

## Combatting Misinformation on Social Media: Will Our First Amendment Allow It?

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The First Amendment is a precious and fiercely protected right from the US Constitution. This amendment states that “Congress shall make no law...abridging the freedom of speech[.]”<sup>1</sup> There is a debate about the role of free speech and the government’s ability to combat misinformation on social media. To monitor what happens on these websites, the government must use the social media companies as a middleman. Some people believe that the government should not be barred from doing so, and that requiring social media companies to counter false information does not violate the First Amendment. Others see this as the government utilizing social media companies as puppets to censor free speech in violation of the First Amendment. Other countries are seeing governmental efforts to stop the spread of misinformation on social media. This begs the question of whether something like that would be possible in the United States.

Supporters of the government’s ability to combat misinformation on social media under the First Amendment are concerned with how misinformation could impact the political process, as well as the health and safety of citizens. Misinformation runs rampant during election season, which could interfere with our democratic system. It also played a prominent role in the January 6<sup>th</sup> Insurrection, with many believing that Facebook allowed the misinformation and threats of violence to fester before the attack occurred.<sup>2</sup> In the public health sphere, social media was also a hotspot for misinformation surrounding the COVID-19 pandemic and mask mandates.<sup>3</sup> For example, there was one rumor about drinking cleaning products with high alcohol content to cure the virus that sent thousands of people to the hospital between January and March of 2020.<sup>4</sup>

The Brennan Center is a civil society group that aims to protect the integrity of elections and access to the polls. If they encounter instances of doxing (the malicious publication of a person’s private information online)<sup>5</sup> or misleading information, they will often contact social media companies or government officials.<sup>6</sup> They believe that the government should be able to address these problems. Supporters will also cite the government’s right to promote activity and dialogue that cultivates the public good.<sup>7</sup> This side of the debate believes that the government’s

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> Craig Silverman, Craig Timberg, Jeff Kao & Jeremy B. Merrill, *Facebook Hosted Surge of Misinformation and Insurrection Threats in Months Leading Up to Jan. 6, Attack, Records Show*, PROPUBLICA (Jan. 4, 2022, 8:00 AM), <https://www.propublica.org/article/facebook-hosted-surge-of-misinformation-and-insurrection-threats-in-months-leading-up-to-jan-6-attack-records-show> [https://perma.cc/T5YX-TATL].

<sup>3</sup> Frank Otto, *COVID-19 Misinformation: The Flip Side of ‘Knowledge is Power’*, PENN MEDICINE (Oct. 25, 2022), <https://www.pennmedicine.org/news/news-blog/2022/october/covid-misinformation-the-flip-side-of-knowledge-is-power> [https://perma.cc/84HP-EG9X].

<sup>4</sup> *Id.*

<sup>5</sup> *What is Doxing?*, PROOFPOINT, <https://www.proofpoint.com/us/threat-reference/doxing> [https://perma.cc/C96T-ADBN].

<sup>6</sup> Robyn Sanders & Ashleigh Maciolek, *The Government Shouldn’t Be Barred from Countering False Information*, BRENNAN CENTER (Aug. 8, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/government-shouldnt-be-barred-countering-false-information> [https://perma.cc/26QM-SU6W].

<sup>7</sup> Nina Totenberg, *Supreme Court examines whether government can combat disinformation online*, NPR (Mar. 18, 2024 5:00 AM), <https://www.npr.org/2024/03/18/1238122337/supreme-court-social-media-disinformation-first-amendment> [https://perma.cc/CRV4-3427].

interference with misinformation is not censorship violative of the First Amendment, but rather constitutionally permissible government speech aimed at protecting citizens.

This is opposed by those who believe that any government interference with social media posts, even posts promoting false information, is censorship under the First Amendment right to free speech. The First Amendment does, in fact, protect false statements unless they are fraudulent or defamatory.<sup>8</sup> This poses a significant problem for government interference. Those who oppose government interference fall on a spectrum from being vehemently against any governmental effort to monitor what is said online, to those who believe it should be left up to the social media companies. Social media companies also have their own rights to free speech, and can create policies for monitoring hate speech, obscenities, and bullying, which helps to combat doxing.<sup>9</sup> Especially during the election season, social media companies will create content policies to promote accurate information.<sup>10</sup> Opponents emphasize the fact that the First Amendment does not protect threats and incitement of violence and harm to reputation. Further, although social media companies are private entities, they are the gateway to crucial communication and information in our society. For that reason, critics of government interference believe that there should be as little content moderation as possible.<sup>11</sup>

With social media being such a crucial aspect of modern life, there is increasing governmental regulation being produced to deal with the problem of misinformation around the world. For example, Australia plans to impose significant fines on social media giants if they fail to address misinformation.<sup>12</sup> They plan to create clear codes of conduct that the companies must follow.<sup>13</sup> This is a major development in government regulation of technology. This bill is aimed at protecting Australian citizens, democracy and economy. Stephen Jones, Australia's assistant treasurer, explicitly mentioned the dangers of deepfakes, child pornography posted online, and internet scam artists.<sup>14</sup> Not everyone sees this bill as an opportunity for protecting users, America's very own Elon Musk referred to the Australian government as 'fascists.'<sup>15</sup>

Legislation aimed at combatting misinformation would be polarizing anywhere, but especially in America. *Murthy v. Missouri* illustrates a recent judicial response to governmental

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<sup>8</sup> Lata Nott, *Free Speech on Social Media: The Complete Guide*, FREEDOM FORUM, <https://www.freedomforum.org/free-speech-on-social-media/> (last visited Sept. 29, 2024) [<https://perma.cc/6UEU-Y9DU>]; see *U.S. v. Alvarez*, 567 U.S. 709, 2359 (2012) (“[c]ontent-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting words,’ child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.”).

<sup>9</sup> Sanders & Maciolek, *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Byron Kaye, *Australia Threatens Fines for Social Media Giants Enabling Misinformation*, REUTERS (Sept. 12, 2024, 4:28 PM), <https://www.reuters.com/technology/australia-threatens-fines-social-media-giants-enabling-misinformation-2024-09-12/>.

<sup>13</sup> *Id.*

<sup>14</sup> Australian Associated Press & Josh Taylor, *Elon Musk Calls Australian Government ‘Fascists’ Over Move to Regulate Online Misinformation*, THE GUARDIAN (Sept. 12, 2024, 6:54 PM), <https://www.theguardian.com/technology/2024/sep/13/elon-musk-fascists-australia-government-misinformation-bill> [<https://perma.cc/932E-CRVT>].

<sup>15</sup> *Id.*

efforts in combatting misinformation. The states of Louisiana and Missouri, along with individuals who were banned from social media sites sued the Joe Biden administration, along with several governmental officials and agencies in the U.S. District Court for the Western District of Louisiana. Their claim was that federal government officials unduly influenced social media companies and used them as puppets to censor social media content.<sup>16</sup> They claim that these officials and companies were targeting conservative speech and opinions.<sup>17</sup> This is illustrative of how politicized this debate is. A federal district judge granted an injunction against the Biden administration and government agencies to prevent them from communicating with social media companies about content.<sup>18</sup> The Supreme Court only overturned this opinion in July 2024, finding that the government was not coercive or unduly influential in its communication.<sup>19</sup> Justice Amy Coney Barrett wrote the decision that declared the plaintiffs did not provide sufficient facts to bring a suit at all.<sup>20</sup>

Though the Supreme Court ultimately found that the plaintiffs' claim was insufficient, both the district court and the Fifth Circuit Court of Appeals found censorship in violation of the First Amendment.<sup>21</sup> This is significant, because it points to a strong urge to oppose government involvement in combatting misinformation on social media, even from the judiciary. This sentiment is shared widely. For example, after Trump was banned from social media sites following the January 6<sup>th</sup> insurrection, Florida and Texas enacted statutes that would prohibit social media companies from monitoring content and banning controversial posts.<sup>22</sup> Others are calling for transparency from social media sites to explain why and how they monitor content.<sup>23</sup>

Although two lower courts believed that there was a constitutional violation in *Murthy v. Missouri*, the Supreme Court found that there was not a sufficient basis for this claim. Therefore, the Court never truly decided the merits of the plaintiffs' claim. This effectively leaves open the question of whether the government can ask social media companies to combat misinformation.<sup>24</sup> This is a small victory for supporters of the government's right to combat misinformation.

In America, a law like what Australia proposed is probably impossible under the First Amendment of the United States Constitution. The issue is when do government speech or actions related to addressing misinformation go too far? The First Amendment is unique compared to other

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<sup>16</sup> *Murthy v. Missouri (Formerly Missouri v. Biden)*, Brennan Center (Aug. 1, 2023), <https://www.brennancenter.org/our-work/court-cases/murthy-v-missouri-formerly-missouri-v-biden> [https://perma.cc/2WMG-D26M]; Kat Duffy, *The Supreme Court Was Right on Murthy v. Missouri*, Council on Foreign Relations (June 28, 2024, 1:26 PM), <https://www.cfr.org/article/supreme-court-was-right-murthy-v-missouri> [https://perma.cc/V2A3-KKZR].

<sup>17</sup> Duffy, *supra* note 16.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Jane E. Kirtley, *Liability for Amplification of Disinformation: A Law of Unintended Consequences*, AMERICAN CONSTITUTION SOCIETY (Jan. 3, 2022), <https://www.acslaw.org/expertforum/liability-for-amplification-of-disinformation-a-law-of-unintended-consequences/> [https://perma.cc/XH69-B2L2].

<sup>23</sup> *Id.*

<sup>24</sup> Duffy, *supra* note 16.

constitutions, since it leaves free speech as a very broad category.<sup>25</sup> This can create a challenge for determining a line. Further, the First Amendment is rooted in the desire to promote the free flow of ideas. So, for a person or entity's speech to be suppressed, it needs to be explicitly prohibited (defamatory, violent, etc.).<sup>26</sup> Although our government has the right to free speech and can try to promote what it believes is best for the public good, the broad language of this amendment limits its efforts. This issue is further complicated by the fact that political speech is particularly favored and protected under the First Amendment.<sup>27</sup>

There is a heated debate about the efficacy of government intervention to combat misinformation on social media. There are vehement supporters on both sides. After the COVID-19 pandemic and the January 6<sup>th</sup> insurrection, there are many people who are calling for more content moderation. However, the odds of having legislation that directly permits this type of government intervention is likely impossible due to the First Amendment. The First Amendment explicitly permits false statements while prohibiting threats and encouragement of violence.<sup>28</sup> Social media posts, especially those regarding political views or statements, can often blur this line. Regardless of which route our government takes in addressing misinformation, it will be met with opposition rooted in concerns about safety and constitutionality. Although there is not a clear path forward, we can be near certain that there will not be legislation created to empower the government's interference for combatting misinformation on social media.

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<sup>25</sup> Alex Gray, *Freedom of speech: which country has the most?*, WORLD ECONOMIC FORUM (Nov. 8, 2016), <https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/>.

<sup>26</sup> *United States v. Stevens*, 559 U.S. 460, 473 (2010) (“In the First Amendment context ... a law may be invalidated as overbroad if ‘a “substantial number” of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449.))

<sup>27</sup> VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2024).

<sup>28</sup> *Id.*