

CREATING A PUBLIC HEALTH DISINFORMATION EXCEPTION TO CDA SECTION 230[†]

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TABLE OF CONTENTS

ABSTRACT	1256
INTRODUCTION	1258
I. THE POST-TRUTH ERA OF PUBLIC HEALTH INFORMATION.....	1268
A. <i>A Brief History of Fake News Disinformation</i>	
<i>Epidemics</i>	1268
1. <i>Ebola Outbreak in West Africa (2013–16)</i>	1271
2. <i>The Anti-Measles Vaccine Movement of 2017</i>	1274
B. <i>The Global War on Truth about COVID-19</i>	1279
C. <i>Why Conspiracy Websites Thrive</i>	1285
D. <i>The Danger of the False Public Health Information</i>	
<i>Echo Chamber</i>	1287
E. <i>The Profit Motive & Viral Disinformation</i>	1290
II. THE BATTLE OVER REFORMING CDA SECTION 230.....	1291
A. <i>Congressional Purpose of CDA Section 230</i>	1291
1. <i>The Pre-CDA Section 230 Split on Access Providers’</i>	
<i>Liability</i>	1291
B. <i>How U.S. Courts Expanded CDA Section 230</i>	1293
1. <i>Stretching the Liability Shield to Distributors</i>	1293
2. <i>Expansion to All Internet Intermediaries</i>	1295
3. <i>Courts Have Expanded the Liability Shield to All</i>	
<i>Torts</i>	1295
4. <i>CDA Section 230 Shields Deplorable Third-Party</i>	
<i>Postings</i>	1298
A. <i>The First Amendment Protects False Information</i>	
<i>by Liars</i>	1298

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	<i>B. The First Amendment Gives Less Protection to False Information</i>	1299
	5. <i>Could President Trump Be Sued for Posting Dangerous COVID-19 Disinformation?</i>	1302
III.	DETECTING FALSE DANGEROUS PUBLIC HEALTH POSTINGS.....	1305
	A. <i>Mechanics of CDA Section 230 Notice-and-Takedown Proposal</i>	1305
	1. <i>What Content Is Subject to Notice-and-Takedown?</i> ...	1311
	2. <i>Who Has a Duty to Takedown?</i>	1312
	3. <i>Private Attorneys General to Initiate Notice & Takedown</i>	1313
	4. <i>Who Must Respond to Takedown Notices?</i>	1317
	5. <i>What Must Be in the Content of a Takedown Notice?</i>	1318
	6. <i>Counternotice & Putback</i>	1320
	7. <i>Consequences if Websites Are Unresponsive to Notice-and-Takedown</i>	1321
	B. <i>Toward a Global Standard for the Liability of Online Intermediaries</i>	1322
	1. <i>Key Provisions of the Electronic Commerce Directive</i>	1324
	2. <i>Overview of Liability Regime for Service Providers</i> ..	1325
	3. <i>Websites & Service Providers Acting as Passive Transmitters</i>	1326
	4. <i>Service Provider is Not Generally Liable for Hosting</i>	1326
	5. <i>No General Obligation to Monitor</i>	1327
	6. <i>CDA Section 230 Notice & Takedown</i>	1327
	7. <i>An Alternative Section 230 Reform: The PACT Act</i> ...	1327
	CONCLUSION.....	1331

ABSTRACT

The “infodemic” of fake news about the COVID-19 virus contains a large number of dangerous postings that fall outside of First Amendment protected speech, such as the promotion and sale of potentially lethal phony cures. We argue that Congress should amend the Communications Decency Act (CDA) Section 230 to recognize a notice-and-takedown exception for deceitful scientific and health information causing specific harm. Arming the direct victims of false health information with a takedown procedure and money damages will allow them to receive compensation for specific harm they suffer from dangerous content. Private attorneys general will supplement public

enforcement by eliminating hazardous content from the Internet that has no First Amendment protection. Our proposed notice and takedown regime for illegal content would harmonize U.S. law with that of the European Union's E-Commerce Directive and is a potential global standard for addressing false public health information. Our CDA Section 230 takedown reform can be extended to disable other illegal content on websites, blogs, and social media that is currently shielded by CDA Section 230's overly expansive liability shield.

Carnegie-Mellon researchers, who studied "more than 200 million tweets discussing coronavirus or COVID-19," concluded that 82% of the fifty most prominent retweeters were "bots," many of which were tied to foreign agents in Russia or China. Protecting the First Amendment rights of bots disguised as humans to weaken U.S. public health is certainly not what Congress had in mind when it enacted CDA Section 230 in 1996

Psychological research demonstrates that social media disseminates so much public health disinformation because many Internet users prefer emotionally satisfying simple explanations to scientific evidence. In many instances, made-up social media posts are inspired by illicit profit motives, rather than to instruct, consider or to debate legitimate public health controversies.

Originally, CDA Section 230's liability shield was restricted to publisher's liability for defamation, but federal courts have overextended it to shield every conceivable tort cause of action. Over the past quarter century, U.S. courts have also stretched CDA Section 230's immunity from Internet Service Providers like America Online and CompuServe to every online intermediary including social networks, websites, and blogs. Under the courts' expansive interpretation of CDA Section 230's sphere of application, websites have no duty to takedown illegal third party content, even if they have notice that the posting poses an imminent harm to public health. No other country gives online intermediaries an absolute immunity for hosting or posting illegal content on the Internet.

Our proposed CDA Section 230 notice-and-takedown reform will enable government regulators and direct victims who relied upon dangerously false online public health information to order websites to disable the harmful content. Our foremost objective in this proposed CDA Section 230 reform is to permit tort lawsuits against online intermediaries that host or post false information threatening public health. Congress may choose to broaden our CDA Section 230 notice-and-takedown proposal to content constituting terrorist threats, revenge pornography, child pornography, and other deplorable content not protected by the First Amendment. Speech is not protected if it constitutes a tort or crime.

Our CDA Section 230 reform will harmonize U.S. online intermediary law with the European Union’s Directive on Electronic Commerce, which will shortly be updated by the Digital Services Act. As with the current E-Commerce Directive, website operators will have no obligation to affirmatively monitor for illegal content on their service but will need to expeditiously disable dangerous postings upon notice. To date, there has been little recognition or study of the role of CDA section 230 in enabling systematic public health disinformation. Our CDA reform will result in greater oversight over online intermediaries and mitigate the dangers of false postings. This issue will lie dormant no longer; it urgently demands Congressional attention.

INTRODUCTION

The COVID-19 outbreak has been a humanitarian and economic calamity. For example, “the decline in gross domestic product last year was the biggest since the Great Depression. The International Labour Organization estimates it cost the equivalent of 255 million people full-time jobs. Researchers at the Pew Research Centre reckon the global middle class shrank for the first time since the 1990s.”¹ In mid-April 2021, the World Health Organization (WHO) reported that “[g]lobally, new COVID-19 cases rose for the eighth consecutive week, with over 5.2 million new cases reported in the last week. The number of new deaths increased for the fifth consecutive week, increasing by 8% compared to last week, with over 83 000 new deaths reported.”² “As of February 20, 2021, an average of more than 2,400 people per day died of COVID-19 in the U.S. during February 2021.”³ “The global coronavirus cases rose to more than 138 million cases (138,858,768 cases) and the death toll reached 2,984,626.”⁴ “Some 5.2 million new cases of COVID-19 were reported” in the third week of April 2021.⁵ As of September 20, 2021,

1. Enda Curran & Simon Kennedy, *COVID-19 Will Leave Deep Scars on the World Economy, Even After Recovery*, CHI. TRIB. (Apr. 22, 2021), <https://www.chicagotribune.com/business/ct-biz-covid-economic-fallout-20210422-xynn4a6m7bgprobjdvmlbrv4ca-story.html> (last visited Sept. 19, 2021).

2. *Weekly Epidemiological Update on COVID-19*, WORLD HEALTH ORG. (Apr. 20, 2021), <https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19—20-april-2021> (last visited Sept. 19, 2021).

3. Cynthia Cox & Krutika Amin, *COVID-19 is the Number One Cause of Death in the U.S. in Early 2021*, KFF (Feb. 22, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-is-the-number-one-cause-of-death-in-the-u-s-in-early-2021/> (last visited Sept. 19, 2021).

4. *Latest on the Worldwide Spread of Coronavirus*, SHAFaq NEWS (Apr. 16, 2021), <https://shafaq.com/en/World/Latest-on-the-worldwide-spread-of-coronavirus-6> (quoting Johns Hopkins University statistics).

5. Phoebe Loomes, *World Records Largest Ever Number of Coronavirus Cases Over a Seven Day Period*, NEWS.COM.AU (Apr. 22, 2021),

there are 42,121,247 confirmed cases in the United States and 677, 899, 600 deaths.⁶This global viral pandemic is accompanied by a “blazing spread of misinformation, lies and rumors” about COVID-19.⁷ Social media postings are creating a hazardous “infodemic”⁸ of “fake news,”⁹ which undermines scientists and medical expert’s efforts to address this public health emergency. “Overall, six in 10 Americans say they will get vaccinated or report having received at least one dose. That leaves four in 10 who say ‘maybe’ (18%) or ‘no’ outright (22%).”¹⁰ Only “36% of Republicans said they had received at least one shot of the vaccine—compared with 67% of Democrats and 47% of independents—and a stunning 43% of Republicans said they would likely never get the vaccine.”¹¹

An empirical study of crowdfunding campaigns as a source of COVID-19-related misinformation concluded:

Efforts to combat the COVID-19 pandemic have been complicated by misinformation about preventing and treating it. Much of this misinformation is spread online. . . . More than one quarter of the most viewed videos about COVID-19 on YouTube and nearly a

<https://www.news.com.au/world/coronavirus/global/world-records-largest-ever-number-of-coronavirus-cases-over-a-seven-day-period/news-story/b68b0b4f634496a346271aa0de298740>(last visited Apr. 24, 2021).

⁶ Joe Murphy, et. al, *Graphic: Coronavirus Deaths in the U.S., Per Day*, NBC NEWS (updated Sept. 20, 2021), <https://www.nbcnews.com/health/health-news/coronavirus-deaths-united-states-each-day-2020-n1177936> (last visited Sept. 19, 2021).

⁷ Matt Richtel, *W.H.O. Fights a Pandemic Besides Coronavirus: An ‘Infodemic’*, N.Y. TIMES, (Feb 6, 2020), <https://www.nytimes.com/2020/02/06/health/coronavirus-misinformation-social-media.html?searchResultPosition=1> (last visited Apr. 24, 2021).

⁸ “‘We’re not just fighting an epidemic; we’re fighting an infodemic’, said Tedros Adhanom Ghebreyesus, Director-General of the World Health Organization (WHO) at a gathering of foreign policy and security experts in Munich, Germany, in mid- February, referring to fake news that ‘spreads faster and more easily than this virus.’ WHO explains that infodemics are an excessive amount of information about a problem, which make it difficult to identify a solution. They can spread misinformation, disinformation, and rumours during a health emergency. ‘Infodemics can hamper an effective public health response and create confusion and distrust among people.’” Department of Global Communications, *UN Tackles ‘Infodemic’ of Misinformation and Cybercrime in COVID-19 Crisis*, U.N. (Mar. 31, 2020), <https://www.un.org/en/un-coronavirus-communications-team/un-tackling-‘infodemic’-misinformation-and-cybercrime-covid-19>(last visited Apr. 24, 2021).

⁹ UNESCO defines ‘Fake news’ as “an oxymoron which lends itself to undermining the credibility of information which does indeed meet the threshold of verifiability and public interest—i.e. real news.” UNESCO, JOURNALISM, ‘FAKE NEWS’ AND DISINFORMATION: HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING 7 (2018).

¹⁰ Kabir Khanna, *COVID-19 Vaccine Hesitancy Ticks Down But Many Remain Opposed - CBS News Poll*, CBS NEWS, <https://www.cbsnews.com/news/covid-19-vaccine-hesitancy-opinion-poll/> (last updated Apr. 26, 2021).

¹¹ Maeve Reston, *Vaccine Hesitancy Among Republicans Emerges as Biden’s Next Big Challenge*, CNN: POLITICS (Apr. 24, 2021), <https://www.cnn.com/2021/04/24/politics/joe-biden-vaccine-hesitancy/index.html> (last visited Apr. 24, 2021).

quarter of tweets using COVID-19-related hashtags contain misinformation. In response, online platforms including Google, YouTube, Twitter, Reddit, and Facebook have announced steps to combat this misinformation, including flagging false claims, removing misinformation, and directing users to reputable information sources. Medical crowdfunding campaigns are significant and persuasive sources of medical misinformation. These include unfounded claims about the efficacy of homeopathic treatments for cancer, hyperbaric oxygen treatment of brain injuries, and stem cell treatments for neurologic conditions. These campaigns can be especially persuasive sources of misinformation, as they are typically presented as patient testimonials by trusted individuals and then spread via social media.¹²

Social media false information constitutes a public health infodemic because “the public is no longer merely passively consuming inaccuracies and falsehoods. It is disseminating them, which is a ‘very different’ dynamic than what took place during prior pandemics MERS and H1N1.”¹³ False COVID19 information endangers the public by fueling anti-vaccination opinions and widespread vaccine hesitancy.¹⁴

12. Jeremy Snyder, Marco Zenone & Timothy Caulfield, *Crowdfunding Campaigns and COVID-19 Misinformation*, 111 AM. J. PUB. HEALTH 739, 739 (2021).

13. Christina Pazzanese, *Battling the ‘Pandemic of Misinformation’*, HARV. GAZETTE (May 8, 2020), https://news.harvard.edu/gazette/story/2020/05/social-media-used-to-spread-create-covid-19-falsehoods/?utm_source=SilverpopMailing&utm_medium=email&utm_campaign=Daily%2520Gazette%252020200511%2520%281%29 (last visited Sept. 19, 2021) (presenting information from Kasisomayajula “Vish” Viswanath, Lee Kum Kee Professor of Health Communication at the Harvard T.H. Chan School of Public Health). “Both newspapers and public officials claimed during the flu’s first wave in the spring and early summer of 1918 that it wasn’t a serious threat. The Illustrated London News wrote that the 1918 flu was ‘so mild as to show that the original virus is becoming attenuated by frequent transmission.’ Sir Arthur Newsholme, chief medical officer of the British Local Government Board, suggested it was unpatriotic to be concerned with the flu rather than the war, Arnold says.” Becky Little, *As the 1918 Flu Emerged, Cover-Up and Denial Helped It Spread*, HISTORY CHANNEL (May 26, 2020), <https://www.history.com/news/1918-pandemic-spanish-flu-censorship>. “At the time of the onset of the 1918 Influenza Pandemic, medicine had quite a long way to go. It was still a common enough belief that the flu was spread through miasma, or poisonous vapors. . . . newspaper article[s] from 1918 falsely tout[ed] the 1918 pandemic strain as just another seasonal flu.” Robert Kessler, *Outbreak: Lies and Misinformation*, ECOHEALTH ALL., <https://www.ecohealthalliance.org/2018/05/outbreak-lies-and-misinformation> (last visited Apr. 24, 2021).

14. “While we’ve seen plenty of anti-vaxx material on social media in the past decade, the last year has been on rocket fuel - it’s really ramped up and there’s even more aggression, especially from the harder-conspiracy theorist groups,” Rhiannon Williams, *Doctors Take to TikTok to Tackle Anti-Vaxx Material* INTERNET: A Growing Number of Medical Professionals Are Combating Misinformation on Social Media, I-INDEPENDENT PRINT LIMITED at 35 (quoting Gary Finnegan, editor of the Vaccines Today website and member of the WHO-led project Vaccine Safety Net.) “The vaccine-hesitant are victims of the deliberate disinformation placed by a small coterie of highly sophisticated, determined, self-interested

Pandemics provide a perfect storm for spreading fake news because social media connects “people during isolation, by creating new intimacies, as well as creating new pressures of productivity and ‘performativity’ towards others online. As a result of this, people are sharing even more during the age of COVID-19 than they might otherwise.”¹⁵ The results can be tragic. For example, the U.S. Attorney’s office for the Southern District of Florida reports that the United States Food and Drug Administration has “received reports of people requiring hospitalizations, developing life-threatening conditions, and dying after drinking” a bleach-like product sold over the Internet.¹⁶ “Clips of Trump’s infamous comments about bleach (“And is there a way we can do something like that, by injection inside or almost a cleaning, because you see it gets in the lungs and it does a tremendous number on the lungs?”) were replayed all around the world and translated into dozens of languages.”¹⁷

This deluge of online disinformation about COVID-19 creates a “snowball effect”¹⁸ as untruthful postings are distorted, amplified, and retweeted.¹⁹ A quarter of U.S. adults accept as true claims that the disease is a “plandemic” generated by power hungry global elites.²⁰

spivs. Policymakers will need a cogent set of tools available that they can easily call on, so that if the platforms won’t pull the emergency brake when there’s a clear emergency, someone else who’s responsible will.” *Id.* (quoting MP Jo Stevens). Besides concerns about potentially authoritarian censorship of the web, the difficulty in legislating against anti-vaxx content lies in distinguishing between the deliberately spread disinformation and the accidentally spread misinformation. *Id.* (quoting Professor Heidi Larson, founding director of the Vaccine Confidence Project at the London School of Hygiene and Tropical Medicine), available in Lexis News).

15. Peter Suci, *Should We All Social Media Detox After the Pandemic?*, FORBES (May 7, 2020), <https://www.forbes.com/sites/petersuci/2020/05/07/should-we-all-social-media-detox-after-the-pandemic/#37454ffc64cf> (last visited Sept. 19, 2021).

16. Meagan Flynn, *Leader of Fake Church Peddling Bleach as Covid-19 Cure Sought Trump’s Support. Instead, He Got Federal Charges.*, WASH. POST. (July 9, 2020), <https://www.washingtonpost.com/nation/2020/07/09/fake-coronavirus-cure-bleach/>.

17. Anne Applebaum, *What America’s Vaccination Campaign Proves to the World*, ATLANTIC (Apr. 10, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/mass-vaccination-show-american-might/618559/> (last visited Sept. 19, 2021).

18. “[A] snowball effect [is] a situation in which something increases in size or importance at a faster and faster rate: The more successful you become, the more publicity you get and that publicity generates sales. It’s a kind of snowball effect.” *Snowball Effect*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/a-snowball-effect> (last visited Sept. 19, 2021).

19. Anu Rames, *Misinformation is Spreading as Much as the Coronavirus*, AM. BANKER (May 8, 2020), <https://www.americanbanker.com/opinion/misinformation-is-spreading-as-much-as-the-coronavirus> (last visited Sept. 19, 2021).

20. “[T]he 26-minute film *Plandemic* . . . was released online and shared via Twitter, YouTube, and other social media platforms. . . . Driven by expert-like testimony and deliberately ‘viral [. . .] shocking and conspiratorial’ branding, the documentary leveraged underlying beliefs about COVID-19 and anti-containment sentiments and diverted viewers

“An Instagram post, for example, claims that the coronavirus pandemic was planned” by elites “to initiate a new world order.”²¹ Social media has a distinctive ability to spread systematic disinformation because many people believe emotionally satisfying postings rather than scientific findings. Misinformation triumphs over authoritative sources because “false news stories are 70 percent more likely to be retweeted than true stories are. It also takes true stories about six times as long to reach 1,500 people as it does for false stories to reach the same number of people.”²² Viral disinformation campaigns can threaten public health by creating divisive myths about the origins of the disease and leads to vaccine hesitancy.

In May of 2020, for example, a YouTube video was posted in which Dr. Judy Mikovitz, a discredited scientist, “described an unsubstantiated secret plot by global elites like Bill Gates and Dr. Anthony Fauci to use the coronavirus pandemic to profit and grab political power.”²³ “In the 26-minute video, the woman asserted how Dr. Fauci, the Director of the National Institute of Allergy and Infectious Diseases and a leading voice on the coronavirus, had buried her research about how vaccines can damage people’s immune systems.”²⁴

QAnon, a conspiracy group and activists from the Reopen America movement, promoted the video, which generated “more than eight million views.”²⁵ In the near future, Sinclair Broadcasting Group, a

towards anti-vaccine behaviors and general questioning the pandemic’s impact on our freedoms and liberties. Specifically, the documentary aimed to expose baseless accusations of corruption among key experts in the pandemic response (e.g., Dr. Anthony Fauci) while also suggesting broader collusion among politicians (e.g., Barack Obama) and global elite (e.g., Bill Gates). In other words, the film politicized and demonized public health figures combatting the pandemic. The film’s rapid spread was facilitated by pre-existing social media networks, such as Facebook groups and viral hashtags. Uniting disparate fringe-belief groups is a common tactic among vaccine opponents.” Matthew D. Kearney, Shawn C. Chiang, Philip M. Massey, *The Twitter Origins and Evolution of the COVID-19 “Plandemic” Conspiracy Theory*, HARV. KENNEDY SCH. MISINFORMATION REV. (Oct. 9, 2020) (internal citations omitted), <https://misinforeview.hks.harvard.edu/article/the-twitter-origins-and-evolution-of-the-covid-19-plandemic-conspiracy-theory/> (last visited Apr. 24, 2021).

21. Miriam Valverde, “*Mountains of Data*” Show Drug Ivermectin “*Basically Obliterates*” COVID-19 Transmission, POLITIFACT (Apr. 23, 2021), <https://www.politifact.com/factchecks/2021/apr/23/instagram-posts/fact-checking-claim-about-use-ivermectin-treat-cov/> (last visited Sept. 19, 2021).

22. Amanda Moore, *Study: On Twitter, False News Travels Faster Than True Stories*, MIT SCH. OF ARCHITECTURE & PLAN. (Mar. 8, 2018), <https://sap.mit.edu/news/study-twitter-false-news-travels-faster-true-stories> (last visited Sept. 19, 2021).

23. Davey Alba, *Virus Conspiracists Elevate a New Champion*, N.Y. TIMES (May 9, 2020), <https://www.nytimes.com/2020/05/09/technology/plandemic-judy-mikovitz-coronavirus-disinformation.html> (last visited Sept. 19, 2021).

24. *Id.*

25. *Id.*

Trump-supporting media empire, was expected to distribute this “viral video that falsely suggests the coronavirus is ‘activated’ by face masks, amid other bizarre claims” through its network of hundreds of local affiliates.²⁶

There is no inherent danger in speculating about the sources of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) or calls for more research on the Moderna COVID-19 Vaccine. Nevertheless, erroneous medical advice, phony remedies, conspiracy myths, and bizarre social and religious disinformation about the COVID-19 pandemic spread rapidly in part because scientists do not have a clear understanding of this disease, its symptoms, and long-term effects.²⁷ The rise of social media has created a unique danger to the public health by producing “an alternate universe of COVID-19 misinformation masquerading as science, which with the encouragement of Donald Trump, is proliferating among his supporters.”²⁸ Reliable information is necessary for informed decision-making in responding to a public health emergency and social media disinformation makes identifying systematic falsehoods increasingly difficult.²⁹

26. Dan Spinelli, *The “Plandemic” Conspiracy Theorist Is Coming to a TV Near You*, MOTHER JONES (July 25, 2020), <https://www.motherjones.com/coronavirus-updates/2020/07/plandemic-conspiracy-theory-judy-mikovits-eric-bolling-sinclair-fauci/> (last visited Sept. 19, 2021). Sinclair Broadcasting eventually withdrew the broadcast from its lineup, and “eventually decided to drop it altogether” but it continues to be available online. Paul Farhi, *Sinclair Yanked a Pandemic Conspiracy Theory Program. But it Has Stayed in Line with Trump on Coronavirus*, WASH. POST (July 31, 2020), https://www.washingtonpost.com/lifestyle/media/sinclair-yanked-a-pandemic-conspiracy-theory-program-but-it-has-stayed-in-line-with-trump-on-coronavirus/2020/07/31/5d90a296-d021-11ea-8c55-61e7fa5e82ab_story.html (last visited Sept. 19, 2021).

27. Craig Chamberlain, *What Drives Us to Blame the Marginalized for Epidemics?*, PHYS.ORG (Apr. 17, 2020), <https://phys.org/news/2020-04-blame-marginalized-epidemics.html>; Allison Navis, *STILL UNCERTAIN: Why Long Covid-19 Remains a Poorly Understood Disease*, QUARTZ (Aug. 17, 2021), <https://qz.com/2048128/why-long-covid-19-remains-a-poorly-understood-disease/> (last visited Sept. 19, 2021).

28. Jessica Glenza, *The US Doctors Taking Trump’s Lead on Hydroxychloroquine – Despite Mixed Results*, GUARDIAN (May 24, 2020), <https://www.theguardian.com/us-news/2020/may/24/hydroxychloroquine-trump-us-doctors-coronavirus> (last visited Sept. 19, 2021).

29. “The sheer volume of COVID-19 misinformation and disinformation online is “crowding out” the accurate public health guidance,” Christina Pazzanese, *HEALTH & MEDICINE: Battling the ‘Pandemic of Misinformation’* HARVARD GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/social-media-used-to-spread-create-covid-19-falsehoods/>; See also, Alec Tyson, *Republicans Remain Far Less Likely Than Democrats to View COVID-19 as a Major Threat to Public Health*, PEW RSCH. CTR. (July 22, 2020), <https://www.pewresearch.org/fact-tank/2020/07/22/republicans-remain-far-less-likely-than-democrats-to-view-covid-19-as-a-major-threat-to-public-health/> (last visited Sept. 19, 2021).

In the United States, statements of opinion, no matter how absurd or morally distasteful, are generally safeguarded by the First Amendment.³⁰ But some social media messages—such as the fraudulent promotion of toxic COVID-19 cures, postings that encourage hate crimes against marginalized populations, and bots that are covertly launched by foreign powers—often fall outside the First Amendment’s protections for free expression.³¹

In 1996, Congress enacted Title V of the Telecommunications Act of 1996, entitled the Communications Decency Act of 1996 (CDA).³² Section 230(c)(2) of the CDA (CDA Section 230) provides in relevant part that

“[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable[.]”³³

“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”³⁴ Because of this provision, website operators, search engines, social media, and other interactive services currently enjoy a broad immunity from liability for any content posted on their services by third parties.

This Article calls for Congress to recognize an exception to the Communications Decency Act’s Section 230 that will be an exception to the liability shield enjoyed by online platforms that currently threatens the public health by shielding the hosting or posting of dangerous medical disinformation. We argue that Congress should institute a notice-and-takedown regime for public health disinformation posted on Facebook, Twitter, YouTube, and other social media, where there is clear and convincing evidence that the disinformation threatens the public health.

30. *Trita Parsi v. Seid Hassan Daiouleslam*, 595 F. Supp. 2d 99, 109 (D.D.C. 2009) (“The First Amendment protects statements of opinions, however pernicious an opinion may seem.”); *see Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974); *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (“[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”).

31. *See Sonia Shah, The Pandemic of Xenophobia and Scapegoating*, TIME (Mar. 2, 2020), <https://time.com/5776279/pandemic-xenophobia-scapegoating/> (last visited Sept. 19, 2021).

32. Section 230 of the CDA was enacted, in part, to “preserve the vibrant and competitive free market that presently exists for the Internet.” 47 U.S.C. § 230(b)(2) (2021); *see Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 472 (E.D.N.Y. 2011); *see also* 47 U.S.C. § 230(c), (e)(3), (f)(3).

33. 47 U.S.C. § 230(c)(2)(A).

34. 47 U.S.C. § 230(e)(3).

While the U.S. Supreme Court has often implied that fabricated information causing harm is outside the scope of the First Amendment, it has never expressly held that false, harmful information is not covered by free expression guarantees. The Court should formally recognize that false public health information that creates specific harm or poses the threat of potential harm is not protectable expression.

Part I of this Article documents how viral public health disinformation epidemics are disseminated on social media. The earliest social media “infodemic” was the Ebola outbreak in Africa from 2013–16.³⁵ In 2017–18, an online anti-vaccination movement led to senseless measles outbreaks in the United States as well as other countries.³⁶ In many cases, concocted false postings are driven by the profit motive or by foreign controlled bots, rather than genuine differences of opinion.

The final section of Part I explains why the victims of dangerous public health disinformation rarely have any practical recourse against the primary wrongdoers. Injured plaintiffs generally find it extremely challenging to locate the primary content creators who are often anonymous, insolvent, or beyond the reach of U.S. legal process. In addition, malicious third-party posters generally have no financial means to pay a judgment. In contrast, online platforms hosting this harmful content are generally solvent and easy to locate but they are immunized by the CDA Section 230 liability shield.

Part II is a history of CDA Section 230, which has evolved into an unassailable shield against any online platform liability for hosting dangerous third-party postings. It could not have been Congress’ purpose to protect dangerous public health disinformation when it enacted CDA Section 230 in 1996. The first social medial platform was not created until 1997.³⁷ The CDA Section 230 liability shield initially extended only to Prodigy, CompuServe, and America Online, and a handful of service providers. The express language of CDA Section 230 was restricted to publisher’s liability for defamation. In the past quarter century, federal

35. *A Brief History of Cyber Attacks: From Ebola to COVID-19*, CYBERPEACE INS. (Jan. 26, 2021), <https://cyberpeaceinstitute.org/news/2020-03-26-a-brief-history-of-infodemics-from-charlie-hebdo-to-ebola-and-covid-19/> (last visited Sept. 19, 2021).

36. Olivia Benecke & Sarah Elizabeth DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 *GLOB. PEDIATRIC HEALTH* 1, 1 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6657116/pdf/10.1177_2333794X19862949.pdf (last visited Sept. 19, 2021).

37. “The first social media site is born (1997) on one of the first true social media sites, SixDegrees.com.” Alexandra Samur, *The History of Social Media: 29+ Key Moments*, HOOTSUITE (Nov. 22, 2018), <https://blog.hootsuite.com/history-social-media/#:~:text=1.,and%20send%20messages%20within%20networks> (last visited Sept. 19, 2021).

courts have stretched it to every imaginable tort and all interactive service providers including social media.

The federal courts have also ruled that CDA Section 230 imposes no takedown duty to remove illegal third-party content, even if the postings create imminent harm to public health. In contrast, the Digital Millennium Copyright Act (DMCA) “mandates a ‘takedown’ notice process be followed when a copyright owner thinks its copyright has been infringed.”³⁸ The United States is the only country that immunizes website operators for hosting illegal content posted by third parties on online platforms.

Part III presents comprehensive procedures to implement a CDA Section 230 notice-and-takedown procedure that can be exercised by the direct victims of dangerous online public health disinformation. For the first time, the victims of dangerous postings would have a way to order websites to takedown false postings causing an imminent threat to public health. This CDA Section 230 takedown would not be applicable to opinions about COVID-19 causes or cures, because questionable viewpoints—even if demonstrably false—are constitutionally protected expression. Our CDA reform parallels Section 512 of the Digital Millennium Copyright Act, which provides a notice-and-takedown mechanism for content that violates the copyrights of third party authors.³⁹ Under the DMCA, websites do not qualify for a liability shield from secondary copyright infringement claims unless they adopt, reasonably implement, and inform users of their policy to terminate repeat infringers in appropriate circumstances.⁴⁰ Similarly, to qualify for the CDA Section 230 shield under our reform, an online platform or

38. *Therion, Inc. v. Media by Design, Inc.*, No. CV 08-5256, 2010 U.S. Dist. LEXIS 135096, at *28 (E.D.N.Y. Nov. 10, 2010).

39. To avail itself of any of the DMCA’s four safe harbors, a website operator must first satisfy certain threshold requirements. That is, it must be a “service provider” and it must adopt, reasonably implement and inform subscribers of a policy providing that it may, in appropriate circumstances, terminate the accounts of repeat infringers. *See* 17 U.S.C. §§ 512(k), 512(i)(1)(A) (2021).

40. 17 U.S.C. § 512(c). Section 512(c) states that “[a] service provider shall not be liable for monetary relief” if it does not know of infringement. A service provider is also not liable under § 512(c) if it acts “expeditiously to remove, or disable access to, the material” when it (1) has actual knowledge, (2) is aware of facts or circumstances from which infringing activity is apparent, or (3) has received notification of claimed infringement meeting the requirements of § 512(c)(3). *Id.* Were we to require service providers to terminate users under circumstances other than those specified in § 512(c), § 512(c)’s grant of immunity would be meaningless. This interpretation of the statute is supported by legislative history. Section 512(i) is not intended “to undermine the . . . knowledge standard of [§ 512](c).” *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1144 (N.D. Cal. 2008) (first citing *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1111 (W.D. Wash. 2004); and then citing H.R. REP. No. 105-551, at 61 (1998)).

website must fulfill certain requirements, generally consisting of implementing measures to expeditiously remove content once they have specific notice from users who are harmed or potentially harmed by the posting. Unlike the DMCA, our CDA notice-and-takedown proposal requires that an online platform have actual notice, not just constructive notice, of illegal content before being required to disable it.⁴¹

Online platforms that refuse to remove or unreasonably delay disabling demonstrably dangerous misinformation about COVID-19 or other future public health crises will be divested of their CDA Section 230 liability shield for that specific content. As with the DMCA, a person calling for a fraudulent takedown is liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by the content creator, and by the website. This CDA Section 230 carveout will be a significant step toward creating a workable global standard, enabling the victims of disinformation, particularly those harmed by the selling of fraudulent cures, to have recourse against websites hosting or posting dangerous or illegal content.⁴² This reform will be a first step toward harmonizing U.S. law with the European Union's Directive on Electronic Commerce, which will shortly be updated by the Digital Services Act.⁴³

As with the current E-Commerce Directive, our CDA reform imposes no obligation on websites to affirmatively monitor for illegal content on their service. The actual notice requirement will reduce the costs and diminish the burdens of the notice-and-takedown process. A website's duty does not arise unless it has received specific notice of dangerous fake public health information. To date, there has been little recognition or study of the role of CDA section 230 in enabling

41. The United States Copyright Office study of Section 512 concluded that constructive or "red flag" knowledge: "drew a notably large number of comments during the Study. The statute requires that, in order to qualify for the section 512(c) or (d) safe harbors, an OSP must both lack actual knowledge that material or activity on its service is infringing, and 'not [be] aware of facts or circumstances from which infringing activity is apparent'". U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 3 (2020) [hereinafter COPYRIGHT REPORT], <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

42. "The legal protections provided by CDA 230 are unique to U.S. law; European nations, Canada, Japan, and the vast majority of other countries do not have similar statutes on the books." *CDA Section 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND. (Jan. 25, 2021), <https://www.eff.org/issues/cda230> (last visited Sept. 19, 2021).

43. See, URSULA VON DER LEYEN, A UNION THAT STRIVES FOR MORE: MY AGENDA FOR EUROPE 13 (2021), https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (last visited Sept. 19, 2021) ("A new Digital Services Act will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market.").

systematic public health disinformation. This issue should lie dormant no longer; it urgently demands Congressional attention.

I. THE POST-TRUTH ERA OF PUBLIC HEALTH INFORMATION

At the time the CDA Section 230 was enacted, Google, Amazon, and eBay had not yet been created, and there was no Facebook, YouTube, or Twitter.⁴⁴ In 1996, there were only 257,601 websites with just over 77 million users. Today there are 1.8 billion websites.⁴⁵ The incredible growth of the Internet is illustrated by the existence of “480 billion Google searches before the end of Q1 2019.”⁴⁶

The Internet receives “[o]ver 7 billion queries every day. 15% of those are new phrases that no one has ever searched before.”⁴⁷ “According to global sites stats, 440,000 gigabytes of data is being uploaded on the [I]nternet every minute.”⁴⁸ “Even Twitter posts are overwhelming at approximately 5,700 a second.”⁴⁹ “The Deep Web consists of 7,500 terabytes of information.”⁵⁰ Internet laws enacted a quarter century ago need to be modernized to take into account the radical growth and societal impact of this revolutionary method of communication.

A. A Brief History of Fake News Disinformation Epidemics

Online misinformation undermines coronavirus mitigation policies such as social distancing, self-quarantining, or pursuing timely and effective medical treatment.⁵¹ A recent study found “a statistically notable link between people who believed false claims about the coronavirus and people who were willing to flout the government’s social

44. See COPYRIGHT REPORT, *supra* note 42, at 27–34 (2020).

45. Total Number of Websites, INTERNET LIVE STATS, <https://www.internetlivestats.com/total-number-of-websites/> (last visited Apr. 24, 2021).

46. Aleksandar S., *Internet Statistics in 2020*, TECH JURY (last updated July 25, 2020), <https://techjury.net/blog/internet-statistics/> (last visited Apr. 24, 2021).

47. *Id.*

48. *Id.* (alteration in original).

49. *Id.*

50. *Id.*

51. “There is currently no approved cure or vaccine for the coronavirus, and for health authorities trying to contain the coronavirus, which has claimed more than 20,000 lives in the U.S. alone, these scams could lead to even more deaths. One wrong shipment sent to a hospital, one wrong miracle cure that goes viral, could undo weeks of effort to contain the pandemic—a consequence weighing heavily on government officials.” Tina Nguyen, *Coronavirus-Killing Silver, Fake Tests, CDC Impersonators: Feds Rush to Stamp Out Scams*, POLITICO (Apr. 11, 2020), <https://www.politico.com/news/2020/04/11/feds-stamp-out-coronavirus-scams-179490> (last visited Sept. 19, 2021).

distancing guidelines.”⁵² As a New York physician observes, “[f]olks delaying seeking care or, taking the most extreme case, somebody drinking bleach as a result of structural factors just underlines the fact that we have not protected the public from disinformation.”⁵³

Seventy-eight percent of U.S. adults regarded incorrect information about COVID-19 as a major concern, with more than half of those polled finding it difficult to separate scientific truth from unsupported falsehood.⁵⁴ The public’s proclivity to trust untruthful claims over scientifically established facts is found “across a wide range of professional domains because it seems to reflect a much broader drop in the credibility of academics and scientists.”⁵⁵ Controlling the mutually reinforcing COVID-19 epidemics of disease and hazardous disinformation requires understanding how these dual pandemics are transmitted and then minimizing their propagation.

The problem with promulgating false COVID-19 postings—aside from the fact that they are fabricated—is that readers may rely on them. By placing their faith in fictitious health data, people may elect to no longer follow physical distancing, handwashing, surface disinfection, and other preventive measures. Public health experts criticize “websites that advise using vodka to make hand sanitizer to blog posts that suggest using bleach for gargling, and some say federal agencies should do more to stamp out misconceptions.”⁵⁶

Internet users may even die from taking online lies seriously:

The FDA, however, has not approved Miracle Mineral Solution for treatment for COVID-19 or for any other use. Rather, in prior official

52. Jim Waterson, *Influencers Among ‘Key Distributors’ of Coronavirus Misinformation*, *GUARDIAN* (Apr. 8, 2020), <https://www.theguardian.com/media/2020/apr/08/influencers-being-key-distributors-of-coronavirus-fake-news> (last visited Sept. 19, 2021) (“His findings, based on an experimental study conducted in coordination with the Centre for Countering Digital Hate, found that people who said they believed coronavirus was connected to 5G mobile phone masts are less likely to be staying indoors, washing their hands regularly or respecting physical distancing.”).

53. Ben Collins, *Coronavirus Conspiracy Theories Are Frustrating ER Doctors*, *NBC NEWS* (May 11, 2020), <https://www.nbcnews.com/tech/tech-news/what-are-we-doing-doctors-are-fed-conspiracies-ravaging-ers-n1201446?fbclid=IwAR1PksXywI7xbx1eQVhJMIIbmMIDlyEuyuGZzYSqTx1wc07JKtULM2vmjS8> (last visited Sept. 19, 2021).

54. Jeffrey M. Jones, *Americans Struggle to Navigate COVID-19 “Infodemic”*, *GALLUP* (May 11, 2020), <https://news.gallup.com/poll/310409/americans-struggle-navigate-covid-infodemic.aspx> (last visited Sept. 19, 2021).

55. Sara L. Rynes, Amy E. Colbert & Ernest H. O’Boyle, *When the “Best Available Evidence” Doesn’t Win: How Doubts About Science and Scientists Threaten the Future of Evidence-Based Management*, 44 *J. OF MGMT.* 2995, 2997 (2018).

56. Sandhya Raman, *U.S. Must Combat ‘Infodemic’ of Bad Information on Coronavirus, Experts Say*, *ROLL CALL*, Mar. 19, 2020, 2020 WL 1301796.

warning statements, the FDA has strongly urged consumers not to purchase or use Miracle Mineral Solution for any reason, explaining that drinking the solution was the same as drinking bleach and could cause dangerous side effects.⁵⁷

The “FDA received reports of people requiring hospitalizations, developing life-threatening conditions and even dying after drinking this Miracle Mineral Solution, which again, is industrial bleach.”⁵⁸

A Florida federal district court issued a temporary injunction against the Genesis II Church of Health and Healing for promoting chlorine dioxide as a COVID-19 remedy, when it is actually a dangerous industrial-grade bleaching agent.⁵⁹ A Georgia poison center reports treating two men who thought that drinking diluted bleach would be an effective antidote for COVID-19.⁶⁰ In July 2020, a Florida U.S. Attorney filed criminal charges against the leaders of this allegedly “fake church” because they continued to peddle this deadly product.⁶¹ The best scientific evidence is that, “with no vaccine, no reliable drug therapies and no widely available test to determine who might have been exposed to the virus, shelter-at-home orders remain the only reliable method to slow the spread.”⁶²

The COVID-19 disinformation war against reputable medical science is the most recent infodemic spread on Facebook, Instagram, and

57. *The Rachel Maddow Show* (MSNBC television broadcast Apr. 23, 2021).

58. *Id.*

59. Press Release, U.S. Food & Drug Admin., *Coronavirus (COVID-19) Update: Federal Judge Enters Temporary Injunction Against Genesis II Church of Health and Healing, Preventing Sale of Chlorine Dioxide Products Equivalent to Industrial Bleach to Treat COVID-19* (Apr. 17, 2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-federal-judge-enters-temporary-injunction-against-genesis-ii-church> (last visited Sept. 19, 2021).

As a result of these violations, today, U.S. District Judge Kathleen M. Williams for the U.S. District Court for the Southern District of Florida, entered the temporary restraining order against Genesis and the individual defendants Mark Grenon, Joseph Grenon, Jordan Grenon and Jonathan Grenon until May 1st, 2020. There will be a hearing on the government’s request to extend the injunction on May 1st, 2020. The complaint, filed by the U.S. Department of Justice (DOJ), against the Bradenton, Fla. seller and the seller’s most responsible individuals, seeks to restrain and enjoin all defendants from labeling, holding and distributing unapproved new drugs and misbranded drugs, including MMS, in interstate commerce on a permanent basis.

60. Hearst Television, *Poison Center: 2 Georgia Men Drink Disinfectants in Attempts to Stop Coronavirus*, CHRON. (last updated Apr. 28, 2020), <https://www.chron.com/national/article/Poison-center-2-Georgia-men-drink-disinfectants-15231853.php> (last visited Sept. 19, 2021).

61. Flynn, *supra* note 16.

62. *Coronavirus Live Updates: As Economy Hemorrhages Jobs, Europe Agrees to Prime E.U.’s Pump*, TODAY NEWS (Apr. 9, 2020), <http://thetodaynews.com.pk/latest/coronavirus-live-updates-as-economy-hemorrhages-jobs-europeans-agree-to-prime-e-u-s-pump/> (last visited Sept. 19, 2021).

other social networks. The ubiquity of social networks is creating an unprecedented surge in dangers created by online misrepresentations. The International Fact-Checking Network (IFCN)⁶³ states that COVID-19 is “the biggest challenge fact-checkers have ever faced.”⁶⁴ Fake news consists of two overlapping categories: misinformation, opinions that are clearly protected by the First Amendment, and disinformation, such as fraudulently selling dangerous fake cures or foreign entities deploying bots to deliberately harm the United States.⁶⁵ At present, online platforms have no duty to takedown either misinformation or disinformation, even if it poses an imminent danger to public health.

Despite the fact that “[u]nder the First Amendment there is no such thing as a false idea,”⁶⁶ the Court has long acknowledged that child pornography, speech integral to illegal conduct, fraud, and speech that incites imminent lawless action—such as the famous example of shouting fire in a crowded theatre—are not protectable expressions. False information-based torts such as defamation, the invasion of privacy, and the tort of fraud or misrepresentation are also not protectable. A brief history of prior online infodemics, where false information led to unnecessary infections and deaths, will illustrate why the latest public health disinformation poses a grave threat.

1. Ebola Outbreak in West Africa (2013–16)

Africa’s Ebola Virus was the first large-scale info-pandemic of the social media age. “From 2014 to 2016, Guinea, Liberia, and Sierra Leone experienced the largest Ebola epidemic of all time, infecting more than 28,000 people and killing more than 11,000.”⁶⁷ Twitter and Facebook were widely used in both Africa and the United States to spread false

63. “The International Fact-Checking Network is a unit of the Poynter Institute dedicated to bringing together fact-checkers worldwide. The IFCN was launched in September 2015 to support a booming crop of fact-checking initiatives by promoting best practices and exchanges in this field.” *The International Fact-Checking Network*, POYNTER, <https://www.poynter.org/ifcn/> (last visited Apr. 24, 2021).

64. J. Scott Brennen, Felix Simon, Philip N. Howard & Rasmus K. Nielsen, *Types, Sources, and Claims of COVID-19 Misinformation*, REUTERS INST. (Apr. 7, 2020), <https://reutersinstitute.politics.ox.ac.uk/types-sources-and-claims-covid-19-misinformation> (last visited Sept. 19, 2021).

65. Pazzanese, *supra* note 13.

66. “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”

Gertz v. Robert Welch, 418 U.S. 323, 339–40 (1974).

67. Ed Yong, *The Rank Hypocrisy of Trump’s Ebola Tweets*, ATLANTIC (Aug. 3, 2019), <https://www.theatlantic.com/health/archive/2019/08/the-rank-hypocrisy-of-trumps-ebola-tweets/595420/> (last visited Sept. 19, 2021).

news about this lethal disease.⁶⁸ During the Ebola outbreak in West Africa, social media spread useless cures, “such as bathing in hot water and salt or consuming bitter nuts from the kola tree.”⁶⁹ Viral social media postings claimed that the Ebola virus was mass-produced in a government lab by former President Joseph Kabila “to drive down voter turnout,” while another online rumor was that Ebola was invented by private mining companies to exploit the region’s natural resources.⁷⁰

The lesson of Ebola and subsequent infodemics is that public officials must be credible, transparent, and trustworthy to mobilize the populace to implement scientific mitigation techniques and to disregard untruthful data. A Liberian Ebola testing administrator emphasized that disinformation must be aggressively refuted and replaced with accurate information:

We started to turn the corner when we acknowledged our incapacity to deal with Ebola, began sharing information domestically and with our Mano River Union neighbors and other regional leaders . . . It worked! Not only did we prevent Ebola’s spread into Western Liberia, we also prevented the disease from expanding beyond Harbel into Buchanan, Nimba and the southeastern counties. We also disproved projections

68. Vittoria Elliott, *Ebola Responders in Congo Confront Fake News and Social Media Chatter*, NEW HUMANITARIAN (May 2, 2019), <https://www.thenewhumanitarian.org/news/2019/05/02/ebola-responders-congo-confront-fake-news-and-social-media-chatter> (last visited Sept. 19, 2021).

One Facebook page, “Véranda Mutsanga en Révolution”, now has 230,000 members. It is both a source of information—many users ridicule others for doubting the existence of the disease or offer tips for staying safe—while other users fan multiple conspiracy theories. “There is no such thing as Ebola,” said one user. “It’s a government lie.”

Ebola responders in Congo rebut fake news and social media chatter with accurate scientific and medical information. *Id.*

69. Nat Gyenes, *Off the Cuff: Fighting Misinfodemics*, HARV. PUB. HEALTH (Feb. 4, 2021), https://www.hsph.harvard.edu/magazine/magazine_article/off-the-cuff-fighting-misinfodemics/ (last visited Sept. 19, 2021).

70. Sonya Stokes, *Epidemics and Infodemics in the Post-Truth Era, from Ebola to COVID-19*, THINK GLOB. HEALTH (Mar. 25, 2020), <https://www.thinkglobalhealth.org/article/epidemics-and-infodemics-post-truth-era-ebola-covid-19> (last visited Sept. 19, 2021).

[C]onspiracy theories about the epidemic have thrived online. Some claim the virus was manufactured in government labs by former President Joseph Kabila Kabange in order to drive down voter turnout during the past election. Others argue the disease doesn’t even exist—it is just a story invented by the private mining corporations as a means of controlling the country’s flow of natural resources. These rumors permeate the overcrowded urban enclaves and surrounding migrant communities in Eastern Congo where in 2017 I joined a research team monitoring the health status of refugees and internally displaced persons in North Kivu Province. At the time, only sporadic cases of Ebola were reported by the Ministry of Health, but even then social media was being bombarded by medical hoaxes and hearsay.

Id.

that 25,000 Liberians would be killed by the virus. In the end, 5,000 of our fellow citizens lost their lives. That number would have been far lower, had we better informed the public, earlier on.⁷¹

In Nigeria, conspiracy theories were distributed on Facebook, Instagram, and other social media outlets during the Ebola epidemic.⁷² One example was a viral lie, allegedly originating from the Atta of Igala, that bathing in and ingesting salt water could shield the user against being infected by Ebola.⁷³ This fabricated advice led to two deaths in Nigeria, which was a quarter of all deaths from Ebola in that country.⁷⁴ Medical professionals expressed concern about the hysteria produced by heightened Ebola coverage in Western nations.⁷⁵ In the United States, both traditional media and social media spread reports that the Ebola epidemic would ultimately decimate the country. “During the height of the Ebola story, in a single week the topic was [cited] nearly 4,000 [times] on [U.S.] cable news channels.”⁷⁶ Because of this epidemic of fake news, Ebola “moved closer to becoming the next great American panic—an anthrax or SARS for the social media age.”⁷⁷

Donald Trump tweeted that the U.S. Centers for Disease Control and Prevention were concealing the life-threatening dangers that Ebola posed to America and called on President Obama to resign for his failure to protect the nation through an African travel ban.⁷⁸ Trump blamed state governments for negligence in the face of this imminent disaster. He tweeted further that: “All the governors are already backing off of the

71. Amara Konneh, *Liberia: Spike in Coronavirus Cases Underscores Liberia Challenges*, ALLAFRICA (Apr. 2, 2020), <https://allafrica.com/stories/202004020278.html> (last visited Sept. 19, 2021).

72. Sunday Oluwafemi Oyeyemi, Elia Gabarron & Rolf Wynn, *Ebola, Twitter, and misinformation: A dangerous combination?* BMJ CLINICAL RSCH. (Oct. 14, 2014), https://www.researchgate.net/publication/266949228_Ebola_Twitter_and_misinformation_A_dangerous_combination (last visited Sept. 19, 2021).

73. Idayat Hassan, *The other COVID-19 pandemic: Fake News*, AFRICAN ARGUMENTS (Mar. 26, 2020), <https://africanarguments.org/2020/03/26/the-other-covid-19-pandemic-fake-news/> (last visited Sept. 19, 2021).

74. *Id.*

75. *See generally*, David Uberti, *The Medium and the Message of Ebola*, THE LANCET (Nov. 8, 2014), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)62016-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)62016-X/fulltext) (last visited Sept. 19, 2021) (discussing experts’ fears about communication of false health solutions).

76. Eric Boehlert, *The Press Crucified Obama for Ebola, Gives Trump a Pass for Coronavirus*, PRESS RUN (Feb. 26, 2020), <https://pressrun.media/p/the-press-crucified-obama-for-ebola> (last visited Sept. 19, 2021) (alterations in original).

77. *Id.*

78. Aaron Rugar, *Trump is Facing a Coronavirus Threat. Let’s Look at How He Talked About Ebola*, VOX (Feb. 26, 2020), <https://www.vox.com/2020/2/26/21154253/trump-ebola-tweets-coronavirus> (last visited Sept. 19, 2021).

Ebola quarantines. Bad decision that will lead to more mayhem.”⁷⁹ Numerous other online voices amplified Trump’s tweets, thus creating the U.S.’s first social media driven infodemic:

[R]umors that the disease has been brought to the United States have spread to right-wing conspiracy sites. Twitter posts and stories on websites such as Gateway Pundit and Breitbart have claimed several cases of the Ebola virus have been confirmed in Laredo, Texas, brought in by a surge of migrants from the Democratic Republic of the Congo.⁸⁰

Observers see parallels between the Ebola infodemic and widespread United States resistance to combating the spread of COVID-19 through social distancing: “Like Ebola, some Americans still do not believe in the existence or severity of COVID-19, the disease caused by the coronavirus. Disinformation campaigns chalk it up to a variation of the flu.”⁸¹

2. *The Anti-Measles Vaccine Movement of 2017*

We were preschoolers in 1952, at the height of the polio epidemic, which “peaked at 57,879 [cases], resulting in 3,145 deaths.”⁸² Pictures of young victims who were permanently confined inside iron lungs spread terror among children and their parents. For our generation, the polio virus, like today’s COVID-19, struck without warning without any firm knowledge of how it was transmitted or what caused it.⁸³ “There were wild theories that the virus spread from imported bananas or stray cats. There was no known cure or vaccine.”⁸⁴ Unlike the COVID-19 virus, this fabricated information did not spread virally because this was more than forty years before the development of the World Wide Web. However,

79. Donald Trump (@TheRealDonaldTrump), TWITTER (Oct. 28, 2014), <https://twitter.com/realDonaldTrump/status/527110542008549376> (noting that President Trump was recently banned from Twitter and therefore his Twitter account is no longer active).

80. Reid Wilson, *Ebola Outbreak in Africa Spreads Fake News in America*, HILL (June 12, 2019), <https://thehill.com/policy/international/448197-ebola-outbreak-in-africa-spreads-fake-news-in-america> (last visited Sept. 19, 2021) (alteration in original).

81. Lara Salahi, *I Studied the 2014 Ebola Outbreak. Here’s the Lesson We Didn’t Learn.*, HUFFPOST (May 1, 2020), https://www.huffpost.com/entry/covid-19-response-lessons-from-ebola_n_5ea85d68c5b6f62665e395c8 (last visited Sept. 19, 2021).

82. Carl Kurlander, *The Deadly Polio Epidemic and Why It Matters for Coronavirus*, DISCOVER (Apr. 2, 2020), <https://www.discovermagazine.com/health/the-deadly-polio-epidemic-and-why-it-matters-for-coronavirus> (last visited Sept. 19, 2021) (alterations in original) (“In 1952, the number of polio cases in the U.S. peaked at 57,879, resulting in 3,145 deaths. Those who survived this highly infectious disease could end up with some form of paralysis, forcing them to use crutches, wheelchairs or to be put into an iron lung, a large tank respirator that would pull air in and out of the lungs, allowing them to breathe.”).

83. *Id.*

84. *Id.*

“a public opinion poll showed that the fear of polio ran second only to the fear of nuclear megadeath.”⁸⁵

Historically, U.S. medical scientists were held in high esteem. During the 1950s, Jonas Salk, the inventor of the “killed virus” vaccine for polio, was an overnight celebrity. “But everyone knew and understood what Jonas Salk had done with the vaccine for paralytic poliomyelitis that bears his name, and everyone loved him for it unreservedly, with the exception of a good many other scientists, who were grossly outnumbered by the adoring multitude.”⁸⁶ “[Salk’s] name was painted in shop windows; he received medals, honorary degrees, and even the offer of a ticker tape parade.”⁸⁷ Very few Americans questioned the enormous desirability of being vaccinated as quickly as possible. “The polio vaccine created by Jonas Salk is one [of] the most medically and culturally-significant breakthroughs of the twentieth century.”⁸⁸ Today, more critical attitudes toward Western medicine, science, and authority in general, have resulted in greater skepticism about the opinions of credentialed experts.

Social media is the chief disseminator of anti-vaccination misinformation. On contemporary social media, “beliefs that vaccines cause more harm than benefits to the health of the children who receive them” are trumpeted and reinforced by celebrities claiming that vaccines cause autism.⁸⁹ Jenny McCarthy, a high profile “anti-vaxxer in Hollywood . . . has a son who was diagnosed with autism when he was two-and-a-half and has been a vocal advocate for her belief that his diagnosis is attributable to the MMR vaccine.”⁹⁰ Jim Carrey “has also

85. Algis Valiunas, *Jonas Salk, the People’s Scientist*, NEW ATLANTIS (Summer/Fall 2018), <https://www.thenewatlantis.com/publications/jonas-salk-the-peoples-scientist> (last visited Sept. 19, 2021).

86. *Id.*

87. Rohanan Hussain, *Jonas Salk: Hero from History*, DIAMOND, <https://www.diamond.ac.uk/Home/News/LatestFeatures/28-10-14.html> (last visited Apr. 24, 2021) (alterations in original).

88. *Id.* (alterations in original).

89. Azhar Hussain, Syed Ali, Madiha Ahmed & Sheharyar Hussain, *The Anti-vaccination Movement: A Regression in Modern Medicine*, CUREUS (Jul. 3, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6122668/> (last visited Sept. 19, 2021).

Voices such as Jenny McCarthy’s have proven to be influential, sweeping fear and distrust into parents’ minds by parading as “autism experts.” Social media and television talk show hosts, such as Oprah Winfrey, played a big role in this miseducation by giving credence to the campaign. This has caused vaccination rates to sustain a surprising drop in some Western countries.

Id. at 1–2.

90. E.J. Dickson, *A Guide to 17 Anti-Vaccination Celebrities: Jessica Biel Isn’t the Only Celebrity to Publicly Come Out Against Vaccines*, ROLLING STONE (June 14, 2019), <https://www.rollingstone.com/culture/culture-features/celebrities-anti-vaxxers-jessica-biel-847779/> (last visited Sept. 19, 2021).

blasted Gov. Jerry Brown, calling him a ‘fascist’ in 2015 for signing a law mandating vaccines for all school-aged children regardless of their parents’ religious’ beliefs.”⁹¹ Rapper Khalifa has become a “central node in the circulation of conspiracy theories on Twitter.”⁹²

“A conspiracy theory [blaming] 5G technology [for] the outbreak of the coronavirus is quickly gaining momentum,” as celebrities promote false medical information.⁹³ Actor Woody Harrelson shared a series of Instagram posts, available to his more than two million followers, linking COVID-19 with 5G cellular networks.⁹⁴ Professional boxer Amir Khan stated on Instagram “that coronavirus was man-made and ‘put there . . . while they test 5G’ and Dancing On Ice judge Jason Gardiner posted several tweets last week that encouraged followers to sign petitions halting the roll-out of 5G.”⁹⁵

Recently, a former “small-time actor . . . peddl[ed] a fake [coronavirus] cure to millions of his social media followers . . . [while fraudulently soliciting investors].”⁹⁶ Videos posted to the actor’s 2.4 million Instagram followers displayed nondescript white pills and a liquefied injection, claiming they would:

[O]ffer immunity and a cure, respectively. The self-described “Genius Entrepreneur” frequently accused Democrats, the media and federal and world health officials of creating mass hysteria as a ploy to hurt President Trump. And at one point, he claimed his drugs had the support of a doctor with the Trump Administration.⁹⁷

91. *Id.*

92. Isobel Cockerell, *Meet the Celebrities Pushing 5G Coronavirus Conspiracies to Millions of Fans*, CODA (Apr. 14, 2020), <https://www.codastory.com/waronscience/celebrities-5g-conspiracies/> (last visited Sept. 19, 2021).

93. Ryan Gallagher, *5G Virus Conspiracy Theory Fueled by Coordinated Effort*, BLOOMBERG (Apr. 10, 2020), <https://www.bloomberg.com/news/articles/2020-04-09/covid-19-link-to-5g-technology-fueled-by-coordinated-effort> (last visited Sept. 19, 2021) (alterations in original).

94. *Id.*

95. Sarah Manavis, *How Celebrities Became the Biggest Peddlers of 5G Coronavirus Conspiracy Theories*, NEW STATESMAN (Apr. 6, 2020), <https://www.newstatesman.com/science-tech/social-media/2020/04/how-celebrities-became-biggest-peddlers-5g-conspiracy-theory-coronavirus-covid-19> (last visited Sept. 19, 2021).

96. Meagan Flynn, *Small-Time Actor Peddled Fake Coronavirus Cure to Millions Online, Feds Charge in First Covid-19 Prosecution*, WASH. POST (Mar. 26, 2020), <https://www.washingtonpost.com/nation/2020/03/26/fake-coronavirus-cure-fraud/> (last visited Sept. 19, 2021) (alterations and omissions in original).

97. *Id.* (alteration in original).

Jessica Biel, *7th Heaven* star and Justin Timberlake's wife, took to Instagram, lobbying against a proposed California state vaccine bill.⁹⁸ Biel's statements were questioned in a fierce exchange on social media "where those against and those in favor of vaccines clashed—far from the first time such issues were aired loudly and publicly."⁹⁹ These celebrities have no scientific training, yet their opinions are often believed over establishment figures, which reflects a larger cultural aversion to scientific expertise:

[I]n the 1970s, alternative-health movements "repositioned expertise as residing within the individual." This ethos has grown dramatically in the internet age, so much so that "in arenas as diverse as medicine, mental health, law, education, business, and food, self-help or do-it-yourself movements encourage individuals to reject expert advice or follow it selectively."¹⁰⁰

The COVID-19 epidemic is accompanied by an infodemic, which "like a virus itself, can be easily transmitted from person to person, carried by both the unwitting and the devious and spreading almost invisibly through a vast virtual world."¹⁰¹ "The spread of misinformation is nothing new. What has changed over time is the volume of misinformation and its rate of transmission. The Internet, and social media in particular, is typically cited as the reason for the rise and acceleration of misinformation and 'fake news.'"¹⁰² The COVID-19 viral propaganda campaign spread on the Internet has similarities with sexually transmitted diseases in that "VD [viral disinformation] spreads easily from person to person and both are bad for you."¹⁰³ A 2019 survey of nearly 2,500 Americans concluded that:

98. Martha Ross, *After Critics Say Jessica Biel 'Wants to Bring Measles Back,' Actress Defends Lobbying Against Vaccination Bill*, MERCURY NEWS (last updated June 13, 2019, 8:51 AM), <https://www.mercurynews.com/2019/06/13/jessica-biel-defends-lobbying-in-sacramento-against-vaccination-legislation-critics-say-she-wants-to-bring-measles-back/> (last visited Sept. 19, 2021).

99. Katherine J. Igoe, *Establishing the Truth: Vaccines, Social Media, and the Spread of Misinformation*, HARV. SCH. OF PUB. HEALTH (July 10, 2019), <https://www.hsph.harvard.edu/ecpe/vaccines-social-media-spread-misinformation/> (last visited Sept. 19, 2021).

100. Peter Beinart, *What the Measles Epidemic Really Says About America*, ATLANTIC (Aug. 2019), <https://www.theatlantic.com/magazine/archive/2019/08/measles-as-metaphor/592756/> (last visited Sept. 19, 2021) (alteration in original).

101. Richtel, *supra* note 7.

102. Josh Reisberg, *How to Protect IP Against COVID-19 Scammers Leveraging Social Media Algorithms to Legitimize Fake Products*, 36 No. 11 WESTLAW J. INTELL. PROP. 03 (Nov. 18, 2020).

103. Erik Sass, *Don't Get VD (Viral Information)*, ECON. STANDARD (Mar. 31, 2020, 10:21 AM), <https://theeconomicstandard.com/dont-get-vd-viral-disinformation/> (last visited Sept. 19, 2021) (quoting Kathleen Hall Jamieson of the University of Pennsylvania's Annenberg School of Communication) (alteration in original).

As a person's reported exposure to measles and MMR-related content *on social media* increased, so too did that individual's level of vaccine misinformation. By contrast, as exposure to measles and MMR vaccine content *in traditional media* increased, one's level of misinformation tended to decrease.¹⁰⁴

Medical experts criticize anti-vaccination postings as containing “[m]isleading and downright false information (about vaccine safety) that has been repeatedly disproved, from obscure, non-credible online sources [that] is spread across the internet to prey on people's fear and ignorance.”¹⁰⁵ Resistance to vaccinations is a huge concern for U.S. pediatricians particularly because of the “now-debunked theory that the measles-mumps-rubella vaccine is linked to autism.”¹⁰⁶ In 2007, Donald Trump propagated this theory:

When I was growing up, autism wasn't really a factor . . . And now all of a sudden, it's an epidemic. Everybody has their theory. My theory, and I study it because I have young children, my theory is the shots. We've giving these massive injections at one time, and I really think it does something to the children.¹⁰⁷

The anti-vaccination movement led to worldwide outbreaks of measles, which previously had been declared eliminated in the United States.¹⁰⁸ These new outbreaks were “fueled in part by misinformation,

104. Dominik Andrzej Stecula, Ozan Kuru & Kathleen Hall Jamieson, *How Trust in Experts and Media Use Affect Acceptance of Common Anti-Vaccination Claims*, HARV. KENNEDY SCH. MISINFORMATION REV. (Jan. 14, 2020), <https://misinforeview.hks.harvard.edu/article/users-of-social-media-more-likely-to-be-misinformed-about-vaccines/> (emphasis in original).

We found that a relatively high number of individuals are at least somewhat misinformed about vaccines: 18% of our respondents mistakenly state that it is very or somewhat accurate to say that vaccines cause autism, 15% mistakenly agree that it is very or somewhat accurate to say that vaccines are full of toxins, 20% wrongly report that it is very or somewhat accurate to say it makes no difference whether parents choose to delay or spread out vaccines instead of relying on the official CDC vaccine schedule, and 19% incorrectly hold that it is very or somewhat accurate to say that it is better to develop immunity by getting the disease than by vaccination.

Id.

105. Bill Roth, *Don't Let Anti-Vaxxers Keep Winning in N.J.; Atlantic City Leadership Needs a Shakeup*, NJ.COM (Jan. 21, 2020), <https://www.nj.com/opinion/2020/01/dont-let-anti-vaxxers-keep-winning-in-nj-atlantic-city-leadership-needs-a-shakeup-letters.html> (last visited Sept. 19, 2021) (alterations in original).

106. Helena Oliviero & Kristal Dixon, *Cobb Student with Measles May Have Spread to Others Unvaccinated*, ATLANTA J. CONST. (Nov. 12, 2020), <https://www.ajc.com/news/cobb-student-with-measles-may-have-spread-others-unvaccinated/g2Q75hd3fnn0UZzwNr9xUK/>.

107. Josh Hafenbrack, *Trump: Autism Linked to Child Vaccinations*, SUN SENTINEL (Dec. 28, 2007), https://www.sun-sentinel.com/sfl-mtblog-2007-12-trump_autism_linked_to_child_v-story.html (last visited Sept. 19, 2021).

108. Helen Branswell, *'They Have to Get the Shots': Trump, Once a Vaccine Skeptic, Changes His Tune Amid Measles Outbreaks*, STAT (Apr. 26, 2019),

poor health services, and conflict.”¹⁰⁹ In 2018, the viral disinformation campaign against vaccination safety enabled measles outbreaks in ninety-eight countries.¹¹⁰ Russia experienced a thirteen-fold increase in measles from 2017.¹¹¹ The World Health Organization (WHO) “declared vaccine misinformation—and consequent declines in vaccination rates—as a top health threat.”¹¹² “In a warning over dangerously low vaccination levels and large outbreaks in several countries—spurred on by social media ‘misinformation campaigns’—the UN health agency insisted that anything less than 95 per cent coverage risked sparking an outbreak.”¹¹³

B. The Global War on Truth about COVID-19

False COVID-19 social media postings are causing needless infections and deaths. Secretary-General António Guterres characterized the COVID-19 infodemic as a “secondary disease,” observing that “[h]armful health advice and snake-oil solutions are proliferating.”¹¹⁴ On April 24, 2020, President Trump suggested that sunlight may stave off the coronavirus.¹¹⁵ Sunlight contains ultraviolet light and an excess of

<https://www.statnews.com/2019/04/26/trump-vaccinations-measles/> (last visited Sept. 19, 2021).

Dr. Matt Zahn, the chair of the Infectious Diseases Society of America’s public health committee . . . said there is a fear among public health officials that the ground is now shifting. Where in recent years U.S. measles numbers have been driven by one or two large outbreaks—among Amish communities in Ohio in 2014, Disneyland in 2015—this year there are multiple large outbreaks around the country.

Id.

109. *Roundup: How Infectious Diseases Complicate Emergency Response*, NEW HUMANITARIAN (Feb. 7, 2020), <https://www.thenewhumanitarian.org/news/2020/02/07/coronavirus-Ebola-polio-measles-cholera-nCoV-2019-infectious-diseases> (last visited Sept. 19, 2021).

110. Ashley Welch, “Alarming” Surge in Measles Cases in 98 Countries, UNICEF Says, CBS NEWS (Mar. 1, 2019), <https://www.cbsnews.com/news/measles-alarming-surge-in-outbreaks-in-98-countries/> (last visited Sept. 19, 2021).

111. *Measles Cases Jump 13-Fold in Russia in 2018*, MOSCOW TIMES (Aug. 24, 2018), <https://www.themoscowtimes.com/2018/08/24/measles-cases-jump-13-fold-russia-2018-a62659> (last visited Sept. 19, 2021).

112. David A. Broniatowski, Sandra C. Quinn, Mark Dredze & Amelia M. Jamison, *Vaccine Communication as Weaponized Identity Politics*, 110 AM. J. PUB. HEALTH 617, 617 (2020).

113. *Measles ‘Misinformation Campaigns’ Through Social Media, Fuel Rising Toll*, UN NEWS (Dec. 5, 2019), <https://news.un.org/en/story/2019/12/1052801> (last visited Sept. 19, 2021).

114. Bill Chappell, *U.N. Chief Targets ‘Dangerous Epidemic of Misinformation’ on Coronavirus*, NPR (Apr. 14, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/14/834287961/u-n-chief-targets-dangerous-epidemic-of-misinformation-on-coronavirus> (last visited Sept. 19, 2021) (alteration in original).

115. Daniel Dale, Nathan McDermott, Marshall Cohen, Maegan Vazquez, Em Steck & Sam Fossom, *Fact Check: Trump Dangerously Suggests Sunlight and Ingesting Disinfectants Could Help Cure Coronavirus*, CNN (Apr. 24, 2020),

it may lead to developing skin cancer such as melanoma.¹¹⁶ On the same day, the Food and Drug Administration issued a warning against the use of chloroquine and hydroxychloroquine as a home remedy to treat COVID-19, drugs which President Trump and his followers continue to advocate.¹¹⁷

President Trump, on May 18, 2020, announced at a press event that he is taking “one pill a day” of hydroxychloroquine, a drug that has not been proven to treat the virus and may cause heart problems.¹¹⁸ President Trump claims—without evidence—that “thousands and thousands of front-line workers” are ingesting the drug.¹¹⁹ In the United States, a man died, and his wife was hospitalized in critical condition, after ingesting aquarium cleaner that contained as an ingredient “chloroquine phosphate,” which is related to chloroquine, a drug also praised by the President along with hydroxychloroquine.¹²⁰

Other world leaders have made irresponsible claims about unscientific cures, such as the President of Serbia commenting that drinking vodka may help stop the virus.¹²¹ The Governor of Nairobi, Kenya stated publicly that “I think from the research it is believed that alcohol plays a very major role in killing the virus.”¹²² The Chinese government, through its National Health Commission, recommended that

<https://www.cnn.com/2020/04/23/politics/fact-check-coronavirus-briefing-april-23/index.html> (last visited Sept. 19, 2021).

116. *Id.*

117. Press Release, U.S. Food & Drug Admin., FDA Cautions Against Use of Hydroxychloroquine or Chloroquine for COVID-19 Outside of the Hospital Setting or a Clinical Trial Due to Risk of Heart Rhythm Problems (last updated July 1, 2020), <https://www.fda.gov/drugs/drug-safety-and-availability/fda-cautions-against-use-hydroxychloroquine-or-chloroquine-covid-19-outside-hospital-setting-or> (last visited Sept. 19, 2021).

118. Salvador Rizzo, *Trump’s Flimsy Attack on Vaccine Official Warning About Hydroxychloroquine*, WASH. POST (May 19, 2020), <https://www.washingtonpost.com/politics/2020/05/19/trumps-flimsy-attack-vaccine-official-warning-about-hydroxychloroquine/> (last visited Sept. 19, 2021).

119. Linda Qiu, *Trump’s Inaccurate Claims on Hydroxychloroquine*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/politics/trump-fact-check-hydroxychloroquine-coronavirus-.html> (last visited Sept. 19, 2021).

120. *Man Dies After Taking Chloroquine for Coronavirus*, WEBMD (Mar. 24, 2020), <https://www.webmd.com/lung/news/20200324/man-dies-after-taking-chloroquine-for-coronavirus> (last visited Sept. 19, 2021).

121. Mila Djurdevic & Andy Heil, *No Joke! Serbian President Makes Light of Coronavirus As One More Reason to Hit the Bottle*, RADIO FREE EUR. (March 4, 2020), <https://www.rferl.org/a/serbian-president-makes-light-of-coronavirus-as-one-more-reason-to-hit-the-bottle/30468925.html> (last visited Sept. 19, 2021).

122. Susan Brink, *When Public Figures Make Questionable Health Claims, Do People Listen?*, NPR (May 1, 2020), <https://www.npr.org/sections/goatsandsoda/2020/05/01/84781280.6/when-public-figures-make-questionable-health-claims-do-people-listen> (last visited Sept. 19, 2021).

COVID-19 be treated with a traditional remedy called *tan ri qing*, which is an injectable substance that contains bear bile.¹²³ In France, national health authorities issued a statement clarifying that using cocaine would not protect against COVID-19 after this theory circulated widely on Twitter.¹²⁴

A pandemic leaves “us all threatened and looking for information to make sense of the world,”¹²⁵ which is the perfect environment for spreading both misinformation and disinformation. An empirical study found “over 4,000 coronavirus-related domains—that is, they contain words like ‘corona’ or ‘covid’—have been registered since the beginning of 2020. Of those, 3 percent were considered malicious and another 5 percent were suspicious.”¹²⁶ False and misleading posts about COVID-19 on social media platforms¹²⁷ such as Facebook, Twitter, YouTube, and TikTok, included the following:

- “[A] false claim that ‘coronavirus is a human-made virus in the laboratory.’”
- “[S]ales of unproven ‘nonmedical immune boosters’ to help people ward off” COVID-19.”
- “Unfounded recommendations to prevent infection by taking vitamin C and avoiding spicy foods.”

123. *Id.*

124. Andy Gregory, *France Tells Citizens Cocaine Cannot Protect Against Coronavirus*, INDEP. (March 9, 2020), <https://www.independent.co.uk/news/world/europe/coronavirus-cocaine-france-government-warning-conspiracy-theories-disinformation-smurfs-a9389146.html> (last visited Sept. 19, 2021).

125. Charlie Warzel, *What We Pretend to Know About the Coronavirus Could Kill Us*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/opinion/sunday/coronavirus-fake-news.html?searchResultPosition=1> (last visited Sept. 19, 2021).

126. Sara Morrison, *Coronavirus Email Scams Are Trying to Cash in on Your Fear*, VOX: RECODE (Mar. 5, 2020), <https://www.vox.com/recode/2020/3/5/21164745/coronavirus-phishing-email-scams> (last visited Sept. 19, 2021).

127. Other fake COVID-19 claims include assertions that: “‘Oregon Oil Proves Effective Against Coronavirus,’ an unfounded claim . . . a hoax stating that the U.S. government had created and patented a vaccine for coronavirus years ago, shared with nearly 5,000 Facebook users . . . a false claim that ‘coronavirus is a human-made virus in the laboratory . . . sales of unproven ‘nonmedical immune boosters’ to help people ward off COVID-19.’” Robert H. Shmerling, *Be Careful Where You Get Your News About Coronavirus*, HARV. HEALTH PUB. (Feb. 1, 2020), <https://www.health.harvard.edu/blog/be-careful-where-you-get-your-news-about-coronavirus-2020020118801> (last visited Sept. 19, 2021). There have also been unfounded recommendations that taking vitamin C and avoiding spicy foods are effective preventive measures and a video touting diet modification such as avoiding cold drinks, milkshakes, or ice cream as safe and effective protections from the infection. *Id.* This video, which demonstrates the removal of a parasitic worm from a person’s lip, is many years old and has nothing to do with 2019-nCoV. *Id.*

- “Dangerous suggestions that drinking bleach and snorting cocaine can cure coronavirus infection.”
- A video with dangerous lies such as avoiding cold food and drinks prevents coronavirus infection.¹²⁸

The Digital Business Solutions Manager for the WHO states that false health information is “spreading faster than the virus.”¹²⁹ The WHO’s website includes a page titled “Coronavirus disease (COVID-19) advice for the public—Myth busters,” where various potentially dangerous COVID-19 assertions are refuted,¹³⁰ including claims that, (1) mosquitos can transmit COVID-19; (2) the virus cannot survive or spread in hot climates; or (3) cold weather, UV lamps, hand dryers, alcohol, or chlorine can kill COVID-19; and (4) taking a hot bath, receiving a pneumonia vaccine, rinsing your nostrils with saline, or eating garlic can prevent or inoculate against COVID-19.¹³¹

A forty minute “Facebook Live” video was live-streamed and posted (for later, non-live viewing) featuring a man boiling water with salt and citrus peels, while encouraging viewers to inhale the steam to treat COVID-19.¹³² A viral Twitter posting claimed that people who do not eat meat cannot contract COVID-19.¹³³ Numerous messages on Facebook, shared tens of thousands of times in February 2020, claimed that ginger can “cure” coronavirus infections if it is boiled and consumed on an empty stomach.¹³⁴ Another widely shared meme advises readers that gargling with warm salt water prevents COVID-19.¹³⁵ An example of a deceptive social media post reads:

128. *Id.*

129. Zoe Thomas, *WHO Says Fake Coronavirus Claims Causing ‘Infodemic’*, BBC (Feb. 13, 2020), <https://www.bbc.com/news/technology-51497800> (last visited Sept. 19, 2021).

130. *Coronavirus Disease (COVID-19) Advice for the Public: Myth Busters*, WHO (Mar. 3, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters> (last visited Sept. 19, 2021).

131. *Id.*

132. W.G. Dunlop, *Inhaling Steam Will Not Treat or Cure Novel Coronavirus Infection*, AGENCE FRANCE-PRESSE (Mar. 26, 2020), <https://web.archive.org/web/20200327172841/https://factcheck.afp.com/inhaling-steam-will-not-treat-or-cure-novel-coronavirus-infection> (last visited Sept. 19, 2021).

133. Vasudevan Mukunth, *‘No Meat, No Coronavirus’ Makes No Sense*, WIRE (Feb. 2, 2020) <https://thewire.in/health/meat-eating-2019-novel-coronavirus-wuhan-bats-proteins-cattle-climate-cow-vigilantism> (last visited Sept. 19, 2021).

134. *Doctors Refute Misleading Online Claim That Consuming Boiled Ginger Can Cure Novel Coronavirus Infections*, AGENCE FRANCE-PRESSE (Mar. 16, 2020), <https://factcheck.afp.com/doctors-refute-misleading-online-claim-consuming-boiled-ginger-can-cure-novel-coronavirus-infections> (last visited Sept. 19, 2021).

135. Jacey Fortin, *That ‘Miracle Cure’ You Saw on Facebook? It Won’t Stop the Coronavirus*, N.Y. TIMES, (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/health/coronavirus-cure-gargle-water.html> (last visited Sept. 19, 2021). “Corona virus before it reaches the lungs it remains in the throat for

Cure for coronavirus . . . In case you contract this . . . don't eat for 24 hours. And boil ginger and drink it like water but it has to be hot . . . You will drink it for 3 days continuously," and coronavirus is a virus that lives only in cold weather . . . It is unlikely they'll live in warm weather... Remember that all kinds of coronavirus only live in cold weather.¹³⁶

In reaction to this epidemic of online disinformation, Facebook, Google, Twitter, and other websites have been voluntarily "removing misinformation . . . and working with the World Health Organization and other government organizations to ensure that people got accurate information."¹³⁷

Since the 2016 election, Facebook has "invested billions to moderate content, drawn up new policies against misinformation and manipulated media, and hired tens of thousands of safety and security workers."¹³⁸ Facebook's remedial measures, however, "have not stopped people in private Facebook groups from linking to and sharing misinformation surrounding the virus."¹³⁹

In March 2020, America's leading technology firms issued a joint statement asking "other companies to join them in helping to combat 'fraud and misinformation' during the coronavirus pandemic,"¹⁴⁰ but even this coordinated campaign lags far behind the steady stream of online hoaxes, conspiracy theories, promotion of snake-oil medicines, and other systematic disinformation masquerading as objective truth.¹⁴¹

four days and at this time the person begins to cough and have throat pains. If he drinks water a lot and gargling with warm water & salt or vinegar eliminates the virus. Spread this information because you can save someone with this information." Leo Benedictus, *Drinking and Gargling Water Will Not Cure the New Coronavirus*, FULL FACT (Mar. 16, 2020), <https://fullfact.org/health/gargle-salt-vinegar-water-coronavirus> (last visited Sept. 19, 2021).

136. AGENCE FRANCE-PRESSE, *supra* note 135.

137. Sheera Frenkel, Davey Alba, & Raymond Zhong, *Surge of Virus Misinformation Stumps Facebook and Twitter*, N.Y. TIMES (Mar. 8, 2020), <https://www.nytimes.com/2020/03/08/technology/coronavirus-misinformation-social-media.html> (last visited Sept. 19, 2021).

138. Kevin Roose, Sheera Frenkel & Nicole Perlroth, *Tech Giants Prepared for 2016-Style Meddling. But the Threat Has Changed*, N.Y. TIMES (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/technology/facebook-google-twitter-november-election.html> (last visited Sept. 19, 2021).

139. Frenkel et al., *supra* note 138.

140. "Among the companies making the request: Google, Microsoft, Facebook, Twitter, Reddit, YouTube (owned by Google) and LinkedIn (owned by Microsoft)." Josh Rivera, *Amid Coronavirus, Google, Microsoft, Facebook, Twitter and Other Tech Companies Ask For Help to Fight 'Misinformation'*, USA TODAY (March 16, 2020), <https://www.usatoday.com/story/tech/2020/03/16/coronavirus-tech-google-microsoft-facebook-misinformation/5064880002> (last visited Sept. 19, 2021).

141. Kirstein Weir, *Why We Believe Alternative Facts: How Motivation, Identity and Ideology Combine to Undermine Human Judgment*, 48 AM. PSYCHOLOGY ASSOC. MONITOR

An empirical study found that, despite the efforts of the leading social networks to remove false COVID-19 claims, fifty-nine percent of the posts on Twitter rated as false by fact-checkers were never removed.¹⁴² “[O]n YouTube, 27% remain up, and on Facebook, 24% of false-rated content in our sample remains up without warning labels.”¹⁴³

Facebook is warning its users about posts containing fake news about COVID-19.¹⁴⁴ A lie that children hospitalized with COVID-19 in the United States and United Kingdom cannot be visited by their parents provides an example of a viral untruth that undermines public health by discouraging bringing sick children to medical facilities for testing or treatment. The meme warned that if the parents’ child gets the virus, the child will be taken to a hospital alone and placed in a room with people they do not know, while the parents will be at home unable to visit.¹⁴⁵ By the time Facebook removes a false meme, it has already gone viral around the globe.¹⁴⁶

As Facebook and other leading social media companies voluntarily disable false posts, conspiracy theorists post their disinformation on sites that either do not pre-screen for or that actively encourage illegal content. Disinformation websites are popular because they promote emotionally satisfying explanations and solutions for the COVID-19 lockdown, rather than presenting the more indeterminate scientific information that appears on more responsible websites. MeWe, a social media and networking site, for example has:

24 (2017), <https://www.apa.org/monitor/2017/05/alternative-facts> (last visited Sept. 19, 2021); see, e.g., Frenkel et al., *supra* note 138; Shmerling, *supra* note 128.

142. Brennen et al., *supra* note 65 (“There is significant variation from company to company, however. On Twitter, 59% of posts rated as false in our sample by fact-checkers remain up. On YouTube, 27% remain up, and on Facebook, 24% of false-rated content in our sample remains up without warning labels.”).

143. *Id.*

144. Mark Scott, *Facebook to Tell Millions of Users They’ve Seen ‘Fake News’ About Coronavirus*, POLITICO (Apr. 16, 2020), <https://www.politico.com/news/2020/04/16/facebook-fake-news-coronavirus-190054> (last visited Sept. 19, 2021).

145. “[I]f your child gets this virus their [sic] going to hospital alone in a van with people they don’t know to a room they don’t know to be with people they don’t know You will be at home without them in their time of need Think about it Stay in.’ It was shared on March 24 by a Facebook page called ‘This is England’ and was then shared by several other British Facebook pages before it began to circulate on American accounts . . . Many hospitals in the U.K. have eliminated patient visitation, except for children, who are allowed to have a parent or ‘care giver’ visit. Guidance is similar in the U.S., with details varying from state to state and hospital to hospital.” Saranac Hale Spencer, *Debunking False Stories: Meme Misleads on Hospital Visits to Children With COVID-19*, FACTCHECK.ORG (Mar. 27, 2020), <https://www.factcheck.org/2020/03/meme-misleads-on-hospital-visits-to-children-with-covid-19/> (last visited Sept. 19, 2021).

146. *Id.*

[F]aced criticism for hosting those who have been kicked off other networks, like conspiracy theorists and white supremacists. In groups on the platform, users criticize Facebook’s action against protest groups, rally against health experts and state governors, and organize protests with no mention of adhering to social-distancing guidelines.¹⁴⁷

C. Why Conspiracy Websites Thrive

During the COVID-19 pandemic, social media has been inundated with conspiracy theories, which “reject authoritative accounts of reality in favor of some plot involving a group of people with malevolent intent that is deliberately kept secret from the public.”¹⁴⁸ Demonstrably deceptive information about unproven causes and bogus cures for COVID-19 find a receptive audience online. Pandemics engender anxiety, which, in turn, bring about a powerful psychological predisposition to seek out information that will allow the recipient to gain a feeling of control and a sense of security.¹⁴⁹ A study of the “prevalence and correlates of beliefs in two conspiracy theories about COVID-19” concluded that: “29% of respondents agree that the threat of COVID-19 has been exaggerated to damage President Trump; 31% agree that the virus was purposefully created and spread.”¹⁵⁰ The survey of conspiracy

147. Paige Leskin, *Anti-Quarantine Protestors Are Being Kicked Off Facebook and Quickly Finding Refuge On A Site Loved By Conspiracy Theorists*, BUS. INSIDER (May 3, 2020), <http://businessinsider.com/anti-quarantine-protestors-mewe-facebook-groups-conspiracy-theorists-social-media-2020-5> (last visited Sept. 19, 2021).

More than 20 MeWe groups against state shelter-in-place orders have popped in the last week, Business Insider has found. Inside these groups, members rail against Facebook for censoring their movement and mock the state governors and health experts who talk about the dangers of re-opening the economy too quickly. And members of these MeWe groups are in recruitment mode, flooding feeds with urgent calls for members to invite everyone they know in anticipation of other platforms taking down protest content. It’s a sign of the difficulties officials face in regulating behavior during a pandemic. For all of one social media site’s adherence to guidelines, another can ignore or dismiss them. Indeed, many of the groups on MeWe explicitly oppose states’ orders.

Id.

148. Joe Pierre, *Why Do Conspiracy Theories Flourish During a Crisis? And What Can Be Done To Counter Them?*, PSYCHOLOGY TODAY (May 8, 2020), <https://www.psychologytoday.com/us/blog/psych-unseen/202005/why-do-conspiracy-theories-flourish-during-crisis> (last visited Sept. 19, 2021).

149. Karen M. Douglas, Robbie M. Sutton, & Aleksandra Cichocka, *The Psychology of Conspiracy Theories*, 26 CURRENT DIRECTION PSYCHOLOGY. SCI. 538, 539 (2017).

150. Joseph Usensky et al., *Why do People Believe COVID-19 Conspiracy Theories?*, HARV. KENNEDY SCH. MISINFORMATION REV. (Apr. 28, 2021), <https://misinfoforeview.hks.harvard.edu/article/why-do-people-believe-covid-19-conspiracy-theories/> (last visited Sept. 19, 2021).

theories found a relationship between the denial and distrust of science with political beliefs:

[T]he psychological predisposition to reject expert, authoritative information (denialism), the tendency to view major social and political events as the product of conspiracies (conspiracy thinking), and partisan motivations are the strongest explanatory factors behind COVID-19 conspiracy beliefs. Because two of these factors—conspiracy thinking and denialism—are founded in a deep distrust of experts and authority figures (e.g., scientists, political leaders), correction of misinformed and conspiratorial beliefs among individuals who exhibit high levels of conspiracy thinking and denialism is likely to be difficult. Conspiracy theorists and denialists are simply unlikely to accept corrective information coming from experts. This link between conspiracy thinking and misinformation has been highlighted as a potential reason for the observed failure of corrective strategies in several health-related cases.¹⁵¹

Adopting conspiracy theories improves self-esteem because insecure individuals can view themselves as having inside knowledge versus the uniformed general public.¹⁵²

Mental shortcuts are commonly used by conspiracy theorists to understand events in the world, which leads them to embrace unproven theories and falsehoods.¹⁵³ The “Truly False Consensus Effect,” for example, “occurs when individuals believe that others share their beliefs, even after they have objective, statistical information that contradicts that belief.”¹⁵⁴ Viewing the same medical misinformation frequently posted on Facebook and other social media leads those who habitually visit similar groups of online “echo chambers” to accept it as truth. This misperception of consensus undermines the science-based advice of doctors and other health care professionals about COVID-19 and other diseases. False consensus is reinforced by “Confirmation Bias” and

151. *Id.* (internal citations omitted).

152. Douglas et al., *supra* note 150, at 540.

153. “People use cognitive shortcuts—largely unconscious rules-of-thumb to make decisions faster—to determine what they should believe. And people experiencing anxiety or a sense of disorder, those who crave cognitive closure, may be even more reliant on those cognitive shortcuts to make sense of the world.” Jillian Kramer, *Why People Latch on to Conspiracy Theories, According to Science*, NATIONAL GEOGRAPHIC (Jan. 8, 2021), <https://www.nationalgeographic.com/science/article/why-people-latch-on-to-conspiracy-theories-according-to-science> (last visited Sept. 19, 2021) (quoting Marta Marchlewska, a social and political psychologist who studies conspiracy theories at the Polish Academy of Sciences); See also, David B. Feldman, *Why Do People Believe Things That Aren't True?*, PSYCHOLOGY TODAY (May, 12, 2017), <https://www.psychologytoday.com/us/blog/supersurvivors/201705/why-do-people-believe-things-aren-t-true> (last visited Sept. 19, 2021).

154. THOMAS HEINZEN & WIND GOODFRIEND, SOCIAL PSYCHOLOGY 156 (1st ed. 2019).

“Cognitive Dissonance,” which are well-established psychological concepts explaining why we seek out information that supports what we already believe and reject evidence that contradicts our existing opinions.¹⁵⁵

The “Illusionary Truth Effect” leads to the acceptance of information as valid, even if it comes from problematic sources:

The illusory truth effect, also known as the illusion of truth, describes how, when we hear the same false information repeated again and again, we often come to believe it is true. Troublingly, this even happens when people should know better—that is, when people initially know that the misinformation is false.¹⁵⁶

“Constant repetition reinforces neural circuits, enhances memorability and encourages acceptance of the frame.”¹⁵⁷ “Denialism” is a person’s choice to deny reality in order to avoid a psychologically uncomfortable truth. Medical information is likely to be denied when it makes people feel vulnerable.¹⁵⁸ “[T]here are reasons for growing alarm about the disbelief of scientific findings across a wide range of professional domains because it seems to reflect a much broader drop in the credibility of academics and scientists.”¹⁵⁹

D. The Danger of the False Public Health Information Echo Chamber

Baseless COVID-19 claims that the disease can be cured “by Lysol, oregano oil, or, worse yet, gargling with bleach,” will inevitably lead to needless infections and the deaths of those who rely upon this dangerously false advice.¹⁶⁰ The perilous suggestion that a toxic bleach is a miracle cure for COVID-19 was posted on the encrypted app Telegram “after being ousted from platforms like YouTube and

155. Feldman, *supra* note 154.

156. *Why do we believe misinformation more easily when it’s repeated many times?*, DECISION LAB, <https://thedecisionlab.com/biases/illusory-truth-effect/> (last visited Apr. 24, 2021).

157. MARSHALL SOULES, *MEDIA, PERSUASION AND PROPAGANDA* 15 (1st ed., 2015).

158. Keith Kahn-Harris, *Denialism: What Drives People To Deny The Truth*, GUARDIAN, (Aug. 3, 2018), <http://www.theguardian.com/news/2018/aug/03/denialism-what-drives-people-to-reject-the-truth> (last visited Sept. 19, 2021). More than two decades ago, Ditto and David F. Lopez compared study participants who received either favorable or unfavorable medical tests results. Weir, *supra* note 142, at 25. People who were told they’d tested positive for a (fictitious) enzyme linked to pancreatic disorders were more likely to rate the test as less accurate, cite more explanations to discount the results, and request a second opinion. *Id.*

159. Sara L. Rynes et al., *supra* note 56, at 2997.

160. Emma Grey Ellis, *Coronavirus Conspiracy Theories Are a Public Health Hazard*, WIRED (Mar. 27, 2020), <http://www.thewired.com/story/coronavirus-covid-19-misinformation-campaigns/> (last visited Sept. 19, 2021).

Facebook.”¹⁶¹ Government prosecutors have just begun to charge defendants with fraudulently marketing COVID-19 misinformation.¹⁶² Websites are criticized for not doing more to screen out harmful false information:

Social media platforms have a responsibility to at least be cognizant of what’s going viral . . . These platforms are the front line of defense . . . whether [it’s] state actors or domestic spammers. They’re the ones hosting this content and they design the algorithms that amplify and push it out to people. There is . . . a degree of responsibility for the downstream harms from the content they amplify.¹⁶³

A Facebook posting, for example, instructs readers to sip water every fifteen minutes to prevent COVID-19 from reaching the lungs.¹⁶⁴ Facebook videos and other false social media postings claim that

161. Tom Porter, *Advocates of a Toxic Bleach Fake ‘Miracle Cure’ Are Telling Desperate People It Can Cure the Coronavirus in Thriving Groups on Telegram*, BUS. INSIDER (Apr 23, 2020), <https://www.businessinsider.com/mms-bleach-advocates-telegram-photos-child-injuries-2020-4> (last visited Sept. 19, 2021). “Chlorine dioxide is a type of toxic bleach, used to clean surfaces. The U.S. Food and Drug Administration warns that it can cause nausea, severe vomiting, diarrhea, and liver failure.” *Id.* Persons relying upon such fabricated postings may die or suffer catastrophic illness. *Id.*

162. Press Release, U.S. Dep’t of Just., *Florida Family Indicted for Selling Toxic Bleach as Fake “Miracle” Cure for Covid-19 and Other Serious Disease, and for Violating Court Orders* (Apr. 23, 2021), <https://www.justice.gov/usao-sdfl/pr/florida-family-indicted-selling-toxic-bleach-fake-miracle-cure-covid-19-and-other> (last visited Sept. 19, 2021).

A federal grand jury in Miami has returned an indictment charging a Florida man—Mark Grenon, 62—and his three sons—Jonathan Grenon, 34, Jordan Grenon, 26, and Joseph Grenon, 32—with fraudulently marketing and selling ‘Miracle Mineral Solution,’ a toxic industrial bleach, as a cure for COVID-19, cancer, Alzheimer’s, diabetes, autism, malaria, hepatitis, Parkinson’s, herpes, HIV/AIDS, and other serious medical conditions, and with defying federal court orders According to the indictment, the Grenons, all of Bradenton, Florida, manufactured, promoted, and sold a product they named Miracle Mineral Solution (‘MMS’). MMS is a chemical solution containing sodium chlorite and water which, when ingested orally, became chlorine dioxide, a powerful bleach typically used for industrial water treatment or bleaching textiles, pulp, and paper. The Grenons claimed that ingesting MMS could treat, prevent, and cure COVID-19, according to the charges. The FDA, however, had not approved MMS for treatment of COVID-19, or for any other use. Rather, in prior official warning statements, the FDA had strongly urged consumers not to purchase or use MMS for any reason, explaining that drinking MMS was the same as drinking bleach and could cause dangerous side effects, including severe vomiting, diarrhea, and life-threatening low blood pressure In fact, FDA received reports of people requiring hospitalizations, developing life-threatening conditions, and even dying after drinking MMS.

(internal citations omitted).

163. Renée DiResta, *Facts and Fakes: How Misinformation, Disinformation, and Hoaxes Impact Brands*, HARV. BUS. SCH. DIGIT. INITIATIVE (Apr. 24, 2020), <https://digital.hbs.edu/platforms-crowds/facts-and-fakes-how-misinformation-disinformation-and-hoaxes-impact-brands/> (last visited Sept. 19, 2021).

164. Fortin, *supra* note 136.

COVID-19 cannot survive temperatures 133 degrees, and that a hairdryer can both achieve 133 degrees and kill the virus.¹⁶⁵ The claim that “sticking a blow dryer in your face or sitting in a sauna and breathing in hot air would kill the coronavirus . . . is not [only] false, but potentially dangerous.”¹⁶⁶

A typical social media post claims that: “‘everyone is required to wear mask everywhere,’ because ‘COVID-19 . . . is confirmed as airborne and remain 8 hrs. in air!’”¹⁶⁷ Another false claim advises readers to: “[t]ake a deep breath and hold your breath for more than 10 seconds. If you complete it successfully without coughing, without discomfort, stiffness or tightness, etc., it proves there is no Fibrosis in the lungs, basically indicates no infection.”¹⁶⁸ Researchers at Carnegie Mellon University report that the spread of stories containing misinformation can “increase if these are rebroadcast by celebrities or news agencies.”¹⁶⁹

“A conspiracy theory that baselessly links 5G technology with the coronavirus has led to a series of arson attacks on cell phone towers in the UK.”¹⁷⁰ Postings by politicians, celebrities and other prominent public figures are responsible for producing or spreading twenty percent of false claims about coronavirus and sixty-nine percent of total social media engagement.¹⁷¹ What makes online public health hoaxes so insidious is that “too many people are trying to ‘help’ by sharing—or perhaps more accurately ‘over sharing’—by retweeting, reposting and even simply ‘liking’ tips and stories they find useful.”¹⁷²

165. *Id.*

166. Belthania Palma, *No, a Hair Dryer Won't Stop Coronavirus*, SNOPE (Mar. 17, 2020), <http://snopes.com/fact-check/hair-dryer-coronavirus/> (last visited Sept. 19, 2021).

167. Angelo Fichera, *Posts Distort Facts on Coronavirus Air Transmission, Masks*, FACTCHECK.ORG (Mar. 24, 2020), <https://www.factcheck.org/2020/03/posts-distort-facts-on-coronavirus-air-transmission-masks/> (last visited Sept. 19, 2021).

168. Angelo Fichera, *Viral Social Media Posts Offer False Coronavirus Tips*, FACTCHECK.ORG (Mar. 12, 2020), <https://factcheck.org/2020/03/viral-social-media-posts-offer-false-coronavirus-tips/> (last visited Sept. 19, 2021).

169. Peter Suci, *During COVID-19 Pandemic It Isn't Just Fake News But Seriously Bad Misinformation That Is Spreading On Social Media*, FORBES (Apr. 8, 2020), <https://www.forbes.com/sites/petersuci/2020/04/08/during-covid-19-pandemic-it-isnt-just-fake-news-but-seriously-bad-misinformation-that-is-spreading-on-social-media/#38ba4a6a7e55> (last visited Sept. 19, 2021).

170. Isobel Asher Hamilton, *77 Cell Phone Towers Have Been Set on Fire so Far Due to a Weird Coronavirus 5G Conspiracy Theory*, BUS. INSIDER (May 6, 2020), <https://www.businessinsider.com/77-phone-masts-fire-coronavirus-5g-conspiracy-theory-2020-5> (last visited Sept. 19, 2021).

171. Rachel E. Greenspan, *Celebrities, Politicians, and Influencers Are Largely Accountable for the Spread of False Coronavirus Information, According to a New Study*, INSIDER (Apr. 9, 2020), <http://www.insider.com/influencers-celebrities-are-spreading-coronavirus-misinformation-2020-43> (last visited Sept. 19, 2021).

172. Suci, *supra* note 170.

E. The Profit Motive & Viral Disinformation

Financial motives are behind many viral disinformation campaigns because conspiracy theories entice users to follow that link and read sensationalized postings. Advertisers pay websites according to the number of visitors, so “click bait” false news postings are a common method of boosting revenue.¹⁷³ Google, for example, earns substantial profits from disinformation.¹⁷⁴ “[T]he GDI (Global Disinformation Index)¹⁷⁵ shows that ad tech players, including Google, are serving up ads and providing ad revenue streams to known disinformation sites peddling coronavirus conspiracies.”¹⁷⁶ Of fifty websites posting coronavirus conspiracies, GDI “found Google provided ad services to 86% of these sites.”¹⁷⁷ “Amazon and Xandr (formerly AppNexus) . . . each served 20% and 18% of the sites in our sample, respectively.”¹⁷⁸ Researchers have

173. “Impression RPM is the amount of revenue paid per 1,000 impressions. It is a metric mainly used by Google AdSense, and tells you how much they will pay you for your ad impressions.” Justin Driskill, *What Does Impression RPM Mean?*, ONLINE ADVERT. GUIDE (June 7, 2017) <https://theonlineadvertisingguide.com/glossary/impression-rpm/> (last visited Sept. 19, 2021).

174. CAMPAIGN FOR ACCOUNTABILITY, HOW GOOGLE MAKES MILLIONS OFF OF FAKE NEWS: GOOGLE PLACES ADS ON FAKE NEWS WEBSITES DESPITE PROMISES TO REFORM 9, <https://campaignforaccountability.org/work/how-google-makes-millions-off-of-fake-news/> (last visited Apr. 24, 2021) (“Based on the sample data, we found that right-wing, extremist news sites contributed more traffic and generated potentially more revenue for Google relative to other news sites. This poses substantial challenges to advertisers and brand reputations. Extremist and hyper-partisan websites can qualify as news outlets, albeit fake news sites, like Breitbart and the Drudge Report”).

175. “The Global Disinformation Index (GDI) aims to disrupt, defund and down-rank disinformation sites. We collectively work with governments, business and civil society. We operate on three core principles of neutrality, independence and transparency. Neutrality: The GDI is non-political and non-partisan. Our Advisory Panel consists of international experts in disinformation, indices and technology. Our Technical Advisory Group provides best practice guidance for designing disinformation risk ratings that are unbiased, neutral and trusted. A Governing Board will be established to oversee our operations and accountability. Independence: The GDI is a not-for-profit organization based in the United Kingdom. Our funding comes from a range of sources including governments, philanthropies, and companies. No single funding source is to make up more than 33% of our total funding base. Transparency: Our research methodologies and findings are in the public domain to review, debate and discuss. Our index methodology and process for selecting sites to review are published. All of our funding sources are made public. Our list of funders will be continually updated online.” *About GDI*, GLOB. DISINFORMATION INDEX, <https://disinformationindex.org/about/> (last visited Sept. 19, 2021).

176. *Why is Ad Tech Funding These Ads on Coronavirus Conspiracy Sites?*, GLOB. DISINFORMATION INDEX: BLOG (Mar. 24, 2020), <https://disinformationindex.org/2020/03/why-is-ad-tech-funding-these-ads-on-coronavirus-conspiracy-sites/> (last visited Sept. 19, 2021).

177. *Id.*

178. *Id.*

suggested that websites alter their algorithms to give priority to authoritative sources rather than to lurid conspiracy websites.¹⁷⁹

II. THE BATTLE OVER REFORMING CDA SECTION 230

As Justice Oliver Wendell Holmes Jr. famously stated, “[i]n order to know what [the law] is, we must know what it has been, and what it tends to become.”¹⁸⁰ Part II of this article recounts the history of Section 230 of the Communications Decency Act (CDA Section 230) and how it evolved from a very limited immunity into an absolute civil liability shield for websites. CDA Section 230 has been extended “far beyond anything that plausibly could have been intended by Congress. Even so, the march of cases extending expansive immunity under § 230 proceeds with remarkable breadth.”¹⁸¹ Websites have come to exercise absolute power without responsibility, even when content posted by third party constitutes an ongoing tort or crime.

A. Congressional Purpose of CDA Section 230

1. The Pre-CDA Section 230 Split on Access Providers’ Liability

Before Congress enacted the CDA, courts were sharply divided on the question of whether access providers were liable for third party content on their services. In the mid-1990s, the most popular access providers were CompuServe, Prodigy, and America Online.¹⁸² The *Cubby, Inc. v. CompuServe, Inc.* court ruled that CompuServe, an early service provider,¹⁸³ was not liable for third party content posted on its online bulletin board because the service provider was merely a distributor, akin to a bookstore, library, or newsstand.¹⁸⁴

179. Mykola Makhortykh, Roberto Ulloa, & Aleksandra Urman, *How Search Engines Disseminate Information About COVID-19 and Why They Should Do Better*, HARV. KENNEDY SCH. MISINFORMATION REV. (May 11, 2020), <https://misinforeview.hks.harvard.edu/article/how-search-engines-disseminate-information-about-covid-19-and-why-they-should-do-better/> (last visited Sept. 19, 2021).

180. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (Boston, Massachusetts, Little Brown, 1881).

181. 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4:86 (2d ed. 2020).

182. Alina Selyukh, *The Big Internet Brands Of The '90s — Where Are They Now?*, NPR (July 25, 2016), <https://www.npr.org/sections/alltechconsidered/2016/07/25/487097344/the-big-internet-brands-of-the-90s-where-are-they-now> (last visited Sept. 19, 2021).

183. “Founded in 1969 as a computer time-sharing service, Columbus, Ohio-based CompuServe drove the initial emergence of the online service industry. In 1979, CompuServe became the first service to offer electronic mail capabilities and technical support to personal computer users.” *About CompuServe*, COMPU SERVE, <https://www.compuserve.com/home/about.jsp> (last visited Sept. 19, 2021).

184. 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹⁸⁵ a New York trial court reversed course, holding that online service providers could be held liable for the speech of their users. In *Prodigy Services*, an anonymous poster on Prodigy's Money Talk bulletin board made the following statements:

- (a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.;
- (b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud";
- (c) PORUSH was "soon to be proven criminal"; and,
- (d) STRATTON was a "cult of brokers who either lie for a living or get fired."¹⁸⁶

The plaintiffs filed suit against PRODIGY as well as the anonymous person who made the statements on the bulletin board.¹⁸⁷ The court concluded that Prodigy had become a "publisher" under state law because it voluntarily deleted some postings from its message boards "on the basis of offensiveness and 'bad taste,'" and therefore was liable for defamatory messages on its service that it failed to takedown.¹⁸⁸ Stratton Oakmont's fraudulent acts were profiled in the movie *The Wolf of Wall Street*.¹⁸⁹ When Congress enacted Section 230, its purpose was to overrule *Prodigy* and adopt the *Cubby* court's holding that distributors were not liable for third party content.¹⁹⁰

185. No. 94-31063, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. Nassau Cty. 1995).

186. *Id.* at *1-2.

187. *Id.* at *2.

188. *Id.* at *10.

189. Peter D. Hutcheon, *Rupture Rapture: Should the GameStop?*, NORRIS McLAUGHLIN P.A. ATT'YS AT L. (Feb. 2, 2021), <https://norrismclaughlin.com/blb/2021/02/02/should-the-gamestop/> (last visited Sept. 19, 2021) ("One of the most 'famous' of these 'boiler room' firms was Stratton Oakmont, whose co-founder, Jordan Belfort, turned his resulting criminal conviction into the basis for the Academy Award-nominated film, 'The Wolf of Wall Street.'").

190. "In passing section 230, Congress sought to spare interactive computer services this grim choice by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete. In other words, Congress sought to immunize the removal of user-generated content, not the creation of content: '[S]ection [230] provides 'Good Samaritan' protections from civil liability for providers . . . of an interactive computer service for actions to restrict . . . access to objectionable online material. One of the specific purposes of this section is to overrule Stratton Oakmont [sic] v. Prodigy and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material.'" Fair Hous. Council of San Fernando Valley v.

*B. How U.S. Courts Expanded CDA Section 230**1. Stretching the Liability Shield to Distributors*

Under the Communications Decency Act, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁹¹ A strict reading of Section 230 would seemingly restrict a website or service provider’s shield to publisher liability for defamation. Section 230(c) (1) only addresses whether interactive computer services should be treated as publishers, making no mention of distributor liability. Courts have long distinguished between primary publishers—i.e., newspapers or book publishers—and secondary publishers or distributors—i.e., bookstores, libraries, or newsstands—in common law defamation lawsuits.¹⁹²

Distributors traditionally encompass mere conduits such as “telegraph and telephone companies, libraries, and news vendors.”¹⁹³ Under the common law of defamation, distributors are not liable for content created by others unless they have knowledge of the defamatory content for materials distributed. A bookstore owner, for example, is not

Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (quoting H.R. Rep. No. 104-458, at 194 (1996)).

191. 47 U.S.C. § 230(c)(1) (2021).

192. Distributors include conduits such as “telegraph and telephone companies, libraries and news vendors.” DAN B. DOBBS, *THE LAW OF TORTS* § 402, at 1123 (2000). Distributors do not have liability for content created by others unless “the distributor knows or should know of the defamatory content in materials he distributes.” *Id.* A bookstore owner, for example, would not be liable for defamatory statements made in books the store sold absent actual knowledge. See Brian C. Lewis, *Note, Prevention of Computer Crime Amidst International Anarchy*, 41 AM. CRIM. L. REV. 1353, 1368 (2004). “ISPs and other distributors of information (e.g., bookstores) only assume liability when they acquire knowledge of the material they are handling.” *Id.* (citing § 230). The common law rule makes a distributor liable where it has knowledge of the facts and circumstances that are producing clearly libelous activity but takes no action to remove the material. See, e.g., *Lerman v. Chuckleberry Pub., Inc.*, 521 F. Supp. 228, 235 (S.D.N.Y. 1981) (“[D]istributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.”) (first citing *Balabanoff v. Fossani*, 192 Misc. 615, 615 (1948); then citing *Lewis v. Time, Inc.*, 83 F.R.D. 355, 463 (E.D. Cal. 1979); and then citing RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977)).

193. Jae Hong Lee, *Note, Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 471 (2004).

Traditional defamation law categorized information disseminators into three groups to which very different legal standards were applied to determine defamation liability related to third-party content: (1) publishers (e.g., newspapers) exercise great control over final content and were therefore subject to strict liability; (2) distributors (e.g., booksellers) merely distribute content and were therefore subject to liability only upon a showing of knowledge or negligence; and (3) common carriers (e.g., telephone companies) only transmit information with no control over content and were therefore not liable at all.

Id. See DOBBS, *supra* note 193, at 1123.

liable for defamatory statements if the store sold the books without actual knowledge of the statements.¹⁹⁴ Similarly, websites and other online defendants are not liable for the defamatory postings of third parties absent proof of knowledge or notice of the objectionable materials.¹⁹⁵

In *Zeran v. America Online*, the Fourth Circuit expanded CDA Section 230's liability shield to distributor liability, as well as publisher liability.¹⁹⁶ Courts across the United States have adopted the *Zeran* court's interpretation that CDA Section 230 bars a wide span of torts, not just defamation.¹⁹⁷ The *Zeran* court's reasoning that the CDA Section shields every tort action is now accepted dogma and "[t]he broad reach of the CDA to bar a panoply of torts is supported by other courts that have considered the CDA's reach."¹⁹⁸ After the *Zeran* decision, most U.S. federal appeals courts construe CDA Section 230 as shielding all Internet intermediaries from all tort liability so long as the content is created by third parties.¹⁹⁹

194. "Distributor liability is much more limited. Newsstands, bookstores, and libraries are generally not held liable for the content of the material that they distribute. The concern is that it would be impossible for distributors to read every publication before they sell or distribute it, and that as a result, distributors would engage in excessive self-censorship." *Immunity for Online Publishers Under the Communications Decency Act*, DIGITAL MEDIA LAW PROJECT (Jan. 22, 2021), <http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act> (last visited Sept. 19, 2021).

195. "The court's solution [in *Barrett v. Rosenthal*, 112 Cal. App. 4th 749, 781 (Cal. Ct. App. 2003)] was notice-based liability, where a web operator would be liable for a defamatory comment posted by a user if the operator refused to remove the comment after receiving notice of the defamation from the victim." Amanda Groover Hyland, *The Taming of the Internet: A New Approach Third-Party Internet Defamation*, 31 HASTINGS COMM'N & ENT. L.J. 79, 83 (2008).

196. 129 F.3d 327, 330 (4th Cir. 1997).

197. *Id.* at 330–31. The reasoning of *Zeran* is followed by many U.S. courts. "The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting *Zeran*, 129 F.3d at 330); see *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); see also *Green v. Am. Online, Inc.*, 318 F.3d 465, 470–71 (3d Cir. 2003); see also *Batzel v. Smith*, 333 F.3d 1018, 1029–30 (9th Cir. 2003); see also *Universal Comm'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); see also *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010). "[T]he broad reach of the CDA bars a panoply of torts is supported by other courts that have considered the CDA's reach." *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01-360 SVW (PJWx), 2011 U.S. Dist. LEXIS 145380, at *21 (C.D. Cal. May 4, 2011).

198. *Asia Econ. Inst.*, 2011 U.S. Dist. LEXIS 145380, at *21.

199. *Almeida*, 456 F.3d at 1321 (quoting *Zeran*, 129 F.3d at 330); *Universal Comm'n Sys., Inc.*, 478 F.3d at 419; *Green*, 318 F.3d at 470–71; *Ben Ezra, Weinstein & Co.*, 206 F.3d at 986.

2. *Expansion to All Internet Intermediaries*

The majority of federal circuits follow *Zeran* in interpreting CDA Section 230 as creating a broad “federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service.”²⁰⁰ The Ninth Circuit Court of Appeals states that “close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites.”²⁰¹ Courts are predisposed to expand CDA Section 230 to any Internet intermediary.²⁰² Websites now qualify for immunity if they allow “third parties to make posts regarding a product or service, regardless of whether the post is made anonymously or under a pseudonym.”²⁰³ As a result of the courts’ expansive interpretation of Section 230, “the prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others.”²⁰⁴ For example, courts are unanimous in holding that Twitter qualifies as an Interactive Computer Service (ICS).²⁰⁵

3. *Courts Have Expanded the Liability Shield to All Torts*

Courts have stretched CDA Section 230 to include a wide range of ICSs, such as “an online matchmaking service, a copy shop, an online bookseller, an online auction service, a public library, and an Internet user who created a chat room” and determined that they are all protected by

200. *See e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1179 (9th Cir. 2008) (en banc); “By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran*, 129 F.3d at 330.

201. *Roommates.com*, 521 F.3d at 1174. (Moreover, “fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.”) *Id.*

202. *Fed. Trade Comm’n v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (“Courts typically have held that internet service providers, website exchange systems, online message boards, and search engines fall within this definition.”).

203. *Roca Labs, Inc. v. Consumer Op. Corp.*, 140 F.Supp.3d 1311, 1318 (M.D. Fla. 2015) (citing *Regions Bank v. Kaplan*, No. 8:12-1837, 2013 U.S. Dist. LEXIS 40805, at *18 (M.D. Fla. Mar. 22, 2013) (stating “A ‘provider’ of an interactive computer service includes websites that host third-party generated content”)).

204. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009)).

205. Courts agree that Twitter qualifies as an interactive computer service. *See, e.g.*, *Dehen v. Doe*, No. 17-198, 2018 U.S. Dist. LEXIS 161220, at *9 (S.D. Cal. Sept. 19, 2018) (finding that “Twitter is an interactive computer service”); *see also* *Field v. Twitter, Inc.*, 200 F. Supp. 3d 964, 969 (N.D. Cal. 2016) (treating Twitter as an interactive computer service); *see also* *Frenken v. Hunter*, No. 17-02667, 2018 U.S. Dist. LEXIS 70571, at *5 (N.D. Cal. Apr. 26, 2018).

CDA Section 230's civil liability protections.²⁰⁶ Courts have interpreted Section 230 based on whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another.²⁰⁷ The tort liability shield only requires that "a different information content provider provided the information" to the interactive computer service claiming immunity.²⁰⁸ Table One lists emblematic federal court decisions that have stretched CDA Section 230 to diverse torts far beyond a publisher's liability for defamation.

Table One: Courts Expansion to CDA Section 230 to Diverse Torts

Types of Torts Shielded by CDA Section 230	Citation
Intentional Interference with Contract	<i>Holomaxx Techs. Corp. v. Microsoft Corp.</i> , No. 10-cv-04924, 2011 U.S. Dist. LEXIS 94316 (N.D. Cal. Aug. 23, 2011).
Defamation, Public Disclosure of Private Facts, Intentional Infliction of Emotional Distress	<i>S.C. v. Dirty World, LLC</i> , No. 11-CV-00392-DW, 2012 U.S. Dist. LEXIS 118297 (W.D. Mo. Mar. 12, 2012).

206. *Defamation: CDA Cases*, ELECTRONIC FRONTIER FOUND., https://ilt.eff.org/Defamation_CDA_Cases.html (last visited Apr. 24, 2021).

207. *See, e.g.*, *Smith v. Intercosmos Media Grp.*, No. 02-1964, 2002 U.S. Dist. LEXIS 24251, at *9–15 (E.D. La. Dec. 17, 2002) (denying relief for defamation, libel, or negligence based on allegedly defamatory websites set up by its customers); *see also* *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071–72 (D.S.D. 2001) (ruling provider was not liable for anonymous Internet user's disparaging remarks about the plaintiffs' software in chat room session where the plaintiffs were unable to determine identity of user because provider did not record identities of persons who rented its computers); *see also* *Marczeski v. Law*, 122 F. Supp. 2d 315, 326–28 (D. Conn. 2000) (holding the individual defendants who created chat room were immunized by 230); *see also*, *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 43 (Wash. Ct. App. 2001) (dismissing defamation lawsuit against Amazon.com for third party's posting of negative comments about author's book on site); *see also* *Doe v. GTE Corp.*, 347 F.3d 655, 659, 622 (7th Cir. 2003) (affirming dismissal of tort claim that web host aided and abetted sale of secretly obtained video tapes showing undressed athletes); *see also* *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000) (holding Internet access provider was immunized for providing access to misleading stock information).

208. *Roca Labs*, 140 F. Supp. 3d at 1319 (citing *Whitney Info. Network, Inc. v. Verio, Inc.*, No. 2:04-cv-462-FtM-29SPC, 2006 U.S. Dist. LEXIS 1424, at *5–6 (M.D. Fla. Jan. 11, 2006)).

Defamation; Defamation per se; False Light; Intentional Interference with Prospective Economic Relations; Negligent Interference with Prospective Economic Relations; and Negligent Interference with Economic Relations	<i>Asia Econ. Inst. v. Xcentric Ventures LLC</i> , No. CV-11-1426-PHX-GMS, 2011 U.S. Dist. LEXIS 114675, (C.D. Cal., Oct. 4, 2011).
Negligence; Gross Negligence; Negligent Misrepresentation; Fraud; and Premises Liability	<i>Doe v. MySpace, Inc.</i> , 528 F.3d 413, 416 (5th Cir. 2008).
Fraud	<i>Goddard v. Google, Inc.</i> , 640 F. Supp. 2d 1193, 1193 (N.D. Cal. 2009).
Negligence	<i>Gentry v. eBay, Inc.</i> , 99 Cal. App. 4th 816 (2002).
Strict Products Liability	<i>Oberdorf v. Amazon.com, Inc.</i> , No. 4:16-CV-01127, 2017 U.S. Dist. LEXIS 93705 (M.D. Pa., Dec. 21, 2017).
Public Nuisance	<i>Dart v. Craigslist</i> , 665 F. Supp. 2d 961 (N.D. Ill. 2009).

Federal courts have overextended CDA Section 230's liability shield to encompass any secondary liability for all torts, so long as the website is not the content-creator that originates with third parties.²⁰⁹ Table One reveals that U.S. courts have expanded CDA Section 230's liability shield to diverse torts far beyond publisher's liability for defamation to various tort actions including business torts, negligence, misrepresentation, strict products liability, and public nuisance. U.S. courts impose no takedown duty for content supplied by third parties even if it constitutes an ongoing tort or pattern of illegal activity.²¹⁰

209. Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 371 (2005) ("An activist judiciary, however, has radically expanded 230 by conferring immunity on distributors. Section 230(c)(1) has been interpreted to preclude all tort lawsuits against ISPs, websites, and search engines. Courts have . . . haphazardly lump[ed] together web hosts, websites, search engines, and content creators into this amorphous category.").

210. Providers have no duty to remove or take down content that constitutes an ongoing tort so long as they are not classifiable as a content creator. *See, e.g., Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148, 156-57 (2009) (ruling MySpace had no duty to remove fraudulent profile); *see also, Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 718 (2002) (ruling that CDA

4. CDA Section 230 Shields Deplorable Third-Party Postings

A. The First Amendment Protects False Information by Liars

The First Amendment of the U.S. Constitution allows for a free exchange of diverse political beliefs and associations.²¹¹ “As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²¹² The U.S. Supreme Court has stated: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²¹³ Justice Anthony Kennedy’s concurring opinion in *Vieth v. Jubelirer*,²¹⁴ described the “First Amendment interest of not burdening or penalizing citizens because of . . . their association with a political party, or their expression of political views.” Justice Kennedy stated that the best remedy for a “straight-out lie [is] the simple truth.”²¹⁵

The theory of the U.S. Constitution is that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²¹⁶ Content-based speech restrictions ordinarily are subjected to strict scrutiny as the standard of review,²¹⁷ which requires the government to prove that a restriction on speech furthers a compelling interest and is narrowly tailored to achieve that interest.²¹⁸ A law banning false information—and only false information—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. “This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”²¹⁹

Section 230 barred negligence claim arising out of eBay’s failure to takedown a fraudulent product description off its service).

211. *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

212. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)).

213. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

214. 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

215. *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

216. *List v. Driehaus*, No. 1:10-cv-720, 2013 U.S. Dist. LEXIS 10261, at *3 (S.D. Ohio., Jan. 25, 2013) (quoting *Alvarez*, 567 U.S. at 728).

217. *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

218. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (quoting *Ariz. Free Ent. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

219. *Alvarez*, 567 U.S. at 717.

The First Amendment does not apply to social media networks because they are not state actors.²²⁰ YouTube’s COVID-19 Medical Misinformation Policy states: “YouTube doesn’t allow content that spreads medical misinformation that contradicts local health authorities’ or the World Health Organization’s (WHO) medical information about COVID-19. This is limited to content that contradicts WHO or local health authorities’ guidance on: Treatment, Prevention, Diagnostic, Transmission”²²¹ Despite social media takedown efforts, the COVID-19 misinformation pandemic is a continuing social problem: “fraudulent and otherwise problematic COVID-19 related posts have managed to persist. We should expect that, as long as COVID-19 persists, social media content promoting scams, fakes, counterfeits, regulated pharmaceutical products and other false information about the pandemic will persist as well.”²²²

B. The First Amendment Gives Less Protection to False Information

The First Amendment, subject only to narrow and well-understood exceptions, does not permit governmental control over the content of messages expressed by private individuals.²²³ For example, “[o]nly certain types of narrowly defined speech are not afforded the full protections of the First Amendment, including ‘fighting words,’ i.e., those words that ‘have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.’”²²⁴ Table Two presents the ten traditional exceptions to the First Amendment.

220. See e.g., *Daniels v. Alphabet, Inc.*, No. 20-cv-04687-VKD, 2021 U.S. Dist. LEXIS 64385, at *13–14 (N.D. Calif., Mar. 31, 2021) (dismissing First Amendment and Section 1983 claims against social media site because there was no state action); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (“Facebook and Twitter are private businesses that do not become ‘state actors’ based solely on the provision of their social media networks to the public.”), *appeal filed*, No. 19-7030 (D.C. Cir. 2019); *Green v. YouTube, LLC*, No. 180cv-203-PB, 2019 U.S. Dist. LEXIS 55577, at *10 (D.N.H. Mar. 13, 2019) (stating there is no “state action giving rise to the alleged violations of [the plaintiff’s] First Amendment rights); *La’Tiejira v. Facebook, Inc.*, 272 F.Supp.3d 981, 991 (S.D. Tex. 2017) (observing that Facebook has a “First Amendment right to decide what to publish and what not to publish on its platform”).

221. *COVID-19 medical misinformation policy*, YOUTUBE HELP, <https://support.google.com/youtube/answer/9891785?hl=en> (last visited Apr. 24, 2021).

222. Reisberg, *supra* note 103.

223. *People v. Austin*, 155 N.E.3d 439, 454 (Ill. 2019) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994)).

224. *State v. Baccala*, 163 A.3d 1, 4 (Conn. 2017) (citing *Chaplinsky v. N.H.*, 315 U.S. 568, 573 (1942)).

Table Two: Traditional Categories of Expression Excluded²²⁵

Content-Based Exceptions to the First Amendment	Leading Case
Incitement of Imminent Lawless Action	<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969) (<i>per curiam</i>).
Obscenity	<i>Miller v. California</i> , 413 U.S. 15 (1973).
Limits on Liability for Defaming a Public Figure	<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).
Limits on Liability for Defaming a Private Figure	<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).
Speech Integral to Criminal Conduct	<i>Giboney v. Empire Storage & Ice Co.</i> , 336 U.S. 490 (1949).
“Fighting Words”	<i>Chaplinsky v. N.H.</i> , 315 U.S. 568 (1942).
Child Pornography	<i>N.Y. v. Ferber</i> , 458 U.S. 747 (1982).
Fraud	<i>Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976).
True Threats	<i>Watts v. U.S.</i> , 394 U.S. 705 (1969) (<i>per curiam</i>).
(10.) Speech Presenting Some Grave and Imminent Threat the Government has the Power to Prevent.	<i>Near v. Minn. ex rel. Olson</i> , 283 U.S. 697 (1931).

As Table Two reveals, the U.S. Supreme Court has only recognized ten traditional content-based restrictions on speech and has not recognized a new exception since 1982. “Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”²²⁶ The U.S. Supreme Court’s traditional exceptions are examples where the benefit is “clearly outweighed by the social interest in order and morality.”²²⁷ The exceptions to First Amendment protection are “certain well-defined and narrowly limited classes of speech, the prevention and

225. *Alvarez*, 567 U.S. at 717.

226. *Id.* at 718 (citing U.S. CONST. amend. I)

227. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942)).

punishment of which has never been thought to raise any Constitutional problem.”²²⁸

Each Court-recognized exception requires the plaintiff to prove that the speech deemed outside the First Amendment causes harm or is likely to bring about imminent harm.²²⁹ Each exception presents true harm or the potential of harm from the statements.²³⁰ “Obscenity . . .”, for example,

generally is not believed to inflict temporal (as distinct from spiritual) harm; or at least the evidence that it does is not generally considered as persuasive as the evidence that other speech that can be regulated on the basis of its content, such as threats of physical harm, conspiratorial communications, incitements, frauds, and libels and slanders, inflicts such harm.²³¹

While the Court has not formally recognized an exception for false statements causing specific harm, there are many examples where this exception is implied. Justice Kennedy notes that while common-law doctrines make “the utterance of certain kinds of false statements unlawful . . . they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims.”²³²

Statements blaming Chinese, Muslims, or a cabal of power-seeking Jews for the COVID-19 virus, however abhorrent, are protected speech

228. *Chaplinsky*, 315 U.S. at 571–72.

229. *See id.*

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

Id.

230. Among these categories are advocacy intended, and likely, to “incite imminent lawless action,” *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (obscenity); *Miller v. California*, 413 U.S. 15, 17 (1973) (defamation); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (providing substantial protection for speech about public figures); *Gertz v. Robert Welch*, 418 U.S. at 325 (imposing some limits on liability for defaming a private figure) (speech integral to criminal conduct); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491 (1949) (so-called “fighting words”); *Chaplinsky*, 315 U.S. at 572 (child pornography); *N.Y. v. Ferber*, 458 U.S. 747, 749 (1982) (fraud); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 749–50 (1976) (true threats); *Watts v. United States*, 394 U.S. 705, 705–06 (1969) (per curiam) (speech presenting some grave and imminent threat the government has the power to prevent); *Near v. Minn.*, 283 U.S. 697, 702–03 (1931). Although a restriction under the last category is most difficult to sustain, *see N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). These categories have a historical foundation in the Court’s free speech tradition. “The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.” *Alvarez*, 567 U.S. 709, 718.

231. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001).

232. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring).

and would not qualify as an exception. Similarly, statements claiming vaccines produce autism would be protected expression, even though there is a scientific consensus that this is untrue. During the recent flu epidemic, an article quoting “an anonymous physician at the Centers for Disease Control and Prevention warned that nearly all the people dying of the flu had one thing in common: They had gotten flu shots.”²³³ The Massachusetts General Hospital rectified the record:

None of this was true; the entire story, including the quotes, was fabricated. Yet that didn’t stop the piece from going viral on the internet, popping up on a variety of alternative-health and conspiracy-theory websites. The story was widely shared on Facebook, generating about 500,000 engagements in January alone—more than any story that week from the Wall Street Journal, NPR, ABC, CBS, CNN or Fox News. It also generated thousands of online comments, some fanning broader fears about vaccinations, with “anti-vax” campaigners writing to support the story’s claims and even purported incidents in which the flu shot itself caused paralysis or even death.²³⁴

Holding the website publishers of fake medical news accountable for the harm caused by Internet users who followed this dangerous disinformation would not violate the First Amendment. Assuming that the First Amendment speech protections can be overcome for fake medical news, government regulators and private litigants would still need to overcome the CDA Section 230 barrier, which is covered in the next part of the article.

5. Could President Trump Be Sued for Posting Dangerous COVID-19 Disinformation?

The civil justice system gives the victims of false information rights, but not meaningful remedies, for the harm they suffer by relying upon posted content on social media and other websites. Even in the absence of CDA Section 230, President Trump would not face liability for postings that advocate potentially dangerous cures of COVID-19. Those suffering specific harm from false public health information will generally not have recourse against public authorities or foreign government officials who spread this dangerous disinformation due to sovereign immunity.

233. Linda Keslar, *The Rise of Fake Medical News*, PROTO (June 18, 2018), <http://protomag.com/articles/rise-fake-medical-news> (last visited Sept. 19, 2021).

234. *Id.*

In the United States, the doctrine of sovereign immunity prohibits “a suit against an unconsenting sovereign for money damages”²³⁵ by prohibiting private party civil suits against “a sitting head of state.”²³⁶ The U.S. Supreme Court has held that U.S. Presidents “have broad immunity when it comes to their actions in office” in cases involving President Andrew Johnson and President Richard Nixon.²³⁷ For this reason, a lawsuit against President Trump for spreading false public health information, filed by injured plaintiffs, would be unsuccessful.²³⁸

Despite this immunity, President Trump is calling for changes in CDA Section 230. In May 2020, Trump issued an executive order limiting CDA Section 230’s liability shield for websites and online platforms that censor viewpoints.²³⁹ “The move came after Twitter appended fact checks to several of his tweets regarding voting by mail. The president has long feuded with big tech companies, arguing they are trying to “rig the election” against him and are “masquerading as neutral while suppressing content they disagree with.”²⁴⁰ In July 2020, the U.S. Commerce Department followed Trump’s lead by asking:

[T]he Federal Communications Commission to write a regulation weakening protections laid out in Section 230, . . . [This action by the Commerce Department fulfills part of] an executive order that President Donald Trump signed in May . . . [A]fter Twitter labeled several of his posts as potentially misleading. Trump cited Twitter, Google, Facebook “and perhaps others” and said online companies

235. Katherine Florey, *Sovereign Immunity’s Penumbra: Common Law, “Accident,” And Policy In The Development Of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 765 (2008).

236. Lewis S. Yelin, *Foreign State Immunity At Home and Abroad: Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT’L L. 911, 990 (2011).

237. Tal Kopan, *Trump Claims Immunity as President in Lawsuit*, CNN POLITICS (Apr. 18, 2017), <https://www.cnn.com/2017/04/17/politics/trump-immunity-lawsuits> (last visited Sept. 19, 2021).

238. “For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of ‘absolute immunity’ . . . our decisions also have extended absolute immunity to certain officials of the Executive Branch . . . [including] the President of the United States.” See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 764 (1982)).

239. See Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) (“It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.”) (citing 47 U.S.C. § 230(c)(2)(A) (2021)).

240. Anshu Siripurapu, *Trump’s Executive Order: What to Know About Section 230*, COUNCIL ON FOREIGN RELS. (June 7, 2020), <https://www.cfr.org/in-brief/trump-and-section-230-what-know> (last visited Sept. 19, 2021).

have “unchecked power to censor, restrict, edit, shape, hide” communications.²⁴¹

In Part III of this article, we present our own reform proposal to recognize notice-and-takedown by the direct victims of fake medical information does not diminish the beneficial impact of Section 230 in that it does not apply to content protected by the First Amendment. In contrast, fraudulent postings advertising snake oil cures for COVID-19 that cause harm to the public is not protectable expression. The dishonest sellers are enriched while the victims spend money for a useless, and possibly even dangerous, fake medical product. In general, the First Amendment does not prevent the government from regulating “fraudulent speech in order to prevent public or consumer deception.”²⁴² This part of the article explains that our CDA Section 230 notice-and-takedown exception for false public health information reform does not apply to opinions about the desirability of traditional folk-cures or other forms of alternative medicine.

Even conspiracy theories about the origin of the COVID-19 epidemic will generally receive First Amendment protection from laws requiring takedowns. As Justice William O. Douglas stated: “[r]estriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.”²⁴³ The proposals to downsize Section 230 by both Democrats and Republicans may violate the First Amendment’s protection of free expression on the Internet. Our narrower reform, in contrast to President Trump’s executive order, will survive legal challenges because it specifically targets speech that has no First Amendment protection.

241. Todd Shields, *Trump Advances Bid to Weaken Shield for Twitter, Facebook* (2), BLOOMBERG LAW (July 27, 2020), https://www.bloomberglaw.com/exp/eyJjdHh0JjoiVEVOVyIsImklJjoiMDAwMDAxNzMtOTI1MC1kZTVhLWE1N2YtYjI3NTIxNmQwMDAwIiwic2lnJjoiM0ppYTEyYjFVdXlvVG1ZQkxTY25udzJoY0xNPSIsInRpbWU0IiwiaXNk1ODg4MDE5IiwidXVpZCI6IjJtOGl1cnB4b0IzYXR1b0tuUFFFTNVE9PVZPaDFjME11bGpBc3I4WEd2blNrdmc9PSIsInYiOiIxIn0=?u sertype=External&bwid=00000173-9250-de5a-a57f-b275216d0000&qid=6949465&cti=LSCH&uc=1320026571&et=CHANNEL_NOTIFICAT ION&emc=btenw_cn%3A1&context=email&email=00000173-9255-d32f-abff-9a575d950000 (last visited Sept. 19, 2021).

242. Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RSCH. SERV. (Jan. 16, 2019), <https://fas.org/sgp/crs/misc/IF11072.pdf> (last visited Sept. 19, 2021) (citing *Illinois ex rel. Madigan v. Telemarketing Assoc.*, 538 U.S. 600, 612 (2003)).

243. William O. Douglas, Assoc. J. of the U.S. Supreme Court, Address to the Author’s Guild Council upon receiving the Lauterbach Award: The One Un-American Act (Dec. 3, 1952).

III. DETERRING FALSE DANGEROUS PUBLIC HEALTH POSTINGS

Part III proposes a notice-and-takedown regime for false postings that pose a risk to public health, such as the COVID-19 infodemic. Knowingly publishing dangerously false public information with knowing or reckless disregard for the truth has a weak, if nonexistent, First Amendment interest. Under our proposed reform, the direct victims of false information will send takedown notices to online intermediaries in a process that parallels that used by the Digital Millennium Copyright Act to disable content infringing the rights of copyright owners. This reform is an important first step toward harmonizing U.S. law with the European Union, Japan, and the rest of the developed world. Our CDA Section 230 notice-and-takedown proposal addresses website safe harbors, repeat offender rules, knowledge requirement standards, and the requirement for specificity for takedown notices. As the Electronic Frontier Foundation notes, CDA Section 230 has no equivalent outside of the United States:

The legal protections provided by CDA 230 are unique to U.S. law; European nations, Canada, Japan, and the vast majority of other countries do not have similar statutes on the books. While these countries have high levels of Internet access, most prominent online services are based in the United States. This is in part because CDA 230 makes the U.S. a safe haven for websites that want to provide a platform for controversial or political speech and a legal environment favorable to free expression.²⁴⁴

A. *Mechanics of CDA Section 230 Notice-and-Takedown Proposal*

Part I discussed how absolute CDA immunity enables websites to host dangerously deceitful disinformation about Ebola, Measles vaccinations, and, most recently, the COVID-19 virus with impunity.²⁴⁵ Section 230 of the CDA grants interactive online services of all types, including blogs, forums, and listservs, broad immunity from liability for third party content even if such content constitutes an ongoing crime, tort, or endangers the public health. Section 230 shields websites from takedown demands for all third-party content, which some observers argue goes too far: “[i]n its current form an accurate metaphor for Section 230 of the CDA would be providing safe harbor to a grocery store that is selling poisonous candy.”²⁴⁶ Section 230 of the CDA protects free

244. *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/issues/cda230> (last visited on Sept. 19, 2021).

245. See *Coreas v. Bounds*, 451 F. Supp. 3d 407, 413 (D. Md. 2020) (describing Coronavirus or COVID-19).

246. Nicklaus Misiti, *Amend Section 230 of the Communication Decency Act*, CHANGE.ORG (last visited Sept. 19, 2021), <https://www CHANGE.ORG/p/the-president-of-the-united-states->

expression but “it also protects illegal, irresponsible, and injurious speech and all its detriments.”²⁴⁷

Congress should update CDA Section 230 to recognize a notice-and-takedown procedure that will require websites to remove or disable false public health online content such as COVID-19 disinformation. The First Amendment does not protect posting or hosting false dangerous information intensifying a public health crisis.²⁴⁸ “Yes, Americans are entitled to freedom from government intrusion. But they also have an obligation not to unnecessarily expose their fellow citizens to a deadly pathogen.”²⁴⁹ As Oliver Wendell Holmes Jr. stated: “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”²⁵⁰

Our proposed CDA Section 230 notice-and-takedown procedures for removing or disabling false health information seeks to balance the interests of websites and content creators. The remainder of this section explains the mechanics of our reform’s procedures and the advantages of our proposal. Table Three presents a synoptic sketch of our proposed reform to CDA Section 230.

Table Three: CDA Notice-and-takedown for false public health information

<i>Major Issues</i>	<i>Our Answer</i>	<i>Rationale</i>
What Content Posted by Third Parties Is Subject to Notice-and-Takedown?	Content that constitutes false public health information that has either caused specific harm or has the potential to result in	Notice-and-takedown does not apply to false facts or opinions, which are protectable by the First Amendment. Only false postings posing an imminent threat to

amend-section-230-of-the-communications-decency-act (last visited Sept. 19, 2021); see Riana Pfefferkorn, *The Earn It Act: How To Ban End-To-End Encryption Without Actually Banning It*, CTR. FOR INTERNET & SOC’Y (Jan. 30, 2020), <https://cyberlaw.stanford.edu/blog/2020/01/earn-it-act-how-ban-end-end-encryption-without-actually-banning-it> (last visited Sept. 19, 2021).

247. Misiti, *supra* note 247.

248. False statements will be protected by the First Amendment only if they do not cause a legally cognizable harm or provide material gain to the speaker and the statute covered speech associated with neither. See *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

249. The Editorial Board, *We the People, in Order to Defeat the Coronavirus*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/05/01/opinion/coronavirus-civil-liberties.html?searchResultPosition=6> (last visited Sept. 19, 2021).

250. *Schenck v. United States*, 249 U.S. 47, 53 (1919) (Holmes, J.).

	imminent harm.	public health are subject to takedown demands.
Who Has a Duty to Takedown?	Only Website Operators	Network operators, network infrastructure providers, Internet access providers, Wi-Fi hotspot providers, Internet service providers (ISPs), hosting providers, search engines and aggregators, and Internet cybercafés are passive. Such parties will continue to have a CDA Section 230 total immunity for third party postings.
Who Can Order Websites to Takedown Content?	The direct victims of dangerous public health disinformation that is devoid of any First Amendment interest.	Under our model of enforcement, private attorneys general (direct victims and their attorneys) are the primary enforcers. The private attorneys general concept arms the victim with the ability to vindicate the public interest by supplementing (but not supplanting) public enforcement. Persons or entities filing bogus takedown orders or sending repeated takedown orders using automated

		means, which have no basis, may be liable for money damages if sued by the website operator for their inconvenience.
Who Must Respond to Takedown Notices?	The website must designate an agent to receive notifications of claimed specific harm arising from false public health information. As with the DMCA, the website operator should place a link at the bottom of the home page (including a clear means for notice-and-takedown requests such as "Contact" or "About Us"), calling it "CDA Notice-and-takedown Policy & Claims." The site should state that the CDA Section 230 shields most claims except for false public health	For continued eligibility for the safe harbor, a website operator must register and assign a designated CDA Section 230 agent who will be responsible for reviewing and must provide the agent's contact information. This provision is drawn from the DMCA, which provides that a service provider is not liable for copyright infringement for third party postings if it designates an agent to receive notices and follows the DMCA's notice and takedown provisions. ²⁵¹

251. See 17 U.S.C. § 512(c)(3)(C) (2021) ("upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."); see also § 512(a) ("service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connection").

	<p>information that causes specific harm or that has the clear potential to cause harm.</p>	
<p>(5) What Must Be in the Content of a Takedown Notice?</p>	<p>(1.) A physical or electronic signature of a person specifically harmed by false public health information or as representative of a government agent authorized to act on behalf of the government; (2.) Identification of the third party posting that is the subject of the takedown notice; (3.) Identification of the specific content of the false public health posting that caused harm or poses the threat of harm supporting removal; (4.) Sufficient data or information necessary to contact the website as well as the complaining party (aggrieved individual or government); (5.) A statement by the complainant of the good faith belief that the material posted has no First Amendment content; and (6.) A statement that the</p>	<p>Additionally, our notice-and-takedown proposal draws from Article 14 of the European Union’s Electronic Commerce Directive, which applies to hosted content relating to all “illegal activity or information.” Online hosts are not liable for the illegal activity or information placed on their systems by a user provided that the online host does not have “actual knowledge” of the activity or information.²⁵² Once the online host has actual knowledge, it must act expeditiously to remove or disable access to the illegal information. The E-Commerce Directive does not set out notice-and-takedown procedures, but it envisaged the development of such a process because</p>

252. See Michael D. Scott, *Would a “Right of Reply” Fix Section 230 of the Communications Decency Act?*, 4 J. INT’L MEDIA & ENT. L. 57, 58 (2011).

	information in the notice is accurate; (7) Notice-and-takedown also requires notifying the website operator of their right to reply, counter-notice, and putback.	online hosts who fail to act expeditiously upon notification lose limited liability protection. The E-Commerce Directive suggests that voluntary agreements between trade bodies and consumer associations could specify notice-and-takedown processes, and that such initiatives should be encouraged by member states
Counternotice & Putback	As with the DMCA notice-and-takedown, Internet users who believe public health information is protected by the First Amendment or protectable expression, have an effective and efficient remedy at their disposal: the counter-notice and putback procedure. ²⁵³	CDA Section 230 does not give website operators a right of reply. Our reform will give websites a right to reply, counternotice, and putback.
Consequences if Website Does Not Takedown	Statutory actual damages awarded to individual harmed	Website loses their CDA Section 230

253. Section 512(g) of the DMCA “allows a user whose content has been removed in response to a takedown notice to submit a counter-notification to an OSP’s designated agent requesting that the content be reposted, if the user believes that the content was improperly removed, such as due to the OSP’s error or content posted pursuant to a valid license or another copyright exception or limitation. The counternotice, like the initial notice, must be in writing” and must include specific information so that the OSP can easily identify the material. COPYRIGHT REPORT, *supra* note 42, at 27.

Deplorable Conduct.	by the false public health information.	immunity for the posted content and are liable for damages to persons who rely upon dangerous public health postings to their detriment.
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1. What Content Is Subject to Notice-and-Takedown?

Notice-and-takedown is a system by which website operators must remove objectionable content upon notice. The system of notice-and-takedown has been adopted by the Digital Millennium Copyright Act of 1998 for copyright infringement cases in the United States²⁵⁴ and by the European Union’s Electronic Commerce Directive of 2000 (Electronic Commerce Directive) for all illegal content.²⁵⁵ Our Section 230 reform proposal adopts a “notice-and-takedown” regime for false public health information when victims have suffered documented harm through their reliance upon false information or there is the imminent threat of future harm.

The DMCA shields internet service providers from secondary copyright liability—assuming that they have a registered copyright agent and enforce a policy of removing infringing materials.²⁵⁶ Section 512(c)(1)(B) states that service providers²⁵⁷ lose their statutory shield from secondary copyright liability if they “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”²⁵⁸ “Section 512’s safe harbor from copyright liability is aimed at online

254. See 17 U.S.C. § 1201 (2021); see also *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (“The DMCA was enacted . . . to provide immunity to service providers from copyright infringement liability for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider.”).

255. See 2000 O.J. (L 178) 1.

256. See § 512(d).

257. Section 512(k)(1)(B) defines the term “service provider” as “a provider of online services or network access, or the operator of facilities therefore, and includes an entity described in subparagraph (A)”, and subparagraph (A) defines the term “service provider” as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” 17 U.S.C. § 512(k)(1).

258. 17 U.S.C. § 512(c)(1)(B).

services that host material contributed by others.”²⁵⁹ Congress enacted Section 512 to balance the interests of service providers and content creators:

Congress sought to create a balance between two goals. One is providing important legal certainty for OSPs, so that the internet ecosystem can flourish without the threat of the potentially devastating economic impact of liability for copyright infringement because of their users’ activity. The other is protecting the legitimate interests of authors and other rights holders against the threat of rampant, low-barrier online infringement. Congress balanced these interests through a system where OSPs can enjoy limitations on copyright liability—known as “safe harbors”—in exchange for meeting certain conditions, while giving rightsholders an expeditious and extra-judicial method for addressing infringement of their works. Thus, for some types of OSPs, their safe harbors are conditioned on taking down infringing content expeditiously upon notification by a right holder.²⁶⁰

2. *Who Has a Duty to Takedown?*

Under our CDA Section 230 procedure, websites, blogs, and social networks will have no duty to affirmatively determine whether illegal content is hosted or posted on their service.²⁶¹ A duty to monitor content on its service would be a cost prohibitive obligation for many small and medium website providers. Websites will have no duty to act until they receive actual written or digital notice that there is false public health content posted on their service. This reform adopts a reasonableness standard for operator duty to takedown or disable content rather than an arbitrary fixed period. The reasonableness standard is flexible, allowing for the evolution of industry standards and norms that will dictate what defines unreasonable delay. Our notice-and-takedown regime relies entirely upon private enforcement, imposing no independent duty of online platforms to monitor or remove illegal content.

Only website or online platforms will have a duty to respond to take down notices. Because website operators are in the best position to respond to takedown notices, it is more efficient to hold them accountable rather than allow plaintiffs to sue other Internet intermediaries such as access providers, mobile network operators, metropolitan or countrywide network operators, or Internet exchanges. Under CDA Section 230

259. Brianna L. Schofield & Jennifer M. Urban, *Takedown and Today's Academic Library*, 13 I/S: J. L. & POL'Y FOR INFO. SOC'Y 125, 129 (2016).

260. COPYRIGHT REPORT, *supra* note 42, at 27.

261. This closely tracks the DMCA's procedure found in 17 U.S.C. §§ 512(c)(1)(B), 1201 (2021).

notice-and-takedown, websites will be broadly defined to include “social networks—including Facebook, Twitter, LinkedIn, Orkut, Google+—and user-generated content (UGC) platforms (e.g., blogging platforms, microblogging platforms, video-sharing sites, picture-sharing sites) as well as the comments sections of blogs and websites.”²⁶²

Today, social networks such as Facebook must comply with the notice-and-takedown procedures set out in the United States’ Digital Millennium Copyright Act.²⁶³ As an example, after the Christchurch, New Zealand mass murder; “YouTube, moderators scrambled to remove videos uploaded at a rate of one every second while Facebook blocked or removed 1.5 million videos in the 24 hours after the attack.”²⁶⁴ Under our CDA Section 230 safe harbor, websites are shielded from tort liability for content posted by users or other third parties, so long as the website has a mechanism in place to receive notice and remove illegal content.

No other Internet intermediaries are subject to our CDA Section 230 notice-and-takedown proposal. All entities providing passive services, such as access providers, would continue to have a broad liability shield.²⁶⁵ Network operators (e.g., MTN, Safaricom), network infrastructure providers (e.g., Cisco, Huawei, Ericsson, Dark Fibre Africa), Internet access providers (e.g., Comcast (U.S.), MWeb (South Africa), AccessKenya (Kenya), Wi-Fi hotspot providers, Internet service providers (ISPs), hosting providers, search engines and aggregators, (e.g., Slashdot or Ushahidi installations), and Internet cafes/cybercafés²⁶⁶ will continue to have a CDA Section 230 liability shield for third party postings on their services.

3. *Private Attorneys General to Initiate Notice & Takedown*

Social media is overwhelmed with COVID-19 deceptions, defined as “a deliberately concocted untruth made to masquerade as truth.”²⁶⁷ In March 2020 alone “46,000 Twitter posts which linked to Covid-19 misinformation were published *each day* . . . on average—exposing potentially tens of millions of people to conspiracy theories, hoaxes or

262. *What is an Internet Intermediary?*, ASS’N FOR PROGRESSIVE COMM’N (Feb. 22, 2021), <https://www.apc.org/en/pubs/apc%E2%80%99s-frequently-asked-questions-internet-intermed> (last visited Sept. 19, 2021).

263. *See* 17 U.S.C. § 1201.

264. Matt Reynolds, *The Strange Story of Section 230, the Obscure Law That Created Our Flawed, Broken Internet*, WIRED (Mar. 24, 2019), <https://www.wired.co.uk/article/section-230-communications-decency-act> (last visited Sept. 19, 2021).

265. “An internet intermediary is an entity which provides services that enable people to use the internet. There are many different kinds of internet intermediaries which fall into two broad categories: ‘conduits’ and ‘hosts.’” ASS’N FOR PROGRESSIVE COMM’N, *supra* note 263.

266. *See id.*

267. CURTIS D. MACDOUGALL, HOAXES vi (2d ed. 1958) (defining hoax).

false statistics.”²⁶⁸ “The world’s largest social media platforms have been pulling out all the stops to combat the wave of false reports, hacking attempts and outright lies that have spread like wildfire about COVID-19.”²⁶⁹

“Facebook, Google, Twitter, TikTok and others have made efforts to promote links to reputable sources such as the WHO or government health agencies when users search for terms related to ‘coronavirus.’ But they’re not catching all the misleading posts, and it’s still easy to find bad information online, whether it’s a claim that the virus is connected to the spread of 5G, that the virus is a bioweapon, or sowing doubts around any forthcoming vaccines.”²⁷⁰ Social media platforms cannot keep pace with this inundation of fake news, even with the help of federal regulators. Our CDA Section 230 takedown regime relies upon private enforcement to supplement the voluntary efforts of social networks to detect and remove illegal content.

Arming the victims of false information with notice-and-takedown and the possibility of recovering monetary damages against the website for failing to remove illegal content, employs “private attorneys general” to supplement the efforts of websites and public regulators in dealing with illegal content. Judge Jerome Frank coined the phrase private attorney general in 1943, to describe a private person acting to “vindicate the public interest.”²⁷¹ Judge Frank used this term to refer to “any person, official or not,” who brought a proceeding “even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private attorney generals.”²⁷²

The United States’ legal system depends upon the institution of private attorneys general to supplement public regulation in a variety of

268. Ella Hollowood & Alexi Mostrous, *Fake News in the Time of C-19: From Miraculous Cures to Paranoid Conspiracies, Our Investigation Reveals How Misinformation About Coronavirus is Going Viral at a Disturbing Rate*, TORTOISE MEDIA (March 23, 2020), <https://members.tortoisemedia.com/2020/03/23/the-infodemic-fake-news-coronavirus/content.html> (last visited Sept. 19, 2021).

269. Mark Scott, *Social Media Giants Are Fighting Coronavirus Fake News. It’s Still Spreading Like Wildfire*, POLITICO (Mar. 12, 2020), <https://www.politico.com/news/2020/03/12/social-media-giants-are-fighting-coronavirus-fake-news-its-still-spreading-like-wildfire-127038> (last visited Sept. 19, 2021).

270. Hadas Gold, *Inside the WHO’s Fight to Stop False Information About Coronavirus from Spreading*, CNN BUSINESS (Mar. 5, 2020), <https://www.cnn.com/2020/03/05/tech/facebook-google-who-coronavirus-misinformation/index.html> (last visited Sept. 19, 2021).

271. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

272. *Id.* Jerome Frank was a leading legal realist who served as Chairman of the Securities and Exchange Commission, and a Circuit Judge of the Second Circuit. See Robert J. Glennon Jr., *Portrait of the Judge as an Activist Jerome Frank and the Supreme Court*, 61 CORNELL L. REV 950, 952 (1976).

contexts.²⁷³ Products liability litigation, for example, supplements the work of public regulators such as the Food and Drug Administration, National Highway Traffic and Safety Administration, and the U.S. Consumer Product Safety Commission in removing dangerously defective products from the marketplace, thus saving lives. Historically, private attorneys general have played a socially beneficial role by advancing the public interest and protecting it from corporate wrongdoing:

The latent function—the hidden face—of tort law is its public role in addressing corporate misconduct without requiring a rigid government bureaucracy. Private tort litigants serve the public by uncovering dangerous products and practices . . . However, the trial attorney also serves a less visible public policy function by uncovering and punishing corporate malfeasance. Thus, tort law not only performs the manifest function of alleviating “the plight of the injured,” but it also fulfills the latent function of furthering “the cause of social justice.”²⁷⁴

Congress has recognized the role of private enforcement in a large number of federal statutes by awarding attorney’s fees to the plaintiffs conducting private enforcement that serves the public interest:

The theory that the public interest is advanced by lawsuits brought by private attorneys is not confined to tort law. A large number of federal statutes, such as the Clean Water Act, Sherman Anti-Trust Act, and Federal Trade Commission Act, provide for attorney’s fees to be awarded to private litigants as a reward for serving the public interest in bringing suit. The rubric under which all the definitions for the private attorneys general fall is the emphasis on private action for the public interest. It is only the possibility of private attorneys general receiving a contingency fee that permits lawsuits to be brought to vindicate the public interest. Tort remedies permit social control of wrongdoers without an overly cumbersome state bureaucracy. The private attorneys general played a critical role in asbestos litigation. It was private attorneys general, not regulators, who uncovered “smoking gun documents” of an industry wide conspiracy to conceal the risks of asbestos exposure.²⁷⁵

Private enforcement is necessary to prevent harm to individuals who rely upon dangerous public health disinformation. Our CDA Section 230 reform will allow the direct victims of harmful false information to have standing for notice-and-takedown of fake public health “facts” and to recover damages for specific harm they suffered in reliance on this

273. THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 2 (2001).

274. *Id.* at 17.

275. Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 *DEPAUL L. REV.* 511, 518 (2011).

information. The false-information torts deployed by victims seeking compensatory damages for their injury will likely be negligence and misrepresentation.²⁷⁶ Content must be removed by the host following notice, whereas removal demands can be challenged by content creators with counternotice and putback procedures. Individuals sending bogus takedown notices in bad faith will be subject to tort liability from website operators. Under our reform, a website operator, deluged with fraudulent takedown notices, would have standing to pursue monetary damages for the cost of responding to frivolous claims. Our proposal gives website's recourse for bad faith takedown notices, backed by compensatory damages, attorneys' fees, and costs. For truly egregious circumstances, the court may award punitive damages to punish and deter repeated takedown notices that have no basis in fact.

The DMCA's provision for bad faith takedown notices allows the prevailing party to recover for costs and attorney's fees as well.²⁷⁷ "The misrepresentation section in [DMCA] § 512(f) created a cause of action against any person who knowingly misrepresents that material or activity online is infringing, or that material or activity was removed or disabled by mistake or misidentification under the put-back procedure."²⁷⁸

Section 512 makes copyright owners liable for damages, including attorney's fees, incurred by a party who is injured by the misrepresentation.²⁷⁹ Section 512 requires "subjective bad faith on the part of the takedown notice sender, which is a nearly impossible legal standard to prove and an impossible challenge for gathering credible admissible evidence."²⁸⁰

Our CDA Section 230 adopts Section 512(f) but it does not adopt Section 512(f)'s provision that a content creator may prove bad faith by a subjective as well as by an objective standard.²⁸¹ Our CDA Section 230

276. THOMAS H. KOENIG & MICHAEL L. RUSTAD, *GLOBAL INFORMATION TECHNOLOGIES: ETHICS & THE LAW* 204–07 (2018).

277. 17 U.S.C. § 512 (2021).

278. Ian Rubenstrunk, *The Throw Down Over Takedowns: An Analysis of the Lenz Interpretation of 17 U.S.C. § 512(f)*, 10 J. MARSHALL REV. INTELL. PROP. L. 792, 796–97 (2011).

279. 17 U.S.C. § 512.

280. Eric Goldman, *DMCA's Unhelpful 512(f) Preempts Helpful State Law Claims—Stevens v. Vodka and Milk*, TECH. & MKTG. L. BLOG (March 28, 2018), <https://blog.ericgoldman.org/archives/2018/03/dmcas-unhelpful-512f-preempts-helpful-state-law-claims-stevens-v-vodka-and-milk.htm>.

281. Section 512(f) also applies to counter-notifications, providing that any person who "knowingly materially misrepresents" that "material or activity was removed or disabled by mistake or misidentification" may be held liable for monetary damages, including costs and attorneys' fees. COPYRIGHT REPORT, *supra* note 42, at 26 (quoting 17 U.S.C. § 512(f)).

notice-and-takedown regime requires that websites have specific written notice of claims rather than constructive notice, which will bring certainty to the law.

4. *Who Must Respond to Takedown Notices?*

The online platform operator is the only party that must respond to notice-and-takedown requests. Access providers and other intermediaries will continue to enjoy the broad liability shield of CDA Section 230 with no new obligations under our proposal. The DMCA's notice-and-takedown procedures are activated when a copyright owner, or an assignee, has either constructive or actual notice to the designated agent of the service provider.²⁸² Service providers can lose the protection of the DMCA safe harbors if they have actual or apparent (also called "red flag") knowledge of infringing content.²⁸³

It is not settled as what establishes red flag for infringing content, assuming that the provider received no notice from the copyright owner.²⁸⁴ "The DMCA's red flag provision is the notice exception that swallows the notice rule, requiring minute examination of specific facts to determine whether an accused service provider ignored 'objectively obvious' individual infringements. The multimillion-dollar question with red flag notice is what makes an infringement 'objectively obvious.'"²⁸⁵

Our proposed CDA Section 230 notice and putback procedure rejects the DMCA's indeterminate "red flag" test because it leads to litigation over what the online platform knew and when it knew it. CDA Section 230 takedown procedures will require the direct victims of public health disinformation to send written or digital notice to the website's designated agent.

As under the DMCA's notice-and-takedown regime, "a service provider need not affirmatively police its users for evidence of repeat infringement."²⁸⁶ "Congress made a considered policy determination that the DMCA notification procedures [would] place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of

282. 17 U.S.C. § 512(c)(3)(A).

283. 17 U.S.C. § 512(c)(3)(A), (d)(1).

284. *See* UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) ("[I]f investigation of facts and circumstances is required to identify material as infringing, then those facts and circumstances are not red flags.") (internal citations omitted); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007) ("We do not place the burden of determining whether [materials] are actually illegal on a service provider").

285. Annemarie Bridy, *Notice Failures In Copyright Law*, 96 B.U.L. REV. 777, 786 (2016).

286. *Perfect 10, Inc.*, 488 F.3d at 1111.

the copyright.”²⁸⁷ Once a website operator has received notice of false public health information causing harm or posing the threat of imminent harm, it is obligated to remove the illegal content. Under our reform, a website that fails to takedown or disable dangerous public health content upon specific notice will lose the CDA Section 230 liability shield and be exposed to liability to those relying upon the false information to their detriment.

5. *What Must Be in the Content of a Takedown Notice?*

Our CDA Section 230 reform closely parallels DMCA’s provision whereby service providers will be divested of their liability shield (for that specific content) if they fail to act expeditiously after acquiring written notice of the illegal content.²⁸⁸ Section 512 of the DMCA requires that a service provider expeditiously remove infringing content upon receipt of a “notice-and-takedown” letter.²⁸⁹ Thus, actual knowledge of infringing material, awareness of facts or circumstances that make infringing activity apparent, or receipt of a takedown notice will each trigger an obligation to remove the infringing material expeditiously.

Under the DMCA, rights holders “do not have to identify each specific URL, or other identifier, where a violated work is found. Instead, they may specify only titles, artists, search result pages or similarly vague identifiers.”²⁹⁰ Our CDA Section 230 reform addresses the problem of imprecise requests for takedown.²⁹¹ The DMCA requires that a notice must:

- (1) be “a written communication,”
- (2) made to the service provider’s “designated agent,”

287. *UMG Recordings, Inc.* 665 F. Supp. 2d at 1022.

288. “To preserve its safe harbor immunity, an OSP that receives a counter-notice must then repost the content in question no fewer than 10 but no more than 14 business days after receiving the counter notification, unless the OSP first receives notice from the party who provided the takedown notice that a judicial action has been filed ‘seeking . . . to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.’” COPYRIGHT REPORT, *supra* note 42, at 27.

289. 17 U.S.C. § 512(c)(1)(C) (2021).

290. Viroopax Mirji & Sunil Gregory, *Why the DMCA Needs to Be Modernized*, L. J. NEWSLETTERS (Nov. 2, 2016), <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2016/12/02/why-the-dmca-needs-to-be-modernized/> (last visited Sept. 19, 2021) (calling for reform in DMCA to require notices of infringement to require specific URLs and better location to assist ISPs in locating objectionable content).

291. Under the DMCA Section 512 notice-and-takedown procedures, “ISPs struggle, or find it impossible, to locate allegedly infringing material on their site or to know whether every instance of a title, artist or other identifier on an identified page is truly infringing.” *Id.*

- (3) bear the signature of a person authorized to act on behalf of the copyright holder;
- (4) state that the signer is authorized to act on behalf of that owner;
- (5) swear, under penalty of perjury, that the information provided is accurate;
- (6) state that the sender “has a good faith belief that use of the material in the manner complained of is not authorized”;
- (7) identify the copyrighted work that is allegedly infringed;
- (8) identify the material that is claimed to be infringing and that is to be removed, in a manner “reasonably sufficient to permit the service provider to locate the material”; and
- (9) contain information reasonably sufficient to provide the service provider to contact the complaining party.²⁹²

Our CDA Section 230 reform requires content creators to give websites more extensive information than required under the DMCA in order to guard against incomplete notices²⁹³ and to specify the exact location of data. Without precise information, website operators may have difficulties identifying the objectionable content quickly and efficiently and determining whether there is a sufficient basis to disable or remove:

- (1) A physical or electronic signature of a person specifically harmed by false public health information or as representative of a government agent authorized to act on behalf of the government;
- (2) Identification of the third party posting that is the subject of the takedown notice;
- (3) Identification of the parts of the false public health posting that caused harm or poses the threat of harm and thus should be removed. In general, the notice should specify the URL and other specific information making it clear where the objectionable material is located;
- (4) Sufficient information to contact the website as well as the complaining party (aggrieved individual or government);
- (5) A statement by the complainant in the good faith belief that the material posted contains no First Amendment content and a brief explanation of why the content is not protectable;

292. 17 U.S.C. § 512(c)(3)(A)(i)–(vi).

293. “Today, rights owners use high-end DMCA BOTS or software BOTs to send large numbers of broad, vague and incomplete notices based on keyword searches. If such incomplete or broad DMCA notifications were brought under a similar ambit of law, it would improve scrutiny and decrease the burden on legitimate users and hosts, increasing both efficiency and effectiveness.” Mirji & Gregory, *supra* note 291.

(6) A statement that the information in the notice is accurate; the notice must be a signed statement, sworn to be true by the signer, that states that the signer is guilty of the crime of perjury if the statement is shown to be materially false.

(7) Notice-and-takedown requires the complainant to give the website operator notice of their right to reply, counternotice, and putback.

6. *Counternotice & Putback*

The website operator must promptly respond to counternotice and putback demands by content creators, where the content is arguably protected by the First Amendment or it is unclear whether it poses a threat of imminent harm to the public. The website operator owes a duty of putback if the objectionable content constitutes protectable expression as opposed to false public health information causing or having the potential of causing specific harm. Prior to disabling content, the website must give notice to the complainant and an opportunity to refute the claims of the content creator by proving that the content is protectable. In the rare case where a website operator is unable to resolve a dispute over whether content is protected, it may file a declaratory judgment action in the federal court in the district where the website operator resides.

The mechanics of counternotice and putback parallel notice-and-takedown. Once a website operator receives notice, it must then notify the content creator that the public health information is false and has caused harm or poses a threat of harm. The content creator may send a counternotice to the website operator for reinstatement of the allegedly infringing content. If the content creator sends a counternotice describing why the posting does not constitute false medical facts, is protected by the First Amendment, or is otherwise allowed under law, the website operator may reinstate the material without liability to the content owner. The provision for counternotice and reinstatement is also found in China's 2019 E-Commerce statute.²⁹⁴ A website can be liable for monetary damages for failing to respond to a counternotice and putback

294. Our proposal, unlike China's does not have a designated period in which content creators or websites must exercise their rights. We prefer to call for a reasonable time letting industry standards be the guidepost. See Robin Tabbers, *China: Intellectual Property Implications of the New E-Commerce Law (2019)*, MONDAQ (May 23, 2019), <https://www.mondaq.com/china/trademark/808400/intellectual-property-implications-of-the-new-e-commerce-law-2019> (last visited Sept. 19, 2021) ("There is also a provision for counter-notices which may be of concern to international brand owners; there is an obligation to the IP owner to respond to the counternotice by filing a case in the local competent court within 15 days of receipt.").

demand in a reasonable time.²⁹⁵ The standard of reasonableness will allow industry standards to inform how much time a website has to respond to putback notices.

7. Consequences if Websites Are Unresponsive to Notice-and-Takedown

Under our proposed CDA Section 230 carveout, Internet broadcasters of false public health information will be liable for hosting or posting false information concerning public health if: (1) the Internet website (or other intermediary) knows the information is false; (2) it is foreseeable that hosting or posting of the information will cause substantial public harm; (3) Internet transmission of the information does in fact directly cause substantial public harm; and (4) individuals suffered illness or death by relying upon false public health information that they accessed on the Internet. False public health information that constitutes opinions are protectable and not subject to takedown.

Similar to the DMCA, under our proposed CDA Section 230 notice-and-takedown, a website must have adopted and reasonably implemented a policy to deal with repeat postings of the same deplorable content. Website operators will lose their CDA Section 230 liability shield if they fail to expeditiously remove false public health information material upon receipt of notification of the false public health information.²⁹⁶ Liability for “false information torts” will deter websites from hosting disinformation, dangerous fabrications, and systematic falsehoods about COVID-19 and future pandemics that cause harm to Internet users. The public injury will be deemed foreseeable if the website could expect, with a significant degree of certainty, which demonstrable harm would occur by hosting or posting false information.

Congress established a DMCA “safe harbor,” which protects the service provider from monetary, injunctive, or other equitable relief for infringement of copyright if the service provider has no actual knowledge that the content is infringing or does not receive direct financial benefit from the infringing content.²⁹⁷ The DMCA places the burden of notifying

295. A reasonable time in Internet time will likely be twelve to twenty-four hours. Given this is the CDA’s first notice and takedown exception, it is likely that the specific time periods will be specified as the Internet industry gains experience in responding to takedowns.

296. The CDA Section 230 notice-and-takedown requires actual notice unlike the DMCA which imposes a takedown duty for constructive as well as actual notice. *Cap. Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 83 (2d Cir. 2016).

297. *Safe Harbor for Online Service Providers Under Section 512(c) of the Digital Millennium Copyright Act*, CONG. RSCH. SERV. (Mar. 26, 2014), https://www.everycrsreport.com/files/20140326_R43436_20adc3c92ec8bd76e4af3e4f1c1df6a79a70ca0.pdf (last visited Sept. 19, 2021) (“Title II of the DMCA, titled the ‘Online Copyright Infringement Liability Limitation Act,’ added a new Section 512 to the Copyright

the service provider of infringements upon the copyright owner or his agent.²⁹⁸ Takedown requests of allegedly infringing content must be in writing that specifies the infringing contents and acknowledges that deficient notifications shall not be considered in determining whether a service provider has actual or constructive knowledge.²⁹⁹

[T]he point of a safe harbor is to provide a clear path for qualifying individuals and companies to avoid liability. By enacting the DMCA safe harbors, Congress hoped to ‘provide [] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities. Requiring a high level of proof to establish that an ISP was ‘aware of facts from which infringing activity is apparent’ serves the purpose of a safe harbor.³⁰⁰

While this article only proposes that Congress carve out an exception to Section 230 for postings that directly harm the public health, this reform could easily be expanded to include other harmful misinformation that is not protected by the First Amendment such as terrorist content, unconsented pornography, the promotion of illicit videotapes, and systematic online harassment. The reform would bring U.S. law into alignment with the European Union’s E-Commerce Directive and harmonize U.S. law with the global standard for protecting public health and safety. Consistency with global standards is of critical important because dangerously false viral postings cross national borders at the click of a mouse.

B. Toward a Global Standard for the Liability of Online Intermediaries

Our CDA Section 230 reform is harmonized with the EU’s E-Commerce Directive under which providers are responsible for removing illegal content when they have specific knowledge of it.³⁰¹ The European

Act (Title 17 of the U.S. Code) in order to limit the liability of providers of Internet access and online services that may arise due to their users posting or sharing materials that infringe copyrights. Congress was concerned that without insulating Internet intermediaries from crippling financial liability for copyright infringement, investment in the growth of the Internet could be stifled and innovation could be harmed.”); *see generally*, 17 U.S.C. § 512 (2021).

298. CONG. RSCH. SERV., *supra* note 298 (“The DMCA expressly states that a service provider is not required to actively monitor its service for infringing activity. However, § 512 requires a service provider, upon proper notification by the copyright owner of online material being displayed or transmitted without authorization, to ‘expeditiously’ remove or disable access to the allegedly infringing material.”).

299. *Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 116 (S.D.N.Y. 2013).

300. Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J. L. & ARTS 233, 253 (2009).

301. *Regulating in a Digital World Chapter 5: Online Platforms*, U.K. PARLIAMENT (2019), <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/29908.htm> (last visited Sept. 19, 2021).

Commission adopted the Electronic Commerce Directive to establish an Internal Market framework for electronic commerce:³⁰² “In practice service providers frequently monitor content, often using specially designed software, and they work with designated organisations (called ‘trusted flaggers’) to identify illegal content. They also rely heavily on users to report content.”³⁰³ Notice-and-takedown under the E-Commerce Directive extends to content that is “[t]errorism-related, child sexual abuse material, threats of violence, [and] infringement of intellectual property rights.”³⁰⁴ European courts do not recognize the broad scope of website immunity for third party content that has been created by the expansive interpretation of CDA Section 230:

In a recent judgment rendered by the European Court of Human Rights, it was held that Contracting States could impose liability on an online news portal for comments posted to its site by third parties, although the portal lacked knowledge of the unlawful nature of the comments and promptly removed them when requested to do so.³⁰⁵

CDA Section 230, as currently formulated, is at odds with the European Union’s Electronic Commerce Directive (ECD), but may not continue to be in conflict with its likely successor, the Digital Services Act (DSA).³⁰⁶ The global Internet cannot have a takedown regime for Europe and no right of removal for users against U.S.-based platforms.. Europe’s ECD, now twenty years old, “has been one of the most successful pieces of Union legislation and has shaped the Digital Single Market as we know it today.”³⁰⁷ The European Commission sponsored a study:

[O]n six fields in the online platform economy, including self-preferencing in terms of dual roles for online platforms; data access; the locking into digital identity services for users; interoperability of services; employing data holdings in other markets; information asymmetries in data gathering that could result in ‘high switching

302. 2000 O.J. (L 178) 1.

303. SELECT COMMITTEE ON COMMUNICATIONS, REGULATING IN A DIGITAL WORLD, 2017–19, HL 299 at 184 (UK) (hereinafter SELECT COMMITTEE).

304. *Id.* at T3.

305. Moran Yemini, *The New Irony of Free Speech*, 20 COLUM. SCI. & TECH. L. REV. 119, 175 n.282 (2018) (citing *Delfi AS v. Estonia*, 2015-II EUR. Ct. H.R. 319, 322–23 (2015), <http://hudoc.echr.coe.int/eng?i=001-155105>).

306. *Committee on the Internal Market and Consumer Protection, Recommendation to the Commission on Digital Services Act: Improving the Functioning of the Single Market*, at 4, COM (2020) (Apr. 24, 2020) (hereinafter *Recommendation*).

307. *Id.* at 3.

costs' for the users of certain social media platforms and search engines.³⁰⁸

The DSA will retain the principal features of the E-Commerce Directive but it will be the product of reevaluation whether “the prohibition on imposing a general monitoring obligation should be maintained.”³⁰⁹ The DSA proposal suggests that the European Union is rethinking whether the incentives for platforms to remove harmful content are currently sufficient.³¹⁰ The European Union has created a forty-six-page questionnaire for stakeholders seeking guidance on crafting its provisions.³¹¹ The European Union is considering expanding notice-and-takedown to include Internet Service Providers (ISPs), cloud services, content delivery networks (CDNs), social media, search engines, and other Internet intermediaries.³¹² The DSA proposal is likely to rely more heavily on algorithms as opposed to human review in order to automatically filter content, thus streamlining the reporting process.³¹³ The proposed CDA Section 230 meshes well with the DSA’s enhanced notice and takedown procedures.

1. Key Provisions of the Electronic Commerce Directive

Because the Internet is a world without borders, the liability of websites and Internet intermediaries for third party content requires a global solution. The Electronic Commerce Directive is not only the law in the twenty-seven countries of the European Union, it has influenced the law in countries outside of Europe.³¹⁴ Our CDA Section 230 “notice-

308. Samuel Stolton, *Commission to Contract €600,000 Study on Gatekeeping Power of Digital Platforms*, EURACTIV (May 11, 2020), <https://www.euractiv.com/section/digital/news/commission-to-contract-e600000-study-on-gatekeeping-power-of-digital-platforms/> (last visited Sept. 19, 2021).

309. *Recommendation*, *supra* note 307, at 4.

310. Danny Bradbury, *What to Expect from the Digital Services Act*, INFOSECURITY MAGAZINE (May 18, 2020), <https://www.infosecurity-magazine.com/infosec/expect-from-digital-services-act/> (last visited Sept. 19, 2021).

311. Foo Yun Chee, *EU Regulators Seek Feedback Ahead of New Tough Tech Rules*, REUTERS (May 20, 2020), <https://www.reuters.com/article/uk-eu-tech-regulations/eu-regulators-seek-feedback-ahead-of-new-tough-tech-rules-idUKKBN22W2QB?edition-redirect=uk> (last visited Sept. 19, 2021).

312. Leaked note from the EU Commission, at 3 (June 2019), <https://cdn.netzpolitik.org/wp-upload/2019/07/Digital-Services-Act-note-DG-Connect-June-2019.pdf> (last visited Sept. 19, 2021).

313. *Id.* at 5.

314. “Safe harbor provisions have been so influential that other countries adopted them into their copyright protection laws. For instance, the European Union adopted the safe harbor exemption model in its Electronic Commerce Directive 2000 law, while other nations, including Japan and New Zealand, followed a self-regulatory authority model formed by intermediaries and rights holders with government involvement.” Mirji & Gregory, *supra* note 291.

and-takedown” procedure is an important first step toward harmonizing U.S. law with Europe’s E-Commerce Directive (ECD),³¹⁵ which “seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.”³¹⁶

The twenty-seven EU Member States are required to develop national legislation implementing the ECD,³¹⁷ which will apply to virtually all websites including those that “sell goods or services to businesses or consumers on the Internet or by email; advertise on the Internet or by email; or convey or store electronic content for your customers or provide access to a communication network.”³¹⁸ Article 5 (1)(c) of the ECD requires service provider to render “easily, directly and permanently accessible” to both recipients of services and the competent authorities “the details of the service provider, including its electronic e-mail address, which allow it to be contacted rapidly and communicated with in a direct and effective manner.”³¹⁹

2. Overview of Liability Regime for Service Providers

The European Union’s E-Commerce Directive (ECD) establishes liability rules for websites and Internet intermediaries storing or managing third party content.³²⁰ The ECD creates special liability rules for three categories of services: mere conduit operators, caching providers and hosting services.³²¹ Websites and other service providers have immunity when they are merely acting as a conduit³²² or caching

315. “The Directive establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. It also enhances administrative cooperation between the Member States and the role of self-regulation.” *E-Commerce Directive*, EUROPEAN COMMISSION, <https://digital-strategy.ec.europa.eu/en/policies/e-commerce-directive> (last visited Apr. 24, 2021). The E-Commerce Directive consists of twenty-four articles and four chapters: Chapter 1—General provisions (Articles 1–3); Chapter 2—Principles (Articles 4–15); Section 1: Establishment and information requirements (Articles 4–5); Section 2: Commercial communications (Articles 6–8); Section 3: Contracts concluded by electronic means (Articles 9–11); Section 4: Liability of intermediary service providers (Articles 12–15); Chapter 3—Implementation (Articles 16–20); Chapter 4—Final provisions (Articles 21–24). The Directive also covers topics such as the liability of intermediary service providers, unsolicited commercial email, and the prohibition of Internet-related surveillance. 2000 O.J. (L 178).

316. 2000 O.J. (L 178) 8.

317. 2000 O.J. (L 178) 5.

318. A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, at 4.

319. 2000 O.J. (L 178) 12–13.

320. *Id.*

321. *Id.*

322. *Id.* at 12.

data.³²³ Articles 12 through 15 of the ECD shield service providers from liability for ministerial or administrative acts.

The E-Commerce Directive provides for exemptions from liability for information society service providers when they host or transmit illegal content that has been provided by a third party. Information society service providers can under certain conditions benefit from these exemptions when they provide one of the so-called intermediary services set out in Articles 12 to 14 of the Directive. Moreover, Article 15 of the Directive prohibits Member States from imposing on providers of these services a general obligation to monitor content that they transmit or host.³²⁴

Article 15 of the ECD prevents EU Member States, “from imposing on intermediaries a general obligation to monitor information which they transmit or store,” and provides that intermediaries cannot be generally obliged to “actively to seek facts or circumstances indicating illegal activity.”³²⁵ Article 15 does not prevent member states from setting up reporting mechanisms which require intermediaries to report illegal content once they are made aware of it. Article 15 is “a strong candidate for the most significant piece of internet law in the UK and continental Europe.”³²⁶

3. Websites & Service Providers Acting as Passive Transmitters

Article 12 of the ECD is entitled “Mere Conduit,” which is a provision that shields websites and providers acting as a conduit. Similarly, websites engaged in caching have no liability under Article 13 of the ECD.³²⁷ Under this provision the service provider is not liable for the automatic, intermediate, and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request.³²⁸

4. Service Provider is Not Generally Liable for Hosting

ECD Article 14 shields websites from liability for data that is stored by their service at the request of a service recipient. Websites lose their liability shield “when the recipient of the service is acting under the

323. 2000 O.J. (L 178) 13.

324. *Id.*

325. *Id.* at 13.

326. Graham Smith, *Time to speak up for Article 15 of the ECommerce Directive*, INFORMM’S BLOG (May 23, 2017), <https://inform.org/2017/05/23/time-to-speak-up-for-article-15-of-the-ecommerce-directive-graham-smith/> (last visited Sept. 19, 2021).

327. 2000 O.J. (L 178) 13.

328. *Id.*

authority or the control of the provider.”³²⁹ Under the ECD, websites do not lose their immunity for “establishing procedures governing the removal or disabling of access to information.”³³⁰

5. No General Obligation to Monitor

The ECD imposes a duty of takedown of illegal content on websites only after the provider has specific notice.³³¹ A Member State cannot force any general content monitoring obligation on intermediaries.³³² The E-Commerce Directive does not impose upon service providers “a general obligation actively to seek facts or circumstances indicating illegal activity.”³³³ The ECD, like Section 230 of the CDA, imposes no general obligation to monitor, as noted by Article 15.³³⁴ Consistent with the ECD, our CDA Section 230 notice-and-takedown procedures for false public health information only requires action after websites receive written or digital notice documenting illegal content on their service.

6. CDA Section 230 Notice & Takedown

As with our CDA Section 230 proposal, the ECD imposes no duty to monitor content. However, under our reform, once Internet intermediaries have received notice of content that has been deemed tortious, infringing, or otherwise illegal, and where the First Amendment interest is deemed to be non-existent or minimal, Internet intermediaries have a duty to remove it. Internet intermediaries such as Google, Facebook, and Twitter are global multinationals that already are required to remove tortious content in the European Union.

Our CDA Section 230 reform proposal will enable websites to implement a single takedown procedure, rather than employ separate policies for the U.S. and Europe. Our reform proposal to establish a takedown duty for ongoing false public health information will likely evolve to address other imminent threats to the public posed by online wrongdoing. CDA Section 230 must continue to be both progressive and flexible in order to punish and deter false information threatening public health.

7. An Alternative Section 230 Reform: The PACT Act

The U.S. Senate is considering bipartisan legislation to address the problem of online platform’s immunity for hosting illegal content. “The

329. *Id.*

330. *Id.*

331. *Id.*

332. 2000 O.J. (L 178) 13.

333. *Id.*

334. *Id.*

Platform Accountability and Consumer Transparency Act, (PACT) reintroduced . . . by Sens. Brian Schatz (D-Hawaii) and John Thune (R-S.D.), would hold technology companies accountable for moderating content on their platform” by revising CDA Section 230.³³⁵ The Schatz-Thune PACT Act will require:

(A) IN GENERAL.—The protection under paragraph (1) shall not apply to a provider of an interactive computer service, with respect to illegal content shared or illegal activity occur ring on the interactive computer service, if the provider—

(i) has knowledge of the illegal content or illegal activity; and

(ii) subject to subparagraph (C), does not remove the illegal content or stop the illegal activity within 24 hours of acquiring that knowledge, subject to reasonable exceptions based on concerns about the legitimacy of the notice.³³⁶

Supporters of the PACT Act argue that CDA Section 230 reform addresses “the ‘cancel culture’ slur by affirming the responsibility of tech companies to make moral, ethical, and civic judgements about the speech and images they host.”³³⁷ Chrisopher Cox, a former member of Congress, contends:

“If a website is in any way complicit in development of illegal content, it does not receive any section 230 protection,” he pointed out. And protections for publishers and distributors from liability for third-party content whose illegality they were unaware of predates section 230. What section 230 “added” was that a platform operator or other Internet intermediary doesn’t have to monitor all third-party content “to avoid becoming derivatively liable.”³³⁸

Opponents of the PACT Act, such as Professor Eric Goldman, argue that this statute raises serious First Amendment and due process problems:

The fact the bill mandates this collateral damage on legitimate content highlights some of the bill’s significant First Amendment and due

335. Rebecca Kern, *Renewed Liability Shield Bill Aims to Hold Tech Accountable (1)*, BLOOMBERG: GOVT. (Mar. 17, 2021), <https://about.bgov.com/news/senators-renew-liability-shield-attack-to-hold-tech-accountable/> (last visited Sept. 19, 2021).

336. Platform Accountability and Consumer Transparency Act (PACT), S. 4066, 116th Congr. §6 (2020).

337. Tina Casey, *IBM Gets It Right on Cancel Culture and Corporate Responsibility*, TRIPLE PUNDIT (Jan. 18, 2021), <https://www.triplepundit.com/story/2021/ibm-cancel-culture/717576> (last visited Sept. 19, 2021) (interviewing Christopher A. Padilla, IBM’s Vice President of Government and Regulatory Affairs).

338. *Senate Panel Hears Warnings on Proposed Section 230 Changes*, TR DAILY, 2020 WLNR 21053010 (July 28, 2020) (quoting Christopher Cox, Counsel at Morgan, Lewis & Bockius LLP, Director of NetChoice).

process problems. Note: in addition to the mandatory removal requirement, the bill carves back Section 230(c)(1) protection for content/activity identified by the court decisions but surgically leaves Section 230(c)(2) in place. Section 230(c)(2) generally doesn't protect leave-up decisions (the only decisions that would be targeted by court orders contemplated by the bill), but this distinction still confused me. Fourth, the bill sidesteps the vexing problem of whether or not the plaintiff must sue UGC sites as part of obtaining the court order.³³⁹

A CATO Institute commentator points to the impracticality of requiring platforms to have 24/7 live representatives to respond to user complaints about content:

PACT would require platforms to maintain 'a live company representative to take user complaints through a toll-free telephone number,' during regular business hours. If in a given day even hundredth of a percent of Facebook's 2.3 billion users decided to make use of such an option, they would generate tens of thousands of calls. In the early days of Xbox Live, Microsoft maintained forum to answer user moderation complaints. The forum was so inundated with unreasonable and inane questions that the project was later abandoned.³⁴⁰

PACT contemplates federal law enforcement by the U.S. Department of Justice and regulation of platforms by the Federal Trade Commission, who will pursue civil actions for online activity.³⁴¹ Senators Schatz and Tune argue that it should be the role of "state attorneys general to enforce federal civil laws against online platforms that have the same substantive elements of the laws and regulations of that state."³⁴² They propose "[r]equiring the Government Accountability Office to study and report on the viability of an FTC-administered whistleblower program for employees or contractors of online platforms."³⁴³

PACT, if enacted, would force social media and other social platforms to takedown public health misinformation that threatens the public. As of September 21, 2021, the bill has not gained traction. Our proposal is an alternative to PACT that will not require a rigid

339. Eric Goldman, *Comments on the 'Platform Accountability and Consumer Transparency Act' (the 'PACT Act')*, TECH. & MKTG. L. BLOG (July 27, 2020), <https://blog.ericgoldman.org/archives/2020/07/comments-on-the-platform-accountability-and-consumer-transparency-act-the-pact-act.htm> (last visited Sept. 19, 2021).

340. Will Duffield, *PACT Act Does More Harm than Good*, CATO INST. (July 27, 2020), <https://www.cato.org/blog/pact-act-does-more-harm-good> (last visited Sept. 19, 2021).

341. See Platform Accountability and Consumer Transparency Act (PACT), S. 4066, 116th Cong. § 5 (2020).

342. *Id.*

343. *Id.*

government bureaucracy and not undermine CDA Section 230's functioning. Unlike our proposal, PACT would undermine CDA Section 230, overextend government bureaucracy, and tax the courts with frequent reviews of takedown orders. Relying upon private attorneys general reduces the risk that a political leader could arbitrarily use takedown to reward ideological friends and punish enemies.³⁴⁴ Importantly, PACT is not harmonized with the Electronic Commerce Directive and the takedown regimes of other countries. The net effect is that it will undermine online intermediary law in the United States and the European Union.

In contrast to PACT's creation of cumbersome bureaucracy, our CDA Section 230 relies chiefly upon private enforcement by drawing upon over two centuries of torts jurisprudence. Tort law "has been transformed from compensating private individuals to private law that empowers often disadvantaged individuals with a public purpose."³⁴⁵ This is a market-based approach to enforcement that reduces the need for intrusive governmental intervention and the political manipulation of online content.

Shifting the burden of enforcement to the direct victims will result in cost savings because the already over-burdened Justice Department and state attorneys general will not need to take on new civil enforcement roles. In the successful cases against Big Tobacco, state attorneys general retained private plaintiffs' law firms to fund and litigate tobacco lawsuits in multiple states. The private law firms that were hired by the states in the tobacco litigation had the expertise, experience, and financial means necessary to recover billions of dollars spent to reallocate the health costs of smoking-related illnesses. Just as in the Tobacco Master Settlement against the four largest tobacco companies, private enforcement deployed against false public health information will be far more efficient than relying upon government agencies or regulators with no expertise in the public health consequences of false postings.

Tort law has well-established standing doctrines that will serve as an effective check on abusive notice and takedown requests that potentially could overwhelm social media sites. Tort actions such as malicious prosecution or abuse of process can be deployed against those tempted to send frivolous notice and takedown demands. Finally, our CDA notice and takedown regime aligns U.S. platform liability with EU law and can evolve into the global standard.

344. See Platform Accountability and Consumer Transparency Act (PACT) § 7.

345. *Id.* at 511.

CONCLUSION

CDA Section 230 is a twenty-six-word clause that has created an invincible liability shield for online platforms, even when they host dangerous public health information. This Article calls for Congress to amend CDA Section 230 to recognize an exception for hosting dangerous public health disinformation. This 1996 legislation needs to be modernized to take into account a variety of unforeseeable technological and societal developments. For example, Carnegie-Mellon researchers collected “more than 200 million tweets discussing coronavirus or COVID-19,”³⁴⁶ discovering that of the fifty leading retweeters, 82% were “bots.”³⁴⁷ The researchers concluded that “[m]any factors of the online discussions about ‘reopening America’ suggest that bot activity is orchestrated.” Multiple accounts posted identical tweets at the same time or tweet more than is “humanly possible,” which indicates they are bots.³⁴⁸

The team concluded that bot assistants, likely controlled by foreign governmental agents, “generated 66% of the tweets.”³⁴⁹ The Carnegie-Mellon researchers acknowledge that they have not identified the “specific entities behind the orchestrated attempts to influence online conversations. ‘We do know that it looks like it’s a propaganda machine, and it definitely matches the Russian and Chinese playbooks, but it would take a tremendous amount of resources to substantiate that.’”³⁵⁰ Congress surely did not consider such situations when it crafted CDA Section 230 a quarter century ago.

Bots created by foreign agents that are calculated to harm U.S. public health have no First Amendment rights. Yet, under the federal courts’ interpretation of CDA Section 230, websites have no duty to remove false public health content even if was orchestrated by foreign

346. Virginia Alvino Young, *Nearly Half of Twitter Accounts Discussing ‘Reopening America’ May be Bots: Researchers Say Sophisticated, Orchestrated Bot Campaigns Aim To Sow Divide*, NPR (May 20, 2020), <https://www.scs.cmu.edu/news/nearly-half-twitter-accounts-discussing-%E2%80%98reopening-america%E2%80%99-may-be-bots> (last visited Sept. 19, 2021).

347. “A bot—short for ‘robot’ and also called an internet bot—is a computer program that operates as an agent for a user or other program, or to simulate a human activity. Bots are normally used to automate certain tasks, meaning they can run without specific instructions from humans.” Alexander S. Gillis, *Definition: Bot (Robot)*, WHATIS.COM, <https://whatis.techtarget.com/definition/bot-robot> (last visited Apr. 24, 2021).

348. Bobby Allyn, *Researchers: Nearly Half of Accounts Tweeting About Coronavirus Are Likely Bots*, NPR (May 20, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/20/859814085/researchers-nearly-half-of-accounts-tweeting-about-coronavirus-are-likely-bots> (last visited Sept. 19, 2021).

349. See Young, *supra* note 348.

350. *Id.*

bots. While the controller of the bots may be difficult to identify, weakening the website liability shield would cripple systematic disinformation campaigns. There is nothing inevitable about this expansive reading of what was originally a very limited immunity that was confined to Internet Access providers.

Disinformation about the COVID-19 pandemic, whether deployed by foreign government bots or taking the form of scams and hoaxes, has the potential of exacerbating public health crises. CDA Section 230 has evolved into a tort liability shield for any content third parties create and post on social networks, even when fraudulent information endangers the public health. In the United States, there is no right to remove dangerous public health disinformation, a policy that enables needless contagion and deaths as evidenced by the current COVID-19 pandemic. CDA Section 230 was enacted “to help clean up the Internet, not to facilitate people doing bad things on the Internet.”³⁵¹

U.S. courts have stretched CDA Section 230 to protect all Internet intermediaries from all torts so long as the false information originated with a third-party user of the service. Our reform acknowledges that false opinions are constitutionally protected speech, but false statements causing specific public health harms have no First Amendment interest. Congress should amend CDA Section 230 to enable the direct victims to force websites to disable dangerously false postings about COVID-19 and comparable public health threats. Unlike PACT, our CDA reform relies chiefly upon private, not public, enforcement. Our CDA reform will address the perceived problem of hosting illegal content without requiring an extensive federal bureaucracy or increasing the strain on the already overburdened state or federal attorneys general.

Our notice-and-takedown proposal fine-tunes procedures for removing infringing content developed in the Digital Millennium Copyright Act. To qualify for CDA Section 230 immunity, a social network would be required to promptly deactivate access to dangerous public health disinformation upon notice from the direct victims or government regulators such as the Federal Trade Commission, Food and Drug Administration, or Consumer Product Safety Commission. Unlike the DMCA’s notice-and-takedown procedures, however, websites ordered to disable false public health content will have a right to reply, counter notice, and put back, where the disputed material is protectable by the First Amendment. While this article only proposes that Congress

351. Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> (last visited Sept. 19, 2021).

carve out an exception to Section 230 for postings that directly harm the public health, this exception could be extended to other illegal content not protected by the First Amendment such as terrorist postings, unconsented pornography, the promotion and sale of illicit materials, or criminal-level online harassment. The United States is the only country with a liability shield for hosting or posting false public health information, even when these lies create demonstrable harm. Our reform would move the United States toward a harmonized global standard for protecting public health and safety, which is extremely valuable because dangerously false viral postings cross national borders at the click of a mouse. Pandemics do not respect national borders, so public health responses require global cooperation.