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Jake Latimer
Seattle University School of Law

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Cover Page Footnote

M. Jacob Latimer graduated from Seattle University School of Law in May 2022. Jacob would like to thank the SJTEIL editors and faculty advisors for their feedback and assistance. He would especially like to thank his family for their encouragement and his wife, Hailey Latimer, for her unwavering support and selflessness.

“I’m concerned about this post”: Combatting Fake News on Social Media

*Jake Latimer**

I. INTRODUCTION

The public concern over the spread of “fake news” on social media has increased over the last decade.¹ Large social networking platforms like Facebook and Twitter have attempted to address fake news by flagging it as misleading.² Even former President Trump has seemingly exhibited a sense of paranoia over its spread.³ While the term “fake news” is often used as a political weapon to discredit unfavorable information and opinions, fake news refers to factually false or grossly misleading content likely designed to sway or entrench one’s opinion on a particular topic.⁴ The pervasiveness of this type of fake news on the internet is a growing threat that requires attention before it becomes indistinguishable from true information in both appearance and popularity.⁵

Section 230 of the Communications Decency Act of 1996 (CDA) helped to create a digital environment where fake news can spread comfortably and pervasively.⁶ Section 230 provides broad immunity to Internet service providers (ISPs)—including social media sites—against liability for third-party content found on their platforms.⁷ Social media companies earn most of their revenue from advertisements on their websites, and their revenue increases in proportion with the amount of

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¹ David A. Graham, *Some Real News About Fake News*, THE ATLANTIC (Jun. 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/fake-news-republicans-democrats/591211/> [https://perma.cc/PBS6-EDMB].

² See Tessa Lyons, *Hard Questions: What’s Facebook’s Strategy for Stopping False News?*, FACEBOOK (May. 23, 2018), <https://about.fb.com/news/2018/05/hard-questions-false-news/> [https://perma.cc/YZ3D-Y3MM].

³ See generally Donald J. Trump (@realDonaldTrump), THE TRUMP ARCHIVE, <https://www.thetrumparchive.com/?results=1&searchbox=%22fake+news%22> [https://perma.cc/BRP4-EWSM].

⁴ See David M. J. Lazer et al., *The Science of Fake News*, 359 SCI. 1094 (2018).

⁵ See *id.*

⁶ See JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019)

⁷ 47 U.S.C.A. § 230(c)(1).

traffic on their platforms.⁸ Thanks to Section 230, social media companies profit from the presence of fake news on their sites because users generally find such news to be more interesting and attractive than reality.⁹ As a result, social media companies may be reluctant to remove fake news from their platforms because it increases their revenue and presents no obvious costs.

Recently, Section 230's breadth has come under political and public scrutiny.¹⁰ Most notably, former President Trump called for the entire repeal of Section 230, and various legislative proposals suggest amending Section 230 to expose social media companies to increased levels of liability.¹¹ However, the proposed amendments and other proffered solutions are unlikely to serve as a panacea, and the legislature is likely to find a better solution outside of the CDA.

The recent legislative proposals to amend Section 230 are underinclusive or insufficient to address the problem of fake news. One proposal seeks to treat the actions of algorithms as the actions of the social media companies—subjecting companies like Facebook to liability for harm caused by such content.¹² Other proposals seek to increase media literacy via public education reforms, encourage providers of interactive computer services to provide politically neutral content moderation, and certify the trustworthiness of news outlets by licensing journalists.¹³

While these suggestions may slow the spread of fake news and mitigate its effects on society, the likely return on such investments is low. Removing bias from the internet is not feasible. Additionally, increasing the public's media literacy, while helpful in recognizing false information, does little to negate the harm it causes as users' opinions are more heavily influenced by their first encounter with false information than its subsequent correction.¹⁴ Additionally, such amendments would unduly stifle public discourse on the internet and restrict its development. For example, subjecting a social media company to liability for the actions of its algorithms may cause the platform to abandon its use even though such systems are necessary to the maintenance and moderation of the site. Moreover, licensing journalists would create a high barrier to entry into a field where a multitude of opinions and perspectives are helpful in maintaining a deliberative democracy.

Instead of amending Section 230, Congress should require big social media companies to hire third-party fact-checkers, who are

⁸ Peter Eavis, *How You're Making Facebook a Money Machine*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/upshot/how-youre-making-facebook-a-money-machine.html> [<https://perma.cc/QTX6-SZYR>].

⁹ Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCI. 1146, 1147 (2018).

¹⁰ See S. 1914, 116th Cong. (2019); H.R. 492, 116th Cong. (2019).

¹¹ Anshu Siripurapu, *Trump and Section 230: What to Know*, COUNCIL ON FOREIGN RELATIONS (Dec. 2, 2020), <https://www.cfr.org/in-brief/trump-and-section-230-what-know> [<https://perma.cc/NNV8-VKPD>]; See generally S. 1914, 116th Cong. (2019); H.R. 492, 116th Cong. (2019).

¹² H.R. 492, 116th Cong. (2019).

¹³ S. 5594, 66th Leg., 2019 Reg. Sess. (Wash. 2019); S. 1914, 116th Cong. (2019); Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623 (2019).

¹⁴ Lazer et al., *supra* note 4, at 1095.

government certified, to evaluate the veracity of user-reported content. Such legislation would require third-party fact-checking companies to abide by certain ethical standards and methods of verifying disputed content online. Once the fact-checkers have determined that a particular piece of information is reasonably disputed, the law would require the social media company to flag the content as disputed or misleading or face a fine for noncompliance. Other industries, such as the Food and Drug Administration (FDA), have successfully employed government certified auditors to oversee their activities.¹⁵

Requiring big social media companies to flag fake news or face a fine will serve as an economic incentive to slow the spread of fake news. Additionally, it would preserve the internet as a place to express ideas and exchange information because the law would not require its removal, only that it be labeled as disputed. When flagged, users could still share and interact with a particular piece of information, but the rate at which users do so would likely decrease because flagged content is less susceptible to dissemination.¹⁶ This solution circumvents potential hurdles imposed by the First Amendment and censorship questions because the determination of its veracity comes from a non-governmental body, and companies do not remove or lock the content but rather place a small asterisk beside it.¹⁷

While social media companies like Facebook have implemented their policies and procedures to prevent the spread of false information, the legislature should not rely on these companies' goodwill to prevent its dissemination because social media companies earn most of their revenue from advertisements they host on their websites.¹⁸ As a result, advertisers are likely willing to pay higher prices for ad space on social media platforms that have high volumes of traffic.¹⁹ Because fake news attracts many more users than factual information, it is an ideal candidate for advertising space.²⁰ Consequently, social media companies have a strong incentive to promote—or at the very least, refrain from—removing fake news.

This article will first seek to understand how Section 230 came about, its purpose, its effects on the internet, and its current standing in the political arena. Second, it will offer a definition and examples of fake news and seek to more fully identify the type of content that the proposal would affect. Additionally, it will evaluate how fake news spreads and its relationship with its consumers and social media companies. Third, it will examine other proffered solutions to curb the spread of fake news and explain why they are inadequate. Finally, it will propose and analyze a

¹⁵ See *infra* note 138.

¹⁶ See *infra* note 149.

¹⁷ See *infra* note 141.

¹⁸ See Lyons, *supra* note 2; Eavis, *supra* note 8; See “Sen. Orrin Hatch (R-Utah): ‘[H]ow do you sustain a business model in which users don’t pay for your service?’ Facebook CEO Mark Zuckerberg: ‘Senator, we run ads.’” *Facebook, Social Media Privacy, & the Use and Abuse of Data: Joint Hearing Before the S. Comm. on the Judiciary & the S. Comm. on Commerce, Science, & Transportation*, 116th Cong. 21 (2018).

¹⁹ Eavis, *supra* note 8.

²⁰ See Vosoughi et al., *supra* note 9, at 1146.

federal regulation's viability to require large social media companies to employ government certified fact-checkers.

II. HISTORY AND DEVELOPMENT OF § 230

A. *Section 230's Inception and Purpose:*

Congress enacted Section 230 in 1996 in response to a ruling in *Stratton Oakmont v. Prodigy*, which held that internet service providers that exercise control over content posted by third parties are considered publishers and are therefore liable for harm caused by the content.²¹

In *Stratton Oakmont*, Prodigy ran an online finance billboard, "Money Talk," where users could post their insights about the stock market and other financial topics.²² An anonymous user posted defamatory statements regarding Stratton Oakmont's president and said that he committed fraud and other criminal acts in connection with the initial public offering of the stock of Solomon-Page Ltd.²³ Unable to locate the original poster, Stratton Oakmont sued Prodigy under the theory that the platform provider functioned as a publisher of the users' statements made on Money Talk.²⁴

Ultimately, the court in *Stratton Oakmont* held Prodigy liable as a publisher of the statements because Prodigy held itself out to the public and its members as controlling the content of Money Talk, and that Prodigy did control its content by monitoring and removing notes on its bulletin boards "on the basis of offensiveness and 'bad taste.'"²⁵ The court further reasoned that Prodigy was a publisher because it had "arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards."²⁶

Under the court's reasoning in *Stratton Oakmont*, "online service providers that voluntarily filter some messages become liable for all messages transmitted, whereas providers that bury their heads in the sand and ignore problematic posts altogether escape liability."²⁷ The decision required internet service providers to decide between taking responsibility for all third-party content on their platforms or removing no content at all.²⁸ Daunted by the task of moderating tens of thousands of posts per day, it is no surprise that providers would choose to do nothing.²⁹

Section 230 overruled *Stratton Oakmont* and other decisions that treated internet service providers as the "publishers or speakers of content that is not their own *because they have restricted access* to objectionable

²¹ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *4 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, 137.

²² *Id.* at *1.

²³ *Id.* at *1-2.

²⁴ *Id.* at *2.

²⁵ *Id.* at *10.

²⁶ *Id.*

²⁷ *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).

²⁸ *Id.*

²⁹ *See Stratton Oakmont*, 1995 WL 323710, at *3.

material.”³⁰ Section 230’s “Good Samaritan” provision would allow internet service providers to remove and moderate objectionable content without the fear of liability.³¹

Another purpose of Section 230 was to “maintain the robust nature of Internet communication, and accordingly to keep government interference in the medium to a minimum.”³² The authors of Section 230, Representative Chris Cox (R-Cal.) and Senator Ron Wyden (D-Or.), wanted to protect the development of a new communication medium from the potential threat of overwhelming liability.³³ Senator Wyden said that such liability “will kill the little guy, the startup, the inventor, the person who is essential for a competitive marketplace. It will kill them in the crib.”³⁴ Removing this type of liability would allow ISPs and other platforms sufficient breathing room to develop and grow.

B. What Section 230 Does:

Section 230 makes social media companies immune to liability for harm caused by a third parties’ content so long as “[they] don’t encourage illegal content, or design [their] website to require users to input illegal content.”³⁵

This grant of immunity only applies if the social media company is not also an “information content provider,” which is a person or entity “responsible in whole or in part, for the creation or development” of the offending content.³⁶ For example, a user who creates a post or shares pictures of their dog would be an information content provider, whereas the website that they shared it on is not an information content provider because it only acted as a host for the content. Therefore, a party that merely hosts or distributes the information is not an information content provider.³⁷ The Ninth Circuit has interpreted the term ‘development’ as “referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.”³⁸

The statute’s language and the courts’ interpretation show that social media companies need not preoccupy themselves with the unsavoriness or unlawfulness of their users’ activity. However, the Fight Online Sex Trafficking Act provides a narrow exception to Section 230’s

³⁰ Roommates.Com LLC, 521 F.3d at 1163 (emphasis in the original).

³¹ The “Good Samaritan” provision states that providers or users of interactive computer services will not be treated as the publisher or speaker of any information provided by another information content provider. 47 U.S.C.A. § 230(c). Additionally, the provision shields providers and users from civil liability for monitoring and restricting items posted by information content providers. *Id.*

³² Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

³³ See JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 67 (2019)

³⁴ Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It – And Everything It’s Brought with It.*, VOX MEDIA (May 16, 2019, 9:50 AM), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality> [<https://perma.cc/8GRU-SMS2>].

³⁵ Roommates.Com LLC, 521 F.3d at 1175.

³⁶ 47 U.S.C.A. § 230(f)(3).

³⁷ *Id.*

³⁸ Roommates.Com LLC, 521 F.3d at 1167–68.

safe harbor clause in cases where the website knowingly hosts content used to promote or facilitate prostitution or sex trafficking.³⁹

C. Current State of Section 230:

Section 230 seems to have accomplished its purpose as the internet's protector because internet increased from roughly 2 million users in 1990 to over 3.4 billion users in 2016 becoming one of the fastest-growing technologies in history.⁴⁰ However, now that the internet has taken on a more robust and centralized role in human life, Section 230's broad immunities have come into question.⁴¹ Section 230's opponents argue that the internet no longer needs its protections, and that large tech companies are taking advantage of the safe harbor at the public's expense.⁴²

Section 230 inadvertently creates an environment for fake news and other false information to thrive. Because fake news attracts more attention than truthful information, it generates greater revenue for social media companies.⁴³ As a result, social media companies can profit from the spread of fake news without exposing themselves to liability because the mere augmentation of the content is insufficient to pierce Section 230's immunizing shield.⁴⁴

Section 230's authors intended to allow internet service providers and, by extension, social media companies to remove objectionable content.⁴⁵ However, the authors did not account for the fact that the same immunization that allows ISPs and social media companies to moderate content may encourage them to ignore or even disseminate such content. For example, Facebook could promote a video of a celebrity defaming another person or entity because it would garner many "likes" and "shares" all while avoiding liability for any harm those defamatory remarks may cause others. Such behavior by social media companies would promulgate false information and the negative effects that accompany it.

III. FAKE NEWS – WHAT IT IS AND WHY IT IS BAD

The term "fake news" has floated around pop culture and is ill-defined while frequently used. "Fake news" is better described as factually false or grossly misleading content likely designed to sway or entrench

³⁹ See H.R. 115, 115th Cong. (2018) [<https://perma.cc/2HDH-G5E7>]; Cecilia Kang & Sheryl Gay Stolberg, *Sex Trafficking Bill heads to Trump, Over Silicon Valley Concerns*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/business/sex-trafficking-bill-senate.html> [<https://perma.cc/D2CB-YT48>].

⁴⁰ See Max Roser et al., *Internet*, OUR WORLD IN DATA, (2017), <https://ourworldindata.org/internet> [<https://perma.cc/4373-SM9V>].

⁴¹ See generally H.R. 115, 115th Cong. (2018); Siripurapu, *supra* note 11; H.R. 492, 116th Cong. (2019); S. 1914, 116th Cong. (2019).

⁴² *Id.*

⁴³ Vosoughi, *supra* note 9 at 1147; Christopher Mims, *How Facebook's Master Algorithm Powers the Social Network*, WALL STREET JOURNAL (Oct. 22, 2017), <https://www.wsj.com/articles/how-facebooks-master-algorithm-powers-the-social-network-1508673600> [<https://perma.cc/P8EQ-FZY8>].

⁴⁴ Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1167-68 (9th Cir. 2008).

⁴⁵ 47 U.S.C.A. § 230(c)(2)(a).

one's opinion on a particular topic.⁴⁶ Notwithstanding, fake news remains relatively amorphous due to the diverse forms it can embody. Fake news can take the forms of videos, articles, memes, social media posts, etc.⁴⁷

A working definition of fake news thus remains elusive. As Justice Stewart said: "I shall not today attempt to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so."⁴⁸ To understand fake news, it is necessary to examine various examples. While fake news and misinformation can take numerous forms, this section will only consider conspiracy theories, memes, and status updates, and deepfakes.

A. Conspiracy Theories:

A conspiracy theory is "a theory that explains an event or set of circumstances as the result of a secret plot by usually powerful conspirators" or "a theory that a secret of great importance is being kept from the public."⁴⁹ An example that gained significant attention was "Pizzagate." In the wake of the 2016 Presidential Election, emails of Hillary Clinton's top aide, John Podesta, leaked to the public.⁵⁰ Forums on social media sites like Reddit and 4Chan quickly and inaccurately "decoded" the emails to reveal hidden messages indicating that the democratic party was running a demonic child-sex trafficking cult.⁵¹ The users on these sites alleged that the democratic party ran the child-sex trafficking ring out of the Washington D.C. pizza parlor, Comet Ping Pong, owned by James Alefantis.⁵²

The sites' users supported this theory by citing various emails discussing the pizzeria and, among other things, asserting that the term "cheese pizza" was code for child pornography.⁵³ The majority of assertions by the Pizzagate believers were composed mainly of loose logic and forced connections, many of which were necessary to support the theory.⁵⁴

⁴⁶A defining element of fake news is the intent and process of the publisher. Lazer et al., *supra* note 4, at 1095. This definition excludes satirical news networks and media like The Onion and Saturday Night Live. *Id.*

⁴⁷ See *infra* notes 49-83 and accompanying text.

⁴⁸ *Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964). (Justice Stewart attempting to define obscenity.)

⁴⁹ *Conspiracy Theory*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/conspiracy%20theory> (last visited Feb. 25, 2021) [<https://perma.cc/VPQ6-32QA>].

⁵⁰ Gregor Aisch et al., *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html?searchResultPosition=1> [<https://perma.cc/GD3S-5FBS>].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ "The most cited email revolved around a handkerchief left at a house Mr. Podesta [the owner of the pizzeria,] visited with a real estate agent. It led to speculation that the handkerchief and map on it were clues to some sort of wrongdoing." *Id.* Other proponents of the conspiracy asserted that the use of crescent moons and stars on the pizzeria's sign were actually satanic symbols. *Id.* The conspiracy theorists also claimed that designs employed by other businesses near Comet Ping Pong (triangles, hearts, spirals, etc.) resembled symbols used by pedophiles to identify sexual preferences even though such designs are extremely common. *Id.*

Notwithstanding the absurdity of the allegations, the theory spread rapidly throughout the internet.⁵⁵ The dissemination led many to believe the conspiracy and even prompted one man to act. On December 4, 2016, Edgar M. Welch, a 28-year-old from North Carolina, “arrived at Comet with a military-style rifle and handgun. The police said he fired the rifle inside the pizzeria, hurting no one, and surrendered after finding no evidence to support claims of child slaves being held there.”⁵⁶

Other far-fetched ideas that suggest that democrats are acting as sinister puppet-masters that control the country have gained significant ground thanks to former President Trump’s support.⁵⁷ Trump has tweeted extensively about the “deep state,” a shapeless specter responsible for many of his shortcomings.⁵⁸

Even the President of the United States can be a fount of fake news. Former President Trump’s acknowledgment of a deep state’s existence and promulgation of lies surrounding the 2020 Presidential Election led some of his followers to storm the Capitol building on January 6, 2020 in an attempt to overturn the results of a free and fair election.⁵⁹ Trump sought to undermine the results of the 2020 election by perpetuating conspiracy theories regarding voter fraud.⁶⁰ Trump’s legal efforts to overturn the election results were wildly unsuccessful and, in some cases, did not even allege fraud.⁶¹ Regarding Trump’s attempt to invalidate millions of votes cast by Pennsylvanians in the election, the Third Circuit Court of Appeals said: “Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”⁶² To make matters worse for the soon-to-be ousted incumbent, his own Department of Homeland Security contradicted him by saying that the election was “the most secure in

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See also *infra* notes 58–66 and accompanying text; Ali Watkins, *He Wasn’t Seeking to Kill a Mob Boss. He Was Trying to Help Trump, His Lawyer Says*, N.Y. TIMES (July, 21, 2019), <https://www.nytimes.com/2019/07/21/nyregion/gambino-shooting-anthony-comello-frank-cali.html> [<https://perma.cc/4N4B-T6S3>].

⁵⁸ The President has often tweeted about the opposition he encounters from this unknown entity. “‘If it weren’t for Donald Trump, we would never know how corrupt these Democrats are, we would never know for sure that there was a Deep State. Now we know it.’ @JudgeJeanine.” (Jul. 28, 2019, 6:56 AM); “The Deep State and the Left, and their vehicle, the Fake News Media, are going Crazy - & they don’t know what to do. The Economy is booming like never before, Jobs are at Historic Highs, soon TWO Supreme Court Justices & maybe Declassification to find Additional Corruption. Wow!” Donald J. Trump (@realDonaldTrump), THE TRUMP ARCHIVE (Sept. 6, 2018, 4:19 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/8D7P-BK69>].

⁵⁹ Steve Holland et al., *Trump Summoned Supporters to “Wild” Protest, and Told Them to Fight. They Did*, REUTERS (Jan. 6, 2021), <https://www.reuters.com/article/us-usa-election-protests/trump-summoned-supporters-to-wild-protest-and-told-them-to-fight-they-did-idUSKBN29B24S> [<https://perma.cc/L6BA-LA6U>].

⁶⁰ Donald J. Trump (@realDonaldTrump), THE TRUMP ARCHIVE “I WON THIS ELECTION, BY A LOT” (Nov. 7, 2021, 10:36 AM); See tweets from Nov. 3rd and on; “All of the recent Biden claimed States will be legally challenged by us for Voter Fraud and State Election Fraud. Plenty of proof – just check out the Media. WE WILL WIN! America First!” (Nov. 5, 2021, 11:22 AM); “STOP THE FRAUD!” (Nov. 5, 2021, 12:21 PM), <https://www.thetrumparchive.com/> [<https://perma.cc/8D7P-BK69>].

⁶¹ Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania, 830 F. App’x 377, 382 (3d Cir. 2020).

⁶² *Id.*

American history” and that there was no evidence that voting systems had malfunctioned.⁶³

Notwithstanding the validity of the election, Trump continued to peddle false information to his constituents shortly before the insurrectionists breached the Capitol building on January 6, 2020.⁶⁴ Trump excited the crowd by claiming that they would march to the Capitol together, that he would never give up or concede, and that the election results were “explosions of bullshit.”⁶⁵ Long after the crowd broke through the barriers and caused mayhem throughout the Capitol, Trump addressed them in a video he posted to Twitter saying: “I know you’re hurt. We had an election that was stolen from us. It was a landslide election . . . , but you have to go home now.”⁶⁶ The surplus of evidence showing the security of the election was insufficient to combat Trump’s unsubstantiated claims. Unfortunately, conspiracy theories no longer reside exclusively in the dark corners of the internet and among fringe groups, but rather they are becoming more common place and can even be found flowing from the Oval Office.

B. Memes and Status Updates

Not all forms of fake news are as incredible as the aforementioned conspiracies. Fake news often takes the form of memes and social media posts that contain quips of false or misleading information. A meme is “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media.”⁶⁷ Because of their format and brevity, memes and status updates are easy for users to digest and share.

A popular social media post emerged in response to various States’ mask mandates to combat the spread of COVID-19.⁶⁸ The image from the post, included below, usually accompanied text claiming that the information in the picture constituted a “mask loophole” that would allow individuals opposed to the mandates to enter stores without their masks.⁶⁹ However, no such loophole exists. The Americans with Disabilities Act, referenced in the image below, does not protect a feigned disability or medical condition.⁷⁰ Similarly, the Health Insurance Portability and Accountability Act does not typically bind retail businesses.⁷¹

⁶³ Alan Feuer, *Trump Loses String of Election Lawsuits, Leaving Few Vehicles to Fight His Defeat*, N.Y. TIMES (updated Dec. 10, 2020), <https://www.nytimes.com/2020/11/13/us/politics/trump-loses-election-lawsuits.html> [<https://perma.cc/7FMN-3CF6>].

⁶⁴ Holland, *supra* note 59.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Merriam Webster Dictionary*, <https://www.merriam-webster.com/dictionary/meme> (last visited Mar. 5, 2021) [<https://perma.cc/E89V-ECNW>].

⁶⁸ Dan Evon, *Can People Without Disabilities Use an ADA ‘Mask Loophole’ in Stores?*, SNOPE (May. 12, 2020) <https://www.snopes.com/fact-check/able-bodied-ada-mask-loophole/> [<https://perma.cc/R5PY-48Q3>].

⁶⁹ *Id.*

⁷⁰ See 42 U.S.C. § 12182 (1990).

⁷¹ See 42 U.S.C. § 1320d-1 (1996).



Another example includes a Twitter screenshot shared on Facebook falsely claiming that California adopted a law legalizing pedophilia. The post has spread across the internet, and the original tweet received around 200 retweets.⁷² The post referred to a proposed amendment to Sections 290 and 290.006 of the California Penal Code.⁷³ However, contrary to the post's claims, the law merely standardized the mandatory sex-offender registration requirements involving minors.⁷⁴ This law does not allow a twenty-one-year-old to have sex with an eleven-year-old as the California Penal Code still prohibits persons from engaging in sexual activities with minors who are three years younger than the perpetrator.⁷⁵

⁷² Karin Willison, YAHOO (May. 21, 2020.) <https://sg.news.yahoo.com/stop-using-ada-hipaa-wearing-180904122.html> [<https://perma.cc/T6BL-ADZX>]; MavericTV (@MavericTV), Twitter, (Sept. 1, 2020, 2:18 PM) <https://twitter.com/MavericTV/status/1300905978511065088> [<https://perma.cc/4VGY-BX5N>].

⁷³ S. 145, 2020, Reg. Sess. (Cal. 2020) [<https://perma.cc/EYH8-BRPJ>].

⁷⁴ The bill states in relevant part: "This bill would exempt from mandatory registration under the act a person convicted of certain offenses involving minors if the person is not more than 10 years older than the minor and if that offense is the only one requiring the person to register." *Id.* As a result, the requirement to register as a sex offender would be left up to the discretion of the presiding judge. *Id.*

⁷⁵ See Cal. Penal Code § 261.5 (2011).



A meme following the certification of the 2020 Presidential election sought to establish the illegitimacy of the election by falsely equating social media followers with voter turnout.⁷⁶ This content is exemplary of true information that is grossly misleading. If Twitter followers were an accurate indication of voting patterns, then Kanye West would have enjoyed a sizeable lead over Joe Biden during the 2020 election.⁷⁷

⁷⁶ Russ Mascari, Facebook (Jan. 30, 2021), <https://www.facebook.com/russ.mascari.5/posts/2828649134018724> [https://perma.cc/EYE8-KGCU].

⁷⁷ Kanye West had roughly 31 million Twitter followers, former President Trump had around 89 million followers, and President Biden had around 12 million followers. Kanye West (@kanyewest), Twitter, (Feb. 4, 2021) <https://twitter.com/kanyewest> [https://perma.cc/T9Q2-6845]; Tommy Beer, *Trump Suddenly Loses 220,000 Twitter Followers – First Big Drop in 5 Years*, FORBES (Dec. 5, 2020) <https://www.forbes.com/sites/tommybeer/2020/12/05/trump-suddenly-loses-220000-twitter-followers-first-big-drop-in-5-years/?sh=4d3a98cc7f2c> [https://perma.cc/WJX6-6WSB]; Jason Murdock, *Joe Biden Gained 15 Million Twitter Followers Since Winning 2020 Election*, NEWSWEEK (Feb. 3, 2021), <https://www.newsweek.com/joe-biden-15-million-twitter-account-followers-since-2020-presidential-election-1566411> [https://perma.cc/2EYW-3QVL]. However, the number of the candidates' Twitter followers did not translate proportionately to election results; President Biden received about 81 million votes, former President Trump received roughly 74 million votes, and Kanye West received a meager 67,906 votes. *Presidential Candidates, 2020*, Ballotpedia, https://ballotpedia.org/Presidential_candidates,_2020 (last visited Feb. 28, 2022) [https://perma.cc/79J3-CC5Y].



And yet the Democrats and the Mainstream Media want us to believe that Joe Biden handily won the election.



C. Deepfakes:

Disturbingly deceptive videos known as “deepfakes” have also gained notoriety in recent years.⁷⁸ Deepfakes are “videos that use AI to overlay a person’s likeness onto existing images or video. The technology can show people saying or doing something they never said or did. It can also be used to create realistic images of people who don’t exist.”⁷⁹ Most notably, Jordan Peele helped create a deepfake where he convincingly impersonated former President Barack Obama.⁸⁰ Peele used Obama’s image and likeness to convey a powerful message about the dangers of deepfake technology.⁸¹ While the technology to produce a convincing deepfake requires advanced resources and technical skills, a well-developed video released at the right time could have significant repercussions.⁸² Such forged videos could depict CEOs announcing large changes in company structure, political leaders calling for violence, defendants in criminal cases confessing their guilt, etc. One such deepfake

⁷⁸ James Rundle, *FBI Warns Deepfakes Might Become Indistinguishable From Reality*, WALL STREET JOURNAL (Jan. 17, 2020), <https://www.wsj.com/articles/fbi-warns-deepfakes-might-become-indistinguishable-from-reality-11579257004> [<https://perma.cc/2VZQ-73ZH>].

⁷⁹ *Id.*

⁸⁰ Craig Silverman, *How to Spot a Deepfake Like The Barack Obama-Jordan Peele Video*, BUZZFEED, (Apr. 17, 2018) <https://www.buzzfeed.com/craigsilverman/obama-jordan-peele-deepfake-video-debunk-buzzfeed> [<https://perma.cc/ULF4-HHKE>].

⁸¹ *Id.*

⁸² Tim Mak and Dina Temple-Raston, *Where are the Deepfakes in this Presidential Election?*, NPR (Oct. 1, 2020) <https://www.npr.org/2020/10/01/918223033/where-are-the-deepfakes-in-this-presidential-election> [<https://perma.cc/3B84-3692>].

portrayed Mark Zuckerberg discussing the benefits of controlling “billions of people’s stolen data, their secrets, their lives, their futures”⁸³

D. *How Fake News Spreads:*

Currently little information exists regarding the specific impacts of fake news on society.⁸⁴ Some academics claim that people pursue their interests online and form circles that filter out opposing views which turn into echo chambers that merely repeat views already held by individuals in the circle.⁸⁵ However, others reject this contention and posit that “ideological echo chambers and filter bubbles on [the internet] are the exception, not the norm.”⁸⁶

While the specific effects of fake news remain unknown, the information available generally suggests that fake news presents “many potential pathways of influence, from increasing cynicism and apathy to encouraging extremism.”⁸⁷ In response to this potential threat, sound policy suggests that the legislature diminish the dissemination of fake news: “Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”⁸⁸

In a study regarding the spread of true and false news online, researchers discovered that “falsehoods diffused significantly farther, faster, deeper, and more broadly than truth in all categories of information.”⁸⁹ This remained true even when the people sharing the information had fewer followers, less activity on their social media accounts, fewer verified accounts, and younger accounts than those sharing true information.⁹⁰

Additionally, the study found that falsehoods tended to be more novel than the truth.⁹¹ To explain this difference, the researchers hypothesized that:

[n]ovelty attracts human attention, contributes to productive decision-making, and encourages information sharing because novelty updates our understanding of the world. When information is novel, it is not only surprising, but also more valuable both from an information theoretic perspective (in that it provides the greatest aid to decision-

⁸³ Samantha Cole, *This Deepfake of Mark Zuckerberg Tests Facebook’s Fake Video Policies*, VICE (Jan. 11, 2019) <https://www.vice.com/en/article/ywyxex/deepfake-of-mark-zuckerberg-facebook-fake-video-policy> [https://perma.cc/TR2E-4SMS]; Bill Posters (@bill_posters_uk), INSTAGRAM, https://www.instagram.com/p/ByaVigGFP2U/?utm_source=ig_embed&utm_campaign=embed_video_watch_again (last visited Feb. 28, 2022) [https://perma.cc/JJD7-REZR].

⁸⁴ Lazer et al., *supra* note 4, at 1095.

⁸⁵ Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* 43, 49 (Princeton: Princeton University Press, 2018).

⁸⁶ Cristian Vaccari, *How Prevalent Are Filter Bubbles and Echo Chambers on Social Media? Not as Much as Conventional Wisdom Has It* (Feb. 13, 2018) <https://cristianvaccari.com/2018/02/13/how-prevalent-are-filter-bubbles-and-echo-chambers-on-social-media-not-as-much-as-president-obama-thinks/> [https://perma.cc/4KXJ-Y272].

⁸⁷ Lazer et al., *supra* note 4, at 1095.

⁸⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

⁸⁹ Vosoughi, *supra* note 9 at 1147.

⁹⁰ *Id.* at 1149.

⁹¹ *Id.*

making) and from a social perspective (in that it conveys social status on one that is “in the know” or has access to unique “inside” information).⁹²

The fact that the researchers controlled their study to account for artificial dissemination by robots bolsters this hypothesis because they found that “[c]ontrary to conventional wisdom, robots accelerated the spread of true and false news at the same rate, implying that false news spreads more than the truth because humans, not robots, are more likely to spread it.”⁹³ Fake news’s ability to spread is partly due to the internet’s low cost of entry.⁹⁴ There is no need to have the license, special equipment, or money necessary to broadcast the message on television or radio. Any person with a computer and an internet connection can disseminate false information into cyberspace.

This low cost of entry is attractive to creators of fake news who typically reject and undermine journalistic norms of objectivity and balance.⁹⁵ Fake news undermines legitimate information sources because it creates the illusion that the ominous “media” is hiding the “real news” from the public. As a result, it is not surprising that general trust in mass media reached historic lows in 2016.⁹⁶ In a Gallup poll, surveyors found that only 32% of persons said that they have “a great deal” or “a fair amount” of trust in mass media as a news source.⁹⁷

In addition to its ability to spread and undermine legitimate sources of information, fake news creates strong impressions on its viewers because of its novelty and tendency to confirm existing biases.⁹⁸ This characteristic makes combatting fake news more difficult because providing viewers with evidence that the information is false is often insufficient to negate its effects.⁹⁹ Yale University explored the impact that fact-checking has on fake news by surveying 7,500 people and found that placing “disputed” tags on the posts only increased the participants’ likelihood of identifying fake news by 3.7 percentage points.¹⁰⁰

Other research similarly found that fact-checking was ineffective to negate the impression false information leaves on its readers because “people tend to remember information, or how they feel about it, while forgetting the context within which they encountered it. Moreover, they are more likely to accept familiar information as true.”¹⁰¹ Because of the virality of fake news and the small impact that fact-checking has on its

⁹² *Id.*

⁹³ *Id.* at 1146.

⁹⁴ Lazer et al., *supra* note 4, at 1094.

⁹⁵ Because of these journalistic norms, creators of fake news would struggle to compete in an industry dominated by fact checking and reliability. Lazer et al., *supra* note 4, at 1094.

⁹⁶ Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP, (Sept. 14, 2016) <https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<https://perma.cc/M8VR-WWTZ>].

⁹⁷ *Id.*

⁹⁸ Lazer et al., *supra* note 4, at 1095; Vosoughi, *supra* note 9 at 1149.

⁹⁹ Jason Schwartz, *Study: Tagging Fake News on Facebook Doesn’t Work*, POLITICO, (Sept. 13, 2017) <https://www.politico.com/story/2017/09/11/facebook-fake-news-fact-checks-242567> [<https://perma.cc/Q8YK-4RW3>].

¹⁰⁰ *Id.*

¹⁰¹ Lazer et al., *supra* note 4, at 1095.

impressionability, there is no telling the harm that inundating amounts of false information could cause to society. However, fact-checking and labeling content as disputed significantly reduces the rate at which fake news spreads.¹⁰² In a recent analysis of election-related tweets, Twitter observed that tweets marked as disputed “saw a 29% decrease in shares, in part due to the prompts that warned users of their disputed information.”¹⁰³ While fact-checking and labeling content as disputed does little to convince people of its accuracy, it does seem to play a significant role in preventing it from spreading.

E. Social Media Companies and Fake News:

The fact that social media companies can profit from the promulgation of fake news exacerbates its spread. Typically, social media companies earn their primary source of income from advertisers.¹⁰⁴ In these situations, users do not pay for access or use of the platforms; rather, their access is uninhibited and encouraged.¹⁰⁵ The number of users on their platforms and the frequency at which those users visit the platforms directly impacts social media companies’ ability to offer advertising space.¹⁰⁶ Fake news is lucrative for social media companies because it is usually novel content that can spread rapidly across the internet.¹⁰⁷ This type of content may keep users visiting their websites and retain their attention for longer.¹⁰⁸ However, the overabundance and effect of fake news may have negative consequences for such platforms. For example, Apple, Google, and Amazon removed the application for the social media platform Parler from their app stores reasoning that the platform failed to adequately address the misinformation and violent threats made on the platform with regards to the insurrection at the Capitol on January 6, 2021.¹⁰⁹ Parler’s reputation as a breeding ground for misinformation and connection with the insurrection placed the company in risk of total dissolution.¹¹⁰ To avoid the potential consequences of similar reputational harm, some social media companies like Facebook and Twitter have implemented methods to discourage the presence of fake news.¹¹¹

¹⁰² See Browning, *infra* note 149.

¹⁰³ Georgia Wells, *Twitter Says Labels and Warnings Slowed Spread of False Election Claims*, WALL STREET JOURNAL (Nov. 12, 2020), <https://www.wsj.com/articles/twitter-says-labels-and-warnings-slowed-spread-of-false-election-claims-11605214925> [<https://perma.cc/WP72-9DU2>].

¹⁰⁴ Eavis, *supra* note 8.

¹⁰⁵ “Your addiction is making Facebook astonishingly profitable. Put a little more kindly, your emotional and intellectual interactions on the social network are creating a great place for companies to advertise.” *Id.*

¹⁰⁶ “Time spent on Facebook’s various properties correlates with the company’s revenue, and that number was going up at last report: In April 2016, Facebook said it was capturing on average 50 minutes of every American’s day, up from 40 minutes in July 2014.” Mims, *supra* note 43.

¹⁰⁷ Vosoughi, *supra* note 9 at 1147.

¹⁰⁸ Eavis, *supra* note 8; Mims, *supra* note 43.

¹⁰⁹ Jack Nicas and Davey Alba, *Amazon, Apple and Google Cut off Parler, an App that Drew Trump Supporters*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html> [<https://perma.cc/3R7B-63AB>].

¹¹⁰ *Id.*; Bruce Haring, *Parler CEO Says Services Dropped by “Every Vendor” and Could End His Business*, DEADLINE (Jan. 10, 2021), <https://deadline.com/2021/01/parler-ceo-says-service-dropped-by-every-vendor-and-could-end-the-company-1234670607/> [<https://perma.cc/ZYD5-JET5>].

¹¹¹ Lyons, *supra* note 2; Yoel Roth and Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER (May. 11, 2020)

These methods involve labeling suspect information, removing it (depending upon its severity), and ranking fake news significantly lower in its news feeds.¹¹² Facebook also uses independent fact-checkers and machine learning to detect and label misinformation.¹¹³ While such initiatives by some social media companies help combat and discourage fake news, they are nonetheless insufficient because companies are under no legal obligation to employ independent fact checkers or even flag and remove many types of fake news.¹¹⁴ This means that social media companies can allow or prohibit the presence of fake news to the degree that it suits them without consequences. In a leaked memo, Andrew Bosworth, a Facebook executive, articulated the company's incentive to promote interaction on the platform regardless of its consequences saying: "[w]e connect people. That can be good if they make it positive. Maybe someone finds love. ... That can be bad if they make it negative. ... Maybe someone dies in a terrorist attack. ... The ugly truth is ... anything that allows us to connect more people more often is *de facto* good."¹¹⁵ Exposing the public to unchecked false information for the sake of connection is not de facto good, and the amount of fake news in people's lives should not depend on social media companies' caprice. For these reasons, Congress needs to enact new legislation to limit the effects of fake news and to require social media companies to assume an appropriate amount of responsibility in preventing its spread.

IV. CURRENT SOLUTIONS:

Various legislative bodies and individuals have recognized the need to impose legal requirements on social media companies to mitigate the adverse effects of fake news. Potential solutions include requiring politically neutral content moderation on ISPs; imposing liability on ISPs for the actions of their algorithms; media literacy to be taught in public schools; and licensing journalists.¹¹⁶ Unfortunately, these solutions are inadequate because they unnecessarily interfere with the purpose of Section 230 to maintain the robust nature of internet communication, or because they would be ineffective in reducing the spread of fake news.

First, a bill proposed in the Senate by Senator Hawley (R-Mis.) suggested amending Section 230 to encourage computer service providers to provide politically neutral content moderation.¹¹⁷ The proposed legislation defines "politically biased moderation" as a provider that moderates information provided by other information content providers in a matter that is:

https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html [<https://perma.cc/WY8L-PRRG>].

¹¹² Roth, *supra* note 111.

¹¹³ Lyons, *supra* note 2.

¹¹⁴ See 47 U.S.C.A. § 230.

¹¹⁵ Shoshana Zuboff, *The Coup We Are Not Talking About*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/opinion/sunday/facebook-surveillance-society-technology.html?searchResultPosition=1> [<https://perma.cc/B783-AHYP>].

¹¹⁶ S. 1914, 116th Cong. (2019); H.R. 492, 116th Cong. (2019); 2019 WA S.B. 5594; Manzi, *supra* note 13 at 2623.

¹¹⁷ S. 1914, 116th Cong. (2019).

(a) designed to negatively affect a political party, candidate, or viewpoint; or disproportionately restricts or promotes access to, or the availability of, information from a political party, candidate, or viewpoint; or (b) an officer or employee of the provider makes a decision about moderating information provided by other information content providers that are motivated to negatively affect a political party, candidate, or viewpoint.¹¹⁸

This bill not only undermined basic notions of freedom of expression and of the press, but it was also underinclusive because it governed the spread of biased fake news and not the spread of fake news itself. Political processes and discourse are inherently biased. Removing bias from the political arena is an impossible task to accomplish and would serve no purpose other than restricting various First Amendment guarantees and limit the value of political discourse.¹¹⁹

Second, the “Biased Algorithm Deterrence Act of 2019” bill (the Amendment) sought to amend Section 230 to provide that an owner or operator of a social media service that hinders the display of user-generated content shall be treated as a publisher or speaker of such content, and for other purposes.¹²⁰

The Amendment would have treated the owner or operator of a social media service

that displays user-generated content in an order other than chronological order, delays the display of such content relative to other content if for a reason other than to restrict access to or availability of material described in paragraph (2)(A) of Section 230 or to carry out the direction of the user that generated such content as the publisher or speaker of such content.¹²¹

The Amendment proposes to treat the actions of algorithms as the actions of the owners and operators. As a result, it would subject social media companies to liability for harm caused by the promoted content and discourage social media companies from promoting fake news. Although social media companies primarily act through algorithms that they designed to control the programs, this Amendment poses several problems. Algorithms involving machine learning and Artificial Intelligence (AI) are incredibly complicated, and the creators often cannot predict what they will do in any given situation.¹²² For example, many Facebook engineers use AI algorithms even though they do not know how

¹¹⁸ *Id.*

¹¹⁹ See U.S. CONST. amend. I.

¹²⁰ H.R. 492, 116th Cong. (2019).

¹²¹ *Id.*

¹²² “AI algorithms are inherently black boxes whose workings can be next to impossible to understand – even by many Facebook engineers.” Mims, *supra* note 43.

to build them.¹²³ Thus, changing the algorithms would unduly burden social media companies because they often rely heavily on algorithms to provide users and advertisers with their expected experiences.¹²⁴ Additionally, this approach would undermine the fundamental purpose of Section 230 to allow burgeoning parts of the internet to develop¹²⁵ because it would apply to all who implement AI and other algorithms, not just the several social media giants.¹²⁶

Third, others have acknowledged that fake news and other false information will always exist and that we should invest in teaching people how to recognize it.¹²⁷ The Washington State Senate proposed such a solution when it introduced the “Supporting Media Literacy and Digital Citizenship” bill.¹²⁸ The bill sought to promote media literacy in Washington public schools by teaching students how to identify false information at an early age.¹²⁹

This approach would avoid complications of requiring companies to flag or remove fake news, and it would protect the original purposes of Section 230. However, this approach alone will not mitigate the harm of fake news. As previously mentioned, various studies have shown that fact-checking has a minimal impact on whether people believe a piece of fake news.¹³⁰ Additionally, even if most of the population could identify fake news, the likelihood that many people would take the extra time to verify everything they read is low.

Finally, one solution suggests that licensing journalists like other professions (lawyers, doctors, etc.) would help manage the spread of misinformation in the “idea [marketplace].”¹³¹ This practice would establish industry standards such as ethical obligations, verification through peer review, and continued education in information gathering.¹³² This type of certification would cause people to ignore non-accredited sources and bolster the declining perception of journalism’s integrity.¹³³ Knowing that journalists are accountable to ethics boards and answer to clearly defined professional standards would likely help convince the

¹²³ *Id.*

¹²⁴ *Id.* (“Every time one of Facebook’s two billion monthly users opens the Facebook app, a personalization algorithm sorts through all the posts that a person could theoretically see, and dishes up the faction it thinks she or he would like to see first. The system weighs hundreds of frequently updated signals, says Mr. Candela. Without AI, many of these signals would be impossible to analyze.”)

¹²⁵ See Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It – And Everything It’s Brought with It.*, VOXMEDIA (May 16, 2019, 9:50 AM), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality> [<https://perma.cc/KE6H-NBVQ>].

¹²⁶ H. Tankovska, *Most Popular Social Networks Worldwide as of January 2021, Ranked by Number of Active Users (in millions)*, STATISTA (Feb. 9, 2021) <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [<https://perma.cc/3V5J-8FBU>].

¹²⁷ 2019 WA S.B. 5594; MEDIA LITERACY & DIGITAL CITIZENSHIP <https://www.k12.wa.us/policy-funding/school-technology/media-literacy-digital-citizenship> (last visited Mar. 30, 2022).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Lazer et al., *supra* note 4, at 1095; Schwartz, *see also supra* note 99.

¹³¹ Manzi, *supra* note 13.

¹³² *Id.* at 2650.

¹³³ Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP, (Sept. 14, 2016) <https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<https://perma.cc/3NAP-8VSW>].

public that journalists actively avoid their violations. Non-accredited sources could not boast this level of accountability and would lose the public's confidence, and by extension, its attention. For these same reasons, the public finds more security and trust in attorney-client confidentiality than in pinky promises.

Unfortunately, this solution would create a high barrier to entry to journalism. A high barrier hinders a deliberative democracy where free speech is encouraged, needed, and protected.¹³⁴ Additionally, a government-enforced barrier to journalism poses potential questions to the First Amendment guarantee of freedom of the press.¹³⁵ Finally, licensing journalists fails to address the fact that fake news's initial impression has greater influence on people than the source's credibility.¹³⁶

The foregoing solutions, while helpful, fail to address all the problems posed by fake news. Instead, Congress should look to other highly regulated industries for inspiration on adequately addressing the fake news problem. For example, the Securities and Exchange Commission (SEC) uses independent certified public accountants to audit companies' financial statements to ensure that companies provide true information to their shareholders.¹³⁷ Requiring large social media companies to employ government certified fact-checking entities to monitor and flag false information would likely fill the gaps left by the foregoing solutions. This solution would avoid government interference in the realm of free speech, remove social media companies' economic incentives to tolerate the presence of fake news, and better assist in reducing the spread of false information.

V. GOVERNMENT-CERTIFIED FACT-CHECKING ENTITIES:

To adequately address the problem of fake news, a holistic solution should balance the need to limit the spread of fake news with the preservation and development of the internet. Congress should require social media companies with over one million monthly users to contract government-certified third-party fact-checking companies to evaluate the veracity of user-reported content. If the fact-checkers reach the level of certainty required to place a post into dispute, then social media companies must mark it as disputed or misleading. Noncompliance with the law would result in a fine against the company.

Other industries employ similar requirements for companies to pay for government-certified auditors to oversee their activities. For example, the Food and Drug Administration, through the Food Safety Modernization Act, "puts an obligation on certain entities in the food industry to verify that their suppliers are meeting FDA food safety standards. The agency contemplates a role for reliable, third-party audits, whether they're conducted by a government agency or a private

¹³⁴ See U.S. CONST. amend. I.

¹³⁵ *Id.* ("Congress shall make no law . . . Abridging the freedom of speech, or of the press . . .").

¹³⁶ Lazer et al., *supra* note 4, at 1095.

¹³⁷ *All About Auditors: What Investors Need to Know*, SEC <https://www.sec.gov/reportspubs/investor-publications/investorpubsaboutauditorshtm.html> (last visited Mar. 31, 2021) [<https://perma.cc/2HPP-A5LB>].

concern.”¹³⁸ Additionally, some commercial fisheries must hire independent auditors to monitor their activities to ensure compliance with federal conservation goals and policies.¹³⁹ As a result, the government does not employ auditors, but rather, the government requires that companies within the industry contract qualified auditors.¹⁴⁰

A legislative requirement to contract a qualified third-party auditor would serve an essential role in supporting important public policies while limiting the government’s hand in directly enforcing the legislation. Just as an auditor would report if a vessel caught more salmon than allowed in its quota, so too would a fact-checker report the presence of fake news online. The auditor on the vessel helps conserve the wild-salmon population, and the one online helps to prevent the spread of false information. Because the auditors are private parties, the government avoids direct regulation of that area. In the case of regulating fake news, the government would not become the arbiter of truth and limit what people can and cannot say online. Rather, a non-governmental auditor held to strict ethical and professional standards determines the accuracy of the user-reported post. As a result, the law would not violate the First Amendment.¹⁴¹

Congress should limit this requirement to companies and platforms whose monthly user count exceeds one million because it would allow smaller websites to develop without increased overhead costs and the fear of additional liability.¹⁴² At the same time, it would prevent the

¹³⁸ *Third-Party Audits and FSMA*, U.S. FDA (Aug. 20, 2018), <https://www.fda.gov/food/food-safety-modernization-act-fsma/third-party-audits-and-fsma> [https://perma.cc/R947-A2UB].

¹³⁹ See 16 U.S.C. § 1853(b)(8); Fishery observers and at-sea monitors collect data from U.S. commercial fishing and processing vessels and other processing plants. *Fishery Observers*, NATIONAL OCEANIC AND ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/topic/fishery-observers> (last visited Apr. 5, 2021) [https://perma.cc/88RY-EBR5]. The observers are “professionally trained biological scientists gathering first-hand data on what’s caught and thrown back, which supports science, conservation and management activities.” *Id.* The data collected is reported to the National Oceanic and Atmospheric Administration and is used to monitor fisheries, manage populations, and set fishing quotas. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ The First Amendment protects against the government restricting individual speech generally. See U.S. CONST. amend. I. However, private persons and companies are not subject to the limitations imposed by the First Amendment. *Civ. Rights Cases*, 109 U.S. 3, 17 (1883). Additionally, it is unlikely that independent-fact-checkers’ conduct can be attributed to the federal government. Joint action between a private party and the state exists when the state has “so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012); see generally *Children’s Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909 (N.D. Cal. 2021), *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Additionally, it is less likely that joint action exists when the private party makes decisions independent from the government. *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 504 (9th Cir. 1996). Here, there would be no interdependence between the government and the fact-checkers. The government’s involvement with the fact-checkers would be mostly limited to ensuring that they abide by certain ethical standards. The government would not be involved in determining the veracity of posts or whether to label them as disputed or misleading; this function would be solely reserved to the fact-checkers. As a result, a private fact-checking agency’s moderation of social media posts would not likely fall under the purview of the First Amendment. However, it should be noted that the scope of this article is too narrow to allow a more in-depth analysis of this issue.

¹⁴² *Most Popular Social Networking Apps in the United States as of September 2019*, by *Monthly Users*, STATISTA RSCH DEP’T (Feb. 4, 2021), <https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/> [https://perma.cc/3B92-2QQY] (The 20 largest social media companies in the United States – in terms of monthly users – all exceed 1

spread of fake news on larger platforms where it spreads more easily and reaches more people. Big social media companies can bear the burden of contracting a certified fact-checking agency (some already do), a fact-checker's presence has greater impact on a platform with millions of monthly users as opposed to one of 500 monthly users.¹⁴³ Niche corners of the internet are more likely to be overly burdened by such a requirement, and the public would not derive much benefit from it. Instituting a "size" requirement would protect the purpose of Section 230 by allowing newly formed and growing companies to blossom while placing an informational check on the large companies.¹⁴⁴

This solution only requires fact-checkers to analyze posts reported by users a significant number of times to mitigate the potential burden of sifting through millions of posts and determining the truthfulness of each. Even with AI and advanced algorithmic assistance, examining every user's posts and determining their factuality would be extremely cumbersome. Restricting the number of posts that need to be analyzed would allow fact-checkers to verify and flag the posts that are most likely to be false and do so before they go viral. In practice, the users' posts will be immediately visible on the platforms. However, if users report a post with sufficient frequency, then the fact-checking agency will attempt to determine whether the post is false or grossly misleading and flag it accordingly.

Additionally, this verification would only apply to facts and not opinions to "maintain the robust nature of the Internet communication"¹⁴⁵ As Justice Kennedy reasoned, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."¹⁴⁶

As we have seen, flagging content as false or disputed is unlikely to change whether a particular user believes its claims.¹⁴⁷ However, this solution substantially limits the number of people exposed to misleading and false content. After the fact-checker flags the post as disputed or misleading, users will still be able to share the post manually with their friends and followers. Social media companies will determine for themselves which posts to remove because they do not have the same censorship and freedom of speech concerns.¹⁴⁸ Notwithstanding, flagging the content as disputed will slow and limit its capacity to spread. In a case study, the Election Integrity Partnership, a coalition of misinformation researchers, found that labeling a post as "disputed" significantly reduced

million monthly users with the largest (Facebook) at 169.7 million users and the smallest (Google+) at 2.62 million users.)

¹⁴³ See Lyons, *supra* note 2.

¹⁴⁴ Kang, *supra* note 43 (quoting Ron Wyden saying "Start-ups need the legal shield most, not tech giants... 'The big guys can take care of themselves.'").

¹⁴⁵ Zeran, 129 F.3d. at 330.

¹⁴⁶ United States v. Alvarez, 567 U.S. 709, 727, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

¹⁴⁷ Schwartz, *supra* note 99 at 1095.

¹⁴⁸ 47 U.S.C.A. § 230(c) (Generally, social media companies may prohibit and remove user created content at their own discretion).

the number of times users shared or interacted with it.¹⁴⁹ If fact-checking and labeling fake news does not significantly impact its perceived credibility, then we can find solace in the knowledge that such labeling and verification seriously restrict its ability to spread. This solution mitigates the most dangerous part of fake news, its ability to reach a broad audience.¹⁵⁰

As a byproduct, limiting the spread of fake news by flagging it reduces its ability to generate revenue for social media companies.¹⁵¹ When coupled with the imposition of a fine for noncompliance, this hindrance would remove the economic incentive that fake news currently provides.¹⁵² This solution limits the extent to which fake news will travel, and by extension, its value to attract users and advertisers. Permanently reducing fake news's economic value by limiting its spread and punishing social media companies for failing to flag misleading material, when identified by the fact-checkers, deals a large blow to fake news and designates it as an informational pariah – unwelcomed and unwanted on major social platforms.

Government certification of fact-checking companies and agencies should require ethical standards and uniform verification processes for analyzing fake news. Such standards would limit the potential for abuses prompted by political bias by requiring analyses of disputed content to pass through multiple levels of review. The review need not be exhaustive and definitive, but sufficient to confidently call into question the truthfulness of a particular post. Additionally, the organization that certifies fact-checkers could take disciplinary measures for breaching the approved verification processes or other ethical violations, much like how the bar can suspend or remove lawyers for similar behavior.¹⁵³ Fact-checkers would act objectively and honestly as the maintenance of their accreditation – and by extension, their employability – would hinge on these characteristics. Finally, licensing third party fact-checkers would not limit public participation in journalism or the press but would still allow the public to place their confidence in an accredited source.

VI. CONCLUSION:

The malady of fake news is not easily cured. Much like a virus, if not contained, it will spread quickly. It is naïve to believe that fake news and false information will cease to exist. Currently, Section 230 serves as a type of safe haven for fake news. It allows social media companies to benefit from its spread with impunity from the law. While there are

¹⁴⁹ Kellen Browning, *After Twitter Labels Trump's Tweet About Pennsylvania, Its Spread Slows*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/live/2020/11/03/us/election-day#after-twitter-labels-trumps-tweet-about-pennsylvania-its-spread-slows> [<https://perma.cc/2KM5-TCLJ>] (In a tweet, President Trump claimed, without evidence, that the Supreme Court's decision to allow Pennsylvania absentee ballots to be received up to three days after November third would "allow rampant and unchecked cheating" and "induce violence in the streets." Before Twitter flagged the tweet, it was shared or replied to about 827 times a minute. After it was flagged, that number dropped to 151 times a minute.).

¹⁵⁰ See Lazer et al., *supra* note 4, at 1095.

¹⁵¹ Mims, *supra* note 43.

¹⁵² *Id.*

¹⁵³ See Model Rules of Pro. Conduct (Am. Bar Ass'n 2020).

instances where these companies attempt to fight its spread, the public should not be wholly reliant on their voluntary efforts. Proposals to amend Section 230 and attempts at increasing public media literacy and licensing journalists are insufficient to address the problem and are often costly solutions.

Legislation requiring that large social media companies employ independent fact-checkers to evaluate the truthfulness of suspect posts on their platforms is the most viable solution. This legislation would avoid complications posed by the potential for infringing on various First Amendment rights and would serve to fulfill the original purposes of Section 230. This solution strikes a balance between limiting the spread of fake news and maintaining the internet as a place where people can exchange ideas and information freely.

This legislation would require more logistical specifications before it would be effective. For example, the law should specify when and which posts the auditors would fact-check and to what extent. Determining which companies would be subject to the law and which would be immune introduces another hurdle. While large social networking platforms are likely to have the most traffic, a significant amount of fake news (perhaps a disproportionate amount) may come from fringe sites and darker corners of the web. More research is required to determine if it may be more effective to target fake news at its source instead of attempting to combat it once it reaches more mainstream channels.

Overall, the best solution is for Congress to force large companies to bear the burden of fact-checking questionable posts by requiring that they contract independent fact-checkers that are government certified. This solution will not entirely eliminate fake news, but it will slow its spread and influence.