 4 (May 28, 2020). In *PruneYard*, however, the U.S. Supreme Court did not find that the First Amendment of the U.S. Constitution gave leafleters the right to leaflet in shopping malls, but instead that a state right of access for leafleters to leaflet did not amount to a taking of a mall’s private property under the 5<sup>th</sup> and 15<sup>th</sup> Amendments of the U.S. Constitution. Indeed, another U.S. Supreme Court case has explicitly held that a mall owner may bar leafleters from distributing handbills at a mall without violating the First Amendment of the U.S. Constitution because the mall is not a state actor. *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

<sup>18</sup>Danielle Citron, [Digital Platforms’ Power Over Speech Should Not Go Unchecked](#), Knight Foundation (June 16, 2020) (“Legally mandated platform neutrality would jeopardize — not reinforce — free speech values. Social media companies could not ban spam, doxing, threats, harassment, nonconsensual pornography, or deep fakes. They could not combat cyber mob attacks that chase people offline. They could not mitigate the damage wrought by sexual-privacy invasions by filtering or blocking them. Empirical evidence shows that cyber harassment has chilled the intimate, artistic, and professional expression of women and people from marginalized communities.”).

To give government the power to control information through ad hoc content moderation during an election season is even more dangerous to our democracy and our constitutional values than private entities engaging in content moderation.<sup>19</sup> The Trump Administration's attempts to curtail Section 230 would chill social media companies from moderating disinformation and preventing voter suppression. In this instance, Twitter was targeted and criticized by a powerful governmental actor (the President)—not for removing the President's content—but rather for engaging in its own speech. Twitter responded with more speech (appending a “Get the facts about mail in-ballots” notice to President Trump's misleading tweets), which it has every right to do. The company responded to the President's narrative by developing messages that informed the public that voting-by-mail during a pandemic is easy and safe for millions of Americans.

While some platforms claim they are advancing "free speech" in refraining from content moderation, in doing so they ignore the effect of the content on many communities of color and facilitate discrimination. "The conflation of the First Amendment and Section 230, and Internet activity with speech, contributes to another common misconception about the law, which is that it requires tech companies to act as 'neutral public forums' in order to receive the benefit of immunity."<sup>20</sup> The argument should not be about speech but effective content moderation.

For many Americans, Facebook and other social media are the primary platforms for political identity, social relationships, professional networking, and other opportunities. To treat discriminatory ad distribution that steers economic opportunities away from Black and Latino communities or steers voter suppression ads toward Black communities as "neutral" ignores the non-neutral harms and disparities produced by the platforms. It is not "neutral" for the world's most valuable companies to externalize the costs of discrimination onto many of the nation's most economically and politically marginalized communities for their own financial gain. Platforms should not treat "neutral" content that has a non-neutral impact.

Social media companies that purport to "advance free speech" by allowing misinformation that suppresses votes willfully ignore the effect of their policies on Black communities. While many of these companies would have you believe they are merely offering an online version of "Speaker's Corner," they are not non-profit organizations designed exclusively to promote civil discourse. In fact, they are some of the world's most profitable companies that earn their revenues based on advertisers' engagement with viewers. Far from being unmoderated venues where citizens express their ideas, these platforms are highly structured entities that seek to optimize the number of ads viewers consume so they can increase revenue.

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<sup>19</sup> *Thomas v. Collins*, 324 U.S. 516, 545 (1945) (“every person must be his watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”).

<sup>20</sup> Danielle Keats Citron & Mary Anne Franks, [The Internet as Speech Conversion Machine and Other Myths Confounding Section 230 Reform](#), U. CHI. L. FORUM (forthcoming) (discussing proposals to reform Section 230 on the theory that platforms should be neutral vis-à-vis online content).

**3. Is there anything else discussed during the October 6 virtual hearing to which you would like to respond? If so, please provide your responses here.**

Social media companies that design and deploy algorithms that target and deliver ads in a discriminatory manner materially contribute to civil rights violations. Congress should amend Section 230 of the Communications Decency Act to explicitly state that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting.<sup>21</sup>

Unfortunately, Facebook has claimed that federal civil rights laws do not apply to the company—that the company can legally accept money to utilize their algorithms and users' data to target employment and housing ads away from Black and Latino users and toward White users.<sup>22</sup> This argument is akin to the Holiday Inn suggesting that civil rights laws do not prohibit them from placing guests of color in the least favorable rooms and denying them access to the breakfast buffet based solely on their race. Social media companies make a material contribution to discrimination when they target (and/or deliver) employment or housing ads toward Whites and away from communities of color, and when they target (and/or deliver) voter suppression ads toward Black users and other protected groups. While Facebook later settled the lawsuit,<sup>23</sup> research suggests it still uses algorithms that deliver employment ads along discriminatory lines.<sup>24</sup>

To prevent similar arguments being made by Facebook and other companies in the future, Congress should explicitly state what is already the law—that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting. Congress should explicitly articulate this carve-out as applied to all types of civil rights claims arising from online ad targeting (e.g., discriminatory dissemination of ads in voting, employment, lending, housing).<sup>25</sup>

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<sup>21</sup> See Spencer Overton, [State Power to Regulate Social Media Companies to Prevent Voter Suppression](#), 53 U.C. Davis L. Rev. 1793, 1830-31 (2020) (proposing explicit carve-out in light of the fact that social media platform ad targeting and delivery along racial lines makes a material contribution to a civil rights legal violation); 47 U.S.C. § 230(e)(1)-(5) (2019) (explaining that Section 230 immunity does not apply to violations of federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986 and similar state laws, and federal sex trafficking law).

<sup>22</sup> See Notice of Motion & Motion to Dismiss First Amended Complaint for Defendant at 2, *Onuoha v. Facebook, Inc.*, No. 16-cv-06440-EJD (N.D. Cal. Apr. 3, 2017) (“Advertisers, not Facebook, are responsible for both the content of their ads and what targeting criteria to use, if any. Facebook’s provision of these neutral tools to advertisers falls squarely within the scope of CDA immunity.”).

<sup>23</sup> In 2019, Facebook settled several legal actions and agreed to make significant changes to prevent advertisers for housing, employment, or credit, from discriminating based on race, national origin, ethnicity, age, sex, sexual orientation, disability, or family status. [Summary of Settlements Between Civil Rights Advocates and Facebook, Housing, Employment and Credit Advertising Reforms](#), ACLU (Mar. 19, 2019).

<sup>24</sup> Piotr Sapiezynski et al. [Algorithms that "Don't See Color": Comparing Biases in Lookalike and Special Ad Audiences](#) (Dec. 17, 2019) (unpublished manuscript), (finding that the Facebook Special Audiences tool, which does not consider race, creates audiences that have nearly the same level of racial bias as the standard Lookalike audience); Ava Kofman & Ariana Tobin, [Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement](#), ProPublica (Dec. 13, 2019, 5:00 AM).

<sup>25</sup> See Olivier Sylvain, *Discriminatory Designs on User Data: Exploring How Section 230's Immunity Protections May Enable or Elicit Discriminatory Behaviors Online*, KNIGHT FIRST AMEND. INST. COLUM. U. (Apr. 1, 2018), <https://knightcolumbia.org/content/discriminatory-designs-user-data> (last visited Jan. 23, 2020) [<https://perma.cc/CB3L-NCSJ>] (“There is no reason why Congress couldn’t also write in an explicit exception to Section 230 immunity for violations of civil rights laws.”); Spencer Overton, [State Power to Regulate Social Media Companies to Prevent Voter Suppression](#), 53 U.C. Davis L. Rev. 1793, 1830-31 (2020) (proposing explicit carve-out

Carve-outs already exist in Section 230 for violations in various areas of the law (e.g., federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986 and similar State laws, federal sex trafficking law).<sup>26</sup> Companies should not be able to assert that the Civil Rights Act of 1964, the Fair Housing Act, and other landmark civil rights laws are inapplicable simply because a company discriminates online rather than at a brick-and-mortar storefront.

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in light of the fact that social media platform ad targeting and delivery along racial lines makes a material contribution to a civil rights legal violation).

<sup>26</sup>See, e.g., 47 U.S.C. § 230(e)(1)-(5) (2019).