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“Voting Rights and Election Administration:
Combatting Misinformation in the 2020 Election”

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Overview

Inauthentic social media accounts, targeted digital advertising, and election disinformation do not just “polarize” the American electorate or facilitate “foreign interference” with U.S. elections. These tactics—utilized by both foreign and domestic actors—also target and suppress Black votes.

For example, while African Americans made up just 12.7 percent of the United States population, in 2016 Black audiences accounted for over 38 percent of U.S.-focused Facebook ads purchased by the Russian Internet Research Agency and almost half of the user clicks. The Russian social media accounts generally built a following by posing as being African American-operated and by paying for ads that social media companies distributed largely to Black users. Near Election Day, the accounts urged African Americans to “boycott the election.”

Another example—in September 2020 British investigative journalists reported that the 2016 Trump campaign disproportionately categorized African Americans as voters who should be encouraged not to vote with tailored and microtargeted social media ads—a category the Trump campaign labelled as “Deterrence.” For example, African Americans accounted for 15% of Michigan’s population but 33% of the voters in Michigan that the Trump campaign labelled “Deterrence.” African Americans represented 22% of North Carolina’s population, but 46% of the voters in the state that the Trump campaign affixed with the label “Deterrence.” Overall, 3.5 million African Americans were categorized by the Trump campaign as “Deterrence.”

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Disinformation targeted at Black voters on social media platforms has continued in the 2020 cycle. During the Democratic presidential primary, the Russian Internet Agency targeted African American users with an attack on Senator Kamala Harris. 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. In September 2020, the Department of Homeland Security indicated that Russia is attempting to “undermine public trust in the electoral process” by promoting false statements online that “mail in ballots are riddled with fraud and susceptible to manipulation” and “voters would not receive their mail ballot in time to cast their vote.” The Russian proxy sites “highlighted reduced in-person polling places in large cities due to the pandemic and the long lines this caused,” and claimed this combination would “disproportionately suppress voting among African-Americans and expose them to the spread of COVID-19.” Russian intelligence agencies are also “amplifying misleading statements from President Trump, mostly about the dangers of mail-in ballots,” by promoting screenshots of his Twitter posts or quoting and amplifying his misleading messages.

Of late, the Trump Administration has issued an executive order, proposed federal legislation, and petitioned the Federal Communications Commission in an attempt to narrowly construe Section 230 of the Communications Decency Act to expose social media companies to the risk of legal liability in retaliation for companies moderating objectionable content by President Trump and his followers. These retaliatory threats deter social media platforms from removing disinformation and only amplify the ongoing targeted discrimination against Black voters.

While the Trump Administration claims content moderation by private social media companies stifles free speech, the First Amendment was supposed to be a check against government—not against private entities. As non-state actors, social media companies currently have the freedom and crucially the power to prevent disinformation that results in voter suppression. In short, the Trump Administration is seeking to use the power of the U.S. government to increase the false and misleading social media posts that lead to an increase in voter suppression and polarization. While the status quo is alarming, empowering the Trump Administration to punish companies for removing disinformation, deceptive information about voting practices, discriminatory tactics, and other objectionable content would be an unacceptable attack on our democracy.

Social media companies that purport to “advance free speech” by allowing disinformation that suppresses votes willfully ignore the effect of their policies on Black communities. While many of these companies would have you believe they are simply offering an online version of “Speaker’s Corner,” they are not non-profit organizations designed exclusively to promote citizen discourse. They are, in fact, 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.

To treat discriminatory ad distribution designed to enhance corporate profits that steers voter suppression ads toward Black communities as “neutral” ignores the non-neutral harms and disparities that result from the content moderation standards of the platforms. It is not “neutral” for the world’s most valuable companies to impose 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 as "neutral" content that has a non-neutral impact.

While online platforms have made progress since 2016 in preventing disinformation, they must do much more. While the companies may claim they were caught unaware of the magnitude of the impact of the voter suppression schemes on Black communities in the 2016 election, they cannot be allowed to make the same mistakes in 2020. Many companies need a more robust definition of voter suppression, and need to enforce standard content rules against politicians (politicians can currently post or buy ads on Facebook that spread disinformation and racial division).

Also, less than a month before Election Day—as many Americans have already started to vote—the American public has no real knowledge about the enforcement of the disinformation policies adopted by companies or their effectiveness. We lack a full understanding of the true foreign and domestic disinformation threats before us. Currently, the public generally receives information from a company only when the company decides to respond to the publication of data from independent investigations by journalists and researchers.

A 28-year-old Abraham Lincoln stated his address "The Perpetuation of Our Political Institutions" before an audience in Springfield, Illinois:

At what point shall we expect the approach of danger? By what means shall we fortify against it? Shall we expect some transatlantic military giant, to step the Ocean, and crush us at a blow? Never!--All the armies of Europe, Asia and Africa combined, with all the treasure of the earth (our own excepted) in their military chest; with a Buonaparte for a commander, could not by force, take a drink from the Ohio, or make a track on the Blue Ridge, in a trial of a thousand years.

At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher.¹

Lincoln could not foresee a world in which foreign actors could invade the United States not through military force, but through the Internet. We face a crisis where domestic and foreign actors enhance and foment existing internal divisions with the goal of destabilizing our democracy and our nation.

All Americans must oppose these attempts—but in addition to the companies—local, state, and federal officials have important roles to play to prevent disinformation. State and local election officials should develop and implement procedures to ensure the availability of accurate information. Congress should require regular briefings from intelligence officials about disinformation, and enact legislation to prevent deceptive practices and to explicitly deter platforms from targeting ads along racial lines in violation of federal and state civil rights laws.

¹ Abraham Lincoln, [*The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois*](#), January 27, 1838.

Part I of this written testimony details online disinformation used to target and suppress Black votes by foreign and domestic actors like the Russian Internet Research Agency and the 2016 Trump campaign. Part II describes disinformation targeted at Black voters in the 2020 election cycle. Part III explains how the Trump Administration’s attempts to rewrite Section 230 of the Communications Decency Act discourage social media companies from content moderation and facilitate online disinformation and voter suppression. Part IV asserts that social media platforms must do more to prevent disinformation during the 2020 election season, and it also summarizes recommendations for federal, state, and local officials.

I. Foreign and Domestic Actors Target Disinformation at Black Audiences Online to Suppress Votes

Both foreign and domestic actors—like the Russian Internet Research Agency and the Trump campaign—have used online disinformation² to target and suppress Black votes.³

For example, on Election Day 2016, the operators of the Williams & Calvin Facebook page — ostensibly two Black men from Atlanta who ran a popular Facebook page focused on Black media and culture — paid for and posted a Facebook ad. The ad proclaimed: “We don’t have any other choice this time but to boycott the election. This time we choose between two racists. No one represents Black people. Don’t go to vote.”⁴ (*See Exhibit A below*).

The creators of the Election Day ad discouraging Black voting selected as audiences the Facebook microtargeting advertising categories of users interested in “Martin Luther King, Jr.”; “African American Civil Rights Movement (1954-68)”; and “African American history or Malcolm X.”⁵ A video with the same message appeared on the Williams & Calvin YouTube account and was also promoted on the Williams & Calvin Twitter account.

After the November 2016 election, an investigation revealed that the Williams & Calvin Facebook, Twitter, and YouTube accounts were fake accounts set up and operated by the Russian Internet Research Agency (the “Russian Agency”). The Williams & Calvin Facebook page started operating at least as early as January 2016.⁶ Many of its posts showcased Black achievements,

² “*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).

³ RENEE DiRESTA ET AL., [THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY](#) 12, 87-88 (2019), (“While other distinct ethnic and religious groups were the focus of one or two Facebook Pages or Instagram accounts, the Black community was targeted extensively with dozens . . .”).

⁴ YOUNG MIE KIM, PROJECT DATA, [UNCOVER: STRATEGIES AND TACTICS OF RUSSIAN INTERFERENCE IN US ELECTIONS: RUSSIAN GROUPS INTERFERED IN ELECTIONS WITH SOPHISTICATED DIGITAL CAMPAIGN STRATEGIES](#) 9 (2018).

⁵ *Id.*

⁶ See Benjamin Fearnow, [Williams & Calvin: Pro-Trump Facebook Stars Reportedly Worked for Kremlin, Accounts Removed](#), INT’L BUS. TIMES (Oct. 10, 2017, 1:51 PM), (noting the “personal” account for Calvin Johnson last posted in 2015); Issie Lapowsky, [House Democrats Release 3,500 Russia-Linked Facebook Ads](#), WIRED (May 10, 2018, 10:00 AM).

Black dignity, and other positive affirmations of Black community.⁷ Over time, regular posts on police violence, disproportionate levels of incarceration, disparate treatment in news media, and other structural inequalities had allowed Williams & Kalvin to establish a significant following among and credibility with Black users.⁸

Fake social media accounts and targeted digital advertising did not just “polarize” the American electorate. They did not simply facilitate “foreign interference” with U.S. elections. These tactics also targeted and suppressed Black votes.⁹

While African Americans make up just 12.7% of the U.S. population, 37.04% of the unique Facebook pages believed to be created by the Russian Agency were focused on Black audiences,¹⁰ and these pages attracted 35.72% of the followers of the pages created by the Russian Agency.¹¹ Of the twenty U.S.-focused audience segments that the Russian Agency targeted on Facebook, just two segments — “African American Politics and Culture” and “Black Identity and Nationalism” — accounted for over 38% of the ads purchased, 46.96% of the user impressions, and 49.84% of the user clicks.¹² The Russian Agency paid Facebook 1,350,489 rubles (about \$20,257) for 1,087 different ads for these two Black audience segments. The ad campaign resulted in 15,815,597 user impressions (users seeing the ad) and 1,563,584 user clicks (users engaging with the ad).¹³

Similar trends occurred on other platforms. Of all of the U.S.-focused Russian Agency-generated YouTube content, 96% was related to the Black Lives Matter movement and police brutality.¹⁴ The Russian Agency Instagram account with the most interactions was @blackstagram__, with

⁷ See Josh Russell (@josh_emerson), TWITTER (Oct. 9, 2017, 7:36 AM), https://twitter.com/josh_emerson/status/917398442661605377 (initiating a Twitter thread of archived posts from disabled social media accounts of Williams & Kalvin).

⁸ See PHILIP N. HOWARD ET AL., [COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018](#), at 35 tbl.5 (2018) (listing the top twenty Russian Agency-backed Facebook pages).

⁹ RENEE DiRESTA ET AL., [THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY](#) 12, 87-88 (2019), (“While other distinct ethnic and religious groups were the focus of one or two Facebook Pages or Instagram accounts, the Black community was targeted extensively with dozens . . .”).

¹⁰ See *id.* at 21 (calculating a total percentage of Black pages at 37.037%, based on numbers indicating that the “Facebook data provided posts from 81 unique pages” (the denominator) and that “[o]verall, 30 targeted Black audiences” (the numerator)); *ACS 2013-2017 Five Year Estimates*, [U.S. CENSUS BUREAU](#) (2017), (indicating a Black population in the United States of 12.7%); see also PHILIP N. HOWARD ET AL., [COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018](#), at 6 (indicating that Facebook provided data on 3,393 individual ads published from 2015-2017 that it believed originated from the Russian Agency to the U.S. Senate Select Committee on Intelligence, and the U.S. House Permanent Select Committee on Intelligence released details on 3,517 of such ads).

¹¹ See RENEE DiRESTA ET AL., [THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY](#), at 21 (“The Facebook data provided included posts from 81 unique Pages . . . Overall, 30 targeted Black audiences and amassed 1,187,810 followers; 25 targeted the Right and amassed 1,446,588 followers, and 7 targeted the Left and amassed 689,045 followers. The remaining 19 were a sporadic collection of pages with almost no posts and approximately 2000 followers across them.”).

¹² See PHILIP N. HOWARD ET AL., [COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018](#), at 23 tbl.4 (providing raw numbers of the twenty audience segments on Facebook targeted by the Russian Agency, including the two audience segments of “African American Politics and Culture” and “Black Identity and Nationalism”).

¹³ See *id.*

¹⁴ RENEE DiRESTA ET AL., [THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY](#) 12, at 16.

303,663 followers, over 27.8 million likes, and over 450,000 comments.¹⁵ The Russian Agency also disproportionately focused on African Americans on its Twitter accounts.¹⁶

While the Russian Agency also created pages and ads that were targeted at and delivered to conservative groups in the United States, those pages warned of voter fraud and encouraged audiences to vote.¹⁷ In contrast, the messages on Black-oriented pages either ignored the election, discouraged African Americans from voting, or encouraged African Americans to vote for a third-party candidate unlikely to win.¹⁸ Even though disinformation was targeted at different groups and the goal may have been to sow division, the impacts were divergent—the voices and votes of many groups were mobilized and encouraged to participate, whereas Black votes were suppressed.

Domestic political actors like the 2016 Trump campaign have also used the creation of psychological profiles on individual voters, microtargeting, and disinformation to discourage Black voters from casting ballots.¹⁹

According to a datafile of over 200 million American voters used by the 2016 Trump campaign and the firm Cambridge Analytica recently obtained by British journalists, in 16 battleground states²⁰ the Trump campaign separated millions of Americans into one of eight “audiences” for targeting of ads with distinct messages on platforms like Facebook (*see Exhibit B*). The groups

¹⁵*Id.* at 27 (showing that the number one Russian Agency account in terms of interactions was @blackstagram__, with 303,663 followers and over 28 million interactions (over 27.8 million likes and over 450,000 comments).

¹⁶ See PHILIP N. HOWARD ET AL., [COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018](#), at 26 (“[T]he IRA focused their political messaging [on Twitter] on two targets above others: conservative voters and African Americans.”).

¹⁷ RENEE DIRESTA ET AL., *The Tactics & Tropes of the Internet Research Agency*, at 83 (“[T]he strategy for Right-leaning groups appears to have been to generate extreme anger and suspicion, in hopes that it would motivate people to vote; posts darkly hinted at . . . voter fraud.”); YOUNG MIE KIM, PROJECT DATA, [UNCOVER: STRATEGIES AND TACTICS OF RUSSIAN INTERFERENCE IN US ELECTIONS: RUSSIAN GROUPS INTERFERED IN ELECTIONS WITH SOPHISTICATED DIGITAL CAMPAIGN STRATEGIES](#), at 8, 10 (indicating that the Russian Agency “deliberately targeted nonwhite voters, particularly African Americans, by promoting their racial/ethnic identity, then suppressing their votes when closer to the elections No evidence suggested that the same type of voter suppression strategy was also employed on the other side of the political spectrum, however”).

¹⁸ See RENEE DIRESTA ET AL., [THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY](#), at 83 (“The Black-targeted content . . . largely ignored the election until the last minute, instead continuing to produce posts on themes about societal alienation and police brutality. As the election became imminent, those themes were then tied into several varieties of voter suppression narratives: don’t vote, stay home, this country is not for Black people, these candidates don’t care about Black people.”); PHILIP N. HOWARD ET AL., [COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018](#), at 18 (“Messaging to African Americans sought to divert their political energy away from established political institutions by preying on anger with structural inequalities faced by African Americans, including police violence, poverty, and disproportionate levels of incarceration. These campaigns pushed a message that the best way to advance the cause of the African American community was to boycott the election and focus on other issues instead This accounts for the majority of content in the dataset that targeted this group.”).

¹⁹ Edmund L. Andrews, *The Science Behind Cambridge Analytica: Does Psychological Profiling Work?* INSIGHTS BY STANFORD GRADUATE SCHOOL OF BUSINESS (Apr. 12, 2018); Sue Halpern, *Mind Games: How Campaigns Are Using Marketing, Manipulation, and “Psychographic Targeting” to win Elections—and Weaken Democracy*, THE NEW REPUBLIC (Oct. 18, 2018).

²⁰ The sixteen states were Arizona, Colorado, Florida, Georgia, Iowa, Indiana, Maine, Michigan, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Nevada, Wisconsin, and Virginia. [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020) (video, at 4:37).

included base voters for each candidate likely to turn out (Core Clinton, Core Trump), disengaged voters for each candidate (Disengaged Clinton, Disengaged Trump), voters who could be ignored because they were least likely to turn out (“Deadbeat”), persuadable swing voters (“Persuasion”), and Trump voters who needed encouragement to ensure they would turn out (“GOTV”).²¹

The eighth group—Clinton voters who could be discouraged from voting—was labelled “Deterrence.”²² A disproportionately large percentage of voters in the Deterrence category were Black. For example, African Americans were 32% of Georgia’s population but 61% of Georgia voters labelled Deterrence, 15% of Michigan’s population but 33% of the state’s voters labelled Deterrence, 22% of North Carolina’s population but 46% of the state’s “Deterrence” voters, and 5.4% of Wisconsin’s population but 17% of the state’s “Deterrence” voters.²³ Overall, 3.5 million African Americans were categorized by the Trump campaign as Deterrence.²⁴

The Trump campaign spent over \$44 million on Facebook ads alone between June and November 2016,²⁵ and posted “six million different versions of highly targeted messages that were pumped directly into the feeds of target voters across America, helped by a Facebook employee embedded within the Trump campaign.”²⁶ There is no public record of which ads the Trump campaign targeted at Black voters, and Facebook has not disclosed this information. According to the British journalists, Cambridge Analytica indicated in a confidential document the Trump campaign spent \$55,000 on a Facebook ad targeted at African Americans in Georgia alone that had a video of Hillary Clinton appearing to label young Black men as “superpredators.”²⁷

The 2016 presidential election marked the most significant decline in Black voter turnout on record — falling from 66.6% in 2012 to 59.6% in 2016.²⁸ Black turnout declined between 2012 and 2016 in most key swing states, including but not limited to Georgia (-4.2 points), Ohio (-7.5 points), Michigan (-12.4 points), North Carolina (-7.1 points), and Wisconsin (-12.3 points).²⁹

UK Channel 4 suggests a correlation between the number of voters marked “Deterrence” and the decline in Black turnout. For example, the investigation examined Ward 116 in Milwaukee, which

²¹ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020) (video, at 3:44).

²² [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020) (video, at 3:44).

²³ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020) (landing page, as well as video 4:38-4:56).

²⁴ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020).

²⁵ Sarah Frier, [Trump’s Campaign Said It Was Better at Facebook. Facebook Agrees](#), BLOOMBERG (Apr. 2, 2018, 3:22 PM EDT).

²⁶ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020).

²⁷ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020).

²⁸ Jens Manuel Krogstad & Mark Hugo Lopez, [Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots](#), PEW RES. CTR. (May 12, 2017).

²⁹ Bernard L. Fraga, Sean McElwee, Jesse Rhodes, and Brian F. Schaffner, [Why Did Trump Win? More Whites—and Fewer Blacks—Actually Voted](#), WASH. POST (May 8, 2017, 6:00 AM EDT).

had 1140 potential voters (80% of whom were African American).³⁰ In Ward 116, 44% of the voters were marked as “Deterrence” (636 voters). Overall, turnout in Ward 116 fell from 75% in 2012 to just 56% in 2016. The investigation observed similar trends in many other wards. Political scientists, however, find it difficult to quantify the precise impact of voter deception through online targeted ads on election outcomes relative to other possible factors.³¹

Today’s foreign and domestic coordinated digital voter suppression campaigns grow out of a history of continuously evolving tactics to suppress Black votes to maintain or acquire political power. Just as communications has evolved over time to embrace new technologies and social contexts, so has voter suppression. For example, following the 1870 ratification of the 15th Amendment prohibiting restrictions on the right to vote on account of race and the federal withdrawal of troops from the South, White Southern politicians created poll taxes, literacy tests, and other voting regulations that denied most African Americans the right to register and vote without explicitly mentioning race, while using “grandfather clauses” to exempt many Whites from being disenfranchised by these hurdles. In 1961, after federal courts ordered Dallas County, Alabama county registrars to stop requiring potential voters to interpret the *federal* constitution, county registrars simply added a new test that required that potential voters demonstrate an understanding of the *state* constitution. (Indeed, the preclearance provisions of the Voting Rights Act were so effective because they addressed the evolving nature of voter suppression). In 2013, the North Carolina legislature enacted a series of voting restrictions that the Fourth Circuit later invalidated, finding that they “target African Americans with almost surgical precision”³²

Today’s coordinated digital voter suppression campaigns compound contemporary offline efforts to suppress Black votes. In 2020, for example, coordinated robocalls to almost 12,000 Detroiters (the city is over 78% Black) falsely asserted that voting by mail would result in a voter’s personal information being used by police to resolve warrants, by credit card companies to collect debts, and by the CDC to “track people for mandatory vaccines.”³³

³⁰ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020) (video, from 8:16-8:52).

³¹ See, e.g., RENEE DiRESTA ET AL., [THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY](#), at 58 (“When we talk about the ‘impact’ of the Russian influence operation, most conversations focus on whether the Russian Agency operation swayed voters and swung the Presidential Election in 2016. The answer is, we can’t tell from this data.”) (emphasis omitted); Scott Shane and Sheera Frenkel, [Russian 2016 Influence Operation Targeted African-Americans on Social Media](#), N.Y. TIMES (Dec. 17, 2018) (“Black voter turnout declined in 2016 for the first time in 20 years in a presidential election, but it is impossible to determine whether that was the result of the Russian campaign.”) (emphasis omitted).

³² North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (2016).

³³ Stephanie Saul, [Deceptive Robocalls Try to Frighten Detroit Residents About Voting by Mail](#), NY TIMES, Aug. 27, 2020; Ryan J. Foley, [Conservative Hoaxers Face Charges Over False Voter Robocalls](#), Wash. Post, Oct. 1, 2020; [QuickFacts, Detroit, MI](#), U.S. CENSUS BUREAU (2019).

II. In the 2020 Election, Foreign and Domestic Actors are Targeting Disinformation at Black Voters

Disinformation targeted at Black voters on social media platforms has continued in the 2020 election cycle. 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. Just like the voter suppression campaign in 2016, 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.”³⁴ (*See Exhibit C below*). 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). In addressing the matter, Twitter acknowledged that in the 2018 midterms the vast majority of voter suppression and disinformation campaigns were domestic rather than foreign.

In August 2020, Twitter deleted an account that included a photo of a young Black man who claimed to be a former Black Lives Matter protester who purported to denounce the movement as Marxist and become a Republican.³⁵ In September, the Department of Homeland Security found that Russian proxy websites “amplified public narratives....such as claims that voters would not receive their mail ballot in time to cast their vote.”³⁶ The Department of Homeland Security emphasized that the Russian proxy websites “highlighted reduced in-person polling places in large cities due to the pandemic and the long lines this caused, claiming this would disproportionately suppress voting among African-Americans and expose them to the spread of COVID-19.”³⁷ The focus on race seems to continue in part because it facilitates engagement. According to a recent study, presenting as a Black activist is the “most effective predictor of disinformation engagement by far.”³⁸

In an analysis of 31 posts linked to Russian Internet Research Agency earlier this year, University of Wisconsin professor Young Mie Kim found that just as in the 2016 election cycle, during the

³⁴ See Clarissa Ward, Katie Polglase, Sebastian Shukla, Gianluca Mezzofiore, and Tim Lister, [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 (Mar. 12, 2020); Taylor Hatmaker, [Russian Trolls Are Outsourcing to Africa to Stoke U.S. Racial Tensions](#), TECH CRUNCH (Mar. 12, 2020).

³⁵ Craig Timberg & Isaac Stanley-Becker, [Black Voters Are Being Targeted in Disinformation Campaigns](#), *Echoing the 2016 Russian Playbook*, WASH. POST (Aug. 27, 2020) (“Twitter deleted an account featuring a profile photo of a young Black man claiming to be a former Black Lives Matter protester who switched allegiances to the Republican Party.” The account, @WentDemtoRep...tweeted, “I joined the BLM protests months ago when they began. They opened my eyes wide! I didn’t realize I became a Marxist...I’m done with this trash. I’ll be registering Republican.”).

³⁶ OFFICE OF INTELLIGENCE AND ANALYSIS, U.S. DEPT. OF HOMELAND SEC., [RUSSIA LIKELY TO CONTINUE SEEKING TO UNDERMINE FAITH IN U.S. ELECTORAL PROCESS](#) (Sept. 3, 2020).

³⁷ *See id.*

³⁸ Deen Freelon, Michael Bossetta, Chris Wells, Josephine Lukito, Yiping Xia, and Kirsten Adams, [Black Trolls Matter: Racial and Ideological Asymmetries in Social Media Disinformation](#), SOCIAL SCIENCE COMPUTER REVIEW, April 7, 2020 (separating Black-presenting accounts from non-Black liberal accounts, and finding that “presenting as a Black activist—to be the most effective predictor of disinformation engagement by far.”).

2020 election cycle the Russians were impersonating Americans³⁹ and were targeting “both sides of the ideological spectrum to sow division.”⁴⁰ 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.”⁴¹ Professor Kim did not identify any posts that discouraged African Americans from voting, perhaps because this type of voter suppression occurs just before elections.⁴² Professor Kim did find, however, that during the Democratic presidential primary the Russian Internet Agency targeted African Americans with an attack on Senator Kamala Harris (*see Exhibit D below*).⁴³

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” (*see Exhibits E, F, and G*).⁴⁴ Disinformation about elections on Facebook and WhatsApp (which is owned by Facebook) in 2020 has also been significant among the Latina/o community.⁴⁵

Federal intelligence officials also indicated that Russia is currently interfering in 2020 elections through disinformation, and 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.”⁴⁶

In July 2020, the Director of the U.S. National Counterintelligence and Security Center issued a statement indicating that Russia is using “internet trolls and other proxies” to “spread disinformation in the U.S. that is designed to undermine confidence in our democratic process.”⁴⁷

³⁹ YOUNG MIE KIM, BRENNAN CENTER, [NEW EVIDENCE SHOWS HOW RUSSIA’S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN](#) (Mar. 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__”).

⁴⁰ *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.”).

⁴¹ *See id.*

⁴² YOUNG MIE KIM, BRENNAN CENTER, [NEW EVIDENCE SHOWS HOW RUSSIA’S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN](#) (Mar. 5, 2020) (“Among the posts we captured in September 2019, I did not notice any messages that promoted election boycotts or deceptions yet, perhaps because those types of voter suppression campaigns usually occur right before the elections, thus it was too early to observe them.”).

⁴³ *See id.* (“In another example, the IRA targeted African Americans for heavy attacks on Sen. Kamala Harris.”).

⁴⁴ *See id.*

⁴⁵ Sabrina Rodriguez & Marc Caputo, [‘This is F---ing Crazy’: Florida Latinos Swamped by Wild Conspiracy Theories](#), POLITICO (Sept. 14, 2020) (highlighting the prevalence of election disinformation targeting Florida’s Latin American and Hispanic community, particularly on Facebook and WhatsApp -- an “encrypted messaging system...widely popular among Latin Americans and other immigrant communities in the U.S.”).

⁴⁶ [Online Foreign Influence Operations: Hearing Before the U.S. House Intelligence Comm.](#), 116th Cong. (2020) (statement of Nathaniel Gleicher, Head of Security Policy, Facebook).

⁴⁷ Press Release, Office of the Director of Nat’l Intelligence, [Statement by NCSC Director William Evanina: Election Threat Update for the American Public](#), (Aug. 7, 2020) (“[F]oreign states” – particularly China, Russia, and Iran – “continue to use covert and overt influence measures in their attempts to sway U.S. voters’ preferences and perspectives, shift U.S. policies, increase discord in the U.S., and to undermine American people’s confidence in our democratic process.”).

Specifically, the Department of Homeland Security indicated that Russia is attempting to “undermine public trust in the electoral process” by promoting false statements online that “mail in ballots are riddled with fraud and susceptible to manipulation.”⁴⁸ In September 2020, FBI Director Christopher Wray testified to the House Homeland Security Committee that “We certainly have seen very active — very active — efforts by the Russians to influence our election in 2020. . . . to both sow divisiveness and discord, and I think the intelligence community has assessed this publicly, to primarily to denigrate Vice President Biden”⁴⁹ Russian intelligence agencies are “amplifying misleading statements from President Trump, mostly about the dangers of mail-in ballots,” by promoting screenshots of his Twitter posts or quoting and amplifying his misleading messages.⁵⁰ In addition, China, Iran, Saudi Arabia, and domestic White supremacists have also parroted Russia’s strategies to stoke division in the United States using social media.⁵¹

Despite the continued prevalence of political disinformation, Americans have strong feelings against it. According to surveys by Gallup and the John S. and James L. Knight Foundation conducted in December 2019 and March 2020, the vast majority of U.S. adults—81 percent—believe that social media companies should never allow intentionally misleading information on elections and political issues.⁵² Of various types of content surveyed, the only other content that larger groups of respondents believed should never be allowed on social media were child pornography and intentionally misleading health and medical information.

⁴⁸ Shane Harris & Ellen Nakashima, [Russia is Working to Undermine Confidence in Mail-In Voting, DHS Warns](#), WASH. POST (Sept. 5, 2020); See also Samantha Lai, [Russia’s Narratives about U.S. Election Integrity in 2020](#), FOREIGN POLICY RESEARCH INSTITUTE, May 25, 2020; Samantha Lai, [Iran’s Narratives about U.S. Election Integrity in 2020](#), FOREIGN POLICY RESEARCH INSTITUTE (Jun. 19, 2020).

⁴⁹ Zolan Kanno-Youngs, [F.B.I. Director Warns of Russian Interference and White Supremacist Violence](#), N.Y. TIMES (Sept. 17, 2020).

⁵⁰ David E. Sanger & Zolan Kanno-Youngs, [The Russian Trolls Have a Simpler Job Today. Quote Trump](#), N.Y. TIMES (Sept. 22, 2020), (indicating that Russian intelligence agencies are finding it much easier to spread disinformation to American voters because they can simply amplify “misleading statements from President Trump, mostly about the dangers of mail-in ballots.”).

⁵¹ Mark Scott & Steven Overly, [Silicon Valley is Losing the Battle Against Election Misinformation](#), POLITICO (Aug. 4, 2020, 4:30 AM).

⁵² FREE EXPRESSION, [HARMFUL SPEECH AND CENSORSHIP IN A DIGITAL WORLD](#), KNIGHT FOUNDATION AND GALLUP, INC., 6 (Jun. 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.

III. The Trump Administration’s Proposals to Rewrite Section 230 Facilitate Online Disinformation and Voter Suppression

Unfortunately, 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. If social media companies are chilled from moderating destructive disinformation (as the executive order seeks), the result will be precisely as hostile actors wish—the suppression of votes, discord, and unrest.

In response to concerns about the transmission of COVID-19 during in-person voting, many states have expanded vote-by-mail options,⁵³ and on May 26, 2020 at 5:17 am, President Trump tweeted the following in two tweets:

There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. . . . The Governor of California is sending Ballots to millions of people, anyone . . . living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!⁵⁴

Later that day, Twitter attached a “Get the facts about mail in-ballots” notice to the President’s tweets, which Twitter hyperlinked to a notice indicating the President’s claim was “unsubstantiated” according to news outlets, and that experts indicate “mail-in ballots are very rarely linked to voter fraud.”⁵⁵ Twitter did not remove the President’s tweets.

In response, President Trump tweeted “Twitter is completely stifling FREE SPEECH, and I, as President, will not allow it to happen!”⁵⁶ 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.⁵⁷

⁵³ NAT’L CONFERENCE OF STATE LEGISLATURES, [COVID-19: HOW’S IT CHANGING ELECTIONS?](#) (June 2020).

⁵⁴ Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 5:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392>; Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 5:17 AM), <https://twitter.com/realDonaldTrump/status/1265255845358645254>

⁵⁵ Twitter Events, *Trump Makes Unsubstantiated Claim That Mail-In Ballots Will Lead to Voter Fraud*, TWITTER (May 26, 2020), <https://twitter.com/i/events/1265330601034256384>.

⁵⁶ Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 4:40 PM), <https://twitter.com/realDonaldTrump/status/1265427539008380928>.

⁵⁷ Donald J. Trump (@realDonaldTrump), TWITTER (May 27, 2020, 4:11 AM), <https://twitter.com/realDonaldTrump/status/1265601611310739456>.

Two days after his original tweet, President Trump issued a retaliatory “Executive Order on Preventing Online Censorship,”⁵⁸ which attempted to narrowly construe the Section 230 of the Communications Decency Act 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. This obviously includes disinformation that causes real harm, and it reflects Congress’s intent to empower platforms to engage in content moderation without fear of legal liability.

To be crystal clear about the aims of the drafters of the provision, Section 230 proclaims that platforms will not “be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, *or otherwise objectionable*, whether or not such material is constitutionally protected...”⁵⁹ Congress then knew that federal agencies could not clean up the internet without the help of interactive service providers and they sought that help by providing a legal shield for companies that over- and under-filtered information posted by users.

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 Information Administration 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.”⁶⁰ The Justice Department proposed a similar change though legislative amendment by replacing “otherwise objectionable” with “unlawful.”⁶¹

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 monitoring. This goal is inconsistent with the very words and the purpose of Section 230. The executive order seemingly gives the National Telecommunications and Information Administration or the Federal Communications Commission authority to change the words and meaning of the statute. This the agencies cannot do. The effort by the Trump Administration is clearly designed not to change the law, but rather 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.

⁵⁸ [Exec. Order on Preventing Online Censorship](#) (May 28, 2020).

⁵⁹ 47 U.S.C. § 230(c)(2) (2019) (emphasis added).

⁶⁰ NTIA Rulemaking Petition at 38.

⁶¹ [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).

The Trump Administration’s proposed narrowing of “otherwise objectionable” would discourage social media companies from content moderation, which would worsen online experiences for many Americans. It would undermine democracy if social media companies could not freely remove disinformation⁶² unless this material was undisputedly “obscene, lewd, lascivious, filthy, excessively violent, harassing” or “unlawful.” Many attempts to use online disinformation to discourage voter participation through deception, suppress votes of particular racial groups, and deceive voters about election procedures are not clearly “obscene, lewd, lascivious, filthy, excessively violent, harassing” and do not always undisputedly violate a law. Such disinformation is deeply harmful to free and fair elections, and it is precisely the sort of online pollution that Congress wanted platforms to remove on their own without any fear of liability.

For example, platforms are currently free to remove disinformation such as “you cannot vote if someone in your family has committed a crime,” “voting is on Wednesday,” or altered video without liability under the “objectionable” standard. But platforms could not necessarily remove this same content without fear of liability if the legal shield only applied to the removal or filtering of “obscene, lewd, lascivious, filthy, excessively violent, harassing” or “unlawful” content.

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. Those proposals are corrosive along several lines—they threaten legislative change that the Executive Branch cannot itself actually do while chilling companies from removing destructive content due to the threat of potential litigation.

While the President claims content moderation by private social media companies stifles free speech, nothing could be further from the truth. Indeed, the First Amendment stands as a check against government censorship—which the executive order and the NTIA petition actually threatens. The First Amendment does not apply to restrict private entities, which themselves have free speech rights.⁶³ As non-state actors, social media companies currently have the freedom and crucially the power to prevent disinformation that results in voter suppression under an “**otherwise**

⁶² Danielle Citron, [Digital Platforms’ Power Over Speech Should Not Go Unchecked](#), KNIGHT FOUNDATION (Jun. 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.”).

⁶³ 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 5th and 15th 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).

objectionable” standard—but the proposal to effectively narrow the statutory language would hinder such content moderation.

To give government the power to control information through ad hoc content moderation during an election season is more dangerous to our democracy and our constitutional values than private entities engaging in content moderation.⁶⁴ 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, which it has every right to do. The company responded to the President’s narrative against a well-established form of voting that would make voting easier and safer for millions of Americans during a pandemic. Litigation is now pending in the U.S. District Court for the District of Columbia challenging the President’s executive order.⁶⁵

⁶⁴ 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.”);

⁶⁵ See [Center for Democracy & Technology vs. Donald J. Trump](#), Case No. 20-1456, U.S. Dist. Ct. (DC), June 2, 2020.

IV. Social Media Platforms Must Do More to Prevent Disinformation During the 2020 Election Season—Both as Ballots are Cast and Counted

Disinformation on social media presents a real danger to racial equity, voting rights, and democracy. Under Section 230, social media companies currently have the authority in the United States to moderate content to prevent disinformation, civil rights violations, and voter suppression. They must use this authority.

Granted, Facebook, Google, Twitter, and other social media companies have made progress and developed specific content moderation guidelines to reduce the spread of false or misleading information about voting in elections, other false or misleading information, and other objectionable content.⁶⁶ Facebook, for example, has made progress by conducting a civil rights audit and through policy improvements documented in that audit, such as an expanded definition of voter suppression, a policy against “don’t vote” ads, a full-time team focused on protecting U.S. elections, 35,000 content moderators,⁶⁷ and a center that provides accurate information on how to vote.⁶⁸ More recently, Facebook has reported that it will remove posts that state people will get COVID-19 if they vote, has banned ads that delegitimize election outcomes, and will flag posts that attempt to declare victory before all ballots are counted.⁶⁹ Google purports to have provided new features in search so people can access information on how to register and vote, reduced microtargeting categories for election ads, and is providing more transparency on political ads.⁷⁰ Twitter has banned all political ads,⁷¹ prohibits false claims on how to participate and content that could suppress participation, prohibits false affiliations, and labels or removes “misleading information intended to undermine public confidence in an election.”⁷²

⁶⁶ [Community Standards](#), FACEBOOK (last visited June 22, 2020) (indicating that content may be removed and accounts may be disabled when users threaten violence, attack people based on protected characteristics such as race or religion, impersonate others by creating fake accounts, and engage in coordinated inauthentic behavior, and that false news will not be removed but significantly reduced in distribution); [Community Guidelines](#), YOUTUBE (last visited June 22, 2020) (prohibiting accounts established to impersonate others, prohibiting threats of violence, and prohibiting content that incites hatred on the basis of protected categories such as race and religion); [The Twitter Rules](#), TWITTER (last visited June 22, 2020) (prohibiting violence, hateful threats or harassment based on a protected characteristic such as race or religion, suppression of civic participation, misleading information about civic participation). While most companies would say they have basic best practices, to the extent they do not they should adopt such practices and enforce them. See Ian Vandewalker, BRENNAN CENTER, [DIGITAL DISINFORMATION AND VOTER SUPPRESSION](#) (Sept. 2020) (recommending that social media platforms: “1. Proactively provide information about how to vote . . . 2. Maintain clear channels for reporting disinformation. . . . 3. Take down false information about voting but preserve the data (and impose more severe consequences on repeat offenders such as account deletion) . . . 4. Protect official accounts and websites (of election officials “against hacking and spoofing) . . . 5. Push corrective information to specific users affected by disinformation”).

⁶⁷ [Preparing for Elections](#), FACEBOOK (last visited Oct. 3, 2020); [Community Standards](#), FACEBOOK (last visited June 22, 2020).

⁶⁸ [FACEBOOK’S CIVIL RIGHTS AUDIT—PROGRESS REPORT](#), June 30, 2019, at 18-24; [Preparing for Elections](#), FACEBOOK (last visited Oct. 3, 2020); [New Steps to Protect the U.S. Elections](#), FACEBOOK (last visited Oct. 3, 2020).

⁶⁹ [New Steps to Protect the U.S. Elections](#), FACEBOOK (last visited Oct. 3, 2020).

⁷⁰ [An Update on Our 2020 U.S. Election Efforts](#), GOOGLE, Aug. 13, 2020 (last visited Oct. 3, 2020).

⁷¹ Kate Conger, [Twitter Will Ban All Political Ads, C.E.O. Jack Dorsey Says](#), N.Y. TIMES (Oct. 30, 2019).

⁷² [Expanding Our Policies to Further Protect the Civic Conversation](#), TWITTER, Sept. 10, 2020 (last visited Oct. 3, 2020).

Much more, however, must be done. 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,⁷³ 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 disinformation. While the companies may claim they were caught unaware of the magnitude of the impact of the voter suppression schemes on Black communities in the 2016 election, the same thing could happen in 2020. The current state of affairs is unacceptable.

For example, Facebook could have a more comprehensive definition of voter suppression, could prohibit any content that attempts to threaten voters from participating, and could be much more transparent and accountable in providing to outside groups data on voter suppression networks it identifies. Facebook could also enforce its standard content rules against politicians, who can currently post or buy ads that spread disinformation and racial division.⁷⁴ Also, there are questions about whether existing moderators—many of whom are lower-wage, hourly, highly-stressed out contract workers—are sufficient.⁷⁵ While 35,000 content moderators seems weighty, Facebook has over 2.7 billion monthly active users—which works out to one content moderator per 77,000 users.⁷⁶

Another problematic example—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’ personal data to target employment and housing ads away from Black and Latino users, and toward White users.⁷⁷ 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. While the company later settled the lawsuit,⁷⁸ research suggests it still uses algorithms that deliver employment ads along discriminatory lines.⁷⁹

⁷³<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/>

⁷⁴ FACEBOOK, [FACEBOOK, ELECTIONS AND POLITICAL SPEECH](#), Sept. 24, 2019.

⁷⁵ Casey Newton, [The Trauma Floor: The Secret Lives of Facebook Moderators in America](#), THE VERGE (Feb. 25, 2019)

⁷⁶ J. Clement, [Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2020](#), STATISTA, August 10, 2020 (last visited Oct. 4, 2020). David Brody of the Lawyers’ Committee for Civil Rights originally made this observation.

⁷⁷ 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.”).

⁷⁸ 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).

⁷⁹ 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).

A third example—despite a recent ban on praise, support, and representation of White supremacy and White nationalism,⁸⁰ White supremacists continue to circumvent Facebook’s policy.⁸¹

While some platforms claim they are advancing “free speech” by allowing disinformation, in doing so, they ignore the effect of the content on Black and other communities. For many Americans, online tools are the primary platforms for political identity, social relationships, professional networking, and other opportunities. To treat discriminatory ad distribution that steers voter suppression ads toward Black communities as “neutral” ignores the non-neutral harms and disparities that result from the content moderation standards of the platforms. It is not “neutral” for the world’s most valuable companies to profit from or externalize the costs of discrimination onto many of the nation’s most economically and politically marginalized communities.⁸² Platforms should not treat as “neutral” content that has a non-neutral impact.

Unfortunately, immediately after announcing its civil rights audit, Facebook announced a conservative bias audit, which falsely equated bigotry against protected classes on Facebook with anti-conservative bias. This approached civil rights as a partisan issue, instead of as an issue of values.

As a bipartisan group of election experts recommended in April 2020:

Leaders in social media, election officials, government leaders, and others should promote the equal protection voting norm, enshrined in the Voting Rights Act and the Fourteenth and Fifteenth Amendments, which ban targeting voters based on race or ethnicity in an effort to suppress or dilute their vote. Social media companies have a unique responsibility to prevent the use of their platforms for efforts that would suppress votes through the spread of misinformation about voting.⁸³

All of the companies should provide much more transparency about coordinated disinformation schemes, and provide civil rights organizations data about these schemes in real time to assess threats. For example, although we have been talking about the Russian Internet Research Agency’s targeting and suppression of voting by Black users for years, in September 2020 we just learned that the 2016 Trump campaign was disproportionately categorizing Black voters for “Deterrence” targeted ads on Facebook. While platforms have policies about preventing disinformation, the American public has no real knowledge about the enforcement of those policies or their

⁸⁰ FACEBOOK, [STANDING AGAINST HATE](#), Mar. 27, 2019.

⁸¹ Casey Newton, [How White Supremacists Evade Facebook Bans](#), THE VERGE (May 31, 2019).

⁸² [2019 Fortune 500](#), FORTUNE (showing that Alphabet (the parent company of Google), Amazon.com, Apple, Facebook, and Microsoft are all among the top 6 U.S. companies in market value); see also Jack M. Balkin, *2016 Sidley Austin Distinguished Lecture on Big Data Law and Policy: The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217 (2017) (analogizing the harms caused by algorithms to nuisance in analyzing the “socially unjustified use of computational capacities that externalizes costs onto innocent others”); Olivier Sylvain, [Intermediary Design Duties](#), 50 CONN. L. REV. 203, 207-08 (“Profits, of course, are not unlawful But profits in this context also are the spoils of a legal regime that effectively absolves online intermediaries from minding the harmful third-party user content that they host and repurpose for commercial gain. They are the benefits of a legal protection that almost no other entity in other legislative fields enjoys.”).

⁸³ [FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC’S CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS](#), UCI LAW (April 2020).

effectiveness in preventing disinformation, and generally only receives information about coordinated disinformation schemes in the company's response to the publication of data from independent investigations by journalists and researchers.

Various platforms—including Facebook, Twitter, and YouTube—have been very effective at preventing other objectionable content—such as adult pornography. Unfortunately, some of these companies do not seem to have internalized the threat disinformation poses to the health of our democracy—perhaps because they believe that advertisers will not pay to support adult pornography but will tolerate disinformation about elections that suppresses Black votes.⁸⁴ The comparative lack of effectiveness in protecting racial equity and the voting rights of all Americans seems to reflect not a lack of capacity, but a lack of will.

Local, state, and federal officials also have important roles to play to prevent disinformation. State and local election officials should deter online disinformation by developing procedures to publicize corrective information, publicize official sources of accurate information, prevent hacking of official websites, actively monitor for disinformation, and engage in community outreach.⁸⁵ Congress should require that intelligence officials give regular briefings about incidents of disinformation, should enact the Deceptive Practices and Voter Intimidation Prevention Act,⁸⁶ and should amend Section 230 of the Communications Decency Act to explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting.⁸⁷

⁸⁴ 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, 116th 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.”).

⁸⁵ Ian Vandewalker, BRENNAN CENTER, [DIGITAL DISINFORMATION AND VOTER SUPPRESSION](#) (Sept. 2020).

⁸⁶ Deceptive Practices and Voter Intimidation Prevention Act, H.R. 6607, 115th Cong. (2018); Deceptive Practices and Voter Intimidation Prevention Act, S. 3279, 115th Cong. (2018); Ian Vandewalker, BRENNAN CENTER, [DIGITAL DISINFORMATION AND VOTER SUPPRESSION](#) (Sept. 2020) (indicating the federal government should enact deceptive practices prevention legislation and share intelligence about incidents of deceptive practices).

⁸⁷ 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 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).

Conclusion

Foreign and domestic actors used online disinformation to target and suppress Black votes in the 2016 presidential election, and this has continued in the 2020 election cycle. The Trump Administration's proposal to narrowly construe Section 230 of the Communications Decency Act makes the problem worse by deterring companies from removing disinformation. While online platforms have made progress since 2016 in preventing disinformation, they must do much more, and local state, and federal officials also have important roles to play. Delay is not an option—failure to act puts our very democracy at risk.

Exhibits

Exhibit A

Exhibit A was posted by the operators of the Williams & Kalvin Facebook page on Election Day 2016,⁸⁸ and the Facebook ad was targeted at the advertising categories of those interested in “Martin Luther King, Jr.”; “African American Civil Rights Movement (1954-68)”;⁸⁹ and “African American history or Malcolm X.”⁸⁹ A video with the same message appeared on the Williams & Kalvin YouTube account and was also promoted on the Williams & Kalvin Twitter account.

Williams&Kalvin Sponsored ·

Power to the People! We have to grow up, we have to wise up.
We don't have any other choice this time but boycott the election.
This time we choose between two racists. No one represents Black people.
Don't go to vote. Only this way we can change the way of things....
[See More](#)

THE WORD OF TRUTH 49

108 Reactions 32 Comments 20 Shares

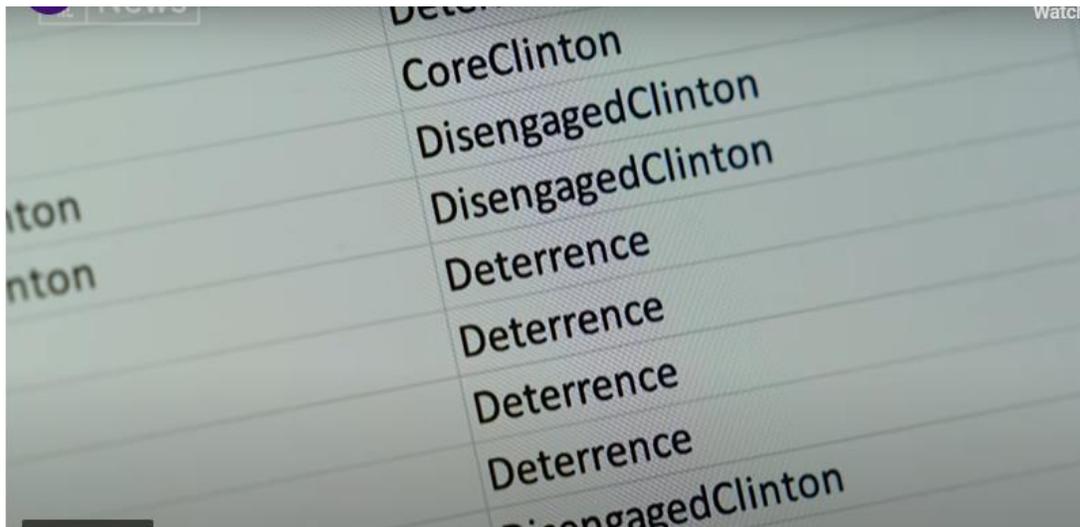
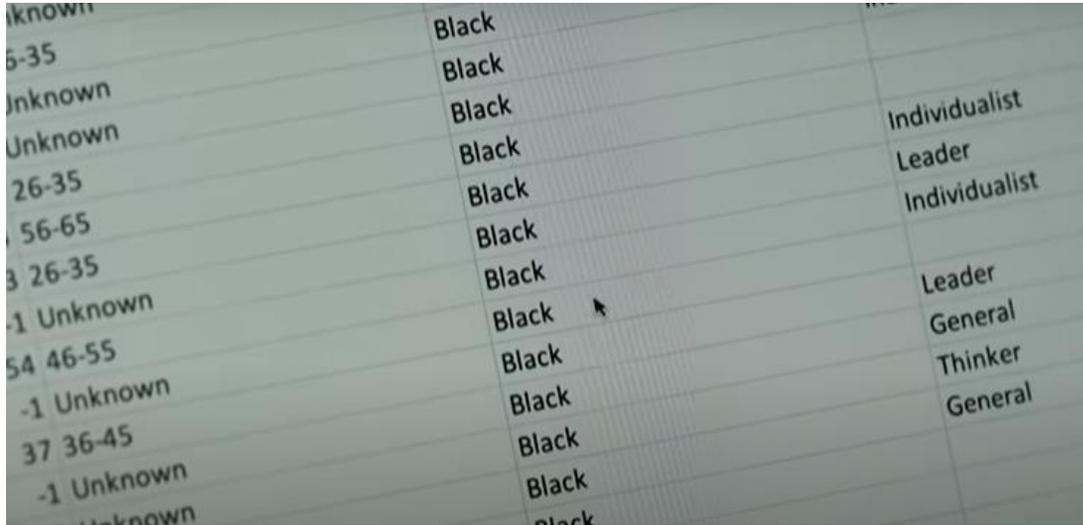
Like Comment Share

⁸⁸*Power to the People! We have to grow up*, INTERNET RESEARCH AGENCY ADS, UNIVERSITY OF MARYLAND INSTITUTE FOR TECHNOLOGY IN THE HUMANITIES (last visited Jun. 22, 2020).

⁸⁹YOUNG MIE KIM, PROJECT DATA, [UNCOVER: STRATEGIES AND TACTICS OF RUSSIAN INTERFERENCE IN US ELECTIONS: RUSSIAN GROUPS INTERFERED IN ELECTIONS WITH SOPHISTICATED DIGITAL CAMPAIGN STRATEGIES](#) 9 (2018).

Exhibit B

Exhibit B consists of pictures of a datafile created by the 2016 Trump Campaign to separate millions of Americans into one of eight “audiences” so that they could target tailored ads to each audience on social media platforms like Facebook.⁹⁰ A disproportionately large number of African Americans were labelled “Deterrence”—Clinton voters who should be encouraged not to vote with targeted social media ads. Overall, 3.5 million African Americans were categorized by the Trump campaign as Deterrence.



⁹⁰ [Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016](#), CHANNEL 4 NEWS UK (Sept. 28, 2020) (video, from :39-:50).

Exhibit C

Exhibit C is from a Facebook page that claimed to be operated by someone in Florida and was removed because it was actually a Russian-backed Ghanaian operative that was targeting African Americans in January of 2020.⁹¹



⁹¹ Clarissa Ward, Katie Polglase, Sebastian Shukla, Gianluca Mezzofiore, and Tim Lister, [Russian election meddling is back -- via Ghana and Nigeria -- and in your feeds](#), CNN (Apr. 11, 2020).

Exhibit D

Exhibit D is from Instagram in September 2019, was targeted at Black audiences, and was removed for links to the Russian Internet Research Agency.⁹²

[Redacted]

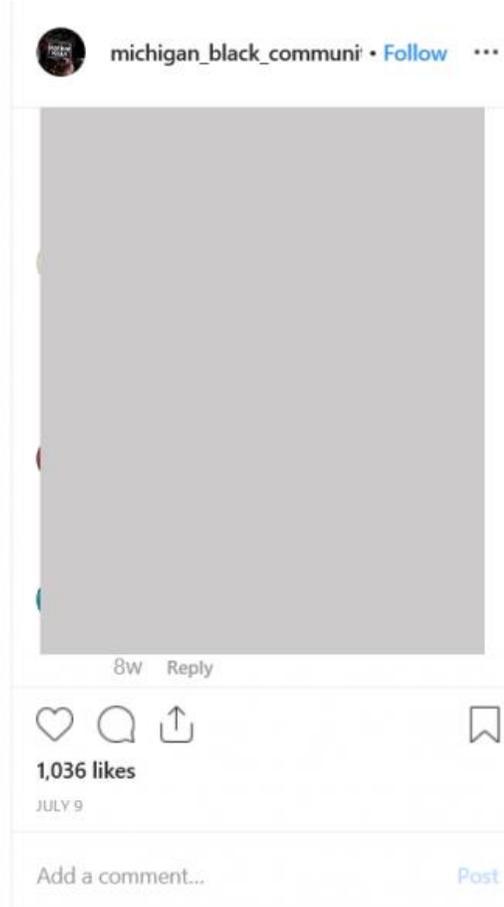
Police & prosecutors framed my friend @JamalTrulove for a murder he had nothing to do with.

He was sentenced to 50 years in prison.

Guess who the District Attorney was?

Kamala Harris.

Cost him years of his life & San Francisco \$13.1 million.



⁹² YOUNG MIE KIM, BRENNAN CENTER, [NEW EVIDENCE SHOWS HOW RUSSIA’S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN](#) (Mar. 5, 2020).

Exhibits E, F, and G are from Instagram in September 2019, and were removed for links to the Russian Internet Research Agency.⁹³

Exhibit E

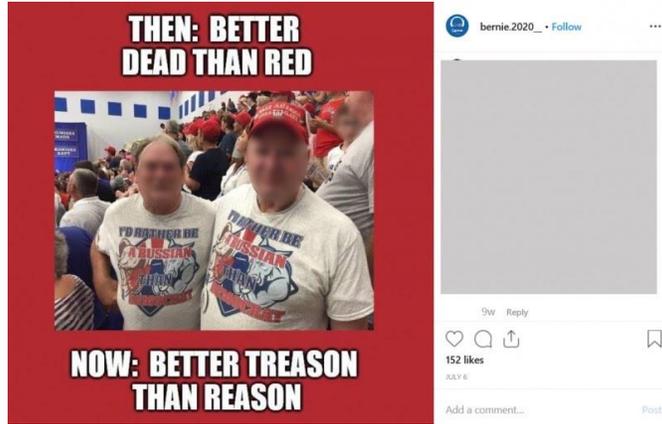
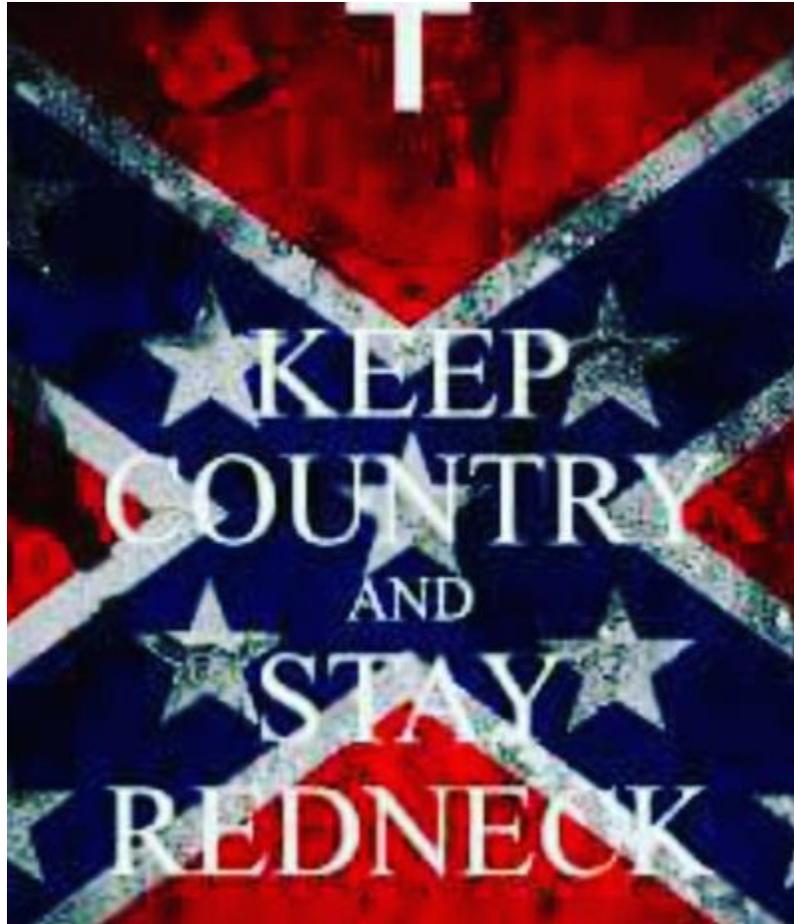


Exhibit F



⁹³ YOUNG MIE KIM, BRENNAN CENTER, [NEW EVIDENCE SHOWS HOW RUSSIA'S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN](#) (Mar. 5, 2020).

Exhibit G



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. He is also a tenured 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*](#) (W.W. Norton) and several academic articles and popular commentaries on voting rights, race, and public policy, including [*State Power to Regulate Social Media Companies to Prevent Voter Suppression*](#), 53 U.C. DAVIS LAW REVIEW 1793 (2020). In 2020, he [testified before the Communications and Technology and the Consumer Protection and Commerce Subcommittees](#) of the U.S. House Committee on Energy and Commerce on disinformation online, submitted [answers to Additional Questions for the Record](#) for that hearing, [and submitted comments to the Federal Communications Commission](#) opposing the Trump Administration petition's to prod the FCC to adopt rules that would discourage online platforms from removing disinformation that suppresses Black votes and other objectionable material.

Spencer's 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, and resulted in Iowa restoring voting rights to 98,000 returning citizens. He was also a part of a group of commissioners that worked to successfully move 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.