

Case No.: 20-2082

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

A.C., a minor, by her parent and guardian ad litem, Torrence S. Waithe; A.C.C., a minor, by her parent and guardian ad litem, Nicolas Cahuec; A.F., minor, by his parent and guardian ad litem, Aletha Forcier; R.F., a minor, by her parent and guardian ad litem, Aletha Forcier; I.M., a minor, by his parents and guardians ad litem Jessica Thigpen and Anthony Thigpen; L.M., a minor, by her parents and guardians ad litem Jessica Thigpen and Anthony Thigpen; K.N.M.R., a minor, by her parent and guardian ad litem, Marisol Rivera Pitre; J.R.H., a minor, by her parents and guardians ad litem, Moira Hinderer and Hillary Reser; M.S., a minor, by his parent and guardian ad litem, Mark Santow; M.M.S., a minor, by his parent and guardian ad litem, Amie Tay; M.S., a minor, by her parents and guardians ad litem, Maruth Sok and Lap Meas; A.W., a minor, by her parent and guardian ad litem, Chanda Womack; J.W., a minor, by her parent and guardian ad litem, Chanda Womack; N.X., a minor, by her parents and guardians ad litem, Youa Yang and Kao Xiong,

Plaintiffs - Appellants

v.

GINA M. RAIMONDO, in her official capacity as Governor of the State of Rhode Island; NICHOLAS A. MATTIELLO, in his official capacity as Speaker of the Rhode Island House of Representatives; DOMINICK J. RUGGERIO, in his official capacity as President of the Rhode Island Senate; RHODE ISLAND STATE BOARD OF EDUCATION; COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION; ANGELICA INFANTE-GREEN, in her official capacity as Commissioner of Education of the State of Rhode Island,

Defendants - Appellees.

KEN WAGNER, in his official capacity as Commissioner of Education
of the State of Rhode Island

Defendant

Appeal from the United States District Court for the District of Rhode Island
Civil Action No. 1:18-cv-00378
(Hon. William E. Smith)

**Brief of National Association for Media Literacy Education, Media Literacy
Now, and Media Education Lab as *Amici Curiae* in Support
of Petitioners– Appellants And Reversal**

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CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for *amici curiae* certify pursuant to Fed. R. App. P. 29(a)(4)(A) that the National Association for Media Literacy Education and Media Literacy Now are non-profit corporations; the Media Education Lab is a small business entity owned by Renee Hobbs, who is a professor at the Harrington School of Communication and Media at the University of Rhode Island. The *amici* do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of their stock.

NATIONAL ASSOCIATION FOR
MEDIA LITERACY EDUCATION,
MEDIA LITERACY NOW, AND
MEDIA EDUCATION LAB

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*¹

Proposed *amici curiae* are three nonpartisan organizations that seek to advance awareness of the critical need for media literacy in the United States. The National Association for Media Literacy Education (“NAMLE”) aims to make media literacy widely practiced as an essential life skill; Media Literacy Now (“MLN”) leads a grassroots movement to ensure that all students learn the 21st century literacy skills they need for health, well-being, economic participation, and citizenship; and the Media Education Lab (“MEL”) is a Rhode Island based organization that improves the practice of digital and media literacy education through scholarship and community service.

Amici are well-positioned to provide context for the request by Plaintiffs-Appellants, Rhode Island public school students and their families, to have courts recognize their rights under the United States Constitution to an adequate civics education to prepare them to participate in democracy with a minimum set of skills to do so productively. *Amici* draw on their significant experience with these issues to demonstrate how educational needs have changed in recent years and how evaluating media is an inseparable element of civics education required for a

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

citizen’s ability to function in modern democratic society.

SUMMARY OF ARGUMENT

Educating students to become functioning members of a democratic society is no longer a matter of steeping them in accepted truths and norms. Due to the ever-growing dominance and proliferation of new media, Americans are bombarded with information through limitless channels and sources, and common ground is elusive. That is why media literacy—the ability to access, analyze, evaluate and create information using all forms of communication²—is critical to becoming a discerning and informed citizen with the minimum level of skills to navigate the breadth of this information in order to effectively function in democratic processes. But it is almost completely absent from the place where our children, who will inherit the obligations and privileges that the Constitution provides, receive most of their instruction: our schools. Current educational methodologies, while well-meaning, assume a pre-digital age society that no longer exists. Without teaching children how to assess

² “Media literacy” as used herein is a shorthand for critical thinking about information sources. According to RAND, media literacy is “made up of several specific competencies, such as the abilities to access, analyze, evaluate, and communicate media messages in a variety of forms. . . . [Media Literacy] education teaches participants to consider the implications of message construction from numerous angles, such as how the motivations of those disseminating information could influence content selection and framing how different kinds of media and other technologies affect the nature of communication.” Alice Huguet *et al.*, *Exploring Media Literacy Education As A Tool for Mitigating Truth Decay* x–xi (2019), rand.org/content/dam/rand/pubs/research_reports/RR3000/RR3050/RAND_RR3050.pdf.

and use the torrents of information that surround them, our citizens are, and will continue to be, unprepared to meet the civic duties owed to our republic, which will then seal its fate as a democracy in decline.

The effects of the failure of our education systems to address the changing communication landscape, including the rise of the social media ecosystem, are all too apparent, from the evisceration of trust in the integrity of elections, to diminishment of faith in democratic institutions, to disbelief in scientific data concerning public health emergencies. Current events show that an inability to evaluate media—to distinguish fact from opinion, discern journalism from advertising or political rhetoric, or utilize critical thinking skills to assess the authenticity, motivations, and intentions of media sources and communication—is not merely dividing Americans, but killing them. Most recently, this has hampered efforts to address the COVID-19 pandemic that has killed hundreds of thousands of Americans, and encouraged a deadly insurrection at the U.S. Capital on January 6, 2021 aimed at preventing Congress from performing their constitutional duty to tally the Electoral College votes for the presidential election.

The causes of the current challenges of the digital era are numerous and perhaps inexorable, which makes media literacy in civics education so crucial. Technology has exponentially increased the ubiquity and quantity of information while undermining traditional intermediaries. Information is delivered by

algorithms designed to maximize repetition and exaggeration, not analysis and understanding. The incentive and ability to take advantage of the challenges that media consumers face in assessing and digesting information have never been greater.

But, since the dawn of the television age, our educational systems have not caught up to evolving media realities, and this has been further exacerbated by the proliferation and influence of social media platforms and other news distribution channels in the digital-era. Although online media now dominates the lives of most American children, little effort has been made to confront the problems it poses through the education of our youngest citizens, as schools largely do not teach media literacy in connection with civics education. As a result, research shows that students lack means to manage the flood of information from their smartphones, tablets, and computers and to distinguish between reliable and unreliable content, jeopardizing their participation as functioning citizens in our democracy. But these circumstances are not unsalvageable. A minimum level of civics education under the Constitution that prioritizes basic media literacy can prepare youth to be functioning participants in democracy, and promote its survival.

ARGUMENT

I. Media Literacy is Fundamental to Exercise Constitutionally Guaranteed Rights of Citizenship

a. Media Illiteracy And Its Contribution to a Crisis of Citizenship

In the span of a few decades, the media landscape has been transformed as the cost of reaching a broad audience has plummeted and the means by which to reach them has proliferated. Previously, the costs of aggregating and reporting “news” largely limited that activity to better capitalized, organized, and institutionalized journalistic operations that, through distribution in traditional media channels, could project into people’s homes. But this dissemination by discrete sources has been in decline since the mid-twentieth century due to the rise of television, twenty-four-seven cable news, and the popularity of pundits and news commentary and entertainment journalism. New media in the twenty-first century (*e.g.*, social networking sites, podcasts, Youtube, messaging applications, streaming services) has only compounded the elimination of barriers to entry and information that masquerades as news or authoritative is instantly spread from sources that may be anonymous, unresearched, commercially oriented or willfully manipulative and untrue.

Instantaneous and unlimited information paradoxically makes it harder for citizens to be informed about civic life, and even basic health-and-safety information, because the information on which people make decisions is no longer

curated by a small handful of sources, which were easier to verify, and whose motivations and intentions were easier to assess.³ This creates opportunities for those who might profit to create more misinformation and disinformation.⁴ Research has shown that five primary drivers of the new media landscape adversely affect the exercise of constitutional rights by promoting misinformation and disinformation.

First, to generate consumer engagement, social networking sites and other platforms use algorithms that filter, rank and prioritize content tailored to the interests of each user, thereby amplifying content and limiting its breadth.⁵ By using

³ Robert Chesney & Danielle K. Citron, *Disinformation on Steroids*, COUNCIL ON FOREIGN REL. (Oct. 16, 2018), <https://www.cfr.org/report/deep-fake-disinformation-steroids>.

⁴ One comprehensive RAND Corporation study, “Truth Decay An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life,” defined misinformation as “[f]alse or misleading information that is spread unintentionally, by error or mistake.” Jennifer Kavanagh & Michael D. Rich, *Truth Decay An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* 10 (2018), https://www.rand.org/pubs/research_reports/RR2314.html. Disinformation is defined as: “[f]alse or misleading information spread intentionally, usually to achieve some political or economic objective, influence public attitudes, or hide the truth. This is a synonym for propaganda.” *Id.* at 8.

⁵ “One unique feature of social media is how the political news you see is impacted by your choice of friends and your past behavior on the site. Each individual sees a different mix of content, depending on who is in his or her feed, as well as the kinds of posts he or she has responded to in the past.” Amy Mitchell *et al.*, *Political Polarization & Media Habits*, PEW RESEARCH CENTER (Oct. 21, 2014), <https://www.journalism.org/2014/10/21/section-2-social-media-political-news-and-ideology/>.

internet-based media, Americans are “ceding more control to tech companies such as Apple and Facebook.”⁶ In this “age of the algorithm,” what is presented as “fact” is actually a distorted mirror reflection, driven by a commercial desire to give people what they want to hear, rather than what they may need to hear.⁷

Second, economic incentives to distort information flow have grown considerably, and financially motivated actors push disinformation to obtain advertising revenue.⁸ For example, one survey found that “fake news stories amassed about 159 million views in 2019[.]”⁹ Another study identified that, in 2016 “the 20 largest fake stories generated 8.7 million shares, reactions, and comments,

⁶ Kristine Lu & Jesse Holcomb, *Digital News – Audience: Fact Sheet*, STATE OF THE NEWS MEDIA 2016, June 15, 2016, at 44, <https://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf>.

⁷ Pablo Barberá, *Social Media, Echo Chambers, and Political Polarization*, in SOCIAL MEDIA AND DEMOCRACY 34, 42 (Nathaniel Persily & Joshua A. Tucker eds., 2020), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/333A5B4DE1B67EFF7876261118CCFE19/9781108835558c3_34-55.pdf/social_media_echo_chambers_and_political_polarization.pdf; see also Tim Hwang, *Dealing with Disinformation: Evaluating the Case for Amendment of Section 230 of the Communications Decency Act*, in SOCIAL MEDIA AND DEMOCRACY, *supra*, at 252, 253, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/665B952A40A6A5F244E2141A84CA45D8/9781108835558c11_252-285.pdf/dealing_with_disinformation_evaluating_the_case_for_amendment_of_section_230_of_the_communications_decency_act.pdf.

⁸ Hwang, *supra* note 7, at 253.

⁹ Ashley Jeffrey & Scott Sargrad, *Strengthening Democracy With a Modern Civics Education*, CENTER FOR AMERICAN PROGRESS (Dec. 14, 2019, 10:00 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2019/12/14/478750/strengthening-democracy-modern-civics-education/>.

compared to 7.4 million generated by the top 20 stories from 19 major news sites.”¹⁰

Another study uncovered that, “fake-news purveyors in the United States were able to rake in up to \$30,000 per month with stories claiming that an FBI agent had been killed after leaking Clinton’s emails, or that Tom Hanks or Pope Francis had endorsed Donald Trump.”¹¹ Much of media focuses not on veracity, but on “audience analytics, social media optimization, and search engine optimization . . . to build digital reach and compete for attention online.”¹²

Third, just as economic incentives have grown for spreading disinformation through the media, so have political incentives.¹³ Political actors use disinformation to shape perceptions and bolster partisan or other special interests.¹⁴ One study confirmed the link between partisanship and disinformation in the coverage of

¹⁰ Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS INST. (Dec. 18, 2017), <https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/>.

¹¹ Nathaniel Persily, *Can Democracy Survive the Internet?*, J. OF DEMOCRACY, April 2017, at 68.

¹² Andrew M. Guess & Benjamin A. Lyons, *Misinformation, Disinformation, and Online Propaganda*, in SOCIAL MEDIA AND DEMOCRACY, *supra* note 7, at 10, 13, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/D14406A631AA181839ED896916598500/9781108835558c2_10-33.pdf/misinformation_disinformation_and_online_propaganda.pdf.

¹³ Jennifer L. Hochschild & Katherine Levine Einstein, *Do Facts Matter?* (2015); Stephan Lewandowsky *et al.*, *Misinformation and Its Correction: Continued Influence and Successful Debiasing*, 13 PSYCH. SCI. PUB. INT. 106 (2012); Meghan Manfra & Casey Holmes, *Integrating Media Literacy in Social Studies Teacher Education*, 20 CONTEMP. ISSUES TECH. TCHR. EDUC. 121 (2020).

¹⁴ Guess & Lyons, *supra* note 12, at 13; Hwang, *supra* note 7, at 254.

political candidates and campaign issues.¹⁵ During the 2016 presidential election, researchers estimated that 93.5% of “fake news” stories published were pro-Trump in orientation.¹⁶ Extremist ideologies have also been profligate in their use of social media and have actively intervened in elections through those means.¹⁷ And, as disinformation has spread, accountability has fallen: political groups use “bots,” or automated social media or other online accounts, to spread content without human action or attribution.¹⁸

Fourth, foreign governments use online media to instigate tension and confusion and erode trust in democratic institutions. For example, Russia deploys “troll” farms or social media “bots” to influence public opinion, sow discord, and undermine democratic institutions in the United States.¹⁹ FBI Director Christopher

¹⁵ Guess & Lyons, *supra* note 12, at 17.

¹⁶ *Id.*

¹⁷ Hwang, *supra* note 7, at 256.

¹⁸ Samuel C. Woolley, *Bots and Computational Propaganda: Automation for Communication and Control*, in *SOCIAL MEDIA AND DEMOCRACY*, *supra* note 7, at 89, 93, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A15EE25C278B442EF00199AA660BFADD/9781108835558c5_89-110.pdf/bots_and_computational_propaganda_automation_for_communication_and_control.pdf.

¹⁹ Am. Bar Ass’n, *Report to the House of Delegates 3–5* (2020) (report adopted August 2020, <https://americanbar.org/content/dam/aba/directories/policy/annual-2020/300b-annual-2020.pdf>); Woolley, *supra* note 18, at 93. Former Attorney General Sally Yates and former Director of National Intelligence James R. Clapper Jr. testified before Congress that the “Russian government and its commercial proxy – the Internet Research Agency (IRA) – made substantive use of bots to spread

Wray warned about “the use of social media, fake news, propaganda, false personas, etc. to spin us up, pit us against each other, to sow divisiveness and discord, to undermine America’s faith in democracy . . . That is not just an election-cycle threat. It is pretty much a 365-day-a-year threat.”²⁰

Finally, although the new media climate is driven by technology, human nature exacerbates its harmful qualities because people, by their nature, are susceptible to influence from mass disinformation.²¹ “The fake news ecosystem preys on some of our deepest human instincts: [including] humans’ primal quest for success and power . . . manipulative actors will use new digital tools to take advantage of humans’ inbred preference for comfort and convenience and their craving for the answers they find in reinforcing echo chambers.”²² The sheer

disinformation and inflame polarization during the 2016 US presidential election.” Woolley, *supra* note 18, at 89.

²⁰ Am. Bar Ass’n, *supra* note 19, at 5.

²¹ Elizabeth J. Marsh & Brenda W. Yang, *Believing Things That Are Not True: A Cognitive Science Perspective on Misinformation*, UNIVERSITY OF TEXAS PRESS, 27 (2018).

²² Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RESEARCH CENTER (Oct. 19, 2017), <https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/>; *see also* Chris Meserole, *How Misinformation Spreads on Social Media—And What to Do About It*, BROOKINGS INST. (May 9, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/>. Moreover, “[n]egatively valenced information tends to be more durable than positive or neutral misinformation.” Chloe Wittenberg & Adam J. Berinsky, *Misinformation and Its Correction*, in SOCIAL MEDIA AND DEMOCRACY, *supra* note

quantity and ubiquity of information exhausts the human mind’s ability to filter it,²³ and the vivid and novel content new media constantly churns commands people’s limited attention.²⁴

b. Media Illiteracy Threatens The Fulfillment of Constitutional Rights and Obligations

The effects of these changes to the media landscape have been dramatic and have accelerated worrying trends over the last several decades in American politics and society, including decline in trust in elected officials, the government, the press, and now the electoral process itself. New media in particular has had a powerful impact in contributing to the decline of faith in American institutions. For example, research confirms that “Americans who get most of their political news on social media display less confidence in the public’s acceptance of election results.”²⁵ Relatedly, recent reports show that American voters were exposed to more “fake

7, at 163, 184, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/61FA7FD743784A723BA234533012E810/9781108835558c8_163-198.pdf/misinformation_and_its_correction.pdf.

²³ See Laura S. Hamilton, Julia H. Kaufman & Lynn Hu, *Media Use and Literacy in Schools: Civic Development in the Era of Truth Decay*, RAND CORPORATION (2020), at 5.

²⁴ See *Social Media and Democracy*, *supra* note 7, at 18.

²⁵ Mark Jurkowitz & Amy Mitchell, *Confidence in Public Acceptance of Election Results Connects to Following Political News, Relying on Social Media*, PEW RESEARCH CENTER (Feb. 12, 2020), <https://www.journalism.org/2020/02/12/confidence-in-public-acceptance-of-election-results-connects-to-following-political-news-relying-on-social-media/>.

news” than accurate political information on Twitter during the 2016 election and that “some of the most widely shared stories on social media were fake.”²⁶ In the 2020 Presidential election cycle, media widely circulated unfounded allegations that mail-in voting would result in fraud, which dovetailed with certain campaign strategies. While evidence indicates that mail-in voting is associated with only minuscule levels of fraud, nonetheless “43% of Republicans and Republican-leaning independents identify voter fraud as a ‘major problem’ associated with mail-in ballots.”²⁷ Another survey found that around 77% of Trump supporters believe that Joe Biden won the election as a result of fraud despite no evidence to support that claim.²⁸ Disinformation campaigns have attacked public trust not only of elections,

²⁶ Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 250 (2018).

²⁷ Amy Mitchell *et al.*, *Political Divides, Conspiracy Theories and Divergent News Sources Heading Into 2020 Election*, PEW RESEARCH CENTER (Sept. 16, 2020), <https://www.journalism.org/2020/09/16/political-divides-conspiracy-theories-and-divergent-news-sources-heading-into-2020-election/>. A Senate bill for the Media Literacy Act, S.2240, concluded that “[i]nfluence campaigns by foreign and domestic groups reached tens of millions of voters during the 2016 and 2018 elections with racially and divisively targeted messages.” Ultimately, “[t]he capability of foreign powers to effectively manipulate political discourse within a country raises difficult questions about the representativeness of elected officials and the decisions made by them.” *Social Media and Democracy*, *supra* note 7, at 257.

²⁸ Hannah Allam, *Right-Wing Embrace of Conspiracy Is ‘Mass Radicalization’ Experts Warn*, NPR (Dec. 15, 2020, 12:17 P.M.), https://www.npr.org/2020/12/15/946381523/right-wing-embrace-of-conspiracy-is-mass-radicalization-experts-warn?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social

but of institutions seen as critical to the maintenance of democracy, such as the news media itself.²⁹ Several surveys have found that trust in government and news media has remained at an all-time low of below 25% in the past decade.³⁰ Another survey observed significant distrust among the American people for Congress.³¹ Recent research by the Pew Research Center found that 81% of respondents believe that members of Congress behave unethically all of the time or some of the time; and only 46% of respondents said they felt that Congress provided accurate information to the public.³² Another survey found that “nearly seven-in-ten U.S. adults (68%) say made-up news and information greatly impacts Americans’ confidence in government institutions[.]”³³

&fbclid=IwAR1c1Vze0cei8HKTXLHqmIcShS9IoKbhEUEfcCVfQrXKnGPGLa-PmjiNi08.

²⁹ Social Media and Democracy, *supra* note 7, at 257-258. Recent studies and surveys show that citizens do not just lack trust in American institutions, but they in fact actively distrust them. See RAND Review: November-December 2020, RAND CORPORATION (2020), https://www.rand.org/pubs/corporate_pubs/CPA682-2.html. See also Am. Bar Ass’n., *supra* note 19, at 2.

³⁰ CRISIS IN DEMOCRACY: RENEWING TRUST IN AMERICA, 20-22 (2019), <https://knightfoundation.org/reports/crisis-in-democracy-renewing-trust-in-america/>.

³¹ Jennifer Kavanagh *et al.*, THE DRIVERS OF INSTITUTIONAL TRUST AND DISTRUST, 16 (2020), https://www.rand.org/pubs/research_reports/RRA112-7.html.

³² *Id.*, at 37.

³³ Amy Mitchell *et al.*, *Many Americans Say Made-Up News Is a Critical Problem That Needs To Be Fixed*, PEW RESEARCH CENTER (June 15, 2019), <https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/>.

These results confirm that if “citizens believe they cannot rely on media for a truthful account of political activities, doubts about the legitimacy of government and its actions are likely to spread.”³⁴ In a survey of nearly 1,000 technology innovators and experts, many respondents acknowledged that the “misuse of digital technology to manipulate and weaponize facts affects people’s trust in institutions and each other. That ebbing of trust affects people’s views about whether democratic processes and institutions designed to empower citizens are working.”³⁵ It is alarmingly clear that the “widespread inability to critically evaluate information leads to deep misunderstanding of important public issues and has a deleterious impact on the ability of people to successfully participate in self-government.”³⁶ A misinformed electorate is not merely unfortunate, but dangerous: “a citizenry armed with, and voting based upon, empirically false facts simply will not be able to render prudent electoral judgments on a reliable basis.”³⁷

Media distorts not only civic decisions and viewpoints, but personal ones, too,

³⁴ CRISIS IN DEMOCRACY: RENEWING TRUST IN AMERICA, *supra* note 30 at 56.

³⁵ Janna Anderson & Lee Rainie, *Many Tech Experts Say Digital Disruption Will Hurt Democracy*, PEW RESEARCH CENTER, 4 (Feb. 21, 2020), <https://www.pewresearch.org/internet/2020/02/21/many-tech-experts-say-digital-disruption-will-hurt-democracy/>.

³⁶ Am. Bar Ass’n, *supra* note 19, at 9.

³⁷ Sanford Levinson & Jack M. Balkin, *“A Republic If [We] Can Keep It”: A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest*, THE UNIVERSITY OF CHICAGO PRESS (2019).

leading to disastrous consequences for public health measures during the pandemic. Since the outbreak of COVID-19, online platforms have aggressively promoted false narratives contradicting the advice of health officials. In fact, “the proliferation of false and misleading information about the virus, how it spreads, how to cure it and who is ‘behind’ it, has prompted the World Health Organization to warn of an ongoing ‘infodemic.’”³⁸ This is compounded by growing distrust in government described above. As a result, misinformation about government action and about the public spread of COVID-19 has generally frustrated the efforts of various public authorities to take measures against the pandemic.³⁹

Moreover, research has shown that being exposed to information about the virus on social media is associated with higher susceptibility to misinformation, which is consistent with recent research showing that people are more likely to encounter fake news (including about COVID-19) via social media.⁴⁰ “Compared with other Americans, adults who ‘often’ use social media to get news about COVID-19 report higher levels of exposure to the conspiracy theory that the

³⁸ Jon Roozenbeek, *et al.*, *Susceptibility to Misinformation about COVID-19 Around the World*, 7 ROYAL SOCIETY OPEN SCIENCE 1, 2 (2020), <https://royalsocietypublishing.org/doi/10.1098/rsos.201199>.

³⁹ J. Scott Brennan *et al.*, *Types, Sources, and Claims of COVID-19 Misinformation*, REUTERS INSTITUTE (April 7, 2020), <https://reutersinstitute.politics.ox.ac.uk/types-sources-and-claims-covid-19-misinformation>.

⁴⁰ Roozenbeek, *et al.*, *supra* note 38 at 2.

pandemic was intentionally planned.”⁴¹ Research shows that Americans’ response to the virus hinges on what media they consume; one study found that “social media news consumers were more likely than most to say that news sources have exaggerated the threat posed by the virus.”⁴² An analysis of the most viewed COVID-related YouTube videos also found that over 25% of the top videos contained misleading information and totaled 62 million views worldwide.⁴³ As a result, experts warn that misinformation about COVID-19 is a “meta-risk” interfering with people’s initial risk perception of the virus, which in itself is linked

⁴¹ Amy Mitchell *et al.*, *Three Months In, Many Americans See Exaggeration, Conspiracy Theories and Partisanship in COVID-19 News*, PEW RESEARCH CENTER (June 29, 2020), <https://www.journalism.org/2020/06/29/three-months-in-many-americans-see-exaggeration-conspiracy-theories-and-partisanship-in-covid-19-news/>.

⁴² Mark Jurkowitz & Amy Mitchell, *Americans who primarily get news through social media are least likely to follow COVID-19 coverage, most likely to report seeing made-up news*, PEW RESEARCH CENTER (Mar. 25, 2020), <https://www.journalism.org/2020/03/25/americans-who-primarily-get-news-through-social-media-are-least-likely-to-follow-covid-19-coverage-most-likely-to-report-seeing-made-up-news/>. But even traditional news media show a similar dividing effect. A study of 8,914 U.S. adults, for example, found that “[t]he group who names MSNBC as their main news source is far more likely than the Fox News group to answer correctly that the coronavirus originated in nature rather than a laboratory and that it will take a year or more for a vaccine to become available.” Mark Jurkowitz & Amy Mitchell, *Cable TV and COVID-19: How Americans perceive the outbreak and view media coverage differ by main news source*, PEW RESEARCH CENTER (Apr. 1, 2020), <https://www.journalism.org/2020/04/01/cable-tv-and-covid-19-how-americans-perceive-the-outbreak-and-view-media-coverage-differ-by-main-news-source/>.

⁴³ Roozenbeek, *et al.*, *supra* note 38 at 2.

to the adoption of preventative health behaviors.⁴⁴ The results have been lamentably calamitous, with thousands of Americans dying because they distrusted advice to take recommended precautions. Justice Brandeis could not have foreseen, in saying that the answer to false speech is more speech,⁴⁵ a media paradigm in which truth is not shared, but is algorithm-tailored to best amplify each person’s preconceptions.

c. Children Are Particularly Unable to Process Information and to Distinguish Between Reliable and Unreliable Content

Children are particularly susceptible to the new media paradigm. On average, children up to age eight consume about two and a half hours of screen media a day.⁴⁶ Daily screen use for ages eight to twelve is, on average, four hours and forty-four minutes. Daily screen use for teens (ages thirteen to eighteen) is seven hours and twenty-two minutes.⁴⁷ Another survey reported that “95% of teens now report they have a smartphone or access to one[,]” and “[s]ome 45% of teens say they use the internet ‘almost constantly.’”⁴⁸ Another found that “[o]ver 90% of young people go

⁴⁴ *Id.*

⁴⁵ See *Whitney v. California*, 274 U.S. 357, 377 (1927).

⁴⁶ Victoria Rideout & Michael B. Robb, *The Common Sense Census: Media Use by Kids Age Zero to Eight*, COMMON SENSE MEDIA, 3 (2020), https://www.commonsensemedia.org/sites/default/files/uploads/research/2020_zero_to_eight_census_final_web.pdf.

⁴⁷ *Media Use By Tweens and Teens 2019: Infographic*, COMMON SENSE MEDIA (Oct. 28, 2019), <https://www.commonsensemedia.org/Media-use-by-tweens-and-teens-2019-infographic>.

⁴⁸ Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RESEARCH CENTER (May 31, 2018), <https://www.pewresearch.org/internet/2018/05/31/teens->

online daily, and youth spend an average of nearly 11 hours with media per day.”⁴⁹

It also comes as no surprise that children fare no better than adults in filtering out true from false: “most young people perform poorly at distinguishing fake news from reliable news.”⁵⁰ Research shows that young people are unable to sufficiently reason and engage with the information on the internet.⁵¹ Most children fail to make appropriate evidentiary judgments about “news” content viewed on the internet: “[t]wo-thirds of students couldn’t tell the difference between news stories and ads” and “[o]ver 96% [of students surveyed] did not consider why ties between a climate change website and the fossil fuel industry might lessen that website’s credibility.”⁵² Overall, “[r]esearch has shown that many American students cannot correctly identify an industry group masquerading as a think tank or distinguish between sponsored content and a disinterested news article. Students lack knowledge of how

social-media-technology-2018/.

⁴⁹ *Developing Digital Citizens: Media Literacy Education for ALL Students*, DEMOCRACY READY NY, 4. Another study found that 79% of elementary teachers and 90% of secondary teachers reported unhealthy amounts of media use by their students as a problem, with 37% and 60%, respectively, describing it as a major problem. See Laura S. Hamilton, Julia H. Kaufman, & Lynn Hu, *supra* note 23, at 4.

⁵⁰ Peter Levine & Kei Kawashima-Ginsberg, *The Republic is (Still) at Risk – and Civics is Part of the Solution*, JONATHAN M. TISCH COLLEGE OF CIVIC LIFE, TUFTS UNIVERSITY (2017) at 5.

⁵¹ Sam Wineburg *et al.*, *Evaluating Information: The Cornerstone of Civic Online Reasoning*, STANFORD HISTORY EDUCATION GROUP (2016), at 4.

⁵² Joel Breakstone *et al.*, *Students’ civic online reasoning: A national portrait, 2019*, STANFORD HISTORY EDUCATION GROUP (2019), at 3, 26-27.

search engines work, believing that results are displayed based on accuracy, rather than the preferences of advertisers.”⁵³ And research suggests that more use of social media intensifies this effect: in one study, respondents were asked certain fact-based questions and “the average proportion [of students] who got each question right is lower among Americans who rely most on social media for political news than those who rely most on other types of news sources[.]”⁵⁴

Another well-known 2016 study conducted by researchers at Stanford University confirmed that students “are easily duped” online.⁵⁵ The study asked more than 7,000 students to undertake a series of online tasks aimed at evaluating their media literacy. “More than 80% of the middle school students could not distinguish the ads from the news stories online. . . . Nearly all of the results suggest the same conclusion—digital natives do not have the skills necessary to evaluate information and separate fact from fiction.”⁵⁶

⁵³ Renee Hobbs *et al.*, *Recommendations to RIDE*, MEDIA LITERACY NOW, 2 (2018), <https://mediaeducationlab.com/sites/default/files/final%20ML%20report%20-%20RIDE%20revised.pdf>.

⁵⁴ Amy Mitchell *et al.*, *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RESEARCH CENTER (July 30, 2020), <https://www.journalism.org/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/>.

⁵⁵ Sam Wineburg *et al.*, *Evaluating Information: The Cornerstone of Civic Online Reasoning*, STANFORD HISTORY EDUCATION GROUP (2016), at 4.

⁵⁶ Meghan Manfra & Casey Holmes, *Integrating Media Literacy in Social Studies Teacher Education*, CONTEMPORARY ISSUES IN TECHNOLOGY AND TEACHER EDUCATION 121 (2020), <https://citejournal.org/wp-content/uploads/2020/02/v20i1socialstudies2.pdf>.

The effects, particularly in the civic realm, are lasting. Evidence shows that “political stances shaped during the mid-to-late teen years persist throughout adult life.”⁵⁷ Research by the Stanford History Education Group shows that “adolescents and young adults are unable to locate and confront partisanship, bias, and flat-out lies in online content...this inability harms civic knowledge and participation.”⁵⁸

II. Media Literacy and Civics Education Would Protect The Privileges and Rights of Citizenship Under the Constitution

a. Schools Are Failing to Recognize the Changes in What It Means to Educate Citizenry

American educational systems have not risen to the challenges described above. Instead, “competing demands and fiscal constraints on the educational system have reduced the emphasis on civic education, media literacy, and critical thinking.”⁵⁹ It is thus not surprising that one survey found that nearly 80% of teacher respondents noted their students’ “limited ability to evaluate the credibility of online information” as a moderate or major problem.⁶⁰ In Rhode Island, specifically, one advisory group detailed several pressing concerns regarding students’ inadequate media literacy competencies upon graduating high school.⁶¹ Overall, “[i]t is not

⁵⁷ Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 967 (2009).

⁵⁸ Manfra & Holmes, *supra* note 56 at 132.

⁵⁹ Kavanagh & Rich, *supra* note 4, at xiv.

⁶⁰ Laura S. Hamilton, Julia H. Kaufman, & Lynn Hu, *supra* note 23, at 4.

⁶¹ Renee Hobbs *et al.*, *supra* note 53, at 2.

clear that the average student emerges from kindergarten through-12th-grade (K-12) schooling competent” in basic media literacy skills.⁶²

Rhode Island acknowledged the serious problem years ago, yet has failed to take steps to address it. In 2017, Rhode Island passed and signed Law § 16-22-28 for Instruction In Media Literacy, mandating that the Rhode Island Department of Education (“RIDE”) examine media literacy education for inclusion in the state’s basic education program regulations.⁶³ To that end, a group of Rhode Island educators formed a committee, gathered data from twenty-four school superintendents, and issued a report to RIDE with action items and recommendations. The committee also made repeated calls to RIDE leaders requesting a meeting to discuss the law and the report recommendations. RIDE never responded, forcing Plaintiff-Appellants to bring this lawsuit. Plaintiff-Appellants correctly explain that “effective instruction in ‘media literacy’ is not provided in most Rhode Island schools.... [which do not] sufficiently provide access to critical educational opportunities necessary to develop the skills for internet and media literacy.”⁶⁴ “[M]ost teachers in Rhode Island have had no training in teaching

⁶² Alice Huget *et al.*, EXPLORING MEDIA LITERACY, EDUCATION AS A TOOL FOR MITIGATION TRUTH DECAY, 1 (2019), rand.org/pubs/research_reports/RR3050.html.

⁶³ 16 R.I. Gen. Laws Ann. § 16-22-28 (West 2017).

⁶⁴ Complaint ¶¶ 81— 83, *A.C. v. Raimondo*, 2020 WL 6042105 (D.R.I. Oct. 13, 2020).

media literacy skills and most schools in Rhode Island do not have sufficient skilled library media specialists[.]”⁶⁵

Thus, while thirty-nine states and the federal government⁶⁶ have acknowledged the need for media literacy programs, implementation is lacking and continues to rely on the initiative of teachers and librarians.⁶⁷ Most teachers report in surveys that they are not adequately prepared to instruct on civics education, and in any event lack resources to do so.⁶⁸ As a result, “there is a cohort of students who are entering adult life and becoming politically active but might not have received the training needed to effectively navigate today’s information system or to understand what is required of them as citizens. As noted, this lack of training might make students emerging (or recently graduated) from schools more susceptible to bias, disinformation, and even intentional agents of misinformation.⁶⁹ As research by RAND summarizes, “[t]he gap between the requirements of the new information

⁶⁵ *Id.* at ¶ 84.

⁶⁶ In July 2019, U.S. Senator Amy Klobuchar introduced new legislation, the Digital Citizenship and Media Literacy Act (S. 2240), to combat foreign interference campaigns by improving media literacy education that teaches students skills to identify misinformation online. Digital Citizenship and Media Literacy Act, S. 2240 (proposed July 23, 2019), <https://www.govtrack.us/congress/bills/116/s2240/text>.

⁶⁷ Laura S. Hamilton *et al.*, *Preparing Children and Youth for Civic Life in the Era of Truth Decay*, RAND CORPORATION 96 (2020), https://www.rand.org/pubs/research_reports/RRA112-6.html.

⁶⁸ *Id.* at xix.

⁶⁹ Kavanagh & Rich, *supra* note 4 at 139.

system and the training provided by schools in such areas as civic and media literacy and critical thinking means that students and young adults are not able to detect, account for, and correct the blurring of the line between opinion and fact that characterizes Truth Decay, and this lack of skill could affect their interpretation and use of information.”⁷⁰

b. Media Literacy, When Taught, Is Effective.

Where media literacy is taught, however, it works to improve the knowledge, skills, and competencies needed for productive digestion of and participation in the media ecosystem. Hundreds of research studies have examined the impact of media literacy education programs on academic achievement, media usage, attitudes, and behaviors. A number of experimental studies have shown that media literacy education is a successful tool in helping students make informed choices about health and safety, and has the ability to reduce behaviors such as alcohol use, smoking, body dissatisfaction, and eating disorders.⁷¹

Media literacy education has a direct impact on the competencies associated

⁷⁰ *Id.* at 149.

⁷¹ Janis B. Kupersmidt *et al.*, *Media Literacy Education for Elementary School Substance Use Prevention: Study of Media Detective*, PEDIATRICS (Sept. 2010); Brian A. Primack *et al.*, *Association of Cigarette Smoking and Media Literacy about Smoking among Adolescents*, JOURNAL OF ADOLESCENT HEALTH (2006); Simon M. Wilksch *et al.*, *Impact of Interactive School-Based Media Literacy Lessons for Reducing Internalization of Media Ideals in Young Adolescent Girls and Boys*, INTERNATIONAL JOURNAL OF EATING DISORDERS (2006).

with functioning democratic participation, such as critical thinking and assessment skills required to digest the breadth of information in the digital era. One study found that media literacy education resulted in decreased attention to and engagement with disinformation media, and concluded that media literacy is an important tool to combat the spread and impact of disinformation.⁷² In another study involving 2,000 teenagers and adults up to age 27, an experiment was conducted to compare the media literacy skills of subjects with higher than average political knowledge but no media literacy training, and those who had little or no political knowledge but had higher levels of exposure to media literacy in school. Participants were asked to evaluate the accuracy of various media messages. The study found that having political knowledge did *not* improve judgments of accuracy, but exposure to media literacy education did.⁷³

⁷² *Randomized control trial finds IREX's media literacy messages to be effective in reducing engagement with disinformation*, IREX (Oct. 20, 2020), <https://www.irex.org/news/randomized-control-trial-finds-irexs-media-literacy-messages-be-effective-reducing-engagement>.

⁷³ In one study that explored the impact of prior beliefs, media literacy education, and political knowledge on judgments of accuracy and truth, “[d]ata suggested a positive relationship between media literacy education and students’ judgments of credibility and accuracy of political content, compared to only having prior background knowledge. In a related study, youth who received civic media literacy learning opportunities were 26% more likely to correctly identify an evidence based post as ‘accurate’ than they were to judge an inaccurate post as accurate, ‘even when both posts aligned with their perspective on an issue.’” Erica Hodgins & Joe Kahne, *Misinformation in the Information Age: What Teachers Can Do To Help Students*, 84(2) SOCIAL EDUCATION 208, 209 (2018); see also Manfra & Holmes, *supra* note 56 at 128.

Other evidence shows that participation in a media literacy program improves civic engagement. In one large-scale survey of Chicago students in grades 4-12, researchers found that exposure to media literacy pedagogies is associated with increased engagement in online participatory politics.⁷⁴ A survey of California high school students similarly found an association between media literacy education and increased politically-driven online participation.⁷⁵ In another study conducted in a large high school in Maryland, students enrolled in two different media literacy programs were compared to a control group of students who did not take a class in media literacy.⁷⁶ Findings show that students in the media literacy classes had higher levels of information-seeking motives, media knowledge, and news analysis skills.⁷⁷ Moreover, these variables independently contributed to adolescents' intent toward civic engagement.⁷⁸

Program evaluation data also shows the value of media literacy education

⁷⁴ Benjamin Bowyer & Joseph Kahne, *The digital dimensions of civic education: Assessing the effects of learning opportunities*, 69 JOURNAL OF APPLIED DEVELOPMENTAL PSYCHOLOGY 1, 9 (2020), <https://reader.elsevier.com/reader/sd/pii/S0193397320301544?token=FF1BD17F5BB29D3BBBD9D79F2E3414B55E58C6151408E813106BED1323CC65CC0CFAA60D0BF787D1AE73BD4B6CB066A9>.

⁷⁵ Joseph Kahne *et al.*, *Digital Media Literacy Education and Online Civic and Political Participation*, INTERNATIONAL JOURNAL OF COMMUNICATION (2012), 14.

⁷⁶ Hans Martens & Renee Hobbs, *How Media Literacy Supports Civic Engagement in a Digital Age*, UNIVERSITY OF RHODE ISLAND DIGITALCOMMONS@URI (2013).

⁷⁷ *Id.* at 24.

⁷⁸ *Id.* at 23.

curriculum. For example, the News Literacy Project (NLP), a national education nonprofit based in Washington, D.C., provided resources to students and teachers to increase news literacy and the results were palpable: “[i]n the 2018-19 school year, 69% of students who used the platform could identify quality journalism, and 68% noted that they planned to be more civically engaged in their communities. In addition to creating a more robust civics education, components of news literacy show potential to increase current events knowledge, internal political efficacy, and cultivate positive relationships with civic life.”⁷⁹

It is clear that media literacy education works. And while schools alone cannot counter the effects of “truth decay,” “they can exert a significant influence because of the large number of youth they serve, the intensity of their interactions with students at a formative stage in their lives, and the centrality of civic deployment to their missions.”⁸⁰ Educational standards must adapt to prepare students to be adequately-informed citizens within a democracy in the technological era and to exercise constitutional responsibilities.

⁷⁹ Ashley Jeffrey & Scott Sargrad, *Strengthening Democracy With a Modern Civics Education*, CENTER FOR AMERICAN PROGRESS (Dec. 14, 2019, 10:00 A.M.), <https://www.americanprogress.org/issues/education-k-12/reports/2019/12/14/478750/strengthening-democracy-modern-civics-education/>.

⁸⁰ Hamilton *et al.*, *supra* note 60 at 95–96.70 Martens & Hobbs, *supra* note 76.

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Dated: February 1, 2021

CERTIFICATE OF COMPLIANCE

The undersigned, Jeffrey Simes, counsel for *Amici Curiae*, Counsel for National Association for Media Literacy Education, Media Literacy Now, and Media Education, hereby certifies that the Brief *Amici Curiae* in Support of Petitioners-Appellants complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word count of Word for Windows, the word-processing system used to prepare the brief, the brief contains 6276 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties will receive notice through the CM/ECF system.

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