

Statement for the Record

House Select Committee to Investigate the January 6th Attack on the United States Capitol

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Social Media and the Weaponization of Free Speech

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I. Introduction

On January 6, 2021, the nation watched as a mob of thousands descended upon the Capitol with the intention of subverting democracy through brute force. The rioters attacked police officers with a fire extinguisher; dragged an officer down several steps and beat him with an American flag; attempted to locate and assassinate Speaker of the House Nancy Pelosi; constructed a gallows on Capitol grounds and called for the hanging of Vice-President Mike Pence; ransacked Congressional offices; looted federal property; and forced terrified elected officials and their staff into hiding for several hours.¹ Four people died during the riot and five law enforcement officers who responded to the event died in the days and weeks following the event.²

As is often the case with acts of coordinated brutality, the Jan. 6 insurrection has many fathers. They include of course the domestic extremists who physically carried out the attack, but also the political figures who encouraged or excused it, the intelligence community that failed to warn or protect against it, and the online platforms that allowed them to promote and plan it. The through line connecting these diverse entities is an inaccurate and dysfunctional view of the First Amendment: from far-right militia groups such as the “Oath Keepers” who invoke the Constitution to justify racist and misogynist violence, to the federal agencies that failed to issue a threat assessment in advance of Jan. 6 because online posts threatening violence towards government personnel and property were “First Amendment protected speech,”³ to the Republican National Committee members who characterized the Capitol attack as “legitimate political discourse,”⁴ to the tech companies who wax poetic about free speech principles to justify their monetized passivity toward extremist content.

The First Amendment looms large over discussions about what can and should be done to impose accountability for the attack and to prevent similar incidents from occurring in the future. The Jan. 6 attack, along with other extremist plots targeting state capitals and state officials, highlights the pernicious influence of misinformation, disinformation, and malinformation

¹ Luke Mogelson, [Among the Insurrectionists](#), New Yorker, Jan. 15, 2021.

² Chris Cameron, [These Are the People Who Died in Connection With the Capitol Riot](#), N. Y. Times, Jan. 5, 2022.

³ Aaron C. Davis, [Red Flags](#), Wash. Post, Oct. 31, 2021.

⁴ Jonathan Weisman & Reid J. Epstein, [G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse’](#), N. Y. Times, Feb. 4, 2022.

(MDM)⁵ on public safety and security. False claims about election fraud, COVID treatments, vaccine mandates, and a host of other controversial topics have helped radicalize and mobilize a far-flung network of disaffected Americans. Calls for effective counter-disinformation and anti-extremism measures have been tempered with cautionary reminders not to impinge upon First Amendment rights.

What is rarely acknowledged in these discussions is the extent to which misinformation *about the First Amendment itself* distorts policy debates and legislative interventions. This statement for the record is intended to highlight how a dysfunctional, fundamentalist, and anti-democratic vision of the First Amendment fuels and protects the extremism that led to the Capitol attack, with particular focus on the tech industry's role in promoting that vision. Understanding and addressing the extent to which free speech doctrine and practice has been instrumentalized for destructive cultural, political, and financial ends is necessary to ensure that the First Amendment does not become, as Supreme Court Justice Robert H. Jackson warned in 1949, a "suicide pact."

II. First Amendment Misinformation

The term "misinformation" is often used as shorthand for three distinguishable but often overlapping types of harmful information: information that "is false, but not created or shared with the intention of causing harm" (misinformation); information that "is deliberately created to mislead, harm, or manipulate a person, social group, organization, or country" (disinformation); and information that "is based on fact, but used out of context to mislead, harm, or manipulate" (malinformation).⁶ All three of these forms contribute to what I have termed "First Amendment fundamentalism,"⁷ or the quasi-religious, selective invocation of the First Amendment for self-serving ends: misinformation created by genuine confusion or erroneous ideas about what the First Amendment says and does; disinformation deliberately pushed by public figures and officials fully aware of the falsity of their claims; and the malinformation of technically accurate but misleadingly presented claims about free speech by groups ranging from domestic extremists to civil libertarians to tech industry representatives.

The First Amendment is a narrow doctrine that restrains the government from abridging the freedom of speech. This has never been treated as an absolute prohibition; the government can and does, consistent with the First Amendment, regulate a vast body of speech in a wide range of ways. This includes regulation of expressly designated historical categories such as obscenity, defamation, speech integral to criminal conduct, fraud, fighting words, incitement, and true threats, but also of categories such as perjury, contracts, intellectual property, securities transactions, food and drug labeling, certain forms of private identifying information, harassment, child pornography, commercial speech, professional speech, and discriminatory speech in employment, educational, and housing contexts. The question of what and how much speech the First Amendment protects has evolved greatly over time, and in many areas continues to evolve.

⁵ Cybersecurity and Infrastructure Security Agency, [Mis, Dis, Malinformation](#).

⁶ *Id.*

⁷ See Mary Anne Franks, *THE CULT OF THE CONSTITUTION* (2019), 20.

What is settled as a matter of law is that with few exceptions, the First Amendment (like the rest of the Bill of Rights) restrains the government, a doctrine known as the “state action doctrine.” It does not prohibit private actors, including tech companies, from excluding, ignoring, or preferring speech. In fact, the First Amendment protects, in the Supreme Court’s words, a “robust sphere of individual liberty”⁸ that allows private actors to make their own decisions about what speech they wish to promote, distribute, or associate with.

As private actors, tech companies have the First Amendment right to fact-check, label, remove, ban, and make other interventions as they see fit about the content on their sites. Providing additional or alternative information to false or misleading posts is classic “counterspeech,” a treasured First Amendment value famously identified by Justice Brandeis in *Whitney v. California*, a landmark free-speech case: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁹ The First Amendment also protects the right of private actors to refuse to host content altogether, as the right to free speech includes both the right to speak and the right *not* to speak. As the Supreme Court held in *West Virginia State Board of Education v. Barnette*, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”¹⁰ The First Amendment also protects the related right of association, including the right of private actors to choose with whom and with what messages they wish to associate.¹¹

And yet a 2019 Freedom Forum Institute survey that found that 65% of respondents agreed with the erroneous statement that “[s]ocial media companies violate users’ First Amendment rights when they ban users based on the content of their posts.”¹² After social media companies took highly publicized steps to enforce their terms of service in the wake of sustained public pressure following the January 6, 2021 insurrection, First Amendment misinformation exploded across the political spectrum.

Much of this misinformation was triggered by the most dramatic intervention made by major tech companies to address extremist content following the Capitol attack: the restriction of then-President Donald Trump’s access to their platforms. On January 8, 2021, two days after the Capitol attack, Twitter permanently banned¹³ then-President Donald Trump’s personal account. Twitter had first temporarily locked the @realDonaldTrump account on January 6 after Trump posted a video and a statement repeating false claims about the election and expressing his “love” for the rioters,¹⁴ requiring Trump to delete the tweets before being able to post again. At the time of the lockout, the Twitter Safety team noted that if Trump violated Twitter’s policies again his

⁸ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019).

⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁰ 319 U.S. 624, 642 (1943).

¹¹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000).

¹² Freedom Forum Institute, [State of the First Amendment Survey](#) (2019).

¹³ Elizabeth Dwoskin & Nitasha Tiku, [How Twitter, on the front lines of history, finally decided to ban Trump](#), Wash. Post, Jan. 16, 2021.

¹⁴ Travis Caldwell, [Trump's 'We love you' to Capitol rioters is more of the same](#), CNN, Jan. 7, 2021.

account would be banned.¹⁵ In a January 8 blog post, the company explained that it had determined that two of Trump’s tweets following the riots, one referencing “American Patriots” and another stating that Trump would not be attending President-Elect Biden’s inauguration, were “likely to inspire others to replicate the violent acts that took place on January 6, 2021, and that there are multiple indicators that they are being received and understood as encouragement to do so.”¹⁶

Twitter’s decision to ban Trump came after Facebook’s announcement that it would be suspending Trump’s account indefinitely¹⁷; more social media bans—not just of Trump, but of other individuals who promoted lies about the election, endorsed white supremacist rhetoric and violence, or encouraged further insurrection efforts—quickly followed.¹⁸ On January 9, Google and Apple removed the rightwing-dominated social media site Parler from their app stores after the site refused to moderate violent content, and Amazon removed the site from its web hosting services later that same day, citing the platform’s multiple violations of Amazon’s terms of service.¹⁹

While some praised the response by tech companies, several prominent Republican figures characterized it as a partisan attack on free speech and the First Amendment.²⁰ Then-Secretary of State Mike Pompeo tweeted, “Silencing speech is dangerous. It’s un-American. Sadly, this isn’t a new tactic of the Left. They’ve worked to silence opposing voices for years.” Donald Trump’s son, Donald Trump Jr., tweeted, “Free Speech Is Under Attack! Censorship is happening like NEVER before! Don’t let them silence us.” Congressman Matt Gaetz proclaimed, on Twitter, “We cannot live in a world where Twitter’s terms of service are more important than the terms in our Constitution and Bill of Rights.”²¹ Many conservatives seem particularly aggrieved by the drop in their follower counts, likening the enforcement of Twitter’s terms of service to the actions of totalitarian regimes.²² Former White House press secretary Sarah Huckabee Sanders tweeted on January 9, “I’ve lost 50k+ followers this week. The radical left and their big tech allies cannot marginalize, censor, or silence the American people. This is not China, this is United States of America, and we are a free country.”

This criticism did not only come from conservatives. Following Facebook’s indefinite suspension of Trump’s account, whistleblower Edward Snowden tweeted, “Facebook officially silences the President of the United States. For better or worse, this will be remembered as a turning point in

¹⁵ Adi Robertson, [Twitter says Trump’s account is locked, and he’s facing a ban](#), The Verge, Jan 6, 2021.

¹⁶ Twitter, [Permanent suspension of @realDonaldTrump](#), Jan. 8, 2021.

¹⁷ Tony Romm & Elizabeth Dwoskin, [Trump banned from Facebook indefinitely](#), CEO Mark Zuckerberg says, Wash. Post, Jan. 7, 2021.

¹⁸ Adi Robertson, [Twitter bans QAnon supporters, including former national security adviser Michael Flynn](#), The Verge, Jan. 8, 2021.

¹⁹ Jack Nicas & Davey Alba, [Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters](#), N. Y. Times, Jan. 9, 2021.

²⁰ Lexi Lonas, [Pompeo, Cruz and other Trump allies condemn Twitter’s ban on president](#), The Hill, Jan 9, 2021.

²¹ Lauren Giella, [Fact Check: Did Twitter Violate President Trump’s First Amendment Rights?](#), Newsweek, Jan. 11, 2021.

²² Abigail Covington, [Conservatives Are Upset They Are Losing Followers on Twitter](#), Esquire, Jan. 10, 2021.

the battle for control over digital speech.”²³ The Electronic Frontier Foundation (EFF) somberly observed that “we are always concerned when platforms take on the role of censors.”²⁴ A senior legislative counsel for the American Civil Liberties Union (ACLU) opined that “it should concern everyone when companies like Facebook and Twitter wield the unchecked power to remove people from platforms that have become indispensable for the speech of billions.”²⁵ Prominent ACLU attorney Ben Wizner criticized Amazon’s decision to cut off Parler, telling the New York Times that “we should recognize the importance of neutrality when we’re talking about the infrastructure of the internet.”²⁶

In short, over the last few years and increasing since the Jan. 6 insurrection, a chorus of influential voices across the political spectrum has, in the name of the First Amendment, condemned social media companies for exercising their First Amendment right to remove or restrict content on their platforms. In addition to being expressed in polls and public commentary, this view has also featured in multiple high-profile lawsuits against companies such as Facebook, Twitter, and Google over alleged free speech violations²⁷; Trump-era executive orders aimed at curtailing “social media censorship”²⁸; and, most chillingly, federal and state legislation seeking to give the government control over the decisions private companies make about speech on their platforms.²⁹ The last category is illustrated by laws passed in states such as Florida and Texas aimed at forcing social media platforms to carry speech against their will³⁰ and by proposed federal legislation aimed at stripping social media platforms of the immunity they currently enjoy under Section 230 (c)(2) of the Communications Decency Act for removing or restricting content³¹ (not to be confused with Section 230 (c)(1), which provides civil immunity for decisions *not* to remove or restrict content).³²

While this Orwellian approach to the First Amendment is misguided and dangerous, it is also in some ways understandable. The outsized influence of the Internet over daily life makes it easy for individuals to think of online platforms and tech companies not as the premises and products of private businesses, but as public forums controlled by quasi-governmental actors. Modern society is so thoroughly dependent upon social media for communication, news, commerce, education, and entertainment that any restriction of access to it can easily *feel* like a matter of constitutional

²³ Alex Hern & Kari Paul, [Donald Trump suspended from Facebook indefinitely, says Mark Zuckerberg](#), Guardian, Jan. 7, 2021.

²⁴ Corynne McSherry, [EFF's Response to Social Media Companies' Decisions to Block President Trump's Accounts](#), Electronic Frontier Foundation, Jan. 7, 2021.

²⁵ Natalie Colarossi, [ACLU Counsel Warns of 'Unchecked Power' of Twitter, Facebook After Trump Suspension](#), Newsweek, Jan. 9, 2021.

²⁶ Jack Nicas & Davey Alba, [How Parler, a Chosen App of Trump Fans, Became a Test of Free Speech](#), N.Y. Times, Jan 10, 2021.

²⁷ See, e.g., Cat Zakrzewski & Rachel Lerman, [Trump files class action lawsuits targeting Facebook, Twitter and Google's YouTube over 'censorship' of conservatives](#), Wash. Post, July 7, 2021.

²⁸ Brian Fung, Ryan Nobles & Kevin Liptak, [Trump signs executive order targeting social media companies](#), CNN, May 28, 2020.

²⁹ See, e.g., Cat Zakrzewski, [Florida governor signs bill barring social media companies from blocking political candidates](#), Wash. Post, May 24, 2021.

³⁰ John Villasenor, [Texas' new social media law is blocked for now, but that's not the end of the story](#), Brookings Institution, Dec. 14, 2021.

³¹ See Zoe Bedell & John Major, [What's Next for Section 230? A Roundup of Proposals](#), Lawfare, July 29, 2020.

³² See Mary Anne Franks, [Reforming Section 230 and Platform Liability](#), Cyber Policy Recommendations for the New Administration, Stanford Cyber Policy Center, Jan. 27, 2021.

significance. Perhaps most importantly, this false view of free speech has for decades been promoted by the tech industry itself, which has actively encouraged the public to think of online platforms as natural, essential, and unmediated outlets for free speech. The social media companies currently being criticized as censors are far from blameless victims of widespread misinformation about the First Amendment—they are themselves among the chief purveyors of it.

III. The Free Speech Industry

The tech industry's unprecedented economic, political, and cultural dominance relies in significant measure on its successful, and successfully disguised, commodification of free speech. From the earliest days of the commercial Internet, techno-libertarians have asserted that cyberspace was the true home of free speech, an assertion inevitably wrapped in antiregulatory sentiment. Tech companies invoked laissez-faire First Amendment principles to justify their failure to address extremism and abuse, elevating passivity into a virtue.

Tech companies appear to provide “free speech” in a dual sense: free from censorship and free from cost. But, as is now increasingly clear, there is nothing free about what the tech industry offers. Multibillion-dollar corporations extract labor and data from individuals for marketing, advertising, and surveillance purposes. Online speech is filtered, arranged, promoted, altered, and labeled in accordance with corporate interests. The relentless pursuit of “engagement” places a premium on extremist content that endangers the public welfare and democracy itself.

While experts in harassment and misinformation have for years warned that unchecked extremism and abuse on the Internet leads to real-world harms, the major players in the tech industry until very recently invoked First Amendment principles to abstain from addressing white supremacist content, coordinated harassment campaigns, and political misinformation on their platforms and services. The Jan. 6 attack was far from the first time racists and misogynists had plotted or promoted violence on social media sites, message boards, or other online channels. The 2014 Isla Vista “incel” killings of six people, the 2017 Unite the Right rally in Charlottesville that resulted in the murder of Heather Heyer, the 2018 Tree of Life synagogue mass shooting that killed 11, the 2019 Christchurch massacre that killed 51, and the 2019 El Paso mass shooting that killed 23 are just a few recent examples of deadly violence organized or broadcast online. But as Facebook CEO Mark Zuckerberg told an audience at Georgetown University in 2019, where others might “decide the cost is simply too great,” Facebook would “continue to stand for free expression, understanding its messiness, but believing that the long journey towards greater progress requires confronting ideas that challenge us.”³³

Journalist Nicholas Thompson observes that “the idea of free speech has long been a central concern in Silicon Valley,” from the early “hacker ethic” that “prized the free flow of information” to a Twitter executive’s (in)famous 2012 characterization of the site as the “free speech wing of the free speech party.”³⁴ John Perry Barlow, a co-founder of the influential libertarian organization Electronic Frontier Foundation (EFF), offered a poetic vision of free speech in his 1996 Declaration of the Independence of Cyberspace: “all the sentiments and

³³ Tony Romm, [Zuckerberg: Standing For Voice and Free Expression](#), Wash. Post, Oct. 17, 2019.

³⁴ Nicholas Thompson, [Mr. Nice Guy](#), Wired, Aug. 14, 2017.

expressions of humanity, from the debasing to the angelic, are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat.”³⁵

Following controversy in 2012 about a subreddit featuring surreptitious photographs of underaged girls, then-CEO of Reddit Yishan Wong wrote, “We stand for free speech. This means we are not going to ban distasteful subreddits. We will not ban legal content even if we find it odious or if we personally condemn it.”³⁶ Fredrick Brennan, the creator of the site 8chan, referred in 2014 to pedophilic content on his site as “simply the cost of free speech.”³⁷ Newer social media sites like Gab and Parler are even more explicit about their professed First Amendment ideals: Gab’s Terms of Service mention the First Amendment no less than eight times³⁸; Parler’s Community Guidelines state its “mission is to create a social platform in the spirit of the First Amendment to the United States Constitution.”³⁹

But, as succinctly expressed in Mark Zuckerberg’s testimony before a 2018 joint hearing before the Senate Judiciary and Senate Commerce, Science, and Transportation committees, the business of social media platforms isn’t free speech, but profit. When asked by Senator Orrin Hatch, “How do you sustain a business model in which users don’t pay for your service?” Zuckerberg answered, “Senator, we run ads.”⁴⁰

A handful of multibillion-dollar companies dominate the Internet. The objective of what is euphemistically referred to by these companies as “engagement,” or “community,” or “user-generated content” is not the promotion of free speech or the protection of the public interest: it is to harvest data for profit. These industry players operate “commercial enterprises designed to maximize revenue, not defend political expression, preserve our collective heritage, or facilitate creativity.”⁴¹ The commodification of free speech is an essential element of what Shoshana Zuboff calls “surveillance capitalism”: “a boundary-less form that ignores older distinctions between market and society, market and world, or market and person. It is a profit-seeking form in which production is subordinated to extraction as surveillance capitalists unilaterally claim control over human, societal, and political territories extending far beyond the conventional institutional terrain of the private firm or the market.”⁴²

Tech companies are committed to free speech only insofar as it provides free labor. Search engines and social media platforms create nothing; they amplify, sort, and sell the speech of “users” who increasingly cannot conceptualize a right of free speech that exists apart from the

³⁵ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Electronic Frontier Foundation, Feb. 8, 1996.

³⁶ Adrien Chen, *Reddit CEO Speaks Out On Violentacrez In Leaked Memo: 'We Stand for Free Speech.'* Gawker, Oct. 16, 2012.

³⁷ Patrick Howard O’Neill, *8chan, the central hive of Gamergate, is also an active pedophile network.* Nov. 17, 2014.

³⁸ Gab, *Terms of Service*, April 10, 2020.

³⁹ Parler, *Community Guidelines 2/14/2021*.

⁴⁰ Emily Stewart, *Lawmakers seem confused about what Facebook does — and how to fix it*, Vox, April 10, 2018.

⁴¹ Astra Taylor, *THE PEOPLE’S PLATFORM: TAKING BACK POWER AND CULTURE IN THE DIGITAL AGE* (2014), 221.

⁴² Shoshana Zuboff, *THE AGE OF SURVEILLANCE CAPITALISM* (2018), 514.

Internet: “to exist is to be indexed by a search engine.”⁴³ The tech industry masks its corporate manipulation, extraction, and exploitation of speech through an increasingly wide range of “free” services promising connection, entertainment, and convenience. “With all of these opportunities for speech, it is sometimes easy to forget that, whatever users wish to do and to be through the use of these platforms, their interests are always subject to the grace of the platform.”⁴⁴

The outcry that resulted when major tech players began belatedly and incrementally to move away from this passive stance, especially following the Capitol attack, is a testament to how successfully the tech industry had colonized the free speech imagination of the American public. A considerable portion of the American public now believes that speech is only real if it appears online, that free speech is not merely a negative freedom from government interference but an affirmative right to an audience and to amplification, and that any moderation, editorial control, or enforcement of quality standards by social media companies is a form of censorship.

IV. Free Speech Fundamentalism

An underappreciated aspect of domestic extremism is the fetishization of the Constitution, in particular the First and Second Amendments.⁴⁵ As a Department of Homeland Security official explained recently to the Senate, “Under the guise of the First Amendment, domestic violent extremists recruit supporters, and incite and engage in violence.”⁴⁶

The Ku Klux Klan’s Constitution has included the promise “to protect and defend the Constitution of the United States of America” since 1921,⁴⁷ and the “patriot” movements that have flourished since the 1970s frequently claim the defense of America and of the Constitution as their fundamental purpose. The influential founder of the paramilitary group “Posse Comitatus,” William Potter Gale, told his followers in a 1982 radio broadcast that they were “either going to get back to the Constitution of the United States in your government or officials are going to hang by the neck until they’re dead.”⁴⁸

The far-right militia group Oath Keepers, several members of which have been indicted in the Jan. 6 insurrection, claim to dedicate themselves to the oath taken by law enforcement or military personnel to “support and defend the Constitution against all enemies, foreign and domestic.” The members pledge not to obey what they characterize as unconstitutional orders, including “any orders which infringe on the right of the people to free speech, to peaceably assemble, and to petition their government for a redress of grievances.”⁴⁹ Stewart Rhodes, the Yale Law School

⁴³ Lucas Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, The Information Society 16(3) (2000), 171.

⁴⁴ Moran Yemini, *The New Irony of Free Speech*, 20 COLUM. SCI. & TECH. L. REV. 119, 192 (2018)

⁴⁵ See generally Mary Anne Franks, *THE CULT OF THE CONSTITUTION* (2019).

⁴⁶ Testimony of Melissa Smislova, Acting Under Secretary, Office of Intelligence and Analysis, Dep’t of Homeland Sec., *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on Jan. 6*, 35.

⁴⁷ Knights of the Ku Klux Klan, *CONSTITUTION AND LAWS* (Atlanta: Imperial Palace, 1921).

⁴⁸ Daniel Levitas, *THE TERRORIST NEXT DOOR: THE MILITIA MOVEMENT AND THE RADICAL RIGHT* (2002), 1-2.

⁴⁹ Anti-Defamation League, [*The Oath Keepers: Anti-Government Extremists Recruiting Military and Police*](#), 4 (2015).

graduate who founded the Oath Keepers in 2009, allegedly described the organization’s activities as “pushing the First Amendment to the absolute limit.”⁵⁰

Among the other far-right paramilitary groups the Oath Keepers have worked alongside is an organization calling itself the 1st Amendment Praetorian. The group describes itself as a “volunteer force of military, Law Enforcement & intel agency community professionals standing up to protect the 1st Amendment and those who use it,”⁵¹ whose mission is to “ensure the American people are protected to say and defend what they believe in” from those “who use violence and intimidation to suppress people’s 1st Amendment rights.”⁵²

White nationalists were also among the earliest Internet adopters, recognizing the potential of decentralized communication for increasing their numbers, disseminating propaganda, and planning attacks. One of the first online bulletin board systems (BBS) to go live was called the Aryan Liberty Net, founded by a KKK leader named Louis Beam in 1984. Beam boasted that he was able to make racist material that had been banned in Canada and European countries available on the US-based computer network.⁵³ The New York Times reported in 1985 that the Aryan Liberty Net had “established a computer-based network to link rightist groups and to disseminate a list of those who it says ‘have betrayed their race.’”⁵⁴ The lists included the names, telephone numbers, and addresses of individuals the organization considered to be “race traitors” and “informers.” The group described itself as “a pro-American, pro-White, anti-Communist network of true believers who serve the one and only God - Jesus, the Christ” and which was restricted to “Aryan patriots only.” An early message posted to the site proclaimed, “Finally, we are all going to be linked together at one point in time. Imagine, if you will, all the great minds of the patriotic Christian movement linked together and joined into one computer.”

The tactics used by extremists today—doxing, trolling, coded memes, decentralized communication strategies to avoid detection and disruption (what Beam referred to as “leaderless resistance”⁵⁵)—were developed decades ago on online bulletin boards like this.⁵⁶ As Adam Clark Estes writes, “You can draw a line from the first neo-Nazi online bulletin boards to the online hate forum Stormfront in the ‘90s to the alt-right movement that helped Donald Trump rise to power in 2016.”⁵⁷ Social media platforms have accelerated the distribution of extremist content through engagement tools such as “like” buttons, which teach algorithms to feed users more content similar to what they have viewed before.

Contrary to oft-repeated claims that social media is biased against conservatives, the algorithms of major social media sites disproportionately amplify right-wing content. Twitter recently

⁵⁰ Hannah Allam, [Who is Stewart Rhodes, the Oath Keepers leader arrested in connection with the Jan. 6 riot?](#), Wash. Post, Jan. 13, 2022.

⁵¹ 1st Amendment Praetorian Twitter bio, https://twitter.com/1st_praetorian.

⁵² 1st Amendment Praetorian website, <https://1apraetorian.com/>.

⁵³ Chip Berlet, *When Hate Went Online* (2002), 3.

⁵⁴ Wayne King, [Computer Network Links Rightist Groups and Offers ‘Enemy’ List](#), N. Y. Times, Feb. 15, 1985.

⁵⁵ See J. M. Berger, [The Strategy of Violent White Supremacy Is Evolving](#), Atlantic, Aug. 7, 2019.

⁵⁶ These tactics were arguably perfected during the widespread online harassment campaign in 2014 against women in the gaming industry known as GamerGate. See Kyle Wagner, [The Future Of The Culture Wars Is Here, And It’s Gamergate](#), Deadspin, Oct 14, 2014.

⁵⁷ Adam Clark Estes, [How neo-Nazis used the internet to instigate a right-wing extremist crisis](#), Vox, Feb. 2, 2021

released internal research demonstrating that its algorithms also amplify right-wing content more than left-wing content.⁵⁸ Research by the Tech Transparency Project found that YouTube algorithms create a much more robust filter bubble for right-wing content than left-wing content, and that Fox is by far the most recommended information channel on YouTube.⁵⁹

Meta has deliberately promoted conservative sites on its platforms, even changing Facebook's algorithm to reduce the visibility of left-leaning news sites and allowing right-wing sites⁶⁰ to "skirt the company's fact-checking rules, publish untrustworthy and offensive content and harm the tech giant's relationship with advertisers," despite the efforts of its own employees to convince the company to consistently apply its own policies.⁶¹ Internal Facebook research titled "Carol's Journey to QAnon," demonstrated how quickly Facebook's algorithm recommended extremist conspiracy theories to an account set up for an imaginary woman with interests in Fox News and Sinclair Broadcasting.⁶² The day after the 2020 election, 10% of all political content posts viewed on Facebook in the U.S. falsely claimed that the vote was fraudulent.⁶³ As one Facebook employee wrote in an internal document, if the company "takes a hands-off stance for these problems,... then the net result is that Facebook, taken as a whole, will be actively (if not necessarily consciously) promoting these types of activities. The mechanics of our platform are not neutral."⁶⁴

The mechanics of social media platforms are indeed not neutral, nor are the offline consequences. The lopsided political amplification of rightwing content on social media is all the more troubling given the disproportionate rate of rightwing violence: "Since 2015, right-wing extremists have been involved in 267 plots or attacks and 91 fatalities," more than four times the number of plots and attacks associated with leftwing viewpoints.⁶⁵

The events of Jan. 6, 2021 dramatically repudiated the clichés of First Amendment fundamentalism: the belief that truth will prevail in the marketplace of ideas, that the answer to bad speech is always more speech, and that the best way to safeguard democracy is to remain passive in the face of lies, racist and misogynist propaganda, and calls to violence. This is an unprincipled, contradictory, and ultimately extremist vision of free speech that plays directly into the hands of those who view the Constitution as the charter for white male supremacy. As Justice Jackson wrote in 1949, "There are many appeals these days to liberty, often by those who are

⁵⁸ Rumman Chowdhury & Luca Belli, [Examining algorithmic amplification of political content on Twitter](#), Twitter, Oct. 21, 2021.

⁵⁹ Tech Transparency Project, [YouTube's Filter Bubble Problem is Worse for Fox News Viewers](#), Oct. 24, 2021.

⁶⁰ Deepa Seetharaman & Emily Glazer, [How Mark Zuckerberg Learned Politics](#), Wall Street Journal, Oct. 16, 2020.

⁶¹ Keach Hagey & Jeff Horwitz, [The Facebook Files: Facebook's Internal Chat Boards Show Politics Often at Center of Decision Making](#), Wall Street Journal, Oct. 24, 2021.

⁶² Brandy Zadrozny, ['Carol's Journey': What Facebook knew about how it radicalized users](#), NBC News, Oct. 22, 2021.

⁶³ Ryan Mac and Sheera Frenkel, [Internal Alarm, Public Shrugs: Facebook's Employees Dissect Its Election Role](#), N. Y. Times, Oct. 22, 2021.

⁶⁴ Mike Isaac, [Facebook Wrestles With the Features It Used to Define Social Networking](#), N. Y. Times, Oct. 25, 2021.

⁶⁵ Robert O'Harrow Jr., Andrew Ba Tran, & Derek Hawkins, [The rise of domestic extremism in America](#), Wash. Post, April 12, 2021.

working for an opportunity to taunt democracy with its stupidity in furnishing them the weapons to destroy it.⁶⁶

IV. Recommendations

Presumably, one of the principal goals of investigating the Capitol attack is to identify responses that will help prevent events like it from happening again. There are three categories of action addressing social media's role in amplifying extremism that should be considered in this endeavor.

1. Change social media platform incentives through Section 230 reform.

Section 230 should be amended to make clear that its protections apply only to speech, not to the entire range of online conduct. If the broad immunity afforded online intermediaries is justified on First Amendment principles, then it should apply only with regard to online activity that can plausibly be characterized as speech protected by the First Amendment. What is more, it should only apply to third-party protected speech for which platforms serve as true intermediaries, not speech that the platform itself creates, controls, or profits from.

Section 230 currently provides extensive immunity to online intermediaries in two very different situations: when they choose to leave content up, and when they choose to take it down. While the second provision, Section 230 (c)(2), reinforces the First Amendment right of private actors to choose not to associate with or promote speech against their will, the first provision, Section (c)(1), is not grounded in the First Amendment and has been interpreted by courts to allow tech companies to knowingly ignore, encourage, or even profit from unlawful behavior. By granting immunity for both taking action and doing nothing with regard to harmful content, it eliminates incentives to dedicate resources to making safer products or services or to develop industry standards for responsible behavior.

Section 230(c)(1) has been invoked to protect message boards like 8chan (now 8kun),⁶⁷ which provide a platform for mass shooters to spread terrorist propaganda, online firearms marketplaces such as Armslist, which facilitate the illegal sale of weapons used to murder domestic violence victims,⁶⁸ and to classifieds sites like Backpage (now defunct), which was routinely used by sex traffickers to advertise underage girls for sex.⁶⁹

In subsidizing platforms that directly benefit from illegal and harmful conduct, Section 230(c)(1) creates a classic “moral hazard,” ensuring that the multibillion-dollar corporations that exert near-monopoly control of the Internet are protected from the costs of their risky ventures even as they reap the benefits from them.⁷⁰ Given that the dominant business model of websites and

⁶⁶ *Terminiello v. City of Chicago*, 337 U.S. 1, 35, 69 (1949).

⁶⁷ Matt Laslo, [The Fight Over Section 230—and the Internet as We Know It](#), *Wired*, Aug. 13, 2019.

⁶⁸ Alexis Kramer, [Armslist Online Gun Sale Case Won't Get Supreme Court Review](#), *Bloomberg Law*, Nov. 25, 2019.

⁶⁹ National Public Radio, [New book details how California prosecutors took down sex trafficking site Backpage](#), Jan. 12, 2022.

⁷⁰ Mary Anne Franks, [Moral Hazard on Stilts: 'Zeran's' Legacy](#), *Law.com*, Nov. 10, 2017.

social media services is based on advertising revenue, they have no natural incentive to discourage abusive or harmful conduct: “abusive posts still bring in considerable ad revenue... the more content that is posted, good or bad, the more ad money goes into their coffers.”⁷¹

Online intermediaries who do not voluntarily intervene to prevent or alleviate foreseeable harm are at best passive bystanders who do nothing to intervene against harm, and at worst, they are accomplices who encourage and profit from harm. Providing them with immunity flies in the face of the longstanding legal principle of collective responsibility that governs conduct in the physical world. In physical spaces, individuals or businesses that fail to “take care” that their products, services, or premises are not used to commit wrongdoing can be held accountable for that failure. There is no justification for abandoning this principle simply because the conduct occurs online. In fact, there are often more compelling reasons for recognizing collective responsibility online, because online interaction provides so many opportunities for direct tortfeasors to escape detection or identification.

The revised version of Section 230(c) would read as follows:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any ~~information~~ **speech wholly** provided by another information content provider, **unless such provider or user intentionally encourages, solicits, or generates revenue from this speech.**

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1);¹

(3) Limitations. The protections of the subsection shall not be available to a provider or user with respect to unlawful material or conduct to which the provider or user has manifested deliberate indifference.

2. *Target harmful disinformation directly through federal legislation.*

Congress should enact legislation, including criminal legislation, to regulate information that involves verifiably false information that is likely to cause significant harm. Such legislation should include the criminalization of digital forgeries (colloquially known as “deep fakes”). The definition of digital forgeries should be limited to audiovisual material that has been created or

⁷¹ Kaley Leetaru, [Do Social Media Platforms Really Care About Online Abuse?](#), Forbes, Jan. 12, 2017.

materially altered to falsely appear to a reasonable observer to be an actual record of actual speech, conduct, appearance, or absence of an individual, which is created, distributed, or reproduced with the intent to seriously harm or with reckless disregard for whether serious harm would result to a falsely depicted individual, or with the intent to incite violence or interfere with official proceedings.

3. Reduce the public's dependence on social media.

Deliberate efforts should be made to reduce public reliance on social media for expression and information, including robust consumer protection laws and regulations as well as investment in public universities, traditional media, libraries, and other non-social-media avenues of expression and information.

The interests of social media companies that rely on an advertising business model will never align with the public's. Of necessity, the goal of that model is to keep individuals in a perpetually "engaged" state, directing their attention and their energy toward activities that can be harvested for profitable data. This goal is deliberately obscured by the illusion that the services provided by social media and search companies are "free." This could be considered in itself a "deceptive and unfair act and practice" that should be subject to intervention by the Federal Trade Commission, perhaps in the form of requiring such companies to charge fees for their services.

Such a move might well offset some of the damage that the Internet has inflicted upon traditional media outlets who have been unable to compete with "free." The fees could also be used to subsidize public resources in a variety of spaces and complement meaningful investments in journalism, public education, universities, community centers, and small businesses to return to or become alternate sites of free expression and informed debate. The goal should be to ensure that no one host or forum, or even one medium, dominates the shaping of public opinion or the boundaries of free speech.

V. Conclusion

At 3:41am on January 7, 2021, closing the joint session that finally and formally declared Biden to be the next president of the United States, Senate Chaplain Barry Black led the legislative body in prayer: "These tragedies have reminded us that words matter ... and that the power of life and death is in the tongue."⁷²

The First Amendment is frequently invoked as a reason to maintain the status quo for free speech and social media. But the First Amendment is intended to serve the values of truth, autonomy, and democracy, all of which are jeopardized by an information ecosystem polluted by extremists and dominated by the interests of billion-dollar corporations. The First Amendment should not be viewed as an obstacle to accountability for harm, carefully drawn legislative interventions, or other measures aimed at safeguarding democracy. The choice, as Justice Jackson reminds us, "is not between order and liberty. It is between liberty with order and anarchy without either."⁷³

⁷² Philip Rucker, [Bloodshed](#), Wash. Post, Oct. 31, 2021.

⁷³ *Terminiello v. City of Chicago*, 337 U.S. 1, 37, 69 (1949)