

# SELF-REGULATION IS NO REGULATION—THE CASE FOR GOVERNMENT OVERSIGHT OF SOCIAL MEDIA PLATFORMS

BRITTANY DOYLE\*

## TABLE OF CONTENTS

- I. CURRENT ISSUES
  - A. Social Media Platform Usage
  - B. Self-Regulation Is No Regulation
  - C. Foreign Interference In U.S. Elections
  - D. The Spread of Misinformation During COVID-19
  - E. Homeland Security
    - i. DHS 2020 Homeland Threat Assessment
    - ii. The Rise of White Supremacy and Anti-Semitism
- II. THE USE OF SOCIAL MEDIA PLATFORMS TO ORGANIZE AND RADICALIZE OTHERS
  - A. The Insurrection
- III. FIRST AMENDMENT ISSUES
- IV. SECTION 230-THE SWORD AND SHIELD
- V. REGULATION OF SOCIAL MEDIA PLATFORMS BY FOREIGN DEMOCRATIC STATES
  - A. Germany
  - B. Australia
  - C. European Union
- VI. A PATH FORWARD FOR THE UNITED STATES
  - A. Federal Communications Commission
    - i. Background of FCC
  - B. Classifying Social Media Platforms as a Public Utility
  - C. Proposed Regulatory Steps and Actions
  - D. Guidelines for Review
  - E. Penalties and Fines
- VII. CONCLUSION

## INTRODUCTION

Since the beginning of the twentieth century, technology innovations such as radio, television, telephones, cellphones, and the internet have transformed how our society communicates. The early 2000s brought a specific new wave of communication advancements—the creation of social media platforms (SMPs). SMPs changed lives, from interacting with friends and family, organizing events from birthday parties to large conventions, to how news is read and received. Yet unlike radio, television, and phones, which are regulated by the Federal Communications Commission (FCC), SMPs are not regulated by the United

---

\* J.D. Candidate, Indiana University Robert H. McKinney School of Law, Class of 2023; M.A. Public Relations, Indiana University School of Arts at IUPUI, 2012; B.S. Political Science & Public Relations, University of Southern Indiana, 2008. I would like to thank my first editor and wife, Katie, and my advisor, Professor Benjamin Keele.

States government and are instead self-regulated by the companies that own them.<sup>1</sup>

In the past five years specifically, the lack of oversight on SMPs led to dire consequences in the United States as foreign adversaries used these platforms to influence elections. Both foreign and domestic terrorist organizations used the platforms to plan attacks, organize, and recruit new members. For the sake of the country's security and its citizens, SMPs cannot be relied upon to continue to self-regulate. Our government must act now to treat SMPs as a public utility and bring them under the auspices of the FCC. Other democratic countries recently passed or introduced legislation to begin regulating SMPs that operate in their countries. It is past time for the United States to do the same.

This Note will establish the need to treat SMPs as a public utility to be regulated by the FCC. The first section will explain current issues and the need for regulation, including homeland security issues, foreign influence in United States elections, and the spread of misinformation online. Section II will outline how terrorists and extremists use SMPs to organize and radicalize others, and Section III will address First Amendment issues. Section IV will review the liability shield, known as Section 230, that currently protects SMPs from liability for the content that users post to their platforms. Section V will begin a comparative analysis of how two democratic countries, Germany and Australia, implemented regulation and penalties for SMPs, along with a brief overview of the European Union's handling of SMPs and its new proposed legislation targeting SMPs. The final section makes the argument for treating SMPs as public utilities regulated under the FCC, along with specific regulatory and penalty suggestions.

## I. CURRENT ISSUES

### A. Social Media Platform Usage

Social media is defined as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).”<sup>2</sup> Common examples of social media platforms are Facebook, YouTube, Pinterest, Instagram, Snapchat, Twitter, and TikTok. The terms “social media,” “social media networks,” and “social media platforms” are used interchangeably. This Note will refer to all types of social media as Social Media Platforms (“SMPs”).

Roughly 72 percent of all Americans use SMPs.<sup>3</sup> An even higher percentage

---

1. See generally FED. COMM'NS COMM'N, <http://www.fcc.gov/about/overview> [<https://perma.cc/4GZS-QC2V>].

2. *Social media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> [<https://perma.cc/4YXQ-M2RY>].

3. *Social Media Fact Sheet*, PEW RSCH. CTR., <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/P5A6-8QUX>].

of young adults aged 18-29 use SMPs at roughly 90 percent.<sup>4</sup> That percentage decreases slightly with each subsequent age group, with 40 percent of adults aged 65 and older using SMPs.<sup>5</sup> YouTube, owned by Google, is the most widely used SMP in America, with 73 percent of all adults using the platform, closely followed by Facebook, with 69 percent of all adults using that platform.<sup>6</sup> Instagram, owned by Facebook, is in third place, with 37 percent of adults using the platform.<sup>7</sup> The reach of SMPs is even more staggering, considering a majority of Facebook and Instagram users visit those sites every day, with 74 percent of Facebook users accessing the site daily, followed by 63 percent of Instagram users.<sup>8</sup>

### *B. Self-Regulation Is No Regulation*

The United States has a “hands-off” approach to regulating SMPs.<sup>9</sup> That may soon change as Congressional testimony indicates an observed need for regulation.<sup>10</sup> Although, it is clear from the lines of questioning during hearings that Congress does not understand how Facebook and other SMPs function.<sup>11</sup> Nearly all SMPs have some level of regulation inside their platforms, including user terms of agreement, and each platform generally self-regulates as it sees fit. This means there is no uniform standard across SMPs. For example, in 2019, Twitter announced it would no longer allow paid political advertising, while Facebook initially exempted politicians and political campaigns from its regular fact-checking process, and Google rarely restricted verifiably false political ads.<sup>12</sup> Facebook changed its policy a year after Twitter, less than five weeks before the 2020 presidential election.<sup>13</sup> In fact, Facebook changed its policies on political

---

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [<https://perma.cc/39Q6-XUX6>].

9. Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1521 (2019).

10. Kurt Wagner, *Congress Doesn't Know How Facebook Works and Other Things We Learned from Mark Zuckerberg's Testimony*, VOX (Apr. 11, 2018), <https://www.vox.com/2018/4/11/17226742/congress-senate-house-facebook-ceo-zuckerberg-testimony-hearing> [<https://perma.cc/L88X-7ZFG>].

11. *Id.*

12. Robert Yablon, *Political Advertising, Digital Platforms, and the Democratic Deficiencies of Self-Regulation*, 104 MINN L. REV. 13 (2020).

13. Jessica Schulberg, *Facebook Ban on Paid Ads Discrediting the Election Won't Stop Trump in his Regular Posts*, HUFFPOST (Oct. 2, 2020), [https://www.huffpost.com/entry/facebook-paid-ads-delegitimize-election-trump-mail-in-voting\\_n\\_5f76704dc5b6374c558b993f](https://www.huffpost.com/entry/facebook-paid-ads-delegitimize-election-trump-mail-in-voting_n_5f76704dc5b6374c558b993f)

advertising numerous times throughout 2020, which led to dire consequences as the company could not properly enforce its guidelines.<sup>14</sup> For example, Facebook announced it would stop accepting new political ads in the week preceding the election, but blamed “technical flaws” when it began blocking previously approved ads to numerous political campaigns, namely the Biden for President campaign, which estimated it lost five hundred thousand dollars in donations due to blocked ads.<sup>15</sup>

It is important to note that the election woes Facebook experienced throughout 2020 came after the creation and implementation of its Oversight Board. In 2018, Facebook announced it would create an independent oversight committee to serve as an “appellate review system” for content and make recommendations back to Facebook.<sup>16</sup> The Oversight Board launched in early 2020 after a yearlong study and buildout.<sup>17</sup> The Oversight Board helps Facebook decide “what to take down, what to leave up, and why.”<sup>18</sup> The Oversight Board consists of twenty members from around the world, many of whom are legal scholars or digital and technology experts.<sup>19</sup> The body will review “highly emblematic cases” to determine if Facebook followed its procedures.<sup>20</sup>

The creation of the Oversight Board did not stop an exodus of Facebook employees aggravated by Facebook’s attempts, or lack thereof, to self-regulate. Ashok Chandwaney, a former Facebook software engineer, quit the company in September 2020 by posting an essay detailing the reasons they were separating from the company, including Facebook being used to spread messages of hate and violence that either went unchecked internally or were approved by Facebook CEO Mark Zuckerberg.<sup>21</sup> Chadwaney stated numerous reasons for their separation, including Zuckerberg's decision to allow President Trump's post regarding the Black Lives Matter protest, which included the line “when the looting starts, the shooting starts” to remain on the platform, and they went so far

---

[<https://perma.cc/8ZDA-CZ39>].

14. Jesselyn Cook, *Facebook’s Political Ads Ban Has Been an Ominous Disaster*, HUFFPOST (Oct. 30, 2020), [https://www.huffpost.com/entry/facebook-political-ads-ban-disaster\\_n\\_5f9c812bc5b60eefc852926d](https://www.huffpost.com/entry/facebook-political-ads-ban-disaster_n_5f9c812bc5b60eefc852926d) [<https://perma.cc/2T3R-CHYU>].

15. *Id.*

16. Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L. J. 2418 (2020).

17. *Id.*

18. *Ensuring Respect for Free Expression, Through Independent Judgment*, OVERSIGHT BD., <https://www.oversightboard.com/> [<https://perma.cc/B82Y-6CZH>].

19. *Meet the Board*, OVERSIGHT BD., <https://www.oversightboard.com/meet-the-board/> [<https://perma.cc/H2CD-CVH6>].

20. OVERSIGHT BD., *supra* note 18.

21. Craig Timberg & Elizabeth Dwoskin, *Another Facebook worker quits in disgust, saying the company ‘is on the wrong side of history’*, WASH. POST (Sept. 8, 2020), <https://www.washingtonpost.com/technology/2020/09/08/facebook-employee-quit-racism/> [<https://perma.cc/CJ29-UHGF>]. Chadwaney is nonbinary and uses they/them pronouns.

as to say Facebook is “choosing to be on the wrong side of history.”<sup>22</sup>

Zuckerberg allowed President Trump’s “looting” post to stay on Facebook, stating it did not break the company’s rules against inciting violence, much to the dismay of several Facebook employees and executives.<sup>23</sup> Facebook then held an “emergency town hall” meeting with over five thousand of its employees who demanded Zuckerberg change Facebook’s policy to not fact check or remove hate speech by politicians; some employees working from home held a “virtual walkout” to protest the decision.<sup>24</sup> Another Facebook employee, who later resigned, asked, “What’s the point of establishing a principle if we’re going to move the goal posts [sic] every time Trump escalates his behavior?”<sup>25</sup>

Uniformity in SMPs enforcing their terms of service on users is lacking, particularly when it comes to public officials violating the platform’s rules. During the summer of 2020, a user decided to test Twitter’s double standards for elected officials and created an account solely to post messages that copied President Trump’s tweets verbatim.<sup>26</sup> Twitter suspended that user’s account in less than three days for violating its rules against “glorifying violence” for the “when the looting starts, the shooting starts” tweet copied from President Trump.<sup>27</sup> Twitter allowed President Trump’s very same tweet to remain on the platform.<sup>28</sup>

Advertising on SMPs also shows a need for regulation. Advertisers love to use Facebook because they can target users “based on almost any personal characteristic.”<sup>29</sup> However, as recently as 2017, news organizations found that advertisers could target Facebook users with anti-Semitic phrases such as “Jew hater,” “Ku-Klux-Klan,” and “How to burn Jews.”<sup>30</sup> Facebook responded by saying it would remove those categories and do more to prevent inappropriate targeting.<sup>31</sup>

Political advertising and campaigns are not the only areas in which self-

---

22. *Id.*

23. Elizabeth Dwoskin & Nitasha Tiku, *Facebook employees said they were ‘caught in an abusive relationship’ with Trump as internal debates raged*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/technology/2020/06/05/facebook-zuckerberg-trump/> [<https://perma.cc/TJ2U-HPRW>].

24. *Id.* See also Timberg & Dwoskin, *supra* note 21.

25. Timberg & Dwoskin, *supra* note 21.

26. Carlie Porterfield, *Twitter Suspends Account Copying Trump’s Tweets for ‘Glorifying Violence.’* FORBES (June 3, 2020), <https://www.forbes.com/sites/carlieporterfield/2020/06/03/twitter-suspends-account-copying-trumps-tweets-for-glorifying-violence/?sh=565ad5e57e20> [<https://perma.cc/T8EF-7RLA>].

27. *Id.*

28. *Id.*

29. Kurt Wagner, *Facebook’s reliance on software algorithms keeps getting the company into trouble*, VOX (Sept. 14, 2017, 9:44 PM), <https://www.vox.com/2017/9/14/16310512/facebook-mark-zuckerberg-algorithm-ad-targeting-jews> [<https://perma.cc/XLA9-54JA>].

30. *Id.*

31. *Id.*

regulation has failed SMPs. University of Miami School of Law Professor Lili Levi lists examples of how “fake news” spread online through SMPs caused broad problems, including a one hundred and thirty billion dollar fallout in stock value after an incorrect AP tweet stated an explosion injured Barack Obama.<sup>32</sup> Ethereum lost a reported four billion dollars in market value after a “hoax statement” was released online stating the company’s chief executive died.<sup>33</sup> This, in turn, means that SMPs have a profound impact on our economy, regardless of whether information shared on the platforms is true.

SMPs greatly influence what news their users see on their platforms. Harvard Law Professor Martha Minow put it best by saying, “a majority of people in the United States now receive news selected for them by a computer-based mathematical formula derived from their past interests, producing echo chambers with few opportunities to learn, understand, or believe what others are hearing as news.”<sup>34</sup> The United States can no longer allow SMPs to singularly control the spread of information because “[t]he rules [social media] platforms adopt—or fail to adopt—thus directly shape the campaigns the public sees.”<sup>35</sup>

### *C. Foreign Interference in U.S. Elections*

There is no disputing the evidence that Russia used SMPs to meddle in the 2016 presidential election. In an op-ed to the *New York Times*, former U.S. Ambassador to the United Nations, Samantha Powers, stated, “Russia has keenly exploited our growing reliance on new media—and the absence of real umpires.”<sup>36</sup> In the three months preceding the 2016 presidential election, American social media users shared 156 related news stories debunked by fact-checking websites more than thirty-eight million times.<sup>37</sup> Some reports go as far as to say American Twitter users were exposed to more “fake news” than “accurate” information during 2016.<sup>38</sup> Additionally, the nation’s campaign finance laws are “woefully antiquated in the internet age.”<sup>39</sup> Facebook admitted that inauthentic accounts from Russia purchased one hundred thousand dollars of political advertising during the 2016 election, a clear violation of federal election

---

32. Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 *FIRST AMEND. L. REV.* 232, 263 (2017).

33. *Id.*

34. Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 *LOY. L. REV.* 499, 500 (2018).

35. Yablon, *supra* note 12, at 14.

36. Samantha Power, *Samantha Power: Why Foreign Propaganda Is More Dangerous Now*, *N.Y. TIMES* (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/opinion/samantha-power-propaganda-fake-news.html> [<https://perma.cc/B8XG-MRUJ>].

37. *Id.*

38. Levi, *supra* note 32, at 249-50.

39. Anthony J. Gaughan, *Putin’s Revenge: The Foreign Threat to American Campaign Finance Law*, 62 *HOW. L.J.* 855, 856 (2019).

laws.<sup>40</sup>

The 2016 election showed that not only are foreign donations affecting elections but that foreign operatives can use SMPs to sway and “shape” public opinion.<sup>41</sup> Foreign actors, including Russia, continued their attacks during the 2018 midterm elections, and election security was a top priority of the FBI leading up to the 2020 elections.<sup>42</sup> A few weeks before the November 2020 election, FBI Director Christopher Wray stated that foreign adversaries use “false personas and fabricated stories” on SMPs to “reach a wide swath of Americans covertly from outside the United States.”<sup>43</sup> This will be an ongoing issue and concern for future American elections.

#### *D. The Spread of Misinformation During COVID-19*

The current COVID-19 pandemic has only exacerbated the need for regulation of SMPs. According to a study by the Pew Research Center, adults in the United States who receive most of their news through SMPs lag behind others in pandemic news.<sup>44</sup> The 2020 study found that only 23 percent of adults who rely mostly on SMPs for political news followed the pandemic very closely, compared to fifty percent who relied on network or cable TV.<sup>45</sup> The study also found that Americans who relied mostly on SMPs for pandemic news were more likely by far—81 percent—to have heard a conspiracy theory that the pandemic was intentionally planned.<sup>46</sup>

The use of SMPs to “distinguish[h] the proliferation of bad information” during the COVID-19 pandemic is unprecedented as users are not only “passively consuming” inaccurate information but are “disseminating” and “creating” it.<sup>47</sup> This makes public health experts’ job to combat misinformation more difficult.<sup>48</sup> The pandemic is being battled on two fronts: the virus itself and the battle of

---

40. Wagner, *supra* note 29.

41. Gaughan, *supra* note 39.

42. Press Release, Fed. Bureau of Investigation, Joint Statement on Election Day Preparations (Nov. 5, 2018), <https://www.fbi.gov/news/pressrel/press-releases/joint-statement-on-election-day-preparations> [<https://perma.cc/5DFQ-U9RF>]; Christopher A. Wray, Director, Fed. Bureau of Investigation, Testimony at Threats to the Homeland: Hearing Before the S. Comm. on Homeland Sec. and Gov. Affairs, 116<sup>th</sup> Cong. (Sept. 24, 2020) [hereinafter Threats to the Homeland].

43. Threats to the Homeland, *supra* note 42.

44. Amy Mitchell et al., *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. (July 30, 2020), <https://www.journalism.org/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/> [<https://perma.cc/XN2A-STST>].

45. *Id.*

46. *Id.*

47. Christina Pazzanese, *Battling the ‘pandemic of misinformation’*, THE HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/social-media-used-to-spread-create-covid-19-falsehoods/> [<https://perma.cc/XAC6-LBQY>].

48. *Id.*

misinformation.<sup>49</sup> Some SMPs took steps to combat misinformation posted to their sites, but with numerous users simultaneously searching for the same topic, it can create a “signal jam [in] search algorithms, which cannot tell the difference usually between truth and lies.”<sup>50</sup> SMPs have “largely fallen short” in combating misinformation spread on their platforms.<sup>51</sup>

For example, in January 2020, before the world went into lockdown, a Harvard public health researcher with approximately sixty thousand followers posted a preprint, which is “scientific literature that has not been peer-reviewed,” to his Twitter account.<sup>52</sup> The preprint suggested the virus that causes COVID-19 showed similarities to HIV.<sup>53</sup> A day later, the authors of the preprint withdrew it after numerous health officials pointed out the study’s flaws, but the preprint “remains the most downloaded preprint ever, with almost [one] million downloads.”<sup>54</sup> Other popular myths surrounding COVID-19 include the ability for someone to obtain a mask exemption card and that the virus was deliberately created and released.<sup>55</sup>

Foreign and domestic extremist groups take advantage of the COVID-19 pandemic to increase recruiting, encourage attacks, and promote hate-filled conspiracy theories.<sup>56</sup> These groups are using SMPs and other online platforms to spread falsehoods, such as the pandemic “being orchestrated by Jews or China.”<sup>57</sup> There are messages encouraging people to intentionally spread the virus or to spread it specifically to Jews and African American children.<sup>58</sup> Steven Stalinsky, executive director of the Middle East Media Research Institute, said the Institute “found online chatter in which participants state that they are infected and seek to become biological weapons” along with suggestions that infected individuals visit synagogues and cough in the faces of rabbis.<sup>59</sup> The Institute also found that Islamic extremists use SMPs to accuse the United States of

---

49. Jackson Ryan, *How COVID-19 infected the world with lies*, CNET (Oct. 21, 2020), <https://www.cnet.com/features/how-covid-19-infected-the-world-with-lies> [<https://perma.cc/GDH5-YXW2>].

50. Pazzanese, *supra* note 47.

51. Ryan, *supra* note 49.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Coronavirus Disease 2019: Myth vs. Fact*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/2019-novel-coronavirus-myth-versus-fact> [<https://perma.cc/D332-UMDN>].

56. Souad Mekhennet, *Far-right and radical Islamist groups are exploiting coronavirus turmoil*, WASH. POST (Apr. 10, 2020), [https://www.washingtonpost.com/national-security/far-right-wing-and-radical-islamist-groups-are-exploiting-coronavirus-turmoil/2020/04/10/0ae0494e-79c7-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/national-security/far-right-wing-and-radical-islamist-groups-are-exploiting-coronavirus-turmoil/2020/04/10/0ae0494e-79c7-11ea-9bee-c5bf9d2e3288_story.html) [<https://perma.cc/5J7J-D2WE>].

57. *Id.*

58. *Id.*

59. *Id.*



intentionally using the virus as a bioweapon.<sup>60</sup> Ahead of the major spring 2020 religious holidays of Passover, Easter, and Ramadan, the Department of Homeland Security encouraged religious leaders to stay vigilant and review their security protocols but stressed they were unaware of imminent or credible threats.<sup>61</sup>

#### *E. Homeland Security*

SMPs have a significant impact on homeland security issues both in the United States and abroad as terrorists and extremists use these platforms to livestream attacks, promote messages of hate, and recruit new members.<sup>62</sup> This leads to an increased risk of terrorist attacks globally.<sup>63</sup> This is not a new phenomenon; in 2006, a cyberterrorism expert argued that “ninety percent of the terrorist activity on the internet takes place using social networking tools.”<sup>64</sup> Small, homegrown terrorist organizations use social media to connect with large international terrorist organizations.<sup>65</sup> In 2020, FBI Director Christopher Wray testified before the Senate Homeland Security and Governmental Affairs Committee, stating, “[w]ith the broad distribution of social media, terrorists can spot, assess, recruit, and radicalize vulnerable persons of all ages in the U.S. either to travel to foreign lands or to conduct an attack on the Homeland.”<sup>66</sup>

The Islamic State of Iraq and Syria (ISIS) mastered the art of using social media to recruit and organize its members. By 2014, ISIS used Twitter to post and share videos of extreme violence, including beheadings of United States citizens.<sup>67</sup> A Brookings Institution report from 2015 found a minimum of forty-six thousand Twitter accounts operating on behalf of ISIS.<sup>68</sup> Twitter reportedly shut down two thousand ISIS accounts in a single one-week span.<sup>69</sup> That same year, it was estimated that ISIS produced upwards of ninety thousand tweets and other social media posts every day, which equates to almost thirty-three million

---

60. *Id.*

61. *Id.*

62. Md Sazzad Hossain, *Social Media and Terrorism: Threats and Challenges to the Modern Era*, 22 S. ASIAN SURV. 136 (2018).

63. *Id.* at 139.

64. *Id.* at 141.

65. *Id.* at 149.

66. Threats to the Homeland, *supra* note 42.

67. Sophie Carson, *Parents of James Foley, other Americans killed by ISIS, call for accused terrorists to face trial in U.S.*, MILWAUKEE J. SENTINEL (July 25, 2020), <https://www.jsonline.com/story/news/2020/07/25/james-foley-parents-call-isis-members-face-trial-u-s/5508221002/> [<https://perma.cc/8WTA-G4DH>].

68. Rick Gladstone & Vindu Goel, *ISIS is Adept on Twitter, Study Finds*, N.Y. TIMES (Mar. 5, 2015), <https://www.nytimes.com/2015/03/06/world/middleeast/isis-is-skilled-on-twitter-using-thousands-of-accounts-study-says.html> [<https://perma.cc/YL7R-QLEK>].

69. *Id.*

posts a year.<sup>70</sup> In 2016, ISIS directly threatened Facebook CEO Mark Zuckerberg and Twitter CEO Jack Dorsey via an online video in response to those platforms' attempts to shut down terrorist-linked accounts and content.<sup>71</sup>

Terrorists and extremists use SMPs to livestream attacks and receive news during them. In the 2016 Pulse Nightclub massacre, which at the time was the deadliest mass shooting in the history of the United States killing forty-nine people, the gunman searched for terms related to the shooting and posted on his various social media accounts as he carried out the attack.<sup>72</sup> The 2019 massacre at two mosques in New Zealand was livestreamed by the attacker on Facebook, and the video was viewed nearly four thousand times before Facebook removed it.<sup>73</sup> Facebook confirmed no user who watched the video during the live broadcast reported it, and Facebook did not remove it until nearly thirty minutes after the attack.<sup>74</sup> That same year, a gunman in Germany livestreamed his attack on a synagogue using the SMP Twitch.<sup>75</sup> Also, in 2019, an attack at the West Freeway Church of Christ in Texas was livestreamed via the church's own YouTube channel, which was being used to broadcast that day's sermon.<sup>76</sup> In 2020, a gunman livestreamed his attack at an Arizona mall on Snapchat.<sup>77</sup>

One common thread between several of these homegrown acts of terror and ISIS is that not only do the perpetrators claim allegiance to ISIS, but ISIS uses those public announcements of allegiance to claim credit for the attacks, even

---

70. Eric Schmitt, *U.S. Intensifies Effort to Blunt ISIS' Message*, N.Y. TIMES (Feb. 16, 2015), [https://www.nytimes.com/2015/02/17/world/middleeast/us-intensifies-effort-to-blunt-isis-message.html?\\_r=0](https://www.nytimes.com/2015/02/17/world/middleeast/us-intensifies-effort-to-blunt-isis-message.html?_r=0) [https://perma.cc/6N6E-SC5E].

71. Jessica Guynn, *Islamic State Video Makes Direct Threats Against Mark Zuckerberg, Jack Dorsey*, USA TODAY (Feb. 24, 2016, 9:06 AM), <https://www.usatoday.com/story/tech/news/2016/02/24/facebook-mark-zuckerberg-twitter-jack-dorsey-isis-video-threats/80861126/> [https://perma.cc/MLK2-P775].

72. Alan Blinder et al., *Omar Mateen Posted to Facebook Amid Orlando Attack, Lawmaker Says*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/us/orlando-shooting.html> [https://perma.cc/T3SN-BQX8].

73. Meagan Flynn, *No One who Watched New Zealand Shooter's Video Live Reported it to Facebook, Company Says*, WASH. POST (Mar. 19, 2019), <https://www.washingtonpost.com/nation/2019/03/19/new-zealand-mosque-shooters-facebook-live-stream-was-viewed-thousands-times-before-being-removed/> [https://perma.cc/3H2N-XZEU].

74. *Id.*

75. Adi Robertson, *An Anti-Semitic Shooting in Germany was Live-streamed on Twitch*, THE VERGE (Oct. 9, 2019), <https://www.theverge.com/2019/10/9/20906637/halle-germany-synagogue-shooting-attack-live-stream-twitch-amazon-video-unavailable> [https://perma.cc/5UR9-DHPF].

76. Bill Hutchinson & Josh Margolin, *Armed Parishioner Says He's 'No Hero,' as New Details Emerge about the Texas Church Shooter*, ABC NEWS (Dec. 31, 2019, 5:11 PM), <https://abcnews.go.com/US/parishioner-gunned-texas-church-shooter-hero/story?id=67982047> [https://perma.cc/3286-5UE6].

77. Elliott C. McLaughlin et al., *Prosecutors: Arizona Shooting Suspect says he Targeted Couples*, MERCURY NEWS (May 21, 2020, 6:22 PM), <https://www.mercurynews.com/2020/05/21/prosecutors-arizona-shooting-suspect-says-he-targeted-couples/> [https://perma.cc/GRZ9-XD5P].

though in many cases, there is no direct evidence linking ISIS leaders and the gunmen.<sup>78</sup> During the Pulse Nightclub massacre in Orlando, the gunman called 911 to pledge his allegiance to ISIS.<sup>79</sup> One of the perpetrators of the San Bernardino massacre that left fourteen dead declared her allegiance to ISIS on Facebook as she and her husband initiated the attack.<sup>80</sup> In 2015, a gunman “directed his Twitter followers to an ISIS supporter who tweeted on his behalf” as he and another man began shooting participants at a Prophet Muhammad cartoon contest.<sup>81</sup> ISIS took credit for each of these attacks after the fact.<sup>82</sup>

*i. DHS 2020 Homeland Threat Assessment*

The Department of Homeland Security (DHS) issued a Homeland Threat Assessment in 2020, stating violent extremists would use SMPs to influence and encourage violence within the United States.<sup>83</sup> The report showed that 2019 was the deadliest year for violent domestic terrorism in the United States since the Oklahoma City bombing in 1995, and to the surprise of many, it stated, “ideologically motivated lone offenders and small groups pose the most likely terrorist threat to the Homeland.”<sup>84</sup> This means that the most serious threat facing the United States comes from within and not from foreign terrorists who cross our borders. The report further states that racially and ethnically motivated people and groups, specifically white supremacist extremists, are the “most persistent and lethal threat” to the United States.<sup>85</sup> Ken Cuccinelli, the second-highest in command at DHS, recently stated white supremacy attacks “show the highest level of lethality, meaning if you compare the number of violent incidents to the number of deaths, the number of deaths relative to the incidents is very high compared to other types of threats.”<sup>86</sup>

*ii. The Rise of White Supremacy and Anti-Semitism*

As evidenced by the DHS Homeland Threat Assessment, white supremacy and anti-Semitic ideas are on the rise in the United States. The New York Times

---

78. Greg Myre, *A Mass Shooter ‘Pledges Allegiance’ to ISIS. What Does This Mean?*, NPR (June 13, 2016, 4:32 PM), <https://www.npr.org/sections/parallels/2016/06/13/481284054/a-mass-shooter-pledges-allegiance-to-isis-what-does-this-mean> [<https://perma.cc/Y42C-NSLA>].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. U.S. DEP’T OF HOMELAND SEC., *HOMELAND THREAT ASSESSMENT 17* (Oct. 2020) [https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf) [<https://perma.cc/E9GZ-UWGD>][hereinafter *HOMELAND THREAT ASSESSMENT*].

84. *Id.* at 18.

85. *Id.* at 17.

86. Betsy Woodruff Swan, *DHS Draft Document: White Supremacists are Greatest Terror Threat*, POLITICO (Sept. 4, 2020, 5:45 PM), <https://www.politico.com/news/2020/09/04/white-supremacists-terror-threat-dhs-409236> [<https://perma.cc/ZEH6-K54D>].

used the term “white supremacy” less than seventy-five times in its coverage of 2010 but over seven hundred times in 2020 coverage.<sup>87</sup> Nearly 56 percent of murders committed by extremists in the United States in the past ten years were carried out by “people espousing white supremacist ideology.”<sup>88</sup> Anti-Semitic incidents in the United States increased 57 percent alone in 2017, according to the Anti-Defamation League, the largest increase in a single year since it began tracking those crimes in 1979.<sup>89</sup> White supremacists committed more homicides between 2000 to 2006 than any other domestic terror group, and from 2008 to 2016, right-wing and white supremacist “attacks and violent events outnumber(ed) such actions by Islamic extremists almost two-to-one.”<sup>90</sup>

Mass casualties and death from violent attacks follow the rise of white supremacy. In 2015, a white supremacist killed nine people at a predominantly African American church in Charleston, South Carolina, as he “declared his hatred for black people before opening fire” on the congregants.<sup>91</sup> In 2017, a “Unite the Right” rally in Charlottesville, Virginia, became deadly when a man drove his car into a crowd of counter-protestors, killing one person and injuring several others.<sup>92</sup> The following year, eleven people were killed when a gunman opened fire on the Tree of Life Congregation in Pittsburgh, Pennsylvania.<sup>93</sup> Then in 2019, a gunman posted a “screed” online blaming the “Hispanic invasion of Texas” for his attack at an El Paso, Texas, Wal-Mart, where he killed twenty-two people.<sup>94</sup>

The rise in attacks by domestic extremists correlates with the increase of hate-based groups operating in the United States. A Southern Poverty Law Center report showed 940 active hate groups in the United States in 2019 and a 55

---

87. Michael Powell, *‘White Supremacy’ Once Meant David Duke and the Klan. Now it Refers to Much More*, N.Y. TIMES (Oct. 17, 2020), <https://www.nytimes.com/2020/10/17/us/white-supremacy.html> [<https://perma.cc/J3CB-RJG6>].

88. John Eligon, *The El Paso Screed, and the Racist Doctrine Behind It*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/el-paso-shooting-racism.html> [<https://perma.cc/T3PZ-GNN9>].

89. Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/ZNL7-VUDE>].

90. George Mixon, *Not Your Father’s Marketplace of Ideas: Hate Speech and the Fraudulent Marketplace of Ideas Created by Social Media*, 34 EMORY INT’L L. REV. 399, (2020).

91. Robert Costa et al., *Church Shooting Suspect Dylann Roof Captured Amid Hate Crime Investigation*, WASH. POST (June 18, 2015, 9:17 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/17/white-gunman-sought-in-shooting-at-historic-charleston-african-ame-church/> [<https://perma.cc/7357-E39Y>].

92. Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> [<https://perma.cc/KC6L-2ZSS>].

93. Robertson et al., *supra* note 89.

94. Eligon, *supra* note 88.

percent increase in white nationalist hate groups since 2017.<sup>95</sup> The report concluded that white supremacists are “increasingly congregating online” without officially joining a hate group but still “networking, raising funds, recruiting and spreading propaganda.”<sup>96</sup>

## II. THE USE OF SOCIAL MEDIA PLATFORMS TO ORGANIZE AND RADICALIZE OTHERS

As outlined above, both foreign and domestic extremists use SMPs to plan attacks, recruit new members, spread hateful rhetoric, and incite violence. SMPs provide an “unparalleled opportunity to reach a broader audience.”<sup>97</sup> In October 2020, Facebook assisted law enforcement with capturing a group of individuals who used the platform to organize a plan to kidnap Michigan Governor Gretchen Whitmer.<sup>98</sup> In response, Michigan Senator Gary Peters said, “Online platforms are unfortunately used both as a way to recruit and radicalize potential extremists and as a tool to plan subsequent violence. . . . [T]here appears to be evidence the alleged perpetrators utilized various social media and messaging platforms to coordinate their efforts and recruit likeminded [sic] individuals.”<sup>99</sup> He continued by saying SMPs “have a responsibility to combat hate and violence when it flourishes on their platforms.”<sup>100</sup> In another example, extremists from “all sides” inundated SMPs with “disinformation, conspiracy theories, and incitements to violence” during the protests surrounding the killing of George Floyd.<sup>101</sup>

One technique domestic extremists use to spread their messages on SMPs is through the use of memes, which are essentially funny pictures or jokes embedded in pictures.<sup>102</sup> For example, the Boogaloo movement is a right-wing

---

95. *The Year in Hate and Extremism 2019*, S. POVERTY LAW CTR. 6, [https://www.splcenter.org/sites/default/files/yih\\_2020\\_final.pdf](https://www.splcenter.org/sites/default/files/yih_2020_final.pdf) [<https://perma.cc/2FNL-492A>].

96. *Id.*

97. Seth G. Jones, *The Rise of Far-Right Extremism in the United States*, CTR. FOR STRATEGIC & INT’L STUD. (Nov. 7, 2018), <https://www.csis.org/analysis/rise-far-right-extremism-united-states> [<https://perma.cc/P84J-WPNN>].

98. Press Release, S. Comm. on Homeland Sec. and Gov. Affairs, Peters Seeks Answers from Top Social Media Executives on Violent Domestic Extremists and Online Activity (Oct. 12, 2020) (on file with author).

99. *Id.*

100. *Id.*

101. Seth G. Jones, *The Escalating Terrorism Problem in the United States*, CTR. FOR STRATEGIC & INT’L STUD. (June 17, 2020), <https://www.csis.org/analysis/escalating-terrorism-problem-united-states> [<https://perma.cc/2JD9-5TCK>].

102. Alex Goldenberg & Joel Finkelstein, *Cyber Swarming, Memetic Warfare and Viral Insurgency: How Domestic Militants Organize on Memes to Incite Violent Insurrection and Terror Against Government and Law Enforcement*, NETWORK CONTAGION RSCH. INST. (2020), <https://networkcontagion.us/wp-content/uploads/NCRI-White-Paper-Memetic-Warfare.pdf> [<https://perma.cc/8LRP-SSSG>].

extremist group that refers to a future civil war.<sup>103</sup> The Boogaloo memes advocate for “extreme violence against law enforcement and government officials.”<sup>104</sup> One prominent Boogaloo meme depicts a young male cartoon character reading a book titled *How to Restore your Liberties*, with Step 1 being “Light Molotov” and Step 2 being “Throw [lit Molotov] at nearest government building.”<sup>105</sup> The problem with these memes is that people may confuse cartoon jokes with what Boogaloo is actually doing—inciting violence against law enforcement and the military.<sup>106</sup> A Network Contagion Research Institute (NCRI) report stated:

This ambiguity is a key feature of the problem: Like a virus hiding from the immune system, the use of comical-meme language permits the network to organize violence secretly behind a mirage of inside jokes and plausible deniability. Evolving threats from this vantage can emerge all at once, undetected, and with no top-down organization at all. Traditional qualitative analysis methods, by themselves, fall short in the capacity to detect such self-organized genocidal violence over massive scales of data through inside jokes and unknown dog whistles.<sup>107</sup>

The use of Boogaloo memes to incite violence became clear during a standoff between an extremist and police in New York in 2019, dubbed the “Whiskey Warrior” event.<sup>108</sup> The extremist took photos of the standoff, saying the officers were trying to take his munitions, and posted them as memes on websites that were immediately shared to SMPs and went viral.<sup>109</sup> Followers began to interfere with law enforcement’s handling of the standoff “through targeted phone calls and online campaigns and incited armed resistance from social media.”<sup>110</sup> While the standoff ended peacefully, the extremist had garnered over one hundred thousand new followers on Instagram during the event.<sup>111</sup> The same NCRI report listed eleven of the “Top Boogaloo Facebook Groups,” with each group having anywhere from fifteen hundred to almost fourteen thousand followers.<sup>112</sup>

Increased exposure to Boogaloo memes risks many users being indoctrinated because the memes and material shared are usually accompanied by “links to more radical communities.”<sup>113</sup> This is similar to the seemingly overnight existence

---

103. *The Boogaloo Movement*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/boogaloo> [<https://perma.cc/55Q9-LSWW>].

104. Goldenberg & Finkelstein, *supra* note 102, at 2.

105. *Id.* at 10.

106. *Id.* at 2-3.

107. *Id.* at 3.

108. *Id.* at 4.

109. *Id.*; *Viral*, MERRIAM-WEBSTER DICTIONARY <https://www.merriam-webster.com/dictionary/viral> [<https://perma.cc/7FNQ-5ZRV>] (a “viral” post occurs when the post is “quickly and widely spread or popularized especially by means of social media”).

110. Goldenberg & Finkelstein, *supra* note 102, at 4.

111. *Id.*

112. *Id.* at 5-6.

113. *Id.* at 6.

of ISIS. National security experts and agencies were “entirely caught off guard at the rapid mobilization of ISIS” as foreign fighters from across the world traveled to join the caliphate.<sup>114</sup> ISIS used SMPs to “crowd-source terror and propaganda outside the guidelines of every national security or military analyst’s playbook,” and it appears the Boogaloo meme and followers are doing precisely the same.<sup>115</sup> For example, several pages on SMPs under the Boogaloo name include posts related to custom gun loadouts, lists of ingredients for explosives, and blueprints for 3-D printable guns.<sup>116</sup> There are even YouTube videos of My Little Ponies accessorized with swastikas and other SS regalia in apparent attempts to indoctrinate youth.<sup>117</sup>

A report by Hatewatch, a Southern Poverty Law Center blog dedicated to monitoring and exposing activities of the radical right, stated, “Facebook continues to provide a safe haven for hate groups and extremists” despite the company’s attempts to stop such groups from using its platform.<sup>118</sup> League of the South, listed as a hate group by the Southern Poverty Law Center since 2000, used Facebook as its “core operations platform” to recruit members and organize events.<sup>119</sup> Members affiliated with League of the South still operate pages on Facebook and provide direct links to the group’s website and information to officially join the organization.<sup>120</sup> The president of League of the South was listed as a featured speaker at the “Unite the Right” rally in Charlottesville, Virginia, in 2017, where violence erupted, forcing the governor to declare a state of emergency.<sup>121</sup> The rally itself was “largely organized on Facebook.”<sup>122</sup> Even though Facebook removed the rally from its platform the day before it occurred, the information had been displayed for a month.<sup>123</sup>

#### *A. The Insurrection*

This leads to January 6, 2021, when extremists stormed the U.S. Capitol

---

114. *Id.* at 7.

115. *Id.*

116. *Id.* at 9.

117. Janet Reitman, *All-American Nazis*, ROLLING STONE (May 2, 2018, 8:00 AM), <https://www.rollingstone.com/politics/politics-news/all-american-nazis-628023/> [<https://perma.cc/SFE7-JHZ2>].

118. *Facebook’s Strategy for Taking Down Hate Groups is Spotty and Ineffective*, S. POVERTY L. CTR. (Apr. 7, 2020), <https://www.splcenter.org/hatewatch/2020/04/07/facebook-strategy-taking-down-hate-groups-spotty-and-ineffective> [<https://perma.cc/G9EH-PXYZ>].

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Kurt Wagner, *Facebook and Twitter Aren’t Changing their Terms of Service Following Violent Protests in Charlottesville*, VOX (Aug. 14, 2017, 5:40 PM), <https://www.vox.com/2017/8/14/16145086/facebook-twitter-charlottesville-terms-of-service-guidelines> [<https://perma.cc/JN5W-4AX2>].

Building to stop Congress's formal certification of the 2020 electoral college results, a historically ceremonial proceeding.<sup>124</sup> The extremists made no secret of their plans, making public posts on Facebook, Instagram, and other SMPs encouraging others to come to Washington, D.C. on January 6th to commence "Operation Occupy the Capitol."<sup>125</sup> President Trump himself promoted the event in December, tweeting "Big protest in D.C. on January 6th. Be there, will be wild!"<sup>126</sup> The day before the attack, a Facebook group told its followers to prepare to "use force," accompanied by several user posts regarding the weapons they planned to bring, including assault rifles.<sup>127</sup> Donning flags, armor, and clothes emblazoned with alt-right and white supremacy symbols, extremists shattered windows and broke through doors to forcefully enter what is normally one of the most secure buildings in the world.<sup>128</sup> Five people died, including Capitol Police Officer Brian D. Sicknick, who was "only the fourth member of the force to be killed in the line of duty since its founding two centuries ago."<sup>129</sup> As of August 2021, four additional capitol police officers who responded to the attack died by suicide.<sup>130</sup>

The attack brought to light new platforms and mechanisms extremists use to organize. In the weeks following the November 2020 presidential election,

---

124. Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/interactive/2021/01/15/us/trump-capitol-riot-timeline.html> [<https://perma.cc/TKV5-CUYU>].

125. Ben Collins & Brandy Zadrozny, *Extremists made little secret of ambitions to 'occupy' Capitol in weeks before attack*, NBC NEWS (Jan. 8, 2021, 11:58 AM), <https://www.nbcnews.com/tech/internet/extremists-made-little-secret-ambitions-occupy-capital-weeks-attack-n1253499> [<https://perma.cc/CK6C-E4Q5>]; Brandy Zadrozny & Ben Collins, *Violent threats ripple through far-right internet forums ahead of protest*, NBC NEWS (Jan 5., 2021, 7:07 PM), <https://www.nbcnews.com/tech/internet/violent-threats-ripple-through-far-right-internet-forums-ahead-protest-n1252923> [<https://perma.cc/8N99-5MQW>].

126. Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html> [<https://perma.cc/AXJ3-DL66>].

127. *Id.*

128. *See generally Identifying far-right symbols that appeared at the U.S. Capitol riot*, WASH. POST (Jan. 15, 2021, 2:56 PM), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/> [<https://perma.cc/WVB4-7TFJ>]; Lindsay Wise et al., *'The Protesters Are in the Building.' Inside the Capitol Stormed by a Pro-Trump Mob*, WALL ST. J. (Jan. 6, 2021, 11:53 PM), <https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654> [<https://perma.cc/QS97-6NXG>].

129. Marc Santora et al., *Capitol Police Officer Dies from Injuries in Pro-Trump Rampage*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/08/us/brian-sicknick-police-capitol-dies.html?searchResultPosition=14> [<https://perma.cc/3MUA-9DYT>].

130. Alexa Corse, *Two More Police Officers Who Responded to Jan. 6 Capitol Attack Died by Suicide*, WALL ST. J. (Aug. 3, 2021, 3:53 PM), <https://www.wsj.com/articles/two-more-police-officers-who-responded-to-jan-6-capitol-attack-died-by-suicide-11628006249> [<https://perma.cc/GF84-A8YG>].



Facebook became “more aggressive” in shutting down pages that advocated “Stop the Steal,” a wholly debunked conspiracy theory alleging the election was stolen from President Trump.<sup>131</sup> This pushed far-right supporters to “move to new, less-restrictive social media sites” such as Parler.<sup>132</sup> Launched in 2018, Parler billed itself as a “‘free speech’ alternative to Twitter and Facebook” after those SMPs increased steps to block, suspend, and ban users that “spread misinformation and incited violence.”<sup>133</sup> In July 2020, Parler had a reported 2.8 million users.<sup>134</sup> That figure more than doubled following the outcome of the November election, with Parler gaining more than 3.5 million users in a single week, surpassing 8 million users.<sup>135</sup> By January 2021, the company said it had 15 million users.<sup>136</sup> It was Parler and similar far-right SMPs where Operation Occupy the Capitol gathered momentum.<sup>137</sup> During the siege on the Capitol Building, users posted to Parler encouraging attackers to find Vice President Mike Pence.<sup>138</sup> This led to extremists chanting “Where is Pence?” inside the Capitol Building.<sup>139</sup> Soon after the attack, Parler faced backlash for the part it played in the assault on the Capitol.<sup>140</sup> Amazon ceased hosting the platform, and Google and Apple prohibited downloads of the Parler app to smartphones, effectively killing the platform for the time being.<sup>141</sup>

In the aftermath of the Capitol assault, Twitter, Facebook, and other popular SMPs suspended, blocked, or permanently banned President Trump from their

---

131. Barry & Frenkel, *supra* note 126.

132. *Id.*

133. Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html> [<https://perma.cc/Y3LP-T6QV>]; Deepa Bharath, *Social media platform Parler wins over millions as some raise red flags about the site*, DAILY BULL. (Nov. 20, 2020, 9:20 AM), <https://www.dailybulletin.com/2020/11/20/social-media-platform-parler-wins-over-millions-as-some-raise-red-flags-about-the-site/> [<https://perma.cc/237Q-RXPV>].

134. Bharath, *supra* note 133.

135. *Id.*

136. Keach Hagey & Jeff Horwitz, *Parler, a Platform Favored by Trump Fans, Struggles for Survival*, WALL ST. J. (Jan. 11, 2021, 8:28 PM), <https://www.wsj.com/articles/parler-struggles-survival-amazon-lawsuit-trump-fans-11610414745> [<https://perma.cc/35AA-LP4H>].

137. Barry & Frenkel, *supra* note 126. For examples of extremist content hosted on Parler prior to the Jan. 6, 2021, siege on the U.S. Capitol Building, see Robert Evans, *How the Insurgent and MAGA Right are Being Welded Together on the Streets of Washington D.C.*, BELLINGCAT (Jan. 5, 2021), <https://www.bellingcat.com/news/americas/2021/01/05/how-the-insurgent-and-maga-right-are-being-welded-together-on-the-streets-of-washington-d-c/> [<https://perma.cc/6WYP-P3MU>].

138. Marc Fisher et al., *The Four-Hour Insurrection*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/graphics/2021/politics/trump-insurrection-capitol/> [<https://perma.cc/HQF3-2K7L>].

139. *Id.*

140. Hagey & Horwitz, *supra* note 136.

141. *Id.*

platforms for inciting the riots that led to the siege and for his comments and posts during and after the insurrection.<sup>142</sup> Additionally, Twitter removed more than seventy thousand accounts that promoted the QAnon conspiracy theory.<sup>143</sup> Several of Twitter's executives were assigned personal security for fear of retribution.<sup>144</sup>

The January 6th attack "galvanized" white nationalists and other extremists, and experts suggest the "attack is likely to join an extremist lexicon" and "fuel[] recruitment and violence for years to come."<sup>145</sup> Online hate groups, including the Boogaloo Bois, celebrated their perceived victory at the Capitol and continue to plan future attacks.<sup>146</sup> The National Counterterrorism Center and the Justice and Homeland Security Departments issued a bulletin warning law enforcement agencies across the country of increased attacks, stating that extremists "very likely pose the greatest domestic terrorism threats in 2021."<sup>147</sup>

### III. FIRST AMENDMENT ISSUES

Any discussion of SMP regulation inevitably involves a review of First Amendment rights.<sup>148</sup> The United States must find the "proper balance" of regulation to protect homeland security and civil liberties.<sup>149</sup> Jack Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, argues the freedom of speech Americans grew up knowing is wholly inadequate today.<sup>150</sup> In his *Free Speech is a Triangle* article, Balkin equates free speech as formerly having two sides, with the government on one side and speakers on the other.<sup>151</sup> The invention of the internet and the digital innovations that came with it created a third side, making free speech a "triangle":

On one corner are nation-states . . . On the second corner are privately

---

142. Kate Conger & Mike Isaac, *Inside Twitter's Decision to Cut Off Trump*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/16/technology/inside-twitter-decision-trump.html> [<https://perma.cc/83UF-TMFJ>].

143. *Id.*

144. *Id.*

145. Neil MacFarquhar et al., *Capitol Attack Could Fuel Extremist Recruitment for Years, Experts Warn*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/16/us/capitol-attack-extremist-hate-groups.html?action=click&module=Spotlight&pgtype=Homepage> [<https://perma.cc/Q6A2-CJZT>].

146. *Id.*

147. Zolan Kanno-Youngs, *Federal Authorities Warn that the Capitol Breach will be a 'Significant Driver of Violence'*, N.Y. TIMES (Jan. 13, 2021, 6:09 PM), <https://www.nytimes.com/2021/01/13/us/politics/capitol-breach-driver-of-violence.html> [<https://perma.cc/9QLB-PQTT>].

148. Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the Way Against Terrorism*, 8 HARV. NAT'L SEC. J. 53, 96 (2017).

149. Paul Haridakis, *The Tension Between National/Homeland Security and the First Amendment in the New Century*, 14 TEMP. POL. & CIV. RTS. L. REV. 433, 435 (2005).

150. Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011 (2018).

151. *Id.*

owned internet-infrastructure companies, including social media companies, search engines, broadband providers, and electronic payment systems. On the third corner are many different kinds of speakers, legacy media, civil-society organizations, hackers, and trolls.<sup>152</sup>

The American mind-set of what free speech is needs to be adjusted to account for technological advancements and the widespread use of SMPs.

Free speech is not an absolute right.<sup>153</sup> Certain types of speech are not protected by the First Amendment, including obscenity, incitement, defamation, slander, and violations of copyright law.<sup>154</sup> The Supreme Court has repeatedly upheld that hate speech is protected under the First Amendment, but hate speech that incites others is not protected speech.<sup>155</sup> Incitement is the type of speech most in need of regulation on SMPs. Incitement is “the act or an instance of provoking, urging on, or stirring up. The act of persuading another person to commit a crime.”<sup>156</sup> Speech is considered incitement when it is “directed to . . . or producing imminent lawless action and is likely to incite or produce such action.”<sup>157</sup> Speech that is “integral to crime, [or] other crime-enabling speech such as that used to solicit, conspire, conduct, plot, or to direct a terrorist attack” is not protected under the First Amendment, regardless of how it is communicated.<sup>158</sup> This is because speech then becomes the actual threat, having been “weaponized.”<sup>159</sup>

Accordingly, social media content that persuades people to break the law is not protected speech. For example, during the George Floyd protests over the summer of 2020, a militia group, the Kenosha Guard, and the Boogaloo Bois used Facebook to “organize their ‘defense’ of Kenosha,” a Wisconsin city where protests were occurring.<sup>160</sup> Facebook received over four hundred warnings from the platform’s users, but the event page and related posts were not removed.<sup>161</sup> Later that evening, a seventeen-year-old gunman shot two protestors to death and injured a third.<sup>162</sup> Facebook CEO Mark Zuckerberg issued a public apology for the “operational mistake” of not acting and removing the posts from the platform

---

152. *Id.*

153. Klein & Flinn., *supra* note 148, at 97.

154. *Id.*; Major William D. Toronto, *Fake News and Kill-Switches: The U.S. Government’s Fight to Respond to and Prevent Fake News*, 79 A.F. L. REV. 167, 197 (2018).

155. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

156. *Incitement*, BLACK’S LAW DICTIONARY (10th ed. 2014).

157. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

158. Rachel E. VanLandingham, *Words We Fear: Burning Tweets & the Politics of Incitement*, 85 BROOK. L. REV. 37, 39 (2019).

159. Toronto, *supra* note 154, at 200.

160. Sam Charles, *Facebook’s Negligence led to Kenosha Shootings: Lawsuit*, CHI. SUN-TIMES (Sept. 23, 2020, 1:10 PM), <https://chicago.suntimes.com/2020/9/23/21452846/facebook-negligence-kenosha-shootings-lawsuit-kyle-rittenhouse> [<https://perma.cc/CT6E-93PA>].

161. *Id.*

162. *Id.*

before the shooting.<sup>163</sup> Facebook said it removed the shooter's accounts and "took action against organizations and content related to Kenosha."<sup>164</sup> Facebook went on to say it found no evidence that the shooter followed the Kenosha Guard Page, but photos from that night show the shooter with a leader of the Boogaloo Bois group.<sup>165</sup> These types of SMP pages and events that incite violence are types of speech not protected by the First Amendment. As the regulations this Note is proposing will focus mainly on social media posts that are likely to produce or induce incitement, social media users' First Amendment rights will remain intact.

### III. SECTION 230 – THE SWORD AND SHIELD

With everything stated thus far, the next logical question to ask is why SMPs are not currently regulated by the federal government. The answer is found in Section 230 of the 1996 Communications Decency Act, which states, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>166</sup> Section 230 provides broad immunity from liability over user-posted content for internet companies like Facebook and other SMPs, even though this law was enacted long before SMPs existed.<sup>167</sup> Section 230 means internet companies are not considered publishers, and they are not liable for the content that users post on their platforms.<sup>168</sup> Compare this to newspapers, which can be held liable for all content it publishes, including advertisements.<sup>169</sup> This law is used successfully as a defense by social media companies in lawsuits.<sup>170</sup>

Section 230 is given credit for the large expansion of the technology era and was enacted to give small internet start-up companies room to grow free from liability by its users. The law helped "build companies worth hundreds of billions of dollars with a lucrative business model of placing ads next to largely free content from visitors."<sup>171</sup> However, Section 230 also protects internet companies that host vile content, including revenge porn sites.<sup>172</sup>

---

163. *Id.*

164. *Id.*

165. *Id.*

166. 47 U.S.C. § 230 (1996).

167. Daisuke Wakabayshi, *Legal Shield for Social Media is Targeted by Lawmakers*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html> [<https://perma.cc/LKA5-6VBZ>].

168. Erin M. Holliday, *Missing Links: The First Amendment's Place in an Ever-Changing Web*, 19 U. PITT. J. TECH. L. & POL'Y 54, 56 (2018-2019).

169. *Id.* at 57.

170. Wakabayshi, *supra* note 167.

171. *Id.*

172. Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google is About to Change*, NPR (Mar. 21, 2018, 5:11 AM), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> [<https://perma.cc/S34C-E672>].

The broad liability protection for SMPs needs to be amended but carefully. Section 230 should stay intact generally as SMPs, and other internet sites should not be held liable for everything their users post. However, SMPs should be held liable for how they *react* and *respond* to content after a user uploads it. SMPs cannot claim to be willfully ignorant of the content on their platforms when that content can harm homeland security. Senator Ron Wyden said Section 230 was "a sword and a shield" for internet companies but added if "you don't use the sword, there are going to be people coming for your shield."<sup>173</sup>

Recent developments, namely due to the 2020 presidential election, increased calls from both major political parties for a revision or repeal of Section 230, though for very different reasons, highly politicizing the issue.<sup>174</sup> Democrats want to make SMPs accountable for election interference and extremism, whereas Republicans want revisions to Section 230 for SMPs' censorship of conservative content.<sup>175</sup> President Trump increased attacks on Section 230 in 2020 after SMPs began flagging, labeling, and removing election-related posts they considered misleading, or that could incite violence.<sup>176</sup> Supreme Court Justice Clarence Thomas said lower courts interpreted Section 230 too broadly, and a potential legal battle between the government and SMPs is likely to be heard before the Supreme Court.<sup>177</sup>

#### V. REGULATION OF SOCIAL MEDIA PLATFORMS BY FOREIGN DEMOCRATIC STATES

Some democratic countries recently enacted or are currently looking to pass legislation to regulate SMPs. Below is a comparative analysis of two such countries and the European Union.

##### *A. Germany*

Germany was the first democratic country to enact legislation regulating SMPs that provides for punitive damages for SMPs that fail to follow the statute.<sup>178</sup> Germany noted a "lack of self-regulatory efforts" by SMPs and saw an increase in hate speech and disinformation on SMPs after the German government stated it would accept over one million Syrian asylum seekers into the country.<sup>179</sup> Additionally, Germany closely followed verified reports of foreign

---

173. Wakabayshi, *supra* note 167.

174. Jessica Guynn, *Trump vs. Big Tech: Everything You Need to Know About Section 230 and Why Everyone Hates It*, USA TODAY (Oct. 15, 2020, 7:18 PM), <https://www.usatoday.com/story/tech/2020/10/15/trump-section-230-facebook-twitter-google-conservative-bias/3670858001/> [<https://perma.cc/M6FV-PTB3>].

175. *Id.*

176. *Id.*

177. *Id.*

178. Laura E. Moon, *A New Role for Social Network Providers: NetzDG and the Communications Decency Act*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 623, 625 (2019).

179. Amélie Heldt, *Germany is Amending its Online Speech Act NetzDG . . . but Not Only*

influence in the United States 2016 presidential election and wanted to protect the integrity of its own upcoming elections.<sup>180</sup> Germany also wanted to combat the ever-growing disinformation circulating among its citizens online.<sup>181</sup>

Germany began with a comprehensive report published by Parliament to investigate the “dissemination of disinformation (“fake news”).”<sup>182</sup> This report led to the Network Enforcement Act (NetzDG), which went into effect on October 1, 2017.<sup>183</sup> This legislation specifically targets social media companies and operators and holds them *criminally liable* for the content on their platforms, in addition to hefty fines and penalties for failure to comply with the law.<sup>184</sup>

One key aspect of NetzDG is that it requires SMPs to target and remove hate speech, which is not protected speech in Germany.<sup>185</sup> After World War II, Germany adopted a law stating human dignity is the most important value, and “therefore free speech is subordinate to protecting human dignity.”<sup>186</sup> Germany’s constitution does protect freedom of expression but sets limits on that expression, including “incitement to crime or violence.”<sup>187</sup> As previously discussed in section III, hate speech is protected in the United States, but similar to Germany, speech that incites others is not protected.

In Germany, once a user flags a post, the SMP has seven days to investigate it for any violation of NetzDG and remove the post if it is determined to violate the law.<sup>188</sup> NetzDG separately gives a twenty-four-hour period to remove content that is “manifestly unlawful,” though the law is fairly silent on what that means.<sup>189</sup> SMPs must also submit a public report every six months detailing the content they deleted under NetzDG standards.<sup>190</sup>

Facebook was the first SMP sanctioned under NetzDG.<sup>191</sup> In July 2019, the German Federal Office of Justice announced a €2 million fine for failure to

---

*That*, INTERNET POL’Y REV. (Apr. 6, 2020), <https://policyreview.info/articles/news/germany-amending-its-online-speech-act-netzdg-not-only/1464> [<https://perma.cc/T8KA-X745>].

180. *Government Responses to Disinformation on Social Media Platforms: Germany*, LIBR. OF CONG., <https://www.loc.gov/law/help/social-media-disinformation/germany.php> [<https://perma.cc/XJ5P-B7VD>].

181. *Id.*

182. *Id.*

183. *Id.*

184. Rebecca Zipursky, *Nuts About Netz: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT’L L.J. 1325, 1351 (2019).

185. *Id.* at 1346.

186. Moon, *supra* note 178, at 626-27.

187. *Id.* at 627.

188. Zipursky, *supra* note 184, at 1328.

189. *Id.*

190. *Id.*

191. *Germany: Facebook Found in Violation of “Anti-Fake News” Law*, LIBR. OF CONG., <https://www.loc.gov/law/foreign-news/article/germany-facebook-found-in-violation-of-anti-fake-news-law/> [<https://perma.cc/8W4K-VJ8N>].

“sufficiently fulfill its reporting duty.”<sup>192</sup> During one six-month period, Google reported two hundred and fifteen thousand complaints about posts made on YouTube, and Twitter reported two hundred and sixty-five thousand complaints.<sup>193</sup> In that same time period, Facebook reported only one thousand seven hundred four complaints.<sup>194</sup>

Even before its passage, NetzDG faced harsh criticism from tech companies and civil rights groups. The top complaint against NetzDG is its hindrance of freedom of speech and that the legislation does not require any sort of appeal or challenge process by users who are flagged or reported for alleged illegal content.<sup>195</sup> The language of the law, in addition to the fines and criminal liabilities assessed, encourage SMPs to remove content that is questionable for fear of risking consequences.<sup>196</sup> Three years after the passage of NetzDG, Germany amended the law commanding SMPs to not only remove violent hate speech from their platforms but also report it to the police.<sup>197</sup>

As the first democratic country to attempt legislation and regulation such as NetzDG, Germany’s law is bound to have flaws, but NetzDG is a good starting point for the United States to begin its regulation efforts. A 2018 poll showed 67 percent of Germans strongly approve of NetzDG and 20 percent somewhat approve, giving it an 87 percent approval.<sup>198</sup> Germany knows it is setting a precedent for other countries. Konstantin von Notz, a member of the German Parliament, said, “What we’re debating here in Berlin has great relevance for all democracies, whether they’re in Europe or elsewhere in the world.”<sup>199</sup> Indeed, France followed suit and in 2020 passed the Fighting Hate on the Internet law, mirrored after Germany’s NetzDG law, but the French Constitutional Court struck it down for attacking freedom of expression.<sup>200</sup>

### B. Australia

Australia recently enacted legislation targeting SMPs in light of terrorist

---

192. *Id.*

193. *Id.*

194. *Id.*

195. Zipursky, *supra* note 184, at 1352.

196. Moon, *supra* note 178, at 632.

197. David Morar & Bruna Martins dos Santos, *The Push for Content Moderation Legislation Around the World*, BROOKINGS (Sept. 21, 2020), <https://www.brookings.edu/blog/techtank/2020/09/21/the-push-for-content-moderation-legislation-around-the-world/> [https://perma.cc/V8BD-GGLM].

198. Lisa Jacob, *87% of Germans Approve of Social Media Regulation Law*, DALIA RSCH. (Apr. 17, 2018), <https://daliaresearch.com/blog/blog-germans-approve-of-social-media-regulation-law/> [https://perma.cc/T7VP-YTSQ].

199. Janosch Delcker, *Germany’s Balancing Act: Fighting Online Hate While Protecting Free Speech*, POLITICO (Oct. 1, 2020, 10:00 AM), <https://www.politico.eu/article/germany-hate-speech-internet-netzdg-controversial-legislation/> [https://perma.cc/H39Z-F4B8].

200. Morar & Martins dos Santos, *supra* note 197.

attacks, namely the Christchurch mosque attack in New Zealand that was streamed live on Facebook.<sup>201</sup> Similar to Germany, Australia's legislation was passed to combat the rise of fake news, hate speech, online harassment, and election interference.<sup>202</sup> Australia not only passed laws specifically targeting SMPs but, in the past three years, also amended existing legislation to strengthen other areas of their cybersecurity laws and create harsher penalties.<sup>203</sup>

Australia's Sharing of Abhorrent Violent Material Act of 2019 requires SMPs to be "expeditious" in removing "abhorrent violent material" from their platforms. Under the Act, individuals can face up to three years in prison or a fine of about 1.47 million USD.<sup>204</sup> For companies hosting the content, punishment includes a fine of ten percent of the company's annual profit or 7.32 million USD, depending on which one is greater.<sup>205</sup> To be prosecuted under the Act, a provider must (1) have been aware that their service can be used to access particular material; (2) have had reasonable grounds to believe that the material was abhorrent violent material; and (3) have had reasonable grounds to believe that the relevant conduct was occurring (or had occurred) in Australia.<sup>206</sup>

The Act does not criminalize the ignorance of SMPs that are not aware of material on its platforms, but SMPs are considered to have knowledge of a violation if the content is reported by a user.<sup>207</sup> SMPs must notify the Australian Federal Police if it finds content that violates the Act and turn over all evidence to them. The Act covers any content that is capable of being accessed in Australia, regardless of where the social media company is headquartered or located.<sup>208</sup> Failure by SMPs to notify the Australian Federal Police of suspected violations of the Act is a fine of up to 840,000 USD.<sup>209</sup>

### *C. European Union*

The European Union (E.U.), of which Germany is a member, is researching potential legislation to regulate SMPs that operate in Member States.<sup>210</sup> The E.U.

---

201. *Government Responses to Disinformation on Social Media Platforms: Australia*, LIBR. OF CONG., <https://www.loc.gov/law/help/social-media-disinformation/australia.php> [https://perma.cc/Q2EG-FSJ2].

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. AUSTL. GOV'T ATT'Y GEN. DEP'T, SHARING OF ABHORRENT VIOLENT MATERIAL FACT SHEET 2 (2019), <https://www.ag.gov.au/sites/default/files/2020-03/AVM-Fact-Sheet.pdf> [https://perma.cc/LX6Q-PPSZ].

207. *Id.*

208. *Id.*

209. *Id.*

210. *Government Responses to Disinformation on Social Media Platforms: European Union*, LIBR. OF CONG., <https://www.loc.gov/law/help/social-media-disinformation/eu.php> [https://perma.cc/TET3-T45N].



made repeated calls for member countries to heighten security protocols and transparency of their elections, including political advertising on SMPs.<sup>211</sup> Interestingly, in 2018, the European Commission drafted the E.U. Code of Practice on Disinformation which was signed by several tech companies, including Twitter, Facebook, and Google.<sup>212</sup> The Practice on Disinformation is an attempt to strengthen SMPs' self-regulatory steps towards political advertising on their platforms.<sup>213</sup>

In December 2020, the E.U. released drafts of two pieces of legislation targeting tech giants.<sup>214</sup> The Digital Services Act would require SMPs to remove illegal and harmful content, and the Digital Markets Act aims to prevent unfair competition.<sup>215</sup> The legislation appears to target several United States-based companies, including Facebook, Google, Apple, and Amazon.<sup>216</sup> In response, the U.S. Chamber of Commerce said it was concerned the legislation would target successful American companies with “onerous new regulatory requirements backed by steep financial penalties.”<sup>217</sup> It could take years for the legislation to pass, and both are likely to be amended, but the current drafts propose a fine of 6 percent of the SMP's global revenue for failure to comply.<sup>218</sup>

The E.U. also takes a different approach to hate speech and data privacy compared to the United States. In 2008, the E.U. passed The Framework Decision on Combating Racism and Xenophobia, which requires Member States to criminalize hate speech, but not in a uniform manner across participating countries.<sup>219</sup> Then in 2014, the E.U. adopted the E.U. Human Rights Guidelines on Freedom of Expression Online and Offline to protect speech, the free-flowing of ideas, and to treat human rights uniformly, both on and offline including the right to privacy and protection of personal data.<sup>220</sup>

It is no wonder why the E.U. felt the need to introduce the Digital Services Act. Reports show that SMPs fail to meet the E.U.'s current standards for removing hate speech. For example, in 2017, the E.U. published a report showing that Twitter only removed 40 percent of what the E.U. considered hate speech, though it was a big improvement from the 19 percent it had removed the prior

---

211. *Id.*

212. *Id.*

213. LIBR. OF CONG., *supra* note 201.

214. Julia Horowitz, *Europe Threatens to Break up Big Tech if it Doesn't Play by New Rules*, CNN (Dec. 15, 2020, 12:57 PM), <https://www.cnn.com/2020/12/15/tech/digital-services-act-europe-google-facebook/index.html> [<https://perma.cc/ECN5-PFNR>].

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Moon, *supra* note 178, at 626.

220. E.U. COUNCIL, EU HUMAN RIGHTS GUIDELINES ON FREEDOM OF EXPRESSION ONLINE AND OFFLINE 1 (2014) <https://www.osce.org/files/f/documents/5/e/120751.pdf> [<https://perma.cc/SQY8-SY89>].

year.<sup>221</sup>

## VI. A PATH FORWARD FOR THE UNITED STATES

SMPs have proven they can be regulated under Germany's NetzDG, Australia's Sharing of Abhorrent Violent Material Act, and current E.U. standards. Congress must act to devise a regulatory system for SMPs that makes sense. Yes, Mark Zuckerberg should have a seat at this table. Congress does not understand how SMPs operate. Therefore, SMPs need to work with the federal government to create a regulatory system that works. Congress should look to the regulatory efforts by Germany and Australia as a foundational step in drafting legislation.

The United States should assess how SMPs currently self-regulate and make it consistent across the various platforms. To be clear, SMPs have proven they can follow many of the regulatory steps this Note suggests. For example, Facebook already flags, reviews, and deletes suspicious content before a user has reported it. From 2018 to 2019, Facebook reported deleting over 95 percent of posts that violated its adult nudity and sexual activity before any user reported it.<sup>222</sup> The same is true for posts that Facebook flagged for possible terrorism, fake accounts, suicide and self-injury promotion violations, and violent and graphic content, along with many other categories.<sup>223</sup> This leads to a logical conclusion that Facebook and other SMPs already have the tools at their disposal to properly enforce government regulation.

### *A. Federal Communications Commission*

The United States has an existing federal agency capable of regulating SMPs: The Federal Communications Commission (FCC). The mission of the FCC, outlined in the Communications Act of 1934, is to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."<sup>224</sup> The Act further states the FCC was created "for the purpose of the national defense."<sup>225</sup>

---

221. Mark Scott, *Twitter Fails E.U. Standard on Removing Hate Speech Online*, N.Y. TIMES (May 31, 2017), [https://www.nytimes.com/2017/05/31/technology/twitter-facebook-google-europe-hate-speech.html?\\_r=0](https://www.nytimes.com/2017/05/31/technology/twitter-facebook-google-europe-hate-speech.html?_r=0) [<https://perma.cc/AX27-LEEM>].

222. *Community Standards Enforcement Report*, FACEBOOK, <https://transparency.facebook.com/community-standards-enforcement> [<https://perma.cc/76D4-ZVQ5>].

223. *Id.*

224. FED. COMM'NS COMM'N, FISCAL YEAR 2018 ANNUAL PERFORMANCE REPORT 3 (2018) [<https://perma.cc/7N4Y-8VB9>].

225. *Id.*

*i. Background of FCC*

The FCC is an independent federal government agency responsible for regulating radio, television, wire, satellite, and cable communications.<sup>226</sup> The FCC is led by five commissioners appointed by the President of the United States, subject to U.S. Senate confirmation.<sup>227</sup> It is required to be a bipartisan commission, and no more than three commissioners can be of the same political party.<sup>228</sup>

The FCC oversees several matters that make it uniquely qualified to regulate SMPs. The FCC regulates public political advertising, requiring that political candidates must appear in their ads with a voiceover stating they “approve this message.”<sup>229</sup> Additionally, the FCC regulates advertising space by ensuring broadcast companies give equal opportunity to all candidates to buy advertising and prohibits those companies from charging candidates exorbitant prices in the forty-five days leading up to an election.<sup>230</sup> The FCC has a Public Safety and Homeland Security Bureau for overseeing public safety communications, such as the 911 emergency line and disaster management.<sup>231</sup> The agency regulates and administers licenses for wireless communication services, including broadband internet capabilities.<sup>232</sup>

FCC commissioner appointments can be highly politicized, which could lead to conflict-of-interest issues if the commissioners had to rule on whether a post by a political figure violates regulations, or the body could penalize an SMP for properly removing a political figure’s post that would violate regulations. The FCC is statutorily an independent regulatory agency, and other independent regulatory agencies are similarly comprised.

For example, the Federal Election Commission (FEC) is headed by six commissioners, appointed by the President and confirmed by the Senate, and no more than three commissioners can share the same political party affiliation at a time.<sup>233</sup> The FEC commissioners vote on several federal campaign finance issues, including enforcement actions against federal candidates, potentially including the same incumbents that nominated or confirmed the commissioners’ nominations to the commission.<sup>234</sup> Additionally, the FCC could encounter the

---

226. FED. COMM’NS COMM’N, *About the FCC* (2020), <https://www.fcc.gov/about-fcc/what-we-do> [https://perma.cc/8FUC-Y3EV].

227. *Id.*

228. *Id.*

229. 47 C.F.R. § 73.1942 (2021).

230. *Id.*

231. FED. COMM’NS COMM’N, *supra* note 224, at 4.

232. *Id.*

233. FED. ELECTION COMM’N, *Commissioners*, <https://www.fec.gov/press/resources-journalists/commissioners/> [https://perma.cc/35B8-KN3M].

234. Arit John, *The Federal Agency that Enforced Campaign Finance Laws Can’t Even Meet. Why?*, L.A. TIMES (Aug. 5, 2020, 1:03 PM), <https://www.latimes.com/politics/story/2020-08-05/federal-election-commission-campaign-finance-enforcement> [https://perma.cc/6CYX-FMF4].

same issues the FEC recently endured—not having enough commissioners to hold a quorum.<sup>235</sup> Heading into the 2020 Presidential Election, the FEC did not have enough commissioners to legally meet to discuss the myriad of issues swarming the election, including COVID-19 concerns.<sup>236</sup> The President, or the Senate, could hold the FCC hostage as they did with the FEC by refusing to appoint or confirm commission nominations.

### *B. Classifying Social Media Platforms as a Public Utility*

SMPs should be classified as a public utility. A public utility is “a company that provides necessary services to the public, such as telephone lines and service, electricity, and water. Most public utilities operate as monopolies but are subject to governmental regulation.”<sup>237</sup> Classifying SMPs as public utilities might require an adjusted understanding of what a public utility is by treating the “provides necessary services to the public” piece as a term of art.<sup>238</sup> In this digital age, SMPs provide necessary services to the public. Roughly 72 percent of all Americans use SMPs.<sup>239</sup> It is not just young Americans using SMPs. Older generations are using SMPs and digital tools, proving these platforms are being used across the spectrum.<sup>240</sup> Once anything reaches this level of importance in society, it is fair to expect it will be regulated.

Even the United States Supreme Court has weighed in on the importance of social media to everyday life.<sup>241</sup> In *Packingham v. North Carolina*, the Supreme Court used the First Amendment to strike down a North Carolina statute banning all registered sex offenders from using SMPs.<sup>242</sup> The Court held the internet, and “social media in particular,” is one of the most important places for the “exchange of views.”<sup>243</sup> The Court cited several examples of SMPs’ importance, from using a platform such as LinkedIn to search and post for jobs to using Twitter to engage with elected officials and other public services.<sup>244</sup>

SMPs are not just used to connect with friends and family but are increasingly used to obtain news and similar information. In 2020, Pew Research Center released a report showing 18 percent of American adults receive their

---

235. *Id.*

236. *Id.*

237. *Public utility*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see generally Public Utility*, CORNELL LAW SCH. [https://www.law.cornell.edu/wex/public\\_utility](https://www.law.cornell.edu/wex/public_utility) [<https://perma.cc/3DCS-E7FK>].

238. BLACK’S LAW DICTIONARY, *supra* note 237.

239. *Social Media Fact Sheet*, *supra* note 3.

240. Emily A. Vogels, *Millennials Stand Out for Their Technology Use, but Older Generations Also Embrace Digital Life*, PEW RSCH. CTR. (Sept. 9, 2019), <https://www.pewresearch.org/fact-tank/2019/09/09/us-generations-technology-use/> [<https://perma.cc/WU4P-M2UG>].

241. *See generally* *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

242. *Id.*

243. *Id.* at 1735.

244. *Id.*

political news primarily from social media, a larger percentage than radio (8 percent), network TV (13 percent), local TV (16 percent), and cable TV (16 percent).<sup>245</sup> In 2018, a report showed a little more than two-thirds of Americans say they “at least occasionally” access news on SMPs, and a majority of those SMP users say the news they see is “largely inaccurate.”<sup>246</sup> Facebook is the most commonly used SMP to access news, with 43 percent of Americans accessing news on that platform.<sup>247</sup> The convenience of accessing the news is what these SMP users like most.<sup>248</sup>

There are, of course, arguments against treating SMPs as public utilities and regulating them.<sup>249</sup> Classifying SMPs as public utilities would be unprecedented. First, are SMPs “essential” services? It is true that “unlike water and electricity, life can go on without Facebook or other social networking services.”<sup>250</sup> However, the increased usage of SMPs for everyday essentials, such as communicating with each other and receiving and sharing news, increases the argument that SMPs are essential and necessary. Second, regulation could also lead to social media monopolies.<sup>251</sup> It would be expensive for SMPs to comply with some proposed regulations, but SMP advertising revenue in the United States exceeded thirty-six billion dollars in 2019 alone and is expected to surpass fifty billion dollars in 2021. In sum, SMPs can afford to comply with regulations.<sup>252</sup>

Other arguments against regulation include stifling innovation, First Amendment issues, and SMPs passing regulatory costs directly onto consumers.<sup>253</sup> However, the United States government has several national security reasons for regulating SMPs, including thwarting attacks and protecting the integrity of elections. While these arguments against regulation have merit, they do not outweigh the egregious national security concerns occurring every day in the United States.

---

245. Mitchell et al., *supra* note 44.

246. Elisa Shearer & Katerina Eva Matsa, *News Use Across Social Media Platforms 2018*, PEW RSCH. CTR. (Sept. 10, 2018), <https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/> [<https://perma.cc/B4XU-ZA2A>].

247. *Id.*

248. *Id.*

249. See generally Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONCEPTUS 249 (2013).

250. *Id.* at 277.

251. *Id.* at 278.

252. *Social Network Advertising Revenues in the United States from 2017 to 2021*, STATISTA, <https://www.statista.com/statistics/271259/advertising-revenue-of-social-networks-in-the-us/#:~:text=In%202019%2C%20social%20network%20advertising,by%20the%20end%20of%202021> [<https://perma.cc/RPG2-43FC>].

253. Thierer, *supra* note 249.

*C. Proposed Regulatory Steps and Actions*

First and foremost, only SMPs with at least five million American users should be regulated. This applies to both foreign and domestic-based SMPs. This will force only well-established companies to come into compliance and give smaller, newer SMPs room to grow and innovate before coming under federal regulation. In addition, this would provide additional time for new SMPs to build the necessary components in anticipation of reaching the five million user threshold.

Regulating SMPs once they reach five million users is especially important given the attack on January 6, 2021, on the U.S. Capitol Building. In the weeks following the November 2020 election, the SMP Parler saw a drastic increase in users. Daniel J. Jones, president of Advance Democracy, said, “Far-right extremists and conspiratorial groups, such as QAnon, specifically flocked to Parler because of the lack of moderation and guidelines.”<sup>254</sup> At the time, Parler relied on volunteers to moderate the content on its platform.<sup>255</sup> When Parler’s users more than doubled in a matter of days, exceeding ten million users, the site could not keep up with regulating the increased content.<sup>256</sup> It tripled the volunteer moderators from two hundred to six hundred and hired full-time moderators.<sup>257</sup> Still, that was not enough to review flagged content, including posts threatening to kill Vice President Pence; the moderators fell behind by around twenty thousand reports.<sup>258</sup> The platform simply grew too fast for the company to keep up. If Parler had been subject to federal regulation once it reached five million users, or even if it had limited the number of users to less than that figure, perhaps January 6, 2021, would not be one of the darkest days in the nation’s history.

Each SMP would still be responsible for creating its own terms of use for users, as long as those terms comply with FCC regulations. SMPs could still choose to have stronger protections for their users. For example, FCC regulations would not necessarily need to address how users interact with one another, but an SMP could include in its terms of use that users must treat each other with respect.

To stem the use by foreign adversaries from using SMPs to influence elections in the United States, SMPs must monitor and investigate users and organizations that purchase political advertising on their platforms. For advertising that exceeds two hundred dollars, SMPs must ensure the purchaser is an American citizen or a political committee properly registered with a local, state, or federal election agency. If there is any doubt as to the monetary source of the advertisements, SMPs would be required to immediately delete those advertisements. SMPs would be required every thirty days to publicly disclose all paid political advertising exceeding two hundred dollars displayed on their

---

254. Hagey & Horowitz, *supra* note 136.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

platforms, including the name of the purchaser. This is similar to the rules and regulations of the FEC, which requires registered committees to publicly disclose any disbursements exceeding an aggregate of two hundred dollars.<sup>259</sup>

To combat the spread of misinformation online, particularly in relation to COVID-19 and issues of public health and safety, SMPs should monitor related activity and delete content that is blatantly false or inherently misleading, according to science-backed research. This is especially true for viral posts or articles shared at an exponential rate. Extinguishing the fire of misinformation is the only way to stop the spread and may save American lives. Content that is not blatantly false or inherently misleading should automatically include an attached disclaimer stating the information contained within might contain false or inaccurate information.

Next, each qualifying SMP should establish a regulatory division to work directly with the FCC. This division would be responsible for reviewing flagged or reported content, determining if it violates the SMP's terms of use or federal regulations, and handling the content appropriately. SMPs should have distinct algorithms enabled on their software to search and internally flag posts, pages, events, and any other user-generated content for violations of terms of use and federal regulations. For example, if a Facebook user creates a private page to organize armed people to storm a state capitol building, the algorithms in place should immediately flag the page for Facebook's regulatory division to review, shut down, and report the page to the FCC. The FCC would then immediately report the incident to DHS. Similar to other countries, the FCC should also have online forms available for users to flag and report explicit content directly to the FCC. This would require the FCC to work with the SMPs regulatory divisions to promptly address serious issues brought to its attention.

In addition, regulated SMPs must release a public report every three months detailing the types and amount of content flagged and reported to the FCC and other law enforcement agencies. This report would enable the public to be aware of potentially harmful or inaccurate information it received, or even potentially shared, on SMPs. The report should include some information on the false or inaccurate information that was shared at an exponential rate on its platform. For example, the preprint mentioned in Section I that was downloaded over one million times should be included in this type of report. The report should identify the types of organizations SMPs blocked from its platforms and examples of the content removed. This type of reporting can also generate goodwill between SMPs and their users, proving the SMPs take the safety of their users seriously, as well as the safety and protection of the United States.

Learning from one of the chief complaints of Germany's NetzDG, SMPs should implement an internal appeal review process for users whose content was flagged or removed. The appeals process should take no longer than thirty days to complete. Each user should have the right to appeal any decision by an SMP to remove or flag content. The appeal would review the content and compare it

---

259. *Recording Disbursements*, FED. ELECTION COMM'N <https://www.fec.gov/help-candidates-and-committees/keeping-records/records-disbursements/> [<https://perma.cc/PVV2-UA4W>].

to the SMP's terms of use and federal regulation standards to render a final decision back to the user. This will also help SMPs keep a catalog of content that is permissible and impermissible for easy comparison in future cases or issues.

Regulations should stipulate the type of information law enforcement agencies may use in their investigations. Numerous reports show the FBI and other agencies use "undercover accounts to infiltrate activist groups" and search for specific keywords on SMPs.<sup>260</sup> Faiza Patel, co-director of the Brennan Center's Liberty and National Security Program, said, "There is no legal framework in place around the police monitoring of social media."<sup>261</sup> Patel also said there was "very little transparency" in how law enforcement agencies use and review content on SMPs.<sup>262</sup> There must be regulations in obtaining a user's SMP content to bring indictments to protect the strength of the case and provide guidance to the judiciary in admitting evidence.

Other federal agencies use social media content to vet immigrants traveling into the United States. Beginning in 2015, DHS began checking immigration applicants' social media accounts as part of its overall review process.<sup>263</sup> In the following years, the U.S. Customs and Immigration Services and the U.S. Immigration and Customs Enforcement agencies, along with the Department of State, began to follow suit.<sup>264</sup> In 2017, DHS Secretary John Kelly came under fire after suggesting that the department could require non-citizens to provide their passwords to their social media accounts.<sup>265</sup> While DHS does not currently require immigrants to provide their social media passwords, in 2019, the State Department began "collecting social media identifiers from nearly all foreign visa applicants."<sup>266</sup> In April of 2021, the Biden Administration rejected DHS's official "proposal to collect social media identifiers on travel and immigration forms."<sup>267</sup> This is yet another example of why regulation is needed—not just as guidance for SMPs, but also for law enforcement and similar agencies.

#### *D. Guidelines for Review*

Similar to Germany's NetzDG, content shared on SMPs that is flagged, either

---

260. Cyrus Farivar & Olivia Solon, *FBI Trawled Facebook to Arrest Protestors for Inciting Riots, Court Records Show*, NBC NEWS (June 19, 2020, 11:12 AM), <https://www.nbcnews.com/tech/social-media/federal-agents-monitored-facebook-arrest-protesters-inciting-riots-court-records-n1231531> [<https://perma.cc/Q3NN-PSBV>].

261. *Id.*

262. *Id.*

263. *Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the State Department*, BRENNAN CTR. FOR JUST. (June 25, 2019), <https://www.brennancenter.org/our-work/research-reports/timeline-social-media-monitoring-vetting-department-homeland-security-and> [<https://perma.cc/93DQ-TPEE>].

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*



by the SMP's own algorithms or by other users, should be investigated within seventy-two hours and removed no later than seven days after the date of the original post if it is found to be in violation. Any subsequent shares of the post should also be promptly removed. Posts that are shared at an exponential rate or "go viral" should be investigated within thirty minutes after being shared five hundred thousand times and promptly removed if found to be in violation.

#### *E. Penalties and Fines*

To force the platforms into compliance, SMPs should suffer severe consequences for failing to comply. Like Germany's NetzDG, SMPs should be held criminally liable for failing to comply with federal regulations. As discussed in Section IV, SMPs should not be held liable for content posted to their sites, but they should be held liable for how they *react* and *respond* to the content. Criminal penalties should not exceed a five-year prison sentence and should be phased in three years after regulations go into effect to give ample time for SMPs, the FCC, and the federal government to adjust and ensure proper protocols are in place.

SMPs should be eligible for civil liabilities for failing to comply with regulations. For example, a lawsuit was filed in federal court against Facebook on behalf of the families of those killed in the Kenosha shooting.<sup>268</sup> The lawsuit alleges Facebook's negligence in failing to remove posts and events to "guard" Kenosha from protestors led to the shooting deaths.<sup>269</sup> Facebook had previously admitted to making an "operational mistake" in not removing the event from its platform.<sup>270</sup> While this lawsuit is not likely to be successful due to the liability shield Facebook receives from Section 230, it is exactly the type of civil suit that should be allowed to proceed to hold SMPs accountable for their failure in assisting with the organization of violent events.

The fines imposed should be severe. Similar to the proposed legislation by the E.U., SMPs should face a fine of 6 percent of their global revenue for failing to comply with federal regulations. Dissimilar from Australia, which has some set fines, using a percentage of the SMP's revenue instead of using set fines would penalize all SMPs equally compared to their revenue and size. This would allow smaller SMPs, such as Pinterest, to still compete with larger SMPs like Facebook and YouTube.

### VII. CONCLUSION

Even Mark Zuckerberg said, "Facebook should not make so many important decisions about free expression and safety on our own."<sup>271</sup> It is past time for the United States to regulate SMPs for the sake of national security, to stop the

---

268. Charles, *supra* note 160.

269. *Id.*

270. *Id.*

271. Nick Clegg, *Welcoming the Oversight Board*, FACEBOOK (MAY 6, 2020), <https://about.fb.com/news/2020/05/welcoming-the-oversight-board/> [<https://perma.cc/B9NE-GCRU>] (discussing the need for an oversight board).

spread of extremist ideologies and acts of violence, to stop foreign interference in elections, to stem the spread of misinformation online, and to uniformly bring these companies into compliance. SMPs will only continue to innovate and expand in this digital age. The United States must act now to treat SMPs as public utilities and bring them under the regulatory auspices of the FCC. Recent history will become the forever future if the United States government fails to address the compounding influences SMPs and their users have on the country.