

# Whose Lie Is It Anyway? Holding Social Media Sites Liable for Procedural Election Disinformation

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## I. INTRODUCTION

The 2020 presidential election was a rollercoaster for the American people. From Facebook providing an election information center notification on posts pertaining to the election,<sup>1</sup> to Twitter flagging tweets from then-President Donald Trump,<sup>2</sup> social media sites have developed and enacted different policies to prevent the spread of political misinformation and disinformation.<sup>3</sup> These sites have taken encouraging steps toward protecting foundational principles of American democracy, but standards that vary site-by-site are insufficient to curb the onslaught of misinformation and disinformation that users are exposed to on a daily basis. Exposure to false information about procedural aspects of elections is especially worrisome for American democracy. To help prevent the spread of procedural election disinformation, Congress should authorize the Federal Trade Commission to promulgate regulations to prevent paid procedural election disinformation from circulating on social media sites.

In 1996, Congress passed the Communications Decency Act. This Act includes section 230, which has been frequently discussed by politicians, federal representatives, and the media throughout 2020 and 2021.<sup>4</sup> Section 230(c)(1) provides that “[n]o 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.”<sup>5</sup> This provision essentially insulates service providers — including social media sites like Facebook and Twitter — from liability for third-party content, with some exceptions relating to criminal acts.<sup>6</sup>

While section 230 was more easily applicable in 1996 when the Internet was just beginning to develop, technological developments have now likely exceeded the bounds of what legislators imagined in 1996. Unfortunately, the legislation has not kept pace with the times, and as such, Internet Service Providers (ISPs) continue to be insulated from liability in questionable circumstances. One such circumstance is that many social media companies fail to meaningfully regulate procedural election advertising on their websites. This failure to regulate leads to the spread of disinformation and could have

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1. Guy Rosen, *Preparing for Election Day*, META (Oct. 7, 2020), <https://about.fb.com/news/2020/10/preparing-for-election-day/> [https://perma.cc/8857-R7CH].

2. *Trump Falsely Claims He Won the Election; Twitter Flags the Tweet*, CBS NEWS (Nov. 16, 2020, 3:42 PM), <https://www.cbsnews.com/news/trump-tweet-claims-he-won-election-twitter-flags/> [https://perma.cc/W793-SVGB].

3. Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 33, 33 (2020).

4. William A. Sodeman, *Communications Decency Act*, BRITANNICA (Nov. 24, 2016), <https://www.britannica.com/topic/Communications-Decency-Act> [https://perma.cc/32GX-2HR5]; Taylor Hatmaker, *Trump Vetoes Major Defense Bill, Citing Section 230*, TECHCRUNCH (Dec. 23, 2020), <https://techcrunch.com/2020/12/23/trump-ndaa-veto-section-230/> [https://perma.cc/2EKR-MHQ6].

5. 47 U.S.C. § 230.

6. *Id.*

long-lasting effects on American democracy by disenfranchising eligible voters.

Permitting the unchecked spread of procedural election disinformation prompts significant concerns both with the First Amendment and with notions of a free democracy. John Stuart Mill's theory of the free marketplace of ideas contemplates that having an open forum for speech will allow individuals to exchange information and ideas, and over time, society will filter out inaccurate information from this exchange.<sup>7</sup> While this "marketplace of ideas" theory applied easily in a time where people were openly exposed to a variety of information and ideas, this theory is limited by the modern marketplace of ideas of social media. Social media users tend to consume content they find interesting and agree with, creating an "echo chamber," wherein users may only be exposed to the ideas with which they agree.<sup>8</sup> This problem is further exacerbated by algorithms which suggest content based on other content users have consumed.<sup>9</sup>

Procedural election disinformation also affects America's notion of a free democracy by suppressing voters and rendering them misinformed.<sup>10</sup> Inaccurate information about polling places, where and how to properly register to vote and to check your voter registration status, and other procedural aspects of participating in elections amounts to voter suppression.<sup>11</sup> Further, citizens may cast their votes based on inaccurate information about candidates and their platforms.<sup>12</sup> For example, a study surrounding the 2016 Presidential election found that undecided voters were more likely to vote for Donald Trump after being exposed to fake news stories about Hillary Clinton.<sup>13</sup>

Social media sites have taken varied and admirable steps to curb the spread of political and election-related misinformation and disinformation. However, because the procedures and policies vary from company to company, and sometimes from state to state,<sup>14</sup> there is no uniform approach. This could lead to the information sneaking into users' feeds if they use

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7. David Schultz & David Hudson, *Marketplace of Ideas*, FREE SPEECH CTR. (June 2017), <https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas> [<https://perma.cc/QUU6-9RM3>].

8. Christopher Seneca, *How to Break Out of Your Social Media Echo Chamber*, WIRED (Sept. 17, 2020, 9:00 AM), <https://www.wired.com/story/facebook-twitter-echo-chamber-confirmation-bias/> [<https://perma.cc/LL9G-SFRU>].

9. *Id.*

10. See Zachary Roth, *We Need a Truth-in-Advertising Commission — For Voters*, BRENNAN CTR. FOR JUST. (Oct. 16, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/we-need-truth-advertising-commission-voters> [<https://perma.cc/5MJY-MJ53>].

11. *See id.*

12. *Id.*

13. Aaron Blake, *A New Study Suggests Fake News Might Have Won Donald Trump the 2016 election*, WASH. POST. (Apr. 3, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/03/a-new-study-suggests-fake-news-might-have-won-donald-trump-the-2016-election/> [<https://perma.cc/RC64-BAZ3>].

14. Salvador Rodriguez, *Facebook to Reinstate Political Ad Ban in Georgia Following Senate Runoff Elections*, CNBC (Jan. 5, 2021), <https://www.cnbc.com/2021/01/05/facebook-to-reinstate-political-ad-ban-in-georgia-following-senate-runoff-elections.html> [<https://perma.cc/SQ54-MWJ9>].

multiple social media applications with different policies. For example, a user could take a screenshot of a political advertisement on Facebook and share it on Twitter.

To combat the difficulties created by and the worrying consequences resulting from allowing unregulated paid procedural election disinformation to be promulgated on social media sites, Congress should pass narrowly tailored and specific legislation authorizing the Federal Trade Commission (FTC) to promulgate rules regulating this area.

This statutory authorization must be narrowly and specifically written to include only regulation in the area of paid advertising regarding procedural aspects of elections. Once the FTC receives congressional authorization, it will be able to promulgate regulations as it sees fit. However, it may want to hold hearings to garner information about the existing procedures and approaches of different social media sites to determine the framework for its regulations. These regulations would be centered around the social media sites and would determine substantive guidelines and regulations for displaying ads concerning procedural election information, rather than focusing on the entities purchasing the ad space.

This Note will first define disinformation in Part II, Section A, and will explore the legal theories that provide a framework for regulation in this area in Section B. In Section C, this Note considers the current regulatory frameworks of two popular social media sites, Facebook and Twitter, compares their approaches, and explains why regulation of social media sites as “middlemen” is appropriate. Section C will also contrast Facebook and Twitter’s approaches with those of Parler. Section D will then establish the FTC’s jurisdiction in this area. In Part III, Section A, the Note will consider why delegation to the FTC is superior to Congress regulating the area itself through legislation; Section B will explain why regulation at the federal level is superior to regulation at the state level; Section C offers considerations concerning how debate over section 230 has made this area ripe for change; and Sections D and E consider alternative solutions and public policy. Finally, Section F explores how the FTC should proceed with regulating this space.

## II. BACKGROUND

### A. *Defining Disinformation*

Political misinformation and disinformation are popular topics, but each has a distinct meaning. Both misinformation and disinformation involve information that is false or out of context and is presented as factual.<sup>15</sup>

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15. Meira Gebel, *Misinformation vs. Disinformation: What to Know About Each Form of False Information, and How to Spot Them Online*, BUS. INSIDER (Jan. 15, 2021), <https://www.businessinsider.com/misinformation-vs-disinformation> [<https://perma.cc/2DTC-J5CY>].

However, disinformation is distinct in that it involves an intent to deceive.<sup>16</sup> Misinformation, by contrast, does not require an intent to deceive.<sup>17</sup>

*B. Two Legal Theories: The Marketplace of Ideas and Protecting Democracy*

There are two legal theories in First Amendment jurisprudence that support federal agency regulation of procedural information about elections. The first is John Stuart Mill's theory of the free marketplace of ideas.<sup>18</sup> Mill applied an economic analysis to speech and ideas, positing that information and ideas exist in a marketplace the same way that commercial products exist in a marketplace.<sup>19</sup> The competition of information and ideas in this marketplace naturally determines what ideas are true and acceptable, as the popular and widely accepted ideas will prevail over inaccurate ones.<sup>20</sup> Mill particularly believed that truth is better derived through this competitive marketplace than through any form of government censorship.<sup>21</sup>

The Supreme Court has come to favor Mill's marketplace of ideas theory in its First Amendment jurisprudence. In particular, the Supreme Court favors counterspeech as the most effective solution to harmful speech. Justice Oliver Wendell Holmes first brought Mill's theory to light in his dissent in *Abrams v. U.S.* In *Abrams*, the defendants published and distributed pamphlets supporting Russia and criticizing capitalism.<sup>22</sup> Notably, this was not at a time when the United States was at war with Russia.<sup>23</sup> The defendants were convicted on counts of conspiracy to incite, provoke, or encourage resistance against the United States and conspiracy to curtail production of war materials.<sup>24</sup> The Supreme Court affirmed the defendants' convictions and rejected their defense that the convictions violated the First Amendment.<sup>25</sup> In a now-famous dissent, Justice Holmes criticized the majority approach, emphasizing that the government interest in restricting speech is more important and justifiable in times of war.<sup>26</sup> He further proposed a major theory of First Amendment jurisprudence that the Supreme Court now favors — Mill's theory that the best way to come to the truth is for ideas to compete in a free marketplace, without any government censorship.<sup>27</sup>

Justice Holmes continued to emphasize this approach in his concurrence in *Whitney v. California*. In that case, the plaintiff attended a convention for the Socialist Party, and later sought to organize a California

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16. *Id.*

17. *Id.*

18. Schultz & Hudson, *supra* note 7.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Abrams v. United State*, 250 U.S. 616, 618 (1919).

23. *Id.* at 617-18.

24. *Id.* at 617.

25. *Id.* at 624.

26. *Id.* at 626-27.

27. *Id.* at 630.

branch of the Communist Labor Party.<sup>28</sup> She was then charged with and convicted of violating the California Criminal Syndicalism Act because she was a member of a group organized to advocate criminal syndicalism.<sup>29</sup> Criminal syndicalism laws were popular in the 1910s and 1920s during the Red Scare, and they outlawed advocating for radical political and economic changes through criminal or violent means.<sup>30</sup> The Supreme Court upheld the Act as constitutional and held that it was not an unreasonable or arbitrary exercise of the State police power.<sup>31</sup> In a concurrence by Justice Brandeis, joined by Justice Holmes, the justices once again espoused Mill's marketplace of ideas theory, especially the soon-to-become-popularized idea that counterspeech is the most effective remedy to harmful speech.<sup>32</sup>

Mill contemplated this theory in his book, *On Liberty*, which was published in 1859.<sup>33</sup> While this theory has its merits, Mill clearly developed it before the existence of the Internet or modern social media. The development of social media, along with its algorithms, have created barriers to the truly free marketplace of ideas that Mill contemplated. During the era in which Mill developed his theory, one could be exposed to different viewpoints simply by walking outside—individuals could post fliers on doors, hand out pamphlets or handbills, or yell on a street corner. Of course, it is still possible to do these things today, but social media is a much more accessible and easy way to exchange information and ideas because individuals don't need to leave their house to do so. However, while social media makes information and ideas more accessible, algorithms make exposure to information and ideas that are different from one's own views and ideas more difficult. Social media algorithms keep track of the content you watch or engage with, and then recommend new content based on your record.<sup>34</sup> For example, if a user explores their personal Facebook profile's settings and ad preferences, they can see certain demographics that Facebook has pegged them as—including their political affiliation.<sup>35</sup> Thus, algorithms tend to lock social media users into an "echo chamber" in which they are more

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28. *Whitney v. California*, 274 U.S. 357, 363 (1927).

29. *Id.* at 359-60.

30. Dale Mineshima-Lowe, *Criminal Syndicalism Laws*, FREE SPEECH CTR. (2009), <https://www.mtsu.edu/first-amendment/article/942/criminal-syndicalism-laws> [<https://perma.cc/BKC2-SQNH>].

31. *Whitney*, 274 U.S. at 372.

32. *Id.* at 377-78.

33. See generally JOHN STUART MILL, *ON LIBERTY* (1859).

34. Audrey Hingle, *Misinfo Monday: Are Algorithms Feeding You Crap?*, MOZILLA (Aug. 10, 2020), [https://foundation.mozilla.org/en/blog/misinfo-monday-are-algorithms-feeding-you-crap/?gclid=Cj0KCQiAjKqABhDLARIsABbJrGkDIZNX3aDo2gSJ4rdf4NskDPYs95i-qkWICdOskxx7o4l7tgiwobcaAqz3EALw\\_wcB](https://foundation.mozilla.org/en/blog/misinfo-monday-are-algorithms-feeding-you-crap/?gclid=Cj0KCQiAjKqABhDLARIsABbJrGkDIZNX3aDo2gSJ4rdf4NskDPYs95i-qkWICdOskxx7o4l7tgiwobcaAqz3EALw_wcB) [<https://perma.cc/YMM7-3E6C>].

35. *How to Check what Facebook Thinks Your Political Views Are*, TRISTATEHOMEPAGE.COM (Apr. 3, 2018, 7:20 PM), <https://www.tristatehomepage.com/news/how-to-check-what-facebook-thinks-your-political-views-are/> [<https://perma.cc/EBM7-XN8B>].

likely to be exposed to viewpoints in which they have expressed prior interest.<sup>36</sup>

Further, Mill's and Justice Holmes' solution of counterspeech is far less effective in the modern world of social media. In the 19th and 20th centuries, individuals could engage in counterspeech by any of the same methods discussed above to engage in speech. People could yell over each other, or post or pass out fliers and pamphlets to counter other fliers and pamphlets. However, social media algorithms make this solution less feasible. When algorithms tend to only recommend speech that aligns with an individual's viewpoints, counterspeech is more difficult to access because algorithms simply won't recommend speech with which users tend to disagree. Beyond that, even where social media sites expose individuals to counterspeech, it is arguably easier to disengage from that speech. When two parties who disagree with each other are having a civil discussion, walking away from that discussion with no explanation would likely be considered rude. However, if someone is consuming media with which they disagree on the Internet and decide they don't want to listen anymore, all they have to do is close the Internet tab or page.

The other First Amendment theory supporting federal agency regulation of election information explores the issue of procedural election disinformation from a democracy standpoint. The First Amendment at its root is about protecting the individual right to speak, and by proxy, is about protecting the ability to have one's voice heard in elections. Although the First Amendment does not directly protect voting itself, it protects activities adjacent to voting, including whether one spends money to support candidates, protesting in general, and signing petitions that allow initiatives to appear on ballots.<sup>37</sup> In order to exercise these First Amendment rights, it is imperative that individuals have accurate information about polling places, voter registration, and the current status of an election race.

Each of these procedural aspects of elections—polling places, registration, and the current status of election races—are important for democracy. Accessible and accurate information about polling places and voter registration makes the voting process easier for people. Up until an individual turns eighteen, they have never registered to vote and may have little to no familiarity with the voting process. Accurate and accessible information about the registration process and how citizens can vote in their respective states makes the process easier because individuals don't have to spend as much time looking up where to go and how to register. If individuals are instead exposed to disinformation about polling places and voter registration, they may decide the process is too laborious. Worse still, people

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36. Christina Pazzanese, *Danger in the Internet Echo Chamber*, HARV. L. TODAY (Mar. 24, 2017), <https://today.law.harvard.edu/danger-internet-echo-chamber/> [https://perma.cc/GR5V-U8GC].

37. Lata Nott, *The First Amendment Protects Activities Adjacent to Voting, But Stops Short of Voting Itself*, FREEDOM F. INST. (Feb. 27, 2020), <https://www.freedomforuminstitute.org/2020/02/27/the-first-amendment-protects-activities-adjacent-to-voting-but-stops-short-of-voting-itself/> [https://perma.cc/H74X-K78Q].

may think they have properly registered and then are denied the ability to vote on Election Day or have their vote rejected during vote processing.

Further, it is important that individuals have accurate information about ongoing or called races, and how those races were called by different news outlets. The 2020 election was particularly intense, as Democrats anticipated a potential change of the party in the White House, as well as the possibility of gaining a majority in the Senate.<sup>38</sup> The process was further intensified as several key states took days to count all of the votes, including a much-increased number of mail-in ballots due to COVID-19.<sup>39</sup> During the 2020 primaries, 50.3% of votes were cast absentee or by mail.<sup>40</sup> During the 2020 presidential election, 46% of votes were cast by mail.<sup>41</sup> Due to the combination of Trump's loss in the 2020 election and far-right conspiracy theories suggesting that mail-in ballots are not legitimate, there is now a right-wing movement insisting that Joe Biden fraudulently won the election, and that Donald Trump is the rightful President.<sup>42</sup>

Although this conspiracy theory initially seemed innocuous, especially as courts all over the country and even the Supreme Court rebuffed lawsuits challenging the election results, it has culminated into a very real threat.<sup>43</sup> On January 6, 2021, Americans lived through a jarring piece of history as a Trump rally went from unmasked crowds attending a speech during a global pandemic to breaking into the Capitol where Congress was in the process of certifying the election results.<sup>44</sup> The riot itself took five lives, and at least one

38. Jacob Pramuk, *A Guide to 2020's Most Important Senate Races*, CNBC (Nov. 9, 2020), <https://www.cnbc.com/guide/the-most-important-senate-races/> [https://perma.cc/6YJR-X3J9].

39. Benjamin Swasey, *Election Night Viewer's Guide: Why You May Need to Be Patient*, NPR (Nov. 3, 2020), <https://www.npr.org/2020/11/03/929740947/election-night-viewers-guide-why-you-may-need-to-be-patient> [https://perma.cc/65JM-YKZ3].

40. Drew DeSilver, *Mail-in Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. CTR. (Oct. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread/> [https://perma.cc/7U78-PN2V].

41. CHARLES STEWART III, MIT ELECTION DATA + SCIENCE LAB, *HOW WE VOTED IN 2020: A FIRST LOOK AT THE SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS* (2020), <http://electionlab.mit.edu/sites/default/files/2020-12/How-we-voted-in-2020-v01.pdf> [https://perma.cc/9KS4-A3PX].

42. Abigail Censky, *How Misinformation Lit the Fire Under a Year of Political Chaos in Michigan*, NPR (Jan. 1, 2021), <https://www.npr.org/2021/01/01/952528193/how-misinformation-lit-the-fire-under-a-year-of-political-chaos-in-michigan> [https://perma.cc/TWQ9-GZWK].

43. William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY NEWS (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [https://perma.cc/9KX2-KETF]; Tucker Higgins, *Supreme Court Refuses Quick Action on Last-Ditch Trump Election Lawsuits*, CNBC (Jan. 11, 2021, 3:53 PM), <https://www.cnbc.com/2021/01/11/supreme-court-refuses-quick-action-on-trump-election-lawsuits.html> [https://perma.cc/6TNA-UJ5Q].

44. Robert O'Harrow Jr., *Rallies Ahead of Capitol Riot Were Planned by Established Washington Insiders*, WASH. POST (Jan. 17, 2021), [https://www.washingtonpost.com/proxygw.wrlc.org/investigations/capitol-rally-organizers-before-riots/2021/01/16/tigations/capitol-rally-organizers-before-riots/2021/01/16/c5b40250-552d-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/proxygw.wrlc.org/investigations/capitol-rally-organizers-before-riots/2021/01/16/tigations/capitol-rally-organizers-before-riots/2021/01/16/c5b40250-552d-11eb-a931-5b162d0d033d_story.html) [https://perma.cc/TWQ9-GZWK].

member of Congress has claimed that she and other representatives were nearly killed.<sup>45</sup>

The prevalence of this conspiracy theory, fueled by former President Trump himself, has illustrated the deadly ramifications of allowing widespread disinformation. For example, the day after the Electoral College certified President Joe Biden's victory, Donald Trump tweeted: "Tremendous evidence pouring in on voter fraud. There has never been anything like this in our Country!"<sup>46</sup> The "evidence" that the former President was referring to was rejected by every court in which he brought suits relating to the election. However, then-President Trump's efforts to undermine the election results began far prior to the Electoral College's certification—as early as May 2020, Trump was making claims about potential voter fraud.<sup>47</sup> The issue is further exacerbated by taking into account that social media sites profit off the purchase of advertising, whether or not it is accurate. Social media sites should not be permitted to profit from the purveyance of disinformation, especially when this disinformation has deadly ramifications.

### C. *Exploring Facebook and Twitter's Approaches to Regulating Political Advertising and Why They Should Be Held Accountable*

Although social media sites are considered the "middlemen" when it comes to advertising, they still have a moral and ethical responsibility to take action against procedural election advertising.<sup>48</sup> Social media sites have played a large role in expanding access to information on the Internet, but allowing this expanded access to go entirely unchecked permits and even promotes widespread disinformation.<sup>49</sup> Beyond this, some social media sites have engaged in anticompetitive behaviors, making it easier for them to govern as they see fit with no marketplace pressures.<sup>50</sup>

These social media sites actually profit from the prevalence of misinformation on their platforms. U.S. House Representative David

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45. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> [<https://perma.cc/U9EL-PQZQ>]; Barbara Sprunt, *'Many Of Us Narrowly Escaped Death': Rep. Ocasio-Cortez Recounts Capitol Insurrection*, NPR (Jan. 13, 2021), <https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/13/956398483/many-of-us-narrowly-escaped-death-rep-ocasio-cortez-recounts-capitol-insurrectio> [<https://perma.cc/3KHU-8EP5>].

46. CBSLA Staff, *Trump Tweets About Voter Fraud After Biden Electoral College Victory*, CBS L.A. (Dec. 15, 2020, 4:19 PM), <https://losangeles.cbslocal.com/2020/12/15/trump-tweets-about-voter-fraud-after-biden-electoral-college-victory/>.

47. *Trump Makes Unsubstantiated Claim that Mail-in Ballots Will Lead to Voter Fraud*, TWITTER (May 26, 2020), <https://twitter.com/i/events/1265330601034256384?lang=en> [<https://perma.cc/3YU3-FSGF>].

48. Brian Stauffer, *Social Media's Moral Reckoning: Changing the Terms of Engagement with Silicon Valley*, HUM. RTS. WATCH (2019), <https://www.hrw.org/world-report/2019/country-chapters/global-6#> [<https://perma.cc/L2L6-GGBT>].

49. *Id.*

50. *Id.*

Cicilline, who is leading an antitrust subcommittee investigation of tech giants, has emphasized that allowing the promulgation of misinformation and disinformation is actually a business decision which profits the companies.<sup>51</sup> Essentially, engagement drives profits, so removing the misinformation and disinformation that are producing engagement cuts down on the companies' profits.<sup>52</sup> House Speaker Nancy Pelosi has described social media sites' business model as one that "capture[s] your time and attention, even if it's at the expense of the truth."<sup>53</sup> Social media sites not only make money by selling ads, but by tracking users and selling their information and data.<sup>54</sup> With less engagement, there is less information and data available to sell.<sup>55</sup>

Although the federal government has the option of going after those who purchase advertising space and use it for nefarious purposes, providing the middlemen with an incentive to restrict this information will reduce the amount of disinformation that is actually disseminated. This may be analogized to selling a product in a store that does not contain the appropriate warning labels—if a person purchases a product and is injured by it, the person would likely try to hold both the store distributing the product and the creator of the product liable, even though the store only serves as the middleman. This is an aspect of tort law referred to as products liability, in which a party injured by a product may attempt to hold any parties involved in the "chain of manufacture" liable for their injury.<sup>56</sup> This approach encourages distributors, the "middlemen" of products, to take care in selecting which products to carry and to err on the side of not carrying products that could open them up to liability. In the same manner, permitting liability for social media sites that do not take action to prevent the spread of disinformation would encourage them to develop more stringent policies to insulate themselves from liability.

"Traditional media" such as broadcast television have developed norms for political advertising, but these norms have not transferred to new forms of media such as social media.<sup>57</sup> For example, cable networks have developed norms around fact-checking political ads for inaccuracies, and may refuse to air ads for that reason.<sup>58</sup> Two such ads, which CNN refused to air, were later

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51. Tatyana Hopkins, *Social Media Companies Profiting from Misinformation*, GW TODAY (June 19, 2020), <https://gwtoday.gwu.edu/social-media-companies-profiting-misinformation> [https://perma.cc/NB6F-ZEPX].

52. *Id.*

53. *Id.*

54. Chirag Shah, *It's Not Just a Social Media Problem — How Search Engines Spread Misinformation*, CONVERSATION (Mar. 10, 2021), <https://theconversation.com/its-not-just-a-social-media-problem-how-search-engines-spread-misinformation-152155> [https://perma.cc/G9PN-JKCW].

55. *Id.*

56. *Products Liability*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/products\\_liability](https://www.law.cornell.edu/wex/products_liability) [https://perma.cc/Y8FM-ZSD6].

57. Amber Herrle, *Regulating fact from fiction: Disinformation in political advertising*, BROOKINGS INST. (Dec. 20, 2019), <https://www.brookings.edu/blog/fixgov/2019/12/20/regulating-fact-from-fiction-disinformation-in-political-advertising/> [https://perma.cc/M322-G28P].

58. *Id.*

featured on Facebook.<sup>59</sup> The ads in question denounced the House Democrats' impeachment inquiry as a coup.<sup>60</sup>

Social media sites have taken somewhat different approaches in attempting to regulate political advertising. Twitter has taken an extreme approach when compared to other websites such as Facebook—it has globally banned the paid promotion of political content.<sup>61</sup> This means that while political candidates are permitted to have accounts and tweet on them—which are expressly labeled with their candidacy—they may not pay for their content to be promoted.<sup>62</sup> The ban extends to any political content, defined as referencing “a candidate, political party, elected or appointed government official, election, referendum, ballot measure, legislation, regulation, directive, or judicial outcome.”<sup>63</sup>

### 1. Twitter's Policies

Over a year before the 2020 election, Twitter's CEO, Jack Dorsey, announced that Twitter was banning political advertising altogether.<sup>64</sup> This policy prohibits ads of any type by candidates, political parties, elected government officials, or appointed government officials.<sup>65</sup> When it comes to the 2020 Presidential election, Twitter also took steps to combat disinformation by users, even though the content wasn't promoted through the site.<sup>66</sup> This highlights an important distinction in approaches—some sites are more hesitant than others to regulate content that users post that is not paid for. However, Twitter is willing to engage in regulation of user-generated content. On its blog, Twitter provided a lengthy explanation of the steps and policies it was putting into place in anticipation of the 2020 election.<sup>67</sup> The most significant step Twitter took was to flag tweets that violated its Civic Integrity Policy.<sup>68</sup> Further, tweets with misleading information from U.S. political figures were flagged with a warning that users had to tap or click before being able to view the tweet.<sup>69</sup> In addition, Twitter requires that users

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59. *Id.*

60. Michael M. Grynbaum & Tiffany Hsu, *CNN Rejects 2 Trump Campaign Ads, Citing Inaccuracies*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/business/media/cnn-trump-campaign-ad.html> [<https://perma.cc/8NJZ-CBUX>].

61. *Political Content*, TWITTER, <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html> [<https://perma.cc/BEB5-DTPH>].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Kate Conger, *How Twitter Policed Trump During the Election*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/technology/trump-twitter-labels-election.html> [<https://perma.cc/SME9-BTLE>].

67. Vijaya Gadde & Kayvon Beykpour, *Additional Steps We're Taking Ahead of the 2020 US Election*, TWITTER: BLOG (Nov. 2, 2020), [https://blog.twitter.com/en\\_us/topics/company/2020/2020-election-changes.html](https://blog.twitter.com/en_us/topics/company/2020/2020-election-changes.html) [<https://perma.cc/7WQG-VUDH>].

68. *Id.*

69. *Id.*

who are also U.S. election candidates have an election label on their Twitter profile “contain[ing] information about the office the candidate is running for, the state the office is located in, and (when applicable) the district number.”<sup>70</sup> Twitter’s specific election policy, focused on election integrity, is called the Civic Integrity Policy.<sup>71</sup> Labeled January 2021, the policy states:

You may not use Twitter’s services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. In addition, we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context.<sup>72</sup>

Twitter reserves the right to flag or remove tweets in violation of this policy.<sup>73</sup> The Civic Integrity Policy had previously been updated prior to the 2020 election, in anticipation of the potential purveyance of misinformation on Twitter’s platform.<sup>74</sup>

Although the policy may seem extreme, it may have paid off in terms of slowing the spread of disinformation. The Election Integrity Partnership, which “support[s] real-time information exchange between the research community, election officials, government agencies, civil society organizations, and social media platforms,” performed an analysis on one of then-President Trump’s tweets.<sup>75</sup> Before Twitter labeled the former president’s tweet with a misinformation notification that users had to click through, it was engaged with (shared or replied to) 827 times per minute.<sup>76</sup> After the label, engagement dropped approximately 82% to engagements occurring 151 times per minute.<sup>77</sup> Nonetheless, a group dedicated to

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70. *About Election Labels on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/election-labels> [<https://perma.cc/9K8U-AX7W>].

71. *Civic Integrity Policy*, TWITTER: HELP CTR., <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> [<https://perma.cc/Q929-WKSE>].

72. *Id.*

73. *Id.*

74. Ry Crist, *Twitter Lays Out Plan to Protect the Election from False or Misleading Tweets*, CNET (Sept. 10, 2020, 10:59 AM), <https://www.cnet.com/news/twitter-lays-out-its-plan-to-protect-the-election-from-false-or-misleading-tweets/> [<https://perma.cc/X8AH-LP4V>].

75. ELECTION INTEGRITY P’SHIP, *THE LONG FUSE: MISINFORMATION AND THE 2020 ELECTION* (2021), <https://www.eipartnership.net/> [<https://perma.cc/XM4W-AWFN>]; Kellen Browning, *After Twitter Labels Trump’s Tweet About Pennsylvania, Its Spread Slows*, N.Y. TIMES (Nov. 3, 2020, 2:15 PM), <https://www.nytimes.com/2020/11/03/technology/after-twitter-labels-trumps-tweet-about-pennsylvania-its-spread-slows.html> [<https://perma.cc/8A59-G7MF>].

76. Kellen Browning, *After Twitter Labels Trump’s Tweet About Pennsylvania, Its Spread Slows*, N.Y. TIMES (Nov. 3, 2020, 2:15 PM), <https://www.nytimes.com/2020/11/03/technology/after-twitter-labels-trumps-tweet-about-pennsylvania-its-spread-slows.html> [<https://perma.cc/K3DH-RWWQ>].

77. *Id.*

combating misinformation says that Twitter's policies would be more effective if decisions about whether and how to flag a tweet were made more quickly.<sup>78</sup>

Finally, following the January 6th, 2021 Capitol riots, Twitter chose to de-platform then-President Trump for inciting violence.<sup>79</sup> CEO Jack Dorsey made the call, announcing that the former President would be banned permanently from Twitter on the Friday following the riots.<sup>80</sup>

## 2. Facebook's Policies

Facebook has taken a different and arguably more hands-off approach. However, Facebook's approach is still surprising considering Mark Zuckerberg's previous stance on regulating political speech. In October 2019, Zuckerberg gave a speech at Georgetown University, emphasizing his belief in Facebook as a proponent of free speech.<sup>81</sup> This speech came after Senator and then-presidential candidate Elizabeth Warren accused Zuckerberg of making Facebook a disinformation-for-profit service.<sup>82</sup> In particular, Zuckerberg emphasized that "greater progress requires confronting ideas that challenge us," invoking historical figures such as Frederick Douglass and Dr. Martin Luther King Jr., as well as First Amendment freedoms of speech and expression.<sup>83</sup>

Facebook's policies surrounding the 2020 election have seemed to backpedal from Zuckerberg's October 2019 stance. These policies are primarily focused on ads surrounding procedural aspects of elections, including the promotion of reliable election results and stopping voter interference and fraud.<sup>84</sup> Facebook has provided a Voting Information Center (VIC), which the Bipartisan Policy Center has supplemented with facts about voting, including voting by mail.<sup>85</sup> The VIC served as a source of information for election results, showing the status of the presidential, U.S. Senate, U.S. House, and gubernatorial races.<sup>86</sup> It also provided information on voter registration and the ability for users to check their registration.<sup>87</sup> These

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78. *Id.*

79. Dylan Byers, *How Facebook and Twitter Decided to Take Down Trump's Accounts*, NBC NEWS (Jan. 14, 2021, 5:01 PM), <https://www.nbcnews.com/tech/tech-news/how-facebook-twitter-decided-take-down-trump-s-accounts-n1254317> [<https://perma.cc/4YKU-XHQ7>].

80. *Id.*

81. Cecilia Kang & Mike Isaac, *Defiant Zuckerberg Says Facebook Won't Police Political Speech*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/17/business/zuckerberg-facebook-free-speech.html> [<https://perma.cc/6BU6-WNZZ>].

82. Elizabeth Warren (@ewarren), TWITTER (Oct. 12, 2019, 10:01 AM), <https://twitter.com/ewarren/status/1183019880867680256> [<https://perma.cc/UT3S-GJER>].

83. See Kang & Isaac, *supra* note 81.

84. FACEBOOK, FACEBOOK'S POLICIES FOR ELECTIONS AND VOTING: WHAT YOU NEED TO KNOW (2020), <https://about.fb.com/wp-content/uploads/2020/10/Facebooks-Policies-for-Elections-and-Voting.pdf> [<https://perma.cc/S7GZ-KNBJ>].

85. *Id.*

86. *Id.*

87. *Id.*

procedures seemed to be aimed at combating claims that voting by mail is not a legitimate means of voting and that voting in person would cause people to contract COVID-19. Facebook also committed to removing ads by candidates or parties declaring a premature victory, and labeling posts from presidential candidates.<sup>88</sup> These labels noted that vote counting was still in progress and a winner had not yet been declared.<sup>89</sup>

Facebook has distinguished between procedural and substantive political ads in its policies based on its approach to the different types of ads. While ads promoting candidates were previously largely unrestricted, Facebook has expressly prohibited “explicit and implicit misrepresentation of the dates, locations, times and methods for voting or voter registration,” as well as “misrepresentation of who can vote, qualifications for voting, whether a vote will be counted, and what information and/or materials must be provided in order to vote.”<sup>90</sup> Ads of this sort are procedural because they concern voter registration and polling places. Thus, Facebook approaches them differently than ads oriented toward promoting a specific candidate or cause.

Facebook further instituted the policy that in the week leading up to the November 3, 2020 election, it would not permit any new political ads.<sup>91</sup> However, this policy was criticized for not having much of an effect because users are still able to see political ads generally, and, at the time the policy was instituted, millions of Americans had already cast their votes due to the early voting and mail-in ballot procedures instituted in several states due to the COVID-19 pandemic.<sup>92</sup> Therefore, the policy did not do much to protect those who had already voted, which was not an insignificant number of people.

On November 3, 2020, Facebook took the more drastic step of implementing a gag rule on “ads about social issues, politics or elections.”<sup>93</sup> The company also implemented a policy restricting the content of certain ads, including ads claiming widespread voter fraud, ads with premature claims of election victory, ads that delegitimize lawful methods of voting or vote-counting as illegal, and ads that delegitimize an election as fraudulent “because the result can’t be determined on the final day of voting and/or before ballots received after the final day of voting are lawfully counted.”<sup>94</sup> Ads of this type were expressly prohibited.<sup>95</sup> Additionally, Facebook banned

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88. *Id.*

89. *Id.*

90. *Id.*

91. See Steve Kovach, *Facebook’s Ban on New Political Ads Won’t Change Anything*, CNBC (Sept. 3, 2020, 3:44 PM), <https://www.cnbc.com/2020/09/03/facebooks-ban-on-new-political-ads-wont-change-anything.html> [<https://perma.cc/L943-5MHC>].

92. *See id.*

93. *What to Know About Facebook Advertising Around the Election*, FACEBOOK (Oct. 26, 2020), <https://www.facebook.com/business/news/facebook-ads-restriction-2020-us-election> [<https://perma.cc/S9KE-T2L9>].

94. *Information on Prohibited Ads Related to Voting and Ads About Social Issues, Elections*, META, <https://www.facebook.com/business/help/253606115684173>.

95. *Id.*

ads regarding the Georgia runoff election starting on January 6, 2021.<sup>96</sup> Until March 3, 2021, Facebook had not yet announced when the ban would be lifted.<sup>97</sup> On that day, Facebook announced that the ban would be lifted starting on March 4, 2021.<sup>98</sup>

In terms of content moderation, Facebook has taken fewer steps than Twitter. While both social media sites have some form of flagging available for false or misleading information about elections, the only posts that Facebook agreed to take down were those expressly stating that if an individual goes to a polling place, they will contract COVID-19.<sup>99</sup> Other user-generated content that was not purchased, but involved false or misleading information regarding election procedures, remained on the website with flags of some sort.<sup>100</sup>

Finally, Facebook also chose to ban then-President Trump in light of the January 6th Capitol riots.<sup>101</sup> The Facebook Oversight Board reviewed the ban in May 2021, and upheld it, but added that the case should be re-reviewed in six months.<sup>102</sup> Not only that, Facebook has gone further, banning the “voice of Trump” from its platform.<sup>103</sup> Lara Trump posted a video in which she interviewed the former President, and the platform took the video down, explaining that it would remove “further content posted in the voice of Donald Trump.”<sup>104</sup>

### 3. Parler’s Policies

Parler is a smaller social media site that entered the spotlight in early 2020.<sup>105</sup> Its popularity grew throughout 2020 as conservative media stars joined and promoted the social media platform.<sup>106</sup> Audiences migrated to the site from Facebook and Twitter, interested in the lack of “censorship” occurring on Parler in comparison to other sites.<sup>107</sup> However, this perceived lack of censorship led to Parler’s partial demise—after the January 6th Capitol riots, the site was removed from Google and Apple application stores, and

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96. Elena Schneider, *Facebook Lifts Political Ad Ban*, POLITICO (Mar. 3, 2021, 2:15 PM), <https://www.politico.com/news/2021/03/03/facebook-lifts-political-ad-ban-473368> [<https://perma.cc/C4T2-44EE>].

97. See Rodriguez, *supra* note 14.

98. See Schneider, *supra* note 96.

99. Steve Kovach, *Facebook to Ban New Political Ads in Week Before Presidential Election*, CNBC (Sept. 3, 2020), <https://www.cnn.com/2020/09/03/facebook-to-ban-political-ads-in-week-before-presidential-election.html> [<https://perma.cc/UP6Q-UPND>].

100. *Id.*

101. See Byers, *supra* note 79.

102. Mike Isaac, *Facebook Oversight Board Upholds Social Network’s Ban of Trump*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/05/05/technology/facebook-trump-ban-upheld.html> [<https://perma.cc/J4GD-HX63>].

103. *Facebook Bans ‘Voice of Trump’ From Platform*, BBC NEWS (Apr. 1, 2021), <https://www.bbc.com/news/world-us-canada-56598862> [<https://perma.cc/F5U7-KVA6>].

104. *Id.*

105. David Strom, *The Rise and Fall of Parler*, AVAST (Jan. 11, 2021), <https://blog.avast.com/the-rise-and-fall-of-parler-avast> [<https://perma.cc/E5KR-FKDC>].

106. *Id.*

107. *Id.*

Amazon revoked its server access.<sup>108</sup> Parler came back online on February 15, 2021.<sup>109</sup>

Parler's Community Guidelines, last updated on November 2, 2021, contain two pages enumerating Parler's two guiding principles in removing content.<sup>110</sup> The first principle is that Parler will remove content that indicates use of Parler as a tool for a crime, civil tort, or other unlawful act.<sup>111</sup> The second is that users may not post spam or use bots.<sup>112</sup> As compared with Facebook and Twitter's policies, these community guidelines are highly underdeveloped.

Some at Parler have apparently pushed for content moderation, but this has not been fruitful—former CEO John Matze was terminated on January 29, 2021, allegedly due to his push for stronger content moderation.<sup>113</sup> This isn't surprising, given that Parler prides itself on being a free speech platform free of censorship.<sup>114</sup>

#### 4. Comparisons

Each of Facebook's and Twitter's procedures have their challenges, and neither is a flawless approach to the issue. Twitter's blanket ban on political ads may level the playing field in terms of preventing candidates with more money from having larger platforms, but the number of followers and algorithms also come into play and may disadvantage new and smaller challenging candidates who do not yet have firm support.<sup>115</sup> Further, Twitter has ventured into user content moderation, a solution that the Federal Government would want to stay away from to avoid First Amendment implications.<sup>116</sup> Regulation of individual users' speech on social media sites is largely new territory, and mandating that social media sites regulate individual users would be a broad overhaul of the way social media sites currently operate and would very likely violate the First Amendment. Finally, in contrast to Facebook, Twitter did not provide links to a VIC, which is a helpful tool that makes reliable information about elections more accessible. This procedure would have helped in combatting disinformation and allowing users to be more informed about voting generally.

Facebook's approach to political advertising seems like a more feasible model for the Federal Government to orient its own regulations around. First,

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108. *Id.*

109. Stephanie Mlot, *Parler Is Back Online and 'Open to Americans of All Viewpoints'*, PCMAG (Feb. 16, 2021), <https://www.pcmag.com/news/parler-is-back-online-and-open-to-americans-of-all-viewpoints> [<https://perma.cc/A4DJ-CP42>].

110. *Community Guidelines*, PARLER (Feb. 14, 2021), <https://legal.parler.com/documents/guidelines.pdf> [<https://perma.cc/H5RB-BHU5>].

111. *Id.*

112. *Id.*

113. Michael Kan, *Parler CEO Fired Over Content Moderation Push*, PCMAG (Feb. 4, 2021), <https://www.pcmag.com/news/parler-ceo-fired-over-content-moderation-push> [<https://perma.cc/D4VS-ZKUD>].

114. *About Parler*, PARLER, <https://parler.com/main.php> (last visited Nov. 27, 2021).

115. See *Political Content*, *supra* note 61.

116. See *Civil Integrity Policy*, *supra* note 72.

Facebook has expressly banned procedural election disinformation, which has extremely important implications for democracy.<sup>117</sup> The protection of social media users from procedural election disinformation allows them greater accessibility to accurate information, which will likely lead to more votes successfully being cast and counted and will likely help prevent voter disenfranchisement. Second, Facebook has made a distinction between procedural election advertising and other political advertising about candidates, previously applying fewer restrictions to the latter.<sup>118</sup> This sets a precedent for that same distinction in federal regulations, making them more likely to withstand a First Amendment legal challenge because they are oriented around facts that may be proven as true or false, rather than speech of a political nature which the First Amendment was designed to protect.<sup>119</sup> The only Facebook policy that federal agencies would likely want to avoid implementing would be Facebook's blanket ban on any ads concerning political and social issues for four months after the election.<sup>120</sup> This policy, if applied by a federal agency, would almost certainly violate the First Amendment as an unconstitutional government restriction on protected speech.<sup>121</sup>

*D. The Federal Trade Commission Has Jurisdiction in this Area Because There Is Precedent for Regulation of Information and the Information at Issue Here Is Not Political Speech*

At first glance, one might think that this type of information should not be regulated at all, because it involves politics in some capacity, which is the crux of First Amendment jurisprudence. If it is regulated, one might think that either the Federal Communications Commission (FCC) or the Federal Election Commission (FEC) are best suited for the job. However, these two government agencies have extremely limited jurisdiction in this area. Further, significant barriers exist to creating a new agency dedicated to this particular area of regulation. As such, the job of regulating procedural election information is best suited to the Federal Trade Commission (FTC), despite the information's pseudo-political nature.

The FCC is not the right federal agency to regulate this type of content because it has limited jurisdiction in this area. The FCC's primary focus is "regulat[ing] interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S.

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117. See *Information on Prohibited Ads Related to Voting and Ads About Social Issues, Elections*, *supra* note 94.

118. See FACEBOOK, *supra* note 84.

119. Ellada Gamreklidze, *Political Speech Protection and the Supreme Court of the United States*, NAT'L COMM'N ASS'N (Oct. 1, 2015), <https://www.natcom.org/communication-currents/political-speech-protection-and-supreme-court-united-states> [<https://perma.cc/2D5Z-NW82>].

120. See *What to Know About Facebook Advertising Around the Election*, *supra* note 93.

121. See Gamreklidze, *supra* note 119.

territories.”<sup>122</sup> The FCC does regulate some areas of political advertising, but its regulations are limited to broadcast stations, cable television, and direct broadcast satellite service.<sup>123</sup> As such, the FCC is primarily focused on communications infrastructure, rather than any form of content moderation, user-generated or purchased.<sup>124</sup> The only potential exception here is section 230, but this Act does not actually grant the FCC any authority over ISPs.<sup>125</sup> The issue of FCC jurisdiction regarding section 230 was brought into question in 2020, after the National Telecommunications and Information Administration submitted a petition for rulemaking with the FCC, seeking clarification of the provisions of section 230.<sup>126</sup> The petition garnered over 1,000 comments in response, many of which expressed brief support for the petition filed at the direction of then-President Donald Trump.<sup>127</sup> However, many trade associations and think tanks also provided comments on the petition, insisting that the FCC does not have the ability or jurisdiction to interpret § 230.<sup>128</sup> Although section 230 is tangentially related to procedural election information, these responses illustrate how this type of information is likely not within the FCC’s jurisdiction to regulate.

The FEC similarly has virtually no authority to regulate procedural election information. The FEC’s focus is on campaign finance law, including public disclosure of the funds that candidates raise.<sup>129</sup> The FEC was initially created to “administer such reform efforts as limiting campaign contributions, facilitating disclosure of campaign contributions and overseeing public funding of presidential elections.”<sup>130</sup> Because the FEC is focused so narrowly on campaign finance, it is unlikely it would feasibly have jurisdiction in this area.

The FTC is the most likely of these three agencies to have jurisdiction in this area. The Federal Trade Commission Act of 1914 empowers the FTC to “prevent unfair methods of competition and unfair acts or practices in or affecting commerce.”<sup>131</sup> Since its inception in 1914, assorted Congressional

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122. *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> [https://perma.cc/AT6T-NEBC].

123. *Statutes and Rules on Candidate Appearances & Advertising*, FCC, <https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising> [https://perma.cc/RRR4-G2JB].

124. Devin Coldewey, *Who Regulates Social Media? Good Question!*, TECHCRUNCH (Oct. 19, 2020), <https://techcrunch.com/2020/10/19/who-regulates-social-media/> [https://perma.cc/9523-3XNY].

125. *Id.*

126. Petition for Rulemaking of the Nat’l Telecomms. & Info. Admin. at 15-16, Section 230 of the Commc’ns. Decency Act of 1934, RM-11862 (Aug. 3, 2020) [hereinafter Petition].

127. Josh Turner et al., *230 Petition Commenters Question FCC Authority, Argue NTIA Proposal Unconstitutional, Bad for Tech*, WILEY: CONNECT (Sept. 4, 2020), <https://www.wileyconnect.com/home/2020/9/4/230-petition-commenters-question-fcc-authority-argue-ntia-proposal-unconstitutional-bad-for-tech> [https://perma.cc/HK53-MNUY].

128. *Id.*

129. *Mission and History*, FED. ELECTIONS COMM’N, <https://www.fec.gov/about/mission-and-history/> [https://perma.cc/PH3M-SWVL].

130. *Federal Election Commission Regulates Presidential Campaigns*, U.S. EMBASSY IN NOR., <https://no.usembassy.gov/education-culture/about-the-usa/us-elections/federal-election-commission-regulates-presidential-campaigns/> [https://perma.cc/DC6L-5BM3].

131. 15 U.S.C. § 45.

statutes have delegated authority to the FTC in varying capacities, especially in the areas of promoting competition and consumer protection.<sup>132</sup> The FTC's power has historically included regulation of advertising, as illustrated in its Truth in Advertising laws.<sup>133</sup> This type of regulation has typically excluded political advertising.<sup>134</sup>

However, the FTC's regulation exception for political advertising is understood to involve ads purchased by candidates encouraging individuals to vote for them and expressing their stances or policies.<sup>135</sup> Political speech in this context involves ideas, opinions, stances, and perspectives.<sup>136</sup> This information is different in nature from procedural election information including polling places, registration information, and the status of election races because the latter is factual information. Procedural information about elections is either true or false, whereas the political advertising exempt from FTC regulation is "political speech" of the nature that the First Amendment is meant to protect.

The Supreme Court has distinguished advertising and commercial speech as distinct from political speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the defendants were convicted of violating a Virginia statute that deemed pharmacists guilty of unprofessional conduct for publishing advertisements for drugs available exclusively by prescription.<sup>137</sup> This statute effectively prevented pharmacists from disseminating any pricing information, making a competitive market more difficult.<sup>138</sup> The Supreme Court struck down the statute, holding that although commercial speech is protected by the First Amendment, it does not have the same value as political speech and thus may be subject to some regulation.<sup>139</sup>

Not only that, but the FTC's existence has also illustrated that the Court does not consider the two types of speech to be the same. If commercial and political speech were of the same caliber, the FTC would not be able to regulate commercial speech in any capacity, as this regulation would be seen as a violation of the First Amendment. Therefore, Supreme Court jurisprudence has illustrated that even when speech affords some First Amendment protections, that does not necessarily mean that it is exempt from regulations entirely.<sup>140</sup>

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132. *Statutes Enforced or Administered by the Commission*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/statutes> [<https://perma.cc/B4BF-YDN7>].

133. *See Truth In Advertising*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising> [<https://perma.cc/UVV2-SNSX>].

134. Liza Lucas, *VERIFY: No, Truth In Advertising Laws Do Not Apply to Political Ads*, WCNC (Oct. 23, 2020), <https://www.wncn.com/article/news/verify/political-ads-truth-in-advertising-laws-election-2020/85-a9b12c2b-c3c7-4284-9f8e-e0e89dc47f85> [<https://perma.cc/WZ5U-JCES>].

135. *Id.*

136. *Id.*

137. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 748-50 (1975).

138. *Id.* at 752-54.

139. *Id.* at 770-71.

140. *Id.*

Considering these categories of speech, the question then becomes under which category procedural information about elections is a better fit. This type of information could be political speech because it relates to elections and therefore is inherently political. However, in its policies, Facebook has distinguished procedural election information from political speech that it has previously chosen not to regulate, indicating that it does not view procedural election information as political speech.<sup>141</sup> This approach reflects the notion that procedural election information is separate and distinct from political speech that expresses viewpoints or encourages an information consumer to vote for or against a specific candidate or issue.

However, commercial speech typically “does no more than propose a commercial transaction.”<sup>142</sup> Procedural election information is not well-suited to fit under this category either, because it does not advertise a transaction. Most likely, procedural information about elections falls into neither category, but nonetheless falls under the jurisdiction of the FTC due to its regulation in tangentially related areas and the fact that procedural election information can be easily verified as accurate or rejected as misleading.

The FTC engages in regulation in a broad array of categories, encompassed by a theme of protecting consumers and promoting competition.<sup>143</sup> The FTC regulates not only products themselves, but the advertisement of these products and advertising in general.<sup>144</sup> Many statutes that delegate authority to the FTC do not necessarily regulate specific products, but rather regulate or involve the FTC in regulating information about products.<sup>145</sup>

The Sober Truth on Preventing Underage Drinking Act (STOP Act) is a prime example of FTC involvement in regulating information.<sup>146</sup> This Act established the “Interagency Coordinating Committee on the Prevention of Underage Drinking, of which the FTC is a member.”<sup>147</sup> This Act is part of a government initiative to reduce underage drinking in the name of public health.<sup>148</sup> The Committee is tasked with policy and program development.<sup>149</sup> The FTC in particular is tasked with measuring underage exposure to messages about alcohol in advertising and “the entertainment media.”<sup>150</sup> The FTC’s power in this area is to make a report not only concerning for-profit advertising, but how alcohol and underage drinking are portrayed in the media.<sup>151</sup> This approach illustrates that the FTC’s jurisdiction may extend beyond mere regulation of for-profit advertising to include reports and analysis of information and exposure to media that goes beyond strictly advertising.

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141. See FACEBOOK, *supra* note 84.

142. See *Va. State Bd. of Pharmacy*, 425 U.S. at 760-763.

143. See *Truth In Advertising*, *supra* note 133.

144. See *id.*

145. See *id.*

146. 42 U.S.C. § 290bb-25b.

147. *Id.* § 290bb-25b(c).

148. *Id.* § 290bb-25b.

149. *Id.* § 290bb-25b(c)(1)(D).

150. *Id.* § 290bb-25b(c)(1)(F).

151. *Id.* § 290bb-25b(c)(1)(F).

Another example of the FTC regulating information is the Protecting Children in the 21st Century Act.<sup>152</sup> This Act tasks the FTC with “encourag[ing] best practices for internet safety and facilitat[ing] access to awareness and education campaigns.”<sup>153</sup> In so doing, the FTC is required to submit a report to Congress about the activities it has carried out under the Act.<sup>154</sup> This delegation is different from the STOP Act because it empowers the FTC more extensively, as it has the ability to engage in education campaigns and promulgate best practices.<sup>155</sup> As such, it illustrates that the FTC can do more than merely research and report on areas of information regulation—it may actually be able to engage in some form of regulation.

Based on Congress’ ability to delegate some form of regulation of information in these areas, it is similarly feasible for Congress to narrowly and specifically delegate regulation of procedural election information advertised on social media sites. The scope of this delegation would have to be very narrow so as to not invoke First Amendment protections or the nondelegation doctrine. These potential challenges are explored in Part III below.

### III. ANALYSIS

#### A. *Potential Legal Challenges*

##### 1. Delegation to the FTC Will Help Insulate Regulations from Judicial Scrutiny Under the *Chevron* Doctrine

Delegation to the FTC is a superior legal solution than legislation for two reasons. First, the Supreme Court is more hesitant to get involved in regulations that have been delegated to an agency than in legislation regulating a certain area, as long as the delegation is not itself unconstitutional. Second, delegation allows the FTC, which is better equipped and in a better position to promulgate these regulations, to consult the social media sites they will be regulating and develop best practices based in part on these consultations.

Generally speaking, delegations of authority to federal agencies are upheld as long as the legislature includes an “intelligible principle” for the delegation.<sup>156</sup> The “intelligible principle” doctrine was mostly famously discussed in *Whitman v. American Trucking Associations, Inc.* In that case, legislation required the Environmental Protection Agency (EPA) to promulgate air quality standards.<sup>157</sup> The plaintiffs brought suit because they didn’t like the standards the EPA promulgated, so they challenged the

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152. 15 U.S.C. §§ 6552-6553.

153. *Id.* § 6552.

154. *Id.* § 6553.

155. *Id.* § 6552.

156. *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 457-58 (2001).

157. *Id.* at 457.

congressional delegation of authority as unconstitutional.<sup>158</sup> The Court determined that there was an intelligible principle in the statute delegating authority because there were limits on the EPA's authority.<sup>159</sup> The Supreme Court has rarely found that there is not an intelligible principle in a statute delegating authority—it will generally only find lack of an intelligible principle where there is no guidance or where authority conferred is very broad and with little justification.<sup>160</sup>

As long as the delegation is constitutional, the Supreme Court would likely uphold the agency action under *Chevron* deference.<sup>161</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* was a Supreme Court case also involving the EPA in which the plaintiffs challenged the EPA's construction of a statute as unconstitutional.<sup>162</sup> The Court declined to hold that either the delegation or the EPA's construction of the statute was impermissible.<sup>163</sup> Here, the Court afforded significant deference to federal agency interpretation of a delegating statute, and noted that an agency's interpretation need not be the best interpretation, merely that the interpretation be permissible under the statute.<sup>164</sup> In particular, the Court noted that agencies are in the best position to interpret statutes that delegate authority, because they have resources and subject matter expertise.<sup>165</sup>

Some states have seen success in instituting legislation in this area. As of 2014, twenty-seven states prohibited misrepresentation in some form within campaign advertising.<sup>166</sup> The categories of false statements or misrepresentation in these laws includes incumbency, endorsements, voter information, veteran status, false statements, and other prohibitions.<sup>167</sup> However, in four of those states, legislation in these areas has been struck down as unconstitutional.<sup>168</sup> This does not bode well for Congress if it seeks to legislate in this area rather than delegating the task to a federal agency. Further, Congress does not really have the resources to regulate this area itself, and would at a minimum have to delegate the task of enforcement to an agency. Because it does not have subject matter expertise in the area, it may as well delegate the development of regulations to an agency instead.

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158. *Id.* at 457-59.

159. *Id.* at 458-59.

160. *Id.* at 474.

161. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 838 (1984).

162. *Id.* at 837-38.

163. *Id.*

164. *Id.* at 843.

165. *Id.* at 865-66.

166. Mark Listes & Wendy Underhill, *Campaign Fair Practice Laws (Is There a Right to Lie?)*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2014), <https://www.ncsl.org/research/elections-and-campaigns/campaign-fair-practice-laws-is-there-a-right-to-lie.aspx> [https://perma.cc/MNH4-K95E].

167. *Id.*

168. Matt Vasilogambros, *Political Candidates Don't Always Tell the Truth (And You Can't Make Them)*, PEW CHARITABLE TRUST (Mar. 21, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/03/21/political-candidates-dont-always-tell-the-truth> [https://perma.cc/5WC5-4NDH].

Therefore, under the intelligible principle standard, *Chevron* deference, and general principles of administrative law, the FTC is best suited to promulgate regulations in this area.

## 2. First Amendment Jurisprudence in this Area Is Unclear

If a litigant chose to go after the substance of the regulations, rather than Congress' authority to delegate or the FTC's jurisdiction in this area, it is unclear how it would play out given Supreme Court First Amendment precedent. Major considerations include whether social media sites are analyzed as public forums and the nature of the speech at issue.

Public forums are public or government-owned spaces in which speech generally may not be regulated.<sup>169</sup> Supreme Court precedent indicates that public forums are not created where the activity at issue is commercial in nature or where the forum is not open to indiscriminate public use.<sup>170</sup> Under this doctrine, it is unlikely that advertising space on social media sites constitutes a public forum. First, the decision to purchase advertising, even for procedural election information, is commercial in nature. In *Lehman v. City of Shaker Heights*, the Supreme Court in a plurality opinion held that a government-owned form of transit with advertising space available for purchase was not a public forum, because the activity at issue was commercial in nature.<sup>171</sup> The Court reasoned that the city was engaged in commerce and had chosen to limit advertising in a viewpoint-neutral way by not permitting any political advertising.<sup>172</sup> Second, the purchase of advertising is not open to indiscriminate public use, because users wishing to purchase advertising have to go through processes to make the purchases, including following both FTC and individual website regulations and policies.<sup>173</sup> Even explicit political advertising space purchased on Facebook requires disclaimers and a certification process.

However, there is an argument to be made that social media sites generally are considered public forums, since the public has access to them unless they are permanently banned for misuse. Despite this, the most convincing argument for a social media site to not be considered a public forum is that social media sites are not owned by the government—they are owned by private companies and thus are private entities. In some cases, government actors may create public forums on a social media site with a

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169. David L. Hudson Jr., *Public Forum Doctrine*, FREE SPEECH CTR. (Jan. 8, 2020), <https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine> [<https://perma.cc/7DTK-YWVB>].

170. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301-303 (1973); *Perry Educators' Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

171. *Lehman*, 418 U.S. at 303.

172. *Id.* at 304.

173. *Facebook Advertising Policies*, FACEBOOK, <https://www.facebook.com/policies/ads/> (last accessed Feb. 2, 2022) [<https://perma.cc/AZ4Z-M2WK>].

specific profile page,<sup>174</sup> but generally speaking, social media sites likely would not be considered a public forum.

Further, it is unclear whether the nature of the speech here would be found to be political, commercial, or neither.<sup>175</sup> The Court has expressed that commercial speech “does no more than propose a transaction.”<sup>176</sup> Within First Amendment jurisprudence, the Court has not expressly defined political speech. However, as discussed above, social media sites have distinguished political advertising from procedural election information, making it more likely that this distinction will become more widely accepted. Whether the Court views procedural election disinformation as high or low value speech may bear on how it chooses to analyze agency regulations.

Despite these confusions, this regulation would likely be considered content-based, because it regulates the content of the speech—procedural election information. Content-based regulations are reviewed under strict scrutiny, requiring a statute to be narrowly tailored to advance a compelling government interest.<sup>177</sup>

If the language of the statute clearly delineated that the FTC may promulgate regulations specifically in the area of procedural election information, this would more likely fulfill the narrowly tailored element of strict scrutiny, or perhaps not invoke strict scrutiny if the Court were to find that this is not the type of high value speech that the First Amendment protects absolutely. After all, false information about election results, polling places, and how to register to vote are low value when compared with the high value speech of political opinions and stances candidates express in advertisements about their candidacy.

The government has a compelling interest in promoting fair access to voting, as well as promulgating accurate information about elections. This interest is essential to democratic governance, so the Court would be inclined to find a compelling government interest here.

However, it is unclear how exactly the Supreme Court would perform analysis in the present case because the proposed legislation is to delegate to the FTC, which would subsequently promulgate regulations. Because of the level of insulation that delegation to the FTC provides, it is unclear whether the Court would choose to evaluate the content of the regulations, and if the Court did choose to evaluate, the means by which it would do so.

### *B. Federal Regulation Is Superior to State Regulation Because It Provides Uniformity*

Although the states could individually regulate procedural election advertisements, it makes more sense to regulate at the federal level, at least

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174. Knight First Amend. Inst. v. Trump, 953 F.3d 216, 218 (2d Cir. 2020).

175. See *supra* text accompanying notes 137–42.

176. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760–763 (1975).

177. Brown v. Ent. Merchs. Ass’n, 564 U.S. 786, 799 (2011).

advertisements regarding federal elections, to promote uniformity and to ease the burden on social media sites.

First, uniformity in how to approach procedural disinformation is highly important. If different states have different standards or procedures for how they regulate this information, disinformation could still easily be promulgated if residents of one state share screenshots or provide information via word of mouth. Further, the varying standards could cause even more confusion than the initial disinformation. For example, if one state mandates that social media sites “flag” inaccurate election information while another mandates that they remove it entirely, there would be confusion about this disparity among users of different states if they communicate amongst each other. The difference in approaches may foster distrust in regulations and undermine the entire effort if people don’t believe the regulations are accurate.

Further, adhering to state-by-state regulations would place a significant burden on social media sites, because having a different approach in each state would be more difficult to adopt than a uniform approach. As a result, social media sites would likely end up adapting the strictest state’s regulations, which would result in uniformity anyways. However, this would make a potentially overbroad approach the norm, running the risk of depriving social media users of information they should be able to freely view and interact with.

At a minimum, there should be uniformity in procedural advertising regulations for federal elections which concern citizens of every state. Disinformation about an election at the state level is not as harmful to individuals who do not vote in or have no personal ties to a particular state. However, federal elections concern all U.S. citizens. If one state is permitting disinformation about which candidate was chosen in a federal election, and another is not, the conflicting information across state lines would wreak havoc and cause more confusion. This would also undermine the intention of the regulations by causing social media users to distrust the inconsistencies in the regulations and thus to distrust election results generally.

### *C. Section 230 of the Communications Decency Act Has Opened the Door for Regulations in this Area*

Section 230 of the Communications Decency Act protects Internet Service Providers (ISPs) from liability for content that its users post.<sup>178</sup> Throughout most of 2020, section 230 was a hot-button topic in the news, as then-President Trump and Democrats alike called for either reform or repeal of the legislation.<sup>179</sup> The primary argument for amending, reforming, or repealing the legislation is that its protections are overbroad, allowing ISPs to

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178. 47 U.S.C. § 230.

179. Anshu Siripurapu, *Trump and Section 230: What to Know*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2020), <https://www.cfr.org/in-brief/trump-and-section-230-what-know> [<https://perma.cc/ED6R-UCWU>].

do virtually whatever they like in terms of regulating content and advertising without facing any liability.<sup>180</sup>

Whatever the future of section 230 may be, it has brought about a larger conversation about the overprotected and anticompetitive nature of Big Tech, and the different ways in which this level of control might be harmful. Given the current climate surrounding section 230 and Big Tech's power, the public likely would not view a specific and narrow delegation as contemplated in this Note as very controversial in comparison to a sweeping repeal of section 230.

#### *D. Creating A New Agency Is an Inefficient and Inferior Solution*

Creating a new agency to regulate this area would likely be more trouble than it is worth, especially considering that there is already an agency that could be regulating this area. First, Congress would have to write an organic statute that creates the new agency and delegates specific powers to that agency. While this legislation would be more likely to pass with Democrats taking control of both the House and the Senate, it may still face challenges—it will likely be scrutinized more strictly because it is regulation of information that is adjacent to political advertising. Further, the Democrats in the Senate hold a razor-thin majority, as each party holds 50 seats, rendering Vice President Kamala Harris the tie-breaking vote if every representative votes down their party lines.<sup>181</sup> If even one Democrat or Vice President Harris chose to break ranks, the legislation to create a new agency would not pass.

Second, even if Congress were successfully able to create this new agency, it would face difficulties in getting started. The prevention of disinformation on social media during and approaching elections is an omnipresent and ongoing issue that requires a shifting approach, as Facebook has illustrated with its choice to ban all political advertising starting on November 4.<sup>182</sup> The new agency would be diving in headfirst and building itself from the ground up at the same time, and that level of multitasking would likely make the agency ineffective at the start. Further, even if the agency were created the day after the 2020 election, it likely would not be fully functional by the time 2022 mid-term elections rolled around.

Delegating this authority to an already-existing agency is superior. As discussed above, the FTC does not only regulate commercial advertising, but also participates in the regulation of information in certain expressly delegated instances.<sup>183</sup> Narrowly expanding the areas in which the FTC has been delegated jurisdiction to include regulation of procedural election

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180. Alan Rozenshtein, *Section 230 and the Supreme Court: Is Too Late Worse Than Never?* LAWFARE (Oct. 20, 2020), <https://www.lawfareblog.com/section-230-and-supreme-court-is-too-late-worse-than-never> [<https://perma.cc/93AM-RDXY>].

181. Emma Hinchliffe, *Kamala Harris Could Make Even More History - as the Senate's Tiebreaker*, FORTUNE (Jan. 20, 2021), <https://fortune.com/2021/01/20/kamala-harris-vp-senate-tiebreaker-biden/> [<https://perma.cc/C24V-LGFV>].

182. See *What to Know About Facebook Advertising Around the Election*, *supra* note 93.

183. See *supra* text accompanying notes 143-55.

information is a much more feasible solution than creating an entirely new agency exclusively for that purpose.

Additionally, the FTC has existed for over 100 years.<sup>184</sup> It has had time to develop and build up agency infrastructure and is thus equipped to take on additional responsibilities. Further, it has already begun to engage in some form of regulation involving information and the Internet, so it won't be venturing into entirely unexplored areas.<sup>185</sup> These elements of the FTC indicate that it is ready to take on the new challenge of regulating procedural election information with little additional burden.

### *E. Public Policy Calls for Regulations in this Area*

The tumultuous 2020 election and the state of United States politics since then have illustrated that there is a public interest in regulation in this area. The promulgation of procedural election misinformation disenfranchises voters, creates mistrust in media generally, and emboldens those who create or share misinformation in any form.

First, procedural election misinformation disenfranchises voters. Those who have inaccurate information about registration or polling places may end up not voting because they think it's too much of a hassle, accidentally show up at the wrong polling place and are turned away, or do not realize they have not been registered to vote by the deadline and are turned away. These possibilities create barriers for citizens interested in voting and may lead to them giving up on having their vote counted in the election.

Second, procedural election misinformation creates distrust in media generally. Whenever someone views an advertisement containing misinformation and is able to identify it as misinformation, they may become distrustful of other advertising on that social media site or media in general. This distrust makes it difficult for users to trust actual reliable information, which in turn may also lead to voter disenfranchisement.

Finally, seeing misinformation being successfully promulgated may embolden those who create misinformation or who profit from it to continue to do so, thus furthering the problem.

### *F. How the FTC Should Proceed with Regulations*

A legislative delegation of authority to the FTC regarding procedural election information is likely to withstand legal challenges.<sup>186</sup> As discussed above, the statute will need to be narrowly and specifically drawn such that the FTC's jurisdiction is restricted to procedural election information, including information about polling places, how to register to vote, and the ongoing status of election races. The statute will be more likely to withstand scrutiny if it specifically enumerates these three categories and uses limiting

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184. *About the FTC*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/G3ZT-TPM5>].

185. *See supra* text accompanying notes 143-55.

186. *See supra* text accompanying notes 156-76.

language, rather than using ambiguous language that is open to significant FTC interpretation.

The statute will also need to specify the context of regulating advertisements paid for and featured on social media sites, rather than regulation of any user-posted content. Although it may seem obvious that federal agencies should not tread in the arena of regulating user-generated, unpaid content, this specification will also help to shield both the legislation and the agency from significant First Amendment challenges. This way, the legislation and the agency are less likely to face legitimate legal First Amendment scrutiny claiming government regulation of speech that should remain unregulated.

Assuming this delegation withstands legal challenges, the statute would likely follow the approach of other statutes delegating authority to the FTC to allow it to promulgate regulations as it sees fit. Typically, this would mean that the FTC is not required to engage in informal notice-and-comment rulemaking that other federal agencies such as the FCC perform.<sup>187</sup> However, perhaps a better approach would be either for the FTC to voluntarily conduct hearings, or the statute to mandate that the FTC conduct hearings. During these hearings, social media site representatives could explain their current approaches in regulating procedural election information. This way, the FTC could use their input in promulgating the regulations that all the social media sites would be following, thereby lessening the burden that these sites will face in making adjustments to the federal regulations.

If the statute were to take the latter approach in requiring hearings, the FTC would likely take the approach of informal notice-and-comment rulemaking. This would help to insulate the legislation and agency action from legal claims by the social media sites themselves—they could claim that they deserve a say in an area that substantially affects part of the way they operate, and therefore should be afforded due process.

Ideally, after either voluntary or legislatively mandated hearings, the FTC would choose to regulate this area of disinformation in an approach similar to the one Facebook has taken. These regulations should focus on three areas: removal of disinformation advertising, flagging misleading (but not expressly false) advertising, and temporal limitations.

First, the FTC should implement a zero-tolerance policy for expressly inaccurate procedural election information. This would mandate that social media sites scrutinize advertising relating to procedural aspects of elections and decline to display those that contain expressly inaccurate information. By mandating this review, procedural election disinformation is less likely to even enter the information stratosphere, causing less harm. Both Facebook and Twitter have already taken this approach, as Facebook had banned procedural election disinformation before its blanket ban on political advertising, and Twitter also has a blanket ban on political advertising.<sup>188</sup>

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187. *Rulemaking Process*, FCC, <https://www.fcc.gov/about-fcc/rulemaking-process> [<https://perma.cc/7S6W-CJS8>].

188. See TWITTER, *supra* note 61; Byers, *supra* note 79.

Second, the FTC should mandate that advertising that is not expressly inaccurate, but is misleading, should be flagged as such. This way, users would get a visual notification that the source they are relying on may not be accurate, and that they should check other sources. The flagged content could also provide a link leading to an election center, such as Facebook has done, but this should be left to the discretion of social media sites as to what information they wish to include.

Finally, there should be temporal limitations. While this will be a prevalent issue as long as free elections exist in the United States, elections are not constantly going on. The FTC should limit its regulation in this area to registration deadlines and leading up to and immediately following elections. These are the times when accurate procedural election information is most imperative and disinformation is most dangerous.

While the above areas should be promulgated as regulations that social media sites must follow, the FTC should also release reports on further best practices, providing recommendations for other actions that social media sites could take. These best practices could include providing an election information center of the nature Facebook provided.

These solutions most closely follow the approach that Facebook has taken.<sup>189</sup> While Twitter's approach works as they are a private company, it is not a feasible model to follow as a federal agency. A global, blanket ban on paid political content would almost certainly go beyond the scope of the statute delegating authority and would further fail to withstand a First Amendment challenge.

#### IV. CONCLUSION

Regulation of paid procedural election information will help to prevent the spread of disinformation and begin the process of restoring the American's people's trust in fair and accurate elections. Citizens have the right to accurate information about the voting process, and the proposed solution will not significantly harm Big Tech companies like Facebook and Twitter, who already engage in both advertising and user content moderation.<sup>190</sup> The potential First Amendment harms—which may or may not be explored should the regulations or the delegation itself face legal challenges—are minimal when compared with the benefits of preventing false procedural election information from being spread, especially when this spread of false information has proven to be deadly.<sup>191</sup> Ultimately, this legislation and the subsequent FTC regulations will protect the American people and begin to restore some of the equilibrium and trust that has been lost over the 2020 election process.

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189. See *supra* text accompanying notes 81-104.

190. See *supra* text accompanying notes 64-104.

191. See *supra* text accompanying notes 156-76.