

THE MAN WHO CRIED RIGGED: ANALYZING GLOBAL EFFORTS TO COMBAT ELECTION MISINFORMATION TO INFORM RECOMMENDATIONS FOR NATIONAL REFORM

Abstract: Since running for president in 2016, Donald Trump has consistently used social media to question the legitimacy of the American election system. This strategy came to a head in 2021 when his supporters—falsely believing that President Joseph Biden fraudulently stole the 2020 presidential election from former President Trump—stormed the U.S. Capitol Building in a deadly and unprecedented attack on American democracy. Yet, although election misinformation has become prominent in American politics, this problem is not exclusive to the United States. Many other countries, including Brazil and Canada, have had their elections questioned or threatened by actors looking to sow mistrust in democratic institutions. Unlike the United States, however, the governments of those countries have taken steps to combat such misinformation. This Note analyzes the policies adopted in other nations to limit and counter election misinformation on social media to determine what actions the U.S. government could and should take to do the same. The Note argues that a non-partisan approach is vital to the success of any such policy, and that the Canadian approach in particular is the most useful guide for American policymakers. Moreover, this Note argues that a more direct, and arguably more effective, approach will necessarily involve reforming Section 230 of the Communications Decency Act to better reflect the role the internet plays in modern society, and to allow the federal government to ensure social media companies are accountable for the roles they play in shaping our democracy.

INTRODUCTION

On March 12, 2016, former President Donald Trump first suggested on Twitter that the American election system was rigged.¹ For seven months, until

¹ See Donald Trump (@realDonaldTrump), X (Mar. 12, 2016, 1:06 PM), <https://twitter.com/realdonaldtrump/status/708715781199044609> [<https://perma.cc/A34W-LERM>] (implying that early voting is a form of election manipulation). In this tweet, former President Trump specifically attacked the validity of early voting in the Florida Republican primary election. *Id.* Using a derogatory nickname, he suggested that U.S. Senator Marco Rubio and the Chairman of the Republican Party of Florida, along with others, were deliberately aiming to “rig the vote” in the primary election. *Id.* President Trump provided no evidence of this claim and instead appeared to be relying on word-of-mouth. *Id.* It is worth noting that the social media platform referred to as “Twitter” in this Note rebranded as “X” in 2023. See Chantal Da Silva, *Twitter Rebrands to ‘X’ as Elon Musk Loses Iconic Bird Logo*, NBC NEWS, <https://www.nbcnews.com/news/us-news/twitter-rebrands-x-elon-musk-loses-iconic-bird-logo-rca95880> [<https://perma.cc/N6R5-ESNG>] (July 24, 2023) (reporting on Elon Musk’s decision to

Election Day on November 8, 2016, President Trump tweeted about the supposedly rigged system forty-seven more times.² After winning the presidency, however, Trump essentially ceased using the term “rigged” on Twitter in connection with the American election system, at least until the next presidential election cycle began in earnest in 2020.³ From January of that year to Election

rebrand the company several months after buying it). Yet, much of the language surrounding the platform has not changed as of the time of this Note, as posts on the site are still typically called “tweets,” the act of posting on the platform is still usually called “tweeting,” and the platform itself is still frequently called “Twitter.” See Saira Mueller, *Why Is X Still Called Twitter?*, CNN (Feb. 23, 2024), <https://www.cnn.com/2024/02/23/tech/twitter-x-rebrand-cec/index.html> [<https://perma.cc/A83S-6HMR>] (describing the social media platform’s inability to shed the “Twitter” branding nearly seven months after its official rebrand). In the interest of clarity, this platform will be referred to as “Twitter” in this Note.

² See Donald Trump (@realDonaldTrump), X, <https://twitter.com/realdonaldtrump?lang=en> [<https://perma.cc/6LGH-LCTX>] (chronicling President Trump’s tweets, including those from March 13, 2016 to November 8, 2016); Twitter, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/app-categories/twitter> [<https://perma.cc/2DCV-YXLJ>] (archiving President Trump’s tweets throughout his presidency and beyond). Of these forty-seven tweets, only three repeated President Trump’s prior claim that the Republican primaries were rigged against him, whereas eight alleged that the Democratic primary election process was rigged against Senator Bernie Sanders. See Trump, *supra* (documenting Trump’s tweets regarding the supposedly rigged primary system in America); Twitter, *supra* (hosting an archive of President Trump’s tweets). Many of the forty-seven tweets—twenty-four in total—specifically alleged that the “system” was rigged in favor of former U.S. Secretary of State Hillary Clinton, or that Secretary Clinton and her team were behind the rigged system. See Trump, *supra* (cataloging President Trump’s tweets about “the system’s” favoritism for Secretary Clinton); Twitter, *supra* (documenting President Trump’s tweets, including those about Secretary Clinton).

³ See Trump, *supra* note 2 (hosting Trump’s tweets from the 2016 election to January 2020); Twitter, *supra* note 2 (archiving President Trump’s tweets from the first several years of his presidency). Donald Trump won the 2016 presidential election, earning 304 electoral votes and thus exceeding the 270 electoral votes needed to attain the presidency. *2016 Presidential Election Results*, N.Y. TIMES, <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/WGS8-64GT>] (Aug. 9, 2017). After 2016, President Trump occasionally repeated his theories about the election being rigged against him, such as when he tweeted that “[m]any mostly Democrat States refused to hand over data from the 2016 Election to the Commission On Voter Fraud. They fought hard that the Commission not see their records or methods because they know that many people are voting illegally. System is rigged, must go to Voter I.D.” Donald Trump (@realDonaldTrump), X (Jan. 4, 2018, 6:02 AM), <https://twitter.com/realdonaldtrump/status/948872192284155904> [<https://perma.cc/2LF2-8L7X>]. Yet, most of President Trump’s uses of the word “rigged” on Twitter between the 2016 and 2020 presidential elections focused on the various congressional investigations of him, such as the investigation into his alleged collusion with Russia during the 2016 election. See Trump, *supra* note 2 (cataloging Trump’s tweets, including those between the 2016 and 2020 presidential elections); Twitter, *supra* note 2 (creating an archive of President Trump’s tweets throughout his presidential candidacy and presidency); Mike Levine, *The Russia Probe: A Timeline from Moscow to Mueller*, ABC NEWS (July 23, 2019), <https://abcnews.go.com/Politics/russia-probe-timeline-moscow-mueller/story?id=57427441> [<https://perma.cc/VJ5R-TGRZ>] (reporting on the events leading up to former special counsel Robert Mueller’s investigation into Russian involvement in President Trump’s 2016 presidential campaign and the 2016 presidential election, and the investigation itself). President Trump refocused his attention on the supposedly rigged election system on January 17, 2020, tweeting, “They are rigging the election again against Bernie Sanders, just like last time, only even more obviously.” Don-

Day on November 8, 2020, President Trump followed his 2016 playbook, tweeting about the allegedly rigged system another forty-five times.⁴

Although President Trump's arguments in 2020 were essentially the same as those he made in 2016, the election's outcome was different: In 2020, President Trump lost the presidential election to President Joseph Biden.⁵ Consequently, President Trump's allegations of a rigged system did not disappear as they did in 2016 after he won the presidency.⁶ Instead, his allegations became even more prevalent in the election's aftermath, as he tweeted that the system was rigged fifty-five more times.⁷

Following the 2020 presidential election, President Trump posted his final tweet describing the American election system as rigged on January 6, 2021 at

ald Trump (@realDonaldTrump), X (Jan. 17, 2020, 10:35 AM), <https://twitter.com/realdonaldtrump/status/1218195021930926082?lang=en> [<https://perma.cc/356J-9X26>].

⁴ See Trump, *supra* note 2 (documenting President Trump's tweets, including those from January 2020 to November 8, 2020); *Twitter, supra* note 2 (hosting President Trump's tweets from his presidential term). Unlike President Trump's claims of rigging in the 2016 presidential election, which mostly alluded vaguely to a rigged system, his allegations of rigging in the 2020 presidential election more specifically focused on mail-in ballots. Trump, *supra* note 2; *Twitter, supra* note 2. Of President Trump's forty-five tweets suggesting that the 2020 election would be rigged against him, twenty-nine expressly discussed mail-in or absentee ballots as the method by which the rigging would take place. Trump, *supra* note 2; *Twitter, supra* note 2. These ballots were more popular in the 2020 presidential election than in years past due to the COVID-19 pandemic, which made it more dangerous and difficult to vote in person. See JACOB FABINA & ZACHARY SCHERER, U.S. CENSUS BUREAU, P20-585, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2020, at 14 (2022), <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf> [<https://perma.cc/L98C-8Y4T>] (finding that 43.2% of voters in the 2020 presidential election voted by mail, compared to twenty-one percent of voters in the 2016 presidential election); 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/C7WF-KH5H>] (connecting the rise of mail-in voting in 2020 to the COVID-19 pandemic).

⁵ *Presidential Election Results*, POLITICO, <https://www.politico.com/2020-election/results/president/> [<https://perma.cc/3TU3-HGPX>] (Nov. 8, 2022). President Biden received 306 electoral votes, exceeding the 270 electoral votes needed to secure the presidency. *Id.*

⁶ See Trump, *supra* note 2 (depicting President Trump's tweets after the 2020 presidential election, which include allegations of election interference); *Twitter, supra* note 2 (archiving President Trump's tweets, including those that contain allegations of rigging after the 2020 presidential election).

⁷ See Trump, *supra* note 2 (chronicling President Trump's tweets after November 18, 2020); *Twitter, supra* note 2 (documenting President Trump's tweets posted after the 2020 presidential election). President Trump composed these fifty-five tweets in a fifty-seven-day span from November 11, 2020 to January 6, 2021. Trump, *supra* note 2; *Twitter, supra* note 2. Between those dates, President Trump averaged over one tweet about the "rigged" election every forty-eight hours, as he tweeted about this topic at least once on thirty-three of those fifty-seven days. Trump, *supra* note 2; *Twitter, supra* note 2. His most prolific dates were November 14 and November 15 with nine tweets total, including one that says, "[President Biden] only won in the eyes of the FAKE NEWS MEDIA. I concede NOTHING! We have a long way to go. This was a RIGGED ELECTION!" Donald Trump (@realDonaldTrump), X (Nov. 15, 2020, 9:19 AM), <https://twitter.com/realdonaldtrump/status/1327979630477922304> [<https://perma.cc/A5XP-23QJ>]; see Trump, *supra* note 2 (containing the record of President Trump's tweets on November 14, 2020 and November 15, 2020).

10:44 AM.⁸ Just over an hour later, at 12 PM, the exiting President Trump spoke to supporters near the White House and publicly asked Vice President Michael Pence to prevent the U.S. Congress from certifying the election.⁹ When President Trump ended his speech around 1 PM, he told his gathered supporters to go to the U.S. Capitol Building and encourage Republican members of Congress to “take back our country.”¹⁰

What began in 2016 with a suggestion that the American election system may be rigged ended with President Trump’s supporters overcoming the U.S. Capitol Police, entering the U.S. Capitol Building by breaking windows and scaling walls, and eventually breaching the U.S. Senate chamber from which senators and Vice President Pence had just evacuated.¹¹ A Capitol Police officer shot and killed a President Trump supporter inside the Capitol Building, and pipe bombs were found at the headquarters of the Republican and Demo-

⁸ Donald Trump (@realDonaldTrump), X (Jan. 6, 2021, 10:44 AM), <https://twitter.com/realdonaldtrump/status/1346845109736845318> [<https://perma.cc/LNF7-DRKL>]. In this tweet, President Trump tagged Senator David Perdue of Georgia, whom he had previously contacted with a request to find as many votes in Georgia as necessary to ensure he would win the state’s electoral votes. *Id.*; Nick Niedzwiedek, ‘Disgusting,’ Perdue Hammers Georgia Secretary of State for Recording Trump Call, POLITICO, <https://www.politico.com/news/2021/01/04/perdue-hammers-ga-sec-state-recording-trump-call-454496> [<https://perma.cc/FRZ9-9JYH>] (Jan. 4, 2021).

⁹ Kat Lonsdorf et al., *A Timeline of the Jan. 6 Capitol Attack—Including When and How Trump Responded*, NPR, <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> [<https://perma.cc/Z6B5-GJ6Q>] (Jan. 5, 2024); *Campaign 2020: Trump’s Jan. 6 Rally Speech*, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?507744-1/trumps-jan-6-rally-speech> [<https://web.archive.org/web/20240418003900/https://www.c-span.org/video/?507744-1/trumps-jan-6-rally-speech#>]. At Trump’s “Stop the Steal” rally on January 6, 2021, at least 10,000 people gathered to listen to him speak. Lisa Mascaro, Ben Fox & Lolita C. Baldor, ‘Clear the Capitol,’ Pence Pleaded, *Timeline of Riot Shows*, ASSOCIATED PRESS (Apr. 10, 2021), <https://apnews.com/article/capitol-siege-army-racial-injustice-riots-only-on-ap-480e95d9d075a0a946e837c3156cdeb9> [<https://perma.cc/2BSP-XMRC>]. During his speech, President Trump suggested that Vice President Pence “send [the election] back to the states to recertify.” *Campaign 2020: Trump’s Jan. 6 Rally Speech*, *supra*. President Trump then indicated that, if this were to happen, he would be re-elected president. *Id.*

¹⁰ Lonsdorf et al., *supra* note 9; *Campaign 2020: Trump’s Jan. 6 Rally Speech*, *supra* note 9.

¹¹ See Scott MacFarlane & Cassidy McDonald, *January 6 Timeline: Key Moments from the Attack on the Capitol*, CBS NEWS, <https://www.cbsnews.com/live-updates/january-6-capitol-riot-time-line-key-moments/> [<https://perma.cc/S38L-GMQ7>] (Jan. 6, 2023) (reporting that rioters reached the Senate floor and occupied Vice President Pence’s seat only around fifteen minutes after lawmakers were evacuated from that space); Lonsdorf et al., *supra* note 9 (outlining the events that took place at the U.S. Capitol Building on January 6, 2021). During the riot on January 6, 2021, at least 2,000 individuals entered the Capitol Building. Olivia Rubin, Alexander Mallin & Will Steakin, *By the Numbers: How the Jan. 6 Investigation Is Shaping Up 1 Year Later*, ABC NEWS (Jan. 4, 2022), <https://abcnews.go.com/US/numbers-jan-investigation-shaping-year/story?id=82057743> [<https://perma.cc/9YY2-B7PC>]. Some of these individuals even unknowingly came within one hundred feet of Vice President Pence, who was sheltered within the building. Barbara Sprunt & Ryan Lucas, *With New Video Footage, Managers Show How Close Rioters Got to Pence and Lawmakers*, NPR (Feb. 10, 2021), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/10/966508091/using-new-video-footage-managers-show-how-close-rioters-got-to-pence-lawmakers> [<https://perma.cc/5SA2-B58Y>].

cratic National Committees in Washington, D.C. that same day.¹² Nearly three hours after President Trump's supporters breached the Capitol Building, he tweeted a video asking the supporters to "go home in peace."¹³

In President Trump's final tweet on January 6, 2021, he justified the actions of his supporters, stating that the presidential election was stolen from them and that they were patriots.¹⁴ President Trump's Twitter account was then temporarily suspended for twelve hours, and it was permanently suspended on January 8, 2021.¹⁵ The account was later reinstated after a change in leadership

¹² Lonsdorf et al., *supra* note 9. In addition to the individual who was shot and killed while attempting to breach the House chamber, three other individuals died while on the Capitol grounds on January 6, 2021. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [https://perma.cc/3643-C6G7] (Oct. 13, 2022). One Capitol Police officer also died of injuries sustained during the riot, and four others later committed suicide. *Id.* As of the time of this Note, no arrests have been made in connection with the pipe bombs that were discovered on January 6, 2021. Press Release, FBI Washington Field Office, \$500,000 Reward Remains in Effect for Information About Capitol Hill Pipe Bomber (Jan. 4, 2024), <https://www.fbi.gov/contact-us/field-offices/washingtondc/news/500000-reward-remains-in-effect-for-information-about-capitol-hill-pipe-bomber> [https://perma.cc/N847-R6RU].

¹³ Lonsdorf et al., *supra* note 9. This video has since been deleted from Twitter, so it is no longer viewable on that platform. *See* Trump, *supra* note 2 (cataloging President Trump's tweets, which no longer include the video posted on January 6, 2021). Nevertheless, the video and some outtakes have been archived elsewhere online. *President Trump Video Statement on Capitol Protesters*, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters> [https://web.archive.org/web/20240418004746/https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters].

¹⁴ Lonsdorf et al., *supra* note 9; *see* Twitter, *supra* note 2 (archiving President Trump's tweets from January 6, 2021). Twitter later deleted this tweet, so it is no longer viewable on that platform. *See* Trump, *supra* note 2 (documenting President Trump's tweets, which no longer include his last tweet from January 6, 2021). Nevertheless, a database chronicling President Trump's Twitter activity shows that this tweet stated, "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long." *Twitter*, *supra* note 2.

¹⁵ Ben Collins & Brandy Zadrozny, *Twitter Permanently Suspends President Donald Trump*, NBC NEWS, <https://www.nbcnews.com/tech/tech-news/twitter-permanently-bans-president-donald-trump-n1253588> [https://perma.cc/8X94-LBMQ] (Jan. 8, 2021). Twitter announced this decision with a blog post on January 8, 2021. *See* X, *Permanent Suspension of @realDonaldTrump*, X BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/U343-BL5D] (citing President Trump's final two tweets to justify the decision to permanently suspend his Twitter account). The first of President Trump's tweets that Twitter used to support its suspension decision referenced his 75,000,000 supporters and stated that those supporters would have "a GIANT VOICE long into the future." Donald Trump (@realDonaldTrump), X (Jan. 8, 2021, 9:46 AM), <https://twitter.com/realDonaldTrump/status/1347555316863553542?ctx=HHwWjMC6jfmavbMIAAAA> [https://perma.cc/3JA4-XFAV]. The second tweet stated that President Trump would not attend President Biden's upcoming inauguration on January 20, 2021. Donald Trump (@realDonaldTrump), X (Jan. 8, 2021, 10:44 AM), <https://twitter.com/realDonaldTrump/status/1347569870578266115?ctx=HHwWhsCx3Yrqw7MIAAAA> [https://perma.cc/67QS-BHYV]. Twitter determined that, given what had occurred on January 6, 2021, these tweets would likely encourage violent behavior at the inauguration. X, *supra*. The company thus found that the tweets violated its Glorification of Violence policy, which justified President Trump's permanent ban from the social media platform. *Id.*

at Twitter resulted in Elon Musk taking control as the platform's chief executive officer, but it has remained essentially dormant since then.¹⁶

The initial decision to permanently suspend President Trump's Twitter account was the culmination of months of policy changes made by prominent social media companies aimed at curbing election misinformation on their platforms.¹⁷ For example, in October 2020, Twitter began placing warning labels over tweets containing false information about the election.¹⁸ Twitter also

¹⁶ See Clare Duffy & Paul LeBlanc, *Elon Musk Restores Donald Trump's Twitter Account*, CNN, <https://www.cnn.com/2022/11/19/business/twitter-musk-trump-reinstate/index.html> [<https://perma.cc/9ZJW-BH7Q>] (Nov. 20, 2022) (reporting on the reinstatement of President Trump's Twitter account); Rob Wile, *A Timeline of Elon Musk's Takeover of Twitter*, NBC NEWS (Nov. 17, 2022), <https://www.nbcnews.com/business/business-news/twitter-elon-musk-timeline-what-happened-so-far-rcna57532> [<https://perma.cc/P47L-KF88>] (detailing the complicated process by which Elon Musk took control of Twitter); Trump, *supra* note 2 (hosting President Trump's Twitter account, which now includes a tweet that was posted after the account's reinstatement). To determine whether President Trump's account should be reinstated, Musk posted a Twitter poll and asked the public to weigh in. Duffy & LeBlanc, *supra*. He then reinstated the account after 51.8% of the public voted in favor of the move. *Id.* Although President Trump is allowed to use the social media platform again, he has only tweeted once since regaining access as of the time of this Note. See Trump, *supra* note 2 (showing only one new tweet on President Trump's Twitter page since his reinstatement). This tweet contains an image of his mugshot that was taken after he surrendered in Georgia on racketeering charges for his alleged conspiracy to overturn the state's election results in 2020. Donald Trump (@realDonaldTrump), X (Aug. 24, 2023, 9:38 PM), <https://twitter.com/realDonaldTrump/status/1694886846050771321> [<https://perma.cc/UF3V-LZ8P>] [hereinafter Trump Tweet]; see Kate Brumback, Jill Colvin & Eric Tucker, *Mug Shot of Donald Trump Shows Scowling Former President During Speedy Booking at Atlanta Jail*, ASSOCIATED PRESS, <https://apnews.com/article/trump-atlanta-indictment-republican-primary-7f4e9860859fbb71221b6a5163aaa42f> [<https://perma.cc/7LNE-TWM3>] (Aug. 24, 2023) (reporting on President Trump's arrest in Georgia, which resulted in his mug shot being taken). True to form, the image that President Trump tweeted also includes the phrase "ELECTION INTERFERENCE NEVER SURRENDER!" Trump Tweet, *supra*. Above the image, President Trump posted a link to his campaign website for the 2024 presidential election. *Id.*; Trump: *Make America Great Again!* 2024, DONALDJTRUMP.COM, <https://www.donaldjtrump.com> [<https://perma.cc/85XE-6YXY>].

¹⁷ See Shannon Bond, *Twitter Expands Warning Labels to Slow Spread of Election Misinformation*, NPR (Oct. 9, 2020), <https://www.npr.org/2020/10/09/922028482/twitter-expands-warning-labels-to-slow-spread-of-election-misinformation> [<https://perma.cc/8UBJ-7LPB>] (outlining Twitter's policies intended to make it more challenging for users to see and spread election misinformation on the platform); Mike Isaac, *Facebook Moves to Limit Election Chaos in November*, N.Y. TIMES, <https://www.nytimes.com/2020/09/03/technology/facebook-election-chaos-november.html> [<https://perma.cc/7Z6K-DKGE>] (Sept. 22, 2020) (describing Facebook's efforts to reduce election misinformation on its platform). According to the Merriam-Webster Dictionary, "misinformation" is defined as "incorrect or misleading information." *Misinformation*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/misinformation> [<https://perma.cc/5G3K-TKVC>] (Apr. 6, 2024). This is in contrast to "disinformation," which is defined by the Merriam-Webster Dictionary as "false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth." *Disinformation*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/disinformation> [<https://perma.cc/9AYE-VSNA>] (Mar. 28, 2024).

¹⁸ Bond, *supra* note 17. These warning labels hid tweets published by American political actors that included false information about the election. *Id.* Twitter previously used similar warning screens for posts that went against the organization's policies, but that were still important to the public interest and would therefore not be deleted. *Id.* To view these hidden tweets, users would have to actively remove the warnings. *Id.*

made it more challenging to share such tweets and ensured they would not be inadvertently spread by the site's algorithms.¹⁹ Similarly, Facebook also took many steps to curb election misinformation on its platform, such as limiting political advertisements, policing posts that encouraged people not to vote, and vowing to continue its content moderation efforts on this front after the election was finalized.²⁰ Many of these policies have remained in place since the 2020 election.²¹

Yet, election misinformation continues to be a significant issue in the United States, due in part to the way it spreads on social media.²² Mere days

¹⁹ *Id.* Under this policy, a user could not passively retweet a post from an American political actor containing election misinformation, as the user would have to add a comment. *Id.* Additionally, users would have to actively seek out these posts because the platform's algorithms would not recommend them. *Id.*

²⁰ Isaac, *supra* note 17. Like Twitter, Facebook began putting warning labels on posts spreading election misinformation, including one posted by President Trump that suggested mail-in ballots may be illegitimate. *Id.* It also began removing posts that implicitly aimed to discourage voting, such as posts suggesting that voting was unsafe, or posts creating confusion about who can vote and what documentation one needs to vote. *Id.* Finally, Facebook stated that it would fact-check any candidate who tried to claim a false victory after the election. *Id.* Similar to Twitter, the social media platform referred to as "Facebook" in this Note rebranded as "Meta" in 2021. Mike Isaac, *Facebook Renames Itself Meta*, N.Y. TIMES, <https://www.nytimes.com/2021/10/28/technology/facebook-meta-name-change.html> [<https://perma.cc/RYP7-LLX7>] (Nov. 10, 2021). In the interest of maintaining consistency with this Note's use of the term "Twitter," however, this platform will be referred to as "Facebook" in this Note.

²¹ See *Civic Integrity Policy*, X HELP CTR. (Aug. 2023), <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> [<https://perma.cc/7A8L-4YNK>] (establishing the Civic Integrity Policy Twitter employs to prevent individuals from using the platform to manipulate elections); *Misinformation*, META, <https://transparency.fb.com/policies/community-standards/misinformation> [<https://perma.cc/C6VJ-VBM4>] (describing the policies Facebook has implemented to protect elections from interference). A Twitter user now violates the company's Civic Integrity Policy if they post misleading information regarding the voting process, publish content designed to intimidate voters or otherwise suppress voting efforts, or create accounts that misrepresent their political affiliation. *Civic Integrity Policy*, *supra*. Twitter also redesigned the warning labels established in 2020 before the 2022 midterm elections and found that they helped decrease engagement with misinformation. *Our Approach to the 2022 US Midterms*, X BLOG (Aug. 11, 2022), https://blog.twitter.com/en_us/topics/company/2022-our-approach-to-the-2022-us-midterms [<https://perma.cc/4JR2-FX96>]. Facebook has likewise pledged to remove misinformation that could contribute to a risk of violence, and misinformation that could interfere with or cause confusion about the country's election process. *Misinformation*, *supra*. Furthermore, Facebook has created policies to combat the rise of misleading videos made with artificial intelligence. *Id.* Even so, the company's own oversight board criticized these rules as ineffective after a video of President Biden that was altered with artificial intelligence went viral on Facebook and was not removed from the platform. Ali Swenson, *Oversight Board Urges Meta to Rethink Its Policy on Manipulated Media in High-Stakes Election Year*, ASSOCIATED PRESS, <https://apnews.com/article/meta-manipulated-media-policy-election-deepfakes-274f9ca63de39e8638aa32fc924ec9c5> [<https://perma.cc/65GE-GWBW>] (Feb. 5, 2024).

²² See David Klepper, *Misinformation and the Midterm Elections: What to Expect*, ASSOCIATED PRESS (Nov. 3, 2022), <https://apnews.com/article/2022-midterm-elections-misinformation-219762637bacf49bf7ec723546b46fb3> [<https://perma.cc/ES88-ZKFW>] (documenting the widespread election misinformation that was on social media and elsewhere before the midterm elections in 2022); Gabriel R. Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public's Confidence in Democracy*,

before the midterm elections in 2022, a survey showed that forty percent of Americans still believed the 2020 election was rigged on behalf of President Biden, or otherwise fraudulently stolen from former President Trump.²³ Additionally, in the 2022 general elections, around sixty percent of voters had an election denier on their ballots.²⁴ Although few outright election deniers ultimately succeeded in the 2022 election, many only lost by narrow margins, and some election deniers did win in states that are traditionally won by Republican candidates.²⁵

One 2020 election denier, Kari Lake, even refused to concede after losing the 2022 Arizona governor's race.²⁶ Instead, she filed a lawsuit alleging that election officials in Maricopa County made deliberate efforts to disenfranchise voters.²⁷ Another Republican candidate in the 2022 midterm election, Solomon

BROOKINGS (July 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/> [<https://perma.cc/A4V2-RPHN>] (compiling statistical research that suggests the American public is becoming increasingly distrustful of politicians and political processes, including elections).

²³ Giulia Carbonaro, *40% of Americans Think 2020 Election Was Stolen, Just Days Before Midterms*, NEWSWEEK, <https://www.newsweek.com/40-americans-think-2020-election-stolen-days-before-midterms-1756218> [<https://perma.cc/GS7A-ADUP>] (Nov. 2, 2022). An additional twenty-three percent of Americans either stated that they did not know whether the presidential election was rigged or stolen, or neither agreed nor disagreed with that premise. *Id.*

²⁴ FiveThirtyEight Staff, *60 Percent of Americans Will Have an Election Denier on the Ballot This Fall*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/republicans-trump-election-fraud/> [<https://web.archive.org/web/20240407013205/https://projects.fivethirtyeight.com/republicans-trump-election-fraud/>] (Nov. 8, 2022). Nearly 200 people running for office in 2022 had expressly stated that the 2020 presidential election was illegitimate. *Id.* Another sixty-one candidates had questioned the presidential election results, and ninety-three had accepted the results but suggested that there might be issues with the integrity of American elections. *Id.*

²⁵ Daniel Dale, *How 2020 Election Deniers Did in Their 2022 Midterm Races*, CNN, <https://www.cnn.com/interactive/2022/11/politics/election-deniers-winners-losers-midterms-2022/> [<https://perma.cc/L3JY-ZVWA>] (Dec. 7, 2022); Greta Bedekovics & Ashleigh Maciolek, *Election Deniers Lost Key Races for Federal and State Offices in the 2022 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 22, 2022), <https://www.americanprogress.org/article/election-deniers-lost-key-races-for-federal-and-state-offices-in-the-2022-midterm-elections/> [<https://perma.cc/9XM3-DZNS>]. Candidates who doubted or outright denied President Biden's win in the 2020 presidential election fared especially poorly in closely contested states, including Pennsylvania and Arizona. Bedekovics & Maciolek, *supra*. Furthermore, of the ninety-four election-denying candidates vying for governor, secretary of state, or attorney general, only fourteen were successful in their elections. Adam Edelman, *Election Deniers Overwhelmingly Lost in Battleground States*, NBC NEWS (Nov. 16, 2022), <https://www.nbcnews.com/politics/2022-election/election-deniers-overwhelmingly-lost-battleground-states-rcna57058> [<https://perma.cc/G93G-TQVY>]. Of nineteen election deniers running for U.S. Senate, however, ten won their respective elections. Dale, *supra*.

²⁶ Jeremy Duda, *Lake Refuses to Concede, Indicates Possible Legal Challenge*, AXIOS, <https://www.axios.com/2022/11/17/lake-refuses-to-concede-indicates-possible-legal-challenge> [<https://perma.cc/6YST-F5D9>] (Nov. 17, 2022).

²⁷ Libby Cathey, *Kari Lake Files Lawsuit Riddled with Falsehoods Seeking to Overturn Arizona Election*, ABC NEWS (Dec. 9, 2022), <https://abcnews.go.com/Politics/kari-lake-files-lawsuit-riddled-falsehoods-seeking-overturn/story?id=94882087> [<https://perma.cc/D2RC-RTVP>]. Lake's lawsuit requested relief that included overturning the governor's race and declaring her the winner. *Id.* Her

Peña, also refused to concede after losing his State House race in New Mexico.²⁸ Peña allegedly acted in a more extreme manner, however, as he was later arrested for paying individuals to shoot at the homes of county commissioners and state legislators.²⁹ Almost two years after these events, questions about the legitimacy of America's election process remain for many voters, even as the country prepares for its next presidential election.³⁰

Nevertheless, concerns about a rising proliferation of election misinformation on social media are not exclusive to the United States.³¹ For example,

legal argument partially relied on printing problems that impacted voting locations in Maricopa County. *Id.* Lake alleged that these printing problems disenfranchised voters, despite the fact that voters at those locations were allowed to vote by alternative means. *Id.* This lawsuit was later dismissed for a lack of evidence after a judge determined that Lake's witnesses were relying on speculation rather than personal knowledge of deliberate malfeasance. *Kari Lake Loses Her Legal Challenge to the Results of the Arizona Governor's Race*, NPR, <https://www.npr.org/2022/12/24/1145445175/kari-lake-arizona-governor-loses-case> [https://perma.cc/6MDT-CBHN] (Dec. 24, 2022). Lake and her lawyers were not sanctioned, but Lake was ordered to pay her opponent's attorney's fees for the case. Kathryn Watson, *Judge Orders Kari Lake to Repay Thousands of Dollars in Fees Related to Election Lawsuit*, CBS NEWS (Dec. 28, 2022), <https://www.cbsnews.com/news/judge-orders-kari-lake-to-repay-fees-related-to-election-lawsuit/> [https://perma.cc/2QRK-RZXT]. Not one to be dissuaded, Lake launched a campaign for Kyrsten Sinema's seat in the U.S. Senate less than a year after her lawsuit concluded. Ximena Bustillo, *Arizona Republican Kari Lake Launches 2024 Senate Campaign*, NPR (Oct. 10, 2023), <https://www.npr.org/2023/10/10/1204870164/arizona-republican-kari-lake-launches-2024-senate-campaign> [https://perma.cc/FGZ2-KP3J].

²⁸ Remy Tumin & Mike Ives, *Republican Ex-Candidate Arrested in Shootings Targeting New Mexico Democrats*, N.Y. TIMES, <https://www.nytimes.com/2023/01/16/us/albuquerque-democrat-officials-shootings-arrest.html> [https://perma.cc/QYG6-QHBA] (Jan. 17, 2023).

²⁹ *Id.* The Albuquerque Police Department alleged that Peña texted the shooters with the addresses of the homes and instructed them to shoot at those locations. *Id.* A spokesman for the department also said that Peña approached the commissioners and legislators shortly before the shootings, claiming that the State House race was rigged and fraudulent. *Id.* Peña was indicted for these crimes and is awaiting trial as of the time of this Note, though two of his co-defendants have since pled guilty to their respective charges. Press Release, U.S. Att'y's Off. for Dist. N.M., No. 24-49, Demetrio Trujillo, Co-Defendant of Solomon Peña, Pleads Guilty (Feb. 2, 2024), <https://www.justice.gov/usao-nm/pr/demetrio-trujillo-co-defendant-solomon-pena-pleads-guilty> [https://perma.cc/9CL6-DMTN]; Press Release, U.S. Att'y's Off. for Dist. N.M., No. 24-13, Jose Trujillo, Co-Defendant of Solomon Peña, Pleads Guilty (Jan. 9, 2024), <https://www.justice.gov/usao-nm/pr/jose-trujillo-co-defendant-solomon-pena-pleads-guilty> [https://perma.cc/D8HW-WEL4]; Press Release, Off. of Pub. Affs., U.S. Dep't of Just., No. 23-619, Former New Mexico House of Representatives Candidate Charged for Shooting Spree (May 31, 2023), <https://www.justice.gov/opa/pr/former-new-mexico-house-representatives-candidate-charged-shooting-spree> [https://perma.cc/8Z4Q-ZYCK].

³⁰ See Susan Page, Sudiksha Kochi & Savannah Kuchar, *Ahead of Jan. 6, Poll Flashes Warning Signs About 2024 Election Aftermath*, USA TODAY, <https://www.usatoday.com/story/news/politics/elections/2024/01/04/jan-6-trump-voters-believe-fraud-2024/72072407007/> [https://perma.cc/US9R-25EK] (Jan. 4, 2024) (citing a 2024 poll that showed a majority of President Trump's voters still demonstrated no confidence in the country's election system).

³¹ See Diane Jeantet, *Brazilian Voters Bombarded with Misinformation Before Vote*, ASSOCIATED PRESS (Oct. 25, 2022), <https://apnews.com/article/jair-bolsonaro-caribbean-social-media-brazil-b75e51f515b0a708800198afa1b8601d> [https://perma.cc/4D9N-7M7S] (reporting on the election misinformation that was shared on Brazilian social media up to a week before the country's presidential election in 2022); Alistair Coleman, *French Election: Misinformation Targets Candidates and Voting System*, BBC (Apr. 22, 2022), <https://www.bbc.com/news/61179620> [https://perma.cc/KZA2-EDBK] (de-

disinformation campaigns attempting to discredit the Canadian election were launched on social media in 2021.³² More recently, disinformation intended to affect Brazil's presidential election was posted on social media in 2022.³³

Although election misinformation spread on social media in both of these countries, each country also took steps to mitigate that spread.³⁴ Conversely, the United States has struggled to do the same.³⁵ Social media companies in

tailoring the election misinformation that spread in France during the country's election cycle in 2022); Julian Jaurisch, *Disinformation in the 2021 German Federal Elections: What Did and Did Not Occur*, INSTITUT MONTAIGNE (Oct. 5, 2021), <https://www.institutmontaigne.org/en/analysis/disinformation-2021-german-federal-elections-what-did-and-did-not-occur> [<https://perma.cc/CW83-LU5G>] (reflecting on the misinformation that spread on German social media before the country's 2021 election); Anja Karadeglija, *From COVID Conspiracies to Rigged Voting Machines, Misinformation Plagues Federal Election*, NAT'L POST, <https://nationalpost.com/news/politics/election-2021/from-covid-conspiracies-to-rigged-voting-machines-misinformation-plagues-the-election> [<https://perma.cc/XEU3-7KJV>] (Sept. 15, 2021) (recounting the misinformation that may have impacted Canada's federal election in 2021).

³² See Karadeglija, *supra* note 31 (outlining the disinformation that spread on Canadian social media in 2021). Election misinformation in Canada included allegations of rigged voting machines, similar to the arguments made in the United States before and after the 2020 election. *Id.*

³³ See Jeantet, *supra* note 31 (highlighting the breadth of misinformation on Brazilian social media regarding the country's most recent election). In addition to misinformation about candidates' policies and personal histories before the Brazilian election, misinformation regarding the election process's security and legitimacy also spread on social media. *Id.* This misinformation also largely centered around electronic voting machines and their alleged unreliability. *Id.*

³⁴ See Jack Nicas, *To Fight Lies, Brazil Gives One Man Power Over Online Speech*, N.Y. TIMES (Oct. 21, 2022), <https://www.nytimes.com/2022/10/21/world/americas/brazil-online-content-misinformation.html> [<https://perma.cc/KQG9-GVD4>] (detailing a Brazilian policy aimed at combating election misinformation, which gave the elections chief the authority to order social media companies to delete content from their platforms); Kathleen Harris, *Elections Canada Prepares to Fight Fake News, Foreign Influence in 2019 Vote*, CBC, <https://www.cbc.ca/news/politics/elections-canada-fake-news-voting-1.4582291> [<https://perma.cc/7ESF-U3WK>] (Mar. 20, 2018) (describing some of the policies adopted by a Canadian agency to combat election misinformation, which included tracking posts on social media and providing facts to rebut misinformation). Some countries in Europe have also instituted policies that combat election misinformation. See *Overview of the NetzDG Network Enforcement Law*, CTR. FOR DEMOCRACY & TECH. (July 17, 2017), <https://cdt.org/insights/overview-of-the-netzdg-network-enforcement-law/> [<https://perma.cc/RZ4G-6CLU>] (reporting on a German law that allows the government to fine social media companies for hosting "obviously illegal" content, which includes defamation and content that publicly incites crimes); Michael-Ross Fiorentino, *France Passes Controversial 'Fake News' Law*, EURONEWS, <https://www.euronews.com/2018/11/22/france-passes-controversial-fake-news-law> [<https://perma.cc/SA9G-KLLJ>] (Nov. 22, 2018) (announcing a French law that allows judges to force the removal of misinformation from social media sites during elections). To minimize the scope of this Note, however, the Note will focus only on the policies adopted in Brazil and Canada, as the effects of those policies have been studied and/or demonstrated through current events. See *infra* notes 51–86 and accompanying text (analyzing the policies adopted by the Brazilian and Canadian governments to combat election misinformation on social media, and the effects of those policies).

³⁵ See Press Release, Off. of Pub. Affs., U.S. Dep't of Just., No. 22-1155, Justice Department Releases Information on Efforts to Protect the Right to Vote, Prosecute Election Fraud and Secure Elections (Oct. 26, 2022), <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote-prosecute-election-fraud> [<https://perma.cc/EE8H-U248>] (describing the U.S. Department of Justice's role in securing elections, which includes enforcing legislative acts on the

the United States have established policies aimed at warning members of the public when they may be viewing misinformation, and at halting the dissemination of that misinformation entirely, but the federal government has thus far not acted on this matter in any meaningful way.³⁶ Still, relying on social media companies themselves to combat misinformation has generally proven to be ineffective, as the companies' policies are limited and subject to change.³⁷

Part I of this Note examines the policies that Brazil and Canada have adopted to combat election misinformation on social media, and the apparent

matter). Currently, the Department of Justice's only role with regard to disinformation on social media involves combating disinformation that is spread by foreign actors. *Id.*

³⁶ See *Civic Integrity Policy*, *supra* note 21 (outlining Twitter's Civic Integrity Policy, which prohibits posts containing misleading information regarding the voting process, content designed to intimidate voters or otherwise suppress voting efforts, and accounts that misrepresent users' political affiliations); *Misinformation*, *supra* note 21 (stating the policies Facebook has established to protect elections from interference, which include banning misinformation that can contribute to a risk of violence, and removing content that could create confusion about voting processes); Justice Department Releases Information on Efforts to Protect the Right to Vote, *supra* note 35 (demonstrating the steps the American government has taken to address election misinformation, which currently only focus on disinformation spread by foreign influences).

³⁷ See *Fact-Checking Policies on Facebook and Instagram*, META BUS. HELP CTR., <https://www.facebook.com/business/help/315131736305613?id=673052479947730> [<https://web.archive.org/web/20240407020512/https://www.facebook.com/business/help/315131736305613?id=673052479947730>] (demonstrating the limits of Facebook's fact-checking policies with regard to misinformation spread by politicians or marked as "opinion"); Matt O'Brien, Barbara Ortutay, David Klepper & The Associated Press, *Here's How Elon Musk Is Changing What Appears on Your Twitter Feed*, *FORTUNE* (Dec. 14, 2022), <https://fortune.com/2022/12/14/how-elon-musk-changing-what-appears-on-your-twitter-feed/> [<https://perma.cc/7GQ4-DZXN>] (explaining how Twitter's policies have changed since Elon Musk bought and began running the company). Politicians and content designated as "opinion" are not fact-checked on Facebook, limiting the company's misinformation policy. *Fact Checking Policies on Facebook and Instagram*, *supra*. Thus, politicians could hypothetically post misinformation that would otherwise be subject to removal from the platform. See *id.* (clarifying that, although misinformation flagged by Facebook's fact-checkers will generally be prevented from spreading or removed from the platform entirely, misinformation posted by politicians will not be subjected to the same fact-checking procedures). Recently, Facebook also decided to restore former President Trump's account, which it previously suspended on January 7, 2021 due to fears that he would use the platform to continue inciting violence. Sheera Frenkel & Mike Isaac, *Meta to Reinstate Trump's Facebook and Instagram Accounts*, *N.Y. TIMES* (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/technology/trump-facebook-instagram-accounts-meta.html> [<https://perma.cc/X2BA-7F9P>]. Similarly, Twitter has loosened its policies regarding misinformation since Musk bought the social media platform in October 2022. O'Brien et al., *supra*. For example, the company has likewise reinstated the accounts of some prominent users who were banned from the platform for spreading election misinformation, including President Trump. *Id.* Furthermore, Twitter announced in November 2022 that it was ending its ban on misinformation about the COVID-19 pandemic, potentially opening the door for the same policy change to be made about election misinformation in the future. David Klepper, *Twitter Ends Enforcement of COVID Misinformation Policy*, *ASSOCIATED PRESS* (Nov. 29, 2022), <https://apnews.com/article/twitter-ends-covid-misinformation-policy-cc232c9ce0f193c505bbc63bf57ecad6> [<https://perma.cc/AR5J-RW5H>]. Facebook then took the same step in June 2023. *Meta Rolls Back Measures to Tackle COVID Misinformation*, *REUTERS* (June 16, 2023), <https://www.reuters.com/technology/meta-rolls-back-measures-tackle-covid-misinformation-2023-06-16/> [<https://perma.cc/6EMU-UJSB>].

effectiveness or ineffectiveness of those policies.³⁸ Part I also outlines the legislative limitations in the United States that have previously stymied efforts to combat this type of misinformation.³⁹ Part II details the benefits and drawbacks to the Brazilian and Canadian approaches, and explains how feasible or infeasible each approach would be in the United States.⁴⁰ Finally, Part III argues that creating a bipartisan approach to informing the public about election misinformation and dispelling such misinformation as it spreads on social media—modeled after the Canadian approach to combating misinformation—is necessary in the United States to secure elections and restore faith in democracy.⁴¹ Alternatively, Part III suggests that modernizing Section 230 of the Communications Decency Act (CDA) could be a readily available bipartisan solution to this issue that could likewise ensure the electorate is adequately informed.⁴²

I. COMBATING ELECTION MISINFORMATION: GLOBAL APPROACHES AND LOCAL BARRIERS

Although election misinformation is a global issue, government responses to that common issue are varied, in part due to the differing levels of protection afforded to speech in different countries.⁴³ Furthermore, policies addressing this matter have enjoyed varying degrees of success in other countries, with some policies proving to have little to no impact on the dissemination of misinformation on social media, and others proving to be more effective in combating this problem.⁴⁴ To better understand solutions the U.S. government could implement to address the dissemination of election misinformation on social

³⁸ See *infra* notes 51–86 and accompanying text.

³⁹ See *infra* notes 87–125 and accompanying text.

⁴⁰ See *infra* notes 126–148 and accompanying text.

⁴¹ See *infra* notes 149–170 and accompanying text.

⁴² See *infra* notes 171–198 and accompanying text.

⁴³ See Nicas, *supra* note 34 (describing the Brazilian government's efforts to create a policy that would curb the spread of election misinformation); *infra* notes 79–83 and accompanying text (outlining the various policies adopted by the Canadian government to address election misinformation, which include compelling social media companies to improve their transparency about political advertising, prohibiting political candidates from making false statements regarding election results, and having non-political officials track content being shared on social media and provide the public with correct information when necessary).

⁴⁴ See Adriano Machado, *Bolsonaro Backers Ransack Brazil Presidential Palace, Congress, Supreme Court*, REUTERS (Jan. 8, 2023), <https://www.reuters.com/world/americas/bolsonaro-supporters-invade-congress-presidential-palace-brasilia-2023-01-08/> [<https://perma.cc/5PLA-GB9V>] (demonstrating the political instability that remained in Brazil after the country's recent presidential election, arguably due to the proliferation of election misinformation beforehand); AENGUS BRIDGMAN ET AL., MEDIA ECOSYSTEM OBSERVATORY, MIS- AND DISINFORMATION DURING THE 2021 CANADIAN FEDERAL ELECTION 3 (2022), https://www.mcgill.ca/maxbellschool/files/maxbellschool/meo_election_2021_report.pdf [<https://perma.cc/J8GZ-H6LV>] (reporting on the relative success of Canada's election misinformation policies, as demonstrated by the citizenry's ability to detect misinformation when faced with it).

media, it is useful to examine the policies implemented in other nations and determine their potential feasibility, applicability, and effectiveness within the confines of the First Amendment.⁴⁵

This Part looks to countries that have experienced the spread of election misinformation on social media, but have taken governmental action to counter this issue in ways the United States has yet to try.⁴⁶ In an effort to ensure a timely sample, Section A of this Part analyzes policies implemented in Brazil,⁴⁷ and Section B examines those implemented in Canada.⁴⁸ Both sections also contextualize these policies in relation to their respective country's constitutional protections of speech.⁴⁹ Finally, Section C outlines the unique constitutional, political, and common law structures that exist in the United States, which have thus far prevented the government from taking action on this matter.⁵⁰

A. Brazil's Efforts to Counter Election Misinformation

Brazilian citizens are guaranteed the right to free expression in Article 5 of the Brazilian Constitution.⁵¹ Article 220 of the Brazilian Constitution even more specifically states that political censorship is unconstitutional.⁵² To protect these rights on the internet, Articles 18 and 19 of Brazil's Civil Rights Framework for the Internet (MCI) establish that social media companies and other internet service providers do not have any civil liability for the content that individual users post on their platforms.⁵³ Thus, social media companies are only tasked with monitoring their platforms for the content they choose to prohibit, which generally includes election misinformation.⁵⁴

⁴⁵ See *infra* notes 51–86 and accompanying text (exploring the policies that the Brazilian and Canadian governments have put in place to prevent election misinformation from spreading on social media platforms).

⁴⁶ See *infra* notes 51–86 and accompanying text.

⁴⁷ See *infra* notes 51–70 and accompanying text.

⁴⁸ See *infra* notes 71–86 and accompanying text.

⁴⁹ See *infra* notes 51–54, 71–72, and accompanying text.

⁵⁰ See *infra* notes 87–125 and accompanying text.

⁵¹ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, § IV (Braz.). Translated into English, this provision states, “[M]anifestation of thought is free, but anonymity is forbidden.” *Id.*

⁵² *Id.* art. 220. Translated into English, the second paragraph of this provision states, “Any and all censorship of a political, ideological and artistic nature is forbidden.” *Id.*

⁵³ Jeffrey Omari, *Taking Aim at “Fake News”: Brazil’s Legislative Agenda for Online Democracy*, 66 ST. LOUIS U. L.J. 115, 124 (2021) (describing the Civil Rights Framework for the Internet (MCI) and its effect on online speech in Brazil). This provision is comparable to § 230 of America’s Communications Decency Act (CDA). *Id.*; see *infra* notes 91–92 and accompanying text (referencing § 230 of the CDA and discussing its breadth).

⁵⁴ See Omari, *supra* note 53, at 124 (explaining the MCI’s impact on internet companies operating in Brazil); see also *Civic Integrity Policy*, *supra* note 21 (describing Twitter’s Civic Integrity Policy, which aims to prevent individuals from using the platform to manipulate elections); *Misinformation*, *supra* note 21 (highlighting the policies Facebook has established to protect elections from interference).

Yet, before Brazil's presidential election in October 2022, Human Rights Watch stated in its annual report that Brazilians' speech rights were at risk under the leadership of then-President Jair Bolsonaro.⁵⁵ President Bolsonaro had previously hinted that he might not concede the presidency if he lost the election, and fears of that situation becoming a reality increased as he spread election misinformation and unsubstantiated allegations of election fraud on social media in the months before Election Day.⁵⁶ Leading up to the presidential election, Facebook, YouTube, WhatsApp, and other social media sites also seemed unable to keep up with their responsibilities to censor fraudulent content under the MCI, and people around the world began criticizing their efforts to do so.⁵⁷

In response to these threats to the Brazilian election, authorities granted a justice on the country's Supreme Federal Court—who also serves as the country's elections chief—the authority to force social media companies to remove content from their platforms.⁵⁸ If the companies fail to comply, their services

⁵⁵ See *Brazil: Protect Voting, Speech Rights*, HUM. RTS. WATCH (Jan. 13, 2022), <https://www.hrw.org/news/2022/01/13/brazil-protect-voting-speech-rights> [<https://perma.cc/VB5R-WSBC>] (finding that democratic institutions in Brazil needed to take steps to protect Brazilians' speech rights before the country's presidential election in 2022). In its report, Human Rights Watch cited President Bolsonaro's propensity for spreading misinformation regarding election fraud and the COVID-19 pandemic. *Id.*

⁵⁶ See Michael Fox, *In Brazil, Disinformation Campaign Puts Democracy at Risk*, N. AM. CONG. ON LATIN AM. (Oct. 26, 2022), <https://nacla.org/brazil-disinformation-democracy> [<https://perma.cc/RBT9-A6TA>] (contextualizing the election misinformation that was spread in Brazil before the 2022 presidential elections); Duarte Mendonca, *Bolsonaro Says He Will Either Be Arrested, Killed or Win Brazil's Next Election*, CNN (Aug. 29, 2021), <https://www.cnn.com/2021/08/29/americas/bolsonaro-brazil-elections-intl/index.html> [<https://perma.cc/FF9H-CUEL>] (reporting on President Bolsonaro's predictions for his future after the 2022 Brazilian presidential election). In 2021, President Bolsonaro said that if he were to lose the 2022 election, the only options were for him to be arrested or killed, implying that he would not concede or allow a peaceful transfer of power. Mendonca, *supra*. President Bolsonaro also repeatedly alleged that the Brazilian election system was fraudulent, arguably justifying his potential attempt to remain in power in the event of an election loss. See Diane Jeantet & Carla Bridi, *EXPLAINER: Bolsonaro Knocks Brazil's Voting System*, ASSOCIATED PRESS (Sept. 6, 2022), <https://apnews.com/article/jair-bolsonaro-caribbean-voting-donald-trump-elections-fb592d5165e5bb07c0426199d86b5787> [<https://perma.cc/9AA3-2BKK>] (outlining the history of President Bolsonaro's claims of election fraud). In 2022, as President Bolsonaro's disinformation campaign solidified ahead of the country's presidential election, a Brazilian journalism professor and researcher indicated that election misinformation could lead to Bolsonaro's victory. Fox, *supra*.

⁵⁷ See Deborah Brown & Maria Laura Canineu, *Social Media Platforms Are Failing Brazil's Voters*, HUM. RTS. WATCH (Oct. 28, 2022), <https://www.hrw.org/news/2022/10/28/social-media-platforms-are-failing-brazils-voters> [<https://perma.cc/3FDT-PXMP>] (arguing that social media companies must revise their policies to better secure elections—including the Brazilian presidential election—from interference caused by misinformation spreading on their platforms); Rebecca Klar, *Meta, YouTube Failing to Crack Down on Brazilian Election Misinformation: Report*, THE HILL (Sept. 28, 2022), <https://thehill.com/policy/technology/3664756-meta-youtube-failing-to-crack-down-on-brazilian-election-misinformation-report/> [<https://perma.cc/LV2H-KUER>] (comparing social media companies' failures to address election misinformation in Brazil in 2022 to their similar failures to contain election misinformation in the United States in 2020).

⁵⁸ Nicas, *supra* note 34.

are subject to suspension in the country.⁵⁹ This represented a significant shift in Brazil's policy toward misinformation, as President Bolsonaro signed a decree banning social media companies from removing such misinformation just one year prior.⁶⁰ The new policy has proven to be controversial, however, as rights groups suggest that it could be taken advantage of, and could potentially lead to fundamental rights violations.⁶¹ Critics may also argue that the modern policy is in conflict with the MCI because it wrests content regulatory powers from social media companies.⁶²

Despite these efforts to ensure the 2022 presidential election results would be trusted, it took two days for President Bolsonaro to agree to vacate the presidency peacefully after he lost to the country's current president, Luiz Inácio Lula da Silva.⁶³ On the day President Bolsonaro conceded, and for several weeks afterward, his supporters protested the election's outcome by blocking highways, demonstrating outside of military facilities, and trying to invade the police headquarters in Brasília.⁶⁴

⁵⁹ *Id.* To prevent violative content from spreading, the policy requires social media companies to comply with an order from the elections chief within two hours. *Id.*

⁶⁰ See Billy Perrigo, *Brazil's Restrictive New Social Media Rules Could Be an Omen for the Future of the Internet*, TIME (Sept. 10, 2021), <https://time.com/6096704/brazil-social-media-rules/> [<https://perma.cc/H6GA-GKDP>] (highlighting President Bolsonaro's efforts to prevent social media companies from policing misinformation on their platforms). Translated into English, this measure stated that "[s]ocial network providers [were] prohibited from adopting criteria for moderating or limiting the scope of the dissemination of content that impl[ies] political, ideological, scientific, artistic or religious censorship." Medida Provisória No. 1.068 art. 8-A(VII), de 06 Setembro de 2021, D.O.U. de 06.09.2021 (Braz.). The measure was merely temporary, however, and it is no longer in force. Perrigo, *supra*.

⁶¹ See *Brazil Election Marked by Disinformation Networks, Says Carter Center*, REUTERS (Nov. 4, 2022), <https://www.reuters.com/world/americas/brazil-election-marked-by-disinformation-networks-says-carter-center-2022-11-05/> [<https://perma.cc/8XTY-5SDM>] (sharing worries about this policy expressed by a non-profit group that observes international elections); Nicas, *supra* note 34 (reporting on concerns that civil rights authorities had about this policy). Much of the concern about the policy focused on the fact that it granted power to a single individual who previously ordered investigations of President Bolsonaro and imprisoned some of his supporters. Nicas, *supra* note 34.

⁶² See Omari, *supra* note 53, at 124 (describing the role that social media companies play under the MCI). To protect individuals' speech from government interference, the MCI requires social media companies to surveil their own platforms for prohibited content, including election misinformation. *Id.* Yet, Brazil's misinformation policy allows the elections chief to take on a similar role and even punish social media companies that do not live up to the country's surveillance standards. Nicas, *supra* note 34.

⁶³ Jack Nicas & André Spigariol, *Bolsonaro Agrees to Transition, Two Days After Losing Brazil Election*, N.Y. TIMES, <https://www.nytimes.com/2022/11/01/world/americas/bolsonaro-protest-brazil-election.html> [<https://perma.cc/2DL2-SQP5>] (Jan. 8, 2023). Although President Bolsonaro agreed to step down from the presidency during his concession speech, he did not explicitly state that he lost the election, nor did he acknowledge the legitimacy of the election. *Id.*

⁶⁴ Ueslei Marcelino & Victor Borges, *Supporters of Brazil's Defeated Bolsonaro Attack Police Headquarters*, REUTERS (Dec. 13, 2022), <https://www.reuters.com/world/americas/supporters-brazils-bolsonaro-try-invade-federal-police-headquarters-2022-12-13/> [<https://perma.cc/8LFG-D84Z>]; Diane Jeantet & Diarlei Rodrigues, *Bolsonaro Supporters Protest Against Brazil's Presidential Election*

Da Silva was officially sworn in as president on January 1, 2023, as the Brazilian government honored the election results despite the ongoing protests.⁶⁵ One week after President da Silva's inauguration, however, former President Bolsonaro's supporters raided Brazil's congress, the presidential palace, and the Supreme Federal Court building in a further effort to protest the election.⁶⁶ President Bolsonaro quickly denounced these attacks on the gov-

Results, PBS (Nov. 15, 2022), <https://www.pbs.org/newshour/world/bolsonaro-supporters-protest-against-brazils-presidential-election-results> [<https://perma.cc/4A2J-QH6X>]; *Bolsonaro Supporters Block Brazil Roads for a 2nd Day as President Refuses to Accept Election Loss*, CBS NEWS, <https://www.cbsnews.com/news/brazil-election-results-2022-protest-lula-bolsonaro-road-blocks/> [<https://perma.cc/S6QV-UXCQ>] (Nov. 1, 2022). These protests were large and coordinated, taking place in cities across Brazil and affecting over 46,500 miles of state highways. *Bolsonaro Supporters Block Brazil Roads for a 2nd Day as President Refuses to Accept Election Loss*, *supra*. Despite President Bolsonaro's requests that protests remain peaceful, the protests at the police headquarters in Brasília resulted in several bus and car fires. Marcelino & Borges, *supra*; *Bolsonaro Supporters Block Brazil Roads for a 2nd Day as President Refuses to Accept Election Loss*, *supra*.

⁶⁵ See Tara John et al., *Lula da Silva Sworn in as Brazil's President Amid Fears of Violence from Bolsonaro Supporters*, CNN, <https://www.cnn.com/2023/01/01/americas/brazil-lula-da-silva-inauguration-intl/index.html> [<https://perma.cc/87ED-MBBH>] (Jan. 1, 2023) (detailing the tense political atmosphere in Brazil at the time of da Silva's inauguration). President Bolsonaro left Brazil and arrived in Florida two days prior to the Brazilian inauguration and thus did not attend. *Id.* Just over one month after leaving Brazil, the ex-president applied for a visa to stay in the United States for six more months. Emily Olson, *Brazil's Jair Bolsonaro Has Applied for a 6-Month Visa to Remain in the U.S.*, NPR (Feb. 2, 2023), <https://www.npr.org/2023/02/02/1152759904/jair-bolsonaro-florida-brazil-visa> [<https://perma.cc/PV7Q-N79Y>]. While in the United States, however, Bolsonaro was not any less politically active than he was in Brazil. See *Brazil's Bolsonaro Says 'Mission Still Not Over' in Speech to US CPAC*, REUTERS (Mar. 4, 2023), <https://www.reuters.com/world/americas/brazils-bolsonaro-says-mission-still-not-over-speech-us-cpac-2023-03-04/> [<https://perma.cc/PQ4E-FJ8H>] (referencing President Bolsonaro's speech at the U.S. Conservative Political Action Conference, wherein he teased a future run for president in Brazil); Vera Bergengruen, *Inside Bolsonaro's Surreal New Life as a Florida Man—and MAGA Darling*, TIME (Feb. 3, 2023), <https://time.com/6252441/jair-bolsonaro-florida-exile-maga/> [<https://perma.cc/4FRD-KQY7>] (reporting on President Bolsonaro's life in the United States and previewing a political event at a resort owned by former President Trump, at which President Bolsonaro headlined with right-wing personality Charlie Kirk); Felipe Marques, *Bolsonaro Takes Post-Presidency Florida Tour to a Trump Resort*, BLOOMBERG (Feb. 3, 2023), <https://www.bloomberg.com/news/articles/2023-02-04/bolsonaro-takes-post-presidency-florida-tour-to-a-trump-resort> [<https://perma.cc/6WT5-WTR3>] (describing President Bolsonaro's political rallies in Florida, at which he questioned Brazil's election results and appeared to show an intent to remain in the United States). President Bolsonaro ultimately returned to Brazil in March 2023, where he is now facing a federal investigation into his attempts to remain in power after losing the country's 2022 presidential election. Michael Rios, *Bolsonaro Denies Coup Plot as Thousands Rally in Support of Former Brazilian Leader*, CNN, <https://www.cnn.com/2024/02/26/americas/brazil-jair-bolsonaro-coup-allegations-intl-latam/index.html> [<https://perma.cc/9ZZG-U78D>] (Feb. 25, 2024); Carrie Kahn & Kaitlyn Radde, *Former President Bolsonaro Returns to Brazil After Three Months in Florida*, NPR (Mar. 30, 2023), <https://www.npr.org/2023/03/30/1167040880/bolsonaro-returns-brazil-from-florida> [<https://perma.cc/6KHM-5T3G>].

⁶⁶ See Machado, *supra* note 44. These protests were destructive, as individuals vandalized the presidential palace, flooded sections of the congressional building, and ransacked the Supreme Federal Court in three hours. *Id.* Within one day, approximately 1,500 people were arrested or detained for their connection with the protest. Doha Madani, *More Than 1,000 People Detained in Connection*

ernment, but he has not acknowledged the legitimacy of the country's presidential election as of the time of this Note.⁶⁷

Despite the elections chief's continued efforts to suspend the social media platforms of individuals spreading election misinformation in Brazil, baseless allegations of fraud regarding the presidential election continued to be prevalent months after President da Silva took office.⁶⁸ As a result, the Brazilian government has since introduced what is known as the "Fake News Law," which, if passed, would create even more mechanisms to combat misinformation on social media.⁶⁹ This law stalled in the country's Chamber of Deputies, however, so the potential impacts of such legislation remain unclear.⁷⁰

with *Attack on Brazil's Capital*, NBC NEWS (Jan. 9, 2023), <https://www.nbcnews.com/news/latino/1000-people-detained-connection-attack-brazils-capital-rcna64977> [<https://perma.cc/BT3K-96CL>].

⁶⁷ See Jack Nicas, *Bolsonaro and Allies Planned a Coup, Brazil Police Say*, N.Y. TIMES (Feb. 8, 2024), <https://www.nytimes.com/2024/02/08/world/americas/brazil-police-raid-bolsonaro-attempted-coup-investigation.html> [<https://perma.cc/XA6E-P473>] (describing President Bolsonaro's defiant reaction to allegations that he attempted to stage a coup after the 2022 election); Rob Picheta, *The Violent Attack on Brazil's Government Was Months in the Making. Here's What You Need to Know*, CNN, <https://www.cnn.com/2023/01/09/americas/brazil-congress-attack-explained-intl/index.html> [<https://perma.cc/56AN-R3W4>] (Jan. 9, 2023) (explaining President Bolsonaro's attempt to distance himself from the protest of Brazil's presidential election, despite his efforts to foster doubt in his loss of said election); Jack Nicas & André Spigariol, *Judge Slaps Down Bolsonaro's Late Bid to Overturn Brazil's Election*, N.Y. TIMES, <https://www.nytimes.com/2022/11/23/world/americas/bolsonaro-brazil-election.html> [<https://perma.cc/EL96-PARX>] (Jan. 8, 2023) (reporting on President Bolsonaro's unsuccessful attempt to have Brazil's judicial system overturn the 2022 election). Although President Bolsonaro has continued to question the election's legitimacy, he has never explicitly alleged that the election results were fraudulent. See Terry Spencer, Eleonore Hughes & Nicholas Riccardi, *Bolsonaro Ponders Election Defeat, as Crowd Chants 'Fraud'*, ASSOCIATED PRESS (Feb. 3, 2023), <https://apnews.com/article/jair-bolsonaro-politics-united-states-government-brazil-florida-state-d76610dcae6f4a2490ae596f2136728d> [<https://perma.cc/JU6J-3QRW>] (outlining President Bolsonaro's post-election strategy, which has involved questioning the outcome but not outwardly denouncing it). He has changed his tune slightly with regard to those who participated in the attacks on Brazil's government buildings, however, as he has recently called for the government to offer "amnesty for those poor people who are imprisoned" for those actions. See Rios, *supra* note 65 (demonstrating how President Bolsonaro has begun to more publicly show support for those who protested Brazil's presidential election on his behalf).

⁶⁸ See Andrew Rosati & Guilherme Bento, *Brazil's Loudest Election Deniers Are Kicked Off Social Media*, BLOOMBERG (Nov. 12, 2022), <https://www.bloomberg.com/news/articles/2022-11-12/brazil-s-loudest-election-deniers-are-kicked-off-social-media/> [<https://perma.cc/5RR6-AD6D>] (reporting on the elections chief's ongoing attempts to suspend the online profiles of individuals spreading election misinformation several weeks after the Brazilian presidential election); Spencer, Hughes & Riccardi, *supra* note 67 (illustrating the moment when President Bolsonaro's supporters chanted "Fraud!" at a rally in response to the former president's musings about how his election loss was baffling).

⁶⁹ See Anthony Boadle, *Brazil Pushes Back on Big Tech Firms' Campaign Against 'Fake News Law'*, REUTERS (May 2, 2023), <https://www.reuters.com/world/americas/brazil-lawmakers-vote-controversial-bill-clean-up-social-media-2023-05-02/> [<https://perma.cc/N3LU-GEYD>] (describing the "Fake News Law"). This proposed law would impose penalties on technology firms, including social media companies, that fail to report misinformation on their platforms. *Id.*

⁷⁰ See *Projeto de Lei n° 2630, de 2020*, SENADO FEDERAL, <https://www25.senado.leg.br/web/atividade/materias/-/materia/141944?> [<https://perma.cc/8JJK-JQN4>] (Apr. 3, 2024) (showing that the "Fake News Law" was last active in Brazil's Chamber of Deputies, but that the bill's process has

B. Canada's Approach to Informing the Public

Canadians have the right to freedom of thought and expression under the Canadian Charter of Rights and Freedoms.⁷¹ Yet, this right does not exist without limits, as hate speech is formally criminalized in the country.⁷² The Canadian government has also debated creating additional limitations on speech on the internet, and has gone back and forth on that issue, particularly with regard to election misinformation.⁷³ For instance, Canada's Parliament struck down a law that criminalized the spread of election misinformation in March 2021 due to its unconstitutional restriction on free speech.⁷⁴ In June 2022, however, the country's Chief Electoral Officer issued a report on Canada's recent federal elections, which again suggested that the act of spreading election misinformation should be made a criminal offense.⁷⁵ The notion that online speech

since been closed); Boadle, *supra* note 69 (explaining the current trajectory of the "Fake News Law"). The Brazilian government received significant push back over the "Fake News Law," which resulted in its progress being halted. Boadle, *supra* note 69.

⁷¹ Canadian Charter of Rights and Freedoms, § 2, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Specifically, the Charter of Rights and Freedoms protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." *Id.* The Canadian government deeply respects the right to freedom of expression, as it led a resolution in front of the Human Rights Council in 2020 to ensure that right is protected in light of modern threats to free expression worldwide. *See Freedom of Expression and Media Freedom*, GOV'T OF CAN., [https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/freedom_expression_media-liberte_expression_medias.aspx? \[https://perma.cc/YTT3-ZD2E\]](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/freedom_expression_media-liberte_expression_medias.aspx? [https://perma.cc/YTT3-ZD2E]) (May 3, 2023) (highlighting the steps the Canadian government has taken to ensure individuals around the world have a right to free expression).

⁷² Criminal Code, R.S.C. 1985, c C-46, s 319(1) (Can.). Under this law, if an individual incites hatred that is targeted at an identifiable group, they are subject to imprisonment for up to two years. *Id.* To constitute a crime, however, this speech must be likely to result in a breach of peace. *Id.*

⁷³ *See* Peter Zimonjic, *Chief Electoral Officer Says It Should Be Illegal to Spread Misinformation About Voting*, CBC, [https://www.cbc.ca/news/politics/chief-electoral-officer-report-2022-1.6480167 \[https://perma.cc/ZF56-E7ZQ\]](https://www.cbc.ca/news/politics/chief-electoral-officer-report-2022-1.6480167 [https://perma.cc/ZF56-E7ZQ]) (June 8, 2022) (detailing Canada's chief electoral officer's calls for the government to aggressively counter election misinformation); Elizabeth Thompson, *Law Prohibiting Election Misinformation Struck Down*, CBC, [https://www.cbc.ca/news/politics/elections-misinformation-court-free-speech-1.5948463 \[https://perma.cc/S7MU-G46B\]](https://www.cbc.ca/news/politics/elections-misinformation-court-free-speech-1.5948463 [https://perma.cc/S7MU-G46B]) (Mar. 15, 2021) (describing a section of law, which was passed by the Canadian government but later struck down, that would have made it illegal to make certain false statements about political candidates).

⁷⁴ *See* Thompson, *supra* note 73 (outlining the backlash to Section 91(1) of the Canada Elections Act, and the justification for rendering it unconstitutional). This law would have made it a criminal offense to falsely state that a political candidate or other similar political figure was under investigation for an offense or was guilty of an offense. *Id.* It also would have made it illegal to make false statements about political figures' citizenship, qualifications, membership in particular groups, and more. *Id.* This was found to be an unjustifiable infringement on a charter right under Canada's Constitution, and was thus struck down by the Ontario Superior Court. *Id.*

⁷⁵ *See* Zimonjic, *supra* note 73 (reporting on the Chief Electoral Officer's suggestions for improving and securing Canada's electoral process against both foreign actors and ill-intentioned Canadian citizens). The report specifically encouraged Canada's Parliament to prohibit individuals from spreading false information about voting processes. *Id.* It stated that this was necessary to avoid the spread of information that was intended to jeopardize voters' trust in the democratic process. *Id.* The Chief

should be limited to some extent continues to be relatively popular in Canada today, with the government introducing the Online Harms Act to combat certain kinds of digital content as recently as February 2024.⁷⁶

Despite the apparent openness to laws limiting online speech, however, the Canadian government has not recently passed legislation on the matter.⁷⁷ Thus, most of Canada's policies that are in place today to combat election misinformation online were established before the country's 2019 election.⁷⁸ For

Electoral Officer envisioned this change being implemented through an amendment to the Canada Elections Act. *Id.*

⁷⁶ See Canadian Heritage, *Backgrounder—Government of Canada Introduces Legislation to Combat Harmful Content Online, Including the Sexual Exploitation of Children.*, GOV'T OF CAN. (Feb. 26, 2024), <https://www.canada.ca/en/canadian-heritage/news/2024/02/backgrounder—government-of-canada-introduces-legislation-to-combat-harmful-content-online-including-the-sexual-exploitation-of-children.html> [<https://perma.cc/227P-PCKL>] (describing the Online Harms Act, which would require online platforms to take steps to reduce harmful content). This law focuses most specifically on sexually exploitative content, but it also directs online platforms to address other types of “harmful content,” including “[c]ontent that foments hatred; [c]ontent that incites violent extremism or terrorism; [and] [c]ontent that incites violence.” *Id.* Members of the Canadian government have been calling for legislation to prohibit speech that “undermines [the country’s] cohesion or democracy” for several years, making the introduction of the Online Harms Act reasonably foreseeable. See Talia Wise, *Canadian Leaders Call for More Limits on Free Speech After Deputy PM Confronted by Angry Protester*, CBN (June 9, 2022), <https://www1.cbn.com/cbnnews/world/2022/september/canadian-leaders-call-for-more-limits-on-free-speech-after-deputy-pm-confronted-by-angry-protester> [<https://perma.cc/8W8X-7BY2>] (presenting arguments for limits on speech that were put forth by some Canadian politicians in 2022, and the criticisms of those proposed changes). Canadian citizens also seem relatively comfortable with the possibility of speech becoming more restricted on the internet, as most participants in a recent survey said they support the Canadian government’s regulation of the internet. See Quinn Patrick, *Majority of Canadians Don’t Believe Online Harms Act Will Make Internet Safer: Poll*, TRUE N. (Mar. 15, 2024), <https://tnc.news/2024/03/15/canadians-dont-believe-online-harms-safer/> [<https://perma.cc/WSA6-Y2M3>] (reporting on research that shed light on Canadian citizens’ views of the Online Harms Act, which demonstrated that citizens are generally supportive of the government taking steps to regulate online content, but less supportive of this particular proposal).

⁷⁷ See Canadian Heritage, *supra* note 76 (introducing a bill that, if passed, could restrict online speech).

⁷⁸ See Elections Modernization Act, S.C. 2018, c 31, s 208.1, amending Canada Elections Act, S.C. 2000, c 9, s 325.1(2) (Can.) (changing the Canadian law regarding political advertising on social media); Rachel Aiello, *Feds Unveil Plan to Tackle Fake News, Interference in 2019 Election*, CTV NEWS, <https://www.ctvnews.ca/politics/feds-unveil-plan-to-tackle-fake-news-interference-in-2019-election-1.4274273> [<https://perma.cc/7UQ7-3NEW>] (Feb. 27, 2019) (reporting on the Critical Election Incident Public Protocol’s creation prior to the 2019 Canadian election). In January 2024, Elections Canada announced the launch of a new government resource intended to combat the spread of election misinformation. Press Release, Elections Canada, *New Resource to Counter Misinformation and Disinformation About the Electoral Process* (Jan. 9, 2024), <https://www.elections.ca/content.aspx?section=med&dir=pre&document=jan0924&lang=e> [<https://perma.cc/R7D4-VB3R>]. Elections Canada is a non-partisan office that reports to the Canadian Parliament and manages the country’s election system. *Our Mission, Mandate, Values*, ELECTIONS CAN., <https://www.elections.ca/content.aspx?section=abo&dir=mis&document=index&lang=e> [<https://perma.cc/UNZ8-GSKX>]. Its new resource, *Elec-to-Facts*, will serve as a source of factual information about Canada’s elections. Press Release, Elections Canada, *supra*. Although this is the Canadian government’s most recent effort to combat election misinformation online, it is too early to analyze the effects of this initiative. See *id.* (announcing the launch of this resource in 2024, several years after Canada’s last federal election in 2021). For this

example, in 2018, the Canadian government amended the Canada Elections Act to compel social media companies to improve their transparency about political advertising.⁷⁹ That same year, under the new Critical Election Incident Public Protocol, the country's Chief Electoral Officer and his team also tracked content on social media to determine what misinformation was spreading, and to provide the public with correct information when necessary.⁸⁰ Five non-political officials were later charged with handling these tasks during the same election cycle.⁸¹ Finally, in 2019, the Canadian government launched the Digital Citizen Initiative to research online misinformation, create strategies for educating the public, and develop policies aimed at addressing this issue.⁸² These modern policies are all in addition to an existing section of the Canada Elections Act that prohibits political candidates from making false statements regarding election results.⁸³

Despite these efforts, the Canadian Election Misinformation Project determined that misinformation similar to that found during the 2020 U.S. presi-

reason, this Note will focus on those laws and government initiatives that were in place before Canada's most recent federal elections.

⁷⁹ Elections Modernization Act, S.C. 2018, c 31, s 208.1, amending Canada Elections Act, S.C. 2000, c 9, s 325.1(2) (Can.). The amended Act now states that online platforms selling advertising space to registered political parties, political candidates, and other similar individuals and organizations must publish registries of the advertisers' election-related messages published on their platforms. *Id.*

⁸⁰ See Aiello, *supra* note 78 (describing the Critical Election Incident Public Protocol and the extent of its influence on digital content); Harris, *supra* note 34 (reporting on the Chief Electoral Officer's concerns regarding election misinformation, as well as the role his agency would play in monitoring social media during the election cycle).

⁸¹ See Aiello, *supra* note 78 (detailing the intricacies of the Critical Election Incident Public Protocol). Under this protocol, the non-political officials would make decisions on whether and how to inform voters about misinformation spreading on social media. *Id.* The team would only take steps to combat misinformation that was potentially disruptive enough to impact the country's ability to ensure a legitimate election. *Id.* If content met that threshold, the officials would advise the prime minister, the country's political parties, and Canadian citizens about the misinformation, and provide guidance about how to avoid being misinformed. *Id.*

⁸² *Digital Citizen Initiative—Online Disinformation and Other Online Harms and Threats*, GOV'T OF CAN., <https://www.canada.ca/en/canadian-heritage/services/online-disinformation.html#a1b> [<https://perma.cc/Q77C-KZ6Y>] (Mar. 20, 2023). Unlike other aforementioned policies, this initiative aimed to educate the public on misinformation, rather than stem the flow of that misinformation. *See id.* (explaining the scope of the Digital Citizen Initiative, which is limited to educating the citizenry and researching future policy options). Specifically, the government aimed to equip Canadians with the digital literacy skills necessary to identify misinformation and better inform themselves on the internet. *Id.* This is in line with the policy goals informing the Critical Election Incident Public Protocol, as that protocol did not allow officials to take down misinformation, but rather had them counter misinformation with truth. *See id.* (showing that the focus of the Digital Citizen Initiative is education); *see also* Aiello, *supra* note 78 (demonstrating the various connections between the Digital Citizen Initiative and the Critical Election Incident Public Protocol).

⁸³ Canada Elections Act, S.C. 2000, c 9, s 486(3)(c) (Can.). This section says in part that political candidates who knowingly make or publish untruths in order to impact election results will be guilty of an offence under the Act. *Id.*

dential election was widespread during the Canadian election in 2021.⁸⁴ Nevertheless, this misinformation appeared to have a negligible effect on Canada's election.⁸⁵ In contrast to American voters, Canadian voters were often able to recognize misinformation when confronted with it, and they were thus less likely to believe said misinformation.⁸⁶

C. The United States' Broad Protections for Speech, and the Challenges Posed by Said Protections

The First Amendment of the U.S. Constitution bars Congress from enacting laws that limit or restrict speech.⁸⁷ Scholars often argue that this is one of the broadest protections of free expression in the world, as the Constitution even protects hateful, libelous, and treasonous speech that may be restricted in other nations.⁸⁸ Moreover, the U.S. Supreme Court has long held that protections for political speech, in particular, are at the heart of the Constitution, and that political speech must therefore be respected to the utmost degree.⁸⁹

⁸⁴ BRIDGMAN ET AL., *supra* note 44, at 3. Researchers discovered misinformation relating to the Canadian election on every social media site studied, indicating that it was relatively ubiquitous. *Id.* Some of this misinformation centered around allegations of voter fraud impacting the legitimacy of the election. *Id.*

⁸⁵ *See id.* (describing the minimal impact election misinformation seemed to have on Canadian citizens, and thus on the election itself). Generally, misinformation received little attention online and in the media, meaning it did not generate a widespread following. *Id.* Canadian voters also appeared to have the digital literacy skills necessary to identify false information. *Id.*

⁸⁶ *See id.* (highlighting Canadian citizens' apparent abilities to spot misinformation online).

⁸⁷ U.S. CONST. amend. I. This amendment says in part, "Congress shall make no law . . . abridging the freedom of speech." *Id.* In 1925, in *Gitlow v. New York*, this protection was incorporated through the Fourteenth Amendment when the Supreme Court held that the freedom of speech is a fundamental right that is protected by the Due Process Clause. 268 U.S. 652, 666 (1925). Thus, neither the states nor Congress can inhibit speech under the Constitution. *Id.*

⁸⁸ *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003) (demonstrating the differences between the broad scope of free speech in the United States and the more limited versions of the same right in other countries); Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 660–61 (2015) (contrasting the wide protections that the U.S. government grants to speech with the narrower protections for speech in other nations, including Canada). A recent Pew Research study showed the effect of these broad protections for free expression, as Americans demonstrated more support for free speech—including offensive speech—than individuals in the thirty-seven other nations researched. *See* Richard Wike & Katie Simmons, *Global Support for Principle of Free Expression, But Opposition to Some Forms of Speech*, PEW RSCH. CTR. (Nov. 18, 2015), <https://www.pewresearch.org/global/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/> [<https://perma.cc/S9X5-9YHQ>] (finding that Americans are more tolerant of the negative byproducts of free speech than others around the world).

⁸⁹ *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that unregulated political speech is one of the freedoms that is most crucially safeguarded by the Constitution). In *Barnette*, the Court stated, "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 . . . or force citizens to confess by word or act their faith therein." *Id.*

These broad freedoms have extended to the internet since 1997, when the Court held in *Reno v. ACLU* that speech is as protected on the internet as it is in books and other written mediums.⁹⁰ This concept was also enshrined in law one year prior when Congress passed Section 230 of the Communications Decency Act (CDA), which declares that the federal and state governments cannot regulate content on the internet.⁹¹ Today, this bar on governments' abilities to regulate online speech extends to social media platforms.⁹²

Section 230 of the CDA goes a step further, however, as it states that operators of interactive computer services also cannot be found liable for information published on their platforms by third parties.⁹³ In other words, through the CDA, Congress eliminated the governments' abilities to regulate content on social media, and also prevented individuals from suing operators of social media platforms for failing to regulate themselves.⁹⁴

Given the wide latitude that Section 230 grants to social media companies and other internet service providers, the legislation has been widely criticized for creating a number of modern issues and perpetuating others.⁹⁵ For example,

⁹⁰ See 521 U.S. 844, 880 (1997) (holding that the government's inability to regulate speech on the internet is comparable to its inability to regulate speech in print).

⁹¹ See 42 U.S.C. § 230(b)(2) (stating that the federal and state governments will continue to allow content on the internet to be published without regulation).

⁹² *Id.* This statute states that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.*

⁹³ See *id.* § 230(c)(1) (protecting internet service providers acting as "Good Samaritan[s]" from legal liability stemming from content published on their platforms). Section 230 states in part 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." *Id.* Additionally, the statute states that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable, whether or not such material is constitutionally protected." *Id.* § 230(c)(2)(A). Content that is objectionable under this statute includes, but is not limited to, "obscene, lewd, lascivious, filthy, excessively violent, [and] harassing" content. *Id.*

⁹⁴ See *id.* § 230(b)(2) (declaring that the governments' bars on regulating speech extend to speech on the internet); *id.* § 230(c)(2)(A) (stating that internet service providers cannot be held liable for information published on their platforms).

⁹⁵ See Haley Halverson, *Ending Immunity of Internet-Facilitated Commercial Sexual Exploitation Through Amending the Communications Decency Act*, 21 J. INTERNET L. 3, 6–7 (2018) (suggesting that the modern interpretation of Section 230 of the CDA is antithetical to its original intent, particularly with regard to the way it is used to shield publishers of sexually exploitative content); Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1507 (2015) (arguing that an overly broad reading of Section 230 has barred defamation claims against internet service providers); Sophia A. Studer, Note, *How Judicial Application of CDA § 230 and FHA § 3604 Have Created Safe Havens for Online Housing Discrimination*, 28 RICHMOND J.L. & TECH. 378, 403 (2021) (explaining how Section 230 has created a digital safe haven for housing advertisements that would otherwise violate the Fair Housing Act (FHA)); Laura Cannon, Note, *Indecent Communications: Revenge Porn and Congressional Intent of § 230(c)*, 90 TULANE L. REV. 471, 476–77 (2015) (detailing how Section 230 has been interpreted as protecting the operators of websites that publish revenge pornography); Stephanie Silvano, Note, *Fighting a Losing Battle to Win the War:*

scholars argue that Section 230 has given broad protection to sites that facilitate sexual exploitation, particularly of minors.⁹⁶ Others suggest that victims of defamation have fewer remedies available to them today than in decades past due to Section 230.⁹⁷ Similarly, researchers claim that the law has allowed individuals to violate the Fair Housing Act by blatantly discriminating in their digital housing advertisements with impunity.⁹⁸ Criticisms of Section 230 of the CDA also extend to the protections it affords to misinformation.⁹⁹

For these reasons, political efforts to create a carveout within the CDA that would allow the government to regulate misinformation have gained some mainstream support in recent years.¹⁰⁰ For instance, while campaigning during the 2020 presidential election cycle, Senator Elizabeth Warren called on the

Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?, 83 *FORDHAM L. REV.* 375, 378 (2014) (describing the hurdles Section 230 has created for efforts to reduce the sex trafficking of minors).

⁹⁶ See Halverson, *supra* note 95, at 6–7 (explaining how the modern interpretation of Section 230 of the CDA differs from its intended purpose in ways that perpetuate sexual violence against children); Cannon, *supra* note 95, at 474, 476–77 (describing how Section 230 allows for the spread of revenge pornography, which is the distribution of sexual images of people without consent); Silvano, *supra* note 95, at 378 (noting how Section 230 has played a role in shielding online classified advertisements for victims of sex trafficking from regulation).

⁹⁷ See Browne-Barbour, *supra* note 95, at 1507 (arguing that Section 230 of the CDA protects internet service providers from accountability for defamatory content that is published on their platforms).

⁹⁸ See Studer, *supra* note 95, at 403 (contending that the impact of the FHA is significantly reduced by Section 230 of the CDA, as individuals who experience discrimination in online housing advertisements have no options for recourse against the platforms publishing those advertisements).

⁹⁹ See Meghan E. McDermott, Note, *Mitigating Misinformation on Social Media Platforms: Treating Section 230 of the Communications Decency Act as a Quid Pro Quo Benefit*, 55 *CONN. L. REV. ONLINE* 1, 26 (2023), <https://connecticutlawreview.law.uconn.edu/wp-content/uploads/sites/2747/2023/01/Meghan-McDermott-Final-3.pdf> [<https://perma.cc/XLJ3-4P29>] (stating that the government should use its maintenance of Section 230 of the CDA as an incentive to encourage social media companies to better regulate misinformation on their platforms); Michael L. Rustad & Thomas H. Koenig, *Creating a Public Health Disinformation Exception to CDA Section 230*, 71 *SYRACUSE L. REV.* 1251, 1261 (2021) (arguing that, in light of the COVID-19 pandemic, Congress should create an exception to the CDA for internet service providers that host medical misinformation).

¹⁰⁰ See Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN, <https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html> (July 20, 2021) [<https://perma.cc/KV4E-TB37>] (detailing the Biden Administration's renewed consideration of Section 230 in light of President Biden's critiques of social media companies' efforts to reduce the dissemination of misinformation on their platforms); Lauren Feiner, *Frustration Shows Through as Congress Grills Social Media CEOs Yet Again*, CNBC, <https://www.cnbc.com/2021/03/25/tech-ceo-hearing-recap-lawmakers-frustrated-with-social-media.html> [<https://perma.cc/HYH9-9PL4>] (Mar. 25, 2021) (describing the apparent urgency among lawmakers to reform Section 230 of the CDA, partly due to the role social media platforms played in the events of January 6, 2021); Sunny Kim, *Elizabeth Warren Proposes Criminal Penalties for Spreading Voting Disinformation Online*, CNBC, <https://www.cnbc.com/2020/01/29/warren-proposes-criminal-penalties-for-spreading-disinformation-online.html> [<https://perma.cc/X74A-LELV>] (Jan. 29, 2020) (reporting on then-presidential candidate Elizabeth Warren's proposed plan to combat election disinformation on social media).

government to enact penalties for individuals who knowingly spread election misinformation on social media.¹⁰¹ Later that year, the U.S. Department of Justice also issued a report wherein it concluded that Section 230 of the CDA should be updated to better reflect the role the internet plays in society today.¹⁰² These proposals—and others like them—have led to several congressional hearings on the matter, but no federal legislative change as of the time of this Note.¹⁰³

Yet, some states have gone in the opposite direction and have passed legislation to further discourage social media companies from moderating content on their platforms.¹⁰⁴ For example, Florida passed a bill in 2022 that prohibited internet service providers from de-platforming political candidates in the state for any reason.¹⁰⁵ Texas passed a similar law in 2021 prohibiting internet ser-

¹⁰¹ See Kim, *supra* note 100 (outlining Senator Warren's proposal to combat election disinformation, which she introduced during the 2020 presidential campaign cycle); *Fighting Digital Disinformation*, WARREN FOR SENATE, <https://elizabethwarren.com/plans/fighting-digital-disinformation> [<https://perma.cc/W7S3-LJKQ>] (archiving Senator Warren's campaign proposals, which included fighting disinformation and holding internet service providers accountable for allowing election disinformation to spread on their platforms).

¹⁰² See U.S. DEP'T OF JUST., SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 1 (2020), <https://www.justice.gov/file/1286331/download> [<https://perma.cc/9UKW-F8HJ>] (finding that Section 230 of the CDA must be reformed). This report is not centered around misinformation, and the proposed reforms likewise do not directly address misinformation, but many of the changes would impact social media companies' abilities to continue publishing misinformation online with impunity. See *id.* at 3–4 (outlining the Department's suggestions for reform, which do not directly address misinformation). For example, the report recommends clarifying that Section 230 does not prevent the federal government from enforcing civil violations on digital platforms. *Id.* at 3. Additionally, the report suggests clarifying what Section 230 means by "good faith," which would likely then encourage social media companies and other internet service providers to be more open about the measures they take to monitor their platforms. *Id.* at 4.

¹⁰³ See Brian Fung, *Senators Warn Big Tech on Section 230: 'Reform Is Coming,'* CNN (Mar. 8, 2023), <https://www.cnn.com/2023/03/08/tech/senators-section-230-reform/index.html> [<https://perma.cc/6PKE-GRCV>] (reporting on senators' continuing calls for reform to Section 230 of the CDA after a subcommittee hearing on the topic); Taylor Hatmaker, *At Social Media Hearing, Lawmakers Circle Algorithm-Focused Section 230 Reform*, TECHCRUNCH (Apr. 27, 2021), <https://techcrunch.com/2021/04/27/section-230-bills-algorithms-congress-hearing/> [<https://perma.cc/YE3X-LFRK>] (highlighting a congressional hearing that resulted in some bipartisan support for updates to Section 230 centered around algorithms); David McCabe & Cecilia Kang, *Republicans Blast Social Media C.E.O.s While Democrats Deride Hearing*, N.Y. TIMES, <https://www.nytimes.com/2020/10/28/technology/senate-tech-hearing-section-230.html> [<https://perma.cc/V9SB-G4MT>] (Dec. 15, 2020) (describing a hearing on Section 230 during which some politicians criticized what they believed to be censorship on social media, and others asked about platforms' plans to increase regulation to combat misinformation).

¹⁰⁴ See FLA. STAT. § 106.072(2) (2023) (limiting internet service providers' abilities to de-platform political candidates in Florida); TEX. CIV. PRAC. & REM. § 143A.002 (2023) (prohibiting internet service providers from censoring social media users in Texas).

¹⁰⁵ FLA. STAT. § 106.072(2). This bill stated that "[a] social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate." *Id.* The bill did not provide any exceptions for this order. *Id.*

vice providers from censoring social media users in the state for expressing their viewpoints.¹⁰⁶

Although Congress has yet to act on this issue, several courts have heard cases on the breadth of Section 230 of the CDA.¹⁰⁷ As a result, both the Florida bill and Texas law were later enjoined on the grounds that they violated the First Amendment and Section 230 of the CDA.¹⁰⁸ Specifically, in 2022, in *NetChoice, LLC v. Attorney General of Florida* (*NetChoice I*), the U.S. Court of Appeals for the Eleventh Circuit stated that content moderation is a protected form of expression under the First Amendment, and restricting a company's ability to moderate content—as the Florida bill did—therefore violates the First Amendment.¹⁰⁹ In 2021, in *NetChoice, LLC v. Paxton* (*Paxton I*), the U.S. District Court for the Western District of Texas likewise stated that the First Amendment guarantees that social media companies can moderate the content they publish.¹¹⁰

The U.S. Court of Appeals for the Fifth Circuit, however, later vacated the injunction granted by *Paxton I*, holding that the Texas law prohibits censorship, which is not a form of speech that is protected under the First Amendment.¹¹¹ The appellate court further held that, although a state cannot require a private company to speak a message that the company does not itself hold, a state can regulate a company so as to require it to host a message that the company does not itself hold.¹¹² According to the court, because Section 230 of the CDA declares that social media platforms cannot be held liable for the third-party content that they publish, the messages published on their platforms are

¹⁰⁶ TEX. CIV. PRAC. & REM. § 143A.002. This bill stated that “[a] social media platform may not censor a user, a user’s expression, or a user’s ability to receive the expression of another person based on the viewpoint of the user or another person [or] the viewpoint represented in the user’s expression or another person’s expression.” *Id.* The bill additionally stated that this order would apply whether or not the viewpoint was stated on the social media platform. *Id.*

¹⁰⁷ See *NetChoice, LLC v. Paxton* (*Paxton II*), 49 F.4th 439, 494 (5th Cir. 2022) (holding that censorship is not speech and is therefore not protected by the First Amendment), *cert. granted in part sub nom.* *NetChoice, LLC v. Paxton* (*Paxton III*), 144 S. Ct. 477 (2023); *NetChoice, LLC v. Att’y Gen., Fla.* (*NetChoice I*), 34 F.4th 1196, 1228, 1231 (11th Cir. 2022) (holding that preventing social media companies from moderating the content on their platforms as they wish is a violation of the First Amendment), *cert. granted in part sub nom.* *Moody v. NetChoice, LLC* (*NetChoice II*), 144 S. Ct. 478 (2023), and *cert. denied sub nom.* *NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023); *NetChoice, LLC v. Paxton* (*Paxton I*), 573 F. Supp. 3d 1092, 1106 (W.D. Tex. 2021) (stating that social media companies have a constitutional right to moderate the content that they publish), *vacated and remanded sub nom.* *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

¹⁰⁸ *NetChoice I*, 34 F.4th at 1231; *Paxton I*, 573 F. Supp. 3d at 1117.

¹⁰⁹ 34 F.4th at 1228. The court further stated that there is no substantial governmental interest in allowing an individual to continue using a platform if that platform would like to stop publishing or hosting the individual’s content. *Id.*

¹¹⁰ 573 F. Supp. 3d at 1106.

¹¹¹ *Paxton II*, 49 F.4th at 494.

¹¹² *Id.* at 455.

not messages “spoken” by the companies.¹¹³ Thus, the court concluded that social media companies can be obligated to host those messages.¹¹⁴

As such, there is a growing circuit split on this issue that further deepened on March 10, 2023, when the U.S. Court of Appeals for the Ninth Circuit held in *O’Handley v. Weber* that Twitter did not violate the First Amendment when it suspended a user’s account that was flagged by the California Secretary of State’s Office of Elections Cybersecurity for posting election misinformation.¹¹⁵ Specifically, the appellate court stated that government officials can request that social media companies do not host or publish certain forms of protected speech, so long as their requests are not accompanied by any threats of adverse consequences.¹¹⁶

This circuit split has not been resolved by the Supreme Court as of the time of this Note.¹¹⁷ On September 29, 2023, however, the Court granted certiorari in both *NetChoice I* and *Paxton I*.¹¹⁸ The Court has since heard oral arguments in both cases, but it has not yet decided them.¹¹⁹

How the Court will rule on this matter is a mystery, especially given the fact that the Court opted to sidestep a related issue as recently as May 18, 2023 in *Gonzalez v. Google LLC*.¹²⁰ This case addressed the question of whether a social media company that promotes content through an algorithm contributes to that content’s creation in a way that is material enough to lose the immunity granted by Section 230 of the CDA.¹²¹ In 2021, the U.S. Court of Appeals for the Ninth Circuit held in this case that content-neutral algorithms do not render social media companies liable under Section 230 of the CDA.¹²² Nevertheless,

¹¹³ *Id.* at 465–66.

¹¹⁴ *Id.* at 455, 494.

¹¹⁵ 62 F.4th 1145, 1158–59 (9th Cir. 2023).

¹¹⁶ *Id.*

¹¹⁷ See *Moody v. NetChoice, LLC (NetChoice II)*, 144 S. Ct. 478, 478 (2023) (demonstrating the current status of this case, wherein the Court granted certiorari); *NetChoice, LLC v. Paxton (Paxton III)*, 144 S. Ct. 477, 477 (2023) (demonstrating the current status of this case, wherein the Court granted certiorari).

¹¹⁸ *NetChoice II*, 144 S. Ct. at 478; *Paxton III*, 144 S. Ct. at 477.

¹¹⁹ See *No. 22-277*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-277.html> [<https://perma.cc/G4FE-ZGJ6>] (Feb. 26, 2024) (hosting the docket for *NetChoice*, which shows that the case was argued before the Court on February 26, 2024, but has not been decided); *No. 22-555*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-555.html> [<https://perma.cc/44JL-X8DP>] (Feb. 26, 2024) (archiving the docket for *Paxton*, which shows that the case was argued before the Court on February 26, 2024, but has not been decided).

¹²⁰ See 143 S. Ct. 1191, 1192 (2023) (*Gonzalez*) (remanding a case regarding speech on the internet without reaching the viability of its claims).

¹²¹ *Gonzalez v. Google LLC (Google)*, 2 F.4th 871, 896 (9th Cir. 2021), *vacated and remanded*, 143 S. Ct. 1191 (2023), *and rev’d sub nom.* *Twitter, Inc. v. Taamneh*, 598 143 S. Ct. 1206 (2023).

¹²² *Id.*

the court did leave open the possibility of other machine-learning algorithms meeting the threshold of content creation.¹²³

Gonzalez gave the Court the opportunity to determine whether social media companies could continue to employ algorithms to advance content and, subsequently, to advance misinformation.¹²⁴ The Court, however, remanded the case without reaching this issue.¹²⁵

II. WEIGHING THE OPTIONS: THE BENEFITS, DRAWBACKS, AND APPLICABILITY OF GLOBAL EFFORTS TO COUNTER ELECTION MISINFORMATION ON SOCIAL MEDIA

Although each country's approach to combating election misinformation is specifically tailored to that nation's political climate, government structure, and system of rights, each also offers an opportunity for other countries to mimic successful aspects of an approach and learn from less successful aspects.¹²⁶ To that end, this Part of the Note reanalyzes the global strategies discussed *supra* and considers how adopting each one in the United States could impact the spread of election misinformation on social media moving forward.¹²⁷ Section A of this Part revisits the policy enacted in Brazil.¹²⁸ Section B likewise reexamines Canada's approach to this issue.¹²⁹ Both sections also consider the feasibility of implementing these global methods in the United States.¹³⁰

A. The Allure of Brazil's Straightforward Approach

Compared to other policies aimed at addressing election misinformation, the one enacted by the Brazilian government is very simple.¹³¹ Under the Brazilian policy, one high-ranking public official has the authority to monitor social media platforms for misinformation, and that same official can order social

¹²³ *Id.*

¹²⁴ 143 S. Ct. at 1192; see also David McCabe, *Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants*, N.Y. TIMES (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html> [<https://perma.cc/92N9-KJTD>] (describing the potential impact a ruling in this case could have had on social media companies, users, and the internet as a whole).

¹²⁵ *Gonzalez*, 143 S. Ct. at 1192.

¹²⁶ See *infra* notes 131–148 and accompanying text.

¹²⁷ See *infra* notes 131–148 and accompanying text.

¹²⁸ See *infra* notes 131–141 and accompanying text.

¹²⁹ See *infra* notes 142–148 and accompanying text.

¹³⁰ See *infra* notes 138–141, 145–148, and accompanying text.

¹³¹ Compare Nicas, *supra* note 34 (describing the Brazilian policy aimed at combating election misinformation on social media, which involves permitting the elections chief to order social media platforms to delete identified misinformation), with Aiello, *supra* note 78 (detailing the complexities of Canada's Critical Election Incident Public Protocol, under which non-political officials decide whether and how to inform voters about misinformation spreading on social media).

media companies to take down said misinformation.¹³² This option presents few, if any, bureaucratic hurdles, and it allows the government to move quickly when faced with a threat to an election or any other democratic process.¹³³ When a country is encountering a danger as fast-moving as misinformation, particularly on social media, acting quickly to remove that misinformation helps prevent it from taking root and gaining credibility.¹³⁴

That being said, by granting one individual the power to combat election misinformation, the Brazilian government chose to bypass checks and balances that could have otherwise ensured the appointed individual did not abuse this power.¹³⁵ Although this allows that individual to operate with speed that would not otherwise be feasible, it likely will not instill trust in an electorate that fears corruption.¹³⁶ This is especially true when the sole individual wielding this power in Brazil is a justice on the country's Supreme Federal Court who previously ruled against President Bolsonaro and his supporters on several occasions, giving him a partisan reputation.¹³⁷

It is highly unlikely that the United States will adopt a policy that is similar to Brazil's given existing law in America.¹³⁸ Just as the Brazilian policy arguably violates Brazil's MCI by wresting regulatory power over social media platforms away from the platforms themselves, a similar policy in the United States would almost certainly violate Section 230 of the CDA for the same reason.¹³⁹ Additionally, given the partisan disagreements about the issue of election misinformation in the United States, a partisan solution would almost cer-

¹³² Nicas, *supra* note 34.

¹³³ See *id.* (explaining how Brazil's policy places control in the hands of one individual who can then act unilaterally to combat misinformation).

¹³⁴ See Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, SCIENCE (Mar. 9, 2018), <https://www.science.org/doi/10.1126/science.aap9559> [<https://perma.cc/D8G9-HE38>] (finding that false information on the internet spreads more quickly and reaches more people than truthful information). This study found that false news related to politics spread particularly quickly and efficiently online. *Id.*

¹³⁵ See Nicas, *supra* note 34 (describing the independent role the elections chief can play in monitoring and regulating social media platforms in Brazil).

¹³⁶ See RJ Reinhart, *Brazilians Lack Confidence in Elections as Vote Nears*, GALLUP (Sept. 26, 2022), <https://news.gallup.com/poll/401672/brazilians-lack-confidence-elections-polls-near.aspx> [<https://perma.cc/G6QW-JC8C>] (highlighting the mistrust that a majority of Brazilians had in their government in 2022). In 2022, sixty-nine percent of Brazilian citizens assumed their government had widespread corruption. *Id.*

¹³⁷ See Nicas, *supra* note 34 (emphasizing the role the elections chief previously played in ordering investigations of President Bolsonaro and imprisoning some of his supporters).

¹³⁸ See 42 U.S.C. § 230(b)(2) (stating that the U.S. federal and state governments will not interfere with speech on the internet, including speech on social media platforms).

¹³⁹ See *id.* (same); Omari, *supra* note 53, at 124 (explaining how the MCI protects individuals' online speech from government interference by allowing social media companies to monitor their own platforms).

tainly inflame the matter rather than resolve it.¹⁴⁰ Finally, due to the apparent lack of success that the policy had in Brazil, there would be little motivation to amend laws in the United States to accommodate such a policy.¹⁴¹

B. The Appeal of Canada's Nonpartisan Efforts

Compared to Brazil's approach to combating election misinformation, Canada's approach focuses less on stopping the spread of misinformation and more on informing the public in light of that misinformation.¹⁴² This strategy appears to have been successful in Canada because, despite the fact that misinformation was present on Canadian social media during the 2021 presidential election, such misinformation evidently had a negligible impact on the electorate during that time.¹⁴³ Having non-political officials monitor election misinformation on social media could also legitimize this approach in the eyes of the public, as these officials have few—if any—partisan motivations.¹⁴⁴ Furthermore, this approach is likely feasible in the United States under the existing legislative framework.¹⁴⁵

Yet, this approach has one clear drawback, in that it allows misinformation to continue spreading on social media, largely without interference.¹⁴⁶

¹⁴⁰ See Fung, *supra* note 103 (reporting on senators' partisan perspectives on the need to reform Section 230 of the CDA).

¹⁴¹ See Machado, *supra* note 44 (depicting the recent protests that occurred in Brazil's presidential palace, congressional building, and Supreme Federal Court, which were arguably fueled by misinformation alleging that the country's presidential election was fraudulent).

¹⁴² Compare Nicas, *supra* note 34 (detailing the policy adopted in Brazil to forcibly take down election misinformation from social media platforms), with Aiello, *supra* note 78 (describing Canada's Critical Election Incident Public Protocol, under which officials inform voters about misinformation on social media when it appears and becomes disruptive enough to warrant action).

¹⁴³ See BRIDGMAN ET AL., *supra* note 44, at 3 (showing the minimal impact election misinformation seemed to have on Canadian citizens, and thus on Canada's election, in 2021).

¹⁴⁴ See Katie Harbath et al., *New Survey Data on Who Americans Look to for Election Information*, BIPARTISAN POL'Y CTR. (Nov. 2, 2022), <https://bipartisanpolicy.org/blog/new-survey-data-election-information/> [<https://perma.cc/DT39-VMZH>] (demonstrating that people are more likely to believe election information from less partisan sources, such as news anchors and election officials, when compared with partisan party leaders); Aiello, *supra* note 78 (highlighting how the task of monitoring election misinformation in Canada was given to non-political officials who then informed voters).

¹⁴⁵ See 42 U.S.C. § 230(b)(2) (declaring that the federal and state governments will allow content on the internet to exist without regulation). If the U.S. government, or agents thereof, were to follow the Canadian policy and merely rebut false information with truthful information, the government would arguably not violate Section 230 of the CDA, as it would not be regulating digital content. See *id.* (stating that the federal and state governments will not regulate the internet, but not limiting their abilities to use the internet to spread truthful information); 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273, 295 (D.N.J. 2006) (stating that the CDA is simply intended to "promote self-regulation of [i]nternet service providers"); *Regulate*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/regulate> [<https://perma.cc/MYJ3-9WA6>] (Mar. 29, 2024) (defining "regulate" as "to govern or direct according to rule" or "to bring under the control of law or constituted authority").

¹⁴⁶ See BRIDGMAN ET AL., *supra* note 44, at 3 (finding that election misinformation was widespread on Canadian social media during the 2021 presidential election); Aiello, *supra* note 78 (outlining how

In this way, the approach is reminiscent of the approaches taken by Twitter and Facebook during the American presidential election in 2020, wherein the social media platforms flagged misinformation but generally allowed it to continue to spread.¹⁴⁷ It is possible that this type of flag and the accompanying factual information would be better trusted if it came from a governmental organization rather than from a social media platform, but whether that is likely to be true in practice, particularly in America's current social and political climate, is questionable.¹⁴⁸

III. MOVING FORWARD: HOW THE UNITED STATES CAN MOST REALISTICALLY COMBAT ELECTION MISINFORMATION ON SOCIAL MEDIA

This Note set out to analyze policies adopted in other nations to counter election misinformation on social media in order to determine what actions the U.S. government should take to do the same.¹⁴⁹ Thus, this Part of the Note refocuses on the United States to consider what the federal government should do to counter election misinformation while remaining true to the First Amendment.¹⁵⁰ Section A of this Part suggests that the government should implement a policy based on Canada's nonpartisan approach to better inform the public and prepare it to recognize election misinformation.¹⁵¹ Section B then argues that modifying the United States' existing legislative framework, and specifically Section 230 of the CDA, may allow for more positive change in the future.¹⁵²

Canada's Critical Election Incident Public Protocol involves monitoring misinformation on social media and alerting the public when it is present, but not ordering the removal of that misinformation).

¹⁴⁷ See *Civic Integrity Policy*, *supra* note 21 (outlining Twitter's Civic Integrity Policy, which limits the reach of posts containing misleading information regarding the voting process, and posts designed to intimidate voters or otherwise suppress voting efforts, but does not allow for the removal of said posts); *Misinformation*, *supra* note 21 (describing the policies that Facebook has established to protect elections from interference, which include flagging and taking steps to reduce the spread of most misinformation, but only removing misinformation that falls into specific categories, such as misinformation that will likely interfere with democratic processes).

¹⁴⁸ See *Public Trust in Government: 1958–2023*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/> [<https://web.archive.org/web/20240407231401/https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/>] (depicting the trajectory of Americans' trust in their government, which is at some of its lowest measures in recent decades).

¹⁴⁹ See *supra* notes 43–148 and accompanying text (researching the Brazilian and Canadian governments' efforts to combat election misinformation on the internet, and contemplating whether these strategies could be implemented in the United States).

¹⁵⁰ See *infra* notes 153–198 and accompanying text.

¹⁵¹ See *infra* notes 153–170 and accompanying text.

¹⁵² See *infra* notes 171–198 and accompanying text.

A. Choosing the Canadian Approach

When looking at the success rates of global approaches to combating election misinformation, the Canadian approach stands apart.¹⁵³ This program was multifaceted and successful, as Canadian citizens were generally able to detect misinformation on social media platforms and not fall victim to falsehoods during the country's most recent presidential election.¹⁵⁴ Therefore, this approach should inform U.S. policy regarding election misinformation on social media moving forward.¹⁵⁵

The Canadian approach is also one that is feasible in the United States, and it likely would not require significant policy changes to implement.¹⁵⁶ Because the approach allows misinformation to spread and simply counters that misinformation with truthful information in a coordinated effort, the approach arguably does not violate Section 230 of the CDA.¹⁵⁷ Thus, to implement this policy, the U.S. government would not need to make any changes to existing law, but would rather need to create an agency dedicated to tracking misinformation on social media and countering it with reliable information.¹⁵⁸ It is possible that social media companies would even partner with the government in this effort, as these companies have shown a desire to limit the impact of misinformation on their platforms in the past.¹⁵⁹

¹⁵³ Compare Machado, *supra* note 44 (reporting on the protests that occurred in Brazil after the country's presidential election, and after President Bolsonaro spread misinformation alleging that the election would be fraudulent), with BRIDGMAN ET AL., *supra* note 44, at 3 (showing the minor impact election misinformation appeared to have on the Canadian presidential election in 2021).

¹⁵⁴ See BRIDGMAN ET AL., *supra* note 44, at 3 (finding that Canadians were more likely to believe truthful stories about the country's most recent presidential election than they were to believe falsehoods).

¹⁵⁵ See *id.* (outlining the success of Canada's plan and demonstrating why the United States should mimic it to combat election misinformation).

¹⁵⁶ See 42 U.S.C. § 230(b)(2) (declaring that the governments will let internet service providers publish content without regulation). Countering false information with truthful information arguably does not constitute regulation and, therefore, will likely not violate Section 230 of the CDA. See 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273, 295 (D.N.J. 2006) (stating the purpose of the CDA is merely to allow internet service providers to self-regulate); *Regulate*, *supra* note 145 (defining the term "regulate" as "to bring under the control of law").

¹⁵⁷ See 42 U.S.C. § 230(b)(2) (clarifying that the governments cannot regulate the content published by internet service providers). Adding truthful information to the ongoing dialogue on a social media platform does not constitute "regulation" as that term is typically used and, therefore, would likely not violate Section 230 of the CDA. See 800-JR Cigar, Inc., 437 F. Supp. 2d at 295 (emphasizing that the purpose of the CDA is simply to leave the goal of internet regulation in the hands of internet service providers); *Regulate*, *supra* note 145 (stating that the term "regulate" entails some degree of governance or control).

¹⁵⁸ See Aiello, *supra* note 78 (describing the Canadian policy, which the U.S. government could arguably readily implement).

¹⁵⁹ See *Civic Integrity Policy*, *supra* note 21 (highlighting Twitter's Civic Integrity Policy, which attempts to limit the reach of election misinformation); *Misinformation*, *supra* note 21 (outlining Facebook's policies that are designed to protect elections from interference).

That being said, the Canadian approach would need to be modified to be fully effective in the United States, as a five-person task force would likely struggle to achieve the goal of combating election misinformation in America when working independently.¹⁶⁰ Expanding on that framework and institutionalizing it, however, could allow the U.S. government to combat misinformation online on an appropriate scale.¹⁶¹ For instance, the Poynter Institute currently runs PolitiFact—a fact-checking website—with a team of thirty-one staff.¹⁶² Yet, this team solely creates short-form articles and does not fact-check directly on social media by interacting with misinformation.¹⁶³ Creating a government agency that is focused exclusively on fact-checking misinformation directly on social media will help minimize the effect of that misinformation and ensure people do not have to seek out truthful information elsewhere, like from PolitiFact.¹⁶⁴ Furthermore, staffing that hypothetical government agency with anywhere from fifty to one hundred individuals will allow this work to be done more thoroughly and systematically.¹⁶⁵

¹⁶⁰ See Niall McCarthy, *Where Concern Is Highest About Fake News on the Internet* [Infographic], FORBES (June 12, 2019), <https://www.forbes.com/sites/niallmccarthy/2019/06/12/where-concern-is-highest-about-fake-news-on-the-internet-infographic/?sh=2a0069aa6629> [<https://perma.cc/L68G-L82C>] (demonstrating that American citizens have greater concerns about misinformation on social media than Canadian citizens do, which may indicate that misinformation is a more significant problem in the United States than in Canada); Aiello, *supra* note 78 (explaining how the Critical Election Incident Public Protocol only relies upon five non-political officials to combat election misinformation in Canada).

¹⁶¹ See Aiello, *supra* note 78 (describing Canada's small-scale approach to what is likely a larger-scale problem in the United States).

¹⁶² *Meet the PolitiFact Staff*, POLITIFACT, <https://www.politifact.com/staff/> [<https://perma.cc/R5MG-W2YS>].

¹⁶³ See PolitiFact (@PolitiFact), X, <https://twitter.com/PolitiFact> [<https://perma.cc/C58K-8XZB>] [hereinafter PolitiFact Twitter] (archiving PolitiFact's tweets, which primarily include links to the PolitiFact website); PolitiFact (@PolitiFact), FACEBOOK, <https://www.facebook.com/politifact/> [<https://perma.cc/58VY-D44M>] [hereinafter PolitiFact Facebook] (demonstrating PolitiFact's presence on Facebook, which also primarily consists of links to the PolitiFact website). Because PolitiFact does not use its social media accounts to reply to or comment on misinformation, individuals would need to purposefully seek out PolitiFact's content after reading misinformation to determine if that information was true. See PolitiFact Twitter, *supra* (cataloging PolitiFact's tweets, which do not include any replies or comments); PolitiFact Facebook, *supra* (recording PolitiFact's presence on Facebook, which also does not include any replies or comments).

¹⁶⁴ See Orestis Papakyriakopoulos & Ellen Goodman, *The Impact of Twitter Labels on Misinformation Spread and User Engagement: Lessons from Trump's Election Tweets*, PROC. OF THE ASSOC. FOR COMPUTING MACH. WEB CONF. 2022 2541, 2541 (showing that misinformation is less impactful and toxic on social media when it is presented with factual information directly rebutting the false claims); PolitiFact Twitter, *supra* note 163 (showing that PolitiFact's reach on Twitter is limited to its followers, as the account does not interact with other posts); PolitiFact Facebook, *supra* note 163 (indicating that PolitiFact's reach on Facebook is likewise limited to its followers, as the account again does not interact with other posts).

¹⁶⁵ See BRIDGMAN ET AL., *supra* note 44, at 3 (describing the apparent success of Canada's efforts to combat misinformation, which primarily relied on only five individuals).

Yet, it is possible that even a modified version of the Canadian approach to combating election misinformation online would not be as successful in the United States because of the current political and social climate in the country.¹⁶⁶ Americans harbor more distrust in the U.S. government than Canadians do in the Canadian government, meaning American citizens may be naturally less likely to trust government information that counters misinformation on social media.¹⁶⁷ Additionally, when misinformation is allowed to spread, as it is under the Canadian approach, that misinformation can cause further distrust in institutions.¹⁶⁸ This could make truthful information provided by those institutions even less effective at altering perceptions.¹⁶⁹ As such, the American government may have to more actively prevent election misinformation from spreading than the Canadian government has seemingly had to.¹⁷⁰

B. Reforming Section 230 of the CDA

Due to the extent of misinformation in mainstream American politics, and Americans' overwhelming distrust in various institutions, a goal more tailored to the status of misinformation in the United States is to stop that misinfor-

¹⁶⁶ See Megan Brennan, *Media Confidence in U.S. Matches 2016 Record Low*, GALLUP (Oct. 19, 2023), <https://news.gallup.com/poll/512861/media-confidence-matches-2016-record-low.aspx> [<https://perma.cc/E3JN-R8FD>] (demonstrating the lack of confidence American citizens have in the news media); *Public Trust in Government: 1958–2023*, *supra* note 148 (reporting on the American population's general distrust of the U.S. government).

¹⁶⁷ See *Public Trust in Government: 1958–2023*, *supra* note 148 (discovering that a small minority of Americans—only sixteen percent—often trust the U.S. government); *Trust in Governments Shows Signs of Life as Pandemic Starts to Fade*, CTV NEWS, <https://www.ctvnews.ca/politics/trust-in-governments-shows-signs-of-life-as-pandemic-starts-to-fade-1.6266377> [<https://perma.cc/Z6AY-8JB7>] (Feb. 9, 2023) (finding that thirty-seven percent of Canadians demonstrate confidence in the Canadian government, and sixty-four percent state that they believe the government helps improve the country).

¹⁶⁸ See Linley Sanders, *How Much Do Americans Trust Dr. Anthony Fauci?*, YOUNG GOV US (May 12, 2020), <https://today.yougov.com/topics/politics/articles-reports/2020/05/12/americans-trust-dr-anthony-fauci> [<https://perma.cc/VEG8-5MX3>] (reporting on trends of distrust toward Dr. Anthony Fauci only around two months into the COVID-19 pandemic); Aiello, *supra* note 78 (describing the limitations of Canada's Critical Election Incident Public Protocol, which allows officials to monitor misinformation on social media and educate the public with factual information, but does not require the deletion of said misinformation). As misinformation about the COVID-19 pandemic spread, trust in Dr. Fauci and the White House Coronavirus Task Force began to diminish. See Sanders, *supra* (showing the gradually increasing distrust in Dr. Fauci during the COVID-19 pandemic, particularly among Republicans); *Timeline—In His Own Words: Trump and the Coronavirus*, REUTERS (Oct. 2, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-trump-comments/timeline-in-his-own-words-trump-and-the-coronavirus-idUSKBN26N0U5> [<https://perma.cc/A5W7-4M7A>] (illustrating President Trump's attempts to publicly downplay the danger of the COVID-19 pandemic, which coincided with Americans' decreasing levels of trust in Dr. Fauci).

¹⁶⁹ See Sanders, *supra* note 168 (highlighting the distrust in Dr. Fauci that increased among Republicans as President Trump spread misinformation about the COVID-19 pandemic).

¹⁷⁰ See *infra* notes 171–198 and accompanying text (suggesting how the U.S. government could take a more active role in regulating election misinformation on the internet).

mation from spreading on social media altogether.¹⁷¹ Under Section 230 of the CDA, however, Congress is unable to regulate content on social media, and individuals have no recourse against the operators of social media platforms if they fail to regulate themselves.¹⁷² Thus, in order to prevent the spread of election misinformation on social media, the government needs to reform Section 230 to better reflect its role in modern society.¹⁷³

Fortunately, there is currently some bipartisan support for modifying Section 230.¹⁷⁴ Yet, this support is not necessarily widespread, nor is it always consistent with regard to what types of reforms are necessary.¹⁷⁵ For example, although many Democrats and Republicans agree that some change to Section 230 is due, Democrats often focus on the need for greater government regulation on social media to combat misinformation, whereas Republicans often focus on the harms of censorship on social media.¹⁷⁶

These differing opinions are not easy to reconcile, which is why there has largely been legislative gridlock on this matter despite the apparent consensus on the need for some action.¹⁷⁷ Amidst the political infighting, however, there have been glimmers of true bipartisanship.¹⁷⁸ For instance, the See Something, Say Something Online Act was introduced in Congress on September 29, 2020, January 22, 2021, and January 30, 2022.¹⁷⁹ This bill, which was sponsored by a Democrat and co-sponsored by a Republican, would require internet service providers to work alongside the U.S. Department of Justice and report

¹⁷¹ See *Public Trust in Government: 1958-2023*, *supra* note 148 (demonstrating the general mistrust Americans have in government institutions, arguably making information from those institutions less widely accepted); Amy Mitchell et al., *Many Americans Say Made-Up News Is a Critical Problem That Needs to Be Fixed*, PEW RSCH. CTR. (June 5, 2019), <https://www.pewresearch.org/journalism/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/> [<https://perma.cc/T2V9-PF6M>] (describing the impact misinformation has on Americans, as sixty-eight percent of adults expressed that misinformation significantly impacted their confidence in the government).

¹⁷² See 42 U.S.C. § 230(b)(2) (declaring that the state and federal governments' inability to regulate speech extends to speech on the internet, including speech on social media platforms); *id.* § 230(c)(2)(A) (stating that internet users cannot hold internet service providers liable for the content they publish on their platforms).

¹⁷³ See U.S. DEP'T OF JUST., *supra* note 102, at 1 (finding that the government must reform Section 230 of the CDA in light of the roles social media and the internet at large play in society).

¹⁷⁴ See Hatmaker, *supra* note 103 (reporting on a congressional hearing demonstrating some bipartisan support among lawmakers for updates to Section 230 that center on the algorithms used by social media platforms).

¹⁷⁵ See Fung, *supra* note 103 (highlighting politicians' views on reforming Section 230, which tend to contrast along party lines).

¹⁷⁶ *Id.*

¹⁷⁷ See Meghan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/CE8H-EN7A>] (outlining the legislative actions on reforming Section 230 that have been introduced by members of Congress thus far, but that have resulted in very little concrete change).

¹⁷⁸ See *id.* (highlighting the few bills proposed in Congress relating to Section 230 of the CDA that received some degree of bipartisan support).

¹⁷⁹ *Id.*

any transmissions on their platforms that show people planning or promoting terrorism or violent crimes.¹⁸⁰ Another bipartisan bill—the Platform Accountability and Consumer Transparency (PACT) Act—was also co-sponsored by a Democrat and a Republican, and was introduced on June 24, 2020 and March 17, 2021.¹⁸¹ This Act would require internet service providers to investigate and potentially remove policy-violating posts within two weeks of the providers being put on notice of the violations.¹⁸² Under this Act, if a provider failed to remove said posts, it would lose the protections offered by Section 230 of the CDA.¹⁸³ If passed, either of these bills would require social media companies to more affirmatively combat election misinformation on their platforms, especially misinformation that could lead to physical violence.¹⁸⁴

It is also possible that Democratic and Republican lawmakers could eventually come to an agreement for regulating election misinformation on social media that is loosely modeled after the Canadian approach to combating election misinformation on social media.¹⁸⁵ In that scenario, a non-political government agency would be tasked with regulating social media platforms for

¹⁸⁰ See See Something, Say Something Online Act of 2021, S. 27, 117th Cong. § 4(a)(1) (2021) (stating that internet service providers would need to report suspicious transmissions on their platforms to the U.S. Department of Justice under this proposed law); Anand et al., *supra* note 177 (describing the breadth of the See Something, Say Something Online Act). In this bill, a “suspicious transmission” is defined as “any public or private post, message, comment, tag, transaction, or any other user-generated content or transmission that commits, facilitates, incites, promotes, or otherwise assists the commission of a major crime.” See Something, Say Something Online Act of 2021, S. 27, 117th Cong. § 3(6) (2021).

¹⁸¹ Anand et al., *supra* note 177.

¹⁸² See Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. § 5(c)(1)(B) (2021) (stating that, under this Act, internet service providers would need to investigate content that was complained about in good faith within two weeks of receiving such a complaint); Anand et al., *supra* note 177 (explaining the new responsibilities internet service providers would have under the PACT Act).

¹⁸³ See Anand et al., *supra* note 177 (describing the potential consequences internet service providers would face for not following the processes established by the PACT Act).

¹⁸⁴ See Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. § 5(c)(1)(B) (2021) (requiring internet service providers to investigate policy-violating content within two weeks of receiving a complaint about said content); See Something, Say Something Online Act of 2021, S. 27, 117th Cong. § 4(a)(1) (2021) (requiring internet service providers to report suspicious transmissions on their platforms, which could include election misinformation, to the U.S. Department of Justice).

¹⁸⁵ See Aiello, *supra* note 78 (describing the Canadian approach to curbing election misinformation, which involves having non-political officials inform voters about misinformation on social media). Although the Canadian approach itself may not be feasible in America, as misinformation is more widespread in the United States, having a non-political government agency regulate social media could be a policy that receives bipartisan support. See Hatmaker, *supra* note 103 (reporting on some bipartisan support for updating Section 230 of the CDA that policymakers expressed during a congressional hearing).

this purpose.¹⁸⁶ Although it is impossible to determine exactly what this agency may look like in practice, one example of a similar agency with existing bipartisan support is described in the Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act.¹⁸⁷

This bill, which was sponsored by a Democrat and co-sponsored by a Republican, was most recently reintroduced on February 1, 2022.¹⁸⁸ If passed, this Act would create a carve-out within Section 230 of the CDA for criminal and civil cases regarding depictions of child sexual abuse on social media platforms.¹⁸⁹ Furthermore, this bill would create a bipartisan commission tasked with developing policies and procedures for social media companies to follow in order to better prevent the exploitation of children on their platforms.¹⁹⁰ As described in the Act, this commission would include members appointed in equal numbers by the minority and majority leaders of both chambers of Congress, in addition to the attorney general, the secretary of homeland security, and the chair of the Federal Trade Commission.¹⁹¹ If Congress could agree on creating a similarly constructed non-political agency to combat election misinformation online, the United States could realistically adopt a policy that is moderately modeled after the Canadian approach.¹⁹²

¹⁸⁶ See Aiello, *supra* note 78 (highlighting aspects of the Canadian approach to combating election misinformation that could be modified to better coordinate with the political and legal landscape in the United States).

¹⁸⁷ See Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022, S. 3538, 117th Cong. § 3(c)(1) (2022) (describing the composition of the bipartisan commission that would be created through the EARN IT Act to research and propose policies to reduce the exploitation of minors online); Anand et al., *supra* note 177 (summarizing the commission that would be formed under the EARN IT Act, which could be used as a model for a similar non-political government agency that would investigate election misinformation).

¹⁸⁸ Anand et al., *supra* note 177.

¹⁸⁹ See Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022, S. 3538, 117th Cong. § 5 (2022) (amending Section 230 of the CDA to state that it does not affect any laws or liabilities relating to child sexual exploitation and the publication thereof); Anand et al., *supra* note 177 (explaining how the EARN IT Act would amend Section 230 of the CDA).

¹⁹⁰ See Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022, S. 3538, 117th Cong. § 4(a)(1)(A) (2022) (outlining the responsibilities of the proposed commission); Anand et al., *supra* note 177 (describing the role of the commission that would be formed under the EARN IT Act). Within a year and a half after its formation, this commission would need to have completed a report on the best practices that internet service providers should follow to reduce child sexual exploitation online. Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022, S. 3538, 117th Cong. § 4(a)(1)(A) (2022).

¹⁹¹ See *id.* § 3(c) (explaining exactly how the commission would be created under this Act, including who its members would be, who would appoint those members, and what qualifications those members would be required to have); Anand et al., *supra* note 177 (detailing the composition of the commission that would be created under the EARN IT Act).

¹⁹² See Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022, S. 3538, 117th Cong. § 3(c)(1) (2022) (introducing the bipartisan commission that would be created through the EARN IT Act); Aiello, *supra* note 78 (describing Canada's Critical Election Incident Public Protocol, which gives non-political officials the ability to decide whether and how to inform voters about misinformation on social media).

Of course, as previously mentioned, such a policy may not be as effective in the United States as it proved to be in Canada due to American citizens' greater mistrust in the government and other institutions.¹⁹³ Furthermore, there are apt concerns about government overreach when limiting any constitutional right, including the right to free speech online.¹⁹⁴ Many individuals already believe that social media companies improperly target and censor people with certain viewpoints, and this sentiment would likely only deepen if the government became involved in the process of monitoring misinformation on social media.¹⁹⁵

Nevertheless, it is growing increasingly apparent that something must change when it comes to Section 230 of the CDA.¹⁹⁶ Ideally, the government should move forward with passing the bipartisan See Something, Say Something Online and PACT Acts to ensure social media companies affirmatively work to combat election misinformation on their platforms.¹⁹⁷ Alternatively, a non-partisan government agency modeled after the commission described in the EARN IT Act, and similar to the commission created by the Canadian government, should be considered as a viable option for combating election misinformation in the United States.¹⁹⁸

¹⁹³ See *supra* notes 166–169 and accompanying text (exploring the degree to which American citizens distrust American institutions, and how such widespread distrust could make it difficult for the U.S. government to combat misinformation).

¹⁹⁴ See *Online Censorship in the States*, ACLU (Feb. 13, 2022), <https://www.aclu.org/other/online-censorship-states> [<https://perma.cc/22VX-3JGL>] (expressing concerns about state legislation enacted to regulate speech on the internet).

¹⁹⁵ See Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/> [<https://perma.cc/B9AE-AF8S>] (finding that seventy-three percent of American citizens think it is very or at least somewhat likely that “social media sites intentionally censor political viewpoints that they find objectionable”).

¹⁹⁶ See Hatmaker, *supra* note 103 (demonstrating some bipartisan support among lawmakers for changes to Section 230 of the CDA); U.S. DEP'T OF JUST., *supra* note 102, at 1 (stating that the government must amend Section 230 of the CDA to reflect changes in technology and society at large).

¹⁹⁷ See Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. § 5(c)(1)(B) (2021) (requiring internet service providers to quickly investigate policy-violating content on their platforms in order to remain shielded from liability under Section 230); See Something, Say Something Online Act of 2021, S. 27, 117th Cong. § 4(a)(1) (2021) (requiring social media companies and other internet service providers to report suspicious transmissions on their platforms to the U.S. Department of Justice).

¹⁹⁸ See Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022, S. 3538, 117th Cong. §§ 3(c)(1), 4(a)(1)(A) (2022) (describing the bipartisan commission that would be created through the EARN IT Act to propose policies that would reduce child exploitation online); Aiello, *supra* note 78 (explaining the role that non-political officials could play in the fight against election misinformation, including by informing citizens about misinformation on social media when it spreads, and by countering that misinformation with truth).

CONCLUSION

Since the U.S. presidential election in 2020, election misinformation has diminished trust in democratic processes in America and other countries around the world. The U.S. government has failed to act on this matter, however, and it is still largely unable to do so given both the outdated CDA and the Supreme Court's broad interpretation of the First Amendment. Yet, it is becoming increasingly clear that the government must act to secure the country's elections and ensure the electorate is adequately informed. Although global efforts to combat misinformation have been largely untested or unsuccessful, or would otherwise be infeasible to replicate in the United States, Canada's approach to informing the public through non-political government officials offers a realistic and useful model for the American government to consider implementing. Alternatively, reforming Section 230 of the CDA to better represent the internet's place in modern society would likewise allow the government and individuals to hold social media companies accountable for the role they play in shaping our democracy. The government currently has the tools it needs to enact change on this front, and various acts and bills that could move the issue in the right direction have gained bipartisan support. With the campaign cycle for the next presidential election well underway as of the time of this Note, it is time for the government to act.

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