

Adjudicating Fake News

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Abstract:

Worldwide, legislators and regulators struggle to structure public policies that tackle problems around disinformation and online harassment while protecting the freedom of expression. One key question in content moderation is content adjudication—or who is responsible for deciding what type of speech violates the law and should be taken down (or not). This article contributes to this debate by presenting the results of a large empirical project on the adjudication of fake news disputes by Brazilian Courts during the 2018 and 2022 Brazilian presidential elections. It examines what led Brazilian judges to order the takedown of online content, what social networks and types of content were the most affected by judicial decisions, and whether there is evidence that incumbent politicians abused the system, among others. It also critically analyzes the evolution of this novel court-driven content moderation regime—one in which the Brazilian Supreme Court is playing an increasingly active role in policing online discourse—with important implications for the Brazilian information ecosystem, democratic institutions, and the reputation of the Court itself. Ultimately, the Brazilian experience teaches many positive and negative lessons to other countries around the world rethinking their online content moderation regulatory regimes.

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Disclosure: Lancieri: I worked on a CERRE-supported report on access to data and algorithms under the DMA/DSA framework. In addition, earlier in my career, I worked as an associate lawyer at (now) Pereira Neto, Macedo, and Rocco Advogados, where clients included Google, Meta/Facebook, and Uber. My engagement with Pereira Neto, Macedo, w and these companies ceased in 2015.

Pereira Neto: As a partner at Pereira Neto, Macedo, Rocco I advise digital platforms such as Google, Airbnb, and Uber on matters relating to Brazilian antitrust and digital regulations. These companies did not provide financial or material support or were involved in the drafting of this article.

Karolczak: Karolczak was part of a team that received an unconditional grant from Facebook to develop the FGV/CEPI database of disinformation cases during the Brazilian 2018 elections, published in 2019. This article partially relies on that database for its analysis of the 2018 elections.

Marchiori de Assis: XXX

Note:

Dear Workshop Participants,

Thank you for taking the time to read this draft. As you will see, this project has been going on for quite some time, but it is still very much a work in progress. We are trying to make sense of the richness of the Brazilian case study and our data, and also understand how to better frame the article for an international audience.

So, this is a perfect moment to receive feedback on the draft—including scope, framing, and the parts of the complex Brazilian electoral court system that you did not fully understand. Ultimately, we plan to submit this article to a US Law Review, so your views as students are particularly appreciated—thank you!

I am looking forward to the workshop.

All the best,

Filippo

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I. Introduction

The digital revolution has placed the internet at the center of the political debate. Twitter/X, Facebook/Instagram, WhatsApp, YouTube, and other networks quickly became crucial to empowering the voices of previously excluded citizens and activists. Concomitantly, social media has generated new challenges for democracies across the globe. Major electoral upsets around the

world brought “fake news”² to the leading ranks of threats to democracy and modern society³, and there it has stayed⁴.

Despite being almost a decade into a world characterized by concerns around online disinformation, digital platforms and countries worldwide continue to struggle to understand the dynamics and impacts of fake news on the electorate and to devise appropriate policy responses. They face a fundamental challenge: how to ensure freedom of expression and the spread of ideas— a core value in liberal democracies – while preventing disinformation from contaminating the public sphere?

Responses varied immensely. Czech Republic experimented with Governmental fact-checking⁵; Germany’s hate speech and false news law attributes some balancing responsibility to online platforms and imposes fines up to EUR 50 million for violations⁶; The UK considered a duty of care imposed on digital platforms, but settled for a system that requires platforms to enforce their own promises to moderate harmful content effectively⁷; France passed a 2018 law against information manipulation that created creates a legal injunction system that enables candidates, political parties, public prosecutors, or any person to file a motion to remove false information

² We collapse fake news, false news, disinformation and misinformation campaigns as similar terms: fabricated stories presented as if from legitimate sources. This meaning includes both information that “*mimics traditional media content in form but not in organizational process and intent*” (fake news), “*information that is overtly false and misleading*” (misinformation) and “*information that is purposely spread to deceive people*” (disinformation). All types can and are used to influence the electoral process, from fake news websites to fake images, videos or memes. For the definitions, see David MJ Lazer and others, ‘The Science of Fake News’ (2018) 359 Science 1094. Pg. 1094. In doing so, we follow Soroush Vosoughi, Deb Roy and Sinan Aral, ‘The Spread of True and False News Online’ (2018) 359 Science 1146. Pg 1146, though they refrained from using the term “fake news” due to its political content.

³ See Nathaniel Persily, ‘The 2016 US Election: Can Democracy Survive the Internet?’ (2017) 28 Journal of democracy 63.

⁴ See <https://www.weforum.org/press/2024/01/global-risks-report-2024-press-release/>, <https://blogs.lse.ac.uk/impactofsocialsciences/2024/10/08/misinformation-is-a-threat-to-society-lets-not-pretend-otherwise/>, <https://www.nytimes.com/2024/10/23/business/media/election-disinformation.html>.

⁵ Anthony Faiola, ‘As Cold War Turns to Information War, a New Fake News Police Combats Disinformation’ *Washington Post* (22 January 2017) <https://www.washingtonpost.com/world/europe/as-cold-war-turns-to-information-war-a-new-fake-news-police/2017/01/18/9bf49ff6-d80e-11e6-a0e6-d502d6751bc8_story.html> accessed 1 July 2018.

⁶ Anthony Faiola and Stephanie Kirchner, ‘How Do You Stop Fake News? In Germany, with a Law.’ *Washington Post* (5 April 2017) <https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2_story.html> accessed 1 July 2018.

⁷ See UK Home Office, ‘Online Harms White Paper - Executive Summary’ (*GOV.UK*, April 2019) <<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper-executive-summary--2>>, Joe Tyler-Todd and John Woodhouse, ‘Preventing Misinformation and Disinformation in Online Filter Bubbles’ <<https://commonslibrary.parliament.uk/research-briefings/cdp-2024-0003/>>.

online during the three months preceding the election's first day and until the election's end⁸; and Singapore granted the Government authority to order the removal of statements of fact deemed false or misleading, allowing for fines or imprisonment in cases of violation⁹ (among many others). The EU initially relied on self-regulation, only to realize its many limitations and enact the Digital Services Act as the world's foremost example of a regulatory regime for online content moderation¹⁰. The US, on the other hand, continues to rely on self-regulation at Federal Level, even if States are increasingly active in passing laws to prevent "online censorship"¹¹. The US government is also increasingly criticizing the EU for censorship of lawful speech and exploitation of American companies and interests¹².

Meanwhile, digital platforms are under a constant barrage of criticism for either over or underenforcing their community guidelines and terms of service¹³, leading some of them to advocate for governmental regulations delimitating what they should do¹⁴, only to then backtrack, abandon fact-checking and fall back into the "mandatory content moderation is censorship" camp¹⁵. In academia, partnerships between lawyers and technologists to identify and fight

⁸ Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information (Dec. 22, 2018), <https://perma.cc/QH5N-25MC>; Nicolas Boring, 'Government Response to Disinformation on Social Media Platforms: France' (*Library of Congress*, September 2019) <https://www.loc.gov/law/help/social-media-disinformation/france.php>

⁹ See Singapore's Parliament, Protection from Online Falsehoods and Manipulation Bill 2019 [10/2019].

¹⁰ See <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

¹¹ Benjamin Din, 'Federal Judge Blocks Florida's Social Media Law' (*POLITICO*) <<https://www.politico.com/news/2021/06/30/judge-block-florida-social-media-law-497442>>; James Pollard, 'Federal Judge Blocks Texas Law That Would Stop Social Media Firms from Banning Users for a "Viewpoint"' (*The Texas Tribune*, 2 December 2021) <<https://www.texastribune.org/2021/12/01/texas-social-media-law-blocked/>>.

¹² <https://www.reuters.com/world/europe/vance-uses-munich-speech-criticize-europe-censoring-free-speech-2025-02-14/>

¹³ Will Oremus, 'Why Twitter Isn't Banning Alex Jones, According to a Top Executive' [2018] *Slate Magazine* <<https://slate.com/technology/2018/07/twitters-vijaya-gadde-on-its-approach-to-free-speech-and-why-it-hasnt-banned-alex-jones.html>> accessed 18 October 2018.

¹⁴ See 'Opinion | Mark Zuckerberg: The Internet Needs New Rules. Let's Start in These Four Areas.' (*Washington Post*) <https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html> accessed 2 April 2019; Shannon Liao, 'Tim Cook Says Tech Needs to Be Regulated or It Could Cause "Great Damage to Society"' (*The Verge*, 23 April 2019) <<https://www.theverge.com/2019/4/23/18512838/tim-cook-tech-regulation-society-damage-apple-ceo>> accessed 24 April 2019. and Kent Walker, 'Smart Regulation for Combating Illegal Content' (*Google Public Policy Blog*, 14 February 2019) <<https://www.blog.google/perspectives/kent-walker-perspectives/principles-evolving-technology-policy-2019/smart-regulation-combating-illegal-content/>> accessed 6 June 2019.

¹⁵ <https://www.nytimes.com/live/2025/01/07/business/meta-fact-checking>

disinformation were initially lauded as saviors of democracy, only to be faced with lawsuits for censoring alternative viewpoints that led to the shutdown of many important initiatives¹⁶.

As countries, companies, and societies scramble to find a solution to disinformation through new legal or extra-legal requirements, some questions remain mostly undiscussed or lack an empirical analysis: under what standards should governments intervene? Which authority would be responsible for enforcing these new regulatory standards? and how to design standards that are actually effective in preventing the spread of online disinformation *and* can be used by authorities to consistently adjudicate disputes in different contexts and across time? A 2019 literature review on disinformation campaigns stressed the urgency for more research on “*the effects of new laws and regulations intended to limit the spread of disinformation*”¹⁷, and while our academic knowledge has progressed ever since¹⁸, many of these pressing questions remain largely unaddressed.

This article helps shed light on these outstanding questions by presenting a case study of Brazil. The world’s seventh-largest country in population (approx. 215 million citizens), Brazil established an election-focused court-based system of content moderation and adjudication since the end of the country’s military dictatorship and the reestablishment of democracy in the late 1980s. More specifically, during bi-annual election periods, an army of around 3,000 career State and Federal Judges and 3,000 State and Federal prosecutors is temporarily transferred to electoral courts to oversee the fairness of the poll, including the veracity of different forms of political advertisement. Since the 2018 Brazilian presidential elections, these judges and prosecutors have also been empowered to adjudicate disputes around the sharing of online disinformation, granting all candidates, political parties, prosecutors and others the ability to sue—and sure enough, “fake news” has become a central topic of Brazilian elections since the 2018 poll that elected President Jair Bolsonaro (deemed by some as the Trump of the tropics)¹⁹. This makes Brazil one of a kind in this arena for both its novel approach to target fake news, geopolitical importance, populational diversity and the independence and professionalization of its long-established electoral content moderation system.

¹⁶ <https://www.compiler.news/misinformation-research/>

¹⁷ See Joshua Tucker and others, ‘Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature’ <<https://www.hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf>> accessed 24 May 2019., p. 7.

¹⁸ **Cite papers.**

¹⁹ <https://www.nytimes.com/2024/08/01/magazine/brazil-bolsonaro-trump.html>

One problem with studying Brazil has been the lack of high-quality data that can enable a comprehensive analysis of the Brazilian case. We overcome this problem by building two novel databases. First, we used a mixture of automated and hand-coding techniques to create a comprehensive database of *all* 1500 disinformation cases adjudicated by the Brazilian courts during the 2018 elections. We complement this comprehensive database with a more restricted sample of cases adjudicated by Brazilian courts during the 2022 elections, when President Lula beat Bolsonaro in a process similar to what happened with Presidents Trump and Biden during the 2016 and 2020 US elections. We then trace the evolution of the Brazilian Supreme Court’s “Anti-Fake news” inquiry, which was initiated before the 2020 elections and has been ongoing ever since. This highly controversial inquiry has empowered one Brazilian Supreme Court Justice (Alexandre de Moraes) to play an increasingly powerful role determining the takedown of online content in Brazil—leading to a showdown against Elon Musk that ultimately led to the temporary suspension of the Twitter/X platform in Brazil and a 2025 lawsuit in the US against Justice Moraes by both Rumble and the Trump Media Group for alleged illegal censorship of right-wing voices²⁰.

Our results paint a complex and nuanced picture of the Brazilian case. In many ways, the Brazilian model is a step forward to democratic accountability in comparison with models that rely primarily on self-regulation by platforms or opaque administrative systems controlled by unelected bureaucrats—it is transparent, independent and professionalized. However, the Brazilian Court-led system also has important limitations: difficulties in developing coherent standards that can be replicated, the need for fast responses during elections lead to many unsubstantiated decisions, progressive centralization in the Supreme Court with limited appeals, fragmented decisionmaking about specific content is insufficient to deal with systematic spread of disinformation by organized groups.

In order to advance this argument, this article is divided in five parts. Part II explains the Brazilian model in more detail, outlining the evolution of the Brazilian content-moderation regime. Part III presents our empirical results for the 2018 (part III.A) and 2022 elections (Part III.B), as well as the post-2022 evolution of the Supreme Court’s anti-fake news investigation (Part III.C). Part IV first builds on the work of Jack Balkin to develop a theoretical framework that enables a

²⁰ See <https://apnews.com/article/trump-lawsuit-brazil-judge-bolsonaro-0061c2f1ea145e3ce3714aa25f49ba67> ; <https://www.nytimes.com/2025/02/19/world/americas/trump-brazil-bolsonaro-judge.html>

critical analysis of the Brazilian case, and then discusses the strengths and weaknesses of the Brazilian model (Section IV). A conclusion follows.

II. Elections and the role of the Brazilian judiciary in tackling disinformation

Brazil hosts a complex and mature election system. Elections take place every even year, always in October/November. Every four years (e.g. 2014, 2018, 2022), the country elects a new President, a new federal House of Representatives and a portion of the Federal Senate,²¹ new state Governors, new state Congresses. Two years after Federal and State elections (e.g. 2020, 2024), the country votes on mayors and municipal legislatures. Elections for President, Governors and Mayors have run-offs with the two most voted candidates if no candidate reaches at least 50% of the valid votes in the first run.

With a population of approximately 215 million people, Brazil is the world's fourth-largest democracy and a highly connected nation. According to the most recent data, 130 million Brazilians are active social network users, and the country is among the largest markets for Facebook (127 million monthly active users), WhatsApp (120 million), Instagram, YouTube and Twitter/X. Moreover, Brazilians trail citizens from developed countries in educational attainments, potentially making them more susceptible to disinformation. As a result, Brazilian authorities identified "fake news" as a potential threat to the high-stakes 2018 presidential elections and adjusted the election monitoring structures to deal with it.

Brazil hosts a sophisticated electoral court system tasked with the organization of fair and safe elections. During election periods, normally three-months before and after an election, an army of around 3,000 State and Federal Judges and 3,000 State and Federal prosecutors is temporarily transferred to electoral courts to oversee the fairness of the poll. Electoral courts are divided into three branches: around 2,500 electoral district courts; 27 Electoral Courts of Appeals (*Tribunais Regionais Eleitorais*, or TREs), one for each of the 26 Brazilian States and another for the Federal District around the Brazilian Capital²²; and the Superior Electoral Tribunal (*Tribunal*

²¹ Each state is represented by 3 Senators, which serve an 8-year term. Senatorial elections are organized every four years, together with the presidential election, renewing 1/3 or 2/3 of the Senate every other election.

²² Which is similar to Washington D.C. in that it is a Federal District, but different in that residents both elect three Senators and have proportional representation in the Brazilian Federal Congress.

Superior Eleitoral, or TSE), Brazil’s highest electoral court. Career judges and prosecutors are appointed to each of the electoral districts²³. The TSE is composed of seven justices²⁴. The TREs follow a similar composition, reflecting lower court appointments²⁵. Both the TSE and TREs also appoint auxiliary justices who are responsible for specific matters, whose decisions are appealable to the full-court.

Brazilian Courts have been trying to address problems associated with online disinformation and irregular electoral advertisement for decades. The system was initially enacted to control what candidates for office would state to the public in the federally funded TV and Radio slots that allocated to political parties during the election period. Since 2009, the Brazilian electoral law has specific provisions: (i) affirming that online platforms must abide by electoral courts’ decisions; and (ii) establishing a safe harbor that exempts platforms from direct liability associated with the illegal content as long as companies were unaware of the content’s illegal nature. As amended in 2017, the law grants the TSE powers to establish “good practices” regarding political advertisement on online platforms. More controversial, in 2017, the TSE expanded on such powers to establish, through a formal rulemaking process, restrictions on disseminating “*facts known to be untrue*”, the standard for taking down false online content. The same regulation also affirms that disinformation is not part of voters’ general freedom of speech; therefore, can be abridged through judicial rulings.

Brazilian law has also been expanded over the years to restrict undue attribution of content to third parties and the use of fake profiles during electoral campaigns. Current law criminalizes or imposes fines against anyone who: (i) unduly attributes the authorship of online electoral advertisement to third parties; (ii) directly or indirectly contracts out individuals or groups to offend candidates or a party through online messages or comments, punishing both the contracting party as well as the contracted parties; or (iii) disseminates content through fake online profiles.

Any candidate, political party, electoral coalition, or public prosecutor may file a complaint alleging the violation of Brazilian Electoral Law. Citizens and companies may not file complaints

²³ Brazil has a career judiciary similar to France. Judges and prosecutors of lower courts are selected based on nationwide exams where positions are allocated according to test scores. Judges and prosecutors then slowly move up the ranks until they reach appeal courts or leadership positions. Supreme Court Justices are appointed by the President and confirmed by the Senate, as in the US.

²⁴ Three of these are Brazilian Supreme Court Justices, two are Justices at the Superior Court of Justice (STJ) and two civilians appointed by the Brazilian President from a short list provided by the Supreme Court (usually lawyers or law professors). Seven substitute-judges can replace the justices in case of absences.

²⁵ Instead of Supreme Court Justices, TRE members are Circuit Court judges.

but may be defendants. Complaints are usually filed before district courts. District-level decisions can then be appealed to TREs and, in restricted circumstances, to the TSE.

These decisions are taken under expedited procedural rules—candidates have between 24 to 72 hours to complain against offensive content. Judges must rule on the matter within 24 hours, and normally issue preliminary rulings before hearing defendants. Defendants have 48 hours to either challenge the initial complaint or the interim order. Judges then issue a final ruling. Appeals follow a similar expedited time-frame: 24 hours to file the appeal, 48 hours to file counter-arguments and 48 hours for the appellate court to rule. In some cases, complaints may be filed directly before TREs/TSE, depending on the claimant and the nature of the claim. This was the case for disinformation proceedings relating to the 2018 and 2022 Brazilian elections: as the election involved only Executive and Legislative positions in the State and Federal Governments, only the TREs and the TSE were involved in adjudication. Relevant to this discussion, the 27 TREs and the TSE had each previously appointed three auxiliary judges (84 in total) who would be responsible for handling disinformation claims.

Judges have basically four alternatives when deciding a complaint alleging that someone is spreading disinformation in violation of Brazilian laws:

- (i) decline jurisdiction if the matter does not directly impact the electoral process/results;
- (ii) grant candidates a “right of reply,” through which the candidate may express their views on the matter on the same venue where the original offense took place²⁶;
- (iii) issue a takedown order against the infringing content, including orders prohibiting the content from being reposted online; and/or
- (iv) impose civil fines—including fines against platforms to ensure compliance.

These can be applied concomitantly, meaning that judges may grant a right of reply, issue a takedown order, and impose a civil fine as the result of a single complaint. In their decisions, Judges are expressly required to balance out the potential restriction of freedom of expression rights vis-à-vis the potential harm to isonomy between candidates and the fairness of the electoral

²⁶ For example, political party J is allocated a 10-minute electoral advertisement slot during prime time Brazilian television. During that time, candidate for office A makes a statement against candidate B deemed to be untrue. The Electoral Court, then, can grant candidate B a right of response worth X minutes to be broadcasted during the next 10 minutes that party J holds in that same prime slot in the future.

process. Importantly, the law also requires that all complaints against online content identify the specific URL linking to that content, meaning that judges can decide between ordering the takedown of a specific URL or issuing a general order for removal of that content. Judges may also order the takedown of the entire hosting platform if the platform repeatedly fails to comply with Court rulings. Also importantly, all electoral takedown orders are interim in nature and are automatically revoked once elections are over. This system runs in parallel to civil litigation-- parties may file civil lawsuits to require the permanent removal of the content and request compensation for any damages through a regular tort case at any moment.

Over the years, the TSE and some lower courts issued controversial decisions that directly restricted freedom of expression rights in ways that would probably be difficult to reconcile with constitutional protections in countries like the US. These include a prohibition on candidates from openly criticizing their competitors (a prohibition on “negative political advertisement”), one qualifying a satirical YouTube movie where a citizen depicted a candidate as having horns and wearing a clown nose as a negative political advertisement (therefore illegal); and another prohibiting candidates from using telemarketing services.

III. Shedding Light on the Brazilian Case Study

This part summarizes the Brazilian case study, dividing it into three parts. III.a covers the 2018 Brazilian Federal elections. Part III.b. covers the 2022 Brazilian Federal elections. Part III.C. covers the aftermath of the 2022 election until early 2025.

a. Disinformation Adjudication in the 2018 Brazilian Elections

Fake news were a central topic of the 2018 Brazilian elections, which led to the election of President Jair Bolsonaro with roughly 55% of all valid votes. Throughout the election period, many candidates accused each other of spreading fake news, and a major accusation that Bolsonaro was relying on a disinformation sharing network to get elected surfaced in 20 October 2018, a week before the final run-off vote between him and Worker’s Party candidate Fernando Haddad²⁷. Some international and national commentators allege that Fake News were a decisive factor in the outcome of that election²⁸, though others challenge such allegations and attribute Bolsonaro’s

²⁷ <https://www.theguardian.com/world/2018/oct/18/brazil-jair-bolsonaro-whatsapp-fake-news-campaign>

²⁸ <https://www.wilsoncenter.org/blog-post/brazil-fell-for-fake-news-what-to-do-about-it-now>

election to the Worker's Party multiple corruption scandals and the fielding of a candidate with limited political appeal²⁹.

No matter the potential impact on the outcome, the central role of Fake News in the election increases interest on the response of the Brazilian judicial system to the problem. To understand the judicial response one must first obtain access to the decisions issued by judges. Brazil, however, has no private or public, comprehensive, searchable case law database. Historically, each Brazilian Tribunal has been responsible for its own IT systems, leading to significant discrepancies. TSE itself hosts a searchable public database³⁰, but this database is not reliable³¹.

To overcome these challenges, FGV-CEPI, a research center on innovation and technology policy within FGV Law School in São Paulo, developed a comprehensive, machine-readable electoral case database for the 2018 Brazilian Elections that contains all 1492 online disinformation cases and their respective metadata.³² The database was created to facilitate research on disinformation in Brazil. To do so, FGV-CEPI first developed a web scraper that allowed the download of judge-issued documents available at the Brazilian nationwide electronic procedure system (PJe), first deployed in 2016,³³ and then used a series of RegEx codes to broadly

²⁹ https://www.youtube.com/watch?v=ym8t7T_c9cw

³⁰ Available at <http://www.tse.jus.br/jurisprudencia/decisoas/jurisprudencia>

³¹ First, it is optimized to return fast queries and a maximum of 1000 results; this sacrifices accuracy, meaning that similar searches yield different results. Second, and most worrisome, the database requires judges to manually upload cases to TSE's system, which becomes particularly challenging when judges are overloaded with 24-hour deadlines. The differences in resources between jurisdictions could also indicate that results are biased as judges in more resourceful courts are more likely to upload cases than those in less resourceful courts. TSE judges themselves told us they do not trust their database.

³² The database was published in 2019 and is available at <https://direitosp.fgv.br/en/projetos-de-pesquisa/eleicoes-fake-news-tribunais-desinformacao-online-nas-eleicoes-brasileiras>. Rodrigo Karolczak was the main researcher in charge of developing the database, which relied on an unconditional grant from Facebook (meaning that Facebook funded the works that led to its creation but retained no overseeing powers over the final construction of the database).

³³ Since 2016, Brazilian electoral courts started using a new, nationwide electronic system known as "Processo Judicial eletrônico," or "PJe". The PJe is slowly digitalizing the entire Brazilian judiciary, meaning that all procedural steps are now electronic: parties file electronic complaints (including evidence), judges then issue electronic decisions, parties file electronic appeals and so on. The use of the PJe was mandatory for all classes of complaints that could encompass disinformation cases during the 2018 elections. However, while the PJe significantly increases the efficiency of the judiciary and is a reliable source of information for researchers, it only allows for individualized access (a researcher can only access one proceeding at a time), and there is no centralized general search functionality.

identify disinformation cases.³⁴⁻³⁵ This paper further refines that database. At the the Competition, Public Policy, Innovation, and Technology (COMPPIT) Nucleus at FGV FGV Direito SP, we trained a group of 10 undergraduate and graduate law students to manually code the content of these 1492 cases.³⁶ This resulted in 2,850 manually-coded decisions—because there are interim rulings, appeals and others, one case may have multiple decisions. After further filtering of cases with incomplete public information and cases that did not really involve disinformation adjudications, this number dropped to a final of 2186 decisions.

Our 2018 codebook included information such as:

- (i) the involved parties (e.g. if plaintiffs are incumbent politicians and whether defendants are politicians, platforms, citizens or journalists);
- (ii) whether the decision resulted in content takedown, fines, rights of response, and/or bans on reposting similar content;
- (iii) The URLs challenged, the type of content (post, image, video, etc.), including whether the specific URL has been taken down or not;
- (iv) How plaintiffs characterized their claim (facts “known to be untrue,” defamation, libel, slander, offense against honor) and how judges ruled on these claims;
- (v) Under what legal basis judges ordered the takedown of the content;
- (vi) Objective information on the judges (including gender and appointment process).

³⁴ This effort resulted in a dataset of over 95,000 cases between December 2017 and March 2019, covering more than the entire 2018 electoral period. Second, CEPI-FGV developed a word search utilizing regular expressions of terms in three categories: (i) fake news, disinformation, and “known to be untrue” information; (ii) online content, digital content, and social media-related terms; (iii) date and time terms to restrict the focus to the 2018 elections. This resulted in over 850 useful expressions and a preliminary sample of 2,928 cases that match one wording at least in categories (i) and (ii). Finally, CEPI manually curated the cases to filter out any disputes that did not involve online “fake news” claims; that is, online content challenged for untruthfulness, fake news, disinformation, libel or similar. Because of the lack of strict definitions for what constitutes online disinformation, it incorporated a broad scope of language that minimally signifies that a content may be untrue. The final sample consists of **1,492 cases**, which should be close to the entire population of online misinformation cases decided by Brazilian courts during the 2018 Federal and State Elections

³⁵ The web scraping process makes 100 attempts at accessing estimated identification numbers after the last known collected case in a given court. There is regulation on case identification numbering and Courts tend to follow the labeling procedure. However, due to idiosyncrasies or error, a case may be misnumbered. Cases that are numbered in such a way that they are over 100 units of distance since the last known case were not collected, as searching for them would incur significant processing costs. This was a conservative approach to ensure a complete sample. Therefore, while some cases may be outside of our numbering sample, these cases are random and non-systematic and, as such, should not materially impact our results.

³⁶ We developed a template for coding the cases. Then, we initially provided a sample of coded cases to teach students how to correctly label the cases. We then split students into groups to promote exchanges and add consistency within the groups. Finally, we held bi-weekly meetings with all students to discuss the coding and settle any potential discrepancies.

i. General trends

Our database covers the entire Brazilian election period for 2018. As expected, the number of cases grows as the first and second voting rounds get closer (October 7th and 28th, respectively). It is also worth noting a spike of cases in early August, though we cannot clearly identify why.

Figure 1: timeline of initial rulings

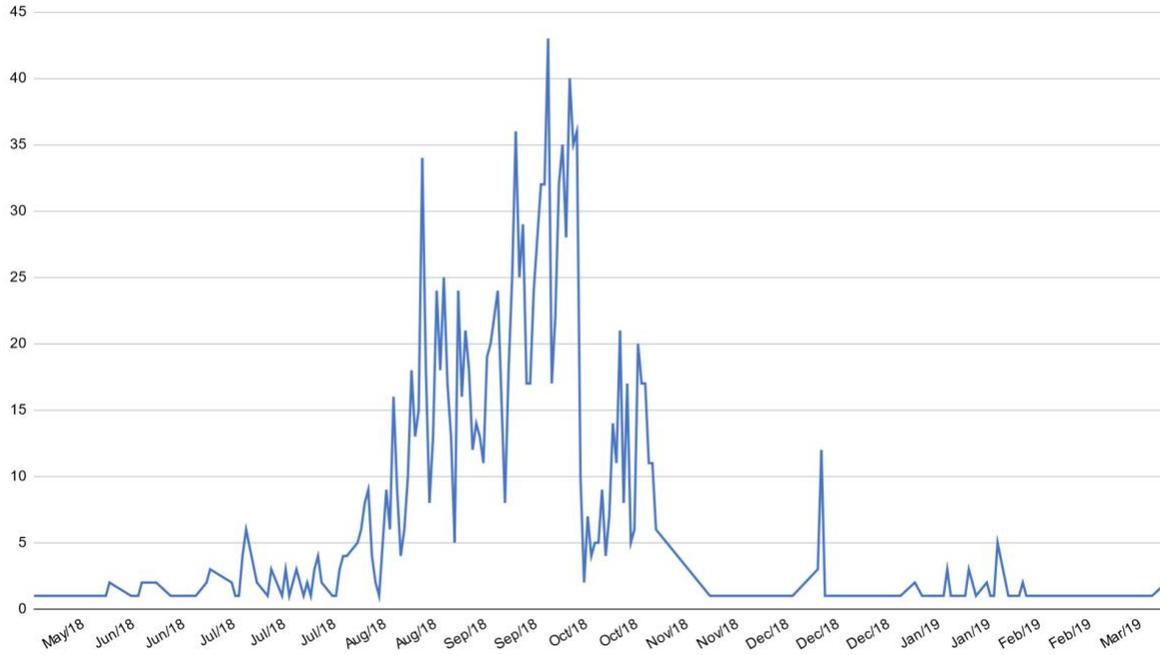


Table I provides summary statistics. Data available for each decision tracks citations of nine relevant articles of law, citation of court cases, how judges utilized evidence for standards of truth, characteristics of individual judges, and characteristics of each decision. We have:

- i. Grouped up mentions to legal articles of the Brazilian Constitution and related regulations that promote freedom of expression³⁷ in a binomial that is assigned to one whenever any of these articles are cited;
- ii. Created a binomial variable for procedural articles³⁸ that generally empower the courts to act and order removal of online content;

³⁷ Federal Constitution Articles 5 and 2020, Resolution #23551 Article 33.

³⁸ Resolution #23551 Article 6, Law #9504 Articles 57 and 58.

- iii. Grouped articles that stipulate prohibited electoral advertising, facts known to be untrue, and the electoral crime of libel, defamation, and sharing of false information;³⁹ and finally
- iv. The “Standards of Truth” category refers to how judges decided whether the underlying content involved or not a “fact known to be untrue”, which is the official legal standard. We divided cases under the categories “not considered” (when the judge does cite the legal standard “facts known to be untrue”), no additional sources (meaning that the judge does not cite any additional source when discussing whether the alleged content promotes a “fact known to be untrue”), the use of non-official sources such as press reports or other material in discussing whether there is a “fact known be untrue” in the online content, and the use of official government sources such as police report or others.

Table 1: Descriptive Statistics of Decisions

	Avg.	Std. Dev.	Variance	Min	Max	N
Content Removal	0.51	0.50	0.25	0.00	1.00	2186
Freedom of Expression	0.54	0.50	0.25	0.00	1.00	2186
Procedural Matters	0.57	0.50	0.25	0.00	1.00	2186
Electoral Advertisement	0.38	0.49	0.24	0.00	1.00	2186
Court Case Citation	0.47	0.50	0.25	0.00	1.00	2186
Standards of Truth: Not Considered	0.42	0.49	0.24	0.00	1.00	2186
Standards of Truth: No Additional Sources	0.40	0.49	0.24	0.00	1.00	2186
Standards of Truth: Non-official Sources	0.09	0.29	0.08	0.00	1.00	2186
Standards of Truth: Official Sources	0.09	0.28	0.08	0.00	1.00	2186
Federal Judge	0.17	0.37	0.14	0.00	1.00	2186
State Judge	0.63	0.48	0.23	0.00	1.00	2186
Appointed Lawyer	0.20	0.40	0.16	0.00	1.00	2186
Female Judge	0.21	0.41	0.17	0.00	1.00	2186
Interim Ruling	0.53	0.50	0.25	0.00	1.00	2186
Appeal	0.09	0.28	0.08	0.00	1.00	2186
District Court Ruling	0.38	0.49	0.24	0.00	1.00	2186

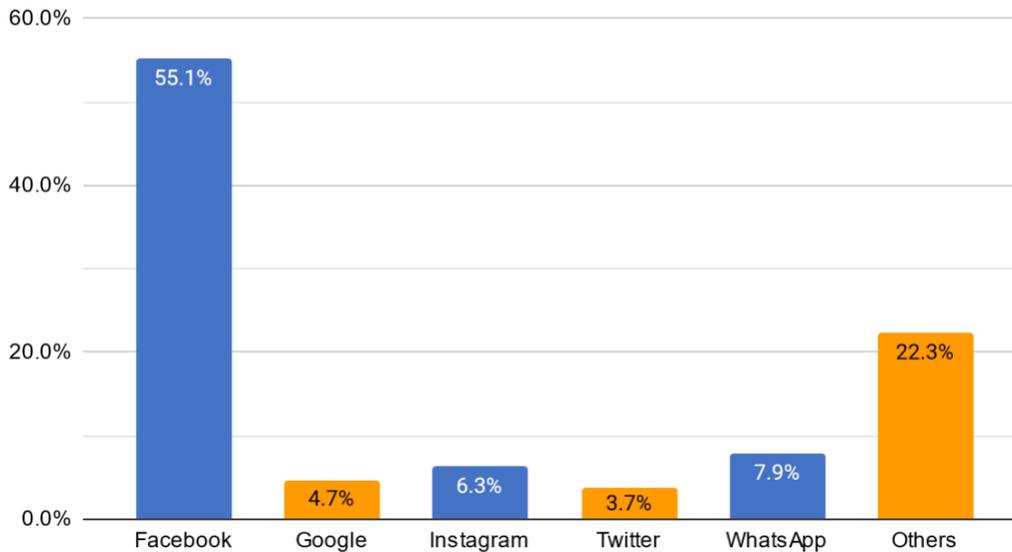
³⁹ Resolution #23551 Articles 17, 22, and 85, and Article 325 of the Electoral Code.

	Avg.	Std. Dev.	Variance	Min	Max	N
State GDP per Capita	32686.31	14967.98	224040420.92	13955.75	85661.39	2186
State Population	26241.71	50597.29	2560086154.88	576.57	208494.90	2186

The graphs below break down these cases in further detail.

Facebook accounts for the bulk of requests for removals (almost 70% of the URLs present in our database, considering Facebook/WhatsApp and Instagram). Google only received a small fraction of requests (Google encompasses YouTube). Others impacted agents include blogs and other websites such as news platforms.

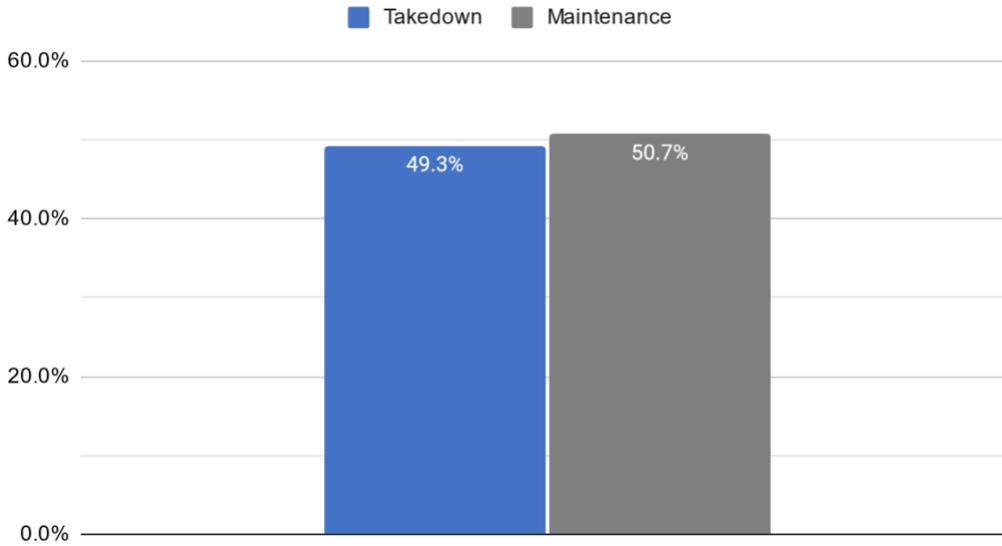
Figure 2: URLs by platform



Despite the several legal reminders that Courts must ensure freedom of expression, Brazilian judges ordered the takedown of content in almost 50% of cases brought before them,⁴⁰ a significant percentage by any account.

⁴⁰ This figure considers “takedown” as the judge ordering the removal of any type of content in a lawsuit. It is not broken down per requested URLs as in Figure 2.

Figure 3: Takedown ratio for the full sample



More worrisome, they ordered the takedown of content in 54.5% of cases involving lawsuits against ordinary citizens. When faced with specific requests to takedown entire profiles, judges ordered their entire removal in 27.6% of cases. When candidates were defendants, judges ruled on taking down content in 43.5% of the cases. Moreover, there were 62% more decisions in which citizens are defendants (876) than candidates (540).

Figure 4: Takedown ratio of claims against citizens

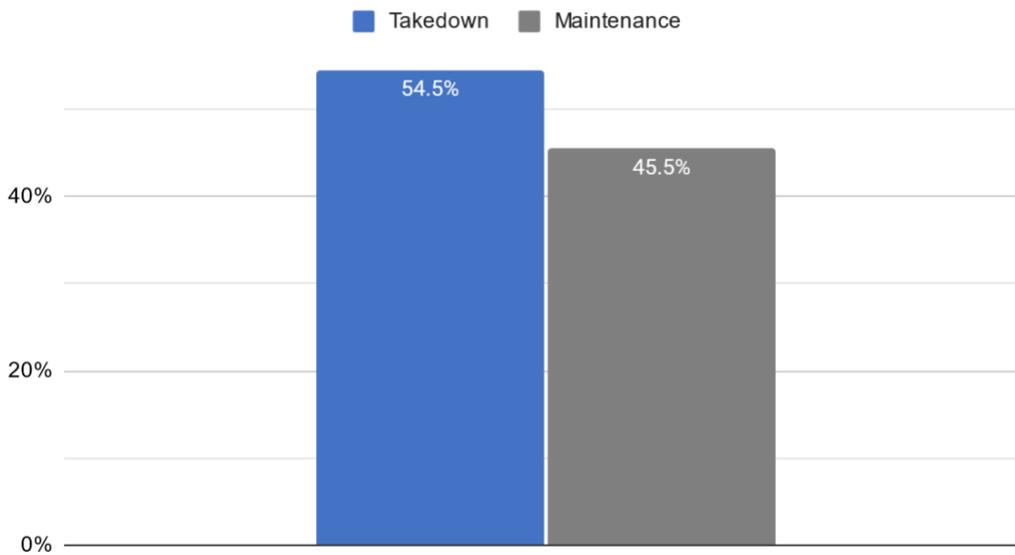
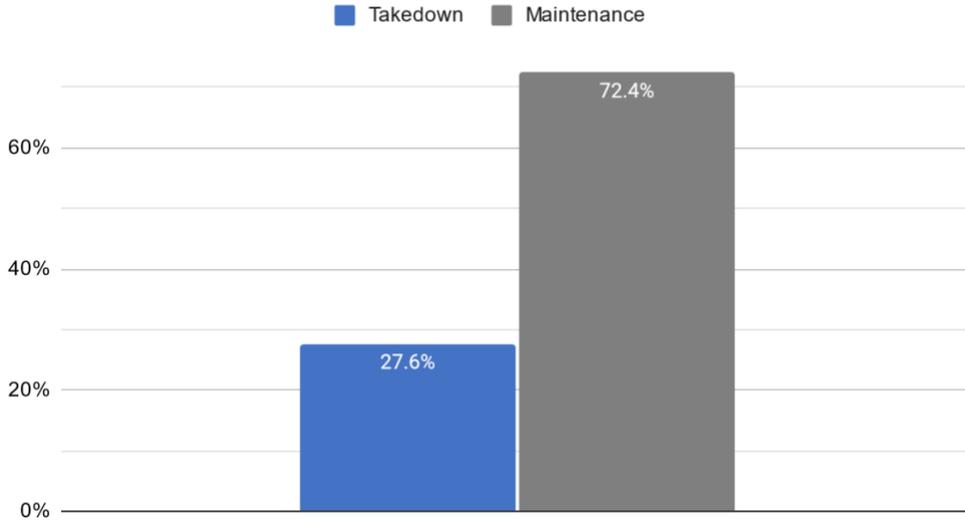
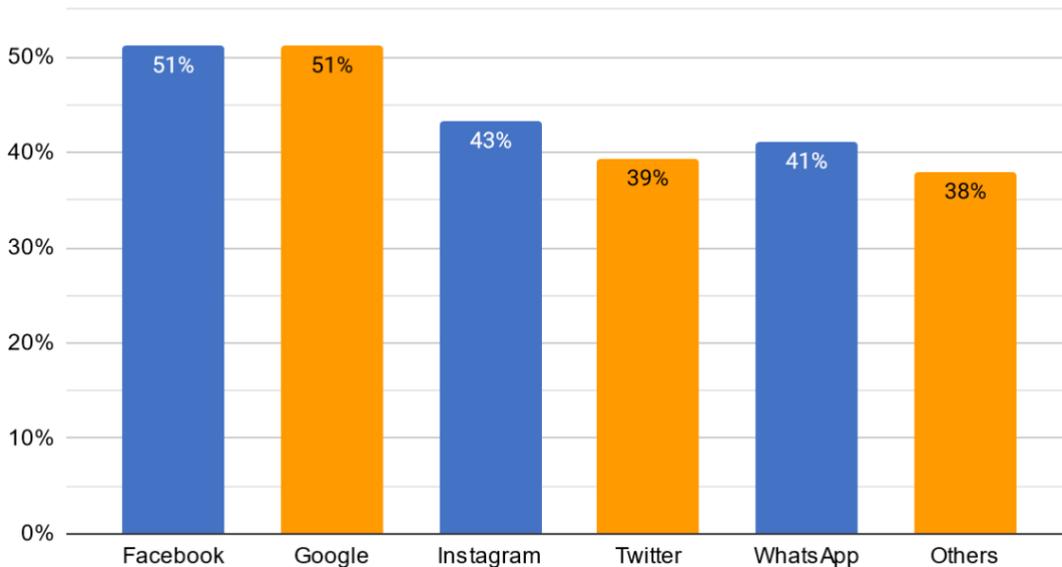


Figure 5: Takedown ratio of claims against social media profiles



Many expressed concerns that fighting disinformation will become harder the more users migrate towards encrypted peer-to-peer communication systems such as WhatsApp. While it represented only 8% of specific requests, judges issued takedown orders in roughly 41% of those cases,⁴¹ a ratio close to other platforms.

Figure 6: Takedown ratio by platform

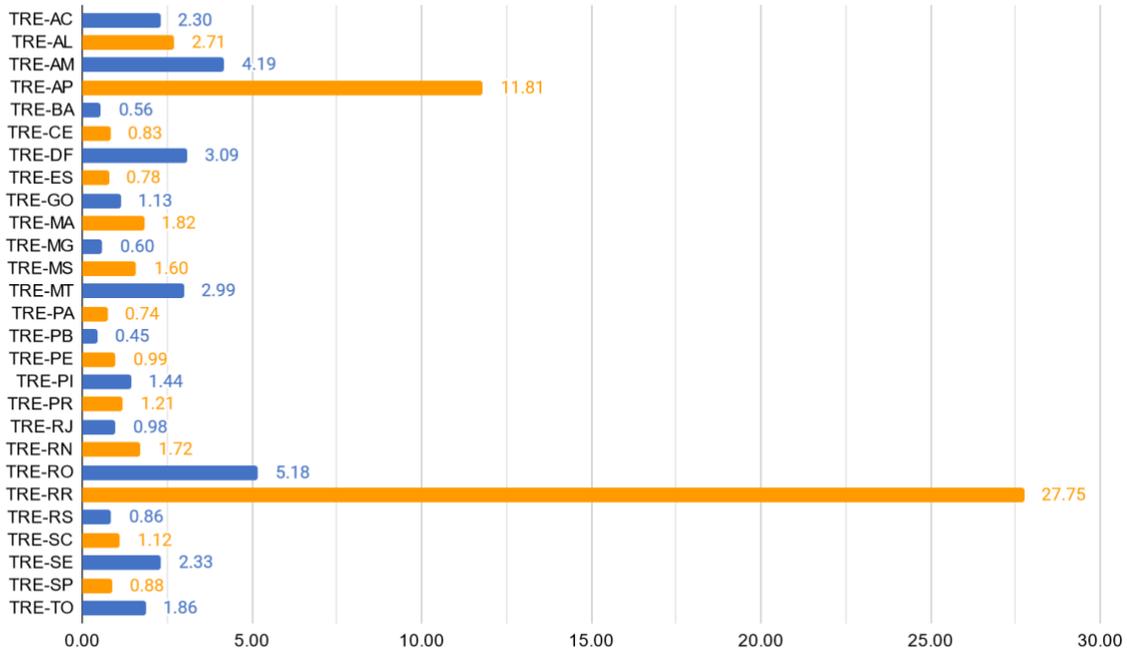


⁴¹ It is difficult, if not impossible, to enforce these orders against individuals or the Whatsapp, considering its peer-to-peer encrypted system. So, it is surprising to see these decisions in the sample.

ii. Political influence

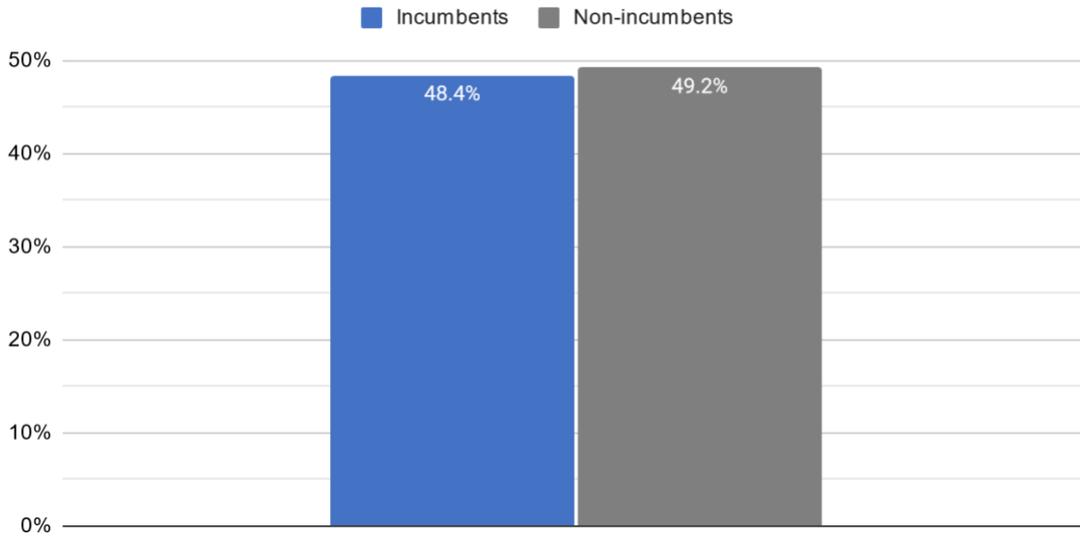
In general, broad freedom of expression rights are justified on a general fear of abuse by those in power: if a door is open for courts to control speech, elites and the government will quickly ensure that their points of view prevail. There is some initial evidence corroborating this fear: TREs in smaller, less economically developed States (e.g. Amapá, Rondônia, Roraima and Amazonas) received a disproportionately larger number of claims when compared to larger, more economically developed Brazilian States (e.g. São Paulo, Rio de Janeiro and Minas Gerais).

Figure 7: Cases by population (in 100.000) per State Court



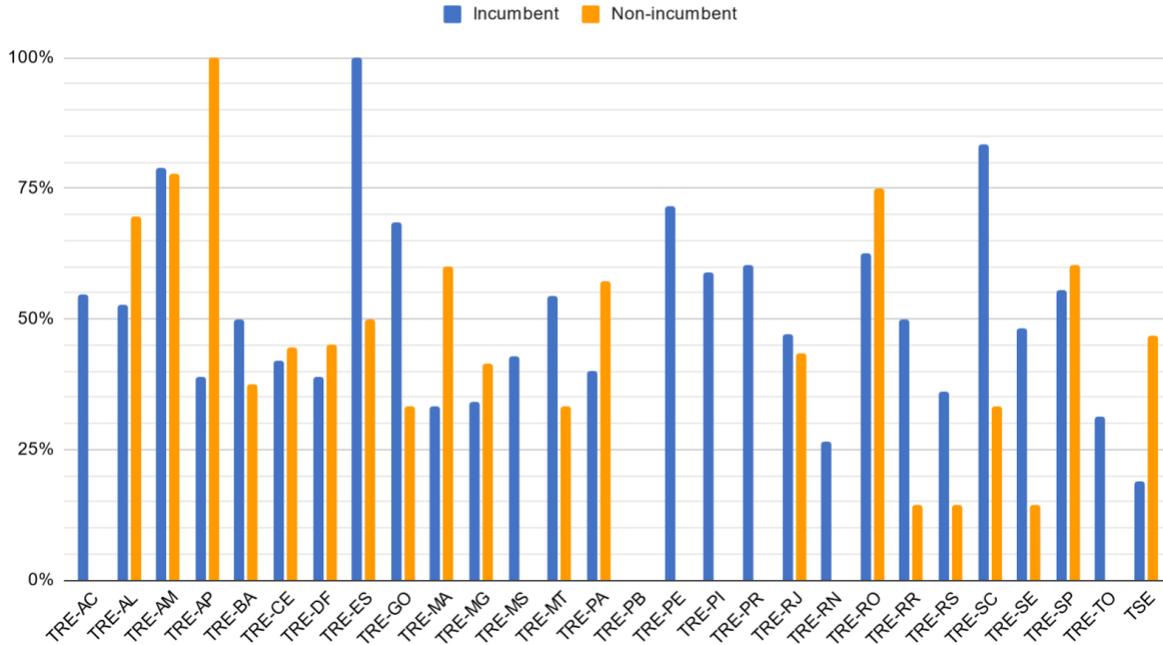
Nationwide, incumbents (considered those who occupied any public office in the year before the election) and non-incumbent politicians were equally likely to win takedown requests.

Figure 8: Initial success rate of incumbents and non-incumbents



Yet, it is interesting to notice how these averages mask significant heterogeneity within States. As shown below, incumbents are apparently significantly more likely to win cases than non-incumbents in many Brazilian States. Indeed, the average and the median win rate for incumbents within States is 49%, versus 35% for non-incumbents—showcasing how there is at least preliminary evidence of some form of capture by politicians. It is worth noting, that the incumbents also used the system much more, being responsible for 1,181 decisions versus only 396 for non-incumbents.

Figure 9: Incumbent and non-incumbent initial takedown success rate by Court



iii. The development of legal standards

Another concern relates to how judges behave and whether the system may develop coherent standards. Our initial results point to a somewhat worrisome picture. Judges only reverted 15% of interim rulings, which are normally decided without any form of defendant involvement. In addition, in 53% of rulings, judges do not quote a single piece of case law, a potential proxy for how well-argued the decisions are.

Figure 10: Reversal rate of interim ruling

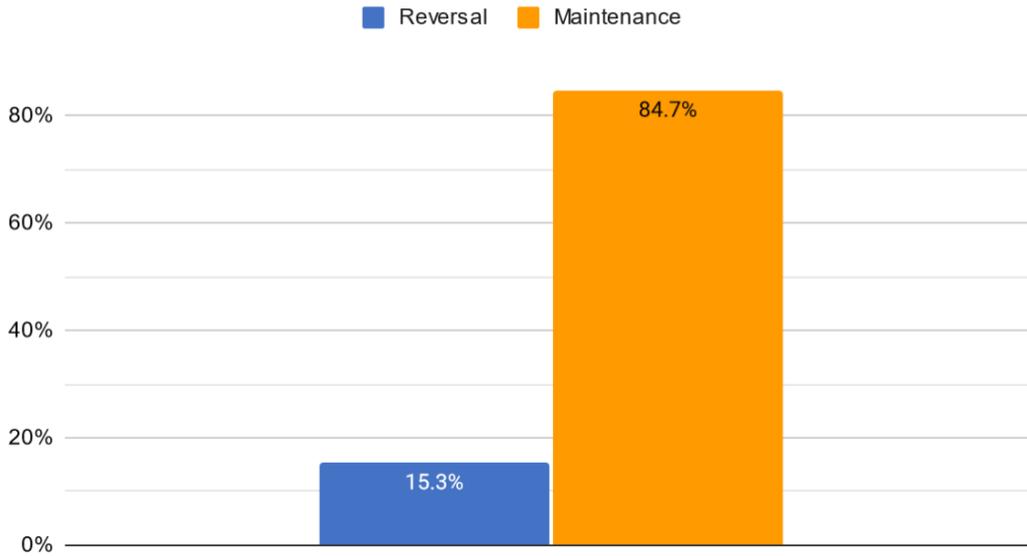
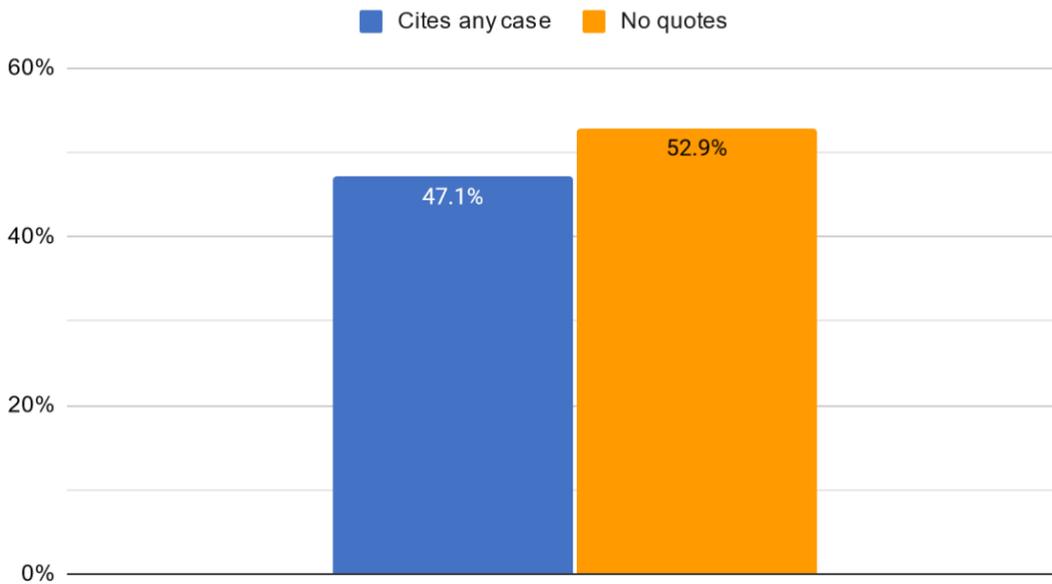


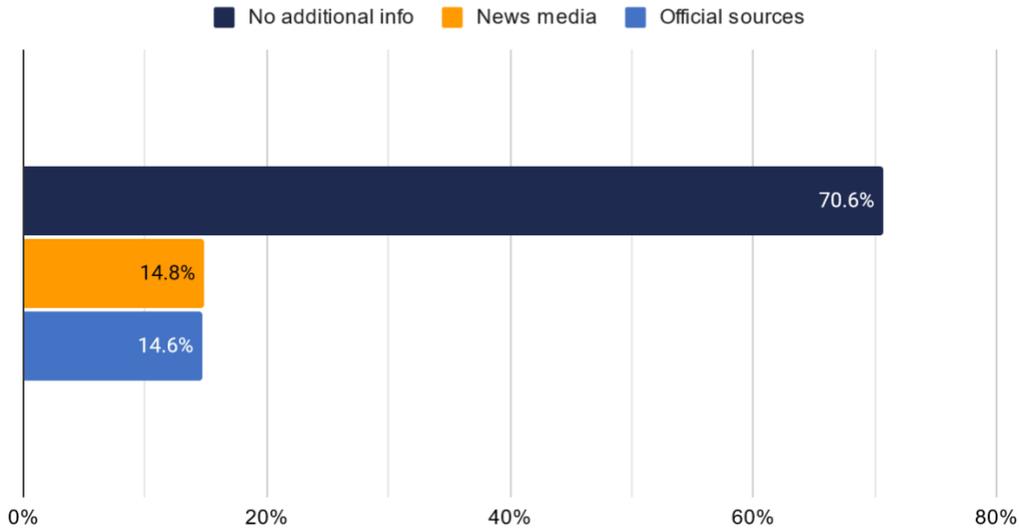
Figure 11: Case law quote rate



This might indicate that judges mostly decide cases based on first impressions. This concern is corroborated by the fact that in almost 70% of cases, judges did not cite or add any additional information or evidence to their rulings. They appear to simply judge by looking at the

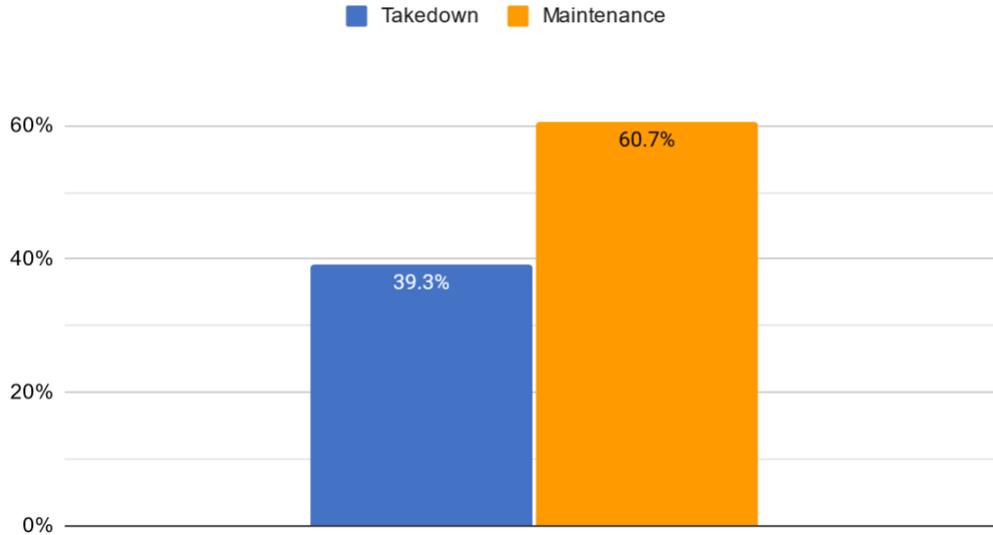
content of the material being challenged (complaints must include a copy of the challenged material).

Figure 12: Standards for "facts known to be untrue"



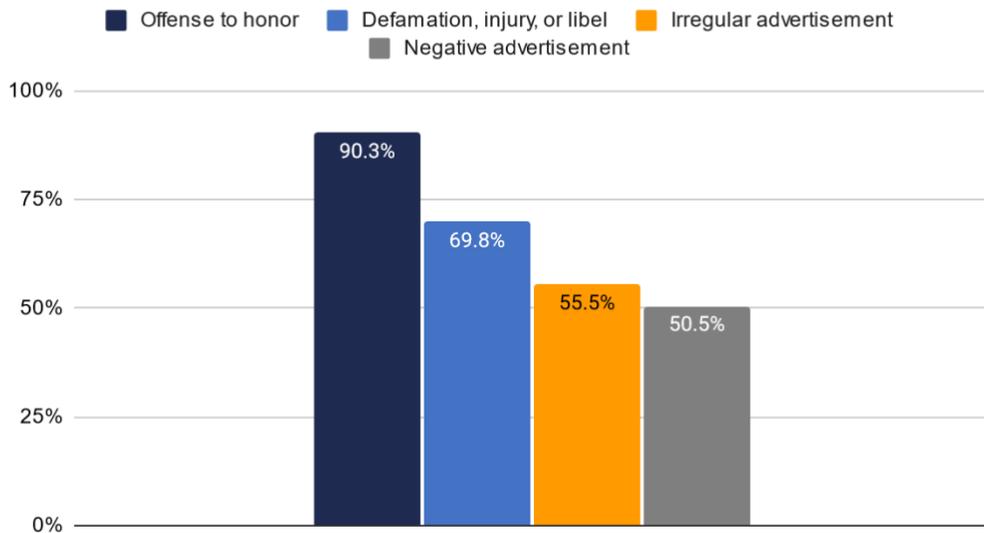
Perhaps surprisingly, takedown ratios are significantly smaller when judges research and quote case law. This may signal either that these are more complex cases that require additional research, that the simple fact of researching the legal standards makes judges more reluctant to take-down content or that judges believe they need bolder justifications to keep content online.

Figure 13: Takedown ratio if judge cites any case law



In 90% of cases, plaintiffs also alleged offense to honor, and 70% of claims combined accusations of disinformation with a punishable crime, such as defamation or libel.

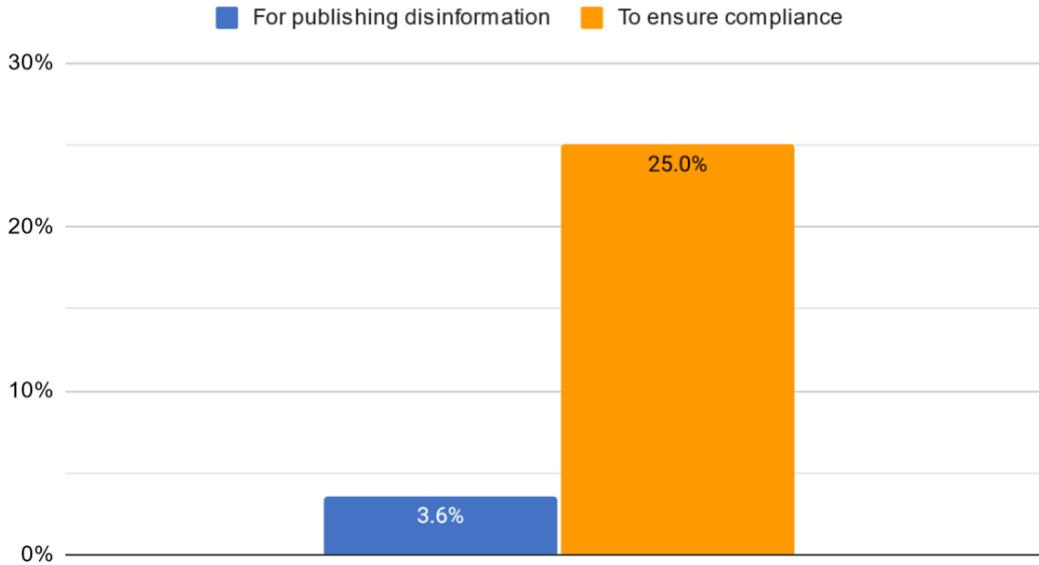
Figure 14: Distribution of other legal arguments by case



Finally, it is worth noting that despite their clear legal powers to impose fines for sharing disinformation and the overall 50% general takedown ratio, judges were reluctant to fine parties in legal proceedings. In only 3% of cases judges imposed fines for the sharing of disinformation;

in 25% of cases, judges imposed daily fines in case parties refused to comply with takedown orders.

Figure 15: Fine ratio by ruling



b. Disinformation Adjudication in the 2022 Brazilian Elections

The system described above remained in place in the 2022 presidential elections, with some adjustments. Electoral courts were once again called upon to evaluate online content, especially in social media, and decide whether it was violating electoral rules. Fake news were again at the center of the Presidential dispute⁴², now between Bolsonaro running for reelection against former president Lula, representing the Worker’s Party. Lula ultimately won the tightest-ever presidential vote in Brazil by a 51%-49% margin.

Brazilian electoral courts considered themselves to be better prepared to fight disinformation in 2022⁴³. The system was similar to the one described above for the 2018 elections, with two important exceptions. First, Courts expanded their power to adjudicate disputes by now relying on two alternative legal standards: (i) facts “*known to be untrue*” and (ii) “*gravely*

⁴² <https://www.washingtonpost.com/opinions/2022/10/27/brazil-election-bolsonaro-lula-fake-news/>

⁴³ <https://americasquarterly.org/article/one-year-later-brazil-has-never-been-so-prepared-to-fight-fake-news/>

decontextualized” information⁴⁴. Second, between the first and second round of the 2022 elections, Courts published a new regulation⁴⁵ that complemented existing rules and established: (i) additional sanctions to the dissemination of facts known to be untrue and gravely decontextualized that could affect “*the integrity of the electoral process*”; (ii) that the presidency of the Superior Electoral Tribunal could extend the effects of a decision of the Tribunal about disinformation to other situations with identical content; (iii) the possibility of suspension of profiles, accounts and channels involved in the “*production of systematic disinformation, characterized by the repeated publication of false and decontextualized information about the electoral process*”; and (iv) a prohibition of any paid dissemination of electoral propaganda in the internet. These new regulations were especially aimed at disinformation campaigns focused on the electoral process itself, such as recurrent accusations by then President Bolsonaro that electronic voting machines used in the elections were open to hacking attacks or somehow rigged⁴⁶. No evidence was provided to back these allegations up.

Two co-authors in this project were actively engaged in tracking disinformation adjudication in real-time during the election period through the FGV Law School Sao Paulo Disinformation Observatory for the 2022 elections⁴⁷. Unlike 2018, the goal was no longer to engage in a comprehensive analysis of all litigation before Brazilian Courts in the 2022 elections—many decisions are not publicly available in real time—but rather to identify and understand key rulings by different Brazilian electoral courts.

More specifically, FGV-CEPI and COMPPIT established a joint project, where 16 researchers followed the week-to-week evolution of court cases and their decisions throughout the election calendar. While we ran a web scraper in search of new cases, we also manually searched

⁴⁴ TSE. Resolution No. 23.610, of December 18, 2019, updated by Resolution No. 23.671, of December 14, 2021, which inaugurated the concept of “seriously decontextualized”, both available at: <https://www.tse.jus.br/legislacao/compilada/res/2019/resolucao-no-23-610-de-18-de-dezembro-de-2019> and <https://www.tse.jus.br/legislacao/compilada/res/2021/resolucao-no-23-671-de-14-de-dezembro-de-2021>. Accessed on March 06, 2025.

⁴⁵ Resolution No. 23.714, of October 20, 2022. Available at: <https://www.tse.jus.br/legislacao/compilada/res/2022/resolucao-no-23-714-de-20-de-outubro-de-2022>. Accessed on March 06, 2025.

⁴⁶ The Brazilian elections are conducted entirely through electronic voting machines. This was a hot topic during the election, which could affect the legitimacy of the electoral system itself. Several tests were made and there was no evidence of failure or tempering with electronic voting machines.

⁴⁷ The results of this project were posted online, with weekly reports about the key cases under adjudications. See all reports at the project webpage: <https://medium.com/observat%C3%B3rio-da-desinforma%C3%A7%C3%A3o-nas-elei%C3%A7%C3%B5es-2022>. Accessed on March 14, 2025.

for upcoming cases due to the limitations of following a live election⁴⁸ – again with the ultimate goal of identifying key cases rather than mapping all decisions.

The process of selecting and categorizing the decisions involved several criteria, focusing on key elements of the case, such as the type of judicial decision (i.e., interim or final), the parties involved, the facts and legal grounds set forth by claimants, and the merits of the case (as established by the decision). Each decision was analyzed in terms of its relevance, considering the jurisdiction (the higher court – TSE – or state-level courts – TRE) and the type of measure applied (removal, compensation, right of reply, among others). Additionally, the legal reasoning supporting the decisions were evaluated, such as the citations to relevant legal provisions (such as articles of Resolution No. 23.610 and the Electoral Code).

The analysis also focused on the specific aspects of disinformation, seeking to understand the rationale behind the decision, i.e., the criteria used to approve or reject the request for taking down content. This procedure allowed the researchers to capture the most significant and relevant decisions for the electoral observatory, with the aim of providing real-time, valuable data and insights on how the Electoral Justice was dealing with disinformation in the 2022 elections. This initiative took shape, mainly, in the form of weekly online bulletins, published on a free access basis. The researchers also participated in webinars aimed at discussing the project and contributed sporadically with press coverage by answering interviews from journalists before, during, as well as after the elections.⁴⁹ Following this path, the Disinformation Observatory identified and analyzed a total of 427 decisions connected to the 2022 electoral voting process. Out of this total, 331 decisions were related to the removal of content and profiles. Almost half of the decisions (155 decisions, representing 47% of the sample) denied the removal of content, finding the claims incompatible with either of the two legal standards for disinformation removal. The other 176 decisions (53% of the sample) ordered the takedown of the content⁵⁰.

⁴⁸ Some decisions were not caught on the weekly scrapping, either because they had not been published yet at the Official Gazette or because of technical difficulties with the scrapper and filters used. In any event, the researchers also followed the press releases of the superior courts and manually gathered relevant decisions not caught in the scraping process.

⁴⁹ FGV Direito SP made an agreement with Folha de São Paulo, a large newspaper based in São Paulo, to provide realtime information and analysis about how electoral courts were dealing with disinformation. See a description of how this coverage was organized here: <https://direitosp.fgv.br/noticias/fgv-direito-sp-folha-acompanharao-transito-decisoes-sobre-desinformacoes-nas-eleicoes-2022>

⁵⁰ See available data at “Os Números da Desinformação na Justiça Eleitoral”, in “Disinformation Observatory in 2022 Elections”, available at <https://medium.com/observat%C3%B3rio-da-desinforma%C3%A7%C3%A3o-nas->

Judges denied takedown orders without citing to any additional source of information in 54% of our sample. For the other 46%, judges cited additional sources such as news pieces from trusted sources, official documents and other versions of the content under discussion. Out of the 176 decisions ordering a takedown, 37% did not cite additional sources, while 63% mention additional sources⁵¹. This data represents an increase in the citation to additional sources of information between 2018-2022, though we cannot rule out that this was caused by sample selection (the Observatorio was naturally looking for more high-profile cases that are more likely to undergo a more in-depth analysis).

On the merits of the decisions, our sample for high-profile caes in the 2022 elections shows similar discussions to the ones seen in 2018. In particular, even in high-profile cases judges continued to struggle to define what should standard should guide decisions on what facts are “*known to be untrue*” or are “*gravely decontextualized*”. Some noteworthy trends identified by the Disinformation Observatory include:

- In some cases, courts relied on fact-checking agencies to justify their decisions⁵². In others, judges merely invoked prior knowledge about the subject to decide on matter (especially in the large number of cases in which no additional source is cited);
- Courts protected content deemed satirical or humorous, even when faced with some decontextualization.⁵³ However, there is no clear criterion to define when satirical content deserves a more flexible standard of analysis, opening space for significant court discretion⁵⁴;
- Some cases protected traditional media from intervention, especially when there is evidence that the news outlet investigated the facts more deeply before publication.⁵⁵ However, courts also held professional journalists to higher standards, requiring them to report accurately and intervening to order the removal of content that contained “technical”

[elei%C3%A7%C3%B5es-2022/os-n%C3%BAmeros-da-desinforma%C3%A7%C3%A3o-na-justi%C3%A7a-eleitoral-495d597ee0e6](#) Accessed on March 5th, 2025.

⁵¹ *Id.*

⁵² BRASIL. Tribunal Superior Eleitoral. Embargos De Declaração Em Representação 060136565/DF, Relator(a) Min. Benedito Gonçalves, Acórdão de 09/11/2023, Publicado no(a) Diário de Justiça Eletrônico 239, data 04/12/2023.

⁵³ BRASIL. Tribunal Superior Eleitoral. Representação 060085467/DF, Relator(a) Min. Maria Claudia Bucchianeri, Acórdão de 25/10/2022, Publicado no(a) Publicado em Sessão 353, data 25/10/2022

⁵⁴ BRASIL. Tribunal Superior Eleitoral. Referendo Na Representação 060084423/DF, Relator(a) Min. Cármen Lúcia, Acórdão de 14/10/2022, Publicado no(a) Publicado em Sessão 242, data 14/10/2022

⁵⁵ BRASIL. Tribunal Superior Eleitoral. Representação (11541) N° 0600746-38.2022.6.00.0000, Relator Ministro Raul Araújo, Decisão de 13/08/2022.

mistakes (e.g. wrongly referring to the legal status of an accusation) even when similar mistakes might have been otherwise acceptable in non-journalistic context⁵⁶;

- Courts continued to struggle to deal with messaging platforms such as Whatsapp. Sometimes, they ruled that their private nature removed them from the scope of electoral regulation.⁵⁷ In other cases, they ordered the takedown of videos circulated in Whatsapp groups and the posting of the judicial decision in the same groups where the video was posted⁵⁸;
- Some decisions identified a the creation of a broader ecosystem to spread misinformation across platforms. In these circumstances, courts decided not only to take down specific content but also to suspend the monetization of certain channels and profiles (i.e. limiting payments from platforms to content creators during elections)⁵⁹; and, finally
- Electoral courts were particularly concerned with the use of manipulated videos or images to spread information⁶⁰;

c. The 2022-2025 “Fake News” Investigations

The system described above was initially designed to tackle the spread of disinformation during election periods. As described, the initial focus of the Courts was ensuring the fairness of the electoral cycle—meaning that rulings follow an expedited procedure (sometimes in less than 24 hours), and all take-down orders are automatically revoked once a given election ends.

However, the Brazilian Superior Electoral Court and the Brazilian Supreme Court expanded their powers to police fake news and the sharing of disinformation well beyond the electoral period. For example, there is an ongoing “Fake News Inquiry” before the Brazilian

⁵⁶ **Caso 7**—BRASIL. Tribunal Regional Eleitoral de Goiás. Recurso (15090) Processo N° 0602100-49.2022.6.09.0000, Relator Mark Yshida Brandão, Acórdão de 29/09/2022.

⁵⁷ BRASIL. Tribunal Regional Eleitoral de Roraima. Representação N° 0601571-40.2022.6.23 .0000, Relator.: Bruno Hermes Leal, Data de Julgamento: 09/10/2022, Data de Publicação: Mural - MURAL 16153, data 10/10/2022

⁵⁸ BRASIL. Tribunal Regional Eleitoral de Mato Grosso do Sul. Representação (11541) N° 0601811-35.2022.6.12.0000, Relator Juiz José Eduardo Chemin Cury, Relator Plantonista Ricardo Gomes Façanha, Decisão de 11/10/2022.

⁵⁹ BRASIL. Tribunal Superior Eleitoral. Referendo Na Ação De Investigação Judicial Eleitoral 060152238/DF, Relator(a) Min. Benedito Gonçalves, Acórdão de 20/10/2022, Publicado no(a) Diário de Justiça Eletrônico 36, data 10/03/2023

⁶⁰ In: BRASIL. Tribunal Superior Eleitoral. Representação N° 06011439720226000000, Relator(a) Min. Cármen Lúcia, Data de Julgamento: 15/05/2023, Data de Publicação: DJE - Diário de Justiça Eletrônico, Tomo 95.

Supreme Court that was opened in March 2019 to investigate the disinformation campaign against the Supreme Court, its members, and their family members⁶¹. Similarly, the Supreme Court opened the still ongoing “Digital Militias Inquiry” in July 2021 to investigate the alleged existence of a criminal organization acting mainly through digital platforms and with the purpose of attacking Democracy and the Rule of Law, including the use of disinformation strategies⁶². Justices also continue to issue rulings and require content take down. It is important to notice that, as an exception to the general rule, these procedures are directly supervised by the Justices themselves, orienting police investigations and issuing rulings, and not by prosecutors requesting decisions to the Justices.

The most consequential case, however, was a dispute between the Superior Electoral Court and the digital platform Twitter/X. We will describe this example in more detail to illustrate the evolving role of the Brazilian Judicial System when dealing with digital platforms and disinformation.

On January 8, 2023, soon after Lula took power on January 1 of the same year, violent riots occurred in Brasilia (nowadays referred to as the “1/8 Riots”)⁶³. These were similar to the January 6 attacks on the US Capitol. These riots led to multiple arrests and a large-scale investigation by the Brazilian Federal Police on potential threats to democracy—which indeed uncovered an attempted coup d’Etat against the Brazilian elected government. This investigation has ultimately led to the filing of a criminal lawsuit against 34 individuals before the Brazilian Supreme Court, with former President Jair Bolsonaro listed as one of the leaders of the attempted Coup.⁶⁴

In April 2024, while the Federal investigations on the 1/8 Riots were ongoing, the Brazilian Supreme Court opened a parallel procedure (PET 12404) to investigate an alleged threat and

⁶¹ BRAZIL. Supreme Court, INQ 4.781, Reporting Minister Alexandre de Moraes, decision of May 26, 2020. Available at: <https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/mandado27maio.pdf>. Accessed on February 28, 2025.

⁶² BRAZIL. Supreme Court, INQ 4.874, Reporting Minister Alexandre de Moraes, decision of July 16, 2021. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15347088212&ext=.pdf>. Accessed on February 28, 2025.

⁶³ NICAS, Jack. SPIGARIOL, André. “Bolsonaro Supporters Lay Siege to Brazil’s Capital”, The New York Times, January 8th, 2023. Available at: <https://www.nytimes.com/2023/01/08/world/americas/brazil-election-protests-bolsonaro.html>. Accessed on February 27, 2025

⁶⁴ NICAS, Jack. “Brazil Charges Bolsonaro with Plotting a Coup After 2022”, The New York Times, February 18, 2025. Available at: <https://www.nytimes.com/2025/02/18/world/americas/brazil-bolsonaro-coup-charges.html>. Accessed on February 28, 2025

disinformation campaign against the Federal Police officers leading the charge⁶⁵. In the same month, X allowed accounts that the Supreme Court had previously ordered the platform to take down during the Digital Militias Inquiry to transmit live content. The Supreme Court, always under the sole reporting of Justice Alexandre de Moraes, then opened a separate proceeding (INQ 4957) to investigate X's and Elon Musk's conduct in potential defiance of the Court order⁶⁶. X explained to the Court that a technical glitch led to the non-compliance with the Court order.

Starting in August the dispute escalated quickly. On August 7, Justice Alexandre de Moraes issued confidential decisions ordering X to block new profiles created by some of the people initially barred from X as part of the campaign against the federal police, subjecting the platforms to a large daily fine in case of non-compliance⁶⁷⁻⁶⁸. The decisions were then leaked to the public by an account hosted by X itself⁶⁹, and X refused to implement those orders. On August 17th, X announced the shutdown of its Brazilian office and is left without a legal representative in the country, in an attempt to avoid enforcement actions against the company and its representative⁷⁰⁻⁷¹. On August 18, Justice Alexandre de Moraes ordered banks and the Brazilian government to block all accounts and assets of X in Brazil and ordered X to appoint a new representative in the

⁶⁵ BRAZIL. Superior Tribunal Federal, PET 12404, Reporting Minister Alexandre de Moraes. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6888934>. Accessed on March 06, 2025.

⁶⁶ BRAZIL. Superior Tribunal Federal, INQ 4957 - DF, Reporting Minister Alexandre de Moraes. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6893258>. Accessed on March 06, 2025.

⁶⁷ "In a decision dated August 7th, 2024, among other measures, I ordered the company TWITTER INC. (responsible for the social network "X") to, within 2 (two) hours, block the indicated channels/profiles/accounts, as well as any groups that are managed by its users, including blocking any monetizations in progress related to the aforementioned profiles, and the platforms must inform the amounts that would be monetized and the recipients of the amounts, under penalty of a daily fine of R\$50,000.00 (fifty thousand reais), with the provision of their registration data to this SUPREME COURT and the full preservation of their content." BRAZIL. Superior Tribunal Federal, PET 12404, Reporting Minister Alexandre de Moraes, decision of August 30, 2024, pg. 2-3. Available at: <https://noticias-stf-wp-prd.s3.sa-east-1.amazonaws.com/wp-content/uploads/wpallimport/uploads/2024/08/30171714/PET-12404-Assinada.pdf>. Accessed on February 27, 2025.

⁶⁸ "In a decision dated August 13, 2024, I DETERMINED the application of a fine in the amount of R\$ 50,000.00 (fifty thousand reais) against the company X BRASIL INTERNET LTDA, as well as its summons for full compliance with the previous decision, within one hour, under penalty of a daily fine of R\$ 200,000.00 (two hundred thousand reais) per profile not blocked." BRAZIL. Superior Tribunal Federal, PET 12404, Reporting Minister Alexandre de Moraes, decision of August 18, 2024, pg. 27, published by @alexandrefiles on September 1st, 2024. Available at: <https://transparency.x.com/assets/alexander-files/decisao-18-08-2024.pdf>. Accessed on February 27, 2025.

⁶⁹ @alexandrefiles

⁷⁰ SCHROEDER, Lucas. "X diz que vai fechar escritório no Brasil após decisões de Moraes", CNN Brasil, August 17, 2024. Available at: <https://www.cnnbrasil.com.br/politica/x-diz-que-vai-fechar-escritorio-no-brasil-apos-decisoes-de-moraes/>. Accessed on February 27, 2025.

⁷¹ Elon Musk commented the decision to shut down the office in X (<https://x.com/GlobalAffairs/status/1824819053061669244>).

country in 24 hours, threatening the suspension of all its activities in the country in case of non-compliance. X again refuses to comply with the Supreme Court order.

On August 30, Justice Alexandre de Moraes ordered the Brazilian National Telecommunications Regulator (ANATEL) and internet service providers to suspend access to X's IP addresses in all Brazilian territory until the company complies with the court orders: appointing a new legal representative, suspending the required accounts, and paying all daily fines.⁷² It also froze the assets of Elon Musk's Starlink in Brazil, despite these companies being separate legal entities. Starlink initially refused to comply with the order to deny access to X—effectively bypassing the Brazilian Supreme Court, but eventually complied, after assets were frozen⁷³. Access to X in Brazil was effectively suspended between August 30 and October 8, and the Court issued fines for contempt of court amounting to BRL 28.6 million (equivalent to USD 5.3 million at the time).

In late September, X retreated and complied with the orders but refused to pay the fines. On September 27, the Supreme Court recognized compliance with the court orders but required the payment of the fines to lift the blockage. On October 4, X paid all fines, and on October 8, the Supreme Court reinstated access to the platform in the country. In early 2025, Trump Media (the media holding company owned by President Trump) and the platform Rumble sued Justice Alexandre de Moraes in U.S. Federal Courts, accusing him of censoring the lawful speech of American citizens⁷⁴. This litigation is ongoing.

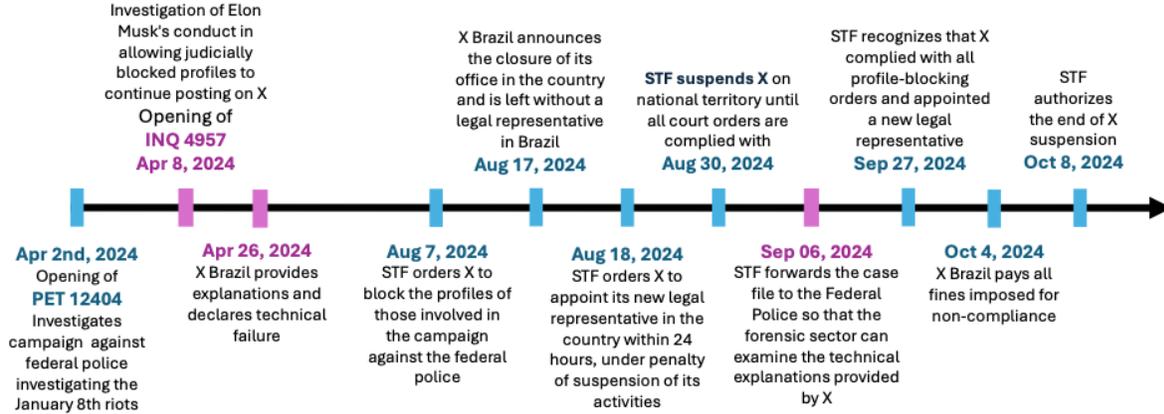
The timeline below summarizes the main events of this dispute, with a special focus on the decisions that led to the blocking of X (the blue points in the timeline).

⁷² BRAZIL. Superior Tribunal Federal, PET 12404, Reporting Minister Alexandre de Moraes, decision of August 30, 2024. Available at: <https://noticias-stf-wp-prd.s3.sa-east-1.amazonaws.com/wp-content/uploads/wpallimport/uploads/2024/08/30171714/PET-12404-Assinada.pdf>. Accessed on February 27, 2025

⁷³ <https://www.theguardian.com/technology/article/2024/sep/04/elon-musk-x-starlink-brazil>

⁷⁴ <https://apnews.com/article/trump-lawsuit-brazil-judge-bolsonaro-0061c2f1ea145e3ce3714aa25f49ba67>

Figure Z – Timeline of Procedures Involving Post-Election Misinformation (2024)



Elaborated by the authors

This episode illustrates how the Brazilian Supreme Court has greatly expanded the powers created and developed to deal with electoral disinformation. Investigations initiated during the elections were kept open after the electoral period. Other investigations, such as the one involving the online disinformation campaign against the federal police, were opened after the elections, following the January 8 riots, and have remained open ever since. In addition, because these procedures were all centralized in the Supreme Court, there is limited room for appeals.⁷⁵ A single reporting Justice, Alexandre de Moraes, effectively concentrated the powers of issuing injunctions and ordering any enforcement measures.

It also showcases the perceived power of leading digital platforms—Elon Musk and X decided to refuse compliance with multiple official orders issued by the Brazilian Supreme Court, despite Brazil being the world's 10th largest economy and 7th largest country in terms of population. This non-compliance continued for months, despite the quick escalation of the dispute.

IV. Assessing the Brazilian Case

a. Five theoretical criteria to assess the Brazilian case

In a seminal article, Prof. Jack Balkin lists four main challenges that any governance system for online speech must overcome to be considered fair and effective:⁷⁶

⁷⁵ For example, X filed a writ against a decision of Justice Alexandre de Moraes, but the Supreme Court dismissed the writ based on procedural arguments, justifying that no writ was available against Supreme Court orders. [CITATION]

⁷⁶ Balkin, 'Free Speech Is a Triangle' (n 27). pg 22.

- (i) developing effective standards that are protective of freedom of speech;
- (ii) avoiding a global jurisdiction (or some form of Brussels' effect where one country effectively imposes standards on all others)⁷⁷;
- (iii) preventing an obscure privatized bureaucracy from serving as prosecutor, judge, and executioner without accountability; and
- (iv) preventing nation-states from co-opting private infrastructures for surveillance, data collection, and analysis to increase their control over civil society.

To those, we must add the importance of responsiveness in remedy design⁷⁸:

- (v) A system that intends to monitor and tackle disinformation during elections must be responsive and acknowledge the rapid dynamic of these processes, where new developments may quickly but fundamentally impact public opinion and voting outcomes.

These five criteria form a solid basis for evaluating regulatory systems that aim to tackle the negative impacts associated with the spread of disinformation, such as the Brazilian case study described above.

b. Applying these criteria to Brazil

From the perspective of a democratic theory of freedom of speech, Courts may be the right locus (or the least bad one) to restrict false statements of fact and preserve the public sphere as a space for deliberation. If the intention of the Law protecting freedom of speech is *“to broaden the terms of public discussion as a way of enabling common citizens to become aware of issues before them and of the arguments on all sides and thus to pursue their ends fully and freely”*,⁷⁹ judicial intervention against disinformation can preserve the overall fairness of the process, avoiding distortions in the information environment.

Under such a framework, the Brazilian model has many theoretical strengths:

⁷⁷ On the Brussel's effect, see Anu Bradford, 'The Brussels Effect' (2012) 107 Nw. UL Rev. 1.

⁷⁸ Filippo Lancieri and Caio Mario Pereira Neto, 'Designing Remedies for Digital Markets: The Interplay between Antitrust and Regulation' (2022) 18 Journal of Competition Law & Economics 613.

⁷⁹ Owen Fiss, *The Irony of Free Speech* (1996), Introduction [Kindle Edition].

- i. It is an open (multiple parties may file complaints) and appealable system, where independent judges and prosecutors decide what content should be taken down. This allows for the development of clear standards on what is acceptable online speech through the evolution of case law;
- ii. The inherent publicity of court decisions allows some form of democratic accountability of the judicial standards—both civil society and Congress may criticize the results and even pass laws to correct interpretations. The possibility of appeals provides an institutional avenue to correct mistakes;
- iii. As access is reasonably open to all parties involved in election disputes, and Courts remain responsible for balancing freedom of speech and election integrity, the system prevents social media platforms from becoming the unique arbiters of online speech;⁸⁰
- iv. The reliance on the Judiciary (instead of a regulatory agency) also diminishes the risk that the party in power abuses its authority and illegally prosecutes its own citizens or political opponents;
- v. Streamlined procedural rules (most decisions are taken between 24 and 72 hours of the complaint being filed) empower the Judiciary to act quickly, thwarting disinformation campaigns at their incipiency;
- vi. Finally, takedown orders are restricted to Brazil and no longer valid after the election ends, diminishing the risk that decisions over-restrict online speech or that Brazil imposes global standards;

Nevertheless, as the Brazilian example showcases, relying on courts to decide what is true or false in a very dynamic electoral process, which is always very context specific, also has important downsides. The distinction between facts and opinion can be particularly blurred in a polarized election context.⁸¹ The ideological aspects of elections may impact Courts' ability to act neutrally, in particular in open-ended standards like the one existent in Brazil (i.e. remove "*facts*

⁸⁰ In theory, the judiciary could even develop standards that are later enforceable by platforms.

⁸¹ According to Robert Post, factual statements claim general validity regardless of community standards, assuming it is possible to achieve convergence on the evaluation of truth or falsity, while statements of opinion claim validity grounded on certain community standards. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARVARD LAW REVIEW 601 (1990) at 660.

known to be untrue” or preventing the spread of “*gravely decontextualized*” information). Even evaluating clear factual claims in this context may be complicated, as “*whenever the state attempts definitively to determine the truth or falsity of a specific factual statement, it truncates a potentially infinite process of investigation and therefore runs a significant risk of inaccuracy.*”⁸² Also, the expedited time frame can (and often do) lead to superficial decisions, and the multiple Courts involved may easily spiral into contradictory standards. Another potential shortcoming of the system is that it still relies on candidates, parties, or prosecutors to flag topics and file complaints, which could create distortions based on parties’ willingness or capacity to litigate, as well as funding available to push these efforts.

The analysis of our data vindicates both the theoretical strengths and concerns identified above: the burden is unduly placed solely on politicians and public prosecutors to monitor the avalanche of online speech. This monitoring was already costly and will become almost untenable as interactions increasingly move to encrypted, peer-to-peer communications (such as WhatsApp).

Judges also seemed to be generally inclined to take down content, potentially over-enforcing the provision and harming freedom of speech. Even after accounting for a strong bias in the cases that make it to Court—a candidate has to spend resources to file a legal complaint against the material—a takedown ratio of around 50% in interim decisions (and 54% in cases against citizens) during the 2018 elections seems high. More worrisome is the low number of reversals, in particular when combined with the fact that most rulings do not cite a single case law or any other data source other than the initial complaint. This indicates that decisions are mostly taken based on first-impressions that are hardly reassessed. This also implies that the legal standards seem overly broad, depriving judges of proper guidance and allowing them to rely primarily on their instincts or prior knowledge when deciding cases.

The system is also costly to maintain, and is not designed to be scaled up to handle more cases. The total number of cases and decisions we identified (i.e. 1,492) and decisions (i.e. around 2,500) were only a scratch on the surface of the disinformation phenomenon. While we do not have comprehensive information for the 2022 election period, it is unlikely that courts made a significant difference in the overall amount of disinformation circulating during the election. That is despite the significant investments in terms of personal and resources, which leave less room for

⁸² *Id.*, at 659.

courts to consider other important violations of electoral laws (e.g. vote buying, limits on campaign expenditures, etc.).

These, however, are more targeted observations. Above all, we believe the Brazilian experience teaches three more general lessons to a broader world that still struggles with problems around content adjudication.

First, platforms recurrently cry foul and argue that any weakening of speech-safe harbors will lead to the breaking down and the demise of the open web. The Brazilian example shows (yet again) that this is really not the case. Democratic societies will only be able to develop effective standards for online content moderation through experimentation, and it is perfectly possible that different societies around the world will settle for different standards on what is accepted online and offline speech.

The decisions of Brazilian courts, with all their limitations, are a serious experiment in trying to set standards based on real cases, opening space to a learning-by-doing exercise. For example, the new regulations issued between the first and second rounds of the 2022 elections clearly understood the need for additional action towards the systematic and repeated spread of fake news by organized groups, making new potential remedies available to the judges. The same rules paid special attention to fake news aimed at undermining the integrity of the election process, as this type of disinformation may be particularly harmful to electoral legitimacy. These are novelties crafted through the learning process of the justice system.

Second, for this system to work in practice, it must be designed to operate at scale and in conjunction with digital platforms. The Brazilian URL or Profile-based notice and takedown system is playing a game of whack-a-mole that is impossible to win. Rather than adjudicating individual disputes, Courts must focus on creating precedents and standards that platforms, candidates, and civil society can incorporate in their own moderation attempts. Future reforms must focus on developing a coherent appeals process that allows for such standards to emerge in a more refined and objective manner. Without clearer standards, the impression of random decisions abridging the freedom of expression will undermine the legitimacy of court interventions on alleged disinformation.

Third, the system must have strict protections to prevent a slippery slope from the get-go—including a requirement of supra-majorities for the development of such standards as well as automatic sunset clauses and other similar provisions. The Brazilian system was created through

some small legal changes and significant ad hoc evolution, based on infra-legal resolutions of TSE, and the institutional framework that was built on a case-by-case adjudication system initially established for television and radio advertisement was quickly appropriated by an entrepreneur Supreme Court Justice in a way that challenges basic notions of due process and freedom of expression. In particular, the concentration of authority in the Supreme Court (and, especially, in the Justice Rapporteur of the cases), the extension of investigations opened by the Supreme Court, and the lack of procedural safeguards led to a system with little checks and balances, especially regarding injunctions issued at the Supreme Court level, opening room for potential distortions and a politically charged debate about the very boundaries of freedom of speech well beyond elections. In practice, the Brazilian Supreme Court is increasingly becoming the ultimate regulator of digital disinformation for the whole country, with the powers to determine the exclusion of content, exclusion of profiles, and even the suspension of access to digital platforms altogether. This, however, is not an unavoidable process—it really builds on the weaknesses of the Brazilian Supreme Court adjudication system to begin with. And can certainly be adjusted through specific reforms and a more decentralized judicial system.

Finally, large digital platforms are on the brink of reaching a level of power where they can challenge the authority of the democratic institutions of some of the world's most powerful countries. They have long ago become more powerful than smaller nations⁸³. While X ultimately yielded and complied with the orders of the Brazilian Supreme Court, there is no guarantee that this would happen again. In this context, it is essential for democratic societies to experiment, with new institutional models, knowing that it will take time and a steep learning curve to reach a new desired equilibrium. The hands-off alternative, adopted by many countries so far, will only let these digital behemoths continue to grow unabated at their own peril, eroding the very fabric of democracy.

V. Conclusion

Under Development

⁸³ Toby Phillips and others, 'Digital Technology Governance: Developing Countries' Priorities and Concerns' (2020) 3 Digital Pathways at Oxford Paper Series <https://www.bsg.ox.ac.uk/sites/default/files/2020-06/final_digital-tech-gov-21may20_0.pdf>.

Appendix I: Measuring correlations in the takedown orders for the 2018 election decisions

Results can be seen in Models 1 through 3, which calculate the probability of content removal in a logit regression. Coefficients are exponentiated to facilitate interpretation. Model 1 shows the variables grouping articles under three different binomials, while Model 2 emphasizes categories of standards of truth compared to not utilizing the term “facts known to be untrue.” Model 3 offers a full specification. All models present state judges and appointed lawyers compared to the baseline of federal judges, women judges compared to the baseline of male judges, appeals and district court rulings compared to the baseline of interim rulings, and the GPD per capita and population estimates for the state in which a given court is located. For the Supreme Electoral Court, estimates for the country were used instead.

Table 2: Model Results

	Model 1	Model 2	Model 3
Constant	1.245 (0.207)	1.051 (0.160)	1.244 (0.211)
Freedom of Expression	0.892 (0.085)		0.901 (0.087)
Procedural Matters	1.127 (0.106)		1.126 (0.107)
Electoral Advertisement	2.000*** (0.193)		1.993*** (0.194)
Court Case Citation	0.455*** (0.043)		0.455*** (0.044)
Standards of Truth: No Additional Sources		1.020 (0.099)	1.002 (0.101)
Standards of Truth: Non-official Sources		0.871 (0.140)	0.852 (0.143)
Standards of Truth: Official Sources		1.559** (0.258)	1.529* (0.263)
State Judge	0.971 (0.123)	1.117 (0.137)	0.962 (0.123)
Appointed Lawyer	2.009***	1.989***	1.997***

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	Model 1	Model 2	Model 3
	(0.317)	(0.305)	(0.316)
Female Judge	0.868	0.883	0.871
	(0.097)	(0.096)	(0.098)
Appeal	0.733	0.601**	0.720*
	(0.121)	(0.097)	(0.120)
District Court Ruling	1.041	0.902	1.036
	(0.102)	(0.084)	(0.102)
State GDP per Capita	1.000	1.000	1.000
	(0.000)	(0.000)	(0.000)
State Population	1.000***	1.000***	1.000***
	(0.000)	(0.000)	(0.000)
Num. Obs.	2186	2186	2186
AIC	2836.1	2946.1	2833.7
BIC	2904.4	3008.7	2919.1
Log. Lik.	-1406.067	-1462.041	-1401.858
F	16.839	9.317	13.704
RMSE	0.48	0.49	0.48

* p < 0.05, ** p < 0.01, *** p < 0.001

Among the articles cited, only articles on electoral advertisement are consistently significant. Its marginal effects for Model 1 can be visualized in Figure 2. In Model 1, citing any relevant article on electoral advertisement increases the odds of content removal by two times. With the added variables in Model 3, its effect marginally shifts to an increase in odds by 1.993 times. While the variable for freedom of expression articles decreases the odds in the expected direction, its coefficient is not significant. Interestingly, citing any court case substantially decreases the odds of removal by 0.455 times, which is significant at the .05 level. Compared to cases that do not mention “facts known to be untrue,” using official government sources as standards of truth increases the odds of removal by 1.559 times in Model 2 and 1.529 times in Model 3, both significant at the .05 level. Interestingly, compared to Federal Judges, appointed lawyers present an increase in odds of content removal by 2 times in Model 1, which is significant at the .05 level. Other models present coefficients with similar magnitude and significance.

Overall, significant indicators of increased odds of content removal are citations of electoral advertisement law, use of official government sources as standards of truth, and appointed lawyers as compared to Federal Judges. Surprisingly, citing law on freedom of expression does not significantly decrease the odds of content removal. Instead, citing any court case throughout the ruling seems key to lower odds of content removal. Moreover, compared to interim rulings,

appeals presents a significant decrease in the odds of content removal. Yet, as seen in Table 1, interim rulings are the most common decision type in the sample at 53% of decisions. Moreover, Law regarding electoral advertisement is seen in 38% of decisions. Appointed lawyers covered 20% of decisions. While 51% of sampled decisions favor content removal, these odds can be even higher given other relatively common circumstances.

Figure XXX: Marginal Effects of Citing Electoral Advertisement Law

