

TESTIMONY OF SPENCER OVERTON
President, Joint Center for Political and Economic Studies
Patricia Roberts Harris Research Professor, George Washington Law School

Before the
Subcommittee on Communications and Technology
U.S. House Committee on Energy and Commerce

Hearing on
“Preserving Free Speech and Reining in Big Tech Censorship”

March 28, 2023*

Overview

This hearing’s framing, “Preserving Free Speech and Reining in Big Tech Censorship,” inaccurately presents the decisions of private platforms to ignore, de-amplify, flag, remove, or criticize certain content posted by users as censorship. In fact, such decisions are exactly what the First Amendment protects. Indeed, government attempts to threaten this right is censorship.

Accepting the characterization that platforms “censor” users every time they engage in content moderation would mean that Fox News “censors” every time it selects hosts to lead its prime-time lineup, that the Wall Street Journal “censors” every op-ed it declines to publish, or that Regnery Publishing “censors” every liberal author to whom they fail to offer a book contract.

Singling out so-called “Big Tech” is moreover selective and misleading, as plenty of small companies have outsized influence on public discourse and cause serious harm, including the platforms where far right terrorists organized the January 6, 2021 attack on the U.S. Capitol. For example, Gab, Parler, Truth Social, and Gettr all openly favor conservative viewpoints and disfavor liberal ones. Truth Social routinely blocks content from users who post about January 6th committee hearings, express pro-choice opinions, or share links to Breitbart, and enjoys a constitutional right to do so.¹

Further, among all users who comply with site guidelines, no evidence conclusively demonstrates that the largest social media platforms disfavor or target conservatives for removal. Much of the evidence strongly actually points in the opposite direction—namely that powerful social media companies, including Twitter and Facebook—bend their rules in favor of far-right content and

* Exchanges with David Brody, Danielle Keats Citron, Mary Anne Franks, and Rebekah Tromble helped develop the ideas in this written testimony. Morenike Oyebade provided invaluable research assistance.

¹ [*Truth Social’s Inexplicable Censorship, Heavy-Handed Terms of Service Defy Free Speech Promises*](#), PUBLIC CITIZEN (Aug. 2, 2022).

speakers.² Evidence also suggests that “the algorithms of major social media sites disproportionately amplify right-wing content.”³ While research has found that conservatives, Black people, and transgender people are more likely than other groups to experience content and account removal, conservative participants’ content was more often removed because it violated site guidelines while transgender and Black content was often removed despite the fact that the content complied with site guidelines or fell into content moderation gray areas.⁴

The larger point, however, is that private companies have a First Amendment right to exclude content as they see fit, and that they are not preventing “free speech” or “censoring” users when they engage in content moderation.

Indeed, treating tech platforms as state actors and requiring that they equally amplify all content that is protected against government restriction would magnify the current ills on platforms and result in more pornography, spam, hate speech, white supremacist organizing, medical disinformation, political disinformation, and online harassment of young people. Platforms would be prohibited from removing deepfake videos of Donald Trump being arrested. The primary objective of Section 230 was to allow platforms to remove harmful content without fear of liability, and treating all user content as “constitutionally-protected speech” that cannot be removed or de-amplified undermines the benefits of Section 230.

² Keach Hagey & Jeff Horwitz, [Facebook’s Internal Chat Boards Show Politics Often at Center of Decision Making](#), WALL STREET JOURNAL (Oct. 24, 2021) (showing internal discussions that Facebook employees urge enforcement of its own rules on misinformation and hate speech but “that Facebook is giving the right-wing publishers a pass to avoid PR blowback. As one employee put it in an internal communication: ‘We’re scared of political backlash if we enforce our policies without exemptions.’”); Alex Thompson, [Why the right wing has a massive advantage on Facebook](#), POLITICO (Sept. 26, 2020) (“In the final stretch of the 2020 campaign, the Facebook posts with the most engagement in the United States most days — measured by likes, comments, shares and reactions — are from conservative voices outside the mainstream media: Dan Bongino, Ben Shapiro, David Harris, Jr., Franklin Graham and “Blue Lives Matter,” according to the Facebook-owned tool Crowdtangle.”); Paul M. Barrett & J. Grant Sims, [False Accusation: The Unfounded Claim that Social Media Companies Censor Conservatives](#), NEW YORK UNIVERSITY STERN CENTER FOR BUSINESS AND HUMAN RIGHTS (Feb. 2021).

³ Opening Statement of Dr. Mary Anne Franks, Hearing Before the U.S. Senate Committee on Homeland Security & Governmental Affairs, “Social Media Platforms and the Amplification of Domestic Extremism & Other Harmful Content,” Oct. 28, 2021 (“Contrary to oft-repeated claims that social media is biased *against* conservatives, the algorithms of major social media sites disproportionately amplify right-wing content.”); Ferenc Huszár, et. al., [Algorithmic Amplification of Politics on Twitter](#) (2020) (“Our results reveal a remarkably consistent trend: In 6 out of 7 countries studied, the mainstream political right enjoys higher algorithmic amplification than the mainstream political left (including the U.S.). Consistent with this overall trend, our second set of findings studying the U.S. media landscape revealed that algorithmic amplification favours right-leaning news sources.”); [Filter Bubble Problem is Worse for Fox News Viewers](#), TECH TRANSPARENCY PROJECT (Oct. 24, 2021) (“YouTube’s recommendation algorithm pushes users into ideological filter bubbles that are stronger for viewers of right-wing content, according to new research by the Tech Transparency Project (TTP) that highlights how the platform drives political polarization.”); Jonas Kaiser & Adrian Rauchfleisch, [Birds of a Feather Get Recommended Together: Algorithmic Homophily in YouTube’s Channel Recommendations in the United States and Germany](#), SOCIAL MEDIA & SOCIETY, (Nov. 24, 2020); Ryan Mac & Sheera Frenkel, *Internal Alarm, Public Shrugs: Facebook’s Employees Dissect Its Election Role*, NEW YORK TIMES, (Oct. 22, 2021) (on November 9, 2020, “a company data scientist wrote in a note to his co-workers that 10 percent of all U.S. views of political material — a startlingly high figure — were of posts that alleged the vote was fraudulent.”).

⁴ Oliver Haimson, et. al, [Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas](#), 5 PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION 1, 6 (2021).

While some foreign governments coercively prohibit social media platforms from allowing citizens to criticize the government or government policies, we surely do not want U.S. government officials to similarly use the power of government to coercively determine what is posted.⁵ Existing law, however, exists to determine when government is excessively coercive toward platforms in content moderation or unfairly conspires with platforms to restrict the constitutional rights of citizens,⁶ and when this occurs users can bring legal action.

We do not want, however, to prevent government officials from informing platforms of disinformation schemes by China that COVID-19 originated in the U.S. or by Russia to sow discord and division among Americans. We want government officials to communicate with platforms to prevent “lone wolf” domestic terrorism events like mass shootings by Dylann Roof in Columbia, South Carolina and Payton Gendron in Buffalo, New York. There is a long list of Republican and Democratic lawmakers who have contacted social media platforms to identify disinformation, obscenity, and other content that violates the platforms’ own community standards and terms of service.⁷ Those lawmakers should be able to contact platforms without the presumption that every communication is coercive.

Even though the First Amendment protects private tech platforms, it does not demand that they bear no responsibility for what they choose to promote or amplify. This kind of supercharged, unqualified immunity has no basis in the First Amendment, but is rather the product of courts’ overly broad interpretation of Section 230 of the Communications Decency Act. Republicans and Democrats can agree on several issues – like the fact that the internet is vastly different today than it was almost 30 years ago when Section 230 was enacted, and that today tech companies design and implement algorithms and other platform features to maximize profits that unfortunately impose real harms on many Americans. Real bipartisan reform is possible if Republicans and Democrats come together to protect their constituents.

I. Private Companies Are Exercising, Not Violating, First Amendment Free Speech Rights When They Engage in Content Moderation

While some suggest that content moderation by private social media companies stifles free speech, nothing could be further from the truth. The First Amendment stands as a check against government censorship—which government attempts to do in deterring platforms from engaging in content moderation. The First Amendment does not restrict private entities, who themselves

⁵ See David Greene, [When “Jawboning” Creates Private Liability](#), ELECTRONIC FRONTIER FOUNDATION (June 21, 2022); Santa Clara Principles, [The Santa Clara Principles on Transparency and Accountability in Content Moderation](#) (last visited Mar. 27, 2023) (calling for disclosure of state involvement in content moderation to users).

⁶ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (outlining the four tests to determine whether a private entity is a state actor); *O’Handley v. Weber*, 2023 WL 2443073, at *5-8 (9th Cir. Mar. 10, 2023) (applying the *Lugar* tests to the social media context and finding that Twitter did not function as a state actor when it flagged a tweet and later deplatformed a user after being informed of a community standards violation by a cybersecurity division within the California Secretary of State’s office).

⁷ Adam Rawnsley & Asawin Suebsaeng, [Twitter Kept Entire ‘Database’ of Republican Requests to Censor Posts](#), ROLLING STONE (Feb. 8, 2023).

have free speech rights.⁸ As non-state actors, social media companies currently have the freedom and crucially the power to engage in content moderation.

Different platforms have different focus areas and different community standards. LinkedIn, for example, requires that content be “professionally relevant,” while TripAdvisor prohibits comments that “are not relevant to travel.”⁹ When users sign up for platforms, they often agree to comply with community standards, such as refraining from posting nudity and sexual activity or engaging in sexual solicitation, hate speech, dehumanizing speech, harassment and bullying, impersonation, misinformation, and violent and graphic content.

Government attempts to prevent platforms from engaging in content moderation restricts platforms’ exercise of editorial judgment and is constitutionally problematic. The U.S. Supreme Court has routinely held that such government actions—such requiring a newspaper to provide space for political candidates to reply to criticism,¹⁰ requiring that cable operators carry broadcast TV channels,¹¹ or requiring that a privately-run parade allow a gay-pride organization to march in the parade¹²—violate the First Amendment.¹³ Further, tech platforms are not “common carriers” that receive less First Amendment protection because tech platforms require their users to agree to comply with community standards; they are not limited to the unique physical limitations of broadcast media (the scarcity of broadcast frequencies); and the Telecommunications Act of 1996 explicitly distinguishes platforms from common carriers.¹⁴

As a result, any attempt by government to restrict content moderation by platforms is generally a content-based restriction—and unlikely to survive heightened (or even intermediate) judicial scrutiny.¹⁵

This First Amendment protection against government attempts to prevent content moderation applies to platforms of all political stripes, including Elon Musk’s Twitter, Donald Trump’s Truth Social, ProAmericaOnly, and The Democratic Hub. Similarly, because they are private sector entities, none of these entities violate First Amendment free speech principles when they engage in content moderation. In contrast, a *state* law to prohibit private sector employers or public

⁸ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (“that “[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.”).

⁹ See Brief of Amici Curiae of Chamber of Progress, et. al. in Support of Cross-Petitioners, *Netchoice, LLC v. Moody*, No. 22-292 (U.S. Nov. 22, 2022) citing LinkedIn, *Professional Community Policies* (last visited November 4, 2022), perma.cc/V4NX-TUDZ; TripAdvisor, *Content & Community Guidelines* (May 4, 2022), perma.cc/Y529LEPL.

¹⁰ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 250–51, 256 (1974).

¹¹ *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 637 (1994).

¹² *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995).

¹³ See also *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 17-21 (1986) (invalidating a state agency’s order requiring a utility company to include in its billing envelopes third-party speech).

¹⁴ See *NetChoice, LLC v. Attorney General, Florida* 34 F.4th 1196, 1220-21 (11th Cir., 2022) (explaining why social media platforms are not common carriers, and holding that state restrictions on platform content moderation violate the First Amendment).

¹⁵ *NetChoice, LLC v. Attorney General, Florida* 34 F.4th 1196, 1227-1228 (11th Cir., 2022) (granting a preliminary injunction because it was substantially likely that a Florida statute’s regulation of social media content moderation was unconstitutional). But see *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (single-sentence unreasoned order staying a federal district court’s preliminary injunction preventing implementation of a Texas law to restrict content moderation by social media platforms).

university professors or students from discussing diversity, racial equity, systemic racism, or related topics could be a viewpoint restriction subject to strict scrutiny and violative of First Amendment free speech rights.¹⁶

II. Preventing Platforms from Content Moderation Would Harm Young People, Vulnerable Populations, National Security, and More

As a policy matter, government inhibition of platforms from moderating all “constitutionally-protected speech”—through either an outright legal ban or narrowing Section 230 protections for companies that moderate such content—would fundamentally change the internet in the United States for the worse. A great deal of speech that is protected by the First Amendment from government regulation would thrive on platforms like Facebook, Twitter, and YouTube, such as legal adult pornography, hate speech, swastikas, holocaust denial, white supremacy radicalization, violent and graphic content, deep fakes, and disinformation campaigns. Currently, because platforms are not state actors and do not have First Amendment obligations, they can freely remove or downrank this material.

Americans have strong feelings against harmful online content. According to surveys by Gallup and the John S. and James L. Knight Foundation, a majority of U.S. adults believe that social media companies should never allow various types of speech that may enjoy constitutional protection from government regulation, such as intentionally misleading information about health and medical issues (85%), intentionally misleading information on elections and political issues (81%), false statements that harm someone’s reputation (79%), and hate speech (64%).¹⁷

Inhibiting content moderation would have real costs to young people. For example, while content promoting eating disorders, self-mutilation, and suicide are not unlawful, they are dangerous to young people and it is good that platforms currently moderate them.¹⁸ Even with content moderation, social media has negative effects on the body image of young adults¹⁹—the problem would only get worse if the government inhibited platforms from moderating this content.

¹⁶ *Honeyfund.com, Inc., v. DeSantis*, 2022 WL 3486962, at *11 (N.D. Fla. Aug. 18, 2022) (“the [Individual Freedom Act as applied to employers] violates the First Amendment. . . Florida’s Legislators may well find Plaintiffs’ speech “repugnant.” But under our constitutional scheme, the “remedy” for repugnant speech “is more speech, not enforced silence.” . . . If Florida truly believes we live in a post-racial society, then let it make its case. But it cannot win the argument by muzzling its opponents.”); *Pernell v. Florida Board of Governors of State University System*, 2022 WL 16985720, at *41 (N.D. Fla. Nov. 17, 2022) (“the IFA unreasonably burdens the Professor Plaintiffs’ speech. Defendants cannot, through the IFA, prophylactically muzzle professors from expressing certain viewpoints about topics that the State of Florida has deemed fair game for classroom discussion. Doing so in the name of reducing racism does not insulate the State from the First Amendment’s reach.”).

¹⁷ [FREE EXPRESSION, HARMFUL SPEECH AND CENSORSHIP IN A DIGITAL WORLD](#), KNIGHT FOUNDATION AND GALLUP, INC., 6 (June 16, 2020). The survey, which was commissioned by the Knight Foundation, was of just over 1600 U.S. adults in December 2019 and just over 1400 U.S. adults in March 2020.

¹⁸ Brief of Amici Curiae of Chamber of Progress, et. al. in Support of Cross-Petitioners, *Netchoice, LLC v. Moody*, No. 22-292 (U.S. Nov. 22, 2022) (“Platforms also may restrict content promoting self-harm, especially that directed to minors. Indeed, federal lawmakers on both sides of the aisle have urged platforms to take steps to help support teen users’ mental health.”).

¹⁹ Jimie E. Sidani, [The Association Between Social Media Use and Eating Concerns Among U.S. Young Adults](#), 116 J. ACAD. NUT. DIET 1465 (2017) (indicating “a strong and consistent association between social media use and eating

While online harassment generally can cause “anxiety, depression, sadness, anger, fear, shame, embarrassment, isolation, low self-esteem, paranoia, stomach aches, panic attacks, post-traumatic stress disorder (PTSD), self-harming behavior, and heart palpitations,”²⁰ certain populations experience particular challenges. The 2022 ADL Online Hate and Harassment survey found that among Black Americans who had experienced online harassment or were worried about future harassment, 22% had trouble sleeping, concentrating, or felt anxious.²¹ Another study found that exposure to online racial discrimination increased depression and anxiety and reduced confidence in academic abilities among Black and Latino adolescents.²²

Another issue is the growth of the white supremacist movement, which has used platforms to recruit and radicalize Americans, strategize, upload videos and manifestos, fundraise, and promote their principles of white cultural and genetic superiority—often for free.²³ In the 2000s white supremacists developed communities on mainstream platforms like Facebook, YouTube, and Twitter.²⁴ Algorithms developed by these platforms to show users content they are most likely to read, watch, and click accelerated the spread of white supremacy.²⁵ A 2016 internal Facebook study, for example, stated that “64% of all extremist group joins are due to our recommendation tools.”²⁶

concerns in a nationally-representative sample of young adults ages 19 to 32 years.”); Richard M. Perloff, *Social Media Effects on Young Women’s Body Image Concerns* (Dec. 2014).

²⁰ Francesca Stevens, et al., *Cyber Stalking, Cyber Harassment, and Adult Mental Health: A Systematic Review*, 24 CYBERPSYCHOLOGY, BEHAVIOR, AND SOCIAL NETWORKING, 367-376 (June 24, 2021).

²¹ See also ADL, *Online Hate and Harassment: The American Experience 2022*, ADL 40 (June 20, 2022). <https://www.adl.org/resources/report/online-hate-and-harassment-american-experience-2022>

²² Alvin Thomas, et al., *Taking the good with the bad?: Social Media and Online Racial Discrimination Influences on Psychological and Academic Functioning in Black and Hispanic Youth*, 52 Journal of Youth and Adolescence 245 (2023) (study finding that exposure of Black and Latino adolescents to online racial discrimination increased depression and anxiety, and reduced confidence in academic abilities). See also Xiangyu Tao and Celia B. Fisher, *Exposure to Social Media Racial Discrimination and Mental Health among Adolescents of Color*, 51 J. YOUTH ADOLESC. 30 (2022) (finding that “exposure to individual and vicarious social media racial discrimination increased depressive symptoms and drug use problems among” Black, Asian American, Indigenous, and Latinx youth).

²³ See Daniel L. Byman, *When Hate Goes Viral*, FOREIGN POLICY (March 23, 2022); ADL, *With Hate in their Hearts: The State of White Supremacy in the United States*, ADL (March 3, 2017) (“[W]hite supremacists of whatever sort adhere to at least one of the following beliefs: 1) whites should be dominant over people of other backgrounds; 2) whites should live by themselves in a whites-only society; 3) white people have their own “culture” that is superior to other cultures; and 4) white people are genetically superior to other people.”)

²⁴ See HEATHER J. WILLIAMS, ET AL., *THE ONLINE EXTREMIST ECOSYSTEM*, RAND, 1,6 (Dec. 2021) (“PHASE II The Emergence of Social Media; Harassment and Trolling Prompt Limited Self-Regulation 2003–2014 As social media sites gained prominence and attracted larger user bases over the early and mid-2000s, white power activists, bands, and other groups joined mainstream platforms, including MySpace, Facebook, YouTube, and Twitter.”).

²⁵ See Steven Lee Myers & Stuart A. Thompson, *Racist and Violent Ideas Jump From Web’s Fringes to Mainstream Sites*, N.Y. TIMES (June 1, 2022) (“For all the efforts some major social media platforms have made to moderate content online, the algorithms they use — often meant to show users posts that they will read, watch and click — can accelerate the spread of disinformation and other harmful content.”).

²⁶ Katrina Mulligan, et al., *A National Policy Blueprint To End White Supremacist Violence*, CENTER FOR AMERICAN PROGRESS AND MCCAIN INSTITUTE FOR INTERNATIONAL LEADERSHIP (April 2021) (“Further online community engagement, and even algorithm-driven recommendations, amplify increasingly white supremacist messages and push users to more extreme content, channels, and forums.33”); Daniel L. Byman, *When Hate Goes Viral*, FOREIGN POLICY (March 23, 2022) (“Part of the problem is how the companies themselves attract and retain users. An internal Facebook study from 2016 found that “64% of all extremist group joins are due to our recommendation tools.”).

Social science studies show a correlation between online hate speech and offline violence.²⁷ Tech platforms facilitate online radicalization of white supremacists and serve as a “propellant” for violent white supremacists “to share manifestos and promote their violent acts in hopes of gaining personal infamy and encouraging others to follow suit.”²⁸

In 2015, for example, 21-year-old Dylann Roof shot and killed nine Black parishioners at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. Prior to the attack, Roof posted a manifesto online detailing how he began engaging with white supremacists online after a Google search led him to a white supremacist site:

The event that truly awakened me was the Trayvon Martin case. I kept hearing and seeing his name, and eventually I decided to look him up. I read the Wikipedia article and right away I was unable to understand what the big deal was. It was obvious that Zimmerman was in the right. But more importantly this prompted me to type in the words ‘black on White crime’ into Google, and I have never been the same since that day. The first website I came to was the Council of Conservative Citizens. There were pages upon pages of these brutal black on White murders.²⁹

In a separate incident, 18-year-old Payton Gendron killed 13 people in a grocery store in Buffalo, New York. Gendron attempted to broadcast the shooting on the livestreaming site Twitch.³⁰ Gendron indicated in his online manifesto that he targeted the grocery store because it was in an area with a high concentration of Black residents. The manifesto also revealed that he was radicalized through online white supremacist communities on platforms like 4chan during the pandemic, and that the attack was motivated by “replacement theory” beliefs about a conspiracy to replace whites with people of color in the United States.³¹

²⁷ Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1042 (2021).

²⁸ HEATHER J. WILLIAMS, ET AL., [THE ONLINE EXTREMIST ECOSYSTEM](#), RAND, 1,9 (Dec. 2021). See also Richard Ashby Wilson & Molly K. Land, [Hate Speech on Social Media: Content Moderation in Context](#), 52 CONN. L. REV. 1033, 1045 (2021) (discussing the correlation between hate speech online, virulent nationalism, and violence against Black people).

²⁹ Rebecca Hersher, [What Happened When Dylann Roof Asked Google for Information About Race?](#) NPR (Jan. 10, 2017) (transcript from manifesto).

³⁰ Brian Stelter and Sharif Paget, [Twitch says livestream of Buffalo mass shooting was removed in less than 2 minutes](#), CNN, May 15, 2022.

³¹ Ellie Hall, [I’m Only Shitposting IRL’: The All-Too-Familiar Online Ideology Of The Alleged Buffalo Shooter](#), BUZZFEED NEWS (May 17, 2022); Ben Collins, [The Buffalo supermarket shooting suspect allegedly posted an apparent manifesto repeatedly citing ‘great replacement’ theory](#), NBC NEWS (May 14, 2022); [How 4chan’s toxic culture helped radicalize Buffalo shooting suspect](#), THE GUARDIAN (May 18, 2022).

In 2020 the U.S. Department of Homeland Security assessed white supremacists as the most persistent and lethal terror threat,³² and ADL estimated that white supremacists committed about 83% of the extremist-related murders in the United States over the previous decade.³³

As mainstream platforms strengthened their content moderation policies and content filters, many white supremacists migrated to fringe platforms—like 8chan, Gab, MeWe, Rumble, Signal, and Voat—that allow for overtly racist and violent content.³⁴

While some white supremacists use violence,³⁵ others use conventional politics. “Mainstreamers,” for example, attempt to appear moderate, infiltrate traditional political institutions, and insert white nationalist policies into mainstream policy debates—such as restrictions on immigration and multicultural programs.³⁶ As the Southern Poverty Legal Center explains:

Many of the most prominent leaders in today’s white nationalist movement define their primary goal as challenging what they call “Conservatism, Inc.” Such figures as Nick Fuentes. . . are trying to harness the grievances of Trump supporters into an openly ethnonationalist political movement – one they hope will become the core of the Republican Party. . . . Ideas once confined to the organized white power movement are now openly discussed within the broader political right, disintegrating the boundary between them. The white supremacist “great replacement” conspiracy, which claims that white people are being systematically replaced across the Western world by “multiculturalists” and Jews, is now cited as a reality by some elected officials and cable news pundits, for example.³⁷

³² Betsy Woodruff Swan, [DHS draft document: White supremacists are greatest terror threat](#), POLITICO, (Sept. 4, 2020) (detailing leaked DHS document stating that “we assess that white supremacist extremists — who increasingly are networking with likeminded persons abroad — will pose the most persistent and lethal threat.”); see also Hannah Allam, [FBI Announces That Racist Violence Is Now Equal Priority To Foreign Terrorism](#), NPR (Feb. 10, 2020) (reporting on FBI statement elevating “racially motivated violent extremism” to the same national threat level as the Islamic State).

³³ See ADL, [With Hate in their Hearts: The State of White Supremacy in the United States](#), ADL(March 3, 2017) (“Among domestic extremist movements active in the United States, white supremacists are by far the most violent, committing about 83% of the extremist-related murders in the United States in the past 10 years. . .”).

³⁴ HEATHER J. WILLIAMS, ET AL., [THE ONLINE EXTREMIST ECOSYSTEM](#), RAND, 1, 7-10 (Dec. 2021) (“Media scrutiny . . . focused public attention on the problem of online harassment, spurring calls for social media companies to improve content filters and enact stronger moderation policies. . . Concurrently, alt-tech platforms emerged to cater to users enraged by mainstream platforms’ new restrictions . . .”); Steven Lee Myers and Stuart A. Thompson, [Racist and Violent Ideas Jump From Web’s Fringes to Mainstream Sites - The New York Times](#), THE NEW YORK TIMES (June 1, 2022).

³⁵ [White Nationalist](#), SOUTHERN POVERTY LAW CENTER (*last visited* March 1, 2023) (“Vanguardists . . . often openly advocate for the use of violence against the state and people they perceive to be their political enemies. Though acts of violence, they believe, they can further polarize politics and accelerate what they view as the inevitable collapse of America.”).

³⁶ [White Nationalist](#), SOUTHERN POVERTY LAW CENTER (*last visited* March 1, 2023) (“Mainstreamers believe that infiltrating and subverting the existing political institutions is the only realistic path to power. They aspire to convert disaffected “normies” to their politics . . . Mainstreaming allows those sympathetic to white nationalism to pursue or enact policies furthering white nationalist priorities.”).

³⁷ [White Nationalist](#), SOUTHERN POVERTY LAW CENTER (*last visited* March 1, 2023).

Content moderation is also important because inauthentic social media accounts, targeted digital advertising, and election disinformation polarize the American electorate and facilitate foreign interference with U.S. elections.

In an analysis of 31 posts linked to the Russian Internet Research Agency from late 2019, University of Wisconsin professor Young Mie Kim found that the Russians were impersonating Americans³⁸ and were targeting “both sides of the ideological spectrum to sow division.”³⁹ The Russian Agency’s social media campaigns “exploit sharp political divisions already existing in our society” and “often create an ‘us vs. them’ discourse, feeding fear to activate or demobilize those who consider an issue personally important.”⁴⁰ In her review of the recent posts, Professor Kim found that the Russian Agency’s posts focused on “racial identity/conflicts, anti-immigration (especially anti-Muslim), nationalism/patriotism, sectarianism, and gun rights.”⁴¹

In March 2020, Facebook and Twitter acknowledged that they removed a network of Russian-backed accounts that originated in Ghana and Nigeria that targeted Black communities in the U.S. The accounts posed as being operated by people in the United States (e.g., California, Florida, Louisiana, New York, New Jersey, North Carolina) and attempted to build an audience with Black Americans with posts focusing on Black history, Black excellence, and “content about oppression and injustice, including police brutality.”⁴² The network consisted of 85 Instagram accounts (which had about 263,000 followers), 49 Facebook accounts, 69 Facebook Pages, and 71 Twitter accounts (which had 68,000 followers). On June 18, 2020, the head of security policy at Facebook testified before Congress that the company disabled 1.7 billion fake accounts between January and March 2020 and had taken down “18 coordinated networks seeking to manipulate public debate, including three networks originating from Russia, two from Iran and two based here in the United States.”⁴³

³⁸ YOUNG MIE KIM, [NEW EVIDENCE SHOWS HOW RUSSIA’S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN](#), BRENNAN CENTER (March 5, 2020) (“The IRA . . . mimicked existing names similar to domestic political, grassroots, and community groups, as well as the candidates themselves. . . For example, the IRA mimicked the official account of the Bernie Sanders campaign, “bernie2020,” by using similar names like “bernie.2020__”).

³⁹ *See id.* (“The IRA targets both sides of the ideological spectrum to sow division. This strategy is unique to Russian election campaigns, making it different than conventional persuasion-oriented propaganda or other foreign countries’ election interference strategies.”)

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See* Clarissa Ward, et. al, [Russian election meddling is back -- via Ghana and Nigeria -- and in your feeds](#), CNN (Apr. 11, 2020); Tony Romm and Craig Timberg, [Facebook, Twitter Suspend Russian-linked Operation Targeting African Americans on Social Media](#), Wash. Post (March 12, 2020); Taylor Hatmaker, [Russian Trolls Are Outsourcing to Africa to Stoke U.S. Racial Tensions](#), TECH CRUNCH (Mar. 12, 2020).

⁴³ [Online Foreign Influence Operations](#), Hearing Before the U.S. House Intelligence Committee (June 18, 2020) (Testimony of Nathaniel Gleicher, the head of security policy at Facebook).

III. Americans Need Bipartisan Solutions to Hold Technology Companies Accountable

Even though the First Amendment protects private tech platforms in their content moderation, it does not demand that they bear no responsibility for what they choose to promote or amplify. This kind of supercharged, unqualified immunity has no basis in the First Amendment, but is rather the product of courts' overly broad interpretation of Section 230 of the Communications Decency Act.

As more economic transactions and political activities move online, Section 230 makes many of our citizens more vulnerable. For example, the *New York Times* could be sued for including in a hard-copy version of the newspaper a discriminatory classified housing ad indicating “no minorities.”⁴⁴ Online platform Craigslist, however, cannot be sued for an electronic post with the same content due to 230 immunity,⁴⁵ and Facebook has effectively argued that Section 230 shields it from liability for steering housing ads away from Latino and Black users.⁴⁶ Guests who are denied a hotel room based on their race by Marriott can clearly sue. Airbnb, however, consistently argues that Section 230 prevents it from being sued when its guests are denied lodging due to racial discrimination,⁴⁷ even though Airbnb has a higher total market value (\$120 billion) than Marriott, Hilton, Wyndham, and Hyatt combined.⁴⁸

Real bipartisan reform is possible if Republicans and Democrats come together to protect average Americans. Republicans and Democrats should be able to agree on several issues – like the fact that the internet is vastly different today than it was in 1996 when Section 230 was enacted. Today, many tech companies design and implement algorithms and other platform features to engage users to maximize profits, and because of broad interpretations of Section 230 many tech companies lack the same incentives as other companies to act responsibly. There should be bipartisan consensus that federal law should not incentivize companies to design platforms that impose real harms on many of the most vulnerable Americans – such as child exploitation and abuse, teen

⁴⁴ *United States v. Hunter*, 459 F.2d 205, 211–12 (4th Cir.1972); *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C.Cir.1972); cf. *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir.1991).

⁴⁵ See *Chi, Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008); See Adam Liptak, *The Ads Discriminate, but Does the Web?*, N.Y. TIMES (March 5, 2006).

⁴⁶ 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).

⁴⁷ Airbnb, [Communications Decency Act Section 230 and How the PLAN Act Could Change it](#), AIRBNB: NEWS (Oct. 23, 2019) (explaining Airbnb's opposition to removing (c)(1) immunity from short-term rental platforms and making the company liable for its users' listings);); Jamila Jefferson-Jones, [Shut Out of Airbnb: A Proposal for Remediating Housing Discrimination in the Modern Sharing Economy](#), FORDHAM URB. L. J. (May 26, 2016);); Sam Levin, [Airbnb gives in to regulator's demand to test for racial discrimination by hosts](#), THE GUARDIAN (Apr. 27, 2017); Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 159-167 (2015) (exploring the legal uncertainty surrounding Airbnb legal compliance due to Section 230; *Smith v. Airbnb, Inc.*, 316 Or. App. 378, 381 (Or. Ct. App. 2021)) (“Airbnb moved for summary judgment, arguing, among other points, that under CDA 230, ‘Airbnb cannot be held liable for the content, or lack of content, on defendant Dennis's listing, as a matter of established law.’”); *Airbnb, Inc. v. City and Cnty of S.F.*, 217 F.Supp.3d 1066 (N.D. Cal. 2016) (arguing that Section 230 preempted the ordinance which made it a misdemeanor to provide and collect a fee for booking services related to short-term rentals); *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1104-5 (C.D. Cal. 2017) (holding that Airbnb was immune under section 230 although it provided ancillary services and edited content from third parties on its site).

⁴⁸ See Max Starkov, [How can hoteliers win the booking war with Airbnb](#), HOSPITALITYNET (Apr. 8, 2021).

eating disorders and other mental health harms, hate-motivated violence, and employment and housing discrimination.

Biography

Spencer Overton is the President of the Joint Center for Political and Economic Studies, which was founded in 1970 and is America's Black think tank. The Joint Center focuses on research on technology policy, economic policy, and workforce policy, as well as congressional staff diversity. He is also the Patricia Roberts Harris Research Professor of Law at George Washington University in Washington, DC.

Spencer is the author of the book [*Stealing Democracy: The New Politics of Voter Suppression*](#) and several academic articles and popular commentaries on democracy and public policy, including [*State Power to Regulate Social Media Companies to Prevent Voter Suppression*](#), 53 U.C. DAVIS LAW REVIEW 1793 (2020). His work as a commissioner on the Carter-Baker Election Commission and the Commission on Presidential Nomination Timing and Scheduling shaped the modern voter ID debate, resulted in Iowa restoring voting rights to over 80,000 returning citizens, and moved more diverse states like South Carolina and Nevada to the beginning of the modern Democratic presidential primary process.

Spencer led the 2008 Obama transition team's Election Assistance Commission agency review group, and during the Obama Administration he served as Principal Deputy Assistant Attorney General in the Office of Legal Policy (the "think tank" of the Department of Justice). In that position, he partnered with White House officials to lead the Administration's policy efforts on democracy issues, including conceptualizing and/or implementing policies related to the Military and Overseas Voter Empowerment Act, the National Voter Registration Act, and the Voting Rights Act.

Spencer has also practiced law at the firm Debevoise & Plimpton, clerked for U.S. Court of Appeals Judge Damon J. Keith, and graduated with honors from both Hampton University and Harvard Law School.