

# Submission to the Thematic Report on “Freedom of Expression and Elections in the Digital Age”

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## **CELE’s Submission to the Thematic Report on “Freedom of Expression and Elections in the Digital Age”**

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### **Introduction**

The Center for Studies on Freedom of Expression (CELE) is an academic research center affiliated with Universidad de Palermo, Argentina. CELE provides technical and legal analysis on issues affecting this fundamental right, and since 2012 has been studying freedom of expression on the Internet as a specific research area. The Center is a leading voice protecting and promoting freedom of expression nationally, regionally, and internationally.

This submission was prepared in response to the [Call for Submissions](#) by the Special Rapporteur on Freedom of Opinion and Expression.

### **The consultation in context**

In 2024, over eighty countries around the world held elections. More than 2.5 billion people—over a quarter of the global population—went to the polls. This marked an unprecedented milestone for democracy: the largest election year in history.

CELE’s contribution aims to shed light on some fundamental issues and concerns during elections in the digital sphere.

### **Tendencies in Electoral Regulation**

The entry into force of the Digital Services Act (DSA) of the European Union marked the rise of the risk-based approach to online speech regulation. Under this approach, the legislator identifies certain “risks” that stem from the operation of very large online platforms and search engines (VLOPs/VLOSEs) and makes them responsible for their “mitigation”. Companies must also mitigate any other risk they

identify in the design and the use of platforms by third parties. Some of the risks identified in the DSA are relevant for this discussion, such as the dissemination of illegal content,<sup>1</sup> actual or foreseeable effects for the exercise of Fundamental Rights,<sup>2</sup> and actual or foreseeable effects on civic discourse and electoral processes.<sup>3</sup> Failure to identify or sufficiently mitigate risks can result in a noncompliance decision and stringent economic sanctions.

The approach has problematic features that are reflected in particular applications to election-related speech. First, risks are vaguely defined, allowing enormous discretion for companies and regulators. Second, while state regulations with substantial influence on expression must pass the three-pronged test, under the DSA the relevant criterion to mandate platforms to act upon a piece of content is its riskiness. Third, it focuses on private action and overlooks the risks of state action. Fourth, big fines for noncompliance nudge companies to err on the side of over-mitigation. These difficulties have been evidenced in specific instances of the DSA deployment, as shown in the following section.

### **Applying the risk framework to election-related expression**

In August 2024, former European Commissioner for Internal Market, Thierry Breton, released a public letter addressed to Elon Musk whereby he expressed concern about a public conversation that Musk was set to have with then-presidential candidate Donald Trump in an X “space”, as it could have “negative effects in Europe regarding the spread of violence, hatred, racism, and disinformation.”<sup>4</sup> This exposed how public officers could use expansive interpretations of the obligations arising from the risk-based approach to circumvent the three-part test and restrict expression they deem

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<sup>1</sup> Digital Services Act, article 34 (1)(a)

<sup>2</sup> Digital Services Act, article 34 (1)(b)

<sup>3</sup> Digital Services Act, article 34 (1)(c)

<sup>4</sup> Available here: <https://x.com/ThierryBreton/status/1823033048109367549>

inadequate, including that connected with elections. It also showed how these interpretations enable sophisticated forms of pressure (“jawboning”) by state actors.<sup>5</sup>

The EU issued guidelines<sup>6</sup> for VLOPs/VLOSEs to mitigate risks in electoral contexts.<sup>7</sup> They warn that a series of phenomena linked to platforms, such as Foreign Information Manipulation and Interference (FIMI),<sup>8</sup> hate speech, disinformation, extremist content, and AI-generated content, create an “increased risk”<sup>9</sup> to elections integrity. The Guidelines proposed recommendations include measures to reduce disinformation, such as demonetizing content declared “false” after fact-checking or coming from accounts that have already published falsehoods. They also propose procedures to detect and stop the manipulation of services through “inauthentic” accounts, and measures related to the creation/dissemination of AI-generated content. The implementation of some of these measures could lead to tightened controls over speech during electoral periods. This is concerning, as political speech must be especially protected around elections.<sup>10</sup> The guidelines reflect the DSA’s lack of distinction between legal and illegal content, which is problematic since the remedies States are allowed to recommend for each are different.<sup>11</sup> Without a clear distinction,

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<sup>5</sup> Álvarez Ugarte, R., “Ruling by bullying? On the difficult balance between illicit threats and effective government”, Verfassungsblog, Oct 12, 2023, available here:

<https://verfassungsblog.de/ruling-by-bullying/>

<sup>6</sup> Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065, available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024XC03014&qid=1714466886277>

<sup>7</sup> An in-depth analysis of the Guidelines can be found here:

<https://observatoriolegislativocele.com/en/indefinitions-and-good-intentions-the-guidelines-of-the-European-Commission-for-the-mitigation-of-systemic-risks-in-the-context-of-electoral-processes-Nicolas-Zara/>

<sup>8</sup> European Union External Action, “Beyond Disinformation - What is FIMI”, available here:

[https://www.eeas.europa.eu/eeas/beyond-disinformation-what-fimi\\_en](https://www.eeas.europa.eu/eeas/beyond-disinformation-what-fimi_en)

<sup>9</sup> Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065, available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024XC03014&qid=1714466886277>

<sup>10</sup> UN Office of the High Commissioner for Human Rights, Manual on Human Rights Monitoring, Chapter 23, Monitoring Human Rights in the Context of Elections”, p. 9, available here:

<https://www.ohchr.org/sites/default/files/Documents/Publications/Chapter23-MHRM.pdf>

<sup>11</sup> Husovec, M. (2024). The Digital Services Act’s red line: what the Commission can and cannot do about disinformation. Journal of Media Law, 16(1), 47–56. <https://doi.org/10.1080/17577632.2024.2362483>

some of the measures suggested in the guidelines nudge companies into acting upon perfectly legal content to avoid being found non-compliant.

Another shortcoming the Guidelines inherit from the DSA is the vagueness of some key terms. The lack of legal definitions for “systemic risk” and “detrimental effect on civic discourse and electoral integrity” leaves platforms and other stakeholders (auditors, civil society, academia) without concrete parameters to work. The guidelines provide no clarification for contested terms such as hate speech and extremist content and introduce new polysemic ones like “disinformation” and “extremist speech” which lack the specificity to meaningfully guide platform behavior. The lack of a clear definition of FIMI encourages silencing critical voices from abroad.

We can find a similar example in Brazil. In March 2024, its Superior Electoral Court issued rules to regulate electoral advertising<sup>12</sup> for the 2025–2028 term, which echoes some of the language from the European model described above. Article 9E of one of the resolutions altered the intermediary liability regime established by the Brazilian Internet Civil Framework (MCI)<sup>13</sup> which states that platforms can only be held civilly liable for content published by third parties if they fail to comply with a judicial takedown order.<sup>14</sup> This new modification creates civil and administrative liability for platforms that fail to promptly removing high-risk content: (i) anti-democratic behavior, (ii) dissemination of disinformation, (iii) threats to the integrity of institutions and their officials, (iv) hate speech, and (v) noncompliance with obligations to label AI-generated content.

These broadly defined categories, similar to the ones in the DSA, pose significant risks to freedom of expression during electoral processes. Moreover, they fail to meet the requirements of the Inter-American three-part test. First, they violate the principle of

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<sup>12</sup> Jost I. (2024), *Judicial Activism or Democratic Safeguard? The New Limits of Digital Electoral Propaganda in Brazil*, CELE, available at: <https://observatoriolegislativocele.com/judicial-activism-or-democratic-safeguard-the-new-limits-of-digital-electoral-propaganda-in-brazil/>

<sup>13</sup> According to Brazil’s MCI platforms can only be held civilly liable for content published by third parties if they fail to comply with a judicial takedown order

<sup>14</sup> Furthermore, the Electoral Law reiterates the terms of the MCI, adopting its liability model for electoral propaganda.

legality, as they were issued by the Judiciary Power,<sup>15</sup> overstepping its prerogatives, and not by the Legislature. Second, the modifications foster indirect restrictions and censorship via platforms, further contravening Article 13 of the American Convention on Human Rights.<sup>16</sup>

### **Utilization of gender violence laws to silence political and electoral expression**

Another intriguing development in Latin America is the increasing use of gender violence laws to suppress critical discourse directed at public officials or candidates for public office. While online violence against women is a significant bar that impedes female participation in politics and demands appropriate measures, in some instances, laws designed to protect women's rights in the digital realm have been leveraged to judicially request the removal, deletion, or blocking of online content of public interest.<sup>17</sup> In several instances, freedom of expression has been adversely affected in its individual and collective dimensions, and, at times, subjected to prior censorship. Public officials, candidates for elected office, and individuals engaged in public affairs must exhibit a higher tolerance degree for criticism, even when it involves language deemed offensive, shocking, or disturbing. Since they have voluntarily subjected themselves to public scrutiny, they should not exploit legal frameworks to stifle democratic discourse. Therefore, in drafting and implementing legislation aimed at protecting women and

<sup>15</sup> Resolutions from the Electoral Judiciary should be limited to clarifying existing legal provisions rather than creating new substantive standards.

<sup>16</sup> This is an undesirable outcome because it encourages providers to act as “curators of public debate, particularly during electoral periods, when dissemination of content, be it news, political advertisement, opinions, or others, reaches the peak of its democratic value.” Supra note 12.

<sup>17</sup> CELE, TEDIC and Wikimedia Foundation (2024), Amicus curiae en la causa "Gisele Zuni Mousques c/Christian Chena y otros s/ violencia contra la mujer" (Paraguay), available here: [https://www.palermo.edu/Archivos\\_content/2024/cele/agosto/amicus-paraguay/TEDIC\\_et\\_al\\_DP18.pdf](https://www.palermo.edu/Archivos_content/2024/cele/agosto/amicus-paraguay/TEDIC_et_al_DP18.pdf)  
CELE (2024), Amicus curiae en la Acción de tutela interpuesta por Ricardo Marín Rodríguez en contra de Carmen Felisa Ramírez Boscán (Representante a la Cámara por los colombianos en el exterior) available here: [https://www.palermo.edu/Archivos\\_content/2024/cele/septiembre/Amicus%20curiae%20CELE%20-%20Exp.%20T-10.261.574%20\(1\).pdf](https://www.palermo.edu/Archivos_content/2024/cele/septiembre/Amicus%20curiae%20CELE%20-%20Exp.%20T-10.261.574%20(1).pdf)

Sequera M. (2024), Violencia de género en línea y libertad de expresión. Estudio de seis casos en Paraguay, available here: [https://www.palermo.edu/Archivos\\_content/2024/cele/abril/paper-tedic/violencia-genero-libertad-expressi on%20\(2\).pdf](https://www.palermo.edu/Archivos_content/2024/cele/abril/paper-tedic/violencia-genero-libertad-expressi on%20(2).pdf)

vulnerable groups from gender-based online violence in the context of elections and political participation, States must prioritize safeguarding freedom of expression. Ensuring this is essential to fostering robust public debate and enhancing the flow of information necessary for an informed citizenry.

### **The role of public officers in generating and spreading mis/disinformation**

Attributing an exclusive role to social media in disseminating disinformation would be an oversimplification. Addressing disinformation requires a nuanced approach that also considers its sources, particularly the individuals or entities promoting it. This would enable disaggregation of the phenomenon into smaller, more specific challenges, thereby clarifying that each subset requires distinct solutions.<sup>18</sup> When public figures propagate disinformation, its reach, scope, and speed are significantly amplified. However, not all public figures hold the same level of influence or responsibility. Public officials, in particular, bear heightened obligations regarding the content and implications of their speech.<sup>19</sup> Moreso, State-driven disinformation is the primary concern at least within Latin America.<sup>20,21</sup>

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<sup>18</sup>Del Campo A. (2021), Are public officials' lies unsustainable or do they have far reaching effects?, available here:

[https://www.palermo.edu/Archivos\\_content/2021/cele/papers/Disinformation-and-public-officials.pdf](https://www.palermo.edu/Archivos_content/2021/cele/papers/Disinformation-and-public-officials.pdf)

<sup>19</sup> Ibid.

<sup>20</sup> Del Campo A. (2024), Alternative Solutions to Disinformation: Address the Sources Rather than the Distribution, Information Society Project, Yale University, available here: [https://law.yale.edu/sites/default/files/area/center/isp/documents/mwi-agustina-del-campo\\_2024-08-01\\_re-fin.pdf](https://law.yale.edu/sites/default/files/area/center/isp/documents/mwi-agustina-del-campo_2024-08-01_re-fin.pdf)

<sup>21</sup> As stated in the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda: “State actors should not make, sponsor, encourage, or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).” Furthermore, state actors should “take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security, and the environment.” (available at <https://www.ohchr.org/en/press-releases/2017/03/freedom-expression-monitors-issue-joint-declaration-fake-news-disinformation>)

Public officials can also play a positive role<sup>22</sup> in combating disinformation without resorting to censorship or prohibitive measures. Protecting knowledge and science institutions by ensuring their independence and autonomy, allows them to operate without political interference and therefore prompts a more robust democratic debate.

### **The impact of AI on electoral disinformation**

The information environment is “the space where human cognition, technology, and content converge.”<sup>23</sup> Despite widespread concern, the current body of evidence remains insufficient to conclusively assert that AI poses a significant threat to the integrity of elections on a global scale.<sup>24</sup> Generative AI appears to reduce the costs associated with creating false information while having a limited impact on the costs of distributing it,<sup>25</sup> and the consumption of misinformation is primarily constrained by demand rather than supply.

Framing disinformation as only a technological problem oversimplifies the phenomenon, hindering a comprehensive understanding. Further research is required to explore whether and how disinformation influences individuals' worldviews and decisions. Rather than succumbing to the moral panic surrounding AI, we should critically examine the broader epistemic crisis<sup>26</sup> affecting traditional and reliable sources

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<sup>22</sup>Del Campo A.(2024), supra note 14. [ale.edu/sites/default/files/area/center/isp/documents/mwi-agustina-del-campo\\_2024-08-01\\_re-fin.pdf](https://ale.edu/sites/default/files/area/center/isp/documents/mwi-agustina-del-campo_2024-08-01_re-fin.pdf)

<sup>23</sup> Wanless A., Shapiro, J. (2022), A CERN Model for Studying the Information Environment, Carnegie Endowment for International Peace, available here: <https://carnegieendowment.org/research/2022/11/a-cern-model-for-studying-the-information-environment?lang=en>

<sup>24</sup> Sayash K., Arvind N. (2024), *We Looked at 78 Election Deepfakes. Political Misinformation Is Not an AI Problem*, Knight First Amendment Institute, available here: <https://knightcolumbia.org/blog/we-looked-at-78-election-deepfakes-political-misinformation-is-not-an-ai-problem>

<sup>25</sup> Simon F., Altay S., Mercier H. (2023), *Misinformation reloaded? Fears about the impact of generative AI on misinformation are overblown*. Harvard Kennedy School (HKS) Misinformation Review, 4(5), available here: <https://misinforeview.hks.harvard.edu/article/misinformation-reloaded-fears-about-the-impact-of-generative-ai-on-misinformation-are-overblown/>

<sup>26</sup> Del Campo A. (2024), *Alternative Solutions to Disinformation: Address the Sources Rather than the Distribution*, Information Society Project, Yale University, available here:

of information, particularly regarding their potential lack of transparency and accountability.

Contextual factors and an individual's ideological predispositions<sup>27</sup> may exert a more significant influence in disseminating disinformation than disinformation itself. Consequently, governments should exercise caution when considering measures to mitigate the alleged impacts of AI-generated disinformation on electoral processes.

## Recommendations

Disinformation is not an autonomous category, and there is no consensus on its precise definition.<sup>28</sup> Most pieces of disinformation are, in fact, lawful from a legal standpoint. As a result, any proposed strategy against misinformation that affects people's expression must comply with the three-part test.

As stated in the OAS' *Guide to Guarantee Freedom of Expression regarding deliberate disinformation in electoral contexts*, States should avoid introducing new criminal offenses targeting disinformation. Such measures, due to the nature of the phenomenon, could be vague or ambiguous, and risk criminalizing expressions about public officials or matters of public interest, creating a chilling effect on free speech and public debate—especially during elections.<sup>29</sup> Introducing categories of “risky”

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[https://law.yale.edu/sites/default/files/area/center/isp/documents/mwi-agustina-del-campo\\_2024-08-01\\_re-fin.pdf](https://law.yale.edu/sites/default/files/area/center/isp/documents/mwi-agustina-del-campo_2024-08-01_re-fin.pdf)

<sup>27</sup> Rao1 A., Morstatter F., Lerman K. (2022), Partisan asymmetries in exposure to misinformation, SciRep, available here: <https://pubmed.ncbi.nlm.nih.gov/36123387/#:~:text=We%20uncover%20partisan%20asymmetries%20in,for%20the%20highly%20polarized%20users%2D>

<sup>28</sup> Irene Khan (Special Rapporteur for Freedom of Opinion and Expression), Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 9, U.N. Doc. A/HRC/47/25 (Apr. 13, 2021).

<sup>29</sup> OAS (2019), Guide to guarantee freedom of expression regarding deliberate disinformation in electoral contexts, available here: [https://www.oas.org/en/iachr/expression/publications/Guia\\_Desinformacion\\_VF%20ENG.pdf](https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf)

expressions that fall short of illegality does not solve the problem, but creates confusion and room for arbitrariness.

In cases involving matters of public interest or individuals engaged in public debate, where public officials or candidates allege defamation, States should consistently apply the "actual malice" standard for factual statements. This standard serves as a critical safeguard for freedom of expression. The most effective way to restore an individual's honor in matters of public interest is through the right of rectification. Where this measure proves insufficient, civil remedies are permissible, provided they remain proportionate.<sup>30</sup>

While platforms do have a role in disseminating disinformation, it is important to focus our attention on its sources. This enables a better understanding of the specific challenges it creates. Public officials amplify disinformation's reach, scope, and speed and therefore bear special responsibilities in exercising freedom of expression. Beyond legal duties, they play a central role in shaping political discourse and influencing election campaigns, which increases the impact of their statements.

Measures blocking or filtering illicit content during elections may be permissible if an independent judicial authority determines their illegality. Such measures must pass a strict proportionality test, be narrowly tailored to avoid infringing on legitimate protected speech, and include safeguards to prevent abuse. Safeguards should ensure transparency regarding the content removed and detailed justification for the necessity of the measure.<sup>31</sup>

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<sup>30</sup> CELE (2024), Amicus Curiae - Caso Ulrich Richter Morales y Claudia Ramírez Tavera vs. Google Inc. y Google México, available here: [https://www.palermo.edu/Archivos\\_content/2024/cele/mayo/2024\\_05\\_09\\_DP13\\_CELE.pdf](https://www.palermo.edu/Archivos_content/2024/cele/mayo/2024_05_09_DP13_CELE.pdf)

<sup>31</sup> OAS (2019), Guide to guarantee freedom of expression regarding deliberate disinformation in electoral contexts, available here: [https://www.oas.org/en/iachr/expression/publications/Guia\\_Desinformacion\\_VF%20ENG.pdf](https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf)

Disinformation should not be framed as a solely technological issue. Policymakers should recognize the multifaceted nature of the problem. Without conclusive evidence linking AI-generated disinformation to significant electoral disruptions, governments should refrain from adopting measures that might unduly restrict freedom of expression. Instead, legislative efforts should focus on improving transparency and accountability while avoiding overly broad or vague regulations that could stifle legitimate public discourse and hamper innovation and creativity.

Fact-checking is critical during electoral processes, particularly in fostering transparency and credibility. Despite ongoing scrutiny, especially following recent statements by Meta, fact-checking is a useful mechanism for enhancing public trust in elections. However, it's not the "silver bullet" some may think it is. It is a kind of journalism that helps mitigate the impact of disinformation and contributes to disseminating reliable and trustworthy information.<sup>32</sup>

Sincerely,



**Agustina Del Campo**

Director

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<sup>32</sup> Funk A., Vesteinsson K., Bake G. (2024), Freedom on the Net 2024: The Struggle for Trust Online, Freedom House, available here: <https://freedomhouse.org/sites/default/files/2024-10/FREEDOM-ON-THE-NET-2024-DIGITAL-BOOKLET.pdf>