

**FACILITATING ACCOUNTABILITY FOR ONLINE
POLITICAL ADVERTISEMENTS**

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I. Introduction

The 2016 elections were plagued by online disinformation campaigns and foreign meddling. In their wake, Internet platforms, like Facebook and Google, came under scrutiny to self-regulate or be regulated by the government. Over the past four years, these platforms have taken steps—some significant, some more smoke-and-mirrors—to reduce the threat of foreign meddling and disinformation in our political campaigns. They have done so voluntarily, but in the shadow of threats of regulation.

Meanwhile, political messaging continues on social media. Online political speech is particularly useful to small campaigns, such as those at the state and local level, who are unable to afford to run television advertisements. These small campaigns can place ads online for mere pennies per view—or even for free. Foreclosing social media political advertising as an option for candidates and campaigns, as Twitter recently did, is probably an overcorrection that would fall especially hard on small campaigns.

Many online political ads narrowly target audiences. The typical political ad on social media lacks audience information, which would enable others to target the same audience in order to run counter-messaging, or *counter-speech*, to use the Supreme Court’s phrasing. This means that campaigns who may be spreading disinformation can do so without being challenged before the same audience. The lack of transparency for online ad buys is notable, especially when compared to ad buys for television and radio, which are disclosed publicly and make the target audience obvious.

The problem is three-fold. First, there is some panic among the public about disinformation, which can weaken the perceived legitimacy of our elections. Second, the disinformation itself may undermine voters’ decision making. It is hard to know how effective the disinformation attacks of 2016 were, in part because Facebook has not shared data like it promised that it would. However, even if the 2016 attacks failed—and they might not have changed many minds—future attacks may succeed. Moreover, the public, after learning about the way

microtargeting works from movies and news specials,¹ seems to be fairly concerned about political disinformation on social media. That concern may cause the public to have less trust in the outcomes of our elections, which is dangerous for our democracy. Therefore, it is important to erect safeguards now.

The third aspect of the problem concerns regulatory symmetry. It is irrational for a system to provide loopholes that leave voters less able to learn about who is speaking to them on social media platforms compared to television and radio. Platforms have partly stepped in to close this gap, but they are unreliable self-regulators, as Former Federal Election Commission Chair Ann Ravel and I explain in other work.²

Government cannot be the arbiter of truth; that would violate the First Amendment. However, it can demand transparency. Online political advertising transparency is best thought of as a democratic guardrail and an aid to accountability rather than a silver bullet that will solve our problem with disinformation and foreign meddling. This essay builds on arguments I have made elsewhere, primarily in Wood & Ravel (2018),³ in which we argued there that platforms should be required to make targeting criteria available. Here, I expand the proposal in order to be consistent with its underlying rationale: platforms should make both the targets (core audience) and the audience who saw the ad due to shares and likes (final audience), available for counter-speech.

¹ See, e.g., THE GREAT HACK (NETFLIX 2019); *How Campaigns Use Big Data Tools to Microtarget Voters*, CBS NEWS (Nov. 5, 2018),

<https://www.cbsnews.com/video/how-campaigns-use-big-data-tools-to-microtarget-voters/> [<https://perma.cc/LD56-2FVW>]; Los Angeles Times, *Here's How Political Campaigns Can Target You Online*, YOUTUBE (Apr. 11, 2018),

<https://www.youtube.com/watch?v=wRlb0R07UJY> [<https://perma.cc/5PMN-YCYA>]; VICE News, *How Political Campaigns Use Data to Target Ads to Voters (HBO)*, YOUTUBE (Apr. 11, 2018),

https://www.youtube.com/watch?v=ZP3kLe_3uLo [<https://perma.cc/Y7MV-U3Z4>].

² Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CALIF. L. REV. 1223, 1244-46 (2018).

³ See *id.*

In Part II, I explain why accountability is important for paid online political speech. I also review what we know about disinformation, its incidence, and review social scientific findings concerning its effects. I conclude Part II by describing the two main types of online political advertising and the ways money is involved distributing it. Part III reviews our core First Amendment jurisprudence on political speech and discusses counter-speech as a remedy for political disinformation. Part IV demonstrates visually how much easier it is to hold speakers accountable and correct misinformation when the paid political speech occurs on broadcast and radio than when it occurs online. Part V presents my proposal that platforms who are profiting from paid political speech online should make the audiences of any paid political speech re-targetable by anyone who wants to speak to the same audience. While the incentives align such that they should simply agree to do this to increase profits and signal to the world that they care about democracy, it is also possible that the government could require this transparency from them. Lastly, Part VI discusses details and limitations of the proposal.

One final note before proceeding: most of the examples in this essay concern Facebook, which is one of the two biggest platforms profiting from paid political speech online. Google is the other. Google is well on its way to solving the problems I discuss. Facebook is not, and so most of my examples are from Facebook.

II. Accountability, Disinformation, and Counter-speech

Political speakers are subject to less accountability online than they are in almost any other venue. The most relevant comparison to online advertising, which often features video and audio, is advertising on television and radio.⁴ There are three reasons to add more accountability to online political advertising: (1) deter potential

⁴ Advertising on cable TV can be narrowly targeted in some instances that are not worth explaining here, except to say that the cable-TV providers should be held to the same requirements that I propose here. The broad point is that the smaller the audience, the lower the accountability for the speech.

disinformation and foreign influence; (2) facilitate counter-speech; and (3) bring at least as much transparency to online political speech as we have for paid political speech on broadcast television and radio. In this Part, I explain how the lack of accountability emerges. I also discuss political disinformation as a potential problem, as well as other aspects of online advertising that might lead opposing campaigns to want to counter-speak to the same audiences.

a. Online Advertising and Accountability

Regulatory gaps and technological innovations, like micro-targeting, create the opportunity for reduced accountability online. Campaign finance transparency can increase accountability for campaign advertising. I take each of these issues in turn.

Reduced accountability and narrow audiences

In this age of polarization, voter mobilization is particularly important. Moreover, we know that narrow targeting can be effective in competitive races.⁵ To that end, as elections approach, most campaigns and related groups making political expenditures (I will refer to them all as “campaigns” for simplicity) will focus almost entirely on mobilizing the people they perceive to be likely voters.

How do campaigns find likely voters? First, they use internal data on who they think will turn out to vote for their candidate or issue, based on the voter file and surveys they’ve conducted. Second, campaigns purchase data from firms who have internal “likely voter models,” based on a proprietary mix of past turnout, demographic, and other data.⁶ Finally, the platforms allow campaigns to target their users based

⁵ See Katherine Haenschen & Jay Jennings, *Mobilizing Millennial Voters with Targeted Internet Advertisements: A Field Experiment*, 36 POL. COMM. 357 (2019).

⁶ Cambridge Analytica may be the most well-known of these firms among the public mind, but they are a relative newcomer to the world of campaign analytics. For a deep dive into the way campaigns use data from Catalist, a data vendor that supports progressive campaigns, see David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSP. 51 (2014). The firms’ data is better

on data that the platforms acquired about the users, though targeting possibilities vary across platforms.⁷ This means that political advertisements can be targeted using the platforms' information about their users, or by using a list of targets generated by the campaign with data from outside of the platform. The novel strategy allowed with online advertisements, which is not possible with broadcast TV and radio advertising, is narrow targeting.

Narrow targeting, however, introduces accountability problems. When audiences are small and like-minded, speakers are less likely to be held accountable for their speech. Take, for example, “locker room talk.” President Trump and his surrogates dismissed his infamous “grab them by the pussy” remark as “locker room talk.”⁸ Locker room talk is boastful and private, and importantly, it goes unchallenged by the hearers, never leaving the all-male “safe space” of the locker room. In other words, it is speech to a small group that one is not held accountable for. Narrow targeting to like-minded audiences is similar to engaging in locker room talk—it is speaking to voters who may not hold the campaign accountable.

What do we know about how campaign messaging changes when accountability is reduced? An analogy to the dark money context may be instructive. Dark money groups do not disclose the sources of their money, so their political speech is anonymous. A recent study shows that “dark money” ads on TV are more likely to be negative than fully-

for voters who are the parties' base, or the likely voters. See generally, EITAN HERSH, *HACKING THE ELECTORATE* (2015).

⁷ Google has recently restricted microtargeting to broad categories of gender, race, age, and location. See CTR. FOR INFO. TECH. & PUB. LIFE, *PLATFORM POLITICAL ADVERTISING POLICIES IN COMPARATIVE PERSPECTIVE* (2020), <https://citadigitalpolitics.com/wp-content/uploads/2020/01/Political-Advertising-Policies-1.pdf>.

⁸ Pamela Engel, *Anderson Cooper Confronts Donald Trump over Lewd Comments*, BUS. INSIDER (Oct. 9, 2016, 9:36 P.M.), <https://www.businessinsider.com/trump-clinton-debate-anderson-cooper-2016-10> [<https://perma.cc/2WQB-8CSC>].

disclosed outside ads.⁹ People speaking without the threat of accountability are simply more likely to be nasty.

It does not require a large logical leap to conclude that ads in another low-accountability setting, that of narrowly-targeted online political communications, may also be more negative, compared to broadly-targeted ads. They also may be more extreme, for example, triggering fear or anger among the targeted voters, in an effort to mobilize them to vote. However, narrowly-targeting political speech online is not necessarily a safe haven for campaigns hoping to mobilize their base without accountability. Online speech can have enormous reach, and accountability for online speech can begin when someone clicks “share” on the ad. Therefore, even narrowly-targeted ads may expose the speaker to accountability if the targeting is inaccurate¹⁰ or the content is shared by the targets.

As a descriptive matter, we are still learning about the ways in which narrowly-targeted ads may differ from broad-based appeals.¹¹ My ongoing research with Shomik Jain suggests that, especially among political ads run by outside groups, narrowly-targeted ads on Facebook are more negative than ads targeted more broadly, and that online ads from dark money groups are also more negative.¹² We also have

⁹ Daniel E. Chand, “Dark Money” and “Dirty Politics”: Are Anonymous Ads More Negative?, 19 BUS. & POL. 454 (2017).

¹⁰ Erroneously targeted voters respond very poorly to seeing ads intended for other people. Eitan D. Hersh & Brian F. Schaffner, *Targeted Campaign Appeals and the Value of Ambiguity*, 75 J. POL. 520, 521 (2013) (“[V]oters who receive a message targeted to a group of which they are not a member consistently penalize the candidate for ‘mistargeting.’”).

¹¹ Jessica Baldwin-Philippi reminds us that the most effective use of micro-targeting may be for A/B testing messages and for fundraising appeals. She also reviews the literature on what we know about the effectiveness of micro-targeting. See Jessica Baldwin-Phillipi, *Data Campaigning: Between Empirics and Assumptions*, 8 INTERNET POL’Y REV. 1 (2019).

¹² While outside groups run most of the ads on Facebook, campaigns and parties also run ads on the platform, and their microtargeted ads tend to be more positive than their broadly-targeted ads. Shomik Jain & Abby K. Wood, *Analyzing the Sentiment and Targeting of Political Advertisements on Facebook* (2020) (unpublished manuscript, on file with author).

studies comparing social media ads, where narrow targeting is possible (if not always pursued), and television ads, which are necessarily broad-based. Studies making this comparison provide conflicting evidence on campaigns' strategies. One recent study suggests that campaigns may not pursue different advertising strategies in the two venues.¹³ Another finds that Facebook ads are more partisan and more ideologically polarized than television ads, but that they engage in *less* attacking of the opponent candidates. The authors conclude, “[c]andidates do appear to take advantage of finer targeting to deliver more partisan messaging, which suggests that the capabilities of social media push candidates toward using ads more for mobilization than for persuasion.”¹⁴ In sum, the existing research is at least suggestive that narrowly-targeted ads differ from more broadly-targeted ads. The ways they differ – in tone and partisanship – may be important to voters.

Mechanisms of accountability from campaign finance transparency

Accountability for political speech is facilitated by transparency and created by two groups, in two time periods. In “real time” (more or less), the media, watchdog groups, and opposition campaigns act to hold speakers accountable. They use the Federal Election Commission (FEC) disclosures, the Federal Communications Commission (FCC) political file, on-ad disclaimers, and, to the extent they can, the platforms' online ad archives to inform voters about the sources and destinations of campaign money. Here, accountability can come from voter reactions to the information. For example, if someone is a “big oil” candidate or “wine cave fundraiser” candidate, or if they have dark money support (discussed in the next subsection), voters can incorporate that information into their vote choice.

¹³ See generally Michael M. Franz et al., *The Issue Focus of Online and Television Advertising in the 2016 Presidential Campaign*, 48 AM. POL. RES. 175 (2020).

¹⁴ Erika Franklin Fowler et al., *Political Advertising Online and Offline* (2018) (unpublished manuscript) (manuscript at 3), https://web.stanford.edu/~gjmartin/papers/Ads_Online_and_Offline_Working.pdf.

Watchdog groups like Campaign Legal Center or Common Cause also push for accountability in real time. Their lawyers follow up on ads and disclosures that seem to violate campaign finance rules, and they file complaints with campaign finance regulators.¹⁵ The groups then engage in a campaign of press releases and social media to amplify their complaints. Attentive members of the public can use the information to decide how much to support a candidate that seems to be in violation of the rules.¹⁶

On a slower time frame, regulators can use complaints, investigations, and disclaimer and disclosure information to hold speakers—including foreign speakers—accountable for other aspects of their campaign financing, though generally not for disinformation itself. At the federal level, this process can be extremely slow, because the FEC holds multiple votes to allow the investigation and subsequent enforcement action to proceed. For example, a SuperPAC supporting Jeb Bush accepted an illegal foreign contribution in 2015, but the group did not pay a fine until the case was finalized four years later in 2019.¹⁷

b. What We Know About the Public, Disinformation, and Campaign Finance Transparency

Social scientists, including myself, have been studying campaign finance transparency through an empirical lens. I described some of our studies of the advertising itself above. Now I briefly summarize what we are learning about transparency and disinformation.

¹⁵ Brendan Fischer & Maggie Christ, *The Real Backstory to the Arrest of Two Ukrainian-American Trump Donors*, CAMPAIGN LEGAL CTR. (Oct. 11, 2019), <https://campaignlegal.org/update/real-backstory-arrest-two-ukrainian-american-trump-donors> [https://perma.cc/3VQC-XHSL].

¹⁶ Abby K. Wood & Christian R. Grose, *Campaign Finance Transparency Affects Legislators' Election Outcomes and Behavior* (Ctr. for Law & Soc. Sci., Research Paper No. CLASS18-23, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236939.

¹⁷ Letter from Mark D. Shonkwiler, Assistant Gen. Counsel, Fed. Election Comm., to J. Gerald Herbert (Mar. 8, 2019) <https://campaignlegal.org/sites/default/files/2019-03/FEC%20Conciliation%20Agreement.pdf>.

The public wants—and rewards—transparency

My own ongoing research suggests that the public wants transparent campaign financing. In an ongoing research project, I presented 1490 voting-aged respondents with two hypothetical profiles for candidates in a party primary for state senate. The profiles included policy positions, campaign skills (e.g., persuasiveness in public, amount of money raised), and campaign finance facts (e.g., relationship to dark money groups, campaign finance compliance). Respondents across the ideological spectrum preferred the more transparent candidates to the less transparent candidates.¹⁸ This finding has been replicated and extended in other work that included party cues—candidates from opposite parties running against each other. As one might expect, where party information is included, the effect of transparency is slightly muted but still statistically significant.¹⁹

Disinformation and the public imagination

Generally speaking, disinformation is politically-motivated messaging “designed explicitly to engender public cynicism, uncertainty, apathy, distrust, and paranoia, all of which disincentivize citizen engagement and mobilization for social or political change.”²⁰ We know that plenty of disinformation circulated online in advance of the 2016 presidential election and that some circulated in 2018 as well. However, the platforms have not made the entire corpus of data available to scholars who might help the public understand whether it was a common occurrence, a deeply harmful attack, or whether it was both harmful and common.

¹⁸ See Abby K. Wood, *Show Me the Money: Candidate Selection Based on Campaign Finance Transparency* (Ctr. for L. & Soc. Sci., Paper No. CLASS17-24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029095.

¹⁹ See Samuel C. Rhodes et al., *The Role of Dark Money Disclosure on Candidate Evaluations and Viability*, 18 ELECTION L.J. 175, 184 (2019).

²⁰ Dean Jackson, *Distinguishing Disinformation from Propaganda, Misinformation, and “Fake News”*, NAT’L ENDOWMENT FOR DEMOCRACY (Oct. 17, 2017), <https://www.ned.org/issue-brief-distinguishing-disinformation-from-propaganda-misinformation-and-fake-news/> [<https://perma.cc/HHY5-BXPF>].

The highest estimate in the public discourse is that disinformation was viewed approximately 100 million times,²¹ but without the denominator of how many political advertising impressions were generated during the campaign—a number that must be in the billions—we cannot know the *rate* of disinformation. Put another way, we do not know how common it was for the average social media user to see political disinformation in her social media feeds. A recent study suggests that sharing disinformation during the 2016 election was a relatively rare activity. In a survey on a representative sample of 1331 respondents with linked Facebook profile data, scholars verified that 8.5% of respondents shared links from websites known to be so-called “fake news” sites.²² Almost all of the people sharing the disinformation described themselves as “conservative” or “extremely conservative,” and most were over the age of 65.²³ Patterns were similar on Twitter in the lead-up to the 2016 election. Almost 6% of “news” consumption was from fake news sites. But only 1% of users were exposed to 80% of fake news, and only 0.1% of users were responsible for sharing 80% of fake news. Voters in swing states did have a “slightly higher” rate of exposure than voters not in swing states.²⁴

One of the key strategies used by propagandists is to make us uncertain of the truth of any assertions by anyone. It is de-mobilizing

²¹ *Social Media Influence in the 2016 U.S. Elections: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong., 1st Sess. (2017) (statement of Sen. Richard Burr, Chair, Sen. Intelligence Comm.); Craig Timberg, *Russian Propaganda May Have Been Shared Hundreds of Millions of Times, New Research Says*, WASH. POST (Oct. 5, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says> [<https://perma.cc/J662-P25X>] (citing Jonathan Albright, *Itemized Posts and Historical Engagement — 6 Now-Closed FB Pages*, TABLEAU (Oct. 4, 2017), <https://public.tableau.com/profile/d1gi#!/vizhome/FB4/TotalReachbyPage> [<https://perma.cc/TJ38-U4WY>]).

²² Andrew Guess et al., *Less Than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook*, 5 SCI. ADVANCES, 1 (2019).

²³ *Id.*

²⁴ Nir Grinberg et al., *Fake News on Twitter During the 2016 U.S. Presidential Election*, 363 SCI. 374, 375 (2019).

and exhausting.²⁵ The more that political speech can push or amplify disinformation, the more likely it is that the media will pick up the story, even if only to correct it. Steve Bannon, former political advisor to President Trump described this strategy as “flood[ing] the zone with shit.”²⁶ To the extent that misinformation and disinformation have any lasting effect, we do know that they can be “sticky,” because we tend to accept familiar information as true. When the media picks up a story about disinformation, it may have the adverse effect of causing us to believe it, incorrectly remembering it as true, solely due to the repetition of the information.²⁷

What about the size of the effect? The public suspects that disinformation *may* have some effects, such as suppressing the vote or exacerbating polarization. However, these effects may be quite small or may not last long. Moreover, they are difficult to pinpoint, for lack of a valid counterfactual. How can we establish that someone would have voted were it not for the disinformation they saw online?²⁸ We

²⁵ See Jason Stanley, *In Defense of Truth, and the Threat of Disinformation*, in CAN PUBLIC DIPLOMACY SURVIVE THE INTERNET? BOTS, ECHO CHAMBERS, AND DISINFORMATION 71 (Shawn Powers & Markos Kounalakis eds., 2017).

²⁶ David Remnick, *Trump vs. the Times: Inside an Off-the-Record Meeting*, NEW YORKER (July 30, 2018), <https://www.newyorker.com/news/news-desk/trump-vs-the-times-inside-an-off-the-record-meeting> [<https://perma.cc/A9MU-8VV4>].

²⁷ David M.J. Lazer et al., *The Science of Fake News*, 359 SCI. 1094, 1095 (2018) (citing Briony Swire et al., *The Role of Familiarity in Correcting Inaccurate Information*, 43 J. EXPERIMENTAL PSYCHOL. 1948 (2017); Ullrich K.H. Ecker et al., *Reminders and Repetition of Misinformation: Helping or Hindering Its Retraction?*, 6 J. APPLIED RES. MEMORY & COGNITION 185, 190 (2017)). Of course, not all propagandists are U.S. citizens. Transparency for online political speech should deter (or expose) at least some foreign influence in our campaigns. The indictments of Lev Parnas and Igor Fruman for laundering foreign money into our campaigns were enabled by a lawyer’s clever investigation into political spending that was disclosed pursuant to our transparency requirements for political giving. A lawyer at Campaign Legal Center matched addresses required by disclosures in order to flag the transactions as suspicious.

²⁸ Without getting too technical, I can imagine a scenario in which we could construct valid counterfactuals. Suppose disinformation attacks targeted very narrow geographic areas—precincts or zip codes. We can imagine matching targeted areas with areas nearby with similar demographic makeup that were not targeted, and looking at the difference in turnout rate. But disinformation attacks are probably not

still lack scholarly findings measuring individual effects of online political disinformation and misinformation, especially around the 2016 election.²⁹ A recent paper examining the effects of interaction with Russian bots on Twitter prior to the 2018 election finds no change in political attitudes before and after contact with bots.³⁰ The authors suggest that the bots may have been targeting people who were already quite polarized and thus harder to persuade.³¹ Again, Facebook has not made data available to analyze the effects on its platform. Facebook is much larger and different than Twitter in many ways, including the age distribution of users of the people who use it.³² So these results using Twitter data may or may not generalize to the Facebook context.

While it is true that people remember disinformation more than corrections,³³ corrections are not altogether ineffective. Moreover, it is likely that most counter-speech will not consist of corrections to intentional disinformation. Rather, it will speak to the same audience, taking a different side of an issue.³⁴

so narrowly targeted—we cannot know because the platforms don't release targeting criteria, and they are shared widely in a way that might cause us to under-state the size of the effect.

²⁹ Joshua A. Tucker et al., *Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature*, HEWLETT FOUND. 1, 54 (Mar. 2018), <https://hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf>.

³⁰ See Christopher A. Bail et al., *Assessing the Russian Internet Research Agency's Impact on the Political Attitudes and Behaviors of American Twitter Users in Late 2017*, 117 PROC. NAT'L ACAD. SCI., 243 (2020).

³¹ *Id.* at 244.

³² Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RES. CTR. (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [<https://perma.cc/B2H3-MJ8R>].

³³ See Emily Thorson, *Belief Echoes: The Persistent Effects of Corrected Misinformation*, 33 POL. COMM. 460, 462 (2015).

³⁴ What's more, the nature of the corrective message matters. Political communications scholars have written extensively about correcting disinformation. See, e.g., Jennifer L. Hochschild & Katherine Levine Einstein, *Do Facts Matter? Information and Misinformation in American Politics*, 130 POL. SCI. Q. 585 (2015); James H. Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 791, 805 (2000); Brendan Nyhan & Jason Reifler, *When*

Still, voters are worried about online disinformation. An October 2018 survey by the Brookings Institute revealed that 45% of respondents believed that “fake news is very much a threat to democracy.”³⁵ Similarly, 50% of respondents to a Pew survey said that “made up news” is a “very big problem for the country.”³⁶ By way of comparison, that is more than the number of respondents who thought terrorism (34%) or racism (40%) is a very big problem.³⁷ Accordingly, public concern about disinformation may be demobilizing and damaging *even if disinformation itself is not*, or even if it is very damaging but is also very rare. Therefore, it is important for the platforms to reduce disinformation in straightforward and reasonable ways.

c. Why Counter-speech as the Solution?

In light of the accountability gaps and the empirical reality of online political disinformation described so far, I introduce the general contours of my proposal forcing platforms to facilitate counter-speech in order to help the public hold bad actors accountable. Regulations requiring platforms to publish the audiences of advertisements on their platforms will also ameliorate an asymmetry in the regulations that exist in our campaign finance system. One appeal of this push for counter-speech is its pragmatism, particularly in light of decades of Supreme Court opinions upholding disclosure requirements but striking down limits and bans.

Counter-speech

Corrections Fail: The Persistence of Political Misperceptions, 32 POL. BEH. 303, 311-22 (2010).

³⁵ Darrell M. West, *Brookings Survey Finds 57 Percent Say They Have Seen Fake News During 2018 Elections*, BROOKINGS: TECHTANK (Oct. 23, 2018), <https://www.brookings.edu/blog/techtank/2018/10/23/brookings-survey-finds-57-percent-say-they-have-seen-fake-news-during-2018-elections-and-19-percent-believe-it-has-influenced-their-vote/> [https://perma.cc/T8BL-97VQ].

³⁶ Michael Dimock, *An Update On Our Research Into Trust, Facts and Democracy*, PEW RES. CTR. (June 5, 2019), <https://www.pewresearch.org/2019/06/05/an-update-on-our-research-into-trust-facts-and-democracy/> [https://perma.cc/RB6J-UW4A].

³⁷ *Id.*

Opposing sides in ideological or partisan battles sometimes aim to mobilize (turn out voters likely to support you), and sometimes they aim to persuade voters who are torn between two or more candidates to vote for their side. The distinction between mobilization and persuasion audiences in party primaries or local elections is probably fairly minimal; campaigns often speak to overlapping groups of people in these election campaigns. In general elections, mobilization audiences probably do not overlap much between the two sides. However, their persuasion audiences may overlap as they each try to locate the median voter. The point is that even without disinformation, electoral competitors sometimes want to reach the same audiences. As I discuss below, reaching your competitor's audience is exceedingly simple on broadcast television and radio. By contrast, when advertising moves online, reaching your competitors' audience ranges from possible if not simple (on Google) to impossible (on Facebook). The platforms could allow campaigns to reach their competitors' audiences, and the government could require platforms to do so. As of this writing in April 2020, only Google comes close to actually facilitating counter-speech, and they did so voluntarily.

Why allow counter-speech in the absence of outright lies? Because careful editing and hyperbole can push the line between truth and lies so much that campaigns may want to respond to opposing sides' advertising. For example, anger is particularly motivating for voters.³⁸ As a result, turnout-oriented messages often give rise to anger in viewers.³⁹ For example, in October 2018, the Trump campaign ran ads about a supposed caravan of (asylum-seeking) migrants trying to enter the United States, using words like "invasion" in the ad.⁴⁰ The caravan

³⁸ Christopher Weber, *Emotions, Campaigns, and Political Participation*, 66 POL. RES. Q. 414, fig.2 (2013). Steve Bannon agrees: "We got elected on Drain the Swamp, Lock Her Up, Build a Wall. . . . This was pure anger. Anger and fear is what gets people to the polls[.]" Remnick, *supra* note 26.

³⁹ Weber, *supra* note 38, at fig.2.

⁴⁰ Donald J. Trump, FACEBOOK (Feb. 21, 2019), [https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&page_ids\[0\]=153080620724&q=trump%20invasion](https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&page_ids[0]=153080620724&q=trump%20invasion) [<https://perma.cc/BE6P-WGTM>]

was obviously not an invasion of the United States. Is this a lie? Oh, who knows. Neither the government nor the platforms want to be involved in these line-drawing exercises. Adopting a blanket rule requiring platforms to facilitate counter-speech means they do not have to.

When such fear—or anger—inspiring ads run, many groups may want to respond to correct disinformation (or misinformation) or to neutralize anger. In our example, refugee-supporting groups or immigration advocates may want to run ads presenting factual information about the challenges of living safely in certain Central American countries or about the relative crime rates between undocumented immigrants and U.S. citizens. Under the current setup, these groups would face two challenges. The most important challenge for this subsection is that they have to be aware that the ad ran at all. For instance, suppose that only people who “like” or “follow” a white supremacist Facebook Page receive an advertisement that contains disinformation. It’s highly unlikely that the people who receive the ad will “blow the whistle” on it by publicizing it. This is for two reasons: (1) they may believe the disinformation contained in it, and (2) they are likely to agree with it. Google and Facebook’s searchable ad archives for paid content have minimally solved this problem by posting the advertisement for all to see.⁴¹

The second challenge that groups hoping to counter-speak face is knowing who *saw* the ad—who they should “counter-speak” to. I return to both challenges in Part III of this essay.

Bring online political advertising in line with broadcast TV/radio.

Under the current system, online political advertisers are subject to less regulation than political advertising on broadcast TV and radio. The regulations and jurisprudence on campaign finance disclosure has

(“We have an INVASION! So we are BUILDING THE WALL to STOP IT. Dems will sue us. But we want a SAFE COUNTRY!”).

⁴¹ Awareness of organic content that circulates online is a different and more challenging problem. See discussion *infra* Part III.

enabled these regulatory disparities by narrowly defining terms such as “political communication,” which only cover “political communications placed for a fee on the website of another”; and so-called “electioneering communications,” which are defined so as to not include internet communications. The net result, as explained in prior work,⁴² is to exempt online political ads from many transparency requirements that identical ads would be subject to, if they aired on television, rather than online.

This state of affairs makes no sense, of course. Even when ads posted online are identical in content to those posted on broadcast and radio, they are capable of reaching many more people than ads run on TV and radio. Online ads can stay online indefinitely, and once posted, they can be retweeted and shared. Thus, at a minimum, ads that air in one venue should be subject to the same transparency requirements as ads that run on other venues, like broadcast and radio.

First Amendment Pragmatism

Finally, accountability for online speech may be the only real tool available for those hoping for more aggressive campaign finance regulation. For over 40 years, regulation of campaign expenditures have been subject to strict scrutiny under the First Amendment.⁴³ Even if the courts should de-constitutionalize their scrutiny of disclosure regulations,⁴⁴ they have not. Still, disclosure policies are scrutinized with a slightly lower—and mushier—level of scrutiny than bans and limits. Disclosure laws are more likely to survive the “exacting scrutiny” they receive than bans and limits on campaign financing, which receive strict scrutiny.

* * *

⁴² Wood & Ravel, *supra* note 2, at 1248-53.

⁴³ *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) “constitutionalized” speech.

⁴⁴ Michael S. Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1721 (2013).

Before moving on, it's important to establish a factual baseline. For our purposes, there are two kinds of online political speech: (1) organic content (most is unpaid) and (2) paid content.

Organic political content is content typically placed for free on social media sites. It may be placed on a campaign's or group's Facebook Page or Twitter feed. From there, it can be shared by followers, which can result in more followers for the campaign or group, increasing the reach and impact of future communications. Organic political content may also be created by someone not affiliated with the campaign or group and shared by the the group or campaign with their social media followers.

Paid political content is placed online by campaigns who pay to place the ads. Social media platforms display ads in their users' feeds for a certain price per view or per click. Campaigns may also place the ads on their own Pages and "boost" the ads into their followers' feeds. Google places ads in search results or on websites.

The proposal advanced here will most easily apply to paid content, which is easiest for the platforms to capture and make transparent. However, organic content is not necessarily cost-free, even when it is placed for free. A lot of organic content is supported by payments, either in production or distribution. Production costs include all of the costs of making videos (writers, lighting, makeup, videography, scriptwriting, editing, production assistants, renting spaces to film, etc.), or paying graphic designers to make still ads look great. Off-platform distribution costs for organic content involve paying for shares, likes, or retweets from so-called "bots." Although this behavior violates the platforms' terms of service, the platforms rarely penalize users for these violations, and it therefore remains a common practice.⁴⁵ Similarly, Michael Bloomberg's campaign blurred the line between the paid and "organic" content by paying "influencers" to post supportive, pro-Bloomberg messages. This practice was

⁴⁵ See generally Lutz Finger, *Do Evil—The Business of Social Media*, FORBES (Feb. 17, 2015, 9:41 A.M.), <https://www.forbes.com/sites/lutzfinger/2015/02/17/do-evil-the-business-of-social-media-bots/#6de157cbfb58> [<https://perma.cc/ZE3G-SDT7>].

previously prohibited by Facebook, but they changed their rules, seemingly to accommodate his campaign.

III. Counter-speech and the First Amendment

As explained above, political disinformation may not cause as much damage as the media coverage suggests. But, however frequent or damaging political disinformation is, its harms⁴⁶ should be addressed by government. Whatever else the First Amendment might allow, a remedy that allows (but does not force) more speech should survive scrutiny. The platforms must facilitate speakers in accomplishing the remedy. In this section, I review the relevant First Amendment jurisprudence about political disinformation and transparency. I also briefly discuss why the general regulation I propose is likely to survive constitutional scrutiny.

The Supreme Court has interpreted our First Amendment to protect political speech, even where it is false. In general, the Court requires a heightened showing—falsity and actual malice—for a public official⁴⁷ or public figure⁴⁸ to establish a prima facie defamation case against someone who utters lies against them. This high bar protects citizens' ability to speak out against the government, core to our First Amendment freedoms. Hyperbole and “rhetorical flourish” are not enough to support a defamation suit brought by a public official.⁴⁹ In addition to how hard it is to bring a defamation or libel suit, a remedy through the courts would also be too slow for the fast-paced and deadline-driven world of political campaigns. Political damage sustained before the election can hardly be repaired after it.

⁴⁶ The Court may undervalue the harm caused by speech—especially when it is hateful. Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 965 (2016). The political advertising I'm writing about here would only rarely cross the line to true hate speech. At its worst, the divisive and disinformative speech we know most about from 2016 contained racist and anti-Semitic dog whistles.

⁴⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁴⁸ *Curtis Publ'g Co v. Butts*, 388 U.S. 130, 164-65 (1967).

⁴⁹ *E.g.*, *Greenbelt Co-op. Pub Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

Defamation suits are therefore disfavored as a solution to online political disinformation.

The Court's most recent statement on disinformation is *U.S. v. Alvarez*, in which the defendant lied about having received the Congressional Medal of Honor.⁵⁰ His claim violated the Stolen Valor Act, a content-based restriction on speech that made it a misdemeanor for someone to falsely claim they received any U.S. military decoration or medal. The Court struck down the statute as violating the First Amendment and concluded that falsity alone may not be enough to exclude speech from constitutional protection. The Court then reasoned,

The remedy for speech that is false is speech that is true The theory of the Constitution is “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” The First Amendment itself ensures the right to respond to speech we do not like, and for good reason.⁵¹

The *Alvarez* opinion suggests that the Court will not tolerate government intervention when false information concerns an individual's character or achievements, such as military decorations. But the court may allow government regulations prohibiting disinformation about the election process itself to survive. In *Minnesota Voters Alliance v. Mansky*, the Court overturned a Minnesota law banning certain clothing worn near polling places as

⁵⁰ *United States v. Alvarez*, 567 U.S. 709 (2012).

⁵¹ *Id.* at 727-28 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). *Alvarez* draws upon a Brandeis concurrence from 1927 in *Whitney v. California*, in which the Court upheld the application of the Syndicalism Act, a criminal law, against a woman who joined the Communist Labor Party, which the majority perceived to present a threat of violent government overthrow. *Alvarez*, 567 U.S. at 727. In his concurrence, Brandeis said “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.” *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

overbroad. In a footnote, the majority noted that “[w]e do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”⁵² This exception probably proves the rule. Legislative or regulatory bans on political disinformation relating to the logistics of voting itself stand the best chance of surviving scrutiny. But with other political disinformation, the Court is unlikely to view bans as acceptable under the First Amendment. That leaves transparency requirements and counter-speech as the best regulatory response.

This idea of counter-speech as the remedy for false political speech is still fairly under-developed in the jurisprudence. For example, it is unclear *who* the Court thinks should counter-speak or hear the counter-speech, *when* the counter-speech must be allowed to occur, or whether it must be facilitated by an entity profiting from the false speech. In *U.S. v. Alvarez*, the counter-speech that satisfied the Court’s majority was conducted by the media in calling out Alvarez’s lies.⁵³ The injured parties in *Alvarez* were presumably recipients of the Congressional Medal of Honor, but the facts of the case do not indicate that they had engaged in counter-speech against Alvarez’s lies.⁵⁴ In the context of online disinformation, the injured parties are the campaigns and candidates about whom the disinformation is spread and the voters who are trying to make up their minds about which candidates and issues to support. The “stolen valor” issue in *Alvarez* was not time-sensitive, with a date beyond which counter-speech would be

⁵² *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018).

⁵³ *Alvarez*, 567 U.S. at 726-27.

⁵⁴ In *Whitney v. California*, Brandeis seems to believe that government efforts to educate voters about the relative merits of capitalism versus communism was important for counter-speech. *Whitney v. California*, 274 U.S. at 364. He is not clear on who the injured party is, though it is presumably the incumbent government. Importantly, *Whitney v. California* is not a disinformation case. *See Whitney*, 274 U.S. at 357. However, in *New York Times v. Sullivan*, which is a disinformation case, the injured party is Sullivan, a public official in Alabama about whom the NAACP ran an ad that contained three inaccuracies. The primary injured party in that case was the public official, who sued for defamation, though the voters seeking to determine who to vote for in the next election may also have been injured. The *New York Times v. Sullivan* court does not discuss counter-speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

practically ineffective and irrelevant, as is the case in the campaign context. Finally, no entity profited from publishing Alvarez's lies, whereas in the context of online political disinformation, the platforms profit from its publication.

Counter-speech as a remedy for disinformation fits well in the court's "marketplace of ideas" theory of the First Amendment. Content neutral regulations that foster more political speech, like the one proposed here, enhance the marketplace of ideas. Nevertheless, the regulation might be challenged under the First Amendment in two ways, neither of which is likely to succeed.⁵⁵

First, challengers could claim that requiring platforms to allow re-targeting of audiences subsidizes political speech by counter-speakers. They may argue that anyone wanting to counter-speak can free-ride on the first speakers' targeting list, which the first speaker may have paid a consultant to compile. This argument would rely on a broad reading of *Arizona Free Enterprise v. Bennett*,⁵⁶ a 2011 Supreme Court opinion ruling that part of Arizona's public financing law violates the First Amendment. That law provided additional funds to publicly-funded candidates who faced spending that exceeded the limits that the publicly-funded candidates voluntarily agreed to in order to qualify for the program. That provision could have resulted in situations that benefitted the publicly-funded candidates in ways that were not triggered by the actions of the privately-funded candidate. The five-justice majority ruled that this system burdened the speech of privately-funded candidates. They seemed particularly troubled by the "multiplier effect" of fundraising by a privately-funded candidate triggering almost equal support to all publicly-funded candidates for the same seat, as well as the fact that independent groups could trigger the matching funds to go to the publicly-funded candidates. The court described the privately-funded candidate's choice as "trigger matching funds, change your message, or do not speak."⁵⁷

⁵⁵ I address policy objections and counterarguments in Part V, *infra*.

⁵⁶ *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

⁵⁷ *Id.* at 2810.

Here, the context differs enough that the government could successfully distinguish a requirement to facilitate counter speech from the public financing “subsidy” in *Arizona Free Enterprise*. In *Arizona Free Enterprise*, the nature of the subsidy was campaign money paid directly to opponents. Here, it is not a financial subsidy at all, but a limited information subsidy, in which the counter-speaker can disseminate information but receives almost no information.⁵⁸ The first speakers will be targeting either “persuadables” – voters who are still undecided between two or more candidates – or base voters, who are unlikely to be swayed by counter speech. Campaign consultants have much more accurate data about base voters and so they focus much more energy on turning them out than on contacting persuadables.⁵⁹ Counter-speakers who are candidates would find the electoral return on contacting base voters to be very small. Importantly, as I explain in Part V, counter-speakers would not know who they were speaking to or why the first-speaker chose them. All a counter speaker could do under my proposal is choose to target an audience, based on whether she wants to respond to an ad placed by her opponent. So the benefit to the candidate is merely in being able to speak to the same audience. If she happens to be contacting persuadables – and remember, consultants have a hard time finding them – the subsidy is slightly higher because she may be able to sway them.

Of course, not all counter-speakers would be involved in elections. Recall the caravan / “invasion” example above. Advocates for Central American immigrants may also want to counter-speak to the audience reached by President Trump’s advertisement. Their motivation for counter-speech may not be electoral, but instead to protect their clients from hate crimes and other harassment from the audiences of ads that demonize their community. These advocates and groups would be uninterested in who the audience is, and the fact that the first speaker

⁵⁸ The first speaker knows the identities of the audience and can contact them in a variety of ways (phone, text, mailers, email, etc.) – a much higher value than the counter speaker receives from the ability to contact the same audience. That does not change the fact that the counter-speaker can “free ride” in this narrow sense of contacting the same audience, as if the ad were run on broadcast television.

⁵⁹ See HERSH, *supra* n. 10.

paid a consultant for the list is particularly irrelevant in this context, since it would not result in an electoral advantage. The subsidy argument should be unavailing when the counter-speaker is not tied to the election.⁶⁰

It is true that the counter speaker will gain access to an audience that the first speaker may have paid a consultant for help with targeting. But this is also true in television and radio advertising. The FCC's political file has been facilitating targeting of audiences for many decades.⁶¹ The targets for TV and radio may be broader than the narrow audiences targeted sometimes on social media, but there is nothing constitutionally interesting about smaller audiences for political speech than larger ones. The proposed regulation would simply bring online political ads in line with existing regulations for political ads on broadcast television and radio. A decision against audience transparency for online political advertisements would call into question the constitutionality of the FCC political file, an unimaginable result given the longevity and utility of the program.

A similar line of attack could come from the campaign finance disclosure jurisprudence. I explain the disclosure jurisprudence more deeply in other work,⁶² so I limit myself to a brief summary here. The Court generally upholds campaign finance disclosure regulations on the theory that disclosure's public benefits (reducing corruption or its appearance, informing voters, and facilitating enforcement) are great enough to tolerate the burdens on political speech that litigants complain about.⁶³ Here, litigants opposed to requiring platforms to

⁶⁰ Groups can hold multiple motivations at once. Some immigrants' rights groups are active in electoral politics, and some are not. My point is that, especially among those who are not, the subsidy argument should be unavailing.

⁶¹ According to FCC.gov, the Commission first adopted rules requiring broadcast stations to keep a public file more than 40 years ago and certain political programming files have been public for nearly 75 years. *See Public Inspection Files*, FED. COMM'NS COMM'N, <https://publicfiles.fcc.gov> [<https://perma.cc/AB9N-JSRK>] (last visited Feb. 27, 2020).

⁶² *See Wood & Ravel, supra note 2; see also Abby K. Wood, Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11 (2018).

⁶³ *See, e.g., Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. FEC*, 558 U.S. 310 (2010).

disclose an advertisement's audiences might say that the requirement burdens speech by "chilling" it.⁶⁴ They may argue that, at the margins, political advertisers will make fewer ads or target differently because their audiences will be targetable by the other side.

The chilling argument is just the subsidy argument in different packaging. Any chilling would not be the result of threats of harassment, which is the only chilling that the Court has found persuasive in a few as-applied challenges in the past 60 years. The chilling that campaigns may complain about here would instead result from the first speaker's perception of reduced efficacy of political advertisements due to the increased possibility of being held accountable for their speech. The rationale for the chilling exception does not go to efficacy of political communication; it goes to harassment.

The cornerstone of democracy is the voters' ability to hold elected officials accountable; that ability starts with campaign finance transparency prior to the election. It is a clever campaign move to take refuge in a regulatory loophole that exists because regulations have not caught up to technology. But the loophole does not expand our First Amendment rights online.

⁶⁴ Note that the Court takes for granted that disclosure "chills" speech, but the evidence of a "chilling" phenomenon is mixed, at best, and it may be offset by a "thawing" phenomenon among those who want to "go on record" for a candidate. See Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 POL. BEHAV. 753 (2014); Wood, *supra* n. 62; Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, 15 ELECTION L.J. 302 (2016); Abby K. Wood et al., *Mind the (Participation) Gap: Vouchers, Voting, and Visibility* (Ctr. for Law & Soc. Sci., Paper No. CLASS19-9, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354826; Abby K. Wood & Michael D. Gilbert, *Disclosure Can Encourage Political Speech*, THE HILL (Oct. 21, 2016, 9:11 A.M.), <http://thehill.com/blogs/pundits-blog/campaign/302152-disclosure-can-encourage-political-speech> [<https://perma.cc/3826-9E6G>].

The benefits of facilitating counter-speech outweigh any “chilling” effect that occurs at the margins.⁶⁵ First, suppose that disinformation does cause primary harm to the “listener,” by encouraging them to vote differently than they would if they were fully informed. That is a harm that, if repeated enough, can indirectly undermine election results.⁶⁶ Reducing the amount of voter disinformation by increasing the probability that counter-speech occurs is a governmental interest the court should recognize and take seriously. Disinformation and media coverage of disinformation seem to cause a secondary public harm by reducing the voters’ confidence in our elections. Government action forcing platforms to enable counter-speech should help to reduce that damage.

Finally, I have argued here that it is important for the government to regulate the platforms, rather than for them to self-regulate. We need a uniform system, and regulators are unreliable as self-regulators.⁶⁷ But if the platforms decided to make audiences re-targetable in the absence of government action, the First Amendment challenges described above would fail for lack of state action.

IV. Comparing Counter-speech Possibilities in TV/Radio and Online Settings

Here’s how counter-speech for TV and radio ads works. The Federal Communications Commission (FCC) requires disclosure of advertising buys for broadcast television and radio advertising. The FCC’s political file contains a station-by-station running account of political

⁶⁵ Abby K. Wood, *Show Me the Money: Candidate Selection Based on Campaign Finance Transparency* (Ctr. for Law & Soc. Sci., Paper No. CLASS17-24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029095.

⁶⁶ I say “indirectly” here with the warnings of Professor Foley in mind. See Edward B. Foley, *Assessing the Validity of an Election’s Result: History, Theory, and Present Threats*, NYU L. Rev. Online (forthcoming 2020). Manipulating election outcomes directly versus affecting voters’ choices through lies are qualitatively very different. As mentioned above, the Court takes very seriously disinformation aimed at electoral integrity. See *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018).

⁶⁷ Wood & Ravel, *supra* n. 2 at 1245-48.

ads purchased on the stations. Figure 1 shows an example of a political file report.

Ln	Ch	Start	End	Inventory Code	Break	Start/End Time	Days	Len	Spots	Rate	Pri	Rtg	Type	Spots	Amount
Print Date: 03/05/20 13:52:29 Page 2 of 7															
Order / Rev:		21966		Advertiser:		POL/Mike Bloomberg/D/President/OH									
Alt Order #:		26787923		Product Desc:		MIKE BLOOMBERG 2020									
Flight Dates:		01/20/20 - 01/31/20		Estimate:		0119									
WBNS-TV															
****BOOKEND**** [BOOKENDS]															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>	<u>Spots/Week</u>	<u>Rate</u>	<u>Rating</u>								
Week:		01/27/20	02/02/20	MTWTF--	1	\$600.00	0.00								
5	WBNS	01/27/20	01/31/20	CBS This Morning M-F 8M CBS This Morning M-F 8a-9	CM	8:00 AM-9:00 AM	MTWTF--	:30	2	\$400.00	P-04	0.00	NM	2	\$800.00
COMMENTS APPLY TO SUB LINES A THRU A CBS This Morning At															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>	<u>Spots/Week</u>	<u>Rate</u>	<u>Rating</u>								
Week:		01/27/20	02/02/20	MTWTF--	2	\$400.00	0.00								
6	WBNS	01/27/20	01/31/20	M-F 9a-10a M-F 9a-10a	CM	9:00 AM-10:00 AM	MTWTF--	:30	3	\$400.00	P-04	0.00	NM	3	\$1,200.00
COMMENTS APPLY TO SUB LINES A THRU A Live With Kelly & Ry															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>	<u>Spots/Week</u>	<u>Rate</u>	<u>Rating</u>								
Week:		01/27/20	02/02/20	MTWTF--	3	\$400.00	0.00								
7	WBNS	01/27/20	01/31/20	Let's Make a Deal Let's Make a Deal	CM	10:00 AM-11:00 AM	MTWTF--	:30	3	\$800.00	P-04	0.00	NM	3	\$2,400.00
COMMENTS APPLY TO SUB LINES A THRU A Let's Make A Deal															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>	<u>Spots/Week</u>	<u>Rate</u>	<u>Rating</u>								
Week:		01/27/20	02/02/20	MTWTF--	3	\$800.00	0.00								
8	WBNS	01/27/20	01/31/20	The Price is Right The Price is Right	CM	11:00 AM-12:00 PM	MTWTF--	:30	3	\$800.00	P-04	0.00	NM	3	\$2,400.00
COMMENTS APPLY TO SUB LINES A THRU A Price is Right															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>	<u>Spots/Week</u>	<u>Rate</u>	<u>Rating</u>								
Week:		01/27/20	02/02/20	MTWTF--	3	\$800.00	0.00								

Figure 1: Excerpt of FCC Political File data for one station and one candidate and one week in 2020.

For the last week of January 2020, Democratic Presidential Candidate Mike Bloomberg’s campaign purchased \$64,940 in advertising slots on WBNS-TV, the CBS affiliate that includes The Ohio State University in its market.⁶⁸ This publicly available form, filed by the

⁶⁸ Bloomberg was the only candidate running ads in that market at the time. Interested readers can track advertising on this particular station at *Mike Bloomberg 2020 Political File, WBNS-TV*, FED. COMM’NS COMM’N, <https://publicfiles.fcc.gov/tv-profile/wbns-tv/political-files/2020/federal/president/82e11558-dbab-2089-11d1-035070be287c/> (last visited Jan. 27, 2020). By way of comparison, a much more active market during the same week was Des Moines, Iowa, where all candidates for the Democratic presidential nomination advertised. The local CBS affiliate for Des Moines, KCCI, had already

station, shows which audiences he targeted. In the 8 AM hour, he ran two spots to appeal to daily CBS This Morning Viewers. In the 10 AM hour, he targeted *Let's Make a Deal* viewers with three spots. In the 11 AM hour, he targeted *Price is Right* viewers with all three spots.⁶⁹ Armed with this information, groups and campaigns who want to reach the same audience that Bloomberg reached with these ads knew where to find them. As I demonstrate next, this counter-speech is currently impossible with political advertising on social media.

a. Counter-speech for Online Paid Political Speech

We start with the good news. Google has facilitated counter-speech for online political speech and discloses targeting criteria in its advertising archive.⁷⁰ Using the platform's downloadable targeting criteria, which includes advertisement ID, anyone who wants to speak to the core audience of a given ad which was targeted using Google's in-platform tools, has the necessary information to do so. That said, the information is not available in a particularly user friendly format. While there are pros and cons to Google's choice to limit targeting abilities, the company's decision to disclose targeting criteria allows the court's preferred remedy to occur: counter-speech, at least to the core audience.

Social media is a different story. Under the social media platforms' current approach, it is nearly impossible, and certainly impractical, to target the audience that saw any ad. Take, for example, the Facebook Ad Archive. Figure 2 shows the Facebook Ad Archive page for an

filed 194 times, for 9 candidates, as of January 24, 2020. *Political Files, KCCI*, FED. COMM'NS COMM'N, <https://publicfiles.fcc.gov/tv-profile/kcci/political-files/2020/federal/president/dcd2b4da-133b-153c-3c19-0f719cc1dd21/> (last visited Jan. 27, 2020).

⁶⁹ Mike Bloomberg 2020 Political File, WBNS-TV January 2020 Invoice, FED. COMM'NS COMM'N, <https://publicfiles.fcc.gov/tv-profile/wbns-tv/political-files/2020/federal/president/82e11558-dbab-2089-11d1-035070be287c/> (Click on the MIKE BLOOMBERG 2020 folder; then click on the file named "21728") (last visited Jan. 27, 2020).

⁷⁰ *Political Advertising in the United States*, GOOGLE: TRANSPARENCY REP., <https://transparencyreport.google.com/political-ads/region/US> (last visited Feb. 22, 2020).

advertisement by “Islamist Watch,” a subgroup of the Middle East Forum, a nonprofit 501(c)3 organization that the Southern Poverty Legal Center describes as “a think tank . . . known for its academic approach to fomenting anti-Muslim sentiment.”⁷¹ The Forum paid for Representative Paul Gosar to travel to London for a “free speech” rally with strong anti-Muslim themes.⁷² (Remember Gosar’s name, as we will return to him when we cover organic content.)

The ad complains that President Trump has not set up a commission on “radical Islam” and that “leading Islamist organizations continue to enjoy government endorsement and patronage,” with a picture of Donald Trump, mouth open. The caption says, “American Islamism Flourishes under Trump.”

⁷¹ *Middle East Forum Bankrolls Violent ‘Free Tommy’ Rally*, S. POVERTY L. CTR.: HATEWATCH (July 11, 2018), <https://www.splcenter.org/hatewatch/2018/07/11/middle-east-forum-bankrolls-violent-free-tommy-rally> [<https://perma.cc/8QSL-JYFP>].

⁷² Alex Kotch, *Arizona Rep Took \$10,000 Trip to Speak at British Anti-Muslim Rally*, SLUDGE (Aug. 9, 2018, 1:27 PM), <https://readsludge.com/2018/08/09/arizona-rep-took-10000-trip-to-speak-at-british-anti-muslim-rally/> [<https://perma.cc/4L2E-S4ED>].

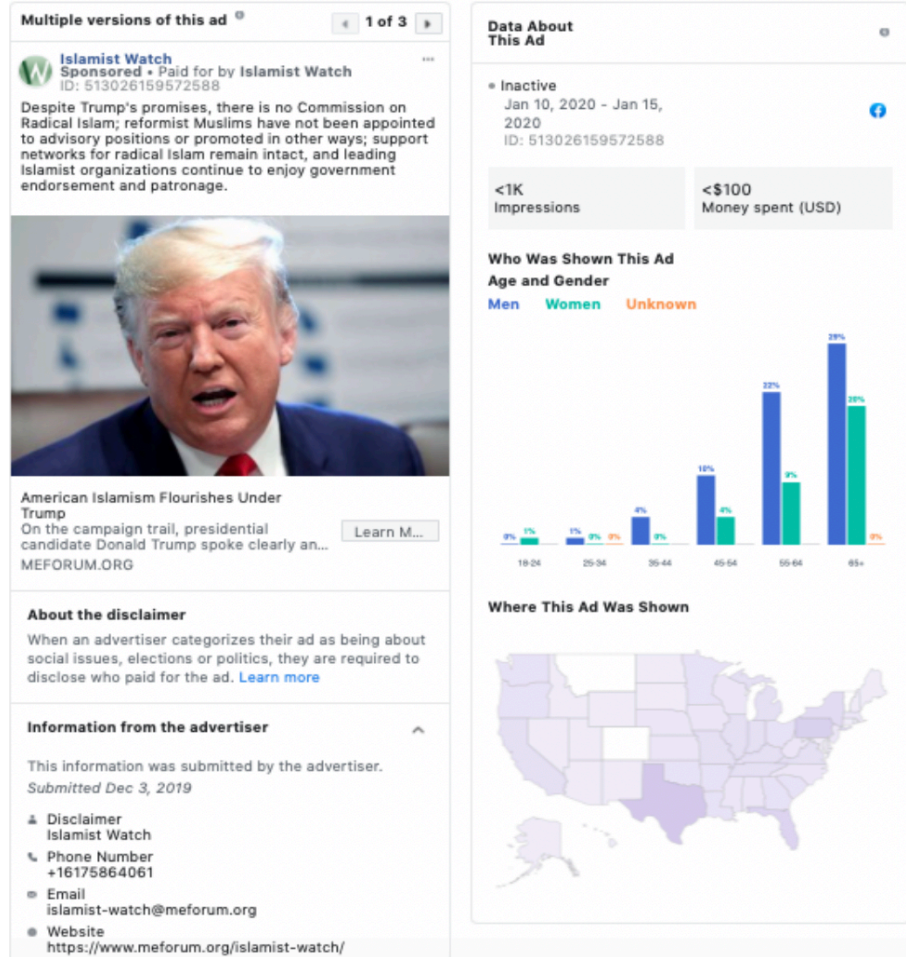


Figure 2: Example of paid political speech on Facebook and the data the platform provides to the public about the speech.

One can imagine several groups who may want to respond to this ad, such as the President or the Council on American-Islamic Relations. How can they speak to the same audience? On the right side of the Figure is the information that Facebook provides. We see that the ad ran for 6 days in January 2020, the group spent less than \$100 and targeted fewer than 1000 people. The gender breakdown is shown in the bar chart. Men above the age of 45 were the primary audience. The map shows that the audience was scattered in every state except Montana, Colorado, and Vermont. Counter-speech to this audience is

impossible without targeting all men over the age of 45 in almost all states. Even in the age of “cheap speech,” this would be extremely expensive.⁷³ Facebook does not facilitate counter-speech for paid ads, and no federal regulation requires them to do so.

b. Counter-speech for Unpaid Organic Content

No social media platform has an archive of organic content, which makes sense because it would be a herculean task, requiring an archive of almost the entire platform. However, the platforms could at least archive the organic content created by or circulated by public officials and politically-oriented Pages, or those in which they are tagged. Then, if a campaign or group wanted to counter-speak to an audience who viewed organic content, the platforms could facilitate that speech.

Take, for example, the organic content circulated on Twitter by Rep. Gosar, depicted in Figure 3. It is a photoshopped image of President Obama with Iranian President Hassan Rouhani, and it says, “[t]he world is a better place without these guys in power.” This is a fake image; whoever made it altered a photograph of President Obama with Indian Prime Minister Manmohan Singh.

⁷³ See generally Richard L. Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 *FIRST AMEND. L. REV.* 200 (2017); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995).



Figure 3: Photoshopped image of President Obama and Iranian President Hassan Rouhani. Rouhani was photoshopped into the image, which originally showed President Obama with Indian Prime Minister Manmohan Singh.⁷⁴

If someone wants to counter-speak against this image, how can they reach the same audience? As of this writing, Rep. Gosar’s tweet has been favorited 22,200 times and retweeted 6,500 times. Thousands of people commented on it, as well. This means that all of the followers of all of the people engaging with it by commenting, favoriting, or retweeting, also may have seen the image. Only Twitter knows who saw the image on its platform. If President Obama, President Rouhani, Prime Minister Singh, or even a group of “Photoshoppers for Democracy” wanted to counter-speak to the same audience, they could not. At best, commenting on the post is a chance to counter-speak, but the comment only goes to followers of the person commenting and anyone scrolling through the comments of the photo after a person comments. Thus, in this context, it is impossible for anyone to

⁷⁴ Philip Bump, *How to spot a Photoshopped image, or, The Problem with the Internet*, WASHINGTON POST, (Jan. 7, 2020, 4:02 PM), <https://www.washingtonpost.com/politics/2020/01/07/how-spot-photoshopped-image-or-problem-with-internet/>.

successfully counter-speak to the same, or even close to the same, audience.

a. Counter-speech for Paid Organic Content

Michael Bloomberg's campaign adopted a sponsored content approach to political ads on social media.⁷⁵ Figure 4 shows an example of sponsored content (a meme) paid for by the Bloomberg campaign, as appeared on Instagram.

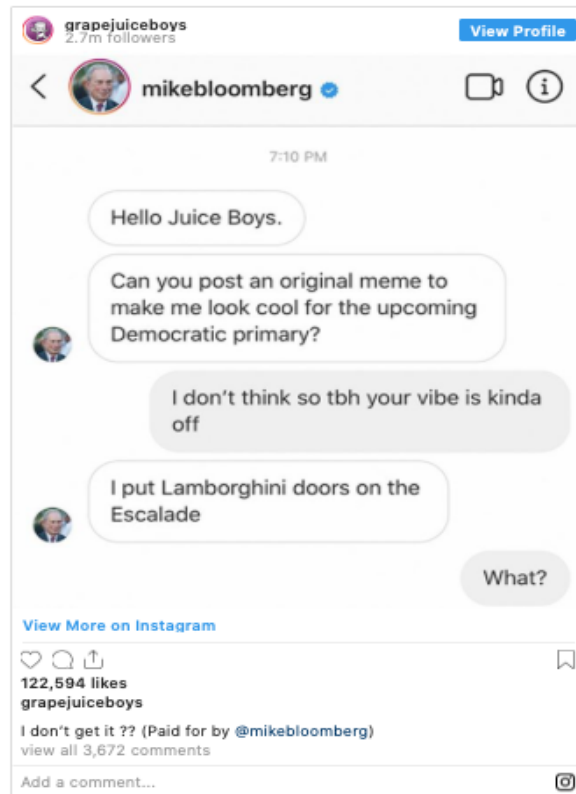


Figure 4: Bloomberg paid “organic” content.

⁷⁵ See Taylor Lorenz, *Michael Bloomberg's Campaign Suddenly Drops Memes Everywhere*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/style/michael-bloomberg-memes-jerry-media.html> [https://perma.cc/27KH-5PYQ].

Facebook reversed its position banning paid content of this type for political ads, but it currently does not plan to put the ads in the Facebook Ad Archive.⁷⁶ This move opens up the possibility that millions upon millions of paid ads and impressions will not be captured in the Archive, meaning that campaigns paying “influencers” to post ads for them will not be held accountable to the same audience that views the content. Counter-speech will be impossible.

V. A Proposal to Facilitate Counter-Speech

Facilitating counter-speech by making the audiences of online political speech available will improve transparency and accountability. It should also marginally reduce incentives to spread disinformation, even where the ultimate source of the money is foreign and meddlesome.

Regulators should design rules that make counter-speech possible in response to all political speech and not only in response to disinformation. This approach avoids sticky administrability concerns that would put platforms, regulators, or courts in the undesirable position of “Truth Arbiter.”

In prior work, I have urged that revealing targeting criteria may suffice to allow counter-speech. I now believe that proposal was too modest, as it did not address the full effects of disinformation. Instead, two audiences must be made available. First, the initial targets of the message—the “core audience”—should be made retargetable, as we argued previously. Secondly, everyone who saw the paid communication in their social media feed—the “final audience”—should be made available. Counter-speakers can choose which list to target.

⁷⁶ See Nancy Scola, *Bloomberg’s Meme Spree Prompts Changes in Facebook, Instagram Rules*, POLITICO (Feb. 14, 2020, 4:58 P.M.), <https://www.politico.com/news/2020/02/14/bloomberg-meme-changes-facebook-instagram-115333> [<https://perma.cc/B7RR-NBNU>].

Importantly, this proposal does not require campaigns to reveal their targeting *strategies*. It only requires making the same audiences – either the core audience or the final audience – available. The campaign doing the re-targeting need not even know the identity of the targets. The platform can assign all core and final audiences an audience identification number to share with advertisers who request to speak to the same audience.

The government should not require platforms to allow microtargeting within the core or final audiences. If speaker B wants to speak to only suburban women within the audience targeted by speaker A, the platforms may choose to make that subgroup available, consistent with the requirements of privacy regulators and their profit motives. However, the government should not *require* that further targeting be permitted, because it needs a well-tailored regulation to fit an important government interest. Here, the government's interest – allowing counter-speech generally, but especially to combat disinformation – is best addressed by making the entire audience (core or final) available. To the extent that disinformation causes harm to the audience, the regulation should be tailored to reduce the harm to *all* who saw the ad. This means the best strategy for surviving judicial review is to prohibit further microtargeting within the core or final audiences. Still, at a minimum, the government should not *require* that the platforms allow microtargeting within core or final audiences.

Of course, there are policy-related objections to my proposal.⁷⁷ First, there is the possibility that campaigns will not actually avail themselves of the tools, because they actually do not want to speak to the same audiences. The argument goes: polarization among voters has become so extreme that candidates no longer even attempt to persuade moderate voters, meaning they no longer target the same mass of voters in the political center. Instead, candidates try to spur on their own base to turn out in mobilization campaigns. Even if this were true in the general election context – and the amount of advertising that still occurs on network television argues against this being universally true – it is not true in nonpartisan elections (like local elections) or in party

⁷⁷ I respond to legal objections in Part III, *supra*.

primaries. Therefore, it's likely that at least some campaigns would avail themselves of the opportunity to speak to the same audience targeted by their political rivals.

Moreover, it is irrelevant whether the tool is used frequently or not for one simple reason: the public is deeply concerned about political disinformation.⁷⁸ Improving the transparency of political speech online can help to assuage a concerned public.⁷⁹

Social media platforms may also protest the proposal on the ground that it would interfere with user privacy. However, the proposal is very similar to the Custom Audiences tool that Facebook already has allowed campaigns and groups to use in order to target millions of Americans. Privacy arguments—especially in the United States, where our data privacy is limited—should be viewed skeptically.

⁷⁸ See Nic Newman, *Executive Summary and Key Findings of the 2019 Digital News Report*, REUTERS INST: DIGITAL NEWS REP., <http://www.digitalnewsreport.org/survey/2019/overview-key-findings-2019/> [<https://perma.cc/L2KX-RFHK>] (finding that public concern about misinformation and disinformation remains high, reaching a 55% average across 38 countries and 67% in the United States, despite efforts by platforms and publishers to build public confidence). As Shannon McGregor recently explained, “there is the POSSIBILITY of propaganda being effective, given the conditions of the current media environment. We don’t need to prove the town is burning to advocate for a fire station. A town CAN burn; therefore, we should have a [public] fire station.” Shannon McGregor (@shannimcg), TWITTER (Feb. 17, 2020, 12:42 PM), <https://twitter.com/shannimcg/status/1229507302387924992> [<https://perma.cc/MUR6-BEUU>] (explaining McGregor’s argument in her recent Washington Post article); see Shannon C. McGregor & Dannagal G. Young, *Mass Propaganda Used to Be Difficult, but Facebook Made It Easy*, WASH. POST (Feb. 14, 2020), <https://www.washingtonpost.com/outlook/2020/02/14/mass-propaganda-used-be-difficult-facebook-made-it-easy/> [<https://perma.cc/UVK3-THXA>].

⁷⁹ See Newman, *supra* note 78; Eric Tucker & Emily Swanson, *AP-NORC Poll: Majority Worry About 2020 Foreign Meddling*, ASSOCIATED PRESS (June 19, 2010), <https://apnews.com/ac56e80c296a49e593104d6575a18ce2> [<https://perma.cc/HZ5B-ZD5E>] (“63% of Americans have major concerns about at least one of those types of foreign election interference . . . Those include the spread of disinformation online to sow divisions among American voters . . .”).

Moving on to implementation details, ideally, the government should implement this proposal rather than the platforms. Additionally, the fact that platforms profit from the political disinformation they host lends political heft to any government disclosure policies around political speech on their platforms. Of course, the platforms are paid directly to run paid ads. When it comes to unpaid organic content, the platforms do not profit directly (they are not paid to post or promote), but they do profit indirectly. *All* content, paid and organic, brings in more users. For platforms, “users” equals “advertising audience,” so platforms can charge more for each ad that is placed as their audiences grow due to organic content on the platforms. Moreover, as best we can tell, a lot of the disinformation that circulated in 2016 was comprised of retweeted and shared memes and dis-informative “fake news” from newspapers that did not actually exist. To the extent that disinformation causes harm, the Court could agree that counter-speech is an appropriate remedy, whether or not the platform was paid directly for the placement.

The existence of payments of any sort, even if offline, provides a nexus for the government to propose a regulation of organic content, though it may be almost impossible to administer a program that regulates organic content beyond that posted by groups already in their existing political ad database. Take, for example, Rep. Gosar’s tweet. If the tweet were disseminated by bots, or if someone was paid for the photoshopping, campaign financing would be involved. However, off-platform payments may be difficult to detect, especially considering the vagueness of many campaigns’ expenditure filings.

In the absence of government regulation, platforms should still consider self-regulation. Platforms have a profit incentive to offer campaigns and groups the ability to target people who saw a given ad or post. This applies to paid *and* organic content. Platforms already allow people to be targeted based on their demographics, who they follow, pages they like and other data. Why not also sell the opportunity to target us based on posts in our feed? And, as mentioned above, this type of transparency should help to reduce panic among the population, helping platforms’ public relations and therefore bottom line.

VI. Conclusion

Accountability for paid online political speech is lacking. Narrow targeting and competing campaigns' inability to counter-speak to each others' audiences have created a situation in which political speakers spreading disinformation do so without much fear of accountability. This accountability gap is remarkable, especially considering that counter-speech is possible under FCC regulations when ads are run on television and radio, rather than posted online.

Government can constitutionally demand transparency, as it has in the television and radio context. In this essay, I have shown concrete examples of how counter-speech is possible in the broadcast context and impossible on Facebook, despite its modest attempts to self-regulate. With or without government requirements to do so, platforms should publicly disclose, and make available, both the targets (core audience) and audience who saw the ad due to shares and likes (final audience). Counter-speakers do not need individually identifying information, which is not available in the broadcast context, either. They just need access to the same audiences.

In summary, counter-speech facilitates accountability, which is crucial in a democracy. Government regulators and platforms should facilitate counter-speech. At minimum, online advertisements should be subject to the same regulatory and disclosure requirements as other types of advertisements, such as those broadcasted on TV or radio.