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Hearing on
"A Country in Crisis: How Disinformation Online is Dividing the Nation."

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Overview

Disinformation on social media presents a real danger to racial equity, voting rights, and democracy. An overwhelming majority of Americans want social media companies to moderate content to prevent disinformation, and Section 230 of the Communications Decency Act clearly gives social media companies this authority. Social media platforms should use this authority.

Clearly, social media has been used to target and suppress Black voters. 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 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." We have seen similar schemes in the current election cycle, and social media companies need to take additional measures to protect voting rights in 2020.

Of late, President Trump has issued an executive order that attempted to narrowly construe Section 230 to expose social media companies to the risk of legal liability in retaliation for companies moderating objectionable content by President Trump and his followers.[1] Retaliatory threats to discourage moderation by social media platforms only make the problem worse by effectively promoting disinformation, polarization, and voter suppression.

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* Exchanges with Matthew Berzok, Danielle Keats Citron, Yosef Getachew, Sam Gill, Pauline Kim, Cheryl Leanza, William P. Marshall, Laura W. Murphy, Dawn Nunziato, John Sands, Daniel Tokaji, David Toomey, and Paul Waters helped develop the ideas in this written testimony. Sheya Jabouin provided invaluable research assistance.

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

Although President Trump's executive order is misguided and constitutionally problematic, a serious debate on possible regulation of social media platforms is warranted in Congress. There are serious questions about whether social media platforms should be required to engage in reasonable content moderation to prevent disinformation that results in online civil rights and other legal violations.

While I am loathe to open up Section 230 to debate, the status quo is not working. Even in the aftermath of the death of George Floyd, there exists a real question about whether social media companies will address their own systemic shortcomings and embrace civil rights principles. Various social media platforms have been very effective at preventing obscenity and disinformation about COVID-19, for example, but have not effectively prevented disinformation that undermines to voting rights and other civil rights. The comparative lack of effectiveness seems to reflect not a lack of capacity, but a lack of will.

While some platforms claim they are advancing "free speech" in refraining from content moderation, in doing so they ignore the effect of the content on many communities of color and facilitate discrimination. For many Americans, Facebook and other social media are the primary platforms for political identity, social relationships, professional networking, and other opportunities. To treat discriminatory ad distribution that steers economic opportunities away from Black and Latino communities or steers voter suppression ads toward Black communities as "neutral" ignores the non-neutral harms and disparities produced by the platforms. It is not "neutral" for the world's most valuable companies to externalize the costs of discrimination onto many of the nation's most economically and politically marginalized communities.

My hope is that private social media companies will embrace civil rights as a core value and use the expansive protections of Section 230 to prevent voter suppression. If legal reforms are needed, the debates should occur in Congress and should center the voices of people of color who have been disproportionately affected by the negative consequences of social media through targeted voter suppression and other disinformation campaigns.

I. Disinformation Is Dividing Americans in 2020

Disinformation presents significant dangers to democracy due to social media's widespread use and the speed with which disinformation is disseminated. According to the most recent Pew Research survey published on the topic, a large percentage of U.S. adults get news on social media sites such as Facebook (43 percent), YouTube (21 percent), Twitter (12 percent), and Instagram (8 percent).[2] Disinformation can be quickly shared among networks of friends ("go viral"[3]) before

[2] ELISA SHEARER AND KATERINA EVA MATSA, PEW RESEARCH CENTER, NEWS USE ACROSS SOCIAL MEDIA PLATFORMS 2018 (Sept. 10, 2019). *See also* A.W. GEIGER, PEW RESEARCH CENTER, KEY FINDINGS ABOUT THE ONLINE NEWS LANDSCAPE IN AMERICA (Sept. 11, 2019) (reviewing the results of a survey conducted July 30-August 12, 2018 indicating the percentage of adults who said that they *get news often* from print newspapers (16 percent), social media (20 percent), radio (26 percent), a news website (33 percent), and television (49 percent)).

[3] *See* NATHANIEL PERSILY, KOFI ANNAN FOUND., THE INTERNET'S CHALLENGE TO DEMOCRACY: FRAMING THE PROBLEM AND ASSESSING REFORMS 5-6, 21-22 (2019) (discussing the velocity, virality, and anonymity of online communications, as well as the power of Google and Facebook platforms).

the disinformation can be rebutted — sometimes just before Election Day.[4] The anonymity of "fake accounts" on social media allows fringe domestic actors to avoid responsibility for misinformation,[5] and allows foreign interests to pose as Americans, build trust, and later undermine American interests. Microtargeting—which gathers information about the preferences and interests of users—allows those intending to deploy misinformation about elections the opportunity to target ads at those most likely to believe the misinformation, while steering it away from those more likely to challenge and correct the misinformation, thereby hardening polarization.[6]

Federal intelligence officials recently revealed 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."[7] The current efforts are similar to strategies used by Russia's Internet Research Agency to polarize Americans from 2015-2017,[8] when over 30 million users in the U.S. shared the Russian agency's Facebook and Instagram posts.[9]

In an analysis of 31 posts linked to Russian Internet Research Agency from late 2019, University of Wisconsin professor Young Mie Kim found that the Russians were impersonating Americans[10]

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[4] *See id.* at 11 ("As bad as the rapid dissemination of falsehoods may be, it is compounded by the inability to timely correct or combat disinformation . . . . A correction is unlikely to reach either the same audience . . . . The speed of information transfer poses particular challenges for democracy, because elections occur at a certain period in time.").

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

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

[7] 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).

[8] PHILIP N. HOWARD ET AL., COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018, at 3 (2018) ("Russia's IRA activities were designed to polarize the US public and interfere in elections by. . . campaigning for African American voters to boycott elections . . . encouraging extreme right-wing voters to be more confrontational; and . . . spreading sensationalist, conspiratorial, and other forms of junk political news and misinformation."); RENEE DIRESTA ET AL., THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY, at 99 (2019) ("the Internet Research Agency exploited divisions in our society by leveraging vulnerabilities in our information ecosystem. They exploited social unrest and human cognitive biases. . . [I]t was absolutely intended to reinforce tribalism, to polarize and divide, and to normalize points of view strategically advantageous to the Russian government on everything from social issues to political candidates.").

[9] PHILIP N. HOWARD ET AL., COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018, at 3 (2018) ("Over 30 million users, between 2015 and 2017, shared the IRA's Facebook and Instagram posts with their friends and family, liking, reacting to, and commenting on them along the way.")

[10] YOUNG MIE KIM, BRENNAN CENTER, NEW EVIDENCE SHOWS HOW RUSSIA'S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN (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__".").

and were targeting "both sides of the ideological spectrum to sow division."[11] 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."[12] 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."[13] See Exhibits A1, A2, and A3 for examples of posts from the current election cycle.

Disinformation and microtargeting that exploits emotion is not merely a foreign exercise, but is also employed by domestic political actors. In 2016, for example, Cambridge Analytica did not just use data on individuals' preferences, but created psychological profiles of individuals so that ads were tailored to particular users to exploit psychological vulnerabilities such as anxiety.[14]

II. Targeted Disinformation Suppresses Votes

In addition to polarizing the electorate, fake social media accounts and targeted digital advertising have targeted and suppressed Black votes.[15] For example, on Election Day 2016, the operators of the Williams & Kalvin 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."[16] ***(See Exhibit B 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."[17] A video with the same message appeared on the Williams & Kalvin YouTube account and was also promoted on the Williams & Kalvin Twitter account.

After the November 2016 election, an investigation revealed that the Williams & Kalvin Facebook, Twitter, and YouTube accounts were fake accounts set up and operated by the Russian Internet Research Agency (the "Russian Agency"). The Williams & Kalvin Facebook page started

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[11] *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.")

[12] *See id.*

[13] *See id.*

[14] 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).

[15] 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 . . . .").

[16] 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).

[17] *Id.*

operating at least as early as January 2016.[18] Many of its posts showcased Black achievements, Black dignity, and other positive affirmations of Black community.[19] 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.[20]

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,[21] and these pages attracted 35.72% of the followers of the pages created by the Russian Agency.[22] 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.[23] 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).[24]

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.[25] The Russian Agency Instagram account with the most interactions was @blackstagram__, with

[18] *See* Benjamin Fearnow, *Williams & Kalvin: 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 Kalvin Johnson last posted in 2015); Issie Lapowsky, *House Democrats Release 3,500 Russia-Linked Facebook Ads*, WIRED (May 10, 2018, 10:00 AM).

[19] *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).

[20] *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).

[21] *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), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_DP05&src=pt [https://perma.cc/YZW7-ETB6] (indicating a Black population in the United States of 12.7%); *see also* HOWARD ET AL., *supra* note 20, 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).

[22] *See* DIRESTA ET AL., *supra*, 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.").

[23] *See* HOWARD ET AL., *supra*, 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").

[24] *See id.*

[25] DIRESTA ET AL., *supra*, at 16.

303,663 followers, over 27.8 million likes, and over 450,000 comments.[26] The Russian Agency also disproportionately focused on African Americans on its Twitter accounts.[27]

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.[28] 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.[29]

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.[30] 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]

These same threats against Black voters on social media platforms continue 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

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[26] *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).

[27] *See* HOWARD ET AL., *supra*, at 26 ("[T]he IRA focused their political messaging [on Twitter] on two targets above others: conservative voters and African Americans.").

[28] DIRESTA ET AL., *supra*, 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."); KIM, *supra* note 16, 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").

[29] *See* DIRESTA ET AL., *supra*, 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."); HOWARD ET AL., *supra* note 20, 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.").

[30] 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).

[31] *See, e.g.*, DIRESTA ET AL., *supra*, 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 & 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).

brutality."[32] (***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 analyzing Russian-linked posts from the current 2020 election cycle, Professor Kim of the University of Wisconsin did not identify any posts that discouraged African Americans from voting, perhaps because this type of voter suppression occurs just before elections.[33] Professor Kim did notice, 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***).[34]

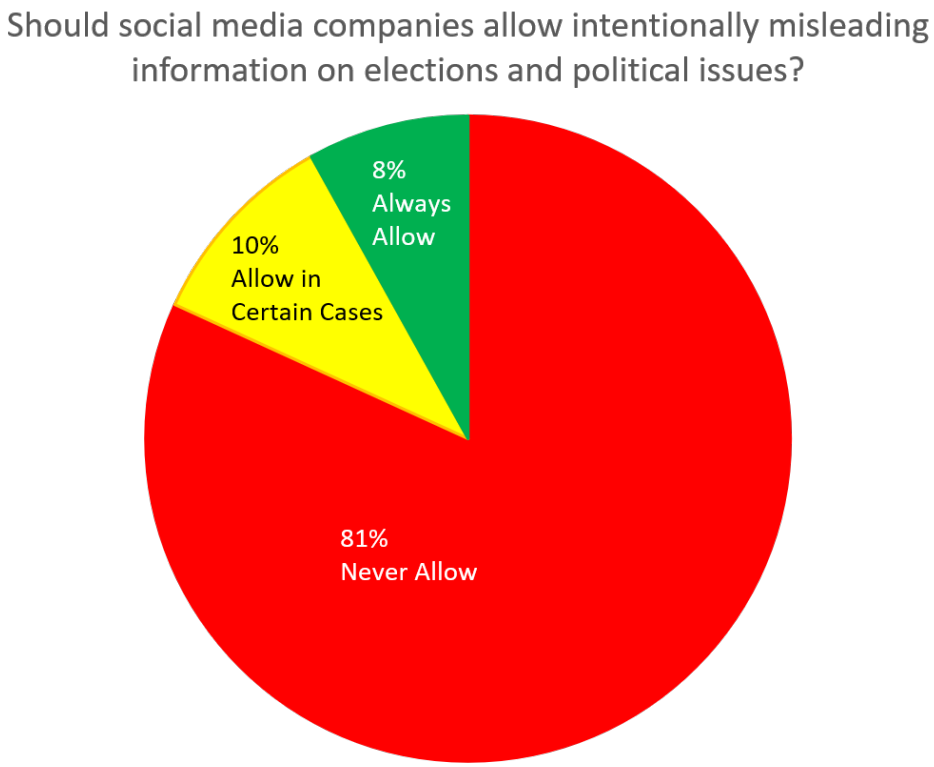
[32] *See* Clarissa Ward, Katie Polglase, Sebastian Shukla, Gianluca Mezzofiore, and Tim Lister, *Russian election meddling is back -- via Ghana and Nigeria -- and in your feeds*, CNN (Apr. 11, 2020); Tony Romm and Craig Timberg, *Facebook, Twitter Suspend Russian-linked Operation Targeting African Americans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

[33] YOUNG MIE KIM, BRENNAN CENTER, NEW EVIDENCE SHOWS HOW RUSSIA'S ELECTION INTERFERENCE HAS GOTTEN MORE BRAZEN (March 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.").

[34] *See id.* ("In another example, the IRA targeted African Americans for heavy attacks on Sen. Kamala Harris.").

III. Americans Want Disinformation Removed

Americans have strong feelings against political disinformation. According to recent 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.[35] 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.



[35] 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.

IV. Federal Law Allows Social Media Companies to Remove Disinformation

Federal law explicitly empowers private social media companies to remove disinformation—even if such content would be constitutionally-protected speech if removed by a state actor. Section 230 of the Communications Act of 1934 (also known as Section 230 of the Communications Decency Act) 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*…"[36] Section 230 also protects social media platforms from being liable as publishers or speakers due to the content of information of third parties by stating: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[37]

These provisions reflect Congress's intent to empower platforms to engage in content moderation without fear of liability. Section 230's drafters sought to repudiate a case that they, and ultimately Congress, believed was wrong. In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,* the trial court found that the internet service provider Prodigy was liable as a publisher for defamatory comments that a third-party user posted on Prodigy's financial bulletin board. Although Prodigy argued that it could not edit the thousands of messages posted to its bulletin board, the trial court reasoned that Prodigy used software to identify and delete "notes from its computer bulletin board on the basis of offensiveness or 'bad taste.'"[38] According to the trial court, by engaging in some content moderation Prodigy had opened itself to liability for all content, unlike a different case which held CompuServe was not liable for defamation for third-party content on its website because CompuServe did not attempt to filter any third-party content.[39]

Members of Congress were disturbed by the holding, fearing that liability stemming from Prodigy's attempted but imperfect screening would not lead to improved content moderation, but no screening at all.[40] In the words of then Congressman Bob Goodlatte (R-VA):

> [T]here is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop

[36] 47 U.S.C. § 230(c)(2) (2019)

[37] *Id.* § 230(c)(1). An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." *Id.* § 230(f)(2).

[38] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *4 (finding that Prodigy was liable as a publisher because it exercised editorial control by "actively utilizing technology and manpower to delete notes from its computer bulletin board on the basis of offensiveness or 'bad taste.'").

[39] *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding that CompuServ, a computerized database on which defamatory statements were made, is a distributor not a publisher because it has no more editorial control the content of statements on its platform than does a public library).

[40] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 405 (2017) ("The court's somewhat perverse reliance on Prodigy's filtering efforts to establish its liability for defamation (of which it had no idea) sufficiently disturbed Congress to move legislators to act to immunize such activity. The concern was that holding online service providers liable for inexact screening would not result in improved screening but rather in no screening at all. This is because providers could avoid publisher liability if they acted as purely passive conduits.").

> policing by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material.[41]

As a result, Congress passed Section 230 to immunize "interactive computer services" such as Facebook, Twitter, and YouTube from liability for claims based on content created entirely by third-party users that they fail to take down. Section 230 ensures social media platforms can freely remove unsavory content by users without fear of becoming "publishers" who are suddenly liable for all third-party content.[42] As a U.S. Court of Appeals decision later explained, in enacting Section 230 "Congress sought to encourage websites to make efforts to screen content without fear of liability."[43] Section 230 also allows for the development of movements like #MeToo, the Tea Party, and Black Lives Matter whose members make controversial allegations, because social media platforms can display this content without fear of being sued.[44]

As they are empowered to do by Section 230, Facebook, Twitter, YouTube, and other social media companies have developed specific content moderation guidelines to reduce the spread of false or misleading information about voting in elections, other false or misleading information, hate speech, threats of violence, and other objectionable content.[45]

V. Executive Branch Retaliation for Content Moderation Promotes Disinformation and Undermines Democracy

Unfortunately, President Trump recently issued an executive order attempting to narrowly construe the protections of Section 230 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, which undermines democracy by effectively promoting disinformation, polarization, and suppression.

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[41] 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

[42] The "good Samaritan" provision of Section 230 proclaims 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 . . . excessively violent, harassing, or otherwise objectionable . . . ." *Id.* § 230(c)(2)(A); *see also* Doe v. Backpage.com, 817 F.3d 12, 18-19 (1st Cir. 2016) (explaining that "Congress sought to encourage websites to make efforts to screen content without fear of liability").

[43] Doe v. Backpage.com, 817 F.3d 12, 18-19 (1st Cir. 2016) (explaining that "Congress sought to encourage websites to make efforts to screen content without fear of liability").

[44] *See, e.g.*, Ron Wyden, *Corporations Are Working with the Trump Administration to Control Online Speech*, WASH. POST (Feb. 17, 2020, 6:30 AM) (arguing that "[w]ithout 230, social media couldn't exist . . . . Movements such as Black Lives Matter or #MeToo, whose advocates post controversial accusations against powerful figures on social media, would have remained whispers, not megaphones for oppressed communities," and asserting that repealing Section 230 would harm start-up companies more than big tech companies that can afford extensive legal representation).

[45] *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); *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); *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).

In response to concerns about the transmission of COVID-19 during in-person voting, many states have expanded vote-by-mail options,[46] 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![47]

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.[48] 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!"[49] 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.[50]

Two days after his original tweet, President Trump issued an "Executive Order on Preventing Online Censorship."[51] Although Section 230 clearly gives social media provider the power to in good faith "restrict access to or availability of material that the provider or users considers" to be "objectionable, whether or not such material is constitutionally protected," the Executive Order directs several federal agencies to restrict significantly Section 230's protections to reflect the Administration's interpretation of the "narrow purpose of the section." The Order directs government agencies to report their advertising spent on social media platforms so that it can be reviewed by the Department of Justice and takes several other steps.

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

[47] 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

[48] https://twitter.com/i/events/1265330601034256384.

[49] Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 4:40 PM), https://twitter.com/realDonaldTrump/status/1265427539008380928.

[50] Donald J. Trump (@realDonaldTrump), TWITTER (May 27, 2020, 4:11 AM), https://twitter.com/realDonaldTrump/status/1265601611310739456.

[51] Executive Order (May 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

While a serious debate on possible regulation of social media platforms by Congress is warranted (see below), the President's retaliatory executive order chills social media companies from moderating content during an election season. In this instance, a social media company was targeted and penalized not for removing the President's content, but by providing facts that counter his narrative against a well-established form of voting that would make voting easier and safer for millions of Americans during a pandemic. The threatening nature of the executive order increases the likelihood that social media companies will fail to take down disinformation by fake accounts that provide erroneous information about voting and discourage voting by communities of color. The order increases the likelihood that social media companies will ignore posts that promote hate speech and facilitate racial polarization. This retaliatory use of executive branch power—particularly during an election season—only promotes the likelihood of disinformation and suppression, and effectively undermines free and fair elections and democracy.

The President's legally-mandated viewpoint neutrality would worsen online experiences for many Americans. Social media companies could not remove threats, harassment, altered video, or misinformation.[52] They could not prevent bullying or cyber harassment of marginalized groups, or block sexual-privacy invasions. As non-state actors social media companies currently have the power to prevent these harms—but a "viewpoint neutrality" requirement would hinder this content moderation.

The executive order harms communities of color in other ways. Because executive branch agencies must report to the Office of Management and Budget the funds they spend on online advertising and the Department of Justice will review the spending to "assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices," federal agencies may be impaired in serving people in the United States. The Census Bureau, for example, could be deterred or prevented from using social media platforms to reach and count communities that are traditionally undercounted. The CDC may be impaired in its ability to use social media platforms to provide critical information about COVID-19 to communities with disproportionately high mortality rates.

Under the President's executive order, social media companies would be forced to moderate content according to the executive branch's perspectives. The solution is not the executive branch sanctioning particular content during an election season. While the President 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. 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 constitution values than private entities engaging in content

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

moderation.[53] As a result, litigation is now pending in the U.S. District Court for the District of Columbia challenging the President's executive order.[54]

VI. Social Media Companies Need to More Effectively Protect Civil Rights

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

While President Trump's executive order is misguided and constitutionally problematic, a serious debate on possible regulation of social media platforms is warranted in Congress. There are serious questions about whether social media platforms should be required to engage in reasonable content moderation to prevent disinformation that results in online civil rights and other legal violations.[55]

While I am loathe to open up Section 230 to debate because the provision serves such an important purpose, the status quo is not working. Even after the killing of George Floyd, there is a real question about whether social media companies will address their own systemic shortcomings and embrace civil rights principles and racial equity. Absent a clear declaration accompanied by action, those interested in racial equity and voting rights may have no choice but to seek to amend Section 230.

Various platforms—including Facebook, Twitter, and YouTube—have been very effective at preventing other objectionable content—such as obscenity. Similarly, social media companies have been very effective in ensuring truthful information on COVID-19 because they perceived that disinformation on the coronavirus posed a public health risk. Unfortunately, some social media companies do not seem to have internalized the threat disinformation poses to the health of our democracy. 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.

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[53] 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.");

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

[55] *See e.g.,* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 419 (2017) (proposing that Section 230 be amended by Congress to exempt from liability only a platform that takes "reasonable steps to prevent or address unlawful uses of its services"); Olivier Sylvain, *Discriminatory Designs on User Data; Exploring How Section 230's Immunity Protections May Enable or Elicit Discriminatory Behaviors Online*, KNIGHT FIRST AMEND. INST. COLUM. U. (Apr. 1, 2018) ("There is no reason why Congress couldn't also write in an explicit exception to Section 230 immunity for violations of civil rights laws."); Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. DAVIS L. REV. 1793, 1830 (2020) (proposing that Congress explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting).

For example, if America's most prominent social media company—Facebook—will not fully commit to civil rights principles, we have little hope of private actors dealing with this alone. Facebook has made some progress in recent years on voting, as evidenced by its civil rights audit and policy improvements documented in that audit, such as an expanded definition of voter suppression, a policy against "don't vote" ads, updated hate speech policy, a full-time team focused on protecting U.S. elections, and a center that provides accurate information on how to vote.[56]

These efforts, however, do not fully address the real challenges to communities of color that the platform facilitates. Facebook claims it was caught unaware of the magnitude of the impact of the voter suppression schemes on Black communities in the 2016 election, but 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.[57] 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 data to target employment and housing ads away from Black and Latino users, and toward White users.[58] While the company later settled the lawsuit,[59] research suggests it still uses algorithms that deliver employment ads along discriminatory lines.[60] A third example—despite a recent ban on praise, support, and representation of White supremacy and White nationalism,[61] White supremacists continue to circumvent Facebook's policy.[62]

While some platforms claim they are advancing "free speech" by facilitating discrimination, in doing so, they ignore the effect of the content on Black and other communities. For many

[56] FACEBOOK'S CIVIL RIGHTS AUDIT—PROGRESS REPORT, June 30, 2019, at 18-24.
[57] FACEBOOK, FACEBOOK, ELECTIONS AND POLITICAL SPEECH, Sept. 24, 2019.
[58] *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.").
[59] 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).
[60] 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).
[61] FACEBOOK, STANDING AGAINST HATE, Mar. 27, 2019.
[62] Casey Newton, *How White Supremacists Evade Facebook Bans*, THE VERGE (May 31, 2019).

Americans, Facebook and other social media are the primary platforms for political identity, social relationships, professional networking, and other opportunities. To treat discriminatory ad distribution that steers economic opportunities away from Black communities or 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 externalize the costs of discrimination onto many of the nation's most economically and politically marginalized communities.[63] Facebook 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 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.[64]

For Facebook, the conclusion of its civil rights audit represents a crossroads—it has an opportunity to take tangible action. My hope is that Facebook and other private social media companies will embrace civil rights values and use the expansive protections of Section 230 to prevent voter suppression and protect civil rights. If legal reforms are needed, the debates should occur in Congress, and should center the voices of people of color who have been disproportionately impacted by negative consequences of social media through targeted voter suppression and other disinformation campaigns.

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[63] 2019 Fortune 500, FORTUNE, https://fortune.com/fortune500/2019/search (last visited Mar. 24, 2020) [https://perma.cc/XRC7-YUV5] (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"); Sylvain, *Intermediary Design Duties*, *supra* note **Error! Bookmark not defined.**, at 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.").

[64] 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).

Conclusion

Disinformation on social media is real. This disinformation is being used by both foreign and domestic actors to deepen divisions among Americans, and if unchecked could again result in voter suppression. The vast majority of Americans believe that social media companies should never allow intentionally misleading information on elections and political issues, and federal law explicitly gives social media companies the power to moderate content and prevent disinformation. Social media companies should commit to civil rights principles and moderate content to protect voting rights and equity.

Exhibits

Exhibits A1, A2, and A3 are from Instagram in September 2019, and were removed for links to the Russian Internet Research Agency.[65]

Exhibit A1

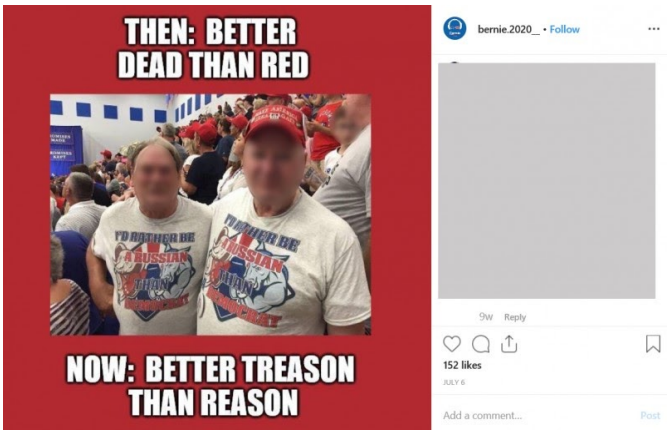

Exhibit A2

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

Exhibit A3

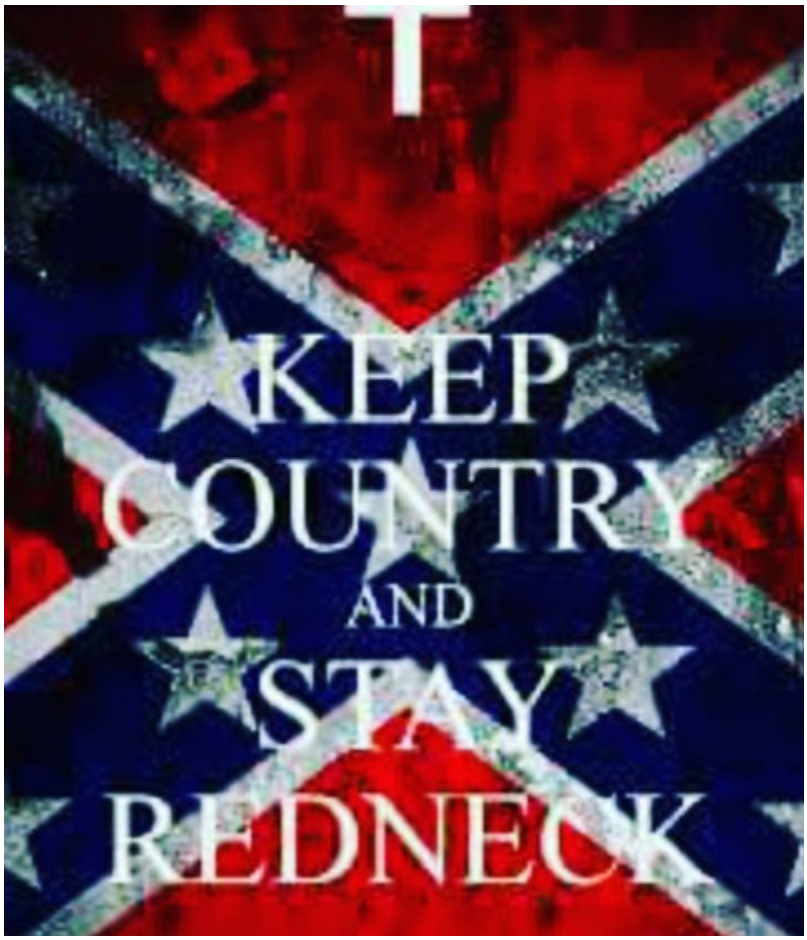

Exhibit B

Exhibit B was posted by the operators of the Williams & Kalvin Facebook page on Election Day 2016,[66] 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)"; and "African American history or Malcolm X."[67] A video with the same message appeared on the Williams & Kalvin YouTube account and was also promoted on the Williams & Kalvin Twitter account.

[66] *Power to the People! We have to grow up*, INTERNET RESEARCH AGENCY ADS, UNIVERSITY OF MARYLAND INSTITUTE FOR TECHNOLOGY IN THE HUMANITIES (last visited June 22, 2020).
[67] 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).

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.[68]

[68] 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.[69]

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

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* 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). 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 98,000 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.