
COMMENT

UNKNOWN UNKNOWNNS: WHY WE NEED TO KNOW MORE ABOUT HOW THE GOVERNMENT STIFLES THE RIGHT TO RECEIVE INFORMATION FROM FOREIGNERS ONLINE

APRATIM VIDYARTHI[†]

The First Amendment right to receive information ensures that where speakers are free to speak, listeners receive their speech. In theory, this right has been enshrined through doctrine, and is critical in protecting the First Amendment's goals of truth-seeking, self-governance, and self-realization. In practice, with respect to foreign speech online, the right to receive is not realized, impacting the First Amendment's goals. Courts have repeatedly struck down right to receive claims because of inadequate standing. The government also cooperates with technology companies to take down (foreign) content and monitor (foreign) speakers, which prevents Americans from seeing information sent their way, both directly and through speaker self-censorship. The government's foreign policy moves in banning apps and

[†] Philanthropy Editor, Volume 170, *University of Pennsylvania Law Review*. J.D. Candidate, 2022, University of Pennsylvania Law School; M.S. 2016, Carnegie Mellon University; B.S., B.A. 2015, University of California, Berkeley.

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pressuring technology companies to remove adversarial leaders also impact this right. These moves mean that listeners do not know what they do not know.

Despite these infringements, it is incredibly difficult to litigate the right to receive. Listeners may not have standing, as they do not know what they do not hear. The Court also defers heavily to the government on alleged issues of national security, which may be implicated with foreign speech. Some such speech could also be considered inciting, though not in line with traditional incitement doctrine. And the nature of the Internet makes it difficult to find plaintiffs whose rights may have been violated. Instead of litigation, legislation is a better avenue of protecting this right. Such legislation could encourage transparency of technology companies, and ensure the government is held accountable for content takedowns and chilled speech online.

INTRODUCTION	1343
I. THE RIGHT TO RECEIVE INFORMATION DOCTRINE.....	1345
A. <i>Why Protect Foreign Speech?</i>	1346
B. <i>The Doctrine of Right to Receive Information</i>	1349
C. <i>Foreign Speech and the Right to Receive Information</i>	1351
D. <i>The Role of the Internet</i>	1353
II. THE RIGHT TO RECEIVE INFORMATION IN PRACTICE.....	1355
A. <i>Failure to Raise the Right to Receive in Court Due to Procedural/Standing Issues and Executive Authority</i>	1355
B. <i>Technology Companies Cooperating with the Government</i>	1357
C. <i>Foreign Policy and Executive Authority</i>	1363
III. THE DIFFICULTIES OF BRINGING A RIGHT TO RECEIVE INFORMATION CLAIM IN COURT	1366
A. <i>Standing is Difficult to Attain</i>	1366
B. <i>National Security and Executive Authority are Given Immense Deference</i>	1368
C. <i>Incitement and True Threats Doctrine Could Take Precedence</i>	1372
D. <i>The Nature of the Internet Complicates the Picture</i>	1375
IV. PROTECTING THE RIGHT TO RECEIVE INFORMATION.....	1378
A. <i>Pushing Technology Companies Toward Transparency</i>	1378
B. <i>Government Online Accountability Legislation</i>	1381
CONCLUSION	1382

INTRODUCTION

In December 2019, Chinese doctor Li Wenliang sent a group message to his colleagues, noting the lab results of patients in Wuhan who exhibited SARS-like symptoms.¹ Screenshots of these messages spread across the Chinese Internet.² One month later, Dr. Li blogged about his experience being interrogated by Chinese authorities, as well as information about a coronavirus disease.³ The post spread globally,⁴ even though President Trump had said that he trusted the Chinese authorities and that the situation was under control a few days prior.⁵ Facebook, reactionary as ever, began to remove conspiracies related to the virus.⁶ Was Dr. Li's post a conspiracy? Were his words endangering American lives? Could the U.S. government have pressured Facebook to remove traces of this alternative theory to the official Chinese version? In theory, no: the First Amendment right to receive information would prevent the government from doing so. But practically, if the government chose to pressure technology companies to do so, we would never know. The depths of what we do not know is not known: these are the unknown unknowns around whether our right to receive is realized.

The right to receive information is a corollary of the First Amendment, which regulates the government's ability to prevent or stifle what kind of information people receive. This right was originally derived in the 1960s, at a time of heightened sensitivity and anxiety over alleged communist influence of American institutions following the peak of the Second Red Scare.⁷ The right still applies in the digital era because while the Internet is many

¹ Stephanie Hegarty, *The Chinese Doctor Who Tried to Warn Others About Coronavirus*, BBC (Feb. 6, 2020), <https://www.bbc.com/news/world-asia-china-51364382> [<https://perma.cc/X76U-6TKD>].

² *Id.*

³ *Id.*

⁴ See, e.g., Cristian Martini Grimaldi, *Così il Regime Minacciò i Medici Sul Virus: "State Zitti, è a Rischio L'ordine Sociale"*, LA STAMPA (Jan. 31, 2020), <https://www.lastampa.it/topnews/primopiano/2020/02/01/news/cosi-il-regime-minaccio-i-medici-sul-virus-state-zitti-e-a-rischio-l-ordine-sociale-1.38408749> [<https://perma.cc/Y5JP-GVRZ>] (describing Dr. Li's post in an Italian publication).

⁵ Matthew J. Belvedere, *Trump Says He Trusts China's Xi on Coronavirus and the US Has It 'Totally Under Control'*, CNBC (Jan. 22, 2020, 5:01 AM), <https://www.cnbc.com/2020/01/22/trump-on-coronavirus-from-china-we-have-it-totally-under-control.html> [<https://perma.cc/Y77P-YHPC>].

⁶ Katie Paul, *As Coronavirus Misinformation Spreads on Social Media, Facebook Removes Posts*, REUTERS (Jan. 31, 2020, 7:46 PM), <https://www.reuters.com/article/us-china-health-facebook/as-coronavirus-misinformation-spreads-on-social-media-facebook-removes-posts-idUSKBN1ZV388> [<https://perma.cc/34B8-KE4L>].

⁷ See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1964) (Brennan, J., concurring) (describing the right to receive as a "fundamental right").

unregulated things—a source of education,⁸ a wellspring of memes,⁹ and allegedly a series of tubes¹⁰—the U.S. government through its employees¹¹ and as an entity¹² plays a role in shaping speech online. Applied to cyberspace, the right to receive protects listener access to speech both by foreign and domestic speakers.¹³ This right furthers the broad goals of the First Amendment, including goals of truth-seeking, self-governance, and self-realization.¹⁴

But the story is not as rosy as described on paper. In theory, the right to receive protects listeners' rights under the First Amendment. This Comment argues that in practice, there are too many unknown unknowns to tell whether the federal government is stifling our right to receive information, leading to a pernicious impact on our First Amendment rights. What we do know is that the government's powers in policing the border, implementing foreign policy through Executive authority, and cooperating with technology companies seriously endanger the right to receive information. And shedding light on whether our right to receive is being stifled faces not hurdles, but mountains. A potential plaintiff faces a quartet of troubles: attaining standing, overcoming deference to the government's national security authority, handling First Amendment incitement doctrine, and dealing with practical issues regarding litigating Internet cases.

This Comment explores the right to receive information in practice. Part I provides context, defining why such speech is valuable, and giving a brief background of the right to receive doctrine. Part II compares this doctrine to reality, investigating how the right holds up in existing cases, the government's use of foreign policy to stifle the right, and the government's cooperation with technology companies to quietly remove and chill speech,

⁸ See, e.g., Alexandra Brod, *Zoom School of Law: From Meme to Moneymaker*, AM. BAR ASS'N (Nov. 1, 2020), <https://abaforslawstudents.com/2020/11/01/zoom-school-of-law-from-meme-to-moneymaker> [<https://perma.cc/YV56-MAUJ>] (describing the transition to online law school amid the COVID-19 pandemic).

⁹ See, e.g., *Law School Memes for Edgy T14s*, FACEBOOK, <https://www.facebook.com/groups/lsm4et14s/> [<https://perma.cc/S3EG-WNMJ>] (displaying a series of memes about legal education).

¹⁰ *The Daily Show with Jon Stewart: From Here to Neutrality* (Comedy Central television broadcast Oct. 26, 2009), <https://www.cc.com/video/blvwyz/the-daily-show-with-jon-stewart-from-here-to-neutrality> [<https://perma.cc/UN8M-KNUA>] (lampooning the dubious claim of U.S. Senator Ted Stevens that “the Internet is a series of tubes”).

¹¹ See, e.g., Donald Trump (@realdonaldtrump), TWITTER, <https://twitter.com/realdonaldtrump> [<https://perma.cc/9C33-XPDB>], (showing former President Trump's former Twitter account, which Twitter suspended for inciting violence); *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [<https://perma.cc/TGS7-X3CF>].

¹² See *infra* Part II (discussing how the government shapes online speech).

¹³ Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 278-79, 282, 291, 305 (2018).

¹⁴ *Id.* at 309-13.

raising the question: how much information is being taken down that we don't know about? Part III discusses hurdles in bringing successful litigation. Finally, Part IV discusses two solutions: holding technology companies accountable for transparency, and legislation requiring government transparency regarding online speech.

While American Internet users have the right to receive information from foreigners over the Internet, in practice the government's policies mean we don't know what we don't know; and the right to receive may be a victim of that unknown unknown. As the Internet's role in American politics and its use by foreign adversaries to influence citizens increases, the government's approach to these issues must be constrained by the right to receive foreign speech.¹⁵ How the government approaches this new era of digital democracy will shape the extent to which the First Amendment protects free speech, or whether the content we don't know and don't see expands in quantity.

I. THE RIGHT TO RECEIVE INFORMATION DOCTRINE

The First Amendment, despite its acclaim and importance, mentions the word "speech" just once: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."¹⁶ Yet these fourteen words imply more than just the right to free speech. The Supreme Court's First Amendment jurisprudence has recognized various corollaries that derive from the right to free speech: rights to free association,¹⁷ to anonymous speech,¹⁸ and to receive information are three of many. While the right to receive is not in the Constitution's text, it arises naturally from the nature of free speech: where speech is unabridged, a listener's right to hear that uncensored speech too should be unabridged.

While the right to receive originates from the *American* Constitution, it covers receiving nearly all speech, including foreign speech.¹⁹ And foreign

¹⁵ See, e.g., Ellen Nakashima & Craig Timberg, *U.S. Agencies Mount Major Effort to Prevent Russian Interference in the Election Even Though Trump Downplays Threat*, WASH. POST (Oct. 21, 2020), <https://www.washingtonpost.com/national-security/us-defends-russian-election-interference/2020/10/21/533b508a-130a-11eb-bc10-40b25382f1be> [https://perma.cc/85WS-PMJF] (describing the National Security Agency's response to Russian cyberattacks).

¹⁶ U.S. CONST. amend. I.

¹⁷ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs . . .").

¹⁸ See, e.g., *Talley v. California*, 362 U.S. 60, 64 (1960) (striking down a law requiring the provision of the publisher's identification on flyers, because "an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression").

¹⁹ See Thai, *supra* note 13, at 282.

speech has unique characteristics that make it invaluable to realizing the purpose of freedom of thought and expression enshrined in the First Amendment. This Section covers the benefits of foreign speech, and then gives a brief overview of right to receive doctrine and how that applies to foreign speech and the Internet.²⁰

A. Why Protect Foreign Speech?

There are at least three goals of free speech²¹ under the First Amendment: truth seeking,²² self-governance,²³ and self-realization.²⁴ Foreign speech is essential to realizing these goals. A Maldivian expressing the effects of climate change on their islands helps Americans realize the veracity and harm of climate change.²⁵ Young Iranians expressing disenfranchisement due to American sanctions help Americans determine whether their elected officials' foreign policy is succeeding.²⁶ And global protests against racism might change an American's perspective on systemic racism.²⁷

Yet, as we shall see, the government's current policies with respect to foreign speech mean that we do not know whether the policies are filtering out objectively harmful speech, or speech the government considers

²⁰ For a deeper look at the theoretical right to receive, see *id.* at 278-309.

²¹ For an exhaustive list of theories of free speech, see Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 328 n.41 (2018) for summaries of some scholars' interpretations of the right to free speech.

²² See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 172 (1999) (discussing truth-seeking and self-governance).

²³ See, e.g., Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2355, 2356, 2363 (2000) (articulating First Amendment theories of truth-seeking and self-governance); Cohen v. California, 403 U.S. 15, 24 (1971) (noting the First Amendment's intent is to create "a more capable citizenry and more perfect polity").

²⁴ See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (writing that the goal of free speech is "individual self-realization"); Whitney v. California 274 U.S. 357, 375 (1927) ("[F]reedom to . . . speak as you think are means indispensable to the discovery and spread of political truth . . .").

²⁵ See, e.g., Alasdair Pal & Devjyot Ghoshal, *We Can't Wait: Maldives Desperate for Funds as Islands Risk Going Under*, REUTERS (Jan. 17, 2020, 4:23 AM), <https://www.reuters.com/article/us-climate-change-maldives/we-cant-wait-maldives-desperate-for-funds-as-islands-risk-going-under-idUSKBN1ZGoXS> [<https://perma.cc/V5CP-7D9U>] (describing the impact of climate change on the Maldives).

²⁶ See, e.g., DJAVAD SALEHI-ISFAHANI, *IRAN'S YOUTH, THE UNINTENDED VICTIMS OF SANCTIONS*, BELFER CTR. 2, 4-6 (2010), https://www.belfercenter.org/sites/default/files/files/publication/Salehi-Isfahani_DI-Policy-Brief_Iran-Youth.pdf [<https://perma.cc/3D2N-WYRP>] (describing the effect of American sanctions on Iranian youth).

²⁷ See, e.g., Daimen Cave, Livia Albeck-Ripka & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES, <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html> [<https://perma.cc/V7LS-JEG9>] (June 9, 2020) (describing the global reach of the 2020 George Floyd protests).

subjectively harmful but still helps seek truth, self-governance, or self-realization. And given the rudimentary policy solutions in response to foreign election interference and disinformation campaigns during the 2016 and 2020 elections, and during the COVID-19 pandemic, it seems probable that foreign speech is likely to bear the brunt of such policies in the near future.²⁸ These policies risk losing the benefits of foreign speech: providing diverse perspectives that encourage truth seeking, broadening information access that informs self-governance, and providing external input to closed ecosystems that might help self-realization.

Foreign speech encourages truth-seeking by providing diverse perspectives. Such varied perspectives create an “atmosphere of ‘speculation, experiment and creation’” that provokes a “robust exchange of ideas,”²⁹ leading to “uninhibited, robust, and wide-open” debate and discussion.³⁰ Given the non-geographic, boundaryless nature of the Internet, online speech facilitates discussion when it includes foreign speakers rather than exclusively American views. Open debate and discussion take place when speech is not chilled, and instead grant listeners the liberty to decide whether (foreign) speech is relevant, important, and true.³¹ Foreign speech is also essential for dialogue across religions, for entrepreneurship, and for accountability against misinformation and authoritarianism.³²

Further, foreign speech—especially on the Internet—improves self-governance within the United States.³³ It helps ensure accountability as the United States continues to be a global superpower whose foreign policy spans continents. Foreign speech can provide uniquely accurate information about the United States’ actions in foreign issues, encouraging policymakers and voters to hold elected officials and the military accountable. For example, Iraqi witnesses initially reported the U.S. military’s civilian massacre in

²⁸ See, e.g., Emily Bazelon, *Free Speech Will Save Our Democracy: The First Amendment in the Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html> [<https://perma.cc/R66Y-MZWW>] (discussing President Biden’s calls for revoking section 230 of the Communications Decency Act, which makes Internet platforms immune from libel and other civil suits, to incentivize companies to remove “falsehoods they know to be false”).

²⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978).

³⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³¹ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (discussing the First Amendment’s truth-seeking function).

³² Hillary Rodham Clinton, U.S. Sec’y of State, Remarks on Internet Freedom, Address Before the Newseum (Jan. 21, 2010), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm> [<https://perma.cc/74BL-W7DQ>].

³³ For a more thorough discussion, see Thai, *supra* note 13, at 311-13.

Haditha in 2005.³⁴ *Time Magazine's* reporting led to the investigation³⁵ and prosecution of soldiers involved³⁶ and changed lawmakers' support of the Iraq war.³⁷ Foreign speech is also useful in ensuring that American officials are doing their job serving and protecting American citizens. For example, a British whistleblower provided evidence to American regulators about international market manipulation by banks,³⁸ and a Chinese whistleblower was central to warning the world about COVID-19.³⁹

Finally, foreign speech furthers the First Amendment goal of self-realization through "individual freedom of mind [rather than] disciplined uniformity"⁴⁰ by providing heterogenous information sources that pierce information bubbles and expand perspective. It also creates a more robust information market, which achieves the First Amendment goal of allowing the listener to make more informed "life-affecting decisions" to help achieve personal goals.⁴¹ Such decisions may come in the form of opportunities. For example, scientific exchanges between the United States and Russia during the Cold War developed trust and facilitated collaboration, furthering scientific discoveries and careers.⁴² But these life-affecting decisions go beyond personal success. Self-realization includes human development,⁴³ and foreign speech is necessary to help engender empathy and understanding of

³⁴ See Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha*, TIME (Mar. 19, 2006), <http://content.time.com/time/world/article/0,8599,1174649,00.html> [<https://perma.cc/7GGZ-J2VL>] ("But the details of what happened that morning in Haditha are more disturbing, disputed and horrific than the military initially reported.").

³⁵ Associated Press, *Evidence Suggests Haditha Killings Deliberate: Pentagon Source*, CBC NEWS (Aug. 2, 2006, 11:08 AM), <https://www.cbc.ca/news/world/evidence-suggests-haditha-killings-deliberate-pentagon-source-1.576884> [<https://perma.cc/YPR8-W9WG>].

³⁶ See, e.g., Charlie Savage & Elisabeth Bumiller, *An Iraqi Massacre, a Light Sentence, and a Question of Military Justice*, N.Y. TIMES (Jan. 27, 2012), <https://www.nytimes.com/2012/01/28/us/an-iraqi-massacre-a-light-sentence-and-a-question-of-military-justice.html> [<https://perma.cc/C3NQ-P2X9>] (detailing the prosecution, acquittal, and plea deals of various soldiers involved in the incident).

³⁷ See, e.g., Jamie McIntyre, *Lawmaker Says Marines Killed Iraqis 'in Cold Blood'*, CNN (May 19, 2006, 3:26 AM), <http://www.cnn.com/2006/WORLD/meast/05/18/murtha.marines/index.html> [<https://perma.cc/7U3W-CNSC>] (describing Representative Murtha's commentary over the Haditha killings, and his continued distancing from the Iraq war, which he originally supported).

³⁸ Michael Gray, *JPMorgan 'Chase' Story in UK*, N.Y. POST (Mar. 29, 2010, 4:00 AM), <https://nypost.com/2010/03/29/jpmorgan-chase-story-in-uk> [<https://perma.cc/3XLW-WDNQ>] (describing the role a British metals trader played in uncovering market manipulation by JPMorgan).

³⁹ See *supra* notes 1-5 and accompanying discussion.

⁴⁰ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

⁴¹ Redish, *supra* note 24, at 593.

⁴² Siegfried S. Hecker, *When Science Brought Americans and Russians Together*, BULLETIN OF THE ATOMIC SCIENTISTS (Apr. 11, 2017), <https://thebulletin.org/2017/04/when-science-brought-americans-and-russians-together/> [<https://perma.cc/WJE3-MFWA>].

⁴³ Redish, *supra* note 24, at 593.

different cultures, given the United States' contentious relationship with immigration and the current increase in xenophobia and nationalism.⁴⁴

Despite these benefits, there may be foreign speech listeners do not like. Among other concerns, such speech can sow disinformation and can encourage terrorism. But these dislikes are subjective, and domestic speech carries similar harms: domestic speech is rife with misinformation,⁴⁵ and homegrown extremism and domestic terrorism (exacerbated by misinformation)⁴⁶ are a bigger threat than foreign terrorism.⁴⁷ More importantly, the government's role as an arbitrator of what foreign speech is acceptable and what is too dangerous leaves listeners in the dark, unknowing of what they cannot hear. One way to reduce our unknown unknowns is through the right to receive information.

B. *The Doctrine of Right to Receive Information*

The right to receive information encompasses speech occurring in most venues, and containing all ideas. But the Court started small. The right was first articulated in *Martin v. City of Struthers*. Striking down an ordinance that made it unlawful for people distributing literature to ring doorbells or summon the occupants of a home, the Court reasoned that freedom of speech encouraged the spread of ideas, which required the right to receive literature (and thus beliefs).⁴⁸ In *Thomas v. Collins*, the Court struck down a statute requiring labor organizers to register with the state before speaking to workers about joining the union, since such a statute restricted the right to

⁴⁴ See, e.g., Michael Balsamo, *Hate Crimes in US Reach Highest Level in More than a Decade*, ASSOCIATED PRESS (Nov. 16, 2020), <https://apnews.com/article/hate-crimes-rise-FBI-data-ebbcadca8458aba96575da905650120d> (describing an upsurge in hate crimes, reflecting xenophobia and nationalism, in 2020); Florian Bieber, *Is Nationalism on the Rise? Assessing Global Trends*, 17 ETHNOPOLITICS 519, 519 (2018) (discussing that some countries, such as the United States, have seen increasing nationalism).

⁴⁵ See, e.g., Paul M. Barrett, *The Disinformation Problem Starts at Home*, WIRED (Mar. 14, 2019, 8:00 AM), <https://www.wired.com/story/disinformation-domestic-problem/> [<https://perma.cc/X75Y-Q3DV>] (discussing anti-vaccine pages, political disinformation, and conspiracy theories originating from the United States).

⁴⁶ See, e.g., Eileen Sullivan & Kate Benner, *Top Law Enforcement Officials Say the Biggest Domestic Terror Threat Comes from White Supremacists*, N.Y. TIMES, <https://www.nytimes.com/2021/05/12/us/politics/domestic-terror-white-supremacists.html> (June 15, 2021) [<https://perma.cc/CJT5-YFJ3>] (“[F]ormer members of the Trump administration told the House Oversight Committee that Mr. Trump’s false claims to have won the 2020 election had fueled the domestic terrorism threat . . .”).

⁴⁷ Neil MacFarquhar, *As Domestic Terrorists Outpace Jihadists, New U.S. Law Is Debated*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/us/domestic-terrorism-laws.html> [<https://perma.cc/CJT5-YFJ3>].

⁴⁸ 319 U.S. 141, 143 (1943).

speak, as well as the “rights of the workers to hear” what the union had to say.⁴⁹ Rounding out this early trilogy of cases establishing the right is *Lamont v. Postmaster General*. The Court considered a statute that allowed the Secretary of the Treasury to designate non-sealed political propaganda originating from adversarial countries as “communist political propaganda.”⁵⁰ The Postmaster General would hold and destroy such propaganda unless the receiver specifically asked for it to be delivered.⁵¹ In a unanimous decision, the Court struck down the statute.⁵² Justice Brennan concurred, noting that the “[g]overnment is powerless to interfere with the delivery of the material because the First Amendment ‘necessarily protects the right to receive it.’”⁵³

The Court then quickly expanded the right to receive to other locations, subject matter, and ideas. In *Griswold v. Connecticut*, the Court used the right to receive information in the home as a means of expanding access to contraceptives.⁵⁴ The Court stated that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . the right to receive.”⁵⁵ In *Stanley v. Georgia*, the Court addressed the private possession of “obscene matter” on film.⁵⁶ Relying upon the right to receive information, the Court noted that such a right is fundamental to “free society” and intersects with the “right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”⁵⁷ Thus, Stanley had the right to read or observe whatever he wanted, and the State could not invade the privacy of his home to regulate what he watched.⁵⁸ Finally, in *Red Lion Broadcasting Co. v. FCC*, the Court outlined the expansiveness of this right to receive, finding that the public has the right to receive information pertaining to “social, political, esthetic, moral, and other ideas and experiences.”⁵⁹

In combination, these cases indicate that the right to receive information intersects with the right to privately consume information at home, and that the right expands across *any* subject matter that makes our society free. Since most online speech falls within “social, political, esthetic, moral, and other

⁴⁹ 323 U.S. 516, 532, 534 (1945).

⁵⁰ 381 U.S. 301, 302 (1965).

⁵¹ *Id.* at 302-03.

⁵² *Id.* at 306-07.

⁵³ *Id.* at 308 (Brennan, J., concurring).

⁵⁴ 381 U.S. 479, 482, 485 (1965).

⁵⁵ *Id.* at 482.

⁵⁶ 394 U.S. 557, 558 & n.1 (1969).

⁵⁷ *Id.* at 564.

⁵⁸ *Id.* at 565.

⁵⁹ 395 U.S. 367, 390 (1969).

ideas and experiences”⁶⁰ and is received within the privacy of our homes, the government cannot filter what listeners choose to see without satisfying heightened scrutiny.⁶¹ However, this changes where the origin of speech is beyond the border.

C. Foreign Speech and the Right to Receive Information

This expansive right to receive information is complicated by the Court’s immigration jurisprudence and its deference to Congress and the Executive on border issues. Foreigners within the United States have First Amendment rights similar to those of American citizens.⁶² In contrast, the government is not prevented from excluding foreign speakers or speech from entering the country for various reasons, including because of their speech and ideas.⁶³ Both foreign speakers and ideas can be prevented from entering the country through immigration and import laws respectively, both of which can supersede the right to receive.

Generally, foreigners residing within the United States have First Amendment rights.⁶⁴ But the situation is more complex for those living outside the United States. In *Kleindienst v. Mandel*, the Court addressed whether the government could deny a visa to a foreigner who sought to participate in academic lectures about socialism in the United States.⁶⁵ The Court found that Mandel, the foreigner, had no constitutional right of entry as a nonimmigrant.⁶⁶ But the Court went further, finding that although citizens had a right to receive information, Congress’ “power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden” took precedent.⁶⁷ Thus, the Court would not inquire further and would accept the Executive’s facially

⁶⁰ *Id.*

⁶¹ *See, e.g.*, *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (noting that a statute infringing the right to receive must survive “exacting scrutiny,” which requires that the state show “a subordinating interest which is compelling” and a “closely drawn” policy).

⁶² *See, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“[F]reedom of speech and of press is accorded aliens residing in this country.”) (citing *Bridges v. California*, 314 U.S. 252 (1941)).

⁶³ *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 580 (1952) (upholding a statute that allowed deporting aliens due to former Communist Party membership).

⁶⁴ *See Wixon*, 326 U.S. at 148 (“Freedom of speech and of press is accorded aliens residing in this country.”).

⁶⁵ 408 U.S. 753, 756-57 (1972).

⁶⁶ *Id.* at 762.

⁶⁷ *Id.* at 766 (quoting *Boutilier v. Immig. & Naturalization Serv.*, 387 U.S. 118, 123 (1967)).

legitimate reasoning in exercising its Congressionally-delegated right to deny Mandel entry,⁶⁸ and “First Amendment rights could not override” that.⁶⁹

While the Court’s decision in *Mandel* was based on a person entering the country, in *United States v. 12 200-Ft. Reels of Super 8mm Film*, the Court went further, allowing the government to stop the flow of “obscene material” (such as films, books, and pamphlets) across the border and into the country.⁷⁰ The Court doubled down on *Mandel*, noting that even for materials that have to do with private consumption, import restrictions “rest on different considerations and different rules of constitutional law from domestic regulations.”⁷¹ While the Court did not distinguish *Lamont*, which also dealt with foreign imports, it noted the narrowness of *Stanley*’s ruling, finding that it rested on an “explicitly narrow and precisely delineated privacy right.”⁷²

The final principle pertaining to foreign speech arises in *Citizens United v. FEC*, where the Court ruled unconstitutional a statute that banned corporate-funded independent expenditures, because “the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”⁷³ While this principle is broad, the Court did not rule explicitly on whether expenditure bans applied to foreigners.⁷⁴ Later, the Court affirmed—without providing reasoning—the ban on foreigners engaging in U.S. political activity.⁷⁵ Thus, foreign speakers’ political speech cannot, in some ways, be received by those in the United States. Additionally, in *Holder v. Humanitarian Law Project*, the Court upheld a statute that forbade providing legal representation and training to foreign organizations defined by the Executive as terrorist groups,⁷⁶ permitting the discrimination of the right to receive based on the nationality of the receiver (in this case, the foreign terrorist organization). But the Court’s reasoning was premised on why strict scrutiny was the most appropriate standard, rather than focusing any analysis

⁶⁸ *Id.* at 770.

⁶⁹ *Id.* at 767. Congress has also created statutory protections and barriers to prevent some foreign speakers from entering, based on their speech. Currently, the PATRIOT and REAL ID acts bar foreign speakers with a history of espousing terrorist activity from entering the United States. See Timothy Zick, *Territoriality and the First Amendment*, 85 NOTRE DAME L. REV. 1543, 1556 (2010) (discussing these provisions of the PATRIOT and REAL ID Acts).

⁷⁰ 413 U.S. 123, 129 (1973).

⁷¹ *Id.* at 125.

⁷² *Id.* at 127.

⁷³ 558 U.S. 310, 350 (2010).

⁷⁴ *Id.* at 362.

⁷⁵ *Bluman v. FEC*, 565 U.S. 1104 (2012), *aff’g* 800 F. Supp. 2d 281, 282 (D.D.C. 2011) (upholding the ban because of the Court’s long-held exclusion of “foreign citizens from activities that are part of democratic self-government in the United States”).

⁷⁶ 561 U.S. 1, 7-10 (2010).

on the national origin of the receivers.⁷⁷ Implicitly, this permitted the Court to discriminate based on nationality because the “terrorist group” was associated with foreign citizens, which therefore allowed discrimination based on non-American nationality. Because of this line of reasoning, the underlying reasoning of discriminating based on national origin has not explicitly been tested in front of the Court.

D. *The Role of the Internet*

The Court has treated online speech as an important part of public discourse, though it is still in the process of mapping public discourse to cyberspace, leading to different and unique approaches regarding online speech. This mapping is complicated because online speech does not adhere to distinctions based on geography and nationality, and so it is hard to determine who receives First Amendment protections. Even so, in the Court’s initial interaction with the Internet in *Reno v. ACLU*, it ruled that speech on the Internet is entitled to the highest level of First Amendment protection, similar to protections provided to print media.⁷⁸

Since *Reno*, the Court has maintained a high level of protection for online speech, and has approached its regulation cautiously. In *Packingham v. North Carolina*, the Court addressed a North Carolina law that prohibited sex offenders from creating social media profiles.⁷⁹ While the Court only applied intermediate scrutiny to the statute, it also noted that the Internet is a “modern public square” for “speaking and listening,” and that preventing sex offenders from using social media altogether prevents them from engaging in their First Amendment rights.⁸⁰ More recently, the Court punted on the question of whether *government officials’* social media accounts are considered public forums.⁸¹ Taken together, these cases indicate that First Amendment principles apply to online speech, though the Court may slowly be trying to shoehorn traditional First Amendment principles, like the idea of a public forum, into the unique dimensions of cyberspace.⁸²

⁷⁷ *Id.* at 26-30.

⁷⁸ 521 U.S. 844, 863, 880, 893 (1997).

⁷⁹ 137 S. Ct. 1730, 1734 (2017).

⁸⁰ *Id.* at 1737.

⁸¹ *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221, 1227 (2021) (“The extent to which [Twitter’s power to cut off users’ from its website] matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions. This petition, unfortunately, affords us no opportunity to confront them.”).

⁸² The Court also considered whether public school officials can regulate off-campus student speech expressed online in *Mahanoy Area High School v. B.L.*, finding that the school’s interest in

Because only a handful of cases address First Amendment rights online, recent Fourth Amendment jurisprudence helps inform what principles might arise from the Roberts court regarding technology. Two cases indicate the Court's reluctance to allow significant encroachment into Fourth Amendment rights by the government. In *Riley v. California*, the Court declined to extend warrantless searches of arrestees by the police to cell phone searches.⁸³ Astutely, the Court noted that “[c]ell phones differ in both a quantitative and a qualitative sense from other objects,” and that the quantity and type of information stored on a cell phone would be too revealing.⁸⁴ Then, in *Carpenter v. United States*, the Court created a new line of Fourth Amendment jurisprudence by limiting the government's warrantless access to cell site location information (CSLI) collected by a third party (the cell service provider).⁸⁵ The Court reasoned that because cell phones are “such a pervasive and insistent part of daily life,” there were no good analogies to the revealing nature of CSLI, so existing Fourth Amendment jurisprudence based on third-party doctrine was inadequate.⁸⁶

These novel First and Fourth Amendment cases provide two takeaways. First, the Court is aware of the unique nature of online activity and speech, and is reluctant to allow the government to broadly encroach on rights through technology. Second, extant case law and analogies might not neatly map on to these new innovations. Where the Court attempts to fit the square shape of the Internet into the round hole of old reasoning, it does so in a rights-protective manner, like in *Packingham*. But complexities arise when the Court's cautious technology jurisprudence clashes with its deferential approach to the government's regulation of foreign speakers and speech, impacting the right to receive in practice.

preventing the use of vulgar language to criticize the school's cheerleading team did not overcome the student's First Amendment rights to free expression. 141. S. Ct. 2038, 2047-48 (2021). In making this ruling, the Court focused on the nature of *in loco parentis*, the student's interests, and the school's interests, rather than on the fact that the speech was online. *Id.* at 2046. Even so, these First Amendment principles have significant implications for students' online speech, regardless of whether the Court focused on that aspect of the speech.

⁸³ 573 U.S. 373, 386 (2014).

⁸⁴ *Id.* at 393-95.

⁸⁵ 138 S. Ct. 2206, 2217 (2018).

⁸⁶ *Id.* at 2219-20 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). The existing third-party doctrine permitted the government to collect information that was given by a surveillance subject to a third party (such as checks given to a bank), without having to get a warrant. *Id.*

II. THE RIGHT TO RECEIVE INFORMATION IN PRACTICE

Although the right to receive information is an established right, in practice, other rights, policies, and jurisprudence take precedence. There are three ways in which the right to receive information from foreign speakers is not realized, especially online. First, foreign nationals are prosecuted for their speech, and using the right to receive often fails as a defense due to procedural and standing issues, or due to deference to Executive authority at the border. Second, technology companies that cooperate with the government impact the right to receive, though regulations that prevent transparency make this hard to verify. Finally, foreign policy decisions more broadly impinge upon the right to receive. These three avenues mean that in practice, listeners don't know what information they're not seeing. They are aware of the existence of the tip of the iceberg, but nothing more: they do not know what they do not know. And if that is the case, then the right to receive information is not really being realized.

A. *Failure to Raise the Right to Receive in Court Due to Procedural/Standing Issues and Executive Authority*

As social media and the Internet has proliferated in the post-9/11 era, so have difficult issues of foreigners exercising their speech online. In multiple cases, foreigners *alleged* to have endorsed terrorist activities have been prosecuted, which impacts Americans' right to receive. But a right to receive defense has often not worked. The speaker whose speech is being chilled cannot raise a right to receive claim. And the listener does not know what they are missing. The right to receive exists in the air, but neither speaker nor listener can catch it.

In *United States v. Al Bahlul*, a military court considered the conviction and Guantanamo Bay imprisonment of a Yemeni al Qaeda officer in charge of the organization's public relations.⁸⁷ Al Bahlul's work included publicizing al Qaeda's bombings and creating propaganda videos.⁸⁸ Al Bahlul argued that his prosecution chilled Americans' "exercise of the right to dissemination of information."⁸⁹ But the Court countered that U.S. citizens could receive such information through other means, including online, and so their right to receive was not impacted by his prosecution.⁹⁰ The D.C. Circuit affirmed after rehearing en banc, noting that "no governing precedent extends First

⁸⁷ 820 F. Supp. 2d 1141, 1159 (Ct. Mil. Comm'n Rev. 2011), *aff'd sub nom.* Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016).

⁸⁸ *Id.* at 1161.

⁸⁹ *Id.* at 1250.

⁹⁰ *Id.*

Amendment protection to speech undertaken by non-citizens on foreign soil,” though this was in response to Al Bahlul’s argument that *he* was exercising *his* First Amendment rights,⁹¹ rather than his argument about Americans’ right to receive his speech. Effectively, the Court dismissed Al Bahlul’s First Amendment claim because Al Bahlul did not have First Amendment rights, indicating that foreign speakers lack standing to bring First Amendment claims in the first place.

Additionally, the concerns raised in *Mandel* that allowed the government to prohibit foreign speakers from entering the country are also seen in immigration cases, where courts have upheld denials of visas to foreign speakers, rejecting right to receive claims by American citizens. In *American Academy of Religion v. Chertoff*, appellant (an American organization) raised a First Amendment right to receive claim when the government denied a visa to an Islamic scholar.⁹² The district court found that the government’s denial rested on the “facially legitimate and bona fide reason” that the appellant donated to a charity which *in turn* provided material support to a terrorist organization.⁹³ Further, the Court has ruled that the Executive can deport non-citizens if the Executive *believes* the person is a member of a terrorism-supporting organization (without having to substantiate those claims), *regardless* of any chilling effect to First Amendment rights.⁹⁴ Procedurally, this stacks the cards against the non-citizens, harming Americans’ right to receive.

Looking beyond the few First Amendment and right to receive cases, Fourth Amendment cases again provide direction. In *United States v. Ramsey*, the Supreme Court considered whether customs officials could open international mail at the border without probable cause or a warrant.⁹⁵ Because the search was made “at the border,” the Court found that Fourth Amendment warrant provisions did not apply and instead “different considerations” applied.⁹⁶ The Court also dismissed any First Amendment considerations that such actions might chill speech as “minimal” and “wholly subjective.”⁹⁷ Here too, we see that different constitutional rules apply at the border, where rights may be suspended in deference of national security issues and Executive authority.

⁹¹ *Bahlul v. United States*, 840 F.3d 757, 796-97 (D.C. Cir. 2016) (en banc), *aff’g* *United States v. Al Bahlul*, 820, F. Supp. 2d 1141 (Ct. Mil. Comm’n Rev. 2011).

⁹² 06 CV 588, 2007 U.S. Dist. LEXIS 93424, at *36-37 (S.D.N.Y. Dec. 20, 2007) (noting that the “right to hear”—such as plaintiffs’ right to meet “face to face” with the visa applicant—is trumped by Executive power to make visa decisions).

⁹³ *Id.* at *54.

⁹⁴ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488-92 (1999).

⁹⁵ 431 U.S. 606, 607-08 (1977).

⁹⁶ *Id.* at 619 (quoting *United States v. 12 200-ft Reels of Film*, 413 U.S. 123, 125 (1973)).

⁹⁷ *Id.* at 624 (citations omitted).

In these cases, procedural/standing and border issues complicate the realization of the right to receive in practice. But unsuccessful litigation is only a fraction of why the right to receive is in practice not realized.

B. *Technology Companies Cooperating with the Government*

The government uses myriad policies to pressure technology companies to share information and take down content; these companies voluntarily share information about their compliance with the government.⁹⁸ Despite the honor system-like method of reporting—a system that is opaque by design—the data show clear examples of government pressure that impacts the right to receive information from foreign *and domestic* speakers. Such pressure is applied through requests to websites to take down content (content takedowns), requests to disclose the identity of an account holder in cases of a physical emergency (emergency disclosure requests), requests to preserve data that could be deleted (data/content preservation requests), Foreign Intelligence Surveillance Act requests (FISA content requests)⁹⁹ to preserve content posted online, and National Security Letters (NSLs) that request limited information about a user's identity.

These policies can be sorted into two groups. First, requests that directly remove content, obviously impacting the right to receive—like content takedowns. Second, policies that chill speech because content or user identity is directly reported to the government—such as emergency disclosure requests, content preservation requests, FISA requests, and NSLs. By providing access to user information or allowing the government to collect and preserve a speaker's speech, technology companies act as enforcers of government surveillance. Such surveillance chills speech by distorting what speakers say so that it conforms to majority behavior, creates self-censorship,

⁹⁸ See, e.g., Rob Pegoraro, *Tech Companies Are Quietly Phasing Out a Major Privacy Safeguard*, ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/technology/archive/2019/09/what-happened-transparency-reports/599035> [<https://perma.cc/F9PJ-93Y8>] (describing the voluntary nature of technology transparency reporting).

⁹⁹ Note that FISA requests can be directed at content and non-content information. See, e.g., LIZ WOOLERY, RYAN BUDISH & KEVIN BANKSTON, THE TRANSPARENCY REPORTING TOOLKIT 35-37, 40, BERKMAN CTR. (Mar. 2016), https://cyber.harvard.edu/sites/cyber.harvard.edu/files/Final_Transparency.pdf [<https://perma.cc/PY5D-R2QM>] (explaining how companies provide content and non-content information when responding to FISA requests). For the limited scope of this Comment, I will focus on content requests, since those requests directly target the essence of speech, whereas non-content information may include metadata and other identifying information that is tangential to the topic of this Comment.

and weakens minority opinions.¹⁰⁰ Both categories of policies leave American listeners unable to access speech that was previously said but later taken down, or more insidiously, speech that foreigners may have wanted to create, but instead self-censored because they were chilled by the government's extralegal surveillance.

Even more troubling is that because of regulations regarding wiretaps, NSL disclosure, and what data and notice can be provided by the receiving technology firm to a user, it is hard to precisely pinpoint what kind of content was removed, and what kind of users are being tracked.¹⁰¹ Nonetheless, there is evidence that content has been taken down and users have been prevented from posting on popular social media websites, summarized in Table 1 *infra*.¹⁰² For example, Facebook¹⁰³ restricted thirty-nine pieces of content in 2020.¹⁰⁴ It also deactivated accounts after law enforcement requested it do so, though Facebook does not report how many such accounts are deactivated, or the deactivated users' locations.¹⁰⁵ And because we don't know what that content

¹⁰⁰ See, e.g., Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 RICH. L. REV. 465, 483-93 (2015) (describing how surveillance undermines primary tenets of the First Amendment).

¹⁰¹ See Reuters Staff, *Web Companies Give First Look at Secret U.S. Government Data Requests*, REUTERS (Feb. 3, 2014, 3:37 PM), <https://www.reuters.com/article/internet-nsa/web-companies-give-first-look-at-secret-u-s-government-data-requests-idUKL2NoL8iE320140203> [<https://perma.cc/4RB4-GQUJ>].

¹⁰² See *infra* Table 1.

¹⁰³ Note that Facebook rebranded its organization to Meta. *Introducing Meta: A Social Technology Company*, META, (Oct. 28, 2021) <https://about.fb.com/news/2021/10/facebook-company-is-now-meta> [<https://perma.cc/48BZ-7KG5>]. However, this Comment addresses the Facebook platform, and so will continue to refer to the platform as Facebook, rather than by its parent company's name.

¹⁰⁴ *Content Restrictions Based on Local Law: United States*, FACEBOOK, <https://transparency.fb.com/data/content-restrictions/country/US> [<https://perma.cc/DQ4V-CEER>].

¹⁰⁵ Dustin Volz, *Rights Groups Ask Facebook to Clarify Policies on Content Removal*, REUTERS (Oct. 31, 2016, 11:01 AM), <https://www.reuters.com/article/us-facebook-content-groups/rights-groups-ask-facebook-to-clarify-policies-on-content-removal-idUSKBN12V1ND> [<https://perma.cc/9JY7-54TW>] ("Facebook deactivated [a U.S. activist's] account after Baltimore police issued an emergency request to the company . . .").

More recently, the Facebook Files have revealed that Facebook's internal policies provide preferential treatment to high-profile users, including not suspending their posts or taking them down even if such users violated Facebook's content policies. Jeff Horwitz et al., *The Facebook Files*, WALL ST. J. (Sept. 13, 2021), <https://www.wsj.com/articles/the-facebook-files-11631713039> [<https://perma.cc/97E3-H6DD>]; Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt*, WALL ST. J. (Sept. 13, 2021, 10:21 AM), https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353?mod=article_inline [<https://perma.cc/F9A4-M3GD>]. In addition, the Files show that Facebook attempted to suppress harmful political movements on its platform and collaborated with the Vietnamese government in censoring political content. *Id.*; see also Justin Scheck, Newley Purnell & Jeff Horwitz, *Facebook Employees Flag Drug Cartels and Human Traffickers. The Company's Response Is Weak, Documents Show*, WALL ST. J. (Sept. 16, 2021, 1:24 PM), https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953?mod=article_inline [<https://perma.cc/B6DK-TZZY>] (noting the extent of foreign government collaboration with Facebook, such as the

entailed and who those accountholders are, we don't know whether the chilled or removed speech was significant, meaningful, or genuinely dangerous.

Google has more granular data about removal requests. Around thirty-five pieces of content were taken down in 2020 for "privacy and security" reasons, and more than forty-two pieces were requested to be removed by government officials.¹⁰⁶ However, sorted by reason, few requests are given the direct motive of "national security," though there are also some requests from the military.¹⁰⁷ Other notable companies include Apple, which received thirty-four account deletion requests,¹⁰⁸ Twitter, which received 358 non-court ordered legal demands and complied with 146 of them,¹⁰⁹ and Reddit, which had three requests from the U.S. government, all in 2020.¹¹⁰

There are two caveats to these data. First, while websites report the types of requests being processed, they are under no obligation to do so, and their transparency requests are not audited.¹¹¹ Further, the format of the transparency reports differ,¹¹² and it is unclear whether the companies use the same methodology to report government requests. Even with a deep investigation of these transparency reports, it is unclear how clean and consistent the data is both within each company, and across companies. Second, with respect to content takedowns, it is extremely difficult to pinpoint

Vietnamese government and military's "organized efforts" to systemically harass a political opponent and restrict the opponent's social media reach). While none of these acts were, prima facie, at the behest of the U.S. government, the *Facebook Files* do indicate the lack of transparency around how Facebook's user policies are implemented, how it interacts with government operators, and how clear it is whether content takedown is done unilaterally or in collaboration or coordination with any government. *Id.*

¹⁰⁶ *Google Transparency Reports By Country/Region: Government Requests to Remove Content*, GOOGLE, <https://transparencyreport.google.com/government-removals/by-country?hl=en> [<https://perma.cc/KQZ3-CFBJ>] (click the tab that says "Government Requests," click on "select countries/regions," choose "United States" and filter by reasons (for "privacy and security") or by requesters (for police and other government officials) under the 'Items' graph, and select the appropriate date range).

¹⁰⁷ *Id.*

¹⁰⁸ *Apple Transparency Report: United States*, APPLE, <https://www.apple.com/legal/transparency/us.html> [<https://perma.cc/3Y4G-UBKE>] (select Date Ranges for both halves of 2020 and look at the "Accounts Specified in the Requests" category under "Account Restriction / Account Deletion").

¹⁰⁹ *Twitter Transparency Report: United States*, TWITTER (Jan. 11, 2021), <https://transparency.twitter.com/en/reports/countries/us.html#2020-jan-jun> [<https://perma.cc/S8R8-HVFT>] (see "Removal Requests"). Note that unlike Facebook and Google, Twitter did not distinguish how many requests were copyright-related.

¹¹⁰ *Reddit Transparency Report 2020*, REDDIT (2020), <https://www.redditinc.com/policies/transparency-report-2020-1> [<https://perma.cc/8BP6-XKW3>].

¹¹¹ See *supra* note 98.

¹¹² This also makes it incredibly difficult to compile data like that in Table 1, which further obscures the extent of these companies' cooperation in making disclosures and makes it harder to assess First Amendment impacts.

whether a user is foreign or content is posted by a foreign user, due to the mechanics of the Internet. For example, even if a user's profile indicates that they live in Delhi, they may currently be located within the United States. A user's Internet Protocol (IP) address—a digital address temporarily attached to their device—could help to identify their location.¹¹³ Even so, IP addresses at best provide approximate positions.¹¹⁴ Further, technologies such as Virtual Private Networks (VPNs)¹¹⁵ and software like Tor¹¹⁶ can obscure an individual's location entirely. Simply put, when a website like Facebook takes down content posted by a user or deactivates a user's account, it is difficult to know whether that user was a foreigner. Nonetheless, given the size and geographic scope of these websites' user bases, it is likely that some foreigners' content or accounts have been taken down.

The data from the five companies is summarized in Table 1 below. Outside of content takedown requests, of note are the sheer number of content preservation requests that are made to Facebook and Google. Specifically, the government made 122,790 total *requests* (and each request may contain information about multiple pieces of data or users) in 2020 from up to 208,385 accounts on Facebook, which in absolute numbers is a lot of chilled speech or users.¹¹⁷ Similarly, the government has made FISA content requests that impact more than 122,000 Facebook users in 2020,¹¹⁸ more than 73,000 Google users in the first half of 2020,¹¹⁹ and nearly 45,000 Apple users in 2020.¹²⁰ And finally, the government has made a total of around 15,000 emergency disclosure

¹¹³ Aaron Mackey, Seth Schoen & Cindy Cohn, *Unreliable Informants: IP Addresses, Digital Tips and Police Raids*, ELEC. FRONTIER FOUND. (Sep. 2016), https://www.eff.org/files/2016/09/22/2016.09.20_final_formatted_ip_address_white_paper.pdf [<https://perma.cc/SEJ9-8XBL>] (“IP address information, by itself, serves as an inconsistent tool . . . to identify an exact location.”).

¹¹⁴ *Id.* (“IP address information, by itself, serves as an inconsistent tool . . . to identify an exact location.”).

¹¹⁵ See, e.g., Zhensheng Zhang, Ya-Qin Zhang, Xiaowen Chu & Bo Li, *An Overview of Virtual Private Network (VPN): IP VPN and Optical VPN*, 7 PHOTONIC NETWORK COMM'NS 213, 214-15 (2004) (describing the mechanics of a VPN).

¹¹⁶ See, e.g., Seongmin Kim, Juhyeong Han, Jaehyeong Ha, Taesoo Kim & Dongsu Han, *SGX-Tor: A Secure and Practical Tor Anonymity Network With SGX Enclaves*, 26 IEEE/ACM TRANSACTIONS ON NETWORKING 2174, 2174 (2018) (describing how Tor works).

¹¹⁷ *Transparency Report: Government Requests for User Data (United States)*, FACEBOOK, <https://transparency.fb.com/data/government-data-requests/country/US> [<https://perma.cc/SM57-M5F5>]. Note that the total number of accounts may be less than 208,385, since the accounts over each half-yearly period may overlap.

¹¹⁸ *Id.* (see “Foreign Intelligence Surveillance Act”).

¹¹⁹ *Google Transparency Report: United States National Security Requests for User Information*, GOOGLE, <https://transparencyreport.google.com/user-data/us-national-security?hl=en> [<https://perma.cc/JF8G-9W9A>]. As of the time of writing, data for the second half of 2020 was unavailable.

¹²⁰ *Apple Transparency Report: United States*, APPLE, <https://www.apple.com/legal/transparency/us.html> [<https://perma.cc/3Y4G-UBKE>] (see “National Security – FISA Content Requests” category).

requests and sent up to 2,500 NSLs towards the five websites.¹²¹ While these numbers are small compared to the user bases of each of these platforms, speech is not chilled by the actual number of government requests, but by the perception of the depth of government reach and the fear of future prosecution.¹²²

Put simply, the government's takedown of content, deletion of accounts, and chilling of speech through various opaque methods impact the right to receive. But these numbers barely scratch the surface, since there are myriad indirect and arcane ways in which the government could pressure technology companies to moderate their content.¹²³ Even so, the numbers indicate that U.S. users' right to receive information from domestic and foreign speakers is being impacted by the government's interaction with technology companies.

But numbers don't tell us exactly *how much* impact the government's acts create. This government-website cooperation functions in kind, though not in magnitude, like the Great Firewall of China:¹²⁴ the government can decide what speech is "too harmful" or "too disruptive" for American viewers to experience. And it can monitor those whose speech *may* be harmful, causing subjects of that surveillance to silence themselves when they would not otherwise. For example, American listeners will never know whether blocked and unsaid speech was terrorist propaganda, or advocacy for the Boycott Divest Sanction (BDS) movement against Israel.¹²⁵ This is especially so because the government can pressure technology companies to undermine civil liberties, and then escape scrutinizing litigation, effectively in an end-run around the Constitution.¹²⁶ These factors create an unknown unknown that is likely to get larger as cyberspace becomes the new terrain for propaganda and election interference.

¹²¹ See *infra* table 1.

¹²² See, e.g., Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 164 (2016) (noting that where users know about government surveillance, they censor themselves "out of concern for potential future harms," and that knowledge of government monitoring, rather than actually being monitored, chills speech).

¹²³ See, e.g., Craig Timberg, *How Conservatives Learned to Wield Power Inside Facebook*, WASH. POST (Feb. 20, 2020), <https://www.washingtonpost.com/technology/2020/02/20/facebook-republican-shift/> [<https://perma.cc/F2A7-3P53>] ("[Republicans] have pressured Facebook by making unproven claims of bias against conservatives amid rising signs of government action on the issue, including investigations by Congress and the Justice Department.").

¹²⁴ See generally, Xueyang Xu, Z. Morley Mao & J. Alex Halderman, *Internet Censorship in China*, in 6579 LECTURE NOTES IN COMP. SCI. 133, 133 (2011) (describing the Great Firewall of China's mechanisms).

¹²⁵ See, e.g., Ark. Times LP. v. Waldrip, 988 F.3d 453, 458-59 (8th Cir. 2020) (addressing an Arkansas law that penalizes government contractors who support BDS).

¹²⁶ See, e.g., Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1290 (2020) ("[A]lgorithmic governance amplifies some recurring problems for procedural due process."); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 14 (2006) ("[G]overnments have sought to enlist private actors . . . as proxy censors to control the flow of information.").

Table 1: Content Takedowns and Chilled Speech Across Technology Platforms¹²⁷

WEBSITE	USER BASE	CONTENT TAKEDOWNS	EMERGENCY DISCLOSURE REQUESTS	DATA/CONTENT PRESERVATION REQUESTS	FISA CONTENT REQUESTS	NSLS
Facebook	~2.8B	31 (restricted); 12 (taken down)	6,976	166,426 requests from 286,423 accounts	0–1996 requests from up to 240,996 accounts	2–998 requests from 2–998 accounts
Google	N/A	35 (privacy and security); 2 (national security)	2,723	31,090	Jan–June 2020: 0– 499 requests from 73,500–73,999 accounts	Jan–June 2020: 6–499 from 1,000–1,499 accounts
Apple	1.65 B active devices	34 (account deletion requests)	523	7,218 requests from 19,674 accounts	0–998 from 44,500–45,948 accounts	4–998 from 502– 1,498 accounts
Twitter	~330M	358	3,789	9,416	N/A	0
Reddit	430M monthly	3	254	313	Combined requests are 0–249 from 0–249 users.	

¹²⁷ A complete table with sources can be found at the end of this piece, *infra* Table 1-A: Content Takedowns and Chilled Speech Across Technology Platforms (with endnote citations).

C. Foreign Policy and Executive Authority

A final way the government impacts Americans' right to receive is through foreign policy and Executive actions. Such actions illustrate the practical weakness of the right to receive, revealing that the Executive's authority over foreign policy gives it power to silence foreign speakers, especially in cyberspace. This Section will cover three categories of such actions: government pressure on technology companies to remove accounts of foreign leaders and extremist figures; sanctions and actions against foreign technology platforms like TikTok; and wartime acts.

Leaders of many nations and groups, not just current U.S. presidents, have social media accounts. Along with the rise in extremism and terrorism, the U.S. government has sought to stem the support that some leaders have on social media by pressuring technology companies to ban "blacklisted" individuals who are on watchlists.¹²⁸ In addition, prominent lawmakers have suggested that social media platforms that host leaders of countries sanctioned by the United States might be violating those sanctions,¹²⁹ and have proposed legislation that would "sanction the 'provision of services,' including the provision and maintenance of . . . social media [accounts] to foreign individuals or entities sanctioned for terrorism, and senior officials of state sponsors of terrorism."¹³⁰ At minimum, this has a chilling effect on how such foreign speakers use technology to convey their speech, and could lead them to self-censor.

In addition, the government's explicit actions regarding foreign technology platforms also directly impact a right to receive. Through Executive Orders, President Trump sought to prevent further downloads of the Chinese language messaging app WeChat¹³¹ and the video/social media platform TikTok.¹³² WeChat is the primary messaging app for Chinese-speaking Americans and especially those who are trying to communicate with

¹²⁸ Sheren Khalel, *US Terror Sanctions: Do Social Media Companies Have to Comply?*, MIDDLE EAST EYE (May 6, 2019, 6:48 PM), <https://www.middleeasteye.net/news/hold-social-media-platforms-navigate-us-blacklists-under-murky-censorship-requirements> [<https://perma.cc/FJ4Q-3HDK>].

¹²⁹ See, e.g., Peter Harrell & Elizabeth Goiten, *How Iran Became the New Battle Line Between Conservatives and Twitter*, POLITICO (June 16, 2020), <https://www.politico.com/news/magazine/2020/06/16/how-iran-became-the-new-battle-line-between-conservatives-and-twitter-320615> [<https://perma.cc/XYZ9-GRGP>] (describing Ted Cruz's argument that Twitter's hosting of Iranian leaders' accounts violates sanctions against Iran).

¹³⁰ Brooke Singman, *No Social Media Accounts for Terrorists': House GOP Pushes to Block Sanctioned Foreign Leaders from Platforms*, FOX NEWS (Mar. 2, 2021), <https://www.foxnews.com/politics/gop-lawmakers-push-no-social-media-accounts-for-terrorists-bill> [<https://perma.cc/78AP-FMJW>].

¹³¹ Exec. Order No. 13,943, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

¹³² Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

China-based users.¹³³ Banning the app impacts American users' right to receive information from their Chinese counterparts. Although the Chinese government censors messages on WeChat,¹³⁴ the U.S. government's ban—currently tied up in the courts¹³⁵—of *all* messages through an app looks like the statute used in *Lamont* to prevent Americans from receiving communist propaganda. Similarly, banning TikTok, which has a global user base, directly impacts Americans' right to receive information from foreign users, including potential (subjectively defined) propaganda or foreign influence.¹³⁶ The President enacted these bans through the International Emergency Economic Powers Act (IEEPA), which allows them to “block and prohibit all transactions in all property and interests in property” against those engaging in economic or industrial espionage of American intellectual property, if such transactions impacts national security.¹³⁷ This broad grant of power sets up a clash between national security authority and the right to receive.

Finally, the government's previous wartime acts indicate that the right to receive may take a back seat to national security.¹³⁸ Since the threat of

¹³³ U.S. *WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 927 (N.D. Cal. 2020) (“WeChat is effectively the only means of communication for many in the [Chinese-American] community, not only because China bans other apps, but also because Chinese speakers with limited English proficiency have no options other than WeChat.”).

¹³⁴ Eileen Guo, *Censored by China, Under Attack in America: What's Next for WeChat?*, MIT TECH. REV. (Oct. 30, 2020), <https://www.technologyreview.com/2020/10/30/1011450/wechat-censored-china-under-attack-in-america> [<https://perma.cc/8Q6R-7D4S>] (“American WeChat users aren't necessarily subject to the same levels of Chinese Internet policing . . . [but] most content is still subject to the [government's] rules.”). The article also notes that and that Chinese operatives may be using WeChat to influence foreigners. *Id.*

¹³⁵ U.S. *WeChat Users All.*, 488 F. Supp. 3d at 912.

¹³⁶ Drew Harwell & Tony Romm, *Inside TikTok: A Culture Clash Where U.S. Views About Censorship Often Were Overridden by the Chinese Bosses*, WASH. POST (Nov. 5, 2019), <https://www.washingtonpost.com/technology/2019/11/05/inside-tiktok-culture-clash-where-us-views-about-censorship-often-were-overridden-by-chinese-bosses> [<https://perma.cc/ADD2-YZXT>] (“[F]ormer employees claimed attempts to persuade Chinese teams not to block or penalize certain videos were routinely ignored, out of caution about the Chinese government[] . . .”). See also Planet Money, *Nervous TikTok*, NPR (Jan. 13, 2021, 10:00 PM), <https://www.npr.org/transcripts/956558906> [<https://perma.cc/6BSH-SXZN>] (discussing propaganda and censorship on TikTok).

¹³⁷ 50 U.S.C. §§ 1701(a), 1708(b).

¹³⁸ The current First Amendment jurisprudence protecting speech rights (except for inciting speech) only goes back to the 1960s, when *Brandenburg v. Ohio* was decided. 395 U.S. 444 (1969). Prior to that, “[t]he U.S. government prosecuted Nazi sympathizers during World War II, draft protesters during World War I, and Southern sympathizers in the Union during the Civil War.” Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015, 5:37 PM), <https://slate.com/news-and-politics/2015/12/isiss-online-radicalization-efforts-present-an-unprecedented-danger.html> [<https://perma.cc/524C-6RUS>]. See, e.g., *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (upholding convictions for distributing anti-draft leaflets as not violative of the First Amendment).

terrorism has created a perpetual state of war,¹³⁹ current policy indicates that the right to receive is being suppressed. Two examples stand out. First, the material support to terrorism statute¹⁴⁰ allows for the possibility that technology companies may be subject to federal criminal prosecution for providing terrorists a platform.¹⁴¹ At minimum, indirectly, it prevents certain non-profits from providing resources to some foreign organizations, including presumably their media presence, if those groups are labelled terrorist organizations.¹⁴² Second, the threat of terrorism has been used to justify the collection of visa applicants' social media handles, which has the potential to chill candid speech online for fear of having visas denied.¹⁴³ While visa applicants themselves do not have First Amendment rights, Americans have the right to receive their speech.

Together, these examples of the failure to uphold the right to receive in courts, the government's pressure on technology companies to take down content or chill speech through monitoring, and the Executive's foreign policy decisions regarding extremism online indicate that the right to receive differs in theory and in practice. But the story gets worse. If a plaintiff wanted to bring a claim against the government for affecting a U.S. user's ability to receive foreign speech, that claim would almost certainly fail in court.

¹³⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (authorizing the use of armed force to "prevent any future acts of international terrorism . . ." without providing any definitive end date to the usage).

¹⁴⁰ 18 U.S.C. § 2339B.

¹⁴¹ Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 5-7 (2017). *But see* *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019) (finding that § 230 of the Communications Decency Act bars liability under the material support statute).

¹⁴² *See* *Holder v. Humanitarian L. Project*, 561 U.S. 1, 8-9 (2010) (upholding the material support statute that prevented petitioners from providing political advocacy and legal training to the Kurdistan Worker's Party and the Liberation Tigers of Tamil Eelam).

¹⁴³ *US Demands Social Media Details from Visa Applicants*, BBC (June 1, 2019), <https://www.bbc.com/news/world-us-canada-48486672> [<https://perma.cc/99ZB-B7WM>]. *See also* Faiza Patel, Rachel Levinson-Waldman, Raya Koreh & Sophia DenUyl, *Social Media Monitoring: How the Department of Homeland Security Uses Digital Data in the Name of National Security*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring> [<https://perma.cc/73KZ-WZ5L>] (Mar. 11, 2020) (detailing the immense Department of Homeland Security data collection operation that surveils immigrants and visa applicants, and conclusively chills speech).

III. THE DIFFICULTIES OF BRINGING A RIGHT TO RECEIVE INFORMATION CLAIM IN COURT

The problem with the right to receive foreign speech runs deeper than practice diverging from doctrine. While there are significant benefits to receiving foreign speech, there are hurdles to successful litigation. Plaintiffs will have to contend with attaining standing, which is difficult. The government could then claim national security authority or raise incitement doctrine to defeat the claim. And there are practical considerations around the mechanics of the Internet that would weaken litigation.

A. *Standing is Difficult to Attain*

The issue of standing in electronics communications cases, especially pertaining to the First Amendment, leaves little in favor of potential plaintiffs. Claims must be concrete and nonspeculative. Instances where the government pressures technology platforms to remove posts or chill speech are difficult to bring precisely because plaintiffs do not know what speech is being stifled—or even that it is being stifled—and thus lack sufficient factual bases to satisfy the *Twombly* and *Iqbal* standard. Further, foreigners outside the United States cannot bring claims, and instead, U.S. persons must bring them to proceed in litigation. This leaves a chicken-and-egg issue implicating third-party standing, which is difficult to attain.

In *Clapper v. Amnesty International USA*, the Court considered whether Amnesty had standing to challenge the government's warrantless surveillance of alleged agents of foreign powers under section 702 of FISA.¹⁴⁴ Amnesty claimed that there was an "objectively reasonable likelihood that their communications will be acquired," chilling their speech.¹⁴⁵ But the Court ruled in favor of the government, noting that "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific" harm.¹⁴⁶ Instead, to establish Article III standing, a plaintiff must show the injury to be "concrete, particularized, and actual or imminent [and] fairly traceable to the challenged action."¹⁴⁷ The injury must also be "'certainly impending' . . . allegations of possible future injury are not sufficient."¹⁴⁸

Clapper's scope and its narrowing effect on cases satisfying Article III standing are especially impactful on right to receive cases. Claims where the

¹⁴⁴ 568 U.S. 398, 401 (2013).

¹⁴⁵ *Id.* at 407.

¹⁴⁶ *Id.* at 418 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

¹⁴⁷ *Id.* at 409.

¹⁴⁸ *Id.*

government's monitoring of technology platforms have chilled speech are not the "objective harm" the Court envisioned and are likely to be considered speculative, because the lack of transparency between technology companies' interaction with the government makes it nearly impossible to concretely and particularly show that the government's actions chill speech. Indeed, appellate courts have found that First Amendment claims where third parties (who can be foreign speakers)¹⁴⁹ are involved or where the government creates inestimable or unlikely risks¹⁵⁰ are too speculative for chilled speech claims. In contrast, examples where chilled speech claims survive standing are direct threats of intimidation to quell speech,¹⁵¹ government targeting based on speech,¹⁵² and reputational injury¹⁵³—none of which resemble the issue here.

Even if a chilled speech claim (which implicitly affects the right to receive information, since the speaker will be chilled from speaking, and thus the receiver will not receive the information that may have been said) could withstand the threshold for standing, finding the right plaintiff is difficult. If located in the United States, a foreigner whose speech is chilled could bring a claim on behalf of third parties whose right to receive is affected. But two issues arise: first, courts generally frown upon third-party standing,¹⁵⁴ and cases where third-party standing is likely to succeed generally have to do with

¹⁴⁹ *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018).

¹⁵⁰ *See, e.g., Munns v. Kerry*, 782 F.3d 402, 410-11 (9th Cir. 2015) (dismissing plaintiff's challenge to the government's policy that forbids negotiating with terrorists for the release of hostages). Plaintiff's argument was that such a policy deterred him from seeking employment as a contractor in Iraq, and would violate his family members' ability to seek his release if plaintiff was captured as a hostage. The Court noted that "even if [plaintiff's] plans to return to Iraq were sufficiently concrete, his likelihood of being kidnapped would still be speculative The chain of events leading to injury from these policies is simply too hypothetical and attenuated to constitute injury in fact." *Id.*

¹⁵¹ *See, e.g., Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (finding standing where the defendant, on behalf of the University of Michigan, used the "implicit threat of punishment and intimidation to quell speech").

¹⁵² *See, e.g., Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827-28 (9th Cir. 2020) (obtaining standing where the primary motivating factor for a government agency's potentially unlawful behavior was the "plaintiff's exercise of their First Amendment rights.").

¹⁵³ *See, e.g., Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 711 (6th Cir. 2015) ("Specifically, where claims of a chilling effect are accompanied by concrete allegations of reputational harm, the plaintiff has shown injury in fact.").

¹⁵⁴ *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). However, if a law or policy is "substantially overbroad," then third-party standing for First Amendment claims exists. Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863, 867-68 (1991). But there is no singular overbroad government policy suppressing foreign speech. Instead, content removal and chilled speech happens ad hoc, as noted in earlier Sections.

associational standing¹⁵⁵ or organizational standing,¹⁵⁶ which are not satisfied here. Second, it is unclear whether foreigners could bring *any* First Amendment claim in U.S. courts, and courts avoid the issue.¹⁵⁷

On the other hand, Americans whose right to receive is impacted by speech *they have yet to hear* could bring a claim on their own behalf—an ouroboros if ever there were one. Of course, American plaintiffs might have an easier time in courts, since plaintiffs who demonstrate self-censorship or that they have foregone electronic communication, as in *Wikimedia Foundation v. National Security Agency/Central Security Service*, have standing.¹⁵⁸ But while American plaintiffs have an easier time establishing standing, they would still have to find out that they were tangibly not receiving speech from foreign speakers the government does not want them to hear from. The unknown unknown provides a blind spot, preventing those with the ability to bring claims in court from doing so.

B. *National Security and Executive Authority Are Given Immense Deference*

Even if the right plaintiff could attain standing and show concrete harm, courts' deference to national security issues complicates the picture. Statutes impacting citizens' speech have been upheld in courts, indicating deference to Congress and the Executive. Courts also give wide latitude to the other branches in national security-related cases, especially regarding terrorism. Finally, the forum itself might be biased, since such cases might end up in Foreign Intelligence Service Courts (FISCs), or might uphold the government's right to interfere in national security issues.

We need not look far to see that courts rarely strike down statutes that sacrifice First Amendment rights in the face of national security, especially during wartime. The Court has upheld statutes that prevented the

¹⁵⁵ See, e.g., *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996) (noting that associational standing, which is sufficient to rebut the presumption "that litigants may not assert the rights of absent third parties" can only be applied in "particular relationships.").

¹⁵⁶ See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A]n organization whose members are injured may represent those members in a proceeding for judicial review.").

¹⁵⁷ See *Hedges v. Obama*, 724 F.3d 170, 194 n.140 (2d Cir. 2013). Note that the Court did not reach whether non-citizen plaintiffs could assert First Amendment rights; see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990) (discussing that the Framers likely intended the phrase "the people" in the Fourth Amendment, as well as the First Amendment, to apply to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." In the context of the Fourth Amendment, the Court notes that its purpose was to protect "the people of the United States.").

¹⁵⁸ 857 F.3d 193, 211 (4th Cir. 2017).

obstruction of military recruitment by distributing leaflets,¹⁵⁹ forbade conspiring to organize as the Communist Party of the United States,¹⁶⁰ authorized the deportation of non-citizens for “ill-defined ideological ‘crimes,’”¹⁶¹ and banned burning draft cards.¹⁶² Contemporarily, in *Humanitarian Law Project*, the Court upheld the material support statute, which prevents Americans from providing legal training to or advocacy for foreign organizations denoted as terrorist groups by the Executive branch, effectively preventing all communications to these off-limits factions.¹⁶³ But not being able to communicate with these groups also means Americans cannot receive information from them. Finally, the Patriot Act chills speech within the United States and between Americans and foreigners, by expanding law enforcement agencies’ ability to tap domestic and international phones.¹⁶⁴ So far, it has consistently been renewed and has largely remained intact.¹⁶⁵

Courts are also deferential when handling terrorism and national security cases. In *United States v. Mehanna*, the First Circuit found that although Mehanna engaged in the First Amendment activity of translating al Qaeda propaganda from Arabic to English and posted it online, Mehanna’s travels abroad and *conspiracy* to kill foreigners, in combination with his First Amendment activity, were adequate to convict him of four terrorism related counts.¹⁶⁶ Similarly, in *United States v. C.S.*, the Third Circuit found that a teenager’s threats made in an “Internet chatroom dedicated to discussing terroristic attacks,” including making “threats against a local church,” were adequate for conviction.¹⁶⁷ And in *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*, the Ninth Circuit ruled that because the

¹⁵⁹ *Schenck v. United States*, 249 U.S. 47, 50-51 (1919).

¹⁶⁰ *Dennis v. United States*, 341 U.S. 494, 516-17 (1951). Note that *Dennis* is still good law and has never been overruled. See Ronald K.L. Collins & David M. Skover, *What is War?: Reflections on Free Speech in “Wartime”*, 36 RUTGERS L.J. 833, 851 (2005) (emphasizing that the Court could be urged to “retreat” to *Dennis*’ version of the “clear and present danger” test).

¹⁶¹ David Cole, *What’s A Metaphor?: The Deportation of a Poet*, 1 YALE J.L. & LIBERATION 5, 6 (1989).

¹⁶² *United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁶³ *Holder v. Humanitarian L. Project*, 561 U.S. 1, 7-8 (2010).

¹⁶⁴ See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. 107-56, §§ 201-25, §§ 501-08, §701, 115 Stat. 272, 278-96, 363-68, 374 (2001).

¹⁶⁵ See, e.g., Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 78 (2006) (“United States persons may still be investigated based in part on First Amendment protected activities”); Patrick P. Garlinger, Note, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105, 1110-11, 1118 (2009) (discussing how the Patriot Act expands the FBI’s NSL authority, and how Congress’s amendments have allowed the act to withstand First Amendment challenges).

¹⁶⁶ 735 F.3d 32, 41-44, 46 (1st Cir. 2013).

¹⁶⁷ 968 F.3d 237, 238, 240 (3d Cir. 2020).

Islamic Foundation's *foreign owner* was designated a global terrorist—a designation partially based on classified information not presented at trial—violation of the Islamic Foundation's due process rights were “harmless.”¹⁶⁸ Taken separately, each of these cases may have been decided correctly, preventing potentially dangerous speech. But taken together, we see that courts are willing to combine First Amendment activity with circumstantial evidence to determine that parties are engaging in terrorist activity, even if not factually true. And these conclusions are based at least in part on whether the speaker is foreign. Even if some of the speech is concerning, if a critical reason to convict is the foreignness of the speech, ruling for the government means a lot of innocent speech is likely to be caught up in such prosecutions.

Beyond terrorism and First Amendment-related cases, the Court has shown significant deference to Congress and the Executive when dealing with national security affairs. In *Humanitarian Law Project*, Chief Justice Roberts spent many pages quoting Congress's and the Executive's findings about terrorism, stating that

[The] evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security . . . neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.¹⁶⁹

This obeisance rankled three liberal dissenters, led by Justice Breyer, who noted the need for the judicial branch to analyze the veracity of the claims made by the government.¹⁷⁰ Yet the Court has continued this deference. For example, in *Trump v. Hawaii*, the Court yielded to Presidential authority to implement the “Muslim ban,”¹⁷¹ despite strong evidence that the content of the ban was “significantly affected by religious animus against Muslims,” which would have violated the First Amendment's Free Exercise Clause.¹⁷²

These cases are but a few of the many examples in which even egregious violations of constitutional rights are found acceptable because the Court defers to the other branches in national security and foreign policy matters. It is unlikely that a violation of the mere right to receive information from

¹⁶⁸ 686 F.3d 965, 971, 974-75, 979-81 (9th Cir. 2012).

¹⁶⁹ Holder v. Humanitarian L. Project, 561 U.S. 1, 33-34 (2010).

¹⁷⁰ See *id.* at 54-55 (Breyer, J., dissenting) (“But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment.”).

¹⁷¹ 138 S. Ct. 2392, 2430 (2018).

¹⁷² *Id.* at 2429, 2430-32 (Breyer, J., dissenting).

foreign speakers will receive sympathy when far more serious constitutional violations, such as in the aforementioned cases, have gone uncorrected by the Court. But even if this were not the case, plaintiffs bringing such right to receive cases to court face an uphill battle, with systemic advantages for the government. Since these cases have to do with foreign speakers and national security, the government may have home court advantage in FISCs, which are notoriously secretive. Further, the government can intervene in cases that implicate national security and where the case, or many of its components, are secret, muddying claims and reducing their chances of success.

FISCs provide an immense home-court advantage.¹⁷³ In *Clapper*, the Court noted that section 702 of FISA was not immune from judicial review, referring the respondents to the FISC,¹⁷⁴ which is a secretive court that oversees surveillance against foreign threats.¹⁷⁵ Because some of the tools that chill speech—such as NSLs—may be implicated by FISA, American plaintiffs who claim that their right to receive has been impacted may have to go to secretive FISCs through amici curiae, since plaintiffs are not allowed to be direct parties.¹⁷⁶ Outside of the FISC, courts in general may also allow the government to withhold relevant information when the government asserts state secrets privilege because “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”¹⁷⁷ The home court advantage tilts to casino-like levels for the government, because if the suit leads to “the disclosure of matters which the law itself regards as confidential,” then that suit cannot be

¹⁷³ Like playing against Rafael Nadal at the French Open. *See, e.g.,* Manoj Bhagavatula, *Rafael Nadal's 1000 Wins: 100 at French Open, 172 vs Top 10, 86 Titles*, ESPN (Nov. 5, 2020), https://www.espn.com/tennis/story/_/id/30260238/rafael-nadal-1000-wins-100-french-open-172-vs-top-10-86-titles [https://perma.cc/P9RL-3WF6].

¹⁷⁴ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 421 (2013).

¹⁷⁵ *See, e.g.,* ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RSCH. SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 3-4 (2014) (describing FISC procedures and operations).

¹⁷⁶ *See* Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (Freedom Act), Pub. L. 114-23, § 401, 129 Stat. 268, 279-81 (2015) (detailing the process of appointing amicus curiae). Note that tools like NSLs are intended to be secret and come with nondisclosure requirements towards the implementing technology companies. *In re Nat'l Sec. Letter v. Sessions*, 863 F.3d 1110, 1114 (9th Cir. 2017). Thus, plaintiffs are also unlikely to know in a timely manner whether their constitutional rights have been impacted.

¹⁷⁷ *United States v. Reynolds*, 345 U.S. 1, 10 (1953). *See generally* El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) for a contemporary example. There, the government asserted the state secrets privilege against a claim by an innocent victim of the CIA's extraordinary rendition program, preventing the claim from proceeding. *Id.* at 535.

maintained *at all*.¹⁷⁸ Since this pro-secrecy approach leads to less accurate legal outcomes¹⁷⁹ and significantly favors the government,¹⁸⁰ potential plaintiffs would still face an uphill battle, if they even got this far.

Thus, the home court advantage for the government is almost insurmountable. The Court is likely to sacrifice First Amendment rights during wartime, including during a perpetual war against terrorism.¹⁸¹ It is likely to defer to the government's authority and provide evidentiary privilege, as well as favorable outcomes, in litigation regarding national security.

C. Incitement and True Threats Doctrine Could Take Precedence

Another problem arises with the nature of the speech in question. A theme of many cases is that a lot of foreign speech the government is concerned with deals with alleged terrorist or violent activity.¹⁸² First Amendment incitement doctrine provides justifications to prevent or suppress speech that incites violence, including censorship that might affect

¹⁷⁸ *Totten v. United States*, 92 U.S. 105, 107 (1875). While this is an old case, the principle is alive and well. *See, e.g.*, *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 486-87 (2011) (applying the state secrets doctrine to a contract breach case). Most recently, the Court *unanimously* upheld the use of the state secrets doctrine in suppressing evidence and dismissing respondents' claims that the FBI violated the Muslim respondents' First Amendment establishment clause rights by infiltrating a Muslim community, recording conversations, collecting phone numbers, and surveilling public discussions. *FBI v. Fazaga*, 142 S. Ct. 1051 (2022). Similarly, in *United States v. Zubaydah*, the Court also used the state secrets doctrine to prevent respondent, a Guantanamo Bay detainee, from subpoenaing former CIA contractors for information that would confirm the *existence* of a detention facility in Poland and substantiate claims that Zubaydah was subject to torture. 142 S. Ct. 959 (2022).

¹⁷⁹ *See, e.g.*, Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 144-45 (2017) (discussing how procedural exceptionalism prevents courts from policing national security secrecy, prevents accurate outcomes due to a lack of adversarialism, and undermines legitimacy of the legal process).

¹⁸⁰ An example of how much of a house effect the government has can be seen in how often the FISC approves applications for electronic surveillance. In 2019, the FISC received 848 applications, but denied just *one*. STEPHEN E. BOYD, ANNUAL FOREIGN INTELLIGENCE SURVEILLANCE ACT REPORT TO CONGRESS (2019), <https://www.justice.gov/nsd/nsd-foia-library/2019fisa/download> [<https://perma.cc/C9Y8-VY98>]. This record is even better than Nadal's at the French Open.

¹⁸¹ *See generally* Emily Posner, Note, *The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine*, 25 CARDOZO ARTS & ENT. L.J. 717 (2007) (discussing and critiquing how freedom of speech may be constrained during times of war).

¹⁸² *See* Maura Conway, *Determining the Role of the Internet in Violent Extremism and Terrorism: Six Suggestions for Progressing Research*, 40 STUD. IN CONFLICT & TERRORISM 77, 77 (2017) ("There is increasing concern on the part of other scholars, and increasingly also policymakers and publics, that high and increasing levels of always-on Internet access and the production and wide dissemination—and thence easy availability—of large amounts of violent extremist content online may have violent radicalizing effects, which certainly appears to be one of the main purposes of its producers.").

the right to receive. A few key historical cases indicate the breadth of the doctrine, but some terrorism cases exemplify that incitement doctrine is too broadly applied contemporarily: courts do not find violations of the First Amendment, even when they should.

Brandenburg v. Ohio is the first modern case to refine incitement doctrine. In overturning the conviction of a Ku Klux Klan member who attended a rally advocating for violence, the Court noted that the government can only proscribe the advocacy where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁸³ Then, in *Hess v. Indiana*, the Court noted that such a threat could not be “advocacy of illegal action at some indefinite future time.”¹⁸⁴ Finally, in *Virginia v. Black*, the Court expanded the “true threats” doctrine. Beyond incitement, the government could also ban “true threats,” which include speech when there is only *intent* to commit unlawful violence, even if such violence is not imminent.¹⁸⁵

What we see in contemporary cases is a broader interpretation of these doctrines which allows the government to proscribe speech, or prosecute individuals for their incitement or terrorism-related speech, without much more. For example, in *Doe v. McKesson*, the Fifth Circuit used a lower standard for incitement, applying a *tort* standard in determining that the respondent’s speech could leave him liable for the petitioner police officer’s injuries: “Officer Doe simply need[s] to plausibly allege that his injuries were *one of the consequences of tortious activity which itself was authorized, directed, or ratified* by McKesson in violation of his duty of care.”¹⁸⁶ A related example of incitement doctrine gone awry is *Perez v. Florida*, where Perez was convicted of threatening acts because he made a (clearly unfunny) joke about having a Molotov cocktail, despite having no proven intent to create one.¹⁸⁷ Courts are thus allowing the government to proscribe speech even when it proximately incites violence or remotely indicates intent to do so, which goes beyond what *Brandenburg* and *Black* originally prescribed.

¹⁸³ 395 U.S. 444, 447 (1969).

¹⁸⁴ 414 U.S. 105, 108 (1973).

¹⁸⁵ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

¹⁸⁶ 945 F.3d 818, 829 (5th Cir. 2019) (emphasis added) (internal quotation marks omitted), (noting that the Fifth Circuit’s decision was based on uncertain readings of state law and that the constitutional question should be presented to the state courts first), *vacated on other grounds*, *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020).

¹⁸⁷ 137 S. Ct. 853, 853-54 (2017) (Sotomayor, J, concurring in denial of certiorari).

While these are but three examples,¹⁸⁸ there is also scholarly support for reducing the threshold of what constitutes “incitement” and to reduce the imminence requirement to facilitate prosecuting terrorism-related cases.¹⁸⁹ In fact, the current true threats doctrine itself may be considered as lessening the protections of the narrow, immediate-effect test of *Brandenburg*, toward a test that communicates intent to harm “at some future time.”¹⁹⁰ And there are non-judicial examples of how speech online may be considered threatening and thus warranting a response from law enforcement.¹⁹¹ Finally, the existence of the material support statute¹⁹² that the Court upheld in *Humanitarian Law Project* entirely removes the need for intent in terrorism support cases, creating a strict liability-type rule for *any* communication with designated organizations.¹⁹³

Thus, the incitement and true threats doctrines as they are currently applied likely will conflict with the right to receive. The right to receive is a First Amendment right. But fighting words and true threats are exempt from First Amendment protections. And considering the nature of the foreign speech the government is likely to find issue with, in reality the right to receive information may not be realized because of the holes cut in the First Amendment fabric. Optimistically, perhaps this tension sets up a clash that the Court must one day decide: between a right to receive and the expanded true threats doctrine, which takes precedence? Until the Court deals with the question, *Brandenburg* and *Black* could tear at the threads of the right to receive.

¹⁸⁸ See also *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1064-65, 1088 (9th Cir. 2002) (en banc) (holding that anti-abortion advocacy organizations’ use of “Guilty” posters for abortion providers constituted “threats of force.”).

¹⁸⁹ See, e.g., Christina E. Wells, *Assumptions About “Terrorism” and the Brandenburg Incitement Test*, 85 BROOK. L. REV. 111, 112-14, 127-29 (2019) (describing and critiquing scholastic commentary urging such a change by Professors Cass Sunstein and Richard Posner, among others).

¹⁹⁰ Matthew G. T. Martin, *True Threats, Militant Activists, and the First Amendment*, 82 N.C. L. REV. 280, 296 (2003).

¹⁹¹ See, e.g., Jason Leopold, *TMZ Emailed the Secret Service About Eminem’s Trump Lyrics. Agents then Investigated the Rapper*, BUZZFEED NEWS (Oct. 24, 2019, 11:49 AM), <https://www.buzzfeednews.com/article/jasonleopold/eminem-secret-service-trump-ivanka-tmz> [<https://perma.cc/KQV9-WHSG>] (reporting that Eminem was investigated by the Secret Service after his song “Framed” included the lyrics “Donald Duck’s on as the Tonka Truck in the yard. But dog, how the fuck is Ivanka Trump in the trunk of my car?”).

¹⁹² 18 U.S.C. § 2339B (2015).

¹⁹³ See, e.g., Nikolas Abel, *United States v. Mehanna, The First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711, 740 (2013) (“If the government’s attenuated form of contact between Mehanna and al Qaeda is ultimately legitimized by the Court then the Material Support Statute could lead to even further restrictions on the right to free speech.”). Notably, Abel writes that *Humanitarian Law Project* does not provide direction on how the incitement standard applies to terrorist organizations and the material support statute, creating doctrinal uncertainty. *Id.* at 741-44.

D. *The Nature of the Internet Complicates the Picture*

A final issue with bringing a right to receive claim online is the nature of the Internet. The Communications Decency Act (CDA) may create liability for Internet companies that host dangerous speech. Additionally, the borderless nature of the Internet and issues of online anonymity create some practical concerns for finding plaintiffs and bringing cases. Finally, issues of Internet geopolitics might disincentivize the government from ensuring that the right to receive is realized.

Section 230 of the CDA protects technology companies from civil liability when such companies in good faith “restrict access to . . . material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, *whether or not such material is constitutionally protected*”¹⁹⁴ This liability shield protects companies that remove online speech.¹⁹⁵ On the other hand, a disincentive for removing such speech is that Internet companies are not considered publishers, and are thus not liable for speech published on their platforms.¹⁹⁶ Even so, if a platform “knowingly” provides material support to terrorists or provides a space for inciting speech, then that platform could be held criminally liable.¹⁹⁷ Section 230 is effectively the perfect shield and sword for technology companies: if they find speech problematic, they can remove it; but they will not be held

¹⁹⁴ 47 U.S.C. § 230(c)(2)(A) (2018) (emphasis added).

¹⁹⁵ Of course, companies are incentivized to preserve content, and especially sensational content, because such content drives engagement, which increases ad revenue. *See, e.g.*, Simon Van Zuylen-Wood, *Likes vs. Hate*, VANITY FAIR (Mar. 2019), <https://archive.vanityfair.com/article/2019/3/likes-vs-hate> [<https://perma.cc/J3KR-FCMG>] (“More speech equals more users, and more users equals more ad revenue.”). This may lead to platforms undermoderating speech that involves harassment, threats, and abuse, because that drives content sharing. Nicholas Suzor, Molly Dragiewicz, Bridget Harris, Rosalie Gillet, Jean Burgess & Tess Van Geelen, *Human Rights by Design: The Responsibilities of Social Media Platforms to Address Gender-Based Violence Online*, 11 POL’Y & INTERNET 84, 94 (2019) (“The attention that advertising-driven digital media platforms derive from the spread of highly inflammatory abusive content can create economic disincentives to deal with abuse.”). But platforms also have interests that might incentivize them to restrict material, such as protecting their reputation, or avoiding difficult court cases like *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). Thus, companies may knowingly (through policy decisions) or inadvertently (through algorithms that emphasize sensational content) keep terrorist content up on their platform. But it stands to reason that companies *can* remove speech without consequences, and sometimes do. And as noted, even some removal of content still harms the right to receive information and chills speech.

¹⁹⁶ 47 U.S.C. § 230(c)(1).

¹⁹⁷ *See, e.g.*, Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605, 605 (2017) (arguing that Congress has the authority to prosecute companies for material support of terrorism if they are “knowingly providing a platform to organizations or individuals who advocate the commission of terrorist acts.”). *But see Force* 934 F.3d 53 at 57 (barring *civil* liability against Facebook despite Hamas using the platform to coordinate a terrorist attack).

liable if they don't. Worse yet, the government could use technology companies as a shield for its own liability. By pressuring companies to remove content, the companies are protected by § 230, and the government is protected because it is not abridging speech directly.¹⁹⁸ And finding evidence of the government's pressure on such companies requires additional effort. Plaintiffs must first prove that the technology company removed speech because of the government; and then must prove that the government abridged the right to receive.

Additionally, the borderless nature of the Internet makes it difficult to determine the identity and location of an anonymous online speaker. As noted, due to the topology of the Internet, it is difficult to ascertain exactly where a user is located.¹⁹⁹ Thus, a *foreign* speaker could have an electronic location *within* the United States. The current model of technology regulation depends on a company's physical location, regardless of where the data is stored, so the government's speech-related actions are based on whether a company is located in the United States, rather than on where the speaker is located.²⁰⁰ Content removal is thus location-independent, making it more difficult to determine whether a foreign speaker was censored. This may even benefit the government, which could be incentivized to censor allegedly foreign speakers (who do not have First Amendment rights), even if it is unclear whether they are actually located outside the country. Further, issues of anonymity on the Internet complicate identifying impacted speakers. American plaintiffs can bring a right to receive claim in American courts. But they would first have to identify speech that was being suppressed, for which they would have to seek anonymous foreign online commentators to reveal what speech was suppressed and convince them that losing the cloak of their anonymity is worthwhile for litigation in a country they may have no attachment to.

Even if plaintiffs can identify speech that was suppressed and bring a claim either as a listener, or in conjunction with the speaker whose speech was stifled, courts might be hesitant to get mired in Internet geopolitics. And the

¹⁹⁸ See Bloch-Wehba, *supra* note 126; Kreimer, *supra* note 126 and accompanying discussion.

¹⁹⁹ See *supra* notes 113–116 and accompanying discussion. Additionally, the advent of modern computing models and network technologies, such as cloud computing, complicate the process of data geolocation. See, e.g., Nicole Paladi & Antonis Michalas, "One of Our Hosts in Another Country": *Challenges of Data Geolocation in Cloud Storage*, INST. ELEC. & ELECS. ENG'RS, 2014, <https://ieeexplore.ieee.org/document/6934507> [<https://perma.cc/6SY9-42ZM>] (explaining how cloud storage systems lead to less control over data).

²⁰⁰ See, e.g., Jennifer Daskal, *Microsoft Ireland, the CLOUD Act, and International Lawmaking 2.0*, 71 STAN. L. REV. ONLINE 9, 11–16 (2018) ("The CLOUD Act clarifies that service providers are required to disclose all data in their possession . . . regardless of the location of the data.")

government would surely have strong arguments against such a ruling, even beyond national security. A ruling in favor of the right to receive that prevents the government from taking down foreign speech could embolden adversaries who use the Internet to interfere with American politics,²⁰¹ or use the Internet to harm American infrastructure.²⁰² And while proponents of Internet freedom—this author included²⁰³—would celebrate decisions favoring the right to receive, such decisions could also severely hamstring the U.S. government’s ability to maintain the current structure of the Internet. Such hamstringing might happen by hampering other policies which might chill some online speech and impact the right to receive, but ultimately do ensure a relatively free and slightly safe Internet.²⁰⁴

In sum, that the speech under consideration is on the Internet is not fatal to bringing a right to receive claim. But it complicates an already complex picture, and one that is rife with arcane issues of national security, unknown unknowns, and conflicting doctrine.

²⁰¹ See, e.g., ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION: VOLUME I 14 (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/F4PJ-7AWD>] (discussing the Russian social media campaign to sow disinformation during the 2016 election).

²⁰² See, e.g., Gordon Lubold and Dustin Volz, *Navy, Industry Partners Are ‘Under Cyber Siege’ by Chinese Hackers, Review Asserts*, WALL ST. J. (Mar. 12, 2019, 2:32 PM), <https://www.wsj.com/articles/navy-industry-partners-are-under-cyber-siege-review-asserts-11552415553> [<https://perma.cc/674R-BKSH>] (detailing a massive Chinese hack of the Navy and private companies aimed at stealing military secrets).

²⁰³ See Apratim Vidyarthi & Rachel Hulvey, *Building Digital Walls and Making Speech and Internet Freedom (or Chinese Technology) Pay for It*, 17 INDIAN J.L. & TECH. 1, 3 (2021) (discussing how the Trump Administration’s TikTok ban had repercussions on the U.S. Internet Freedom policy).

²⁰⁴ For example, the government’s prosecution of Julian Assange, ostensibly for endangering lives of agents and informants by releasing unredacted documents, is a beneficial Internet-related governmental action that could be curtailed by an expansion of the right to receive. *Julian Assange ‘Put Lives at Risk’ by Sharing Unredacted Files*, BBC (Feb. 24, 2020), <https://www.bbc.com/news/uk-51616077> [<https://perma.cc/Z5CS-Y2GT>]. The government would be hampered in prosecuting Assange because while not all the information on WikiLeaks was injurious to national security, the First Amendment protects the rights of reporters to receive and publicize unlawfully obtained classified information, including those documents that could have endangered lives. See Rainey Reitman, *The Selective Prosecution of Julian Assange*, ELEC. FRONTIER FOUND. (Oct. 7, 2020), <https://www.eff.org/deeplinks/2020/10/selective-prosecution-julian-assange> [<https://perma.cc/W3ND-5VA3>] (“[T]he First Amendment strongly protects the rights of journalists, including Assange, to publish truthful information of clear public interest that they merely receive from whistleblowers, even when the documents are illegally obtained.”). Thus, the government would find it hard to prosecute callous leakers, while the right to receive would expand.

IV. PROTECTING THE RIGHT TO RECEIVE INFORMATION

The right to receive exists in theory, but may be hard to protect in practice: the government's actions regarding speech online, combined with the difficulty of bringing a case, make it impracticable to help American "listeners" receive information that is being chilled or suppressed through the courts. A more rights-protective approach is possible through legislation.

A. Pushing Technology Companies Toward Transparency

As the U.S. government reckons with disinformation and hate speech on social media, an updated approach to how technology companies are regulated and required to be transparent can facilitate information gathering on how the right to receive is being impacted. There are two main avenues: mandatory reporting of the numbers of content takedowns and how many users are being monitored, as well as a reporting appeals pipeline for those whose content is removed.

As seen in Table 1 and Section II.B, companies *voluntarily* report instances of content monitoring, takedown, and national security requests. However, what data is reported, the report's format, accessibility, veracity, and frequency of the reporting is unregulated. By pushing for mandatory reporting parameters, a clearer picture of the government's role in content regulation on the Internet—and thus its role in stifling the right to receive—will be available, and can inform plaintiffs of when they have a cognizable legal claim. The report should include how many requests were granted to national, state, and local governments of any country *at least* for (1) content takedowns, (2) content preservations, (3) account shutdowns, (4) account monitoring, and (5) NSLs.²⁰⁵ This solution could comfortably slot into calls for greater transparency in technology companies' internal content

²⁰⁵ Note that this information is *voluntarily* provided by some companies. *See, e.g.*, notes and text accompanying Table 1-A. As noted, the lack of regularity in reporting creates an uneven field on which to compare statistics.

moderation policies,²⁰⁶ especially given the role social media has played in the 2016²⁰⁷ and 2020 elections,²⁰⁸ and the ensuing insurrection.²⁰⁹

Such a requirement could come through legislation, given that there is bipartisan agreement that big technology companies like Facebook and Amazon should be subject to antitrust action and further regulation.²¹⁰ Or enforcement could come through the Federal Trade Commission's (FTC's) existing authority to prohibit "unfair or deceptive acts or practices,"²¹¹ which applies to most Internet platforms.²¹² An ancillary benefit is that this would encourage technology platforms to be transparent regarding censorship from foreign countries as well, giving the U.S. government a clearer picture of how other countries are pressuring technology firms.

Such legislation could also mandate reporting to users the reason for content takedown, and providing to users an appeals process. For example, if the government requested a Twitter user's account be taken down, the user should be informed that the government's request led to the takedown. The user could then appeal the decision, potentially reinstating their

²⁰⁶ See, e.g., Kevin Roose, *How the Biden Administration Can Help Solve Our Reality Crisis*, N.Y. TIMES, <https://www.nytimes.com/2021/02/02/technology/biden-reality-crisis-misinformation.html> (May 20, 2021) [<https://perma.cc/38FV-4WK8>] ("[E]xperts recommended . . . much more transparency into the inner workings of the black-box algorithms that . . . major platforms use . . .").

²⁰⁷ See, e.g., Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPS. 211, 212 (2017) (discussing how "fake news" tilted the 2016 election in favor of Donald Trump).

²⁰⁸ See, e.g., Sheera Frenkel, *How Misinformation 'Superspreaders' Seed False Election Theories*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/11/23/technology/election-misinformation-facebook-twitter.html> [<https://perma.cc/PU4L-YUBZ>] ("[A] small group of people—mostly right-wing personalities with outsized influence on social media—helped spread the false voter-fraud narrative that led to [Stop the Steal] rallies."); Jeff Jones, *In Election 2020, How Did the Media, Electoral Process Fare? Republicans, Democrats Disagree*, KNIGHT FOUND. (Dec. 7, 2020) <https://knightfoundation.org/articles/in-election-2020-how-did-the-media-electoral-process-fare-republicans-democrats-disagree> [<https://perma.cc/KT64-NLZL>] ("Majorities of those who say they were exposed to misinformation this election year believe [it was through] social media . . .").

²⁰⁹ See, e.g., Andrew Marantz, *How Social Media Made the Trump Insurrection a Reality*, NEW YORKER (Jan. 7, 2021), <https://www.newyorker.com/news/daily-comment/how-social-media-made-the-trump-insurrection-a-reality> [<https://perma.cc/LBC2-WL7E>] (discussing former President Trump's use of Twitter to stoke the insurrection); Tonya Mosley & Allison Hagan, *How Social Media Fueled the Insurrection at the U.S. Capitol*, WBUR (Jan. 7, 2021), <https://www.wbur.org/hereandnow/2021/01/07/social-media-capitol-mob> [<https://perma.cc/9QPR-FTQ7>] (discussing that "calls for violence ran rampant" on websites like Parler and apps like Telegram).

²¹⁰ See, e.g., Rani Molla, *Poll: Most Americans want to break up Big Tech*, VOX (Jan. 26, 2021, 2:20 PM), <https://www.vox.com/2021/1/26/22241053/antitrust-google-facebook-break-up-big-tech-monopoly> [<https://perma.cc/MW9L-8QA7>] ("feelings about Big Tech and antitrust are generally consistent among Democrats and Republicans . . .").

²¹¹ 15 U.S.C. § 45(a)(1) (2018).

²¹² See, e.g., VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10309, REGULATING BIG TECH: LEGAL IMPLICATIONS 2 (2019) (describing the FTC's authority to regulate social media).

content. This would be an easier mechanism than engaging in costly litigation and facing the aforementioned challenges.

A variety of benefits abound from this type of reporting requirement. Though this legislation is intended to protect just U.S. users (who are subject to First Amendment protections), because most of these companies are headquartered in the United States, it protects foreign users' "right" to receive information as well, preventing foreign censorship.²¹³ In that vein, the government currently can thwart such First Amendment concerns by labeling problematic social media accounts as "foreign," and thus escaping First Amendment protections of U.S. persons (e.g., through the aforementioned difficult litigation). This legislation prevents that type of loophole, since *any* social media or website user would have access to these reports and to an appeals process.

There are, of course, constraints to both these types of legislation. They would certainly make it more difficult for the government to combat election disinformation and propaganda pushed by foreign adversaries. But shedding light on such content takedown does not mean that affected users can always claim their First Amendment rights are being violated and have the content reinstated. It simply provides more transparency to users about *why* their content is being removed, and sets up communication between platforms and users such that if content is being removed incorrectly, it can be reinstated. Informing users that their content has been taken down allows them to know that their First Amendment right to receive *may* have been violated. But it does not mean courts would foreclose the government from taking down content that has to do with national security, especially where it is clearly propaganda or election interference.

²¹³ See Zick, *supra* note 69, at 1579-85 for a discussion of why First Amendment rights do not traditionally apply to non-U.S. persons, though that may be changing with globalization and "digitized" speech.

B. Government Online Accountability Legislation

Government accountability policies are probably as unifying²¹⁴ as dislike for North Korea²¹⁵ or acknowledgment that Jon Stewart is timelessly funny.²¹⁶ Thus, a policy requiring the government to be more transparent about its interactions with technology companies might have broad, bipartisan support. Such legislation should have two goals.

The first goal should be to define broad government disclosure rules: the FBI, National Security Agency (NSA), and other intelligence organizations must report to Congress or to the public a list of companies that they provide content takedown requests and surveillance requests to. This ensures that the government's end-run around the Constitution is monitored.²¹⁷ Additionally, the legislation should create a limit as to how long data obtained from technology companies can be stored by the government, in order to prevent the government from creating an enormous and continuously growing data profile of individuals that would indefinitely chill their speech.²¹⁸ Finally, where the government intends to assert state secrets doctrine regarding content takedowns or chilled speech,²¹⁹ litigation must be able to continue

²¹⁴ See, e.g., Dustin Volz, *NSA Phone Surveillance Program Faces an End as Parties Come Together*, WALL ST. J., <https://www.wsj.com/articles/nsa-phone-surveillance-program-faces-an-end-as-parties-come-together-11575641253> [<https://perma.cc/GZ6E-PTMD>] (Dec. 6, 2019, 3:16 PM) (discussing bipartisan congressional support for terminating an NSA surveillance program despite the Trump Administration's wish to preserve it). Terminating such surveillance programs increases government accountability because many of these programs are secret, but have been abused by government agencies into collecting vast troves of personal data, and are generally violative of privacy rights, without giving notice to Americans that the government is watching over them. See generally Ewen Macaskill & Gabriel Dance, *NSA Files: Decoded*, GUARDIAN (Nov. 1, 2013), <https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded> [<https://perma.cc/Q7YY-68PJ>] (detailing the privacy issues arising from the NSA's surveillance program, and how the program may reflect the NSA's overreaching powers, thus requiring accountability).

²¹⁵ Frank Newport, *North Korea Remains Least-Popular Country Among Americans*, GALLUP (Feb. 20, 2017), <https://news.gallup.com/poll/204074/north-korea-remains-least-popular-country-among-americans.aspx> [<https://perma.cc/WNN2-EXA9>] (showing that eighty-six percent of Americans hold a negative view of North Korea).

²¹⁶ See *The Daily Show with Jon Stewart: Me Lover's Pizza with Crazy Broad* (Comedy Central television broadcast, June 1, 2011), <https://www.cc.com/video/oect4f/the-daily-show-with-jon-stewart-me-lover-s-pizza-with-crazy-broad> [<https://perma.cc/6GJ3-VMJ9>].

²¹⁷ See Bloch-Wehba, *supra* note 126; Kreimer, *supra* note 126 and accompanying discussion.

²¹⁸ See, e.g., *Developments in the Law—Cooperation or Resistance? The Role of Tech Companies in Government Surveillance*, 131 HARV. L. REV. 1722, 1725–26 (2018) (describing the NSA–AT&T partnership that raised issues of allowing the government to “indulge in its temptation to play “Big Brother” and “copy[] the whole Internet.”).

²¹⁹ See *supra* notes 174–180 and accompanying discussion.

based on only publicly available information, rather than foreclosing all litigation due to state secrets.²²⁰

The second goal should be to prioritize disclosure rules towards individuals: while NSLs are generally not subject to disclosure requirements,²²¹ legislation can mandate that users whose content is being monitored be informed of this, subject to a time delay so that investigations are not impacted.²²² At minimum, this will ensure that the government is cautious when it comes to national security-related content takedowns online. Of course, the cost is that adversaries might know they are being watched. But it will also provide false positives—such as individuals the government considers terrorists, but who are not terrorists²²³—with information that could lead to remedial measures. In short, such a clause might reduce the overinclusiveness of the government’s approach to content takedowns.

CONCLUSION

The right to receive is alive in our casebooks. But in reality, we must do a lot more—through Congress, private entities, and state legislatures—to ensure that Americans enjoy this aspect of the First Amendment. While the loss of a few tweets from a suspicious foreigner may seem altogether infinitesimal, that is just the tip of the iceberg. We don’t know what we don’t know: our unknown unknowns are the content we don’t know has been surreptitiously removed by the government or government coordination.

With cyberspace becoming the new frontier for warfare, this space is likely to become a confusing and conflicting hotbed of removed content and missed opportunities to hear foreign speech. Between Chinese disinformation about COVID-19²²⁴ and Russian propaganda favoring the

²²⁰ See generally Janelle Smith, Comment, Jeppesen Dataplan: *Redefining the State-Secrets Doctrine in the Global War on Terror*, 45 U.S.F. L. REV. 1073, 1100 (2011) for a detailed discussion on this approach.

²²¹ *In re Nat’l Sec. Letter v. Sessions*, 863 F.3d 1110, 1114 (9th Cir. 2017).

²²² There is already a six-month delay in allowing technology companies to report how many NSLs they have received, indicating adequate precedence. Reuters Staff, *supra* note 101.

²²³ See, e.g., Brennan Ctr. for Just. v. United States Dep’t of Just., No. 18-1860, 2021 U.S. Dist. LEXIS 122947, at *54 (D.D.C. 2021) (noting that in some cases, the DOJ may have “cases [that] were designated as terrorism-related by accident”).

²²⁴ See, e.g., Erika Kinetz, *COVID Conspiracy Shows Vast Reach of Chinese Disinformation*, ASSOCIATED PRESS (Feb. 15, 2021), <https://apnews.com/article/beijing-media-coronavirus-pandemic-conspiracy-only-on-ap-e696b32d4c3e9962ac0bdbdae2991466> [<https://perma.cc/89R5-P8HA>] (discussing the Chinese government’s use of the Internet to spread disinformation about the origins of COVID-19).

losing candidate in 2020,²²⁵ the board is set. The incentive for the government to interfere in speech is growing, with some reason. The right to receive is likely to be a casualty, unless lawyers and lawmakers work to ensure that it can be realized in practice. This Comment, though limited in scope, has provided some solutions. However, further research is needed on how to balance an effective response to disinformation, election interference, and foreign government censorship online, and the right to receive information. Nonetheless, it is undeniable that more must be done before our image of this right is no longer a mirage, but tethered in reality.

²²⁵ See, e.g., Sheera Frenkel & Julian E. Barnes, *Russians Again Targeting Americans with Disinformation, Facebook and Twitter Say*, N.Y. TIMES, <https://www.nytimes.com/2020/09/01/technology/facebook-russia-disinformation-election.html> [<https://perma.cc/4XAE-SQ7E>] (Sep. 22, 2020) (describing Russian attempts to use social media to support Donald Trump).

Table 1-A: Content Takedowns and Chilled Speech Across Technology Platforms (with endnote citations)¹

Website	User Base	Content Takedowns	Emergency Disclosure Requests	Data/Content Preservation Requests	FISA Content Requests ²	NSLs ³
Facebook	~2.8B ⁴	31 (content restricted) ⁵ ; 12 (content taken down) ⁶	6,976 ⁷	166,426 requests from 286,423 accounts ⁸	0-1,996 requests from up to 240,996 accounts ⁹	2-998 requests from 2-998 accounts ¹⁰
Google	N/A ¹¹	35 (“privacy and security”); 2 (“national security”) ¹²	2,723 ¹³	31,090 ¹⁴	Jan.-June 2020: 0-499 requests from 73,500-73,999 accounts ¹⁵	Jan.-June 2020: 6-499 from 1,000-1,499 accounts ¹⁶
Apple	1.65B active devices ¹⁷	34 (account deletion requests) ¹⁸	523 ¹⁹	7,218 requests from 19,674 accounts ²⁰	0-998 from 44,500-45,948 accounts ²¹	4-998 from 502-1,498 accounts ²²
Twitter	~330M ²³	358 ²⁴	3,789 ²⁵	9,416 ²⁶	N/A	0 ²⁷
Reddit	430M monthly ²⁸	3	254 ²⁹	313 ³⁰	Combined requests are 0-249 users. ³¹	0-249 from 0-249 users. ³¹

¹ All figures are for the entirety of 2020 unless otherwise stated.

² Note that these are reported in increments due to disclosure requirements, and are subject to a six-month reporting delay. Reuters Staff, *Web Companies Give First Look at Secret U.S. Government Data Requests*, REUTERS (Feb. 3, 2014, 3:37 PM), <https://www.reuters.com/article/internet-nsa/web-companies-give-first-look-at-secret-u-s-government-data-requests-idUKL2NoL81E320140203> [<https://perma.cc/4RB4-GQUD>].

³ See *id.* for an explanation of the data range. As can be seen, most companies report in bands of 500.

⁴ *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2020*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [<https://perma.cc/UD7P-9EKF>].

⁵ *Transparency Center: Restrictions by Product (United States)*, FACEBOOK, <https://transparency.fb.com/data/content-restrictions/country/US> [<https://perma.cc/GRR7-HPGQ>]. Note that these are content restrictions, rather than content takedowns, since Facebook generally does not take down content, but rather restricts its viewing in the geographical locations where it is illegal to view that data. But the effect of these restrictions on the right to receive is the same: American viewers do not get to see that content.

⁶ *Transparency Center: Global Restrictions*, FACEBOOK, <https://transparency.fb.com/data/content-restrictions/global> [<https://perma.cc/3CL5-A38W>]. Facebook notes that “[w]hile uncommon, we will occasionally receive legal demands that assert extraterritorial jurisdiction, and request that we restrict the availability of content globally.” *Id.*

⁷ *Transparency Center: Government Requests for User Data (United States)*, FACEBOOK, <https://transparency.fb.com/data/government-data-requests/country/US> [<https://perma.cc/K8A9-ZDPE>]. Note that data for January to June 2020 and July to December periods had to be summed, since data for those two ranges was separately provided.

⁸ *Transparency Center: Preservation Requests*, FACEBOOK, <https://transparency.fb.com/data/government-data-requests/preservation-requests> [<https://perma.cc/XP2G-KU3S>]. Note that the data here are from the downloaded data rather than that presented on the website, filtered by country. There may be some discrepancies between the website and the raw data.

⁹ *Transparency Report: Government Requests for User Data (United States)*, *supra* endnote 7 (“Foreign Intelligence Surveillance Act”). Note once again that this is just the sum of two bands, so the real number might be lower than the maximum.

¹⁰ *Id.* (“National Security Letters”). Note once again that this is just the sum of two bands, so the real number might be lower than the maximum.

¹¹ Because Google searches are not always made by account holders, the scope of the company’s reach is not defined by a “user base.”

¹² *Google Transparency Reports by Country/Region: Government Requests to Remove Content*, GOOGLE, <https://transparencyreport.google.com/government-removals/by-country?hl=en> [<https://perma.cc/KQZ3-CFBJ>] (click the tab that says “Government Requests”; click on “select countries/regions”; choose “United States”; and filter by reasons (for “privacy and security”) or by requesters (for police and other government officials) under the Items graph; and then select the appropriate date range).

¹³ *Google Transparency Report: Global Requests for User Information*, GOOGLE, <https://transparencyreport.google.com/user-data/overview?hl=en> [<https://perma.cc/BG3Q-42EH>] (click the “Global Requests” tab; then select United States under “Requests by reporting period” graph; and then see data for 2020 range).

¹⁴ *Id.*

¹⁵ *Google Transparency Report: US National Security Requests*, GOOGLE, <https://transparencyreport.google.com/user-data/us-national-security?hl=en> [<https://perma.cc/5F2J-2MBG>].

16 *Id.*

17 As of 2020. Jacob Kastrenakes, *Apple Says There Are Now Over 1 billion Active iPhones*, VERGE (Jan. 27, 2021, 5:59 PM), <https://www.theverge.com/2021/1/27/22253162/iphone-users-total-number-billion-apple-tim-cook-q1-2021> [<https://perma.cc/JJD6-CV2U>].

18 *Apple Transparency Report: United States*, APPLE, <https://www.apple.com/legal/transparency/us.html> [<https://perma.cc/3Y4G-UBKE>] (select Date Ranges for both halves of 2020 and look at the “Accounts Specified in the Requests” category under “Account Restriction / Account Deletion”).

19 *Id.* (see “Emergency” under “Requests Received” category).

20 *Id.* (see “Account Preservation” category).

21 *Id.* (see “National Security – FISA Content Requests” category).

22 *Id.* (see “National Security Letter Requests” category).

23 As of 2019. *Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 1st Quarter 2019*, STATISTA, <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users> [<https://perma.cc/2RRL-HQFJ>].

24 *Twitter Transparency Report: United States*, TWITTER (Jan. 22, 2021), <https://transparency.twitter.com/en/reports/countries/us.html#2020-jan-jun> [<https://perma.cc/S8R8-HVFT>] (see “Removal Requests”).

25 *Id.* (see “Compare countries” and select “Information requests”). Note that it is unclear whether this number is for all of 2020 or just the first or second half.

26 *Id.* (select “More information” under “Information requests”).

27 *Id.*

28 As of 2019. *Reddit’s 2019 Year in Review*, REDDIT (Dec. 4, 2019), <https://redditblog.com/2019/12/04/reddits-2019-year-in-review/> [<https://perma.cc/99PD-WVYV>].

29 *Reddit Transparency Report 2020*, REDDIT (2020), <https://www.redditinc.com/policies/transparency-report-2020-1> [<https://perma.cc/8BP6-XKW3>] (see Chart 20).

30 *Id.* (see Chart 21).

31 *Id.* (see “US National Security Requests”).

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