From: Candeub, Adam
To: candeub.adam(b) (6)
Date: Tuesday, June 9, 2020 9:10:06 PM
Attachments: Notes_2.docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

6 Pages (1 Record)
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Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: candeub.adam(b) (6)
Date: Thursday, July 16, 2020 8:14:25 PM
Attachments: social media information service Title I.docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

2 Pages (1 Record)
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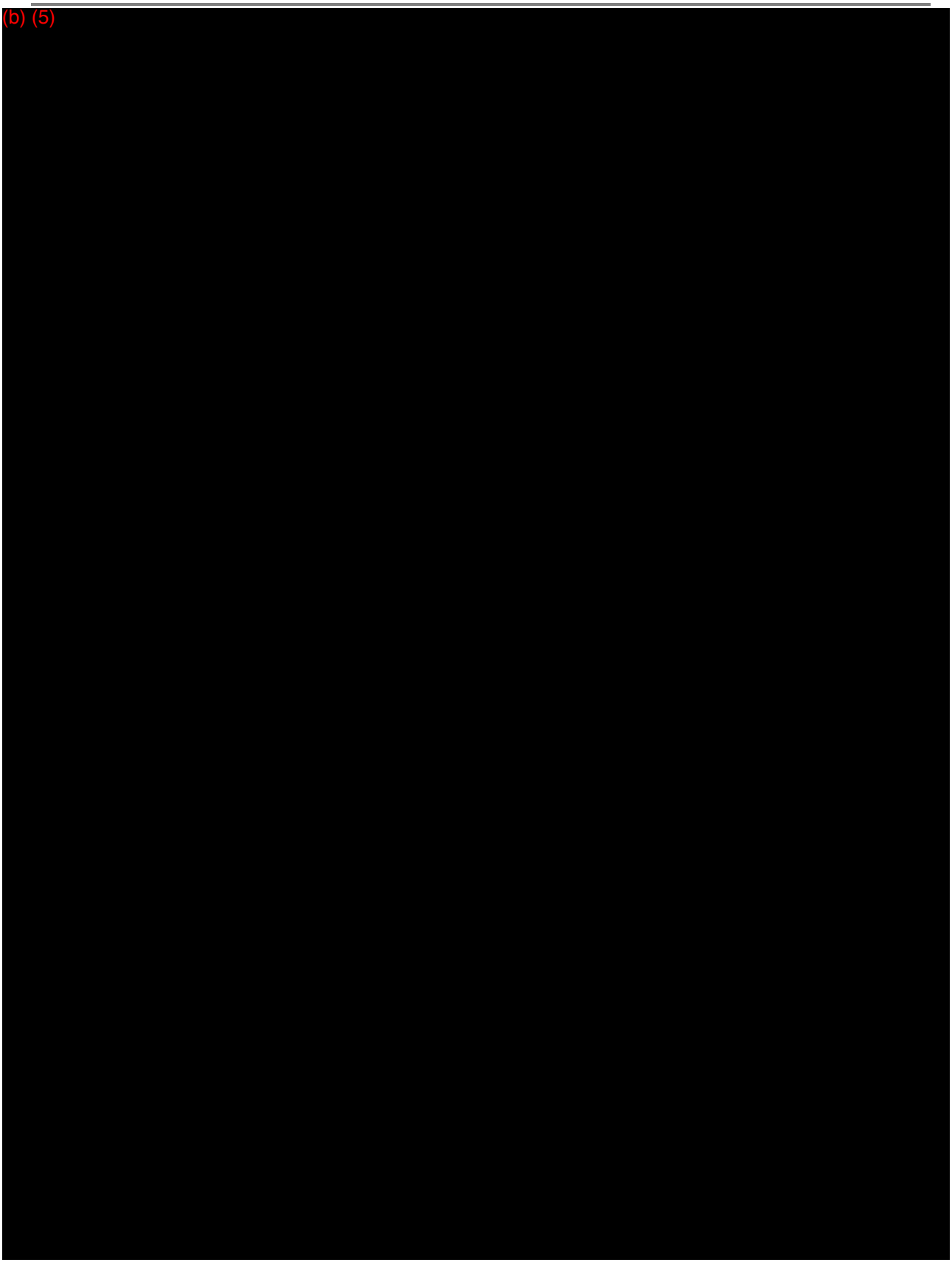
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Adam Candeub
Date: Monday, July 27, 2020 9:39:39 AM

(b) (5)



Adam Candeub
Deputy Assistant Secretary
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From: Candeub, Adam
To: candeub.adam(b) (6)
Date: Monday, June 15, 2020 8:05:13 PM
Attachments: version2.1_6_15_AC.docx

Adam Candeub
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National Telecommunications and Information Administration

67 Pages (1 Record)
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Pursuant to FOIA
Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Blair, Robert (Federal)
Date: Tuesday, June 16, 2020 5:38:10 PM
Attachments: Version3_6.16 (002).docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

47 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

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To:	RBlair@doc.gov
Subject:	FW:
Date:	Tuesday, June 16, 2020 5:41:14 PM
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From: Candeub, Adam
Sent: Tuesday, June 16, 2020 5:38 PM
To: Blair, Robert (Federal) <RBlair@doc.gov>
Subject:

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

44 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5
(5 U.S.C. § 552 (b)(5))

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To: candeub.adam(b) (6)
Date: Thursday, July 16, 2020 6:46:16 PM

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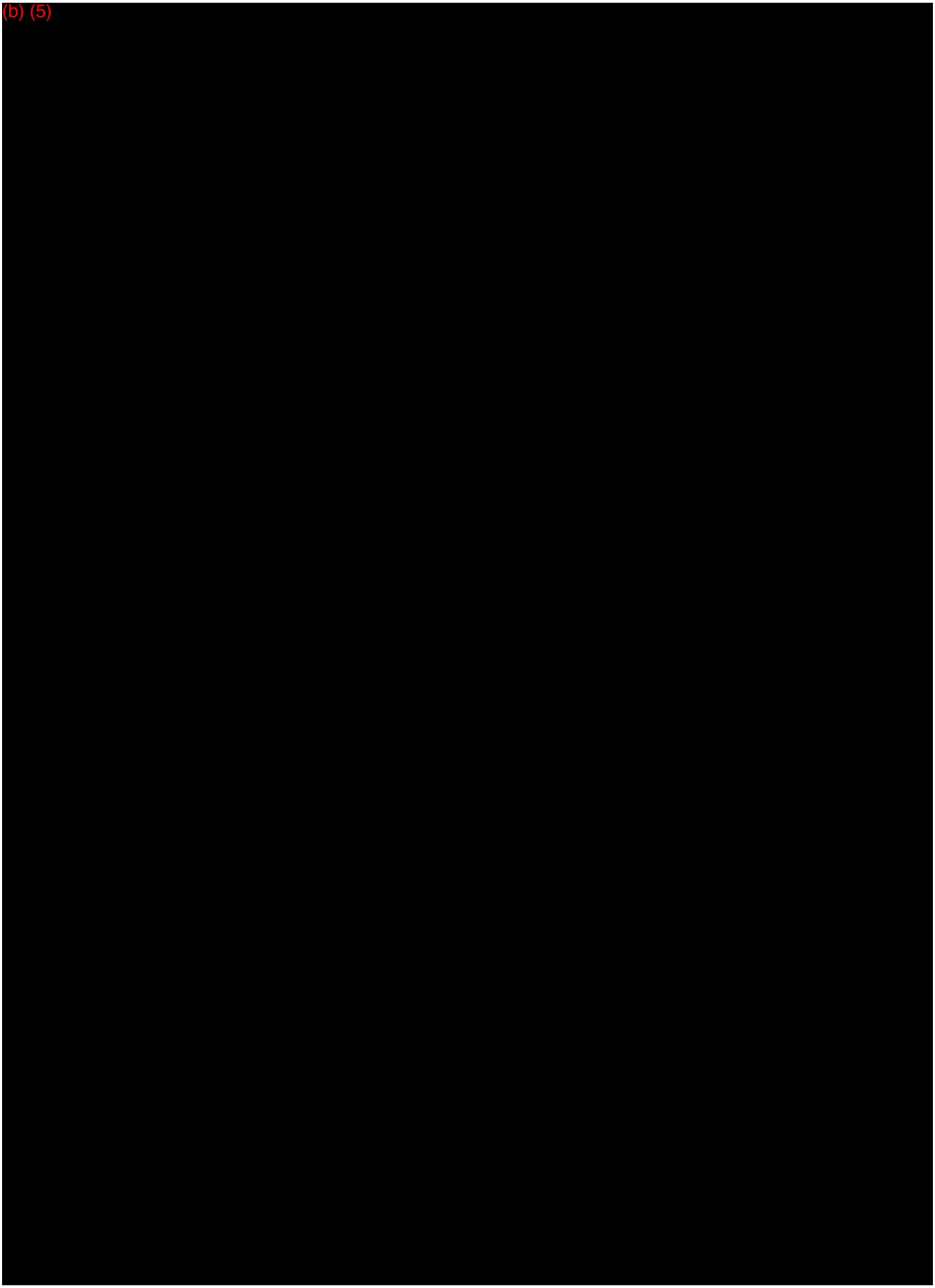

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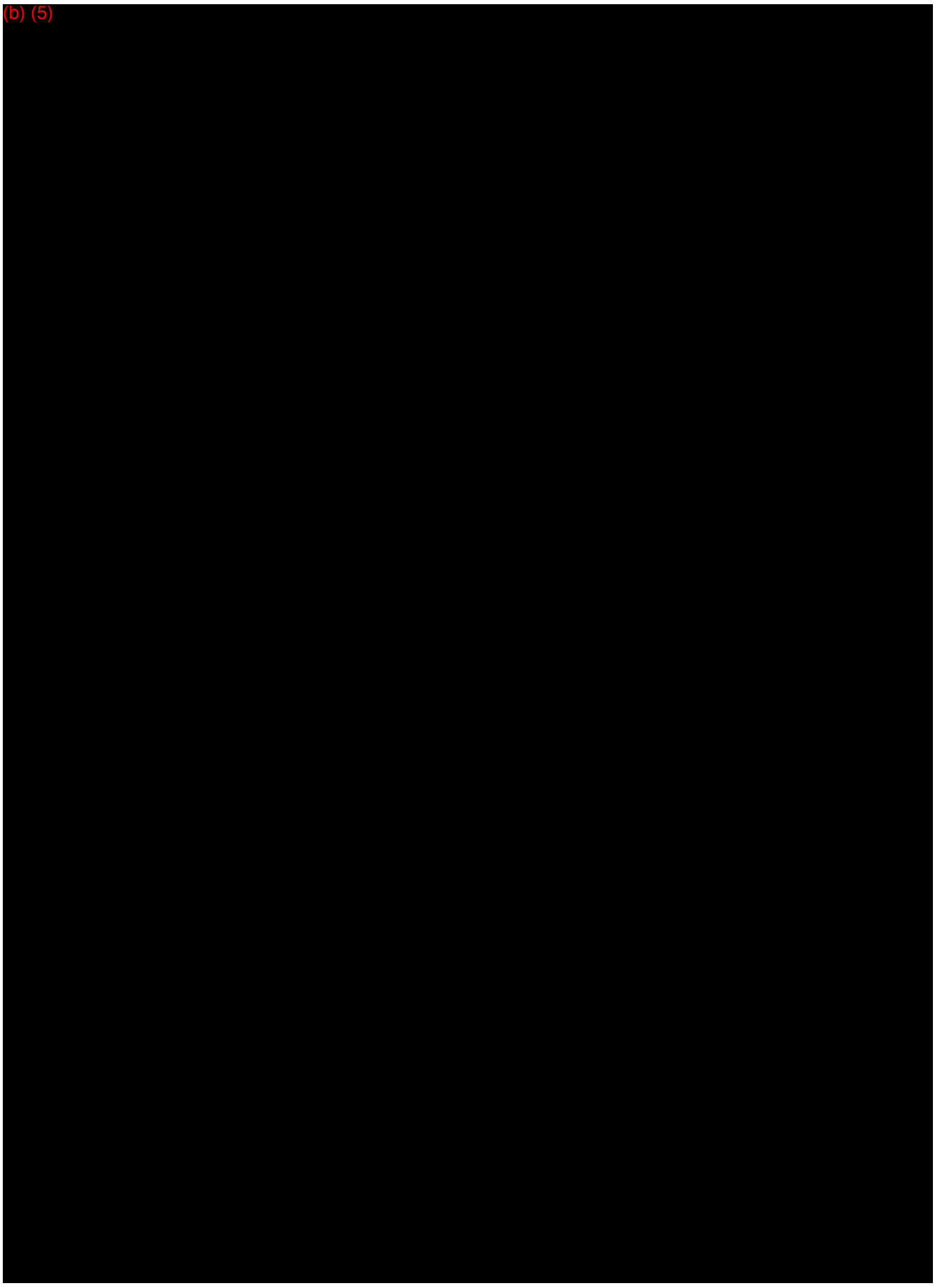

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

From: Candeub, Adam
To: Simington, Nathan; Roddy, Carolyn
Date: Friday, July 17, 2020 8:49:27 AM
Attachments: social media_information service_Title I_ac.docx

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Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

2 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Roddy, Carolyn
Cc: Simington, Nathan
Date: Friday, July 17, 2020 2:22:02 PM
Attachments: NTIA External Draft 1.0 -- Potential 47 CFR Chapter I Subchapter E.docx

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Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

4 Pages (1 Record)
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Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Roddy, Carolyn
Date: Monday, July 20, 2020 2:02:36 PM
Attachments: Draft Regs and Outline for NTIA Petition_7.13 5pm + DPC (002).docx
NTIA External Draft 1.0 -- Potential 47 CFR Chapter I Subchapter E.docx

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Thanks . . .

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

10 Pages (2 Records)
Withheld in their entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

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To: Simington, Nathan
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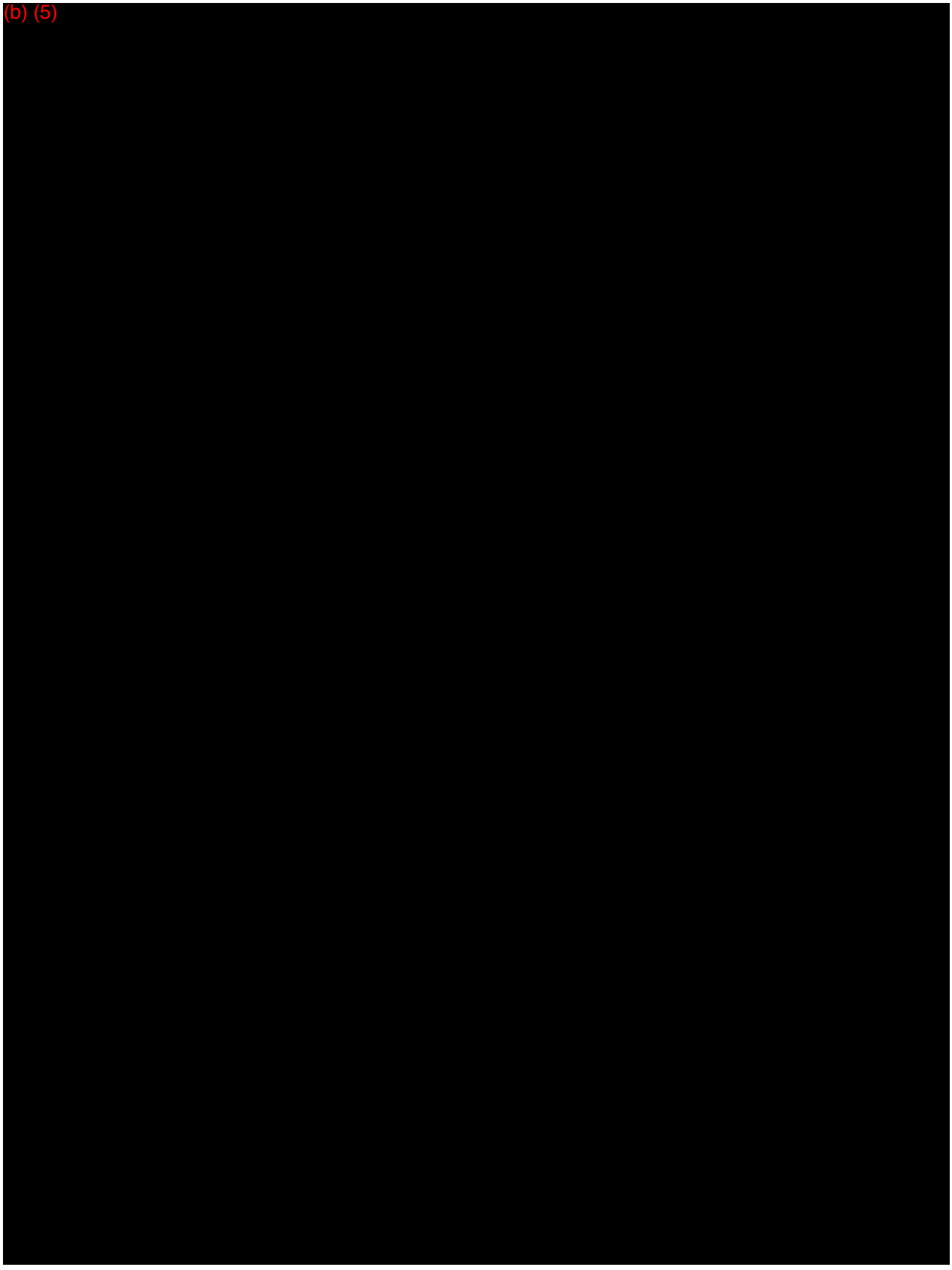

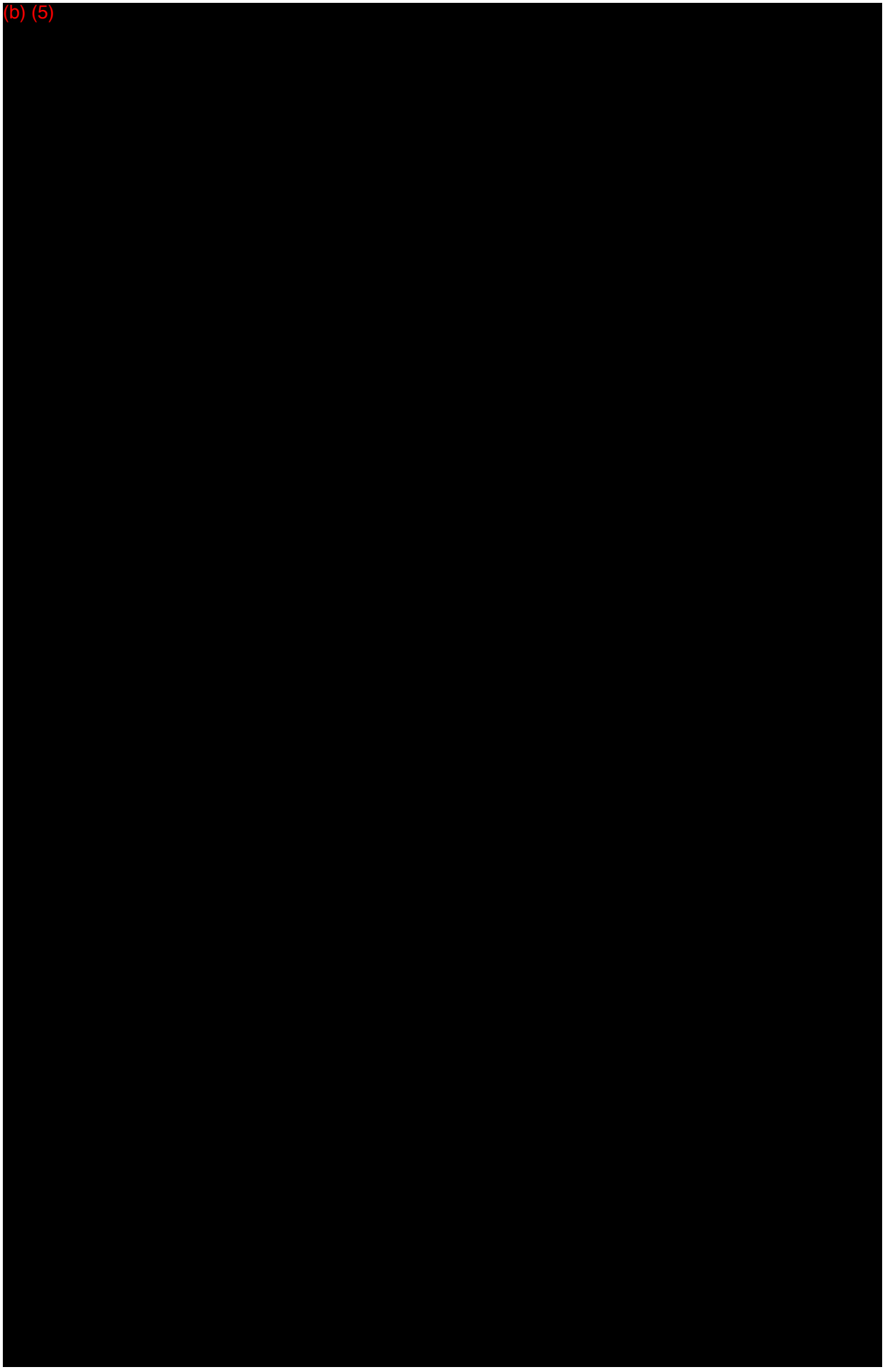
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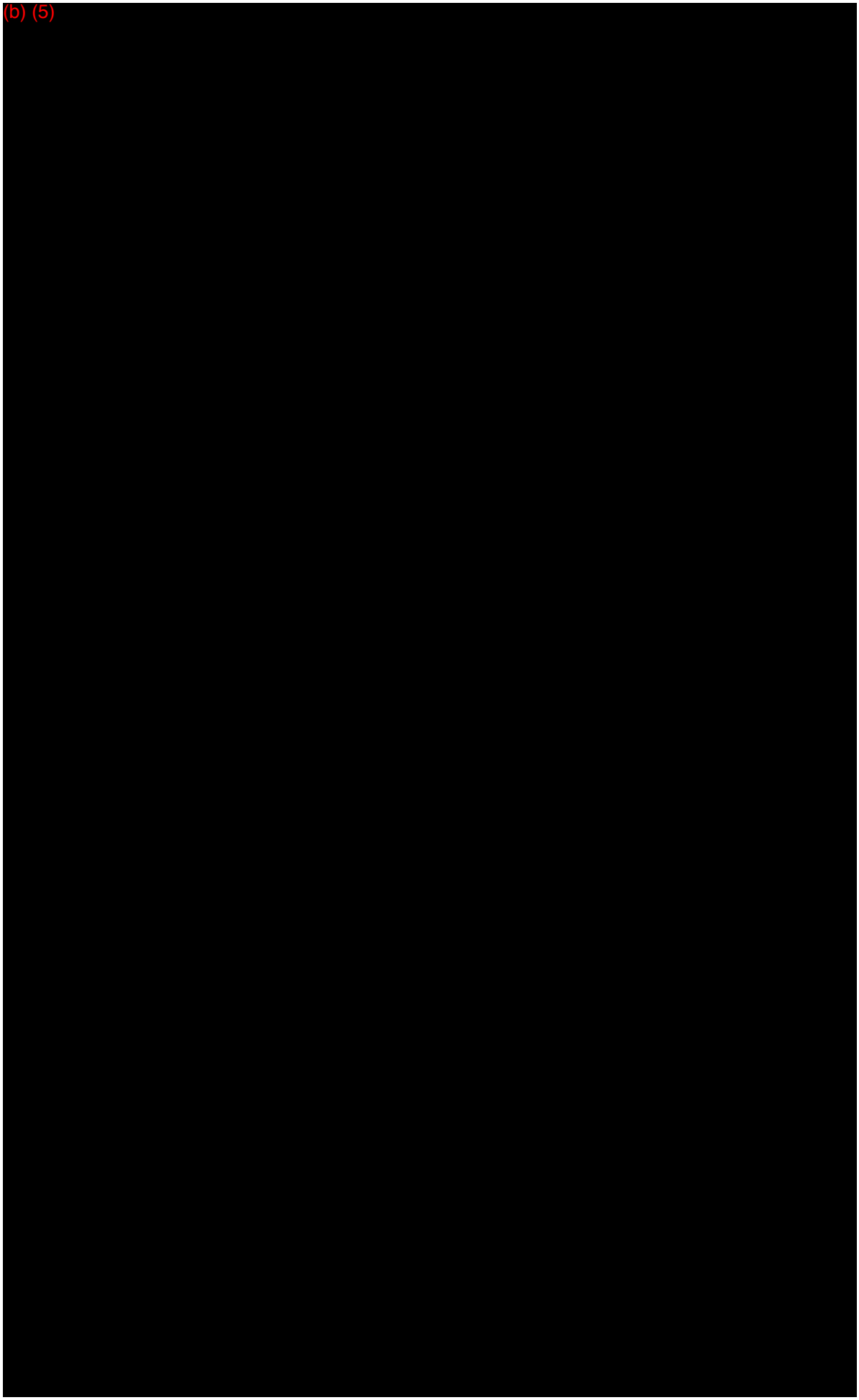
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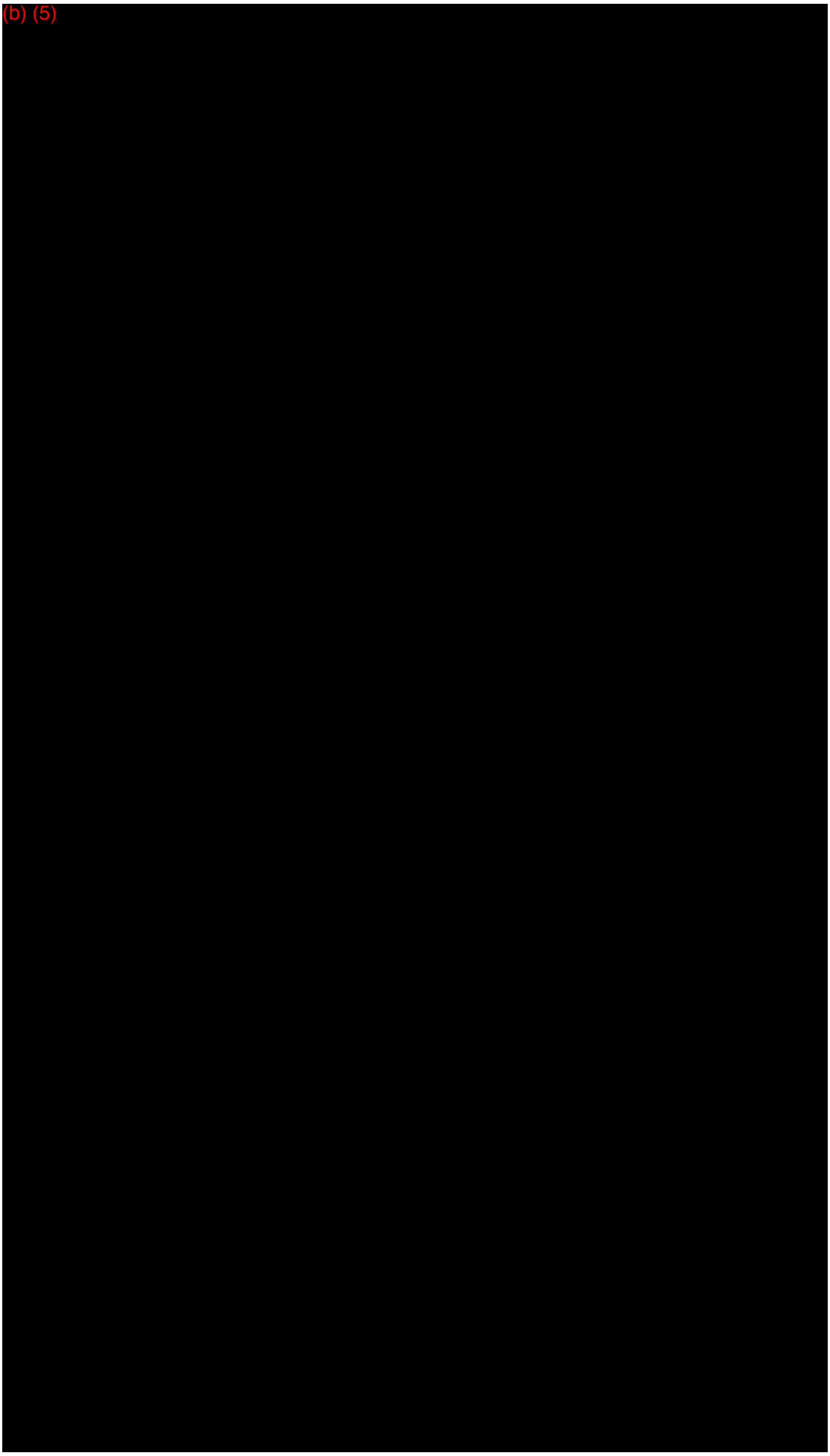
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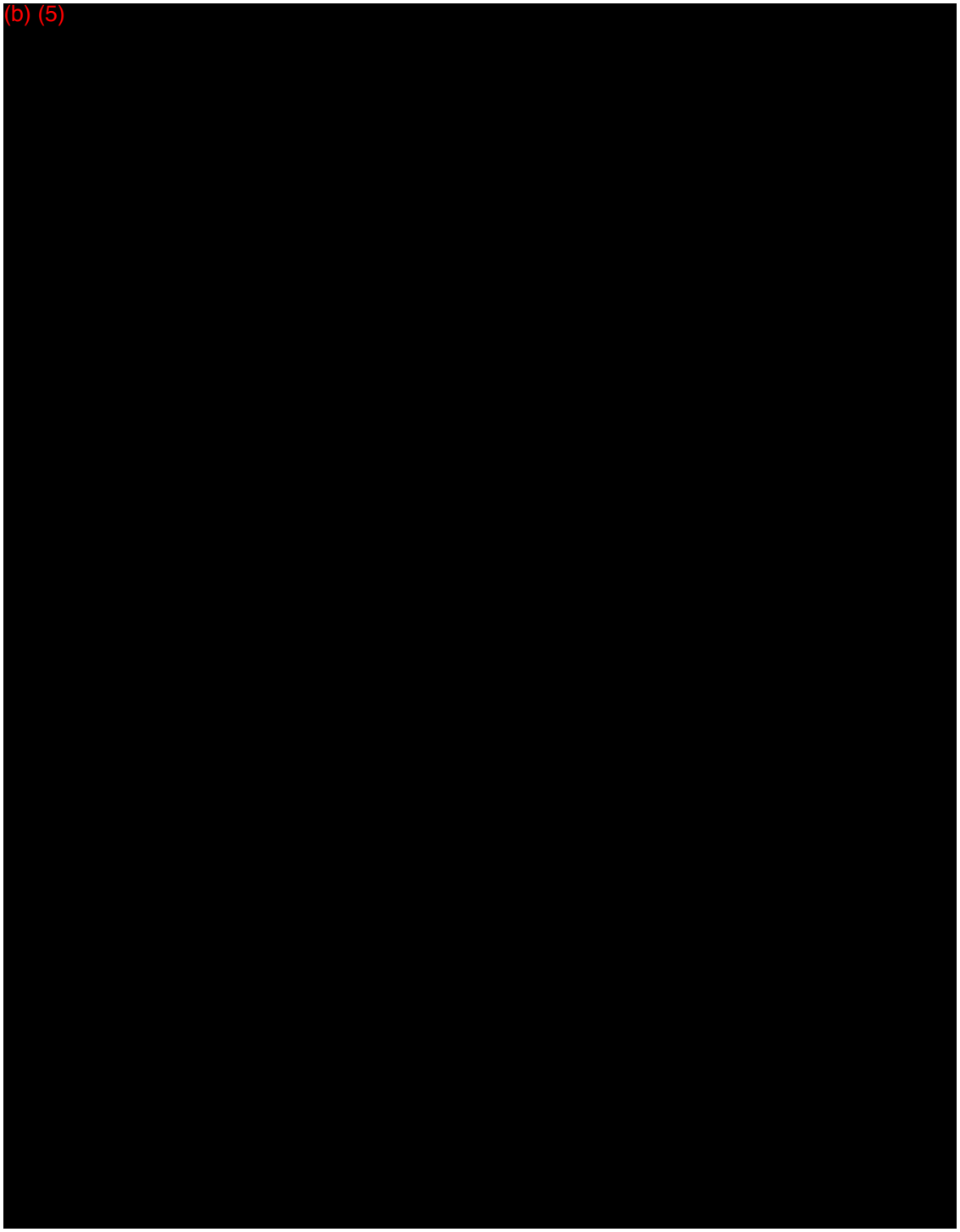
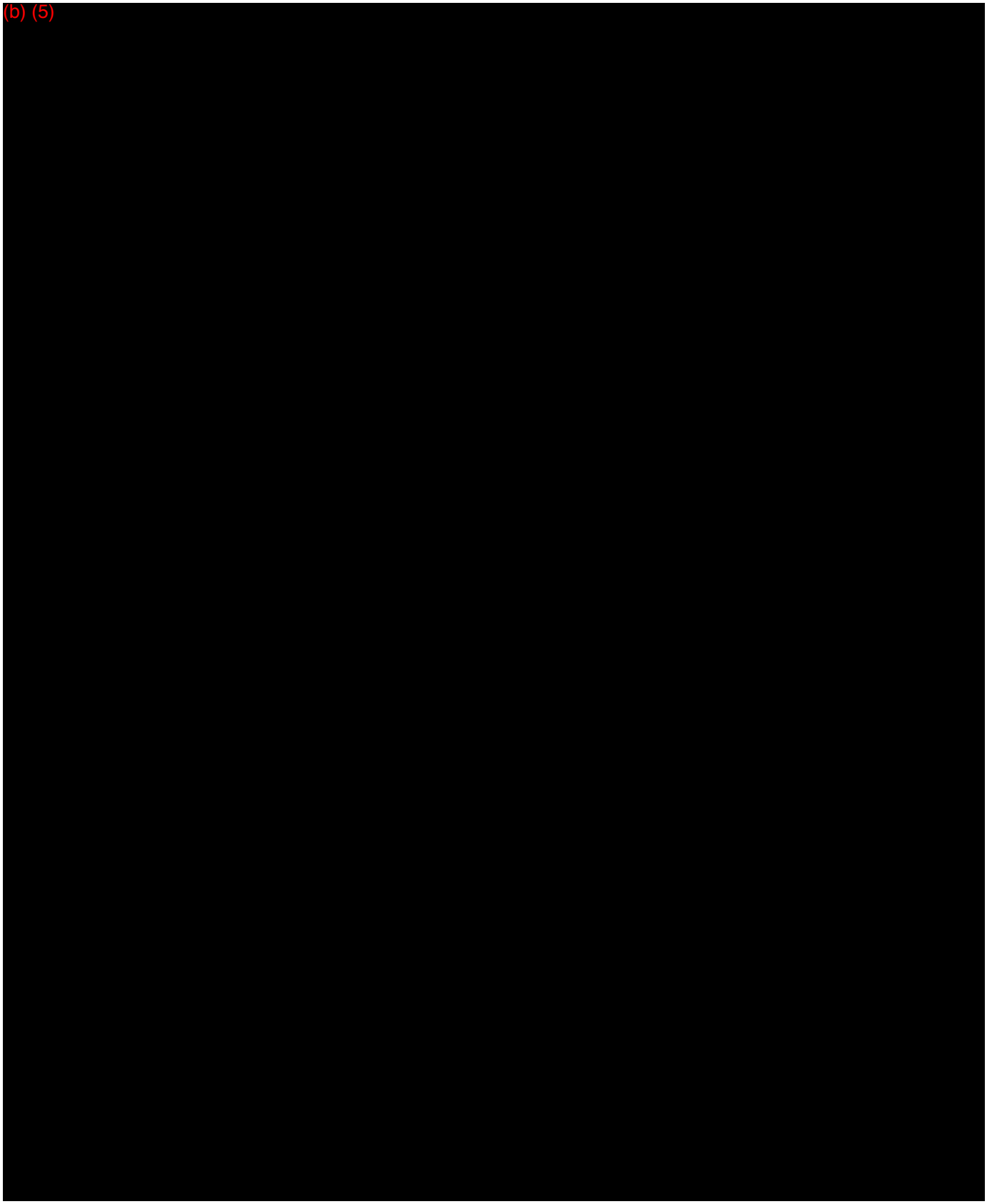


Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

From: Candeub, Adam
To: candeub(b) (6)
Date: Tuesday, July 21, 2020 9:37:21 PM

[DRAFT]

(b) (5)



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From: Candeub, Adam
To: Adam Candeub
Date: Thursday, September 10, 2020 9:56:32 PM
Attachments: APA concerns.docx

Adam Candeub
Acting Assistant Secretary
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15 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Adam Candeub
Date: Friday, September 11, 2020 7:17:28 PM
Attachments: NTIA_Reply.docx

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25 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Candeub, Adam
Date: Tuesday, July 21, 2020 9:29:00 PM
Attachments: to_work_on.docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

36 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: candeub.adam@gmail.com
Date: Friday, July 24, 2020 8:27:27 AM
Attachments: EO_social_media_petition_7_24.WH_AC_DOJ.docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

59 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Simington, Nathan
Date: Friday, July 24, 2020 10:26:52 AM
Attachments: full conformed version as of 10-20 am -- all DOJ and WH edits.docx

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Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

55 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Simington, Nathan
Date: Friday, July 24, 2020 11:58:54 AM
Attachments: Adam"s crap.docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

27 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

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To: Adam Candeub
Date: Tuesday, September 15, 2020 10:09:31 PM
Attachments: NTIA_REPLY_9_15_CLEAN-DRAFT.docx

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36 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Adam Candeub
Date: Tuesday, September 8, 2020 10:31:30 PM
Attachments: STATUTE-110-Pg56.pdf
NTIA Social Media Petition for Rulemaking 7.27.20.pdf

Adam Candeub
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Public Law 104–104
104th Congress

An Act

Feb. 8, 1996
[S. 652]

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Telecommunications Act of 1996.
Intergovernmental relations.
47 USC 609 note.

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SEC. 3. DEFINITIONS.

(a) ADDITIONAL DEFINITIONS.—Section 3 (47 U.S.C. 153) is amended—

(1) in subsection (r)—

(A) by inserting "(A)" after "means"; and

(B) by inserting before the period at the end the following: ", or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service"; and

(2) by adding at the end thereof the following:

"(33) AFFILIATE.—The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.

"(34) AT&T CONSENT DECREE.—The term 'AT&T Consent Decree' means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

"(35) BELL OPERATING COMPANY.—The term 'Bell operating company'—

"(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

"(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

"(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

"(36) CABLE SERVICE.—The term 'cable service' has the meaning given such term in section 602.

"(37) CABLE SYSTEM.—The term 'cable system' has the meaning given such term in section 602.

"(38) CUSTOMER PREMISES EQUIPMENT.—The term 'customer premises equipment' means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

"(39) DIALING PARITY.—The term 'dialing parity' means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

"(40) EXCHANGE ACCESS.—The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

"(41) INFORMATION SERVICE.—The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

"(42) INTERLATA SERVICE.—The term 'interLATA service' means telecommunications between a point located in a local access and transport area and a point located outside such area.

"(43) LOCAL ACCESS AND TRANSPORT AREA.—The term 'local access and transport area' or 'LATA' means a contiguous geographic area—

"(A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

"(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

"(44) LOCAL EXCHANGE CARRIER.—The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

"(45) NETWORK ELEMENT.—The term 'network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, func-

tions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

"(46) NUMBER PORTABILITY.—The term 'number portability' means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

"(47) RURAL TELEPHONE COMPANY.—The term 'rural telephone company' means a local exchange carrier operating entity to the extent that such entity—

"(A) provides common carrier service to any local exchange carrier study area that does not include either—

"(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

"(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

"(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

"(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

"(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

"(48) TELECOMMUNICATIONS.—The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

"(49) TELECOMMUNICATIONS CARRIER.—The term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

"(50) TELECOMMUNICATIONS EQUIPMENT.—The term 'telecommunications equipment' means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

"(51) TELECOMMUNICATIONS SERVICE.—The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.".

(b) COMMON TERMINOLOGY.—Except as otherwise provided in this Act, the terms used in this Act have the meanings provided in section 3 of the Communications Act of 1934 (47 U.S.C. 153), as amended by this section. 47 USC 153 note.

(c) STYLISTIC CONSISTENCY.—Section 3 (47 U.S.C. 153) is amended—

(1) in subsections (e) and (n), by redesignating clauses (1), (2), and (3), as clauses (A), (B), and (C), respectively;

(2) in subsection (w), by redesignating paragraphs (1) through (5) as subparagraphs (A) through (E), respectively;

(3) in subsections (y) and (z), by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(4) by redesignating subsections (a) through (ff) as paragraphs (1) through (32);

(5) by indenting such paragraphs 2 em spaces;

(6) by inserting after the designation of each such paragraph—

(A) a heading, in a form consistent with the form of the heading of this subsection, consisting of the term defined by such paragraph, or the first term so defined if such paragraph defines more than one term; and

(B) the words "The term";

(7) by changing the first letter of each defined term in such paragraphs from a capital to a lower case letter (except for "United States", "State", "State commission", and "Great Lakes Agreement"); and

(8) by reordering such paragraphs and the additional paragraphs added by subsection (a) in alphabetical order based on the headings of such paragraphs and renumbering such paragraphs as so reordered.

(d) CONFORMING AMENDMENTS.—The Act is amended—

(1) in section 225(a)(1), by striking "section 3(h)" and inserting "section 3"; 47 USC 225.

(2) in section 332(d), by striking "section 3(n)" each place it appears and inserting "section 3"; and 47 USC 332.

(3) in sections 621(d)(3), 636(d), and 637(a)(2), by striking "section 3(v)" and inserting "section 3". 47 USC 541, 556, 557.

TITLE I—TELECOMMUNICATION SERVICES

Subtitle A—Telecommunications Services

SEC. 101. ESTABLISHMENT OF PART II OF TITLE II.

(a) AMENDMENT.—Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part:

"PART II—DEVELOPMENT OF COMPETITIVE MARKETS

"SEC. 251. INTERCONNECTION. 47 USC 251.

"(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—

"(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

"(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

"(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.—Each local exchange carrier has the following duties:

"(1) RESALE.—The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

"(2) NUMBER PORTABILITY.—The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

"(3) DIALING PARITY.—The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

"(4) ACCESS TO RIGHTS-OF-WAY.—The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

"(5) RECIPROCAL COMPENSATION.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

"(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

"(1) DUTY TO NEGOTIATE.—The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

"(2) INTERCONNECTION.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

"(A) for the transmission and routing of telephone exchange service and exchange access;

"(B) at any technically feasible point within the carrier's network;

"(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

"(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

"(3) UNBUNDLED ACCESS.—The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall

provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

"(4) RESALE.—The duty—

"(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

"(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

"(5) NOTICE OF CHANGES.—The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

"(6) COLLOCATION.—The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

"(d) IMPLEMENTATION.—

"(1) IN GENERAL.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section. Regulations.

"(2) ACCESS STANDARDS.—In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

"(A) access to such network elements as are proprietary in nature is necessary; and

"(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

"(3) PRESERVATION OF STATE ACCESS REGULATIONS.—In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

"(A) establishes access and interconnection obligations of local exchange carriers;

"(B) is consistent with the requirements of this section; and

"(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

"(e) NUMBERING ADMINISTRATION.—

"(1) COMMISSION AUTHORITY AND JURISDICTION.—The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

"(2) COSTS.—The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

"(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS.—

"(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES.—

"(A) EXEMPTION.—Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

"(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE.—The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

"(C) LIMITATION ON EXEMPTION.—The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

"(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS.—A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate

nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

"(A) is necessary—

"(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

"(ii) to avoid imposing a requirement that is unduly economically burdensome; or

"(iii) to avoid imposing a requirement that is technically infeasible; and

"(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

"(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

"(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.—

"(1) DEFINITION.—For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

"(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

"(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

"(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

"(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS.—The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof)

as an incumbent local exchange carrier for purposes of this section if—

"(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

"(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

"(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

"(i) SAVINGS PROVISION.—Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 USC 252.

"SEC. 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

"(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION.—

"(1) VOLUNTARY NEGOTIATIONS.—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

"(2) MEDIATION.—Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

"(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.—

"(1) ARBITRATION.—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

"(2) DUTY OF PETITIONER.—

"(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

"(i) the unresolved issues;

"(ii) the position of each of the parties with respect to those issues; and

"(iii) any other issue discussed and resolved by the parties.

"(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

"(3) OPPORTUNITY TO RESPOND.—A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

"(4) ACTION BY STATE COMMISSION.—

"(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

"(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

"(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

"(5) REFUSAL TO NEGOTIATE.—The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

"(c) STANDARDS FOR ARBITRATION.—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

"(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

"(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

"(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

"(d) PRICING STANDARDS.—

"(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.—Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

"(A) shall be—

"(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

"(ii) nondiscriminatory, and

"(B) may include a reasonable profit.

"(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.—

"(A) IN GENERAL.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

"(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

"(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

"(B) RULES OF CONSTRUCTION.—This paragraph shall not be construed—

"(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

"(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

"(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.—For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

"(e) APPROVAL BY STATE COMMISSION.—

"(1) APPROVAL REQUIRED.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

"(2) GROUNDS FOR REJECTION.—The State commission may only reject—

"(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

"(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

"(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

"(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

"(3) PRESERVATION OF AUTHORITY.—Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

"(4) SCHEDULE FOR DECISION.—If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

"(5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

"(6) REVIEW OF STATE COMMISSION ACTIONS.—In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

"(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.—

"(1) IN GENERAL.—A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

"(2) STATE COMMISSION REVIEW.—A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

"(3) SCHEDULE FOR REVIEW.—The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

"(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

"(B) permit such statement to take effect.

"(4) AUTHORITY TO CONTINUE REVIEW.—Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

"(5) DUTY TO NEGOTIATE NOT AFFECTED.—The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

"(g) CONSOLIDATION OF STATE PROCEEDINGS.—Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

Public information.

"(h) FILING REQUIRED.—A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

"(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.—A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

"(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.—For purposes of this section, the term 'incumbent local exchange carrier' has the meaning provided in section 251(h).

47 USC 253.

"SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

"(a) IN GENERAL.—No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

"(b) STATE REGULATORY AUTHORITY.—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

"(c) STATE AND LOCAL GOVERNMENT AUTHORITY.—Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

"(d) PREEMPTION.—If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission

shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

"(e) COMMERCIAL MOBILE SERVICE PROVIDERS.—Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

"(f) RURAL MARKETS.—It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

"(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

"(2) to a provider of commercial mobile services.

"SEC. 254. UNIVERSAL SERVICE. 47 USC 254.

"(a) PROCEDURES TO REVIEW UNIVERSAL SERVICE REQUIREMENTS.—

"(1) FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE.—Within one month after the date of enactment of the Telecommunications Act of 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c), one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after the date of enactment of the Telecommunications Act of 1996.

"(2) COMMISSION ACTION.—The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after the date of enactment of the Telecommunications Act of 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

"(b) UNIVERSAL SERVICE PRINCIPLES.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

"(1) QUALITY AND RATES.—Quality services should be available at just, reasonable, and affordable rates.

"(2) ACCESS TO ADVANCED SERVICES.—Access to advanced telecommunications and information services should be provided in all regions of the Nation.

"(3) ACCESS IN RURAL AND HIGH COST AREAS.—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

"(4) EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS.—All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

"(5) SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS.—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

"(6) ACCESS TO ADVANCED TELECOMMUNICATIONS SERVICES FOR SCHOOLS, HEALTH CARE, AND LIBRARIES.—Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

"(7) ADDITIONAL PRINCIPLES.—Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

"(c) DEFINITION.—

"(1) IN GENERAL.—Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

"(A) are essential to education, public health, or public safety;

"(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

"(C) are being deployed in public telecommunications networks by telecommunications carriers; and

"(D) are consistent with the public interest, convenience, and necessity.

"(2) ALTERATIONS AND MODIFICATIONS.—The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

"(3) SPECIAL SERVICES.—In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

"(d) TELECOMMUNICATIONS CARRIER CONTRIBUTION.—Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

"(e) UNIVERSAL SERVICE SUPPORT.—After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

"(f) STATE AUTHORITY.—A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

"(g) INTEREXCHANGE AND INTERSTATE SERVICES.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

Rules.
Rural areas.

"(h) TELECOMMUNICATIONS SERVICES FOR CERTAIN PROVIDERS.—

"(1) IN GENERAL.—

"(A) HEALTH CARE PROVIDERS FOR RURAL AREAS.—A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any,

between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

"(B) EDUCATIONAL PROVIDERS AND LIBRARIES.—All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

"(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

"(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

"(2) ADVANCED SERVICES.—The Commission shall establish competitively neutral rules—

"(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

"(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

"(3) TERMS AND CONDITIONS.—Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

"(4) ELIGIBILITY OF USERS.—No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a forprofit business, is a school described in paragraph (5)(A) with an endowment of more than $50,000,000, or is a library not eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 335c et seq.).

"(5) DEFINITIONS.—For purposes of this subsection:

"(A) ELEMENTARY AND SECONDARY SCHOOLS.—The term 'elementary and secondary schools' means elementary schools and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the

Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

"(B) HEALTH CARE PROVIDER.—The term 'health care provider' means—

"(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

"(ii) community health centers or health centers providing health care to migrants;

"(iii) local health departments or agencies;

"(iv) community mental health centers;

"(v) not-for-profit hospitals;

"(vi) rural health clinics; and

"(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

"(C) PUBLIC INSTITUTIONAL TELECOMMUNICATIONS USER.—The term 'public institutional telecommunications user' means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

"(i) CONSUMER PROTECTION.—The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

"(j) LIFELINE ASSISTANCE.—Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

"(k) SUBSIDY OF COMPETITIVE SERVICES PROHIBITED.—A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

"SEC. 255. ACCESS BY PERSONS WITH DISABILITIES. 47 USC 255.

"(a) DEFINITIONS.—As used in this section—

"(1) DISABILITY.—The term 'disability' has the meaning given to it by section 3(2)(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A)).

"(2) READILY ACHIEVABLE.—The term 'readily achievable' has the meaning given to it by section 301(9) of that Act (42 U.S.C. 12181(9)).

"(b) MANUFACTURING.—A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

"(c) TELECOMMUNICATIONS SERVICES.—A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

"(d) COMPATIBILITY.—Whenever the requirements of subsections (b) and (c) are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible

with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

"(e) GUIDELINES.—Within 18 months after the date of enactment of the Telecommunications Act of 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

"(f) NO ADDITIONAL PRIVATE RIGHTS AUTHORIZED.—Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

47 USC 256.

"SEC. 256. COORDINATION FOR INTERCONNECTIVITY.

"(a) PURPOSE.—It is the purpose of this section—

"(1) to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service through—

"(A) coordinated public telecommunications network planning and design by telecommunications carriers and other providers of telecommunications service; and

"(B) public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service; and

"(2) to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

"(b) COMMISSION FUNCTIONS.—In carrying out the purposes of this section, the Commission—

"(1) shall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service; and

"(2) may participate, in a manner consistent with its authority and practice prior to the date of enactment of this section, in the development by appropriate industry standards-setting organizations of public telecommunications network interconnectivity standards that promote access to—

"(A) public telecommunications networks used to provide telecommunications service;

"(B) network capabilities and services by individuals with disabilities; and

"(C) information services by subscribers of rural telephone companies.

"(c) COMMISSION'S AUTHORITY.—Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.

"(d) DEFINITION.—As used in this section, the term 'public telecommunications network interconnectivity' means the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and exchange informa-

tion without degeneration, and to interact in concert with one another.

"SEC. 257. MARKET ENTRY BARRIERS PROCEEDING. 47 USC 257.

"(a) ELIMINATION OF BARRIERS.—Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services. Regulations.

"(b) NATIONAL POLICY.—In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

"(c) PERIODIC REVIEW.—Every 3 years following the completion of the proceeding required by subsection (a), the Commission shall review and report to Congress on— Reports.

"(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) and that can be prescribed consistent with the public interest, convenience, and necessity; and

"(2) the statutory barriers identified under subsection (a) that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

"SEC. 258. ILLEGAL CHANGES IN SUBSCRIBER CARRIER SELECTIONS. 47 USC 258.

"(a) PROHIBITION.—No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

"(b) LIABILITY FOR CHARGES.—Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe. The remedies provided by this subsection are in addition to any other remedies available by law.

"SEC. 259. INFRASTRUCTURE SHARING. 47 USC 259.

"(a) REGULATIONS REQUIRED.—The Commission shall prescribe, within one year after the date of enactment of the Telecommunications Act of 1996, regulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested

and obtained designation as an eligible telecommunications carrier under section 214(e).

"(b) TERMS AND CONDITIONS OF REGULATIONS.—The regulations prescribed by the Commission pursuant to this section shall—

"(1) not require a local exchange carrier to which this section applies to take any action that is economically unreasonable or that is contrary to the public interest;

"(2) permit, but shall not require, the joint ownership or operation of public switched network infrastructure and services by or among such local exchange carrier and a qualifying carrier;

"(3) ensure that such local exchange carrier will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section;

"(4) ensure that such local exchange carrier makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier, as determined in accordance with guidelines prescribed by the Commission in regulations issued pursuant to this section;

"(5) establish conditions that promote cooperation between local exchange carriers to which this section applies and qualifying carriers;

"(6) not require a local exchange carrier to which this section applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area; and

"(7) require that such local exchange carrier file with the Commission or State for public inspection, any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section.

"(c) INFORMATION CONCERNING DEPLOYMENT OF NEW SERVICES AND EQUIPMENT.—A local exchange carrier to which this section applies that has entered into an infrastructure sharing agreement under this section shall provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment.

"(d) DEFINITION.—For purposes of this section, the term 'qualifying carrier' means a telecommunications carrier that—

"(1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and

"(2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e).

"SEC. 260. PROVISION OF TELEMESSAGING SERVICE. 47 USC 260.

"(a) NONDISCRIMINATION SAFEGUARDS.—Any local exchange carrier subject to the requirements of section 251(c) that provides telemessaging service—

"(1) shall not subsidize its telemessaging service directly or indirectly from its telephone exchange service or its exchange access; and

"(2) shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.

"(b) EXPEDITED CONSIDERATION OF COMPLAINTS.—The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (a) or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.

"(c) DEFINITION.—As used in this section, the term 'telemessaging service' means voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services.

"SEC. 261. EFFECT ON OTHER REQUIREMENTS. 47 USC 261.

"(a) COMMISSION REGULATIONS.—Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

"(b) EXISTING STATE REGULATIONS.—Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

"(c) ADDITIONAL STATE REQUIREMENTS.—Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.".

(b) DESIGNATION OF PART I.—Title II of the Act is further amended by inserting before the heading of section 201 the following new heading:

"PART I—COMMON CARRIER REGULATION".

(c) STYLISTIC CONSISTENCY.—The Act is amended so that— 47 USC 151 note.

(1) the designation and heading of each title of the Act shall be in the form and typeface of the designation and heading of this title of this Act; and

(2) the designation and heading of each part of each title of the Act shall be in the form and typeface of the designation and heading of part I of title II of the Act, as amended by subsection (a).

SEC. 102. ELIGIBLE TELECOMMUNICATIONS CARRIERS.

(a) IN GENERAL.—Section 214 (47 U.S.C. 214) is amended by adding at the end thereof the following new subsection:

"(e) PROVISION OF UNIVERSAL SERVICE.—

"(1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.—A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received—

"(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

"(B) advertise the availability of such services and the charges therefor using media of general distribution.

"(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS.—A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

"(3) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS FOR UNSERVED AREAS.—If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

"(4) RELINQUISHMENT OF UNIVERSAL SERVICE.—A State commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission shall establish a time, not to exceed one year after the State commission approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

"(5) SERVICE AREA DEFINED.—The term 'service area' means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.".

SEC. 103. EXEMPT TELECOMMUNICATIONS COMPANIES.

The Public Utility Holding Company Act of 1935 (15 U.S.C. 79 and following) is amended by redesignating sections 34 and 35 as sections 35 and 36, respectively, and by inserting the following new section after section 33: 15 USC 79z–6, 79.

"SEC. 34. EXEMPT TELECOMMUNICATIONS COMPANIES. 15 USC 79z–5c.

"(a) DEFINITIONS.—For purposes of this section—

"(1) EXEMPT TELECOMMUNICATIONS COMPANY.—The term 'exempt telecommunications company' means any person determined by the Federal Communications Commission to be engaged directly or indirectly, wherever located, through one or more affiliates (as defined in section 2(a)(11)(B)), and exclusively in the business of providing——

"(A) telecommunications services;

"(B) information services;

"(C) other services or products subject to the jurisdiction of the Federal Communications Commission; or

"(D) products or services that are related or incidental to the provision of a product or service described in subparagraph (A), (B), or (C).

No person shall be deemed to be an exempt telecommunications company under this section unless such person has applied to the Federal Communications Commission for a determination under this paragraph. A person applying in good faith for such a determination shall be deemed an exempt telecommunications company under this section, with all of the exemptions

Notification.

provided by this section, until the Federal Communications Commission makes such determination. The Federal Communications Commission shall make such determination within 60 days of its receipt of any such application filed after the enactment of this section and shall notify the Commission whenever a determination is made under this paragraph that any person is an exempt telecommunications company. Not later than 12 months after the date of enactment of this section, the Federal Communications Commission shall promulgate rules implementing the provisions of this paragraph which shall be applicable to applications filed under this paragraph after the effective date of such rules.

Rules.

"(2) OTHER TERMS.—For purposes of this section, the terms 'telecommunications services' and 'information services' shall have the same meanings as provided in the Communications Act of 1934.

"(b) STATE CONSENT FOR SALE OF EXISTING RATE-BASED FACILITIES.—If a rate or charge for the sale of electric energy or natural gas (other than any portion of a rate or charge which represents recovery of the cost of a wholesale rate or charge) for, or in connection with, assets of a public utility company that is an associate company or affiliate of a registered holding company was in effect under the laws of any State as of December 19, 1995, the public utility company owning such assets may not sell such assets to an exempt telecommunications company that is an associate company or affiliate unless State commissions having jurisdiction over such public utility company approve such sale. Nothing in this subsection shall preempt the otherwise applicable authority of any State to approve or disapprove the sale of such assets. The approval of the Commission under this Act shall not be required for the sale of assets as provided in this subsection.

"(c) OWNERSHIP OF ETCS BY EXEMPT HOLDING COMPANIES.—Notwithstanding any provision of this Act, a holding company that is exempt under section 3 of this Act shall be permitted, without condition or limitation under this Act, to acquire and maintain an interest in the business of one or more exempt telecommunications companies.

"(d) OWNERSHIP OF ETCS BY REGISTERED HOLDING COMPANIES.—Notwithstanding any provision of this Act, a registered holding company shall be permitted (without the need to apply for, or receive, approval from the Commission, and otherwise without condition under this Act) to acquire and hold the securities, or an interest in the business, of one or more exempt telecommunications companies.

"(e) FINANCING AND OTHER RELATIONSHIPS BETWEEN ETCS AND REGISTERED HOLDING COMPANIES.—The relationship between an exempt telecommunications company and a registered holding company, its affiliates and associate companies, shall remain subject to the jurisdiction of the Commission under this Act: *Provided,* That—

"(1) section 11 of this Act shall not prohibit the ownership of an interest in the business of one or more exempt telecommunications companies by a registered holding company (regardless of activities engaged in or where facilities owned or operated by such exempt telecommunications companies are located), and such ownership by a registered holding company

shall be deemed consistent with the operation of an integrated public utility system;

"(2) the ownership of an interest in the business of one or more exempt telecommunications companies by a registered holding company (regardless of activities engaged in or where facilities owned or operated by such exempt telecommunications companies are located) shall be considered as reasonably incidental, or economically necessary or appropriate, to the operations of an integrated public utility system;

"(3) the Commission shall have no jurisdiction under this Act over, and there shall be no restriction or approval required under this Act with respect to (A) the issue or sale of a security by a registered holding company for purposes of financing the acquisition of an exempt telecommunications company, or (B) the guarantee of a security of an exempt telecommunications company by a registered holding company; and

"(4) except for costs that should be fairly and equitably allocated among companies that are associate companies of a registered holding company, the Commission shall have no jurisdiction under this Act over the sales, service, and construction contracts between an exempt telecommunications company and a registered holding company, its affiliates and associate companies.

"(f) REPORTING OBLIGATIONS CONCERNING INVESTMENTS AND ACTIVITIES OF REGISTERED PUBLIC-UTILITY HOLDING COMPANY SYSTEMS.—

"(1) OBLIGATIONS TO REPORT INFORMATION.—Any registered holding company or subsidiary thereof that acquires or holds the securities, or an interest in the business, of an exempt telecommunications company shall file with the Commission such information as the Commission, by rule, may prescribe concerning—

"(A) investments and activities by the registered holding company, or any subsidiary thereof, with respect to exempt telecommunications companies, and

"(B) any activities of an exempt telecommunications company within the holding company system,

that are reasonably likely to have a material impact on the financial or operational condition of the holding company system.

"(2) AUTHORITY TO REQUIRE ADDITIONAL INFORMATION.—If, based on reports provided to the Commission pursuant to paragraph (1) of this subsection or other available information, the Commission reasonably concludes that it has concerns regarding the financial or operational condition of any registered holding company or any subsidiary thereof (including an exempt telecommunications company), the Commission may require such registered holding company to make additional reports and provide additional information.

"(3) AUTHORITY TO LIMIT DISCLOSURE OF INFORMATION.—Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be reported under this subsection. Nothing in this subsection shall authorize the Commission to withhold the information from Congress, or prevent the Commission from complying with a request for information from any other Federal or State department or agency requesting the information for purposes

within the scope of its jurisdiction. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

"(g) ASSUMPTION OF LIABILITIES.—Any public utility company that is an associate company, or an affiliate, of a registered holding company and that is subject to the jurisdiction of a State commission with respect to its retail electric or gas rates shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an exempt telecommunications company. Any public utility company that is an associate company, or an affiliate, of a registered holding company and that is subject to the jurisdiction of a State commission with respect to its retail electric or gas rates shall not assume any obligation or liability as guarantor, endorser, surety, or otherwise by the public utility company in respect of any security of an exempt telecommunications company.

"(h) PLEDGING OR MORTGAGING OF ASSETS.—Any public utility company that is an associate company, or affiliate, of a registered holding company and that is subject to the jurisdiction of a State commission with respect to its retail electric or gas rates shall not pledge, mortgage, or otherwise use as collateral any assets of the public utility company or assets of any subsidiary company thereof for the benefit of an exempt telecommunications company.

"(i) PROTECTION AGAINST ABUSIVE AFFILIATE TRANSACTIONS.—A public utility company may enter into a contract to purchase services or products described in subsection (a)(1) from an exempt telecommunications company that is an affiliate or associate company of the public utility company only if—

"(1) every State commission having jurisdiction over the retail rates of such public utility company approves such contract; or

"(2) such public utility company is not subject to State commission retail rate regulation and the purchased services or products—

"(A) would not be resold to any affiliate or associate company; or

"(B) would be resold to an affiliate or associate company and every State commission having jurisdiction over the retail rates of such affiliate or associate company makes the determination required by subparagraph (A).

The requirements of this subsection shall not apply in any case in which the State or the State commission concerned publishes a notice that the State or State commission waives its authority under this subsection.

"(j) NONPREEMPTION OF RATE AUTHORITY.—Nothing in this Act shall preclude the Federal Energy Regulatory Commission or a State commission from exercising its jurisdiction under otherwise applicable law to determine whether a public utility company may recover in rates the costs of products or services purchased from or sold to an associate company or affiliate that is an exempt telecommunications company, regardless of whether such costs are incurred through the direct or indirect purchase or sale of products or services from such associate company or affiliate.

"(k) RECIPROCAL ARRANGEMENTS PROHIBITED.—Reciprocal arrangements among companies that are not affiliates or associate companies of each other that are entered into in order to avoid the provisions of this section are prohibited.

"(l) BOOKS AND RECORDS.—(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

"(A) a public utility company subject to its regulatory authority under State law;

"(B) any exempt telecommunications company selling products or services to such public utility company or to an associate company of such public utility company; and

"(C) any associate company or affiliate of an exempt telecommunications company which sells products or services to a public utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric or gas service in connection with the activities of such exempt telecommunications company.

"(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information. Confidentiality.

"(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection. Courts.

"(4) Nothing in this section shall—

"(A) preempt applicable State law concerning the provision of records and other information; or

"(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

"(m) INDEPENDENT AUDIT AUTHORITY FOR STATE COMMISSIONS.—

"(1) STATE MAY ORDER AUDIT.—Any State commission with jurisdiction over a public utility company that—

"(A) is an associate company of a registered holding company; and

"(B) transacts business, directly or indirectly, with a subsidiary company, an affiliate or an associate company that is an exempt telecommunications company,

may order an independent audit to be performed, no more frequently than on an annual basis, of all matters deemed relevant by the selected auditor that reasonably relate to retail rates: *Provided*, That such matters relate, directly or indirectly, to transactions or transfers between the public utility company subject to its jurisdiction and such exempt telecommunications company.

"(2) SELECTION OF FIRM TO CONDUCT AUDIT.—(A) If a State commission orders an audit in accordance with paragraph (1), the public utility company and the State commission shall jointly select, within 60 days, a firm to perform the audit. The firm selected to perform the audit shall possess demonstrated qualifications relating to—

"(i) competency, including adequate technical training and professional proficiency in each discipline necessary to carry out the audit; and

"(ii) independence and objectivity, including that the firm be free from personal or external impairments to independence, and should assume an independent position with the State commission and auditee, making certain that the audit is based upon an impartial consideration of all pertinent facts and responsible opinions.

"(B) The public utility company and the exempt telecommunications company shall cooperate fully with all reasonable requests necessary to perform the audit and the public utility company shall bear all costs of having the audit performed.

"(3) AVAILABILITY OF AUDITOR'S REPORT.—The auditor's report shall be provided to the State commission not later than 6 months after the selection of the auditor, and provided to the public utility company not later than 60 days thereafter.

"(n) APPLICABILITY OF TELECOMMUNICATIONS REGULATION.—Nothing in this section shall affect the authority of the Federal Communications Commission under the Communications Act of 1934, or the authority of State commissions under State laws concerning the provision of telecommunications services, to regulate the activities of an exempt telecommunications company.".

SEC. 104. NONDISCRIMINATION PRINCIPLE.

Section 1 (47 U.S.C. 151) is amended by inserting after "to all the people of the United States" the following: ", without discrimination on the basis of race, color, religion, national origin, or sex,".

Subtitle B—Special Provisions Concerning Bell Operating Companies

SEC. 151. BELL OPERATING COMPANY PROVISIONS.

(a) ESTABLISHMENT OF PART III OF TITLE II.—Title II is amended by adding at the end of part II (as added by section 101) the following new part:

"PART III—SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

47 USC 271.

"SEC. 271. BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.

"(a) GENERAL LIMITATION.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

"(b) INTERLATA SERVICES TO WHICH THIS SECTION APPLIES.—

"(1) IN-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i)) if the Commission approves the application of such company for such State under subsection (d)(3).

"(2) OUT-OF-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).

"(3) INCIDENTAL INTERLATA SERVICES.—A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g)) originating in any State after the date of enactment of the Telecommunications Act of 1996.

"(4) TERMINATION.—Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j).

"(c) REQUIREMENTS FOR PROVIDING CERTAIN IN-REGION INTERLATA SERVICES.—

"(1) AGREEMENT OR STATEMENT.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

"(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

"(B) FAILURE TO REQUEST ACCESS.—A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

"(2) SPECIFIC INTERCONNECTION REQUIREMENTS.—

"(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

"(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

"(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

"(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

"(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

"(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).

"(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

"(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

"(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

"(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

"(vi) Local switching unbundled from transport, local loop transmission, or other services.

"(vii) Nondiscriminatory access to—

"(I) 911 and E911 services;

"(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

"(III) operator call completion services.

"(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

"(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

"(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

"(xi) Until the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

"(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

"(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).

"(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

"(d) ADMINISTRATIVE PROVISIONS.—

"(1) APPLICATION TO COMMISSION.—On and after the date of enactment of the Telecommunications Act of 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

"(2) CONSULTATION.—

"(A) CONSULTATION WITH THE ATTORNEY GENERAL.— The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3). Notification.

"(B) CONSULTATION WITH STATE COMMISSIONS.—Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

"(3) DETERMINATION.—Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

"(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and—

"(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or

"(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B);

"(B) the requested authorization will be carried out in accordance with the requirements of section 272; and

"(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

"(4) LIMITATION ON COMMISSION.—The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

Federal Register, publication.

"(5) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

"(6) ENFORCEMENT OF CONDITIONS.—

"(A) COMMISSION AUTHORITY.—If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

"(i) issue an order to such company to correct the deficiency;

"(ii) impose a penalty on such company pursuant to title V; or

"(iii) suspend or revoke such approval.

"(B) RECEIPT AND REVIEW OF COMPLAINTS.—The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

"(e) LIMITATIONS.—

"(1) JOINT MARKETING OF LOCAL AND LONG DISTANCE SERVICES.—Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

"(2) INTRALATA TOLL DIALING PARITY.—

"(A) PROVISION REQUIRED.—A Bell operating company granted authority to provide interLATA services under subsection (d) shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

"(B) LIMITATION.—Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after the date of enactment of the Telecommunications Act of 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

"(f) EXCEPTION FOR PREVIOUSLY AUTHORIZED ACTIVITIES.—Neither subsection (a) nor section 273 shall prohibit a Bell operating company or affiliate from engaging, at any time after the date of enactment of the Telecommunications Act of 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before such date of enactment, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

"(g) DEFINITION OF INCIDENTAL INTERLATA SERVICES.—For purposes of this section, the term 'incidental interLATA services' means the interLATA provision by a Bell operating company or its affiliate—

"(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

"(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

"(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

"(D) of alarm monitoring services;

"(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5);

"(3) of commercial mobile services in accordance with section 332(c) of this Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

"(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

"(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

"(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

"(h) LIMITATIONS.—The provisions of subsection (g) are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

"(i) ADDITIONAL DEFINITIONS.—As used in this section—

"(1) IN-REGION STATE.—The term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996.

"(2) AUDIO PROGRAMMING SERVICES.—The term 'audio programming services' means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

"(3) VIDEO PROGRAMMING SERVICES; OTHER PROGRAMMING SERVICES.—The terms 'video programming service' and 'other programming services' have the same meanings as such terms have under section 602 of this Act.

"(j) CERTAIN SERVICE APPLICATIONS TREATED AS IN-REGION SERVICE APPLICATIONS.—For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

"(1) terminate in an in-region State of that Bell operating company, and

"(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1).

47 USC 272.

"SEC. 272. SEPARATE AFFILIATE; SAFEGUARDS.

"(a) SEPARATE AFFILIATE REQUIRED FOR COMPETITIVE ACTIVITIES.—

"(1) IN GENERAL.—A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that—

"(A) are separate from any operating company entity that is subject to the requirements of section 251(c); and

"(B) meet the requirements of subsection (b).

"(2) SERVICES FOR WHICH A SEPARATE AFFILIATE IS REQUIRED.—The services for which a separate affiliate is required by paragraph (1) are:

"(A) Manufacturing activities (as defined in section 273(h)).

"(B) Origination of interLATA telecommunications services, other than—

"(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g);

"(ii) out-of-region services described in section 271(b)(2); or

"(iii) previously authorized activities described in section 271(f).

"(C) InterLATA information services, other than electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)).

"(b) STRUCTURAL AND TRANSACTIONAL REQUIREMENTS.—The separate affiliate required by this section—

"(1) shall operate independently from the Bell operating company;

"(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate; Records.

"(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

"(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

"(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

"(c) NONDISCRIMINATION SAFEGUARDS.—In its dealings with its affiliate described in subsection (a), a Bell operating company—

"(1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and

"(2) shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Commission.

"(d) BIENNIAL AUDIT.—

"(1) GENERAL REQUIREMENT.—A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b).

"(2) RESULTS SUBMITTED TO COMMISSION; STATE COMMISSIONS.—The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report. Public information.

"(3) ACCESS TO DOCUMENTS.—For purposes of conducting audits and reviews under this subsection— Records.

"(A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates;

"(B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and

"(C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

"(e) FULFILLMENT OF CERTAIN REQUESTS.—A Bell operating company and an affiliate that is subject to the requirements of section 251(c)—

"(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates;

"(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions;

"(3) shall charge the affiliate described in subsection (a), or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and

"(4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

"(f) SUNSET.—

"(1) MANUFACTURING AND LONG DISTANCE.—The provisions of this section (other than subsection (e)) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order.

"(2) INTERLATA INFORMATION SERVICES.—The provisions of this section (other than subsection (e)) shall cease to apply with respect to the interLATA information services of a Bell operating company 4 years after the date of enactment of the Telecommunications Act of 1996, unless the Commission extends such 4-year period by rule or order.

"(3) PRESERVATION OF EXISTING AUTHORITY.—Nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity.

"(g) JOINT MARKETING.—

"(1) AFFILIATE SALES OF TELEPHONE EXCHANGE SERVICES.—A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.

"(2) BELL OPERATING COMPANY SALES OF AFFILIATE SERVICES.—A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).

"(3) RULE OF CONSTRUCTION.—The joint marketing and sale of services permitted under this subsection shall not be

considered to violate the nondiscrimination provisions of subsection (c).

"(h) TRANSITION.—With respect to any activity in which a Bell operating company is engaged on the date of enactment of the Telecommunications Act of 1996, such company shall have one year from such date of enactment to comply with the requirements of this section.

"SEC. 273. MANUFACTURING BY BELL OPERATING COMPANIES. 47 USC 273.

"(a) AUTHORIZATION.—A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that Bell operating company or any Bell operating company affiliate to provide interLATA services under section 271(d), subject to the requirements of this section and the regulations prescribed thereunder, except that neither a Bell operating company nor any of its affiliates may engage in such manufacturing in conjunction with a Bell operating company not so affiliated or any of its affiliates.

"(b) COLLABORATION; RESEARCH AND ROYALTY AGREEMENTS.—

"(1) COLLABORATION.—Subsection (a) shall not prohibit a Bell operating company from engaging in close collaboration with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof related to such equipment.

"(2) CERTAIN RESEARCH ARRANGEMENTS; ROYALTY AGREEMENTS.—Subsection (a) shall not prohibit a Bell operating company from—

"(A) engaging in research activities related to manufacturing, and

"(B) entering into royalty agreements with manufacturers of telecommunications equipment.

"(c) INFORMATION REQUIREMENTS.—

"(1) INFORMATION ON PROTOCOLS AND TECHNICAL REQUIREMENTS.—Each Bell operating company shall, in accordance with regulations prescribed by the Commission, maintain and file with the Commission full and complete information with respect to the protocols and technical requirements for connection with and use of its telephone exchange service facilities. Each such company shall report promptly to the Commission any material changes or planned changes to such protocols and requirements, and the schedule for implementation of such changes or planned changes. Regulations.

"(2) DISCLOSURE OF INFORMATION.—A Bell operating company shall not disclose any information required to be filed under paragraph (1) unless that information has been filed promptly, as required by regulation by the Commission.

"(3) ACCESS BY COMPETITORS TO INFORMATION.—The Commission may prescribe such additional regulations under this subsection as may be necessary to ensure that manufacturers have access to the information with respect to the protocols and technical requirements for connection with and use of telephone exchange service facilities that a Bell operating company makes available to any manufacturing affiliate or any unaffiliated manufacturer.

"(4) PLANNING INFORMATION.—Each Bell operating company shall provide, to interconnecting carriers providing telephone exchange service, timely information on the planned deployment of telecommunications equipment.

"(d) MANUFACTURING LIMITATIONS FOR STANDARD-SETTING ORGANIZATIONS.—

"(1) APPLICATION TO BELL COMMUNICATIONS RESEARCH OR MANUFACTURERS.—Bell Communications Research, Inc., or any successor entity or affiliate—

"(A) shall not be considered a Bell operating company or a successor or assign of a Bell operating company at such time as it is no longer an affiliate of any Bell operating company; and

"(B) notwithstanding paragraph (3), shall not engage in manufacturing telecommunications equipment or customer premises equipment as long as it is an affiliate of more than 1 otherwise unaffiliated Bell operating company or successor or assign of any such company.

Nothing in this subsection prohibits Bell Communications Research, Inc., or any successor entity, from engaging in any activity in which it is lawfully engaged on the date of enactment of the Telecommunications Act of 1996. Nothing provided in this subsection shall render Bell Communications Research, Inc., or any successor entity, a common carrier under title II of this Act. Nothing in this subsection restricts any manufacturer from engaging in any activity in which it is lawfully engaged on the date of enactment of the Telecommunications Act of 1996.

"(2) PROPRIETARY INFORMATION.—Any entity which establishes standards for telecommunications equipment or customer premises equipment, or generic network requirements for such equipment, or certifies telecommunications equipment or customer premises equipment, shall be prohibited from releasing or otherwise using any proprietary information, designated as such by its owner, in its possession as a result of such activity, for any purpose other than purposes authorized in writing by the owner of such information, even after such entity ceases to be so engaged.

"(3) MANUFACTURING SAFEGUARDS.—(A) Except as prohibited in paragraph (1), and subject to paragraph (6), any entity which certifies telecommunications equipment or customer premises equipment manufactured by an unaffiliated entity shall only manufacture a particular class of telecommunications equipment or customer premises equipment for which it is undertaking or has undertaken, during the previous 18 months, certification activity for such class of equipment through a separate affiliate.

"(B) Such separate affiliate shall—

Records.

"(i) maintain books, records, and accounts separate from those of the entity that certifies such equipment, consistent with generally acceptable accounting principles;

"(ii) not engage in any joint manufacturing activities with such entity; and

"(iii) have segregated facilities and separate employees with such entity.

"(C) Such entity that certifies such equipment shall—

"(i) not discriminate in favor of its manufacturing affiliate in the establishment of standards, generic requirements, or product certification;

"(ii) not disclose to the manufacturing affiliate any proprietary information that has been received at any time from an unaffiliated manufacturer, unless authorized in writing by the owner of the information; and

"(iii) not permit any employee engaged in product certification for telecommunications equipment or customer premises equipment to engage jointly in sales or marketing of any such equipment with the affiliated manufacturer.

"(4) STANDARD-SETTING ENTITIES.—Any entity that is not an accredited standards development organization and that establishes industry-wide standards for telecommunications equipment or customer premises equipment, or industry-wide generic network requirements for such equipment, or that certifies telecommunications equipment or customer premises equipment manufactured by an unaffiliated entity, shall—

"(A) establish and publish any industry-wide standard for, industry-wide generic requirement for, or any substantial modification of an existing industry-wide standard or industry-wide generic requirement for, telecommunications equipment or customer premises equipment only in compliance with the following procedure— Publication.

"(i) such entity shall issue a public notice of its consideration of a proposed industry-wide standard or industry-wide generic requirement; Notice.

"(ii) such entity shall issue a public invitation to interested industry parties to fund and participate in such efforts on a reasonable and nondiscriminatory basis, administered in such a manner as not to unreasonably exclude any interested industry party;

"(iii) such entity shall publish a text for comment by such parties as have agreed to participate in the process pursuant to clause (ii), provide such parties a full opportunity to submit comments, and respond to comments from such parties;

"(iv) such entity shall publish a final text of the industry-wide standard or industry-wide generic requirement, including the comments in their entirety, of any funding party which requests to have its comments so published; and

"(v) such entity shall attempt, prior to publishing a text for comment, to agree with the funding parties as a group on a mutually satisfactory dispute resolution process which such parties shall utilize as their sole recourse in the event of a dispute on technical issues as to which there is disagreement between any funding party and the entity conducting such activities, except that if no dispute resolution process is agreed to by all the parties, a funding party may utilize the dispute resolution procedures established pursuant to paragraph (5) of this subsection;

"(B) engage in product certification for telecommunications equipment or customer premises equipment manufactured by unaffiliated entities only if—

"(i) such activity is performed pursuant to published criteria;

"(ii) such activity is performed pursuant to auditable criteria; and

"(iii) such activity is performed pursuant to available industry-accepted testing methods and standards, where applicable, unless otherwise agreed upon by the parties funding and performing such activity;

"(C) not undertake any actions to monopolize or attempt to monopolize the market for such services; and

"(D) not preferentially treat its own telecommunications equipment or customer premises equipment, or that of its affiliate, over that of any other entity in establishing and publishing industry-wide standards or industry-wide generic requirements for, and in certification of, telecommunications equipment and customer premises equipment.

"(5) ALTERNATE DISPUTE RESOLUTION.—Within 90 days after the date of enactment of the Telecommunications Act of 1996, the Commission shall prescribe a dispute resolution process to be utilized in the event that a dispute resolution process is not agreed upon by all the parties when establishing and publishing any industry-wide standard or industry-wide generic requirement for telecommunications equipment or customer premises equipment, pursuant to paragraph (4)(A)(v). The Commission shall not establish itself as a party to the dispute resolution process. Such dispute resolution process shall permit any funding party to resolve a dispute with the entity conducting the activity that significantly affects such funding party's interests, in an open, nondiscriminatory, and unbiased fashion, within 30 days after the filing of such dispute. Such disputes may be filed within 15 days after the date the funding party receives a response to its comments from the entity conducting the activity. The Commission shall establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process.

Penalties.

"(6) SUNSET.—The requirements of paragraphs (3) and (4) shall terminate for the particular relevant activity when the Commission determines that there are alternative sources of industry-wide standards, industry-wide generic requirements, or product certification for a particular class of telecommunications equipment or customer premises equipment available in the United States. Alternative sources shall be deemed to exist when such sources provide commercially viable alternatives that are providing such services to customers. The Commission shall act on any application for such a determination within 90 days after receipt of such application, and shall receive public comment on such application.

"(7) ADMINISTRATION AND ENFORCEMENT AUTHORITY.—For the purposes of administering this subsection and the regulations prescribed thereunder, the Commission shall have the same remedial authority as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act.

"(8) DEFINITIONS.—For purposes of this subsection:

"(A) The term 'affiliate' shall have the same meaning as in section 3 of this Act, except that, for purposes of paragraph (1)(B)—

"(i) an aggregate voting equity interest in Bell Communications Research, Inc., of at least 5 percent of its total voting equity, owned directly or indirectly by more than 1 otherwise unaffiliated Bell operating company, shall constitute an affiliate relationship; and

"(ii) a voting equity interest in Bell Communications Research, Inc., by any otherwise unaffiliated Bell operating company of less than 1 percent of Bell Communications Research's total voting equity shall not be considered to be an equity interest under this paragraph.

"(B) The term 'generic requirement' means a description of acceptable product attributes for use by local exchange carriers in establishing product specifications for the purchase of telecommunications equipment, customer premises equipment, and software integral thereto.

"(C) The term 'industry-wide' means activities funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access lines deployed by telecommunications carriers in the United States as of the date of enactment of the Telecommunications Act of 1996.

"(D) The term 'certification' means any technical process whereby a party determines whether a product, for use by more than one local exchange carrier, conforms with the specified requirements pertaining to such product.

"(E) The term 'accredited standards development organization' means an entity composed of industry members which has been accredited by an institution vested with the responsibility for standards accreditation by the industry.

"(e) BELL OPERATING COMPANY EQUIPMENT PROCUREMENT AND SALES.—

"(1) NONDISCRIMINATION STANDARDS FOR MANUFACTURING.—In the procurement or awarding of supply contracts for telecommunications equipment, a Bell operating company, or any entity acting on its behalf, for the duration of the requirement for a separate subsidiary including manufacturing under this Act—

"(A) shall consider such equipment, produced or supplied by unrelated persons; and

"(B) may not discriminate in favor of equipment produced or supplied by an affiliate or related person.

"(2) PROCUREMENT STANDARDS.—Each Bell operating company or any entity acting on its behalf shall make procurement decisions and award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors.

"(3) NETWORK PLANNING AND DESIGN.—A Bell operating company shall, to the extent consistent with the antitrust laws, engage in joint network planning and design with local exchange carriers operating in the same area of interest. No

participant in such planning shall be allowed to delay the introduction of new technology or the deployment of facilities to provide telecommunications services, and agreement with such other carriers shall not be required as a prerequisite for such introduction or deployment.

"(4) SALES RESTRICTIONS.—Neither a Bell operating company engaged in manufacturing nor a manufacturing affiliate of such a company shall restrict sales to any local exchange carrier of telecommunications equipment, including software integral to the operation of such equipment and related upgrades.

"(5) PROTECTION OF PROPRIETARY INFORMATION.—A Bell operating company and any entity it owns or otherwise controls shall protect the proprietary information submitted for procurement decisions from release not specifically authorized by the owner of such information.

"(f) ADMINISTRATION AND ENFORCEMENT AUTHORITY.—For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to any Bell operating company or any affiliate thereof as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act.

"(g) ADDITIONAL RULES AND REGULATIONS.—The Commission may prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of this section, and otherwise to prevent discrimination and cross-subsidization in a Bell operating company's dealings with its affiliate and with third parties.

"(h) DEFINITION.—As used in this section, the term 'manufacturing' has the same meaning as such term has under the AT&T Consent Decree.

47 USC 274.

"SEC. 274. ELECTRONIC PUBLISHING BY BELL OPERATING COMPANIES.

"(a) LIMITATIONS.—No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.

"(b) SEPARATED AFFILIATE OR ELECTRONIC PUBLISHING JOINT VENTURE REQUIREMENTS.—A separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company. Such separated affiliate or joint venture and the Bell operating company with which it is affiliated shall—

Records.

"(1) maintain separate books, records, and accounts and prepare separate financial statements;

"(2) not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the Bell operating company;

"(3) carry out transactions (A) in a manner consistent with such independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted auditing standards;

"(4) value any assets that are transferred directly or indirectly from the Bell operating company to a separated affiliate or joint venture, and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies;

"(5) between a separated affiliate and a Bell operating company—

"(A) have no officers, directors, and employees in common after the effective date of this section; and

"(B) own no property in common;

"(6) not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing Bell operating company except for names, trademarks, or service marks that are owned by the entity that owns or controls the Bell operating company;

"(7) not permit the Bell operating company—

"(A) to perform hiring or training of personnel on behalf of a separated affiliate;

"(B) to perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or

"(C) to perform research and development on behalf of a separated affiliate;

"(8) each have performed annually a compliance review—

"(A) that is conducted by an independent entity for the purpose of determining compliance during the preceding calendar year with any provision of this section; and

"(B) the results of which are maintained by the separated affiliate or joint venture and the Bell operating company for a period of 5 years subject to review by any lawful authority; and

"(9) within 90 days of receiving a review described in paragraph (8), file a report of any exceptions and corrective action with the Commission and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section. Reports.

"(c) JOINT MARKETING.—

"(1) IN GENERAL.—Except as provided in paragraph (2)—

"(A) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate; and

"(B) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.

"(2) PERMISSIBLE JOINT ACTIVITIES.—

"(A) JOINT TELEMARKETING.—A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: *Provided,* That if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall

be made available to all electronic publishers on request, on nondiscriminatory terms.

"(B) TEAMING ARRANGEMENTS.—A Bell operating company may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the Bell operating company only provides facilities, services, and basic telephone service information as authorized by this section, and (ii) the Bell operating company does not own such teaming or business arrangement.

"(C) ELECTRONIC PUBLISHING JOINT VENTURES.—A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, if the Bell operating company or affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50 percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize the Bell operating company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

"(d) BELL OPERATING COMPANY REQUIREMENT.—A Bell operating company under common ownership or control with a separated affiliate or electronic publishing joint venture shall provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing.

"(e) PRIVATE RIGHT OF ACTION.—

"(1) DAMAGES.—Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may file a complaint with the Commission or bring suit as provided in section 207 of this Act, and such Bell operating company, affiliate, or separated affiliate shall be liable as provided in section 206 of this Act; except that damages may not be awarded for a violation that is discovered by a compliance review as required by subsection (b)(7) of this section and corrected within 90 days.

"(2) CEASE AND DESIST ORDERS.—In addition to the provisions of paragraph (1), any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may make application to the Commission for an order to cease and desist such

violation or may make application in any district court of the United States of competent jurisdiction for an order enjoining such acts or practices or for an order compelling compliance with such requirement.

"(f) SEPARATED AFFILIATE REPORTING REQUIREMENT.—Any separated affiliate under this section shall file with the Commission annual reports in a form substantially equivalent to the Form 10–K required by regulations of the Securities and Exchange Commission.

"(g) EFFECTIVE DATES.—

"(1) TRANSITION.—Any electronic publishing service being offered to the public by a Bell operating company or affiliate on the date of enactment of the Telecommunications Act of 1996 shall have one year from such date of enactment to comply with the requirements of this section.

"(2) SUNSET.—The provisions of this section shall not apply to conduct occurring after 4 years after the date of enactment of the Telecommunications Act of 1996.

"(h) DEFINITION OF ELECTRONIC PUBLISHING.—

"(1) IN GENERAL.—The term 'electronic publishing' means the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.

"(2) EXCEPTIONS.—The term 'electronic publishing' shall not include the following services:

"(A) Information access, as that term is defined by the AT&T Consent Decree.

"(B) The transmission of information as a common carrier.

"(C) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

"(D) Voice storage and retrieval services, including voice messaging and electronic mail services.

"(E) Data processing or transaction processing services that do not involve the generation or alteration of the content of information.

"(F) Electronic billing or advertising of a Bell operating company's regulated telecommunications services.

"(G) Language translation or data format conversion.

"(H) The provision of information necessary for the management, control, or operation of a telephone company telecommunications system.

"(I) The provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising.

"(J) Caller identification services.

"(K) Repair and provisioning databases and credit card and billing validation for telephone company operations.

"(L) 911–E and other emergency assistance databases.

"(M) Any other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.

"(N) Any upgrades to these network services that do not involve the generation or alteration of the content of information.

"(O) Video programming or full motion video entertainment on demand.

"(i) ADDITIONAL DEFINITIONS.—As used in this section—

"(1) The term 'affiliate' means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate.

"(2) The term 'basic telephone service' means any wireline telephone exchange service, or wireline telephone exchange service facility, provided by a Bell operating company in a telephone exchange area, except that such term does not include—

"(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, or

"(B) a commercial mobile service.

"(3) The term 'basic telephone service information' means network and customer information of a Bell operating company and other information acquired by a Bell operating company as a result of its engaging in the provision of basic telephone service.

"(4) The term 'control' has the meaning that it has in 17 C.F.R. 240.12b–2, the regulations promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or any successor provision to such section.

"(5) The term 'electronic publishing joint venture' means a joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

"(6) The term 'entity' means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.

"(7) The term 'inbound telemarketing' means the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.

"(8) The term 'own' with respect to an entity means to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement.

"(9) The term 'separated affiliate' means a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company and that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

"(10) The term 'Bell operating company' has the meaning provided in section 3, except that such term includes any entity or corporation that is owned or controlled by such a company (as so defined) but does not include an electronic publishing joint venture owned by such an entity or corporation.

"SEC. 275. ALARM MONITORING SERVICES. 47 USC 275.

"(a) DELAYED ENTRY INTO ALARM MONITORING.—

"(1) PROHIBITION.—No Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is 5 years after the date of enactment of the Telecommunications Act of 1996.

"(2) EXISTING ACTIVITIES.—Paragraph (1) does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a Bell operating company that was engaged in providing alarm monitoring services as of November 30, 1995, directly or through an affiliate. Such Bell operating company or affiliate may not acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring service entity after November 30, 1995, and until 5 years after the date of enactment of the Telecommunications Act of 1996, except that this sentence shall not prohibit an exchange of customers for the customers of an unaffiliated alarm monitoring service entity.

"(b) NONDISCRIMINATION.—An incumbent local exchange carrier (as defined in section 251(h)) engaged in the provision of alarm monitoring services shall—

"(1) provide nonaffiliated entities, upon reasonable request, with the network services it provides to its own alarm monitoring operations, on nondiscriminatory terms and conditions; and

"(2) not subsidize its alarm monitoring services either directly or indirectly from telephone exchange service operations.

"(c) EXPEDITED CONSIDERATION OF COMPLAINTS.—The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (b) or the regulations thereunder that result in material financial harm to a provider of alarm monitoring service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, as determined by the Commission in accordance with such regulations, the Commission shall, within 60 days after receipt of the complaint, order the incumbent local exchange carrier (as defined in section 251(h)) and its affiliates to cease engaging in such violation pending such final determination.

"(d) USE OF DATA.—A local exchange carrier may not record or use in any fashion the occurrence or contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of such local exchange carrier,

or any other entity. Any regulations necessary to enforce this subsection shall be issued initially within 6 months after the date of enactment of the Telecommunications Act of 1996.

"(e) DEFINITION OF ALARM MONITORING SERVICE.—The term 'alarm monitoring service' means a service that uses a device located at a residence, place of business, or other fixed premises—

"(1) to receive signals from other devices located at or about such premises regarding a possible threat at such premises to life, safety, or property, from burglary, fire, vandalism, bodily injury, or other emergency, and

"(2) to transmit a signal regarding such threat by means of transmission facilities of a local exchange carrier or one of its affiliates to a remote monitoring center to alert a person at such center of the need to inform the customer or another person or police, fire, rescue, security, or public safety personnel of such threat,

but does not include a service that uses a medical monitoring device attached to an individual for the automatic surveillance of an ongoing medical condition.

47 USC 276.

"SEC. 276. PROVISION OF PAYPHONE SERVICE.

"(a) NONDISCRIMINATION SAFEGUARDS.—After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service—

"(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

"(2) shall not prefer or discriminate in favor of its payphone service.

"(b) REGULATIONS.—

"(1) CONTENTS OF REGULATIONS.—In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

"(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

"(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

"(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90–623) proceeding;

"(D) provide for Bell operating company payphone service providers to have the same right that independent

payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

"(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

"(2) PUBLIC INTEREST TELEPHONES.—In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

"(3) EXISTING CONTRACTS.—Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.

"(c) STATE PREEMPTION.—To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

"(d) DEFINITION.—As used in this section, the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.".

(b) REVIEW OF ENTRY DECISIONS.—Section 402(b) (47 U.S.C. 402(b)) is amended—

(1) in paragraph (6), by striking "(3), and (4)" and inserting "(3), (4), and (9)"; and

(2) by adding at the end the following new paragraph:

"(9) By any applicant for authority to provide interLATA services under section 271 of this Act whose application is denied by the Commission.".

TITLE II—BROADCAST SERVICES

SEC. 201. BROADCAST SPECTRUM FLEXIBILITY.

Title III is amended by inserting after section 335 (47 U.S.C. 335) the following new section:

"SEC. 336. BROADCAST SPECTRUM FLEXIBILITY.

47 USC 336.

"(a) COMMISSION ACTION.—If the Commission determines to issue additional licenses for advanced television services, the Commission—

"(1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed

to operate a television broadcast station or hold a permit to construct such a station (or both); and

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"(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

"(b) CONTENTS OF REGULATIONS.—In prescribing the regulations required by subsection (a), the Commission shall—

"(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

"(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

"(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;

"(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and

"(5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

"(c) RECOVERY OF LICENSE.—If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.

"(d) PUBLIC INTEREST REQUIREMENT.—Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualifications for renewal of its license.

"(e) FEES.—

"(1) SERVICES TO WHICH FEES APPLY.—If the regulations prescribed pursuant to subsection (a) permit a licensee to offer ancillary or supplementary services on a designated frequency—

"(A) for which the payment of a subscription fee is required in order to receive such services, or

"(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),

the Commission shall establish a program to assess and collect from the licensee for such designated frequency an annual fee or other schedule or method of payment that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

"(2) COLLECTION OF FEES.—The program required by paragraph (1) shall—

"(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

"(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this Act and the Commission's regulations thereunder; and

"(C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

"(3) TREATMENT OF REVENUES.—

"(A) GENERAL RULE.—Except as provided in subparagraph (B), all proceeds obtained pursuant to the regulations required by this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code.

"(B) RETENTION OF REVENUES.—Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this section and regulating and supervising advanced television services. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis.

"(4) REPORT.—Within 5 years after the date of enactment of the Telecommunications Act of 1996, the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.

"(f) EVALUATION.—Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program. Such evaluation shall include—

"(1) an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services;

"(2) an assessment of alternative uses, including public safety use, of the frequencies used for such broadcasts; and

"(3) the extent to which the Commission has been or will be able to reduce the amount of spectrum assigned to licensees.

"(g) DEFINITIONS.—As used in this section:

"(1) ADVANCED TELEVISION SERVICES.—The term 'advanced television services' means television services provided using digital or other advanced technology as further defined in the opinion, report, and order of the Commission entitled 'Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service', MM Docket 87–268, adopted September 17, 1992, and successor proceedings.

"(2) DESIGNATED FREQUENCIES.—The term 'designated frequency' means each of the frequencies designated by the Commission for licenses for advanced television services.

"(3) HIGH DEFINITION TELEVISION.—The term 'high definition television' refers to systems that offer approximately twice the vertical and horizontal resolution of receivers generally available on the date of enactment of the Telecommunications Act of 1996, as further defined in the proceedings described in paragraph (1) of this subsection.".

Regulations.

SEC. 202. BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.—The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.—

(1) APPLICABLE CAPS.—The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will

result in an increase in the number of radio broadcast stations in operation.

(c) TELEVISION OWNERSHIP LIMITATIONS.—

(1) NATIONAL OWNERSHIP LIMITATIONS.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

(2) LOCAL OWNERSHIP LIMITATIONS.—The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE-TO-A-MARKET.—With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) DUAL NETWORK CHANGES.—The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of—

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are "networks" as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) CABLE CROSS OWNERSHIP.—

(1) ELIMINATION OF RESTRICTIONS.—The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION.—The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) LOCAL MARKETING AGREEMENTS.—Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall

determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

(i) ELIMINATION OF STATUTORY RESTRICTION.—Section 613(a) (47 U.S.C. 533(a)) is amended—

(1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking "and" at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting "; and"; and

(6) by adding at the end the following new paragraph:

"(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l).".

SEC. 203. TERM OF LICENSES.

Section 307(c) (47 U.S.C. 307(c)) is amended to read as follows:

"(c) TERMS OF LICENSES.—

"(1) INITIAL AND RENEWAL LICENSES.—Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.

"(2) MATERIALS IN APPLICATION.—In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.

"(3) CONTINUATION PENDING DECISION.—Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect.".

SEC. 204. BROADCAST LICENSE RENEWAL PROCEDURES.

(a) RENEWAL PROCEDURES.—

(1) AMENDMENT.—Section 309 (47 U.S.C. 309) is amended by adding at the end thereof the following new subsection:

"(k) BROADCAST STATION RENEWAL PROCEDURES.—

"(1) STANDARDS FOR RENEWAL.—If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license—

"(A) the station has served the public interest, convenience, and necessity;

"(B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and

"(C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

"(2) CONSEQUENCE OF FAILURE TO MEET STANDARD.—If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.

"(3) STANDARDS FOR DENIAL.—If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e), that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall—

"(A) issue an order denying the renewal application filed by such licensee under section 308; and

"(B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 specifying the channel or broadcasting facilities of the former licensee.

"(4) COMPETITOR CONSIDERATION PROHIBITED.—In making the determinations specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.".

(2) CONFORMING AMENDMENT.—Section 309(d) (47 U.S.C. 309(d)) is amended by inserting after "with subsection (a)" each place it appears the following: "(or subsection (k) in the case of renewal of any broadcast station license)".

(b) SUMMARY OF COMPLAINTS ON VIOLENT PROGRAMMING.—Section 308 (47 U.S.C. 308) is amended by adding at the end the following new subsection:

"(d) SUMMARY OF COMPLAINTS.—Each applicant for the renewal of a commercial or noncommercial television license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the commentor as constituting violent programming.".

(c) EFFECTIVE DATE.—The amendments made by this section apply to applications filed after May 1, 1995. 47 USC 308 note.

SEC. 205. DIRECT BROADCAST SATELLITE SERVICE.

(a) DBS SIGNAL SECURITY.—Section 705(e)(4) (47 U.S.C. 605(e)(4)) is amended by inserting "or direct-to-home satellite services," after "programming,".

(b) FCC JURISDICTION OVER DIRECT-TO-HOME SATELLITE SERVICES.—Section 303 (47 U.S.C. 303) is amended by adding at the end thereof the following new subsection:

"(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term 'direct-to-home satellite services' means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.".

SEC. 206. AUTOMATED SHIP DISTRESS AND SAFETY SYSTEMS.

Part II of title III is amended by inserting after section 364 (47 U.S.C. 362) the following new section:

47 USC 363.

"SEC. 365. AUTOMATED SHIP DISTRESS AND SAFETY SYSTEMS.

"Notwithstanding any provision of this Act or any other provision of law or regulation, a ship documented under the laws of the United States operating in accordance with the Global Maritime Distress and Safety System provisions of the Safety of Life at Sea Convention shall not be required to be equipped with a radio telegraphy station operated by one or more radio officers or operators. This section shall take effect for each vessel upon a determination by the United States Coast Guard that such vessel has the equipment required to implement the Global Maritime Distress and Safety System installed and operating in good working condition.".

Effective date.

Regulations.
47 USC 303 note.

SEC. 207. RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES.

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

TITLE III—CABLE SERVICES

SEC. 301. CABLE ACT REFORM.

(a) DEFINITIONS.—

(1) DEFINITION OF CABLE SERVICE.—Section 602(6)(B) (47 U.S.C. 522(6)(B)) is amended by inserting "or use" after "the selection".

(2) CHANGE IN DEFINITION OF CABLE SYSTEM.—Section 602(7) (47 U.S.C. 522(7)) is amended by striking "(B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way;" and inserting "(B) a facility that serves subscribers without using any public right-of-way;".

(b) RATE DEREGULATION.—

(1) UPPER TIER REGULATION.—Section 623(c) (47 U.S.C. 543(c)) is amended—

(A) in paragraph (1)(B), by striking "subscriber, franchising authority, or other relevant State or local government entity" and inserting "franchising authority (in accordance with paragraph (3))";

(B) in paragraph (1)(C), by striking "such complaint" and inserting "the first complaint filed with the franchising authority under paragraph (3)"; and

(C) by striking paragraph (3) and inserting the following:

"(3) REVIEW OF RATE CHANGES.—The Commission shall review any complaint submitted by a franchising authority after the date of enactment of the Telecommunications Act of 1996 concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

"(4) SUNSET OF UPPER TIER RATE REGULATION.—This subsection shall not apply to cable programming services provided after March 31, 1999.".

(2) SUNSET OF UNIFORM RATE STRUCTURE IN MARKETS WITH EFFECTIVE COMPETITION.—Section 623(d) (47 U.S.C. 543(d)) is amended by adding at the end thereof the following: "This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.".

(3) EFFECTIVE COMPETITION.—Section 623(l)(1) (47 U.S.C. 543(l)(1)) is amended—

(A) by striking "or" at the end of subparagraph (B);

(B) by striking the period at the end of subparagraph (C) and inserting "; or"; and

(C) by adding at the end the following:

"(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.".

(c) GREATER DEREGULATION FOR SMALLER CABLE COMPANIES.—Section 623 (47 U.S.C 543) is amended by adding at the end thereof the following:

"(m) SPECIAL RULES FOR SMALL COMPANIES.—

"(1) IN GENERAL.—Subsections (a), (b), and (c) do not apply to a small cable operator with respect to—

"(A) cable programming services, or

"(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.

"(2) DEFINITION OF SMALL CABLE OPERATOR.—For purposes of this subsection, the term 'small cable operator' means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.".

(d) MARKET DETERMINATIONS.—

(1) MARKET DETERMINATIONS; EXPEDITED DECISIONMAKING.—Section 614(h)(1)(C) (47 U.S.C. 534(h)(1)(C)) is amended—

(A) by striking "in the manner provided in section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991," in clause (i) and inserting "by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns,"; and

(B) by striking clause (iv) and inserting the following:

"(iv) Within 120 days after the date on which a request is filed under this subparagraph (or 120 days after the date of enactment of the Telecommunications Act of 1996, if later), the Commission shall grant or deny the request.".

47 USC 534 note.

(2) APPLICATION TO PENDING REQUESTS.—The amendment made by paragraph (1) shall apply to—

(A) any request pending under section 614(h)(1)(C) of the Communications Act of 1934 (47 U.S.C. 534(h)(1)(C)) on the date of enactment of this Act; and

(B) any request filed under that section after that date.

(e) TECHNICAL STANDARDS.—Section 624(e) (47 U.S.C. 544(e)) is amended by striking the last two sentences and inserting the following: "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.".

(f) CABLE EQUIPMENT COMPATIBILITY.—Section 624A (47 U.S.C. 544A) is amended—

47 USC 544a.

(1) in subsection (a) by striking "and" at the end of paragraph (2), by striking the period at the end of paragraph (3) and inserting "; and"; and by adding at the end the following new paragraph:

"(4) compatibility among televisions, video cassette recorders, and cable systems can be assured with narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market.";

(2) in subsection (c)(1)—

(A) by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively; and

(B) by inserting before such redesignated subparagraph (B) the following new subparagraph:

"(A) the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and other cable converters unrelated to the descrambling or decryption of cable television signals;"; and

(3) in subsection (c)(2)—

(A) by redesignating subparagraphs (D) and (E) as subparagraphs (E) and (F), respectively; and

(B) by inserting after subparagraph (C) the following new subparagraph:

"(D) to ensure that any standards or regulations developed under the authority of this section to ensure compatibility between televisions, video cassette recorders, and cable systems do not affect features, functions, protocols, and other product and service options other than those specified in paragraph (1)(B), including telecommunications interface equipment, home automation communications, and computer network services;".

(g) SUBSCRIBER NOTICE.—Section 632 (47 U.S.C. 552) is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection:

"(c) SUBSCRIBER NOTICE.—A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding section 623(b)(6) or any other provision of this Act, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.".

(h) PROGRAM ACCESS.—Section 628 (47 U.S.C. 548) is amended by adding at the end the following:

"(j) COMMON CARRIERS.—Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this subsection, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company).".

(i) ANTITRAFFICKING.—Section 617 (47 U.S.C. 537) is amended—

(1) by striking subsections (a) through (d); and

(2) in subsection (e), by striking "(e)" and all that follows through "a franchising authority" and inserting "A franchising authority".

(j) AGGREGATION OF EQUIPMENT COSTS.—Section 623(a) (47 U.S.C. 543(a)) is amended by adding at the end the following new paragraph:

"(7) AGGREGATION OF EQUIPMENT COSTS.—

"(A) IN GENERAL.—The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3), to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

"(B) REVISION TO COMMISSION RULES; FORMS.—Within 120 days of the date of enactment of the Telecommunications Act of 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).".

(k) TREATMENT OF PRIOR YEAR LOSSES.—

47 USC 543.

(1) AMENDMENT.—Section 623 (48 U.S.C. 543) is amended by adding at the end thereof the following:

"(n) TREATMENT OF PRIOR YEAR LOSSES.—Notwithstanding any other provision of this section or of section 612, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.".

47 USC 543 note.

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of enactment of this Act and shall be applicable to any rate proposal filed on or after September 4, 1993, upon which no final action has been taken by December 1, 1995.

SEC. 302. CABLE SERVICE PROVIDED BY TELEPHONE COMPANIES.

(a) PROVISIONS FOR REGULATION OF CABLE SERVICE PROVIDED BY TELEPHONE COMPANIES.—Title VI (47 U.S.C. 521 et seq.) is amended by adding at the end the following new part:

"PART V—VIDEO PROGRAMMING SERVICES PROVIDED BY TELEPHONE COMPANIES

47 USC 571.

"SEC. 651. REGULATORY TREATMENT OF VIDEO PROGRAMMING SERVICES.

"(a) LIMITATIONS ON CABLE REGULATION.—

"(1) RADIO-BASED SYSTEMS.—To the extent that a common carrier (or any other person) is providing video programming to subscribers using radio communication, such carrier (or other person) shall be subject to the requirements of title III and section 652, but shall not otherwise be subject to the requirements of this title.

"(2) COMMON CARRIAGE OF VIDEO TRAFFIC.—To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of title II and section 652,

but shall not otherwise be subject to the requirements of this title. This paragraph shall not affect the treatment under section 602(7)(C) of a facility of a common carrier as a cable system.

"(3) CABLE SYSTEMS AND OPEN VIDEO SYSTEMS.—To the extent that a common carrier is providing video programming to its subscribers in any manner other than that described in paragraphs (1) and (2)—

"(A) such carrier shall be subject to the requirements of this title, unless such programming is provided by means of an open video system for which the Commission has approved a certification under section 653; or

"(B) if such programming is provided by means of an open video system for which the Commission has approved a certification under section 653, such carrier shall be subject to the requirements of this part, but shall be subject to parts I through IV of this title only as provided in 653(c).

"(4) ELECTION TO OPERATE AS OPEN VIDEO SYSTEM.—A common carrier that is providing video programming in a manner described in paragraph (1) or (2), or a combination thereof, may elect to provide such programming by means of an open video system that complies with section 653. If the Commission approves such carrier's certification under section 653, such carrier shall be subject to the requirements of this part, but shall be subject to parts I through IV of this title only as provided in 653(c).

"(b) LIMITATIONS ON INTERCONNECTION OBLIGATIONS.—A local exchange carrier that provides cable service through an open video system or a cable system shall not be required, pursuant to title II of this Act, to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers.

"(c) ADDITIONAL REGULATORY RELIEF.—A common carrier shall not be required to obtain a certificate under section 214 with respect to the establishment or operation of a system for the delivery of video programming.

"SEC. 652. PROHIBITION ON BUY OUTS. 47 USC 572.

"(a) ACQUISITIONS BY CARRIERS.—No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.

"(b) ACQUISITIONS BY CABLE OPERATORS.—No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.

"(c) JOINT VENTURES.—A local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to

subscribers or to provide telecommunications services within such market.

"(d) EXCEPTIONS.—

"(1) RURAL SYSTEMS.—Notwithstanding subsections (a), (b), and (c) of this section, a local exchange carrier (with respect to a cable system located in its telephone service area) and a cable operator (with respect to the facilities of a local exchange carrier used to provide telephone exchange service in its cable franchise area) may obtain a controlling interest in, management interest in, or enter into a joint venture or partnership with the operator of such system or facilities for the use of such system or facilities to the extent that—

"(A) such system or facilities only serve incorporated or unincorporated—

"(i) places or territories that have fewer than 35,000 inhabitants; and

"(ii) are outside an urbanized area, as defined by the Bureau of the Census; and

"(B) in the case of a local exchange carrier, such system, in the aggregate with any other system in which such carrier has an interest, serves less than 10 percent of the households in the telephone service area of such carrier.

"(2) JOINT USE.—Notwithstanding subsection (c), a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.

"(3) ACQUISITIONS IN COMPETITIVE MARKETS.—Notwithstanding subsections (a) and (c), a local exchange carrier may obtain a controlling interest in, or form a joint venture or other partnership with, or provide financing to, a cable system (hereinafter in this paragraph referred to as 'the subject cable system'), if—

"(A) the subject cable system operates in a television market that is not in the top 25 markets, and such market has more than 1 cable system operator, and the subject cable system is not the cable system with the most subscribers in such television market;

"(B) the subject cable system and the cable system with the most subscribers in such television market held on May 1, 1995, cable television franchises from the largest municipality in the television market and the boundaries of such franchises were identical on such date;

"(C) the subject cable system is not owned by or under common ownership or control of any one of the 50 cable system operators with the most subscribers as such operators existed on May 1, 1995; and

"(D) the system with the most subscribers in the television market is owned by or under common ownership or control of any one of the 10 largest cable system operators as such operators existed on May 1, 1995.

"(4) EXEMPT CABLE SYSTEMS.—Subsection (a) does not apply to any cable system if—

"(A) the cable system serves no more than 17,000 cable subscribers, of which no less than 8,000 live within an urban area, and no less than 6,000 live within a nonurbanized area as of June 1, 1995;

"(B) the cable system is not owned by, or under common ownership or control with, any of the 50 largest cable system operators in existence on June 1, 1995; and

"(C) the cable system operates in a television market that was not in the top 100 television markets as of June 1, 1995.

"(5) SMALL CABLE SYSTEMS IN NONURBAN AREAS.—Notwithstanding subsections (a) and (c), a local exchange carrier with less than $100,000,000 in annual operating revenues (or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier) may purchase or otherwise acquire more than a 10 percent financial interest in, or any management interest in, or enter into a joint venture or partnership with, any cable system within the local exchange carrier's telephone service area that serves no more than 20,000 cable subscribers, if no more than 12,000 of those subscribers live within an urbanized area, as defined by the Bureau of the Census.

"(6) WAIVERS.—The Commission may waive the restrictions of subsections (a), (b), or (c) only if—

"(A) the Commission determines that, because of the nature of the market served by the affected cable system or facilities used to provide telephone exchange service—

"(i) the affected cable operator or local exchange carrier would be subjected to undue economic distress by the enforcement of such provisions;

"(ii) the system or facilities would not be economically viable if such provisions were enforced; or

"(iii) the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; and

"(B) the local franchising authority approves of such waiver.

"(e) DEFINITION OF TELEPHONE SERVICE AREA.—For purposes of this section, the term 'telephone service area' when used in connection with a common carrier subject in whole or in part to title II of this Act means the area within which such carrier provided telephone exchange service as of January 1, 1993, but if any common carrier after such date transfers its telephone exchange service facilities to another common carrier, the area to which such facilities provide telephone exchange service shall be treated as part of the telephone service area of the acquiring common carrier and not of the selling common carrier.

"SEC. 653. ESTABLISHMENT OF OPEN VIDEO SYSTEMS. 47 USC 573.

"(a) OPEN VIDEO SYSTEMS.—

"(1) CERTIFICATES OF COMPLIANCE.—A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent

with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section. An operator of an open video system shall qualify for reduced regulatory burdens under subsection (c) of this section if the operator of such system certifies to the Commission that such carrier complies with the Commission's regulations under subsection (b) and the Commission approves such certification. The Commission shall publish notice of the receipt of any such certification and shall act to approve or disapprove any such certification within 10 days after receipt of such certification.

Publication.

"(2) DISPUTE RESOLUTION.—The Commission shall have the authority to resolve disputes under this section and the regulations prescribed thereunder. Any such dispute shall be resolved within 180 days after notice of such dispute is submitted to the Commission. At that time or subsequently in a separate damages proceeding, the Commission may, in the case of any violation of this section, require carriage, award damages to any person denied carriage, or any combination of such sanctions. Any aggrieved party may seek any other remedy available under this Act.

"(b) COMMISSION ACTIONS.—

"(1) REGULATIONS REQUIRED.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary (including any reconsideration) to prescribe regulations that—

"(A) except as required pursuant to section 611, 614, or 615, prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory;

"(B) if demand exceeds the channel capacity of the open video system, prohibit an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system, but nothing in this subparagraph shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers;

"(C) permit an operator of an open video system to carry on only one channel any video programming service that is offered by more than one video programming provider (including the local exchange carrier's video programming affiliate): *Provided,* That subscribers have ready and immediate access to any such video programming service;

"(D) extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67), network nonduplication (47 C.F.R. 76.92 et seq.), and syndicated exclusivity (47 C.F.R. 76.151 et seq.); and

"(E)(i) prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscrib-

ers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers;

"(ii) require an operator of an open video system to ensure that video programming providers or copyright holders (or both) are able suitably and uniquely to identify their programming services to subscribers;

"(iii) if such identification is transmitted as part of the programming signal, require the carrier to transmit such identification without change or alteration; and

"(iv) prohibit an operator of an open video system from omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide, or menu.

"(2) CONSUMER ACCESS.—Subject to the requirements of paragraph (1) and the regulations thereunder, nothing in this section prohibits a common carrier or its affiliate from negotiating mutually agreeable terms and conditions with over-the-air broadcast stations and other unaffiliated video programming providers to allow consumer access to their signals on any level or screen of any gateway, menu, or other program guide, whether provided by the carrier or its affiliate.

"(c) REDUCED REGULATORY BURDENS FOR OPEN VIDEO SYSTEMS.—

"(1) IN GENERAL.—Any provision that applies to a cable operator under—

"(A) sections 613 (other than subsection (a) thereof), 616, 623(f), 628, 631, and 634 of this title, shall apply,

"(B) sections 611, 614, and 615 of this title, and section 325 of title III, shall apply in accordance with the regulations prescribed under paragraph (2), and

"(C) sections 612 and 617, and parts III and IV (other than sections 623(f), 628, 631, and 634), of this title shall not apply,

to any operator of an open video system for which the Commission has approved a certification under this section.

"(2) IMPLEMENTATION.—

"(A) COMMISSION ACTION.—In the rulemaking proceeding to prescribe the regulations required by subsection (b)(1), the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection. The Commission shall complete all action (including any reconsideration) to prescribe such regulations no later than 6 months after the date of enactment of the Telecommunications Act of 1996.

"(B) FEES.—An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area, as determined in accordance with regulations prescribed by the Commission. An operator of an open video system may designate that portion

of a subscriber's bill attributable to the fee under this subparagraph as a separate item on the bill.

"(3) REGULATORY STREAMLINING.—With respect to the establishment and operation of an open video system, the requirements of this section shall apply in lieu of, and not in addition to, the requirements of title II.

"(4) TREATMENT AS CABLE OPERATOR.—Nothing in this Act precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code.

"(d) DEFINITION OF TELEPHONE SERVICE AREA.—For purposes of this section, the term 'telephone service area' when used in connection with a common carrier subject in whole or in part to title II of this Act means the area within which such carrier is offering telephone exchange service.".

(b) CONFORMING AND TECHNICAL AMENDMENTS.—

(1) REPEAL.—Subsection (b) of section 613 (47 U.S.C. 533(b)) is repealed.

47 USC 522.

(2) DEFINITIONS.—Section 602 (47 U.S.C. 531) is amended—

(A) in paragraph (7), by striking ", or (D)" and inserting the following: ", unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title; or (E)";

(B) by redesignating paragraphs (12) through (19) as paragraphs (13) through (20), respectively; and

(C) by inserting after paragraph (11) the following new paragraph:

"(12) the term 'interactive on-demand services' means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider;".

(3) TERMINATION OF VIDEO-DIALTONE REGULATIONS.—The Commission's regulations and policies with respect to video dialtone requirements issued in CC Docket No. 87–266 shall cease to be effective on the date of enactment of this Act. This paragraph shall not be construed to require the termination of any video-dialtone system that the Commission has approved before the date of enactment of this Act.

SEC. 303. PREEMPTION OF FRANCHISING AUTHORITY REGULATION OF TELECOMMUNICATIONS SERVICES.

(a) PROVISION OF TELECOMMUNICATIONS SERVICES BY A CABLE OPERATOR.—Section 621(b) (47 U.S.C. 541(b)) is amended by adding at the end thereof the following new paragraph:

"(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—

"(i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services; and

"(ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.

"(B) A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limit-

ing, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

"(C) A franchising authority may not order a cable operator or affiliate thereof—

"(i) to discontinue the provision of a telecommunications service, or

"(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.

"(D) Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.".

(b) FRANCHISE FEES.—Section 622(b) (47 U.S.C. 542(b)) is amended by inserting "to provide cable services" immediately before the period at the end of the first sentence thereof.

SEC. 304. COMPETITIVE AVAILABILITY OF NAVIGATION DEVICES.

Part III of title VI is amended by inserting after section 628 (47 U.S.C. 548) the following new section:

"SEC. 629. COMPETITIVE AVAILABILITY OF NAVIGATION DEVICES.

Regulations.
47 USC 549.

"(a) COMMERCIAL CONSUMER AVAILABILITY OF EQUIPMENT USED TO ACCESS SERVICES PROVIDED BY MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS.—The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor. Such regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

"(b) PROTECTION OF SYSTEM SECURITY.—The Commission shall not prescribe regulations under subsection (a) which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.

"(c) WAIVER.—The Commission shall waive a regulation adopted under subsection (a) for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video

programming systems, technology, or products. Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection, and such waiver shall be effective for all service providers and products in that category and for all providers of services and products.

"(d) AVOIDANCE OF REDUNDANT REGULATIONS.—

"(1) COMMERCIAL AVAILABILITY DETERMINATIONS.—Determinations made or regulations prescribed by the Commission with respect to commercial availability to consumers of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, before the date of enactment of the Telecommunications Act of 1996 shall fulfill the requirements of this section.

"(2) REGULATIONS.—Nothing in this section affects section 64.702(e) of the Commission's regulations (47 C.F.R. 64.702(e)) or other Commission regulations governing interconnection and competitive provision of customer premises equipment used in connection with basic common carrier communications services.

"(e) SUNSET.—The regulations adopted under this section shall cease to apply when the Commission determines that—

"(1) the market for the multichannel video programming distributors is fully competitive;

"(2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and

"(3) elimination of the regulations would promote competition and the public interest.

"(f) COMMISSION'S AUTHORITY.—Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.".

SEC. 305. VIDEO PROGRAMMING ACCESSIBILITY.

Title VII is amended by inserting after section 712 (47 U.S.C. 612) the following new section:

47 USC 613.

"SEC. 713. VIDEO PROGRAMMING ACCESSIBILITY.

"(a) COMMISSION INQUIRY.—Within 180 days after the date of enactment of the Telecommunications Act of 1996, the Federal Communications Commission shall complete an inquiry to ascertain the level at which video programming is closed captioned. Such inquiry shall examine the extent to which existing or previously published programming is closed captioned, the size of the video programming provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors. The Commission shall submit to the Congress a report on the results of such inquiry.

Reports.

Regulations.

"(b) ACCOUNTABILITY CRITERIA.—Within 18 months after such date of enactment, the Commission shall prescribe such regulations as are necessary to implement this section. Such regulations shall ensure that—

"(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions, except as provided in subsection (d); and

"(2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions, except as provided in subsection (d).

"(c) DEADLINES FOR CAPTIONING.—Such regulations shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming.

"(d) EXEMPTIONS.—Notwithstanding subsection (b)—

"(1) the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming;

"(2) a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law; and

"(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would result in an undue burden.

"(e) UNDUE BURDEN.—The term 'undue burden' means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include—

"(1) the nature and cost of the closed captions for the programming;

"(2) the impact on the operation of the provider or program owner;

"(3) the financial resources of the provider or program owner; and

"(4) the type of operations of the provider or program owner.

"(f) VIDEO DESCRIPTIONS INQUIRY.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings. The Commission's report shall assess appropriate methods and schedules for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate. Reports.

"(g) VIDEO DESCRIPTION.—For purposes of this section, 'video description' means the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

"(h) PRIVATE RIGHTS OF ACTIONS PROHIBITED.—Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation there-

under. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.".

TITLE IV—REGULATORY REFORM

SEC. 401. REGULATORY FORBEARANCE.

Title I is amended by inserting after section 9 (47 U.S.C. 159) the following new section:

47 USC 160.

"SEC. 10. COMPETITION IN PROVISION OF TELECOMMUNICATIONS SERVICE.

"(a) REGULATORY FLEXIBILITY.—Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

"(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

"(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

"(3) forbearance from applying such provision or regulation is consistent with the public interest.

"(b) COMPETITIVE EFFECT TO BE WEIGHED.—In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

"(c) PETITION FOR FORBEARANCE.—Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

"(d) LIMITATION.—Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

"(e) STATE ENFORCEMENT AFTER COMMISSION FORBEARANCE.—A State commission may not continue to apply or enforce any

provision of this Act that the Commission has determined to forbear from applying under subsection (a).".

SEC. 402. BIENNIAL REVIEW OF REGULATIONS; REGULATORY RELIEF.

(a) BIENNIAL REVIEW.—Title I is amended by inserting after section 10 (as added by section 401) the following new section:

"SEC. 11. REGULATORY REFORM. 47 USC 161.

"(a) BIENNIAL REVIEW OF REGULATIONS.—In every even-numbered year (beginning with 1998), the Commission—

"(1) shall review all regulations issued under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

"(2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

"(b) EFFECT OF DETERMINATION.—The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.".

(b) REGULATORY RELIEF.—

(1) STREAMLINED PROCEDURES FOR CHANGES IN CHARGES, CLASSIFICATIONS, REGULATIONS, OR PRACTICES.—

(A) Section 204(a) (47 U.S.C. 204(a)) is amended—

(i) by striking "12 months" the first place it appears in paragraph (2)(A) and inserting "5 months";

(ii) by striking "effective," and all that follows in paragraph (2)(A) and inserting "effective."; and

(iii) by adding at the end thereof the following:

"(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.".

(B) Section 208(b) (47 U.S.C. 208(b)) is amended—

(i) by striking "12 months" the first place it appears in paragraph (1) and inserting "5 months"; and

(ii) by striking "filed," and all that follows in paragraph (1) and inserting "filed.".

(2) EXTENSIONS OF LINES UNDER SECTION 214; ARMIS REPORTS.—The Commission shall permit any common carrier— 47 USC 214 note.

(A) to be exempt from the requirements of section 214 of the Communications Act of 1934 for the extension of any line; and

(B) to file cost allocation manuals and ARMIS reports annually, to the extent such carrier is required to file such manuals or reports.

(3) FORBEARANCE AUTHORITY NOT LIMITED.—Nothing in this subsection shall be construed to limit the authority of the Commission to waive, modify, or forbear from applying any of the requirements to which reference is made in paragraph (1) under any other provision of this Act or other law. 47 USC 204 note.

(4) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by paragraph (1) of this subsection shall apply with respect to any charge, classification, regulation, or practice 47 USC 204 note.

filed on or after one year after the date of enactment of this Act.

(c) CLASSIFICATION OF CARRIERS.—In classifying carriers according to section 32.11 of its regulations (47 C.F.R. 32.11) and in establishing reporting requirements pursuant to part 43 of its regulations (47 C.F.R. part 43) and section 64.903 of its regulations (47 C.F.R. 64.903), the Commission shall adjust the revenue requirements to account for inflation as of the release date of the Commission's Report and Order in CC Docket No. 91–141, and annually thereafter. This subsection shall take effect on the date of enactment of this Act.

Effective date.

SEC. 403. ELIMINATION OF UNNECESSARY COMMISSION REGULATIONS AND FUNCTIONS.

(a) MODIFICATION OF AMATEUR RADIO EXAMINATION PROCEDURES.—Section 4(f)(4) (47 U.S.C. 154(f)(4)) is amended—

(1) in subparagraph (A)—

(A) by inserting "or administering" after "for purposes of preparing";

(B) by inserting "of" after "than the class"; and

(C) by inserting "or administered" after "for which the examination is being prepared";

(2) by striking subparagraph (B);

(3) in subparagraph (H), by striking "(A), (B), and (C)" and inserting "(A) and (B)";

(4) in subparagraph (J)—

(A) by striking "or (B)"; and

(B) by striking the last sentence; and

(5) by redesignating subparagraphs (C) through (J) as subparagraphs (B) through (I), respectively.

(b) AUTHORITY TO DESIGNATE ENTITIES TO INSPECT.—Section 4(f)(3) (47 U.S.C. 154(f)(3)) is amended by inserting before the period at the end the following: ": and *Provided further,* That, in the alternative, an entity designated by the Commission may make the inspections referred to in this paragraph".

(c) EXPEDITING INSTRUCTIONAL TELEVISION FIXED SERVICE PROCESSING.—Section 5(c)(1) (47 U.S.C. 155(c)(1)) is amended by striking the last sentence and inserting the following: "Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this Act, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of title 5, United States Code, of any hearing to which such section applies.".

(d) REPEAL SETTING OF DEPRECIATION RATES.—The first sentence of section 220(b) (47 U.S.C. 220(b)) is amended by striking "shall prescribe for such carriers" and inserting "may prescribe, for such carriers as it determines to be appropriate,".

(e) USE OF INDEPENDENT AUDITORS.—Section 220(c) (47 U.S.C. 220(c)) is amended by adding at the end thereof the following: "The Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits under this section. While so employed or engaged in conducting an audit for the Commission under this section, any such person shall have the powers granted the Commission under this subsection and shall be subject to sub-

section (f) in the same manner as if that person were an employee of the Commission.".

(f) DELEGATION OF EQUIPMENT TESTING AND CERTIFICATION TO PRIVATE LABORATORIES.—Section 302 (47 U.S.C. 302) is amended by adding at the end the following: 47 USC 302a.

"(e) The Commission may—

"(1) authorize the use of private organizations for testing and certifying the compliance of devices or home electronic equipment and systems with regulations promulgated under this section;

"(2) accept as prima facie evidence of such compliance the certification by any such organization; and

"(3) establish such qualifications and standards as it deems appropriate for such private organizations, testing, and certification.".

(g) MAKING LICENSE MODIFICATION UNIFORM.—Section 303(f) (47 U.S.C. 303(f)) is amended by striking "unless, after a public hearing," and inserting "unless".

(h) ELIMINATE FCC JURISDICTION OVER GOVERNMENT-OWNED SHIP RADIO STATIONS.—

(1) Section 305 (47 U.S.C. 305) is amended by striking subsection (b) and redesignating subsections (c) and (d) as (b) and (c), respectively.

(2) Section 382(2) (47 U.S.C. 382(2)) is amended by striking "except a vessel of the United States Maritime Administration, the Inland and Coastwise Waterways Service, or the Panama Canal Company,".

(i) PERMIT OPERATION OF DOMESTIC SHIP AND AIRCRAFT RADIOS WITHOUT LICENSE.—Section 307(e) (47 U.S.C. 307(e)) is amended to read as follows:

"(e)(1) Notwithstanding any license requirement established in this Act, if the Commission determines that such authorization serves the public interest, convenience, and necessity, the Commission may by rule authorize the operation of radio stations without individual licenses in the following radio services: (A) the citizens band radio service; (B) the radio control service; (C) the aviation radio service for aircraft stations operated on domestic flights when such aircraft are not otherwise required to carry a radio station; and (D) the maritime radio service for ship stations navigated on domestic voyages when such ships are not otherwise required to carry a radio station.

"(2) Any radio station operator who is authorized by the Commission to operate without an individual license shall comply with all other provisions of this Act and with rules prescribed by the Commission under this Act.

"(3) For purposes of this subsection, the terms 'citizens band radio service', 'radio control service', 'aircraft station' and 'ship station' shall have the meanings given them by the Commission by rule.".

(j) EXPEDITED LICENSING FOR FIXED MICROWAVE SERVICE.—Section 309(b)(2) (47 U.S.C. 309(b)(2)) is amended by striking subparagraph (A) and redesignating subparagraphs (B) through (G) as subparagraphs (A) through (F), respectively.

(k) FOREIGN DIRECTORS.—Section 310(b) (47 U.S.C. 310(b)) is amended—

(1) in paragraph (3), by striking "of which any officer or director is an alien or"; and

(2) in paragraph (4), by striking "of which any officer or more than one-fourth of the directors are aliens, or".

(l) LIMITATION ON SILENT STATION AUTHORIZATIONS.—Section 312 (47 U.S.C. 312) is amended by adding at the end the following:

"(g) If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.".

(m) MODIFICATION OF CONSTRUCTION PERMIT REQUIREMENT.—
47 USC 319. Section 319(d) is amended by striking the last two sentences and inserting the following: "With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.".

(n) CONDUCT OF INSPECTIONS.—Section 362(b) (47 U.S.C.
47 USC 360. 362(b)) is amended to read as follows:

"(b) Every ship of the United States that is subject to this part shall have the equipment and apparatus prescribed therein inspected at least once each year by the Commission or an entity designated by the Commission. If, after such inspection, the Commission is satisfied that all relevant provisions of this Act and the station license have been complied with, the fact shall be so certified on the station license by the Commission. The Commission shall make such additional inspections at frequent intervals as the Commission determines may be necessary to ensure compliance with the requirements of this Act. The Commission may, upon a finding that the public interest could be served thereby—

"(1) waive the annual inspection required under this section for a period of up to 90 days for the sole purpose of enabling a vessel to complete its voyage and proceed to a port in the United States where an inspection can be held; or

"(2) waive the annual inspection required under this section for a vessel that is in compliance with the radio provisions of the Safety Convention and that is operating solely in waters beyond the jurisdiction of the United States: *Provided,* That such inspection shall be performed within 30 days of such vessel's return to the United States.".

(o) INSPECTION BY OTHER ENTITIES.—Section 385 (47 U.S.C. 385) is amended—

(1) by inserting "or an entity designated by the Commission" after "The Commission"; and

(2) by adding at the end thereof the following: "In accordance with such other provisions of law as apply to Government contracts, the Commission may enter into contracts with any person for the purpose of carrying out such inspections and certifying compliance with those requirements, and may, as part of any such contract, allow any such person to accept reimbursement from the license holder for travel and expense costs of any employee conducting an inspection or certification.".

TITLE V—OBSCENITY AND VIOLENCE

Communications Decency Act of 1996.
Law enforcement and crime.
Penalties.

Subtitle A—Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

47 USC 609 note.

This title may be cited as the "Communications Decency Act of 1996".

SEC. 502. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended—

(1) by striking subsection (a) and inserting in lieu thereof:

"(a) Whoever—

"(1) in interstate or foreign communications—

"(A) by means of a telecommunications device knowingly—

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

"(B) by means of a telecommunications device knowingly—

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

"(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

"(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

"(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

"(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both."; and

(2) by adding at the end the following new subsections:

"(d) Whoever—

"(1) in interstate or foreign communications knowingly—

"(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

"(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

"(e) In addition to any other defenses available by law:

"(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

"(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

"(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

"(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

"(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

"(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

"(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

"(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in

this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

"(f)(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

"(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: *Provided, however*, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

"(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under subsection (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

"(h) For purposes of this section—

"(1) The use of the term 'telecommunications device' in this section—

"(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

"(B) does not include an interactive computer service.

"(2) The term 'interactive computer service' has the meaning provided in section 230(e)(2).

"(3) The term 'access software' means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or

"(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

"(4) The term 'institution of higher education' has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).

"(5) The term 'library' means a library eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).".

SEC. 503. OBSCENE PROGRAMMING ON CABLE TELEVISION.

Section 639 (47 U.S.C. 559) is amended by striking "not more than $10,000" and inserting "under title 18, United States Code,".

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S.C. 551 et seq.) is amended by adding at the end the following:

47 USC 560.

"SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

"(a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

"(b) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

47 USC 561.

"SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

"(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

Children and youth.

"(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

"(c) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

47 USC 561 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

SEC. 506. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHANNELS.—Section 611(e) (47 U.S.C. 531(e)) is amended by inserting before the period the following: ", except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity".

(b) CABLE CHANNELS FOR COMMERCIAL USE.—Section 612(c)(2) (47 U.S.C. 532(c)(2)) is amended by striking "an operator" and inserting "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and".

SEC. 507. CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

(a) IMPORTATION OR TRANSPORTATION.—Section 1462 of title 18, United States Code, is amended—

(1) in the first undesignated paragraph, by inserting "or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)" after "carrier"; and

(2) in the second undesignated paragraph—

(A) by inserting "or receives," after "takes";

(B) by inserting "or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)" after "common carrier"; and

(C) by inserting "or importation" after "carriage".

(b) TRANSPORTATION FOR PURPOSES OF SALE OR DISTRIBUTION.—The first undesignated paragraph of section 1465 of title 18, United States Code, is amended—

(1) by striking "transports in" and inserting "transports or travels in, or uses a facility or means of,";

(2) by inserting "or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce" after "foreign commerce" the first place it appears;

(3) by striking ", or knowingly travels in" and all that follows through "obscene material in interstate or foreign commerce," and inserting "of".

(c) INTERPRETATION.—The amendments made by this section are clarifying and shall not be interpreted to limit or repeal any prohibition contained in sections 1462 and 1465 of title 18, United States Code, before such amendment, under the rule established in United States v. Alpers, 338 U.S. 680 (1950). 18 USC 1462 note.

SEC. 508. COERCION AND ENTICEMENT OF MINORS.

Section 2422 of title 18, United States Code, is amended—

(1) by inserting "(a)" before "Whoever knowingly"; and

(2) by adding at the end the following:

"(b) Whoever, using any facility or means of interstate or foreign commerce, including the mail, or within the special maritime and territorial jurisdiction of the United States, knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.".

SEC. 509. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL. 47 USC 230.

"(a) FINDINGS.—The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) POLICY.—It is the policy of the United States—

"(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

"(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

"(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

"(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

"(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

"(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

"(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"(d) EFFECT ON OTHER LAWS.—

"(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating

to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

"(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

"(e) DEFINITIONS.—As used in this section:

"(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

"(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

"(4) ACCESS SOFTWARE PROVIDER.—The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or

"(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.".

Subtitle B—Violence

SEC. 551. PARENTAL CHOICE IN TELEVISION PROGRAMMING.

47 USC 303 note.

(a) FINDINGS.—The Congress makes the following findings:

(1) Television influences children's perception of the values and behavior that are common and acceptable in society.

(2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming has established a uniquely pervasive presence in the lives of American children.

(3) The average American child is exposed to 25 hours of television each week and some children are exposed to as much as 11 hours of television a day.

(4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior.

(5) Children in the United States are, on average, exposed to an estimated 8,000 murders and 100,000 acts of violence on television by the time the child completes elementary school.

(6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children.

(7) Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children.

(8) There is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children.

(9) Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.

(b) ESTABLISHMENT OF TELEVISION RATING CODE.—

(1) AMENDMENT.—Section 303 (47 U.S.C. 303) is amended by adding at the end the following:

"(w) Prescribe—

"(1) on the basis of recommendations from an advisory committee established by the Commission in accordance with section 551(b)(2) of the Telecommunications Act of 1996, guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children: *Provided,* That nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content; and

"(2) with respect to any video programming that has been rated, and in consultation with the television industry, rules requiring distributors of such video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children.".

47 USC 303 note.

(2) ADVISORY COMMITTEE REQUIREMENTS.—In establishing an advisory committee for purposes of the amendment made by paragraph (1) of this subsection, the Commission shall—

(A) ensure that such committee is composed of parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee;

(B) provide to the committee such staff and resources as may be necessary to permit it to perform its functions efficiently and promptly; and

(C) require the committee to submit a final report of its recommendations within one year after the date of the appointment of the initial members. Reports.

(c) REQUIREMENT FOR MANUFACTURE OF TELEVISIONS THAT BLOCK PROGRAMS.—Section 303 (47 U.S.C. 303), as amended by subsection (a), is further amended by adding at the end the following:

"(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4).".

(d) SHIPPING OF TELEVISIONS THAT BLOCK PROGRAMS.—

(1) REGULATIONS.—Section 330 (47 U.S.C. 330) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by adding after subsection (b) the following new subsection (c):

"(c)(1) Except as provided in paragraph (2), no person shall ship in interstate commerce or manufacture in the United States any apparatus described in section 303(x) of this Act except in accordance with rules prescribed by the Commission pursuant to the authority granted by that section.

"(2) This subsection shall not apply to carriers transporting apparatus referred to in paragraph (1) without trading in it.

"(3) The rules prescribed by the Commission under this subsection shall provide for the oversight by the Commission of the adoption of standards by industry for blocking technology. Such rules shall require that all such apparatus be able to receive the rating signals which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and blocking specifications established by industry under the supervision of the Commission.

"(4) As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that blocking service continues to be available to consumers. If the Commission determines that an alternative blocking technology exists that—

"(A) enables parents to block programming based on identifying programs without ratings,

"(B) is available to consumers at a cost which is comparable to the cost of technology that allows parents to block programming based on common ratings, and

"(C) will allow parents to block a broad range of programs on a multichannel system as effectively and as easily as technology that allows parents to block programming based on common ratings,

the Commission shall amend the rules prescribed pursuant to section 303(x) to require that the apparatus described in such section be equipped with either the blocking technology described in such

section or the alternative blocking technology described in this paragraph.".

(2) CONFORMING AMENDMENT.—Section 330(d), as redesignated by subsection (d)(1)(A), is amended by striking "section 303(s), and section 303(u)" and inserting in lieu thereof "and sections 303(s), 303(u), and 303(x)".

47 USC 330.

47 USC 303 note.

(e) APPLICABILITY AND EFFECTIVE DATES.—

(1) APPLICABILITY OF RATING PROVISION.—The amendment made by subsection (b) of this section shall take effect 1 year after the date of enactment of this Act, but only if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have not, by such date—

(A) established voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission; and

(B) agreed voluntarily to broadcast signals that contain ratings of such programming.

(2) EFFECTIVE DATE OF MANUFACTURING PROVISION.—In prescribing regulations to implement the amendment made by subsection (c), the Federal Communications Commission shall, after consultation with the television manufacturing industry, specify the effective date for the applicability of the requirement to the apparatus covered by such amendment, which date shall not be less than two years after the date of enactment of this Act.

47 USC 303 note.

SEC. 552. TECHNOLOGY FUND.

It is the policy of the United States to encourage broadcast television, cable, satellite, syndication, other video programming distributors, and relevant related industries (in consultation with appropriate public interest groups and interested individuals from the private sector) to—

(1) establish a technology fund to encourage television and electronics equipment manufacturers to facilitate the development of technology which would empower parents to block programming they deem inappropriate for their children and to encourage the availability thereof to low income parents;

(2) report to the viewing public on the status of the development of affordable, easy to use blocking technology; and

(3) establish and promote effective procedures, standards, systems, advisories, or other mechanisms for ensuring that users have easy and complete access to the information necessary to effectively utilize blocking technology and to encourage the availability thereof to low income parents.

Subtitle C—Judicial Review

47 USC 223 note.

SEC. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district

court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

TITLE VI—EFFECT ON OTHER LAWS

47 USC 152 note.

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

(a) APPLICABILITY OF AMENDMENTS TO FUTURE CONDUCT.—

(1) AT&T CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(2) GTE CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) MCCAW CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(b) ANTITRUST LAWS.—

(1) SAVINGS CLAUSE.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL.—Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) CLAYTON ACT.—Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking "Federal Communications Commission,".

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided

in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

(d) COMMERCIAL MOBILE SERVICE JOINT MARKETING.—Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.

(e) DEFINITIONS.—As used in this section:

(1) AT&T CONSENT DECREE.—The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(2) GTE CONSENT DECREE.—The term "GTE Consent Decree" means the order entered December 21, 1984, as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83–1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

(3) MCCAW CONSENT DECREE.—The term "McCaw Consent Decree" means the proposed consent decree filed on July 15, 1994, in the antitrust action styled United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civil Action No. 94–01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

(4) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

SEC. 602. PREEMPTION OF LOCAL TAXATION WITH RESPECT TO DIRECT-TO-HOME SERVICES.

(a) PREEMPTION.—A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

(b) DEFINITIONS.—For the purposes of this section—

(1) DIRECT-TO-HOME SATELLITE SERVICE.—The term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment,

except at the subscribers' premises or in the uplink process to the satellite.

(2) PROVIDER OF DIRECT-TO-HOME SATELLITE SERVICE.—For purposes of this section, a "provider of direct-to-home satellite service" means a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service.

(3) LOCAL TAXING JURISDICTION.—The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

(4) STATE.—The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States.

(5) TAX OR FEE.—The terms "tax" and "fee" mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

(c) PRESERVATION OF STATE AUTHORITY.—This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

TITLE VII—MISCELLANEOUS PROVISIONS

SEC. 701. PREVENTION OF UNFAIR BILLING PRACTICES FOR INFORMATION OR SERVICES PROVIDED OVER TOLL-FREE TELEPHONE CALLS.

(a) PREVENTION OF UNFAIR BILLING PRACTICES.—

(1) IN GENERAL.—Section 228(c) (47 U.S.C. 228(c)) is amended—

(A) by striking out subparagraph (C) of paragraph (7) and inserting in lieu thereof the following:

"(C) the calling party being charged for information conveyed during the call unless—

"(i) the calling party has a written agreement (including an agreement transmitted through electronic medium) that meets the requirements of paragraph (8); or

"(ii) the calling party is charged for the information in accordance with paragraph (9); or";

(B)(i) by striking "or" at the end of subparagraph (C) of such paragraph;

(ii) by striking the period at the end of subparagraph (D) of such paragraph and inserting a semicolon and "or"; and

(iii) by adding at the end thereof the following:

"(E) the calling party being assessed, by virtue of being asked to connect or otherwise transfer to a pay-per-call service, a charge for the call."; and

(C) by adding at the end the following new paragraphs:

"(8) SUBSCRIPTION AGREEMENTS FOR BILLING FOR INFORMATION PROVIDED VIA TOLL-FREE CALLS.—

"(A) IN GENERAL.—For purposes of paragraph (7)(C)(i), a written subscription does not meet the requirements of this paragraph unless the agreement specifies the material terms and conditions under which the information is offered and includes—

"(i) the rate at which charges are assessed for the information;

"(ii) the information provider's name;

"(iii) the information provider's business address;

"(iv) the information provider's regular business telephone number;

"(v) the information provider's agreement to notify the subscriber at least one billing cycle in advance of all future changes in the rates charged for the information; and

"(vi) the subscriber's choice of payment method, which may be by direct remit, debit, prepaid account, phone bill, or credit or calling card.

"(B) BILLING ARRANGEMENTS.—If a subscriber elects, pursuant to subparagraph (A)(vi), to pay by means of a phone bill—

"(i) the agreement shall clearly explain that the subscriber will be assessed for calls made to the information service from the subscriber's phone line;

"(ii) the phone bill shall include, in prominent type, the following disclaimer:

'Common carriers may not disconnect local or long distance telephone service for failure to pay disputed charges for information services.'; and

"(iii) the phone bill shall clearly list the 800 number dialed.

"(C) USE OF PINS TO PREVENT UNAUTHORIZED USE.—A written agreement does not meet the requirements of this paragraph unless it—

"(i) includes a unique personal identification number or other subscriber-specific identifier and requires a subscriber to use this number or identifier to obtain access to the information provided and includes instructions on its use; and

"(ii) assures that any charges for services accessed by use of the subscriber's personal identification number or subscriber-specific identifier be assessed to subscriber's source of payment elected pursuant to subparagraph (A)(vi).

"(D) EXCEPTIONS.—Notwithstanding paragraph (7)(C), a written agreement that meets the requirements of this paragraph is not required—

"(i) for calls utilizing telecommunications devices for the deaf;

"(ii) for directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate; or

"(iii) for any purchase of goods or of services that are not information services.

"(E) TERMINATION OF SERVICE.—On receipt by a common carrier of a complaint by any person that an information provider is in violation of the provisions of this section, a carrier shall—

"(i) promptly investigate the complaint; and

"(ii) if the carrier reasonably determines that the complaint is valid, it may terminate the provision of service to an information provider unless the provider supplies evidence of a written agreement that meets the requirements of this section.

"(F) TREATMENT OF REMEDIES.—The remedies provided in this paragraph are in addition to any other remedies that are available under title V of this Act.

"(9) CHARGES BY CREDIT, PREPAID, DEBIT, CHARGE, OR CALLING CARD IN ABSENCE OF AGREEMENT.—For purposes of paragraph (7)(C)(ii), a calling party is not charged in accordance with this paragraph unless the calling party is charged by means of a credit, prepaid, debit, charge, or calling card and the information service provider includes in response to each call an introductory disclosure message that—

"(A) clearly states that there is a charge for the call;

"(B) clearly states the service's total cost per minute and any other fees for the service or for any service to which the caller may be transferred;

"(C) explains that the charges must be billed on either a credit, prepaid, debit, charge, or calling card;

"(D) asks the caller for the card number;

"(E) clearly states that charges for the call begin at the end of the introductory message; and

"(F) clearly states that the caller can hang up at or before the end of the introductory message without incurring any charge whatsoever.

"(10) BYPASS OF INTRODUCTORY DISCLOSURE MESSAGE.—The requirements of paragraph (9) shall not apply to calls from repeat callers using a bypass mechanism to avoid listening to the introductory message: *Provided,* That information providers shall disable such a bypass mechanism after the institution of any price increase and for a period of time determined to be sufficient by the Federal Trade Commission to give callers adequate and sufficient notice of a price increase.

"(11) DEFINITION OF CALLING CARD.—As used in this subsection, the term 'calling card' means an identifying number or code unique to the individual, that is issued to the individual by a common carrier and enables the individual to be charged by means of a phone bill for charges incurred independent of where the call originates.".

(2) REGULATIONS.—The Federal Communications Commission shall revise its regulations to comply with the amendment made by paragraph (1) not later than 180 days after the date of enactment of this Act. 47 USC 228 note.

(3) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect on the date of enactment of this Act. 47 USC 228 note.

(b) CLARIFICATION OF "PAY-PER-CALL SERVICES".—

(1) TELEPHONE DISCLOSURE AND DISPUTE RESOLUTION ACT.—Section 204(1) of the Telephone Disclosure and Dispute Resolution Act (15 U.S.C. 5714(1)) is amended to read as follows:

"(1) The term 'pay-per-call services' has the meaning provided in section 228(i) of the Communications Act of 1934, except that the Commission by rule may, notwithstanding subparagraphs (B) and (C) of section 228(i)(1) of such Act, extend such definition to other similar services providing audio information or audio entertainment if the Commission determines that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules prescribed pursuant to section 201(a).".

(2) COMMUNICATIONS ACT.—Section 228(i)(2) (47 U.S.C. 228(i)(2)) is amended by striking "or any service the charge for which is tariffed,".

SEC. 702. PRIVACY OF CUSTOMER INFORMATION.

Title II is amended by inserting after section 221 (47 U.S.C. 221) the following new section:

47 USC 222.

"SEC. 222. PRIVACY OF CUSTOMER INFORMATION.

"(a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

"(b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

"(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.—

"(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.—Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

"(2) DISCLOSURE ON REQUEST BY CUSTOMERS.—A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

"(3) AGGREGATE CUSTOMER INFORMATION.—A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

"(d) EXCEPTIONS.—Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

"(1) to initiate, render, bill, and collect for telecommunications services;

"(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

"(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

"(e) SUBSCRIBER LIST INFORMATION.—Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

"(f) DEFINITIONS.—As used in this section:

"(1) CUSTOMER PROPRIETARY NETWORK INFORMATION.—The term 'customer proprietary network information' means—

"(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

"(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

"(2) AGGREGATE INFORMATION.—The term 'aggregate customer information' means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

"(3) SUBSCRIBER LIST INFORMATION.—The term 'subscriber list information' means any information—

"(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

"(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.".

SEC. 703. POLE ATTACHMENTS.

Section 224 (47 U.S.C. 224) is amended—

(1) in subsection (a)(1), by striking the first sentence and inserting the following: "The term 'utility' means any person who is a local exchange carrier or an electric, gas, water,

steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.";

(2) in subsection (a)(4), by inserting after "system" the following: "or provider of telecommunications service";

(3) by inserting after subsection (a)(4) the following:

"(5) For purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h).";

(4) by inserting after "conditions" in subsection (c)(1) a comma and the following: "or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f),";

(5) in subsection (c)(2)(B), by striking "cable television services" and inserting "the services offered via such attachments";

(6) by inserting after subsection (d)(2) the following:

Applicability.

"(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service."; and

(7) by adding at the end thereof the following:

Regulations.

"(e)(1) The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

"(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

"(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

Effective date.

"(4) The regulations required under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

"(f)(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

"(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

"(g) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

"(h) Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

"(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).".

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.—Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY.—

"(A) GENERAL AUTHORITY.—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS.—

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

"(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record. Records.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Courts.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

"(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).".

Rules.

(b) RADIO FREQUENCY EMISSIONS.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93–62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

President.
47 USC 332 note.

(c) AVAILABILITY OF PROPERTY.—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

SEC. 705. MOBILE SERVICES DIRECT ACCESS TO LONG DISTANCE CARRIERS.

Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(8) MOBILE SERVICES ACCESS.—A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.". Regulations.

SEC. 706. ADVANCED TELECOMMUNICATIONS INCENTIVES. 47 USC 157 note.

(a) IN GENERAL.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) INQUIRY.—The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) DEFINITIONS.—For purposes of this subsection:

(1) ADVANCED TELECOMMUNICATIONS CAPABILITY.—The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) ELEMENTARY AND SECONDARY SCHOOLS.—The term "elementary and secondary schools" means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

SEC. 707. TELECOMMUNICATIONS DEVELOPMENT FUND.

(a) DEPOSIT AND USE OF AUCTION ESCROW ACCOUNTS.—Section 309(j)(8) (47 U.S.C. 309(j)(8)) is amended by adding at the end the following new subparagraph:

"(C) DEPOSIT AND USE OF AUCTION ESCROW ACCOUNTS.—Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding—

"(i) the deposits of successful bidders shall be paid to the Treasury;

"(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

"(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 714 of this Act.".

(b) ESTABLISHMENT AND OPERATION OF FUND.—Title VII is amended by inserting after section 713 (as added by section 305) the following new section:

47 USC 614.

"SEC. 714. TELECOMMUNICATIONS DEVELOPMENT FUND.

"(a) PURPOSE OF SECTION.—It is the purpose of this section—

"(1) to promote access to capital for small businesses in order to enhance competition in the telecommunications industry;

"(2) to stimulate new technology development, and promote employment and training; and

"(3) to support universal service and promote delivery of telecommunications services to underserved rural and urban areas.

"(b) ESTABLISHMENT OF FUND.—There is hereby established a body corporate to be known as the Telecommunications Development Fund, which shall have succession until dissolved. The Fund shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue and jurisdiction in civil actions, to be a resident and citizen thereof.

"(c) BOARD OF DIRECTORS.—

"(1) COMPOSITION OF BOARD; CHAIRMAN.—The Fund shall have a Board of Directors which shall consist of 7 persons appointed by the Chairman of the Commission. Four of such directors shall be representative of the private sector and three of such directors shall be representative of the Commission, the Small Business Administration, and the Department of the Treasury, respectively. The Chairman of the Commission shall appoint one of the representatives of the private sector to serve as chairman of the Fund within 30 days after the date of enactment of this section, in order to facilitate rapid creation and implementation of the Fund. The directors shall include members with experience in a number of the following areas: finance, investment banking, government banking, communications law and administrative practice, and public policy.

"(2) TERMS OF APPOINTED AND ELECTED MEMBERS.—The directors shall be eligible to serve for terms of 5 years, except of the initial members, as designated at the time of their appointment—

"(A) 1 shall be eligible to service for a term of 1 year;

"(B) 1 shall be eligible to service for a term of 2 years;

"(C) 1 shall be eligible to service for a term of 3 years;

"(D) 2 shall be eligible to service for a term of 4 years; and

"(E) 2 shall be eligible to service for a term of 5 years (1 of whom shall be the Chairman).

Directors may continue to serve until their successors have been appointed and have qualified.

"(3) MEETINGS AND FUNCTIONS OF THE BOARD.—The Board of Directors shall meet at the call of its Chairman, but at least quarterly. The Board shall determine the general policies which shall govern the operations of the Fund. The Chairman of the Board shall, with the approval of the Board, select, appoint, and compensate qualified persons to fill the offices as may be provided for in the bylaws, with such functions, powers, and duties as may be prescribed by the bylaws or by the Board of Directors, and such persons shall be the officers of the Fund and shall discharge all such functions, powers, and duties.

"(d) ACCOUNTS OF THE FUND.—The Fund shall maintain its accounts at a financial institution designated for purposes of this section by the Chairman of the Board (after consultation with the Commission and the Secretary of the Treasury). The accounts of the Fund shall consist of—

"(1) interest transferred pursuant to section 309(j)(8)(C) of this Act;

"(2) such sums as may be appropriated to the Commission for advances to the Fund;

"(3) any contributions or donations to the Fund that are accepted by the Fund; and

"(4) any repayment of, or other payment made with respect to, loans, equity, or other extensions of credit made from the Fund.

"(e) USE OF THE FUND.—All moneys deposited into the accounts of the Fund shall be used solely for—

"(1) the making of loans, investments, or other extensions of credits to eligible small businesses in accordance with subsection (f);

"(2) the provision of financial advice to eligible small businesses;

"(3) expenses for the administration and management of the Fund (including salaries, expenses, and the rental or purchase of office space for the fund);

"(4) preparation of research, studies, or financial analyses; and

"(5) other services consistent with the purposes of this section.

"(f) LENDING AND CREDIT OPERATIONS.—Loans or other extensions of credit from the Fund shall be made available in accordance

with the requirements of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.) and any other applicable law to an eligible small business on the basis of—

"(1) the analysis of the business plan of the eligible small business;

"(2) the reasonable availability of collateral to secure the loan or credit extension;

"(3) the extent to which the loan or credit extension promotes the purposes of this section; and

"(4) other lending policies as defined by the Board.

"(g) RETURN OF ADVANCES.—Any advances appropriated pursuant to subsection (d)(2) shall be disbursed upon such terms and conditions (including conditions relating to the time or times of repayment) as are specified in any appropriations Act providing such advances.

"(h) GENERAL CORPORATE POWERS.—The Fund shall have power—

"(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel;

"(2) to adopt, alter, and use the corporate seal, which shall be judicially noticed;

"(3) to adopt, amend, and repeal by its Board of Directors, bylaws, rules, and regulations as may be necessary for the conduct of its business;

"(4) to conduct its business, carry on its operations, and have officers and exercise the power granted by this section in any State without regard to any qualification or similar statute in any State;

"(5) to lease, purchase, or otherwise acquire, own, hold, improve, use, or otherwise deal in and with any property, real, personal, or mixed, or any interest therein, wherever situated, for the purposes of the Fund;

"(6) to accept gifts or donations of services, or of property, real, personal, or mixed, tangible or intangible, in aid of any of the purposes of the Fund;

"(7) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of its property and assets;

"(8) to appoint such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, to fix their salaries, require bonds for them, and fix the penalty thereof; and

"(9) to enter into contracts, to execute instruments, to incur liabilities, to make loans and equity investment, and to do all things as are necessary or incidental to the proper management of its affairs and the proper conduct of its business.

"(i) ACCOUNTING, AUDITING, AND REPORTING.—The accounts of the Fund shall be audited annually. Such audits shall be conducted in accordance with generally accepted auditing standards by independent certified public accountants. A report of each such audit shall be furnished to the Secretary of the Treasury and the Commission. The representatives of the Secretary and the Commission shall have access to all books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Fund and necessary to facilitate the audit.

"(j) REPORT ON AUDITS BY TREASURY.—A report of each such audit for a fiscal year shall be made by the Secretary of the

Treasury to the President and to the Congress not later than 6 months following the close of such fiscal year. The report shall set forth the scope of the audit and shall include a statement of assets and liabilities, capital and surplus or deficit; a statement of surplus or deficit analysis; a statement of income and expense; a statement of sources and application of funds; and such comments and information as may be deemed necessary to keep the President and the Congress informed of the operations and financial condition of the Fund, together with such recommendations with respect thereto as the Secretary may deem advisable.

"(k) DEFINITIONS.—As used in this section:

"(1) ELIGIBLE SMALL BUSINESS.—The term 'eligible small business' means business enterprises engaged in the telecommunications industry that have $50,000,000 or less in annual revenues, on average over the past 3 years prior to submitting the application under this section.

"(2) FUND.—The term 'Fund' means the Telecommunications Development Fund established pursuant to this section.

"(3) TELECOMMUNICATIONS INDUSTRY.—The term 'telecommunications industry' means communications businesses using regulated or unregulated facilities or services and includes broadcasting, telecommunications, cable, computer, data transmission, software, programming, advanced messaging, and electronics businesses.".

SEC. 708. NATIONAL EDUCATION TECHNOLOGY FUNDING CORPORATION.

(a) FINDINGS; PURPOSE.—

(1) FINDINGS.—The Congress finds as follows:

(A) CORPORATION.—There has been established in the District of Columbia a private, nonprofit corporation known as the National Education Technology Funding Corporation which is not an agency or independent establishment of the Federal Government.

(B) BOARD OF DIRECTORS.—The Corporation is governed by a Board of Directors, as prescribed in the Corporation's articles of incorporation, consisting of 15 members, of which—

(i) five members are representative of public agencies representative of schools and public libraries;

(ii) five members are representative of State government, including persons knowledgeable about State finance, technology and education; and

(iii) five members are representative of the private sector, with expertise in network technology, finance and management.

(C) CORPORATE PURPOSES.—The purposes of the Corporation, as set forth in its articles of incorporation, are—

(i) to leverage resources and stimulate private investment in education technology infrastructure;

(ii) to designate State education technology agencies to receive loans, grants or other forms of assistance from the Corporation;

(iii) to establish criteria for encouraging States to—

(I) create, maintain, utilize and upgrade interactive high capacity networks capable of providing

audio, visual and data communications for elementary schools, secondary schools and public libraries;

(II) distribute resources to assure equitable aid to all elementary schools and secondary schools in the State and achieve universal access to network technology; and

(III) upgrade the delivery and development of learning through innovative technology-based instructional tools and applications;

(iv) to provide loans, grants and other forms of assistance to State education technology agencies, with due regard for providing a fair balance among types of school districts and public libraries assisted and the disparate needs of such districts and libraries;

(v) to leverage resources to provide maximum aid to elementary schools, secondary schools and public libraries; and

(vi) to encourage the development of education telecommunications and information technologies through public-private ventures, by serving as a clearinghouse for information on new education technologies, and by providing technical assistance, including assistance to States, if needed, to establish State education technology agencies.

(2) PURPOSE.—The purpose of this section is to recognize the Corporation as a nonprofit corporation operating under the laws of the District of Columbia, and to provide authority for Federal departments and agencies to provide assistance to the Corporation.

(b) DEFINITIONS.—For the purpose of this section—

(1) the term "Corporation" means the National Education Technology Funding Corporation described in subsection (a)(1)(A);

(2) the terms "elementary school" and "secondary school" have the same meanings given such terms in section 14101 of the Elementary and Secondary Education Act of 1965; and

(3) the term "public library" has the same meaning given such term in section 3 of the Library Services and Construction Act.

(c) ASSISTANCE FOR EDUCATION TECHNOLOGY PURPOSES.—

(1) RECEIPT BY CORPORATION.—Notwithstanding any other provision of law, in order to carry out the corporate purposes described in subsection (a)(1)(C), the Corporation shall be eligible to receive discretionary grants, contracts, gifts, contributions, or technical assistance from any Federal department or agency, to the extent otherwise permitted by law.

(2) AGREEMENT.—In order to receive any assistance described in paragraph (1) the Corporation shall enter into an agreement with the Federal department or agency providing such assistance, under which the Corporation agrees—

(A) to use such assistance to provide funding and technical assistance only for activities which the Board of Directors of the Corporation determines are consistent with the corporate purposes described in subsection (a)(1)(C);

(B) to review the activities of State education technology agencies and other entities receiving assistance from

the Corporation to assure that the corporate purposes described in subsection (a)(1)(C) are carried out;

(C) that no part of the assets of the Corporation shall accrue to the benefit of any member of the Board of Directors of the Corporation, any officer or employee of the Corporation, or any other individual, except as salary or reasonable compensation for services;

(D) that the Board of Directors of the Corporation will adopt policies and procedures to prevent conflicts of interest;

(E) to maintain a Board of Directors of the Corporation consistent with subsection (a)(1)(B);

(F) that the Corporation, and any entity receiving the assistance from the Corporation, are subject to the appropriate oversight procedures of the Congress; and

(G) to comply with—

(i) the audit requirements described in subsection (d); and

(ii) the reporting and testimony requirements described in subsection (e).

(3) CONSTRUCTION.—Nothing in this section shall be construed to establish the Corporation as an agency or independent establishment of the Federal Government, or to establish the members of the Board of Directors of the Corporation, or the officers and employees of the Corporation, as officers or employees of the Federal Government.

(d) AUDITS.—

(1) AUDITS BY INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS.—

(A) IN GENERAL.—The Corporation's financial statements shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants who are certified by a regulatory authority of a State or other political subdivision of the United States. The audits shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Corporation and necessary to facilitate the audit shall be made available to the person or persons conducting the audits, and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians shall be afforded to such person or persons.

(B) REPORTING REQUIREMENTS.—The report of each annual audit described in subparagraph (A) shall be included in the annual report required by subsection (e)(1).

(2) RECORDKEEPING REQUIREMENTS; AUDIT AND EXAMINATION OF BOOKS.—

(A) RECORDKEEPING REQUIREMENTS.—The Corporation shall ensure that each recipient of assistance from the Corporation keeps—

(i) separate accounts with respect to such assistance;

(ii) such records as may be reasonably necessary to fully disclose—

(I) the amount and the disposition by such recipient of the proceeds of such assistance;

(II) the total cost of the project or undertaking in connection with which such assistance is given or used; and

(III) the amount and nature of that portion of the cost of the project or undertaking supplied by other sources; and

(iii) such other records as will facilitate an effective audit.

(B) AUDIT AND EXAMINATION OF BOOKS.—The Corporation shall ensure that the Corporation, or any of the Corporation's duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of any recipient of assistance from the Corporation that are pertinent to such assistance. Representatives of the Comptroller General shall also have such access for such purpose.

(e) ANNUAL REPORT; TESTIMONY TO THE CONGRESS.—

Publication.

(1) ANNUAL REPORT.—Not later than April 30 of each year, the Corporation shall publish an annual report for the preceding fiscal year and submit that report to the President and the Congress. The report shall include a comprehensive and detailed evaluation of the Corporation's operations, activities, financial condition, and accomplishments under this section and may include such recommendations as the Corporation deems appropriate.

(2) TESTIMONY BEFORE CONGRESS.—The members of the Board of Directors, and officers, of the Corporation shall be available to testify before appropriate committees of the Congress with respect to the report described in paragraph (1), the report of any audit made by the Comptroller General pursuant to this section, or any other matter which any such committee may determine appropriate.

SEC. 709. REPORT ON THE USE OF ADVANCED TELECOMMUNICATIONS SERVICES FOR MEDICAL PURPOSES.

The Secretary of Commerce, in consultation with the Secretary of Health and Human Services and other appropriate departments and agencies, shall submit a report to the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate concerning the activities of the Joint Working Group on Telemedicine, together with any findings reached in the studies and demonstrations on telemedicine funded by the Public Health Service or other Federal agencies. The report shall examine questions related to patient safety, the efficacy and quality of the services provided, and other legal, medical, and economic issues related to the utilization of advanced telecommunications services for medical purposes. The report shall be submitted to the respective committees by January 31, 1997.

SEC. 710. AUTHORIZATION OF APPROPRIATIONS.

47 USC 156 note.

(a) IN GENERAL.—In addition to any other sums authorized by law, there are authorized to be appropriated to the Federal Communications Commission such sums as may be necessary to carry out this Act and the amendments made by this Act.

47 USC 156 note.

(b) EFFECT ON FEES.—For the purposes of section 9(b)(2) (47 U.S.C. 159(b)(2)), additional amounts appropriated pursuant to subsection (a) shall be construed to be changes in the amounts appro-

priated for the performance of activities described in section 9(a) of the Communications Act of 1934.

(c) FUNDING AVAILABILITY.—Section 309(j)(8)(B) (47 U.S.C. 309(j)(8)(B)) is amended by adding at the end the following new sentence: "Such offsetting collections are authorized to remain available until expended.".

Approved February 8, 1996.

LEGISLATIVE HISTORY—S. 652 (H.R. 1555):

HOUSE REPORTS: No. 104–204, Pt. 1 accompanying H.R. 1555 (Comm. on Commerce).

SENATE REPORTS: Nos. 104–23 (Comm. on Commerce, Science, and Transportation) and 104–230 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 141 (1995): June 7–9, 12–15, considered and passed Senate.
Aug. 2, 4, H.R. 1555 considered and passed House.
Oct. 12, S. 652 considered and passed House, amended, in lieu of H.R. 1555.

Vol. 142 (1996): Feb. 1, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 32 (1996):
Feb. 8, Presidential remarks and statement.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	File No. RM-_____
Communications Act of 1934	)	

To: The Commission

PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

National Telecommunications and
Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230
(202) 482-1816

July 27, 2020

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the	)	File No. RM-_____
Communications Act of 1934	)	

To: The Commission

PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Pursuant to section 1.401 of the Code of Federal Regulations,[1] in accordance with Executive Order 13925 (E.O. 13925),[2] and through the National Telecommunications and Information Administration (NTIA), the Secretary of Commerce (Secretary) respectfully requests that the Federal Communications Commission (FCC or Commission) initiate a rulemaking to clarify the provisions of section 230 of the Communications Act of 1934, as amended.[3] NTIA, as the President's principal adviser on domestic and international telecommunications and information policy, is charged with developing and advocating policies concerning the regulation of the telecommunications industry and "ensur[ing] that the views of the executive branch on telecommunications matters are effectively presented to the Commission . . . ."[4] Specifically, per E.O. 13925, NTIA requests that the Commission propose rules to clarify:

[1] 47 CFR § 1.401(a).
[2] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020) (E.O. 13925).
[3] 47 U.S.C. § 230.
[4] 47 U.S.C. § 902(b)(2)(J); see also 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I) (setting forth related duties).

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(a) may also not be able to claim protection under subparagraph (c)(1);[5]

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard;[6] and

(iii) any another proposed regulation that NTIA concludes may be appropriate to advance the policy described in subsection (a) of E.O. 13925, to impose disclosure requirements similar those imposed on other internet companies, such as major broadband service providers, to promote free and open debate on the internet.[7]

[5] See infra sections V.E.1, V.E.3 and section V.E.4.
[6] See infra section V.E.2.
[7] See infra section VI.

I. Statement of Interest

Since its inception in 1978, NTIA has consistently supported pro-competitive, pro-consumer telecommunications and internet policies. NTIA files this petition pursuant to E.O. 13925 to ensure that section 230 of the Communications Act of 1934, as amended, continues to further these goals. The President, through E.O. 13925, has directed the Secretary to file this petition for rulemaking through NTIA.[8]

II. Summary of Argument

Freedom of expression defends all our other freedoms. Only in a society that protects free expression can citizens criticize their leaders without fear, check their excesses, and expose their abuses. As Ben Franklin stated, "[w]hoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech."[9] However, social media and its growing dominance present troubling questions on how to preserve First Amendment ideals and promote diversity of voices in modern communications technology. Social media's power stems in part from the legal immunities granted by the Communications Decency Act of 1996.[10] Congress passed the statute in the beginning of the internet age with the goal of creating a safe internet for children. It did so by protecting children from pornography and providing incentives for platforms to

[8] E.O. 13925, Section 2(b).
[9] Benjamin Franklin, Silence Dogood No. 8, The New-England Courant, July 9, 1722.
[10] Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133, Title V—Obscenity and Violence, § 509 "Online family empowerment," codified at 47 U.S.C. 230, "Protection for private blocking and screening of offensive material." The CDA was incorporated as Title V to the Telecommunications Act of 1996, which in turn, was incorporated in the Communications Act of 1934. While these laws are all now part of the same statute, they do have separate histories and will be referred to individually when necessary.

remove harmful content. While the Supreme Court struck down the provisions limiting pornography, section 230 remained.[11]

Section 230 is the legislative response to a New York state case, Stratton Oakmont, Inc. v. Prodigy Servs. Co.[12] In this case, the court extended tort liability to internet bulletin boards and ruled that defendant Prodigy Services Company would be liable for the entire content of their platform if they engaged in editing and moderation to remove distasteful content.[13] Congress intended section 230 to offer platforms immunity from liability under certain circumstances, namely to encourage platforms to moderate specific types of material, mostly that are sexual or inappropriate to minors. It is vital to remember, however, that Congress in section 230 also had the express purpose of ensuring that the "Internet and other [internet platforms] offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[14]

Times have changed, and the liability rules appropriate in 1996 may no longer further Congress's purpose that section 230 further a "true diversity of political discourse." A handful of large social media platforms delivering varied types of content over high-speed internet have replaced the sprawling world of dial-up Internet Service Providers (ISPs) and countless bulletin boards hosting static postings. Further, with artificial intelligence and automated methods of textual analysis to flag harmful content now available, unlike at the time of Stratton Oakmont, Inc., platforms no longer need to manually review each individual post but can review, at much

[11] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).
[12] 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished). See also, Force v. Facebook, Inc., 934 F.3d 53, 63-64 (2d Cir. 2019) ("To overrule Stratton . . . .").
[13] Stratton Oakmont, 1995 WL 323710, at *3.
[14] 47 U.S.C. § 230(a)(3).

lower cost, millions of posts.[15] Thus, the fundamental assumptions driving early section 230 interpretation are antiquated and lack force, thus necessitating a recalibration of section 230 protections to accommodate modern platforms and technologies.

The FCC should use its authorities to clarify ambiguities in section 230 so as to make its interpretation appropriate to the current internet marketplace and provide clearer guidance to courts, platforms, and users. NTIA urges the FCC to promulgate rules addressing the following points:

1. Clarify the relationship between subsections (c)(1) and (c)(2), lest they be read and applied in a manner that renders (c)(2) superfluous as some courts appear to be doing.

2. Specify that Section 230(c)(1) has no application to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service.

3. Provide clearer guidance to courts, platforms, and users, on what content falls within (c)(2) immunity, particularly section 230(c)(2)'s "otherwise objectionable" language and its requirement that all removals be done in "good faith."

4. Specify that "responsible, in whole or in part, for the creation or development of information" in the definition of "information content provider," 47 U.S.C. § 230(f)(3), includes editorial decisions that modify or alter content, including but not limited to substantively contributing to, commenting upon, editorializing about, or presenting with a discernible viewpoint content provided by another information content provider.

[15] Adrian Shahbaz & Allie Funk, "Freedom on the Net 2019 Key Finding: Governments harness big data for social media surveillance," Freedom House, Social Media Surveillance, https://freedomhouse.org/report/freedom-on-the-net/2019/the-crisis-of-social-media/social-media-surveillance ("Social media surveillance refers to the collection and processing of personal data pulled from digital communication platforms, often through automated technology that allows for real-time aggregation, organization, and analysis of large amounts of metadata and content . . . . Advances in artificial intelligence (AI) have opened up new possibilities for automated mass surveillance.").

5. Mandate disclosure for internet transparency similar to that required of other internet companies, such as broadband service providers.

III. The Commission Should Act to Protect Free Speech Online

New regulations guiding the interpretation of section 230 are necessary to facilitate the provisions' interpretation in a way that best captures one of the nation's most important Constitutional freedoms. "Free speech is the bedrock of American democracy . . . . The freedom to express and debate ideas is the foundation for all of our rights as a free people."[16] Our democracy has long recognized that control of public discourse in the hands of too few stifles freedom of expression and risks undermining our political institutions. For centuries, Americans have taken action to maintain the free flow of information and ideas to ensure the fullest and most robust marketplace of ideas—from the Postal Service Act of 1792, one of Congress's first acts which established preferential rates for newspapers,[17] to nondiscrimination requirements for telegraphs and telephones,[18] to antitrust actions to ensure the free flow of news stories,[19] and to efforts to limit undue dominance in broadcast and cable media to guarantee the flow of information to television viewers.[20]

Yet today, free speech faces new threats. Many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other

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[16] E.O. 13925, Section 1.
[17] Richard B. Kielbowicz, News in the Mail: The Press, Post Office and Public Information, 1700-1860s, at 33-34 (1989).
[18] Thomas B. Nachbar, The Public Network, 17 CommLaw Conspectus 67, 77 (2008). ("Nondiscriminatory access is . . . the order of the day for . . . telecommunications, and even cable television.").
[19] Associated Press v. United States, 326 U.S. 1 (1945).
[20] Turner Broad. Sys, Inc. v. F.C.C., 512 U.S. 622 (1994); F.C.C. v. National Citizens Comm. for Broad., 436 U.S. 775 (1978); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943); Time Warner Ent. Co. L.P. v. F.C.C., 240 F.3d 1126 (D.C. Cir. 2001).

online platforms. These platforms function, as the Supreme Court recognized, as a 21st century equivalent of the public square.[21] Provision and control of the public square is a public trust. Because it entails selecting which speech gets heard and by whom, social media can assimilate a collective conversation into a corporate voice with a corporate point of view. As the E.O. explains, "[w]hen large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators."[22] The Commission itself has previously recognized the importance of enabling "the widest possible dissemination of information from diverse and antagonistic sources" and "assuring that the public has access to a multiplicity of information sources" as internet regulations' essential goal.[23]

Unfortunately, large online platforms appear to engage in selective censorship that is harming our national discourse. The E.O. notes that "[t]ens of thousands of Americans have reported online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service" and is not unlawful. The platforms "mak[e] unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints and delet[e] content and entire accounts with no warning, no rationale, and no recourse."[24] FCC

[21] Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) ("Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").
[22] E.O. 13925, Section 1.
[23] Federal Communications Commission, In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC 15-24, Report and Order on Remand, Declaratory Ruling, and Order, 2015 WL 1120110, *268 (¶ 545) (quoting Turner, 512 U.S. at 663).
[24] E.O. 13925, Section 1; Divino Group LLC, et al. v. Google LLC, et al., 5:19-cv-4749-VKD, Dkt #20 (2d Am. Compl.) at ¶¶ 119-123, 128-247 (N.D. Cal. (San Jose Division), dated Aug. 13, 2019) (class action complaint alleging YouTube censorship of LGBT+ content).

Commissioner Brendan Carr has remarked, "there's no question that [large social media platforms] are engaging in editorial conduct, that these are not neutral platforms."[25] Others have expressed shock that while large social media platforms will censor or fact-check constitutionally elected democratic leaders, many social media companies welcome and facilitate censorship by the Chinese Communist Party, thereby spreading disinformation and communist propaganda related to China's mass imprisonment of religious minorities, the origins of the COVID-19 pandemic, and the pro-democracy protests in Hong Kong.[26] Unfortunately, few academic empirical studies exist of the phenomenon of social media bias.

Much of social media's overarching influence and power stems from the immunities it enjoys under expansive interpretations of section 230 of the Communications Decency Act,[27] a provision Congress passed in 1996 at the beginning of the internet era. Many early cases, understandably protective of a nascent industry, read section 230's protections expansively. But, given the maturing internet economy and emergence of dominant social media platforms, the FCC should re-examine section 230, as well as other provisions of the Communications Act of 1934. The FCC should determine how section 230 can best serve its goals of promoting internet

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[25] Jan Jekielek, On Social Media Bias, Trump's Executive Order, and the China Data Threat: FCC Commissioner Brendan Carr, The Epoch Times, June 1, 2020, https://www.theepochtimes.com/on-social-media-bias-trumps-executive-order-and-the-china-data-threat-fcc-commissioner-brendan-carr_3372161.html.

[26] See, e.g., Sigal Samuel, China paid Facebook and Twitter to help spread anti-Muslim propaganda, Vox, Aug. 22, 2019, https://www.vox.com/future-perfect/2019/8/22/20826971/facebook-twitter-china-misinformation-ughiur-muslim-internment-camps; Ryan Gallagher, China's Disinformation Effort Targets Virus, Researcher Says, Bloomberg News, May 12, 2020, https://www.bloomberg.com/news/articles/2020-05-12/china-s-disinformation-campaign-targets-virus-and-businessman; James Titcomb & Laurence Dodds, Chinese state media use Facebook adverts to champion Hong Kong crackdown, June 8, 2020, https://www.telegraph.co.uk/technology/2020/06/08/chinese-state-media-use-facebook-adverts-champion-hong-kong/.

[27] 47 U.S.C. § 230.

diversity and a free flow of ideas, as well as holding dominant platforms accountable for their editorial decisions, in new market conditions and technologies that have emerged since the 1990s.[28]

IV. Relevant Facts and Data: Technological and Market Changes

Contemporary social media platforms have vastly different offerings, business models, relationships to users and customers, and, indeed, roles in national life than the early online bulletin boards that Prodigy and AOL offered in 1996. The FCC should recognize that the liability protections appropriate to internet firms in 1996 are different because modern firms have much greater economic power, play a bigger, if not dominant, role in American political and social discourse, and, with machine learning and other artificial techniques, have and exercise much greater power to control and monitor content and users.

CompuServe, Prodigy, America Online, and their competitors had fundamentally different business models from modern social media companies.[29] They had proprietary server banks, and their business model was to charge consumers for access, with significant surcharges

[28] See, e.g., Cubby, Inc. v. CompuServe Inc., 776 F.Supp. 135 (S.D.N.Y. 1991) (addressing CompuServe's 1990 service providing various online subscriber forums for certain groups).
[29] Andrew Pollack, Ruling May Not Aid Videotex, N.Y. Times, Sept. 15, 1987, at D1, https://www.nytimes.com/1987/09/15/business/ruling-may-not-aid-videotex.html (last visited July 27, 2020) ("The Videotex Industry Association estimates that there are 40 consumer-oriented services, such as CompuServe and the Source, in the United States, with a total membership of 750,000.").

for use of social features.[30] They were not interoperable,[31] There was thus no online "general public" population about whom information could be known, nor were there business partners to whom information on members of the public could be aggregated and sold. Online services faced a competitive landscape.

Online services competed with one another by commissioning or developing their own games, chat systems, financial-markets reporting, news services, and in-network mail services.[32] As users paid to connect, and thus directly funded online services, most online services did not contain advertising. The online service business model was not significantly reliant on third-party content because access to proprietary content was at the heart of online services' marketing

[30] Id. ("It is unclear, for instance, to what extent the gateway will be able to tell consumers where to go for the information they desire . . . . Each information service has its own commands for information retrieval."); Michael J. Himowitz, A look at on-line services CompuServe and Prodigy, The Baltimore Sun, Jan. 17, 1994 ("CompuServe [costs] $8.95 per month . . . . Effective Feb. 6, rates for forums and extended services . . . are an additional $4.80 per hour at 1200 or 2400 Baud, $9.60 per hour at 9600 or 14,400 Baud . . . . Prodigy: Most popular plan charges $14.95 per month . . . Additional Plus hours [for use of bulletin boards and stock market prices] are $3.60 each.").

[31] Pollack, supra note 29 ("Each information service has its own commands for information retrieval. With a useful gateway [which did not yet exist], the user would need to know only one set of commands and the gateway would translate them."); David Bernstein, Interoperability: The Key to Cloud Applications, https://e.huawei.com/en/publications/global/ict_insights/hw_376150/feature%20story/HW_376286 (last visited July 19, 2020) ("[T]he original online services such as AOL, Prodigy, and CompuServe had no interoperability between them. Content posted on one service could not be consumed by a client connected to a different service. Email could not be sent from a user on one service to a user on another.").

[32] Joanna Pearlstein, MacWorld's Guide to Online Services, MacWorld, Aug. 1994, at 90 ("Core services include general, business, and sports news; computer forums and news; reference materials; electronic mail and bulletin boards; business statistics and data; games; shopping services; travel services; and educational reference material. Still, the different online services do have different emphases, so even though they all offer a range of basic services, they are not interchangeable.").

efforts.[33] The online services of the late 1990s ran online bulletin boards as a minor sideline and used volunteer moderators from the computer hobbyist community.[34] Their business model was based on fees for connection time and professional database access, not community content.

One result of this model was that monitoring users and their content was a burden and regulatory imposition. Zeran, a leading and widely cited case on moderation, reflects this understanding of the technology of that time.[35] The Zeran court took the view, which most section 230 cases accept, that "liability [for third-party posts] upon notice [by an offended

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[33] James Coats, Getting on-line with cyberspace heavyweights, Chicago Tribune, Feb. 28, 1993 at C8 ("GEnie's greatest value to me is that it serves as a gateway to the ultraexpensive Dow Jones News/Retrieval service. Typing DOWJONES on GEnie gets me access to hundreds of thousands of newspaper articles - but at a cost well above $2 a minute. Still, when I'm involved in personal research, it empowers me with access to more than 100 different newspapers, wire services and magazines . . . . A costly service [on CompuServe] called IQUEST, for example, gets you access to thousands of newspapers, magazines, books and other research materials. A magazine database lets you search hundreds of thousands of back issues of publications from Playboy to Foreign Policy. The catch is that each article you decide to read in full costs $1.50 . . . . Tremendous amounts of information about stocks and investing can be had as well, for a price. You can follow favorite stocks by BasicQuotes and seek out news by company. Much of the famous Standard and Poor's research data can be had on CompuServe's S&P Online. Most company filings with the Securities and Exchange Commission can be downloaded on a service called Disclosure. I make heavy use of CompuServe's Executive News Service, which gives me an electronic 'clipping service' providing each day's news about dozens of firms I follow for my job, as well as other topics . . . . But Delphi takes the Internet much further than the other boards, which confine Internet traffic to electronic mail. With Delphi you can actually hook your home computer up with mainframes and minicomputers all around the world and read and download an almost unimaginably diverse wealth of files.").

[34] Catherine Buni & Soraya Chemaly, The Secret Rules of the Internet: the murky history of moderation, and how it's shaping the future of free speech, The Verge (April 13, 2016), https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech (last visited July 19, 2020) ("Moderation's initially haphazard, laissez-faire culture has its roots here. Before companies understood how a lack of moderation could impede growth and degrade brands and community, moderators were volunteers; unpaid and virtually invisible. At AOL, moderation was managed by a Community Leader program composed of users who had previously moderated chat rooms and reported 'offensive' content. They were tasked with building 'communities' in exchange for having their subscription fees waived. By 2000, companies had begun to take a more proactive approach.").

[35] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

viewer] reinforces service providers' incentives to restrict speech and abstain from self-regulation."[36] The court went on to explain that online services cannot possibly take responsibility for third-party content due to its volume; as such, online services will simply prohibit all such content unless they are protected from liability for it. In the court's words:

> "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context."[37]

However, today's social media companies have adopted a different business model. Rather than provide database access, like Prodigy did, social media offers primarily third-party content.[38] Rather than charge fees, social media platforms profile users in order to categorize

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[36] Id. at 333.
[37] Id.
[38] Facebook Investor Relations, https://investor.fb.com/resources/default.aspx (last visited July 19, 2020) ("Founded in 2004, Facebook's mission is to give people the power to build community and bring the world closer together. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them."); Twitter Investor Relations, https://investor.twitterinc.com/contact/faq/default.aspx (last visited July 19, 2020) ("What is Twitter's mission statement? The mission we serve as Twitter, Inc. is to give everyone the power to create and share ideas and information instantly without barriers. Our business and revenue will always follow that mission in ways that improve – and do not detract from – a free and global conversation."); Google, Our Approach to Search, https://www.google.com/search/howsearchworks/mission/ (last visited July 19, 2020) ("Our company mission is to organize the world's information and make it universally accessible and useful."); YouTube Mission Statement, https://www.youtube.com/about/ (last visited July 19, 2020) ("Our mission is to give everyone a voice and show them the world. We believe that everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories."); Matt Buchanan, Instagram and the Impulse to Capture Every Moment, The New Yorker, June 20, 2013, https://www.newyorker.com/tech/annals-of-technology/instagram-and-the-impulse-to-capture-every-moment (last visited July 27, 2020)

them and connect them to advertisers and other parties interested in user information.[39] Online platforms like Twitter, Facebook, and YouTube have content moderation at the heart of their business models. Unlike the early internet platforms, they have invested immense resources into both professional manual moderation and automated content screening for promotion, demotion, monetization, and removal.[40]

("When I think about what Instagram is, I think about moments," said Kevin Systrom, the photo-sharing service's co-founder and C.E.O. "Our mission is to capture and share the world's moments.").

[39] Len Sherman, Why Facebook Will Never Change Its Business Model, Forbes.com, Apr, 16, 2018, https://www.forbes.com/sites/lensherman/2018/04/16/why-facebook-will-never-change-its-business-model/#7cdac11c64a7 (last visited July 27, 2020) ("By now, it's widely understood that Facebook's voracious appetite for user data is driven by their business model which charges advertisers for access to precisely targeted segments of their massive consumer database. No one knows more about more consumers than Facebook"); Twitter and Facebook have differing business models, The Economist, June 6, 2020, https://www.economist.com/business/2020/06/04/twitter-and-facebook-have-differing-business-models (last visited July 27, 2020) ("At first blush, Twitter and Facebook look similar. Each is a social network, connecting users online and presenting them with content in a 'feed', a never-ending list of posts, pictures and videos of pets. Each makes money by selling advertising, and thus has an interest in using every trick to attract users' attention. And each employs gobbets of data gleaned from users' behaviour to allow advertisers to hit targets precisely, for which they pay handsomely"); Enrique Dans, Google Vs. Facebook: Similar Business Models, But With Some Very Big Differences, Forbes.com, Feb. 2, 2019, https://www.forbes.com/sites/enriquedans/2019/02/02/google-vs-facebook-similar-business-models-but-with-some-very-big-differences/#6ab9408541ef (last visited July 27, 2020) ("Google does not sell my data or pass it on to any third party, it simply allows that third party to display an advertisement to a segment of its database that includes me, based on certain variables . . . . What is the result of Google knowing about us and our online interests? We receive ads that largely reflect those interests and we still have some control over what we see.").

[40] Zoe Thomas, Facebook content moderators paid to work from home, BBC.com, Mar. 18, 2020, https://www.bbc.com/news/technology-51954968 (last visited July 27, 2020) ("Facebook has approximately 15,000 content moderators in the US, who are hired by third-party contracting companies"); Elizabeth Dwoskin, et al., Content moderators at YouTube, Facebook and Twitter see the worst of the web — and suffer silently, Washington Post, July 25, 2019, https://www.washingtonpost.com/technology/2019/07/25/social-media-companies-are-outsourcing-their-dirty-work-philippines-generation-workers-is-paying-price/ (last visited July 27, 2020) ("In the last couple of years, social media companies have created tens of thousands of jobs around the world to vet and delete violent or offensive content . . . ."); Shannon Bond, Facebook, YouTube Warn Of More Mistakes As Machines Replace Moderators, National Public

Understanding how new entrants can or cannot participate in these intermediary markets is therefore key in understanding appropriate liability regimes; this is particularly important because liability shields can deter entrance. Market observers have significant concerns about barriers to entrance for new social media companies as well as social media's role with other edge providers in creating mediation markets. It is no secret that today's online platforms exist in highly concentrated markets.[41] Moreover, the relationship between social media and their adjacent markets is unclear, with mergers and other agreements having the potential for unexpected anticompetitive results.[42] Social media firms also demonstrate network effects and other barriers to entry, which frequently lead to weaker competition.[43] This lack of competition is particularly troubling given the decrease of new entrants documented in the broader economy.[44]

Section 230 was designed to assist the nascent internet industry. Pivotal judicial decisions, such as Zeran, interpreted ambiguous language in section 230 broadly, but at a time when different cost structures, business models, and markets prevailed. Given the rapidly

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Radio, March 31, 2020, https://www.npr.org/2020/03/31/820174744/facebook-youtube-warn-of-more-mistakes-as-machines-replace-moderators (last visited July 27, 2020) ("Facebook, YouTube and Twitter are relying more heavily on automated systems to flag content that violate their rules . . . . Tech companies have been saying for years that they want computers to take on more of the work of keeping misinformation, violence and other objectionable content off their platforms. Now the coronavirus outbreak is accelerating their use of algorithms rather than human reviewers.").

[41] Justin Haucap & Ulrich Heimeshoff, Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization? 11 Int. Econ. Policy 49–61 (2014).

[42] Carl Shapiro, Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets. 33(3) Journal of Economic Perspectives 69 (2019), available at http://faculty.haas.berkeley.edu/shapiro/protectingcompetition.pdf.

[43] Steven Berry, Martin Gaynor & Fiona Scott Morton, Do Increasing Markups Matter? Lessons from Empirical Industrial Organization, 33(3) Journal of Economic Perspectives 44 (2019).

[44] Germán Gutiérrez & Thomas Philippon, The Failure of Free Entry. NBER Working Paper No. 26001 (June 2019), available at https://www.nber.org/papers/w26001.pdf.

changing markets and relationship between market structure and optimal liability rules, NTIA urges the FCC to re-examine section 230 and work towards transparency in these markets.

V. The Authority and Need for Issuing Regulations for Section 230

This section sets forth the FCC's authority to issue regulations to interpret section 230 and shows how regulations are necessary to resolve the statute's ambiguities that the E.O. identified. This section further explains how the FCC has jurisdiction to issue regulations, outlines the background and history of section 230, explains its structure, and shows how courts have relied upon its ambiguities to make overly expansive interpretations.

Finally, it examines how the section's ambiguities should be resolved. Specifically, NTIA respectfully requests the FCC to:

- clarify the relationship between 230(c)(1) and (c)(2);
- explain the meaning of "good faith" and "otherwise objectionable" in section 230(c)(2);
- specify how the limitation on the meaning of "interactive computer service" found in section 230(f)(2) should be read into section 230(c)(1); and,
- explicate the meaning of "treated as a speaker or publisher" in section 230(c)(1).

A. The Commission's Power to Interpret Section 230 of the Communications Decency Act

Section 201(b) of the Communications Act (Act) empowers the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter."[45] Under this authority, the FCC should promulgate rules to resolve ambiguities in Section 230. The Supreme Court has confirmed that "the grant in section 201(b) means what it

[45] 47 U.S.C. § 201(b).

says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'" Section 230, in turn, was incorporated into the Act – in the same portion of the Act, Title II, as section 201(b) – by the Telecommunications Act of 1996 (1996 Act). The fact that section 230 was enacted after section 201(b) is of no consequence; the Supreme Court repeatedly has held that the Commission's section 201(b) rulemaking power extends to all subsequently enacted provisions of the Act, specifically identifying those added by the Telecommunications Act of 1996.[46] Thus, the Commission has authority under section 201(b) to initiate a rulemaking to implement section 230. That broad rulemaking authority includes the power to clarify the language of that provision, as requested in the petition.

The Commission has authority to implement section 230 through regulation even if this section was added to the 1934 Act through the amendments in the Telecommunications Act of 1996. It does not matter if the provision specifically mentions or contemplates FCC regulation. For instance, section 332(c)(7), which was also added to the Act by the 1996 Act, limits State and local decision-making on the placement, construction, or modification of certain wireless service facilities. The section makes no mention of FCC authority, only alluding to the Commission in passing and giving it no role in the provision's implementation. The Supreme Court nonetheless, upheld Commission's authority to issue regulations pursuant to section

[46] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252, added by the Telecommunications Act of 1996"); City of Arlington v. FCC, 668 F.3d 229, 250 (5th Cir. 2012), aff'd, 569 U.S. 290 (2013) ("Section 201(b) of that Act empowers the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions. Of course, that rulemaking authority extends to the subsequently added portions of the Act.").

332(c)(7) for the simple reason that it was codified within the 1934 Act, and section 201(b) empowers the Commission to promulgate rules interpreting and implementing the entire Act.[47]

Similarly, in Iowa Utilities, the Supreme Court ruled that the FCC had rulemaking authority to implement sections 251 and 252 of the Act.[48] As with section 332, these sections did not explicitly grant the Commission power over all aspects of their implementation, arguably excluding intrastate and other areas. Nonetheless, the Court ruled that "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[49] These two decisions, and their underlying rationales, compel the same result for a Commission rulemaking to interpret section 230, and the rationale is simple and inarguable: if Congress chooses to codify a section into the 1934 Communications Act, then section 201(b) gives the FCC the power to clarify and implement it through regulation.

Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has power to issue regulations under section 230. As the Fifth Circuit noted with respect to section 332(c)(7), "surely Congress recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC." [50] Accordingly, if Congress wished to exclude the Commission from the interpretation of section 230, "one would expect it to have done so explicitly." Congress did not do so and, as was the case for section 332(c)(7), that decision

[47] City of Arlington, 569 U.S. at 293 ("Of course, that rulemaking authority [of section 201(b)] extends to the subsequently added portions of the Act").
[48] Iowa Util. Bd., 525 U.S. at 378-87.
[49] Iowa Util. Bd., 525 U.S. at 380.
[50] Arlington, 668 F.3d at 250.

opens an ambiguity in section 230 that the Commission may fill pursuant to its section 201(b) rulemaking authority.

B. Background to Section 230

Section 230 reflects a congressional response to a New York state case, Stratton Oakmont, Inc. v. Prodigy Servs. Co., decided in 1995.[51] In Stratton Oakmont, a New York trial court reasoned that Prodigy had become a "publisher" under defamation law because it voluntarily deleted some messages from its message boards "on the basis of offensiveness and 'bad taste,'" and was liable for the acts of its agent, the "Board Leader" of the message board, who it had hired to monitor postings on its bulletin board. The court held that Prodigy, having undertaken an affirmative duty to remove content, therefore was legally responsible for failing to remove an allegedly defamatory posting.[52] The U.S. Court of Appeals for the Ninth Circuit explained that: "[t]he Stratton Oakmont court concluded that when a platform engages in content

[51] Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) ("Section 230 was prompted by a state court case holding Prodigy responsible for a libelous message posted on one of its financial message boards"); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009) ("This is not surprising, because, as we and some of our sister circuits have recognized, Congress enacted the Amendment in part to respond to a New York state court decision, Stratton Oakmont, [citations omitted,] which held that an internet service provider could be liable for defamation."); Barrett v. Rosenthal, 40 Cal. 4th 33, 44, 146 P.3d 510, 516 (2006) ("The legislative history indicates that section 230 was enacted in response to an unreported New York trial court case."); Sen. Rep. No. 104-230, 2d. Session at 194 (1996) ("One of the specific purposes of [section 230] is to overrule Stratton Oakmont v. Prodigy and any other similar decisions"); see also H.R. Conf. Rep. No. 104-458, at 208 ("The conferees believe that [decisions like Stratton Oakmont] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services"); 141 Congressional Record H8469–H8470 (daily ed., June 14, 1995) (statement of Rep. Cox, referring to disincentives created by the Stratton Oakmont decision); Blumenthal v. Drudge, 992 F. Supp. 44, 52 n.13 (D.D.C. 1998) ("the legislative history makes clear that one of the primary purposes of Section 230 was to overrule the Stratton Oakmont decision").

[52] Stratton Oakmont, 1995 WL 323720 at *4.

moderation, or 'some voluntary self-policing,' the platform becomes 'akin to a newspaper publisher, and thus responsible for messages on its bulletin board that defamed third parties.'"[53]

Stratton Oakmont applied established tort law, which makes "publishers" liable for defamatory material.[54] Traditionally, tort law defines "publication" as simply the "communication intentionally or by a negligent act to one other than the person defamed."[55] But because the publication element of a defamation claim can also be satisfied when someone unreasonably fails to remove a communication exhibited via means in his possession or control, the Stratton Oakmont court concluded that Prodigy's content moderation or "voluntary self-policing" of the bulletin board rendered Prodigy a publisher of a defamatory statement on its board. Therefore, Prodigy was liable as a publisher.[56]

Stratton Oakmont distinguishes an earlier case, Cubby, Inc. v. CompuServe, Inc.,[57] which ruled an internet bulletin board was not the publisher of material on its bulletin board. The key distinguishing factor was that in Cubby, CompuServe did not moderate postings. The court ruled that CompuServe was not a publisher, but rather what tort law terms a "distributor," i.e., one "who merely transmit[s] defamatory content, such as news dealers, video rental outlets,

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[53] Fair Hous. Council, 521 F.3d at 1163.
[54] Barnes, 570 F.3d at 1104, citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 113, at 799 (5th ed. 1984) ("[E]veryone who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication."); see also Cianci v. New Times Publ'g Co., 639 F.2d 54, 60–61 (2d Cir.1980) (noting the "black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally").
[55] Restatement (Second) of Torts § 577.
[56] Stratton Oakmont, 1995 WL 323710 at *5 ("PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."); Barnes, 570 F.3d at 1102 ("publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content"); see Rodney A. Smolla, Law of Defamation § 4:77 (2d ed., 1999).
[57] Cubby, 776 F.Supp. 135.

bookstores, libraries, and other distributors and vendors."[58] "Distributors" are subject to liability "if, but only if, they know or have reason to know of the content's defamatory character."[59] Thus, publishers had strict liability for materials they published, whereas distributors only had liability for publishing defamation with actual or constructive knowledge of its defamatory character.[60] The Stratton Oakmont court reasoned that, in Cubby, CompuServe "had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe's computer banks," and, therefore, CompuServe had no liability for defamatory posts on platforms that it owned and controlled as distributor.[61]

While following established common law tort rules, the Stratton Oakmont and Cubby cases presented internet platforms with a difficult choice: voluntarily moderate unlawful or obscene content and thereby become liable for all messages on their bulletin boards, or do nothing and allow unlawful and obscene content to cover their bulletin boards unfiltered. In litigation, Prodigy claimed that the "sheer volume" of message board postings it received—by our current standards a humble "60,000 a day"—made manually reviewing every message impossible. If forced to choose between taking responsibility for all messages and deleting no messages at all, it would take the latter course.[62] Thus, given the technological differences between an internet platform and a bookstore or library, the former's ability to aggregate a much greater volume of information, traditional liability rules became strained. Tort law risked dis-incentivizing platforms from editing or moderating any content for fear they would become liable for all third-party content.

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[58] Smolla § 4:92.
[59] Restatement (Second) of Torts § 581(1) (1977).
[60] Prosser, supra note 54, § 113 at 803.
[61] Stratton Oakmont, 1995 WL 323710 at *2-3.
[62] Stratton Oakmont, 1995 WL 323710 at *3.

Congress intended section 230 to address this difficult liability problem, but nothing in the law's history, purpose or text allows for the conclusion that internet platforms should avoid all responsibility for their own editing and content-moderating decisions. Indeed, section 230 was originally titled the "Online Family Empowerment" amendment to the Communications Decency Act, which was titled, "protection for private blocking and screening of offensive material." [63] Responding to pornography and obscene material on the web, Congress designed section 230 to encourage platforms to moderate specific types of content, mostly related to sexual material inappropriate to minors. Congress did not intend a vehicle to absolve internet and social media platforms—which, in the age of dial-up internet bulletin boards, such as Prodigy, did not exist—from all liability for their editorial decisions.

Representatives Christopher Cox and Ron Wyden floated the bill that became section 230 as an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors.[64] In public comments, Representative Cox explained that the section 230 would reverse Stratton Oakmont and advance the regulatory goal of allowing families greater power to control online content.[65] The final statute reflected his stated policy: "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer

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[63] Telecommunications Act of 1996, Pub. L. No. 104-104, title V, Sec. 509 (1996).
[64] Robert Cannon, The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 Fed. Comm. L.J. 51 (1996); Felix T. Wu, Collateral Censorship and the Limits of Intermediary Immunity, 87 Notre Dame L. Rev. 293, 316 (2011); 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995); Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 564 (2002) ("[T]he Communications Decency Act reflected Congress's response to the proliferation of pornographic, violent and indecent content on the web Congress' first attempt to protect children from exposure to pornographic material on the Internet.").
[65] See 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

services."[66] The comments in the Congressional record from supporting congressmen and women—and it received strong bi-partisan support—reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, as a non-regulatory approach to protecting children from pornography,[67] intended to provide incentives for "Good Samaritan" blocking and screening of offensive material.

C. Section 230(c)'s Structure

To further these goals, Congress drafted the "Good Samaritan" exception to publisher liability. Section 230(c)(1) has a specific focus: it prohibits "treating" "interactive computer services," i.e., internet platforms, such as Twitter or Facebook, as "publishers." But, this provision only concerns "information" provided by third parties, i.e., "another internet content provider"[68] and does not cover a platform's own content or editorial decisions.

The text of section 230(c)(1) states:

(c) Protection for "Good Samaritan" blocking and screening of offensive material:

(1) Treatment of publisher or speaker

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[66] 47 U.S.C. § 230(b)(3).

[67] See 141 Cong. Rec. H8470 (1995) (statement of Rep. White) ("I want to be sure we can protect [children] from the wrong influences on the Internet. But . . . the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent. That is why I was proud to cosponsor this bill that is what this bill does . . . ."); id., (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment . . . .").

[68] 47 U.S.C. § 230(c)(1).

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Section (c)(2) also has a specific focus: it eliminates liability for interactive computer services that act in good faith "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[69]

Subsection (c)(2) governs the degree to which some of the platform's own content moderation decisions receive any legal protection, stating:

> "No provider or user of an interactive computer service shall be held liable on account of- **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . ."

Here, Congress protects "any action . . . taken in good faith to restrict access to or availability of material." This means any social media platform's editorial judgment, moderation, content editing or deletion receives legal immunity, but the plain words of the provision indicate that this protection only covers decisions to restrict access to certain types of enumerated content. As discussed infra, these categories are quite limited and refer primarily to traditional areas of media regulation—also consistent with legislative history's concern that private regulation could create family-friendly internet spaces—and only actions within these categories taken in "good faith."

[69] 47 U.S.C. § 230(c)(2).

D. Expansive Court Rulings Tied to Early Platforms and Outdated Technology

Courts have recognized that "Congress enacted this provision for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."[70] Congress intended sections 230(c)(1) and (c)(2) to protect platform openness and monitoring for certain specific issues. But, as discussed infra, ambiguous language in these statutes allowed some courts to broadly expand section 230's immunity from beyond its original purpose into a bar any legal action or claim that involves even tangentially "editorial judgment."[71] These subsequent protections established from "speaker or publisher" are overly broad and expansive, and often have absolutely nothing to do with the original harm section 230 was meant to remedy: relieving platforms of the burden of reading millions of messages to detect for defamation as Stratton Oakmont would require. Far and above initially intended viewer protection, courts have ruled section 230(c)(1) offers immunity from contracts,[72] consumer fraud,[73] revenge pornography,[74]

[70] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003).
[71] See, e.g., Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F.Supp.3d 1088, 1094–1095 (N.D.Cal. 2015).
[72] Caraccioli v. Facebook, Inc., 167 F. Supp.3d 1056, 1064-66 (N.D. Cal. 2016) (dismissing breach of contract claim and Cal. Bus. & Prof. Code § 17200 unfair practices claim); Lancaster v. Alphabet Inc., No. 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (dismissing claim for breach of covenant of good faith and fair dealing); Jurin v. Google, Inc., 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (dismissing claim for fraud); Fed. Agency of News LLC, et al. v. Facebook, Inc., 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (dismissing discrimination claims under Title II and 42 U.S.C. § 1983); Obado v. Magedson, 43 Media L. Rep. 1737 (D.N.J. 2014) (dismissing claim for promissory estoppel), aff'd, 612 F. App'x 90 (3d Cir. 2015).
[73] See Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002); Hinton v. Amazon, 72 F. Supp. 3d 685, 687 (S. D. Miss. 2014); Oberdorf v. Amazon, 295 F. Supp. 3d 496 (Mid. D. PA Dec. 21, 2017).
[74] Jones v. Dirty World Entertainment Holding LLC, 755 F.3d 398 (6th Cir. 2014); S.C. v. Dirty World LLC, 40 Media L. Rep. 2043 (W.D. Mo. 2012); Poole v. Tumblr, Inc., 404 F. Supp. 3d 637 (D. Conn. 2019).

anti-discrimination civil rights obligations,[75] and even assisting in terrorism.[76] By expanding protections beyond defamation, these courts extend to platforms a privilege to ignore laws that every other communications medium and business must follow and that are no more costly or difficult for internet platforms to follow than any other business.

The problem of overly expansive interpretations for section 230 is not merely hypothetical. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse. As FCC Commissioner Brendan Carr has observed, social media such as Twitter "punis[h] speakers based on whether it approves or disapproves of their politics."[77] One can hardly imagine a result more contrary to Congress's intent to preserve on the internet "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[78]

Further, by making contract and consumer fraud claims concerning moderation unenforceable under section 230, courts seriously injure section 230's goal "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[79] Content moderation policies become, as FCC Commissioner Brendan

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[75] Sikhs for Justice "SFJ", Inc., 144 F. Supp.3d 1088, 1094-1095.
[76] Force, 934 F.3d at 57.
[77] Jon Brokin, Arstechnica, FCC Republican excitedly endorses Trump's crackdown on social media, May 29, 2020, https://arstechnica.com/tech-policy/2020/05/fcc-republican-excitedly-endorses-trumps-crackdown-on-social-media/.
[78] 47 U.S.C. § 230(a)(1).
[79] 47 U.S.C. § 230(b)(2).

Carr recently described Twitter's moderation policy, "free speech for me, but not for thee." [80] Further, if interactive computer services' contractual representations about their own services cannot be enforced, interactive computer services cannot distinguish themselves. Consumers will not believe, nor should they believe, representations about online services. Thus, no service can credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns.

Much of this overly expansive reading of section 230 rests on a selective focus on certain language from Zeran, a case from the United States of Appeals for the Fourth Circuit.[81] The line of court decisions expanding section 230 in such extravagant ways relies on Zeran's reference to: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[82] This language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or fact-checking statements.[83] But, it is an erroneous interpretation, plucked from its surrounding context and thus removed from its more accurate meaning.

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[80] News Break, Brendan Carr Decries Twitter Censorship as 'Free Speech for Me, but Not for Thee, June 11, 2020, https://www.newsbreak.com/news/1582183608723/brendan-carr-decries-twitter-censorship-as-free-speech-for-me-but-not-for-thee.

[81] Zeran, 129 F.3d at 327.

[82] Zeran, 129 F.3d at 330.

[83] These lines from Zeran have led some courts to adopt the so-called three part section 230(c)(1) test: (1) whether Defendant is a provider of an interactive computer service; (2) if the postings at issue are information provided by another information content provider; and (3) whether Plaintiff's claims seek to treat Defendant as a publisher or speaker of third party content. Okeke v. Cars.com, 966 N.Y.S.2d 843, 846 (Civ. Ct. 2013), citing Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 564 F. Supp. 2d 544, 548 (E.D. Va. 2008), aff'd, 591 F.3d 250 (4th Cir. 2009). As the text explains, this so-called test errs in the third prong. The question is not whether the claim treats defendant as a publisher or speaker—after all, virtually every legal claim (contract, fraud, civil rights violations) would do so. The question is whether liability is

In fact, the quotation refers to third party's exercise of traditional editorial function—not those of the platforms. As the sentence in Zeran that is immediately prior shows, section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." In other words, the liability from which section 230(c)(1) protects platforms is that arising from the content that the third-party posts—i.e. the "information" posted by "another information provider" and those information providers' editorial judgments.

In light of the history of publisher and distributor liability law upon which section 230 draws, as well as its actual text, the best way to interpret the distinction between section 230(c)(1) and (c)(2) is as follows: Section 230(c)(1) applies to acts of omission—to a platform's failure to remove certain content. In contrast, section 230(c)(2) applies to acts of commission—a platform's decisions to remove. Section 230(c)(1) does not give complete immunity to all a platform's "editorial judgments."

E. Need for FCC Regulations: Ambiguities in Section 230

Section 230 contains a number of ambiguities that courts have interpreted broadly in ways that are harmful to American consumers, free speech, and the original objective of the statute. First, as discussed below, uncertainty about the interplay between section 230(c)(1) and (c)(2) has led many courts to a construction of the two provisions that other courts consider to be anomalous or lead to rendering section 230(c)(2) superfluous. Second, the interplay between section 230(c)(1) and (c)(2) does not make clear at what point a platform's moderation and presentation of content becomes so pervasive that it becomes an information content provider

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based on the content of third-party information. Requiring platforms to monitor the content of thousands of posts was the impetus behind section 230.

and, therefore, outside of section 230(c)(1)'s protections. Third, critical phrases in section 230(c)(2)— the "otherwise objectionable" material that interactive computer service providers may block without civil liability; and the "good faith" precondition for activating that immunity—are ambiguous on their face. And, with respect to the former, courts have posited starkly divergent interpretations that can only create uncertainty for consumers and market participants. Finally, what it means to be an "information content provider" or to be "treated as a publisher or speaker" is not clear in light of today's new technology and business practices. The Commission's expertise makes it well equipped to address and remedy section 230's ambiguities and provider greater clarity for courts, platforms, and users.

1. The Interaction Between Subparagraphs (c)(1) and (c)(2)

Ambiguity in the relationship between subparagraphs (c)(1) and (c)(2) has resulted in courts reading section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity. Numerous district court cases have held that section 230(c)(1) applies to removals of content, not section 230(b)(2) with its exacting "good faith" standard."[84] For instance, in Domen v. Vimeo, a federal district court upheld the removal of videos posted by a religious groups' questioning a California law's prohibition on so-called sexual orientation change efforts (SOCE), and the law's effect on pastoral counseling. Finding the videos were "harassing," the court upheld their removal under both section 230(c)(1) and section (c)(2), ruling that these sections are co-extensive, rather than aimed at very different issues.[85] In doing so, the court rendered section

[84] Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 601 (S.D.N.Y. 2020); Lancaster v. Alphabet, Inc., 2016 WL 3648608 (N.D. Cal. July 28, 2016); Sikhs for Justice "SFJ", Inc., 144 F.Supp.3d 1088.
[85] Domen, 433 F. Supp. 3d at 601 ("the Court finds that Vimeo is entitled to immunity under either (c)(1) or (c)(2)").

230(c)(2) superfluous—reading its regulation of content removal as completely covered by section 230(c)(1)'s regulation of liability for user-generated third party content.

The Commission should promulgate a regulation to clarify the relationship between the two provisions so that section 230(c)(1) does not render section 230(c)(1) superfluous. To determine how these subparagraphs interact—or as E.O. 13925 specifically instructs: "to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1),"[86] the FCC should determine whether the two subsections' scope is additive or not. While some courts have read section 230(c)(1) "broadly,"[87] few have provided any principled distinction between the two subsections.

NTIA urges the FCC to follow the canon against surplusage in any proposed rule.[88] Explaining this canon, the Supreme Court holds, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[89] The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme."[90]

While some district courts, such as Domen discussed above, have ruled that section 230(c)(1) applies to content removal, which is section 230(c)(2)'s proper domain, those courts

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[86] E.O. 13925 § 2(b)(i).
[87] See Force, 934 F.3d at 64.
[88] Marx v. General Revenue Corp., 568 U.S. 371, 385 (2013).
[89] Corley v. United States, 556 U.S. 303, 314 (2009), quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004).
[90] Marx, 568 U.S. at 386; see also Fair Hous. Council, 521 F.3d 1157 at 1167-68 (avoiding superfluity in interpret the "developer" exception in Section 230(f)(3) of the CDA).

that have explicitly inquired into the proper relationship between the two subparagraphs have followed the surplusage canon—ruling that the provisions cover separate issues[91] and "address different concerns."[92] "Section 230(c)(1) is concerned with liability arising from information provided online," while "[s]ection 230(c)(2) is directed at actions taken by Internet service providers or users to restrict access to online information."[93] Thus, "[s]ection 230(c)(1) provides immunity from claims by those offended by an online publication, while section 230(c)(2) protects against claims by those who might object to the restriction of access to an online publication."[94] Courts have refused to "interpret[] the CDA . . . [to allow] the general immunity in (c)(1) [to] swallow[] the more specific immunity in (c)(2)" because subsection (c)(2) immunizes only an interactive computer service's "actions taken in good faith."[95]

NTIA suggests that the FCC can clarify this relationship between section 230(c)(1) and section 230(c)(2) by establishing the following points. First, the FCC should make clear that section 230(c)(1) applies to liability directly stemming from the information provided by third-party users. Section 230(c)(1) does not immunize a platforms' own speech, its own editorial decisions or comments, or its decisions to restrict access to content or its bar user from a platform. Second, section 230(c)(2) covers decisions to restrict content or remove users.

NTIA, therefore, requests that the Federal Communications Commission add the below Subpart E to 47 CFR Chapter I:

> **Subpart E. Interpreting Subsection 230(c)(1) and Its Interaction With Subsection 230(c)(2).**

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[91] See, e.g., Zango, 568 F.3d at 1175 (holding that (c)(2) is a "different . . . statutory provision with a different aim" than (c)(1)).
[92] Barrett, 40 Cal. 4th 33.
[93] Id. at 49 (emphasis added).
[94] Id. (emphasis added).
[95] e-ventures Worldwide, LLC v. Google, Inc., (M.D. Fla. Feb. 8, 2017) 2017 U.S. Dist. LEXIS 88650, at *9.

§ 130.01
As used within 47 U.S.C. 230, 47 CFR Chapter I, Subchapter A and within this regulation, the following shall apply:

(a) 47 U.S.C. 230(c)(1) applies to an interactive computer service for claims arising from failure to remove information provided by another information content provider. Section 230(c)(1) has no application to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service. Any applicable immunity for matters described in the immediately preceding sentence shall be provided solely by 47 U.S.C. § 230(c)(2).

(b) An interactive computer service is not a publisher or speaker of information provided by another information content provider solely on account of actions voluntarily taken in good faith to restrict access to or availability of specific material in accordance with subsection (c)(2)(A) or consistent with its terms of service or use.

2. The Meaning of Section 230(c)(2)

Section 230(c)(2)'s ambiguities include (1) how to interpret "otherwise objectionable" and (2) "good faith."

a. "Otherwise objectionable"

If "otherwise objectionable" means any material that any platform "considers" objectionable, then section 230(b)(2) offers de facto immunity to all decisions to censor content. And some district courts have so construed section 230(c)(2).[96] But, many courts recognize

[96] Domen v. Vimeo, Inc., 2020 U.S. Dist. L 7935 (S.D.N.Y. Jan. 15, 2020), appeal filed No 20-616 (Feb. 18, 2020) ("Section 230(c)(2) is focused upon the provider's subjective intent of what is 'obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.' That section 'does not require that the material actually be objectionable; rather, it affords protection for blocking material "that the provider or user considers to be' objectionable."'); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631 (D. Del. 2007) ("Plaintiff argues there was no refusal to run his ads on the basis they were obscene or harassing, and that Defendants cannot create 'purported reasons for not running his ads.' He omits, however, reference to that portion of § 230 which provides immunity from suit for restricting material that is 'otherwise objectionable.'").

limiting principles. Many look to the statutory canon of ejusdem generis, which holds that catch-all phases at the end of a statutory lists should be construed in light of the other phrases.[97] In this light, section 230(c)(2) only applies to obscene, violent, or other disturbing matters.[98]

Understanding how the section 230(c)(2) litany of terms has proved difficult for courts in determining how spam filtering and filtering for various types of malware fits into the statutory framework. Most courts have ruled that "restrict[ing] access" to spam falls within the section

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[97] Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372 (2003) ("under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words").

[98] Darnaa, LLC v. Google, Inc., 2016 WL 6540452 at *8 (N.D. Cal. 2016) ("The context of § 230(c)(2) appears to limit the term to that which the provider or user considers sexually offensive, violent, or harassing in content."); Song Fi, Inc. v. Google, Inc., 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015) ("First, when a statute provides a list of examples followed by a catchall term (or 'residual clause') like 'otherwise objectionable,' the preceding list provides a clue as to what the drafters intended the catchall provision to mean," citing Circuit City Stores v. Adams, 532 U.S. 105, 115 (2001)). This is the rationale for the canon of construction known as eiusdem generis (often misspelled ejusdem generis), which is Latin for 'of the same kind); National Numismatic v. eBay, 2008 U.S. Dist. LEXIS 109793, at *25 (M.D. Fla. Jul. 8, 2008) ("Section 230 is captioned 'Protection for 'Good Samaritan' blocking and screening of offensive material,' yet another indication that Congress was focused on potentially offensive materials, not simply any materials undesirable to a content provider or user"); Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129 (S.D. Cal. 2014) (text messages allegedly violate Telephone Consumer Protection Act; Yahoo! raised section 230(c)(2)(B) as a defense) ("The Court declines to broadly interpret 'otherwise objectionable' material to include any or all information or content. The Ninth Circuit has expressed caution at adopting an expansive interpretation of this provision where providers of blocking software 'might abuse th[e CDA] immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material "otherwise objectionable" under § 230(c)(2)."); Goddard v. Google, Inc., 2008 U.S. Dist. LEXIS 101890 (N.D. Cal. Dec. 17, 2008) ('[i]t is difficult to accept . . . that Congress intended the general term "objectionable" to encompass an auction of potentially-counterfeit coins when the word is preceded by seven other words that describe pornography, graphic violence, obscenity, and harassment.' In the instant case, the relevant portions of Google's Content Policy require that MSSPs provide pricing and cancellation information regarding their services. These requirements relate to business norms of fair play and transparency and are beyond the scope of § 230(c)(2).").

230(c)(2) framework, although that is difficult perhaps to see as a textual matter.[99] Spam, though irritating and destructive of the online experience, does not fit clearly into the litany in section 230, at least as courts have understood this litany.

The spam cases have prompted courts to examine the thread that runs through the list in section 230. A recent Ninth Circuit case perceptively sees the challenge: On one hand, "decisions recognizing limitations in the scope of immunity [are] persuasive,"[100] and "interpreting the statute to give providers unbridled discretion to block online content would . . . enable and potentially motivate internet-service providers to act for their own, and not the public, benefit."[101] In addition, the court did recognize that "the specific categories listed in § 230(c)(2) vary greatly: [m]aterial that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing. If the enumerated categories are not similar, they provide little or no assistance in interpreting the more general category. We have previously recognized this concept."[102]

Yet, in fact, the original purpose of the Communications Decency Act—"to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online

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[99] Asurvio LP v. Malwarebytes Inc., 2020 U.S. Dist. LEXIS 53906 (N.D. Cal. Mar. 26, 2020) (allegation that M is wrongfully classifying A's software as malware); 4PC Drivers Headquarters, LP v. Malwarebytes Inc., 371 F. Supp. 3d 652 (N.D. Cal. 2019) (malware); Shulman v. FACEBOOK.com, 2018 U.S. Dist. LEXIS 113076 (D.D.C. Jul. 9, 2018) (spam); Holomaxx Technologies v. Microsoft Corp., 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (spam); Smith v. Trusted Universal Stds. in Elec. Transactions, Inc., 2010 U.S. Dist. LEXIS 43360 (D. N.J. May 4, 2010) (deletion of spam); e360insight v. Comcast Corp., 546 F. Supp. 2d 605 (N.D. Ill. 2008) (spam); Zango v. Kapersky Lab., 568 F.3d 1169 (9th Cir. 2009) (competitive blocking software).

[100] Enigma Software Grp. USA, v. Malwarebytes, Inc., 946 F.3d 1040, 1050 (9th Cir. 2019).

[101] Id.

[102] Id. at 1051.

material"[103]—suggests that the thread that combines section 230(c)(2)'s concepts are those materials that were objectionable in 1996 and for which there was already regulation—regulation which Congress intended section 230 to provide incentives for free markets to emulate.

The first four adjectives in subsection (c)(2), "obscene, lewd, lascivious, filthy," are found in the Comstock Act as amended in 1909.[104] The Comstock Act prohibited the mailing of "every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character."[105] In addition, the CDA used the terms "obscene or indecent," prohibiting the transmission of "obscene or indecent message."[106] The Act's second provision declared unconstitutional in Reno v. ACLU, section 223(d), prohibits the knowing sending or displaying of "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."[107] This language of "patently offensive . . ." derives from the definition of indecent speech set forth in the Pacifica decision and which the FCC continues to regulate to this day.[108]

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[103] 47 U.S.C. § 230(a)(4).
[104] Section 3893 of the Revised Statutes made by section 211 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129; United States v. Limehouse, 285 U.S. 424, 425 (1932) (stating that "Section 211 of the Criminal Code (18 USCA § 334) declares unmailable 'every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character") (additional citation added). The phrase is repeated in numerous state statutes.
[105] Id. at 424-6.
[106] 47 U.S. § 223(a) (May 1996 Supp.).
[107] 521 U.S. 844 (1997).
[108] FCC v. Pacifica Found., 438 U.S. 726, 732 (1978) ("patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs").

The next two terms in the list "excessively violent" and "harassing" also refer to typical concerns of communications regulation which were, in fact, stated concerns of the CDA itself. Congress and the FCC have long been concerned about the effect of violent television shows, particularly upon children; indeed, concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip. This device allows viewers to block programming according to an established rating system.[109] The legislation led to ratings for broadcast television that consisted of violent programming.[110] The FCC then used this authority to require televisions to allow blocking technology.[111]

And, of course, Congress and the FCC have long regulated harassing wire communications. Section 223, Title 47, the provision which the CDA amended and into which the CDA was in part codified, is a statute that prohibits the making of "obscene or harassing"

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[109] 47 U.S.C. § 303(x). See Technology Requirements to Enable Blocking of Video Programming Based on Program Ratings, 63 Fed. Reg. 20, 131 (Apr. 23, 1998) ("[T]he Commission is amending the rules to require . . . technological features to allow parents to block the display of violent , sexual, or other programming they believe is harmful to their children. These features are commonly referred to as 'v-chip' technology."). Finding that "[t]here is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children," Congress sought to "provid[e] parents with timely information about the nature of upcoming video programming and with the technological tools" to block undesirable programming by passing the Telecommunications Act of 1996 (the "Telecommunications Act").

[110] FCC News, Commission Finds Industry Video Programming Rating System Acceptable, Report No. GN 98-3 (Mar. 12, 1998), available at https://transition.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html.

[111] Amy Fitzgerald Ryan, Don't Touch That V-Chip: A Constitutional Defense of the Television Program Rating Provisions of the Telecommunications Act of 1996, 87 Geo. L.J. 823, 825 (1999), citing Lawrie Mifflin, TV Networks Plan Ratings System, Orange County Reg., Feb. 15, 1996, at A1.

telecommunications.[112] These harassing calls include "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number" or "mak[ing] repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication."[113] Roughly half of the States also outlaw "harassing" wire communications via telephone.[114] Congress enacted the Telephone Consumer Protection Act (TCPA), recently upheld in most part by the Supreme Court,[115] to ban "automated or prerecorded telephone calls, regardless of the content or the initiator of the message," that are considered "to be a nuisance and an invasion of privacy."[116]

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[112] 47 U.S.C. § 223.

[113] 47 U.S.C. § 223(a)(1)(D) & (E) (2012).

[114] See, e.g., (Arizona) Ariz. Rev. Stat. § 13-2916 ("It is unlawful for any person, with intent to terrify, intimidate, threaten or harass a specific person or persons, to do any of the following: 3. Otherwise disturb by repeated anonymous, unwanted or unsolicited electronic communications the peace, quiet or right of privacy of the person at the place where the communications were received."); (California) Cal. Pen. Code § 653m(b) ("Every person who, with intent to annoy or harass, makes repeated telephone calls or makes repeated contact by means of an electronic communication device, or makes any combination of calls or contact, to another person is, whether or not conversation ensues from making the telephone call or contact by means of an electronic communication device, guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith or during the ordinary course and scope of business."); (Maryland) Md. Code Ann., Crim. Law § 3-804 ("A person may not use telephone facilities or equipment to make: (1) an anonymous call that is reasonably expected to annoy, abuse, torment, harass, or embarrass another; (2) repeated calls with the intent to annoy, abuse, torment, harass, or embarrass another"); (Oklahoma) 21 Okl. St. § 1172 ("It shall be unlawful for a person who, by means of a telecommunication or other electronic communication device, willfully either: 6. In conspiracy or concerted action with other persons, makes repeated calls or electronic communications or simultaneous calls or electronic communications solely to harass any person at the called number(s)").

[115] Barr v. Am. Ass'n of Political Consultants, 140 S. Ct. 2335 (2020) (upholding the Act except for its debt-collection exception).

[116] Telephone Consumer Protection Act of 1991, 105 Stat. 2394, 2395, codified at 15 U.S.C. § 6101.

Thus, the cases that struggled over how to fit spam into the list of section 230(c)(2) could simply have analogized spam as similar to harassing or nuisance phone calls.

The regulatory meanings, as understood in 1996 and used in the Communications Decency Act, itself, constitute the thread that unites the meanings of "obscene, lewd, lascivious, filthy, excessively violent, and harassing." All deal with issues involving media and communications content regulation intended to create safe, family environments. Compelling that conclusion is "the presumption of consistent usage—the rule of thumb that a term generally means the same thing each time it is used . . . [particularly for] terms appearing in the same enactment."[117] To ensure clear and consistent interpretations of the terms used in subsection 230(c)(2), NTIA requests, therefore, that the FCC add the below Subpart E to 47 CFR Chapter I:

> **Subpart E. Clarifying Subsection 230(c)(2).**
> § 130.02
> As used within 47 U.S.C. 230, 47 CFR Chapter I, Subchapter A and within this regulation, the following shall apply:
>
> **(a) "obscene," "lewd," "lascivious," and "filthy"**
> The terms "obscene," "lewd," "lascivious," and "filthy" mean material that:
> i. taken as a whole, appeals to the prurient interest in sex or portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, or scientific value;
> ii. depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards; to the average person, applying contemporary community standards; or
> iii. signifies the form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel.
>
> **(b) "excessively violent"**
> The term "excessively violent" means material that:
> i. is likely to be deemed violent and for mature audiences according the Federal Communications Commission's V-chip regulatory regime and TV Parental Guidance, promulgated pursuant to Section 551 of the 1996

[117] United States v. Castleman, 572 U.S. 157, 174 (2014), citing IBP, Inc. v. Alvarez, 546 U.S. 21, 33–34 (2005) (Scalia, J., conc.).

Telecommunications Act, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (codified at 47 U.S.C. § 303; § 330(c)(4)); or

ii. constitutes or intends to advocate domestic terrorism or international terrorism, each as defined in 18 U.S.C. § 2331 ("terrorism").

(c) "harassing"

The term "harassing" means any material that:

i. that sent by an information content provider that has the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value;

ii. regulated by the CAN-SPAM Act of 2003, 117 Stat. 2699; or

iii. that is malicious computer code intended (whether or not by the immediate disseminator) to damage or interfere with the operation of a computer.

(d) "otherwise objectionable"

The term "otherwise objectionable" means any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials.

b. "Good faith"

The phrase "good faith" in section 230(c) is also ambiguous. On one hand, most courts, in interpreting the phrase, have looked to pretext, dishonesty, or refusing to explain wrongful behavior when finding good faith or lack thereof in the removal of content. As the United States Court of Appeals for the Ninth Circuit explains, "unless § 230(c)(2)(B) imposes some good faith limitation on what a blocking software provider can consider 'otherwise objectionable' . . . immunity might stretch to cover conduct Congress very likely did not intend to immunize." Under the generous coverage of section 230(c)(2)(B)'s immunity language, a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material "otherwise objectionable."[118] At the same time, some courts, focusing the words "the provider or user considers to be

[118] Zango, 568 F.3d at 1178 (Fisher, J., concurring). The Ninth Circuit has adopted Judge Fisher's reasoning. See Enigma, 946 F.3d at 1049.

obscene," see the provision's immunity available whenever an interactive computer service simply claims to consider the material as fitting within the provision's categories. Thus, "good faith" simply means the existence of some "subjective intent."[119]

Good faith requires transparency about content moderation disputes processes. In order to qualify for section 230(c)(2)'s immunity, a social media platform, or any interactive computer service, must demonstrate in a transparent way that when it takes action pursuant to section 230(c)(2), it provides adequate notice, reasoned explanation, or a meaningful opportunity to be heard."[120]

To ensure clear and consistent interpretation of the "good faith" standard, NTIA requests that the FCC further add the below to newly requested 47 CFR Chapter I Subchapter E Section 130.02:

> **(e) "good faith"**
> A platform restricts access to or availability of specific material (including, without limitation, its scope or reach) by itself, any agent, or any unrelated party in "good faith" under 47 U.S.C. § (c)(2)(A) if it:
>
> i. restricts access to or availability of material or bars or refuses service to any person consistent with publicly available terms of service or use that state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices, including by any partially or fully automated processes, and that are in effect on the date such content is first posted;
> ii. has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A);
> iii. does not restrict access to or availability of material on deceptive or pretextual grounds, and does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict; and
> iv. supplies the interactive computer service of the material with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively

[119] Domen, 433 F.Supp. 3d 592.
[120] E.O. 13925, Sec. 2(b).

> reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.

3. Section 230(c)(1) and 230(f)(3)

Section 230(c)(1) places "information content providers," i.e., entities that create and post content, outside its protections. This means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet, does not receive the statute's shield. Numerous cases have found that interactive computer service's designs and policies render it an internet content provider, outside of section 230(c)(1)'s protection. But the point at which a platform's form and policies are so intertwined with users' postings so as to render the platform an "information content provider" is not clear.

Courts have proposed numerous interpretations, most influentially in the Ninth Circuit in Fair Housing Council of San Fernando Valley v. Roommates.Com.[121] There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[122] The court continued, "[w]e interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."[123] But, this definition has failed to provide clear guidance, with courts struggling to define "material contribution."[124]

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[121] Fair Hous. Council, 521 F.3d at 1166.
[122] Id.
[123] Id. at 1167–68 (emphasis added); see also Dirty World Entertainment, 755 F.3d at 411.
[124] See, e.g., People v. Bollaert, 248 Cal. App. 4th 699, 717 (2016).

Further, not all courts accept the material contribution standard. The Seventh Circuit concludes that "[a] company can, however, be liable for creating and posting, inducing another to post, or otherwise actively participating in the posting of a defamatory statement in a forum that that company maintains."[125] Other circuits conclude that a website becomes an information content provider by "solicit[ing] requests" for the information and then "pa[ying] researchers to obtain it."[126]

This confusion stems from the difference between the way an online bulletin board worked in the 1990s, which simply posted content, and how social media works today. As Federal Trade Commissioner Rohit Chopra explained, new social media shape and control information and online experience often as an expression of platforms' and their advertisers' goals rather than their users':

> "[Section 230] seeks to foster an environment where information and ideas can flourish. If a company is just helping move information from point A to point B, that company is just like the mail carrier or the telegraph company. That makes sense . . . . But the tech market has dramatically shifted in the decades since this law was enacted . . . . I would argue that once platforms started prioritizing their paid predictions, the content became more a reflection of advertisers targeting users, than users' own preferences."[127]

In light of modern technology, the FCC should clarify the circumstances under which an interactive computer service becomes an information content provider. Interactive computer services that editorialize particular user comments by adding special responses or warnings appear to develop and create content in any normal use of the words. Analogously, district

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[125] Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016).
[126] FTC v. Accusearch Inc., 570 F.3d 1187, 1199–1200 (10th Cir. 2009).
[127] Rohit Chopra, Tech Platforms, Content Creators, and Immunity, American Bar Association, Section of Antitrust Law Annual Spring Meeting, Washington, D.C. (Mar. 28, 2019) (transcript available online at https://www.ftc.gov/system/files/documents/public_statements/1510713/chopra_-_aba_spring_meeting_3-28-19_0.pdf (last visited June 15, 2020)).

courts have concluded that when interactive computer services' "employees . . . authored comments," the interactive computer services would become content providers.[128] In addition, prioritization of content under a variety of techniques, particularly when it appears to reflect a particularly viewpoint, might render an entire platform a vehicle for expression and thus an information content provider.

To clarify when interactive computer services become information content providers through developing and creating content through the presentation of user-provided material, NTIA requests that the FCC add the below Subpart E to 47 CFR Chapter I:

> **Subpart E. Clarifying Subsection 230(f)(2).**
> § 130.03
> As used within 47 U.S.C. 230, 47 CFR Chapter I, Subchapter A and within this regulation, the following shall apply:
>
> For purposes of 47 U.S.C. § 230(f)(3), "responsible, in whole or in part, for the creation or development of information" includes substantively contributing to, modifying, altering, presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider.

4. "Treated as a Publisher or Speaker"

Finally, the ambiguous term "treated as a publisher or speaker" is a fundamental question for interpreting that courts in general have not addressed squarely. One of the animating concerns for section 230 was court decisions holding online platforms liable as publishers for third-party speech, when in fact they were merely passive bulletin boards. By prohibiting an interactive computer service from being "treated" as a publisher or speaker, therefore, section 230 could be interpreted as not converting non-publisher platforms into publishers simply because they passively transmit third-party content. That does not, however, mean that the

[128] Huon, 841 F.3d at 742.

statute meant to immunize online platforms when they actually act as publishers and exert significant control over the third-party speech and the message it conveys.

FCC Chairman Pai made a similar point by asking if selective content moderation based on ideology eventually becomes "editorial judgment":

> Are these tech giants running impartial digital platforms over which they don't exercise editorial judgment when it comes to content? Or do they in fact decide what speech is allowed and what is not and discriminate based on ideology and/or political affiliation? [129]

If content-moderating can never, no matter how extreme or arbitrary, become editorializing that no longer remains the "speech of another," then section 230(c)(1) will subsume section 230(c)(2) and eliminate liability for all interactive computer services' decisions to restrict content. Interpreting "speaker or publisher" so broadly is especially harmful when platforms are opaque and deceptive in their content-monitoring policies.

This concern is hardly theoretical, given the highly inconsistent, baffling, and even ideologically driven content moderating decisions that the large interactive computer services have made, at least according to numerous accounts. For instance, one interactive computer service made the editorial decision to exclude legal content pertaining to firearms,[130] content that was deemed acceptable for broadcast television,[131] thereby chilling the speech of a political candidate supportive of gun rights. Another interactive computer service has suppressed the

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[129] Ajit Pai, What I Hope to Learn from the Tech Giants, FCC Blog (Sept. 4, 2018), https://www.fcc.gov/news-events/blog/2018/09/04/what-i-hope-learn-tech-giants.
[130] Facebook, Inc., Facebook Prohibited Content: 7. Weapons, Ammunition, or Explosives, https://www.facebook.com/policies/ads/prohibited_content/weapons (last visited June 15, 2020).
[131] Maria Schultz, Facebook pulls ad from gun-toting Georgia candidate taking on Antifa: 'Big Tech censorship of conservatives must end', Fox News (June 6, 2020), https://www.foxnews.com/politics/facebook-pulls-ad-from-gun-toting-georgia-candidate-big-tech-censorship-of-conservatives-must-end.

speech of an American politician for "glorifying violence"[132] while permitting that of a foreign politician glorifying violence to pass without action,[133] as publicly noted by the FCC Chairman.[134] Still another interactive computer service, purporting to be a document repository and editing service,[135] deleted a controversial paper about a potential therapy for COVID-19,[136] stating simply that it was in violation of the site terms of service.[137] A major food-workers' union has objected to social media-implemented internal communication networks for companies, or "intranets," implementing automated censorship to prevent discussions of unionization.[138]

At common law, as a general matter, one is liable for defamation only if one makes "an affirmative act of publication to a third party."[139] This "affirmative act requirement" ordinarily

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[132] Alex Hern, Twitter hides Donald Trump tweet for 'glorifying violence', The Guardian (May 29, 2020), https://www.theguardian.com/technology/2020/may/29/twitter-hides-donald-trump-tweet-glorifying-violence.
[133] White House official Twitter account (May 29, 2020), https://twitter.com/WhiteHouse/status/1266367168603721728.
[134] Ajit Pai verified Twitter account (May 29, 2020), https://twitter.com/AjitPaiFCC/status/1266368492258816002.
[135] Google, Inc., Google Docs "About" page, https://www.google.com/docs/about/ (last visited June 15, 2020) ("Google Docs brings your documents to life with smart editing and styling tools to help you easily format text and paragraphs. Choose from hundreds of fonts, add links, images, and drawings. All for free . . . . Access, create, and edit your documents wherever you go — from your phone, tablet, or computer — even when there's no connection.").
[136] Thomas R. Broker, et al., An Effective Treatment for Coronavirus (COVID-19), (Mar. 13, 2020), page archived at https://archive.is/BvzkY (last visited June 15, 2020).
[137] Google, Inc., Google Docs result for https://docs.google.com/document/d/e/2PACX-1vTi-g18ftNZUMRAj2SwRPodtscFio7bJ7GdNgbJAGbdfF67WuRJB3ZsidgpidB2eocFHAVjIL-7deJ7/pub (last visited June 15, 2020) ("We're sorry. You can't access this item because it is in violation of our Terms of Service.").
[138] United Food and Commercial Workers International Union, Facebook Censorship of Worker Efforts to Unionize Threatens Push to Strengthen Protections for Essential Workers During COVID-19 Pandemic (June 12, 2020), http://www.ufcw.org/2020/06/12/censorship/.
[139] Benjamin C. Zipursky, Online Defamation, Legal Concepts, and the Good Samaritan, 51 Val. U. L. Rev. 1, 18 (2016) , available at https://scholar.valpo.edu/cgi/viewcontent.cgi?article=2426&context=vulr.

"depict[s] the defendant as part of the initial making or publishing of a statement."[140] The common law also recognized a "narrow exception to the rule that there must be an affirmative act of publishing a statement."[141] A person "while not actually publishing—will be subjected to liability for the reputational injury that is attributable to the defendant's failure to remove a defamatory statement published by another person."[142] Such a duty might apply where a defendant has undertaken an affirmative duty to remove. Stratton Oakmont embodies the latter idea: The court held that Prodigy, having undertaken to moderate some content on its page, thereby assumed an affirmative duty to moderate all content on its site. At common law, then, the publication element of defamation could be satisfied either through the rule—an affirmative act—or the exception—an omission where an affirmative duty applies.

Section 230(c)(1)'s "treated as the publisher or speaker" could plausibly be understood to foreclose liability only if a defendant would satisfy the exception. Satisfying the exception subjects one to defamation liability as if he were the publisher or speaker of the content, although he did not "actually publish[]" the content.[143] He is not a "true publisher" in the sense of satisfying the affirmative act requirement, but he is deemed or regarded as if he were because he had an affirmative duty to moderate.[144] This interpretation of section 230(c)(1) reads it to foreclose the very argument courts may have been on track to embrace after Stratton Oakmont, viz., that a platform has an affirmative duty to remove defamatory content and will be treated as satisfying the publication element of defamation for nonfeasance in the same way as a true publisher. Section 230(c)(1) states—in the face of Stratton Oakmont's contrary holding—a

[140] Id. at 19.
[141] Id. at 20.
[142] Id. at 21 (citing Restatement (Second) of Torts § 577(2) (Am. Law Inst. 1977)).
[143] Zipursky, 51 Val. L. Rev. at 21.
[144] Id. at 45.

general rule: There is no affirmative duty to remove. For that reason, section 230(c)(1) should be construed to concern only failures to remove and not takedowns, and not to apply when a platform "actually publishes" content.

NTIA suggests that the FCC can clarify the ambiguous phrase "speaker or publisher" by establishing that section 230(c)(1) does not immunize the conduct of an interactive service provider that is actually acting as a publisher or speaker in the traditional sense. Two points follow. First, when a platform moderates outside of section 230(c)(2)(A), section 230(c)(1) does not provide an additional, broader immunity that shields content takedowns more generally. Such affirmative acts are outside of the scope of (c)(1). Second, when a platform reviews third-party content already displayed on the internet and affirmatively vouches for it, editorializes, recommends, or promotes such content on the basis of the content's substance or message, the platform receives no section 230(c)(1) immunity. NTIA therefore requests that the FCC further add the below to newly requested Subpart E to 47 CFR Chapter I:

Subpart E. Clarifying Subsection 230(f)(2).

§ 130.04

(c) An interactive computer service is not being "treated as the publisher or speaker of any information provided by another information content provider" when it actually publishes its own or third-party content. Circumstances in which an interactive computer service actually publishes content include when:

(i) it affirmatively solicits or selects to display information or content either manually by the interactive computer service's personnel or through use of an algorithm or any similar tool pursuant to a reasonably discernible viewpoint or message, without having been prompted to, asked to, or searched for by the user; and
(ii) it reviews third-party content already displayed on the Internet and affirmatively vouches for, editorializes, recommends, or promotes such content to other Internet users on the basis of the content's substance or messages. This paragraph applies to a review conducted, and a recommendation made, either manually by the interactive computer service's personnel or through use of an algorithm or any similar tool.

(d) An interactive computer service does not publish content merely by:

(i) providing content in a form or manner that the user chooses, such as non-chronological order, explicit user preferences, or because a default setting of the service provides it, and the interactive computer service fully informs the user of this default and allows its disabling; or

(ii) transmitting, displaying, or otherwise distributing such content, or merely by virtue of moderating third-party content consistent with a good faith application of its terms of service in force at the time content is first posted. Such an interactive computer service may not, by virtue of such conduct, be "treated as a publisher or speaker" of that third-party content. 47 U.S.C. § 230(c)(1).

VI. Title I and Sections 163 and 257 of the Act Permit the FCC to Impose Disclosure Requirements on Information Services

With roots in the Modified Final Judgment for the break-up of AT&T[145] and codified by the Telecommunications Act of 1996,[146] the term "information service" refers to making information available via telecommunications. Under FCC and judicial precedent, social media sites are "information services." As such, courts have long recognized the Commission's power to require disclosure of these services under sections 163 and 257.

A. Social media are information services

Section 230(f)(2) explicitly classifies "interactive computer services" as "information services," as defined in 47 U.S.C. § 153(20).[147] Further, social media fits the FCC's definition of

[145] United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 179 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (observing that "'Information services' are defined in the proposed decree at Section IV(J) as: the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications").

[146] 47 U.S.C. § 153(24).

[147] Id. ("[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

enhanced services.[148] In Brand X, the Supreme Court explained, "The definitions of the terms 'telecommunications service' and 'information service' established by the 1996 Act are similar to the Computer II basic-and enhanced-service classifications" with "'information service'—the analog to enhanced service."[149]

Numerous courts have ruled that search engines, browsers and internet social media precursors such as chat rooms are information services.[150] Courts have long recognized edge providers as information services under Title I. For example, in Barnes, the U.S. Court of Appeals for the Ninth Circuit classifies Yahoo's social networking services an "information service," interchangeably with "interactive computer service," and in Howard v. Am. Online, the same court designates America Online's messaging facilities "enhanced services."[151]

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[148] 47 CFR § 64.702 ("[S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.").

[149] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977 (2005).

[150] Mozilla Corp. v. F.C.C., 940 F.3d 1, 34 (D.C. Cir. 2019) ("But quite apart from the fact that the role of ISP-provided browsers and search engines appears very modest compared to that of DNS and caching in ISPs' overall provision of Internet access, Petitioners are in a weak posture to deny that inclusion of 'search engines and web browsers' could support an 'information service' designation . . . since those appear to be examples of the 'walled garden' services that Petitioners hold up as models of 'information service'-eligible offerings in their gloss of Brand X.") (internal citations omitted); FTC v. Am. eVoice, Ltd., 242 F. Supp. 3d 1119 (D. Mont. 2017) (Email and online "chat rooms" "were enhanced services because they utilized transmission lines to function, as opposed to acting as a pipeline for the transfer of information . . . . 'This conclusion is reasonable because e-mail fits the definition of an enhanced service.'" (quoting Howard v. Am. Online Inc., 208 F.3d 741, 746 (9th Cir. 2000)). "Also excluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line." H.R. Rep. No. 103-827, at 18 (1994), as reprinted in 1994 U.S.C.C.A.N. 3489, 3498

[151] Barnes, 570 F.3d at 1101.

B. Several statutory sections empower the FCC to mandate disclosure

Beyond having jurisdiction over social media as information services, the FCC has clear statutory authority to impose disclosure requirements under sections 163 and 257 of the Communications Act. Section 163 charges the FCC to "consider all forms of competition, including the effect of intermodal competition, facilities-based competition, and competition from new and emergent communications services, including the provision of content and communications using the Internet" and "assess whether laws, regulations, regulatory practices . . . pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services."[152] Section 257(a) of the Communications Act requires the FCC to examine market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."[153]

In its 2018 Internet Order, the Commission relied on section 257 to impose service transparency requirements on providers of the information service of broadband internet access. It reasoned that doing so would reduce entry barriers.[154] Similar reasoning applies to requiring transparency for social media. Clear, current, readily accessible and understandable descriptions of an interactive computer service provider's content moderation policies would help enterprising content providers fashion their offerings so that they can be provided across multiple

[152] 47 U.S.C. § 163.
[153] 47 U.S.C. § 257(a) (2018). While section 257 was amended and repealed in part, its authority remained intact in section 163. "Congress emphasized that '[n]othing in this title [the amendment to the Telecommunications Act creating section 163] or the amendments made by this title shall be construed to expand or contract the authority of the Commission." Mozilla, 940 F.3d at 47 citing Pub. L. No. 115-141, Div. P, § 403, 132 Stat. at 1090.
[154] Federal Communications Commission, In the Matter of Restoring Internet Freedom, 33 F.C.C. Rcd. 311 (2018).

platforms with reduced costs and friction for the provider and fewer disruptions to user experiences.[155]

Perhaps more important, information about an interactive computer service provider's content moderation policies would help entities design filtering products that could improve the providers' implementation of those policies, or assist consumers in remedying the gaps they may see in the providers' policies. Certainly, empowering consumers with blocking technologies that they choose and control—rather than accepting a platform's top-down centralized decisions, would directly advance section 230's policy of encouraging "the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."[156] Increasing transparency about online platforms' content moderation practices would also enable users to make more informed choices about competitive alternatives.

Consumers today have a one-way relationship with social media transparency; platforms know everything about consumers, but consumers know very little about how or why platforms exercise influence or direct control over consumers' speech. Certain information disappears or becomes difficult to find, while other information is promoted and prominently displayed. Inevitably, some consumers and content creators begin to worry that secretive forces within platform providers are manipulating social media for ends that can only be guessed at.[157] Such suspicion is inevitable when there is so little transparency about the process behind the social media visibility of user-provided content, even when policies are applied fairly and no

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[155] See supra Section IV.
[156] 47 U.S.C. § 230(a)(3).
[157] Rod Dreher, Google Blacklists Conservative Websites (July 21, 2020), https://www.theamericanconservative.com/dreher/google-blacklists-conservative-websites/.

wrongdoing has taken place. By increasing transparency to consumers, platforms would ensure that consumers can choose to consume social media whose policies they agree with without fear that manipulations to which they did not consent are happening behind the scenes.

The importance of disclosure to our communications networks cannot be underestimated. Chairman Pai recognizes that democracies must require transparency and to ensure the proper function of essential communications networks.[158] That is why, when eliminating Title II common carrier so-called "network neutrality" regulations, Chairman Pai's FCC retained Title I disclosure requirements for broadband access service providers.

The same is true for other information service providers. Speaking of the social media platforms, FCC Chairman Ajit Pai asked "how do these companies make decisions about what we see and what we don't? And who makes those decisions?"[159] For social media, it is particularly important to ensure that large firms avoid "deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints,"[160] or engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree."[161]

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[158] Federal Communications Commission, In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report And Order, And Order (Jan, 4, 2018) ¶ 209, available at https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order ("'Sunlight,' Justice Brandeis famously noted, 'is . . . the best of disinfectants.' This is the case in our domain. Properly tailored transparency disclosures provide valuable information to the Commission to enable it to meet its statutory obligation to observe the communications marketplace to monitor the introduction of new services and technologies, and to identify and eliminate potential marketplace barriers for the provision of information services. Such disclosures also provide valuable information to other Internet ecosystem participants.").

[159] Ajit Pai, What I Hope to Learn from the Tech Giants (Sept. 4, 2018), https://www.fcc.gov/news-events/blog/2018/09/04/what-i-hope-learn-tech-giants (last visited June 15, 2020).

[160] E.O. 13925, Section 2(a).

[161] Id.

To prevent these ends, NTIA requests that the FCC further add the below to Subpart E to 47 CFR Chapter I Subchapter A Part 8:

§ 8.2 Transparency for Interactive Computer Services.

Any person providing an interactive computer service in a manner through a mass-market retail offering to the public shall publicly disclose accurate information regarding its content-management mechanisms as well as any other content moderation, promotion, and other curation practices of its interactive computer service sufficient to enable (i) consumers to make informed choices regarding the purchase and use of such service and (ii) entrepreneurs and other small businesses to develop, market, and maintain offerings by means of such service. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

VII. Conclusion

For the foregoing reasons, NTIA respectfully requests that the Commission institute a rulemaking to interpret Section 230 of the Communications Act.

Respectfully submitted,

Douglas Kinkoph

Douglas Kinkoph
Performing the Delegated Duties of the
Assistant Secretary for Commerce for
Communications and Information

July 27, 2020

APPENDIX A: Proposed Rules

47 CFR Chapter I, Subchapter E
Part 130 – Section 230 of the Communications Decency Act.

Interpreting Subsection 230(c)(1) and Its Interaction With Subsection 230(c)(2).
§ 130.01
As used within 47 U.S.C. 230, 47 CFR Chapter I, Subchapter A and within this regulation, the following shall apply:

(a) 47 U.S.C. 230(c)(1) applies to an interactive computer service for claims arising from failure to remove information provided by another information content provider. Section 230(c)(1) has no application to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service. Any applicable immunity for matters described in the immediately preceding sentence shall be provided solely by 47 U.S.C. § 230(c)(2).

(b) An interactive computer service is not a publisher or speaker of information provided by another information content provider solely on account of actions voluntarily taken in good faith to restrict access to or availability of specific material in accordance with subsection (c)(2)(A) or consistent with its terms of service or use.

(c) An interactive computer service is not being "treated as the publisher or speaker of any information provided by another information content provider" when it actually publishes its own or third-party content. Circumstances in which an interactive computer service actually publishes content include when:

(i) it affirmatively solicits or selects to display information or content either manually by the interactive computer service's personnel or through use of an algorithm or any similar tool pursuant to a reasonably discernible viewpoint or message, without having been prompted to, asked to, or searched for by the user;

(ii) it reviews third-party content already displayed on the Internet and affirmatively vouches for, editorializes, recommends, or promotes such content to other Internet users on the basis of the content's substance. This paragraph applies to a review conducted, and a recommendation made, either manually by the interactive computer service's personnel or through use of an algorithm or any similar tool.

(d) An interactive computer service does not publish content merely by:

(1) providing content in a form or manner that the user chooses, such as non-chronological order, explicit user preferences, or because a default

setting of the service provides it, and the interactive computer service fully informs the user of this default and allows its disabling; or
(2) transmitting, displaying, or otherwise distributing such content, or merely by virtue of moderating third-party content consistent with a good faith application of its terms of service in force at the time content is first posted. Such an interactive computer service may not, by virtue of such conduct, be "treated as a publisher or speaker" of that third-party content. 47 U.S.C. § 230(c)(1).

Clarifying Subsection 230(c)(2).
§ 130.02
As used within 47 U.S.C. 230, 47 CFR Chapter I, Subchapter A and within this regulation, the following shall apply:

(a) "obscene," "lewd," lascivious" and "filthy"
The terms "obscene," "lewd," "lascivious," and "filthy" mean material that

iv. taken as a whole, appeals to the prurient interest in sex or portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, or scientific value;
v. depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards; to the average person, applying contemporary community standards; or
vi. signifies the form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel.

(b) "excessively violent"
The term "excessively violent" means material that

iii. is likely to be deemed violent and for mature audiences according the Federal Communications Commission's V-chip regulatory regime and TV Parental Guidance, promulgated pursuant to Section 551 of the 1996 Telecommunications Act Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (codified at 47 U.S.C. § 303; § 330(c)(4));
iv. constitutes or intends to advocate domestic terrorism or international terrorism, each as defined in 18 U.S.C. § 2331 ("terrorism").

(c) "harassing"
The term "harassing" means any material that

iv. that sent by an information content provider that has the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value;
v. regulated by the CAN-SPAM Act of 2003, 117 Stat. 2699; or
vi. that is malicious computer code intended (whether or not by the immediate disseminator) to damage or interfere with the operation of a computer.

(d) "otherwise objectionable"
The term "otherwise objectionable" means any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials.

(e) "good faith"
A platform restricts access to or availability of specific material (including, without limitation, its scope or reach) by itself, any agent, or any unrelated party in "good faith" under 47 U.S.C. § (c)(2)(A) if it:

v. restricts access to or availability of material or bars or refuses service to any person consistent with publicly available terms of service or use that state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices, including by any partially or fully automated processes, and that are in effect on the date such content is first posted;

vi. has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A);

vii. does not restrict access to or availability of material on deceptive or pretextual grounds, and does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict; and

viii. supplies the interactive computer service of the material with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.

Clarifying Subsection 230(f)(2).
§ 130.03
As used within 47 U.S.C. 230, 47 CFR Chapter I, Subchapter A and within this regulation, the following shall apply:

For purposes of 47 U.S.C. § 230(f)(3), "responsible, in whole or in part, for the creation or development of information" includes substantively contributing to, modifying, altering, presenting with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider.

47 CFR Chapter I Subchapter A Part 8 ---Internet Freedom.

§ 8.2 Transparency for Interactive Computer Services.

Any person providing an interactive computer service in a manner through a mass-market retail offering to the public shall publicly disclose accurate information regarding its content-management mechanisms as well as any other content moderation, promotion, and other curation practices of its interactive computer service sufficient to enable (i) consumers to make informed choices regarding the purchase and use of such service and (ii) entrepreneurs and other small businesses to develop, market, and maintain offerings by means of such service. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

From: Candeub, Adam
To: Roddy, Carolyn
Date: Wednesday, September 16, 2020 1:57:36 PM
Attachments: NTIA_Reply_First_Half.docx

A few little things.

Adam Candeub
Acting Assistant Secretary
National Telecommunications and Information Administration
(202) 360-5586

39 Pages (1 Record) Withheld in their Entirety Pursuant to FOIA Exemption 5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
Sent: Tuesday, September 15, 2020 6:25 PM
To: Adam Candeub

Sources: Trump settles on Commerce Department adviser for FCC seat

BY JOHN HENDEL
|09/15/2020 05:28 PM EDT

President Donald Trump has settled on telecom lawyer Nathan Simington to fill the FCC seat now occupied by longtime GOP Commissioner Mike O'Rielly and plans to announce the nomination as soon as Tuesday evening, two people close to the discussions told POLITICO.

The people spoke on condition of anonymity because the nomination is not yet public.

The White House yanked a renomination for O'Rielly this summer after the commissioner expressed public skepticism at the idea of his agency regulating social media. Some had seen O'Rielly's words as criticizing Trump's efforts to get the FCC to punish what the president alleges is anti-conservative bias among Silicon Valley companies.

Simington, meanwhile, joined the administration amid Trump's attempted tech crackdown. He started working for the Commerce Department in June as a senior adviser in the National Telecommunications and Information Administration, a key tech agency that has formally asked the FCC to narrow the liability protections of Section 230 of the Communications Decency Act. Simington joined shortly after Adam Candeub, who this August rose to become acting head of the agency.

Simington's portfolio, according to his LinkedIn profile, includes the allocation of airwaves and internet freedom issues. He previously worked at wireless company Brightstar and various law firms. The Verge previously reported he was under consideration for the FCC seat, one among several names that have been swirling in the last several weeks.

O'Rielly, who has been at the agency since 2013, will have to vacate his seat at the end of the year. Senate confirmation of any nominee could be difficult in the near term.

The White House didn't immediately comment. The announcement could be subject to change given that the administration has not formally announced the move.

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From: Candeub, Adam
To: Adam Candeub
Date: Tuesday, September 15, 2020 7:46:35 PM
Attachments: Binder1.pdf

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	

COMMENTS OF VIMEO, INC., AUTOMATTIC INC., AND REDDIT, INC. IN OPPOSITION TO THE PETITION OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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September 2, 2020

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
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Section 230 of the Communications Act	)	RM-11862
	)	

To: The Commission

COMMENTS OF VIMEO, INC., AUTOMATTIC INC., AND REDDIT, INC. IN OPPOSITION TO THE PETITION OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

INTRODUCTION AND SUMMARY

The United States has produced the world's most vibrant and innovative market for online services. The companies who file these Comments are examples of the nation's success. They are medium-sized companies that collectively host, stream, and power millions of user communications, web pages, and video streams per day and allow people throughout the nation to work, practice their religion, educate, entertain, and express themselves. They are diverse in focus and business model, but what they all have in common is that they rely on Section 230 of the Communications Decency Act of 1996 to do what they do.

Congress had the foresight in 1996 to realize the promise of the Internet and understood that it needed intermediaries—websites, apps, and other services—to work and that intermediaries wouldn't be in business long if they were held liable for user content and didn't have the freedom to remove offensive content. Section 230 delivers that freedom by providing certain immunities to both providers *and users* with respect to user content. By doing so, the

statute helps "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[1]

Despite this clear Congressional mandate, the National Telecommunications and Information Administration ("NTIA") invites the Commission to, in effect, repeal Section 230 by administrative fiat and plunge head-first into "the constitutionally sensitive area of content regulation."[2] In particular, NTIA asks the Commission to gut Section 230 by (1) repealing its core immunity for publishing user content; and (2) imposing heavy-handed regulations on platforms by telling them what content they can remove and how they can remove it.[3] The Commission should decline this invitation to regulate the Internet.

First, the Commission lacks both subject matter jurisdiction and rulemaking authority over Internet content—which Congress specifically wanted to leave unregulated. *Second*, the proposed rules cannot issue because they would effectively repeal and rewrite Section 230 in the guise of interpreting it. *Third*, there is no market failure that justifies burdensome *ex ante* regulations.

Fourth, the proposed rules would harm the Internet. They would leave platforms exposed to liability for hosting third-party content, thereby reintroducing the very problems Congress sought to avoid in passing Section 230. They would eliminate protections for removing hate speech and other highly problematic content. They would discourage the

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[1] 47 U.S.C. § 230(b)(2) (emphasis added).

[2] Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, *Report*, 102 F.C.C.2d 142, 157 ¶ 20 (1985).

[3] National Telecommunications and Information Administration, Petition for Rulemaking, RM-11862 (July 27, 2020) ("Pet.") at 53-55. The petition is the result of Executive Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

development of automated technologies that help platforms combat spam and inauthentic content. All of this would burden and chill speech, dampen investment, and stifle competition. In short, the rules are unauthorized, anti-speech, anti-business, and anti-competition. They should be rejected without any further proceeding.[4]

STATEMENT OF INTEREST OF COMMENTING PARTIES

The commenting parties are medium-sized businesses that host and share a wide variety of user content. Section 230 has allowed them to thrive and to develop unique self-regulatory practices that are tailored to their services and the communities they serve. They are thus emblematic of the innovation that Congress sought to unlock by enacting Section 230.:

Automattic is the company behind WordPress.com, WooCommerce, Jetpack, and Tumblr. Automattic is a globally distributed company with 1,255 employees living and working in 76 countries. Automattic is committed to diversity and inclusion, with a common goal of democratizing publishing so that anyone with a story can tell it, regardless of income, gender, politics, language, or where they live in the world.

Automattic strives to carefully balance automation and human review across all of its platforms' content moderation practices. It leverages machine learning to enhance and improve its trust and safety decisions; however, it is Automattic's highly trained trust and safety moderators that allow it to apply context and nuance to ensure a fair outcome for our user communities. Whether it is hate speech or copyright infringement, Automattic strives to prioritize user safety and freedom of expression.

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[4] Commenters have focused on the primary problems with NTIA's petition. These are not the only problems, and we reserve all rights.

Reddit, Inc. is a user-generated content sharing platform whose mission is to bring community and belonging to everyone in the world. Founded in 2005 and with around 650 employees, Reddit comprises more than 130,000 communities, known as "subreddits," based on shared interests regarding everything from history and science to relationships, parenting, and pet ownership. Each of these communities is created and moderated not by Reddit employees, but by the users themselves, democratizing the content moderation process.

Reddit's content moderation approach is unique in the industry. Reddit relies on a governance model akin to our own democracy—where everyone follows a set of rules, has the ability to vote and self-organize, and ultimately shares some responsibility for how the platform works. Each subreddit is governed by rules set and enforced not by Reddit employees, but by volunteer community moderators, who execute more than 99.7% of all non-spam content removals on Reddit. Their efforts are complemented by the work of specialized Reddit employees and automated tooling to protect against illegal content like CSAM and foreign terrorist content, ensuring that such material is reported to the proper authorities.

Vimeo, Inc. operates a global video platform for creative professionals, small and medium businesses, organizations and enterprises to connect with their audiences, customers and employees. Vimeo provides cloud-based Software-as-a-Service offerings that allow customers to create, host, stream, monetize, analyze and distribute videos online and across devices. Launched in 2005, Vimeo has over 600 employees, nearly 1.4 million paying subscribers, and approximately 175 million users.

Vimeo has a dedicated Trust & Safety team with a global presence to help keep its services free of materials that infringe third-party rights, violate laws, or cause harm. In addition to human content moderation, Vimeo uses a number of automated methods to detect and remove

a variety of harmful content, ranging from spam and fraud to child sexual abuse materials and terrorist propaganda.

ARGUMENT

I. NTIA's Petition Asks for Rules that Are Beyond the FCC's Powers to Make.

A. The FCC Lacks Subject Matter Jurisdiction.

The FCC may not regulate matters outside its subject matter jurisdiction delineated in Section 2(a) of the Communications Act.[5] In *American Library Association v. FCC*, an ancillary jurisdiction case, the D.C. Circuit explained that subject matter jurisdiction is a precondition to the Commission's assertion of authority: "the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act, which . . . encompasses 'all interstate and foreign communications by wire or video.'"[6] In *Verizon v. FCC*, the Court held that subject matter jurisdiction is an important "limiting principle" that holds true whether the Commission seeks to make rules based upon a specific source of rulemaking authority or the Commission's ancillary authority.[7]

NTIA's proposed rules exceed the Commission's subject matter authority because they seek to regulate the act of *deciding* whether or not to publish content (or deciding to remove previously published content). This act is undertaken after a communication ends, or before it begins, and is separable from the act of transmitting it via communications. In this regard, the

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[5] 47 U.S.C. § 152(a).

[6] 406 F.3d 689, 692-93 (D.C. Cir. 2005) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 167 (1968)).

[7] 740 F.3d 623, 640 (D.C. Cir. 2014) ("Any regulatory action authorized by section 706(a) would thus have to fall within the Commission's subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction.").

proposed rules are analogous to those in *American Library Association*, in which the Commission sought to require all television sets to incorporate a chip that would implement certain prohibitions on copying content. The D.C. Circuit held that the Commission exceeded its subject matter authority by attempting "to regulate apparatus that can receive television broadcasts when those apparatus are not engaged in the process of receiving a broadcast transmission."[8] Critical to the opinion was the fact that the rules did not "not regulate the actual transmission of the DTV broadcast" but instead regulated "devices that receive communications after those communications have occurred," and not "communications themselves."[9] Here, too, the Commission would be regulating content selection and moderation decisions, not actual transmissions or communications themselves.

B. The FCC Lacks Statutory Rulemaking Authority.

NTIA's reliance on Section 201(b) of the Communications Act for statutory rulemaking authority[10] is misplaced, as that provision grants the Commission authority to regulate common carriers like telephone companies. Section 2 is titled "Service and charges" and it is the lead provision in Part 1 of the Communications Act (also known as Title 2), titled "Common Carrier Regulation."[11] Section 201(a) begins with the words, "It shall be the duty of every *common carrier* engaged in interstate or foreign communication by wire or radio . . . "[12] and Section 201(b) begins with "[a]ll charges, practices, classifications, and regulations for and in connection

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[8] *Am. Library Ass'n*, 406 F.3d at 691.
[9] *Id*. at 703.
[10] Pet. at 15-18.
[11] 47 U.S.C. § 201.
[12] 47 U.S.C. § 201(a) (emphasis added).

with *such communication service*, shall be just and reasonable . . . ."[13] After describing a litany of common-carrier related subject matter—including the right of common carriers to "furnish reports on the positions of ships at sea"—Section 201(b) ends with a limited grant of authority: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to *carry out* the provisions of this chapter."[14]

NTIA unmoors this last sentence from its proper common carrier-specific context and argues that because Section 230 falls within Title 2 of Title 47, it is fair game for rulemaking under that section. NTIA cites two Supreme Court decisions to support its position,[15] but these cases stand for the unremarkable proposition that Section 201(b) permits rulemaking to implement Title 2 enactments subsequent to that of Section 201. NTIA omits the crucial passage from *Iowa Utilities* making clear that Section 201 does not apply to later Title 2 provisions regardless of what they say or do. Commenting on Justice Breyer's dissent, the majority states: "Justice Breyer says . . . that 'Congress enacted [the] language [of § 201(b)] in 1938,' and that whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute depends upon *what that later enacted statute contemplates*.' *That is assuredly true."*[16]

True to that statement, both Supreme Court cases invoked by NTIA involved Title 2 provisions governing common carrier matters. In *AT&T Corp. v. Iowa Utilities Board* concerned the 1996 addition of local competition provisions, which improve network sharing, service

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[13] 47 U.S.C. § 201(b) (emphasis added).

[14] *Id.* (emphasis added).

[15] Pet. at 16-17, 16 n.46.

[16] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis added) (internal citation omitted).

resale, and interconnection obligations on the most heavily regulated of all common carriers—incumbent local exchange carriers (*i.e.*, the progeny of the Bell telephone companies).[17] Similarly, *City of Arlington v. FCC* involved a provision that concerned state regulation of siting applications for "personal wireless services," another common carrier service.[18] Consequently, the orders in these cases carried out common carrier regulation.

No such mandate is in play here. Section 230 does not concern, or even refer to, common carriers. Instead, its subject matter is "providers *and users*" of interactive computer services—entities who are certainly not common carriers.[19] Moreover, there is nothing for the Commission to "carry out" in Section 230. The Commission is not tasked with doing anything and is not even mentioned once. Instead, the statute, which was prompted by inconsistent judicial decisions,[20] seeks to limit "civil liability"[21] of providers and users and is self-enforcing on its face. The Commission has no role in adjudicating disputes in which Section 230(c)'s immunities might arise. Tellingly, these immunities have been interpreted and applied by the state and federal courts for 24 years without the FCC's intervention. Accordingly, the Commission does not have statutory authority to make rules under Section 230.

Nor does the Commission have ancillary authority. The D.C. Circuit has rejected attempts to claim plenary authority over a subject "simply because Congress has endowed it

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[17] *Id*. (involving 47 U.S.C. §§ 251 and 252).

[18] 569 U.S. 290 (2013) (involving 47 U.S.C. § 332).

[19] 47 U.S.C. § 230(c)(1) (emphasis added).

[20] *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (Section 230 "assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions applying traditional defamation law to internet providers"); *see also* Pet. at 18 ("Section 230 reflects a congressional response to a New York state case").

[21] 47 U.S.C. § 230(c) (heading).

with *some* authority to act in that area."[22] As discussed below, the target of the rulemaking—Section 230—does not permit rulemaking and likely forbids it.

C. Section 230 Does Not Permit Rulemaking.

Section 230 is a deregulatory statute that is fundamentally at odds with an agency rulemaking. In the first sentence of its *Restoring Internet Freedom Order*, the Commission cited Section 230 as a mandate to *de*regulate Internet service providers (ISPs):

> Over twenty years ago, in the Telecommunications Act of 1996, President Clinton and a Republican Congress established the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." Today, we honor that bipartisan commitment to a free and open Internet by rejecting government control of the Internet.[23]

The quoted language is one of the statutory goals set forth in Section 230(b). Because Congress took the "rather unusual step"[24] of expressing its policy objectives directly in the statute, these words are the conclusive evidence of Congress' intent. Even if there were any lingering doubt about what Congress meant by these words, Section 230's co-sponsor, Representative Christopher Cox, made clear in his floor statement that Section 230:

> will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats

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[22] *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir.), *amended*, 38 F.3d 1224 (D.C. Cir. 1994); *see also EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 (D.C. Cir. 2013) ("[W]e refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of commercial availability of navigation devices.").

[23] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311, 312 (2018) (quoting 47 U.S.C. § 230(b)(2)), *aff'd in part, remanded in part, and vacated in part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (per curiam); *see also* Restoring Internet Freedom, 33 FCC Rcd at 348-50.

[24] *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1047 (9th Cir. 2019)

> regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.[25]

Consistent with both the language of the statute and Representative Cox's statement, the Commission itself has explained that Section evinces a "deregulatory policy . . . adopted as part of the 1996 Act."[26]

Not surprisingly, prior attempts by the Commission to ground ancillary authority in Section 230 have run aground.[27] Today, the Commission "remains persuaded that section 230(b) is hortatory" only and, even if it provided some degree of regulatory authority, it cannot "be invoked to impose regulatory obligations on ISPs."[28] In any event, given the Commission's decision, right or wrong, not to regulate ISPs' *transmission* of Internet traffic based in part on Section 230(b), it would be ironic if the Commission nonetheless determined that it had right to regulate the *content decisions* of, not only ISPs, but also websites, blogs, and ordinary users, under Section 230(c).

D. The Rules Would Impose Unlawful Common Carrier Obligations.

The Communications Act distinguishes between "telecommunications services" and "information services."[29] As the Commission has explained, "information services"—which include blogs, websites, search engines, and other Internet services—are "largely unregulated by

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[25] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[26] Restoring Internet Freedom, *supra*, 33 FCC Rcd at 349 ¶ 61.

[27] *Comcast v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010) (criticizing attempt as "seek[ing] to shatter" the outer limits of the Commission's jurisdiction).

[28] Restoring Internet Freedom, *supra*, 33 FCC Rcd at 480 ¶ 284.

[29] *See* 47 U.S.C. § 153(24) (defining "information service" as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing"); *compare id*. §§ 153(50) (defining "telecommunications"), 153(51) (defining "telecommunications carrier").

default."[30] In fact, the definition of "telecommunications carrier" actually prohibits FCC from regulating any entity as a common carrier except "to the extent that it is engaged in providing telecommunications services . . . ."[31] As a result, non-carriers are "statutorily immune . . . from treatment as common carriers."[32]

Here, NTIA's proposed rules would impose a panoply of common carrier regulations on non-carriers such as websites and users. For example, the proposed requirement that a social media platform may not restrict access to material that is similarly situated to material that the platform intentionally declines to restrict amounts to a prohibition on "unreasonable discrimination." Similarly, by limiting the categories of content that may be removed,[33] the rules leave no "room for individualized bargaining and discrimination in terms" or to account for "individualized circumstances."[34] And the obligation to support an "objectively reasonable belief" with "reasonably factual bases" amounts to a requirement that access restrictions be "just and reasonable."[35] Indeed, requiring carriers to provide factual support is a hallmark of the Commission's application of the "just and reasonable" standard used in traditional common carrier regulation.[36]

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[30] Restoring Internet Freedom, *supra*, 33 FCC Rcd. at 474 ¶ 273.
[31] 47 U.S.C. § 153(51)
[32] *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).
[33] *See* Pet. at 55 (proposed rule 47 C.F.R. 130.02(e)).
[34] *Verizon*, 740 F.3d at 652 (quoting *Cellco P'ship*, 700 F.3d at 548).
[35] *Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005), *aff'd*, 550 U.S. 45 (2007).
[36] *See* Ameritech Operating Companies' New Expanded Interconnection Tariff, *Order Designating Issues for Investigation*, CC Docket No. 96-185, DA 97-523, 1997 WL 106488, at *10 (Mar. 11, 1997).

As yet another example, NTIA would condition a user's or provider's immunity in Section 230(c)(2) for removing offensive content on, *inter alia*, providing advance notice and an opportunity to respond.[37] The near-impossibility of this burden would effectively require covered entities to continue hosting content that they believe is objectionable for an uncertain period of time, thus requiring them to "'to serve the public indiscriminately.'"[38]

E. The Commission Is Being Asked to Regulate Internet Participants More Heavily Than It Does Broadcasters.

The sweeping breadth of NTIA's content regulations is confirmed by the fact that they would regulate companies and individuals who are not Commission-licensed broadcasters more heavily than broadcasters themselves. In fact, even for broadcasters, the Commission has abandoned its erstwhile fairness doctrine, which required broadcast licensees to air contrasting political viewpoints. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court had upheld the fairness doctrine for broadcasters based on the scarcity of broadcast spectrum and the "unique medium" of broadcasting.[39] But the authority of *Red Lion* has been devitalized.[40] In 1987, the Commission stopped enforcing the fairness doctrine as no longer serving the public interest and

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[37] *See* Pet. at 55 (proposed rule 47 C.F.R. 130.02(e)(viii)).

[38] *Verizon*, 740 F.3d at 655-56 (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976)).

[39] 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

[40] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530 (2009) (Thomas, J., concurring) ("*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."); *id.* at 533 ("[E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions.").

inconsistent with First Amendment values; in 2011, it officially eliminated the rule.[41] Just as important, even before it took these actions, the Commission had explained that the fairness doctrine should not be applied to other media, particularly where the rules would "affect the constitutionally sensitive area of content regulation . . . ."[42]

Oblivious to this history, NTIA essentially seeks to resurrect the fairness doctrine in a new medium and require the airing of contrasting viewpoints. Thus, for example, an online forum for citizens dedicated to the President's reelection would not be able to exclude supporters of the former Vice President without potentially undertaking liability. By purporting to tell users and online providers what categories of speech they can and cannot remove without liability, the proposed rules veer into content-based regulation of speech in contravention of the First Amendment.[43] This should give the Commission great pause, particularly as the Internet does not possess any of the "unique" characteristics of traditional broadcast television that justified the fairness doctrine in the first place.[44]

II. NTIA'S PROPOSED RULES ARE INCONSISTENT WITH THE STATUTE

A. NTIA's Proposed Rules Would Overrule Congress.

The Constitution vests the legislative branch with the exclusive power to enact laws—statutes like Section 230—and the judiciary with the exclusive power to interpret them. Agencies are creatures of statute and thus must act in accordance with the limited set of powers

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[41] Amendment of Parts 1, 73 and 76 of the Commission's Rules, *Order*, 26 FCC Rcd 11422, 11422 ¶ 3 (2011).

[42] Inquiry into Section 73.1910, *supra*, 102 F.C.C.2d at 157 ¶ 20.

[43] *See*, *e.g.*, *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346-47 (2020) (striking down TCPA exemptions for robocalls for government debt as content-based discrimination).

[44] *Red Lion*, 395 U.S at 390-91.

granted to them by Congress. While agencies are entitled to a degree of deference to interpret genuine statutory ambiguities, they cannot rewrite the statute in the guise of interpretation: As Justice Scalia observed, "It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"[45] When an agency does so, it "risks trampling the constitutional design," as Justice Gorsuch has put it.[46]

This concern is particularly apt here, where the proposed changes are at odds with Congress's goal of leaving interactive computer services "unfettered by Federal or State regulation"[47] and Congress's acceptance of the judicial consensus that Section 230 be interpreted "broadly" in favor of immunity.[48] NTIA's rules thwart Congress's intent by (1) effectively repealing the core protection for users and online providers when they are sued for acting as "publishers or speakers" under Section 230(c)(1); and (2) replacing Section 230(c)(2)'s straightforward immunity for removing content a user or provider considers objectionable with a complicated set of regulations, the text of which is longer than the entirety of Section 230 itself.[49]

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[45] *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring).

[46] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

[47] 47 U.S.C. § 230(b)(2).

[48] *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) ("In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity."). Congress has impliedly ratified this consensus by not disturbing it on all of the occasions that it has amended Section 230. *See*, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 385-87 (1982) (Congress ratified judicially-recognized private rights of action when it amended the Commodities Exchange Act, but declined to eliminate private remedies). Congress last amended Section 230 in 2018, with the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

[49] The entirety of Section 230, as amended, takes up less than 1,000 words; NTIA's proposed regulations add more than 1,180.

B. NTIA's Rules Would Effectively Repeal Section 230(c)(1).

Section 230(c)(1) states that no service provider "shall be treated as the publisher or speaker of any information provided by another information content provider."[50] Courts agree that Section 230(c)(1) applies when: (1) the defendant provides an "interactive computer service"; (2) the defendant did not create the "information content" at issue; and (3) the plaintiff's claims "seek[] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[51] In other words, "any activity that can be boiled down to *deciding whether to exclude material* that third parties seek to post online is perforce immune[.]"[52]

Courts have applied Section 230(c)(1) to two principal fact patterns: (1) cases involving situations where a service provider has published allegedly illegal user content; and (2) cases where the service provider restricts or removes user content.[53] NTIA's proposed rules would eliminate Section 230(c)(1)'s application to both scenarios.

1. *The Proposed Rules Eliminate Section 230(c)(1)'s Protection for Publishing Third-Party Content*

NTIA asks the Commission to "clarify" that "[a]n interactive computer service is not being 'treated as the publisher or speaker of any information provided by another information content provider' when it actually publishes its own or *third-party content*."[54] This strikes at the

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[50] 47 U.S.C. § 230(c)(1).

[51] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[52] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (*en banc*) (emphasis added).

[53] *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 602 (S.D.N.Y. 2020) (describing both scenarios and collecting cases); *see also Fyk v. Facebook*, 808 F. App'x 597, 598 (9th Cir. 2020).

[54] Pet. at 53 (proposed 47 C.F.R. 130.01(c)) (emphasis added). In addition, NTIA would make users and providers responsible for third-party content that they "present[] with a reasonably

heart of Section 230(c)(1). The whole point of the immunity is that a website should not be liable for tortious or illegal user content that it makes available. Since the words "actually publishes" can be read to include any act of making third-party content available, Section 230(c)(1) would cease to serve any purpose.[55]

2. The Proposed Rules Eliminate Section 230(c)(1)'s Protection for Removing Content

NTIA next proposes that Section 230(c)(1) should be read to exclude any content-removal act covered by Section 230(c)(2).[56] There is no textual basis for this change. Notably, the Section 230(c)(1) immunity is not limited to the affirmative act of making content available. Instead, it covers "any information provided by another information content provider" and therefore any decision concerning that information, including the traditional editorial function of whether to publish it.[57] Because "removing content is something publishers do,"[58] Section 230(c)(1) necessarily covers content removal.[59]

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discernible viewpoint." *Id*. at 55 (proposed rule 47 C.F.R. 130.03). This would have the same effect as eliminating immunity for publishing as virtually every website presents content for some content-based reason.

[55] NTIA's regulations proceed to describe *examples* of when a website "actually publishes" third-party content (*see id*.), but because there are illustrative only, they in no way cabin the above language.

[56] Pet. at 30.

[57] *See Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) ("decisions relating to the monitoring, screening, and deletion of content" are "quintessentially related to a publisher's role"); *cf. Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (in First Amendment context, decision *not* to publish a response from a politician to a critical op-ed "constitute[s] the exercise of editorial control and judgment").

[58] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). And courts have adopted "'a capacious conception of what it means to treat a website operator as the publisher . . . of information provided by a third party.'" *Force*, 934 F.3d at 65 (ellipses in original; quotation marks and citation omitted) (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)).

[59] Had Congress had intended that Section 230(c)(1) apply only to the act of making content available, it could have omitted the word "publisher" entirely and simply protected services

Nor is there any merit to NTIA's argument that applying Section 230(c)(1) to content removal decisions renders Section 230(c)(2) mere surplusage.[60] This is because Section 230(c)(2) "still has work to do"[61] even when Section 230(c)(1) applies to content removal decisions. In particular, there are at least three types of cases in which Section 230(c)(2) does something that Section 230(c)(1) does not:

- Section 230(c)(1) does not apply where the content at issue was created or developed, in whole or in part, by the defendant service provider itself. Because Section 230(c)(2) covers the removal of any "materials," not just content created by "another," it applies to a different class of entities who may have "developed, even in part, the content at issue,"[62] including the defendant itself. For this reason, the Ninth Circuit recently stated that, "as we have explained, § 230(c)(2)(a) 'provides an *additional shield* from liability.'"[63] An interactive computer service may wish to restrict access to content it has created itself because, for example, it may wish (or be required) to restrict access to certain materials (like R-rated movies) to people over a certain age. In this case, only Section 230(c)(2) would protect the service.
- Section 230(c)(1) might not apply where the service provider has allegedly breached an express promise with respect to user content.[64] To the extent it does not provide

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providers from situations where they are treated as the "speaker" of content. Thus, NTIA's arguments read the word "publisher" out of the statute.

[60] *See* Pet. 28-29.

[61] *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (in different statutory context, declining to apply canon regarding surplusage interpretations).

[62] *Barnes*, 570 F.3d at 1105.

[63] *Fyk*, 808 F. App'x at 598 (emphasis in original) (quoting *Barnes*, 570 F.3d at 1105).

[64] *See Barnes*, 570 F.3d at 1109 (Section 230(c)(1) did not bar promissory estoppel based upon express promise).

coverage, Section 230(c)(2) clearly "insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices."[65]

- Section 230(c)(2)(B) provides a distinct immunity to entities that create and distribute tools that allow others to restrict access to content as permitted under Section 230(c)(2)(A).[66] There is no analog to this immunity in Section 230(c)(1).

These use cases demonstrate that Section 230(c)(2) was Congress' way of, to paraphrase Justice Kavanaugh, making "doubly sure" that Section 230 covered content removals and restrictions.[67] The sole case cited by NTIA—*e-Ventures Worldwide*, *LLC v. Google, Inc*.[68]—fails to address any of these cases and has not been followed for precisely this reason.[69] Accordingly, NTIA's attempt to limit Section 230(c)(1) in light of Section 230(c)(2) fails.

C. NTIA's Rules Would Rewrite Section 230(c)(2).

Section 230(c)(2) states that no service provider shall be liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user

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[65] *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003), superseded in part by statute on other grounds.

[66] *See*, *e.g.*, *Fehrenbach v. Zedlin*, No. 17 Civ. 5282, 2018 WL 4242452, at *5 (E.D.N.Y. Aug. 6, 2018) (Section 230(c)(2)(B) precluded lawsuit that "charges the Facebook defendants with enabling users to restrict access to material.").

[67] Statutory redundancy is often a feature, not a bug. This makes sense because "members of Congress often want to be redundant" to be "doubly sure about things." Brett Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 718 (2014).

[68] No. 2:14-cv-646, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017).

[69] *See Domen*, 433 F. Supp. 3d at 603 ("The Court does not find *e-ventures* persuasive since Section 230(c)(2)'s grant of immunity, while "overlapping" with that of Section 230(c)(1), *see Force*, 934 F.3d at 79 (Katzmann, C.J., concurring), also applies to situations not covered by Section 230(c)(1). Thus, there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage.").

considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[70] NTIA's proposed rules rewrite this provision by:

- Transforming the standard of subjective good faith to a supposedly objective one[71];
- Effectively eliminating the catch-all term "otherwise objectionable"[72]; and
- Adding affirmative requirements that the user or provider of the interactive computer service give, among other things: (1) advance written notice of its decision to remove or restrict content; (2) a reasoned explanation therefor; and (3) an opportunity for the affected user to challenge the decision.[73]

Each proposed change cannot be reconciled with the statutory text. *First*, NTIA cannot replace Section 230(c)(2)'s subjective good faith element. By its terms, Section 230(c)(2) applies to a "good faith" action to remove content that the service provider "considers to be" objectionable.[74] The words "good faith" and "considers to be" speak to subjective good faith, which focuses on "the actor's state of mind and, above all, to her honesty and sincerity."[75] This is the polar opposite of an objective standard of reasonableness.

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[70] 47 U.S.C. § 230(c)(2)(A).

[71] *See* Pet. at 55 (proposed rule 47 C.F.R. 130.02(e)) (provider must have "an objectively reasonable belief").

[72] *Id*. (subject-matter of removal limited to "one of the listed categories").

[73] *Id.* (requiring provision of "timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others").

[74] 47 U.S.C. § 230(c)(2)(A).

[75] David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 892 (2016).

Second, NTIA cannot erase the catch-all "otherwise objectionable." The statutory interpretation canon *esjudem generis*, on which NTIA relies,[76] limits catch-all terms only where the preceding terms are closely related. That is not the case here where the enumerated terms speak to vastly different matters, from adult content to harassment to violence. As the Ninth Circuit has concluded, because the enumerated terms "vary greatly . . ., the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s."[77]

Third, NTIA cannot add detailed notice and redress procedures to a statute that contains none.[78] Good faith does not require a whole panoply of due process rights.[79] Congress knows how to draft user redress procedures. The Digital Millennium Copyright Act of 1998—a companion statute dealing with online intermediary liability—sets forth a detailed notice and takedown framework for submitting complaints of copyright infringement along with an equally detailed redress procedure for affected users.[80] Nothing close to this appears in Section 230. Indeed, Section 230 imposes only one affirmative obligation on service providers.[81] This

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[76] Pet. at 32.

[77] *Enigma Software*, 946 F.3d at 1051-52.

[78] *See*, *e.g.*, *Holomaxx Tech. Corp. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1105 (C.D. Cal. 2011) (imposing "duty [on Microsoft] to discuss in detail its reasons for blocking Holomaxx's communications or to provide a remedy for such blocking . . . would be inconsistent with [Congressional] intent").

[79] Many judicial and governmental decisions are made every day without providing grounds. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995) (examples include the Supreme Court denying certiorari; appellate judges ruling from the bench; and trial judges overruling objections).

[80] 17 U.S.C. § 512(c).

[81] 47 U.S.C. § 230(d) (requirement that service providers inform users that filtering technologies are available). Even then, Congress did not condition the Section 230(c) immunities upon its compliance or provide a remedy for violation thereof.

confirms that Congress did not intend to impose any other affirmative obligations for providers to take advantage of Section 230(c)(2).

Finally, the whole point of Section 230(c) is to encourage voluntary self-regulation—"Good Samaritan" behavior as Congress put it.[82] In doing so, Congress decided against requiring content moderation.[83] It would make no sense for Congress to fail to tell service providers when to remove content, and yet regulate in a detailed, prescriptive manner if and when they actually remove content. Congress is not known to "hide elephants in mouseholes,"[84] and so it would be surprising if Congress sought to undermine its own self-regulatory goals by burdening them with undisclosed content-moderation regulations. This plainly does not produce the "unfettered market[]" that Congress wanted.[85]

III. NTIA'S PROPOSED RULES ARE UNECESSARY.

NTIA's proposed rules are a classic "solution in search of a problem."[86] The Commission has previously rejected regulatory initiatives when there is "sparse evidence" of a market failure.[87] NTIA supplies no evidence for its view that Internet platforms are systematically discriminating against certain political viewpoints such that people holding those views are effectively unable to speak. Moreover, platforms have no incentive to alienate a

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[82] 47 U.S.C. § 230(c).

[83] Notably, the immunity applies "even when self-regulation is unsuccessful, or completely unattempted." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006) (discussing lack of obligations under Section 230(c)(1)); *Green*, 318 F.3d at 472 ("Section 230(c)(2) does not *require* AOL to restrict speech; rather it allows AOL to establish standards of decency without risking liability for doing so.").

[84] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[85] 47 U.S.C. §§ 230(b)(2)-(b)(4).

[86] Restoring Internet Freedom, *supra*, 33 FCC Rcd 375 ¶ 109 (heading).

[87] *Id.* ¶ 109.

substantial portion of the population through arbitrary actions or discrimination against a widely-held political view or affiliation. On the contrary, because they earn money from subscriptions or advertising, they have a strong economic incentive to cater to as many people as possible. To this end, companies have every reason to make their rules clear, to provide notice of decisions (when possible), and to consider user appeals.

Even if NTIA's policy views were supported by evidence, amending Section 230 to address the perceived practices of a "handful of large social media platforms"[88] is a vastly overbroad solution. Because Section 230 protects "users" and "providers," NTIA's rules would not just regulate the world's largest Internet platforms—they would affect all Internet participants of all shapes and sizes, including everyone from individual users to small businesses to the companies who submit these comments. Such a massive policy change should not be undertaken lightly.

IV. NTIA'S PROPOSED RULES WOULD HARM THE INTERNET BY DAMPENING INNOVATION, CHILLING SPEECH, AND STIFLING COMPETITION.

A. The Rules Would Return the Internet to the Pre-Section 230 Days.

The proposed rules would effectively reinstate the pre-Section 230 common-law rules that imposed liability on platforms that engaged in self-regulation. Yet, the same concerns that animated Section 230 remain true, and indeed have become even truer, today. As the Fourth Circuit observed in 1997:

> The amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive

[88] Pet. at 4; *see also id*. at 43 (referring to "tech giants").

> computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[89]

The difference today, perhaps, is that content moderation is more essential than ever. First of all, the typical consumer does not want to use a platform that is swimming with spam, pornography, and hate speech. Second, platforms are under tremendous pressure to proactively remove all sorts of content, including the most pernicious kinds, *e.g.*, hate speech, terror and extremist propaganda, child sexual abuse materials (CSAM).[90] Third, content has mushroomed exponentially.

NTIA argues that times have changed "with artificial intelligence and automated methods of textual analysis to flag harmful content now available,"[91] but fails to grasp that these very technologies were made possible because of Section 230's robust immunities. Removing protections for editorial decisions and requiring notice and detailed reasons every time a platform removes a post precludes the operation of most automated technologies and thus returns us to a world where platforms actually do "need to manually review each individual post."[92]

In addition to the sheer burden associated with it, manual review is unlikely to be successful unless it is combined with automated tools. This is particularly true in the case of content like spam, fraud, inauthentic content, where bad actors have the resources to inundate

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[89] *Zeran*, 129 F.3d at 331.

[90] *See* John Samples, "Why the Government Should Not Regulate Content Moderation of Social Media," *Policy Analysis* No. 865, at pp. 1-2 (Cato Inst. Apr. 9, 2019) (describing criticism of platforms' moderation decisions), available at https://www.cato.org/sites/cato.org/files/pubs/pdf/pa_865.pdf.

[91] Pet. at 4.

[92] *Id*.

sites with bots, scripts, and other automated means. This content can ruin the user experience and harm a platform's brand.[93] For this reason, businesses like the commenting parties have invested heavily in content moderation tools (as described earlier). These are but a sampling of techniques, and they are all examples of innovating "blocking and filtering technologies" that Congress sought to encourage.[94] Tying the hands of platforms will limit the continued development of such technologies. This will make for a markedly poorer Internet experience for everyone.

B. The Rules Would Harm Online Communities.

By removing protections for editorial decisions and severely constraining content removal decisions, NTIA's rules would harm online interest-based communities. NTIA makes a nonsensical claim about platforms being unable to distinguish themselves in today's environment based upon their contractual terms,[95] but the reality is that communities of all kinds do in fact distinguish themselves based upon shared identities and interests. Yet, NTIA's rules would discourage these communities from controlling their own messages by, among other things, setting content rules and excluding off-topic content. This decreases the value of the community and discourages people from participating in it.

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[93] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625 (2018) ("Platforms create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users' speech and community norms.").

[94] 47 U.S.C. § 230(b)(4).

[95] Pet. at 26.

C. The Rules Would Discourage the Removal of Hate Speech and Other Pernicious Content.

NTIA's rules would remove protections for a wide variety of content that platforms currently work hard to fight. Most glaringly, NTIA's rules would expose platforms to liability for removing hate speech.[96] Hate speech is one of the most pernicious categories of unwanted content. It is different from other kinds of speech because its harm is twofold: it incites hatred and violence upon targeted groups *and* it chills speech and public participation by targeted groups in the first place. Indeed, one Second Circuit judge, in voting to allow the President to block users in his own Twitter feed, explained that having a forum "overrun with harassment, trolling, and *hate speech*" will lead to less speech, not more.[97] NTIA's rules would lead to exactly that.

In addition to hate speech, there are innumerable categories of unwanted content that have the potential to cause harm. Take inauthentic content. People want to use a service that they can trust to deliver honest user feedback about a business, product, or vacation spot. A review site has value when consumers believe that it is a source of genuine feedback from other consumers. Fake reviews—whether bad reviews manufactured by a rival or glowing "consumer" reviews created by a proprietor—diminish the platform's value by making it difficult to know when one is reading a genuine or fake review. This ultimately leads to disengagement and thus less speech in the first place.

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[96] The rules do this by limiting immunity for content removal decisions to the enumerated grounds in Section 230(c)(2), which the rules construe narrowly. Hate speech, and many other harmful categories, are not among the enumerated grounds. In fact, the petition never once mentions hate speech in spite of the problem it poses for online platforms.

[97] *Knight First Am. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 231 (2d Cir. 2019) (Park, J., dissenting from denial of rehearing *en banc*) (emphasis added).

D. The Rules Would Dampen Investment and Stifle Competition.

All told, the rules will impose costly burdens on businesses that host and facilitate user content by exposing them to liability for user content and by penalizing content moderation. This will erect new barriers to entry and discourage investment in startups. This in turn will make it harder for the next generation of Internet platforms to succeed. Thus, while NTIA's petition complains about large tech firms that dominate "highly concentrated markets,"[98] its rules would actually entrench them by making it more unlikely that competitors can challenge their dominance. There are, of course, remedies in the event a company were to abuse its market power, but they lie beyond the purview of this rulemaking.

CONCLUSION

For the reasons set forth above, the Commission should not undertake a rulemaking proceeding based upon NTIA's petition.

Dated: September 2, 2020

Respectfully Submitted,

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[98] Pet. at 14.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking of the National	)	RM No. 11862
Telecommunications and Information	)	
Administration Regarding Section 230	)	
of the Communications Act of 1934	)	

COMMENTS OF AT&T SERVICES, INC.

America's tech platforms have grown from humble beginnings in the late 20th century into the most powerful forces in the global economy today. They now account for the top five U.S. companies by market capitalization, and those five alone "made up about 25% of the S&P 500 at the end of July."[1] The decisions these companies make on a daily basis—which search results to rank first, which products to promote, which news stories to feature, and which third parties they will deal with and on what terms—shape every aspect of America's economic and political life. Yet those decisions are shrouded in obscurity, away from public view. And the companies that make them still enjoy extraordinary legal immunities designed a quarter century ago to protect nascent innovators, not trillion-dollar corporations. This corner of "the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled."[2] Members of both parties in Congress are engaged in discussions regarding these issues, and AT&T welcomes the opportunity to contribute to that bipartisan dialogue. In particular, as discussed below, we support the growing consensus that online platforms should be more accountable for, and more transparent about, the decisions that fundamentally shape American society today.

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1 Amrith Ramkumar, *Apple Surges to $2 Trillion Market Value*, Wall St. J. (Aug. 20, 2020).

2 *Fair Housing Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008) (en banc).

Much of the current debate focuses on reforming Section 230 of the Communications Act, the subject of NTIA's petition here.[3] Congress enacted that provision in 1996 to address a narrow set of concerns involving a nascent online ecosystem that, at the time, still played only a marginal role in American life. Although there were bulletin boards, there were no social networks in the modern sense. No e-commerce company competed to any significant degree with brick-and-mortar businesses, let alone served as an essential distribution platform for all of its rivals. No app stores mediated between consumers and third-party Internet services. Americans still obtained most of their news from a multitude of traditional news sources rather than from a few online news aggregators. And although rudimentary search engines and "directories" helped consumers navigate the then-fledgling Internet, no one company's algorithmic choices had any material effect on competition or public discourse.

Against that backdrop, Congress enacted Section 230 to insulate the first Internet platforms from liability risks they might otherwise face as "publisher[s]" or "speaker[s]"—risks that Congress feared would weaken their incentives to block "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content, particularly from underage users.[4] Congress did not foresee that some courts would construe that provision to confer near-absolute immunity for online conduct that bears no relation to that objective—or, in some cases, affirmatively subverts it.[5] Congress also did not foresee that such overbroad immunity would extend not only to financially vulnerable startups, but to the largest and most powerful

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[3] Petition for Rulemaking of the National Telecommunications and Information Administration, *Section 230 of the Communications Act of 1934*, RM-11862 (July 27, 2020); *see* 47 U.S.C. § 230.

[4] 47 U.S.C. § 230(c)(1).

[5] *See*, *e.g.*, Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 403 (2017) (observing that courts "have extended this safe harbor far beyond what the provision's words, context, and purpose support," in some cases "to immunize from liability sites *designed* to purvey offensive material") (emphasis added).

companies in the world—companies whose black-box algorithms and back room decisions pick winners and losers in every sphere of public life, from markets to political contests.

Of course, the stratospheric growth of the Internet over the ensuing quarter century has brought inestimable benefits to American consumers. And for the most part, today's leading platforms should be commended, not condemned, for the innovations that have fueled their extraordinary success. But with great success comes great responsibility. And policymakers thus should undertake at least two basic reforms to make these platforms more accountable to the American public.

First, the largest online platforms owe the public greater transparency about the algorithmic choices that so profoundly shape the American economic and political landscape. As Chairman Pai has observed, "the FCC imposes strict transparency requirements on companies that operate broadband networks—how they manage their networks, performance characteristics. Yet consumers have virtually no insight into similar business practices by tech giants."[6] Given the unrivaled influence of these platforms, he added, steps may now "need to be taken to ensure that consumers receive more information about how these companies operate."[7]

Just as AT&T and other ISPs disclose the basics of their network management practices to the public, leading tech platforms should now be required to make disclosures about how they collect and use data, how they rank search results, how they interconnect and interoperate with others, and more generally how their algorithms preference some content, products and services over others. Such disclosures would help consumers and other companies make better educated choices among online services and help policymakers determine whether more substantive

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[6] Ajit Pai, *What I Hope to Learn from the Tech Giants*, Medium (Sept. 4, 2018), https://www.fcc.gov/news-events/blog/2018/09/04/what-i-hope-learn-tech-giants.

[7] *Id.*

oversight is needed. This is not to say that online platforms must divulge the granular details of their "secret sauce." Many types of disclosure would cast much-needed light on the enormously consequential decisions of online platforms while raising no serious concern about compromised trade secrets or third-party manipulation.[8] For example, policymakers and consumers have a right to know whether and how a dominant search engine, e-commerce platform, or app store designs its algorithms to privilege its own vertically integrated services over competing services.[9] And they also have a right to know whether, in the words of British regulators, a dominant ad tech company exploits its "strong position at each level of the intermediation value chain … to favour its own sources of supply and demand" and "self-preferenc[e] its own activities" to the detriment of its customers and competitors.[10]

Second, Section 230 immunity should be modernized to reduce gross disparities in legal treatment between dominant online platforms and similarly situated companies in the traditional economy. Few dispute that Section 230 should continue to shield online platforms in the paradigmatic cases for which that provision was enacted. For example, even if online platforms should have continued immunity from defamation liability when, like the bulletin boards of 1996, they act as more or less passive hosts of third-party content and intervene mainly to

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[8] Significantly, the High Level Group of tech advisors to the European Commission—a group that includes experts from leading tech companies—recently agreed that platforms can and should "provide transparent and relevant information on the functioning of algorithms that select and display information without prejudice to platforms IPRs [intellectual property rights]." *Report of the Independent High Level Group on Fake News and Online Disinformation*, European Commission 23 (2018) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271; *see also* Natasha Lomas, *Report Calls for Algorithmic Transparency and Education to Fight Fake News*, TechCrunch (Mar. 12, 2018), https://techcrunch.com/2018/03/12/report-calls-for-algorithmic-transparency-and-education-to-fight-fake-news/ (noting that leading tech companies "are listed as members" of the Group and "are directly involved in shaping these recommendations").

[9] *See*, *e.g.*, Competition & Markets Authority (U.K.), *Online Platforms and Digital Advertising: Market Study Final Report* 361 (July 1, 2020), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study (proposing greater transparency).

[10] *Id.* at 20.

address the categories of objectionable conduct set forth in Section 230(c)(1), leading platforms today often play a much more active curation role. They routinely amplify some content over other content and shape how it appears, often for financially driven reasons that have nothing to do with the original content-filtering goal of Section 230.[11] There is nothing inherently wrong with such business models, and many are pro-competitive. But there is also no clear reason why such platforms should play by radically different liability rules than traditional purveyors of third-party content, such as book publishers, newspapers, or radio or television businesses.[12]

Although AT&T endorses no specific proposal for Section 230 reform here, it does urge federal policymakers to adopt a single set of nationally consistent rules. Federal and state courts across the country have interpreted that provision in widely divergent ways. The resulting legal hodge-podge prescribes different liability rules in different jurisdictions, and the lines drawn in any given jurisdiction are themselves often obscure and unhinged from sound public policy. As Section 230 nears its 25th anniversary, it is time for federal policymakers to step back, return to first principles, and revisit whether and when the nation's largest online platforms should enjoy legal immunities unavailable to similar companies in similar circumstances.

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[11] *See* U.S. Dep't of Justice, *Section 230—Nurturing Innovation or Fostering Unaccountability?*, at 24 (June 2020), https://www.justice.gov/file/1286331/download); John Bergmayer, *How to Go Beyond Section 230 Without Crashing the Internet*, Public Knowledge (May 21, 2019), https://www.publicknowledge.org/blog/how-to-go-beyond-section-230-without-crashing-the-internet/ ("While shielding platforms from liability for content developed by third parties has a number of legitimate justifications, the rationale for shielding them from liability when they actively amplify such content seems weaker."); *see also Roommates.com*, *supra* (addressing fact-intensive issue of when a website crosses the indistinct line from an "interactive computer service," which is entitled to Section 230(a)(1) immunity, to an "information content provider" in its own right, which is not).

[12] Citron & Wittes, *supra*, at 420 (expressing "skeptic[ism] that online providers really need dramatically more protection than do newspapers to protect free expression in the digital age").

AT&T appreciates the opportunity to express these high-level views on the legal regimes governing today's online platforms, and it looks forward to engaging with Congress, the Commission, and other policymakers as the debate about these critical issues evolves.

Respectfully submitted,

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September 2, 2020

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
National Telecommunications and Information Administration	)	RM-11862
	)	
	)	
Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934	)	
	)	

REPLY COMMENTS OF PROFESSORS CHRISTOPHER TERRY AND DANIEL LYONS

We respectfully submit these comments in response to the Public Notice in the above-captioned proceeding. Christopher Terry is an assistant professor at the University of Minnesota's Hubbard School of Journalism and Mass Communication. Daniel Lyons is a professor at Boston College Law School.[1] We both specialize in telecommunications law and have extensive experience in practice before the Federal Communications Commission. We hail from opposite sides of the political spectrum and often disagree about the nuances of communications policy. But we are united in our opposition to the National Telecommunications & Information Administration's Petition requesting that this agency interpret Section 230. NTIA's proposal offends fundamental First Amendment principles and offers an interpretation of Section 230 that is inconsistent with the statute's language, legislative history, and interpretation by this agency and by courts.

I. The NTIA Petition Offends Fundamental First Amendment Principles

There can be little debate that any FCC action on the NTIA petition raises immediate and significant First Amendment implications, none of which fall in the favor of further action on the

[1] Affiliations are listed for identification purposes only.

petition. Section 230 of the CDA follows a long legacy of law and regulations in the United States which collectively act to promote the quantity of free speech, political discussion, and access to information. These key values on which communication processes in the United States are based cannot or should not be forgotten and must be considered when taking up the speech regulation issues that are explicit in the NTIA petition, including the clear request for the FCC to engage in a content-based regulation of speech that cannot survive even the thinnest application of strict scrutiny or legal precedent.

The NTIA petition is short sighted because Section 230 promotes free expression online by creating and protecting the pathways for a range of expression, including political speech. Political speech has preferred position, the highest First Amendment protection, as laid out by the Supreme Court in *New York Times v. Sullivan* and *Hustler Magazine, Inc. v. Falwell*.[2] Section 230 provides the mechanism which implements similar protections by ensuring platforms, such as social media or newspaper comment sections, are not the subject of lawsuits about the third-party speech which occurs on their platforms.

Functionally, the NTIA is asking the FCC to develop and enforce a content compelling regulation for the purposes of mitigating perceived political bias. Setting aside the incredibly subjective nature of regulating for bias in media content, for nearly 40 years the agency has correctly moved away from trying to influence licensee decision-making in informational programming content. The inquiry related to this petition seems like an odd time for the FCC to abruptly abandon this extended course of action, especially in order to develop a regulation that would apply to internet platforms and edge providers that, unlike broadcasters, over whom the agency has standing no licensing authority.

[2] See generally: NY Times v. Sullivan, 376 U.S. 254 (1964) and Hustler v. Falwell, 485 U.S. 46 (1988).

While the FCC's regulatory history includes balancing mechanisms like the Equal Time Provisions for political advertising,[3] these provisions are entirely quantitative, rather than subjective in nature. In fact, the Equal Time Rules specifically prevent a balancing mechanism based on content bias as the FCC and licensees are not permitted to interfere with the content or speech of legally qualified candidates under these provisions.[4] While these advertising focused provisions do not apply to non-candidate political advertising, any decisions about the content of ads, including the decision on whether or not to run those ads, lies with the licensee operating as a public trustee rather than the agency's oversight.

While what the NTIA is asking for is essentially a modern-day Fairness Doctrine and Political Editorial rule for the internet, this idea cannot work outside of a licensed broadcast setting. While the Supreme Court recognized in both *NBC*[5] and *Red Lion*[6] that FCC regulations which increase speech are constitutional under the First Amendment, this conclusion was tied to the physical realities caused by limited availability, and the licensed use of spectrum by broadcasters. This standard cannot be applied to edge providers or internet platforms, which are private entities.

Further, when given the opportunity to apply a similar access and response provision to newspapers just a few years later in *Tornillo*,[7] the Supreme Court entirely rejected the premise

[3] 47 USC § 315.
[4] "[A] licensee shall have no power of censorship over the material broadcast under the provisions of this section." 47 U.S § 315(a).
[5] "…we are asked to regard the Commission as a kind of traffic officer…but the act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." National Broadcasting Co. v. United States, 319 U.S. 190 (1943) at 215-216.
[6] "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), FN28 at 401.
[7] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

that compelled speech created through a mandated access provision was even remotely constitutional. Likewise, as a result of the Supreme Court decision in *Reno v. ACLU*, state regulation of internet content is subject to strict scrutiny review,[8] making the action sought by the NTIA petition the legal equivalent of a compelled speech provision on newspapers, a requirement that has long been universally rejected as a valid legal premise in the United States.

Beyond questions of authority or constitutionality, both of which are high hurdles for the FCC to cross, there is also an important question of practicality. Could the agency meaningfully enforce a hypothetical regulation in a reasonable time frame without enduring substantial process burdens, not the least of which would be the resource costs of adjudication? The agency's own enforcement history illustrates that the logical conclusion to this question is a resounding no.

While the FCC still enforces content-based regulations including Children's Television,[9] Sponsorship Id,[10] and provisions for reporting political advertising,[11] the FCC has largely abandoned the enforcement of regulations for which an adjudication requires a subjective analysis of media content by the agency. In the closest historical example to what the NTIA petitions the FCC to implement, a balancing mechanism that operates like a Fairness Doctrine, the agency itself argued that a rule that mandated access for alternative viewpoints actually reduced the availability of informational programming.[12] Even after the agency curtailed

[8] "The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media-the history of extensive Government regulation of broadcasting,…the scarcity of available frequencies at its inception… and its "invasive" nature…are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet." *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 868.
[9] 34 FCC Rcd 5822 (2019).
[10] 47 C.F.R 73.1212.
[11] 47 USC § 315(e).
[12] "..the doctrine often worked to dissuade broadcasters from presenting any treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes." Syracuse Peace Council v. FCC, 867 F. 2d 654 (1989).

enforcement in 1987, the ever present specter of the FCC's reimplementation of the Fairness Doctrine haunted broadcasters like a boogeyman until Congress finally acted to formally repeal the rule in 2011. Each of these content-based regulations require that a broadcaster affirmatively include elements related to specific programming while the judgements about that programming remain with the licensee, in turn requiring no subjective enforcement decisions by the Commission.

In 2020, the final legacies of the FCC's enforcement regime on indecency is the closest remaining regulation to what the NTIA petition is proposing. Although indecency enforcement actions have been limited since the adoption of the so called Egregious Standard in 2013,[13] indecency enforcement requires the FCC to analyze content and placing the Enforcement Bureau into the position where it must make a series of subjective judgments as part of the adjudication process. Since the airing of George Carlin's infamous list of 7 dirty words, the indecency standard has covered only a relatively narrow range of speech, during a limited time period each day, and again, only on broadcast stations licensed by the FCC.

Acting upon the proposal the NTIA petition requests would force the FCC into a position where the agency would not only have to make judgements about content but it would also have to do so by reviewing potentially charged political content at the same time as making decisions about how to best "balance" the viewpoint of that content before compelling the transmission of viewpoint specific speech through a privately-owned venue. This places the FCC into the role of deciding the value of political viewpoints, a process which quickly becomes state action against protected expression that implicates the First Amendment.

[13] 28 FCC Rcd 4082 (2013).

Setting aside the important legal differences between a time place and manner restriction on offensive depictions or descriptions of sexual or execratory organs or activities and regulations compelling political speech in private venues, even when indecency rules were most stringently enforced, especially in the period of time after the 2004 Super Bowl, the FCC could not adjudicate complaints quickly. The regulatory and enforcement process is lengthy by design, so much so, that in at least one case, the agency did not even make a decision before the statute of limitations expired on the violation.[14] Disputes the FCC would be asked to mediate under the NTIA petition, would force the agency to resolve complaints over bias in online content that would be, at best, done so in a manner that was untimely for a response and of course, subject to a lengthy period of stringent judicial review.

Perhaps most importantly, if one follows the NTIA petition to a logical conclusion, the FCC also would be under the burden of potentially adjudicating what could amount to a near unlimited quantity of individual complaints about biased online content, and to do so in what amounted to real-time. Even if the agency could cross the barriers of the jurisdictional questions we address at length below, while successfully navigating a range of treacherous First Amendment issues, the FCC simply lacks the resources to engage in the amount of adjudication that the NTIA petition would most certainly require for a meaningful enforcement regime.

In short, on First Amendment issues alone, the NTIA petition should be rejected outright. The FCC has none of the necessary mechanisms in place and lacks the resources to engage in the quantity of enforcement the petition would require, even if the agency suddenly finds the desire to engage in the subjective analysis of political content in private venues the agency has only the thinnest of authority over.

[14] 19 FCC Rcd. 10,751 (2004).

II. Section 230 Does Not Give the FCC Authority to Act

The NTIA Petition also overstates the FCC's authority to regulate edge providers under Section 230. The petition correctly notes that Section 201(b) gives the FCC broad rulemaking authority to implement the Communications Act of 1934.[15] That authority "extends to subsequently added portions of the Act"[16] such as Section 230, which was adopted as part of the 1996 Telecommunications Act's amendment of the original statute.[17] But this jurisdiction is unavailing: while the FCC has authority to implement provisions of the Act, in this case there is nothing to implement, as Section 230 unequivocally precludes the FCC from regulating edge providers as NTIA requests.

This conclusion flows inexorably from the plain language of the statute. On its face, Section 230 is a shield that protects interactive computer services from being treated as the publisher or speaker of user content and from liability for removing objectionable content. But NTIA asks this agency to turn that *shield* into a *sword* to combat those very interactive computer services that the statute is designed to protect. This request is inconsistent with Section 230(b)(2), which states that "[i]t is the policy of the United States…to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, ***unfettered by Federal or State regulation.***"[18] Particularly in light of this language, it stretches the statute beyond the breaking point to transform a statute conferring legal rights into regulations mandating legal duties.[19]

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[15] AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 377 (1999).
[16] City of Arlington v. FCC, 569 U.S. 290, 293 (2013).
[17] See Pub. L. 104-104 (1996).
[18] 47 U.S.C. § 230(b)(2) (emphasis added).
[19] Notably, Section 230(d) is titled "**Obligations** of Interactive Computer Service." By comparison, Section 230(c), which is the subject of NTIA's petition, is captioned "**Protection** for 'Good Samaritan' Blocking and Screening of Offensive Material." It flows from this structure that any duties Congress intended to impose on interactive computer services should flow from Section 230(d), not 230(c).

The legislative history also demonstrates that Congress did not intend the FCC to regulate online conduct. Representative Christopher Cox, the bill's author, stated without qualification that the statute "will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[20] Earlier this year, in testimony before the United States Senate, former Representative Cox had the chance to elaborate upon the meaning of the statute amidst the modern criticism that inspired the NTIA petition. He explained that, contrary to NTIA's claims, "Section 230 does not require political neutrality, and was never intended to do so…Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is."[21]

Courts have also rejected the argument that Section 230 gives the FCC authority to regulate interactive computer services. In *Comcast v. FCC*, the D.C. Circuit reviewed this agency's decision to sanction Comcast, an Internet service provider, for throttling BitTorrent content on its network in violation of its 2005 Internet Policy Statement.[22] The FCC claimed authority to act under Section 230(b). But the court found that this provision "delegate[s] no regulatory authority" to the agency, nor does it support an exercise of the Commission's ancillary authority.[23]

While the *Comcast* decision examined Section 230(b) rather than 230(c), its rationale is applicable to the NTIA Petition. To exercise its ancillary authority, the Commission must show that its proposed regulation is reasonably ancillary to "an express delegation of authority to the

[20] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).
[21] Testimony of Former U.S. Rep. Chris Cox, Hearing Before Subcommittee on Communications, Technology, Innovation, and the Internet, United States Senate Committee on Commerce, Science, and Transportation, July 28, 2020, available at https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71.
[22] Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
[23] Id. at 652.

Commission."[24] The NTIA has not, and cannot, identify express delegation of authority to support its proposed regulation of interactive computer services. NTIA's citation to *City of Arlington v. FCC* and *AT&T Corp. v. Iowa Utilities Board* is inapposite, as the statutory provisions at issue in those cases (Section 332(c)(7) and Section 251/252) were reasonably ancillary to the Commission's expressly delegated authority to regulate wireless communication and telecommunications services, respectively.

Finally, NTIA's petition conflicts with this Commission's previous interpretation of Section 230, expressed most recently in the Restoring Internet Freedom Order. In that decision, the Commission repeatedly cited Section 230's commitment to a "digital free market unfettered by Federal or State Regulation."[25] Notably, the Commission explained that "[w]e are not persuaded that section 230 of the Communications Act grants the Commission authority" to regulate, and "even assuming arguendo that section 230 could be viewed as a grant of Commission authority, we are not persuaded it could be invoked to impose regulatory obligations on ISPs."[26] Rather, it explained, "[a]dopting requirements that would impose federal regulation on broadband Internet access service would be in tension with that [Section 230(b)] policy, and we thus are skeptical such requirements could be justified by section 230 even if it were a grant of authority as relevant here."[27] This logic should apply equally to obligations placed on edge providers such as social media platforms, which are further removed from FCC authority than ISPs.

[24] Id. at 653; see also NARUC v. FCC, 533 F.3d 601, 612 (D.C. Cir. 1976) (requiring ancillary authority to be "incidental to, and contingent upon, specifically delegated powers under the Act").
[25] In re Restoring Internet Freedom, 33 FCC Rcd. 311, 434 (2018); see also id. at 348.
[26] Id. at 480-481.
[27] Id. at 481.

In fact, the Restoring Internet Freedom Order rejected Section 706 as a source of regulatory authority precisely *because* the logical implication would be to allow the FCC to regulate edge providers, which it found inconsistent with Section 230. Under Section 706, the Commission is to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[28] If this constituted an independent grant of authority, said the Commission, a "necessary implication" would be that "the Commission could regulate not only ISPs but also edge providers or other participants in the Internet marketplace…so long as the Commission could find at least an indirect nexus to promoting the deployment of advanced telecommunications capability. For example, some commenters argue that 'it is content aggregators (think Netflix, Etsy, Google, Facebook) that probably exert the greatest, or certainly the most direct, influence over access.'" The Commission explained that such a claim—that the Commission could regulate Google or Facebook because these companies exert influence over online activity—is "in tension" with Section 230.[29]

This finding directly contradicts NTIA's claim that Section 230 *supports* such intervention. At a minimum, were the Commission to grant NTIA's petition, it would face significant difficulty harmonizing these two contradictory readings of Section 230 in a way that would survive arbitrary and capricious review.

III. NTIA Fails to Identify or Reasonably Resolve Ambiguities in Section 230

Even if the NTIA petition were to clear these jurisdictional hurdles, its proposed regulations would struggle on judicial review. Under the familiar *Chevron* standard, an agency's statutory interpretation will be upheld only if the statute is ambiguous and if the agency has offered a reasonable resolution of that ambiguity. Many of NTIA's proposed regulations fail to

[28] 47 U.S.C. § 1302(a).
[29] Id. at 474.

identify genuine ambiguities in the statute, and where they do, the proposed interpretation is unreasonable because it is inconsistent with the statutory language.

A. There is No Ambiguity Between Sections (c)1 and (c)2, and NTIA's Proposed Regulations are Problematic

NTIA first argues that there is "[a]mbiguity in the relationship between subparagraphs (c)(1) and (c)(2)." To support this claim, the petition cites several court decisions that have applied Section 230(c)(1) to defeat claims involving removal of content. Because Section 230(c)(2) applies a "good faith" standard to content removal, NTIA argues that this expansive application of subparagraph (c)(1) "risks rendering (c)(2) a nullity."

As an initial matter, the claim that an expansive reading of (c)(1) makes (c)(2) superfluous is simply false. The Ninth Circuit addressed this concern in *Barnes v. Yahoo! Inc.*[30] Consistent with NTIA's complaint, the Ninth Circuit interprets (c)(1) broadly to include decisions to remove "content generated entirely by third parties."[31] But the court explained that this does not render (c)(2) a nullity:

> Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[32]

But assuming NTIA is correct that courts are erroneously reading (c)(1) too broadly, the alleged defect in judicial reasoning is not the result of any ambiguity in the statute itself. Section

[30] 570 F.3d 1096 (9th Cir. 2009).
[31] Id. at 1105.
[32] Id.

230(c)(1) is fairly straightforward about the protection that it grants: it assures that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." NTIA does not explain which part of this statute is ambiguous and in need of clarification. Rather, its complaint is that courts have applied (c)(1) to conduct that is unambiguously outside the scope of the statute. If so, the appropriate remedy is to appeal the erroneous decision, or perhaps secure an additional statute from Congress. But there is no ambiguity in Section 230(c)(1) for the Commission to resolve.

Moreover, NTIA's proposed regulation is unreasonable. The petition asks the Commission to clarify that "Section 230(c)(1) has *no application* to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service. Any applicable immunity for matters described in the immediately preceding sentence shall be provided *solely* by 47 U.S.C. § 230(c)(2)." The problems with this language are two-fold. First, as noted in Section I above, social media platforms retain a First Amendment right of editorial control, which could be implicated when a platform is accused of improperly removing content. Therefore it is erroneous (and potentially unconstitutional) to assert that platform immunity is provided "solely" by Section 230(c)(2).

Second, several Section 230(c)(1) cases involve claims stemming from an interactive computer service's failure to remove offending content. In the *Barnes* case referenced above, for example, a Yahoo! user published nude pictures of his ex-girlfriend online. The victim complained, and Yahoo! agreed to remove the offending pictures, but failed to do so. The victim sued, alleging negligent provision or non-provision of services which Yahoo! undertook to

provide.[33] Similarly, in the landmark case of *Zeran v. America Online, Inc.*, the plaintiff sued for negligent delay after AOL agreed to remove his personal information from the company's bulletin board, but did not do so in a timely fashion.[34] Both cases involve an "interactive computer service's decision [or] agreement…to restrict access to or availability of" third party material—in each case the defendant agreed to remove the content but failed, which gave rise to the complaint. It would be wrong to state that Section 230(c)(1) has "no application" to these cases—they are quintessential cases to which (c)(1) should apply.

B. NTIA's Proposed Objective Definitions of Offensive Material Contradict the Statute's Plain Language

NTIA next complains that the immunity for providers and users of interactive computer services under Section 230(c)(2) is too broad. The statute provides immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." NTIA is concerned that "[i]f 'otherwise objectionable' means any material that any platform 'considers' objectionable, then section 230(b)(2) [sic] offers de facto immunity to all decisions to censor content." To avoid this purported problem, NTIA recommends that the Commission define "otherwise objectionable" narrowly to include only material "similar in type" to the preceding adjectives in the statute—and then, for good measure, suggests objective definitions for each of these other terms as well.

Once again, NTIA's request is inconsistent with the plain language of the statute. By its terms, Section 230(c)(2) establishes an *subjective*, not *objective*, standard for objectionable

[33] Id. at 1099.
[34] Zeran v. America Online, Inc., 129 F.3d 327, 329, 332 (4th Cir. 1997).

content: Congress explicitly exempted any action to restrict access to material that "**the provider or user considers to be**" objectionable. The only statutory limit on the exercise of a provider or user's judgment is that the decision be made in "good faith." While NTIA may be troubled that this gives de facto immunity to all decisions to censor content, it was Congress's unambiguous choice to empower providers and users to make their own judgments about such material. Any attempt to provide objective definitions of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content would be inconsistent with the words "the provider or user considers to be" objectionable, and therefore would be unreasonable.

NTIA's proposed limitation on "otherwise objectionable" is separately problematic. Concerned about the potential breadth of the phrase, NTIA proposes limiting "otherwise objectionable" to content that is "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." Although this is perhaps a closer question, this narrowing also seems inconsistent with the statute's language. Congress deliberately chose not to adopt a closed list of problematic content. Instead, it added "or otherwise objectionable," which is most naturally read as an inclusive, catch-all phrase. Particularly when coupled with the language establishing a subjective standard, the phrase is best read as broadening, rather than narrowing, the scope of material that a provider or user may block. To read "objectionable" as simply "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing" would fail to give meaning to the word "otherwise." Congress's use of "otherwise" as a modifier to "objectionable" suggests the phrase is best understood to mean "objectionable even if it does not fall into the afore-mentioned categories."

C. NTIA's Proposed Definition of "Good Cause" is Unreasonable

Next, NTIA proposes that that the Commission define "good cause" so that courts can better discern when the Section 230(c)(2) defense applies. NTIA is correct that the phrase "good cause" is ambiguous. But its proposed definition is unreasonable.

NTIA would correlate "good faith" with transparency. But the two are distinct phenomena. A requirement that a party act in "good faith" means the party's proffered reason is honest and not pretextual. This is different from transparency, which requires that the actor publish its decision criteria in advance and not deviate from that criteria. A provider can block content in accordance with published criteria and still act in bad faith, if the published criteria are merely a pretext for the provider or user's animus toward the speaker. Conversely, a provider can have a good faith belief that a speaker's content is obscene or otherwise objectionable and on that basis block it, even if the provider had not indicated in advance that it would do so. NTIA's proposal would require that a provider predict what material it would expect its users to post—and the failure to predict user behavior accurately would require the provider to leave objectionable content up or lose the statute's protection, which contradicts congressional intent.

Moreover, NTIA's suggested notice and comment procedure finds no grounding anywhere in the statute. With limited exceptions, this proposal would require platforms to notify a user and give that user a reasonable opportunity to respond before removing objectionable content. Unlike in the Digital Millennium Copyright Act, Congress chose not to adopt a notice and comment regime for Section 230 content, choosing instead to vest discretion in providers and users to choose whether and how to display content. While NTIA fails to define "reasonable," the effect of this suggested provision would be to require a provider to make content available on its platform against its will, at least during the notice and comment period—

a result that violates both the intent of the statute and the provider's First Amendment right of editorial control.

Finally, it is worth noting that in its attempt to clarify the ambiguous phrase "good faith," NTIA has added several more ambiguous phrases that would likely generate additional litigation. Issues such as whether a belief is "objectively reasonable," whether the platform restricts access to material that is "similarly situated" to material that the platform declines to restrict, whether notice is "timely" given to speakers or whether speakers had a "reasonable opportunity" to respond, are all open to interpretation. The net effect of this compound ambiguity is likely to be fewer cases dismissed and more cases going to trial, which strips Section 230 of one of its biggest advantages: avoiding the litigation costs of discovery.

D. NTIA's Proposed Clarification of Section 230(f) is Unnecessary and Overbroad

Finally, NTIA requests that the Commission clarify when an interactive computer service is responsible, in whole or in part, for the creation or development of information (and therefore cannot take advantage of the Section 230(c)(1) defense). As NTIA notes, numerous courts have addressed this issue, and have largely settled on the Ninth Circuit's standard that one loses Section 230(c)(1) protection if that person "materially contributes" to the alleged illegality of the content. There is little disagreement that a platform's own speech is not protected. So, for example, if a platform posts an editorial comment, special response, or warning attached to a user's post, the platform is potentially liable for the content of that comment or warning. NTIA's suggestion that this is somehow an open question is baffling—under any interpretation of Section 230(f)(3), the platform would umambiguously be responsible for the creation or development of that addendum.

NTIA uses this purported ambiguity to alter Section 230(f)(3) in ways that unquestionably impose liability for a publisher's editorial choices. For example, NTIA suggests that "presenting or prioritizing" a user's statement "with a reasonably discernable viewpoint" would make the platform responsible in part for the statement. Given that every platform presents and prioritizes user content, this suggested exception could swallow Section 230(c)(1) entirely. Similarly, NTIA's proposal seems to suggest that a platform is responsible for any user content that it comments upon or editorializes about. Thus, while everyone agrees that a platform that comments on a user's post is liable for the content of the comment, NTIA suggests that commenting would also make the platform a partial creator of the underlying post and therefore lose Section 230(c)(1) protection. NTIA's proposed definition of when an interactive computer services is "treated as a publisher or speaker" of third-party content is equally problematic. It includes when a platform "vouches for," "recommends," or "promotes" content, terms which are so ambiguous and potentially broad as to swallow the immunity completely.

The statutory touchstone for distinguishing first-party from third-party content is creation: an information content provider is responsible for a statement if it is "responsible, in whole or in part, for the *creation* or *development* of information." Acts such as commenting on, presenting, prioritizing, editorializing about, vouching for, recommending, or promoting particular content have nothing to do with *creation* of the content. Instead, these activities all relate to publicizing content once it has been created—or in other words, *publishing* content. The cornerstone of Section 230(c)(1) is that a platform shall not be held liable as publisher of someone else's content. It would turn the statute on its head to limit that defense by redefining publishing activity in a way that makes the publisher a content creator.

IV. Conclusion

NTIA spends several pages explaining how the Internet ecosystem today differs from the environment in which Section 230 was drafted. While this is unquestionably true, one cannot understate the crucial role that Section 230 has played in helping the evolution of that ecosystem. It may be that, as NTIA suggests, technological advancements have made portions of the statute less effective or obsolete. But if that's the case, the proper remedy lies with Congress, not the FCC. NTIA's proposal invites the FCC to freelance beyond the outer boundary of its statutory authority, in ways that would contradict the plain language of the statute and raise serious constitutional concerns. The Commission would be wise to decline this invitation.

Respectfully submitted,

___/s/_____

10 September 2020

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Before the
Federal Communications Commission
Washington, D.C.

In the matter of	
Section 230 of the Communications Act of 1934	RM-11862

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the Federal Communications Commission (FCC)'s August 3, 2020 Public Notice,[1] the Computer & Communications Industry Association (CCIA)[2] submits the following comments. By requesting that the FCC regulate based on Section 230, NTIA has acted beyond the scope of its legal authority. Granting this request would similarly exceed the authority delegated to the FCC. The FCC has no role in regulating speech on the Internet, and NTIA's proposed narrowing of the phrase "otherwise objectionable" would lead to the proliferation of objectionable content online.

I. Federal Agencies Must Act Within the Bounds of Their Statutory Grant of Authority

On May 28, 2020, the Administration issued an Executive Order on "Preventing Online Censorship,"[3] which directed NTIA to file a petition for rulemaking with the FCC requesting that the FCC expeditiously propose regulations to clarify elements of 47 U.S.C. § 230. As an independent government agency,[4] the FCC is not required to adhere to the directives of the

[1] Public Notice, Consumer & Governmental Affairs Bureau – Petition for Rulemakings Filed, Report No. 3157 (Aug. 3, 2020), *available at* https://docs fcc.gov/public/attachments/DOC-365914A1.pdf.

[2] The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 45 years, to promoting innovation and preserving full, fair and open competition throughout our industry. Our members employ more than 1.6 million workers and generate annual revenues in excess of $870 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[3] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[4] Dissenting Statement of Commissioner Robert M. McDowell, Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 20, 2008) ("We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers."), *available at* https://docs fcc.gov/public/attachments/FCC-08-183A6.pdf; *see also* Harold H. Bruff, *Bringing the Independent*

Executive branch. By issuing this Executive Order, the President has taken the extraordinary step of directing NTIA to urge the FCC, an independent government agency, to engage in speech regulation that the President himself is unable to do.

As explained below, NTIA is impermissibly acting beyond the scope of its authority because an agency cannot exercise its discretion where the statute is clear and unambiguous, and the statute and legislative history are clear that the FCC does not have the authority to promulgate regulations under Section 230.

A. NTIA Is Acting Beyond Its Authority

NTIA's action exceeds what it is legally authorized to do. NTIA has jurisdiction over telecommunications[5] and advises on domestic and international telecommunications and information policy. NTIA is charged with developing and advocating policies concerning the regulation of the telecommunications industry, including policies "[f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets."[6] Nowhere does the statute grant NTIA jurisdiction over Internet speech. When Congress has envisioned a regulatory role for NTIA beyond its established telecommunications function, it has done so explicitly.[7] Therefore, NTIA's development of a proposed national regulatory policy for Internet speech is outside the scope of NTIA's Congressionally-assigned responsibilities. Accordingly, the very impetus for this proceeding is an organ of the Administration acting beyond the scope of its authority.

B. An Agency Cannot Exercise Its Discretion Where the Statute Is Clear and Unambiguous

Even worse, NTIA's *ultra vires* action involves a request that another agency exceed its authority. NTIA's petition either misunderstands or impermissibly seeks to interpret Section 230 because it requests the FCC to provide clarification on the unambiguous language in 47 U.S.C. § 230(c)(1) and § 230(c)(2). Specifically, NTIA's petition asks for clarification on the terms "otherwise objectionable" and "good faith." The term "otherwise objectionable" is not unclear because of the applicable and well-known canon of statutory interpretation, *ejusdem generis*, that

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Agencies in from the Cold, 62 Vand. L. Rev. En Banc 62 (Nov. 2009), *available at* https://www.supremecourt.gov/opinions/URLs_Cited/OT2009/08-861/Bruff_62_Vanderbilt_Law_Rev_63.pdf (noting the independent agencies' independence from Executive interference).

[5] 47 U.S.C. § 902(b).

[6] 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I).

[7] *See, e.g.*, 17 U.S.C. § 1201(a)(1)(C) (providing a rulemaking function which articulates a role for "the Assistant Secretary for Communications and Information of the Department of Commerce", which is established as the head of NTIA under 47 U.S.C. § 902(a)(2)).

the general follows the specific. Propounding regulations regarding the scope of "good faith" would confine courts to an inflexible rule that would lend itself to the kind of inflexibility that was not intended by the original drafters of the statute.[8] Courts have consistently held that Section 230 is clear and unambiguous, with the Ninth Circuit noting that "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition" and there is a "consensus developing across other courts of appeals that § 230(c) provides broad immunity. . . ."[9]

Under *Chevron*, when a statute is clear and unambiguous an agency cannot exercise discretion but must follow the clear and unambiguous language of the statute.[10] The Administration cannot simply, because it may be convenient, declare a statute to be unclear and seek a construction that is contrary to the prevailing law and explicit Congressional intent.

C. The FCC Does Not Have the Authority to Issue Regulations Under Section 230

Neither the statute nor the applicable case law confer upon the FCC any authority to promulgate regulations under 47 U.S.C. § 230. The FCC has an umbrella of jurisdiction defined by Title 47, Chapter 5. That jurisdiction has been interpreted further by seminal telecommunications cases to establish the contours of the FCC's authority.[11]

Title 47 is unambiguous about the scope of this authority and jurisdiction. The FCC was created "[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*"[12] and "[t]he provisions of this chapter shall apply to all interstate and foreign

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[8] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. . . . We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents.").

[9] *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (citing *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 328-29 (4th Cir. 1997)); *see also Fair Housing Coun. of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) ("The *plain language* and structure of the CDA *unambiguously* demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes *congressional intent* and violates the spirit and serendipity of the Internet.") (*emphasis added*).

[10] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[11] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

[12] 47 U.S.C. § 151 *(emphasis added)*.

communication by wire or radio".[13] The statute does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC's jurisdiction. What NTIA proposes is not included in the scope of the FCC's enabling statute, which only gives the FCC the following duties and powers: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary *in the execution of its functions*."[14] Additionally, Section 230(b)(2) explicitly provides that the Internet should be "unfettered by Federal or State regulation."[15] Even the legislative history of 47 U.S.C. § 230, including floor statements from the sponsors, demonstrates that Congress explicitly intended that the FCC should not be able to narrow these protections, and supports "prohibiting the FCC from imposing content or any regulation of the Internet."[16] Indeed, the FCC's powers have regularly been interpreted narrowly by courts.[17]

The FCC's 2018 Restoring Internet Freedom Order (the Order),[18] reaffirms that the FCC is without authority to regulate the Internet as NTIA proposes. In the Order, the FCC said it has no authority to regulate "interactive computer services."[19] Although the FCC considered Section 230 in the context of net neutrality rules, its analysis concluded that Section 230 renders further regulation unwarranted.[20] If the FCC had sufficiently broad jurisdiction over Internet speech under Section 230 to issue NTIA's requested interpretation, litigation over net neutrality, including the *Mozilla* case, would have been entirely unnecessary. As *Mozilla* found, agency

[13] 47 U.S.C. § 152 *(emphasis added)*.
[14] 47 U.S.C. § 154(i) *(emphases added)*.
[15] 47 U.S.C. § 230(b)(2).
[16] H.R. Rep. No. 104-223, at 3 (1996) (Conf. Rep.) (describing the Cox-Wyden amendment as "protecting from liability those providers and users seeking to clean up the Internet and prohibiting the FCC from imposing content or any regulation of the Internet"); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (rebuking attempts to "take the Federal Communications Commission and turn it into the Federal Computer Commission", because "we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet").
[17] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[18] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.
[19] *Id*. at 164-66.
[20] *Id*. at 167 and 284.

"discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating."[21]

The D.C. Circuit explained in *MPAA v. FCC* that the FCC can only promulgate regulations if the statute grants it authority to do so.[22] There is no statutory grant of authority as Section 230 does not explicitly mention the FCC, the legislative intent of Section 230 does not envision a role for FCC, and the statute is unambiguous. As discussed above, the FCC lacks authority to regulate, and even if it had authority, the statute is unambiguous and its interpretation would not receive any deference under *Chevron*.

II. The FCC Lacks Authority to Regulate The Content of Online Speech

Even if the FCC were to conclude that Congress did not mean what it explicitly said in Section 230(b)(2), regarding preserving an Internet "unfettered by Federal or State regulation",[23] NTIA's petition asks the FCC to engage in speech regulation far outside of its narrow authority with respect to content. Moreover, NTIA's request cannot be assessed in isolation from the Administration's public statements. It followed on the President's claim, voiced on social media, that "Social Media Platforms totally silence conservatives voices."[24] The President threatened that "[w]e will strongly regulate, or close them down, before we can ever allow this to happen."[25] NTIA's petition must therefore be analyzed in the context of the President's threat to shutter American enterprises which he believed to disagree with him.

Within that context, NTIA's claim that the FCC has expansive jurisdiction — jurisdiction Commission leadership has disclaimed — lacks credibility. When dissenting from the 2015 Open Internet Order, which sought to impose limited non-discrimination obligations on telecommunications infrastructure providers with little or no competition, FCC Chairman Pai characterized the rule as "impos[ing] intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have".[26] It is inconsistent to contend that the FCC has no legal authority to impose limited non-discrimination obligations on infrastructure providers operating under the supervision of public service and utilities

[21] *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, J., concurring).
[22] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[23] 47 U.S.C. § 230(b)(2).
[24] Elizabeth Dwoskin, *Trump lashes out at social media companies after Twitter labels tweets with fact checks*, Wash. Post (May 27, 2020), https://www.washingtonpost.com/technology/2020/05/27/trump-twitter-label/ (orthography in original).
[25] *Id*.
[26] Dissenting Statement of Commissioner Ajit Pai, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, *available at* https://www fcc.gov/document/fcc-releases-open-internet-order/pai-statement, at 1.

commissions, while also arguing that the FCC possesses authority to enact retaliatory content policy for digital services whose competitors are a few clicks away.

The FCC has an exceptionally limited role in the regulation of speech, and the narrow role it does possess is constrained by its mission to supervise the use of scarce public goods. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, whatever limited speech regulation powers the FCC possesses are rooted in "the scarcity of radio frequencies."[27] No such scarcity exists online.

Rather than engaging with the precedents that narrowly construe the FCC's role in content policy, NTIA's petition relies upon a criminal appeal, *Packingham v. North Carolina*, in asserting that "[t]hese platforms function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[28] But the Supreme Court did not recognize this. The language NTIA quotes from *Packingham* presents the uncontroversial proposition that digital services collectively play an important role in modern society. If there were any doubt whether the *dicta* in *Packingham*, a case which struck down impermissible government overreach, could sustain the overreach here, that doubt was dispelled by *Manhattan Community Access Corp. v. Halleck*.[29] In *Halleck*, the Court held that "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[30]

III. NTIA's Proposal Would Promote Objectionable Content Online

As discussed, neither NTIA nor the FCC have the authority to regulate Internet speech. Assuming arguendo, the FCC did have the authority, NTIA's proposed regulations "interpreting" Section 230 are unwise. They would have the effect of promoting various types of highly objectionable content not included in NTIA's proposed rules by discouraging companies from removing lawful but objectionable content.[31]

Section 230(c)(2)(A) incentivizes digital services to "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively

[27] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[28] Petition for Rulemaking of the Nat'l Telecomms. & Info. Admin. (July 27, 2020), *available at* https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "NTIA Petition"), at 7, note 21 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017)).

[29] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

[30] *Id.* at 1930.

[31] Matt Schruers, *What Is Section 230's "Otherwise Objectionable" Provision?*, Disruptive Competition Project (July 29, 2020), https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/.

violent, harassing, or otherwise objectionable." NTIA, however, would have the term "otherwise objectionable" interpreted to mean "any material that is *similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials"[32] — terms that NTIA's proposed rules also define narrowly — and confine harassment to "any specific person."

Presently, a digital service cannot be subject to litigation when, for example, it determines that the accounts of self-proclaimed Nazis engaged in hate speech are "otherwise objectionable" and subject to termination, consistent with its Terms of Service. Digital services similarly remove content promoting racism and intolerance; advocating animal cruelty or encouraging self-harm, such as suicide or eating disorders; public health-related misinformation; and disinformation operations by foreign agents, among other forms of reprehensible content. Fitting these crucial operations into NTIA's cramped interpretation of "otherwise objectionable" presents a significant challenge.

Under NTIA's proposed rules, digital services therefore would be discouraged from acting against a considerable amount of potentially harmful and unquestionably appalling content online, lest moderating it lead to litigation. Avoiding this scenario was one of the chief rationales for enacting Section 230.[33]

The term "otherwise objectionable" foresaw problematic content that may not be illegal but nevertheless would violate some online communities' standards and norms. Congress's decision to use the more flexible term here acknowledged that it could not anticipate and legislate every form of problematic online content and behavior. There are various forms of "otherwise objectionable" content that Congress did not explicitly anticipate in 1996, but which may violate the norms of at least some online communities. It is unlikely that Congress could have anticipated in 1996 that a future Internet user might encourage dangerous activity like consuming laundry detergent pods, or advise that a pandemic could be fought by drinking bleach. Section 230(c)(2)(A)'s "otherwise objectionable" acknowledges this. Congress wanted to encourage services to respond to this kind of problematic — though not necessarily unlawful — content, and prevent it from proliferating online.

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[32] NTIA Petition, *supra* note 28, at 54 (emphasis supplied).

[33] H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how under recent New York precedent, "the existing legal system provides a massive disincentive" and the Cox-Wyden amendment "will protect them from taking on liability such as occurred in the Prodigy case in New York").

NTIA's proposed rules "clarifying" the phrase "otherwise objectionable" would also open the door to anti-American lies by militant extremists, religious and ethnic intolerance, racism and hate speech. Such speech unquestionably falls within Congress's intended scope of "harassing" and "otherwise objectionable" and thus might reasonably be prohibited by digital services under their Terms of Service. NTIA's petition, however, proposes confining harassment to content directed at *specific* individuals. This tacitly condones racism, misogyny, religious intolerance, and hate speech which is general in nature, and even that which is specific in nature provided the hateful speech purports to have "literary value."

IV. Conclusion

For the foregoing reasons, the FCC should decline NTIA's invitation to issue regulations on Section 230.

Respectfully submitted,

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September 2, 2020

Before the
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Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	))))))	RM No. 11862

COMMENT OF
AMERICANS FOR PROSPERITY FOUNDATION
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SEPTEMBER 1, 2020

Introduction and Executive Summary

The Internet, and the untold commerce and free expression it enables, would not exist as we know it today without Section 230.[1] The National Telecommunications and Information Administration's ("NTIA") petition for rulemaking,[2] if adopted, threatens to end all of that. The free market has allowed internet-based companies to rise and fall over the years, innovating and providing new technologies to consumers. Some, like Facebook or Amazon, have grown from seemingly implausible ideas to successful businesses. Others, like MySpace or LiveJournal, seemed dominant at the time only to be replaced by newer, better options. And some, like Twitter, are only now entering their teen years.

These websites have offered people unprecedented access to each other, information, leaders, commerce, and expression. If someone wants to instantly share his opinion on breaking news with 500 of his friends on Facebook, he can. If he wants to reply to the President's tweet and let him—and the world—know what he thinks about it, he can do that too. On top of all that, online technology platforms have enabled small businesses and entrepreneurs to innovate and flourish. It is modern innovation that allows us to make a product in our home and then instantly market and sell it to someone across the globe. So many businesses, large and small, would

[1] *See* Adam Thierer, *Celebrating 20 Years of Internet Free Speech & Free Exchange*, Plain Text (June 21, 2017), *available at* https://bit.ly/32kHyIC ("Section 230 was hugely important in that it let online speech and commerce flourish without the constant threat of frivolous lawsuits looming overhead.").

[2] Nat'l Telecomm. & Info. Admin., Pet. for Rulemaking of the NTIA (July 27, 2020) [hereinafter "Pet."].

not exist without this sort of technology. And many of these opportunities only exist because of Section 230.

NTIA's petition imperils this freedom. It asks the Federal Communications Commission ("Commission" or "FCC") to promulgate new regulations, despite Section 230 being an unambiguous edict from Congress that ultimately limits courts and litigants. Importantly, Section 230 contains *no* affirmative commands to the FCC. NTIA supports this its petition by misreading the statute and misstating case law—wrongly arguing that courts have expanded Section 230 protections beyond Congress's intent and allowed some Section 230 provisions to swallow others. Through a careful reading of the jurisprudence, this comment shows NTIA is wrong.

Further, the remedy NTIA asks for would not only be *ultra vires*, but also would violate the First Amendment by compelling individuals to engage in or host speech they otherwise find objectionable. What's more, NTIA does not even have the statutory authority to petition the FCC for a rulemaking, as it is an agency and cannot be an "interested party." Its request that the FCC classify edge providers as "information services" is out of bounds of its primary petition. Finally, the rulemaking NTIA asks for is bad policy. It could drive small businesses and entrepreneurs out of business, chill online speech, and create impossible barriers to entry for new competitors.

The Commission should deny NTIA's petition in full.

Argument

I. The FCC has no authority under the Communications Act to regulate under Section 230.

Section 230 does not delegate any rulemaking authority to the FCC, whether implicitly or explicitly. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."[3] And when agencies act "improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."[4]

A. Section 230 is unambiguous.

When Congress enacted Section 230, it spoke clearly and directly. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[5] Once Congress enacts a statute, the *only* role left for an agency is to "fill any gap left, implicitly or explicitly, by Congress."[6]

Before diving into the case law, "we begin with the text."[7] "Of all the tools of statutory interpretation, '[t]he most traditional tool, of course, is to read the text.'"[8] As the Supreme Court has repeatedly held, "[t]he preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it

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[3] *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).
[4] *City of Arlington v. Fed Commc'ns Comm'n*, 569 U.S. 290, 297 (2013).
[5] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Although many have called the wisdom of *Chevron* into question, it is still the law of the land. And when it precludes deference to an agency, as it does here, the FCC must respect it.
[6] *Id.*
[7] *City of Clarksville v. Fed. Energy Regulatory Comm'n*, 888 F.3d 477, 482 (D.C. Cir. 2018).
[8] *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020) (citing *Engine Mfrs. Ass'n v. Envtl. Prot. Agency*, 88 F.3d 1075, 1088 (D.C. Cir. 1996)).

means and means in a statute what it says there."[9] "Only the written word is the law, and all persons are entitled to its benefit."[10]

The relevant text here is 47 U.S.C. § 230(c), which reads:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[11]

NTIA makes a fundamental error when it writes that "[n]either section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has power to issue regulations under section 230."[12] But silence

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[9] *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)).
[10] *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1737 (2020).
[11] "So in original. Probably should be 'subparagraph (A)." 47 U.S.C.A. § 230 (West), n.1.
[12] Pet. at 17.

does not convey authority. This is not how administrative law works, as decades of case law illuminates. Courts should never "presume a delegation of power absent an express withholding of such power" as this logic means agencies "would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[13] For an agency to claim authority whenever "a statute does not expressly *negate* the existence of a claimed administrative power is both flatly unfaithful to the principle of administrative law and refuted by precedent."[14] Even assuming there were any uncertain terms in the statute, "[m]ere ambiguity in a statute . . . is not evidence of congressional delegation of authority."[15]

B. Legislative intent is clear.

Former Representative Chris Cox, one of authors and co-sponsors of the Section 230 legislation, has written at length on its history and background.[16] As a threshold matter, "Section 230 was not part of the [Communications Decency Act ("CDA")] . . . it was a freestanding bill" that was ultimately wrapped into the CDA during conference negotiations.[17] Representative Cox, along with his co-author,

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[13] *Ethyl Corp. v. Envt'l Prot. Agency*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see N.Y. Stock Exch. LLC v. Sec. & Exch. Comm'n*, 962 F.3d 541 (D.C. Cir. 2020) (same quote, 15 years later).
[14] *N.Y. Stock Exch. LLC*, 962 F.3d at 553 (citation omitted).
[15] *Id.*
[16] *See The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World*, 116th Cong. (2020) [hereinafter "Cox Testimony"] (testimony of Former U.S. Rep. Chris Cox), *available at* https://bit.ly/2YuyrE4. The Commission should incorporate the whole of Representative's Cox testimony and detailed history of Section 230 as part of any decision.
[17] *Id.* at 5.

Senator Ron Wyden, wrote Section 230 to "ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others."[18]

When speaking about the bill on the floor, Representative Cox plainly rejected the idea of having a "Federal Computer Commission" made up of "bureaucrats and regulators who will attempt . . . to punish people by catching them in the act of putting something into cyberspace."[19] The whole point of the bill "was to recognize the sheer implausibility of requiring each website to monitor all of the user-created content that crossed its portal each day."[20] But this is exactly what NTIA's petition would have social media companies and the Commission do, contrary to legislative intent.

C. NTIA is asking the FCC to engage in a legislative function that the Constitution reserves only to Congress.

NTIA's grievances about Section 230 hurting free speech and limiting public participation are ill-founded.[21] But assume, for the sake of argument, that NTIA were correct. Could this Commission still act? No—because what NTIA really seeks here is a legislative amendment to Section 230. For example, following a paragraph detailing what "Congress intended" with Section 230, NTIA argues that "[t]imes have changed, and the liability rules appropriate in 1996 may no longer further Congress's

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[18] *Id.* at 8.

[19] 141 Cong. Rec. H8469–71 (Aug. 4, 1995) (statement of Rep. Cox). The FCC relied on this statement in its Restoring Internet Freedom Order. Fed. Commc'ns Comm'n, FCC 17-166, Restoring Internet Freedom at 40 n.235 [hereinafter "RIFO"].

[20] Cox Testimony at 13.

[21] *See, e.g.*, Robby Soave, *Big Tech Is Not a Big Threat to Conservative Speech. The RNC Just Proved It.*, Reason (Aug. 25, 2020), *available at* https://bit.ly/2Yy5nvy ("If social media were to be regulated out of existence—and make no mistake, proposals to abolish Section 230 could accomplish precisely this—then the Republican Party would return itself to the world where traditional media gatekeepers have significantly more power to restrict access to conservative speech.").

purpose that section 230 further a 'true diversity of political discourse.'"[22] NTIA then (erroneously) argues that things are different now, "unlike the time of *Stratton Oakmont*[.]"[23] Later, it states that "free speech faces new threats."[24] It also argues that "liability protections appropriate to internet firms in 1996 are different because modern firms have much greater economic power" and "play a bigger, if not dominant, role in American political and social discourse[.]"[25] Even if NTIA's observations had merit,[26] they would be beside the point because NTIA's complaints, as it repeatedly concedes through its comment, relate to *what Congress passed*.

Thus, NTIA wants the FCC to amend an unambiguous statute that NTIA believes is outdated. But agencies cannot amend statutes, no matter how old they may be. That is the role of Congress. Legislative power resides there—and nowhere else.[27] As James Madison wrote, "[w]ere the federal Constitution . . . really chargeable with the accumulation of power, or with a mixture of powers . . . no further arguments would be necessary to inspire a universal reprobation of the system."[28] For "[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty[.]"[29]

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[22] Pet. at 4.
[23] *Id.*
[24] *Id.* at 6
[25] *Id.* at 9.
[26] In responding to this argument that Section 230 is no longer needed, Representative Cox recently wrote, "[a]s co-author of [Section 230], I can verify that this is an entirely fictious narrative." Cox Testimony at 13.
[27] *See, e.g.*, U.S. Const. art. I ("All legislative Powers herein granted shall be vested in a Congress of the United States".)
[28] Federalist No. 47 (James Madison).
[29] *Id.* (quoting Montesquieu).

As discussed below, the impact of granting NTIA's petition would be widespread and have drastic economic consequence. To borrow NTIA's own language, "[n]either section 230's text, nor any speck of legislative history" shifts this rulemaking responsibility to the FCC.[30] After all, Congress would not "delegate a decision of such economic and political significance to an agency in so cryptic [or silent, in this case] a fashion."[31] And when regulating speech, Congress does not grant "broad and unusual authority through an implicit delegation[.]"[32] It does not "hide elephants in mouseholes."[33] If Congress wanted to grant the FCC rulemaking authority under Section 230, it knows how to do so and would have done so. But it did not. Instead, it adopted unambiguous language that contains *no affirmative commands* to the FCC.[34] The FCC cannot invoke "its ancillary jurisdiction"—in this case, Section 201(b) rulemaking authority—"to override Congress's clearly expressed will."[35] To grant NTIA's petition would be to engage in unlawful, *ultra vires* action. For this reason, the petition should be denied.

D. Section 230 provides no affirmative command to the FCC.

Section 230 does not actually tell the FCC to *do* anything. It grants no new powers. It does not ask, explicitly or implicitly, for the Commission's guidance. Instead, it limits litigation. And it expands on First Amendment protections for both

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[30] Pet. at 17.
[31] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).
[32] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).
[33] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[34] *See infra* at § I(D).
[35] *EchoStar Sat. LLC v. Fed Commc'ns Comm'n*, 704 F.3d 992, 1000 (D.C. Cir. 2013).

providers and users of internet services. Congress's whole point, as petitioners openly concede, was to overrule *Stratton Oakmont*.[36] Thus, Section 230 speaks to the courts and private litigants, not the FCC. If a statute "does not compel [an agency's] interpretation, it would be patently unreasonable—not to say outrageous—for [an agency] to insist on seizing expansive power that it admits the statute is not designed to grant."[37] In fact, Section 230 explicitly counsels *against* regulation, finding that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*[.]"[38]

E. NTIA and, by extension, the FCC cannot artificially inject ambiguity into the statute.

Throughout its Petition, NTIA tries to inject—and thus asks the FCC to inject—ambiguity into the statute in an attempt to conjure up some sort of rulemaking authority where none exists. NTIA consistently misreads case law to create jurisprudential confusion that simply is not there. The FCC should not follow suit. "[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'"[39]

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[36] Pet. at 18 n.51 (citing Sen. Rep. No. 104-230, 2d Sess. at 194 (1996) ("One of the specific purposes of [section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions.") & H.R. Conf. Rep. No. 104-458 at 208 (disparaging *Stratton Oakmont*)).

[37] *Utility Air Reg. Grp. v. Envt'l Prot. Agency*, 573 U.S. 302, 324 (2014).

[38] 47 U.S.C. § 230(b)(2) (emphasis added).

[39] *Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (cleaned up) (quoting *PDK Labs., Inc. v. Drug Enf't Agency*, 362 F.3d 786, 798 (D.C. Cir. 2004)).

And subsection (c)(1) is abundantly clear: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[40] There is no ambiguity to be found here or elsewhere in the statute.[41] The law explicitly defines "interactive computer service" and "information content provider."[42] And the words "publish," "publication," and "speaker" are well-known and have accepted legal definitions that are particularly relevant to defamation and slander. To wit:

> Publish, vb. (14c) 1. To distribute copies (of a work) to the public. 2. To communicate (defamatory words) to someone other than the person defamed.[43]
>
> Publication, v. (14c) 1. Generally, the act of declaring or announcing to the public. 2. *Copyright*. The offering or distribution of copies of a work to the public.[44]
>
> Speaker. 1. One who speaks or makes a speech <the slander claim was viable only against the speaker>[45]

When evaluating Section 230 claims, courts have had no difficulty defining the word "publisher," adopting to the word's ordinary meaning.[46] Courts also have properly

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[40] 47 U.S.C. § 230(c)(1).
[41] And even if the terms are broad, as NTIA implies, that does not render them necessarily ambiguous, especially if they have a plainly accepted meaning.
[42] 47 U.S.C. § 230(f)(2).
[43] Black's Law Dictionary (9th ed. 2009) (alternative definitions and explanation omitted).
[44] *Id.* (same)
[45] *Id.* (same)
[46] *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) ("This Circuit and others have generally looked to [publisher's] ordinary meaning: 'one that makes public'; 'the reproducer of a work intended for public consumption,' and 'one whose business is publication.'") (cleaned up and internal citations omitted).

construed the protection from "publisher" liability to mean both decisions to affirmatively publish and decisions to "withdraw, postpone, or alter content."[47]

Subsection (c)(2) is similarly clear. "Good faith" is a commonly understood and applied term in common law. It is "honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."[48] In the D.C. Circuit, courts have construed the meaning of "good faith" given the relevant context.[49] And the term appears frequently throughout FCC statutes and rules.[50] No other rulemaking is necessary to define a term already well-understood by the Commission and the courts.

The rest of subsection (c)(2) is detailed, complete, and unambiguous. For the uncommon situation when a court must address a claim of (c)(2)(A) immunity, the statute establishes a safe harbor for certain content moderation decisions.[51] And a litany of cases, cited by NTIA itself, affirm Congress's intent that the safe harbor operate as it has.[52] NTIA cites only two cases for the proposition that "some district courts have . . . construed" (c)(2) immunity overbroadly.[53] The first, *Langdon v. Google, Inc.*, is a district court case filed by a *pro se* plaintiff in 2007, alleging that

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[47] *See, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).
[48] *Good faith*, Black's Law Dictionary (9th ed. 2009).
[49] *See, e.g.*, *Barnes v. Whelan*, 689 F.2d 193, 199 (D.C. Cir. 1982); *Window Specialists, Inc. v. Forney Enters., Inc.*, 106 F. Supp. 3d 64, 89 (D.D.C. 2015).
[50] *See, e.g.*, 47 U.S.C. §§ 230, 251, 252, 325; 47 C.F.R. §§ 76.65, 76.7.
[51] *See infra* at § 2(G).
[52] *See* Pet. at 32 n.98.
[53] Pet. at 31.

Google had injured him by refusing to run ads on two websites.[54] One website purported to expose "fraud perpetrated by North Carolina government officials" and the other delineated "atrocities committed by the Chinese government."[55] The *Langdon* court ruled against the *pro se* plaintiff and held that he failed to address the otherwise-fatal provision of (c)(2), omitting it from his argument.[56]

The second—which is currently on appeal—does not support NTIA's argument that courts are reading subsection (c)(2) overbroadly.[57] Instead, the court there easily understood the provision in (c)(2) that asks what "the provider or user considers to be" objectionable.[58] "That section 'does not require that the material actually be objectionable, rather it affords protection for blocking material 'that the provider or user considers to be' objectionable."[59] Thus what matters is "Vimeo's *subjective* intent[,]" which the Court found by looking at Vimeo's guidelines which explicitly "define hateful, harassing, defamatory, and discriminatory content[.]"[60] The Court also found Vimeo explicitly warned the plaintiffs against videos that promoted certain content.[61] This case is a prime example of a *successful* application of (c)(2)'s safe harbor provision. NTIA is thus left with a single *pro se* case summarily decided in

[54] 474 F. Supp. 2d 622 (D. Del. 2007).
[55] *Id.* at 626.
[56] *Id.* at 631. Thus, there was no substantive discussion of what "otherwise objectionable" covers.
[57] *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592 (S.D.N.Y. 2020).
[58] *Id.* at 603.
[59] *Id.* at 603–04.
[60] *Id.* at 604 (emphasis added).
[61] *Id.*

2007 to support its demand that this Commission enact broad rulemaking. NTIA's argument cannot be propped up on so thin a reed.

F. If the FCC were to adopt NTIA's rubric, it would lead to bad outcomes.

NTIA's request that the FCC define each word in subsection (c)(2) according to an objective standard is both unnecessary and unlawful. For example, NTIA wants "excessively violent" to be limited to the "[FCC's] V-chip regulatory regime and TV parental guidance" or content that promotes terrorism.[62] It asks the FCC to limit "harassing" to malicious computer code, content covered under the CAN-SPAM Act, and material "sent by an information content provider that has the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value[.]"[63]

With those definitions in mind, consider two hypothetical situations. Suppose a ministry created a social media site called ChristianTimesTube that targeted a Christian audience.[64] The site explodes in popularity, with millions of Christians—adults and children—from all around the world watching content on it. The site considers it "harassing" or "otherwise objectionable" if users post content that blasphemes God or mocks religious belief, so it removes this content. An atheist user,

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[62] Pet. at 37–38.

[63] Pet. at 38.

[64] The idea of a "Christian monitored version" of a site like TikTok is not far-fetched. *See* ye (@KanyeWest), Twitter (Aug. 17, 2020, 4:36 PM), https://bit.ly/34RcT8I (last accessed Aug. 18, 2020). Mr. West's idea was endorsed by Senator Josh Hawley. Josh Hawley (@HawleyMO), Twitter (Aug. 17, 2020, 5:16 PM), https://bit.ly/34VaolW ("Best idea I've heard in weeks[.]") (last accessed Aug. 18, 2020). Other faith-based sites that allow user or third-party generated content currently exist. *See, e.g.*, https://www.patheos.com/, https://www.godtube.com/.

however, accesses the site. He uses its functionality to share videos from atheist commentators. The videos directly attack the Christian faith and encourage people, including children, to apostatize. He does not direct them at any specific individual, and the videos include several atheist academics. ChristianTimesTube deletes the videos and bans the user. They offer him no explanation—it should be clear—or procedure to appeal his ban. He sues. Should the Christian site be forced to live under what a court deems is "objectively harassing" or should it instead moderate its own content as it sees fit and tailored to its users? Should it be forced to expend scarce dollars to litigate through discovery? After all, the site deleted his content in "bad faith"—as NTIA would define it—because they disagree with his view on the world and did not offer "adequate notice, reasoned explanation, or a meaningful opportunity to be heard."[65] And the atheist user supported it with "serious literary" or "scientific" material by referring to academic sources. According to NTIA, ChristianTimesTube could be liable. No business can survive under this standard, much less entrepreneurs or communities with scant resources or few employees.

Suppose again that a social media network is created for survivors of gun violence, called WeHealTogetherTube. The site bans and routinely deletes videos that show any firearms. This is because both users and operators of WeHealTogetherTube, who have been victims of gun crime, subjectively view such videos as "excessively violent." A gun-rights activist, however, finds that there is nothing "excessively violent" or "otherwise objectionable" about target shooting. He

[65] Pet. at 39.

joins WeHealTogetherTube and begins to post videos of target shooting to share with his friends—and perhaps to acclimatize the site's users to the non-violent use of guns. Some of the videos are his own, and others are from a local broadcast news segment on a new gun range. WeHealTogetherTube deletes the videos and bans the user; he sues. Should the gun-survivor network be forced to live under what a court deems is "excessively violent" or should it moderate its own content as it sees fit? After all, the posted videos would not fit under any of NITA's proposed definitions,[66] and some videos were even aired on the local news. According to NTIA, WeHealTogetherTube—a small, tight-knit community of people trying to support each other—is possibly liable and must litigate an expensive case.

The second hypothetical is particularly apt because one of NTIA's grievances is that an "interactive computer service [*i.e.*, Facebook] made the editorial decision to exclude content pertaining to firearms, content that was deemed acceptable for broadcast television, thereby chilling the speech of a political candidate supportive of gun rights."[67] Ignoring for a moment that private fora do not "chill speech" in the First Amendment context, Facebook is within its rights to *subjectively* deem such content "excessively violent." Our hypothetical gun-crime survivors group perfectly exemplifies why Congress selected subjective rather than objective standards.

And it would not stop there. Religious groups that suddenly lose Section 230's safe harbor may be forced to host blasphemous or other objectionable content—or at

[66] *Id.* at 37–38.
[67] *Id.* at 43.

least engage in expensive and lengthy litigation for refusing to allow or share it. They may even need to hire compliance counsel just to get the site started, imposing new barriers to entry, stifling competition among online platforms, and *actually* chilling speech due to government policymaking. If NTIA's petition is granted in full, government officials (judges and bureaucrats)[68] will soon be deciding what every owner or operator of every private internet forum must host. This is offensive to American's founding principles. The Commission must reject it.

G. NTIA's definitions would violate the First Amendment.

Thankfully for WeHealTogetherTube and ChristianTimesTube, NTIA's view of the world is unconstitutional. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[69] This freedom is not limited to when an individual chooses not to speak at all, but also applies when an organization has chosen to speak and invited others to speak too. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court held that the government could not compel the organizers of a parade to include individuals, messages, or signs that conflicted with the organizer's beliefs.[70] This is because "*all* speech inherently involves choices of what to say and what to leave

[68] Of course, the First Amendment would hopefully stop this. *See infra* at § I(G).
[69] *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.").
[70] 515 U.S. 557, 573 (1995) (citation and quotation omitted).

unsaid"[71] and includes not only the right to "tailor the speech" but also "statements of fact the speaker would rather avoid[.]"[72] This logic extends to other applications, such as newspapers where "'the choice of material and the decisions made as to limitations on the size and content and treatment of public issues—whether fair or unfair—constitute the exercise of editorial control and judgment' upon which the State cannot intrude."[73] The First Amendment protects our hypothetical platforms, other users of internet services, and even Facebook and Twitter. They do not sacrifice their own freedom of speech just because they provide an opportunity for billions of users around the globe to speak.[74]

II. NTIA misreads the current state of the law.

There is a concerning pattern throughout NTIA's Petition. The agency consistently misreads or misapplies relevant case law. A few examples outlined below display the actual state of the law on Section 230.

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[71] *Id.*

[72] *Id.* at 575 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)) (cleaned up). Petitioners may point to *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 648 (1994), but that case concerned a content-neutral restriction and thus only applied intermediate scrutiny. NTIA's proposed definitions under subsection (c)(2) are not content neutral.

[73] *Hurley*, 515 U.S. at 581. This applies also to state conscription to carry a message. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *see Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

[74] For further discussion of how Section 230 promotes innovation, *see* Eric Goldman, *Why Section 230 is Better than the First Amendment*, 95 Notre Dame L. Rev. Online 33 (2019), *available at* https://bit.ly/2QlOP5v.

A. NTIA misconstrues the case law on Section 230 "immunity."

Let's start at the top. As NTIA concedes, Congress passed Section 230 in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*[75] There, a state court held that Prodigy "acted more like an original publisher than a distributor both because it advertised the practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin board."[76] In response, "Congress enacted [Section] 230 to remove the disincentives to selfregulation [sic] created by the *Stratton Oakmont* decision."[77] Since then, courts have held that "[Section] 230 forbids the imposition of publisher liability on a service provider *for the exercise of its editorial and self-regulatory functions*."[78] NTIA's petition correctly articulates that *Stratton Oakmont*, and a related case, "presented internet platforms with a difficult choice: voluntarily moderate and thereby become liable for all messages on their bulletin boards, or do nothing and allow unlawful and obscene content to cover their bulletin boards unfiltered."[79] But, thankfully, Congress intervened.

This is where things start to go awry for NTIA. It cites many cases for the proposition that "ambiguous language . . . allowed some courts to broadly expand section 230's immunity from beyond its original purpose into a bar [on] any legal action or claim that involves even tangentially 'editorial judgement.'"[80] It claims Section 230 "offers immunity from contract[] [claims], consumer fraud, revenge

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[75] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)
[76] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).
[77] *Id.*
[78] *Id.* (emphasis added).
[79] Pet. at 20.
[80] Pet. at 24.

pornography, anti-discrimination civil rights obligations, and even assisting in terrorism."[81] This sounds bad. Fortunately, it's not true.

First, what Section 230 does do is prevent courts from construing content providers, such as Twitter or Facebook, as the speaker of third-party content communicated on their service. It does not immunize Twitter from lawsuits. If Twitter, for example, posted a blog tomorrow that falsely said, "John Smith is a murderer. I saw him do it. -Twitter.com," then Section 230 affords Twitter no protection from a tort suit. Similarly, if John Smith tweeted "the sky is blue" and then, in response, Twitter posted an editorial note that falsely said, "This tweet is a lie. John Smith dyed the sky blood red," Section 230 would not bar Smith from bringing a suit against Twitter for its statements. But if Jane Doe tweeted, "John Smith is a murderer. I saw him do it," then Jane Doe would be the proper defendant, not Twitter. It's pretty straightforward.

The case law reflects this structure. For example, in support of its contention that Section 230 provides "immunity from contract[]" claims, NTIA cites five cases—none of which demonstrate that Section 230 immunizes platforms from contract liability.

- The first case involved a *pro se* complaint that alleged numerous claims, including a breach of contract claim.[82] Several of these claims failed under Section 230 because the plaintiff did not allege "that Facebook actually created,

[81] Pet. at 24–25.
[82] *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016).

developed or posted the content on the suspect account."[83] The word "contract" was *never mentioned by the court* in its Section 230 analysis.[84] The breach of contract claim failed for a reason *entirely unrelated* to Section 230, because "while Facebook's Terms of Service place restrictions on users' behavior, they do not create affirmative obligations."[85]

- The second case did apply Section 230, this time to a claim of a "breach of the covenant of good faith and fair dealing."[86] But this claim was in response to YouTube removing the plaintiff's videos from its channel, a moderation decision by YouTube that is within the purview of Section 230.[87] Importantly, the court held that "Plaintiff fail[ed] to plead any facts to support a reasonable finding that Defendants issued copyright claims, strikes, and blocks in bad faith as part of a conspiracy to steal Plaintiffs' YouTube partner earnings"—claims that required factual support separate from simple moderation.[88] A poorly pled complaint does not mean YouTube has some global "immunity from contracts."

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[83] *Id.* at 1066.
[84] *Id.* at 1064–66.
[85] *Id.* at 1064. (quotation marks omitted) (citing *Young v. Facebook, Inc.*, No. 10-cv-03579, 2010 WL 4269304, at *3 (N.D. Cal. Oct. 25, 2010)). *Young* contains no discussion of Section 230.
[86] *Lancaster v. Alphabet*, No. 15-05299, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016).
[87] *Id.*
[88] *Id.*

- The third case did not allege a breach of contract between the plaintiff and Google.[89] Instead, it dealt with several interference with contract claims, among other claims, such as fraud.[90] The court applied Section 230 and correctly held that Google did not create the ads in question, but merely provided hosting for them on its site.[91] It also found that suggesting keywords was not nearly enough to turn Google into an "information content provider."[92]
- The fourth case, again, related to content not created by the defendant, Facebook, but instead by the plaintiff.[93] The plaintiff was a Russian corporation whose account Facebook shut down because it "allegedly sought to inflame social and political tensions in the United States" and the account was "similar or connected to that of Russian Facebook accounts . . . that were allegedly controlled by the Russia-based Internet Research Agency."[94] By citing this case, does NTIA mean to suggest that Facebook should be liable for shutting down accounts allegedly controlled by Russian disinformation agencies? This is the sort of critical content moderation that Section 230 protects.

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[89] *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010).
[90] *Id.* at 1122–23 ("The purpose of [Section 230] is to encourage open, robust, and creative use of the internet . . . . Ultimately, Defendant's Adwords program simply allows competitors to post their digital fliers where they might be most readily received in the cyber-marketplace.").
[91] *Id.*
[92] *Id.*
[93] *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1304–05 (N.D. Cal. 2019).
[94] *Id.* at 1300.

- The fifth case lacks the word "contract."[95] It does include a "promissory estoppel" claim, but that claim failed because "Plaintiff has not alleged that any such legally enforceable promise was made to remove any content by the Defendants."[96] Instead, the court held that refusal to moderate content is "nothing more than an exercise of a publisher's traditional editorial functions, and is preempted by [Section 230]."[97]

Section 230's protections can of course apply to contract claims when the complained-of behavior is by third parties, not the site itself. And the cases above involved courts faithfully applying Section 230 as Petitioner's own words describe it: to relieve "platforms of the burden of reading millions of messages for defamation as *Stratton Oakmont* would require."[98] These courts adhered strictly to Congress's intent and did not overstep their authority. It is a fiction that "Big Tech" companies are immune from virtually all litigation due to Section 230.[99] Instead, courts have properly stayed within the bounds established by Congress. If, for example, a company contracted with Facebook to create and publish content, and Facebook failed to do so—it could face a suit for breach. Section 230 would have no relevance.

Second, NTIA cites three cases to allege that Section 230 creates "immunity from . . . consumer fraud" claims.[100]

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[95] *Obado v. Magedson*, No. 13-2382, 2014 WL 3778261 (D.N.J., July 31, 2014).
[96] *Id.* at *8.
[97] *Id.*
[98] Pet. at 24.
[99] *See* 47 U.S.C. 230(e).
[100] Pet. at 24.

- The first case is a standard Section 230 case in which a plaintiff sought to hold eBay liable for hosting allegedly fraudulent auctions on its site.[101] eBay did not select the allegedly false product descriptions, nor were the people who did choose them defendants in the action.[102] eBay just hosted them. Section 230 worked as planned. If eBay needed to investigate every single auction posting for any possible allegations of fraud, its business model would break.[103]
- The second case again dealt with products sold on eBay by third-party sellers.[104] The judge, though, made an important point that NTIA should heed: "Plaintiff's public policy arguments, some of which have appeal, *are better addressed to Congress*, who has the *ability to make and change the laws*."[105]
- The third case is currently on appeal before an *en banc* Third Circuit, which is awaiting a response to a certified question to the Pennsylvania Supreme Court on a products liability theory that does not mention Section 230.[106]

These cases do not support the proposition that tech companies are immune from liability for engaging in consumer fraud. For example, if eBay were to draft allegedly fraudulent product descriptions and then sell allegedly fraudulent products *itself*,

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[101] *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).
[102] *Id.* at 832.
[103] *See id.* at 833 (enforcement of state law here would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").
[104] *Hinton v. Arizona.com.dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014).
[105] *Id.* at 692 (emphasis added).
[106] *See* Certification of Question of Law, *Oberdorf v. Amazon.com, Inc.*, No. 18-1041 (3d Cir. June 2, 2020), ECF No. 189. The Third Circuit vacated a prior panel opinion when it granted *en banc* review, so it is unclear what impact Section 230 may ultimately have on this case. *See Oberdorf v. Amazon.com Inc.*, 936 F.3d 182 (3d Cir. 2019).

then it could be liable—and Section 230 would be no impediment to an action. Section 230 does apply to claims of consumer fraud, but only when the claims allege bad behavior by a third party, not the site itself.[107]

Third, an examination of one final case that NTIA relies on deserves special attention because it explains a critical doctrine. NTIA alleges that Section 230 has led to immunity for "assisting in terrorism."[108] In the cited case, the plaintiffs alleged that "Hamas used Facebook to post content that encouraged terrorist attacks in Israel during the time period of the attacks [relevant to] this case."[109] The plaintiffs argued that because Facebook uses algorithms to promote content, that practice rendered it a non-publisher.[110] The Second Circuit rejected that argument, found "no basis [for the claim] in the ordinary meaning of 'publisher,' or the other text of Section 230," and concluded that an "interactive computer service is not the 'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests."[111]

The Second Circuit next considered whether Facebook was itself an "information content provider" or whether Hamas was responsible for the content that allegedly spurred terrorist activity.[112] The court applied its "material contribution" test, asking whether "defendant directly and materially contributed to

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[107] *See, e.g.*, *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).
[108] Pet. at 25.
[109] *Force v. Facebook*, 934 F. 3d 53, 59 (2d Cir. 2019).
[110] *Id*. at 65.
[111] *Id*. at 66.
[112] *Id*. at 68

what made the content itself unlawful."[113] Relying on a D.C. Circuit decision, it held that "a website's display of third-party information does not cross the line into content development."[114] It reasoned that Facebook "does not edit (or suggest edits) for the content that its users—including Hamas—publish."[115] And the algorithms Facebook uses are "neutral" and "based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers."[116] Using these algorithms did not open Facebook to liability.

This case, which NTIA cites to support its petition, is a perfect example of a court easily understanding Section 230 and applying it in a situation Congress intended to cover. If the Court held otherwise—and had the case not failed for other reasons—Facebook would have been expected to monitor *every post made on its site* by its 2.7 billion monthly active users[117] to ensure none of them could be considered to be inciting terrorism anywhere in the world. It would also have been barred from using algorithms to do so, which would leave it virtually unable to use any technology to manage its site. Such a Herculean task that would end Facebook as we know it.

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[113] *Id.*

[114] *Id.* (citing *Marshall's Locksmith Serv. v. Google*, 925 F.3d 1263 (D.C. Cir. 2019). In *Marshall's Locksmith*, the D.C. Circuit held that simply translating information into "textual and pictorial 'pinpoints' on maps . . . did not develop that information (or create new content) because the underlying" data was provided by a third party." *Id.* (citing *Marshall's Locksmith Serv.* at 1269–70).

[115] *Id.* at 70.

[116] *Id.*

[117] Dan Noyes, *The Top 20 Valuable Facebook Statistics – Updated August 2020*, Zephora Digital Marketing (Aug. 2020), *available at* https://bit.ly/34yMKLx.

Contrary to NTIA's contention, these cases track not only the text of the Act, but also what NTIA readily admits was Congress's intent. Any of these cases, had they been decided the other way, would transform Section 230 to require onerous moderation of every product listed, post shared, account created, and video uploaded that would make it virtually impossible to sell products, host social media, or share advertisements. Amazon, for example, may be relegated to selling only its own products, shutting many third-party small businesses and entrepreneurs out of its marketplace.[118] Facebook would have to pre-approve all posts to ensure they do not contain potentially unlawful content. eBay would need to investigate every product listing, including perhaps the physical product itself, to ensure no fraud or danger existed. These are not sustainable business models. Congress knew that, which is why it adopted Section 230. Perhaps NTIA believes Congress was wrong and that these businesses should not exist. If so, NTIA should petition Congress, not the FCC.

B. Section 230 does not provide immunity for a site's *own actions*.

NTIA cites a foundational case in Section 230 jurisprudence, *Zeran v. America Online, Inc.*, and claims it "arguably provides full and complete immunity to the platforms for *their own publications*, editorial decisions, content-moderating, and *affixing of warning or fact-checking statements*."[119] But NTIA references no other authority to support its reading of the case. It fails to cite either a case where a company received Section 230 immunity for *its own publication* or a case where a

[118] It is an open question of whether courts may still find Amazon strictly liable for certain third-party products despite Section 230. This is currently on review in front of the *en banc* Third Circuit. *See supra* n.106.
[119] Pet. at 26.

court has read *Zeran* the way NTIA has. Instead, courts routinely and vigorously evaluate whether the defendant in a case was the publisher itself or was simply hosting third-party content.

Zeran was decided over twenty years ago. If NTIA's interpretation were correct, the natural momentum of precedent would have led to NTIA's parade of horribles by now, or surely at least one case adopting that interpretation. But it hasn't. Instead, cases like a recent Second Circuit decision are typical.[120] The plaintiff there, La Liberte, alleged that Joy Reid, a member of the news media, defamed La Liberte when Ms. Reid "authored and published her own Instagram post . . . which attributed to La Liberte" certain remarks.[121] La Liberte claimed these remarks were defamatory. Ms. Reid, among other defenses, asserted that Section 230 immunized her because she reshared someone else's video, arguing that her post "merely repeated what countless others had previously shared before her[.]"[122] But the Court properly found that Ms. Reid added "commentary" and "went way beyond her earlier retweet . . . in ways that intensified and specified the vile conduct that she was attributing to La Liberte."[123] Reid tried to argue that the Circuit's "material contribution" test, which contrasts between displaying "actionable content and, on the other hand, responsibility *for what makes the displayed content [itself] illegal or actionable*,"[124] should save her. But because "she authored both Posts at issue[,]" she

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[120] *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020).
[121] *Id*. at 89.
[122] *Id*. at 89–90.
[123] *Id*.
[124] *Id*. (quoting and citing *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019)).

is potentially liable.[125] Replace Ms. Reid in this fact pattern with any corporation, such as Twitter, Facebook, or Google, and you would get the same result.

Similarly, in *Federal Trade Commission v. LeadClick Media, LLC,* the Second Circuit found an internet advertising company liable as the company itself engaged in "deceptive acts or practices."[126] Because it directly participated in the deceptive scheme "by recruiting, managing, and paying a network of affiliates to generate consumer traffic through the use of deceptive advertising and allowing the use of deceptive advertising where it had the authority to control the affiliates participating in its network,"[127] Section 230 rightly provided no shelter. That case is no outlier. Both *La Liberte* and *Force* rely on it. Unlike NTIA's purely hypothetical outcomes, courts have shown a willingness and ability to only apply Section 230 protection where Congress intended—and no broader.

C. NTIA misreads the law on the distinction between subsections (c)(1) and (c)(2).

One of NTIA's key claims—and the centerpiece of its petition[128]—is that courts have read subsection (c)(1) to swallow (c)(2) and thus (c)(2) must mean something more than it does. On the back of this claim, NTIA asks the FCC to initiate a rulemaking to redefine (c)(2) in a way that is not only contrary to both the statutory text and congressional intent but will cast a shadow of regulation over the Internet.

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[125] *Id.*
[126] *Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 171 (2d Cir. 2016).
[127] *Id.* at 172.
[128] As Professor Goldman puts it, this is NTIA's "payload." *See* Eric Goldman, Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230 (Aug. 12, 2020), *available at* https://bit.ly/31swytu.

NTIA relies on *Domen v. Vimeo*[129] for the proposition that the two sections "are co-extensive, rather than aimed at very different issues."[130] Thus, according to NTIA, "the court rendered section 230(c)(2) superfluous—reading its regulation of content removal as completely covered by 230(c)(1)'s regulation of liability for user-generated third party content."[131] This is backwards. The *Domen* court expressly held "there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage."[132] It also explained, relying on a Ninth Circuit decision, that "even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue . . . can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable."[133] The proposition that *Domen* stands for is that in some situations one can avail oneself of (c)(2), despite not receiving immunity under (c)(1), and that is why (c)(2) is not surplusage. While *Domen* ultimately found the defendant immune under either subsection—litigants often avail themselves of multiple protections in a statute—it did not hold that the sections were "co-extensive."[134]

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[129] 433 F. Supp. 3d 592 (S.D.N.Y. 2020) (*appeal pending*, No. 20616 (2d Cir.)).
[130] Pet. at 28.
[131] *Id*. at 28–29.
[132] *Domen* at 603.
[133] *Id*. (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009)).
[134] NTIA's misunderstanding of *Domen* also conflicts with its extensive citations to cases holding "that the provisions cover separate issues and 'address different concerns.'" Pet. at 30. And NTIA is only able to cite one case, *e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), to support its contention that courts may be construing (c)(1) overbroadly. The *Domen*

D. NTIA confuses the meaning of subsection (c)(2).

NTIA makes the same error regarding the terms enumerated in subsection (c)(2), claiming that "[u]nderstanding how the section 230(c)(2) litany of terms has proved difficult for courts in determining how spam filtering and filtering for various types of malware fits into the statutory framework."[135] Perhaps NTIA believes courts have struggled with parsing what the words in (c)(2) mean. But this supposition is undermined by NTIA's impressive string cite of courts applying well-worn canons of statutory construction and determining what the law means. There is no support for the idea that courts have "struggled." Yes, courts needed to apply canons to interpret statutes. That is what courts do, and they do so here successfully.

NTIA also claims that, "[a]s the United States Court of Appeals for the Ninth Circuit explains, unless" there is some sort of "good faith limitation" then "immunity might stretch to cover conduct Congress very likely did not intend to immunize."[136] But this quotation is from a concurrence. In a later case, the Ninth Circuit adopted a portion of this concurrence, holding that "'otherwise objectionable' does not include software that the provider finds objectionable for anticompetitive reasons[.]"[137] This

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court explicitly declined to follow this unpublished case, finding it unpersuasive in the face of *Force*. *Domen*, 433 F. Supp. 3d. at 603. But even if *e-ventures* were rightly decided, it deals directly with content moderation of spam, not defamation or other claims relating to publication. *See* 2017 WL 2210029, at *1. And defendants ultimately prevailed there on an alternate ground, the First Amendment, so there was no incentive to appeal. *Id*. at *4.

[135] Pet. at 32.

[136] *Id.* at 38.

[137] *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1045 (9th Cir. 2019).

adheres to Section 230's text and reinforces that courts are not struggling to parse (c)(2). NTIA's proposed redefinition of subsection (c)(2) should be rejected.[138]

E. NTIA misstates the law on "information content providers."

NTIA next turns its eye toward "information content providers," seeking a new definition from the Commission.[139] It concedes that "[n]umerous cases have found that interactive computer service's designs and policies render it an internet content provider, outside of section 230(c)(1)'s protection."[140] This is, of course, true and is well supported. Yet then NTIA confoundingly argues that "the point at which a platform's form and policies are so intertwined with users' so as to render the platform an 'information content provider' is not clear."[141] This is simply not the case—courts consistently engage in clear analysis to determine whether defendants are "information content providers."

Fair Housing Council of San Fernando Valley v. Roommates.com, which NTIA relies on, provides such an example. In *Roommates*, the Ninth Circuit found the defendant could be liable because it provided users "a limited set of pre-populated answers" in response to a set of "unlawful questions" thus becoming "much more than a passive transmitter of information."[142] NTIA argues "this definition has failed to provide clear guidance, with courts struggling to define 'material contribution,'"[143]

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[138] *See* Pet. at 37.
[139] *Id*. at 42.
[140] *Id*. at 40.
[141] *Id*.
[142] *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1166–67 (9th Cir. 2008); Pet. at 40.
[143] Pet. at 40.

citing *People v. Bollaert*[144] as an example of "confusion." But the court in *Bollaert* actually did the opposite, easily holding "that like the Web site in *Roommates*, [the defendant here] forced users to answer a series of questions with the damaging content in order to create an account and post photographs."[145] It also cited a "material contribution" case, finding that the defendant did not fit the definition.[146] There is no sign of a struggle—this is a clear decision that applies precedent.

NTIA also argues that "not all courts accept the material contribution standard,"[147] citing a case that does not address or explicitly reject the "material contribution" standard at all.[148] That case instead is a straightforward inquiry into whether the defendant, Gawker, was responsible for "creating and posting, inducing another to post, or otherwise actively participating in the posting of a defamatory statement in a forum that the company maintains."[149] The Seventh Circuit found that it could be liable[150] because "Gawker itself was an information content provider" including encouraging and inviting users to defame, choreographing the content it received, and employing "individuals who authored at least some of the comments themselves."[151] This is another example of Section 230 working: a company that

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[144] 248 Cal. App. 4th 699, 717 (2016)
[145] *Id*. at 833.
[146] *Id*. at 834.
[147] Pet. at 41.
[148] *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016).
[149] *Id*. at 742.
[150] *Huon* merely reviewed a motion to dismiss, rather than a final judgment. *Id*. at 738.
[151] *Id*. at 742.

allegedly *actively participated* in creating defamatory content faced liability. It was not—as NTIA might argue—magically immune.

NTIA's proposed definition for "information content provider" differs from the statute and is unnecessary given courts' application of the law as written.

F. NTIA wrongly argues that "publisher or speaker" is undefined.

Finally, NTIA argues that "the ambiguous term 'treated as publisher or speaker' is a fundamental question for interpreting that courts in general have not addressed squarely."[152] But as both the cases NTIA cites and this comment demonstrate, courts have had no difficulty defining these terms. And, not surprisingly, NTIA cites no authority to back up this statement. Instead, NTIA enumerates a list of grievances about moderation decisions, implying the current state of the law holds that "content-moderating can never, no matter how extreme or arbitrary, become editorializing that no longer remains the 'speech of another,'" and thus subsection (c)(2) will be swallowed whole.[153] Of course, as the spam cases and others show—and NTIA itself details—this is not the case. And one can easily imagine a situation when Section 230 would not provide immunity on a bad faith content moderation decision. Imagine, for example, that John Smith tweeted "I am not a murderer." Then, a Twitter moderator places a flag on John Smith's post that reads, "False: Smith is a murderer." This creates new content, deliberately misrepresents reality, and is done in bad faith. This would be actionable, and Section 230 would provide Twitter with no relief. For these reasons, NTIA's proposed

[152] Pet. at 42.
[153] *Id*. at 43.

redefinition of Section 230(f)(2) is both unnecessary and unlawful. It should be rejected.[154]

G. Studies show that NTIA's view of the law is flawed.

This Commission need not look only to the cases described above. The Internet Association recently did a survey of over 500 Section 230 lawsuits.[155] The Association's thorough report had some important key findings:

- A wide cross-section of individuals and entities rely on Section 230.
- Section 230 immunity was the primary basis for a court's decision in only forty-two percent of decisions reviewed.
- A significant number of claims in the decisions failed without application of Section 230 because courts determined that they lacked merit or dismissed them for other reasons.
- Forty-three percent of decisions' core claims related to allegations of defamation, just like in the *Stratton Oakmont v. Prodigy Services* case that spurred the passage of Section 230.[156]

The Internet Association's "review found that, far from acting as a 'blanket immunity,' most courts conducted a careful analysis of the allegations in the complaint, and/or of the facts developed through discovery, to determine whether or not Section 230 should apply."[157] While the report did find that subsection (c)(2) is

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[154] *See id*. at 46.
[155] Elizabeth Banker, A Review of Section 230's Meaning & Application Based On More Than 500 Cases, Internet Association (July 7, 2020) [hereinafter "Association Report"], *available at* https://bit.ly/3b7NlFD.
[156] *Id.* at 2.
[157] *Id*. at 6 (citing *Gen. Steel v. Chumley*, 840 F.3d 1178 (10th Cir. 2016); *Samsel v. DeSoto Cty. School Dist.*, 242 F. Supp.3d 496 (N.D. Miss. 2017); *Pirozzi v. Apple*, 913 F. Supp. 2d 840 (N.D. Cal. 2012); *Cornelius v. Delca*, 709 F. Supp. 2d 1003 (D. Idaho 2010); *Best Western v. Furber*, No. 06-1537 (D. Ariz. Sept. 5, 2008); *Energy Automation Sys. v. Xcentric Ventures*, No. 06-1079, 2007 WL 1557202 (M.D. Tenn.

used in a small minority of Section 230 cases, "the vast majority involved disputes over provider efforts to block spam."[158] And it added that "another reason" (c)(2) cases are limited is "that many of those lawsuits are based on assertions that the provider has violated the First Amendment rights of the user whose content was removed, but the First Amendment only applies to government actors."[159] The Commission should consider and incorporate the Internet Association's report in its decisionmaking.

III. NITA's request for transparency rules would require the FCC to classify social media as information services, which is outside the boundaries of the petition.

At the end of its petition, NTIA argues that social media services are "information services" and asks the FCC to impose disclosure requirements on them.[160] But the FCC has previously declined to classify edge services, including social media services, as information services: "[W]e need not and do not address with greater specificity the specific category or categories into which particular edge services fall."[161] NTIA's petition never actually requests that the FCC classify social media as an information service—it just asks for disclosure requirements. And, critically, this docket lists the "Nature of Petition" as "Clarify provisions of Section 230 of the Communications Act of 1934, as amended."[162] It would be legally

May. 25, 2007); *Hy Cite v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142 (D. Ariz. 2005)).

[158] *Id*. at 3.

[159] *Id*. at 3.

[160] Pet. at 47.

[161] RIFO at 137 n.849.

[162] Fed. Commc'ns Comm'n, Report No. 3157, RM No. 11862 (Aug. 3, 2020).

momentous and beyond the scope of this proceeding for the FCC to determine the regulatory classification of social media services and potentially other edge providers.

Furthermore, NTIA erroneously argues that "Section 230(f)(2) "explicitly classifies 'interactive computer services' as 'information services[.]'"[163] What the statute says, instead, is "[t]he term 'interactive computer services' means any information service, system, or access software provider[.]" 47 U.S.C. 230(f)(3). Thus, one can be an "interactive computer service" but not an "information service." NTIA's definition is like saying "all apples are red" and turning it into "all red things are apples." Therefore, the FCC must engage in new action to render this classification. Such a decision should be noticed properly and not be decided in response to a petition that fails to request it.

IV. There is no statutory authority for NTIA to petition the FCC.

In its petition, NTIA invoked an FCC regulation that allows "[a]ny interested person [to] petition for the issuance, amendment or repeal of a rule or regulation."[164] Correspondingly, the FCC opened this rulemaking by citing Sections 1.4 and 1.405 of its rules. But NTIA is not an "interested person" and therefore cannot petition the FCC as it has sought to do. The FCC should reject the petition on this basis alone.

The term "interested person" is not defined in Chapter I of Title 47 of the Code of Federal Regulations. In its 1963 reorganization and revision of its regulatory code, the FCC cited the original 1946 Administrative Procedure Act ("APA") as the basis of

[163] Pet. at 47.
[164] Pet. at 1 (citing 47 C.F.R. § 1.401(a)).

authority for Section 1.401(a) and its petition-for-rulemaking process.[165] The original Section 4(d) of the APA, now codified at 5. U.S.C. § 553(e), requires that "[e]very agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."[166] While the APA did not, and still does not, define "interested person," it did define "person" as "individuals, partnerships, corporations, associations, or public or private organizations . . . *other than agencies*."[167] This term is contrasted with the definition of a "party," which explicitly *includes* agencies.[168]

NTIA is an Executive Branch agency within the Department of Commerce and an "agency" under the APA.[169] Agencies cannot be a "person" or "interested person" under the statute. Because it is not an "interested person," NTIA cannot petition an agency for a rule. And because the FCC based its petitioning process on the APA and has identified no source for a more expansive definition of the term "interested person,"[170] NTIA's attempted petition on Section 230 is a legal nullity. The FCC has no obligation to respond to it.

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[165] *See* Reorganization and Revision of Chapter, 28 Fed. Reg. 12386, 12432 (Nov. 22, 1963) (citing "sec. 4, 60 Stat. 238; 5 U.S.C. 1003" as the basis of its authority).
[166] *See* 60 Stat. 238; *see also* 5 U.S.C. § 553(e).
[167] Sec. 2(b), 60 Stat. 238; 5 U.S.C. § 551(2) (emphasis added).
[168] Sec. 2(b), 60 Stat. 238; 5 U.S.C. § 551(3) ("'Party' includes any person or agency . . .").
[169] *See* Our Mission, ntia.doc.gov (last accessed Aug. 14, 2020); 47 U.S.C. § 901 (NTIA, "an agency in the Department of Commerce"); Sec. 2(a), 60 Stat. 238; 5 U.S.C. § 551(1) (defining "agency").
[170] The FCC rulemaking procedure is governed by the APA. See, e.g., *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1115 (D.C. Cir. 2019).

V. This petition is bad policy.

A recent book, arguably the definitive history of Section 230, refers to it as "The Twenty-Six Words that Created the Internet."[171] Without Section 230, the Internet as we know it today may not exist. Throughout this comment, hypotheticals, real-life situations, and other policy arguments show that the disappearance of Section 230 would imperil internet providers, hurt small businesses, and restrain innovation. But it would do more than that by chilling participation in the public square, both commercial and purely communicative.

A. Granting the petition will harm free expression.

People have many online forums available to express themselves. If NTIA attains its goal, these forums will change dramatically. Due to the risk of litigation, platforms would begin to engage in severe content moderation. Rather than erring to the side of speech, they may err to the side of caution, removing any content that could potentially trigger a lawsuit. This moderation comes at a cost, not only to pay moderators but also for a legal budget to deal with litigation, even if it meritless.

Thus, no longer would citizens have virtually free access to commenting on politicians, such as the President. No longer would journalists be able to easily promote their work on social media—all claims would need to be independently vetted by the social media network itself, making it near impossible to distribute news. And no longer would sites be willing—or able—to allow third parties, such as bloggers, journalists, or others, to promote content without fear of retribution. And ultimately,

[171] Jeff Kosseff, The Twenty-Six Words That Created the Internet (1st ed. 2019).

all this will do is further consolidate the market. Legal and compliance requirements create massive barriers to entry, further entrenching existing "Big Tech" companies and making it near impossible for small entrepreneurs to compete.[172]

B. Granting the petition will harm commerce and entrepreneurship.

Granting the petition would also significantly impact online commerce. Sites like Amazon, Etsy, and eBay may need to stop providing third-party products that are not first thoroughly vetted. The costs of internet advertising would skyrocket, as each ad would require detailed review by the placement company.[173] No longer would small businesses and entrepreneurs be able to advertise, promote, and sell their products online.[174] As Representative Cox wrote, "[w]ithout Section 230, millions of American websites—facing unlimited liability for what their users create—would not be able to host user-generated content at all."[175]

C. NTIA's petition is anti-free market.

What NTIA demands would harm the free market. It attacks small businesses, innovators, and entrepreneurs. As President Ronald Reagan once remarked:

> Too often, entrepreneurs are forgotten heroes. We rarely hear about them. But look into the heart of America, and you'll see them. They're the owners of that store down the street, the faithfuls who support our churches, schools, and communities, the brave people everywhere who produce our goods, feed a hungry world, and keep our homes and

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[172] *See generally* Statement of Neil Chilson, U.S. Dep't of Justice Workshop: Section 230 – Nurturing Innovation or Fostering Unaccountability? (Feb. 19, 2020), *available at* https://bit.ly/32tfZNc.

[173] This is assuming that it would even be possible to conduct such a review as different people have different opinions and experiences with products—hence the popularity of third-party "review" functionality.

[174] *See generally* Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* (June 5, 2017), *available at* https://bit.ly/2Eyv5sy.

[175] Cox Testimony at 2.

> families warm while they invest in the future to build a better America.[176]

NTIA's proposal threatens all of that because it may disagree—whether rightly or wrongly—with certain "Big Tech" business decisions. But the answer is not government regulation. The answer is not the courts. The answer is America and her free market principles.[177] As Milton Friedman argued, the free market "gives people what they want instead of *what a particular group thinks they ought to want*."[178] NTIA does not speak for the consumer, the consumer does. "Underlying most arguments against the free market is the lack of belief in freedom itself."[179] Although Friedman conceded the need for some government, he maintained that "[t]he characteristic feature of action through political channels is that it tends to require or enforce substantial conformity."[180] He warned that "economic freedom" is threatened by "the power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority."[181] Or a federal agency. As Chairman Pai wrote, we do not want a government that is "in the business of picking winners and losers in the internet economy. We should have a level playing field and let consumers

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[176] Ronald Reagan, Radio Address to the Nation on Small Business (May 14, 1983), *available at* https://bit.ly/31oDYOq.
[177] *See, e.g.*, Diane Katz, *Free Enterprise is the Best Remedy for Online Bias Concerns*, Heritage Found. (Nov. 19, 2019), *available at* https://herit.ag/2YxFImC.
[178] *Milton Friedman: In His Own Words* (Nov. 16, 2006), *available at* https://on.wsj.com/34yjVPw (emphasis added).
[179] *Id.*
[180] *Id.*
[181] *Id.*

decide who prevails."[182] President Reagan warned that "[t]he whole idea is to trust people. Countries that don't[,] like the U.S.S.R. and Cuba, will never prosper."[183]

These words may seem drastic, perhaps not fit for the subject of this comment. But they are. Should this Commission adopt NTIA's rule, the impact on American entrepreneurship would be extreme. What NTIA seeks would cripple one of humanity's greatest innovations, the Internet and the technology sector. "In contrast to other nations, in the United States the government does not dictate what can be published on the internet and who can publish it."[184] Yet NTIA would risk this because they do not like how some corporations have moderated things in the past few years.[185] The FCC should not fall prey to this thinking—the stakes are too high.

VI. Granting NTIA's petition would threaten the success of the Commission's Restoring Internet Freedom Order.

The Commission's Restoring Internet Freedom Order ("RIFO") took an important step by re-establishing the FCC's devotion to using a "light touch" style of regulation on internet service providers, returning "Internet traffic exchange to the longstanding free market framework under which the Internet grew and flourished for decades."[186] While there is no question pending before the FCC on classifying social media sites under Title II, what NTIA's petition does ask for—unlawful Section 230 rules—may have same effect by imposing heavy-handed content regulation. As the Commission stated in RIFO, "The Internet thrived for decades under the light-

[182] RIFO at 222 (Statement of Chairman Ajit Pai).
[183] Reagan, *supra* n.176.
[184] Cox Testimony at 2.
[185] *See* Exec. Order on Preventing Online Censorship, 85 Fed. Reg. 34079 (2020).
[186] RIFO at 99.

touch regulatory regime" noting that "[e]dge providers have been able to disrupt a multitude of markets—finance, transportation, education, music, video distribution, *social media*, health and fitness, and many more—through innovation[.]"[187]

Following RIFO's precedent, the Commission should hold here that it does "not believe hypothetical harms, unsupported by empirical data, economic theory, or even recent anecdotes, provide a basis for . . . regulation[.]"[188] The free market does a much better job, particularly because providers realize "that their businesses depend on their customers' demand for edge content."[189] Furthermore, when contemplating RIFO, the Commission held it was "not persuaded that Section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here."[190] Specifically, it found "requirements that would impose federal regulation on broadband Internet services would be in tension" with the policy of Section 230(b)(2).[191] If that is the case for broadband Internet services—classified as information services—then it must be doubly so for edge providers.[192] Thus, to grant NTIA's petition here could not only jeopardize the economic and legal reasoning undergirding the RIFO decision, but it may also start the FCC on a path back to the Fairness Doctrine, a failed approach that enabled government control of speech.[193]

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[187] *Id*. at 65 (emphasis added).
[188] *Id*. at 68.
[189] *Id*. at 69.
[190] *Id*. at 161.
[191] *Id*. at 171.
[192] Edge providers are not currently classified as "information services" nor is that an appropriate consideration for this petition. *See supra* at § III.
[193] *See Red Lion Broadcasting Co. v. Fed Commc'ns Comm'n*, 395 U.S. 367 (1969).

As Chairman Pai wrote, "[t]he Internet is the greatest free-market innovation in history. It has changed the way we live, play, work, learn, and speak."[194] And "[w]hat is responsible for the phenomenal development of the Internet? It certainly wasn't heavy-handed government regulation."[195] Innovators need room to take risks, create new products, and test out consumer interests—as they have for decades. "In a free market of permissionless innovation, online services blossomed."[196] This includes many of the critical commerce and social media platforms targeted by NTIA's order. And now NTIA asks this Commission to step in with "heavy-handed micromanagement."[197] But as this Commission well knows, "[e]ntrepreneuers and innovators guided the Internet far better than the clumsy hand of government ever could have."[198] The Internet should be "driven by engineers and entrepreneurs and consumers, rather than lawyers and accountants and bureaucrats."[199] Instead of limiting consumers through the wolves of litigation and regulation, "[w]e need to empower all Americans with digital opportunity [and] not deny them the benefits of greater access and competition."[200] This Commission took a critical step in empowering free market participants—both creators and consumers—through RIFO. It should not imperil all of that now on the back of this meritless Petition.

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[194] *Id.* at 219 (Statement of Chairman Ajit Pai).
[195] *Id.*
[196] *Id.* (listing the many accomplishments of Internet innovation).
[197] *Id.*
[198] *Id.*
[199] *Id.* at 22.
[200] *Id.* at 220.

Conclusion

For all the above reasons, the Commission should reject NTIA's petition.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September 2020, a copy of the foregoing comments was served via First Class Mail upon:

Douglas Kinkoph
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Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

/s/ Eric R. Bolinder

ERIC R. BOLINDER
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A Modest Proposal to Pare Back Section 230 Immunity

The purpose of Section 230 of the Communications Decency Act of 1996 was to immunize online service providers from liability when posting third-party content: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by *another* information content provider." *See* 47 U.S.C. § 230 (emphasis added).

As the Electronic Frontier Foundation (EFF) describes it, Section 230 is "one of the most valuable tools for protecting freedom of expression and innovation on the Internet." If the tech platforms were exposed to liability for third-party content, the logic goes, they would be forced to engage in a level of censorship that many would find objectionable. Small platforms might even shut down to limit their legal risk. EFF credits Section 230 for making the United States a "safe haven" that induces the "most prominent online services" to locate here. Indeed, U.S. online platforms have thrived, relative to their foreign counterparts, at least in part due to the protections from Section 230.

The protected intermediaries under Section 230 include Internet Service Providers (ISPs), as well as "interactive computer service providers," or what are now understood as tech platforms such as Facebook and Twitter (hosting third-party micro-bloggers), Google (hosting third-party content), YouTube (hosting third-party videos), and Amazon (hosting third-party reviews and merchandise).

The Concerns with Unbounded Section 230 Protections

In the last few years, Section 230 has come under fire from multiple political factions as being a tool for the largest platform companies to evade regulation writ large. Left-leaning politicians blame Section 230 for enabling misinformation (from Covid-19 to voting rights) and hate speech. And Senator Josh Hawley (R-MO) offered legislation that extends Section 230 protections only to platforms "operating in good faith," defined as not selectively enforcing terms of service or acting dishonestly.

Current laws shield Amazon from liability when experimental products end up killing or hurting Amazon.com shoppers. A Texas judge recently ruled that Amazon could not be held liable for failing to warn shoppers that a knockoff Apple TV remote control lacked a childproof seal on the battery compartment, which resulted in injury to at least one customer's child who swallowed the battery. That the product description came from a third-party Chinese vendor gave Amazon immunity under Section 230, despite the fact that Amazon may have recruited the low-cost supplier to its platform.

As noted by *American Prospect* editor David Dayen, Section 230 is "being extended by companies like Airbnb (claiming the home rentals of their users are 'third-party content') and Amazon (the same for the product sold by third parties on their marketplace) in ways that are downright dangerous, subverting consumer

protection and safety laws." Dayen proposes tying Section 230 protection to the banning of targeted advertising, "in the hopes that eliminating a click-bait business model would make hosting valuable content the only path to success." George Washington Law Professor Spencer Overton argues that Congress should explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting, especially those aimed to suppress voting by Black Americans.

The Justice Department has proposed to limit Section 230 immunity if platforms violate free speech rights, "facilitate" violations of federal law or show "reckless disregard" to such violations happening on their sites.

Thwarting Congressional Intent

Implicit from the plain language of the statute is that the liability protections do not pertain when the online service provider offers its own content; else the phrase "another information content provider" serves no purpose.

By vertically integrating into content, and still claiming the liability shield of Section 230, the tech platforms have thwarted the original intent of Congress—not being held liable for content generated by "another information content provider." When the legislation was drafted in 1996, the tech platforms had not yet integrated into adjacent content markets, which likely explains why the statute is silent on the issue of content generated by the platform itself. In the 1990s, and even late into the 2000s, the tech platforms offered to steer users to the best content and then, in the infamous words of Google's Larry Page, "get out of the way and just let you get your work done."

Only in the past decade have platforms begun to leverage their platform power into the "edge" of their networks. For example, Google figured out that delivering clicks to third-party content providers was not as profitable as steering those clicks to Google-affiliated properties. According to a Yelp complaint filed with the European Commission in 2018, Google's local search tools, such as business listings and reviews from Google Maps, receive top billing in results while links to Yelp and other independent sources of potentially more helpful information are listed much lower. Because local queries account for approximately one third of all search traffic, Google has strong incentives to keep people within its search engine, where it can sell ads.

Google is not the only dominant tech platform to enter adjacent content markets. Amazon recently launched its own private-label products, often by cloning an independent merchant's wares and then steering users to the affiliated clone. Apple sells its own apps against independent app developers in the App Store, also benefitting from self-preferencing. And Facebook has allegedly appropriated app functionality, often during acquisition talks with independent developers. Facebook also integrated into news content via its Instant Articles program, by forcing news

publishers to port their content to Facebook's website, else face degraded download speeds. News publishers can avoid this degradation by complying with Facebook's porting requirement, but at a cost of losing clicks (that would have occurred on their own sites) and thus advertising dollars.

After holding hearings this summer, the House Antitrust Subcommittee is set to issue a report to address self-preferencing by the tech platforms. There are strong policy reasons for intervening here, including the threat posed to edge innovation as well as the limited scope of antitrust laws under the consumer-welfare standard. Among the potential remedies, there are two approaches being considered. Congress could impose a line-of-business restriction, along the lines of the 1933 Glass-Steagall Act, forcing the platforms to divest any holdings or operations in the edges of their platforms. This remedy is often referred to as "structural separation" or "breaking up the platform," and it is embraced by Senator Warren (D-MA) as well as Open Markets, a prominent think tank. Alternatively, Congress could tolerate vertical integration by the platforms, but subject self-preferencing to a nondiscrimination standard on a case-by-case basis. This remedy is fashioned after Section 616 of the 1992 Cable Act, and has been embraced in some form by the Stigler Center, Public Knowledge and former Senator Al Franken.

Tying Section 230 Immunity to Structural Separation

Consistent with this policy concern, and with the plain language of Section 230, the Federal Communications Commission (FCC) could issue an order clarifying that Section 230 immunity only applies when online service providers are carrying third-party content, but does not apply when online service providers are carrying their content.

As a practical matter, this clarification would have no effect on platforms such as Twitter or WhatsApp that do not carry their own content. In contrast, integrated platforms that carry their own content, or carry their own content plus third-party content, could only invoke Section 230 immunity with respect to their third-party content. This light-touch approach would not prevent Amazon, for example, from invoking Section 230 immunity when it sells a dangerous Chinese product.

An alternative and more aggressive approach would be to revoke 230 immunity for *any* content offered by an integrated online service provider. Under this approach, vertically integrated platforms such as Amazon and Google could retain Section 230 immunity only by divesting their operations in the edges of their platforms. Vertically integrated platforms that elect not to divest their edge operations would lose Section 230 immunity. The same choice—integration or immunity—would be presented to vertically integrated ISPs such as Comcast. This proposal could be understood as a tax on integration. Such a tax could be desirable because private platforms, especially those with market power such as Amazon and Facebook, do not take into account the social costs from lost edge innovation that results from self-preferencing and cloning.

The ideal regulatory environment would apply equally to all platforms—regardless of whether they operate physical infrastructure or virtual platforms—so as to eliminate any distortions in investment activity that come about from regulatory arbitrage. Under the current regulatory asymmetry, however, cable operators are subject to nondiscrimination standards when it comes to carrying independent cable networks, while Amazon is free to block HBO Max from Amazon's Fire TV Cube and Fire TV Stick, or from Amazon's Prime Video Channels platform. These issues deserve more attention and analysis than is presented here.

It's clear the original purpose of Section 230 is no longer being served, and the law is instead being exploited by the online platforms to maintain their immunity and to thwart any attempts to regulate them.

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CENTER FOR DEMOCRACY & TECHNOLOGY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	**)**	**RM-11862**
Section 230 of the Communications Act	**)**	
	)	

Comments of the Center for Democracy & Technology
Opposing the National Telecommunications and Information Administration's
Petition for Rulemaking

August 31, 2020

Introduction

This petition is the product of an unconstitutional Executive Order that seeks to use the FCC as a partisan weapon. The petition, and the Order, attack the constitutionally protected right of social media services to moderate content on their platforms, limiting those services' ability to respond to misinformation and voter suppression in an election year, and depriving their users of access to information and of access to services that operate free from government coercion. Any one of the constitutional, statutory, and policy deficiencies in the NTIA's petition requires that the FCC reject it without further consideration.

CDT's comments focus on three key issues: the unconstitutionality of the Order itself, the FCC's lack of authority to do what the petition asks, and the petition's fundamental errors about the key issue it purports to request action on: content moderation. These issues are fatal to the petition, and, as such, the FCC should reject it. To do otherwise is to act contrary to the Constitution of the United States and especially to the principles of free speech which it enshrines.

CENTER FOR DEMOCRACY & TECHNOLOGY

1. **The FCC should dismiss the NTIA petition because it is unconstitutional, stemming from an unconstitutional Executive Order**

The petition is the result of an unconstitutional attempt by the President to regulate speech through threats and retaliation. Social media services have a constitutionally protected right to respond to hate speech, incitement, misinformation, and coordinated disinformation efforts on their platforms. The President seeks to embroil the FCC in a political effort to coerce social media companies into moderating user-generated content only as the President sees fit. The FCC should reject this unconstitutional and partisan effort in its entirety.

As CDT alleges in our lawsuit challenging the Order for its violation of the First Amendment,[1] the Order seeks to retaliate directly against social media companies that have moderated and commented upon President Trump's own speech. The Order names specific media companies that have, consistent with their community guidelines regarding election-related misinformation, appended messages to the President's misleading tweets linking to accurate third-party information about mail-in voting.[2] The Order directs several federal agencies to begin proceedings with the goal of increasing the liability risk that intermediaries face for such actions.

These threats of liability chill online intermediaries' willingness to engage in fact-checking and other efforts to combat misinformation–and indeed, to host controversial user speech at all. To host users' speech without fear of ruinous lawsuits over illegal material, intermediaries depend on a clear and stable legal framework that establishes the limited circumstances in which they could be held liable for illegal material posted by third-parties. Section 230 has provided just such a stable framework, on which intermediaries rely, since it was enacted by Congress in 1996. Courts have consistently interpreted and applied Section 230, in accordance with their constitutional function to interpret the law.

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[1] Complaint, *Center for Democracy & Technology v. Donald J. Trump* (D.D.C. 2020), *available at* https://cdt.org/wp-content/uploads/2020/06/1-2020-cv-01456-0001-COMPLAINT-against-DONALD-J-TRUMP-filed-by-CENTER-FO-et-seq.pdf.

[2] For example, the Order is framed in part as a response to Twitter's own speech that was appended to President Trump's May 26, 2020, tweet. The Order states President Trump's view that his tweets are being selectively targeted: "Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias." https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[3] Threatening unilateral and capricious changes to the structure and function of Section 230 directly threatens intermediaries' ability and willingness to host people's speech, and to respond to misinformation and other potentially harmful content consistent with their community guidelines.

The President's unconstitutional desire to chill speech is clear in the Order itself, and the NTIA's petition clearly aims to advance that goal. For example, the NTIA proposes that the FCC effectively rewrite Section 230 to deny its liability shield to any intermediary that is "...commenting upon, or editorializing about content provided by another information content provider."[4] This perhaps reflects a fundamental misunderstanding of the law: intermediaries have never been shielded from liability under Section 230 for content that they directly create and provide–that is, where they are the information content provider. But the sort of content explicitly targeted by the Order–accurate information about the security and integrity of voting systems–could not credibly be considered illegal itself. Thus, the Order, and now the NTIA petition, seek to suppress that kind of information by revoking intermediaries' Section 230 protection for hosting *user-generated content*, solely on the basis that the intermediary has also posted its own lawful speech.

In practice, this would mean that any fact-checking or independent commentary that an intermediary engages in would also expose it to potential liability for defamation, harassment, privacy torts, or any other legal claim that could arise out of the associated user-generated content. It would be trivially easy for bad actors intent on sowing misinformation about the upcoming election, for example, to pair whatever inaccurate information they sought to peddle with inflammatory false statements about a person, or harassing commentary, or publication of their personal information. Intermediaries would face the difficult choice of staying silent (and letting several kinds of abuse go unaddressed, including lies about how to vote) or speaking out with accurate information and also exposing themselves to lawsuits as an entity "responsible, in whole or in part, for the creation or development of" illegal content that they are specifically seeking to refute.

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[3] *See, e.g., Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–93 (N.D. Cal. 2015); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Green v. America Online,* 318 F.3d 465, 470-71 (3d Cir. 2003).

[4] National Telecommunications & Information Administration, *Petition for Rulemaking of the NTIA* (July 27, 2020), 42, *available at* https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "Petition").

The Order's efforts to destabilize the Section 230 framework, and thus coerce intermediaries into editorial practices favorable to the President, violate the First Amendment. The First Amendment prohibits the President from retaliating against individuals or entities for engaging in speech.[5] Government power also may not be used with the intent or effect of chilling protected speech,[6] either directly or by threatening intermediaries.[7]

The Order has other constitutional deficiencies. It runs roughshod over the separation of powers required by the Constitution: Congress writes laws, and courts–not independent agencies– interpret them. Congress may, of course, delegate rulemaking authority to the FCC, but, as discussed below, it has not done so here.[8]

The FCC should not be drawn any further into the President's unconstitutional campaign to dictate the editorial practices of the private online service providers that host individuals' online speech. Although it is couched in the language of free speech, the petition would have the Commission regulate the speech of platforms, and by extension, the speech to which internet users have access. The FCC should deny this petition.

[5] *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.") (internal citations omitted).

[6] "Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment." *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (citing *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 794 (1988)).

[7] *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" constitutes "informal censorship" that violates the First Amendment).

[8] *See* Harold Feld, *Could the FCC Regulate Social Media Under Section 230? No.* Public Knowledge, (August 14, 2019) https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/.

2. Even if it were not constitutionally infirm, the FCC should dismiss the NTIA petition because the FCC has no statutory authority to "clarify" Section 230.

a. The text and structure of Section 230 require no agency implementation.

Section 230 is entirely self-executing. There is nothing in the statute requiring agency implementation: no directions to the FCC, not even a mention of the FCC or any other regulatory agency. Instead, the statute is a clear statement of how courts should treat intermediaries when they face claims based on content provided by users. Beyond its unconstitutional origin, the NTIA's petition asks the Commission to do something Congress did not authorize: to interpret the meaning of a provision giving explicit instructions to courts. That the NTIA asks the Commission to act on Section 230 by issuing regulations also conflicts with the statute's statement that the policy of the United States is to preserve the open market of the internet, unfettered by federal regulation.[9] The Commission has cited this provision as potential support for its deregulatory actions regarding net neutrality, as demonstrated in the Restoring Internet Freedom docket.[10] It would be wildly contradictory and inconsistent for the FCC to suggest that it now has authority to issue rules under the very statute it said previously should leave the internet "unfettered" from regulation. The Commission should decline to take any further action on this petition.

b. Nothing in the Communications Act authorizes the FCC to reimagine the meaning or structure of Section 230.

The petition says the FCC has authority where it does not. It tries to draw a false equivalence between other statutory provisions under Title II (47 U.S.C. §§ 251, 252, and 332), claiming that because the FCC has authority to conduct rulemakings addressing those provisions, it must also be able to do so to "implement" Section 230.[11] But the petition mischaracterizes the nature of those provisions and the extent of the FCC's authority under Section 201.

[9] 47 U.S.C. 230(b)(2).
[10] In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4467 (2017).
[11] Petition at 17.

First, Section 201 gives the FCC broad power to regulate telecommunications services.[12] This part of the Act is titled "Common carrier regulation," while the Executive Order is about an entirely different set of companies, the "interactive computer services" who moderate content as intermediaries. Because the FCC's authority under Section 201 pertains only to common carriers, the FCC's authority to "implement" Section 230 must then either be limited to Section 230's impact on common carriers, or dismissed as a misunderstanding of the scope of FCC authority under Section 201.

Second, all three of the other provisions cited by the NTIA to support its theory of FCC authority directly address common carriers, not intermediaries that host user-generated content.[13] Therefore, the Commission's authority to conduct rulemakings to address these Sections (332, 251, 252) derives from Section 201's broad grant of authority to implement the act ***for the regulation of common carriers***. But Section 230 has nothing to do with telecommunications services or common carriers.[14]

Unlike these other provisions, Section 230 does not even mention the FCC. This omission is not accidental–as discussed above, there is simply nothing in Section 230 that asks or authorizes the FCC to act. A rulemaking to "clarify" the statute is plainly inconsistent with what Congress has written into law.

Moreover, the NTIA takes a particularly expansive view of Congressional delegation to agencies that also misrepresents the role of statutory "ambiguity" in an agency's authority. The NTIA claims the Commission has authority because Congress did not explicitly foreclose the FCC's power to issue regulations interpreting Section 230. But an assessment of agency authority begins with the opposite presumption: that Congress meant only what it said. Agencies only have the authority explicitly granted by statute, unless ambiguity warrants agency action. No such ambiguity exists here, as reflected by decades of consistent judicial interpretation.[15]

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[12] 47 U.S.C. § 201.
[13] 47 U.S.C. § 251 sets out the duties and obligations of telecommunications carriers; 47 U.S.C. § 252 describes procedures for negotiation, arbitration, and approval of agreements between telecommunications carriers; 47 U.S.C. § 332(c) prescribes common carrier treatment for providers of commercial mobile services.
[14] 47 U.S.C. § 230. The statute addresses only "interactive computer services" and "information services," which may not be treated as common carriers according to *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[15] *See* footnote 3.

For the FCC to determine it has authority here, it must first ignore the intent of Congress and then contradict the Chairman's own approach toward congressional delegation. Chairman Pai has said that, when Congress wants the FCC to weigh in, it says so. "*Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (e.g., "[t]he Commission shall prescribe regulations to implement the requirements of this subsection" or "the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section"), and it has done so more generally (e.g., "[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e Communications] Act"). Congress did not do either in section 706.*"[16] Although we disagree with the Chairman's assessment with respect to Section 706 (which says "the Commission shall...take immediate action to promote deployment...by promoting competition,") the Commission cannot now take the opposite approach and find that it has authority in a provision that contains no instructions (or even references) to the Commission.[17]

Make no mistake, rewriting the statute is exactly what the petition (and the Executive Order) seek, but the FCC should reject this unconstitutional effort.

c. The FCC has disavowed its own authority to regulate information services.

"*We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here*." Restoring Internet Freedom Order at para. 267.

The FCC has disavowed its ability and desire to regulate the speech of private companies, in part basing its policy justifications for internet deregulation on this rationale.[18] Moreover, it recently revoked its own rules preventing internet service providers from exercising their power as gatekeepers through such acts as blocking, slowing, or giving preferential treatment to specific content, on the rationale that

[16] Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5971 (2015).
[17] 47 U.S.C. 1302(b).
[18] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order* (hereinafter, "RIF Order"), 33 FCC Rcd 311, paras. 1-2 (2018).

internet service providers are "information services" whom the FCC cannot regulate in this way.[19] While CDT fundamentally disagrees with the Commission's characterization of internet service providers as "information services,"[20] the Commission cannot have it both ways. It would be absurd for the FCC to claim regulatory authority over intermediaries of user-generated content when it has said repeatedly that it lacks regulatory authority over providers of internet access. The FCC has never claimed regulatory authority over the content policies of social media services or other edge providers, and NTIA's attempt to force this inconsistency flies in the face of agency precedent and common sense.

3. The FCC should dismiss the NTIA petition because the petition is fundamentally incorrect on the facts.

If the constitutional and statutory authority problems were not enough to warrant dismissal of this petition–which they are–the factual errors in the NTIA's petition reflect a fundamental misunderstanding of the operation of content moderation at scale. This is yet another reason to reject the petition.

As an example, the petition states that "[W]ith artificial intelligence and automated methods of textual analysis to flag harmful content now available ... platforms no longer need to manually review each individual post but can review, at much lower cost, millions of posts."[21] It goes on to argue that, because some social media companies employ some automation in their content moderation systems, the entire rationale for Section 230 has changed.[22] This is wrong. "Artificial intelligence" is a general concept that does not describe concrete technologies currently in use in content moderation. Some providers may use automated systems that employ relatively simple technology, like keyword filters, to help screen out unwanted terms and phrases, but such filters are notoriously easy to circumvent and lack any kind of

[19] RIF Order, 33 FCC Rcd at 407-08, para 161.
[20] In the matter of Restoring Internet Freedom, WC Docket 17-108, *Amended Comments of the Center for Democracy & Technology* (July 19, 2017), available at https://cdt.org/wp-content/uploads/2017/07/CDT-2017-FCC-NPRM-Amended-Comment.pdf.
[21] Petition 4-5. The source that NTIA cites for this statement, the 2019 Freedom on the Net Report, in fact is discussing the risks to human rights from overbroad government surveillance of social media--one of those threats being the *inaccuracy* of automated tools in parsing the meaning of speech. *See, e.g.,* Marissa Lang, "Civil rights groups worry about government monitoring of social media", San Francisco Chronicle (October 25, 2017), *available at* https://www.sfchronicle.com/business/article/Civil-rights-groups-worry-about-government-12306370.php.
[22] Petition at 12-15.

consideration of context.[23] Content moderation also requires much more than textual analysis, and automated analysis of images, video, and audio content present distinct technical challenges.[24]

Some of the largest online services do use more sophisticated machine learning classifiers as part of their systems for detecting potentially problematic content,[25] but, as CDT and others have explained, these automated tools are prone to inaccuracies that disproportionately affect under-represented speakers.[26] A tool designed to detect "toxicity" in online comments may not be able to parse the nuances in communication of a small, tight-knit community (such as the drag queen community)[27] and may identify benign comments as "toxic" and warranting takedown. Automated content analysis is no substitute, legally or practically, for human evaluation of content.

The NTIA fundamentally misapprehends the state of technology and the complexities of hosting and moderating user-generated content at scale. Content filters do not, and cannot, create the presumption that intermediaries are able to reliably and effectively pre-screen user-generated content in order to detect illegal material. Any policy proposals built on that presumption are destined to fail in practice and in the courts.

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[23] *See* N. Duarte, E. Llansó, A. Loup, *Mixed Messages? The Limits of Automated Social Media Content Analysis* (November 2017), https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf.

[24] E. Llansó, J. van Hoboken, P. Leerssen & J. Harambam, *Artificial Intelligence, Content Moderation, and Freedom of Expression* (February 2020), *available at* https://www.ivir.nl/publicaties/download/AI-Llanso-Van-Hoboken-Feb-2020.pdf. For example, tools to detect images and video depicting nudity often use "flesh tone analysis" to identify a high proportion of pixels in an image or frame that meet certain color values. These tools can generate false positives when analyzing desert landscape scenes and other images that happen to include those color values. *Id.* at 6.

[25] For a discussion of the use of automation in content moderation by several major social media services, *see* Facebook, *Community Standards Enforcement Report* (August 2020), https://transparency.facebook.com/community-standards-enforcement; Twitter, *An update on our continuity strategy during COVID-19* (April 1, 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html; Youtube, *Community Guidelines enforcement* (August 2020): https://transparencyreport.google.com/youtube-policy/removals.

[26] *Supra* n.24; *see also,* Brennan Center, *Social Media Monitoring* (March 2020), https://www.brennancenter.org/our-work/research-reports/social-media-monitoring.

[27] Internet Lab, *Drag queens and Artificial Intelligence: should computers decide what is 'toxic' on the internet?* (June 28, 2019), https://www.internetlab.org.br/en/freedom-of-expression/drag-queens-and-artificial-intelligence-should-computers-decide-what-is-toxic-on-the-internet/.

CENTER FOR DEMOCRACY & TECHNOLOGY

Conclusion

The FCC is not an arbiter of online speech. If it attempts to assume that role, it will be violating the First Amendment and many other provisions of law. The only way forward for the FCC is to reject the petition and end this attack on free speech and free elections in America.

Respectfully submitted,

Emma Llanso, Director, Free Expression Project

Stan Adams, Open Internet Counsel

Avery Gardiner, General Counsel

August 31, 2020

Before the

Federal Communications Commission

Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	)	RM No. 11862

COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE

September 2, 2020

Prepared by:

Patrick Hedger
Research Fellow

Introduction

On behalf of the Competitive Enterprise Institute ("CEI"), I respectfully submit these comments to the Federal Communications Commission ("FCC") in response to the the National Telecommunications & Information Administration's ("NTIA") Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended (RM No. 11862) ("The NTIA petition" or "NTIA's petition").

CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective. It is our view that the NTIA petition is extremely problematic on process grounds. This comment letter will briefly address our concerns. Ultimately we recommend FCC reject NTIA's petition outright.

Process Objections

In 2015, then-Commissioner Ajit Pai took a stance that ought to hold in this instance. Writing in his dissent to the *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 ("*Open Internet Order*"), Pai stated the following:

> "This isn't how the FCC should operate. We should be an independent agency making decisions in a transparent manner based on the law and the facts in the record. We shouldn't be a rubber stamp for political decisions made by the White House."[1]

[1] Dissenting Statement of Commissioner Ajit Pai Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, accessed at https://www.fcc.gov/document/fcc-releases-open-internet-order/pai-statement

Now-Chairman Pai was responding to blatant pressure by President Obama on FCC to adopt Title II, or *de facto* public utility classification of Internet service providers in order to preserve the amorphous concept of "net neutrality."[2] Then-Chairman Tom Wheeler even testified before Congress that President Obama's open support for Title II changed his thinking on the matter.[3]

Chairman Pai and others were right to object to a president openly steering the agenda of a supposed independent regulatory agency like the FCC. As NTIA's own website states, "The Federal Communications Commission (FCC) is an independent Federal regulatory agency responsible directly to Congress."[4]

Such agencies are indeed explicitly designed to not "rubber stamp political decisions made by the White House."

While all decisions by a politician, including a president, are fundamentally political, NTIA's petition goes a step beyond what Pai lamented in his dissent on the *Open Internet Order*. President Obama had expressed his support for "net neutrality" as early as 2007.[5] His pressure on

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[2] Press Release, Free Press, "President Obama Calls for Title II as the Best Way to Protect Real Net Neutrality," November 10, 2014 https://www freepress.net/news/press-releases/president-obama-calls-title-ii-best-way-protect-real-net-neutrality

[3] Ryan Knutson, "FCC Chairman Says Obama's Net Neutrality Statement Influenced Rule," The Wall Street Journal, March 17, 2015, https://www.wsj.com/articles/fcc-chairman-says-obamas-net-neutrality-statement-influenced-rule-1426616133

[4] National Telecommunications and Information Administration website, accessed at https://www.ntia.doc.gov/book-page/federal-communications-commission-fcc on September 2, 2020

[5] President Obama's Plan for a Free and Open Internet, accessed at https://obamawhitehouse.archives.gov/net-neutrality on September 2, 2020

FCC stemmed from a long-held difference of opinion on policy, not any sort of direct political challenge to him, especially considering that President Obama's most-overt lobbying for the kind of changes made in the *Open Internet Order* came during his second term.

NTIA's petition all-but outright asks FCC to rubber stamp a political priority of the White House. As it states at the outset, NTIA's petition is "in accordance with Executive Order 13925 (E.O. 13925)[.]"[6] In E.O. 13925, President Trump references specific firms and instances where content moderation decisions were made contrary to his own political agenda:

> "Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called 'Site Integrity' has flaunted his political bias in his own tweets."[7]

If Congress established FCC to be independent of the policy agenda of the president, then it certainly did not intend for FCC to become a campaign arm of the president. For this reason

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[6] Petition for Rulemaking of the National Telecommunications and Information Administration, In the Matter of Section 230 of the Communications Act of 1934, July 27, 2020 https://ecfsapi.fcc.gov/file/10803289876764/ntia_petition_for_rulemaking_7.27.20.pdf

[7] E.O. 13925 of May 28, 2020, Preventing Online Censorship, https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship

alone, it would be entirely inappropriate for FCC to accept and consider this petition. It would dramatically erode the credibility of any claim of the Commission's independence going forward, not to mention one of the bedrock arguments against the *Open Internet Order,* as largely-reversed by the 2017 *Restoring Internet Freedom Order*.

In the hypothetical case that the requests of the NTIA petition found their genesis entirely within FCC, there would still be major constitutional hurdles.

Nowhere does Congress provide FCC authority to regulate under Section 230. NTIA's petition claims FCC's power to interpret Section rests under Section 201(b) of the Communications Act.[8] However, 201(b) explicitly only applies to services that have been declared common carriers.[9] Section 230, on the other hand, applies to "interactive computer services" and "information content providers." According to the D.C. Circuit Court, as held in *Verizon v. FCC*, these services may not be treated as common carriers.[10] Therefore, Section 201(b) authority has nothing to do with Section 230.

FCC itself acknowledged in the *Restoring Internet Freedom Order* that Section 230 is not a license to regulate:

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8 Petition for Rulemaking of the National Telecommunications and Information Administration, In the Matter of Section 230 of the Communications Act of 1934, July 27, 2020, https://ecfsapi fcc.gov/file/10803289876764/ntia_petition_for_rulemaking_7.27.20.pdf (pages 15-16)

9 Federal Communications Commission Memorandum and Order, Bruce Gilmore, Claudia McGuire, The Great Frame Up Systems, Inc., and Pesger, Inc., d/b/a The Great Frame Up v. Southwestern Bell Mobile Systems, L.L.C., d/b/a Cingular Wireless, September 1, 2005, File No. EB-02-TC-F-006 (page 4)

10 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

> "We are not persuaded that Section 230 of the Communications Act grants the Commission authority that could provide the basis for conduct rules here. In *Comcast,* the DC Circuit observed that the Commission there 'acknowledge[d] that Section 230(b)' is a 'statement [ ] of policy that [itself] delegate[s] no regulatory authority.'"[11]

Conclusion

The facts are that FCC is an independent regulatory agency, answerable to Congress, not the president. The NTIA petition is a direct product of President Trump's E.O. 13925, a nakedly-political document. Congress has granted FCC no power to reinterpret or regulate under Section 230. For these reasons, any FCC action in accordance with the requests of NTIA would cost the agency's credibility on several matters, including its independence, only to ultimately fail in court. The FCC should reject the NTIA's petition and take no further action on the matter.

Respectfully submitted,

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[11] Restoring Internet Freedom Order, 83 FR 7852, paragraph 290, accessed at: https://www.federalregister.gov/d/2018-03464/p-290

A copy of the above comments was served via First Class Mail on September 2, 2020 upon:

Douglas Kinkoph
National Telecommunications and Information Administration Herbert C. Hoover Building (HCHB)
U.S. Department of Commerce 1401 Constitution Avenue, NW Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
Section 230 of the Communications Act Of 1934	)	Docket No. RM-11862

COMMENT OF THE COPIA INSTITUTE OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

I. Preliminary Statement

The NTIA petition must be **rejected**. The rulemaking it demands represents an unconstitutional power grab not authorized by any statute. It also represents bad policy. The petition is rife with misstatements and misapprehensions about how Section 230 operates and has been interpreted over the years. The most egregious is at page 14 of the petition:

"[L]iability shields can deter entrance."

Not only is that statement utterly incorrect, but if any of the recommendations NTIA makes were to somehow take on the force of law, it is these changes themselves that would be catastrophic to new entrants. Far from vindicating competitive interests, what NTIA proposes would be destructive to them, as well as the First Amendment interests of Internet users and platforms. Every policy value NTIA suggests it cares about in its petition, including speech and competition, would be hurt by giving any of its language suggestions the force of law. In this comment the Copia Institute explains why.

II. About the Copia Institute

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com, an online publication that has chronicled technology law and policy for more than 20 years. These efforts are animated by the belief in the importance of promoting innovation and expression and aimed at educating lawmakers, courts, and other regulators, as well as innovators, entrepreneurs, and the public, on the policy choices needed to achieve these values. The Copia Institute regularly files regulatory comments, amicus briefs, and other advocacy instruments on subjects ranging from freedom of expression, platform liability, patents, copyright, trademark, privacy, innovation policy and more, while Techdirt has published more than 70,000 posts commenting on these subjects. The site regularly receives more than a million page views per month, and its posts have also attracted more than a million reader comments—itself user-generated speech that advances discovery and discussion around these topics. Techdirt depends on Section 230 to both enable the robust public discourse found on its website and for its own speech to be shared and read throughout the Internet.[1]

III. Argument

A. FCC action to codify amendments to statutory language are unconstitutional.

The Constitution vests the power to legislate with Congress.[2] Consistent with that authority Congress passed Section 230. That statutory language has been in force for more than 20 years. Even if it were no longer suited to achieve Congress's intended policy goals,[3] or even if those policy goals no longer suited the nation,[4] it is up to Congress, and only

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[1] See Comment of Michael Masnick, founder and editor of Techdirt for further insight in how Section 230 makes his small business possible.

[2] U.S. Const. art. 1, § 1.

[3] As this comment explains, *infra*, the original language is well-suited to meeting its objectives, and to the extent that any improvements might be warranted to better achieve those policy goals, none of the language proposed by the NTIA would constitute an effective improvement. Rather, it would all exacerbate the problems the NTIA complains of.

[4] Even the NTIA concedes that free speech and competition that Congress hoped to foster when it passed Section 230 remain desirable policy goals. *See*, *e.g.*, NTIA Petition at 6.

Congress, to change that statutory language to better vindicate this or any other policy value.

The United States Supreme Court recently drove home the supremacy of Congress's legislative role. In *Bostock v. Clayton County, Ga.* the Supreme Court made clear that courts do not get to rewrite the statute to infer the presence of additional language Congress did not include.[5] This rule holds even when it might lead to results that were not necessarily foreseen at the time the legislation was passed.[6] Courts do not get to second guess what Congress might have meant just because it may be applying that statutory text many years later, even after the world has changed. Of course the world changes, and Congress knows it will when it passes its legislation. If in the future Congress thinks that a law hasn't scaled to changed circumstances it can change that law. But, per the Supreme Court, courts don't get to make that change for Congress. The statute means what it says, and courts are obligated to enforce it the way Congress wrote it, regardless of whether they like the result.[7]

While the *Bostock* decision does not explicitly spell out that agencies are prohibited from making changes to legislation, the Constitution is clear that legislating is the domain of Congress. If Article III courts, who are charged with statutory interpretation,[8] do not get to read new language into a statute, there is even less reason to believe that Article II Executive Branch agencies get to either.

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[5] *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1754 (2020) ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.").

[6] *Id.* at 1737 ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[7] *Id.* at 1753 ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.").

[8] *Marbury v. Madison*, 5 U.S. 137 (1803).

But that is what NTIA is attempting to do with its petition to the FCC: usurp Congress's power to legislate by having the FCC overwrite the original language Congress put into the statute with its own and give this alternative language the force of law. Even if Congress had made a grievous error with its statutory language choices back in 1996 when it originally passed the law, even if it had been bad policy, or even if it was language that failed to achieve Congress's intended policy, it is not up to the FCC or any other agency to fix it for Congress. Even if Congress's chosen language simply no longer meets its intended policy goals today, or the policy goals have evolved, it is still not up to any agency to change it.

If the statute is to change, it is Congress's job to make that policy decision and implement the appropriate language that will achieve it. It is not the job of the FCC, NTIA, or any other member of the Executive Branch[9] to claim for itself the power to legislate, no matter how well-intentioned or how much better its language or policy choices might be.

But, as explained further below, these recommendations are not better. The petition is rife with inaccuracies, misunderstandings, and contradictory policy goals. Under the best of circumstances the FCC should not speak here. And these are hardly the best.

Congress's legislative goal to foster online speech and innovation with Section 230 was a good one. Furthermore, the language it chose to implement this policy was well-suited to meet it then, and it remains well-suited to meet it now. Allowing the Executive Branch to overwrite this chosen language with the alternate language it proposes would turn the statute into an entirely different law advancing entirely different policy goals than Congress intended when it passed Section 230 in order to ensure that the Internet could continue to grow to be vibrant and competitive. And it would do it at their expense.

The NTIA petition must therefore be **rejected**.

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[9] *See* Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020).

B. The NTIA's recommendation for language changes to Section 230 are misguided and counter-productive.

The NTIA's petition is full of mistakes and misunderstandings about Section 230, its operation, its intended policy goals, and how courts have interpreted it over the past two decades. But none are as profoundly misguided as the statement that "liability shields can deter [market] entrance." In reality, the exact opposite is true.

Liability shields are critical to enabling new market entrants. Without them the barriers to entry for new Internet platforms and services can be insurmountable. If Internet platforms and services could be held liable for their users' activity, as soon as they took on users, they would also take on potentially crippling liability. Even if ultimately there is nothing legally wrong with their users' activity, or even if they would not ultimately be found liable for it, the damage will have already been done just by having to take on the defense costs.

What is critically important for policymakers to understand is that liability shields are about more than ultimate liability. Litigation in the United States is cripplingly expensive. Even simply having a lawyer respond to a demand letter can cost four figures, answering complaints five figures, and full-blown litigation can easily cost well into the six or even seven figures.[10] And those numbers presume a successful defense. Multiply this financial risk by the number of users, and scale it to the volume of user-generated content they create, and the amount of financial risk a new platform would face is staggering. Few could ever afford to enter the market, assuming they could even get capitalized in the first place. Needed investment would be deterred, because instead of underwriting platforms' future success, investors' cash would be more likely spent underwriting legal costs.

We know this market-obliviating risk is not hypothetical because we can see what happens in the fortunately still-few areas where Section 230 is not available for Internet

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[10] *See* Engine, Section 230 Cost Report (last accessed Sept. 2, 2020), http://www.engine.is/s/Section-230-cost-study.pdf.

platforms and services. For instance, if the thing allegedly wrong with user-supplied content is that it infringes an intellectual property right, Section 230 is not available to protect the platform.[11] In the case of potential copyright infringement, the Digital Millennium Copyright Act provides some protection,[12] but that protection is much more limited and conditional. Lawsuits naming the platforms as defendants can rapidly deplete the them and drive them to bankruptcy, even when they might ultimately not be held liable.

A salient example of this ruinous reality arose in *UMG v. Shelter Capital*.[13] In this case UMG sued Veoh Networks, a video-hosting platform similar to YouTube, for copyright infringement. Eventually Veoh Networks was found not to be liable, but not before the company had been bankrupted and the public lost a market competitor to YouTube.[14] Indeed, as that case also demonstrates, sometimes driving out a competitor may itself be the goal of the litigation.[15] Litigation is so costly that lawsuits are often battles of attrition rather than merit. The point of Section 230 is to protect platforms from being obliterated by litigiousness. It is likely a policy failure that Section 230 does not cover allegations of intellectual property infringement because it has led to this sort of market harm. But in its recommendations the NTIA does not suggest plugging this hole in its coverage. Instead it demands that the FCC make more.

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[11] 47 U.S.C. § 230(e)(2).
[12] *See* 17 U.S.C. § 512.
[13] *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006 (9th Cir. 2013).
[14] Peter Kafka, Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/ (describing how the startup platform in UMG v. Shelter Capital, supra, could not get funding and thus went out of business while it was litigating the lawsuit it later won).
[15] *See*, *e.g.*, Dmitry Shapiro, UNCENSORED – A personal experience with DMCA, The World Wide Water Cooler (Jan. 18, 2012), available at https://web.archive.org/web/20120119032819/http://minglewing.com/w/sopapipa/4f15f882e2c68903d2000004/uncensored-a-personal-experience-with-dmca-umg ("UMG scoffed at their responsibilities to notify us of infringement and refused to send us a single DMCA take down notice. They believed that the DMCA didn't apply. They were not interested in making sure their content was taken down, but rather that Veoh was taken down! As you can imagine the lawsuit dramatically impacted our ability to operate the company. The financial drain of millions of dollars going to litigation took away our power to compete, countless hours of executive's time was spent in dealing with various responsibilities of litigation, and employee morale was deeply impacted with a constant threat of shutdown.").

If we are unhappy that today there are not enough alternatives to YouTube we only have ourselves to blame by having not adequately protected its potential competitors so that there today could now be more of them. Limiting Section 230's protection is certainly not something we should be doing more of if we actually wish to foster these choices. The more Section 230 becomes limited or conditional in its coverage, the more these choices are reduced as fewer platforms are available to enable user activity.

This point was driven home recently when Congress amended Section 230 with FOSTA.[16] By making Section 230's critical statutory protection more limited and conditional, it made it unsafe for many platforms that hoped to continue to exist to remain available to facilitate even lawful user expression.[17]

We cannot and should not invite more of these sorts of harms that reduce the ability for Americans to engage online. Therefore we cannot and should not further limit Section 230. But this limitation is exactly what the NTIA calls for in its petition with each of its proposed language changes. And thus this depletion of online resources is exactly what will result if any of this proposed language is given effect. The NTIA is correct that there should be plenty of forums available for online activity. But the only way to achieve that end is to **reject** every one of the textual changes it proposes for Section 230.

C. The NTIA's recommendation for language changes to Section 230 are misguided and counter-productive.

In its petition the NTIA alleges that changes are needed to Section 230 to vindicate First Amendment values. In reality, the exact opposite is true. Not only would the changes proposed by the NTIA limit the number of platforms available to facilitate user expression,[18] and their ability to facilitate lawful speech,[19] but its animus toward existing

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[16] Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA").
[17] Craigslist notably turned off its online personals section in response to FOSTA. See https://www.craigslist.org/about/FOSTA. It also prohibited the advertisements of lawful services. *Woodhull Freedom Foundation v. U.S.*, 948 F. 3d 363, 374 (D.C. Cir. 2020) (finding that a masseuse who could no longer advertise on Craigslist had standing to challenge FOSTA).
[18] See discussion *supra* Section III.B.
[19] *Id.*

platforms' moderation practices ignores their First Amendment rights to exercise that editorial discretion. The changes the NTIA proposes, purposefully designed to limit that editorial discretion, would thus unconstitutionally offend these rights if put into effect.

An initial failing here is a lack of understanding of what Section 230 protects. It is not just the large, commercial platforms the NTIA takes issue with; Section 230 protects everyone, including ordinary Internet users.[20] Because it is not just large commercial platforms that intermediate third-party content; individual people can too, and Section 230 is just as much about insulating them as it does the larger platforms.[21]

For example, individuals with Facebook posts may allow comments on their posts. If one of those comments happens to be wrongful in some way, the Facebook user with the parent post is not liable for that wrongfulness. Section 230 makes clear that whoever imbued the content with its wrongful quality is responsible for it, but not whoever provided the forum for that content.[22] It isn't just Facebook that offered the forum for the content; so did the Facebook user who provided the parent post, and both are equally protected.

It's easy to see, however, that a Facebook user who allows comments on their post should not be obligated to keep a comment that they find distasteful, or be forced to delete a comment they enjoy. The First Amendment protects those decisions.

It also protects those decisions even if, instead of Facebook, it was the person's blog where others could comment, or an online message board they host. The First Amendment would protect those decisions even if the message board host monetized this user activity, such as with ads. And it would protect those decisions if the message board host ran it with their friend, perhaps even as an corporation. That editorial discretion would remain.[23]

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[20] *See*, *e.g.*, *Barrett v. Rosenthal*, 146 P. 3d 510 (Cal. 2006).

[21] Section 230 also protects online publications, including newspapers, that accept user comments. Were the FCC to take upon itself the authority to change Section 230, it would inherently change it for media that has never been part of its regulatory purview, including traditional press.

[22] *See*, *e.g.*, *Force v. Facebook, Inc.*, 934 F. 3d 53 (2d. Cir. 2019).

[23] Requiring "transparency" into these editorial decisions also itself attacks this discretion. The NTIA's proposal to require "transparency" into these editorial decisions also itself attacks this discretion. True discretion includes the ability to be arbitrary, but having to document these decisions both chills them and raises issues of compelled speech, which is itself constitutionally dubious.

The changes the NTIA proposes are predicated on the unconstitutional notion that there is some size a platform or company could reach that warrants it to be stripped of its discretion. There is not, and NTIA suggests no Constitutional basis for why companies of a certain size should be allowed to have their First Amendment rights taken from them. Even if there were some basis in competition law that could justify different treatment of some platforms, simply being large, successful, and popular does not make a business anti-competitive. Yet the NTIA offers no other principled rationale for targeting them, while also proposing changes to the functioning language of Section 230 that will hit far more platforms than just the large ones that are the targets of the NTIA's ire.

Indeed, as long as new platforms can continue to be launched to facilitate user expression, stripping any of their editorial discretion is insupportable. The "irony" is that these attempts to strip these platforms of their Section 230 protection and editorial discretion are what jeopardizes the ability to get new platforms and risks entrenching the large incumbents further. The NTIA is correct to want to encourage greater platform competition. But the only way to do that is to ensure that platforms retain the rights and protections they have enjoyed to date. It is when we meddle with them that we doom ourselves to the exact situation we are trying to avoid.

IV. Conclusion

For the forgoing reasons, the NTIA petition must be **rejected**.

Dated: September 2, 2020

Respectfully submitted,

/s/ Catherine R. Gellis

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Before the
Federal Communications Commission
Washington, D.C.

In the matter of	
Section 230 of the Communications Act of 1934	RM-11862

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the Federal Communications Commission (FCC)'s August 3, 2020 Public Notice,[1] the Computer & Communications Industry Association (CCIA)[2] submits the following comments. By requesting that the FCC regulate based on Section 230, NTIA has acted beyond the scope of its legal authority. Granting this request would similarly exceed the authority delegated to the FCC. The FCC has no role in regulating speech on the Internet, and NTIA's proposed narrowing of the phrase "otherwise objectionable" would lead to the proliferation of objectionable content online.

I. Federal Agencies Must Act Within the Bounds of Their Statutory Grant of Authority

On May 28, 2020, the Administration issued an Executive Order on "Preventing Online Censorship,"[3] which directed NTIA to file a petition for rulemaking with the FCC requesting that the FCC expeditiously propose regulations to clarify elements of 47 U.S.C. § 230. As an independent government agency,[4] the FCC is not required to adhere to the directives of the

[1] Public Notice, Consumer & Governmental Affairs Bureau – Petition for Rulemakings Filed, Report No. 3157 (Aug. 3, 2020), *available at* https://docs fcc.gov/public/attachments/DOC-365914A1.pdf.

[2] The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 45 years, to promoting innovation and preserving full, fair and open competition throughout our industry. Our members employ more than 1.6 million workers and generate annual revenues in excess of $870 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[3] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[4] Dissenting Statement of Commissioner Robert M. McDowell, Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 20, 2008) ("We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers."), *available at* https://docs fcc.gov/public/attachments/FCC-08-183A6.pdf; *see also* Harold H. Bruff, *Bringing the Independent*

Executive branch. By issuing this Executive Order, the President has taken the extraordinary step of directing NTIA to urge the FCC, an independent government agency, to engage in speech regulation that the President himself is unable to do.

As explained below, NTIA is impermissibly acting beyond the scope of its authority because an agency cannot exercise its discretion where the statute is clear and unambiguous, and the statute and legislative history are clear that the FCC does not have the authority to promulgate regulations under Section 230.

A. NTIA Is Acting Beyond Its Authority

NTIA's action exceeds what it is legally authorized to do. NTIA has jurisdiction over telecommunications[5] and advises on domestic and international telecommunications and information policy. NTIA is charged with developing and advocating policies concerning the regulation of the telecommunications industry, including policies "[f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets."[6] Nowhere does the statute grant NTIA jurisdiction over Internet speech. When Congress has envisioned a regulatory role for NTIA beyond its established telecommunications function, it has done so explicitly.[7] Therefore, NTIA's development of a proposed national regulatory policy for Internet speech is outside the scope of NTIA's Congressionally-assigned responsibilities. Accordingly, the very impetus for this proceeding is an organ of the Administration acting beyond the scope of its authority.

B. An Agency Cannot Exercise Its Discretion Where the Statute Is Clear and Unambiguous

Even worse, NTIA's *ultra vires* action involves a request that another agency exceed its authority. NTIA's petition either misunderstands or impermissibly seeks to interpret Section 230 because it requests the FCC to provide clarification on the unambiguous language in 47 U.S.C. § 230(c)(1) and § 230(c)(2). Specifically, NTIA's petition asks for clarification on the terms "otherwise objectionable" and "good faith." The term "otherwise objectionable" is not unclear because of the applicable and well-known canon of statutory interpretation, *ejusdem generis*, that

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Agencies in from the Cold, 62 Vand. L. Rev. En Banc 62 (Nov. 2009), *available at* https://www.supremecourt.gov/opinions/URLs_Cited/OT2009/08-861/Bruff_62_Vanderbilt_Law_Rev_63.pdf (noting the independent agencies' independence from Executive interference).

[5] 47 U.S.C. § 902(b).

[6] 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I).

[7] *See, e.g.*, 17 U.S.C. § 1201(a)(1)(C) (providing a rulemaking function which articulates a role for "the Assistant Secretary for Communications and Information of the Department of Commerce", which is established as the head of NTIA under 47 U.S.C. § 902(a)(2)).

the general follows the specific. Propounding regulations regarding the scope of "good faith" would confine courts to an inflexible rule that would lend itself to the kind of inflexibility that was not intended by the original drafters of the statute.[8] Courts have consistently held that Section 230 is clear and unambiguous, with the Ninth Circuit noting that "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition" and there is a "consensus developing across other courts of appeals that § 230(c) provides broad immunity. . . ."[9]

Under *Chevron*, when a statute is clear and unambiguous an agency cannot exercise discretion but must follow the clear and unambiguous language of the statute.[10] The Administration cannot simply, because it may be convenient, declare a statute to be unclear and seek a construction that is contrary to the prevailing law and explicit Congressional intent.

C. The FCC Does Not Have the Authority to Issue Regulations Under Section 230

Neither the statute nor the applicable case law confer upon the FCC any authority to promulgate regulations under 47 U.S.C. § 230. The FCC has an umbrella of jurisdiction defined by Title 47, Chapter 5. That jurisdiction has been interpreted further by seminal telecommunications cases to establish the contours of the FCC's authority.[11]

Title 47 is unambiguous about the scope of this authority and jurisdiction. The FCC was created "[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*"[12] and "[t]he provisions of this chapter shall apply to all interstate and foreign

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[8] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. . . . We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents.").

[9] *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (citing *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 328-29 (4th Cir. 1997)); *see also Fair Housing Coun. of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) ("The *plain language* and structure of the CDA *unambiguously* demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes *congressional intent* and violates the spirit and serendipity of the Internet.") (*emphasis added*).

[10] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[11] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

[12] 47 U.S.C. § 151 *(emphasis added)*.

communication by wire or radio".[13] The statute does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC's jurisdiction. What NTIA proposes is not included in the scope of the FCC's enabling statute, which only gives the FCC the following duties and powers: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary *in the execution of its functions*."[14] Additionally, Section 230(b)(2) explicitly provides that the Internet should be "unfettered by Federal or State regulation."[15] Even the legislative history of 47 U.S.C. § 230, including floor statements from the sponsors, demonstrates that Congress explicitly intended that the FCC should not be able to narrow these protections, and supports "prohibiting the FCC from imposing content or any regulation of the Internet."[16] Indeed, the FCC's powers have regularly been interpreted narrowly by courts.[17]

The FCC's 2018 Restoring Internet Freedom Order (the Order),[18] reaffirms that the FCC is without authority to regulate the Internet as NTIA proposes. In the Order, the FCC said it has no authority to regulate "interactive computer services."[19] Although the FCC considered Section 230 in the context of net neutrality rules, its analysis concluded that Section 230 renders further regulation unwarranted.[20] If the FCC had sufficiently broad jurisdiction over Internet speech under Section 230 to issue NTIA's requested interpretation, litigation over net neutrality, including the *Mozilla* case, would have been entirely unnecessary. As *Mozilla* found, agency

[13] 47 U.S.C. § 152 *(emphasis added)*.
[14] 47 U.S.C. § 154(i) *(emphases added)*.
[15] 47 U.S.C. § 230(b)(2).
[16] H.R. Rep. No. 104-223, at 3 (1996) (Conf. Rep.) (describing the Cox-Wyden amendment as "protecting from liability those providers and users seeking to clean up the Internet and prohibiting the FCC from imposing content or any regulation of the Internet"); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (rebuking attempts to "take the Federal Communications Commission and turn it into the Federal Computer Commission", because "we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet").
[17] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[18] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.
[19] *Id*. at 164-66.
[20] *Id*. at 167 and 284.

"discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating."[21]

The D.C. Circuit explained in *MPAA v. FCC* that the FCC can only promulgate regulations if the statute grants it authority to do so.[22] There is no statutory grant of authority as Section 230 does not explicitly mention the FCC, the legislative intent of Section 230 does not envision a role for FCC, and the statute is unambiguous. As discussed above, the FCC lacks authority to regulate, and even if it had authority, the statute is unambiguous and its interpretation would not receive any deference under *Chevron*.

II. The FCC Lacks Authority to Regulate The Content of Online Speech

Even if the FCC were to conclude that Congress did not mean what it explicitly said in Section 230(b)(2), regarding preserving an Internet "unfettered by Federal or State regulation",[23] NTIA's petition asks the FCC to engage in speech regulation far outside of its narrow authority with respect to content. Moreover, NTIA's request cannot be assessed in isolation from the Administration's public statements. It followed on the President's claim, voiced on social media, that "Social Media Platforms totally silence conservatives voices."[24] The President threatened that "[w]e will strongly regulate, or close them down, before we can ever allow this to happen."[25] NTIA's petition must therefore be analyzed in the context of the President's threat to shutter American enterprises which he believed to disagree with him.

Within that context, NTIA's claim that the FCC has expansive jurisdiction — jurisdiction Commission leadership has disclaimed — lacks credibility. When dissenting from the 2015 Open Internet Order, which sought to impose limited non-discrimination obligations on telecommunications infrastructure providers with little or no competition, FCC Chairman Pai characterized the rule as "impos[ing] intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have".[26] It is inconsistent to contend that the FCC has no legal authority to impose limited non-discrimination obligations on infrastructure providers operating under the supervision of public service and utilities

[21] *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, J., concurring).
[22] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[23] 47 U.S.C. § 230(b)(2).
[24] Elizabeth Dwoskin, *Trump lashes out at social media companies after Twitter labels tweets with fact checks*, Wash. Post (May 27, 2020), https://www.washingtonpost.com/technology/2020/05/27/trump-twitter-label/ (orthography in original).
[25] *Id*.
[26] Dissenting Statement of Commissioner Ajit Pai, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, *available at* https://www fcc.gov/document/fcc-releases-open-internet-order/pai-statement, at 1.

commissions, while also arguing that the FCC possesses authority to enact retaliatory content policy for digital services whose competitors are a few clicks away.

The FCC has an exceptionally limited role in the regulation of speech, and the narrow role it does possess is constrained by its mission to supervise the use of scarce public goods. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, whatever limited speech regulation powers the FCC possesses are rooted in "the scarcity of radio frequencies."[27] No such scarcity exists online.

Rather than engaging with the precedents that narrowly construe the FCC's role in content policy, NTIA's petition relies upon a criminal appeal, *Packingham v. North Carolina*, in asserting that "[t]hese platforms function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[28] But the Supreme Court did not recognize this. The language NTIA quotes from *Packingham* presents the uncontroversial proposition that digital services collectively play an important role in modern society. If there were any doubt whether the *dicta* in *Packingham*, a case which struck down impermissible government overreach, could sustain the overreach here, that doubt was dispelled by *Manhattan Community Access Corp. v. Halleck*.[29] In *Halleck*, the Court held that "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[30]

III. NTIA's Proposal Would Promote Objectionable Content Online

As discussed, neither NTIA nor the FCC have the authority to regulate Internet speech. Assuming arguendo, the FCC did have the authority, NTIA's proposed regulations "interpreting" Section 230 are unwise. They would have the effect of promoting various types of highly objectionable content not included in NTIA's proposed rules by discouraging companies from removing lawful but objectionable content.[31]

Section 230(c)(2)(A) incentivizes digital services to "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively

[27] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[28] Petition for Rulemaking of the Nat'l Telecomms. & Info. Admin. (July 27, 2020), *available at* https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "NTIA Petition"), at 7, note 21 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017)).

[29] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

[30] *Id.* at 1930.

[31] Matt Schruers, *What Is Section 230's "Otherwise Objectionable" Provision?*, Disruptive Competition Project (July 29, 2020), https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/.

violent, harassing, or otherwise objectionable." NTIA, however, would have the term "otherwise objectionable" interpreted to mean "any material that is *similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials"[32] — terms that NTIA's proposed rules also define narrowly — and confine harassment to "any specific person."

Presently, a digital service cannot be subject to litigation when, for example, it determines that the accounts of self-proclaimed Nazis engaged in hate speech are "otherwise objectionable" and subject to termination, consistent with its Terms of Service. Digital services similarly remove content promoting racism and intolerance; advocating animal cruelty or encouraging self-harm, such as suicide or eating disorders; public health-related misinformation; and disinformation operations by foreign agents, among other forms of reprehensible content. Fitting these crucial operations into NTIA's cramped interpretation of "otherwise objectionable" presents a significant challenge.

Under NTIA's proposed rules, digital services therefore would be discouraged from acting against a considerable amount of potentially harmful and unquestionably appalling content online, lest moderating it lead to litigation. Avoiding this scenario was one of the chief rationales for enacting Section 230.[33]

The term "otherwise objectionable" foresaw problematic content that may not be illegal but nevertheless would violate some online communities' standards and norms. Congress's decision to use the more flexible term here acknowledged that it could not anticipate and legislate every form of problematic online content and behavior. There are various forms of "otherwise objectionable" content that Congress did not explicitly anticipate in 1996, but which may violate the norms of at least some online communities. It is unlikely that Congress could have anticipated in 1996 that a future Internet user might encourage dangerous activity like consuming laundry detergent pods, or advise that a pandemic could be fought by drinking bleach. Section 230(c)(2)(A)'s "otherwise objectionable" acknowledges this. Congress wanted to encourage services to respond to this kind of problematic — though not necessarily unlawful — content, and prevent it from proliferating online.

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[32] NTIA Petition, *supra* note 28, at 54 (emphasis supplied).

[33] H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how under recent New York precedent, "the existing legal system provides a massive disincentive" and the Cox-Wyden amendment "will protect them from taking on liability such as occurred in the Prodigy case in New York").

NTIA's proposed rules "clarifying" the phrase "otherwise objectionable" would also open the door to anti-American lies by militant extremists, religious and ethnic intolerance, racism and hate speech. Such speech unquestionably falls within Congress's intended scope of "harassing" and "otherwise objectionable" and thus might reasonably be prohibited by digital services under their Terms of Service. NTIA's petition, however, proposes confining harassment to content directed at *specific* individuals. This tacitly condones racism, misogyny, religious intolerance, and hate speech which is general in nature, and even that which is specific in nature provided the hateful speech purports to have "literary value."

IV. Conclusion

For the foregoing reasons, the FCC should decline NTIA's invitation to issue regulations on Section 230.

Respectfully submitted,

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September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, I caused a copy of the foregoing comments to be served via FedEx upon:

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1401 Constitution Avenue NW
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/s/ Ali Sternburg
Ali Sternburg

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Public Interest Comment[1] on

The National Telecommunications and Information Administration's

Petition to the Federal Communications Commission

for Rulemaking on Section 230 of the Communications Act

Docket No. RM-11862

September 2, 2020

Jerry Ellig, Research Professor[2]

The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the National Telecommunications and Information Administration's (NTIA's) petition for rulemaking[3] does not represent the views of any particular affected party or special interest, but is designed to help the Federal Communications Commission (FCC) evaluate the effect of the proposal on overall consumer welfare.

The NTIA proposal includes several provisions that would narrow the scope of Internet intermediaries' liability when they remove or restrict access to content provided by others. It would also require the intermediaries to disclose their content moderation policies in a form that is understandable by consumers and small businesses. Those two sentences of course do not capture all of the legal subtleties involved, and this comment takes no position on the legal issues raised by the petition. However, I believe that in deciding whether to propose a regulation in

[1] This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

[2] The author is a research professor at the George Washington University Regulatory Studies Center.

[3] "Petition for Rulemaking of the National Telecommunications and Information Administration," In the Matter of Section 230 of the Communications Act of 1934 (July 27, 2020).

response to the NTIA petition, the FCC should be fully aware of the analysis required to identify the likely economic effects of the NITA proposal and other alternatives the FCC may consider.

The duties of the FCC's Office of Economics and Analytics include preparing "a rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of $100 million or more."[4] Relevant economic effects could be costs, benefits, transfers, or other positive or negative economic effects. A rulemaking based on the NTIA petition would likely require a full benefit-cost analysis.

The rules requested by the NTIA could create significant economic impacts by altering Internet intermediaries' content moderation practices and/or altering investment in new and improved services or innovative new companies. Given the large value consumers receive from Internet intermediaries and the size of investments in this industry, even a small regulation-induced change in the companies' economic incentives would likely generate an annual economic impact exceeding $100 million.

Consumers clearly derive enormous benefits from Internet intermediaries. For example, a 2019 National Bureau of Economic Research (NBER) study estimated that use of Facebook created $213 billion in consumer surplus between 2003 and 2017.[5] Another NBER study estimated that one month of Facebook use creates a total of $31 billion of consumer surplus in the US.[6] Laboratory experiments found that students place significant value on other Internet intermediaries as well.[7] Indeed, since there are 172 million[8] US users of Facebook alone, a regulatory change that altered the average value of the service by just 59 cents per user would have more than $100 million in economic impact. Similarly, a National Economic Research Associates study estimated that adding five seconds of advertising per web search would increase web browsers' ad revenues by about $400 million annually;[9] thus, if a regulatory change led to a two-second increase in advertising per search, the effect would exceed the $100 million threshold.

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[4] Federal Communications Commission, "In the Matter of Establishment of the Office of Economics and Analytics," MD Docket No. 18-3 (adopted January 30, 2018), Appendix.

[5] Eric Byrnjolfsson et. al., "GDP-B: Accounting for the Value of New and Free Goods in the Digital Economy," National Bureau of Economic Research Working Paper 25695 (March 2019), 29.

[6] Hunt Allcott et.al, "The Welfare Effects of Social Media," National Bureau of Economic Research Working Paper No. 25514 (November 2019), 32. The authors caution that this calculation, based on experimental subjects' willingness to accept compensation for deactivating their Facebook accounts, may over-state the value to users because the average compensation users required to forego Facebook after they spent a month without using it fell by 14 percent. Even assuming the lower figure represents users' "true" demand, the consumer surplus number is huge.

[7] Brynjolfsson et. al., *supra* note 5, at 33-38.

[8] Allcott et. al., *supra* note 6, at 5.

[9] Christian M. Dippon, "Economic Value of Internet Intermediaries and the Role of Liability Protections," National Economic Research Associates report produced for the Internet Association (June 5, 2017), 13.

The rule NTIA requests could have economic impacts beyond its direct effect on consumer surplus generated by incumbent firms offering their current suites of services. A 2019 study by the Copia Institute presents some comparisons which suggest that Section 230 liability protections (or similar policies) help companies attract more venture capital investment and improve their chances of survival.[10] The study compares the experience of companies in the US versus the European Union; US digital music companies versus US social media and cloud computing companies; and intermediaries in several other countries where liability protections identifiably changed. This study does not control for other factors that might affect the results, so its conclusions are only suggestive, but the pattern suggests that more extensive data analysis could be informative.[11]

A 2015 study by Oxera took a different approach, combining literature reviews with interviews of 20 experts to assess how liability protections for intermediaries affect intermediary start-ups. It found that stronger liability protections are associated with higher success rates and greater profitability for start-ups.[12]

Whether a regulation-induced change in venture capital funding for Internet intermediaries, or their success rate or profitability, should count as a benefit or a cost depends on whether the current level of startup activity is above or below the economically optimal level. That is a key question a full benefit-cost analysis should help answer. My point here is a much more limited one: the NTIA's proposal could very well affect investment flows by more than $100 million annually.

Thus, in one way or another, the NTIA proposal is likely to have economic effects that exceed the $100 million annual threshold and hence require a full benefit-cost analysis.

[10] Michael Masnick, "Don't Shoot the Message Board: How Intermediary Liability Harms Investment and Innovation," Copia Institute and NetChoice (June 2019).

[11] The results are thus analogous to the comparisons of raw data on broadband investment discussed in the Restoring Internet Freedom order. See FCC, *In the Matter of Restoring Internet Freedom: Declaratory Ruling, Report and Order* (Adopted Dec 14, 2017; Released Jan. 4, 2018), para. 92.

[12] "The Economic Impact of Safe Harbours on Internet Intermediary Startups," study prepared for Google (February 2015).

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	)))))	RM No. 11862

Comment of
Engine

SEPTEMBER 2, 2020

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Introduction and Executive Summary

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues.

Given Engine's focus on startups, entrepreneurship, innovation, and competition, we are particularly troubled by the anti-competitive impacts of NTIA's proposed changes to Section 230. While hundreds of pages could—and likely will—be written on the factual inaccuracies contained in the petition regarding Section 230's legislative history and subsequent legal interpretation, our comments will focus on the ways in which NTIA's petition for rulemaking is predicated on wholly unsupported allegations about how Section 230 shapes the Internet ecosystem and how its proposed changes to Section 230 would harm smaller and newer platforms and their ability to compete in the market.

The petition fundamentally misunderstands several things about both Section 230 and today's Internet ecosystem. The petition claims that Section 230 has become unnecessary in a world with a mature Internet industry and that the law's legal framework has anticompetitive effects. Both of those claims are untrue. The Internet ecosystem has not changed so dramatically since the law's passage, and it is still made up of the new, innovative, and competition companies that Congress sought to protect in 1996. At the same time, the dramatic rise in the increase of usage of Internet platforms means that perfect content moderation has

become—despite the petition's completely unsupported claims to the contrary—more impossible every day, increasingly making the legal liability limitations under Section 230 a necessity for a platform of any size that hosts user-generated content. Section 230 is what allows new and small platforms to launch and compete in the market, and making the changes envisioned by the petition would make it harder to launch and compete—a burden that will fall disproportionately on startups.

The rewriting of Section 230 envisioned by the petition is especially egregious because the NTIA has failed to identify any justification for that rewriting. The petition acknowledges that there is no empirical evidence to support its repeatedly disproven claims that major social media platforms are exhibiting "anti-conservtative bias," and it doesn't even attempt to justify the absurd claim that limiting platforms' legal liability somehow reduces competition, including by deterring new companies from entering the market. Without managing to accurately identify a competitive or consumer harm currently being suffered, the petition envisions significant policy changes to a fundamental law that will ultimately hurt competition and consumers.

The petition is predicated on unsupported and inaccurate claims about Section 230 and the Internet ecosystem

Simply put, NTIA's petition asks the FCC to usurp the roles of Congress and the judiciary to rewrite settled law. Such sweeping changes to a foundational legal regime that has allowed private companies to build the most powerful medium for human expression and economic growth in history are beyond the scope of the FCC's proper authority. If, as the

petition claims, courts have applied Section 230 in a manner contrary to Congress's intent for decades, the responsibility for updating the regime lies with Congress, not the FCC.

Putting aside the obvious deficiencies with NTIA's theory of FCC authority, the petition fails to provide a single plausible policy justification for its attempt to rewrite Section 230. Rather than citing empirical evidence, the petition relies on ahistorical reinterpretations of Congress's intent in passing 230, debunked conspiracies about alleged political bias amongst social media companies, and economically illiterate theories of startup competition to paper over its true motivation: to punish platforms over political grievances. The President's May 28, 2020 executive order and resulting NTIA petition came after a social media company correctly flagged a post from the President as inaccurate, and they are little more than an attempt to "work the refs" by threatening private Internet companies with a flood of meritless litigation if they do not allow politically advantageous falsehoods to proliferate on their platforms. If policy changes to Section 230's critical framework are deemed necessary, Congress should take a comprehensive view of the current Internet ecosystem and the impacts any policy changes would have on that ecosystem, rather than take at face value the many misrepresentations presented in the petition.

The Internet ecosystem is made up of thousands of smaller, newer online platforms that continue to rely on Section 230's commonsense liability framework

The petition, like many critics of Section 230, incorrectly asserts that the Internet industry has grown so large and mature that its companies no longer need Section 230's legal framework as they did when the law was written in 1996:

> "Times have changed, and the liability rules appropriate in 1996 may no longer further Congress's purpose that section 230 further a 'true diversity of political discourse'" when "[a] handful of large if large social media platforms delivering varied types of content over high-speed Internet have replaced the sprawling world of dial-up Internet Service Providers (ISPs) and countless bulletin boards hosting static postings."[1]

This could not be further from the truth; the Internet ecosystem is not a monolith, and anyone with a connection to the open Internet can find—and even contribute to—a sprawling world of diverse platforms hosting user-generated content.

Despite policymakers' and the media's attention on a few, large companies, the Internet is made up of thousands of small, young companies. Section 230 helped create the legal framework that supports the Twitters and Facebooks of the world—where a platform can host an untold amount of user-generated content without being held liable for each individual piece of content it did not create—but it also supports any website or online service that hosts user-generated content. From file sharing services, to e-commerce websites with third-party sellers, to comment sections across the Internet, Section 230 enables all kinds of platforms to host all kinds of user communities creating all kinds of content.

Take, for instance, Newsbreak.com, a news aggregation website cited in the petition for its reposting of an article from Breitbart.com.[2] Newsbreak.com posts previews of news stories

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[1] Petition of the National Telecommunications and Information Administration, Docket RM-11862, (July 27, 2020), at 4. Available at https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf ("Petition").

[2] Petition at 26.

from around the Internet and allows users to comment on those stories. A quick scan of the website's front page shows stories with thousands of comments on each of them. Section 230 protects Newsbreak.com from being held liable for anything posted in those comments. At the same time, Newsbreak.com also has a "Commenting Policy" prohibiting comments containing hate speech, harassment, and misrepresentations.[3] The applicability of Section 230 to Newsbreak.com's comments does not—and should not—change based on the steps they take to keep their platform free from hate speech, harassment, and misrepresentations, but that's the kind of detrimental policy change the petition envisions.

Additionally, the argument that the Internet has matured past the stage of being a "nascent industry"—and therefore can survive such a dramatic shift in the legal landscape as the fundamental rethinking of Section 230 as envisioned by the petition—fails to take into account that as Internet usage grows, so does the amount of content on the Internet that would need to be individually moderated were it not for Section 230. Twitter is a perfect example of that kind of typical explosion in content. The year after Twitter's launch, "[f]olks were tweeting 5,000 times a day in 2007. By 2008, that number was 300,000, and by 2009 it had grown to 2.5 million per day."[4] By 2010, the site was seeing 50 million tweets per day.[5] By 2013, Twitter was averaging more than 500 million tweets per day.[6] What was impractical within a year of the company's launch—monitoring and moderating, if necessary, every one of the 5,000 tweets per day—was

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[3] News Break, "News Break Commenting Policy" (June 2020), available at https://help.newsbreak.com/hc/en-us/articles/360045028691-News-Break-Commenting-Policy
[4] Twitter, "Measuring Tweets" (Feb. 22, 2010), available at https://blog.twitter.com/official/en_us/a/2010/measuring-tweets.html
[5] Id.
[6] Twitter, "New Tweets per second record, and how!" (Aug. 16, 2013), available at https://blog.twitter.com/engineering/en_us/a/2013/new-tweets-per-second-record-and-how.html

impossible within a year and would be inconceivable now. Section 230 creates the legal certainty a platform needs to host user-generated content whether or not it has the ability to monitor and moderate a small number of posts at launch of hundreds of millions of posts after a few years of growth.

At the same time the petition misunderstands the nature and scope of online content moderation in the modern era, it also overstates the ability of technological tools to handle content moderation at scale and the availability of those tools. The petition repeatedly makes claims like, "[m]odern firms…with machine learning and other artificial techniques [sic], have and exercise much greater power to control and monitor content and users,"[7] and overestimates the efficacy of technological content moderation tools. "[W]ith artificial intelligence and automated methods of textual analysis to flag harmful content now available...platforms no longer need to manually review each individual post but can review, at much lower cost, millions of posts,"[8] the petition states, citing only—and rather ironically—a 2019 Freedom House report that warns about the dangers of the use of social media analytics tools by government officials for mass surveillance. The report notes that technologies exist to "map users' relationships through link analysis; assign a meaning or attitude to their social media posts using natural-language processing and sentiment analysis; and infer their past, present, or future locations" in ways that risk civil liberties of social media users. However, nothing in the report suggests that Internet platforms have within reach well-functioning tools to automatically, consistently, and perfectly identify problematic speech as nuanced as defamation, hate speech, harassment, or the many other types of dangerous speech that platforms prohibit to protect their

[7] Petition at 9.
[8] Petition at 5.

users. In fact, the report's policy recommendations include "[p]reserving broad protections against intermediary liability" and warn that "[p]olicies designed to enforce political neutrality would negatively impact 'Good Samaritan' rules that enable companies to moderate harmful content without fear of unfair legal consequences and, conversely, would open the door for government interference."

In reality, perfect content moderation tools do not exist, and the tools that do exist cannot be used alone, especially without chilling user speech. Human moderation will always be a necessary step to understand the context of speech, and, as exemplified by Twitter's growth pattern described above, human moderation of each piece of user-generated content quickly becomes impossible and carries its own steep costs. Even where platforms have supplemented their human moderation efforts with automated content moderation tools, they have been extremely expensive, and they work imperfectly, often removing legal content and other speech that does not violate a platform's acceptable use policies.

Take, for instance, YouTube's work on ContentID, a tool to help rightsholders identify copyrighted material uploaded to the video sharing site. According to the company, YouTube's parent company Google had invested more than $100 million in ContentID as of 2018. The problems with ContentID incorrectly flagging non-infringing content are well documented,[9] despite that substantial investment from one of the world's largest technology companies. The petition even recognizes the overwhelming costs of building content moderation tools, acknowledging that the largest companies have "invested immense resources into both

[9] Washington Journal of Law, Technology & Arts, "YouTube (Still) Has a Copyright Problem" (Feb. 28, 2019), available at https://wjlta.com/2019/02/28/youtube-still-has-a-copyright-problem/

professional manual moderation and automated content screening for promotion, demotion, monetization, and removal."[10] Content moderation tools, and the "immense resources" needed to build them, are far out of the reach of startups, which launch with, on average, $78,000 in funding.[11] If automated content filtering tools are not the silver bullet—as the petition implies—for the biggest and best positioned technology companies in the world, they will certainly fail to solve all content moderation problems for small and new Internet platforms.

The petition's claims about alleged online platform bias are unsupported and cannot support its proposed rewrite of Section 230

In laying out the case for its sweeping reimagining of Section 230, the petition cherry picks one of the statute's findings, claiming that "Congress's purpose [in enacting] section 230 [was to] further a 'true diversity of political discourse,'" but that "times have changed, and the liability rules appropriate in 1996 may no longer further" this purpose.[12] Putting aside the fact that the petition conveniently omits that one of the statute's other stated policy goals "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"[13] militates against its proposed rulemaking, the petition fails to provide any evidence that Section 230 no longer promotes a diversity of political discourse.

[10] Petition at 13.
[11] Fundable, "A Look Back at Startup Funding in 2014," (2014), available at https://www.fundable.com/learn/resources/infographics/look-back-startup-funding-2014
[12] Petition at 4.
[13] 47 U.S.C. § 230(b)(2).

The petition is full of unsupported claims that "large online platforms appear to engage in selective censorship that is harming our national discourse"[14] and that "tens of thousands of Americans have reported, among other troubling behaviors, online platforms 'flagging' content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse,"[15] but it does not present any evidence supporting these claims. Transparently, it attempts to buttress its assertions about "tens of thousands" of reports of Internet platform censorship by citing to the EO, which, not surprisingly, itself fails to provide any evidence beyond conclusory allegations that any such censorship (or even the purported complaints themselves) actually happened.[16] The best evidentiary support the petition can muster for these claims of political bias amongst online platforms is an unsupported assertion from FCC Commissioner Brendan Carr that "there's no question that [large social media platforms] are engaging in editorial conduct, that these are not neutral platforms," and a reference to a pending lawsuit against a single online platform alleging bias.[17] Factually baseless claims—even from an FCC Commissioner—cannot support such a drastic reversal of settled law.

NTIA reveals its hand by openly admitting that it has no factual basis for its assertions of political bias, admitting that "few academic empirical studies exist of the phenomenon of social

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[14] Petition at 7.
[15] Id. at 25.
[16] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020), available at https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship; Petition at 7.
[17] Id. at 7-8.

media bias."[18] Curiously, it does not actually cite any of these studies, likely because they undermine the petition's thesis. In fact, as two studies from Media Matters for America regarding the reach of partisan content on Facebook demonstrated, "right-leaning and left-leaning pages had virtually the same engagement numbers based on weekly interactions (reactions, comments, and shares) and interaction rates (a metric calculated by dividing the total number of interactions per post on an individual page by the number of likes the page has)."[19] Far from proving that Internet companies engage in widespread censorship of political speech they disapprove of, these studies make clear what is evident to anyone who spends any amount of time on the Internet: opinions from across the political spectrum are widely available online to anyone at any time. The only reason that this diversity of political opinion has flourished online is because Section 230 prevents websites from being sued out of existence for user speech—particularly political speech—that it cannot fully control. Removing 230's protections to promote "a diversity of political discourse" online is like fasting to prevent hunger. Contrary to the petition's claims, Section 230 is more necessary than ever for fostering a diverse range of speech online.

The petition's claims that Section 230 inhibits competition are absurd

To support its claim that Section 230 is outdated, the petition argues "that the liability protections appropriate to internet firms in 1996 are different because modern firms have much

[18] Id.
[19] Natalie Martinez, "Study: Analysis of top Facebook pages covering American political news," Media Matters (July 16, 2018), available at https://www.mediamatters.org/facebook/study-analysis-top-facebook-pages-covering-american-political-news; Natalie Martinez, "Study: Facebook is still not censoring conservatives," Media Matters (April 9, 2019), available at https://www.mediamatters.org/facebook/study-facebook-still-not-censoring-conservatives.

greater economic power, play a bigger, if not dominant, role in American political and social discourse,"[20] and that in light of these market developments, "liability shields [like Section 230] can deter market entrance."[21] The notion that protections from virtually unlimited legal liability could somehow be bad for early-stage startups is so perplexing that NTIA predictably makes no effort to justify this claim with anything beyond mere supposition. It is, of course, simple common sense that as the cost of launching and operating a company increases, the rate of new firm formation will decrease. One study of investors found that 78 percent of venture capitalists said they would be deterred from investing in online platforms if new regulations increased secondary legal liability for hosting user content.[22] Given the high cost of litigation, even a slight increase in legal exposure will have a significant negative impact on startup success. Both Congress and the judiciary recognized the problems of unlimited legal exposure for early-stage companies when they passed and interpreted Section 230, respectively.[23] NTIA has failed to identify any changed circumstances in the intervening years to suggest that subjecting early-stage companies to such unlimited legal exposure would now enhance startup formation and competition.

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[20] Petition at 9.
[21] Id. at 14.
[22] Evan Engstrom, Matthew Le Merle, and Tallulah Le Merle, "The Impact of Internet Regulation on Early Stage Investment," Fifth Era and Engine Advocacy, (November 2014), at 5. Available at https://bit.ly/2YKwmnz. Because this study specifically focused on potential increased secondary liability for copyright infringement, it is likely that increasing secondary liability for a much larger range of non-IP claims as NTIA recommends would have an even larger negative impact on investment in new entrants.
[23] Jeff Kosseff, "What's in a Name? Quite a Bit, If You're Talking About Section 230," Lawfare, (Dec. 19, 2019), available at https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230

Equally implausibly, the petition argues that Section 230 hinders competition because it blocks lawsuits to enforce "interactive computer services' contractual representations about their own services," such that "interactive computer services cannot distinguish themselves."[24] According to NTIA's petition, because "[c]onsumers will not believe, nor should they believe, representations about online services," websites cannot "credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns."[25] As with its other arguments, the petition's claims are not supported by evidence or logic.

NTIA's argument is based on the notion that websites are routinely failing to comply with their own terms of service and representations regarding their content moderation practices—an allegation that the petition does not support with any evidence. Moreover, even if the petition were able to cite examples of platforms not complying with their "contractual representations about their own services," it has failed to present any evidence that consumers make decisions about which platforms to use because of their stated content moderation practices rather than, say, the quality of their services. The petition also fails to explain the supposed causal connection between some platforms allegedly failing to comply with their terms of service and a decrease in platform competition. If consumers do not believe that incumbents are fairly moderating user content in accordance with their stated policies, new entrants will be able to compete by deploying better content moderation policies. This is, of course, how the free market works. NTIA's petition seems to believe that users would be more willing to bring costly lawsuits with specious damages claims against platforms that fail to comply with their stated moderation practices than simply switch to a different platform that abides by its moderation

[24] Petition at 26.
[25] Id.

commitments. Not only does the petition fail to present any evidence at all supporting such a bizarre theory of consumer behavior, but it makes the absurd claim that the FCC would bolster competition by drastically changing the legal framework created by Section 230.

Changing Section 230, especially as envisioned by the petition, will do harm to innovation and competition in the online platform space

Section 230 remains one of the most pro-competition laws supporting the U.S. Internet ecosystem. Changing the legal framework that allows Internet platforms to host user-generated content, especially as envisioned by petition, will harm the ability of small and new companies to launch and compete without providing any meaningful benefits to consumers or competition. To quote Chairman Pai, NTIA's petition for rulemaking isn't merely "a solution in search of a problem—it's a government solution that creates a real-world problem."[26]

Modifying Section 230 in the way envisioned by the petition will cement large platforms' market power by making it too costly for smaller companies to host user-generated content. Even with the current legal framework created by Section 230, it costs platforms tens of thousands of dollars per lawsuit to fend off meritless litigation when such a lawsuit can be dismissed at the earliest stages.[27] If platforms lose the ability to quickly dismiss those lawsuits, the costs quickly run into the hundreds of thousands of dollars per lawsuit.[28] At the same time, the petition evisions creating regulatory burdens in the form of transparency requirements around

[26] Oral Dissenting Statement of Commissioner Ajit Pai Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, at 5. Available at https://bit.ly/3lHMujI
[27] Evan Engstrom, "Primer: Value of Section 230," Engine (Jan. 31, 2019), available at https://www.engine.is/news/primer/section230costs
[28] Id.

"content-management mechanisms" and "any other content moderation...practices" that will fall disproportionately on smaller companies. Only the largest, most established platforms with the deepest pockets will be able to compete in a world with a modified Section 230. That will mean there are dramatically fewer places on the Internet where users can go to express themselves, making it harder for diverse viewpoints to find a home online.

Not only would the changes envisioned by the petition make it harder for small and new platforms to launch and grow, changes to the application of the term "otherwise objectionable" would create a legal framework that disincentivizes differentiation in content moderation practices as a way to appeal to unique communities of users online. Take, for instance, the Reddit community "Cats Standing Up." This subreddit features user-submitted images of cats standing up. Their community rules prohibit content that is "[a]nything that isn't a housecat standing."[29] If Section 230's framework were changed such that Reddit would be held liable for user-generated content if they remove content not specifically defined by a narrowed reading of Section 230 (c)(2)(A), they would open themselves up to risk by allowing communities to have rules such as those enabling communities to cater to users who only want to see images of cats standing up. Platforms that launch with the goal of catering to specific communities by hosting specific kinds of content would have to risk legal liability for all user-generated content—which, as established above, is impossible to police in real-time—if they want to engage in content moderation to do anything besides prevent against content that is illegal, obscene, lews, lascivious, filthy, excessively violent, or harassing. This would have the effect of hindering

[29] Reddit, "Cats Standing Up" (March 14, 2012), available at https://www.reddit.com/r/CatsStandingUp/

competition by making it prohibitively expensive to host only specific kinds of user-generated content, or by forcing platforms to forfeit their ability to host niche communities online.

Conclusion

Leaving aside the worthy criticisms of the petition for its inaccuracies surrounding the FCC's authority and the congressional intent of Section 230, the petition fails to identify a justification for such dramatic changes to the law, especially changes that would so disproportionately harm small and new companies and hamper competition in the Internet ecosystem. If the goal of the petition is to "promot[e] Internet diversity and a free flow of ideas" and address a "particularly troubling" alleged lack of competition, the federal government should be strengthening Section 230's legal framework, not taking politically-motivated shots at the law that underpins the creation and sharing of user-generated speech online.

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via First Class mail upon:

Douglas Kinkoph
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for
Commerce for Communications and Information

/s/ 

Evan Engstrom

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	**)**	
Section 230 of the Communications Decency Act	**)**	**RM-11862**
	)	

COMMENTS OF CONSUMER REPORTS
RE: THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

September 2, 2020

Consumer Reports (CR) is an independent, nonprofit member organization that works side by side with consumers for truth, transparency, and fairness in the marketplace. In defense of those principles, CR strongly encourages the Federal Communications Commission (FCC) to reject the National Telecommunications and Information Administration's (NTIA) petition for rulemaking[1] submitted to the FCC on July 27, 2020 regarding Section 230 of the Communications Decency Act of 1996 (Section 230).[2]

Neither the NTIA nor the FCC have the legal authority to act on these issues. Moreover, platforms should be encouraged to exercise more moderation of their platforms to remediate fraud, harassment, misinformation, and other illegal activity; the policies requested in the NTIA petition for rulemaking would make it more difficult for platforms to police for abuse, resulting in a worse internet ecosystem for consumers.

I. Introduction and Background

On May 26, 2020 the President tweeted two statements about mail-in voting.[3] Twitter applied fact-checks—adding constitutionally-protected speech—to those tweets.[4] Six days later, the President issued the Executive Order on Preventing Online Censorship,[5] which directed the Secretary of Commerce, by way of the NTIA, to file the Petition which would further encourage an FCC rulemaking to reinterpret Section 230. The regulatory proposals offered to the FCC by the NTIA would introduce contingencies to, and ultimately reduce, the scope of immunities that Section 230 grants to interactive computer services. If enacted, these new measures would expose platforms to significantly more liability than they currently face and could thereby disincentivize content moderation and editorial comment

[1]National Telecommunications & Information Administration, Petition for Rulemaking of the NTIA (July 27, 2020), 42, available at https://www ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf ("Petition").
[2] 47 USC § 230 (*available at:* https://www.law.cornell.edu/uscode/text/47/230).
[3] Kate Conger and Davy Alba, "Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting" New York Times (May 26, 2020), https://www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots html.
[4] *Id.*
[5] Executive Order on Preventing Online Censorship (May 28, 2020), *available at:* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/. ("Executive Order").

expressed by platforms—the very sort of actions taken by Twitter that seem to have spurred the Executive Order in the first place.

Notwithstanding Twitter's very sporadic fact-checks, online platforms generally fail consumers in the quality of their content moderation. Contrary to the Executive Order's presumed intent, the law needs to do more, not less, to encourage the transparent remediation of harmful content on internet platforms. Any honest appraisal of the amount of online misinformation in 2020 reveals the failure by platforms to better mitigate the viral spread of lies, dangerous conspiracy theories, scams, counterfeit goods, and other falsehoods.[6]

To adequately protect and empower consumers, existing platforms should make efforts to strengthen and improve moderation capacity, technique, nuance, and quality. However, any government-designed incentives to this end, either through the modification of Section 230 or the enactment of alternative regulatory frameworks to better incentivize thoughtful platform moderation is not the job of the NTIA or the FCC. Moreover, the mere exercise of debating the Petition in this proceeding has the potential to chill free expression online, threaten the open internet, and accelerate a myriad of consumer harms caused by inadequate platform moderation that fails to mitigate harmful content.

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[6] Deepa Seetharaman, "QAnon Booms on Facebook as Conspiracy Group Gains Mainstream Traction" Wall Street Journal (August 13, 2020), https://www.wsj.com/articles/qanon-booms-on-facebook-as-conspiracy-group-gains-mainstream-traction-11597367457; *see also* Kaveh Waddell, "Facebook Approved Ads with Coronavirus Misinformation" Consumer Reports (April 7. 2020), https://www.consumerreports.org/social-media/facebook-approved-ads-with-coronavirus-misinformation/; Elyse Samuels, "How Misinformation on WhatsApp Led to a Mob Killing in India" Washington Post (February 21, 2020), https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/; Ryan Felton, "Why Did It Take a Pandemic for the FDA to Crack Down on a Bogus Bleach 'Miracle' Cure?" Consumer Reports (May 14, 2020), https://www.consumerreports.org/scams-fraud/bogus-bleach-miracle-cure-fda-crackdown-miracle-mineral-solution-genesis-ii-church/; *and* Ryan Felton, "Beware of Products Touting False Coronavirus Claims" Consumer Reports (March 9, 2020), https://www.consumerreports.org/coronavirus/beware-of-products-touting-fake-covid-19-coronavirus-claims/. The article highlighted: "...a spot check by CR uncovered a number of questionable products with claims that they help fight and even prevent COVID-19. A brimmed hat with an 'anti-COVID-19 all-purpose face protecting shield' was available for $40. A 'COVID-19 protective hat for women' could be purchased for $6. And if you happened to search for 'COVID-19,' listings for multivitamins and a wide array of e-books on the topic popped up."

As it stands, the NTIA Petition to the FCC has no basis in legitimate constitutional or agency authority. Therefore, the FCC should reject the Petition in its entirety. The Petition's very existence stems from an unconstitutional Executive Order and lacks legal authority to be implemented for two reasons. First, NTIA lacks the authority to file such a petition. Second, the FCC possesses no authority to rulemake on this matter, to interpret section 230, or to regulate platforms. Ultimately, the concerns raised regarding Section 230 are appropriately and best addressed by Congress. As discussed at length in CR's testimony delivered at a House Energy & Commerce hearing earlier this year, and made clear above, we agree that online misinformation is an urgent and crucial issue affecting the online marketplace.[7] However, to punish those platforms who are attempting to mitigate those harms runs counter to public welfare, common sense, and even the underlying intent and purpose of Section 230 immunity.

II. A Lack of Constitutional and Regulatory Authority

The First Amendment prohibits both retaliatory action by government officials in response to protected speech and the use of government power or authority to chill protected speech.[8] The Executive Order's issuance in response to the fact-checks applied to the President's Twitter account make clear that the attempt to alter Section 230 immunity in ways that will open the platforms up to more liability is a punitive retaliatory action. This act alone offends the sensibilities of the First Amendment.

Furthermore, the issuance of the Executive Order, the NTIA's subsequent Petition, and even the FCC's consideration, rather than outright denial of the Petition—are all forms of government action that, taken as a whole, chill constitutionally-protected speech. These efforts represent an executive branch attempt to increase platform content liability because

[7] Testimony of David Friedman, ""Buyer Beware: Fake and Unsafe Products on Online Marketplaces" House Energy and Commerce Committee Hearing, (March 4, 2020), https://advocacy.consumerreports.org/wp-content/uploads/2020/03/HHRG-116-IF17-Wstate-FriedmanD-20200304.pdf.

[8] For an excellent citation of federal court cases that elaborate upon First Amendment protection against government action that chills free speech, *see* footnotes 5-7 found on page 4 of the Comments of the Center of Democracy and Technology, "Opposing the National Telecommunications and Information Administration's Petition for Rulemaking", FCC Docket RM-11862, (August 31, 2020), https://cdt.org/wp-content/uploads/2020/08/CDT-Opposition-to-NTIA-Petition-on-Section-230.pdf ("CDT Comments").

the President disagreed with Twitter's editorial fact-checks. Not only could Twitter be chilled by this action, platforms considering similar mitigation efforts to curtail and fact-check misinformation on their platforms could also be reluctant to exercise their constitutionally-protected free speech rights.

A. The NTIA Lacks Authority to File the Petition

Even if we could presume the Executive Order is constitutionally sound, it is unclear, at best, whether the NTIA maintains the legal authority to file the Petition. The NTIA filed the Petition to the FCC on the basis of its mandate to, "ensure that the views of the executive branch on telecommunications matters are effectively presented to the [Federal Communications] Commission*"*[9] and its authority to, "develop and set forth telecommunications policies pertaining to the Nation's economic and technological advancement and to the regulation of the telecommunications industry."[10] However, "telecommunications" refer specifically to the "transmission" of information,[11] and the cited authorities do not reference "information" or "information services."[12] The NTIA's scope of expertise has been primarily rooted in access to telecommunications services, international telecommunications negotiations, funding research for new technologies and applications, and managing federal agency spectrum use.[13] Even the agency's FY 2020 budget proposal reflects these priorities: undeniably centered on infrastructure, the budget explicitly prioritized broadband availability, spectrum management, and advanced communications research—and, even where policy was concerned, focused on cybersecurity, supply-chain security, and 5G.[14]

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[9] 47 U.S.C. § 902(b)(2)(J).
[10] 47 U.S.C. § 902(b)(2)(I).
[11] 47 USC § 153(50).
[12] 47 U.S.C. § 902(b)(2).
[13] U.S. Congressional Research Service, *The National Telecommunications and Information Administration (NTIA): An Overview of Programs and Funding*, R43866 (May 19, 2017), https://crsreports.congress.gov/product/pdf/R/R43866.
[14] U.S. Department of Commerce, *National Telecommunications and Information Administration FY 2020 Budget as Presented to Congress*, (March 2019), https://www.ntia.doc.gov/files/ntia/publications/fy2020_ntia_congressional_budget_justification.pdf.

Section 230 of the Communications Decency Act, however, concerns the information itself—the content—as published on the internet and moderated by platforms, rather than the technical infrastructure over which that content is passed. Said another way, the NTIA mission centers upon the systems that power technology, not the creative cargo that travels on top of it. Therefore, dabbling with regulations concerning content moderation and liability are well outside the expertise of the NTIA. Perhaps most tellingly, the NTIA has never before seen fit to comment on Section 230—despite nearly a quarter century of vigorous debate since its passage in 1996.[15]

B. The FCC Lacks Authority To Rulemake on Section 230 and Lacks Jurisdiction Over Platforms in Question

The type of rules sought by the NTIA at the President's behest are also outside the scope of the Federal Communications Commission's authority.[16] First and foremost, there is no mention of the FCC in Section 230.[17] As such, there is no grant of Congressional authority for the Commission to promulgate the rules envisioned by the NTIA's Petition. Try as it might, the Petition cannot by fiat create FCC authority to act where no such power exists with respect to Section 230. The simple reality is that Section 230 is a self-executing statute enforced by the courts, and not the FCC.

If the FCC were to agree with and act pursuant to the NTIA's Petition, it would run contrary to the Commission's citation to Section 230 as a reason for liberating internet service providers (ISPs) from internet regulation in the name of preserving an open internet in 2017.[18] Furthermore, the *Restoring Internet Freedom Order (RIFO)* also reclassified ISPs

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[15] Vimeo, Inc. "Petition Of Vimeo, Inc. To Dismiss The National Telecommunications And Information Administration's Petition For Rulemaking," FCC Docket RM-11862, p. 3, (August 4, 2020), https://ecfsapi fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf.

[16] For a fuller discussion of the FCC's lack of authority regarding Sec. 230, *see* Harold Feld, "Could the FCC Regulate Social Media Under Section 230? No." Public Knowledge, (August 14, 2019). https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/.

[17] CDT Comments, p. 6.

[18] In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4467 (2017).

as "information" services rather than "telecommunications" services[19] (CR has strongly argued that ISPs plainly are the latter)—but the NTIA's justification for FCC jurisdiction relies upon the Commission's ability to regulate telecommunications services as common carriers. If an ISP like Comcast or AT&T no longer qualifies as a telecommunications service, then neither, surely, does an edge provider or social media network like Twitter or Google.[20]

Even before *RIFO* was adopted in 2017, the Commission lacked authority to promulgate rules interpreting Section 230. Nearly three years later, the effect of that order further cements the FCC's lack of power to do anything that the NTIA asks of it regarding Section 230. To do otherwise could represent the sort of internet regulation that the Commission feared when it repealed its own net neutrality rules, and would constitute an about-face with respect to FCC authority over the internet ecosystem.

III. Limits on Content Moderation Under Existing Law and the Need for Stronger—Not Weaker—Incentives for Platform Responsibility

While Section 230 broadly immunizes internet platforms for curation and moderation decisions, it is important to note that there are existing legal constraints on platform behavior. If a platform editorializes about someone else's content—as Twitter did when it fact-checked the President's tweet regarding mail-in voting—the platform itself is responsible for that speech. In that case, it may be held liable for its own defamatory content, though American libel laws are famously narrow to accord with our free speech values.[21] If a platform suborns or induces another to behave illegally, it may bear responsibility for its own role in encouraging such behavior.[22] Further, if a platform mislabels or misidentifies another's

[19] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order (hereinafter, "RIF Order"), 33 FCC Rcd 311 (2018).
[20] CDT Comments, p. 6.
[21] Ari Shapiro, "On Libel And The Law, U.S. And U.K. Go Separate Ways" NPR (March 21, 2015), https://www.npr.org/sections/parallels/2015/03/21/394273902/on-libel-and-the-law-u-s-and-u-k-go-separate-ways.
[22] *See Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th. Cir. 2008).

content for commercial advantage, it may violate Section 5 of the Federal Trade Commision (FTC) Act's prohibition on deceptive or unfair business practices.[23]

Indeed, Section 5 may affirmatively *require* some degree of content moderation to protect platform users from harmful content. For at least fifteen years, the FTC has interpreted its Section 5 unfairness authority to require companies to use reasonable data security to prevent third-party abuse of their networks. In a number of other contexts, too, the FTC has interpreted Section 5 to require policing of others' actions: Neovi and LeadClick are just two examples of the FTC holding platforms liable for third-party abuses.[24] Given the vital role that large online platforms play in the modern economy, these companies should have an even greater responsibility to curate and remediate harmful content—even and especially where they have historically done a poor job of addressing such issues.[25]

In many cases, platforms today have material disincentives to moderate deceptive and harmful activity: fake reviews, views, accounts, and other social engagement artificially amplify the metrics by which they are judged by users and investors.[26] Perhaps, in part, it is for this reason that social media sorting algorithms tend to prioritize posts that receive more engagement from users with higher followers—providing further incentives for marketers to use deceptive tactics to augment those numbers.

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[23] *See* Lesley Fair, "A Date With Deception? FTC Sues Match.com For Misleading And Unfair Practices" Federal Trade Commission (September 25, 2019), https://www ftc.gov/news-events/blogs/business-blog/2019/09/date-deception-ftc-sues-matchcom-misleading-unfair-practices.

[24] *See* Footnote 6. *See also* Press Release, "FTC Action Results in Contempt Order Against Online Check Writing Marketers", Fed. Trade Comm'n (Jul. 27, 2012), https://www.ftc.gov/news-events/press-releases/2012/07/ftc-action-results-contempt-order-against-online-check-writing; Press Release, "U.S. Circuit Court Finds Operator of Affiliate Marketing Network Responsible for Deceptive Third-Party Claims Made for Lean-Spa Weight-Loss Supplement" Fed. Trade Comm'n (Oct. 4, 2016), https://www ftc.gov/news-events/press-releases/2016/10/us-circuit-court-finds-operator-affiliate-marketing-network.

[25] Alexandra Berzon, Shane Shifflett and Justin Scheck, "Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products" Wall Street Journal (August 23, 2019), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990; *see also* Olivia Solon, "Facebook Management Ignored Internal Research Showing Racial Bias, Employees Say" NBC News (July 23, 2020), https://www.nbcnews.com/tech/tech-news/facebook-management-ignored-internal-research-showing-racial-bias-current-former-n1234746 https://www.nytimes.com/2019/11/28/business/online-reviews-fake html.

[26] Nicholas Confessore et al., "The Follower Factory*"* New York Times (Jan. 27, 2018), https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots html.

Policymakers should explore solutions that incentivize remediating the worst sorts of harms that platforms currently enable. As currently written and interpreted, Section 230's "Good Samaritan" provision *allows* for good faith moderation, but it does *not* encourage it. Setting aside its lack of legal basis, this Petition wrongly urges the FCC to go in the opposite direction, and could further discourage platforms from taking responsibility for the potential harm that misinformation facilitates. If somehow the NTIA's proposed framework were enacted by the Commission, it would make it considerably more risky and costly for platforms to act on behalf of their users to address illegitimate third-party behavior. Such a policy would exacerbate the many ills caused by online misinformation, and we fear would lead to more, not less, consumer harm.

IV. Conclusion

Ultimately, the power to substantively re-clarify, expand or narrow protections, or otherwise functionally modify Section 230 immunity belongs with our elected representatives in Congress, and even then, should be undertaken with great caution. Subsection (c)(1) of Section 230 has been referred to as "the twenty-six words that created the internet."[27] This statute simultaneously allows smaller online platforms and edge providers to compete by shielding them from ruinous litigation, and allows all platforms to moderate harmful content in accordance with their own terms of use without being deterred by liability for every piece of user-generated content on the platform.

Nevertheless, Congress can and should strengthen the incentives for platforms to carefully moderate harmful or false content on their sites and networks. Lawmakers should also hold platforms responsible, commensurate with their power and resources, for protecting consumers from content that causes demonstrable harm. This is no easy task. Any alteration of Section 230 that risks or reduces the incentive to fact-check or mitigate the damage caused

[27] *See* Jeff Kosseff "The Twenty-Six Words That Created the Internet" Cornell University Press; 1st Edition (April 15, 2019).

by misinformation would be irresponsible legislation with the unintended consequence of increasing, not decreasing, online misinformation.

Consumer access to accurate information is crucial to a safe, fair marketplace, particularly in the midst of a global pandemic and an election cycle fraught with misinformation that leads to real consequences. Yet the authority to weigh these costs and rewrite Section 230 of the Communications Decency Act lies exclusively with Congress. The FCC has no legal authority to do so and the NTIA further lacks the legal authority to file the Petition as directed by the President's Executive Order. For these reasons, the Commission should reject the NTIA Petition in its entirety.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
NTIA Petition for Rulemaking to	)	
Clarify Provisions of Section	)	RM-11862
230 of the Communications Act	)	
Act of 1934, As Amended	)	

COMMENTS OF FREE PRESS

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Executive Summary

Donald Trump's tenure as President of the United States has been marked by attacks on the press, media outlets, and social media companies any time that they have sought to provide context, scrutinize, or even simply cover his statements accurately.[1] The NTIA's petition for rulemaking ("Petition") was born from those corrupt and ignoble impulses.[2] The president, upset after Twitter fact-checked his statements regarding mail-in voting,[3] promulgated an unlawful and unconstitutional executive order that seeks to use the power of the federal government to stifle, censor, and intimidate media companies that criticize him, and to force those same companies to carry and promote favorable content about him and his administration.[4] It is hard to think of actions more inimical to the promise of the First Amendment and the spirit of the Constitution. To protect the rule of law and uphold those values, Free Press has joined a lawsuit challenging the lawfulness of the executive order that began this process.[5]

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[1] *See* Committee to Protect Journalists, *The Trump Administration and the Media* (April 16, 2020) ("The Trump administration has stepped up prosecutions of news sources, interfered in the business of media owners, harassed journalists crossing U.S. borders, and empowered foreign leaders to restrict their own media. But Trump's most effective ploy has been to destroy the credibility of the press, dangerously undermining truth and consensus even as the COVID-19 pandemic threatens to kill tens of thousands of Americans.") https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/.

[2] Petition for Rulemaking of the National Telecommunications and Information Administration, RM-11862 (filed July 27, 2020) ("Petition").

[3] *See, e.g.*, Shirin Ghaffary, "Twitter has Finally Started Fact-Checking Trump," *Vox* (May 26, 2020), https://www.vox.com/recode/2020/5/26/21271210/twitter-fact-check-trump-tweets-mail-voting-fraud-rigged-election-misleading-statements.

[4] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020).

[5] Press Release, Free Press, "Free Press and Allies File Lawsuit Challenging Trump's Executive Order Against Social-Media Companies" (Aug. 27, 2020), https://www.freepress.net/news/press-releases/free-press-and-allies-file-lawsuit-challenging-trumps-executive-order-against.

As such, we are reluctant to engage in this cynical enterprise, intended by the administration to bully and intimidate social media companies into rolling back their content moderation efforts for political speech in the few months before the 2020 presidential election lest they face adverse regulation. The FCC, as Commissioner Rosenworcel said, ought not have taken this bait and entertained a proposal to turn the FCC into "the President's speech police."[6]

Yet, here we are.

The NTIA petition is shoddily reasoned and legally dubious. It unlawfully seeks to radically alter a statute by administrative fiat instead of through the legislative process. It invents ambiguity in Section 230 where there is none,[7] and imagines FCC rulemaking authority where there is none.[8] Lastly, it asks the courts to abide by FCC "expertise" on Section 230 and intermediary liability for speech where there is none (and where the FCC itself disclaims such a role),[9] based on authority that the FCC does not have and jurisdiction it has disavowed.

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[6] Press Release, "FCC Commissioner Jessica Rosenworcel on Section 230 Petition and Online Censorship" (July 27, 2020) ("If we honor the Constitution, we will reject this petition immediately."), https://docs.fcc.gov/public/attachments/DOC-365758A1.pdf.

[7] *See* Eric Goldman, "Comments on NTIA's Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230," (Aug. 12, 2020), https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm.

[8] *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 267 (2017) ("*RIFO*") ("We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here."); *see also* Harold Feld, "Could the FCC Regulate Social Media Under Section 230? No.", (Aug. 14, 2020), https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/.

[9] See, for example, the Commission's public outreach materials that expressly disclaim any such role and declare simply that "[t]he Communications Act prohibits the FCC . . . from making any regulation that would interfere with freedom of speech." Federal Communications Commission, "The FCC and Freedom of Speech," (Dec. 30 2019), https://www.fcc.gov/consumers/guides/fcc-and-freedom-speech.

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Introduction

For over a decade now Free Press has been stalwart in its advocacy that broadband internet access service is a transmission service, or what the Communications Act defines as a "telecommunications service" properly subject to nondiscrimination rules that protect internet users, competition, speech, and the free and open internet.[10] Yet, the Trump FCC's misnamed Restoring Internet Freedom Order ("RIFO") repealed those successful rules for broadband providers, and abandoned the proper Title II authority to institute those rules.

At that time, members of the present majority at the Commission conflated broadband internet access with the content that flows over such access networks; but whatever the folly of such conflation, they doubled down on the (il)logic of their argument, and proclaimed that the FCC should never have decided "to regulate the Internet" at all.[11] Even Commissioner Carr agreed, crowing that the repealed rules represented a "massive regulatory overreach" because they applied nondiscrimination rules to broadband providers, which in Carr's opinion should be treated as information services subject to no such "Internet conduct" rules at all.[12] The attack on conduct rules was premised not only on the same Trump FCC's belief that there was no need for them, but – crucially – that the Commission also had no authority to adopt such rules.

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[10] *See, e.g.*, Comments of Free Press, GN Docket No. 10-127, at 2 (filed July 15, 2010) ("Pursuing a limited Title-II classification restores the Commission's authority to move forward. The factual record and relevant legal precedent unassailably support the conclusion that the proposed policy shift is both necessary and wise. And a limited Title-II classification will uphold the commonly shared principles of universal service, competition, interconnection, nondiscrimination, consumer protection, and reasoned deregulation – principles that created the Internet revolution.").

[11] *See, e.g., RIFO*, Statement of Commissioner Michael O'Rielly.

[12] *See id.*, Statement of Commissioner Brendan Carr.

How times have changed. Though this is perhaps unsurprising, because one of the only consistent aspects of this administration and its appointees is their wild inconsistency. Yet having abdicated and rejected its own authority to adopt such rules for broadband telecommunications providers, the Commission now entertains the notion (at NTIA's behest) that it could adopt such rules after all, only for all information service providers this time. At least insofar as they qualify as "interactive computer services" pursuant to the different statutory definition in Section 230.

Regulating access networks to prevent unreasonable discrimination is still essential to ensuring free speech online, preserving access to diverse points of view and political information of all kinds, and cultivating online communities where people with common interests can meet, organize, and have moderated conversations of their choosing. That's because broadband telecommunications networks provide access to every destination online. But no matter how powerful and popular certain individual destinations on the internet have become, regulating them in the same way makes no sense. Regulating the conversations that happen on the internet, and not the pathways[13] that take us there, is a funhouse mirror version of the FCC's proper role, and it also would thwart all of the NTIA's alleged goals of promoting a diversity of viewpoints and conversations online.

NTIA's Petition reads Section 230 all wrong, in service of the administration's real objective: preventing commentary on and critique of the president's misinformation and unfounded utterances. Specifically, the Petition wrongly claims that the provisions in Section

[13] *See* Matt Wood, "Private: Public Sidewalks on Private Property: Net Neutrality, Common Carriage, and Free Speech," American Constitution Society Blog (Sept. 29, 2015) https://www.acslaw.org/expertforum/public-sidewalks-on-private-property-net-neutrality-common-carriage-and-free-speech/.

230(c)(2)(A), which allows websites to moderate any content they deem "otherwise objectionable," are ambiguous and in need of clarification. Yet this supposed clarification would render that provision a nullity. It would allow interactive computer services (as defined in Section 230 itself) that enable access to third-party content to moderate only when content is already unlawful or already subject to FCC regulation (like pornography or obscenity are).

No other third-party material, if it is lawful, could readily be taken down by platforms were the Commission to accept the Petition's invitation. This lawful-versus-unlawful dichotomy plainly contradicts the statutory text in Section 230. It would effectively end the ability of social media sites to create differentiated services, and forbid them from taking down Nazi, anti-Semitic, racist, and "otherwise objectionable" content that is permitted under the First Amendment. This supposed "clarification" of Section 230, mandated that "good faith" moderation requires leaving such objectionable material up, is awful policy and unlawful too.

I. NTIA's Interpretation Guts One of the Most Important Protections for Online Speech, and Would Curtail Not Promote Diversity of Viewpoint on the Internet.

Despite the emergence of Section 230 reform as a hot-button political issue on both sides of the political aisle,[14] and the Petition's fanciful and evidence-free claims that this statute is somehow suppressing political expression[15] and other views, any claimed harm is swamped by

[14] *See* Adi Robertson, "Lots of Politicians Hate Section 230 - But They Can't Agree on Why," *The Verge* (June 24, 2020), https://www.theverge.com/21294198/section-230-tech-congress-justice-department-white-house-trump-biden.

[15] *See, e.g.*, Mathew Ingram, "The myth of social media anti-conservative bias refuses to die," *Columbia Journalism Review* (Aug. 8, 2019), https://www.cjr.org/the_media_today/platform-bias.php; Casey Newton, "The real bias on social networks isn't against conservatives," *The Verge* (April 11, 2019) ("The truth is that social networks have been a boon to partisans of every stripe – conservatives especially."), https://www.theverge.com/interface/2019/4/11/18305407/social-network-conservative-bias-twitter-facebook-ted-cruz.

the benefits of Section 230. The fact remains that Section 230 greatly lowers barriers for third-party speech hosted on platforms, large and small, that these third-party speakers do not themselves own.

The speech-promoting effects of Section 230's provisions are straightforward. An interactive computer service generally will not be subject to speaker or publisher liability simply because it hosts third-party or user-generated content. Those same interactive computer services will also not create liability for themselves by removing content from their own services, if either the service itself or its users consider that content to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[16]

We have discussed the origin and necessity of Section 230's provisions in other forums.[17] Both Section 230(c)(1) and (c)(2) are necessary for the proper functioning of the liability shield, and only together do they properly cure the confused, pre-230 liability regime which required online entities to choose a course of either no moderation at all, or moderation with the risk of exposure to publisher-liability for restricting access to any third-party content.

Together, these subsections allow people and companies of all sizes to create forums that host content of their own choosing. That means forums can organize themselves around people's identities, political affiliations, or other interests too, without having to entertain interlopers in their digital houses if they choose not to.

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[16] 47 U.S.C. § 230 (c)(2)(A).

[17] *See* Gaurav Laroia & Carmen Scurato, "Fighting Hate Speech Online Means Keeping Section 230, Not Burying It," *TechDirt* (Aug. 31, 2020), https://www.techdirt.com/articles/20200821/08494445157/fighting-hate-speech-online-means-keeping-section-230-not-burying-it-gaurav-laroia-carmen-scurato.shtml.

The NTIA's radical reinterpretation of Section 230 would shrink the congressionally mandated scope of the statute's grant to interactive computer services, taking away their generally free-hand to take down or restrict any content such services find objectionable or problematic, and restricting them to removing only material that the president and his advisors deem objectionable too: content that is already unlawful, or that fits a category the Commission itself already has regulated (like pornography, obscenity, and some spam and harrassment).

Section 230's language ensuring that takedowns of content do not give rise to liability must be broad, especially when it concerns content that is distasteful to the platform or its users. The statute itself has exemptions from the liability protections it otherwise grants – carve-outs to the carve-out – for federal criminal law, intellectual property law, and other topics. And courts have explained that this immunity is broad though not unlimited.[18] Yet Section 230 rightfully protects websites when they remove material that is "lawful, but awful" and allows them to set their own terms of service without fear of exposing them to liability. Shrinking this provision in the way the NTIA proposes would undermine Section 230's necessary fix to the pre-230 liability regime. That would force websites to carry objectionable third-party content, and use the structure of Section 230 to impermissibly adopt conduct rules for websites.

[18] *See Enigma Software Grp. USA, v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019) ("We therefore reject Malwarebytes's position that § 230 immunity applies regardless of anticompetitive purpose. But we cannot, as Enigma asks us to do, ignore the breadth of the term 'objectionable' by construing it to cover only material that is sexual or violent in nature.").

A. NTIA's Proposal rests on an Ahistorical and Unwarranted Read of the "Otherwise Objectionable" and "Good Faith" Provisions of Section 230.

Though NTIA spills buckets of ink and fills dozens of pages attemptinging to justify its proposed changes to Section 230, we can cut to the chase and lay out plainly the statutory text that this administration wants to rewrite on Congress's behalf – violating the separation of powers between the legislative and executive branches and usurping the power of the Commission as an independent agency in the process.

NTIA seeks to restrict the meaning of "otherwise objectionable" in Section 230(c)(2)(A), changing it to mean something far less than any material that an interactive computer service may deem offensive – whether those materials are "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" or objectionable in some other way.[19] In the administration's view, the term should encompass only materials targeted by the Communications Decency Act ("CDA") itself, and those "that were objectionable in 1996 and for which there was already regulation" – claiming that, despite the plain text of the statute, Congress merely "intended section 230 to provide incentives for free markets to emulate"[20] that "already-regulated" structure.

According to NTIA, that means permitted takedowns would solely be for the kind of material prohibited in the 1909 Comstock Act[21] and in Section 551 of the Communications Act

[19] 47 U.S.C. § 230 (c)(2)(A).

[20] Petition at 34.

[21] *Id.* ("The Comstock Act prohibited the mailing of 'every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character.'").

titled "Parental Choice in Television Programming"[22]; material akin to obscene or harassing telephone calls[23]; and material the rest of the CDA prohibited. NTIA thereby reads the subsection as only referencing "issues involving media and communications content regulation intended to create safe, family environments."[24]

NTIA's proposal is a radical restriction of the meaning of "otherwise objectionable" in the statute, without textual or judicial support.[25] There is no historical evidence to tie the purposes or meaning of Section 230 to the remainder of the largely struck-down Communications Decency Act or its goals.[26] Courts have debated the contours of Section

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[22] *Id.* at 35 ("The legislation led to ratings for broadcast television that consisted of violent programming. The FCC then used this authority to require televisions to allow blocking technology.").

[23] *Id.* at 37, citing 47 U.S.C. § 223 ("Thus, the cases that struggled over how to fit spam into the list of section 230(c)(2) could simply have analogized spam as similar to harassing or nuisance phone calls.").

[24] *Id.* at 37.

[25] *See Enigma Software*, 946 F.3d at 1051 (dismissing such a narrow construction of the term "otherwise objectionable").

[26] *See* Hon. Christopher Cox, Counsel, Morgan, Lewis & Bockius LLP; Director, NetChoice, "The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World," before the Commerce, Science, & Transportation Committee of the Senate (July 28, 2020) ("Cox Testimony"), https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71. As former Representative Cox explained: "In fact, the Cox-Wyden bill was deliberately crafted as a rebuke of the Exon [Communications Decency Act] approach." Cox also described the relationship between the remainder of the CDA, largely struck down because it sought to prohibit certain kinds of content; and Section 230, which sought instead to give parents the tools to make these choices on their own. "Perhaps part of the enduring confusion about the relationship of Section 230 to Senator Exon's legislation has arisen from the fact that when legislative staff prepared the House-Senate conference report on the final Telecommunications Act, they grouped both Exon's Communications Decency Act and the Internet Freedom and Family Empowerment Act into the same legislative title. So the Cox-Wyden amendment became Section 230 of the Communications Decency Act – the very piece of legislation it was designed

230(c)(2)(A) and some have declined to give interactive computer services complete carte-blanche to take down third-party content (citing possible anticompetitive motives for some content takedowns that might not be exempt),[27] but none have articulated a standard as restrictive as NTIA's. The administration's proposed reading collapses the universe of permissible takedowns to only those enumerated in NTIA's formulation, and not the current, ever-evolving, and inventive panoply of objectionable content on the internet. It would severely curtail platforms ability to take down propaganda, fraud, and other "lawful, but awful" content that isn't lascivious or violent but causes serious harm, like disinformation about elections or COVID-19.

NTIA then seeks to place severe limitations on the meaning of "good faith" in the statute. This "good samaritan" provision was meant to facilitate interactive computer services creating a myriad of websites and content moderation schemes that would "allow a thousand flowers to bloom."[28] NTIA seeks to do the exact opposite.

In its formulation a platform, its agent, or an unrelated party, would be "acting in good faith" under Section 230 only if it "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[29] The Petition would restrict the ability of platforms to rapidly take down objectionable content, only permitting it if

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to counter. Ironically, now that the original CDA has been invalidated, it is Ron's and my legislative handiwork that forever bears Senator Exon's label."

[27] *See* Petition at 32, n. 98.

[28] Cox Testimony at 17 ("Ensuring that the internet remains a global forum for a true diversity of political discourse requires that government allow a thousand flowers to bloom – not that a single website has to represent every conceivable point of view." (internal quotation marks omitted).

[29] Petition at 39.

the "interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others."[30]

These restrictions completely rewrite the meaning, purpose, and effect of the statute. Under this scheme a platform would open itself up to liability for (purportedly) not acting in good faith if it were to restrict or remove third-party content unless that material runs afoul of a largely invalidated law's conception of what is "family friendly." This reinterpretation of the meaning of "otherwise objectionable" in Section 230 would read that unambiguous, and broad but perfectly clear phrase right out of the statute Congress wrote. Just because Congress granted broad discretion to interactive computer services does not make the term "otherwise objectionable" ambiguous. Section 230(c)(2)(A) clearly leaves these moderation decisions to an interactive computer service, to restrict access to any "material that the provider or user considers to be . . . otherwise objectionable."

B. NTIA's Proposal Restricts Lawful, First Amendment-Protected Activity by Interactive Computer Services, and Calls on the FCC to Regulate the Internet by Imposing Conduct Rules on Websites.

NTIA's proposal represents a departure from Section 230's lauded deregulatory regime.[31] The Petition is incredibly proscriptive and seeks to flatten all content moderation into a few designated categories. If enacted it would curtail the rights of private businesses and individuals – all of which are First Amendment-protected speakers – from moderating their sites as they see fit. Instead of providing clarity for websites that carry third-party content, it would force them to

[30] *Id.* at 40.

[31] *See RIFO* ¶ 61, n. 235 ("The congressional record reflects that the drafters of section 230 did 'not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.'") (citing 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

either guess what speech the government chooses to abridge as "objectionable" and then stay within those contours; or else forgo moderation altogether – instituting a must-carry regime and ersatz Fairness Doctrine for the internet, and leaving sites little choice but to drown in posts from bigots, propagandists, charlatans, and trolls. The Petition is nothing more than a cynical attempt to use the guise of law to force internet platforms to carry such content, all chiefly to preserve the presence on private platforms of the falsehoods uttered by this president without any fact-checking, contextualizing, or other editorializing.

NTIA's unlawfully proposed amendments to Section 230's straightforward text would place huge burdens on owners and operators of websites, which are emphatically speakers in their own right.[32] It does so with little justification and only general paeans to the importance of protecting the free speech rights of all.[33] But an FCC-enforced, must-carry mandate for discourse on websites would flatten discussions across the web and destroy the countless discrete and vibrant communities that rely on some degree of moderation to ensure that typically marginalized voices can reach their audience. As former Representative Chris Cox recently testified in defense of Section 230, "Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is."[34] This confusion of the sidewalk for conversation, and of the means of transmission for the speaker, fails at producing the free-speech protective outcome NTIA purportedly seeks to create.

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[32] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 882 (1997).

[33] *See* Petition at 3.

[34] Cox Testimony at 17.

II. The Same FCC that Wrongly Declared Itself Unable to Adopt Conduct Rules for Broadband Providers Under Far More Certain Authority Cannot Fashion Conduct Rules for the Internet Now on the Basis of Section 230 Authority It Disavowed.

Ironically, these stringent anti-blocking rules remind us of the neutrality provisions this FCC undermined and repealed for providers of broadband internet access. Yet whatever one believes about the need for such rules as applied to broadband providers, there is no question that the statute, the courts, and the Commission itself have all denied the agency's ability to impose such stringent nondiscrimination rules on the basis of Section 230 alone.

As indicated at the outset of these comments, we believe nondiscrimination rules are not just lawful but vital for the broadband transmission networks that carry speech to every destination on the internet. But there is no question that such rules are unique. Despite this FCC's propaganda and the intense broadband industry lobbying efforts that fueled it, common carriage rules are still vital for transmission services and others that hold themselves out as providing nondiscriminatory carriage of third-party speech to different users and destinations on the internet. Twitter or Facebook, or any site that hosts third-party or user-generated content, is just such an internet endpoint. An online platform is not a transmission pathway: it's a destination, no matter how many people gather there.

The Petition ignores these kinds of distinctions, and blithely asserts that (1) Section 230 is in the Communications Act, in Title II itself no less; and that (2) Section 201(b) gives the Commission plenary power to adopt any rules it likes pursuant to such other provisions that happen to be in the Communications Act.[35] Because the Supreme Court has previously found FCC action valid under Section 201(b), even when the substantive statute in question did not

[35] *See, e.g.*, Petition at 15-18.

specify a role for the Commission,[36] the NTIA presumes that the Commission is free to act here even though Section 230 makes no mention whatsoever of the FCC (let alone any specific role or ability for the agency to weigh in court's application on Section 230's liability shield).

Having thus asserted but not proven that the Commission might issue some kind of rules under Section 230, the Petition completely ignores the question of whether the FCC could issue these kinds of rules, binding on all "interactive computer services" under Section 230 pursuant to that statute alone. The answer to this question that the Petition desperately evades is a resounding no, based on controlling court precedent and on the FCC's own view of its authority – or, more appropriately, its lack thereof – under 230.

When considering an earlier attempt at Net Neutrality protections and the kind of nondiscrimination mandate that NTIA now proposes for every website and platform on the internet, the D.C. Circuit's decision in *Verizon v. FCC* held in no uncertain terms that such nondiscrimination rules are common carriage requirements. As such, they can be placed only on regulated entities classified as common carriers subject to Title II of the Communications Act, not just on any service or entity merely mentioned in another one of the Act's provisions like Section 230. No massaging of the Communications Act could support those rules under other authorities.[37] So as the Commission itself subsequently recognized, *Verizon* makes plain that

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[36] *See id.* at 16 (citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999) and *City of Arlington v. FCC*, 569 U.S. 290 (2013)).

[37] *See Verizon v. FCC*, 740 F.3d 623, at 655-56 (D.C. Cir. 2014) ("We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], *pro tanto*, to common carrier status. In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold themselves out 'to serve the public indiscriminately.'" (internal citations omitted)).

such common carriage rules are only supportable under the Title II regulation that the current FCC majority rejected even for broadband transmission services.[38]

Adopting these rules would not only put the Commission in the position of having to ignore this *Verizon* precedent, it would require the agency to reverse its stance on whether Section 230 is a substantive grant of authority too. When it repealed its open internet rules for broadband providers in 2017, the Trump FCC's resounding rejection of Section 230 as a source of any substantive authority whatsoever forecloses such a self-serving reversal now. Hewing closely to lessons learned from even earlier appellate losses than *Verizon*, the Commission said in no uncertain terms then that Section 230 is "hortatory," and that this statute simply does not serve as "authority that could provide the basis for conduct rules."[39]

It's plain that the Petition would require the Commission to enforce a nondiscrimination regime for speech on websites, while having abandoned rules that prohibited discrimination by broadband providers, even though he broadband-specific rules were grounded on rock-solid common carrier authority and policies. This position would be untenable and absurd.

The Petition proposes nothing less than this kind of nondiscrimination regime, seriously curtailing the ability of different websites to create unique and differentiated experiences for different users across the internet. This "platform neutrality" notion has grown in popularity in Congress as well, even though "neutrality" wasn't the goal of Section 230 and should not be the

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[38] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 41 (2015).

[39] *See RIFO* ¶ 284 (citing *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)); *see also id.* ¶ 293 (explaining that Section 230 and other tenuous authority provisions "are better read as policy pronouncements rather than grants of regulatory authority").

goal of any intermediary liability regime.[40] And among the bad results that would flow from such a course of action, this would likely end the ability of people of color, women, and other groups subjected to systemic oppression and harassment to create spaces where they can share ideas and discuss topics important to them without the imposition of racist and misogynist interlopers shutting down that speech.

In sum, the Petition asks the FCC to create a "Neutrality" regime for websites, after the same agency wrongly rejected its stronger authority and similar conduct rules for broadband telecommunications.[41] To avoid this absurd, unlawful, and unconstitutional outcome, the Commission must reject the NTIA Petition as well as the rules it proposes, and put an end to this process.

Conclusion

This proceeding was born from a corrupt and illegal desire to intimidate websites and media companies into not fact-checking the President of the United States in the months before his attempt at reelection. It is a cynical enterprise that threatens our fundamental freedoms and the rule of law. Skepticism about the wisdom and intellectual honesty of this project has already imperiled the career of one Republican Commissioner, apparently as punishment doled out by a president from the same party as him, and as retribution for the fact that this independent agency

[40] Daphne Keller, "The Stubborn, Misguided Myth that Internet Platforms Must be 'Neutral,'" *Wash. Post* (July 29, 2019) ("CDA 230 isn't about neutrality. In fact, it explicitly encourages platforms to moderate and remove 'offensive' user content. That leaves platform operators and users free to choose between the free-for-all on sites like 8chan and the tamer fare on sites like Pinterest."), https://www.washingtonpost.com/outlook/2019/07/29/stubborn-nonsensical-myth-that-internet-platforms-must-be-neutral/.

[41] *See, e.g., RIFO* ¶ 4.

commissioner would dare question the president's understanding of these issues.[42] The Commission should instead follow the logic of the statute, the courts, and its own past pronouncements, declining this invitation to surrender its own independence in service of the Petition's efforts to bully online platforms into silence too.

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September 2, 2020

[42] *See* Michael T.N. Fitch & Wesley K. Wright, "The Making – and Unmaking – of an FCC Commissioner," *The National Law Review* (Aug. 10, 2020), https://www.natlawreview.com /article/making-and-unmaking-fcc-commissioner.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Section 230 of the Communications Act of 1934	Docket No. RM-11862

Opposition of the Internet Infrastructure Coalition

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I. Introduction and Summary

Section 230, as it is understood today, is fundamental to free and robust speech on the Internet. In addition to the protections it provides social media companies, Section 230 is also essential to the companies that operate the infrastructure on which speakers depend. While social media platforms dominate the headlines, everything online depends on the Internet's infrastructure, including the services provided by hosting companies, data centers, domain registrars and registries, cloud infrastructure providers, managed services providers, and related services. Many of these companies are members of the Internet Infrastructure Coalition (i2Coalition), an organization formed to ensure that those who build the infrastructure of the Internet have a voice in public policy.

Internet infrastructure providers play a critical role in promoting open and robust Internet speech by not only providing the infrastructure on which much of the Internet depends, but also by providing services that minimize barriers to entry for anyone with a message, no matter their viewpoint. Internet infrastructure providers also drive economic growth by providing small businesses with greater reach and flexibility to innovate. Therefore, we agree with NTIA that protecting the Internet from stagnation and excessive restrictions is a critical goal.

Unfortunately, NTIA's proposal poses a far greater risk to free and open speech on the Internet than the moderation practices of a few private companies ever could. NTIA focuses narrowly on Section 230 of the Communications Decency Act as it applies to a handful of the largest social media platforms and seeks to narrow its protections to combat alleged political biases in these companies' content moderation practices.[1] Unfortunately, in so doing, NTIA not

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[1] *See* Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079, 34,081 (June 2, 2020) (E.O. 13925).

only ignores the law but also misses the vastly diverse array of services and speakers beyond those platforms. And it overlooks the role of the free market — and the marketplace of ideas — in ensuring that fora will always exist for speech for which there is a willing and interested audience, in the absence of government restrictions.

NTIA's proposed regulations would upend the liability protections Internet infrastructure companies rely on to protect them against litigation over content posted by users. Although it would not strip these protections away overtly, it proposes new rules that would call this liability shield into question for any provider that makes decisions that even arguably evince a "discernable viewpoint" — a meaningless standard that invites abuse and subjectivity. NTIA's proposal therefore attempts to force providers into the untenable position of being unable to engage in any form of content moderation or even to choose with whom they do business. In so doing, it exposes Internet infrastructure providers to new risks and requires them to contemplate measures such as pre-screening content and, ironically, far more aggressive content moderation and removal than they would ever have considered otherwise. Not only would such measures stifle a great deal of Internet speech, they would raise costs and erect other new barriers, particularly for small businesses and individuals seeking to build an online presence.

NTIA's proposal would also be illegal. The text of Section 230, its legislative history, and its purpose all clearly indicate that Congress intended Section 230 to be interpreted by the courts, not to serve as a font for vast new FCC regulatory authority. Moreover, NTIA's proposed rules, while putatively promoting free speech, would actually violate the First Amendment by conditioning providers' liability protections on their compliance with content-based distinctions.

II. NTIA overlooks the foundational importance of Section 230 protections throughout our connected economy.

Internet infrastructure providers rely on the protections of Section 230 to make their businesses work. It offers crucial assurances that their companies will not be treated as the publishers or speakers of content made available by others — assurances that have become foundational to the economic diversity and low barriers to entry that characterize today's Internet. These assurances are vital because the nature of critical Internet infrastructure services, such as website hosting and content distribution networks, may create a superficial association between the infrastructure provider and third-party content. Indeed, Section 230(c)(1) has played a key role in protecting such companies against lawsuits relating to content posted by independent third parties, which the infrastructure provider never reviewed and in no way endorsed.

In one dramatic example, the family of one of the victims of the tragic 2019 mass shooting in El Paso, TX,[2] brought a wrongful death suit against Cloudflare, an i2Coalition member, as well as its CEO and numerous other parties.[3] The basis for these allegations was apparently the fact that 8chan, the platform on which the shooter posted racist messages, used one or more of Cloudflare's services before Cloudflare terminated service in August 2019. Cloudflare's cybersecurity services, in some cases, can result in Cloudflare's name appearing in public Domain Name System records associated with its users' websites. This can lead people to misunderstand Cloudflare's relationship with websites and their content, and seek to hold it

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[2] *See* Molly Hennessy-Fiske, El Paso shooting victim remembered at funeral: 'She was just a beautiful person,' LA TIMES (Aug. 9, 2019, 4:00 PM), https://www.latimes.com/world-nation/story/2019-08-09/funerals-begin-for-shooting-victims-in-el-paso.

[3] *See* Pls.' Pet., Englisbee, et al. v. Cloudflare Inc., et al., 2019 DCV 4202 (Tex. El Paso County Ct. filed Oct. 29, 2019).

liable for this content even though Cloudflare has no opportunity to review it and, in fact, cannot even access content posted on user-generated content sites like 8chan. Cloudflare defended itself in that case by asserting the protections of Section 230(c)(1), among other things, which prevents Cloudflare from being "treated as the publisher or speaker of any information provided by another information content provider."

The facts of this case are thankfully atypical, but Internet infrastructure companies know that there is nothing abnormal about aggrieved parties seeking to hold them liable for content posted by users. Whether they host the content on their servers, accelerate users' access to it using their content distribution network, or use their network to protect the content from cyberattacks, Internet infrastructure companies are the targets of lawsuits even with the robust liability protections of Section 230. Without its protections, or if its protections were restricted, such lawsuits would proliferate, and Internet infrastructure companies would lose a fundamental tool in managing their risk.

Unfortunately, NTIA's proposed restriction of Section 230 threatens to do just that. NTIA proposes a "clarification" of the statute's definition of "information content provider" that would extend that term to cover any service provider that moderates content in a way that evinces "a reasonably discernible viewpoint." Far from a mere "clarification," this extremely broad concept would allow virtually any plaintiff to allege that a service has a "viewpoint," even if the service has moderated or terminated service only rarely and with great care and discretion. This, in turn, would vitiate the protections of Section 230(c)(1) by placing the service provider in the position of an Internet content provider speaking on its own behalf — rather than a service standing apart from content provided by "another information content provider."[4] As the petition

[4] 47 U.S.C. § 230(c)(1).

unabashedly explains, "prioritization of content under a variety of techniques, particularly when it appears to reflect a particular[] viewpoint, might render an entire platform a vehicle for expression and thus an information content provider."[5]

This change would thrust Internet infrastructure companies back into the "moderator's dilemma" created by cases like *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[6] that Section 230 was specifically designed to correct. Hosting providers and other critical builders of the nation's Internet infrastructure would have to make a choice. They could choose to maintain their liability protections by abstaining from any moderation of objectionable content. Or they could choose to moderate content on their network, consistent with their business needs, but accept that doing so could strip them of their liability protection under Section 230(c)(1). For Internet infrastructure companies, neither option is tenable.

A business that abstains from any moderation would be forced to maintain content on its network regardless of the threat that it may pose to its legitimate business goals. For example, failing to remove some types of content may result in the blacklisting of a provider's Internet Protocol ("IP") addresses either by third-party email providers seeking to block spam or third-party Internet content filtering services. This can have a major impact on a provider's business because the available pool of IP addresses is severely limited and, therefore, each of a provider's IP addresses is commonly shared among numerous customers. In addition, some types of content draw a significantly greater intensity of cyberattacks, greatly increasing the costs of hosting it.

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[5] Petition for Rulemaking of the National Telecommunications and Information Administration at 42, Docket No. RM-11862 (filed July 27, 2020) ("Petition").

[6] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished).

For example, Endurance International Group offers web hosting, domain registration, email marketing, and other Internet infrastructure services through a number of brands including Bluehost, Domain.com, and Constant Contact. Because Endurance recognizes the important role its industry plays in ensuring that anyone can have a presence on the Internet, it exercises great restraint in deciding when content must be removed from its platform. As a general matter, Endurance's policy is not to remove customer content unless a compelling case can be made for doing so. Nonetheless, Endurance has encountered situations where, due to its content, one of its hosted sites attracts incessant cyberattacks. Although Endurance believes that it is not its role to block unpopular content from the Internet, it simply cannot host sites that place such extreme demands on its network, including where a website under attack is hosted on a shared server that might host up to thousands of other websites — one of the most economical options for small businesses, bloggers, and others to try an idea or establish an online presence at very little cost. Today, Section 230 protects Endurance's ability to make such operational decisions, including removing content, to ensure that it can continue to serve its customers reliably and affordably. Under NTIA's proposal, however, such a move could endanger Endurance's Section 230(c)(1) liability protection by inviting litigants to claim that such decisions were made in bad faith or manifest a discernible viewpoint.

Challenges to hosted content on legal grounds would also present major risks under NTIA's proposal. i2Coalition members including Endurance, Rackspace, and others commonly receive requests to take down content that is allegedly defamatory or illegal in other ways that cannot readily be ascertained based on a review of the content alone. However, in the absence of a judgment or other final legal decision, there is often no way for an infrastructure provider to know whether a decision to take the material down or to leave it up would be most in the public

interest or least likely to trigger liability. In a claim that a provider is hosting defamatory content, for example, a provider cannot know whether the complaint is legitimate and leaving the content on its network would perpetuate the defamation — or whether the complaint is spurious and taking the content down would be unjustified and potentially injurious to the content owner or the public at large. For example, review sites are often targets of defamation claims, but they may also warn viewers of fraud or other bad behavior.

Today, Section 230 allows providers to limit their liability in such situations. But NTIA's proposed restrictions would increase the risks associated with such routine decisions, no matter what course the provider chooses. A decision to take the content down could invite arguments that the provider has acted in bad faith or with bias. But a decision to leave it up could increase the provider's risk of liability and perpetuate an ongoing public harm.

Some i2Coalition members have faced similar decisions relating to the ongoing public health crisis caused by the SARS-CoV-2 pandemic. As the U.S. Department of Justice and other law enforcement have cracked down on those who seek to take advantage of the pandemic for their own gain,[7] i2Coalition members have received notices from law enforcement notifying them of *potentially* fraudulent COVID-19-related content. Determining with certainty which content is fraudulent and which is not, however, requires investigative resources well beyond those that Internet infrastructure companies can bring to bear. Indeed, i2Coalition members have, in at least one case, received notice from law enforcement officials that identified a hosted site as providing fraudulent information about COVID-19 testing, only later to learn the site was operated by a small business offering real testing services. Therefore, hosting providers must

[7] *See* Memorandum from the Deputy Attorney Gen., U.S. Dep't. of Justice to All Heads of Law Enforcement Components, Heads of Litigating Divisions, and U.S. Attorneys (Mar. 24, 2020), https://www.justice.gov/file/1262771/download.

decide whether to take such content down, and risk withholding valuable information from the public, or leave it up and risk perpetuating a fraud. Again, today's Section 230 protects businesses' ability to make these difficult decisions without undue risk of liability. NTIA's proposal could strip away this protection whether they leave the information up or take it down — causing utter chaos in the Internet ecosystem.

Worse still, many Internet infrastructure providers, due to their role in the broader Internet infrastructure system, have only blunt tools at their disposal for policing content that could potentially expose them to liability. For example, one i2Coalition member, Donuts, provides domain name registry services for 242 top-level domains, including .live, .photography, and .consulting. As a registry, they perform a role analogous to a wholesaler, providing the services to companies like Domain.com that interact directly with individuals and organizations and allow them to register domain names. Because of this role, however, Donuts's only recourse to avoid liability from problematic content hosted on a .live domain name, for example, would be to suspend or terminate the domain name, essentially disconnecting any associated website, email, application, or other services. Therefore, Donuts only takes action to block content in extremely narrow and serious circumstances. However, erosion of Section 230's liability protections would make such a policy of restraint more difficult to maintain.

Similarly, another i2Coalition member, cPanel, provides management software for website hosts and other types of providers. Some cPanel tools, however, allow users to upload, edit, and manage content in a way that has sometimes caused cPanel to become incorrectly associated with content managed using their tools. However, cPanel has no ability to police individual users' use of its tools. Rather, it licenses its software to website hosts that, in turn, make the tools available to their users. Therefore, cPanel's only potential recourse is to disable software licenses

barring entire companies from using its tools, and disrupting the service provided to all of that host's users. Because this is such a drastic remedy, cPanel has only taken this action in one very unusual case. But NTIA's proposal would greatly increase the risks for businesses that — rightly — take such a hands-off approach.

NTIA's proposal, therefore, would disrupt the basic infrastructure of the Internet even as it drives increased costs for individuals and small businesses. By raising barriers to entry, it would perversely undercut a broad array of competitive services, leaving only well-funded companies with the resources to maintain their own websites. Others, ironically, may be driven onto more closely moderated and tightly structured platforms, such as those offered by large social media companies, which have the greater resources required to take on content screening and increased liability.

III. Internet infrastructure companies cannot rely on automated content screening to mitigate risk.

NTIA glosses over the impact that its proposals would have on tech companies, including Internet infrastructure providers.[8] It asserts that the loss of liability protection under Section 230 is acceptable in the current environment because a platform provider can use artificial intelligence technology and other high-tech tools to ensure that its service remains free of harmful content, thus controlling their liability. Unfortunately, however, NTIA is simply wrong. No technology exists that would allow operators to meaningfully limit their liability in the absence of Section 230's protections.

The most obvious flaw in NTIA's assertion relates to defamatory content. It is extremely doubtful that any company — including the largest social media platforms — will have the

[8] *See, e.g.*, Petition at 9-14.

technology to automatically flag defamatory content today or in the foreseeable future. This is simply because a statement must be false in order to be defamatory.[9] But the truth or falsity of an assertion requires access to information, and the capability to analyze this information, beyond the reach of any automated system that platform providers could foreseeably create. Obscenity presents similar challenges by requiring a highly nuanced understanding of evolving community norms in order to be reliably identified.[10] Justice Stewart may have known obscenity when he saw it,[11] but it is unlikely a computer will have the same degree of skill anytime soon. Any AI-based system is also likely to have a large number of both false positives and false negatives. Thus, it would block a substantial amount of speech that should have been permitted even as it fails to fully control a platform's liability. Simply put, there is no technology today that would automatically flag content with any reliability.

But even if the largest social media platforms could use artificial intelligence to help ease the burden of screening billions of social media posts, this advantage would not be available to Internet infrastructure providers who currently rely on Section 230 protections to host third-party content without undue risk of liability. Unlike social media platforms, Internet infrastructure companies often do not have unrestricted access to users' content — many have no access at all — and have no way of knowing what type of content a third-party has uploaded or in what format, making AI-based screening impossible. At the same time, the services provided by Internet infrastructure companies typically do not involve AI-based categorization, prioritization, or targeting, meaning that they do not have existing AI-based tools that could be repurposed for screening content.

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[9] Restatement 2d of Torts § 558 (1977).

[10] Roth v. United States, 354 U.S. 476, 489 (1957).

[11] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring.).

One i2Coalition member, Rackspace Technology, Inc., for example, provides a wide range of cloud-based services including data management, datacenter colocation, managed clouds, and virtual hosting. In these roles, Rackspace services often host websites and other data that could include content that could expose Rackspace to liability, were it not for the protections afforded providers of "interactive computer services" under Section 230. Indeed, Rackspace devotes considerable resources to ensuring that its network remains "clean" and free of prohibited content, processing as many as 6 million complaints per year.

Given the nature of Rackspace's services, however, there would be no way to effectively screen this content before it can be made available on Rackspace's network. For Rackspace to review and approve every website created, every file uploaded, and every email sent on its network would be literally impossible. And attempting to do so would be profoundly inconsistent with the expectations of Rackspace's customers, and the customers of any other hosting service, who expect that they will enjoy unfettered access to the hosting platform they have purchased.

Unfortunately, the harm of eroding Section 230's liability protections cannot, therefore, be waved away. By undermining the liability protections of Section 230, NTIA's petition would force Internet infrastructure companies to restructure their operations and business practices in ways that would raise costs for consumers and small businesses and potentially curtail important services. For example, U.S. providers may struggle to provide the low-cost hosting services that millions of small businesses rely on today in the absence of reliable legal tools that allow them to limit their liability for hosted content. This would be a major blow for America's small businesses that rely on these services and a major setback for online speech.

IV. The Commission lacks authority to make regulations under Section 230.

For more than twenty years, it has been widely understood that Congress intended Section 230 — directed as it was to insulating providers from common-law tort claims and other forms of legal liability — to be interpreted and applied by the courts. And over those intervening decades that is exactly what has occurred, with courts developing a robust body of case law, with no serious suggestion by the FCC or any other regulator that they might have a role to play in interpreting Section 230's protections.

NTIA now asserts, in effect, that prior Commissions, prior administrations, established industry consensus, and thousands of judicial decisions all got it wrong. Simply because of where it was codified in the U.S. Code, NTIA claims that the FCC possesses previously undiscovered powers to deeply enmesh itself in content-based speech regulation of the Internet by rendering interpretations of, and potentially restrictions on, Section 230's protections. It cannot be denied that the Commission has broad powers to interpret the provisions of the Communications Act. However, this authority does not extend so far as to allow the Commission to make regulations to override longstanding judicial interpretations of Section 230.

Most obviously, the statute includes no language hinting at a regulatory role for the FCC. In fact, it does the opposite: Section 230(a)(4) announces Congress's finding that the Internet has flourished "to the benefit of all Americans, with a minimum of government regulation." Likewise, Section 230(b)(2) explicitly states that it is the policy of the United States to maintain a free market on the Internet "unfettered by Federal or State regulation." The D.C. Circuit has held that such statements of policy "can help delineate the contours of statutory authority."[12] In this case, these findings and policy statements demonstrate that Congress was not silent on the

[12] Comcast Corp. v. F.C.C., 600 F.3d 642, 654 (D.C. Cir. 2010).

question of Commission authority. Congress clearly intended there to be no federal regulation under Section 230.

Even if Congress had not been clear, there are good reasons to conclude that the Commission lacks regulatory authority under Section 230. The regulatory authority NTIA posits in its petition would put the FCC in the position of dictating what types of content are "objectionable," and how a provider should go about making its moderation decisions "in good faith."[13] These decisions would dictate the daily business of Internet infrastructure companies, including cloud providers and content distribution networks whose services support large enterprises, small businesses, blogs, and personal websites, among others. This regulatory authority would therefore reach into virtually every corner of the Internet, influencing the content that may be posted and restructuring longstanding industry relationships by pushing companies to unwillingly step into the role of censor.

But the Supreme Court has held that, when Congress grants a regulatory agency such sweeping authority, it must do so clearly. Just as Congress would not surreptitiously grant the Food and Drug Administration the power to regulate tobacco,[14] or quietly give the Environmental Protection Agency authority to regulate small emitters of greenhouse gases,[15] Section 230 cannot be interpreted as conferring upon the FCC vast authority over Internet content without even a word of explanation. Such claims to sweeping regulatory authority are especially dubious when an agency claims to "discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy."[16] All the more so when, as in

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[13] Petition at 31-39.

[14] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[15] Util. Air Regulatory Grp. v. E.P.A., 573 U.S. 302, 324 (2014).

[16] *Id*. (internal quotation marks omitted).

this case, the agency's claim to authority would "render the statute unrecognizable to the Congress that designed it."[17]

Such reservations are amplified, in this case, by the fact that the newly discovered authority not only would grant the FCC new regulatory powers over a significant portion of the U.S. economy, but also would do so in a manner that installs the Commission as an arbiter of acceptable speech. If courts demand a clear expression of congressional intent before allowing a regulator to claim authority over tobacco or greenhouse gases, surely at least this level of scrutiny should be applied when an agency seeks to interpose itself in the exercise of one of our most closely guarded constitutional rights. That NTIA's proposed rules would violate these rights out of the starting gate confirms that restraint is the only prudent course.

V. NTIA's proposed rules violate the First Amendment.

NTIA's proposed rules would impose content-based regulations on private actors' speech in violation of the First Amendment. NTIA proposes a series of definitions for the various categories of content that a provider may remove without liability under Section 230(c)(2)(a). For example, the petition proposes to constrain the definition of the terms "obscene," "lewd," "lascivious," and "filthy" so that they encompass only content that would constitute obscenity under prevailing First Amendment jurisprudence[18] or that would have constituted "obscene libel" banned from the U.S. Mail under the Comstock Act.[19] It defines "excessively violent" to mean either content that is "violent and for mature audiences" or that promotes or constitutes

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[17] *Id*. (internal quotation marks omitted).

[18] *Compare* Petition at 37 *with* Roth, 354 U.S. at 489 (1957).

[19] Section 3893 of the Revised Statutes made by section 211 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129. NTIA does not address the fact that this Comstock Act language was held to be constitutional only to the extent that it is coextensive with the definition of obscenity articulated in Roth, 354 U.S. at 492.

terrorism. And it constrains the term "otherwise objectionable" to only content which "is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials."

Thus, NTIA's proposal — like Section 230 itself — acknowledges that providers and users of interactive computer services may make certain editorial decisions regarding the content they are willing to allow on their platforms. A platform that seeks to be an appropriate venue for children may, for example, prohibit depictions or descriptions of violence. But it may also choose not to. Similarly, under NTIA's proposal, platforms may choose to bar obscenity, whether or not applicable state laws would require them to do so. In short, platforms may choose — or be forced, for business reasons — not to function as neutral conduits for the speech of others. But, in making decisions such as whether to bar violence and obscenity, they also assume the role of speakers. When they do so, the D.C. Circuit has recognized that "entities that serve as conduits for speech produced by others receive First Amendment protection."[20]

Yet, beyond the narrow categories targeted under NTIA's proposed rules, the petition seeks to penalize the platforms that choose to disassociate themselves from any *other* form of speech. To promote health and human safety online, Donuts, an i2Coalition member, for example, and other leading domain name registries and registrars have agreed to voluntarily take steps to "disrupt the illegal distribution of child sexual abuse materials, illegal distribution of opioids, human trafficking, and material with specific, credible incitements to violence."[21] Removal of some of these categories of content, such as distribution of malware, would be

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[20] United States Telecom Ass'n v. F.C.C., 825 F.3d 674, 742 (D.C. Cir. 2016). *See also* Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997) (explaining that Section 230 protects a service provider's "exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content").

[21] Framework to Address Abuse, DONUTS (Oct. 8, 2019), https://donuts.news/framework-to-address-abuse.

permissible under NTIA's proposed rules. But these efforts to prevent abuse go farther and could include voluntary actions against, for example, websites engaged in the unlicensed distribution of pharmaceuticals. NTIA's rules would penalize Donuts for acting on their belief that such material is dangerous and should not be allowed to proliferate online. Other services may seek to adopt analogous policies seeking to curb types of content even less similar to those targeted by NTIA.

Thus, NTIA's proposed rules plainly disadvantage speakers that seek to limit the speech with which they are associated in ways inconsistent with NTIA's own vision for discourse on the Internet. Users and providers that do so would be excluded from the protections of Section 230(c)(2)(a), raising the specter of liability for such removals. Speakers that only moderate content in a manner with which NTIA agrees, however, would remain insulated from liability. *In other words, NTIA's proposal discriminates between speakers based on the content of their speech.*

It is foundational to our First Amendment jurisprudence, however, that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[22] It makes no difference that NTIA's proposed rules would withhold the benefit of a liability shield rather than imposing a penalty. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech."[23] Nor does it matter that the proposed

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[22] Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984).

[23] Perry v. Sindermann, 408 U.S. 593, 597 (1972). A parallel line of cases has held that the government may, under limited circumstances, condition the receipt of government funding in ways that burden constitutionally protected interests. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 195, n. 4 (1991). *See also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 206 (2013) (the government may impose speech-based "conditions that define the limits of the government spending program" but may not "seek to leverage funding to regulate speech outside the contours of the federal program itself"). But this jurisprudence is irrelevant here as

rules would punish speakers for what they choose not to say rather than what is said. In fact, the Supreme Court has held that regulations that compel speech are often more pernicious than those that proscribe it:

> Free speech serves many ends. It is essential to our democratic form of government and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.
>
> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence.[24]

Notably, NTIA's proposed interpretation of Section 230(c)(2) would render the statute unconstitutional by reading a key feature out of its text. First, although NTIA proposes detailed, objective definitions for the various terms listed in 230(c)(2)(a), the statute's standard is subjective: it extends liability protections for decisions to take down content that "*the provider or user considers to be* obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[25] This subjective standard avoids the pernicious viewpoint-based discrimination inherent in NTIA's attempt to reframe the rule in objective terms. NTIA's omission of this subjective component renders it plainly inconsistent with the statutory test it purports to interpret — another fatal flaw in NTIA's proposal. Second, and even more importantly, however, NTIA's proposed interpretation would convert a viewpoint-neutral statutory provision into one that

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it deals only with government funding programs. It is animated by the Spending Clause, Art. I, § 8, cl. 1, a distinct source of congressional authority not implicated by NTIA's petition.

[24] Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2464 (2018) (internal citations and quotation marks omitted).

[25] 47 U.S.C. § 230(c)(2)(a) (emphasis added).

unconstitutionally conditions its benefits on a speaker's compliance with a program of speech restrictions devised by the president and proposed by NTIA under his direction. Such a regulation would clearly violate the First Amendment.

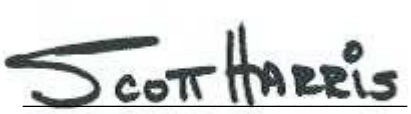
VI. Conclusion

NTIA's petition asks the FCC to vastly expand its regulatory jurisdiction to include decisions made by private companies to keep up or take down content posted by others. This radical expansion of the FCC's authority, however, would overstep the bounds set by both Section 230 and the First Amendment.

Even if the Commission could lawfully exercise these powers, however, the public interest would weigh decisively against doing so. NTIA's proposal would erode or eliminate liability protections that Internet infrastructure providers rely on every day to help small businesses, individuals, and even new Internet services reach their customers and users. Section 230's liability protections allow these infrastructure companies to offer their services on a neutral basis without pre-screening or intrusive content moderation, while retaining the flexibility to address truly harmful content in response to complaints, requests by law enforcement, or other special circumstances. NTIA's proposal would force many infrastructure

providers to choose between these goals, undermining the free and open forum for speech that today's Internet provides and limiting the Internet's potential as an engine for continued economic growth and innovation.

Respectfully submitted,



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September 2, 2020

Certificate of Service

I, Allison O'Connor, certify that on this 2nd day of September, 2020, I caused a copy of the foregoing comments to be served by postage pre-paid mail on the following:

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National Telecommunications and
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U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

/s/ Allison O'Connor

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications	)	RM - 11862
Act of 1934 (as amended)	)	

COMMENTS OF INTERNET ASSOCIATION OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

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September 2, 2020

EXECUTIVE SUMMARY

Section 230 simultaneously allows for free speech and expression online, while also providing critical protections to internet companies to set and enforce policies for acceptable behavior on their services. Disrupting the careful balance created by Section 230 and elucidated through two decades of case law would cause serious public policy harms and would detrimentally affect the robust internet ecosystem that society has come to rely upon. Therefore, IA urges the Federal Communications Commission ("FCC") to carefully consider whether: (1) the FCC's statutory authority extends to promulgating rules interpreting Section 230; (2) NTIA's proposed rules are consistent with the text of the statute, congressional intent, and the First Amendment; and (3) the FCC has the ability to require interactive computer services to publicly disclose their content moderation practices. IA believes that careful consideration will show that the Petition is misguided, lacks grounding in law, and poses serious public policy concerns. Therefore, the FCC should deny NTIA's Petition to clarify Section 230.

First, the FCC lacks the appropriate authority to issue the rules proposed by NTIA ("Proposed Rules") in the Petition. Section 230 does not explicitly grant the FCC authority and it should not be implied. To do so would be contrary to the clear text of Section 230's policy findings and the legislative history. Unlike the provisions discussed in *AT&T v. Iowa Utilities Board* and *City of Arlington v. FCC*, Section 230 was enacted as a private-sector driven alternative to government regulation and was a

clear rejection of FCC regulatory authority in this space. Additionally, after more than twenty years of court interpretations, NTIA's proposal to have the FCC introduce new rules contradicting well-established case law would adversely impact a large sector of the economy and would be viewed with skepticism by any court due to the agency's lack of designated authority.

Second, the Proposed Rules clearly conflict with the plain language of the statute, congressional intent, and interpretation by courts. The Proposed Rules would significantly narrow the application of Section 230's protections to content removal decisions by proposing a new interpretation of how the immunities in Section 230(c)(1) and (c)(2) operate. Section 230(c)(1) protections would be lost to any provider who removes content or makes any decisions about placement, prioritization, arrangement or other editorial decisions. The immunity in Section 230(c)(2) would have new limitations through newly introduced definitions of "good faith" and "otherwise objectionable." These definitions would result in a loss of Section 230 protections for any provider who removes content based on a change of rules after the content was originally posted, engages in selective enforcement, or fails to provide a poster of content with notice of the intent to remove content and the opportunity to respond. In addition, providers could not benefit from Section 230's protections for action taken against content that the provider considers objectionable, unless it is "obscene, lewd, lascivious, filthy, excessive violent, or harassing." This would result in a loss of Section 230 protections for removals of fraudulent schemes, scams, dangerous content

promoting suicide or eating disorders to teens, and a wide range of other types of "otherwise objectionable" content clearly covered by Section 230 today. Moreover, the Proposed Rules conflict with the plain meaning of statute as it has been understood by almost all courts to examine the provision.

Third, the Proposed Rules also run afoul of the First Amendment, failing to observe critical guardrails:

- ⇒ Private entities, even those that provide a forum for speech, are not subject to the First Amendment's limitations when it comes to choosing which speech to allow and which to prohibit.
- ⇒ Private entities have their own free expression interests in decisions about what to allow and what to prohibit on their services and that these interests are protected by the First Amendment.
- ⇒ The First Amendment prohibits the government from imposing strict liability for content on distributors.
- ⇒ The government cannot do indirectly that which it would be prohibited from doing directly, which means that coercing providers into allowing or disallowing certain speech by withholding a government benefit raises significant constitutional concerns.

The FCC should draw on its experience with the Fairness Doctrine to recognize the constitutional pitfalls and inherent practical challenges with attempting to regulate content decisions.

Fourth, NTIA's proposed mandatory disclosure rule likewise exceeds the FCC's jurisdiction. NTIA claims that "interactive computer services" ("ICSs"), covered by Section 230, are "information services" and that its expansive disclosure requirement is authorized by Sections 163 and 257(a) of the Communications Act. Those provisions

require the FCC to publish and submit to Congress a biennial report assessing the state of competition and identifying barriers to entry, particularly for entrepreneurs and small businesses, in various communications marketplaces. NTIA's Petition proposes using this congressional reporting requirement to exponentially expand the FCC's authority to reach the entire internet and beyond. This expansion of FCC authority is not supported by law, both because the FCC has not treated *all* ICSs as "information services" and the proposed transparency requirements would have nothing to do with communications market entry barriers. Moreover, this sort of compelled speech also raises significant First Amendment concerns.

Finally, there are important public policy reasons why NTIA's Petition should be rejected. The prevailing interpretation of Section 230 over the last two decades has spurred significant innovation and growth in the U.S. internet sector, far more than has been seen in jurisdictions with different legal regimes resulting in U.S. leadership. Changes to Section 230 will hamper the continued growth and innovation of services, and the higher costs of litigation and potential liability will cripple startups and small online services who will not be able to fund their legal defenses or obtain the necessary investments to grow their businesses. Section 230 is critical to a wide range of ICSs who offer interactive components as an adjunct to their core missions. These ICSs include newspapers, employers, universities, churches, labor unions, professional associations, sports leagues, nonprofits dedicated to supporting those struggling with diseases, and many more organizations for whom liability for posting or refusing to

post user content would clearly make it cost-prohibitive to continue their services. It would be devastating to lose the diversity of voices and content, due to overly invasive and unreasonable rules that are not based in properly delegated congressional authority.

Ultimately, it would not benefit the public and the users of online services for providers to be subject to lawsuits for every content decision they make. It would create, or rather re-institute from the pre-Section 230 era, disincentives to content moderation and reward providers who take a hands-off approach. This result is contrary to the specific goal Section 230 was enacted to advance, and will impede the important work that providers engage in voluntarily today to address harmful content online. Therefore, the FCC must deny NTIA's Petition for Rulemaking and allow courts to continue their decades long analysis of the language of Section 230.

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COMMENTS OF INTERNET ASSOCIATION OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

Internet Association ("IA") appreciates the opportunity to comment on the Petition for Rulemaking of the National Telecommunications and Information Administration ("NTIA") of the Department of Commerce ("DOC") in the matter of Section 230 of the Communications Act of 1996 ("the Petition").[1]

IA is the only trade association that exclusively represents global internet companies on matters of public policy.[2] IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. IA believes

[1] *Public Notice*, Department of Commerce's Section 230 Petition for Rulemaking, File No. RM-11862, (August 3, 2020), https://docs.fcc.gov/public/attachments/DOC-365904A1.pdf; Petition for Rulemaking of the National Telecommunications and Information Administration, File No. RM-11862 (filed July 27, 2020) ("Petition").

[2] IA represents the interests of companies including Airbnb, Amazon, Ancestry, DoorDash, Dropbox, eBay, Etsy, Eventbrite, Expedia, Facebook, Google, Groupon, Handy, IAC, Indeed, Intuit, LinkedIn, Lyft, Match Group, Microsoft, PayPal, Pinterest, Postmates, Quicken Loans, Rackspace, Rakuten, Reddit, Snap Inc., Spotify, Stripe, SurveyMonkey, Thumbtack, Tripadvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Vivid Seats, Vrbo, Zillow Group, and ZipRecruiter. IA's member list is available at: https://internetassociation.org/our-members/.

the internet creates unprecedented benefits for society, and as the voice of the world's leading internet companies, we ensure stakeholders understand these benefits. Section 230 plays a critical role in allowing IA member companies to set rules for appropriate use of their services and to enforce those rules for the safety of their users and the public, without the fear of constant lawsuits challenging such decisions. Thus, Section 230 is essential to realizing the benefits of the wide range of products and services offered by IA member companies, as well as by the extraordinarily broad group of entities and individuals covered by Section 230 protections.

Unfortunately, NTIA's Petition focuses exclusively on a particular type of online service, namely social media, that implicates only a few of IA's over 40 member companies. IA's membership spans a range of business models and types of online services. It is critically important to understand that the businesses, non-profit organizations, and individuals who rely on Section 230 expand far beyond the small handful of companies that are targeted in the Petition[3] and that the changes the Petition proposes would adversely impact all of these entities and individuals.

[3] For a further discussion of the broad range of entities that benefit from Section 230, see IA's recent report, *A Review Of Section 230's Meaning & Application Based On More Than 500 Cases*, at p. 6 (July 27, 2020)(available at: https://internetassociation.org/publications/a-review-of-section-230s-meaning-application-based-on-more-than-500-cases/). For additional background on the specific companies that are targets of this rulemaking, *see* the President's Executive on Preventing Online Censorship, which identifies companies by name. Exec. Order No. 13925, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020). (Executive Order Preventing Online Censorship).

I. THE IMPORTANCE OF SECTION 230 TO THE INTERNET INDUSTRY

Section 230 plays an essential role in fostering an environment conducive to startup internet companies and new market entrants across a wide variety of services. It has been critical in the development and success of the U.S. internet industry. Without Section 230 it is difficult to imagine that we would have seen the range of innovative services leveraging user-generated content that exist today. The costs and burdens of litigation and the risks of liability would have made such business models untenable. It is no coincidence that the leading global online services and most of IA's members are U.S.-based — it is because Section 230's protections create a unique and properly balanced legal environment that supports innovation.

Section 230 was enacted in response to a pair of court decisions that exposed internet companies to liability based on their efforts to block objectionable third-party content.[4] Congress feared that if internet companies could be liable due to efforts to monitor and moderate objectionable content, they would be discouraged from performing even basic safety removals in order to avoid being subjected to the costs of litigation and the specter of liability. Section 230 removes this disincentive by shielding service providers from claims that would hold them liable as a result of their attempts

[4] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *Cubby Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). *See also* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (discussing *Stratton Oakmont* and *Cubby* decisions).

to moderate certain content. As a consequence, Section 230 has enabled and effectively encouraged service providers to engage in responsible self-regulation.

Passed as part of the Communications Decency Act in 1996, Section 230 codified two key legal principles. First, internet companies that provide platforms for user-generated content generally cannot be held liable based on their users' content, whether it consists of blogs, social media posts, photos, professional or dating profiles, product and travel reviews, job openings, or apartments for rent. And second, online services—whether newspapers with comment sections, employers, universities, neighbors who run listservs in our communities, volunteers who run soccer leagues, bloggers, churches, labor unions, or anyone else that may offer a space for online communications—can moderate and delete harmful or illegal content posted on their platform without being held liable based on their actions to block or remove that content. Most online providers—and all of IA's members—have robust terms of service, and Section 230 allows the providers to formulate, adapt, and enforce them, largely without fear of litigation and liability.

Without Section 230's protection, internet companies would be left with a strong economic disincentive to moderate content. By removing this disincentive, Section 230 creates essential breathing space for internet companies to adopt policies and deploy technologies to identify and combat objectionable or unlawful content—or to develop other innovative solutions to address such content. Under Section 230, it is

the originators of unlawful content, not the platforms who carry it, who are appropriately subject to liability. Despite the protection from liability for hosting third party content, providers have been successfully encouraged to engage in content moderation, as evidenced by the substantial investments that online services make into fighting a range of harmful activities from the most clearly illegal, such as child abuse imagery, harassment, and fraud, to content that is harmful and disruptive to their services or inappropriate for the nature of the service or the chosen audience.

As Congress intended, the broad construction of Section 230 that courts across the country have nearly unanimously adopted has succeeded in encouraging online providers to adopt and enforce effective content moderation policies, while preserving and encouraging free expression. Community standards are easily accessible through providers' websites and, in general, users must accept them as a pre-condition to posting content or otherwise accessing the service.

Online providers are clear about why they have adopted their respective online terms or rules, which are often tailored to achieve the specific goals of their services and developed in partnership with a wide range of external industry and policy experts as well as based on direct feedback from users. The rules adopted by online providers reflect the diversity of the internet itself, with each online provider adopting standards specifically tailored to the various needs of its particular community of users. While online providers that seek to create family-oriented platforms may broadly prohibit

violent or graphic content, others may allow such content in limited contexts, such as for educational, newsworthy, artistic, satire or documentary purposes, or may require the user posting the content to self-identify it (by, for example, flagging it as "Not Safe For Work") so other users can easily avoid it. Social network providers may implement protections to prevent harassment of younger users or "cyberbullying" given that such content can have more of an emotional impact on minors. Retail and rental providers may prohibit users from posting inaccurate product information given the importance of buyers knowing what they are purchasing. Platforms that compile user reviews may prohibit users from posting irrelevant reviews or may prevent users from reviewing their own, friends' or relatives' businesses. And providers frequented by influential figures may prohibit users from misleadingly impersonating such figures, which could create confusion leading to disruptions in financial markets or other arenas.

Online providers likewise take a range of different approaches to enforcing their standards. Many providers offer special "modes" that restrict access to content otherwise available on the platform. Providers may allow users to voluntarily opt-in to these modes, such as YouTube's "Restricted Mode," which allows users (like parents or schools) to block access on their accounts to videos containing potentially mature content. Or providers may require users to affirmatively opt-out of such modes, such as Twitter's "Sensitive media policy," which requires users to click past a warning message to view certain content. Providers may also remove content and terminate

accounts, frequently after providing warnings. For less severe violations, providers may use techniques designed to educate users about provider policies such as requiring a user to edit or delete content to comply with rules or virtual "time outs."

Further, IA members employ a multitude of technologies to support their content moderation efforts, such as providing users with "report abuse" buttons and other mechanisms to flag problematic content or contact the companies with complaints. Members also devote significant staff and resources to monitoring, analyzing and enforcing compliance with their respective community guidelines. In addition, providers have developed sophisticated software and algorithms to detect and remove harmful content. In many instances, they have shared these technologies to help others eradicate that harmful content as well. Some providers also dedicate large teams of staff—for example, Facebook employs approximately 15,000 content moderators in the U.S.—to enhance their ability to provide quick responses to evolving problems.

The scale of content moderation efforts is staggering. Depending on the size of the platform, moderators must enforce rules against millions or hundreds of millions new pieces of content a day. For example, consider the actions taken by just a few IA member companies to enforce rules against spam:

- ⇒ Facebook: In the three-month period from July to September 2019, Facebook took action against 1.9 billion pieces of content for spam.[5]
- ⇒ Twitter: During the first six months of 2019, Twitter received over 3 million user reports of spam and challenged over 97 million suspected spam accounts.[6]
- ⇒ YouTube: In the first quarter of 2020, 87.5 percent of channel removals were for violations that were related to spam, scams, and other misleading content resulting in 1.7 million channels being removed. In addition, in the same period, YouTube removed over 470 million spam comments.[7]

Flexibility has played a critical role in enabling providers to experiment and thereby refine their approaches to content moderation over time. Moderating content is not easy given the almost unfathomable volumes of content online and the need to make sometimes-nuanced distinctions. Without Section 230, providers would face powerful disincentives for even the most basic steps to enforce their rules.[8]

[5] Facebook Transparency, Community Standards Enforcement Report. Available at: https://transparency.facebook.com/community-standards-enforcement#dangerous-organizations.

[6] Twitter Transparency Report, Jan. - June 2019, Rules Enforcement. Available at: https://transparency.twitter.com/en/twitter-rules-enforcement.html.

[7] Google Transparency Report, YouTube Community Guidelines Enforcement, Video Removals by Reason. Available at: https://transparencyreport.google.com/youtube-policy/removals?hl=en&total_removed_videos=period:Y2020Q1;exclude_automated:human_only&lu=total_removed_videos.

[8] This not risk is not hypothetical. Even with Section 230, providers regularly face lawsuits. Returning to the spam example, there have been multiple lawsuits brought by spammers against providers who attempted to block their messages. *See. e.g.*, *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. 10-cv-04926 JF (PSG) (N.D. Cal. August 23, 2011), *e360Insight, LLC v. Comcast Corp.*, 546 F.Supp.2d 605 (N.D. Ill. 2008); *Pallorium v. Jared*, G036124 (Cal. Ct. App. Jan. 11, 2007); *America Online, Inc. v. GreatDeals. Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999).

II. NTIA'S PETITION LACKS AN ADEQUATE LEGAL BASIS FOR THE PROPOSED RULEMAKING

The Petition grounds its request for the rulemaking on the FCC's supposed authority under the Communications Act, NTIA's perception that there is a lack of evidence of Congressional intent to avoid such regulations, and the belief that there are ambiguities in Section 230 should be resolved through rulemaking. IA urges the FCC to carefully examine the assertions in the Petition in light of clear evidence that the type of regulation NTIA proposed is exactly the type of regulation that Section 230 was enacted to prevent. IA believes that the Petition errs in describing the legal basis on which the FCC could enact the rules proposed in the Petition ("Proposed Rules") and, in fact, further examination of the text and legislative history of Section 230 shows that the FCC does not have the authority necessary to issue Proposed Rules.

A. FCC Lacks Authority To Adopt Section 230 Regulations

The Petition proposes that the FCC adopt regulations to implement Section 230. But the FCC can only act pursuant to authority delegated by Congress, not at the direction of the executive branch.[9] Because Congress has delegated no such authority to the FCC, NTIA's proposed revisions to Section 230's implementation cannot be acted upon by the FCC.

[9] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[As the Commission has explained] [a]n agency literally has no power to act . . . unless and until Congress confers power upon it. And so our role is to achieve the outcomes Congress instructs, invoking the authorities that Congress has given us--not to assume that Congress *must* have given us authority to address any problems the Commission identifies").

NTIA asserts that the Commission has authority to adopt all but one of NTIA's Proposed Rules pursuant solely to Section 201(b) of the Communications Act.[10] Specifically, NTIA claims the authority provided by Section 201(b) "includes the power to clarify the language of [a] provision [within the Act]."[11] But Section 230 is clear and unambiguously affords the FCC no such authority. To the contrary, Section 230 is a self-executing provision directed at private parties and courts seeking to resolve civil complaints against covered service providers. Congress intended that the courts, not the FCC, construe Section 230 in the context of particular disputes.

NTIA relies on two cases, *City of Arlington v. FCC* and *AT&T v. Iowa Utilities Board*, each of which held that the incorporation of a statutory provision into the Communications Act was sufficient to afford the Commission jurisdiction to exercise its Section 201(b) rulemaking authority.[12] But, as described in detail below, Section 230 is distinguishable from the provisions at issue in those cases. Both *City of Arlington* and *Iowa Utilities Board* involved FCC regulations that would guide state and local decision-making over telecommunications network pricing and siting decisions against a

[10] 47 U.S.C. § 201(b) ("[The Commission may] "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter").

[11] Petition at 16.

[12] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (holding that the FCC could exercise its section 201(b) authority to establish pricing standards "interconnection and network element charges" under Section 251, which authorized state commissions to resolve disputes); *City of Arlington v. FCC*, 569 U.S. 290 (2013) (upholding FCC authority to adopt rules determining what constitutes a "reasonable period of time" under 47 U.S.C. § 332(c)(7)(B)(ii) for a municipality to make a decision on an application by a wireless provider seeking to construct a cell tower).

backdrop of a larger, specifically authorized, FCC regulatory program. Unlike those provisions, Section 230's (1) text, (2) legislative history, and (3) structure and purpose all provide affirmative evidence that Congress intended that the FCC would not, in fact, regulate here.

First, contrary to NTIA's assertion, the text of Section 230 is not "silen[t]" when it comes to the FCC's rulemaking authority.[13] Rather, Section 230's policy section expressly states that Congress intended to keep the Internet a "free market" that is "unfettered by Federal or State Regulation."[14] However, even if NTIA were correct, "silence" alone would not be a sufficient basis for the FCC to conclude that it has authority. Courts have repeatedly declined to "presume a delegation of power absent an express withholding of such power."[15] Furthermore, if NTIA could somehow find support for its assertion of FCC authority in Section 230's policy statements, the D.C. Circuit in *Comcast v. FCC*[16] already specified that Section 230's policy statement is not an independent source of FCC authority in and of itself. Instead, the court explained that Section 230's policy statements "help [to] delineate the contours of the statutory authority."[17] Indeed, the FCC has previously taken the view that Section 230 does not

[13] Petition at 17.

[14] 47 U.S.C. § 230(b)(2).

[15] *Motion Pictures Association of America, Inc. v. Federal Communications Commission*, 309 F.3d 796 (D.C. Cir. 2002) (quoting *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)).

[16] 600 F.3d 642, 654 (D.C. Cir. 2010).

[17] *Id.*

itself provide the agency with statutory authority to issue rules.[18] That holds true when delineating the contours of the FCC's rulemaking authority under Section 230 itself. In evaluating the Petition, the FCC must adhere to the text of Section 230, which specifically disclaims federal regulation and establishes legal immunities to be addressed by the courts in the litigation context.

Section 230 is thus different from the provisions at issue in the cases relied on by NTIA, which include no such statutory language. The question in *City of Arlington*, for example, was whether Congress intentionally left the statute ambiguous with the "'understand[ing] that the ambiguity would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[19] As the Court explained, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[20] Unlike *City of Arlington* and *Iowa Utilities Board*, Section 230's plain text is not silent on the FCC's role, but rather unambiguously states that the internet should be "unfettered by Federal or State Regulation."[21]

Second, NTIA also inaccurately asserts in its Petition that Section 230 lacks "[a] speck of legislative history [to] suggest congressional intent preclud[ing] the

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[18] *See, Restoring Internet Freedom*, Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 590 (2018). [hereinafter Restoring Internet Freedom Order]

[19] *See City of Arlington*, 569 U.S. at294 (quoting *Smiley v. Citibank* (South Dakota), N.A., 517 U.S. 735, 740-741 (1996)).

[20] *City of Arlington,* 569 U.S. at 294.

[21] 47 U.S.C § 230(b)(2).

Commission's implementation."[22] In fact, the cosponsors[23] of the Cox-Wyden Amendment that created Section 230, specifically designed the legislation as a *private-sector-driven* alternative to the Exon Amendment, which directed the FCC to regulate online obscene materials.[24] During the congressional markup and review of the bill both Reps. Wyden and Cox specifically expressed their concerns about the FCC being involved with regulating content on the newly budding Internet. Rep. Wyden explained that private parties "are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats."[25] He also asserted that an alternative FCC regulatory approach would "involve the Federal Government spending vast sums of money trying to define elusive terms that [would] lead to a flood of legal challenges."[26] Moreover, Representative Cox emphasized that "[the amendment] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the

[22] Petition at 17.

[23] The cosponsors of the amendment that eventually became Section 230 were Sen. Ron Wyden (D-OR) (then Rep. Wyden) and Former Rep. Christopher Cox (R-CA).

[24] 141 Cong. Rec. Pt. 11, 16007 (June 14, 1995) (remarks of Sen. Exon). *See also*, Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Rich. J. L. & Tech. Blog (Aug. 27, 2020)(available at: https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/) (describing the history of the Exon Amendment and its ultimate demise when the Supreme Court struck down the vast majority of the original Communications Decency Act as unconstitutional).

[25] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

[26] *Id.*

Internet."[27] These statements of Section 230's authors provide unequivocal evidentiary support that Congress *did not* intend for the FCC (or any government agency) to have a rulemaking role under Section 230.

Indeed, NTIA appears to concede as much. Elsewhere in the Petition, NTIA explains that Section 230 was specifically adopted as a "*non-regulatory* approach…intended to provide incentives for "Good Samaritan" blocking and screening of offensive materials."[28] But NTIA nowhere explains how its claim of FCC authority can be reconciled with this legislative history. To the contrary, NTIA appears well aware that Congress intended to create a legal environment free from government regulation and designed to stimulate a consistently vibrant and growing internet economy while still allowing companies within that ecosystem to set and enforce content moderation policies and procedures to protect their users. Confusingly, NTIA nonetheless asserts the FCC's jurisdiction to regulate.

Third, Section 230's structure and purpose also militate against FCC authority and are distinguishable from the provisions at issue in the cases relied on by NTIA. Congress adopted the provisions at issue in the *Iowa Utilities Board* and *City of Arlington* cases to establish a uniform federal regulatory regime to drive deployment and competition among former state-regulated local monopolies. As noted above, Section 230 involves no larger FCC federal program—or any regulatory scheme at all.

[27] *Id.* (statement of Rep. Cox).
[28] Petition at 22.

Rather, it is a self-executing statute focused on civil litigation. This is nothing like *Iowa Utilities Board*. There, Congress adopted extensive provisions designed to open local telecommunications markets to competition for the first time by allowing new entrants to lease "network elements" from the incumbent monopolists. The complex provisions called for state regulatory commissions to resolve disputes between the incumbents and new entrants concerning which network elements could be leased and at what cost. It was necessary and desirable for the FCC to establish rules governing those matters, rather than state regulatory commissions creating a patchwork of rules that would slow the development of intrastate and interstate competition. In contrast, Section 230 presents nothing like the complex regulatory scheme involving 50 state regulatory commissions in *Iowa Utilities Board*.

City of Arlington is likewise inapposite. In that case, the Court assessed whether Section 201(b) provided the FCC with rulemaking authority under Section 332(c)(7)(B)(ii), which requires state or local governments to act on applications to place, construct, or modify wireless facilities "within a reasonable period of time after the request is duly filed."[29] Congress adopted that provision to encourage local infrastructure decisions that would advance network deployment for FCC-regulated wireless services. Accordingly, it made sense for the FCC to provide guidance on what constitutes a "reasonable period" to facilitate and standardize the local authorization

[29] 47 U.S.C. § § 201(b), 332(c)(7)(B)(ii); *City of Arlington v. FCC*, 569 U.S. 290 (2013).

process as part of the larger regulatory scheme governing mobile communications services, over which Congress has expressly given the FCC lead regulatory authority.[30]

In short, NTIA's reliance on *Iowa Utilities Board* and *City of Arlington* to extend the FCC's Section 201(b) rulemaking authority over Section 230 is misplaced. Here, the specific evidence that Congress affirmatively intended to deny the FCC any authority over implementing Section 230(c) overcomes the mere incorporation of Section 230 into an Act with general rulemaking language. Because NTIA is asking the FCC to go beyond the authority delegated to it by Congress, the Commission must deny NTIA's request.

But even if that were not the case, and some ambiguity with respect to FCC authority remained, it would be unreasonable for the FCC to attempt to exercise it here. NTIA's Proposed Rules would bring within the Commission's purview huge swaths of the U.S. economy. As the Supreme Court explained in *Utility Air Regulatory Group v. EPA*, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' by exercising the power to interpret an ambiguous term within its organic statute, 'we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and

[30] 47 U.S.C. § 332.

political significance.'"[31] Applied here, the courts—not the Commission—have interpreted Section 230 for decades, with no indication of, let alone need for, Commission intervention. As a whole, NTIA's Petition would have the FCC upend well-established judicial interpretations of Section 230 in ways that would be hugely disruptive to the internet economy and undermine interactive computer service ("ICS") providers' ability to set and enforce necessary content policies and practices. Like the EPA rule in *Utility Air Regulatory Group*, the exercise of rulemaking authority over Section 230 would be "unreasonable because it would bring about an enormous and transformative expansion in. . .regulatory authority without clear congressional authorization."[32]

Finally, the FCC cannot adopt rules that would violate the First Amendment. As described below, NTIA's proposed regulations are inconsistent with fundamental First Amendment principles.[33] The Commission (like any reviewing court) should interpret its authority in ways that avoid such serious constitutional questions.

Under the constitutional avoidance canon of statutory construction "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the agency should construe the statute to avoid such problems unless such

[31] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2013). *See also US Telecom Ass'n v. FCC*, 855 F.3d 381 (DC Cir. 2017) (dissents from rehearing *en banc* of Brown, J., and Kavanaugh, J.).
[32] *Id.*
[33] *See infra* at Section IV. Proposed Rules Are Inconsistent With First Amendment Principles, pp. 46-55.

construction is plainly contrary to the intent of Congress."[34] In particular, the Supreme Court has invoked the need for the "clearest indication" of congressional intent to limit the reach of agency authority that would raise serious First Amendment concerns.[35] As the Court explained in *N.L.R.B. v. Catholic Bishop of Chicago,* where an agency's "exercise of its jurisdiction ... would give rise to serious constitutional questions," the court "must first identify the 'affirmative intention of the Congress clearly expressed'" before concluding that the Act grants jurisdiction.[36] Applied here, notwithstanding Section 230's incorporation into the Communications Act, there is no "affirmative intention of Congress clearly expressed." Absent the clear intent of Congress to afford the FCC rulemaking authority over Section 230, the Commission should decline to exercise jurisdiction here given the serious constitutional concerns raised by NTIA's Proposed Rules.

B. Section 230 Is Unambiguous And Leaves No Room For FCC Regulation

In addition to asking the Commission to exceed its jurisdiction, NTIA's petition rests on the incorrect premise that there is ambiguity in Section 230 that should be

[34] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (denying *Chevron* deference and rejecting the NLRB's interpretation of the National Labor Relations Act ("NLRA") as banning peaceful hand-billing, where the NLRA contained no clear expression of congressional intent to do so).

[35] *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 501 (1979) (holding that, given the First Amendment implications, the National Labor Relations Board's jurisdiction did not extend to religious school-teachers absent evidence of congressional intent).

[36] *Id.*

clarified through rules.[37] Section 230, however, is unambiguous as has been repeatedly demonstrated by courts in the twenty plus years since its passage. Even courts that have raised public policy concerns with Section 230 based on the outcomes in specific cases in which they have ruled have noted that the law is clear in terms of text and intent and that only Congress can alter it.[38] Perhaps even more importantly, Congress has ratified the very interpretation of Section 230 in *Zeran v. America Online*[39] on which NTIA relies for its assertion that Section 230 is ambiguous.[40]

The Petition characterizes the nearly 25 years of case law on Section 230 as based on a quote from the *Zeran* decision that was taken out of context.[41] To evaluate the claim in the Petition, it is critical to look specifically at the language of the Petition and the relevant passage from the Fourth Circuit's opinion in *Zeran*. The Petition claims,

> Much of this overly expansive reading of section 230 rests on a selective focus on certain language from *Zeran*, a case from the United States of Appeals for the Fourth Circuit. The line of court decisions expanding section 230 in such extravagant ways relies on

[37] Petition at 15-17.

[38] *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F. 3d 12, 29 (1st Cir. 2016), cert. denied 137 S. Ct. 622 (2017) ("If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation."); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998) (noting that "Congress made a different policy choice" and that "the statutory language is clear."). *See also*, *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, n. 5 (E.D. Va. 2003) ("Plaintiff argues that providing ISPs immunity against federal civil rights is bad policy. Yet it is not the role of the federal courts to second-guess a clearly stated Congressional policy decision.").

[39] 129 F.3d 327 (4th Cir. 1997).

[40] Petition at 26-27.

[41] *Zeran*, 129 F.3d at 330.

> *Zeran*'s reference to: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." This language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or factchecking statements. But, it is an erroneous interpretation, plucked from its surrounding context and thus removed from its more accurate meaning."[42]

The irony is that the argument the Petitioner makes is itself an "erroneous interpretation, plucked from its surrounding context."[43] NTIA has mistakenly omitted the sentence that is actually "immediately prior" to the sentence it believes has been taken out of context, as is demonstrated by the full quotation from the court's opinion below. The language the Petition quotes, appears as part of the court's analysis of Section 230(c)(1), in which it states,

> By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. **Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.** Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred."[44]

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[42] Petition at 26 (citations omitted). To the extent that this language in the Petition suggests that *Zeran* has been erroneously construed to mean that Section 230 to protect a provider's own statements, this is not the case. There are numerous cases refusing to apply Section 230 to content developed, in whole or in part, by providers. *See, e.g.*, *Enigma Software Group v. Bleeping Computer*, 194 F. Supp. 3d 263 (2016); *Tanisha Systems v. Chandra*, 2015 U.S. Dist. LEXIS 177164 (N.D. Ga. 2015); *Perkins v. LinkedIn*, 53 F. Supp. 3d 1222 (2014); *Anthony v. Yahoo!, Inc.*, 421 F.Supp.2d 1257 (N.D. Cal. 2006); *Maynard v. Snapchat*, 816 SE 2d 77 (Ga. Ct. App. 2018); *Dimetriades v. Yelp*, 228 Cal. App. 4th 294 (2014).

[43] Petition at 26.

[44] *Zeran*, 129 F.3d at 330 (emphasis added).

In light of the clear statement of the court that the claims barred are those which treat the service provider liable as though they were a publisher, it is difficult to understand how the Petition concludes from the court's opinion that Zeran intended Section 230(c)(1) to only protect the editorial decisions of information content provider, stating,

> ... the quotation refers to third party's exercise of traditional editorial function—not those of the platforms. As the sentence in *Zeran* that is immediately prior shows, section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." In other words, the liability from which section 230(c)(1) protects platforms is that arising from the content that the third-party posts—i.e. the "information" posted by "another information provider" and those information providers' editorial judgments."[45]

While NTIA may believe that courts have erred in their interpretation of Section 230, Congress has not only acquiesced to the courts' interpretation of Section 230, but rather has specifically endorsed the application of Section 230 adopted in leading cases such as *Zeran*.[46] For example, House Report Number 107-449, on the creation of the new kids.us domain, specifically states that *Zeran* "correctly interpreted section

[45] *Id.*

[46] *See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("The protection provided by § 230 has been understood to merit expansion. Congress has extended the protection of § 230 into new areas. See 28 U.S.C. § 4102(c)(1) (providing that U.S. courts 'shall not recognize or enforce' foreign defamation judgments that are inconsistent with § 230); 47 U.S.C. § 941(e)(1) (extending § 230 protection to new class of entities)").

230(c)."[47] In 2010, Congress expanded the application of Section 230 in the "Securing the Protection of our Enduring and Established Constitutional Heritage Act" or "SPEECH Act."[48] Codified at 28 U.S.C. § 4102, the SPEECH Act prevents the enforcement of foreign defamation judgements by U.S. courts, if the courts determine that enforcing the judgement against an ICS would be inconsistent with Section 230.[49]

In addition, Congress has shown that when it disapproves of judicial application of Section 230, it will not hesitate to act. For example, after the First Circuit held that Section 230 barred claims against an online site that assisted in drafting advertisements for underage sex-trafficking,[50] Congress instead of eliminating Section 230, amended the law to create an exception for civil actions brought under anti-trafficking laws.[51]

The other examples provided of how Section 230 is purportedly "ambiguous" fail to recognize the clear consensus among courts or focus on isolated instances in nearly a quarter-century of jurisprudence to attempt to justify the FCC's intervention.[52]

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[47] *See* H.R. Rep. No. 107-449, at 13 (2002) (providing that the interpretation from *Zeran* should apply to the new "kids.us" subdomain, established in 47 U.S.C. § 941); 28 U.S.C. § 4102(c)(1) (applying § 230 to foreign judgments).

[48] Pub. L. No. 111–223 (2010).

[49] 28 U.S.C. § 4102(c).

[50] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F. 3d 12.

[51] Pub. L. No. 115-164, 132 Stat. 1253 (2018).

[52] Petition at 27-28; *cf., Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) ("It is clear that § 230 was intended to provide immunity for service providers like Google on exactly the claims Plaintiff raises here"); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d at 1262 (quoting *Ben Ezra, Weinstein, & Company, Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir.2000), "Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Green v. America Online Inc.*, 318 F.3d 465 (3rd Cir. 2003) ("By its terms, § 230

III. THE PROPOSED RULES ARE INCONSISTENT WITH THE TEXT AND INTENT OF SECTION 230

Even if the FCC determines that it has an adequate legal basis to issue rules interpreting Section 230, the FCC may not issue rules that conflict with the language of the statute and the intent of Congress.[53] The substance of the Proposed Rules are contrary to the plain meaning of Section 230 and Congress' clear intent.

A. Overview Of Proposed Rules

The Proposed Rules would make several changes to Section 230 which are best understood by examining how the Proposed Rules would alter the protections provided by (c)(1) and (c)(2).

The Proposed Rules would restrict application of Section 230(c)(1) to claims based on a failure to remove content developed by a third party, specifically excluding any claims related to the removal of content or other exercise of editorial discretion. Today, Section 230(c)(1) may be asserted by a provider in response to claims based on hosting of content or removal of content, so long as the content is from "another information content provider." In addition, the Proposed Rules would alter (c)(1)'s

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provides immunity to AOL as a publisher or speaker of information originating from another information content provider"); *Blumenthal v. Drudge*, 992 F. Sup. at 50 ("Congress has said quite clearly that such a provider shall not be treated as a 'publisher or speaker' and therefore may not be held liable in tort.").

[53] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("When a court reviews an agency's construction of the statute which it administers it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress").

operation by adding a new definition of "information content provider" that would cause an ICS to be treated as an "information content provider" for "presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing" a third party's content.[54] Today, providers have protection under (c)(1) for performing traditional editorial functions including deciding which content to publish or withdraw, arranging the content, and editing the content (subject to limitations).[55] Obviously, if a provider comments on third party content that comment is content "developed in whole or in part" by the provider and not "another information content provider" and thus is not covered by (c)(1)'s existing language or its interpretation by courts.[56] The Proposed Rules would further limit Section 230(c)(1) through NTIA's proposed definition of what it means to treat a service provider as a "publisher or speaker" of third party content.[57] This would cause a provider to lose the protections of (c)(1) if the provider—whether manually or through an algorithm—selects, recommends, promotes, or arranges third party content. Today, a provider's decisions about how to display third party content are protected by (c)(1), thus the Proposed Rule would result in a substantial change in the law.

[54] Petition at 40-42.

[55] *See* discussion of *Zeran*, *infra* p. 34 n. 83. "Subject to limitations" refers to the current law which would treat an interactive computer service as an information content provider if the service edited content in such a way that it "materially contributed to the illegality" of the content. *See, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[56] *See supra* p. 20 n. 42.

[57] Petition at 46-47.

The Proposed Rules would also restrict the application of Section 230(c)(2), with a particular focus on (c)(2)(A). Under the Proposed Rules, the immunity in (c)(2)(A) would become the exclusive immunity that applies to a service provider's decision to remove or reject content. As noted above, today Section 230's protections in (c)(1) and (c)(2) both potentially apply to removal decisions, though how and when they apply differs. In addition, protections for content removals would be limited by new definitions of "good faith" and "otherwise objectionable." The details of these definitions are important for understanding their impact.

The Proposed Rules put forward an all-encompassing definition of "good faith" restricting Section 230(c)(2)(A)'s protections to only provider removal decisions that meet all of the following requirements:

- ⇒ restricts access to or availability of material or bars or refuses service to any person consistent with publicly available terms of service or use that state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices, including by any partially or fully automated processes, and that are in effect on the date such content is first posted;
- ⇒ has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A);
- ⇒ does not restrict access to or availability of material on deceptive or pretextual grounds, and does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict; and

⇒ supplies the interactive computer service[58] of the material with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.[59]

These changes to (c)(2)(A) would dramatically limit the ability of providers to assert Section 230 protections in lawsuits resulting from content removal and substantially burden the process by which "interactive computer services" exercise their discretion to determine which content to allow on their services. For example, if a social media platform decides to change its policies to explicitly prohibit a new type of content it would not be able to rely on Section 230 for protection from lawsuits if it removed content that was posted before the policy change (even if advance notice of the change was provided). Thus, Section 230 would not apply if a service decided to become more family-friendly by prohibiting pornography and it sought to remove pornography posted before the change to its rules. In addition, service providers would be unable to benefit from Section 230 if they decided to enforce a rule in one instance but not in another. Thus, in order to qualify to assert (c)(2)(A) a provider would not be able to have a "public figure" or "newsworthiness" exception without the risk of

[58] While the text of the Petition does say "interactive computer service," we are operating under the presumption that NTIA intended to use the term "information content provider" in this part of the Proposed Rule. Therefore, our comments respond to the text with that presumption in mind.
[59] Petition at 39-40.

litigation or if they have a rule against nudity they would not be able to make exceptions for works of art, science, or journalism. Additionally, providers would have to provide notice and an opportunity to appeal for each removal decision unless there was an "objectively reasonable" belief that the content was related to criminal activity or that notice would create a risk of "imminent physical harm." Thus, a provider who fails to provide notice to an individual related to a content removal because they have a subjective belief that it will cause a significant risk of physical harm to a person will not be able to assert Section 230 without burdensome litigation if there is a question of fact as to whether it is objectively reasonable to believe that the risk of harm is "imminent." Therefore, an operator of an online forum for victims of domestic abuse would be forced to face a potential litigation or to provide notice and the opportunity to respond to a user that it believes is an abuser who is trying to ascertain the location of a victim who uses the forum for the purpose of causing physical harm.

It is also notable that the Proposed Rules seek to define "good faith" using an objective standard ("objectively reasonable"), replacing the subjective test in place today[60] and displacing the provider discretion intended by Congress in crafting the immunity and the plain language of the provision itself.[61] This is a significant change

[60] *See, e.g., Holomaxx v. Yahoo!*, Case Number 10-cv-4926-JF ("Indeed, the good faith immunity is focused upon the provider's subjective intent."); *Holomaxx v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (same).

[61] *See e.g., Shulman v. Facebook*, Civil Action No. 17-764 (JMV) (LDW) (D.N.J. Feb. 4, 2019) ("Importantly, Section 230(c)(2)(A) does not require the user or provider of an interactive computer service to demonstrate that the otherwise "objectionable" material is actually objectionable.").

that will impact how and when the (c)(2)(A) immunity can be asserted and how a court will assess whether to apply the immunity.

Finally, the Proposed Rules would introduce a new requirement for transparency regarding content moderation practices in mass-market products. "Any person providing an interactive computer service in a manner through a mass-market retail offering to the public shall publicly disclose accurate information regarding its content-management mechanisms as well as any other content moderation, promotion, and other curation practices of its interactive computer service sufficient to enable (i) consumers to make informed choices regarding the purchase and use of such service and (ii) entrepreneurs and other small businesses to develop, market, and maintain offerings by means of such service."[62] This requirement has no basis in Section 230 and thus does not impact the operation of the statute. Further, the implications of promulgating such a rule could provide a roadmap for bad actors to navigate their way around enforcement of the ICS's content moderation policies. As a result, this Proposed Rule could place the safety of users at risk and create a more restrictive internet environment, which directly conflicts with Congress's intended purpose of this statute.

[62] Petition at 52.

B. The Proposed Rules Conflict With The Language And Intent Of Section 230

Congress intended to encourage content moderation through Section 230, but the Proposed Rules disincentivize it by creating more protection for leaving up potentially harmful content than removing it. The Proposed Rules do this in two significant ways: (1) putting forward a reading of Section 230 that links (c)(1) and (c)(2); and (2) adopting novel definitions of key terms in (c)(2) such as "good faith" and "otherwise objectionable."

1. Linking (c)(1) And (c)(2)

The Petition's Proposed Rules seek to advance dramatic new interpretations of Section 230's twin immunities — the protection from publisher liability for decisions related to third party content and protections for moderation activities. Courts have long held that these two provisions operate as two independent immunities. However, the Proposed Rules would deprive these two provisions of their independence and stand to disrupt the careful balance of the statute by providing more protection for *leaving up* harmful content than removing it. As a result of the Proposed Rules, providers would continue to enjoy the broad immunity granted in Section 230(c)(1) only for decisions to leave up third-party content. Decisions to remove third-party content would be subject to Section 230(c)(2)'s more narrow protections for "good faith" removals of content deemed by the provider to be "obscene, lewd, lascivious,

filthy, excessively violent, harassing, or otherwise objectionable."[63] As is discussed more fully below, the Proposed Rules put forward an interpretation of (c)(2) that is substantially narrowed due to new definitions of "good faith" and "otherwise objectionable." This would clearly tip the balance of Section 230 away from the intended goal of encouraging online services to self-regulate, since to benefit from Section 230's full protection from litigation and liability a provider would have to leave third-party content untouched as a matter of policy and practice. This result stands in stark contrast to the language of the statute and the intent of Congress. The statute is titled "Protection for private blocking and screening of offensive material."[64] And the title of subsection (c)—which encompasses both of the Section 230 immunities at issue here—is "Protection for 'Good Samaritan' blocking and screening of offensive material."[65]

In addition, contrary to NTIA's assertion, this interpretation is not necessary to avoid surplusage as (c)(1) and (c)(2) are not coextensive.[66] Federal courts have repeatedly rejected this specific argument.[67] Pointing to dicta in a lone district court

[63] 47 U.S.C. § 230(c)(2)(A).
[64] *Id.* § 230.
[65] *Id.* § 230(c).
[66] Petition at 29-30.
[67] *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F. 3d at 23 (stating "The appellants' suggestion of superfluity is likewise misplaced. Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites. *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009); *Chi. Lawyers' Comm. for Civil Rights Under Law Inc. v. Craigslist Inc.*, 519 F.3d 666, 670-71 (7th Cir. 2008); *Batzel v. Smith*, 333 F.3d 1018, 1030 n. 14 (9th Cir.2003), and nothing about the district court's analysis is at odds with that conclusion.").

opinion in *E-ventures Worldwide, LLC v. Google Inc.*, NTIA argues that allowing Section 230(c)(1) to immunize decisions to remove content would render Section 230(c)(2)(A) "superfluous."[68] *E-ventures*'s interpretation—which does not appear to have been cited favorably by any other court—is unpersuasive because "Section 230(c)(2)'s grant of immunity, while overlapping with that of Section 230(c)(1), also applies to situations not covered by Section 230(c)(1)."[69] As the Ninth Circuit explained in *Barnes v. Yahoo!, Inc.*,[70] Section 230(c)(1) "shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."[71] Section 230(c)(2)(A) simply "provides an additional shield from liability," encompassing, for example, those service providers "who cannot take advantage of subsection (c)(1) ... because they developed, even in part, the content at issue."[72] The Ninth Circuit recently reiterated that conclusion in *Fyk v. Facebook*,[73] holding that Section 230(c)(1) immunized Facebook against claims based on its alleged "de-publishing" of user content and explicitly rejecting the argument that applying Section 230(c)(1) to content removal decisions makes Section 230(c)(2) superfluous.[74]

[68] *Id.* at 30.
[69] *E-ventures Worldwide, LLC v. Google Inc.*, 2017 U.S. Dist. LEXIS 88650 at *7 (M.S. Fla. Feb. 8, 2017.
[70] 570 F.3d 1096 (9th Cir. 2009).
[71] *Id.* at 1105.
[72] *Id.* (emphasis added).
[73] 808 F. App'x 597 (9th Cir. 2020).
[74] *Id.* at 598.

The immunity in (c)(2)(B) is clearly distinct from the immunity in (c)(1). Section 230(c)(2)(B) states, a "provider or user of an interactive computer service" shall not be held liable for—"any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."[75] Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an ICS. In addition, nowhere in (c)(2)(B) is there any mention of the protections being limited to legal claims seeking to treat the provider or user as a "publisher or speaker" of content. This has two important consequences — (1) the immunity provision is available to users and ICSs who have played roles in content removal but are not hosting or "publishing" the content at issue; and (2) the claims against which the (c)(2) immunities can be asserted include claims that are not based on treating the user or provider as the "speaker or publisher" of content. For example, (c)(2)(B) has been applied to protect a provider of security tools from liability for their decision within their tool to treat a specific piece of downloadable software as malicious code.[76] The provision also clearly applies to tools that providers make available to the "information content providers" that use their services and to the manner in which those "information content providers" may use those tools. These tools include options to mute or block other users, keyword filters, parental control tools, and "Not Safe for

[75] 47 U.S.C. § 230(c)(2)(B).

[76] *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F. 3d 1169 (9th Cir. 2009).

Work" or other warning designations that content providers can apply. It is exactly these types of tools that (c)(2) was designed to promote.[77]

Section (c)(2) provides an important backstop to ensure Section 230 broadly protects provider efforts to restrict or remove inappropriate content as Congress intended.[78] Unlike (c)(1), the protections of (c)(2)(A) are not restricted to when service providers are being treated as the "publisher or speaker" of the third party content and thus provide an important additional protection for cases where courts may determine the claims are of a nature that does not implicate (c)(1). In its recent amicus brief in the California Court of Appeals case *Murphy v. Twitter*, IA noted the long line of cases in which plaintiffs have tried to circumvent Section 230(c)(1) "through the creative pleading of barred claims."[79] Many courts, including the California Supreme Court and the California Court of Appeal, have wisely rejected those attempts.[80] Other courts have reached similar results and dismissed claims sounding in breach of contract,

[77] *See, e.g.*, 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.").

[78] *Donato v. Moldow*, 865 A.2d 711, 727 (N.J. Super. Ct. App. Div. 2005) (noting one court's interpretation of the purpose of the good samaritan provision, that "[i]t was inserted not to diminish the broad general immunity provided by § 230(c)(1), but to assure that it not be diminished by the exercise of traditional publisher functions. If the conduct falls within the scope of the traditional publisher's functions, it cannot constitute, within the context of § 230(c)(2)(A), bad faith.").

[79] *Hassell v. Bird*, 5 Cal. 5th 522, 541-542 (2018) (internal citation and quotation marks omitted).

[80] *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (rejecting "artful skirting of the CDA's safe harbor provision"); *Hassell*, 5 Cal. 5th at 541; *Cross v. Facebook*, Cal. App. 5th 190, 201-02 (2017); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573 (2009); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (2002).

promissory estoppel, and unfair competition.[81] Section 230(c)(2) ensures that regardless of the nature of the claim, there remains broad immunity for a provider's efforts to remove content.

NTIA's proposed interpretation would have an enormous impact on providers because it would cut to the heart of how they have benefited from the protections of Section 230(c)(1). A growing number of courts have held that Section 230(c)(1) bars claims based on a provider's removal of content or "deplatforming" of a user.[82] These courts have found support for this approach in the plain language of Section 230(c)(1) and many earlier cases, dating back to the seminal *Zeran* decision. "At its core, § 230 bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish [or] withdraw ... content."[83] Courts of Appeals have widely held that a provider's decision about whether to remove a third-party's content, or "prevent its posting," is "precisely the

[81] *See, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 599 (9th Cir. 2020) (affirming dismissal of UCL claim and fraud claim, among others); *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119-20 (N.D.Cal. 2020) (breach of contract claim); *Brittain v. Twitter, Inc.*, No. 19-cv-00114-YGR, 2019 WL 2423375, at *3 (N.D. Cal. June 10, 2019) (breach of contract and promissory estoppel); *Dehen v. Does 1-100*, 2018 WL 4502336 at *3-4 (S.D. Cal. Sept. 19, 2018) (breach of contract).

[82] *See, e.g.*, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015), aff'd sub nom. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (barring claims alleging that a platform had "engaged in blatant discriminatory conduct" by publishing some content and removing other content); *Domen v. Vimeo, Inc.*, 2020 WL 217048, at *6 (S.D.N.Y. Jan. 15, 2020), appeal docketed, No. 20-616 (2d Cir. Feb. 18, 2020); *Mezey v. Twitter, Inc.*, 2018 WL 5306769 at *1 (S.D. Fla. July 19, 2018).

[83] *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (quotations omitted).

kind of activity for which Section 230 was meant to provide immunity."[84] And this is for good reason. In *Batzel v. Smith*, the Ninth Circuit observed that treating decisions regarding what to publish versus what not to publish differently "is not a viable" and that "[t]he scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance."[85]

Given the clear differences between the (c)(1) and (c)(2) immunities, NTIA's argument for disrupting over twenty years of jurisprudence fails. There is no basis on which the FCC could issue a valid rule to overturn existing interpretations of (c)(1) and (c)(2) given the clarity and consistency of court interpretations of the statutory text,[86] the plain language of the statute, and the legislative history. As previously noted, the

[84] *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1170; *see Force v. Facebook, Inc.*, 934 F. 3d 53, 65 (2d Cir. 2019).

[85] *Batzel v. Smith*, 333 F.3d 1018 (paragraph 64) (9th Cir. 2003).

[86] *See e.g.*, *Sikhs for Justice*, 697 F. App'x at 526 (holding that Section 230(c)(1) barred a lawsuit claiming that Facebook had unlawfully discriminated against the plaintiff by "hosting, and later blocking, [plaintiff's] online content" in India); *see also Fyk*, 808 F. App'x at 598 (providing immunity for "de-publishing pages that [plaintiff] created and then re-publishing them for another third party"); *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (affirming dismissal under Section 230(c)(1) of claims challenging MySpace's deletion of fake user profiles); *Fed. Agency of News v. Facebook*, 432 F. Supp. 3d 1107 (applying Section 230(c)(1) to dismiss claims challenging Facebook's decision to remove accounts that Facebook believed to be controlled by Russian intelligence); *Taylor v. Twitter, Inc.*, No. CGC 18-564460 (Cal. Superior Ct. Mar. 8, 2019) (dismissing claims under Section 230(c)(1) challenging Twitter's decision to suspend the account for violations of Twitter's rule against violent extremism); *Johnson v. Twitter, Inc.*, No. 18CECG00078 (Cal. Superior Ct. June 6, 2018) (ruling that Section 230(c)(1) barred a lawsuit challenging Twitter's decision to suspend a user after he attempted to raise money to "tak[e] out" an activist).

application of (c)(1) to content removal decisions has been explicitly ratified by Congress.[87]

In addition, the Proposed Rule's attempts to exclude from Section 230(c)(1) other traditional publisher functions, such as determining the placement and prioritization of content, must also be rejected in light of the clear meaning of the text, correctly interpreted by courts and endorsed by Congress, that (c)(1) protects all traditional publisher functions. The justification in the Petition strains credibility, stating "NTIA suggests that the FCC can clarify the ambiguous phrase 'speaker or publisher' by establishing that section 230(c)(1) does not immunize the conduct of an interactive service provider that is actually acting as a publisher or speaker in the traditional sense."[88] Without any indication from Congress that it intended the words chosen for the statute to have a meaning other than "actually acting" as a "publisher" or a "speaker," the FCC must decline to adopt alternative meanings of those terms.[89] Courts have already evaluated these terms in Section 230, and relying on their terms plain meaning, rejected the argument that (c)(1) should not apply to arranging third party content. In *Force v. Facebook*, the Second Circuit Court of Appeals stated,

> We disagree with plaintiffs' contention that Facebook's use of algorithms renders it a non-publisher. First, we find no basis in the ordinary meaning of "publisher," the other text of Section 230, or decisions interpreting Section 230, for concluding that an

[87] *See supra* pp. 21-22.

[88] Petition at 46.

[89] *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (undefined terms should be given their "plain meaning.").

> interactive computer service is not the "publisher" of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests.[90]

The Court also noted, correctly, that

> Accepting plaintiffs' argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties.[91]

Courts have also made clear that there is no basis in Section 230 to distinguish between manual and automated editorial decisions regarding the placement of content. For example, Section 230(c)(1) has been applied to the "'automated editorial acts' of search engines."[92] Courts have also noted that arguments intended to narrow (c)(1) and exclude automated editorial decisions would be inconsistent with Congress's intent.[93] At a practical level, this Proposed Rule would have a dramatic effect on the online products and services that many of us rely on a daily basis. As a

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[90] *Force v. Facebook, Inc.*, 934 F. 3d at 66 (citing to *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d at 1172; *Carafano v. Metrosplash.com Inc.*, 339 F. 3d 1119, 1124-25 (9th Cir. 2003); and *Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019), cases which all rejected similar arguments).

[91] *Id.*

[92] *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F. 3d 1263, 1271(D.C. Cir. 2019) (quoting *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016)).

[93] *Force v. Facebook*, 934 F. 3d at 67 ("We disagree with plaintiffs that in enacting Section 230 to, *inter alia*, "promote the continued development of the Internet," 47 U.S.C. § 230(b)(1), and "preserve the vibrant and competitive free market," *id.* § 230(b)(2), Congress implicitly intended to restrain the automation of interactive computer services' publishing activities in order for them to retain immunity" and "it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.").

result of the Proposed Rule, these products and services would be subject to potential lawsuits for any of the millions of automated decisions required to elucidate the incredible volume of content available via today's internet.[94]

For these reasons, the FCC should deny the NTIA's Petition including Proposed Rules for 47 C.F.R. § 130.01 and § 130.03.

2. Novel Definitions Of Terms In (c)(2) Narrow The Immunity

The Proposed Rules also seek to substantially narrow provider protections for removal of content by making changes to Section 230(c)(2)(A). As previously discussed, Congress clearly intended Section 230 to remove disincentives to moderating content, namely the threat of endless litigation and specter of potential liability, that existed at the time Section 230 was enacted.[95] Thus, proposals to further narrow Section 230's protections available to providers who engage in content moderation directly contravene the will of Congress and cannot succeed.

The strong protections for content moderation in Section 230 have played a particularly important role in creating space for online platforms to refine their approaches to content moderation over time. Moderating content is not easy given the enormous volume of content online and the sometimes-nuanced distinctions that providers must make to strike the right balance between which content to remove and

[94] For example, Google has indexed hundreds of billions of webpages. (https://www.google.com/search/howsearchworks/crawling-indexing/).
[95] *See supra* p. 3 n. 4.

which to leave up. Our member companies recognize that they do not always achieve the perfect balance, but they are constantly learning, adapting, and updating their approaches. Section 230 allows online companies the room to experiment in this way without having to worry that they will face the heavy costs of litigation each time a mistake is made or someone is unhappy with a moderation decision. Companies can learn and make adjustments—an essential process that they engage in constantly.

The Proposed Rules would dramatically change the scope of the immunity in Section 230(c)(2)(A)[96] by introducing new and unsupported definitions of key terms, including "good faith" and "otherwise objectionable" and pose great risks to the ability of providers to continue many of the voluntary efforts engaged in today to make services higher quality and safe to use. The Proposed Rule for 47 C.F.R. § 130.02(e) introduces a novel interpretation of "good faith" that spans from unfair and deceptive trade practices, already regulated by the Federal Trade Commission, to new requirements for publishing policies, providing notice to users, and allowing appeals for content removal decisions. The Petition's only support for the notion that "good faith" requires private entities to afford users of their services some form of "procedural due process"[97] to qualify as acting in "good faith" is the Executive Order

[96] 47 U.S.C. § 230(c)(2)(A).

[97] "Procedural due process" is used as a shorthand to reference user notice and appeal processes in content moderation and should not be confused with legal "due process" or circumstances under which legal due process is required.

on Preventing Online Censorship.[98] NTIA offers no support in law or legislative history to reinforce its recommendation of an objective standard that deviates from two decades of jurisprudence interpreting "good faith" as used in Section 230(c)(2)(A) as a subjective standard.[99] Further, the Petition speaks of "ambiguity" among the courts in interpreting this provision of Section 230 without citing cases that conflict. In other words, the Petition provides no concrete evidence for why the FCC should substitute its judgement for that of Congress and the courts in interpreting the meaning of "good faith." For that reason alone the FCC should reject this recommendation, however, there are other compelling reasons why the Commission should refuse to redefine good faith.

The text of Section 230(c)(2)(A) does not support interpreting the good faith requirement as including some elements of procedural due process. Moreover, this proposition is inconsistent with precedent[100] and additional First Amendment concerns arise. Section 230's protections apply to a wide range of "interactive computer services." Among these services are many institutions that have been created for a specific purpose or among individuals holding shared values. The practical impact of the Proposed Rule changing the definition of good faith is to impose a series of costs

[98] Petition at 38-39. The Executive Order on Preventing Online Censorship provides a questionable basis for any agency action, as significant concerns have been raised regarding the legal basis for the Order and whether it is constitutional.

[99] *Id.*

[100] *See e.g., Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097

and restrictions on the exercise of these institutions' constitutionally-protected First Amendment rights to choose which speech to publish and which to reject or else face consequences in the form of expensive litigation. This impermissibly burdens free expression without any appropriate justification. Additionally, the institutions that would be most substantially burdened are those that offer platforms for communication among a community that is organized around shared values, such as church groups, religious organizations, schools, or those working on common political causes.

The text of Section 230 also does not support defining "good faith" in such a way that it would exclude imperfect or selective enforcement. "A mere claim of selective enforcement is not sufficient to show a lack of good faith under Section 230(c)(2)(A). Indeed, this provision was expressly enacted to provide immunity for providers that 'remove[] some—but not all—offensive material from their websites.'"[101] And because wholly uniform application of content-moderation policies at scale is almost impossible, allowing Section 230(c)(2)(A) immunity to be defeated by an allegation that someone else's similar content was not removed would render the statute a virtual dead letter. That is not the result Congress intended. Section 230's authors were well aware of the risks of allowing liability to attach to instances of

[101] *Bennett v. Google*, 882 F.3d 1163, 1166 (D.C. Cir. 2018); *see also Force v. Facebook*, 934 F. 3d at 71 (finding that Section 230 immunity applies where a provider "undertake[s] efforts to eliminate objectionable" content even where it "has not been effective or consistent in those efforts.").

imperfect content moderation and acted with the specific intent of addressing such risks.

The text of Section 230 also makes it clear that (c)(2)(A) is intended to be a subjective standard focused on what the provider or user believes is an appropriate response to potentially objectionable content.[102] The provision states it protects actions taken in good faith to voluntarily restrict content that the "*provider or user considers* to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[103] Thus, the Proposed Rules frequent use of "objectively reasonable" in proposed Section 130.02 conflicts with the language of the statute. In particular, proposed Section 130.2(e)(ii)'s addition to the definition of "good faith" directly conflicts with and cannot be reconciled with this language from Section 230(c)(2)(A).[104] Section 130.02(e)(ii) states that good faith requires that the provider "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[105] Rather than adopt a single national standard for objectionable content, Congress pegged immunity to what a provider "considers to be"

[102] *See Holomaxx v. Yahoo!*, 783 F. Supp. 2d at 1104 (internal citation omitted) (concluding that "virtually total deference to provider's subjective determination is appropriate").
[103] 47 U.S.C. § 230(c)(2)(A) (emphasis added).
[104] Petition at 39.
[105] *Id.*

objectionable.[106] Section 230(c)(2)(A) allows online providers to establish "standards of decency without risking liability for doing so."[107] Given the wide range of platforms on the internet, there can be no one objective "standard[] of decency."[108] A website about veganism, for example, might find material about hunting objectionable. Or a forum for Catholics might find material about reproductive rights objectionable. Accordingly courts have easily determined that "Section 230(c)(2)(A)...does not require that the material actually be objectionable; rather it affords protection for blocking material that the provider or user considers to be objectionable."[109] Courts have also noted that "[t]his standard furthers one of section 230's goals "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."[110]

The Proposed Rule's effort to re-define "otherwise objectionable" and the other descriptors of content in Section 230(c)(2)(A) also conflict with the plain language of the statute and clear precedent interpreting that language. Proposed Rule Section

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[106] 47 U.S.C. § 230(c)(2)(A) (emphasis added); *see Enigma Software Group v. Malwarebytes*, 946 F.3d at 1052; *see also Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006) ("[T]o promote active screening by service providers," in other words, Congress "contemplated self-regulation, rather than regulation compelled at the sword point of tort liability").

[107] *Green v. America Online Inc.*, 318 F.3d at 472.

[108] *Id.*

[109] *Zango, Inc. v. Kaspersky Lab, Inc.*, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007) (emphasis added), aff'd 568 F.3d 1169 (9th Cir. 2009)).

[110] *e360 Insight v. Comcast Corp.*, 546 F. Supp.2d at 608 (citing § 230(b)(3)).

130.02(a)-(d) attempts to define for the first time in more than 20 years what Congress meant by "obscene, lewd, lascivious, filthy"; "excessively violent"; "harassing"; or "otherwise objectionable."[111] In addition to eliminating the provider discretion explicitly included in the statute, the new definitions seek to restrict the types of content that could be removed under the protections of Section 230(c)(2)(A). For example, the Proposed Rules would limit "excessively violent" to only to content regulated by the FCC under the V-chip rules and content promoting terrorism.[112] This proposal replaces provider discretion with government regulations of content, an outcome Congress specifically sought to avoid in enacting Section 230.[113]

The focus on "otherwise objectionable" and the Petition's effort to limit interpretation of the term by reference to the other types of content contained in the preceding list is likewise misguided. As the Petition itself notes, one of the few courts to raise concerns about an expansive reading of "otherwise objectionable" also noted that attempting to restrict its meaning by relying on similarities among the preceding terms is difficult, because those terms have dramatically different meanings and address distinct problems.[114] It would also deprive the term "otherwise objectionable"

[111] Petition at 37-38.

[112] *Id.*

[113] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)("[the amendment] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.").

[114] Petition at 31-32.

of fulfilling its clearly intended purpose in Section 230(c)(2)(A), which is to ensure that forms of objectionable content that could not be imagined in 1995 would be covered by Section 230's protections today. Providers rely on "otherwise objectionable" language to protect their decisions to remove or restrict a range of problematic content that does not fall under the specifically identified categories such as content promoting suicide and eating disorders (which has proven dangerous content for younger users), platform manipulation, and misleading synthetic or manipulated media. Depending on the nature of a service, providers may define "otherwise objectionable content" based on what content is appropriate for the specific purpose of service. Content that is appropriate for a dating site is likely not appropriate for a job search site. Review sites may limit posts to only those that contain reviews or may impose additional restrictions, such as a requirement that reviews be posted only by individuals who have used the product or service being reviewed. If former employees want to complain about treatment by a hotel manager, that content is not appropriate for a site dedicated to reviews of hotels for travelers but would be perfectly at home on a service dedicated to sharing information about employers (where a post about what a nice stay an individual enjoyed at that hotel would likely be considered inappropriate). At the time Section 230 was written many of these types of inappropriate content would have been unimaginable and thus exactly the type of thing a catch-all would be intended to cover.

NTIA's argument also fails, because it merely seeks to replace Congress' judgment with the agency's judgment. If Congress wanted to limit provider discretion to only types of content similar to the largely dissimilar categories identified, it should be presumed that it would have done so explicitly.[115] Instead, Congress chose the term "otherwise objectionable."[116] Congress also specifically added the qualifier at the end of the list, "even if otherwise constitutionally protected," making clear that these categories should not be considered narrowly and limited to only illegal content.[117]

IV. THE PROPOSED RULES ARE INCONSISTENT WITH FIRST AMENDMENT PRINCIPLES

Any regulations purporting to interpret Section 230 must take careful account of three First Amendment guardrails.

First, providers are not state actors and consequently need not refrain from moderating speech protected by the First Amendment.[118] Some have suggested that social media sites should be treated as public forums subject to First Amendment restrictions. The Supreme Court has made clear that the bar is high to convert private activity into state action and requires that the private party is serving a "traditional,

[115] *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 176-77 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words "aid" and "abet" in the statutory text.").

[116] 47 U.S.C. § 230(c)(2)(A).

[117] *Id.*

[118] *See Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 295-296 (2001); *Hudgens v. N.L.R.B.*, 424 U.S. 507, 520-521 (1976) (providing some kind of forum for speech is not an activity that only government entities have traditionally performed).

exclusive public function."[119] In addition, "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor"[120] because "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed."[121] Courts have consistently held that internet providers are not state actors bound to follow the strictures of the First Amendment.[122] And most users would not want the First Amendment to dictate internet providers' content moderation practices as though they were state actors. If that were to happen, providers would be prevented from blocking or screening a wide-range of problematic content that courts have held to be constitutionally protected including pornography, hate speech, and depictions of violence.

Second, the First Amendment protects the rights of the providers themselves. When providers determine what kind of platform to be and what kinds of content to host or prohibit, those are forms of free expression protected by the First Amendment.[123] It is bedrock First Amendment doctrine that such editorial decision-

[119] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). There are other bases for finding state action which are not relevant here, including when the government compels private action or when the government acts jointly with a private entity.

[120] *Id.* at 1930.

[121] *Id.*

[122] *See, e.g.*, *Freedom Watch, Inc. v. Google Inc.*, 2020 WL 3096365, at *1 (D.C. Cir. May 27, 2020) (per curiam); *Prager Univ. v. Google LLC*, 951 F.3d 991, 996-999 (9th Cir. 2020).

[123] In *Halleck*, Justice Kavanaugh, delivering the opinion of the Court, also noted that restricting a private party's ability to determine what to allow or prohibit would interfere with that party's property interests. "[T]o hold that private property owners providing a forum for speech are constrained by the First Amendment would be 'to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.'" *Halleck* at 1931.

making is constitutionally protected. In *Miami Herald Publishing Co. v. Tornillo*,[124] for instance, the Supreme Court held that a statute requiring newspapers to provide political candidates with a right of reply to critical editorials violated the newspaper's First Amendment right to exercise "editorial control and judgment" in deciding the "content of the paper."[125] Several courts have applied this reasoning in the online context, holding that providers possess the First Amendment right to decide what content to carry.[126] Recognizing this principle has never been more important. It is critical to allowing online communities and services to develop around common interests, shared beliefs, and specific purposes. It is also critical to allowing online services to cater to different audiences, including the ability to design rules to make their services age-appropriate or purpose-appropriate.

Third, the First Amendment sets a constitutional floor that ensures that online platforms that carry vast quantities of third-party content cannot be held liable for harms arising from that content based on a standard of strict liability or mere negligence. Applying such non-protective standards of liability to entities that distribute large volumes of third-party material would violate bedrock First Amendment principles. The Supreme Court examined this issue over six decades ago,

[124] 418 U.S. 241 (1974).

[125] *Id.* at 258.

[126] *See, e.g.*, *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 436-443 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-630 (D. Del. 2007).

in *Smith v. California*.[127] There, a city ordinance prohibited bookstores from selling obscene or indecent books regardless of whether the store owners knew the books were obscene or indecent.[128] The ordinance violated the First Amendment, the Court explained, because it would cause a bookseller to "restrict the books he sells to those he has inspected" and thus "impose a severe limitation on the public's access to constitutionally protected matter."[129] This principle—that the First Amendment gives special protection to those who act as clearinghouses for large quantities of third-party content—applies with especially great force to internet platforms, given the exponentially greater volumes of content that they host and the important role they play in societal discourse. Were these platforms to face liability for distributing unlawful third-party material absent circumstances in which they both knew of that particular content and yet failed to remove it, internet users' access to vital constitutionally protected speech would be severely stifled.

The petition proposes regulations that do not respect these guardrails and that would violate the First Amendment in several respects.

To start, the proposed regulations would be an unconstitutional content-based regulation of speech. The First Amendment does not permit the government to grant

[127] 361 U.S. 147 (1959).
[128] *Id.* at 148-149.
[129] *Id.* at 153.

immunity to some speakers but not others, based on the content of their speech.[130] Yet that is what the proposed regulations would do. Under the proposed regulations, immunity would be available only when a provider chooses to block or remove "obscene, lewd, lascivious, filthy, excessively violent, or harassing material" but not for any other content that a provider considers to be "objectionable."[131] The First Amendment does not permit the government to favor certain content-based editorial choices over others in this way.

These content-based lines likewise violate the unconstitutional conditions doctrine. Under the unconstitutional conditions doctrine, the government may not deny a benefit—including a discretionary one—based on a person or company's exercise of a constitutional right.[132] When constitutional rights are at stake, the government cannot accomplish indirectly what it is constitutionally prohibited from doing directly. Under the regime envisioned by the regulations, the government would be conditioning the receipt of an important government benefit—the long-standing, full protections of Section 230—on companies' limiting the exercise of their editorial rights to only "obscene, lewd, lascivious, filthy, excessively violent, or harassing material"

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[130] *See Waremart Foods v. N.L.R.B.*, 354 F.3d 870, 875 (D.C. Cir. 2004) (invalidating rule that allowed union picketing but not other picketing on employers' private property as an unconstitutional content-based restriction on speech); *see also Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16-17 (1986) (the government may not impose a "content-based grant of access to private party" absent a "compelling interest").

[131] *See* Petition at 37-38 (narrowing scope of subsection (c)(2)(A)); *see also id.* at 31 (narrowing scope of subsection (c)(1)).

[132] *Frost and Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926).

but not to any other content that a provider considers to be "objectionable."[133] The First Amendment bars the government from conditioning immunity on providers abandoning their own First Amendment right to decide what kind of content to host or prohibit.

Furthermore, the FCC's unsuccessful experience with the Fairness Doctrine ("Doctrine") and the bipartisan consensus to repeal it demonstrate how the Proposed Rules would impermissibly interfere with First Amendment rights. The Fairness Doctrine ostensibly required the Commission to determine only whether broadcasters acted in good faith to provide balanced airtime on controversial issues, but in practice, the Doctrine injected the Commission into the editorial decision-making process in ways that proved both chilling to speech and unadministrable. Similarly, NTIA's Proposed Rules asking the Commission to again define and interpret good faith would replicate the well-established failures of the Fairness Doctrine.

Adopted in 1949, the Fairness Doctrine required broadcasters "(1) to provide coverage of vitally important controversial issues of interest in the community served by the licensee; and (2) to afford a reasonable opportunity for the presentation of contrasting viewpoints on such issues[134] The Commission later codified related requirements, including the Personal Attack Rule (requiring broadcasters to notify the

[133] Petition at 31, 37-38.

[134] *Inquiry into Section 73.1910 of the Commission's Rules & Regulations Concerning Alternatives to the Gen. Fairness Doctrine Obligations of Broad. Licensees*, Report, 2 FCC Rcd. 5272, ¶ 2 (1987) ("*1987 Fairness Report*").

person attacked within one week of the broadcast, provide a copy of the broadcast, and allow the person the opportunity to respond).[135] To determine compliance with the Fairness Doctrine, the Commission's animating standard was whether the broadcaster "acted reasonably and in good faith."[136]

The Supreme Court upheld the Fairness Doctrine and the related Personal Attack Rule against a First Amendment challenge in *Red Lion Broadcasting Co. v. FCC*.[137] But it did so on spectrum scarcity and interference grounds inapplicable to the Proposed Rules and the internet ecosystem.[138] In fact, the Court took the opposite view outside of the spectrum context, striking down a similar state right-of-reply requirement on the newspaper industry as violating the First Amendment.[139] And the Supreme Court specifically declined to extend *Red Lion* to its review of the Commission's must-carry regulations "because cable television does not suffer from

[135] 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679. The Commission grounded its authority to adopt the Fairness Doctrine in the Communications Act's requirement that "licenses . . . be issued only where the public interest, convenience or necessity would be served thereby." *Editorializing by Broadcast Licensees*, 13 F.C.C. 1242, 1248 (1949).

[136] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Pub. Importance*, Public Notice, 40 F.C.C. 598, 599 (1964) ("*1964 Fairness Report*") (emphasis added).

[137] 395 U.S. 367, 394 (1969).

[138] *Id.* ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.")

[139] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257-258 (1974) (striking under the First Amendment a state law requiring right of reply access to the newspaper on grounds that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'").

the inherent limitations that characterize the broadcast medium."[140] To the contrary, the Court explained, "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium."[141] Moreover, in *Red Lion* itself, the Court noted that "if experience with the administration of [the Fairness Doctrine and Personal Attack rule] indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[142]

Ultimately, the FCC did exactly that—finding that the Fairness Doctrine regulations chilled rather than promoted discussion of public issues, and repealing them on both constitutional and statutory grounds as contrary to the public interest.[143] By the mid-1980s, the Commission determined that the proliferation of additional broadcast outlets obviated the need and constitutional basis for the Doctrine.[144] In

[140] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 639 (1994). Ultimately, the Court applied intermediate scrutiny and upheld the FCC's must-carry rules. *See Turner Broad. Sys. v. FCC*. 520 U.S. 180, 224 (1997).

[141] *Turner Broad. Sys.*, 512 U.S. at 639.

[142] *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. at 393.

[143] *See, e.g., Inquiry into Section 73.1910 of the Commission's Rules & Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d 142, ¶ 72 (1985) ("*1985 Fairness Report*") ("[T]he doctrine has the inexorable effect of interjecting the Commission into the editorial decision-making process."); *See also Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C. Rcd. 5043 (1987) (concluding that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest").

[144] *Meredith Corp. v. FCC*, 809 F.2d 863, 872–74 (D.C. Cir. 1987) (remanding Fairness Doctrine case for consideration of constitutional issues, especially in light of 1985 Commission Report that "quite clearly determined that the fairness doctrine as embodied in its regulations no longer serves the statutory public interest Congress charges the Commission with advancing").

particular, the Commission found that the threat and expense of compliance with the Fairness Doctrine rules produced a perceived and actual chilling effect on broadcaster speech.[145] The Commission expressed unease with its role in "second guessing [broadcasters'] good faith, professional determinations with regard to program content" and explained that, without the "fear" of such oversight, broadcasters might increase their coverage of "issues of public importance."[146] Moreover, the Commission became "extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another."[147]

Like the Fairness Doctrine, the Proposed Rules would violate fundamental First Amendment principles. None of the spectrum scarcity or interference concerns relied on in *Red Lion* are present in the internet ecosystem. Rather, just as the *Turner* Court foresaw with cable television, there are "no practical limitations on the number of speakers who may use the [internet] medium,"[148] obviating any basis for a government mandated right of access. And just as the Commission ultimately concluded with the Fairness Doctrine, the threat and expense produced by NTIA's Proposed Rules will result in a perceived and actual chilling effect on internet speech. For example, NTIA's

[145] Dominic E. Markwordt, *More Folly Than Fairness: The Fairness Doctrine, the First Amendment, and the Internet Age*, 22 Regent U. L. Rev. 405, 430 (2010) (detailing "strong evidence indicating that the Fairness Doctrine chilled speech").
[146] *1987 Fairness Report* ¶ 129.
[147] *1985 Fairness Report* ¶ 71.
[148] *Turner Broad.Sys.*, 512 U.S. at 639.

proposed good faith requirement that ICSs must treat all "similarly situated" content on the internet the same way.[149] Echoing the Fairness Doctrine, this will give rise to disputes over whether content removed by an online provider is "similar" to other content that the online provider has not removed and unavoidably involve second-guessing the provider's decision-making about internet content.[150] The result will be to chill an ICS's ability to moderate content on their platform which is protected First Amendment activity.

Beyond that, however, the Commission's Fairness Doctrine experience also reveals how poorly suited the FCC is to regulating fairness and good faith when it comes to content decisions. Despite emphasizing that the Commission's role was "limited to a determination of whether the licensee has acted reasonably and in good faith"[151] and despite its stated "attempt[] to minimize our role in evaluating program content in administering the fairness doctrine,"[152] in practice, the Commission was forced to scrutinize program content and duration on a case-by-case, minute-by-minute basis to ensure that broadcasters provided a "reasonable opportunity" to respond to controversial issues. As a result, the FCC is no better suited to regulations for Section 230 and online content moderators. Like the Fairness Doctrine, the Proposed Rule would similarly graft onto the good faith definition a requirement that

[149] Petition at 39.
[150] *Id.*
[151] *1974 Fairness Report* ¶ 21.
[152] *1985 Fairness Report* ¶ 72.

ICSs provide "timely notice" and a "meaningful opportunity to respond" to content moderation. Examination of such conditions would suffer from the same flaws that caused the FCC to abandon the Fairness Doctrine.

V. THE PROPOSED MANDATORY DISCLOSURE REQUIREMENT GOES BEYOND FCC JURISDICTION AND VIOLATES THE FIRST AMENDMENT

NTIA's proposed mandatory disclosure rule likewise exceeds the FCC's jurisdiction. NTIA claims that ICSs are "information services" and that its expansive disclosure requirement is authorized by Sections 163 and 257(a) of the Communications Act.[153] Those provisions require the FCC to publish and submit to Congress a biennial report assessing the state of competition and identifying barriers to entry, particularly for entrepreneurs and small businesses, in various communications marketplaces.[154] NTIA's Petition proposes using this congressional reporting requirement to massively expand the FCC's authority over the entire internet and beyond. That's wrong for multiple reasons.

To begin with, the FCC has never classified the diverse array of ICSs as "information services," let alone found that they are covered by Sections 163 and 257(a). In fact, the Commission specifically declined to do so[155] and the *Mozilla*

[153] Petition at 47-52.

[154] 47 U.S.C. § 163.

[155] Restoring Internet Freedom Order at n. 849 ("[w]e need not and do not address with greater specificity the specific category or categories into which particular edge services fall; *Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5749 n.900 (2015) (declining to "reach the question of whether and how" services outside the scope of broadband internet access "are classified under the Communications Act").

decision did not reach the question.[156] The FCC has never before reached out to regulate such a broad swath of the American economy. And for good reason. There is no indication that Congress intended a reporting requirement to so dramatically expand the Commission's authority. Moreover, even if certain ICSs could be covered by Sections 163 and 257(a), the Proposed Rule does not identify market entry barriers as required by the statute and, thus, falls outside the scope of those provisions. NTIA asserts that the disclosures will improve consumers' online experiences[157] and help develop better filtering products.[158] Maybe so or maybe not, but those objectives have nothing to do with entry into the telecommunications or information services markets. Finally, the vague terms and overbroad scope of NTIA's mandatory disclosure rule, would *raise*—not *lower*—market entry barriers, particularly for small ICS providers, by increasing administrative costs and exposing them to new liability.

Furthermore, the First Amendment also precludes adoption of the proposed disclosure regulation.[159] Freedom of speech "includes both the right to

[156] In *Mozilla v. FCC*, the court upheld Section 163 and 257(a) as authority for the FCC's broadband disclosure requirement. In that case, however, the Commission had expressly classified broadband as an information service and the court upheld the FCC's reasoning that disclosures of broadband's technical characteristics, rates and terms (as opposed to editorial policies) would identify barriers to entry by telecommunications and information service providers reliant on the underlying broadband service to reach their customers. *See* 930 F.3d 1, 47 (2019); Restoring Internet Freedom Order at 445-450.

[157] Petition at 50-51.

[158] *Id.* at 50.

[159] *See* Petition at 47-52.

speak freely and the right to refrain from speaking at all."[160] Accordingly, except in limited circumstances not presented here, the government cannot "force" an online provider "to speak in a way that [it] would not otherwise."[161] This protection is especially important here because the proposed regulation would "intru[de]" into the very heart of platforms' First Amendment rights by compelling each platform to disclose how it "exercise[s] ... editorial control and judgment" over the "content" it chooses to display online.[162] An online platform—like a newspaper—might *voluntarily* choose to inform the public how it chooses to exercise that discretion. But the government cannot *force* an online platform to disclose internal editorial standards or deliberations—just as the government cannot *force* a newspaper to reveal how it selects letters to the editor or op-eds for publication. For these reasons, the First Amendment does not permit the Commission to compel providers to "disclose" their "content-management mechanisms" or any other "content moderation, promotion, and other curation practices."[163]

[160] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
[161] *Washington Post v. McManus*, 944 F.3d 506, 517 (4th Cir. 2019) (affirming preliminary injunction against state law that would have compelled "online platforms" to disclose certain information).
[162] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[163] Petition at 52.

VI. PUBLIC POLICY CONSEQUENCES OF THE PROPOSED RULES

The Petition and the President's Executive Order on Preventing Online Censorship will not achieve the public policy result they seek. By all accounts, the goal is to expose large social media companies to liability for engaging in what is perceived to be "viewpoint discrimination." As explained in the Executive Order,

> Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.[164]

The crux of this appears to be the notion that if social media companies are treated like traditional editors and publishers, then they will face liability for their editorial decisions over what to publish and what to withdraw. As has been discussed in Section IV, however, traditional publishers are not subject to liability for their editorial decisions. In fact, it is a hallmark of the First Amendment to protect these editorial decisions. Thus, if online services become subject to the same legal regime as traditional publishers, "viewpoint discrimination" actually becomes sacrosanct

[164] Exec. Order No. 13925, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020).

constitutionally-protected activity. And the rejection of any content that has even a scintilla of factually inaccurate or misleading content becomes essential to the continued viability of the service—because publication of such content could give rise to legal liability.

The First Amendment is a powerful tool in quickly disposing of claims seeking to hold providers liable for exercising editorial discretion.[165] However, Section 230 remains an important protection against these types of lawsuits.

Section 230's primary benefit is as a protection from protracted litigation. The Proposed Rules introduce a host of new factual issues that will require discovery and argument before a decision could be rendered on the applicability of the Section 230 immunity. This would result in a reversal of Section 230's incentive structure—providers who take an "anything goes" approach to their services would be protected and providers who attempt to engage in responsible content moderation would be exposed to significant litigation deterring providers from taking action due to the resulting risk and financial harm. This is precisely the equation that Section 230 was intended to alter. Section 230 was intended to remove disincentives to content moderation and to encourage providers to engage to promote safer online services without the interference of government regulation and burdens of endless litigation.

[165] *Prager Univ. v. Google LLC*, 951 F.3d 991, 996-999 (9th Cir. 2020); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d at 436-443; *Langdon v. Google, Inc.*, 474 F. Supp. 2d at 629-630.

Society benefits from online services and communities who are able to set and enforce rules for appropriate conduct. Most online providers–and all of IA's members–have robust codes of conduct, and Section 230 allows the providers to enforce them.

Returning to the world before Section 230 was law would result in stark choices for ICSs. On the one hand, providers would be discouraged from moderating content out of fear that moderation could create liability. And on the other hand, there would be providers that would supply only highly-curated content to reduce legal risk, but they would give representation to significantly fewer voices. The now-flourishing middle ground where average citizens can create and consume content subject to reasonable rules set by individual platforms and services would contract dramatically.

Section 230 undergirds this flourishing middle ground by enabling services that allows internet users to post their own content and engage with the content of others, whether that's friends, family, co-workers, companies posting jobs, someone posting an apartment for rent, gamers, or complete strangers from the other side of the globe with a shared experience or interest.

The stable and predictable legal environment established by Section 230 has spurred innovation, resulting in U.S. leadership and a multi-faceted online ecosystem. There are now user-generated content components to almost everything we do, whether it be school, work, newspapers, entertainment, travel, religion or politics. In many instances this is an adjunct to the core purpose of an entity.

Contrary to the unsupported assertion in the Petition that limitations on liability harm new market entrants,[166] Section 230 is essential to fostering an environment conducive to startup internet companies and new market entrants.[167] Without Section 230, small and medium-sized businesses would be exposed to, but unable to quickly end, litigation arising from their hosting of third-party content. While some internet companies are no longer upstarts, IA represents more than 40 internet industry companies of which the vast majority are unlikely to be considered "titans." The technology industry still features a vibrant pipeline of startups that fuels continued innovation. Weakening Section 230 by imposing additional exposure to litigation and potential liability would be a burden felt disproportionately by new market entrants and small and medium-sized companies. Litigation is expensive, even when it lacks merit.[168] Even when defendants are awarded attorney fees after successfully defending

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[166] *See* Petition at 14 ("Understanding how new entrants can or cannot participate in these intermediary markets is therefore key in understanding appropriate liability regimes; this is particularly important because liability shields can deter entrance").

[167] Engine Advocacy, *Startup Perspective Critical to 230 Review*, February 19, 2020 (available at: https://www.engine.is/news/startup-perspective-critical-in-230-review); Engine Advocacy, *Intermediary Liability Protections Have Allowed Startups to Thrive*, October 16, 2010 (available at: https://www.engine.is/news/intermediary-liability-protections-have-allowed-startups-to-thrive). *See also*, Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639-694 (2014) (discussing how intermediary liability protections gave rise to web 2.0); Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech Companies*, New York Times, (October 16, 2019) (arguing that changes to Section 230 would help solidify the position of large companies).

[168] Engine Advocacy, *Primer: The Value of Section 230*, January 31, 2019 (available at: https://www.engine.is/news/primer/section230costs) (last accessed February 26, 2020) (noting that filing a single motion to dismiss can cost between $15,000-$80,000 and that the average startup begins with around $80,000 in funds). This estimate does not account for the reality that defendants may have to file multiple motions to dismiss in the same action as a result of plaintiffs amending complaints. *See, e.g.*, *Colon v. Twitter,* Case No. 6:18-cv-00515 (M.D. Fla.) (Defendants' motion to dismiss the *third*

a case, recovering those fees is difficult.[169] And the cost of litigating an expensive case to its conclusion are often too daunting for a startup company to bear.

Section 230 plays a critical role in protecting the ability of online services to operate responsibly on a global basis. Foreign jurisdictions generally lack Good Samaritan protections for online services that moderate content. This creates exposure to liability in foreign courts for content that not only doesn't violate U.S. laws, but that is protected expression under the First Amendment. Section 230 provides important protections when international courts are willing to apply forum selection and choice of law clauses from contracts and apply U.S. law. Also, under the SPEECH Act, U.S. courts are barred from enforcing foreign libel judgements when they are inconsistent with Section 230.[170] For this reason, Section 230 is a critical bulwark against foreign efforts to engage in censorship of content on U.S. platforms.

VII. Conclusion

IA urges the FCC to carefully consider NTIA's Petition and its Proposed Rules. IA believes that careful consideration of the full record of legislative history and case law applying Section 230 will clearly show that Congress intended, and has subsequently

amended complaint is pending before the court).

[169] *See, e.g., Eade v. Investorshub.com*, Case No. CV11-01315 (C.D. Cal. Sept. 27, 2011) (review of the docket shows that after winning a Motion to Strike under an Anti-SLAPP statute and being awarded $49,000 in attorneys fees in 2011, defendant is still trying to recover the fees from plaintiff, an attorney, in 2020).

[170] 28 U.S.C. § 4102(c)(1). *See, e.g., Joude v. Wordpress*, 2014 WL 3107441 (N.D. Cal. July 3, 2014) (declining to enforce a foreign defamation judgment under the SPEECH Act).

endorsed, the broad application of Section 230 to protect online services from potential liability, not only for decisions about what to allow, but equally for decisions about what not to allow. These decisions cannot be separated and treated differently whether under Section 230, the First Amendment, or practically—they are simply two sides of the same coin. The Proposed Rules would turn Section 230 on its head by applying more protection to leaving up objectionable content, than to the removal of objectionable content. This is the opposite of what Congress intended and the FCC may not adopt rules that contravene the clear intent of Congress. Thus, for these and the other reasons raised, the FCC should reject NTIA's Petition.

Respectfully submitted,

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September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via FedEx upon:

Douglas Kinkoph
National Telecommunications and Information
Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

/s/ Allison O'Connor
Allison O'Connor

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	RM-11862
Communications Act of 1934	)	

COMMENTS OF IMGUR, INC.

Imgur submits this comment in opposition to the petition.

Section 230 of the Communications Act – CDA §230 – contains at its core the provision that many have said "created the Internet":

> *No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*

Section 230 is the bedrock upon which the diverse and astonishingly successful universe of interactive online activity – from blogging to social networking to photo and video sharing sites to consumer reviews of products and services— has been able to flourish. It is a major factor why the United States has led the world in the growth of online technology and creative content, none of which would have been possible had every online provider been subject to liability for the material posted by every user.

Imgur, Inc. is a privately-owned company based in San Francisco and runs www.imgur.com, one of the top 100 websites in the world (daily active users, according to the Alexa ranking service) and related smartphone apps. Imgur users post millions of images, short videos, and comments every day, reflective of what users all over the world are doing for

adventure, creativity, fun, love, or silliness. Only a tiny portion of user-posted content violates our terms of service, our community rules, or the law. Multiple levels of monitoring, reporting, and correction are in place with respect to that small number of problematic images: Our community of users instantly alerts us to any disallowed material. We have implemented automatic image-scanning software that identifies known CSAM (child sexual abuse material), which, whenever found, is reported to the National Center for Missing and Exploited Children (NCMEC) and has more than once resulted in the arrest and imprisonment of lawbreakers. Our moderators quickly respond to user or law enforcement requests. Within the context of CDA §230, private enterprise works and enables individual, creativity without stifling governmental regulation.

Imgur is a small company with fewer than 50 employees. If onerous pre-monitoring regulations and liability were imposed as the Petition proposes, Imgur (and thousands of small online companies that allow user content) would cease to exist, online content would become the fiefdom of large and monopolistic tech companies, and innovation would be stifled accordingly.

Respectfully submitted,

DocuSigned by:
Alan Schaaf
307A73FF81B34E7...

Alan Schaaf, founder and CEO

Imgur, Inc.

Dated: September 2, 2020

ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Rulemaking of the National Telecommunications and Information Administration to Clarify the Provisions of Section 230 of the Communications Act of 1934	))))))	RM-11862

Comments of ITIF

The National Telecommunications and Information Administration (NTIA) has petitioned the Federal Communications Commission (FCC or Commission) to initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934,[1] in accordance with Executive Order 13925, "Preventing Online Censorship" (E.O. 13925).[2] The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on this petition.[3] ITIF supports efforts to clarify or update Section 230 to reflect the ways the Internet has changed since the Communications Act was amended in 1996. However, it is the role of Congress, not the FCC, to provide this clarification or update.

Congress originally passed Section 230 in response to a pair of court decisions that had troubling implications for the future of the Internet. In the first of these decisions, *Cubby v. CompuServe* (1991), the U.S. District Court for the Southern District of New York ruled that an online service that has no firsthand knowledge of the third-party content published on its platform, has no control over the publication of this content, and has no opportunity to review the content is not liable for illegal third-party content on the platform.[4] Four years later, in *Stratton Oakmont v. Prodigy* (1995), the New York Supreme Court ruled that an online service that exercises "editorial control" over third-party content on its platform—in the form of content moderation

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[1] Petition of the National Telecommunications and Information Administration, Docket RM-11862, (July 2020), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[2] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020) (E.O. 13925).
[3] Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytic rigor, policy pragmatism, and independence from external direction or bias. *See* About ITIF: A Champion for Innovation, http://itif.org/about.
[4] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

tools such as rules for user-generated content, software programs that filter out offensive language, and moderators who enforce content guidelines—is liable for illegal third-party content.[5]

These decisions were counter to how Congress believed the Internet should operate. Online services that exercised no control over what was posted on their platforms and allowed any and all content—including potentially unlawful or abusive content—were protected. On the other hand, service that exercised good faith efforts to moderate content and remove potentially unlawful or abusive material were punished. Section 230 addressed this discrepancy by allowing online services to engage in content moderation without fear of liability. In doing so, the law played a significant role in creating the Internet we know it, enabling the growth of business models that rely on user-generated content, including social media platforms, smaller blogs and forums, knowledge-sharing websites, comments sections, and product and business reviews.

Given the context and history of Section 230, ITIF agrees with FCC Commissioner Geoffrey Starks' statement that, in its petition, "NTIA has not made the case that Congress gave the FCC any role here. Section 230 is best understood as it has long been understood: as an instruction to courts about when liability should not be imposed."[6]

The specific clarifications the NTIA has petitioned the FCC to make are best left either up to the interpretation of the courts, as they have been since the law's passage, or for Congress to clarify in an amendment to Section 230.

First, the NTIA requests that the FCC clarify the relationship between Section 230(c)(1) and (c)(2). Section 230(c)(1) protects online services from civil liability for failing to remove illegal third-party content,[7] while (c)(2) protects them from civil liability for "good faith" content moderation in the form of removing objectionable material.[8] E.O. 13925 and the NTIA suggest that the FCC determine whether an online service that has not acted in good faith when removing content, as per (c)(2), would also lose its liability protection under (c)(1). This would drastically change the effect of the law. If Congress had intended for platforms that remove content in bad faith to lose not only (c)(2) but also (c)(1) liability protection, it would have written such a provision into the law. And if the way the Internet has changed since 1996 necessitates such a change, it would be Congress' role, not the FCC's, to make it.

Second, the NTIA requests that the FCC clarify the meaning of Section 230(c)(2), specifically when content moderation actions are considered to be "taken in good faith." This determination has always been up to the courts to decide. If the way courts currently interpret Section 230(c)(2) is hindering the freedom of expression online, as the NTIA suggests, it would still be Congress' role to amend the law to resolve this, much as it amended the Communications Act in 1996 to address the *Cubby* and *Stratton Oakmont* rulings.

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[5] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).
[6] Geoffrey Starks, "Commissioner Starks Statement on NTIA's Section 230 Petition," Federal Communications Commission press release, July 27, 2020, https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf.
[7] 47 U.S.C. § 230(c)(1).
[8] 47 U.S.C. § 230(c)(2).

Similarly, the NTIA's other proposals to the FCC—that the Commission make further clarifications to Section 230(c)(1), establish rules on when an online service would not qualify for Section 230 liability protection, and create transparency requirements—are best left to Congress because the FCC does not have the statutory authority to make these changes.

Congress is considering reforms to Section 230 with multiple bills introduced in the last few months.[9] Section 230 is one of the foundational laws of the Internet, and any changes of this magnitude that would affect such a broad swath of the Internet ecosystem require the type of careful consideration that, by design, takes place in Congress. The FCC should step back and let Congress continue its work.

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September 2, 2020

[9] Ashley Johnson and Daniel Castro, "PACT Act Would Increase Platform Transparency, But Undercut Intermediary Liability," *Information Technology and Innovation Foundation*, August 7, 2020, https://itif.org/publications/2020/08/07/pact-act-would-increase-platform-transparency-undercut-intermediary.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
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OPPOSITION OF NEXT CENTURY CITIES TO THE PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OPPOSITION OF NEXT CENTURY CITIES TO THE PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

I. Introduction

Next Century Cities ("NCC")[1] submits this in opposition to the petition filed by the National Telecommunications Information Administration ("NTIA").[2] Free speech online is critical to creating a meaningful discourse. Yet, NTIA's petition provides a roadmap for creating new barriers that can disadvantage some in order to increase a perceived sense of "fairness" for others, which is antithetical to the freedom of expression principles that have allowed the internet to thrive.

As society becomes more dependent on technology, our public forums have moved from town halls to the digital platforms made up of social media, message boards, and messaging applications. Eroding the foundations of the 21st century public square would not only chill free

[1] Next Century Cities is a nonprofit nonpartisan 501(c)(3) coalition of over 200 member municipalities that works collaboratively with local leaders to ensure reliable and affordable broadband access for every community, while helping others realize the economic, social and public health importance of high-speed connectivity.
[2] *Petition for Rulemaking of the National Telecommunications and Information Administration*, RM-11862 (filed July 27, 2020), https://ecfsapi fcc.gov/file/10803289876764/ntia_petition_for_rulemaking_7.27.20.pdf (NTIA 230 Petition).

speech, but would underscore just how unconstitutional the Executive Order,[3] the NTIA petition is born from, is. Accordingly, the Federal Communications Commission ("FCC" or "Commission") should refuse to open a rulemaking.

First, the NTIA lacks the authority to seek a rulemaking, and this petition exceeds their jurisdiction. NTIA has historically acted as an advisor to the President and executive branch on matters and policies regarding spectrum allocation, scientific research programs, and technological innovation and development. In its first foray into content moderation, the NTIA has exceeded their authority and is asking the Commission to participate in a retaliatory campaign to regulate online speech.

Secondly, the petition submitted by NTIA seeks to chill free speech at the behest of the highest government official. This petition clearly seeks to punish private entities for engaging in political speech. It is clear that this administration is seeking to compel these private entities into promoting opinions that it agrees with and silencing those it does not. The Commission should not excuse unconstitutional attempts to suppress speech by considering this request.

Thirdly, per its *Restoring Internet Freedom Order*,[4] the Commission relinquished any authority to regulate online platforms, and cannot promulgate new rules to regulate the content hosted on social media platforms.

Finally, the Commission should remain focused on one of its most important goals to promote programs and promulgate rules aimed at bringing broadband within reach for the millions of Americans that still do not have affordable and reliable high-speed connections. The Coronavirus (COVID-19) pandemic has shown that connectivity is more important than ever,

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[3] *See* Exec. Order No. 13925, 85 FR 34079 (June 02, 2020) (hereinafter " Executive Order No. 13925"), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[4] *See generally,* Restoring Internet Freedom, Declaratory Ruling, Report and Order, 33 FCC Rcd 311 ("RIF Order").

and the Commission should not divert any time or resources away from its indispensable work to close the digital divide.

II. The NTIA Lacks Authority to Seek a Rulemaking

The NTIA was envisioned to serve as the President's principal advisor on telecommunications policies pertaining to economic and technological advancement in the telecommunications industry.[5] Section 230 of the Communications Decency Act ("Section 230") does not purport to regulate "Telecommunications" defined by the Communications Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[6] Section 230 does not purport to regulate telecommunications, but is explicit about its intent to regulate "interactive computer services."[7] Section 230 regulates user generated content online whereas "telecommunications" applies to the infrastructure through which user-generated content flows.

It follows that the NTIA does not have authority to seek this rulemaking under its codified policy mandates under the Communications Act. As stated in statute the NTIA must seek to advance policies that promote the benefits of technological development,[8] facilitate and contribute to the full development of competition, efficiency, and the free flow of commerce in

[5] Exec. Order No. 12046, 43 FR 13349 (Mar. 29, 1978), *reprinted as amended in* 47 U.S.C. §§ 901-04 (1992).
[6] 47 U.S.C. § 153 (50) (2018).
[7] 47 U.S.C § 230 (f)(2) (2018) (Interactive Computer Service is defined as "any information services, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.").
[8] 47 U.S.C. § 901 (c)(1) (2018).

telecommunications markets,[9] foster full and efficient use of telecommunications resources,[10] and further scientific knowledge about telecommunications and information.[11] However, critically, the petition does nothing to advance any of these institutional policy priorities. Instead, the NTIA petition threatens to interfere with the efficient and free flow of commerce in online markets by inserting a government content moderator into the business of private companies. This further disrupts the full and efficient use of telecommunications resources by forcing telecommunications regulators to assign time, resources, and personnel to determine which political speech is acceptable, and which is not.

This is the first time that the NTIA has ever expressed that Section 230 is under its authority. Notably, however, the petition under consideration by the Commission actively works against policies and protocol previously set by the NTIA.

III. Promulgating Rules To Modify Section 230 Will Chill Free Speech

The NTIA petition was born from Executive Order 13925.[12] This Executive Order tasked the NTIA with seeking to garner a rulemaking from the FCC that would compel online platforms to promote certain speech, while living in fear that at any time a regulatory action could be brought against them at the whim of political actors. As Justice Robert H. Jackson asserted, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[13] However, this is exactly what the

[9] 47 U.S.C. § 901 (c)(3) (2018).
[10] 47 U.S.C. § 901 (c)(4) (2018).
[11] 47 U.S.C. § 901 (c)(5) (2018).
[12] *See* Executive Order No. 13925.
[13] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

petition before the Commission seeks to do. The rules the NTIA are urging the Commission to adopt would limit what types of information private actors can host on their platforms and punish them with potential regulatory action if they were to publish, or fail to publish, something the administration disagreed or agreed with respectively.

The NTIA petition correctly points out that many American's use social media to follow news, connect with friends and family, share their views on current events, and act as the present day public square.[14] The NTIA argues that social media firms are engaging in selective censorship with regards to the incredible dearth of content that is hosted on their sites every day. However, even if this were true, the NTIA is asking the Commission to force these private actors to take a more active role in censorship to the point that they would lose their protections under Section 230 even if it were in alignment with the political winds.

The internet was created with the intent of it being a place where people can freely share information. Changing the calculus so that it is unclear which information will stay and which information will go while forcing private actors to bend to political wills was never envisioned by the internet's founders. Simply, it's wrong. The commission should refuse to participate in this exercise aimed at stifling free speech.

IV. The Federal Communications Commission Lacks Authority to Promulgate Rules Regulating Section 230

If the Commission were to undertake a rulemaking at the request of the NTIA petition, it would be acting outside the scope of its rulemaking authority. The Commission does not have subject matter jurisdiction to promulgate any proposed rules. In fact, it voluntarily shed its

[14] NTIA 230 Petition at 6-7 (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017)).

authority to regulate broadband and any implied authority to regulate the online content it supports. In its 2018 *Restoring Internet Freedom Order* ("RIF Order"), the Commission reclassified broadband providers from telecommunications services to information services. As a consequence, these providers are relegated to a category of entities "left largely unregulated by default."[15] The Commission would have to do an about-face and impose regulatory obligations to accommodate this request.

Moreover, the Commission lacks the proper jurisdiction to promulgate the requested rules. As courts have decided in the past the Commission's jurisdiction encompasses the transmission of covered material. This means the Commission's jurisdiction does not extend to what happens before that transmission is sent, nor does it cover what occurs after the transmission is received by the intended recipient.[16]

The language of Section 230 protects "providers" and "users" of interactive computer services from liability in the editorial decision making they decide to undertake with regards to online content.[17] As the NTIA petition points out "social media offers primarily third-party content. Rather than charge fees, social media platforms profile users in order to categorize them and connect them to advertisers and other parties interested in user information."[18]

Clearly, NTIA understands that the social media companies must wait until a user has hosted content on their website in order to take action. At no point are social media companies taking actions while the data from users is in transit. Nevertheless, NTIA's proposal seeks to regulate providers and users before they transmit content, and after it has been received. As

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[15] RIF Order at ¶ 203 (emphasis added) (quotation marks and citations omitted).
[16] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).
[17] 47 U.S.C. § 230 (c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider").
[18] NTIA 230 Petition at 12-13.

Vimeo noted, the analog equivalent is telling individuals what they must consider before they decide to answer a ringing phone.[19]

In the past, the Commission has cited Section 230 as a justification for it's deregulation of broadband providers.[20] The Commission has been clear that it intended to take a hands-off approach to internet regulation. The Commission claimed, in the RIF Order, that it sought to end utility-style regulation of the internet in favor of market based policies that would preserve the future of internet freedom.[21] Currently, The NTIA is urging the Commission to make a decision that would have not only far reaching implications for social media, but for all internet platforms that host third party content. If the Commission were to undertake this rulemaking, it would be in stark contrast to agency precedent and undermine its current stated objectives. To the contrary, even if the Commission finds justification for this rulemaking, it is missing a critical jurisdictional piece required to promulgate a rule – direction from Congress.

Generally there are two instances where an agency may regulate. The first is when there is a direct ask from Congress to do something or to take some action. The second is when Congress uses ambiguous language in a statute. If there is ambiguous language, under the Chevron Doctrine, Congress delegates its authority to an agency to "fill in the gaps" and resolve the ambiguity.[22] However, Section 230 provides no explicit commands to the FCC to do anything, nor are there any ambiguities that the Commission would be able to act upon without reconciling with the RIF Order.

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[19] Petition of Vimeo, Inc. to Dismiss the National Telecommunications and Information Administration's Petition for Rulemaking, RM-11962, at 4 (filed Aug. 4, 2020), https://ecfsapi.fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf.

[20] RIF Order, 33 FCC Rcd 311 ¶ 1, 2 (2018).

[21] *Id.* at ¶ 2.

[22] *See Generally, Chevron, U.S.A. v. Natural Resources Defence Council, Inc.*, 467 U.S. 837 (1984).

The Commission clearly took the stance in 2018 that it wished to wash its hands of internet regulation. In order to take up a new rulemaking now would cause the FCC to need to reconcile its prior decisions in order to avoid having a new rule be challenged as arbitrary and capricious. It is important to note that, in April 2020, the Commission denied a request by the organization Free Press to investigate the spread of COVID-19 misinformation during White House broadcasts,[23] citing that it does not wish to be an arbiter of free speech and to take up rulemaking now would force it to reconcile with recent, persuasive precedent to the contrary.

Beyond lacking the jurisdiction to promulgate the rules sought by the NTIA, the Commission has documented its opposition, and does not have cause, to regulate speech online.

VI. Reforming Section 230 Will Hinder the Commission in its Main Goal of Granting Universal Internet Access Across the Nation

The purpose of the Federal Communications Commission is to "make available, so far as possible, to all the people of the United States, without discriminaton. . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service. . ."[24] The Coronavirus (COVID-19) pandemic has shown that, now more than ever, access to reliable high-speed connectivity is essential. As students begin the new school year from home, parents continue to telework, and we rely on video and voice conferencing to stay connected with friends and family, the Commission must remain focused on expanding high-speed connectivity for every community, helping unserved and underserved populations gain access to affordable and reliable

[23] Letter from Michelle M. Carey, Chief, Federal Communications Commission Media Bureau and Thomas M. Johnson, General Counsel, Federal Communications Commission, to Jessica J. González, Co-CEO, Free Press and Gaurav Laroia, Senior Policy Counsel, Free Press (Apr. 6, 2020), *available at* https://www.fcc.gov/document/fcc-defends-1st-amendment-and-denies-petition-filed-free-press.
[24] 47 U.S.C. § 151 (2018).

broadband. However, the petition currently before the Commission is a distraction. It supports diverting critical time, resources, and manpower from furthering the Commission's core goal of universal connectivity.

It's mission is essential. The work is urgent. The Commission must continue to work diligently to bring connectivity to all corners of the country as there is no "one size fits all" technological solution to achieve universal connectivity. Some communities may respond better to the deployment of wireless solutions. Others may require more robust fiber optic connections to meet the demands placed on their networks. Either way, millions of Americans are waiting and are counting on the Commission.

Local and state government leaders are working feverishly to fill in the connectivity gaps. Working from home, shutting down schools, closing down businesses, etc. has forced every member of government and the general public to confront the reality that, in a digital society, high-speed connectivity is essential. We have an obligation to support broadband networks and the community partnerships that increase adoption. In the midst of one of the largest connectivity crises of the modern age, this is not time for the Commission to switch gears and manufacture opportunities to police speech.

VII. Conclusion

More than 30 years ago the Commission struck down the "Fairness Doctrine." Expressing its discomfort with its role in the editorial decisions being made by broadcasters, the Commission argued that government involvement in such decisions ran contrary to the First Amendment. The Doctrine was implemented to serve the public interest, however, as the

Commission stated, it ended up stifling speech and inhibited free and open debate on the public airwaves.[25]

Granting NTIA's petition requires the Commission to abandon those concerns today. It is an unconstitutional request that should be denied as it flies in the face of shared goals to ensure that every American can enjoy the benefits of digital citizenship. Instead, the Commission should concentrate its time and resources on the millions who are still waiting for affordable and reliable opportunities to get online.

[25] *See* Amendment of the Rules Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Order, 50 FR 35418 (Aug. 30, 1985).

New Civil Liberties Alliance

September 2, 2020

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Submitted via FCC E-filing

Re: *National Telecommunications and Information Administration's Petition for Rulemaking, Docket RM-11862*

The New Civil Liberties Alliance (NCLA) submits the following letter urging the Federal Communications Commission (FCC) to reject the National Telecommunications and Information Administration's (NTIA) Petition for Rulemaking concerning Section 230 of the Communications Decency Act (CDA), Docket RM-11862. NTIA's petition invites the Commission to run roughshod over the constitutional limits on its authority and substantively rewrite a federal statute to mean the opposite of what Congress enacted. Regardless of whatever merit the petition's policy objectives might have (or not), FCC cannot adopt NTIA's proposed regulations without violating its constitutional role as an entity subservient to both Congress and the judiciary.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be governed only by laws passed by Congress. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because lawmakers, federal administrative agencies and department

heads, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people on a daily basis. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[1] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention. To this end, NCLA has filed lawsuits against federal agencies that have attempted to usurp Congress' core legislative function.

Even where NCLA has not yet brought a suit to challenge the unconstitutional exercise of regulatory or executive power, it encourages government officials themselves to curb unlawful administrative power by establishing meaningful limitations on their exercise of authority. NCLA believes that administrative agencies—including the Commissioners of the FCC—should ensure that they are not disregarding their constitutional obligations.

II. BACKGROUND

On May 28, 2020, President Trump issued Executive Order 13925, *Preventing Online Censorship*, 85 Fed. Reg. 34079 (June 2, 2020). Among other things, the Order directed the Secretary of Commerce, in consultation with the Attorney General, and acting through NTIA, to file a petition for rulemaking with FCC concerning Section 230 of the Communications Decency Act. *Id.* at 34081.

Consistent with the Order, NTIA filed a petition for rulemaking on July 27, 2020. The petition asked the Commission to substantively rewrite Section 230 (47 U.S.C. § 230) by providing extensive regulatory revisions to the statutory text. NTIA Pet. at Appx. A. Specifically, NTIA proposed that FCC amend Section 230 to provide that immunity for liability under Section 230(c)(1) not be available to an internet-service provider that "restrict[ed] access to or availability of material provided by another information content provider." NTIA Pet. at Appx. A, Proposed 47 C.F.R. § 130.01(a). NTIA also proposed that Section 230(c)(1)'s immunity be restricted as to any service provider that does any of the following—"substantively contributing to, modifying, altering, presenting with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider." NTIA Pet. at Appx. A, Proposed 47

[1] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

C.F.R. §130.03. Finally, NTIA proposed that FCC rewrite Section 230(c)(2)'s more limited immunity provision by narrowing the circumstances in which a provider will be considered to have acted in "good faith" and by limiting the types of material a provider may restrict. NTIA Pet. at Appx. A, Proposed 47 C.F.R. §§ 130.02(d), (e).

Chairman Pai opened NTIA's petition for public comment on August 3, 2020.

III. FCC LACKS THE AUTHORITY TO ACCEPT NTIA'S INVITATION TO SUBSTANTIVELY REWRITE FEDERAL LAW

NCLA takes no position on the policy goals of either President Trump's Executive Order or NTIA's Petition. Reasonable minds can and do differ about the need to reform Section 230. But FCC may not settle that debate through rulemaking, absent further legislation from Congress. NCLA urges the Commission to recognize the core limits of its authority and decline NTIA's Petition, which asks FCC to exceed the bounds of proper administrative functions.

Indeed, NTIA argues, in defiance of longstanding court interpretation, that FCC has the power to rewrite Section 230 entirely. But the Commission has no such authority. Section 230's language is clear, and there is no legal "gap" for FCC, or any agency, to fill. More fundamentally, FCC has no power to *revise* the statutory language to reach legal outcomes that are specifically precluded by existing law. NTIA would have the Commission act as a super-legislature—issuing new laws in defiance of both Congress and the judiciary. The Constitution does not and cannot tolerate NTIA's proposed course of action.

A. FCC'S CONSTITUTIONAL AUTHORITY

Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress. Article I, § 7, Clauses 2 and 3 of the Constitution require that "Every Bill" shall be passed by both the House of Representatives and the Senate and signed by the President "before it [may] become a Law." Article II, § 3 of the Constitution directs that the President "shall take Care that the Laws be faithfully executed[.]"

This constitutional structure divides the branches of government. "Even before the birth of this country, separation of powers was known to be a defense against tyranny," and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 756-57 (1996).

No agency has any inherent power to make law. Thus, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355,

374 (1986).

And an agency may only "fill [] statutory gap[s]" left by "ambiguities in statutes within an agency's jurisdiction to administer" to the extent Congress "delegated" such responsibility to the agency. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (there must exist "a gap for the agency to fill" to authorize lawful agency action). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). A statute that is unambiguous "means that there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (quoting *Brand X Internet Servs.*, 545 U.S. at 982-83).

In "review[ing] an agency's construction of [a] statute which it administers," the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Under this analysis, the court "must reject administrative constructions which are contrary to clear congressional intent," because the "judiciary is the final authority on issues of statutory construction." *Id.* at n.9; *see also Webster v. Luther*, 163 U.S. 331, 342 (1896) ("[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.").

B. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

"Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014). It "marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others." *Id.* (citing *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003)).

CDA's protection comes in two distinct sections. Section 230(c)(1) states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Courts of appeals have consistently and uniformly "recognized the provision to protect internet service providers for the display of content created by someone else." *Jones*, 755 F.3d at 406 (collecting cases).

The protections of Section 230(c)(1) do not consider the good faith, or lack thereof, on the

part of the service provider or user. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19, 23 (1st Cir. 2016) ("assertions about [the defendant's] behavior" were irrelevant for § 230(c)(1)).

Instead, the only question relevant to Section 230(c)(1) is whether a defendant is in a "publisher's role." The statute bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Zeran v. America Online, Inc. (AOL)*, 129 F.3d 327, 330 (4th Cir. 1997); *see also, e.g.*, *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."). When a defendant acts in a publisher's role, Section 230(c)(1) provides the defendant with immunity from liability in connection with a wide variety of causes of action, including housing discrimination, see *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008), negligence, *see Doe*, 528 F.3d at 418; *Green*, 318 F.3d at 470-71, and even securities fraud and cyberstalking, *see Universal Comm's Systems Inc. v. Lycos, Inc.*, 478 F.3d 413, 421-22 (1st Cir. 2007).

By contrast, Section 230(c)(2) "provides an additional shield from liability, but only for 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene ... or otherwise objectionable.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (quoting 47 U.S.C. § 230(c)(2)(A)). "Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service." *Id.* "Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue … can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable." *Id.* (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc)); *see also Doe*, 817 F.3d at 22-23 ("Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites.") (collecting cases).

The interplay between the two subsections of 230(c) in the CDA is not subject to confusion or even debate in the courts of appeals. The statutory language is quite clear. "It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language." *Barnes*, 570 F.3d at 1105.

C. FCC CANNOT REWRITE SECTION 230

Undeterred by the statutory text and consistent court interpretation thereof, NTIA has advanced three purported ambiguities in Section 230 it says allow the Commission to act. First, it says there is "uncertainty about the interplay between section 230(c)(1) and (c)(2)." NTIA Pet. at 27. Second, NTIA says that "what it means to be an 'information content provider' or to be 'treated as a publisher or speaker' is not clear in light of today's new technology and business practices." NTIA Pet. at 28. Third, NTIA claims that Section 230's terms "otherwise objectionable" and "good faith" "are ambiguous on their face." NTIA Pet. at 28. Based on these contrived ambiguities, NTIA then proposes a radical rewrite of each statutory section to fundamentally alter what each provision does. *See* NTIA Pet. at Appx. A.

NTIA does not appear to appreciate the difference between true ambiguity that would allow for rulemaking versus its own simple disagreement with the law's plain text as consistently interpreted by the courts. Indeed, NTIA says, "Section 230 contains a number of ambiguities that courts have interpreted broadly in ways that are harmful to American consumers, free speech, and the original objective of the statute." NTIA Pet. at 27. Pointing to consistent interpretation by the judiciary of plain statutory terms does not provide the Commission with *any* power to take the law into its own hands through NTIA's requested rulemaking. NTIA's argument boils down to a simple disagreement with court interpretation of the plain language of the statute. The Commission should not accept NTIA's invitation to vastly exceed its authority.

i. FCC Cannot Rewrite Section 230(c)(1) to Remove Immunity for Restricting Access to Material

First, NTIA's request to have FCC "determine whether the two subsections' scope is additive or not" flies in the face of both clear statutory language and consistent court interpretations. *See* NTIA Pet. at 29. NTIA briefly, and without any analysis, asserts that the "relationship between subparagraphs (c)(1) and (c)(2)" is "ambiguous" because "courts [have] read[] section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity." NTIA Pet. at 28. This contention is both false and a distraction from the ambiguity analysis. Expansive is different than ambiguous. Courts have just disagreed with NTIA's view of what the statute *should* be. That provides no basis for the Commission to act.

A court has a duty to "exhaust all the traditional tools of construction" before "wav[ing] the ambiguity flag." *Kisor*, 139 S. Ct. at 2415 (internal citations and quotation marks omitted). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a

judge conclude that it is more one of policy than of law." *Id.* (internal citations and quotation marks omitted). And these same rules of statutory interpretation "bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring).

NTIA never really identifies what is ambiguous about the statute—because any principled application of the test for ambiguity comes up short. NTIA has hardly "exhaust[ed] all the traditional tools of construction." *See Kisor*, 139 S. Ct. at 2415. Instead, courts have explained that the plain language of the statute sets up two distinct liability shields. Section 230(c)(1) applies to publishers who are not information content providers, whereas (c)(2) applies to "*any* provider of an interactive computer service," whether or not it also provides information. *Barnes*, 570 F.3d at 1105. There is nothing odd, much less *ambiguous*, about Congress' choice to have different protections for different parties.

NTIA even recognizes that courts have uniformly interpreted the plain text of Section 230 to explain the interplay between these sections. *See* NTIA Pet. at 29 (citing *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019)). It just disagrees with those court decisions. Disagreement with an outcome is hardly identification of ambiguity. Instead, it illuminates what NTIA really wants the Commission to do—*change the law*.

If there were any doubt about NTIA's goals, it would be answered by the text of NTIA's proposed regulation. Proceeding from an unidentified ambiguity, NTIA proposes a regulation that explicitly contradicts the statute and prevailing case law, artificially narrowing Section 230(c)(1) so that it provides *no* protection for service providers that "restrict access to or availability of material provided by another information content provider." *See* NTIA Pet at 30-31. But as the Ninth Circuit explained in *Barnes*, Section 230(c)(1) "by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." 570 F.3d at 1105. Restricting *access* to third-party content is at the heart of what Section 230(c)(1) protects. The Commission cannot limit that protection through rulemaking.

ii. FCC Cannot Rewrite Section 230 to Penalize Providers Who Make Editorial Decisions About Content

NTIA's next request, to have the Commission redefine the term "information content provider" must also be rejected as antithetical to the agency's proper role. *See* NTIA Pet. at 42.

Whereas Section 230(c)(1) provides immunity when a service provider is not acting as a "publisher or speaker" of certain information, it does not protect any "information content

providers" who are "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).[2] Thus, as a secondary line of argument, litigants have often tried to argue that an internet service provider is really an *information content provider* because they have made certain editorial decisions about what content to display or prioritize or merely have encouraged creation of certain content. *See, e.g.*, *Jones*, 755 F.3d at 413-14 (collecting cases).

But the unanimous view of the courts is that the statutory language plainly applies to "creation or development" of material, not the exclusion or prioritization of content. *See, e.g.*, *Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."). As the Sixth Circuit said in joining every other court of appeals on this question, "an encouragement test would inflate the meaning of 'development' to the point of eclipsing the immunity from publisher-liability that Congress established." *Jones*, 755 F.3d at 414.

NTIA asks FCC to sweep that law aside and adopt a new definition of an information content provider, treating a service provider as the publisher or speaker of content when it merely "recommends, or promotes" content, even if it does so with an algorithm or other automated means. NTIA Pet. at 46-47. In short, NTIA wants to eliminate protection when a service provider does something far less concrete than the "creation or development" of content.

As a threshold matter, NTIA's petition yet again pretends that there is some ambiguity in the statutory text, as it asks FCC to overrule these courts and rewrite the scope of the law. Rather than engage meaningfully with the statutory text, NTIA just says that "[c]ourts have proposed numerous interpretations" of what it means to be an information content provider. NTIA Pet. at 40.

But there is no ambiguity in the text of the statute. Indeed, Section 230(f)(2) provides a detailed statutory definition of what it means to be an information content provider. NTIA does not really argue otherwise, it just suggests that there could always be an additional level of definitions. *See* NTIA Pet. at 40.

Of course, in construing statutes, courts "give undefined terms their ordinary meanings," and not every undefined term is ambiguous. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018); *see also United States v. Day*, 700 F.3d 713, 725 (4th Cir. 2012) ("It is beyond cavil that a criminal statute need not define explicitly every last term within its text[.]"). If agencies can rewrite statutes by defining

[2] As discussed, this definition does not apply to Section 230(c)(2). That subsection provides liability even for information content providers, which is part of what differentiates the provisions. *See Barnes*, 570 F.3d at 1105.

every undefined term, Congress cannot control the law. No matter how clear the statute or its *definitions*, some term will always be left undefined—or else the definitions themselves will have undefined terms in them. But "silence does not always constitute a gap an agency may fill"; often it "simply marks the point where Congress decided to stop authorization to regulate." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc on behalf of 10 judges). Indeed, reading Congress' silence as an implicit grant of authority is both "a caricature of *Chevron*" and a "notion [] entirely alien to our system of laws." *Id.* at 359-60.

NTIA invites the Commission to make the rudimentary mistake of believing that it has unlimited authority to define *every* open-ended term on the premise of ambiguity. But if that were so, where would it end? Surely not every term in a definition is itself defined. Indeed, NTIA wants a new definition of the terms within the statute's definitions. Congress did not bestow on the Commission unlimited power over Section 230, and NTIA's passing suggestion otherwise should be rejected.

In any event, and contrary to NTIA's suggestion, the courts have adopted clear limits based on the text of the statute. Indeed, whereas NTIA cites to *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016), and *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199-1200 (10th Cir. 2009), as evidence of disagreement in the courts, *see* NTIA Pet. at 40-41, both cases adopted and applied the "material contribution test." And *Huon* even dealt with a provider that "authored" allegedly defamatory content. 841 F.3d at 743. Thus, *Huon* and *Accusearch, Inc.* demonstrate nothing more than the consensus view that information content providers must do something much more than simply promote or prioritize material in order to become liable. NTIA's suggestion about the state of the law is, at best, disingenuous.

More importantly, the courts have based their rulings on the clear statutory text. *See Jones*, 755 F.3d at 414. NTIA's suggestion that FCC can somehow overrule those courts is an affront to the proper role of an agency. *See Brand X Internet Servs.*, 545 U.S. at 982-83. Thus, the Commission cannot lawfully adopt NTIA's proposed rewrite to Section 230(f)(2).

iii. FCC Cannot Drastically Revise Section 230(c)(2) to Make Providers Liable for Good Faith Efforts to Restrict Objectionable Content

Finally, the Commission should reject NTIA's request to redefine the statutory terms "otherwise objectionable" and "good faith" in ways that run counter to their plain meaning. *See* NTIA Pet. at 31, 38.

Section 230(c)(2) grants a limited protection. It immunizes all service and content providers who "in good faith" "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).

NTIA objects to this broad statutory standard, yet again under the pretense of asking the Commission to fill in ambiguities. First, NTIA says that the term "otherwise objectionable" is "ambiguous" because courts routinely consider it to be separate and apart from the other enumerated types of material—*e.g.*, obscene or violent material. *See* NTIA Pet. at 31. NTIA wishes instead that courts would limit this phrase to mean only what the enumerated terms already encompass—"any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." *See* NTIA Pet. at 31-32, 38.

Needless to say, disagreement over court decisions is not the same thing as identifying an ambiguity. And courts have often been called upon to construe the broad term "objectionable." *See, e.g.*, *Zimmerman v. Bd. of Trustees of Ball State Univ.*, 940 F. Supp. 2d 875, 890 (S.D. Ind. 2013). There is "nothing ambiguous" about that term. *Id.*

What NTIA seeks to do is have the Commission write the term "objectionable" out of the statute. Indeed, courts have recognized that Congress intended to give the term "otherwise objectionable" *some* meaning, and not just reiterate the list of other forms of content. *See Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019). Rejecting the argument advanced by NTIA, the Ninth Circuit said, "We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s. But even if *ejusdem generis* did apply, it would not support [a] narrow interpretation of 'otherwise objectionable.' Congress wanted to give internet users tools to avoid not only violent or sexually explicit materials, but also harassing materials." *Id.* FCC may not alter statutory language just because NTIA wishes Congress would have written a different law.

NTIA also says, yet again without analysis, that the "phrase 'good faith' in section 230(c) is also ambiguous." NTIA Pet. at 38. But instead of explaining why that phrase is purportedly incapable of being readily understood, NTIA does what it does best—it argues against courts that have interpreted the phrase in its ordinary sense. *See* NTIA Pet. at 38-39.

NTIA's attempt to create ambiguity around the meaning of "good faith" is particularly misplaced because the phrase "good faith" is "a legal term that has a well understood meaning." *See Wilder v. World of Boxing LLC*, 220 F. Supp. 3d 473, 480 (S.D.N.Y. 2016). And courts have applied

this understanding to Section 230 consistently—looking for bad motives on the part of the provider. *See, e.g.*, *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 603 n.9 (S.D.N.Y. 2020).

Consistent with its pattern of framing disagreement with settled law as ambiguity, NTIA acknowledges that the law runs counter to its proffered regulation. It just argues that, as a policy matter, good faith should be read unnaturally to "require[] transparency about content moderation dispute processes." *See* NTIA Pet. at 39. And its proposed regulation takes that idea and runs with it—defining good faith with a four-part definitional test that forbids a finding of good faith in a host of circumstances, including where automated content moderation fails to perfectly align with a provider's terms of service. *See* NTIA Pet. at 39. This definition is not the plain meaning of good faith—it is not even arguably so. NTIA apparently wants to completely scrap the statutory language in favor of something very different.

IV. CONCLUSION

NCLA urges FCC to reject NTIA's Petition. Even if the Commission shared NTIA's view about what Section 230 *should* look like, it has a constitutional obligation to leave such complex policy decisions in the hands of Congress and the President. FCC simply cannot revise an act of Congress, under the pretense of rulemaking, so that it means the opposite of what Congress set out in law. To allow such *sub rosa* lawmaking would be an affront to constitutional order.

Sincerely,

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Litigation Counsel
caleb.kruckenberg@ncla.legal
Mark Chenoweth
General Counsel
New Civil Liberties Alliance

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
National Telecommunications	)	RM – 11862
and Information Administration	)	
	)	
Petition for Rulemaking to	)	
Clarify provisions of Section 230	)	
Of the Communications Act of 1934	)	

COMMENTS OF TECHFREEDOM

110 Maryland Ave NE
Suite #205
Washington, DC 20002

Dated: September 2, 2020

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
National Telecommunications	)	RM – 11862
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	)	
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Clarify provisions of Section 230	)	
Of the Communications Act of 1934	)	

COMMENTS OF TECHFREEDOM: EXECUTIVE SUMMARY

Section 230 is the law that made today's Internet possible. The law has allowed websites to host content created by users without, as the bill's author, Rep. Chris Cox (R-CA), warned in 1995, "spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges." Without the broad protections of 230(c)(1) in particular, websites would face "death by ten thousand duck-bites" in the form of massive litigation risks.

NTIA asks the FCC to turn this law on its head, but the FCC has no authority to reinterpret the statute. The plain language and the legislative history of Section 230 demonstrate that Congress did not intend to grant any regulatory authority to the FCC. Instead, as Rep. Cox declared, Congress did "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet." Under the statute's express terms, the "interactive computer service" providers protected by Section 230 are not "information service providers," nor are they otherwise subject to the FCC's jurisdiction. Both the courts and the FCC itself have concluded that Section 230 confers no authority on

the Commission. The FCC's lack of delegated authority under Section 230 is demonstrated by the fact that no courts have deferred to the FCC, or awaited its opinion on the meaning of the statute before applying it. NTIA's principal argument, that Section 201(b) confers plenary rulemaking powers to interpret any provision of the Communications Act, including Section 230, fails: this provision applies only to common carrier services, as this Commission itself argued in repealing the previous Commission's broad claims of power to regulate Internet services. The FCC also lacks authority to impose disclosure requirements on social media.

NTIA proposes a new, more arbitrary Fairness Doctrine for the Internet. But because social media sites are not public fora, the First Amendment protects the editorial discretion of their operators. The Supreme Court permitted the original Fairness Doctrine only because it denied full first Amendment protection to broadcasters — whereas new media, including social media, enjoys full First Amendment protection. Conditioning eligibility for Section 230's protections on the surrender of editorial discretion violates the "unconstitutional condition" doctrine. NTIA's narrowing of Section 230 effectively seeks to compel social media to carry speech they do not wish to carry and associate themselves with views, persons and organizations they find repugnant — and places upon social media providers themselves the burden of defending the exercise of their editorial judgment. Finally, despite NTIA's rhetoric about "neutrality," its proposal will empower the government to punish or reward editorial decisions on the basis of content and viewpoint.

NTIA insists that the representations of fairness or neutrality social media make about their services must be enforced, but it is basic principles of consumer protection and contract law, grounded in the First Amendment, — *not* Section 230 — that bar such claims. Broad statements about not making decisions for political reasons simply are not actionable,

and the First Amendment does not permit the government to compel more "particular" promises. The disclosure requirements the FCC has imposed on Broadband Internet Access Service providers are utterly unlike those NTIA proposes for social media: by definition, BIAS services do not exercise editorial discretion, while social media services do. Enforcing BIAS providers' promises of "net neutrality" is nothing like second-guessing how social media provide "edited services." Only in narrow circumstances will the First Amendment permit suit against media providers based on discrepancies between clear and specific representations about their editorial practices and those practices.

NTIA's statutory interpretations would turn Section 230 on its head, placing a heavy burden on websites to defend their exercise of editorial discretion each time they are sued for content moderation decisions. Courts have correctly interpreted 230(c)(1) to protect broadly the exercise of editorial discretion. NTIA is simply mistaken that this renders 230(c)(2)(a) superfluous: it protects content moderation decisions even when providers responsible for the creation of content, and it protects against other kinds of claims. NTIA would transform 230(c)(2) into the basis for micromanaging how social media operate. Similarly, by redefining which services are eligible for the 230(c)(1) immunity, NTIA would create exactly the kind of censorship regime Section 230 was intended to prevent.

The FCC should dismiss this petition for lack of authority to implement it, and because it violates the most basic precepts of the First Amendment. Evaluating the fairness of media, both offline and online is, as a Republican FTC Chairman eloquently put it, "is a task the First Amendment leaves to the American people, not a government agency." If consumers believe bias exists, it must be remedied through the usual tools of the media marketplace: consumers must vote with their feet and their dollars.

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Clarify provisions of Section 230	)	
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COMMENTS OF TECHFREEDOM

TechFreedom, pursuant to Sections 1.4 and 1.405 of the Commission's rules (47 C.F.R. §§ 1.4 & 1.405), hereby files these Comments in response to the Petition for Rulemaking filed by the National Telecommunications and Information Agency ("NTIA") on July 27, 2020 (the "NTIA Petition").[1] In support of these Comments, TechFreedom submits:

I. About TechFreedom

Founded in 2010, TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes

[1] By Public Notice, Report No. 3157, released Aug. 3, 2020, the FCC opened NTIA's Petition for comment, with comments due by Sept. 2, 2020. These Comments are timely filed. These comments were drafted by Berin Szóka, TechFreedom Senior Fellow, and James Dunstan, TechFreedom General Counsel, with contributions and vital assistance from Ashkhen Kazaryan, TechFreedom's Director of Civil Liberties and Legal Research Fellow; Andy Jung, Law Clerk, TechFreedom; and, Sara Uhlenbecker, Law Clerk, TechFreedom.

the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

For the last decade, TechFreedom has opposed expansive readings of the Communications Act that would give the FCC broad authority, and unchecked discretion, to regulate the Internet.[2] In 2015, we joined the lawsuit challenging the FCC's imposition of common carriage regulation on Internet services in the name of protecting "neutrality."[3] The arguments we made as intervenors were those then-Judge Kavanaugh and Judge Brown stressed in their dissents, arguing that the full D.C. Circuit should rehear the panel decision upholding the FCC's order.[4] We have also developed a core expertise in consumer protection law, and have provided testimony to Congress multiple times on how the Federal Trade Commission wields that authority.[5] Finally, we have devoted much of our

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[2] *TechFreedom Files in Amicus in the Latest Net Neutrality Litigation*, TECHFREEDOM (Oct. 18, 2018), https://techfreedom.org/techfreedom-files-amicus-latest-net-neutrality-litigation/; *TechFreedom Releases First Comprehensive Analysis of Federalism Obstacles to State Net Neutrality Regulations*, TECHFREEDOM (Oct. 31, 2018), https://techfreedom.org/techfreedom-releases-first-comprehensive-analysis-federalism-obstacles-state-net-neutrality-regulations/; *CRA Resolutions Cannot Legally Protect Net Neutrality*, TECHFREEDOM (May 14, 2018), https://techfreedom.org/cra-resolutions-cannot-legally-protect-net-neutrality/; TechFreedom, Comments of TechFreedom In the Matter of Notice of Proposed Rulemaking – Restoring Internet Freedom WC Docket No. 17-108 (Aug. 30, 2017), http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf; *Our Fight to Stop FCC Regulation of the Internet Continues*, TECHFREEDOM (Dec. 29, 2017), https://techfreedom.org/fight-stop-fcc-regulation-internet-continues/.

[3] Mot. of TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, & David Frankel for Leave to Intervene, Case No. 15-1063 (2015) available at http://docs.techfreedom.org/TF_FCC_OIO_Motion_to_Intevene_6.8.15.pdf; Br. for Intervenors for Pet'rs TechFreedom, CARI.net, Jeff Pulver, Charles Giancarlo, Wendell Brown, & David Frankel, Nos. 15-1063 (2015) available at http://docs.techfreedom.org/TF_Intervenor_Brief_8.6.15.pdf; Reply Br. For Intervenors for Pet'rs TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown & David Frankel, Nos. 15-1063 (2015) available at https://techfreedom.org/important-documents-open-internet-order-case/; Pet. For Reh'g En Banc for Intervenors TechFreedom, CARI.net, Jeff Pulver, Charles Giancarlo, Wendell Brown, & David Frankel, Nos. 15-1063 (2015) available at http://docs.techfreedom.org/TF_Petition_for_Rehearing_En_Banc.pdf.

[4] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 418-26 (D.C. Cir. 2017) (Kavanaugh dissenting) and *id*. at 408-17 (Brown dissenting).

[5] *Consumer Protection & Competition Regulation in A High-Tech World: Discussing the Future Of The Federal Trade Commission, Report 1.0 Of The FTC*: Technology & Reform Project 24 (Dec. 2013),

attention over the last three years on Section 230 and proposals to reform it, including providing Congressional testimony.[6] We led the drafting of a set of seven principles to guide lawmakers considering amending Section 230 — a document signed onto by 27 civil society organizations and 53 academics.[7] Finally, the First Amendment's application to the Internet has always been at the core of our work. All four areas of our work are incorporated in these comments.

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http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf; Berin Szóka & Geoffrey A. Manne, The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature 57-60 (2016), http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf [hereinafter White Paper]; Comments of TechFreedom, Hearings on Competition & Consumer Protection in the 21st Century: Topic 11: The agency's investigation, enforcement and remedial processes (Aug. 20, 2018), http://techfreedom.org/wpcontent/uploads/2018/08/ftc-august-2018-workshop-comments-topic-11.pdf; Comments of TechFreedom & International Center for Law and Economics, In the Matter of Big Data and Consumer Privacy in the Internet Economy, Docket No. 140514424–4424–01 (Aug. 5, 2014), available at http://www.laweconcenter.org/images/articles/tf-icle_ntia_big_data_comments.pdf; Geoffrey A. Manne, R. Ben Sperry & Berin Szoka, In the Matter of Nomi Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case (2015), available at http://laweconcenter.org/images/articles/icle-nomi_white_paper.pdf;

[6] Berin Szóka , *The First Amendment Bars Regulating Political Neutrality, Even Via Section 230*, TECHDIRT (July 24, 2020), https://www.techdirt.com/articles/20200724/11372744970/first-amendment-bars-regulating-political-neutrality-even-via-section-230.shtml; TechFreedom (@TechFreedom), TWITTER (May 28, 2020), https://twitter.com/techfreedom/status/1265877617519009792; Letter from TechFreedom to the Senate Judiciary Committee (Mar. 5, 2020), available at https://techfreedom.org/wp-content/uploads/2020/03/TechFreedom-Letter-re-EARN-IT-Act-3.5.2020.pdf; *EARN IT Act Could Hurt Kids and Undermine Privacy of All Americans*, TECHFREEDOM (Mar. 5, 2020), https://techfreedom.org/earn-it-act-could-hurt-kids-and-undermine-privacy-of-all-americans/; *Academics, Civil Society Caution Lawmakers Considering Amending Section 230*, TECHFREEDOM (July 11, 2019), https://techfreedom.org/academics-civil-society-caution-lawmakers-considering-amending-section-230/; Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical; *Hawley Proposes a Fairness Doctrine for the Internet*, TECHFREEDOM (June 19, 2019), https://techfreedom.org/hawley-proposes-a-fairness-doctrine-for-the-internet/; Ashkhen Kazaryan, *Some conservatives need a First Amendment refresher*, WASHINGTON EXAMINER (May 21, 2019), https://www.washingtonexaminer.com/opinion/some-conservatives-need-a-first-amendment-refresher; Letter from TechFreedom to Attorney General Jeff Sessions (Sept. 21, 2018), available at http://techfreedom.org/wp-content/uploads/2018/09/Letter_-to-Jeff-Sessions-re-Social-Media-Bias-v2.pdf; *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Apr. 26, 2018) (Testimony of TechFreedom), available at http://docs.techfreedom.org/Szoka_Testimony-Platform_Reponsibility_&_Neutrality-4-25-18.pdf; *Senate Passes Hybrid SESTA Bill, Despite Constitutional & Backfiring Concerns*, TECHFREEDOM (Mar. 21, 2018), https://techfreedom.org/senate-passes-hybrid-sesta-bill-despite-constitutional-backfiring-concerns/; *Backpage Shutdown Proves SESTA Was Rushed Unnecessarily*, TECHFREEDOM (Apr. 6, 2018), https://techfreedom.org/backpage-shutdown-proves-sesta-rushed-unncessarily/.

[7] Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical.

II. The FCC Lacks Authority to Implement the NTIA Petition

Congress passed Section 230 of the Communications Decency Act nearly 25 years ago. Since then, hundreds of reported cases,[8] courts have interpreted the meaning of Section 230, and its principle provision, Paragraph (c)(1), which has been called "the twenty-six words that created the Internet."[9] Suddenly, after the passage of so much time, NTIA now seeks to thrust the FCC into the middle of the national debate over the role and power of technology companies in America, or as many call it, "the TechLash."[10] Apparently unhappy with how courts have interpreted the language set down by Congress, NTIA would have the FCC set forth a new, radically different interpretation of what Section 230 means. The fundamental problem with this is that there simply is no role for the FCC here, and the FCC should dismiss NTIA's Petition as being beyond the scope of its delegated authority.

A. The FCC Lacks Delegated Authority to Interpret Section 230

The first fundamental question the FCC must address is whether the Commission has any authority under the Communications Act to interpret Section 230. It does not.

Empowering the FCC to conduct rulemakings about online content was the last thing the creators of Section 230 had in mind. Fundamentally, they opposed heavy-handed governmental

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[8] Eric Goldman, *Comments on the Internet Association's Empirical Study of Section 230 Cases*, Technology & Marketing Law Blog (Aug. 3, 2020), https://blog.ericgoldman.org/archives/2020/08/comments-on-the-internet-associations-empirical-study-of-section-230-cases.htm ("I think the total universe of Section 230 case citations is more like 1,200+"); *see also A Review Of Section 230'S Meaning & Application Based On More Than 500 Cases*, INTERNET ASSOCIATION (July 27, 2020), https://internetassociation.org/publications/a-review-of-section-230s-meaning-application-based-on-more-than-500-cases/ [hereinafter *IA Report*].

[9] *See, e.g.*, JEFF KOSSEFF, TWENTY SIX WORDS THAT CREATED THE INTERNET (2019).

[10] *See, e.g.*, Robert D. Atkinson Et Al., *A Policymaker's Guide to the "Techlash" - What It Is and Why It's a Threat to Growth and Progress*, Information Technology & Innovation Foundation (Oct. 28, 2019), https://itif.org/publications/2019/10/28/policymakers-guide-techlash.

regulation of the Internet, an idea very much gathering steam at the time as the Senate moved to pass the rest of the Communications Decency Act:

> the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected . . . ***I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter[s].***[11]

Enter now the NTIA Petition. Somehow the NTIA Petition manages to ignore both the statutory Congressional language and the legislative history quoted above to conclude that "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation."[12] With respect, this assertion is flatly contradicted by the text and history of the statute.[13]

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[11] *Id.* at H8470 (statement of Rep. Wyden, emphasis added).

[12] National Telecommunications and Information Administration, Petition for Rulemaking of the National Telecommunications and Information Administration at 17 (July 27, 2020) [hereinafter *NTIA Petition*], https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

[13] Interestingly, NTIA can find its way around the legislative history by discussing the fact that Congress enacted Section 230, in part, to overrule the *Stratton Oakmont* decision, and to empower parents to choose what their children saw on the Internet. *See id*. at 18, n. 51, 21, n. 64, 21, n. 65, 22, n. 67. Yet apparently NTIA cannot find any of the references quoted above, from the same Representatives, to the fact that the statute was never intended to be implemented by the FCC.

1. The Language and the Legislative History of Section 230 Demonstrate that Congress Did Not Intend to Grant Any Regulatory Authority to the FCC.

Both the plain statutory language of the CDA as well as the legislative history of Section 230 clearly indicate that Congress did not intend to grant any regulatory authority to the FCC to enforce, or even interpret, Section 230. In Subsection 230(b)(2), Congress stated that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, ***unfettered by Federal or State regulation***."[14]

> In discussing the fact that the CDA was not designed to provide the FCC with any jurisdiction, author Chris Cox said this during the floor debates: We do "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[15] Rep. Cox also pointed out that "there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time." [16]

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[14] Communication Decency Act, 47 U.S.C. § 230(b)(2) (emphasis added).

[15] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The full quote from the floor colloquy sheds additional light on what one of Section 230 author's had in mind for how the law would operate:

> Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, ***it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government***. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

Id.

[16] *Id.* at H8469 (emphasis added).

Similarly, Representatives Bob Goodlatte (R-VA)[17] and Rick White (R-WA)[18] expressed their support for Section 230 ***and*** for the notion that there was little room, if any, for the federal government to police the content online. Section 230 co-author (then) Rep. Wyden (D-OR) agreed that "The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats."[19] Wyden fully recognized that the FCC (or any other federal agency) would never be able to police the content of the Internet in a timely basis. "Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today."[20]

2. Under the Statute's Express Terms, Interactive Computer Service Providers Are not Information Service Providers or Subject to FCC Jurisdiction

NTIA argues that Section 230(f)(2) "explicitly classifies 'interactive computer services' as 'information services[.]'"[21] Yet NTIA has it exactly backwards: Section 230(f)(2) states "[t]he term 'interactive computer services' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including

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[17] "The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment." *Id.* at H8471.

[18] "I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision [as to what my children see on the Internet] is the Federal Government." *Id.*

[19] *Id.* at H8470.

[20] *Id.* at H8471.

[21] *Id.* at 47.

specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[22] Thus, while *some* information services are interactive computer services, that doesn't mean that *all* interactive computer services are information services. [23] This more limited reading of the meaning of Section 230(f)(2) is therefore consistent with the policy statement contained in Section 230(b)(2) : "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . ."[24] The broad reading of the term "information service" advocated by NTIA, *to justify new federal regulation*, would stand in stark conflict with this policy finding.

3. Both the Courts and the FCC Itself Have Concluded that Section 230 Confers No Authority on the FCC

The NTIA Petition further ignores ample court precedent, and conclusions reached by the FCC itself, that Section 230 confers no regulatory authority on the FCC. In *Comcast v. FCC,*[25] the D.C. Circuit addressed the first in a series of many challenges to the authority of the FCC to regulate an Internet service provider's network management practices (so-called "net neutrality" regulation). The FCC's order[26] found that the company's limitation on peer-to-peer programs violated the FCC's 2005 Internet Policy Statement[27] On appeal, the FCC argued that, through Section 230, Congress

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[22] 47 U.S.C. § 230(f)(3).

[23] *Restoring Internet Freedom* ¶ 60, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (1) (2018) [hereinafter *RIFO*].

[24] 47 U.S.C. § 230(b)(2).

[25] *Comcast v. FCC*, 600 F.3d 642 (DC Cir 2010).

[26] *In re Formal Compl. Of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) [hereinafter *Comcast Order*).

[27] *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14,986, 14,998, ¶ 4 (2005).

provided the FCC with authority to prohibit Internet Service Providers (ISPs) from implementing any network practices that might frustrate "the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet."[28]

The *Comcast* court flatly rejected this assertion of authority. It first found that Section 230 (in conjunction with Section 1 of the Communications Act) "are statements of policy that themselves delegate no regulatory authority."[29] It also rejected the FCC's argument that Section 230 nonetheless conveyed "ancillary" authority:[30]

> We read *Southwestern Cable* and *Midwest Video I* quite differently. In those cases, the Supreme Court relied on policy statements not because, standing alone, they set out "statutorily mandated responsibilities," but rather because they did so in conjunction with an express delegation of authority to the Commission, i.e., Title III's authority to regulate broadcasting.[31]

Instead, the *Comcast* court analyzed the FCC's authority to regulate the Internet based on *Midwest Video II*,[32] wherein the Supreme Court found that, absent clear statutory authority under Title III, the FCC's cable regulations related to public access requirements were unlawful.[33] The court also relied on *NARUC II,*[34] which struck down FCC regulations of non-video uses of cable systems, to conclude that the Communications Act "commands that each and every assertion of jurisdiction

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[28] *Comcast v. FCC*, 600 F.3d at 651 (slip op. p. 17).

[29] *Id.* at 652 (slip op. p. 18).

[30] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)*; United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*).

[31] *Comcast v. FCC*, 600 F.3d at 652.

[32] *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

[33] *Comcast v. FCC*, 600 F.3d at 654, *quoting Midwest Video II*, 440 U.S. at 706.

[34] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II).

over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting."[35] The *Comcast* court thus concluded:

> The teaching of *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II* — that policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority — derives from the "axiomatic" principle that "administrative agencies may [act] only pursuant to authority delegated to them by Congress." Policy statements are just that — statements of policy. They are not delegations of regulatory authority.[36]

The *Comcast* court warned of reading expansive authority into policy statements contained in provisions from the Communications Act, without specific delegated authority:

> Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations . . . that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers. [37]

The NTIA Petition indeed seeks to shatter the limits of FCC authority by claiming the mere codification of Section 230 into the Communications Act confers upon the FCC the power to review and regulate the editorial practices of any website on the Internet that hosts comments or other content created by users. Granting an unelected independent agency such power, as NTIA suggests, should send shivers down the spine of all Americans, regardless of political party affiliation.

Since *Comcast*, the FCC has, under both Democratic and Republican leadership, either avoided claiming Section 230 as providing direct statutory authority, or disclaimed outright Section 230 as an independent source of regulatory authority. The FCC's 2015 *Open Internet Order*, for example, reissued (with significant modifications) the net neutrality rules contained in the 2010

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[35] *Comcast v. FCC*, 600 F.3d at 651, *quoting NARUC II*, 533 F.2d at 612.

[36] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

[37] *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

Order, but sought to ground them on two distinct sources of authority *other* than Section 230: (i) interpreting Section 706 as an independent grant of authority and (ii) reclassifying Broadband Internet Access Service (BIAS) as a Title II telecommunications service. In reaching the latter conclusion, the FCC held that Section 230(f)(2)'s reference to "information service" and a "system that provides access to the Internet" did not resolve the question of whether BIAS was an information service or a telecommunications service, concluding that it was "unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner, especially given the opportunity to do so when it adopted the Telecommunications Act of 1996."[38] Nowhere in the course of this discussion of the Commission's statutory authority (in Title II) did the 2015 Order say anything to suggest that Section 230 was itself a source of statutory authority.

In the *Restoring Internet Freedom Order*, the FCC found not that Section 230 provided any regulatory authority to the FCC, but the very opposite: that the policy statement (that the Internet should remain "unfettered by Federal or State regulation") in Section 230(b)(2)

> confirms that the free market approach that flows from classification as an information service is consistent with Congress's intent. In contrast, we find it hard to reconcile this statement in section 230(b)(2) with a conclusion that Congress intended the Commission to subject broadband Internet access service to common carrier regulation under Title II.[39]

The *RIFO* agreed with the *Comcast* analysis, concluding that "Section 230 did not alter any fundamental details of Congress's regulatory scheme but was part and parcel of that scheme, and confirmed what follows from a plain reading of Title I—namely, that broadband Internet access

[38] OIO ¶ 386.

[39] *RIFO* ¶ 58.

service meets the definition of an information service."[40] Finally, in determining whether it had authority to adopt conduct rules for BIAS providers, the *RIFO* rejected an argument that Section 230 could be read as a source of authority: "section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority."[41]

On appeal, the D.C. Circuit drove the final nail in the coffin of the idea that Section 230 confers any regulatory authority:

> As the Commission has itself acknowledged, this is a "statement[] of policy," not a delegation of regulatory authority. . . . To put it even more simply, "[p]olicy statements are just that—statements of policy. They are not delegations of regulatory authority." *Comcast*, 600 F.3d at 654.[42]

4. The Lack of Delegated Authority under Section 230 is Demonstrated by the Fact that No Courts Have Deferred to the FCC.

Although NTIA would have us believe that they've discovered never-before-used authority for the FCC, it is notable that in none of 1000+ cases involving Section 230,[43] particularly the early cases, has any court refused to rule on the meaning of Section 230 out of deference to an FCC that has yet to act. One would think that if Section 230 conferred authority on the FCC to interpret its meaning, some enterprising lawyer, somewhere, would have argued for a stay of judicial proceedings, or referral to the FCC, when it lost on its Section 230 claim. The fact that no one has

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[40] *Id.* ¶ 61. The FCC added: "The legislative history of section 230 also lends support to the view that Congress did not intend the Commission to subject broadband Internet access service to Title II regulation. The congressional record reflects that the drafters of section 230 did 'not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.' See 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)." RIFO n. 235.

[41] *RIFO* ¶ 284 (emphasis added).

[42] *Mozilla v. FCC*, 940 F.3d 1, 78 (D.C. Cir. 2019).

[43] *See supra* note 8.

even tried that as a legal strategy further reinforces just how untethered from the statute the NTIA Petition really is.[44]

When it comes to interpreting most provisions contained in the Communications Act, courts generally defer to the FCC's determinations where there is a clear grant of authority. In *North County Communications, Corp. v. California Catalog & Technology*,[45] for example, the Ninth Circuit rejected an inter-carrier dispute over termination fees, concluding that the FCC had yet to provide guidance on the charges in question:

> North County essentially requests that the federal courts fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b). This we decline to do. The district court properly dismissed North County's declaratory judgment claim premised on § 201(b), because entry of a declaratory judgment "would ... put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission."[46]

Many other courts have hesitated to step in to adjudicate disputes arising out of the Communications Act, especially where the FCC has not issued rules or otherwise provided guidance on how courts should interpret those legislative provisions.[47] As one court put it, in dismissing a

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[44] *See, e.g., State of North Dakota v. EPA*, Case No. 15-1381 (D.C. Cir. 2017) (Order holding case in abeyance) (unpublished opinion.) The D.C. Circuit issued an order holding in abeyance a challenge to the Clean Air Act and Executive Order 13783 "Promoting Energy Independence and Economic Growth" (82 FR 16093, March 13, 2017) and order the EPA to file status reports on a rulemaking to implement the EO.

[45] 594 F.3d 1149 (9th Cir. 2010).

[46] *Id.* at 1158, *quoting* Greene v. Sprint Commc'ns Co., 340 F.3d 1047, 1053 (9th Cir.2003)

[47] *See, e.g. Hoffman v. Rashid*, 388 Fed. Appx. 121, 123 (3d Cir. 2010) (concluding it was the FCC's purview to determine whether a particular practice by a carrier violated Section 201(b) of the Communications Act); *Iris Wireless LLC v. Syniverse Tech.*, 2014 WL 4436021, (M.D. Fla. Sept. 8, 2014) ("a court should not 'fill in the analytical gap' where the Commission has not made a determination regarding whether a company's action violates section 201(b)") (quoting *North County*, 594 F.3d at 1158); *see also id*. ("if the Court were to make a declaratory ruling" on an issue that the Commission had not yet addressed, "it would 'put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission'") (quoting *North County*, 594 F.3d at 1158); *Free Conferencing*

claim that "it is a violation of section 201(b) for a party to 'warehouse' toll free numbers without identified subscribers," because previous Commission orders "do not address the precise type of conduct at issue in this case," the court could not "risk disturbing the delicate regulatory framework that the Commission is tasked with maintaining").[48] If similar delegated authority existed for the FCC to interpret Section 230, how have hundreds of cases proceeded without a single court stopping to analyze whether its decision would "risk disturbing the delicate regulatory framework" assigned by Congress to, supposedly, the FCC? The answer is self-evident, especially after even a cursory review of the legislative history of Section 230: Congress never intended any regulatory role for the FCC in regard to Section 230.

B. The FCC Lacks Authority Under Section 201(b) to Interpret Section 230

The NTIA Petition next invokes the FCC's broad authority under Section 201(b) to conduct rulemakings to "carry out" the provisions of the Communications Act., which just happens to include Section 230.[49] The Petition quotes from *AT&T Corp. v. Iowa Utilities Bd.* that "Section 201(b) means what it says."[50] NTIA's reliance on Section 201(b) as a "blank check" to regulate, however, is not

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Corp. v. T-Mobile US, Inc., 2014 WL 7404600, *7 (C.D. Cal. Dec. 30, 2014) (because "re-routing calls to rural LECs is an evolving area of law," and because it "is important to 'protect[ ] the integrity' of the FCC's evolving regulatory scheme," the court decided "not to meddle" in this area until the Commission had ruled on the question) (quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)); *James v. Global Tel*Link Corp.*, 2014 WL 4425818, **6-7 (D.N.J. Sept. 8, 2014) ("where the question is whether an act is reasonable" under section 201(b), "primary jurisdiction should be applied"; the reasonableness of defendants' charges and practices in providing inmate calling services "implicates technical and policy questions that the FCC has the special expertise to decide in the first instance") (internal quotation marks omitted); *Demmick v. Cellco P'ship*, 2011 WL 1253733, *6 (D.N.J. March 29, 2011) ("courts have consistently found that reasonableness determinations under [section] 201(b) lie within the primary jurisdiction of the FCC, because they involve policy considerations within the agency's discretion and particular field of expertise").

[48] *Havens v. Mobex Network Servs., LLC*, 2011 WL 6826104, *9 (D.N.J. Dec. 22, 2011).

[49] *NTIA Petition*, *supra* note 12, at 15-16.

[50] *Id.*, n. 46 (quoting *AT&T v. Iowa Utilities Bd*, 525 U.S. 366 (1999)).

supported by the statute, court precedent, or prior FCC approaches to its authority under Section 201(b).

First, the reference to the FCC's authority cited by the petition is contained in the final sentence of Section 201(b), which deals with the obligations of "common carriers" to provide services to the public whereby "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." Social media platforms are not "common carriers," (or any type of carrier, for that matter), nor are they providing a "communication service." So while the FCC may have broad regulatory authority over "carriers" and "communication services," the NTIA Petition's request that the FCC provide an interpretation of Section 230 that has nothing to do with either subject matter addressed in Section 201(b).

Even the *Iowa Utility Board* court recognized that the FCC's authority under Section 201(b) is not boundless. "JUSTICE BREYER says … that 'Congress enacted [the] language [of § 201(b)] in 1938,' and that whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates.' ***That is assuredly true***."[51] Far from the FCC attempting to impose regulations on entities not otherwise subject to the Commission's jurisdiction, as is the case with NTIA's request, the issues addressed in *Iowa Utility Board* were whether the FCC had authority to implement Sections 251 and 252 added by the 1996 Telecommunications Act — provisions that related to "pricing and nonpricing provisions" of communications carriers. The Court rejected the claims of carriers and state commissioners that the FCC's authority was limited to "interstate or foreign" communications by

[51] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis added).

carriers under Section 201(a), and hence the "means what it says" language was born.[52] Thus, we are directed by *Iowa Utility Board* itself to return to what Congress "contemplated" in adopting Section 230, which is that it clearly did not intend to grant any authority to the FCC to regulate non-common carriers under Section 230.

This interpretation is consistent with the approach taken by the *Comcast* court, which rejected the FCC's claim that it could invoke authority under Section 230 via ancillary authority to regulate carriers under Section 201(b) because the FCC had failed even to attempt to tie the two provisions together in the FCC order then on appeal.[53] Such an attempt to bootstrap authority under such ancillary jurisdiction, "if accepted[,] . . . would virtually free the Commission from its congressional tether."[54]

The only time the FCC has successfully argued that that Section 201 grants authority to regulate any part of the Internet was for the short period between 2015 and 2018 where the Commission determined that BIAS (*and only BIAS*) was a telecommunications service, and could be regulated under Title II (and thus Section 201(b)).[55] Even then, application of Section 201(b) to non-carriers was highly questionable.[56] But since the FCC rejected the *2015 Order*'s approach and

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[52] *Id.* at 378.

[53] Comcast, 600 F.3d at 652-55.

[54] *Id.* at 655.

[55] *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5724 (2015) ("In light of our Declaratory Ruling below, the rules we adopt today are also supported by our legal authority under Title II to regulate telecommunications services. For the reasons set forth below, we have found that BIAS is a telecommunications service and, for mobile broadband, commercial mobile services or its functional equivalent.").

[56] *Id.* at 5999 (O'Reilly, Comm'r, dissenting) ("Moreover, if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice "in connection with" a communications service. There is no limiting principle.").

returned BIAS to be an information service, there is no arguable basis for NTIA to claim that the FCC today has authority to regulate the activities of social media platforms under Section 201.[57]

C. The FCC Lacks Delegated Authority to Impose Disclosure Requirements on Social Media.

The NTIA Petition further argues that the FCC has authority under Sections 163 and 257 of the Communications Act to impose disclosure requirements on social media sites as "information services."[58] The multi-cushion regulatory bank shot that NTIA proposes would make Paul Newman's Fast Eddie Felson from *The Hustler* proud.

NTIA cites no court cases or even FCC decisions to support its argument that Section 163, which merely requires the FCC to submit biennial reports to Congress, somehow provides regulatory authority to the FCC.[59] Section 163 conveys to the FCC no regulatory authority

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[57] The *RIFO* openly challenged whether the *2015 Order* could be squared with the FCC's authority under Section 201(b) and *Comcast*.

> The Open Internet Order contended that ISPs that also offer telecommunications services might engage in network management practices or prioritization that reduces competition for their voice services, arguably implicating section 201(b)'s prohibition on unjust or unreasonable rates or practices in the case of common carrier voice services and/or section 251(a)(1)'s interconnection requirements for common carriers. The Open Internet Order never squares these legal theories with the statutory prohibition on treating telecommunications carriers as common carriers when they are not engaged in the provision of telecommunications service or with the similar restriction on common carrier treatment of private mobile services.1045 That Order also is ambiguous whether it is relying on these provisions for direct or ancillary authority. If claiming direct authority, the Open Internet Order fails to reconcile its theories with relevant precedent and to address key factual questions.1046 Even in the more likely case that these represented theories of ancillary authority, the Open Internet Order's failure to forthrightly engage with the theories on those terms leaves it unclear how conduct rules are sufficiently "necessary" to the implementation of section 201 and/or section 251(a)(1) to satisfy the standard for ancillary authority under Comcast. (footnotes omitted).

RIFO ¶ 286.

[58] *NTIA Petition*, *supra* note 12, at 46-51.

[59] *Id.* at 49. The NTIA Petition quotes only a portion of the statute, and do so completely out of context. A reading of the full section makes clear that the intent of Congress was not to delegate additional regulatory

whatsoever, but is merely a Congressional mechanism requiring the FCC to report to it every other year on the status "of the communications marketplace,"[60] and "describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section." It is not an independent grant of authority.

NTIA next argues that Section 257, similarly largely a reporting requirement, grants the FCC authority to require social media providers to disclose their moderation policies.[61] That's where

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authority to the FCC, but rather, that Congress merely sought more information from the FCC about its activities pursuant to other delegated authority provisions. Section 163 states in full:

> (a) In general
>
> In the last quarter of every even-numbered year, the Commission shall publish on its website and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the state of the communications marketplace.
>
> (b) Contents. Each report required by subsection (a) shall—
>
> > (1) assess the state of competition in the communications marketplace, including competition to deliver voice, video, audio, and data services among providers of telecommunications, providers of commercial mobile service (as defined in section 332 of this title), multichannel video programming distributors (as defined in section 522 of this title), broadcast stations, providers of satellite communications, Internet service providers, and other providers of communications services;
> >
> > (2) assess the state of deployment of communications capabilities, including advanced telecommunications capability (as defined in section 1302 of this title), regardless of the technology used for such deployment;
> >
> > (3) assess whether laws, regulations, regulatory practices (whether those of the Federal Government, States, political subdivisions of States, Indian tribes or tribal organizations (as such terms are defined in section 5304 of title 25), or foreign governments), or demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services;
> >
> > (4) describe the agenda of the Commission for the next 2-year period for addressing the challenges and opportunities in the communications marketplace that were identified through the assessments under paragraphs (1) through (3); and
> >
> > (5) describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section.

47 U.S.C. § 163.

[60] 47 U.S.C. § 163(a).

[61] *NTIA Petition*, *supra* note 12, at 49.

NTIA's legerdemain really kicks in. The Petition begins by claiming that "In its 2018 Internet Order, the Commission relied on section 257 to impose service transparency requirements on providers of the information service of broadband internet access."[62] From there, the Petition goes on to argue that the FCC has the power to impose disclosure requirements on all social media, because social media are also "information service[s]."[63] To reach that conclusion, however, NTIA relies on cases that ultimately either have nothing to do with Section 257, or nothing to do with what the FCC would call "Edge Providers," a broad term that includes social media sites.[64]

NTIA relies heavily on language from the *Mozilla* decision, which is inapposite because it involved BIAS providers.[65] NTIA is correct that the *Mozilla* court did uphold the FCC's authority to adopt transparency rules ***for BIAS providers*** under Section 257, which the *Mozilla* court also found to be largely a reporting statute.[66] In contrast to the "regulated entities" involved in *Mozilla*, social media companies have never been regulated by the FCC, for very good reason. Since the dawn of the "net neutrality" debate, the FCC has been extremely careful to distinguish among the three sectors of the Internet: providing broadband Internet access service; providing content, applications, services, and devices accessed over or connected to broadband Internet access service ("edge" products and services); and subscribing to a broadband Internet access service that allows access to edge products

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[62] *Id.*

[63] *Id.* at 47-48.

[64] *See infra* note 67 and associated text.

[65] *Id.* at 48, *quoting* Mozilla Corp. v. F.C.C., 940 F.3d 1, 34 (D.C. Cir. 2019).

[66] *Mozilla*, 940 F.3d at 48-49 ("Section 257(a) simply requires the FCC to consider 'market entry barriers for entrepreneurs and other small businesses.' 47 U.S.C. § 257(a). The disclosure requirements in the transparency rule are in service of this obligation. The Commission found that the elements of the transparency rule in the 2018 Order will 'keep entrepreneurs and other small businesses effectively informed of [broadband provider] practices so that they can develop, market, and maintain Internet offerings.' In fact, the Order takes care to describe the specific requirements of the rule to 'ensure that consumers, entrepreneurs, and other small businesses receive sufficient information to make [the] rule effective.'") (internal citations omitted).

and services.[67] The 2010 Order made clear that its rules, including its "transparency" rules, did not apply to Edge Providers — the very entities that NTIA would now sweep into the FCC regulatory tent:

> these rules apply only to the provision of broadband Internet access service and not to edge provider activities, such as the provision of content or applications over the Internet. First, the Communications Act particularly directs us to prevent harms related to the ***utilization of networks and spectrum to provide communication by wire and radio***. Second, these rules are an outgrowth of the Commission's *Internet Policy Statement*. The Statement was issued in 2005 when the Commission removed key regulatory protections from DSL service, and was intended to protect against the harms to the open Internet that might result from ***broadband providers'*** subsequent conduct. ***The Commission has always understood those principles to apply to broadband Internet access service only***, as have most private-sector stakeholders. Thus, insofar as these rules translate existing Commission principles into codified rules, ***it is appropriate to limit the application of the rules to broadband Internet access service***.[68]

Finally, only by focusing its rules exclusively on broadband providers, and not Edge Providers, was the 2010 Order able to dispense with the First Amendment arguments raised by some ISPs.[69]

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[67] Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905, 17972-80, ¶ 20 (2010) (*2010 Order*).

[68] *Id.* ¶ 50 (footnotes omitted, emphasis added).

[69] The Commission explained:

> In arguing that broadband service is protected by the First Amendment, AT&T compares its provision of broadband service to the operation of a cable television system, and points out that the Supreme Court has determined that cable programmers and cable operators engage in speech protected by the First Amendment. The analogy is inapt. When the Supreme Court held in Turner I that cable operators were protected by the First Amendment, the critical factor that made cable operators "speakers" was their production of programming and their exercise of "editorial discretion over which programs and stations to include" (and thus which to exclude).
>
> Unlike cable television operators, broadband providers typically are best described not as "speakers," but rather as conduits for speech. The broadband Internet access service at issue

Clearly, had the FCC attempted to extend any of its 2010 rules to Edge Providers, it would have then been subject to First Amendment scrutiny it could never have survived.[70] This regulatory "hand's off" approach to Edge Providers has been acknowledged elsewhere in government. "Edge provider activities, conducted on the 'edge' of the internet—hence the name—are not regulated by the Federal Communications Commission (FCC)."[71] The FCC has rejected attempts in the past to regulate social media and other Edge Providers, even at the height of Title II Internet regulation. "The Commission has been unequivocal in declaring that it has no intent to regulate edge providers."[72]

The NTIA Petition now seeks to erase the regulatory lines the FCC has drawn over decades to declare Edge Providers subject to FCC jurisdiction because they provide "information services." None of the cases cited in the NTIA petition relate in any way to whether the FCC has jurisdiction over Edge Providers. *Barnes v. Yahoo!*[73] involved a very narrow ruling related to whether Yahoo!

> here does not involve an exercise of editorial discretion that is comparable to cable companies' choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefiting from an editorial presence. To the contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.

Id. ¶¶ 140-41.

[70] *See infra* at 56-60.

[71] *See, e.g.*, Clare Y. Cho, Congressional Research Service, "Competition on the Edge of the Internet," Jan. 30, 2020, summary, available at: https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf.

[72] *See* In the Matter of Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests. DA 15-1266, adopted November 6, 2015, available at https://docs.fcc.gov/public/attachments/DA-15-1266A1.pdf. That order goes on to state that even after finding that the provision of BIAS was a telecommunications service, At the same time, the Commission specified that in reclassifying BIAS, it was not "regulating the Internet, per se, or any Internet applications or content." Rather, as the Commission explained, its "reclassification of broadband Internet access service involves only the transmission component of Internet access service." Quoting Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, par. 5575 (2015) (*2015 Open Internet Order*).

[73] *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir 2009).

could, notwithstanding Section 230(c)(1), be sued under a theory of promissory estoppel after an employee made a specific promise to take down revenge porn material and the company failed to do so.[74] The fact that the court referred to Yahoo! as a provider of "information services"[75] in no way speaks to whether the FCC has jurisdiction to regulate it under the Communications Act. Likewise, *FTC v. Am. eVoice*[76] is even further afield, as it ***neither*** related to FCC regulations ***nor*** the term "information services."[77] Finally, *Howard v. Am. Online Inc.*,[78] hurts, not helps, NTIA's argument. That case involved a class action suit brought against AOL under far-flung legal theories, everything from RICO to securities law fraud, and eventually, to improper billing under Section 201 of the Communications Act. The court rejected the Section 201 claim, finding that AOL provided an "enhanced service," was not a "common carrier," and thus outside the purview of the FCC's Section 201 regulations.[79]

NTIA's position that any provider of an "information service" is subject to the regulatory authority of the FCC simply is wrong as a matter of law. As we have demonstrated, that the term "information service" appears in Section 153 does not, in itself, confer independent regulatory

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[74] *Id.* at 1109 ("we conclude that, insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the Act does not preclude her cause of action. Because we have only reviewed the affirmative defense that Yahoo raised in this appeal, we do not reach the question whether Barnes has a viable contract claim or whether Yahoo has an affirmative defense under subsection 230(c)(2) of the Act").

[75] *Id.* at 1108.

[76] *FTC v. Am. eVoice, Ltd.*, 242 F. Supp. 3d 1119 (D. Mont. 2017).

[77] *See In re Second Computer Inquiry,* 77 F.C.C.2d 384, 417-23 (1980).

[78] *Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000).

[79] *Id.* at 753 ("hybrid services like those offered by AOL "are information [i.e., enhanced] services, and are not telecommunication services." This conclusion is reasonable because e-mail fits the definition of an enhanced service — the message is stored by AOL and is accessed by subscribers; AOL does not act as a mere conduit for information. Even chat rooms, where subscribers can exchange messages in "real-time," are under AOL's control and may be reformatted or edited. Plaintiffs have failed to show that AOL offers discrete basic services that should be regulated differently than its enhanced services.") (internal citations omitted).

authority on the FCC, and the FCC has properly refrained from even attempting to regulate Edge Providers merely because *some* of the services they provide may fall within that definition. The FCC recognized the danger of such a broad interpretation of its regulatory authority in its 2018 *Restoring Internet Freedom Order*:

> Our interpretation of section 706 of the 1996 Act as hortatory also is supported by the implications of the Open Internet Order's interpretation for the regulatory treatment of the Internet and information services more generally. The interpretation of section 706(a) and (b) that the Commission adopted beginning in the Open Internet Order reads those provisions to grant authority for the Commission to regulate information services so long as doing so could be said to encourage deployment of advanced telecommunications capability at least indirectly. A reading of section 706 as a grant of regulatory authority that could be used to heavily regulate information services—as under the Commission's prior interpretation—is undercut by what the Commission has found to be Congress' intent in other provisions of the Communications Act enacted in the 1996 Act—namely, to distinguish between telecommunications services and information services, ***with the latter left largely unregulated by default***.

The FCC then continued:

> In addition, the 1996 Act added section 230 of the Communications Act, which provides, among other things, that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." A necessary implication of the prior interpretation of section 706(a) and (b) as grants of regulatory authority is that the Commission could regulate not only ISPs but also edge providers or other participants in the Internet marketplace—even when they constitute information services, and notwithstanding section 230 of the Communications Act—so long as the Commission could find at least an indirect nexus to promoting the deployment of advanced telecommunications capability. For example, some commenters argue that "it is content aggregators (think Netflix, Etsy, Google, Facebook) that probably exert the greatest, or certainly the most direct, influence over access." Section 230 likewise is in tension with the view that section 706(a) and (b) grant the Commission regulatory authority as the Commission

> previously claimed. These inconsistencies are avoided, however, if the deployment directives of section 706(a) and (b) are viewed as hortatory.[80]

Finally, as noted previously, the legislative history of the 1996 Telecommunications Act reveals unequivocally that the FCC lacks this regulatory authority. Sponsors Rep. Cox, Rep. Wyden, and others never contemplated that the FCC would have this type of authority.[81] The FCC should refrain from attempting to cobble together authority that simple does not exist, is antithetical to decades of FCC and court precedent, and as we discuss fully below, would violate the First Amendment.

III. NTIA Proposes a New, More Arbitrary Fairness Doctrine for the Internet—Something the First Amendment Bars.

The President's Executive Order argues:

> When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.[82]

This requirement opens the door to punishing ICS providers for "engag[ing] in editorial conduct" of which the government — be that the FTC, state attorneys general, or judges hearing their suits or those of private plaintiffs —disapproves. Such retaliation against the exercise of editorial discretion would be a clear and egregious violation of the First Amendment. As the Supreme Court has repeatedly noted, conditioning the receipt of a

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[80] *RIFO* ¶¶ 273-74 (emphasis added, internal citations omitted).

[81] 141 Cong. Rec. H8469 (statement of Rep. Cox)

[82] Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34080 (June 2, 2020) (*Executive Order*).

benefit (such as immunity) on the surrender of First Amendment rights is no different than a direct deprivation of those rights.[83]

Over two years ago, the Chairman of the House Judiciary Committee invited TechFreedom to testify before the committee. We warned that proposals to reinterpret or amend Section 230 to require political neutrality amounted to a new "Fairness Doctrine for the Internet."[84]

The Original Fairness Doctrine required broadcasters (1) to "adequately cover issues of public importance" and (2) to ensure that "the various positions taken by responsible groups" were aired, thus mandating the availability of airtime to those seeking to voice an alternative opinion. President Reagan's FCC abolished these requirements in 1987. When Reagan vetoed Democratic legislation to restore the Fairness Doctrine, he noted that "the FCC found that the doctrine in fact inhibits broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose."[85]

The Republican Party has steadfastly opposed the Fairness Doctrine for decades. The 2016 Republican platform (re-adopted verbatim for 2020) states: "We likewise call for an

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[83] *See, e.g.*, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 713 (1996) ("While government officials may terminate at-will relationships, unmodified by any legal constraints, without cause, it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."). *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" (quoting *Speiser*, 357 U.S. at 526)).

[84] *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Apr. 26, 2018) (Testimony of TechFreedom), available at http://docs.techfreedom.org/Szoka_Testimony-Platform_Reponsibility_&_Neutrality-4-25-18.pdf.

[85] Message from the President Vetoing S. 742, S. Doc. No. 10-100, at 2 (1987), available at https://www.senate.gov/legislative/vetoes/messages/ReaganR/S742-Sdoc-100-10.pdf.

end to the so-called Fairness Doctrine, and support free-market approaches to free speech unregulated by government."[86] Yet now, under Republican leadership, NTIA proposes to have the FCC institute, without any clear statutory authority, a version of the Fairness Doctrine for the Internet that would be more vague, intrusive, and arbitrary than the original. The Supreme Court permitted the Fairness Doctrine to be imposed on broadcasters only because it denied them the full protection of the First Amendment. The Court has steadfastly refused to create such carveouts for new media. While striking down a state law restricting the purchase of violent video games, Justice Scalia declared: "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[87]

A. Because Social Media Sites Are Not Public Fora, the First Amendment Protects the Editorial Discretion of their Operators.

The NTIA petition breezily asserts that "social media and other online platforms… function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[88] NTIA cites the Supreme Court's recent *Packingham* decision: "Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human

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[86] Republican Platform 2016, at 12 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

[87] *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 790 (2011).

[88] *NTIA Petition*, *supra* note 12, at 7.

thought and knowledge."[89] The Executive Order goes even further: "Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980)."[90] The Executive Order suggests that the First Amendment should *constrain*, rather than protect, the editorial discretion of social media operators because social media are *de facto* government actors.

This claim undergirds both the Executive Order and the NTIA Petition, as it is the only way they can brush aside arguments that the First Amendment bars the government from adjudging the "fairness" of social media. The Executive Order and NTIA, however, flip the First Amendment on its head, undermining the founding American ideal that "Congress shall make no law . . . abridging the freedom of speech."[91]

Both the Order and the Petition omit a critical legal detail about *Packingham*: it involved a *state law* restricting the Internet use of convicted sex offenders. Justice Kennedy's simile that social media is "a 21st century equivalent of the public square" merely conveys the gravity of the deprivation of free speech rights effected by the state law. *Packingham* says nothing whatsoever to suggest that private media companies become *de facto* state actors by virtue of providing that "public square." On the contrary, in his concurrence, Justice Alito expressed dissatisfaction with the "undisciplined dicta" in the majority's opinion and asked

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[89] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

[90] *Executive Order*, *supra* note 82, at 34082.

[91] U.S. Const. amend. I.

his colleagues to "be more attentive to the implications of its rhetoric" likening the Internet to public parks and streets.[92]

The Executive Order relies on the Supreme Court's 1980 decision in *Pruneyard Shopping Center v. Robins*, treating shopping malls as public fora under California's constitution.[93] NTIA makes essentially the same argument, by misquoting *Packingham*, even without directly citing *Pruneyard*. NTIA had good reason *not* to cite the case: it is clearly inapplicable, stands on shaky legal foundations on its own terms, and is antithetical to longstanding conservative positions regarding private property and the First Amendment. In any event, *Pruneyard* involved shopping malls (for whom speech exercised on their grounds was both incidental and unwelcome), not companies for which the exercise of editorial discretion lay at the center of their business. *Pruneyard* has *never* been applied to a media company, traditional or new. The Supreme Court ruled on a very narrow set of facts and said that states have general power to regulate property for certain free speech activities. The Supreme Court, however, has not applied the decision more broadly, and lower courts have rejected *Pruneyard*'s application to social media.[94] Social media companies are in the speech business, unlike businesses which incidentally host the speech of others or post their own speech to their storefronts (*e.g.*, "Black Lives Matter" signs).

In a line of cases following *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court consistently upheld the First Amendment right of media outlets other

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[92] *Packingham,* 137 S. Ct. at 1738, 1743 (Alito J, concurring in judgement).

[93] 447 U.S. 74, 85-89 (1980).

[94] *See hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1115–16 (N.D. Cal. 2017); *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020).

than broadcasters (a special case discussed below). In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), the Court made clear that, unlike broadcasters, digital media operators enjoy the same protections in exercising their editorial discretion as newspapers:

> some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers . . . Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television.[95]

Miami Herald struck down a 1913 state law imposing a version of the Fairness Doctrine on newspapers that required them to grant a "right of reply" to candidates for public office criticized in their pages.[96] The Court acknowledged that there had been a technological "revolution" since the enactment of the First Amendment in 1791. The arguments made then about newspapers are essentially the same arguments NTIA and the Executive Order make about digital media today. The *Miami Herald* court summarized them as follows:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market.[97]

Despite this, the Court struck down Florida's law as unconstitutional because:

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[95] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997).

[96] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[97] *Id*. at 250.

> a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. . . . Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[98]

Critically, the Court rejected the intrusion into the editorial discretion "[e]ven if a newspaper would face no additional costs to comply," because:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.[99]

In exactly the same way, the First Amendment protects a website's decisions about what user-generated content to publish, remove, highlight, or render less accessible. In *Reno,* when the Supreme Court struck down Congress' first attempt to regulate the Internet, it held: "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[100]

Lastly, media companies do not qualify as state actors merely because they provide "platforms" for others' speech. A private entity may be considered a state actor when the entity exercises a function "traditionally exclusively reserved to the State."[101] In a 2019 case *Manhattan v. Halleck*, the Supreme Court held that "operation of public access channels on a

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[98] *Id*. at 256-57.

[99] *Id*. at 258.

[100] *Reno*, 521 U.S. at 870; Brown, 564 U.S. at 790; *see also supra* note 87 and associated text.

[101] *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 352 (1974).

cable system is not a traditional, exclusive public function."[102] "Under the Court's cases, those functions include, for example, running elections and operating a company town," but not "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[103] Justice Kavanaugh, writing for the five conservatives Justices, concluded the majority opinion as follows: "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[104] While *Halleck* did not involve digital media, the majority flatly rejected the argument made by the Executive Order for treating digital media as public fora.

B. The Constitutional Basis for Regulating Broadcast Media Does Not Apply to Internet Media, which Enjoy the Full Protection of the First Amendment.

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld the Fairness Doctrine only as applied to broadcasters, which lack full First Amendment protection. "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards."[105] The Supreme Court has explicitly rejected applying the same arguments to the Internet.[106] Thus,

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[102] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1930 (June 17, 2019), available at https://www.supremecourt.gov/opinions/18pdf/17-1702_h315.pdf (holding that the private operator of a public access TV channel is not a state actor and not bound by the First Amendment in the operator's programming choices).

[103] *Id*. at 1929.

[104] *Id*.

[105] 395 U.S. 367, 386 (1969).

[106] *See supra* note 95 and associated text at 29.

Red Lion represented a singular exception to the rule set forth in *Miami Herald*, and even that exception may not survive much longer.

In *FCC v. Pacifica Foundation*, the Court upheld FCC regulation of indecency in broadcast media.[107] The NTIA Petition invokes *Pacifica*, and the FCC's ongoing regulation of indecent[108] and violent content[109] on broadcast radio and television, to justify reinterpreting Section 230(c)(2)(A) immunity to narrowly protect only content moderation directed at "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" content. Consequently, Section 230(c)(2)(A) would no longer protect moderation driven by other reasons, including political or ideological differences.

The Petition's reliance on *Pacifica* is a constitutional red herring. First, the *Reno* Court clearly held that the invasiveness rationale underlying *Pacifica* did not apply to the Internet.[110] Since 1996, it has become easier than ever for parents to rely on providers of digital media — enabled by Section 230's protections — to ensure that their children are not exposed to content they might consider harmful.[111] Indeed, many of the loudest complaints

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[107] 438 U.S. 726 (1978).

[108] *NTIA Petition*, *supra* note 12, at 34 (Section 223(d)'s (of the Communications Decency Act) "language of 'patently offensive . . .' derives from the definition of indecent speech set forth in the *Pacifica* decision and which the FCC continues to regulate to this day.").

[109] *NTIA Petition*, *supra* note 12, at 35 ("concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip. This device allows viewers to block programming according to an established rating system.")

[110] Even in 1997, the *Reno* court recognized that, "the Internet is not as 'invasive' as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' It also found that '[a]lmost all sexually explicit images are preceded by warnings as to the content,' and cited testimony that "`odds are slim' that a user would come across a sexually explicit sight by accident." 521 U.S. at 869 (internal citations omitted).

[111] *See, e.g.,* Caroline Knorr, Parents' Ultimate Guide to Parental Control, Common Sense Media (June 6, 2020), *available at* https://www.commonsensemedia.org/blog/parents-ultimate-guide-to-parental-controls

about political bias are really complaints about those controls being applied in ways that some people allege are politically harmful[112] — because they believe there is *too much* content moderation going on online. This is the very opposite of the situation undergirding *Pacifica*: the impossibility, in the 1970s, of protecting children from adult-oriented programming broadcast in primetime hours.

In its comments, American Principles Project rejects Justice Stevens' statement in *Reno* that the Internet "is not as 'invasive' as radio and television."[113] "Today," APP argues, "a seventh grader with a smartphone has unlimited access to the most grotesque pornographic live streams imaginable. Very few porn sites have implemented any sort of age verification system to prevent this from happening."[114] APP ignores, however, *Pacifica*'s clear caveat: "It is appropriate, in conclusion, to emphasize the narrowness of our holding."[115] *Pacifica* was decided at a time when the only methods available for parents to control what their children heard on the radio were (a) change the channel, (b) to unplug or hide the radio and (c) to send their children to bed by a certain hour. Thus, the FCC did not "prevent respondent Pacifica Foundation from broadcasting [George Carlin's "Seven Dirty Words"] monologue during late evening hours when fewer children are likely to be in the audience."[116]

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[112] *See infra* at 34.

[113] Americans Principles Project Comment on the NTIA Petition for Rulemaking and Section 230 of the Communications Act of 1934 (Aug. 27, 2020) (*APP Comments*), https://ecfsapi.fcc.gov/file/10827668503390/APP%20Comment%20on%20NTIA%20Petition%20Sec.%20230%20082720.pdf

[114] *Id*. at 2.

[115] 438 U.S. at 750.

[116] *Id*. at 760.

Today, Apple offers robust parental control technologies on its iOS operating system for mobile devices that allow parents to restrict not only the Internet content that their children can access, but also the "playback of music with explicit content and movies or TV shows with specific ratings."[117] Google's Android offers similar functionality for apps, games, movies, TV, books and music."[118] While the company notes that "[p]arental controls don't prevent seeing restricted content as a search result or through a direct link,"[119] a wide range of third party parental control apps can be installed on Android devices to restrict access to such content, and "parental control software tends to be more powerful on Android than on iOS, since Apple locks down app permissions and device access."[120] If a seventh grader is using their smartphone to access "grotesque pornographic live streams," it is because their parent has not taken advantage of these robust parental controls. Less restrictive alternatives need not be perfect to be preferable to regulation, as Justice Thomas has noted.[121] Finally, APP completely ignores why it is that "[v]ery few porn sites have implemented any sort of age verification system": Congress attempted to mandate such age verification in the Child Online Privacy Act (COPA) of 1998, but the Court struck this

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[117] Prevent explicit content and content ratings, Apple, https://support.apple.com/en-us/HT201304#explicit-content (last visited Sept. 2, 2020).

[118] Set up parental controls on Google Play, Google For Families Help, https://support.google.com/families/answer/1075738?hl=en (last visited Sept. 2, 2020).

[119] *Id*.

[120] Neil J. Rubenking & Ben Moore, The Best Parental Control Apps for Your Phone, PCMag (Apr. 7, 2020), https://www.pcmag.com/picks/the-best-parental-control-apps-for-your-phone.

[121] Justice Thomas has rejected the Supreme Court's rationale for "wholesale limitations [on contributions to political campaigns] that cover contributions having nothing to do with bribery": "That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored." Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 643 (1996) (Thomas, J. concurring in part and dissenting in part).

requirement down as unconstitutional.[122] But even if the rationale of *Pacifica* did somehow apply to the Internet (despite the clear holding of *Reno* that it does not), it would justify *more* aggressive content moderation, not *limits* on content moderation. Social media providers offer tools that allow parents to protect their children from potentially objectionable content — and yet have been accused of political bias for doing so. For example, when YouTube placed PragerU videos into "Restricted Mode" — an *opt-in* feature offered to parents, schools and libraries, which anyone but children (or others without device administrator privileges) could turn off — it did so because it considered the material to be "potentially mature content."[123] The logic of *Pacifica* suggests encouraging such tools, not punishing them with litigation.

C. Requiring Websites to Cede Editorial Discretion to Qualify for Section 230 Protections Imposes an Unconstitutional Condition on Their First Amendment Rights.

Lawmakers of both parties claim that Section 230 is a special privilege granted only to large websites, and that withholding this "subsidy" raises no First Amendment issues because websites are not legally entitled to it in the first place. In truth, Section 230 applies equally to *all* websites. Consequently, Section 230 protects newspapers, NationalReview.com, FoxNews.com, and every local broadcaster from liability for user

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[122] *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

[123] YouTube rates videos as mature if they contain drugs and alcohol, sexual situations, incendiary and demeaning content, mature subjects, profane and mature language, or violence. YouTube content rating, YouTube Help, https://support.google.com/youtube/answer/146399?hl=en (last visited Sept. 2, 2020). Further, YouTube breaks down videos into three subcategories: no mature content, mild mature content, and mature content that should be restricted for viewers under 18. Similarly, Facebook's community standards go far beyond what the First Amendment allows the government to regulate — limiting violence, hate speech, nudity, cruel and insensitive content, and many other categories that violate Facebook's community standards.

comments posted on their website in exactly the same way it protects social media websites for user content. Indeed, the law protects ICS users just as it protects providers. President Trump himself relied upon Section 230 to have dismissed a lawsuit against him alleging that he was liable for retweeting defamatory material posted by another Twitter user.[124] Providers and users of ICS services alike rely on Section 230, without which they would face "death by ten thousand duck-bites."[125] Thus, as the *Roommates* court explained, "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[126]

The "unconstitutional conditions" doctrine prevents the FCC —and, for that matter, Congress — from denying the protections of Section 230 to websites who choose to exercise their editorial discretion. The Supreme Court has barred the government from forcing the surrender of First Amendment rights as a condition of qualifying for a benefit or legal status.

1. The Supreme Court Has Forbidden the Use of Unconstitutional Conditions Intended to Coerce the Surrender of First Amendment Rights.

In *Speiser v. Randall*, the Supreme Court struck down a California law denying tax exemptions to World War II veterans who refused to swear a loyalty oath to the United States: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[127] The court distinguished between this case and earlier cases upholding loyalty oaths for positions of public employment, candidates for public

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[124] Cristiano Lima, Before bashing tech's legal shield, Trump used it to defend himself in court, Politico (June 4, 2020), https://www.politico.com/news/2020/06/04/tech-legal-trump-court-301861.

[125] *Fair v. Roommates,* 521 F.3d 1157, 1174 (9th Cir. 2008).

[126] *Id*.

[127] 357 U.S. 513, 521 (1958).

office, and officers of labor unions, where the "congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially."[128]

The Court articulated this distinction more fully in *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.* ("*USAID*"). The Court struck down a federal law requiring that recipients of federal funding intended to fight AIDS worldwide adopt a "policy explicitly opposing prostitution."[129] The Court noted that "Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem."[130] But, explained the Court,

> the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.[131]

Thus, in *Regan v. Taxation with Representation of Wash*, the Court ruled that, by "limiting §501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely 'chose[n] not to subsidize lobbying.'"[132] Critically, however, this limitation is not "unduly burdensome" because, by "separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3)

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[128] *Speiser*, 357 U.S. at 527 (citing *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951) (public employees); *Gerende v. Bd. of Supervisors*, 341 U.S. 56 (1951) (candidates for public office); *Am. Commc'ns Ass'n. v. Douds*, 339 U.S. 382 (1950) (labor union officers)).

[129] 570 U.S. 205 (2013).

[130] *Id*. at 216 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

[131] *Id*. at 214.

[132] 570 U.S. 205 at 215 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983)).

status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds."[133]

By contrast, in *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984), the Court had, as it later explained in *USAID*:

> struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program.[134]

In short, the Supreme Court will not allow conditions on eligibility for a government benefit to be used to do what the First Amendment forbids the government to do directly: change the decisions made by private actors about what speech they will and will not engage in (or host).

2. NTIA Proposes to Condition Eligibility for Section 230 Immunity on a Website's Surrender of Its Editorial Discretion.

The proposal would allow the government to use Section 230 to regulate the decisions ICS providers make about which speech to host. NTIA would no doubt argue that the "scope of the program" of Section 230 immunity has always intended to ensure political

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[133] Id. (citing *Regan*, 461 U.S., at 545, n.6).

[134] 570 U.S. 205, 215 (internal citations omitted) (citing and quoting *League of Women Voters of Cal.*, 468 U.S. at 399-401).

neutrality across the Internet, citing the "forum for a true diversity of political discourse" language in 230(a)(3); however, the *USAID* Court anticipated and rejected such attempts to erase the distinction it recognized across its previous decisions:

> between conditions that define the limits of the government spending program …. and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[135]

Here, the proposal would compel *every* social media operator to cede its editorial discretion to remove (or render inaccessible) content that it finds objectionable, especially for political or ideological reasons. This goes beyond laws which allow regulated entities to continue to exercise their First Amendment rights through some other vehicle, be that by setting up a separate 501(c)(4), as in *Regan*, or simply segmenting their activities into subsidized and unsubsidized buckets. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a federal program that subsidized family planning services, except "in programs where abortion is a method of family planning."[136] The Court explained:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one

[135] *USAID*, 570 U.S. at 214.

[136] *Rust*, 500 U.S. at 216.

> activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[137]

"Because the regulations did not 'prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,' they did not run afoul of the First Amendment."[138]

With Section 230, it would be impossible to distinguish between an entity qualifying overall and specific "projects" qualifying for immunity (while the same entity could simply run other, unsubsidized projects). Just as each broadcaster in *League of Women Voters* operated only one station, social media sites cannot simply clone themselves and run two separate versions, one with limited content moderation and an alternate version unprotected by Section 230. Without the protection of Section 230, only the largest sites could manage the legal risks inherent in hosting user content.[139] Moreover, even for those largest sites, how could a social network split into two versions? Even if such a thing could be accomplished, it would be *far* more difficult than strategies which the Court has recognized as "not unduly burdensome" — such as having separate family planning "programs" or non-profits dividing their operations into separate 501(c)(3) and 501(c)(4) sister organizations.[140]

Consider how clearly the same kind of coercion would violate the First Amendment in other contexts. For example, currently pending legislation would immunize businesses

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[137] *Id*. at 192 (quoting *Regan*, 461 U.S. at 549).

[138] *USAID*, 570 U.S. at 217 (internal citations omitted) (quoting *Rust*, 500 U.S. at 196-97).

[139] *See, e.g.*, Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598 (2018).

[140] *See supra* note 133.

that re-open during the pandemic from liability for those who might be infected by COVID-19 on their premises.[141] Suppose such legislation included a provision requiring such businesses to be politically neutral in any signage displayed on their stores — such that, if a business put up or allowed a Black Lives Matter sign, they would have to allow a "right of reply" in the form of a sign from "the other side" (say, "All Lives Matter" or "Police Lives Matter"). The constitutional problem would be just as clear as it has been in cases where speech has been compelled directly.

3. The Proposal Would Compel ICS Providers to Carry Speech they Do Not Wish to Carry and Associate Themselves with Views, Persons and Organizations They Find Repugnant.

In *Pacific Gas Elec. Co. v. Public Util. Comm'n*, the Court struck down a California regulatory rule forcing a utility to include political editorials critical of the company along with the bills it mailed to its customers. "Since *all* speech inherently involves choices of what to say and what to leave unsaid …. For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[142] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, wherein the Supreme Court barred the city of Boston from forcing organizers' of St. Patrick's Day parade to include pro-LGBTQ individuals, messages, or signs that conflicted with the organizer's beliefs.[143] The "general rule" is "that the speaker

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[141] *See, e.g.*, SAFE TO WORK Act, S.4317, 116th Cong. (2020), https://tinyurl.com/y694vzxc.

[142] 475 U.S. 1, 10, 16 (1986) (plurality opinion) (emphasis in original) (internal quotations omitted) (quoting *Harper Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985)).

[143] 515 U.S. 557, 573 (1995) (citation and quotation omitted).

has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[144]

In neither case was it sufficient to overcome the constitutional violation that the utility or the parade organizer might attempt to disassociate itself with the speech to which they objected. Instead, as the *Hurley* court noted, "we use the word 'parade' to indicate marchers who are making some sort of *collective* point, not just to each other but to bystanders along the way."[145] By the same token it would be difficult, if not impossible, for a social media site to disassociate itself from user content that it found repugnant, but which it was effectively compelled to host.

In treating certain shopping malls as public fora under the California constitution, *Pruneyard* emphasized that they could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."[146] But users naturally assume speech carried by a social network reflects their decision to carry it — just as Twitter and Facebook have been attacked for *not* removing President Trump's tweets or banning him from their services.[147]

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[144] *Id*. at 573 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-342 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-798 (1988).

[145] *Id*. at 568 (emphasis added).

[146] *Pruneyard*, 447 U.S. at 87.

[147] "For the first time, Twitter has added a fact-check label to a tweet by President Donald Trump that claimed mail-in election ballots would be fraudulent. But it stopped short of removing those tweets or others he posted earlier this month about a false murder accusation that generated huge criticism against the company for failing to remove them." Danielle Abril, *Will Twitter Ever Remove Trump's inflammatory Tweets?* FORTUNE (May 26, 2020, 7:54 PM) https://fortune.com/2020/05/26/twitter-president-trump-joe-scarborough-tweet/

If anything, disclaimers may actually be *less* effective online than offline. Consider the three labels Twitter has applied to President Trump's tweets (the first two of which provoked the issuance of his Executive Order).

This example[148] illustrates how difficult it is for a website to effectively "disavow any connection with the message."[149] It fails to communicates Twitter's disavowal while creating further ambiguity: it could be interpreted to mean there really *is* some problem with mail-in ballots.

Similarly, Twitter added a "(!) Manipulated Media" label just below to Trump's tweet of a video purporting to show CNN's anti-Trump bias.[150] Twitter's label is once again ambiguous: since Trump's video claims that CNN had manipulated the original footage, the "manipulated media" claim could be interpreted to refer to either Trump's video or CNN's. Although the label links to an "event" page explaining the controversy,[151] the warning works (to whatever degree it does) only if users actually click through to see the page. It is not obvious that the label is actually a link that will take them to a page with more information.

Finally, when Trump tweeted, in reference to Black Lives Matter protests, "when the looting starts, the shooting starts,"[152] Twitter did not merely add a label below the tweet. Instead, it hid the tweet behind a disclaimer. Clicking on "view" allows the user to view the original tweet:

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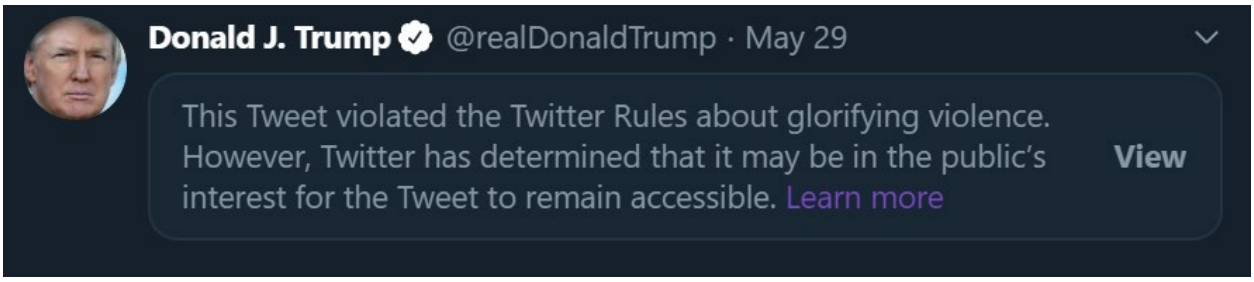
[148] @realDonaldTrump, TWITTER (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392.

[149] *Pruneyard*, 447 U.S. at 87.

[150] @realDonaldTrump, TWITTER, (June 18, 2020, 8:12 PM), https://twitter.com/realDonaldTrump/status/1273770669214490626.

[151] *Video being shared of CNN report on toddlers is doctored, journalists confirm*, Twitter (June 18, 2020), https://twitter.com/i/events/1273790055513903104.

[152] @realDonaldTrump, TWITTER (May 29, 2020, 12:53 AM), https://twitter.com/realDonaldTrump/status/1266231100780744704.



Such ambiguities are unavoidable given the difficulties of designing user interface in a medium optimized for 280 characters, with a minimum of distraction around Tweets. But no matter how clear they become, sites like Twitter will still be lambasted for choosing only to apply labels to such material, rather than to remove it completely.[153]

Further, adding such disclaimers invites further harassment and, potentially, lawsuits from scorned politicians — perhaps even more so than would simply taking down the material. For example, Twitter's decision to label (and hide) Trump's tweet about mail-in voting seems clearly to have provoked issuance of the Executive Order two days later — and the Order itself complains about the label.[154] In the end, the only truly effective way for Twitter to "expressly disavow any connection with [Trump's] message"[155] would be to ban him from their platform — precisely the kind of action the Executive Order and NTIA Petition aim to deter.

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[153] *See supra* note 147.

[154] Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34079 (June 2, 2020) ("Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet.").

[155] *Pruneyard*, 447 U.S. at 87.

4. The First Amendment Concerns are Compounded by the Placement of the Burden of Qualifying for Eligibility upon ICS Providers.

Today, Section 230(c)(1) draws a clear line that enables ICS providers and users to exercise their editorial discretion without bearing a heavy burden in defending their exercise of their First Amendment rights that that exercise is chilled by the threat of litigation. Specifically, if sued, they may seek to have a lawsuit against them dismissed under F.R.C.P. 12(b)(6) merely by showing that (1) that it is an ICS provider, (2) that the plaintiff seeks to hold them liable "as the publisher" of (3) of information that they are not responsible, even in part, for creating. While the defendant bears the burden of establishing these three things, it is a far lesser burden than they would bear if they had to litigate a motion to dismiss on the merits of the claim. More importantly, the plaintiff bears the initial burden of pleading facts that, if proven at trial, would suffice to prove both (a) their claim and (b) that the Section 230(c)(1) immunity does not apply.[156] While this burden is low, it is high enough to allow many such cases to be dismissed outright, because the plaintiff has simply failed even to allege facts that could show that the ICS provider or user is responsible, even in part, for the development of the content at issue.

The NTIA Petition places heavy new burdens upon ICS providers to justify their content moderation practices as a condition of claiming Section 230 immunity: Not only must they prove that their content moderation decisions were made in good faith (something (c)(1) plainly does not require, but which would, under NTIA's proposal, no longer protect content moderation), they would also have to satisfy a series of wholly new

[156] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)*; Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

requirements to prove their good faith.[157] In *Speiser*, the Court declared: "The power to create presumptions is not a means of escape from constitutional restrictions."[158] Yet this is precisely what NTIA seeks to do. The Court will not allow such a circumventing of the First Amendment:

> ***Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion***. … The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized. ***The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens***.[159]

The NTIA petition will have precisely that effect: to force social media operators to steer as wide as possible of content moderation decisions that they fear might offend this administration, future administrations, state attorneys general, or private plaintiffs.

5. NTIA's Rewriting of Section 230 Would Facilitate Discrimination by the Government based on Both the Content at Issue and the Provider's Viewpoint, Under the Guise of Mandating "Neutrality."

NTIA's proposal, by contrast, *maximizes* the potential for viewpoint discrimination by the government in determining which companies qualify for the protections of Section 230. Consider just a few of the criteria an ICS provider would have to satisfy to establish its eligibility for immunity.

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[157] *NTIA Petition*, *supra* note 12, at 39.

[158] *Speiser*, 357 U.S. at 526.

[159] *Id*. at 525.

Requirement #1: <u>Not</u> Having a Viewpoint. NTIA proposes to exclude "presenting or prioritizing [user content] with a reasonably discernible viewpoint" from the definition of an ICS provider altogether,[160] making any ICS provider that the government decides *does* have such a viewpoint ineligible for any of Section 230's three immunities. This requirement is both far more draconian and more arbitrary than was the original Fairness Doctrine[161]as the FCC did *not* bar the broadcaster from having its own viewpoint.[162]

Requirement #2 Line-drawing Between Permitted and Disqualifying Content Moderation. Limiting the categories of content moderation that qualify for the (c)(2)(A) immunity (by reinterpreting "otherwise objectionable" very narrowly[163]) inevitably creates a difficult problem of line-drawing, in which the ICS provider would bear the burden of proof to establish proof that it "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[164] For example, all major social media platforms limit or bar the display of images of abortions being performed or aborted fetuses. Pro-life groups claim their content (or ads) have been "censored" for political reasons. Facebook and Twitter might argue that abortion imagery is "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials," but the

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[160] Petition at 42.

[161] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

[162] At most, the FCC's "political editorial rule required that when a broadcaster endorsed a particular political candidate, the broadcaster was required to provide the other qualified candidates for the same office (or their representatives) the opportunity to respond over the broadcaster's facilities." Congressional Research Service, Fairness Doctrine: History and Constitutional Issues, R40009, at 3 (2011), https://fas.org/sgp/crs/misc/R40009.pdf (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (2011)).

[163] *See infra* at 78 et seq.

[164] Petition at 39.

government may not agree. Similarly, where is the line between "excessively violent" content and the "hateful" content or conduct banned on major platforms?[165]

Requirement #3: Non-Discrimination. NTIA proposes that an ICS provider must show that its content moderation practices are not discriminatory to qualify for any Section 230 immunity — specifically, that it "does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict."[166] How could a provider prove yet another negative?

Even when a plaintiff makes a *prima facie* showing that content moderation has had politically disparate effects, this would not actually *prove* bias in moderation. Dennis Prager's *Wall Street Journal* op-ed[167] points to the empirical study conservatives have pointed to most often to prove their claims of Twitter's political bias. Richard Hanania, a Research Fellow at the Saltzman Institute of War and Peace Studies at Columbia University, assembled:

> a database of prominent, politically active users who are known to have been temporarily or permanently suspended from the platform. My results make it difficult to take claims of political neutrality seriously. Of 22 prominent, politically active individuals who are known to have been suspended since 2005 and who expressed a preference in the 2016 U.S. presidential election, 21 supported Donald Trump.[168]

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[165] Twitter will "allow limited sharing of hateful imagery, provided that it is not used to promote a terrorist or violent extremist group, that you mark this content as sensitive and don't target it at an individual." Twitter, Media Policy, https://help.twitter.com/en/rules-and-policies/media-policy (last visited Aug. 31, 2020).

[166] Petition at 39.

[167] Dennis Prager, *Don't Let Google Get Away With Censorship*, Wall St. J. (Aug. 6, 2019), https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175.

[168] Richard Hanania, *It Isn't your Imagination: Twitter Treats Conservatives More Harshly Than Liberals,* Quillette (Feb. 12, 2019), https://quillette.com/2019/02/12/it-isnt-your-imagination-twitter-treats-conservatives-more-harshly-than-liberals/.

Hanania clearly creates the impression that Twitter is anti-Trump. Nowhere does he (or those who cite him, including Prager) mention just who were among the accounts (43 in the total data set) of Trump supporters "censored" by Twitter. They include, for example, (1) the American Nazi Party; (2) the Traditionalist Worker Party, another neo-Nazi group; (3) "alt-right" leader Richard Spencer; (4) the National Policy Institute, the white supremacist group Spencer heads; (5) the League of the South, a neo-Confederate white supremacist group; (6) American Renaissance, a white supremacist online publication edited by (7) Jared Taylor; (8) the Proud Boys, a "men's rights" group founded by (9) Gavin McInnes and dedicated to promoting violence against their political opponents, (10) Alex Jones, America's leading conspiracy theorist, and publisher of (11) InfoWars; a series of people who have made careers out of spreading fake news including (12) Chuck Johnson and (13) James O'Keefe; "alt-right" personalities that repeatedly used the platform to attack other users, including (14) Milo Yiannopoulos and (15) Robert Stacy McCain; and (16) the Radix Journal, an alt-right publication founded by Spencer and dedicated to turning America into an all white "ethno-state," and so on.[169] While Prager's op-ed leaves readers of the Wall Street Journal with the impression that Hanania had proved systematic bias against ordinary conservatives like them, the truth is that Hanania made a list of users that elected Republican member of Congress would ever have identified with prior to 2016, and, one hopes, few would identify with now as "conservatives." More importantly, as Hanania notes in his database — but fails to mention in his *Quillette* article — for each of these users, Twitter had identified categories of violations of its terms of service, summarized by Hanania himself to

[169] Richard Hanania, *Replication Data for Article on Social Media Censorship*, https://www.richardhanania.com/data (last visited Sept. 2, 2020).

include "Pro-Nazi tweets," "violent threats," "revenge porn," "anti-gay/racist slurs," "targeted abuse," *etc*.[170]

Did Twitter "discriminate" against conservatives simply because it blocked more accounts of Trump supporters than Clinton supporters? Clearly, Hanania's study does not prove that Twitter "discriminates," but under the NTIA's proposal it is Twitter that bears the burden of proof. How could it possibly disprove such claims? More importantly, how could it be assured, in advance of making content moderation decisions, that its decision-making would not be declared discriminatory after the fact?

By the same token, even if there were evidence that, say, social media service providers refused to carry ads purchased by Republican politicians at a higher rate than Democratic politicians (or refused to accept ad dollars to increase the reach of content those politicians had posted to ensure that it would be seen by people who would not have seen the "organic" posts), this disparate impact would not prove political bias, because it does not account for differences in the degree to which those ads complied with non-political requirements in the website's community standards. Similarly, it is impossible to prove political bias by showing that media outlets on the left and right are affected differently by changes to the algorithms that decide how to feature content, because those are not apples to apples comparisons: those outlets differ significantly in terms of their behavior. NewsGuard.com, a startup co-founded by Gordon Crovitz, former publisher of *The Wall Street Journal* and a lion of traditional conservative journalism, offers "detailed ratings of more than 5,800 news websites that account for 95% of online engagement with news" that

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[170] *Id.*

one can access easily alongside search results via a browser extension.[171] NewsGuard gives InfoWars a score of 25/100,[172] and GatewayPundit an even lower score: 20/100.[173] DiamondAndSilk.com ranks considerably higher: 52/100.[174] These outlets simply are not the same as serious journalistic outlets such as *The National Review*, *The Wall Street Journal* or *The Washington Post* — and it what might qualify as a "similarly situated" outlet is inherently subjective. That such outlets might be affected differently by content moderation and prioritization algorithms from serious media outlets hardly proves "discrimination" by any social media company.

Requirement #4: "Particularity" in Content Moderation Policies. Requiring companies to show that their policies were sufficiently granular to specify the grounds for moderating the content at issue in each new lawsuit would create a staggering burden. It will be impossible to describe all the reasons for moderating content while also keeping "community standards" documents short and digestible enough to serve their real purpose: informing users of the general principles on which the site makes content moderation decisions.

Requirement #5: Proving Motives for Content Moderation. As if all this were not difficult enough, NTIA would require ICS providers seeking, in each lawsuit, to qualify for the (c)(2)(A) immunity, to prove that their content moderation decision was not made on

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[171] The Internet Trust Tool, NewsGuard, https://www.newsguardtech.com/ (last visited Sep. 2, 2020).

[172] infowars.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/03/infowars-ENG-3-13x.pdf (last visited Sep. 2, 2020).

[173] thegatewaypundit.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/02/The-Gateway-Pundit-NewsGuard-Nutrition-Label.pdf (last visited Sep. 2, 2020).

[174] diamondandsilk.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/04/diamondandsilk.com-1.pdf (last visited Sep. 2, 2020).

"deceptive or pretextual grounds."[175] In short, an ICS provider would have to prove its motive — or rather, lack of ill motive — to justify its editorial discretion. If there is precedent for such an imposition on the First Amendment rights of a media entity of any kind, the NTIA does not cite it.

Requirement #6: Rights to Explanation & Appeals. Finally, NTIA would require an ICS provider to supply third parties "with timely notice describing with particularity [their] reasonable factual basis for the restriction of access and a meaningful opportunity to respond," absent exigent circumstances.[176] Thus, whenever the ICS provider claims the (c)(2)(A) immunity, they must defend not merely the adequacy of their system for providing explanation in general, but the particular explanation given in a particular case.

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Each of these six requirements would be void for vagueness, particularly because "a more stringent vagueness test should apply" to any that "interferes with the right of free speech."[177] As Justice Gorsuch recently declared, "the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power."[178] These requirements are so broad and require so much discretion in their

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[175] Petition at 39.

[176] The Petition's proposed regulation would require that a platform must "suppl[y] *the interactive computer service of the material* with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond..." Petition at 39-40. The only way to read this sentence that makes any sense is to assume that NTIA intended to require the ICS *provider* to provide the ICS *user* (which is also, in most circumstances, the "information content provider" defined by 230(f)(2)); in other words, it appears that they wrote "interactive computer service" when they meant "information content provider."

[177] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

[178] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018).

implementation that they invite lawmakers to apply them to disfavored speakers or platforms while giving them cover not to apply them to favored speakers or platforms.[179] Thus, the "Court has condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity.""[180] "It is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.'"[181] In that case, the Court recognized that "some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as 'political.'"[182] Under NTIA's proposal, both the FCC, in making rules, and judges, in applying them to determine eligibility for Section 230 immunity, would inevitably make decisions guided not by objective, workable standards, but by their own political views.

IV. It Is Not Section 230 but the First Amendment that Protects Social Media Providers, Like Other Media, from Being Sued for the Exercise of Their Editorial Discretion.

The premise of the NTIA Petition is that the rules it asks the FCC to promulgate will make it possible to sue social media providers for their content moderation practices. Just as

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[179] *Police Dept of City of Chicago v. Mosley*, 408 U.S. 92, 96-99 (1972).

[180] *Id*. at 97 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555-558 (1965); Staub v. City of Baxley, 355 U.S. 313, 321-325 (1958); *Saia* v. *New York*, 334 U.S. 558, 560-562 (1948)).

[181] *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

[182] *Id*.

the Executive Order explicitly demands enforcement of promises of neutrality,[183] NTIA argues:

> if interactive computer services' contractual representations about their own services cannot be enforced, interactive computer services cannot distinguish themselves. Consumers will not believe, nor should they believe, representations about online services. Thus, no service can credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns.[184]

This premise is false: even if the FCC had the statutory authority to issue the rules NTIA requests, forcing social media providers to "state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices"[185] would violate the First Amendment, as would attempting to enforce those promises via consumer protection, contract law or other means. What NTIA is complaining about is not, Section 230, but the Constitution. The category of "representations" about content moderation that *could*, perhaps, be enforced in court would be narrow and limited to claims that are quantifiable or otherwise verifiable without a court having to assess the way a social media company has exercised its editorial discretion.

The NTIA Petition focused on what it wants the FCC to do: make rules effectively rewriting Section 230. But the Executive Order that directed the NTIA to file this petition (and laying out the essential contours of its argument) also contemplates the FTC and state attorneys general using consumer protection law to declare unfair or deceptive "practices by entities covered by section 230 that restrict speech in ways that do not align with those

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[183] *See Executive Order*, supra note 82.

[184] Petition at 26.

[185] *Id*.

entities' public representations about those practices."[186] Without mentioning such enforcement directly, the NTIA proposal clearly contemplates it and intends to facilitate it. The proposal would create a four-prong test for assessing whether content moderation had been done in "good faith."[187] Among those is a requirement that the ICS provider **"**restricts access to or availability of material or bars or refuses service to any person ***consistent with publicly available terms of service or use that state plainly and with particularity*** the criteria the interactive computer service employs in its content-moderation practices."[188]

A. Community Standards Are Non-Commercial Speech, Unlike the Commercial Speech That Can Be Regulated by Consumer Protection Law.

The Federal Trade Commission has carefully grounded its deception authority in the distinction long drawn by the Supreme Court between commercial and non-commercial speech, as best articulated in *Central Hudson Gas Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Commercial speech is which "[does] no more than propose a commercial transaction."[189] In *Pittsburgh Press Co. v. Human Rel. Comm'n*, the Supreme Court upheld a local ban on referring to sex in the headings for employment ads. In ruling that the ads at issue were not non-commercial speech (which would have been fully protected by the First Amendment), it noted: "None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them

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[186] *Executive Order*, *supra* note 82, Section 4 (c).

[187] Petition at 39.

[188] *Id*.

[189] *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385 (1973) (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

criticize the Ordinance or the Commission's enforcement practices."[190] In other words, a central feature of commercial speech is that it is "devoid of expressions of opinions with respect to issues of social policy."[191] This is the distinction FTC Chairman Joe Simons was referring to when he told lawmakers that the issue of social media censorship is outside the FTC's remit because "our authority focuses on commercial speech, not political content curation."[192]

While "terms of service" for websites might count as commercial speech, the kind of statement made in "community standards" clearly "expresses a position on … matter[s] of social policy." Consider just a few such statements from Twitter's "rules":

> Violence: You may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence. Learn more about our violent threat and glorification of violence policies.
>
> Terrorism/violent extremism: You may not threaten or promote terrorism or violent extremism. …
>
> Abuse/harassment: You may not engage in the targeted harassment of someone, or incite other people to do so. This includes wishing or hoping that someone experiences physical harm.
>
> Hateful conduct: You may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, caste, sexual

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[190] *Id*. at 385.

[191] The Constitution of the United States of America, Analysis and Interpretation, Prepared by the Congressional Research Service, Library of Congress (June 28, 2020) Page 1248 https://books.google.com/books?id=kAAohNvVik8C&pg=PA1248&lpg=PA1248&dq=%22devoid+of+expressions+of+opinions+with+respect+to+issues+of+social+policy%22&source=bl&ots=Ftv1KrxXrO&sig=ACfU3U0kK1Hj2fil69UlwwZ7Rr6vPNzzcQ&hl=en&sa=X&ved=2ahUKEwj_v-WA3cPrAhWej3IE

available at *https://www.law.cornell.edu/constitution-conan/amendment-1/commercial-speech.*

[192] Leah Nylen, *Trump Aides Interviewing Replacement for Embattled FTC* Chair, POLITICO(August 28, 2020, 02:28 PM), *available at* https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479.

> orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.[193]

Each of these statements clearly "expresses a position on … a matter of social policy,"[194] and therefore is clearly non-commercial speech that merits the full protection of the First Amendment under the exacting standards of strict scrutiny. ""If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[195]

B. The First Amendment Does Not Permit Social Media Providers to Be Sued for "Violating" their Current Terms of Service, Community Standards, or Other Statements About Content Moderation.

In 2004, when MoveOn.org and Common Cause asked the FTC to proscribe Fox News' use of the slogan "Fair and Balanced" as a deceptive trade practice.[196] The Petition acknowledged that Fox News had "no obligation whatsoever, under any law, actually to present a 'fair' or 'balanced' presentation of the news,"[197] but argued: "What Fox News is not free to do, however, is to advertise its news programming—a service it offers to consumers in competition with other networks, both broadcast and cable—in a manner that is blatantly

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[193] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

[194] *Pittsburgh Press*, 413 U.S. at 385.

[195] *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[196] Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act, MoveOn.org and Common Cause (July 19, 2004), https://web.archive.org/web/20040724155405/http://cdn.moveon.org/content/pdfs/ftc_filing.pdf

[197] *Id*. at 2.

and grossly false and misleading."[198] FTC Chairman Tim Muris (a Bush appointee) responded pithily: "I am not aware of any instance in which the [FTC] has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency."[199]

Deception claims always involve comparing marketing claims against conduct.[200] Muris meant that, in this case, the nature of the claims (general claims of fairness) meant that their accuracy could not be assessed without the FTC sitting in judgment of how Fox News exercised its editorial discretion. The "Fair and Balanced" claim was not, otherwise, verifiable — which is to say that it was not *objectively* verifiable.

PragerU attempted to use the same line of argument against YouTube. The Ninth Circuit recently dismissed their deceptive marketing claims. Despite having over 2.52 million subscribers and more than a billion views, this controversialist right-wing producer[201] of "5-minute videos on things ranging from history and economics to science and happiness," sued YouTube for "unlawfully censoring its educational videos and discriminating against its right to freedom of speech."[202] Specifically, Dennis Prager alleged[203] that roughly a sixth of the

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[198] *Id*. at 3.

[199] Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris.

[200] Fed. Trade Comm'n, FTC Policy Statement on Deception, at 1 (Oct. 14, 1983) (*Deception Statement*).

[201] PragerU, YOUTUBE, https://www.youtube.com/user/PragerUniversity/about (last visited July 26, 2020).

[202] *PragerU Takes Legal Action Against Google and YouTube for Discrimination*, PragerU (2020), https://www.prageru.com/press-release/prageru-takes-legal-action-against-google-and-youtube-for-discrimination/.

[203] Dennis Prager, *Don't Let Google Get Away With Censorship*, The Wall Street Journal (Aug. 6, 2019), https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175.

site's videos had been flagged for YouTube's Restricted Mode,[204] an opt-in feature that allows parents, schools and libraries to restrict access to potentially sensitive (and is turned on by fewer than 1.5% of YouTube users). After dismissing PragerU's claims that YouTube was a state actor denied First Amendment protection, the Ninth Circuit ruled:

> YouTube's braggadocio about its commitment to free speech constitutes ***opinions*** that are not subject to the Lanham Act. Lofty but vague statements like "everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories" or that YouTube believes that "people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities" are classic, non-actionable opinions or puffery. Similarly, YouTube's statements that the platform will "help [one] grow," "discover what works best," and "giv[e] [one] tools, insights and best practices" for using YouTube's products are ***impervious to being "quantifiable," and thus are non-actionable "puffery."*** The district court correctly dismissed the Lanham Act claim.[205]

Roughly similar to the FTC's deception authority, the Lanham Act requires proof that (1) a provider of goods or services made a "false or misleading representation of fact,"[206] which (2) is "likely to cause confusion" or deceive the general public about the product.[207] Puffery fails both requirements because it "is not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact."[208] The FTC's bedrock 1983 Deception Policy Statement declares that the "Commission generally

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[204] Your content & Restricted Mode. YouTube Help (2020), https://support.google.com/youtube/answer/7354993?hl=en.

[205] *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) (internal citations omitted).

[206] 15 U.S.C. § 1125 (a)(1).

[207] 15 U.S.C. § 1125 (a)(1)(A).

[208] *Coastal Abstract Service v. First Amer. Title*, 173 F.3d 725, 731 (9th Cir. 1998).

will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously."[209]

There is simply no way social media services can be sued under either the FTC Act (or state baby FTC acts) or the Lanham Acts for the kinds of claims they make today about their content moderation practices. Twitter CEO Jack Dorsey said this in Congressional testimony in 2018: "Twitter does not use political ideology to make any decisions, whether related to ranking content on our service or how we enforce our rules."[210] How is this claim any less "impervious to being 'quantifiable'" than YouTube's claims?[211]

Moreover, "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."[212] Thus, isolated statements about neutrality or political bias (*e.g.*, in Congressional testimony) must be considered in the context of the other statements companies make in their community standards, which broadly reserve discretion to remove content or users. Furthermore, the FTC would have to establish the materiality of claims, *i.e.*, that an "act or practice is likely to affect the consumer's conduct or decision with

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[209] *Deception Statement, supra* note 200, at 4. The Commission added: "Some exaggerated claims, however, may be taken seriously by consumers and are actionable." But the Commission set an exceptionally high bar for such claims:

> For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated: Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae.

Id.

[210] United States House Committee on Energy and Commerce, *Testimony of Jack Dorsey* (September 5, 2018) *available at* https://d3i6fh83elv35t.cloudfront.net/static/2018/09/Dorsey.pdf

[211] *Prager*, 951 F.3d at 1000.

[212] *Deception Statement, supra* note 200, at 3.

regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[213] In the case of statements made in Congressional testimony or in any other format besides a traditional advertisement, the Commission could not simply presume that the statement was material.[214] Instead, the Commission would have to prove that consumers would have acted differently but for the deception.

C. The First Amendment Does Not Permit Social Media Providers to Be Compelled to Detail the Criteria for their Content Moderation Decisions.

Perhaps recognizing that the current terms of service and community standards issued by social media services do not create legally enforceable obligations regarding content moderation practices, NTIA seeks to compel them, as a condition of claiming immunity under Section 230, to "state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices."[215] The First Amendment will not permit the FCC (or Congress) to compel social media services to be more specific in describing their editorial practices.

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[213] *Id.* at 1.

[214] As the DPS notes, "the Commission presumes that express claims are material. As the Supreme Court stated recently, '[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.'" *Id*. at 5 (quoting Central Hudson, 447 U.S. at 567)).

[215] Petition at 39.

1. The FCC's Broadband Transparency Mandates Do Not Implicate the First Amendment the Way NTIA's Proposed Mandate Would.

The NTIA's proposed disclosure requirement is modeled on an analogous disclosure requirement imposed on Broadband Internet Access Service (BIAS) providers under the FCC's 2010 and 2015 Open Internet Order to provide "sufficient for consumers to make informed choices" about their BIAS service.[216] The FTC updated and expanded that requirement in its 2018 Restoring Internet Freedom Order,[217] and explained that, because the FCC had repealed its own "conduct" rules, the transparency rule would become the primary hook for addressing "open Internet" concerns in the future: "By restoring authority to the FTC to take action against deceptive ISP conduct, reclassification empowers the expert consumer protection agency to exercise the authority granted to them by Congress if ISPs fail to live up to their word and thereby harm consumers."[218]

FCC Commissioner Brendan Carr explicitly invokes this model in proposing what he calls "A Conservative Path Forward on Big Tech."[219] After complaining that "[a] handful of corporations with state-like influence now shape everything from the information we consume to the places where we shop," and that "Big Tech" censors conservatives, Carr says:

> There is a "light-touch" solution here. At the FCC, we require Internet service providers (ISPs) to comply with a transparency rule that provides a good baseline for Big Tech.
>
> Under this rule, ISPs must provide detailed disclosures about any practices that would shape Internet traffic—from blocking to prioritizing or

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[216] See 47 C.F.R. § 8.3; see also *Open Internet Order* and *RIFO*.

[217] *RIFO* ¶ 220.

[218] *RIFO* ¶ 244.

[219] Brendan Carr, *A Conservative Path Forward on Big Tech*, NEWSWEEK (July 27, 2020, 7:30 AM), *available at* https://www.newsweek.com/conservative-path-forward-big-tech-opinion-1520375.

> discriminating against content. Any violations of those disclosures are enforced by the Federal Trade Commission (FTC). The FCC and FTC should apply that same approach to Big Tech. This would ensure that all Internet users, from entrepreneurs to small businesses, have the information they need to make informed choices.[220]

In fact, the FCC's disclosure mandates for BIAS providers are fundamentally different from the disclosure mandates Carr and the NTIA want the FCC to impose on social media services.[221] The FCC's transparency rule has never compelled broadband providers to describe how they exercise their editorial discretion because it applies only to those providers that, by definition, hold themselves out as *not* exercising editorial discretion.

The FCC has been through three rounds of litigation over its "Open Internet" Orders, and, although the D.C. Circuit has blocked some of its claims of authority and struck down some of its conduct rules, the court has never struck down the transparency rule. Verizon did not challenge the 2010 Order's version of that rule.[222] The D.C. Circuit upheld the reissuance of that rule in the 2015 Order in its *US Telecom I* as a reasonable exercise of the Commission's claimed authority under Section 706.[223] The FCC's transparency rule was upheld in D.C. Circuit's decision to uphold *RIFO*.[224] But the key decision here is actually *US Telecom II*, in which the D.C. Circuit denied en banc rehearing of the *US Telecom I* panel

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[220] *Id*.

[221] In any event, Carr has no business opining on how another federal agency should wield its authority, especially given that he clearly does not understand *why* the FTC has *never* sought to bring a deception claim predicated on alleged inconsistency between a media company's exercise of editorial discretion and its public statements about its editorial practices. *See infra* at 58-62.

[222] "Verizon does not contend that these [transparency] rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would. Also, because Verizon does not direct its First Amendment or Takings Clause claims against the disclosure obligations," *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 659 (D.C. Cir. 2014).

[223] 825 F.3d at 733.

[224] *Mozilla*, 940 F.3d at 47.

decision. Then-Judge Kavanaugh penned a lengthy dissent, arguing that the 2015 Order violated the First Amendment. Judges Srinivasan and Tatel, authors of the *US Telecom I* panel decision, responded:

> In particular, "[b]roadband providers" subject to the rule "represent that their services allow Internet end users to access all or substantially all content on the Internet, *without alteration, blocking, or editorial intervention*." *[2015 Order]* ¶ 549 (emphasis added). Customers, "in turn, expect that they can obtain access to all content available on the Internet, *without the editorial intervention of their broadband provide*." *Id.* (emphasis added). Therefore, as the panel decision held and the agency has confirmed, the net neutrality rule applies only to "those broadband providers that hold themselves out as neutral, indiscriminate conduits" to any internet content of a subscriber's own choosing. *U.S. Telecom Ass'n*, 825 F.3d at 743…
>
> The upshot of the FCC's Order therefore is to "fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet" without editorial intervention. *Id.* ¶¶ 17, 549." *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 389 (D.C. Cir. 2017).[225]

Obviously, this situation is completely different from that of social media operators. The mere fact that Twitter, Facebook and other such sites have lengthy "community standards" proves the point. Contrast what Twitter says about its service —

> Twitter's purpose is to serve the public conversation. Violence, harassment and other similar types of behavior discourage people from expressing themselves, and ultimately diminish the value of global public conversation. Our rules are to ensure all people can participate in the public conversation freely and safely.[226]

— with what Comcast says:

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[225] 855 F.3d at 388-89.

[226] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

> Comcast does not discriminate against lawful Internet content, applications, services, or non-harmful devices … Comcast does not block or otherwise prevent end user access to lawful content, applications, services, or non-harmful devices. … Comcast does not degrade or impair access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device.[227]

Twitter discriminates, blocks and "throttles" while Comcast does not. *US Telecom II* makes clear that, if it wanted to, Comcast could offer an edited service comparable to Twitter's — and, in so doing, would remove itself from the scope of the FCC's "Open Internet" rules because it would no longer qualify as a "BIAS" provider:

> While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of "editorial intervention." [2015 Order] ¶ 549. For instance, Alamo Broadband, the lone broadband provider that raises a First Amendment challenge to the rule, posits the example of an ISP wishing to provide access solely to "family friendly websites." Alamo Pet. Reh'g 5. ***Such an ISP, as long as it represents itself as engaging in editorial intervention of that kind, would fall outside the rule***. … The Order thus specifies that ***an ISP remains "free to offer 'edited' services" without becoming subject to the rule's requirements***. [2015] Order ¶ 556.
>
> That would be true of an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content (e.g., family friendly websites). It would also be true of an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP's commercial interests. ***An ISP would need to make adequately clear its intention to provide "edited services" of that kind, id. ¶ 556, so as to avoid giving consumers a mistaken impression that they would enjoy indiscriminate "access to all content available on the Internet, without the***

[227] Xfinity, Xfinity Internet Broadband Disclosures https://www.xfinity.com/policies/internet-broadband-disclosures (last visited Aug. 31, 2020).

> ***editorial intervention of their broadband provider***," *id.* ¶ 549. It would not be enough under the Order, for instance, for "consumer permission" to be "buried in a service plan—the threats of consumer deception and confusion are simply too great." *Id.* ¶ 19; *see id.* ¶ 129.[228]

US Telecom II simply recognizes that the First Amendment permits the government to compel a company that does *not* engage in editorial discretion to "disclose accurate information regarding the network management practices, performance, and commercial terms of its [unedited] services sufficient for consumers to make informed choices regarding use of such services."[229] The decision in no way supports the NTIA's proposal that media companies that *do* engage in editorial discretion may be compelled to "state plainly and with particularity the criteria" they employ in exercising their editorial discretion.[230]

2. The False Analogy between "Net Neutrality" and Regulating the Fairness of Social Media.

After strenuously opposing net neutrality regulation for over a decade, many conservatives have now contorted themselves into ideological pretzels to argue that, while "net neutrality" regulation is outrageous government interference with the free market, imposing neutrality on social media providers is vital to prevent "censorship" (of, supposedly, conservatives). For example, the American Principles Project (once a fierce opponent of neutrality mandates, but now a staunch advocate of them) attacks the Internet Association, which supported the FCC's 2015 net neutrality rules, for opposing the imposition of neutrality regulation upon its members (social media providers) now:

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[228] 855 F.3d at 389-90 (emphasis added).

[229] 47 C.F.R. § 8.3.

[230] Petition at 39.

> But now these same market-dominant Big Tech companies are arguing in favor of censorship and viewpoint discrimination? If we are to rely on these companies to disseminate information, then they must be governed by — or at least strongly incentivized to play by — a set of rules that promote free speech and expression.[231]

We have already explained the crucial legal difference between BIAS and social media in the representations they make to consumers.[232] But it is important to understand *why* these services make such completely different representations, and why this is simply the market at work, not proof that they are "market dominant." BIAS, by definition, "provides the capability to transmit data to and receive data from all or substantially all Internet endpoints…."[233] As such, BIAS operates at a lower "layer" of the Internet[234] than the "application layer," the highest layer, at which social media, like other websites, are accessed by users.[235] Blocking and throttling of content at lower layers are problematic in ways that they are not at the application layer. Thus, as the *RIFO* noted, "There is industry near-consensus that end user[s] . . . should not be subject to blocking, substantial degrading, throttling, or unreasonable discrimination by broadband ISPs. This consensus is widely reflected in the service terms that broadband ISPs furnish to their end user subscribers."[236]

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[231] APP Comments, *supra* note 113, at 4.

[232] *See supra* at 59.

[233] *RIFO* ¶ 176.

[234] 2015 Order ¶ 378 ("engineers view the Internet in terms of network 'layers' that perform distinct functions. Each network layer provides services to the layer above it. Thus the lower layers, including those that provide transmission and routing of packets, do not rely on the services provided by the higher layers.")

[235] "[The Applications] top-of-stack host layer is familiar to end users because it's home to Application Programming Interfaces (API) that allow resource sharing, remote file access, and more. It's where you'll find web browsers and apps like email clients and social media sites." Dale Norris, *The OSI Model Explained – 2020 update*, (May 2, 2020), *available at* https://www.extrahop.com/company/blog/2019/the-osi-model-explained/.

[236] *RIFO* n. 505.

By contrast, just the opposite is true among social media: *all* major social media services retain broad discretion to remove objectionable content.[237] The reason is not because "Big Tech" services have "liberal bias," but because social media would be unusable without significant content moderation. Social media services that claim to perform only limited content moderation have attracted only minimal audiences. Parler, a relatively new social media platform, bills itself as the "free speech alternative" to Twitter, but even it has established its own content moderation rules and reserved the right to remove any content for any reason at any time.[238] Sites like 8kun (formerly 8chan) and 4chan, which claim to do even less moderation, have been favored by white supremacists and used to promote mass shootings, among other forms of content all but a tiny minority of Americans would

[237] *See, e.g.*, Pinterest, Community Guidelines, https://policy.pinterest.com/en/community-guidelines (last visited August 31, 2020). ("Pinterest isn't a place for antagonistic, explicit, false or misleading, harmful, hateful, or violent content or behavior. We may remove, limit, or block the distribution of such content and the accounts, individuals, groups and domains that create or spread it based on how much harm it poses."); *See, e.g.,* Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited August 31, 2020). Facebook, Community Standards, https://www.facebook.com/communitystandards/false_news (last visited Aug. 31, 2020). ("Our commitment to expression is paramount, but we recognize the internet creates new and increased opportunities for abuse. For these reasons, when we limit expression, we do it in service of one or more of the following values: Authenticity, Safety, Privacy, Dignity.)

[238] Parler, User Agreement, #9 https://news.parler.com/user-agreement, (last visited Aug. 31, 2020). ("Parler may remove any content and terminate your access to the Services at any time and for any reason to the extent Parler reasonably believes (a) you have violated these Terms or Parler's Community Guidelines (b) you create risk or possible legal exposure for Parler…"). Notably, Parler does not limit "risk" to legal risks, so the service retains broad discretion to remove content or users for effectively any reason.

doubtless find reprehensible.[239] Even a quick glance at the competitive metrics of such websites makes it clear that less active content moderation tends to attract fewer users.[240]

This Commission is, in significant part, to blame for increasing confusion on this these distinctions, especially among conservatives. APP notes, to justify its argument for imposing neutrality regulation upon social media: "The Commission itself has noted the reality of viewpoint suppression by market dominant tech," and proceeds to quote from the *RIFO*: "If anything, recent evidence suggests that hosting services, social media platforms, edge providers, and other providers of virtual Internet infrastructure are more likely to block content on viewpoint grounds."[241] The Commission had no business commenting on services outside its jurisdiction, and did not need to do so to justify repealing the 2015 Order. It should take care not to further compound this confusion.

3. Compelling Media Providers to Describe How They Exercise their Editorial Discretion Violates Their First Amendment Rights.

Other than the FCC's broadband transparency requirements, the Petition does not provide any other example in which the government has required private parties to disclose

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[239] Julia Carrie Wong, *8chan: the far-right website linked to the rise in hate crimes*, THE GUARDIAN (Aug. 4, 2019, 10:36 PM), https://www.theguardian.com/technology/2019/aug/04/mass-shootings-el-paso-texas-dayton-ohio-8chan-far-right-website; Gialuca Mezzofiore, Donnie O' Sullivan, *El Paso Mass Shooting at Least the Third Atrocity Linked 8chan this year*, CNN BUSINESS (Aug. 5, 2019, 7:43 AM), https://www.cnn.com/2019/08/04/business/el-paso-shooting-8chan-biz/index.html.

[240] Alexa, Statistics for 4chan, https://www.alexa.com/siteinfo/4chan.org (last visited Aug. 31, 2020); Rachel Lerman, *The conservative alternative to Twitter wants to be a place for free speech for all. It turns out, rules still apply*, THE WASHINGTON POST,(July 15, 2020 10:48 AM), *available at* https://www.washingtonpost.com/technology/2020/07/15/parler-conservative-twitter-alternative/ (2.8 million users total, as of July 2020).

[241] *RIFO* ¶ 265.

how they exercise their editorial discretion — and for good reason: such an idea is so obviously offensive to the First Amendment, it appears to be without precedent.

Does anyone seriously believe that the First Amendment would — whether through direct mandate or as the condition of tax exemption, subsidy or some other benefit — permit the government to require book publishers to publish detailed summaries of the policies by which they decide which books to publish, or newspapers to explain how they screen letters to the editor, or talk radio shows to explain which listener calls they put on the air, or TV news shows to explain which guests they book? Even the FCC's original Fairness Doctrine for broadcasting did not go this far.

Such disclosure mandates offend the First Amendment for at least three reasons. First, community standards and terms of service are themselves non-commercial speech.[242] Deciding how to craft them is a form of editorial discretion protected by the First Amendment, and forcing changes in how they are written is itself a form of compelled speech — no different from forcing a social media company's other statements about conduct it finds objectionable on, *or off*, its platform. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of Blind*, 487 U.S. 781, 795 (1988). In that case, the Court struck down a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. The Court declared that the

[242] *See supra* at 48 *et seq*.

"the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[243]

Second, forcing a social media site to attempt to articulate *all* of the criteria for its content moderation practices while also requiring those criteria to be as specific as possible will necessarily constrain what is permitted in the underlying exercise of editorial discretion. Community standards and terms of service are necessarily overly reductive; they cannot possibly anticipate every scenario. If the Internet has proven anything, it is that there is simply no limit to human creativity in finding ways to be offensive in what we say and do in in interacting with other human beings online. It is impossible to codify "plainly and with particularity" all of the reasons why online content and conduct may undermine Twitter's mission to "serve the public conversation."[244]

Third, even if NTIA argued that the criteria it seeks to compel social media providers to disclose are statements of fact (about how they conduct content moderation) rather than statements of opinion, the *Riley* Court explicitly rejected such a distinction. Citing cases in which the court had struck down compelled speech requirements, such as displaying the slogan "Live Free or Die" on a license plate,[245] the Court noted:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state

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[243] *Id*. at 797 (citing *Miami Herald*, 418 U.S. at 256).

[244] *See* Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

[245] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

> during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.[246]

The same is true here: the First Amendment protects Twitter's right to be as specific, or as vague, as it wants in defining what constitutes "harassment," "hateful conduct," "violent threats," "glorification of violence," *etc*.

Finally, the Petition makes clear that the goal of mandating transparency about content moderation practices is to chill certain content moderation practices. If Facebook had to specifically identify all the conspiracy theories and false claims it considers to violate its "False News" policy,[247] the company would expose itself to even greater attack from those who have embraced, or normalized, such claims. The company would find itself in the same situation as the professional fundraisers whose speech was at issue in *Riley*:

> in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone. Again, the predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.[248]

The NTIA petition would have the same effect: by forcing social media companies to be extremely specific about their content moderation practices, NTIA would open them to further attack by those who feel persecuted, who would, metaphorically speaking, "hang up

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[246] *Riley*, 487 U.S. at 797-98.

[247] Facebook, False News, Community Standards, https://www.facebook.com/communitystandards/false_news (last visited Aug. 31, 2020).

[248] 487 U.S. at 799.

the phone" on "Big Tech." If anything, the constitutional problem here would be far greater, since the effect of NTIA's proposed regulations would be not merely to force social media operators to quit the market but to change the very nature of the editorial decisions they make, which are themselves a category of "speech" protected by the First Amendment.

D. The Circumstances in Which the First Amendment Permits Media Providers To be Sued for Violating Promises Are So Narrow as to Be of Little Relevance to NTIA's Complaints.

Even if the First Amendment permitted social media providers to be compelled to describe their content moderation practices with "particularity," or if they simply chose to be considerably more specific in describing the criteria underlying those practices, it is unlikely that the First Amendment would permit liability to be imposed upon them for are ultimately questions of how they exercise their editorial discretion, except in circumstances that are likely to be so narrow as to have little to do with NTIA's complaints. Thus, NTIA's demand that "representations about … [digital services] services [must] be enforced"[249] is unlikely to be satisfied regardless how Section 230 might be rewritten by Congress or, in effect, the FCC through the rulemaking NTIA proposes.

1. Section 230(c)(1) Protects Against Claims Based on the Exercise of Their Editorial Discretion, but not Based on Their Business Practices.

In *Mazur v. eBay*, Section 230(c)(1) did not protect eBay from liability (and the First Amendment was not even raised) when a plaintiff alleged that they had been deceived by eBay's marketing claims that bids made through the site's "Live Auctions" tool (administered

[249] Petition at 26; *see also supra* at 51.

by a third party to place bids at auctions in real time) were "were 'safe' and involved 'floor bidders' and 'international' auction houses."[250] The court rejected eBay's claims that it had made clear that "it: 1) only provides a venue; 2) is not involved in the actual transaction between buyer and seller; and 3) does not guarantee any of the goods offered in any auction…" and concluded that "these statements, as a whole, do not undermine eBay's representation that Live Auctions are safe."[251] The court concluded:

> In *Prickett* and *Barnes* CDA immunity was established because of a failure to verify the accuracy of a listing or the failure to remove unauthorized profiles. Since both acts fell squarely within the publisher's editorial function, the CDA was implicated. The case at bar, however, is opposite. eBay did not make assurances of accuracy or promise to remove unauthorized auctioneers. Instead, eBay promised that Live Auctions were safe. Though eBay styles safety as a screening function whereby eBay is responsible for the screening of safe auctioneers, this court is unconvinced. eBay's statement regarding safety affects and creates an expectation regarding the procedures and manner in which the auction is conducted and consequently goes beyond traditional editorial discretion.[252]

That last line explains why this case was different from the 2004 complaint against Fox News.[253] In *Mazur*, the conduct against which the company's marketing claims were compared was *not* the exercise of editorial discretion, but the way eBay structured a commercial service (making bids at live auctions at the direction of users online). For the same reasons, Section 230(c)(1) has not prevented the FTC (or state AGs) from bringing deception cases against social media services that fail to live up to their promises regarding, for example, privacy and data security: these claims can be assessed with reference to the

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[250] *Mazur v. Bay Inc.*, No. C 07-03967 MHP (N.D. Cal. Mar. 3, 2008).

[251] *Id*. at 14.

[252] *Id*. at *16-17.

[253] *See supra* at 59.

companies' *business* practices, not the way they exercise their editorial discretion. Section 230 does not protect a website from claiming it provides a certain level of data security, but failing to deliver on that claim.

2. Likewise, the First Amendment Protect Against Claims Based on the Exercise of Editorial Discretion, but not Based on Their Business Practices.

The First Amendment ensures that book publishers have the right to decide which books to print; producers for television and radio have the right to decide which guests to put on their shows, which calls to take from listeners, when to cut them off; and so on. But the First Amendment would *not* protect these publishers from suit if, say, a book publisher lied about whether its books were printed in the United States, whether the paper had been printed using child labor, whether the printing process was carbon-neutral, etc. Like eBay's decisions about how to configure its service, these are not aspects of "traditional editorial discretion."

It is certainly possible to imagine hypothetical cases where that line becomes blurry. Suppose that a group of leading book publishers decided, in response to public concerns about structural racism and sexism in media, decided to start publishing "transparency reports" (modeled on those pioneered by tech companies like Google) detailing the rates at which they accepted manuscripts for publication based on categories of racial groups, gender, sexual orientation, etc., how much they paid authors in each category on average, how much they spent on marketing, *etc*. Leaked documents revealed that one publisher had manipulated its statistics to make its offerings appear artificially diverse. Could that publisher be sued for deceptive marketing? While it might be difficult to establish the

materiality of such claims,[254] the First Amendment likely would not bar such a suit because, unlike the Fox News example, there *would* be "way to evaluate [the complaint] without evaluating the content of the [speech] at issue."[255]

Suppose that, instead of making general claims to be "Fair and Balanced," Fox News began publishing data summarizing the partisan affiliations of its guests, and it later turned out that those data appeared were falsified to make the network appear more "balanced" than it really was. Could Fox News be sued for deceptive marketing? Perhaps, if the FCC could show such claims were "material" in convincing consumers to consumer Fox News' products. The point of this hypothetical is that the FTC (or another plaintiff) could objectively prove the falsity of the claim *because it is measurable*. Thus, the FTC could avoid the problem Muris noted in dismissing real-world complaints against Fox: the impossibility of judging Fox's description of editorial practices from judging Fox's editorial practices themselves.[256]

What kind of objectively provable claims might be made by a social media company? If a company claimed that no human monitors were involved in selecting stories to appear in a "Trending Topics" box — or removing stories from that box — and this claim turned out to be false, this might be grounds for suit, depending on the "net impression" given by a company's statements overall (and, again, the FTC or a state AG would still have to establish the materiality of such claims). Such cases would necessarily involve objectively verifiable

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[254] *See supra* at notes 213 & 214 and associated text.

[255] *Cf. supra* 199.

[256] *See supra* at 46 and note 199.

facts,[257] and would not involve the government in second-guessing non-commercial speech decisions involving which content to publish.[258]

3. Promises Regarding Content Moderation Can Be Enforced Via Promissory Estoppel Only in Exceptionally Narrow Circumstances.

Only under exceptionally narrow circumstances have courts ruled that a website may be sued for failing to live up to a promise regarding content moderation — and properly so. In *Barnes v. Yahoo!*, Section 230(c)(1) immunity did not bar a claim, based on promissory estoppel (a branch of contract law) that Yahoo! broke a promise to one of its users, but the facts of that case are easily distinguishable from the kind of enforcement of terms of service and community standards NTIA proposes — and not merely because *Barnes* involved a failure to remove content, rather than removing too much content. NTIA cites the case five times but it in no way supports NTIA's proposed approach.

Cecilia Barnes complained to Yahoo! that her ex-boyfriend had posted revenge porn on Yahoo! After being ignored twice, the company's director of communications promised Barnes "that she would 'personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.'"[259] Yet Yahoo! failed to take down the material, so Barnes sued. Section 230(c)(1) did not bar Barnes' suit because:

> Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from

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[257] *See supra* note 205 and associated text at 55.

[258] *See supra* note 192 and associated text at 53.

[259] *Id*. at 562.

> the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle."[260]

But, as the court explained, promissory estoppel may be invoked only in exceptionally narrow circumstances:

> as a matter of contract law, the promise must "be as clear and well defined as a promise that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration." 1 Williston & Lord, supra § 8.7. "The formation of a contract," indeed, "requires a meeting of the minds of the parties, a standard that is measured by the objective manifestations of intent by both parties to bind themselves to an agreement." Rick Franklin Corp., 140 P.3d at 1140; see also Cosgrove v. Bartolotta, 150 F.3d 729, 733 (7th Cir.1998) (noting that if "[a] promise [ ] is vague and hedged about with conditions .... [the promisee] cannot plead promissory estoppel."). Thus ***a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability***. ***This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.***[261]

Thus, a promissory estoppel claim is even harder to establish than a deception claim: in a deception claim, it is not necessary to prove a "meeting of the minds," only that a company made a claim (a) upon which consumers reasonably relied (making it "material") in deciding whether to use a product or service that was (b) false.[262] "General" policies would not suffice to establish an "intention to be bound." Social media Terms of Service and Community Standards policies are for leading social media services are, by necessity "vague and hedged about with conditions" — because they must account for an vast range of

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[260] 565 F.3d 560, 572 (9th Cir. 2009),

[261] *Id*. at 572.

[262] *Deception Statement, supra* note 200, at 4

scenarios that cannot be reduced to specific statements of what speech or conduct are and are not allowed.

Current case law allows plaintiffs to overcome the (c)(1) immunity based on promissory estoppel, but an actionable claim, like that in *Barnes*, would require a similarly specific fact pattern in which clear promises were made to specific users, and users relied upon those promises to their detriment. Changing Section 230 would do nothing to make a promissory estoppel case easier to bring or win.

V. NTIA's Interpretations Would Turn Section 230 on Its Head, Forcing Websites to Bear a Heavy Burden in Defending Their Exercise of Editorial Discretion Each Time They Are Sued for Content Moderation Decisions

Congress wrote a statute that broadly protects digital media publishers in exercising their editorial discretion, principally by saying (in (c)(1)) that it simply does not matter whether they are classified as publishers — because they may not be held liable as such. In this way, Congress overruled the trial court decisions in *Cubby, Inc. v. CompuServe Inc.*,[263] and Stratton *Oakmont, Inc. v. Prodigy Servs. Co.*[264]

NTIA seeks to have the FCC rewrite that statute to achieve precisely the opposite effect: "forcing websites to face death by ten thousand duck-bites."[265] But as the Supreme Court has noted, "immunity means more than just immunity from liability; it means

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[263] 776 F.Supp. 135 (S.D.N.Y. 1991). Unlike *Stratton Oakmont*, the *Cubby* court found no liability, but made clear that this finding depended on the fact that CompuServe had not been provided adequate notice of the defamatory content, thus implying (strongly) that such notice *would* trigger a takedown obligation under a theory of distributor liability.

[264] 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

[265] *Roommates*, supra note 125, 521 F.3d at 1174.

immunity from the burdens of defending a suit[.]"[266] If the NTIA's reinterpretations of Section 230 became law, websites would bear an impossible burden of defending their content moderation practices.

A. Courts Have Interpreted 230(c)(1) Correctly: ICS Providers May Not be Held Liable as Publishers of Content They Do Not Create.

Perhaps the most nonsensical part of the NTIA petition — after its complete misstatement of the meaning of *Packingham*[267] — is the proposal that the Commission reinterpret Subsection (c)(1) as follows:

> An interactive computer service is not being "treated as the publisher or speaker of any information provided by another information content provider" when it actually publishes its own or third-party content. [268]

There has never been any doubt that (c)(1) does not protect an ICS provider when it "publishes its own… content" — because the company would, to that extent, cease to be an ICS provider and, instead, become an information content provider "responsible, in whole or in part, for the creation or development of information."[269] But the Petition marries this self-evident fact with the preposterous claim that, when Congress said, in (c)(1), that an ICS provider may not be "treated as the publisher or speaker of any information provided by another information content provider," it intended that categorical declaration to depend on whether the provider merely "published" that third-party content or "*actually* published" that content. One has only to imagine applying such an interpretation in other contexts to

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[266] *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995).

[267] *See supra* at 30.

[268] Petition at 46.

[269] 47 U.S.C. § 230(f)(3).

see that it would allow regulatory agencies to do the exact opposite of what Congress intended, while pretending to faithfully implement the plain text of the law, simply by invoking the qualifier "actually."

B. 230(c)(1) and 230(c)(2)(A) Both Protect Certain Content Moderation Decisions, but in Clearly Different Ways.

NTIA argues that courts have read "section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity."[270] The petition claims interpreting Paragraph (c)(1) to cover decisions to remove content (as well as to host content) violates the statutory canon against surplusage because it renders (c)(2) superfluous.[271] The plain text of the statute makes clear why this is not the case. While the Petition refers repeatedly to "230(c)(2)," this provision actually contains two distinct immunities, which are clearly distinct both from each other and from the immunity contained in (c)(1). Neither subparagraph of (c)(2) is rendered a "nullity" by the essentially uniform consensus of courts that Paragraph (c)(1) covers decisions to remove user content just as it covers decisions to leave user content up.[272] Both of these immunities do things that the (c)(1) immunity does not.

NTIA also argues that the factual premises (about the technological feasibility of content moderation) underlying *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the

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[270] Petition at 28.

[271] "NTIA urges the FCC to follow the canon against surplusage in any proposed rule.88 Explaining this canon, the Supreme Court holds, '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .' The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme." Petition at 29.

[272] *IA Report, supra* note 8, at 10 ("Of the decisions reviewed pertaining to content moderation decisions made by a provider to either allow content to remain available or remove or restrict content, only 19 of the opinions focused on Section 230(c)(2). Of these, the vast majority involved disputes over provider efforts to block spam. The remainder were resolved under Section 230(c)(1), Anti-SLAPP motions, the First Amendment, or for failure to state a claim based on other deficiencies.").

first appellate decision to parse the meaning of the (c)(1) immunity, no longer hold. Neither these arguments nor NTIA's statutory construction arguments actually engage with the core of what *Zeran* said: that the (c)(1) immunity protects the First Amendment rights of digital media operators as publishers. We begin our analysis there.

1. Courts Have Correctly Interpreted the (c)(1) Immunity as Protecting the Exercise of Editorial Discretion, Co-Extensive with the First Amendment Itself.

Kenneth Zeran's suit argued "that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."[273] The Fourth Circuit dismissed the suit under (c)(1):

> By its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.
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> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . .[274]

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[273] 129 F.3d at 328.

[274] *Zeran*, 129 F.3d at 330-31.

The Petition claims that "[t]his language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or fact-checking statements."[275] Here, NTIA makes several elementary legal mistakes:

- It misses the key limiting principal upon the (c)(1) immunity: it does not protect content that the ICS provider is responsible, even in part, for creating. We discuss this issue more below,[276] but here, note that the warning or fact-checking statements affixed to someone else's content would *clearly* be first-party content created by the website operator for which it is responsible. The same goes for "their own publications" — assuming that means posting content that the operator itself creates, as opposed to deciding whether to publish content created by others.[277]
- Even when it applies, (c)(1) never provides "full and complete immunity" to anyone because it is always subject to the exceptions provided in Subsection (e), most notably for federal criminal law and sex trafficking law.
- (c)(1) protects ICS providers only from being "treated as the publisher or speaker of any information provided by another information content provider." Thus, it does not protect them from being sued for breach of contract, as in *Barnes v. Yahoo!*[278]

NTIA's characterization of *Zeran* is correct: the decision's interpretation of the (c)(1) immunity broadly protects "editorial decisions [and] content-moderating." As the Barnes

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[275] Petition at 26.

[276] *See infra* at 49.

[277] *See* Roommates, *supra* note 125, 521 F.3d at 1163.

[278] *See infra* at 37.

court noted: "Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."[279] What NTIA fails to mention is that this interpretation of (c)(1) really just protects the editorial discretion protected by the First Amendment.

NTIA proposes the following reinterpretation of the statute:

> Section 230(c)(1) applies to acts of omission—to a platform's failure to remove certain content. In contrast, section 230(c)(2) applies to acts of commission—a platform's decisions to remove. Section 230(c)(1) does not give complete immunity to all a platform's "editorial judgments."[280]

This omission/commission dichotomy may sound plausible on paper, but it fails to reflect the reality of how content moderation works, and would make Section 230(c)(1)'s protection dependent on meaningless distinctions of sequencing. The "editorial judgments" protected by (c)(1) are not simply about decisions to "remove" content that has already been posted. They may also involve automatically screening content to decide whether to reject it — and even suspend or block the user that posted it. Such decisions would not be captured by *either* prong what NTIA holds up as a complete model of content moderation. There is no significant difference between a just-in-time pre-publication "screening" publication decision (to "put up" content) and one made minutes, hours, days or weeks later (to "take down" content), after users have complained and either an algorithm or a human makes a decision to do the same thing. There is no reason that Section 230 should treat these decisions differently; both should be covered by 230(c)(1), as courts have consistently ruled.

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[279] *Barnes.*, 565 F.3d at 569.

[280] Petition at 27.

In *Batzel v. Smith*, the Ninth Circuit rejected such a distinction in a slightly different context, but its analysis helps show the incoherence of NTIA's position. The dissenting judge argued that "We should hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication."[281] While that judge wanted to distinguish between "active" and passive publication, he did not (unlike NTIA) dispute that "interactive computer service users and providers who screen the material submitted and remove offensive content are immune."[282] The majority responded:

> These two positions simply cannot logically coexist.
>
> > A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either. For one thing, there is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity. Also, Congress could not have meant to favor removal of offending material over more advanced software that screens out the material before it ever appears. If anything, the goal of encouraging assistance to parents seeking to control children's access to offensive material would suggest a preference for a system in which the offensive material is not available even temporarily.[283]

In short, Section 230(c)(1) should continue to apply equally to "any exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content"[284] — regardless of whether a company decided to

To reinterpret (c)(1) otherwise would raise obvious First Amendment problems. Consider another version of the hypothetical posited at the outset: suppose Congress conditioned businesses' eligibility for COVID immunity or PPP funds on how businesses

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[281] 333 F.3d 1018, 1038 (9th Cir. 2003).

[282] *Id*. at 1032 (summarizing the dissent).

[283] *Id*.

[284] *Zeran*, 129 F.3d at 330.

handled political signage on their facades and premises. To avoid First Amendment concerns, the legislation disclaimed any intention to punish businesses for "acts of omission" (to use NTIA's term): they would not risk jeopardizing their eligibility for allowing protestors to carry signs, or leaving up signs or graffiti protestors had posted on their premises. But acts of *commission* to reflect their own "editorial judgments" — banning or taking down some or all signs carried by others — would cause the business to lose their eligibility, unless they could prove that they had acted in "good faith." The statute specified that "good faith" could not include politically discriminatory motivations (so a business would have to bar both "All Lives Matter" signs and "Black Lives Matter" signs). Furthermore, the business would have to post a detailed policy explaining what signage is and is not allowed, and would have to create an appeals process for those who felt their "free speech" rights had been violated.

Would such a law be constitutional? Obviously not: this would clearly be a grossly unconstitutional condition, requiring businesses to surrender a large part of their editorial discretion to qualify for a benefit.[285] And it would not matter that the law disclaimed any intention to interfere with the business' right to leave up signage posted by others, or to put up its own signage. The First Amendment protects that right no less than it protects the business' right to exercise editorial discretion about what third parties do on its property.[286]

Congress avoided creating such an unconstitutional condition by choosing *not* to write the version of (c)(1) that NTIA proposes. Instead, it created a broad immunity that

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[285] *See supra* at 27 et seq.

[286] *See supra* at 25.

protects ICS providers from being held liable for the way they exercise their editorial discretion.[287]

2. How 230(c)(2)(A) Differs from 230(c)(1).

The Ninth Circuit has already explained what work Subparagraph (c)(2)(A) does that Subsection (c)(1) does not:

> Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection ***(c)(2), for its part, provides an additional shield from liability***, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene ... or otherwise objectionable." § 230(c)(2)(A). Crucially, the persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates.Com,* 521 F.3d at 1162-63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[288]

Subparagraph (c)(2)(A) ensures that, even if an ICS provider is shown to be partially responsible for content creation, its decision to remove content generally will not be grounds for liability. This belt-and-suspenders approach is crucial to serving the statute's central purpose — removing disincentives against content moderation — because certain forms of content moderation may at least open the door for plaintiffs to argue that the ICS provider

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[287] See *supra* n. 279.

[288] *Barnes*, 565 F.3d at 569-70. *See also, Fyk v. Facebook, Inc.,* No. 19-16232 at *5 (9th Cir. June 12, 2020) (reaffirming *Barnes*).

had become responsible for the content, and thus subject them to the cost of litigating that question at a motion to dismiss or the even greater cost of litigating past a motion to dismiss if the trial judge rules that they may have been responsible for the creation of that content. Discovery costs alone have been estimated to account as much as 90% of litigation costs.[289]

In general, an ICS provider will not be held to be responsible, even "in part," for the creation of content posted by others merely through content moderation — unless they transform the meaning of that content in ways that contribute to its illegality, such as by editing "John is not a rapist" to read "John is a rapist.[290] Suppose that, instead of taking down objectionable posts completely, an ICS provider decides to err on the side of leaving such posts up, but with certain expletives or common slurs blacked out. To make such a policy scale for the service, such decisions are made by machines, not humans. In some cases, algorithmic removal of certain words might be said to change the meaning of the sentence, thus allowing a plaintiff to argue that the provider is responsible "in part" for the creation of such posts — and thus should lose its (c)(1) immunity. Or suppose that the provider, in response to user complaints, decides to add some degree of human moderation, which introduces the possibility of error (deleting additional words or even accidentally adding words): additional words may be deleted, increasing the likelihood that the ICS provider may be said to be responsible for that content. In either case, the ICS provider may decide to fall back on a second line of defense: deleting (or hiding) the post altogether. The (c)(1) immunity may not protect that removal decision, because company is now considered the

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[289] Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).

[290] *See infra* at 79 and note 314.

"information content provider" of that post. But the (c)(2)(A) immunity does not depend on this protection, so it will protect the removal decision.

The *Barnes* court omitted another important function of Subparagraph (c)(2)(A): like all three immunities contained in Section 230, it protects both providers and *users* of interactive computer services. If anything, Subparagraph (c)(2)(A) may be *more* important for users to the extent that they are more likely to have contributed, at least in part, to the creation of content. If multiple users collaborate on an online document, it may be difficult to determine which user is responsible for which text. If one user adds a defamatory sentence to a Wikipedia page, and another user (who happens to be an admin), rewrites the sentence in order to make it less defamatory, the admin risks being sued if the statement remains somewhat defamatory. If that admin then decides to take down the entire page, or merely to delete that sentence, and is sued for doing so, they would rely on the (c)(2)(A) immunity to protect themselves.

It is true that relatively few cases are resolved on (c)(2)(A) grounds, as compared to (c)(1). This does not make superfluous. The Supreme Court has set a very high bar for applying the canon against surplusage. For example, the Court rejected a criminal defendant's reading of the phrase "State post-conviction or other collateral review" (that it should "encompass both state and federal collateral review") because "the word 'State' [would place] no constraint on the class of applications for review that toll the limitation period. The clause instead would have *precisely the same content* were it to read 'post-conviction or other collateral review.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added). It is simply impossible to characterize the consensus current interpretationof

Subsection (c)(1) (as covering removal decisions) as amounting to "precisely the same" as their reading of Subparagraph (c)(2)(A): the two have plainly different meanings.

The fact that few cases are resolved on (c)(2)(A) grounds understates its true importance: what matters is now how many cases are brought and dismissed, but how many cases are *not* brought in the first place, because the (c)(2)(A) immunity assures both users and providers of interactive computer services that they will be shielded (subject to the good faith requirement) even if they lose their (c)(1) immunity.

In short, there is no canon of interpretation that would suggest that (c)(1) should not apply to content removal decisions — and every reason to think that the courts have applied the statute as intended.

C. NTIA Proposes to Rewrite 230(c)(2) as a Hook for Massive Regulatory Intervention in How Websites and other ICS Providers Operate.

After proposing to sharply limit the scope of the (c)(1) immunity, and to exclude *all* content moderation from it, the Petition proposes to sharply limit when the (c)(2) immunity can be invoked, and to build into the eligibility criteria a series of highly prescriptive regulatory requirements. This is plainly *not* what Congress intended.

1. The Term "Otherwise Objectionable" Has Properly Been Construed Broadly to Protect the Editorial Discretion of ICS Providers and Users.

The Petition argues that "the plain words of [(c)(2)(A)] indicate that this protection only covers decisions to restrict access to certain types of enumerated content. As discussed infra, these categories are quite limited and refer primarily to traditional areas of media regulation—also consistent with legislative history's concern that private regulation could

create family-friendly internet spaces."[291] The Petition makes two arguments to support this assertion.

First, the petition argues: "If 'otherwise objectionable means any material that any platform 'considers' objectionable, then section 230(b)(2) offers de facto immunity to all decisions to censor content."[292] NTIA is clearly referring to the wrong statutory provision here; it clearly mean 230(c)(2) — yet "makes this same erroneous substitution on page 28, so it wasn't just a slip of the fingers."[293] NTIA fails to understand how the (c)(2)(A) immunity works. This provision contains two distinct operative elements: (1) the nature of the content removed (a *subjective* standard) and (2) the requirement that the action to "restrict access to or availability" of that content be taken in good faith (an *objective* standard). Under the clear consensus of courts that have considered this question, the former *does* indeed mean "any material that any platform 'considers' objectionable" *provided* that the decision to remove it is taken in "good faith."[294] This has *not* created a "de facto immunity to all decisions to censor content" under (c)(2)(A) because, while the subjective standard of objectionability is constrained by the objective standard of good faith.

Second, the petition invokes another canon of statutory construction: "ejusdem generis, which holds that catch-all phases at the end of a statutory lists should be construed

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[291] Petition at 23.

[292] Petition at 31.

[293] Eric Goldman, *Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230,* Technology and Marketing Law Blog (Aug. 12, 2020) *available at* https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm ("I have never seen this typo by anyone who actually understands Section 230. It's so frustrating when our tax dollars are used to fund a B-team's work on this petition (sorry for the pun).")

[294] *Cf. e360Insight, LLC v. Comcast Corp.,* 546 F. Supp. 2d 605 (N.D. Ill. 2008) (dismissing unfair competition claims as inadequately pled, but implying that better pled claims might make a prima facie showing of "bad faith" sufficient to require Comcast to establish its "good faith").

in light of the other phrases."[295] The Ninth Circuit explained why this canon does not apply in its recent *Malwarebytes* decision:

> the specific categories listed in § 230(c)(2) vary greatly: Material that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing. If the enumerated categories are not similar, they provide little or no assistance in interpreting the more general category. We have previously recognized this concept. *See Sacramento Reg'l Cty. Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1270 (9th Cir. 1990) ("Where the list of objects that precedes the 'or other' phrase is dissimilar, *ejusdem generis* does not apply").
>
> We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s.[296]

The categories of objectionable material mentioned in (c)(2)(A) are obviously dissimilar in the sense that matters most: their constitutional status. Unlike the other categories, "obscenity is not within the area of constitutionally protected speech or press."[297] Note also that five of these six categories include no qualifier, but the removal of "violent"

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[295] Petition at 32 (citing Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372 (2003) ("under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words")).

[296] *Enigma Software Grp. U.S.A v. Malwarebytes, Inc*., 946 F.3d 1040, 1052 (9th Cir. 2019). The *Reilly* court explained:

> The phrase "other property" added to a list of dissimilar things indicates a Congressional intent to draft a broad and all-inclusive statute. In Garcia, the phrase "other property" was intended to be expansive, so that one who assaulted, with intent to rob, any person with charge, custody, or control of property of the United States would be subject to conviction under 18 U.S.C. § 2114. Where the list of objects that precedes the "or other" phrase is dissimilar, ejusdem generis does not apply. However, the statute at issue here falls into a different category. Because section 1292(1) presents a number of similar planning and preliminary activities linked together by the conjunction "or," the principle of ejusdem generis does apply. "[O]r other necessary actions" in the statute before us refers to action of a similar nature to those set forth in the parts of the provision immediately preceding it. We have previously construed "or other" language that follows a string of similar acts and have concluded that the language in question was intended to be limited in scope — a similar conclusion to the one we reach today.

905 F.2d at 1270.

[297] *Roth v. United States*, 354 U.S. 476 (1957).

content qualifies only if it is "excessively violent." Merely asserting that the six specified categories "[a]ll deal with issues involving media and communications content regulation intended to create safe, family environments," does not make them sufficiently similar to justify the invocation of *eiusdem generis*, in part because the term "safe, family environment" itself has no clear legal meaning. Harassment, for example, obviously extends far beyond the concerns of "family environments" and into the way that adults, including in the workplace, interact with each other.

But in the end, this question is another red herring: whether *eiusdem generis* applies simply means asking whether Congress intended the term to be, in the *Reilly* decision's terms, "broad and all-inclusive" or "limited in scope."[298] This is, obviously a profound constitutional question: does the term "otherwise objectionable" protect an ICS provider's exercise of editorial discretion under the First Amendment or not? *Eiusdem generis* is a linguistic canon of construction, supporting logical inferences about the meaning of text; it is thus a far weaker canon than canons grounded in substantive constitutional principles. Here, the canon of constitutional avoidance provides ample justification for courts' interpretation of otherwise "objectionable" as "broad and all-inclusive":

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress .... 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues

[298] *Reilly*, 905 F.2d at 1270.

> not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.[299]

Finally, because of the First Amendment questions involved, it is unlikely that any court would apply the deferential standard of *Chevron* to an FCC rule reinterpreting "otherwise objectionable" narrowly.[300]

2. The "Good Faith" Standard Has Been Read to Be Consistent with the First Amendment and Should Remain So.

Above, we explain why NTIA's proposed five-prong definition of "good faith" creates a host of First Amendment problems.[301] Courts have avoided these problems by reading the "good faith" standard, like other parts of the statute, to ensure that the statute's protections are co-extensive with the First Amendment's protection of editorial discretion. Any other reading of the statute necessarily creates the kind of unconstitutional condition described above,[302] because the government would be making eligibility for protection dependent on an ICS provider surrendering some of its First Amendment rights.

That does *not* render the "good faith" standard a nullity. Anticompetitive *conduct* is not protected by the First Amendment; thus, media companies are *not* categorically immune

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[299] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). *Accord, Burns v. United States*, 501 U.S. 129, 138 (1991); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

[300] *See, e.g., U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999) ("It is seductive for us to view this as just another case of reviewing agency action. However, this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees, legislative mandates, and administrative interpretation is at the heart of our responsibility. This case highlights the importance of that role.").

[301] *See supra* at 45 *et seq*.

[302] *See supra* at 37-41.

from antitrust suit.[303] However, as the Tenth Circuit has noted, "the First Amendment does not allow antitrust claims to be predicated solely on protected speech."[304] Thus, antitrust suits against web platforms — even against "virtual monopolies" — must be grounded in economic harms to competition, not the exercise of editorial discretion.[305] For example, Prof. Eugene Volokh (among the nation's top free speech scholars) explains:

> it is constitutionally permissible to stop a newspaper from "forcing advertisers to boycott a competing" media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951). But the newspaper in *Lorain Journal Co*. was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. ***The* Lorain Journal Co. *rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers***.[306]

Critically, however, that the degree of a media company's market power does not diminish the degree to which the First Amendment protects its editorial discretion:

> the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a "substantial monopoly" could not be ordered to run a movie advertisement that it wanted to exclude, because "[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." *Associates & Aldrich Co. v. Times Mirror Co*., 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that, "[n]ewspaper publishers may refuse to publish whatever

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[303] Eugene Volokh and Donald Falk, First Amendment Protection for Search Engine Search Results — White Paper Commissioned by Google at 20-22 (April 20, 2012). UCLA School of Law Research Paper No. 12-22, https://ssrn.com/abstract=2055364.

[304] Jefferson County Sch. Dist. No. R-1 v. Moody's Investor Servs., 175 F.3d 848, 860 (10th Cir. 1999).

[305] "Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).

[306] Volokh, supra *note* 303, at 22 (emphasis added).

> advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).[307]

In addition to the antitrust laws, other claims grounded in the common law of competition could be grounds for showing that an ICS provider had acted in bad faith, and thus was ineligible for the (c)(2)(A) immunity. In such cases, the provider would be published for their anti-competitive conduct, not the exercise of editorial discretion.[308]

D. 230(c)(2)(B) Does *Not* Require "Good Faith" in Protecting Those Who Offer Tools for Content Removal for Others to Use.

As noted at the outset, Paragraph 230(c)(2) contains two distinct immunities. The (c)(2)(B) immunity protects those who "make available to information content providers or others the technical means to restrict access to material described in [(c)(2)(A)]." Thus, subparagraph (c)(2)(B) incorporates by reference the list ending in "or otherwise objectionable." What it plainly does *not* incorporate is Subparagraph's (c)(2)(A) "good faith" requirement, as the Ninth Circuit recently held.[309] While the NTIA Petition does explicitly not propose to reinterpret (c)(2)(B) to require good faith, it does cite the Ninth Circuit's confused decision in arguing for a narrower interpretation of "good faith" (perhaps taking for granted

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[307] *Id.* at 23.

[308] *See supra* note 250 (discussing *Mazur*, No. C 07-03967 MHP, at *14).

[309] *Enigma Software Grp. U.S.A v. Malwarebytes, Inc*., 946 F.3d 1040, 1052 (9th Cir. 2019).

that (c)(2)(B) require good faith).[310] TechFreedom amicus brief supporting Malwarebytes' petition for cert explains why the Ninth Circuit was mistaken.[311]

E. "Development of Information": When 230(c)(1) Should Apply.

NTIA proposes to redefine the line between an "interactive computer service" — the providers or users of which are covered by (c)(1) — and an "information content provider," which are never protected by (c)(1): "'responsible, in whole or in part, for the creation or development of information' includes substantively contributing to, modifying, altering, presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider."[312] Parts of this definition are uncontroversial: again, Section 230 has never applied to content that a website creates itself, so, yes, "adding special responses or warnings [to user content] appear to develop and create content in any normal use of the words."[313] There is simply no confusion in the courts about this. Similarly, "modifying" or "altering" user content may not be covered today, as the Ninth Circuit explained in *Roommates*:

> A website operator who edits user-created content — such as by correcting spelling, removing obscenity or trimming for length — retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality — such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to

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[310] Petition at 38.

[311] Brief for TechFreedom, as Amici Curiae on a Petition for Writ Certiorari in *Malwarebytes, Inc., v. Enigma Software Grp. U.S.A* 946 F.3d 1040, 1052 (9th Cir. 2019), June 12, 2012 https://techfreedom.org/wp-content/uploads/2020/06/TechFreedom_Cert_Amicus_Brief.pdf.

[312] Petition at 42 (quoting 47 U.S.C. § (f)(3)).

[313] *Id*. at 41.

> transform an innocent message into a libelous one — is directly involved in the alleged illegality and thus not immune.[314]

But then the Petition veers off into radically reshaping current law when it claims that "prioritization of content under a variety of techniques, particularly when it appears to reflect a particularly [sic] viewpoint, might render an entire platform a vehicle for expression and thus an information content provider."[315]

Once again, NTIA is trying to redefine the exercise of editorial discretion as beyond the protection of (c)(1), despite the plain language of that provision. What the Supreme Court said in *Miami Herald* is no less true of website operators: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.[316] As the Ninth Circuit has noted, "the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message."[317] NTIA is proposing a legal standard by which the government will punish digital media publishers for exercising that prerogative in ways this administration finds objectionable.

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[314] *Roommates*, supra note 125, 521 F.3d at 1169.

[315] Petition at 40.

[316] *Miami Herald*, 418 U.S. at 258; *see generally supra* at 28.

[317] *Batzel*, supra note 281,333 F.3d at 1031.

VI. Conclusion

NTIA's complaints are not really about Section 230, but about the First Amendment. The agency objects to the results of content moderation online, but the proposal leads down a dangerous road of politicized enforcement that ends in true censorship — *by the government* — not neutrality. However strongly anyone believes social media are biased against them, we all would do well to remember what President Reagan said when he vetoed legislation to restore the Fairness Doctrine back in 1987:

> We must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.[318]

By the same token, it may, in the sense of many of Justice Kennedy's grandiloquent pronouncements,[319] be true that "social media and other online platforms… function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[320] Yet this does not transform the First Amendment from a shield against government interference into a sword by which the government may to ensure "a diversity of viewpoints … in any particular medium, let alone in any particular [website]." If consumers believe bias exists, it

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[318] *See supra* note 85.

[319] For example, at the outset of his majority opinion in *Obergefell v. Hodges,* Justice Kennedy declared: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." 135 S. Ct. 2584, 2591 (2015). Justice Scalia, dissenting, responded: "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." Echoing Justice Scalia's many warnings about Justice Kennedy's lofty language, Justice Alito was quite right to caution against the very line NTIA quotes from Packingham as "undisciplined dicta." 137 S. Ct. at 1738*; see also supra* note 92.

[320] Petition at 7.

must be remedied through the usual tools of the media marketplace: consumers must vote with their feet and their dollars. If they do not like a particular social media service's practices, they have every right not to use it, to boycott advertisers that continue to buy ads on that service, etc. The potential for bias in editorial judgment is simply not a problem the First Amendment permits the government to address.

Rewriting, through regulation, Section 230, or even repealing it altogether, will not actually address the concerns behind the NTIA Petition or the President's Executive Order. Instead, NTIA's reinterpretation of the statute that has made today's Internet possible will simply open a Pandora's Box of politicized enforcement: if the FTC or a state AG may sue a social media site because it believes that site did not live up to its community standards, what would prevent elected attorneys general from either party from alleging that social media sites had broken their promises to stop harassment on their services by continuing to allow any president to use their service? The First Amendment would ultimately bar liability, but it would not prevent the proliferation of such claims under the theories NTIA espouses.

Because the Constitution forbids what NTIA seeks, NTIA's petition should never have been put out for public comment in the first place. Because the FCC lacks statutory authority to issue rules reinterpreting Section 230, it should dismiss the petition on those grounds without creating further confusion about the First Amendment and consumer protection law.

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

I, Berin Szóka, hereby certify that on this 2nd day of September, 2020, a copy of the foregoing "Comments of TechFreedom" have been served by Fedex, postage prepaid, upon the following:

Douglas Kinkoph
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

_____/s/_____
Berin Szóka
110 Maryland Ave NE
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Washington, DC 20002

NATIONAL TAXPAYERS UNION

September 2, 2020

Federal Communications Commission
Consumer and Governmental Affairs Bureau
445 12th Street SW
Washington, D.C. 20554

RE: RM-11862, "Section 230 of the Communications Act of 1934"

Introduction

On behalf of National Taxpayers Union (NTU), I write in response to the Federal Communications Commission's invitation for public input on the Department of Commerce's Petition for Rulemaking regarding Section 230 of the Communications Decency Act of 1996.[1] NTU urges the Commission to reject the Department's recommendations for changes to Section 230, which we believe would improperly substitute regulatory overreach for Congressional action and do substantial harm to the numerous platforms that millions of Americans rely on every day. We urge the Commission to take no further action on the Department's petition, thereby leaving most of the debate over Section 230 to Congress - the proper venue for such discussions.

NTU's Stake in Technology and Telecommunications Policy

NTU has been the leading advocate for America's taxpayers since 1969, predating most of the platforms discussed below. Technology and telecommunications policy broadly - and more recently, Section 230 specifically - have long been a core part of our goals and priorities:

- Light-touch regulatory policy at the federal and state levels enables companies, workers, and entrepreneurs to grow and thrive, and this is true of the technology and information services sectors more than most. Section 230 is properly called 'the twenty-six words that created the Internet,'[2] and represents a rare area of federal policymaking restraint that has brought immeasurable growth to the American economy and innumerable benefits to society.
- Heavy-handed regulation, especially when handed down by federal bureaucrats, creates deadweight loss in the affected sectors and erects barriers to entry for would-be entrants to a new and/or thriving market. This adversely impacts competition, raising costs for consumers and taxpayers.

[1] NTU uses "Federal Communications Commission," "FCC," and "the Commission" interchangeably throughout this comment. NTU also uses "Department of Commerce" and "the Department" interchangeably throughout this comment.
[2] "The Twenty-Six Words That Created the Internet." Jeff Kosseff. Retrieved from: https://www.jeffkosseff.com/home (Accessed August 31, 2020.)

- Technological advancement has saved government agencies time and money, notwithstanding the challenges many bloated bureaucracies face in modernizing and updating their digital infrastructure. Policymaking that chokes off or slows innovation and growth, in turn, impacts taxpayers when the public sector cannot provide similar speed, reliability, and efficiency in goods or services as the private sector - and history has shown the public sector almost never can.

Therefore, NTU is invested in policies that support robust private technology and information services sectors, which benefit tens of millions of consumers and taxpayers across the country every single day. Threats to Section 230 are threats to all of the progress made in the Internet age, just one major reason why NTU is deeply concerned with the Department of Commerce's petition for rulemaking recently submitted to the FCC.[3]

The Department's Recommendations Would Represent an Improper Use of Regulatory Authority

Though NTU will argue against the Department's recommendations on the merits below, we believe that the Commission should reject the Department's petition out of hand because the Department's recommendations would represent an improper use of regulatory authority by the Commission.

Most of the recommendations made by the Department appear to substitute hasty but significant regulatory overreach for deliberative and measured policymaking in Congress, the venue where debates over Section 230 belong. At one point in the petition, the Department argues:

> "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation [of the law]."[4]

Section 230's text does not permit the Commission's wholesale *re*implementation or reinterpretation of the statute, though, and 24 years after its passage at that. The Department is correct that the Internet has changed dramatically since the Communications Decency Act of 1996 became law.[5] The expansion of the Internet in that time, though, does not automatically expand either the Commission's regulatory authorities or the Department's authorities.

The Department argues at another point:

> "Congress did not intend a vehicle to absolve internet and social media platforms—which, in the age of dial-up internet bulletin boards, such as Prodigy, did not exist—from all liability for their editorial decisions."[6]

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[3] National Telecommunications and Information Administration. (July 27, 2020). "Petition for Rulemaking of the National Telecommunications and Information Administration." Retrieved from: https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (Accessed August 31, 2020.)
[4] *Ibid*., page 17.
[5] *Ibid*., page 9.
[6] *Ibid*., page 21.

This reading of Congressional intent may or may not be correct. Even if the Department is correct in its interpretation here, though, that does not give the Department or the Commission the ability to create or assemble a *separate* "vehicle" - one that would, in the Department's estimation, *not* "absolve internet and social media platforms … from all liability for their editorial decisions." Such a vehicle, if desired, would have to be assembled by Congress.

Lastly, the Department writes that:

> "The Commission's expertise makes it well equipped to address and remedy section 230's ambiguities and provider greater clarity for courts, platforms, and users."[7]

The Commission certainly has plenty of expertise on telecommunications matters, and NTU has worked productively with the Commission on several initiatives recently. However, that still does not allow the Commission (or the Department) the license to wholesale reinterpret or reimplement portions of the law that were enacted a quarter-century ago. If Congress wanted the Commission's rulemaking assistance here, and we assume they would, then lawmakers could write a bill that gives the Commission a role in modifying or reinterpreting Section 230. The Department cannot compel the Commission to do so just because the Department would like to see the law treated in a different manner.

The Department's Recommendations Would Do Substantial Harm to the Digital Economy and the Free Movement of Ideas on Digital Platforms

Notwithstanding NTU's belief that neither the Commission nor the Department has the authority to completely reinterpret Section 230 of the Communications Decency Act, we must challenge some of the assumptions and recommendations the Department makes throughout their petition.

Many of the Department's Statements Are Contradictory

The Department states near the beginning of their petition:

> "Since its inception in 1978, NTIA has consistently supported pro-competitive, proconsumer telecommunications and internet policies."[8]

Unfortunately, none of the Department's proposed remedies would be pro-competitive or pro-consumer. By proposing to enact new and significant regulatory burdens on digital companies, the Department erects barriers to entry for would-be competitors to existing technology companies. By raising the cost of regulatory compliance for new and existing companies, the Department's recommendations also risk raising the cost of goods and services for consumers and taxpayers.

In defending the burdensome standards the Department proposes for assessing platforms' content moderation, they complain that the courts have:

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[7] *Ibid*., page 28.
[8] *Ibid*., page 3.

> "...extend[ed] to platforms a privilege to ignore laws that every other communications medium and business must follow and that are no more costly or difficult for internet platforms to follow than any other business."[9]

In dismissing any added burdens the Department proposes for technology companies, though, they contradict a plain fact acknowledged by the Department earlier in their petition: that both manual and automated content moderation require "immense resources."

> "Online platforms like Twitter, Facebook, and YouTube have content moderation at the heart of their business models. Unlike the early internet platforms, they have invested immense resources into both professional manual moderation and automated content screening for promotion, demotion, monetization, and removal."[10]

Either content moderation is a low and easy standard for any company to meet, even if it requires reviewing millions of pieces of content per day, or it is a tremendous financial and logistical burden that requires significant resources. NTU would argue it is the latter, but at minimum it cannot be both. Therefore, the Department's argument that their proposed standards for technology companies are easy to meet - an argument it makes throughout the petition - makes little sense.

Elsewhere in the petition, the Department's proposed remedy of more "transparency" from technology platforms seems to contradict their proposed definition for what makes a platform "responsible, in whole or in part, for the creation or development of information."[11] The Department argues that defining a "[g]ood faith effort" from technology companies moderating their platforms "requires transparency about content moderation disputes processes." However, the Department also proposes a far more rigorous standard for when "an interactive computer service becomes an information content provider" and loses Section 230 immunity, a standard in which any service "commenting upon, or editorializing about content provided by another information content provider" becomes responsible for the information. This could create a scenario where a platform, such as Facebook or Twitter, providing the public with *transparent* information about why they moderated a piece of content from a public figure, could be seen as "commenting upon" the content and, therefore, becoming an "information service provider" partially or fully responsible for the content. It seems the Department is asking for more transparency, but also warning technology platforms that more transparency could strip them of Section 230 liability protections.

The Department's Proposed Remedies Would Harm the Digital Economy and the Free Movement of Ideas

More important than the contradictions above are the proposed changes to the Commission's interpretation of Section 230 that would significantly expand platform liability and kneecap the digital economy in the middle of America's economic recovery.

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[9] *Ibid*., page 25.
[10] *Ibid*., page 13.
[11] *Ibid*., page 42.

The Department proposes, among other items, 1) narrowing Section 230(c)(1) protections, so that they only "[apply] to liability directly stemming from the information provided by third-party users," 2) limiting the definition of "otherwise objectionable" content that platforms can moderate in the law to, essentially, "obscene, violent, or otherwise disturbing matters," 3) making Section 230 protections conditional on all sorts of "transparency" measures not otherwise prescribed by law, and 4) narrowing the law's definition of what makes a content platform a "speaker or publisher."[12] The Department is requesting a significant distortion of a quarter-century old law, and asking the Commission to do so by regulatory fiat. This is contradictory to this Administration's deregulatory agenda, and - as mentioned above - the Commission is an improper venue for such changes.

NTU has also written before about how changes like those mentioned above are counterproductive even if proposed through proper channels like legislation:

> "[Sen. Josh] Hawley's legislation [S. 1914] would hold Section 230 liability protections for internet services hostage to a cumbersome and vague regulatory process, which is deeply troubling. While details of what the Trump administration would do are not exactly clear, moving in the same policy direction of the Hawley bill would be extremely ill-advised. Such proposals undermine a prudent legal provision that has helped the internet flourish and grow in the last several decades. A thriving internet, in turn, has brought countless benefits to American consumers, workers, and taxpayers."[13]

NTU wrote this roughly a year ago. Now that details of what the Administration would do are clear, we are even more concerned than we were when efforts to change Section 230 through regulation were merely theoretical.

More broadly, as a coalition of civil society organizations, including NTU, wrote in July 2019:

> "Section 230 encourages innovation in Internet services, especially by smaller services and start-ups who most need protection from potentially crushing liability. The law must continue to protect intermediaries not merely from liability, but from having to defend against excessive, often-meritless suits—what one court called 'death by ten thousand duck-bites.' Without such protection, compliance, implementation, and litigation costs could strangle smaller companies even before they emerge, while larger, incumbent technology companies would be much better positioned to absorb these costs. Any amendment to Section 230 that is calibrated to what might be possible for the Internet giants will necessarily mis-calibrate the law for smaller services."[14]

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[12] *Ibid*.
[13] Lautz, Andrew. "The Trump Administration Should Do No Harm to Section 230." National Taxpayers Union, August 23, 2019. Retrieved from: https://www ntu.org/publications/detail/the-trump-administration-should-do-no-harm-to-section-230
[14] "Liability for User-Generated Content Online: Principles for Lawmakers." National Taxpayers Union, July 11, 2019. Retrieved from: https://www.ntu.org/publications/detail/liability-for-user-generated-content-online-principles-for-lawmakers

The Department's proposed changes to Section 230 would be a miscalibration for both larger and smaller services, but the impacts of these regulatory changes might be most harmful to small, up-and-coming technology platforms. By choking off opportunities to grow and thrive in the Internet era, the Department's proposed changes would do significant harm to the digital economy, consumers who benefit from digital platforms, and taxpayers who benefit from more efficient and effective technology in government.

Conclusion

NTU urges the FCC to reject the Department of Commerce's recommendations. Gutting Section 230 is a counterproductive and harmful move in any venue, but it is particularly misplaced for the Department to suggest doing so through regulation rather than in legislation. Both process and substance matter here, and the Department's proposed changes would violate prudent policymaking in both. Section 230 has been vital to the growth of innovative and often free services provided by America's digital economy, and significant changes to this bedrock law could have multibillion-dollar impacts on companies, workers, consumers, and taxpayers. We urge the Commission to avoid major adjustments to the law.

Sincerely,

Andrew Lautz
Policy and Government Affairs Manager

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	
	)	

To: The Commission

COMMENTS BY NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE AND RANKING DIGITAL RIGHTS URGING DENIAL OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

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September 2, 2020

Before the
Federal Communications Commission
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In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	
	)	

To: The Commission

COMMENTS BY NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE AND RANKING DIGITAL RIGHTS URGING DENIAL OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

Introduction

New America's Open Technology Institute (OTI) and Ranking Digital Rights (RDR) appreciate the opportunity to submit a statement in response to the Petition for Rulemaking of the National Telecommunications and Information Administration (NTIA). OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technologies that are open and secure, and their benefits. RDR works to promote freedom of expression and privacy on the internet by creating global standards and incentives for companies to respect and protect users' rights. We support and defend the right to privacy and freedom of expression, and press internet platforms to provide greater transparency and accountability around their operations, technologies, and impacts. For the reasons outlined below, we urge the Commission to deny the petition on the grounds that the petition does not warrant consideration and the Commission should not proceed further in the rulemaking process.[1]

We support many of the statements in NTIA's petition regarding the importance of safeguarding free expression online, including where it states, "Only in a society that protects free expression can citizens criticize their leaders without fear, check their

[1] 47 C.F.R. § 1.401(e) (2007)

excesses, and expose their abuses."[2] Further, we agree with the NTIA that "times have changed"[3] since the passage of Section 230 of the Communications Decency Act of 1996, and the internet ecosystem now reflects a diversity of opinions across a myriad of online platforms. However, any further consideration of NTIA's petition would improperly broaden the statutory authority of the Commission, violate the First Amendment, and chill the free speech of users online. The NTIA's petition seeks to censor, not protect, the freedom of expression of users. To ensure that our governing institutions maintain their proper and constitutionally valid roles in our democratic system, the Commission should deny this petition.

I. The Commission lacks statutory authority to promulgate a Section 230 rulemaking.

A. NTIA's assertion that social media platforms are information services subject to FCC rulemaking is incorrect and inconsistent with FCC precedent.

The Commission should deny the NTIA petition because it is inconsistent with the Title I authority over information services[4] and contradicts previous Commission statements on Section 230. The Commission has never interpreted Section 230 as a grant of rulemaking authority and has repeatedly asserted the opposite position, both in litigation and in agency orders. The NTIA petition's classification of social media platforms as information services is incorrect, and the claims the petition makes about the Commission's authority to regulate social media are inaccurate and inconsistent with Commission precedent.

The NTIA's claim that the definition of "interactive computer services" in Section 230(f)(2) classifies such services as "information services" is in direct conflict with the text of the statute, which actually says the opposite. The statutory definition includes "information service" in a list with "system" and "access software provider" as types of services that can be "interactive computer services" if they satisfy the rest of the definition.[5] Therefore, information services can also be interactive computer services, but it does not follow that all interactive computer services are always information

[2] Petition for Rulemaking, RM-11862 (filed July 27, 2020) ("NTIA Rulemaking Petition"), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[3] *Id.*
[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-163).
[5] 47 USC § 230(f)(2). "The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

services. The Commission declined to classify edge providers, including social media, as "information services" in the Restoring Internet Freedom Order.

Moreover, in the Restoring Internet Freedom Order, the Commission repeatedly asserted that Section 230 could not provide the basis for rulemaking. The Commission reclassified broadband Internet access service as an information service rather than a telecommunications service to justify a deregulatory policy, interpreting the 1996 act to confirm "Congress's approval of our preemptive federal policy of nonregulation for information services."[6] And the Commission agreed with the D.C. Circuit opinion stating that section 230(b) is a "statement [] of policy that [itself] delegate[s] no regulatory authority."[7] The Commission has abdicated its authority on net neutrality by reclassifying broadband Internet access service under Title I information service, therefore to claim regulatory authority now over information services is inconsistent with agency precedent.

B. Congressional silence does not grant the Commission rulemaking authority.

The Commission should deny NTIA's petition because Congress has not delegated authority to the Commission to promulgate regulations on Section 230. NTIA claims that Congress's silence on the issue implies delegated authority, but this argument is not supported and is, in fact, contradicted by case law.[8] OTI and RDR agree with Commissioner Starks that "NTIA has not made the case that Congress gave the FCC any role here."[9]

NTIA claims that the Commission has appropriate authority to promulgate rules related to Section 230 because Congress failed to explicitly say that it did not have authority to do so.[10] NTIA assumes that Congress must explicitly state when it has not delegated authority to the Commission, and concludes that because "Congress did not

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[6] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 at 122 (2017).
[7] *Id*. at 171.
[8] *See, e.g., Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.), amended, 38 F.3d 1224 (D.C. Cir. 1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995) ("We refuse ... to presume a delegation of power merely because Congress has not expressly withheld such power.").
[9] William Davenport, *COMMISSIONER STARKS STATEMENT ON NTIA'S SECTION 230 PETITION*, Federal Communications Commission (July 27, 2020), https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf.
[10] NTIA Rulemaking Petition at 17 ("[n]either section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude . . . the presumption that the Commission has power to issue regulations under section 230.").

do so ...[it] opens an ambiguity in section 230 that the Commission may fill pursuant to its section 201(b) rulemaking authority."[11] The petition ignores the body of case law that consistently rejects this argument.

The D.C. Circuit has rejected earlier attempts by the Commission to derive implied authority from Congressional silence.[12] In *MPAA v. FCC*, the question was whether, in addition to its statutory mandate to issue closed captioning regulations, the Commission had been delegated authority by Congress "to promulgate visual description regulations."[13] The Court rejected the Commission's argument that "the adoption of rules ... is permissible because Congress did not expressly foreclose the possibility," calling it "an entirely untenable position."[14] The D.C. Circuit held that Congress could have decided to provide the Commission with authority to adopt rules and that the statute's "silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations."[15] Likewise, in *ALA v. FCC*, the Court rejected the Commission's broadcast flag regulations because they had "no apparent statutory foundation and, thus, appear[ed] to be ancillary to nothing."[16]

Congressional silence on the FCC's authority is a reflection of the nature of Section 230. The statute is self-executing because it is a grant of immunity from civil liability that is enforced through private litigation. Congress did not mention the Commission in Section 230 because, unlike other statutes the Commission enforces, implements, and oversees, it does not require agency action to implement or enforce. The Commission has never had a role in implementing or enforcing Section 230, and it would be inaccurate to use Congressional silence to read one into the statute now.

II. NTIA's draft regulation language seeks to create content-based regulation that poses grave threats to First Amendment protections.

NTIA's goal of having federal regulations dictate what type of content interactive computer services can host or remove to benefit from Section 230's liability shield would amount to content-based regulation that likely violates the First Amendment. As the Court has said, "Content-based laws -- those that target speech based on its communicative content -- are presumptively unconstitutional and may be justified only if

[11] *Id*.
[12] *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796 (D.C. Cir. 2002).
[13] *Id*. at 801.
[14] *Id*. at 805.
[15] *Id*. at 806.
[16] *Am. Library Ass'n. v. F.C.C.*, 406 F.3d 689, 703 (D.C. Cir. 2005).

the government proves that they are narrowly tailored to serve compelling state interests."[17]

NTIA, through its proposed regulations, attempts to protect a certain type of content from being removed by interactive computer services. Specifically, the proposed regulations remove an interactive computer service's classification as a publisher when it "restricts access or availability" of content. This classification is a core part of the Section 230 liability shield[18] and removing this shield for certain actions would push services to avoid removing content, including posts that violate their own terms of services. In essence, NTIA's proposal would prescribe the limited conditions for when a service can benefit from a liability shield and when it can be subject to liability for its decisions concerning user-generated content. By attempting to dictate when liability attaches to a certain type of content moderation action by platforms, the proposed regulation amounts to content-based restrictions that run afoul of the First Amendment.[19] Even if the NTIA or the Commission are able to establish a compelling state interest, such content-based regulations will likely be found unconstitutional since the path to regulating speech here is not narrowly-tailored.

III. The Commission's rulemaking would chill free speech of internet users.

While NTIA's petition purports to advance the cause of freedom of expression for American internet users, if the Commission accepts the petition for rulemaking this would instead chill user speech by enabling the targeted harassment of members of protected classes, by disincentivizing platforms from moderating most types of user content, and by raising the specter of government surveillance, censorship, and reprisal.

NTIA contends that social media platforms moderate user speech in a manner that is "selective censorship."[20] Many of the anecdotes put forth as evidence of ideological bias concern the removal either of user speech that threatens, harasses, or intimidates other users on the basis of their membership in a protected class, or of factually incorrect information about the voting process among other topics.[21] The first type of speech is intended to, and frequently has the effect of, driving members of protected classes away from the social media "public square" and chilling their speech, while the second is intended to dissuade Americans from exercising their constitutionally protected right to vote. The NTIA's petition appears to be designed to

[17] Reed v. Town of Gilbert, Ariz. 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015).
[18] Domen v. Vimeo 433 F. Supp 3d 592, 601 (S.D.N.Y. 2020).
[19] Matal v. Tam 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017) "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'").
[20] NTIA Rulemaking Petition at 7.
[21] NTIA Rulemaking Petition at 25, 43-44.

prevent social media platforms from moderating such objectionable content. But this would have the effect of first, disproportionately chilling the speech of members of protected classes in service of enabling other speakers to engage in threatening, harassing, and intimidating speech, and second, of reducing voter participation by sowing doubts about the legality of absentee ballots distributed through the mail.

NTIA's petition urges adoption of rules that would enable harassment and deliberate disinformation -- two types of content that many platforms currently prohibit -- and diminish the voices of members of protected classes. First, the petition urges the FCC to clarify that "section 230(c)(1) applies to liability directly stemming from the information provided by third-party users" and that it "does not immunize a platforms' own speech, its own editorial decisions or comments, or its decisions to restrict access to content or its bar user from a platform."[22] In other words, under NTIA's proposal, interactive computer services would be open to lawsuits when they remove a user's speech for running afoul of the company's terms of service, or when they append a "fact check" or other supplementary information to a user's original post. These rules would create an incentive for platforms to avoid enforcing their rules against users they believe are likely to file suit, regardless of the underlying merits of such litigation. This is precisely the scenario that Section 230 was enacted to avoid.

Second, the petition urges the FCC to redefine "otherwise objectionable" in section 230(3)(b) in a way that strictly limits the content that platforms can moderate without risking litigation. Specifically, NTIA wants the meaning of "otherwise objectionable" to be limited to "obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." This proposed definition would disincentive platforms from removing harmful content that the original drafters of Section 230 in 1996 could never have foreseen, content that was originally covered by the current category of "otherwise objectionable." NTIA seeks to remove the immunity shield that applies whenever platforms take down or fact-check misinformation and disinformation around voting or Census participation, as well as racist comments that are not deemed to rise to the level of "harassing" an individual. As a result, individuals who belong to a protected class would have their voices in the digital space diminished because services fear that removing or fact-checking such negative material will open them to lawsuits.

Third, conditioning Section 230 immunity on a service's ability to demonstrate that a content moderation action meets the standard set by the proposed definition of "good faith" would incentivize companies to refrain from moderating user content in order to avoid burdensome litigation. Most concerningly, the proposed standard would require companies to achieve perfect consistency in the enforcement of their content

[22] NTIA Rulemaking Petition at 30.

rules against “similarly situated” material.[23] This bar would be extremely difficult, if not impossible, to achieve at a global scale and proving compliance with this metric in litigation would be very costly. Again, this is precisely the scenario that Section 230 was intended to avoid, and it would be inappropriate for the FCC to circumvent the will of Congress by engaging in the rulemaking urged by the NTIA petition.

More generally, even the perception of governmental monitoring and regulation of citizen speech has demonstrated chilling effects. A 2016 study found that simply being aware of government monitoring "significantly reduced the likelihood of speaking out in hostile opinion climates."[24] Similarly, a 2017 study confirmed not only that various types of government intervention causes chilling effects, but also “that younger people and women are more likely to be chilled; younger people and women are less likely to take steps to resist regulatory actions and defend themselves; and anti-cyberbullying laws may have a salutary impact on women’s willingness to share content online suggesting, contrary to critics, that such laws may lead to more speech and sharing, than less.”[25]

IV. Conclusion

The Commission should cease to go any further in considering this petition. If Congress wanted to delegate authority to the FCC to make rules defining Section 230, it could do so. Instead, Congress wrote 230 in a way that has been implemented and enforced for decades without the involvement of the FCC. Section 230 is a self-executing statute because it is a grant of immunity from civil liability that is enforced through private litigation. The FCC has never had a role in implementing or enforcing Section 230, and it would be inaccurate to read one into the statute now. Further, NTIA’s proposal would violate the First Amendment by imposing a content-based regulation that picks and chooses what type of content provides interactive computer services with an immunity shield and what type of editorial discretion opens them up to liability. Finally, by disincentivizing social media platforms from removing harmful content that threatens or negatively impacts marginalized communities, NTIA’s proposal would chill the speech of those who are members of a protected class.

Therefore, OTI and RDR urge the Commission to deny NTIA’s petition. For the reasons outlined in these comments, the Commission has no reason to move forward with the petition or seek public comment on this matter.

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[23] NTIA Rulemaking Petition at 39.
[24] Elizabeth Stoycheff, Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring, 93 J.ism & Mass Comm. Q. (2016).
[25] Jonathon W. Penney, Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study, 6 Internet Pol’y Rev. (2017).

Respectfully submitted,

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	
	)	

To: The Commission

COMMENTS BY NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE AND RANKING DIGITAL RIGHTS URGING DENIAL OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

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In the Matter of	)	
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excesses, and expose their abuses."[2] Further, we agree with the NTIA that "times have changed"[3] since the passage of Section 230 of the Communications Decency Act of 1996, and the internet ecosystem now reflects a diversity of opinions across a myriad of online platforms. However, any further consideration of NTIA's petition would improperly broaden the statutory authority of the Commission, violate the First Amendment, and chill the free speech of users online. The NTIA's petition seeks to censor, not protect, the freedom of expression of users. To ensure that our governing institutions maintain their proper and constitutionally valid roles in our democratic system, the Commission should deny this petition.

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services. The Commission declined to classify edge providers, including social media, as "information services" in the Restoring Internet Freedom Order.

Moreover, in the Restoring Internet Freedom Order, the Commission repeatedly asserted that Section 230 could not provide the basis for rulemaking. The Commission reclassified broadband Internet access service as an information service rather than a telecommunications service to justify a deregulatory policy, interpreting the 1996 act to confirm "Congress's approval of our preemptive federal policy of nonregulation for information services."[6] And the Commission agreed with the D.C. Circuit opinion stating that section 230(b) is a "statement [] of policy that [itself] delegate[s] no regulatory authority."[7] The Commission has abdicated its authority on net neutrality by reclassifying broadband Internet access service under Title I information service, therefore to claim regulatory authority now over information services is inconsistent with agency precedent.

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II. NTIA's draft regulation language seeks to create content-based regulation that poses grave threats to First Amendment protections.

NTIA's goal of having federal regulations dictate what type of content interactive computer services can host or remove to benefit from Section 230's liability shield would amount to content-based regulation that likely violates the First Amendment. As the Court has said, "Content-based laws -- those that target speech based on its communicative content -- are presumptively unconstitutional and may be justified only if

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NTIA, through its proposed regulations, attempts to protect a certain type of content from being removed by interactive computer services. Specifically, the proposed regulations remove an interactive computer service's classification as a publisher when it "restricts access or availability" of content. This classification is a core part of the Section 230 liability shield[18] and removing this shield for certain actions would push services to avoid removing content, including posts that violate their own terms of services. In essence, NTIA's proposal would prescribe the limited conditions for when a service can benefit from a liability shield and when it can be subject to liability for its decisions concerning user-generated content. By attempting to dictate when liability attaches to a certain type of content moderation action by platforms, the proposed regulation amounts to content-based restrictions that run afoul of the First Amendment.[19] Even if the NTIA or the Commission are able to establish a compelling state interest, such content-based regulations will likely be found unconstitutional since the path to regulating speech here is not narrowly-tailored.

III. The Commission's rulemaking would chill free speech of internet users.

While NTIA's petition purports to advance the cause of freedom of expression for American internet users, if the Commission accepts the petition for rulemaking this would instead chill user speech by enabling the targeted harassment of members of protected classes, by disincentivizing platforms from moderating most types of user content, and by raising the specter of government surveillance, censorship, and reprisal.

NTIA contends that social media platforms moderate user speech in a manner that is "selective censorship."[20] Many of the anecdotes put forth as evidence of ideological bias concern the removal either of user speech that threatens, harasses, or intimidates other users on the basis of their membership in a protected class, or of factually incorrect information about the voting process among other topics.[21] The first type of speech is intended to, and frequently has the effect of, driving members of protected classes away from the social media "public square" and chilling their speech, while the second is intended to dissuade Americans from exercising their constitutionally protected right to vote. The NTIA's petition appears to be designed to

[17] Reed v. Town of Gilbert, Ariz. 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015).
[18] Domen v. Vimeo 433 F. Supp 3d 592, 601 (S.D.N.Y. 2020).
[19] Matal v. Tam 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017) "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'").
[20] NTIA Rulemaking Petition at 7.
[21] NTIA Rulemaking Petition at 25, 43-44.

prevent social media platforms from moderating such objectionable content. But this would have the effect of first, disproportionately chilling the speech of members of protected classes in service of enabling other speakers to engage in threatening, harassing, and intimidating speech, and second, of reducing voter participation by sowing doubts about the legality of absentee ballots distributed through the mail.

NTIA's petition urges adoption of rules that would enable harassment and deliberate disinformation -- two types of content that many platforms currently prohibit -- and diminish the voices of members of protected classes. First, the petition urges the FCC to clarify that "section 230(c)(1) applies to liability directly stemming from the information provided by third-party users" and that it "does not immunize a platforms' own speech, its own editorial decisions or comments, or its decisions to restrict access to content or its bar user from a platform."[22] In other words, under NTIA's proposal, interactive computer services would be open to lawsuits when they remove a user's speech for running afoul of the company's terms of service, or when they append a "fact check" or other supplementary information to a user's original post. These rules would create an incentive for platforms to avoid enforcing their rules against users they believe are likely to file suit, regardless of the underlying merits of such litigation. This is precisely the scenario that Section 230 was enacted to avoid.

Second, the petition urges the FCC to redefine "otherwise objectionable" in section 230(3)(b) in a way that strictly limits the content that platforms can moderate without risking litigation. Specifically, NTIA wants the meaning of "otherwise objectionable" to be limited to "obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." This proposed definition would disincentive platforms from removing harmful content that the original drafters of Section 230 in 1996 could never have foreseen, content that was originally covered by the current category of "otherwise objectionable." NTIA seeks to remove the immunity shield that applies whenever platforms take down or fact-check misinformation and disinformation around voting or Census participation, as well as racist comments that are not deemed to rise to the level of "harassing" an individual. As a result, individuals who belong to a protected class would have their voices in the digital space diminished because services fear that removing or fact-checking such negative material will open them to lawsuits.

Third, conditioning Section 230 immunity on a service's ability to demonstrate that a content moderation action meets the standard set by the proposed definition of "good faith" would incentivize companies to refrain from moderating user content in order to avoid burdensome litigation. Most concerningly, the proposed standard would require companies to achieve perfect consistency in the enforcement of their content

[22] NTIA Rulemaking Petition at 30.

rules against “similarly situated” material.[23] This bar would be extremely difficult, if not impossible, to achieve at a global scale and proving compliance with this metric in litigation would be very costly. Again, this is precisely the scenario that Section 230 was intended to avoid, and it would be inappropriate for the FCC to circumvent the will of Congress by engaging in the rulemaking urged by the NTIA petition.

More generally, even the perception of governmental monitoring and regulation of citizen speech has demonstrated chilling effects. A 2016 study found that simply being aware of government monitoring "significantly reduced the likelihood of speaking out in hostile opinion climates."[24] Similarly, a 2017 study confirmed not only that various types of government intervention causes chilling effects, but also “that younger people and women are more likely to be chilled; younger people and women are less likely to take steps to resist regulatory actions and defend themselves; and anti-cyberbullying laws may have a salutary impact on women’s willingness to share content online suggesting, contrary to critics, that such laws may lead to more speech and sharing, than less.”[25]

IV. Conclusion

The Commission should cease to go any further in considering this petition. If Congress wanted to delegate authority to the FCC to make rules defining Section 230, it could do so. Instead, Congress wrote 230 in a way that has been implemented and enforced for decades without the involvement of the FCC. Section 230 is a self-executing statute because it is a grant of immunity from civil liability that is enforced through private litigation. The FCC has never had a role in implementing or enforcing Section 230, and it would be inaccurate to read one into the statute now. Further, NTIA’s proposal would violate the First Amendment by imposing a content-based regulation that picks and chooses what type of content provides interactive computer services with an immunity shield and what type of editorial discretion opens them up to liability. Finally, by disincentivizing social media platforms from removing harmful content that threatens or negatively impacts marginalized communities, NTIA’s proposal would chill the speech of those who are members of a protected class.

Therefore, OTI and RDR urge the Commission to deny NTIA’s petition. For the reasons outlined in these comments, the Commission has no reason to move forward with the petition or seek public comment on this matter.

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[23] NTIA Rulemaking Petition at 39.

[24] Elizabeth Stoycheff, Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring, 93 J.ism & Mass Comm. Q. (2016).

[25] Jonathon W. Penney, Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study, 6 Internet Pol’y Rev. (2017).

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via UPS upon:

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Performing the Delegated Duties of the Assistant Secretary
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/s/ Christine Bannan
Christine Bannan
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Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	
National Telecommunications and Information Administration Petition to "Clarify" Provisions of Section 230 of the Communications Act of 1934, as Amended	RM 11862

COMMENTS OF PUBLIC KNOWLEDGE

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September 2, 2020

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I. Introduction

The National Telecommunications and Information Administration (NTIA), at the direction of President Donald Trump, has asked the FCC to "clarify" a statute the Commission has no role in administering, in a way that contradicts the unambiguous, plain meaning of the text. Its petition must be rejected.

At its core Section 230, 47 U.S.C. § 230, is about promoting free speech online. It allows platforms to host user content without fear of becoming liable for everything their users write. It also allows platforms to take down content they find objectionable, which encourages free speech by allowing multiple platforms to develop and to create spaces where particular viewpoints and voices can be heard, or where multiple voices and views can be heard. There are of course legitimate debates to be had about the interpretation of Section 230 in some cases, and even ways it could be amended. But this is not the right place for that. The FCC does not administer this statute, has been assigned no role in doing so, and its opinions about its meaning would and should be given no weight by the courts. In any event the construction the NTIA has asked the FCC to give Section 230 contradicts its plain meaning and is likely unconstitutional, seeking to punish companies for taking points of view that the current administration disagrees with.

The NTIA's recommendations are also bad policy. Online platforms cannot and should not necessarily be "neutral., although some may choose to do so. While platforms that seek to have mass market appeal naturally have an incentive to be welcoming to a wide range of points of view on various controversial matters, they also have an incentive to weed out hate speech, obscenity, extremism, misinformation, and many other kinds of content, which may be constitutionally protected. *See* 47 U.S.C. 230(c)(2) (granting

immunity to providers and users of interactive computer services for removing or limiting access to material "whether or not such material is constitutionally protected"). If followed, the NTIA's view of how platforms should moderate content would turn them into something like common carriers, a concept that makes sense for some transmission, delivery and infrastructure companies but as applied to online speech platforms could lead to their being overrun with extremist content, abuse, and pornography. Or, it would turn them into dull wastelands where all user content had to be approved prior to publication, eliminating the vibrancy and dynamism of online discourse.

While these high-level concerns are interesting and worthy of discussion in the correct forum, this comment will focus particularly on the FCC's lack of jurisdiction to create rules "clarifying" Section 230.

II. Congress Has Not Delegated Authority Over Section 230 to the FCC

Congress may give agencies the power to administer a statute by issuing rules to fill in "gaps" either explicitly or implicitly. *Morton v. Ruiz*, 415 US 199, 231 (1974). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron USA v. Natural Resources Defense Council*, 467 US 837 (1984). However, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit," *id.*, and "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco*, 529 US 120, 159 (2000).

Congress has not delegated rulemaking or interpretive authority to the FCC over Section 230 either explicitly or implicitly. The NTIA's attempts to argue otherwise are unavailing.

A. There Has Been No Explicit Delegation

While Section 230 is codified in the Communications Act for reasons having to do with its legislative history,[1] this does not mean that the FCC has any role in implementing or interpreting the statute. NTIA has it exactly backwards when it states the FCC has authority because "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has the power to issue regulations under Section 230." NTIA Petition 17. The law is that "[t]he FCC may only take action that Congress has authorized," not merely just those actions it has not forbidden." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir.) (Kavanaugh, J.)) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)). *Accord: Motion Picture Ass'n of America, Inc. v. FCC*, 309 F. 3d 796, (DC Cir. 2002) ("*MPAA*") (When Congress declined to give the Commission authority to adopt video description rules, "This silence cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the … regulations.").

Because Congress has not expressly delegated any interpretive authority to the FCC with respect to this provision, even if the agency were to pronounce upon its meaning, courts would owe it no deference. As the Supreme Court explained in *United States v. Mead,*

[1] Section 230 was an amendment to the Communications Decency Act, itself Title V of the Telecommunications Act of 1996, amending the Communications Act of 1934.

"We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." 533 US 218, 229. Such authorization is absent here.

1. Section 201(b) Does Not Grant the FCC Authority to Change the Meaning of Section 230

The NTIA rests much of its argument for FCC authority on Section 201(b) of the Communications Act, which states in part that "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." Section 201 in general gives the FCC broad authority over the services and charges of common carriers not over the "interactive computer services" Section 230 is concerned with. By itself this provides reason enough to disregard the NTIA's attempt to bootstrap FCC authority over online services. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). *See also Gonzales v. Oregon*, 546 U.S. 243, 263 (2006) ("it is not enough that the terms 'public interest,' 'public health and safety,' and 'Federal law' are used in the part of the statute over which the Attorney General has authority.")

But even looking past the context of the language the NTIA puts so much weight on, and considering the language in isolation, the purported grant of rulemaking authority is no such thing, because the Commission has nothing whatever to do to "carry out" the provision. Section 230 concerns liability for various torts as litigated between private parties. The FCC has no role in this. The parties, and state and federal judges do. The FCC

may not interject its opinions into lawsuits that have nothing to do with its duties or jurisdiction merely because the President, via the NTIA, has asked it to.

Nor has the FCC seen any need to "carry out" this provision in the past through rulemakings or otherwise instead, as Blake Reid has documented, it has primarily cited to Section 230 as general evidence of federal technology policy, declining to use it as a direct source of authority. *See Blake Reid, Section 230 as Telecom Law*, https://blakereid.org/section-230-as-telecom-law (cataloging the FCC's scattered citations to this provision over the years). If the FCC was in fact charged by Congress in 1996 with "carrying out" this law, presumably it would have done so at some point, and its drafters would have wondered why it had not done so by now. *See Gonzales v. Oregon,* 546 at 257 (no deference due to agency when its sole rulemaking over decades is simply to "parrot" the statutory language in its regulations).

In a more fundamental sense, the NTIA's attempt to expand FCC authority by pointing to where the statute is codified is simply a version of the error made by the losing party in *City of Arlington*. There, the Court explained that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington, TX v. FCC*, 569 US 290, 297 (2013). Under this analysis the question before the agency is not whether it has "jurisdiction" over the matter in question but whether it is acting consistently with the statute. Even if successful, the NTIA's attempts to put this matter before the FCC do not in themselves give the FCC authority to act contrary to the plain meaning of the statute.

2. DC Circuit Precedent Forbids Imposing "Neutrality" Requirements on Interactive Computer Services

The NTIA's proposal would punish providers and users of interactive computer services for having a particular point of view as to what content is "objectionable." *See* NTIA Petition 37-38; 38-40. In other words, it imposes anti-discrimination and anti-blocking rules on interactive computer services, providing them with only a short list of types of content they may be permitted to block without incurring a legal penalty. The DC Circuit held that requirements of this kind amount to common carrier rules. *Verizon v FCC*, 740 F.3d 623, 628, 653-54 (DC Cir. 2014). As a policy matter common carriage is appropriate for some kinds of communication services, like telephony and broadband access, but imposing common carrier requirements on online speech platforms makes no more sense than imposing them on newspapers. Further, even with policy and sense aside, the DC Circuit has held it's illegal: it has interpreted the definition of "telecommunications carrier" in 47 U.S.C. 153(51), which includes the language that "A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services," to mean that the FCC can impose common carrier requirements *only* on services classified as telecommunications services. *Verizon* at 650. Interactive computer services are not so classified, of course, and could not be. This provides another reason for the FCC to reject the NTIA's request.[2]

[2] It is notable that following the NTIA's request would involve the FCC at least partially repealing the Restoring Internet Freedom Order, 33 FCC Rcd 311 (2017). Imposing any form of non-discrimination requirements on ISPs (who are included in the meaning of "interactive computer services" under Section 230), or even asserting jurisdiction over them, would constitute a significant departure from the current FCC's deregulatory approach.

3. The FCC Needs Express Authority to Regulate Content, Which It Lacks Here

The NTIA also seeks to have the FCC directly regulate the content of interactive computer services, an activity that the FCC cannot do without express statutory authority, which it lacks. In *MPAA,* the court held that where "the FCC promulgates regulations that significantly implicate program content" it cannot rely on a general grant of authority such as § 1 of the Communications Act (47 U.S.C. § 151). *MPAA* at 799, 803-04. Similarly here, even if Section 201 were viewed as a general grant of authority, the FCC lacks the specific grant of content-regulation authority that DC Circuit found it would need. The MPAA court is not alone in this. Other courts have also required the FCC to demonstrate clear statutory authority when it seeks to expand its purview to cover things other than the actual transmission of electronic communications. *See American Library Ass'n. v. FCC*, 406 F. 3d 689, 700 (DC Cir. 2005) (the FCC's "general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission"); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F. 2d 1397, 1400 (7th Cir. 1972) (FCC jurisdiction does not extend to activities that merely "affect communications" because this "would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature.")

B. There Has Been No Implicit Delegation

Congress has not implicitly delegated authority to the FCC to interpret Section 230, either. Implicit delegation occurs when the statute an agency is charged to administer contains ambiguous terms that must be resolved to give a statute effect. But while "*Chevron*

establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency," *Christensen v. Harris County*, 529 US 576, 590 (Scalia, J. concurring), there is no reason to think that Congress intended the FCC to "administer" Section 230. Further, the NTIA's attempts to concoct "ambiguity" where there is none fall short on their own terms. "The implausibility of Congress's leaving a highly significant issue unaddressed (and thus "delegating" its resolution to the administering agency) is assuredly one of the factors to be considered *in determining whether there is ambiguity*[.]" *Id. See also King v. Burwell*, 576 U.S. 473, 487 (2015) (because who should receive tax credits was "a question of deep 'economic and political significance' that is central to this statutory scheme" Congress would have assigned the decision to an agency "expressly.")

1. "Otherwise Objectionable" and "Good Faith" Are Not Ambiguous in this Context

While a subsequent section of this comment will explain in more detail how the NTIA's alleged understanding of the statute defies its plain meaning, here it is worth explaining that the phrases "otherwise objectionable" and "good faith" in 230(c)(2) are not ambiguous in a way that calls for or could support agency clarification.

"Otherwise objectionable" is a subjective term, not an ambiguous one. The fact that one platform might find content objectionable, and others might not, does not mean that the FCC (or even federal courts) can substitute their own judgment for the editorial, content moderation decisions of platforms. In fact, different platforms having different views as to what is an is not "objectionable" is exactly what is intended by Section 230, which seeks to foster "a true diversity of political discourse" on the internet as a whole across a multiplicity of forums (not to require the whole range of views within specific

private services, which remain free to draw the boundaries of acceptable discourse in their own way). It is a fundamental error to confuse a subjective standard with an "ambiguous" one.

In this context, "good faith" is not an ambiguous technical term, either it is a common law term of art that state and federal courts are accustomed to applying in a great variety of contexts. Article 3 federal courts are not crying out to the FCC for help in determining what "good faith" means in the context of litigation between private parties, which as discussed above, is what Section 230 addresses. The courts interpret this term in a variety of contexts as a matter of course, and generally employ a fact-specific approach that is not compatible with the simple interpretive rubric the NTIA provides. *See, e.g.*, *United States v. United States Gypsum*, 438 U.S. 422, 454-455 (1978) (discussing the "fact-specific nature" of a good faith inquiry in a different area of law); *Arenas v. United States Trustee*, 535 B.R. 845, 851 (10th Cir. BAP 2015) ("Courts evaluate a debtor's good faith case by case, examining the totality of circumstances."); *Alt v. United States*, 305 F.3d 413 (6th Cir. 2002) ("good faith is a fact-specific and flexible determination"); *Reserve Supply v. Owens-Corning Fiberglas*, 639 F. Supp. 1457, 1466 (N.D. Ill. 1986) ("[T]he inquiry into good faith is fact-specific, with the relevant factors varying somewhat from case to case.") Such legal determinations are the bread and butter of courts and the FCC has no helpful guidance to give, nor authority to do so. This is not a matter of determining what "good faith" means in complex areas fully subject to FCC oversight, such as retransmission consent negotiations, where the FCC itself, in addition to issuing rules, adjudicates the underlying disputes. *See* 47 C.F.R. § 76.65.

2. Circumstances Do Not Suggest That Congress Intended to Delegate Authority over Section 230 to the FCC

There are further reasons to conclude that the FCC has no authority to act on this matter. In *Brown & Williamson*, the Court explained that in some cases it is unlikely that Congress intended to delegate the resolution of major policy questions to agencies implicitly. In that case, the FDA "asserted jurisdiction to regulate an industry constituting a significant portion of the American economy." *FDA v. Brown & Williamson Tobacco*, 529 US 120, 159 (2000). Just as it was unlikely that Congress had delegated authority to the FDA to regulate the tobacco industry, here it is unlikely that Congress has delegated authority to regulate "interactive computer services" to the FCC, which are an even more significant portion of the economy. Given "the breadth of the authority" that NTIA would have the FCC seize for itself, the Commission must reject its "expansive construction of the statute" that goes far beyond Congressional intent and the words of the law itself. *Id.* at 160.

In *King v. Burwell*, the Court added that there was not likely to be delegation was when the agency has "no expertise in crafting" the policies purportedly delegated to it. 576 U.S. at 486 (Congress did not delegate authority over healthcare policy to IRS). Had Congress intended for the FCC to assert authority over the content moderation practices of online platforms and websites it would have said so explicitly. It did not, and there is no evidence it intended to.

This is especially clear in that the FCC has no particular expertise or experience in managing the moderation policies of interactive computer services. As mentioned above the FCC, in its various duties, has never relied on Section 230 as a direct source of rulemaking authority. Nor is it clear where in the FCC's internal structure organized by bureau into subject matters such as "Public Safety" and "Wireless Telecommunications"--

supervision of the content moderation practices of Twitter and Facebook would even fit. The FCC lacks the institutional capacity, history, staff, or resources to tackle the issues the NTIA wants to put before it. This is understandable because the FCC is a creature of Congress, and Congress never intended for it to take the sweeping actions the NTIA now requests. Because the FCC has no expertise in regulating internet content or liability generally, it is therefore "especially unlikely that Congress would have delegated this decision to" the FCC. *King v. Burwell,* 576 U.S. at 487.

Similarly, in *Gonzales v. Oregon*, the Supreme Court rejected the effort of the Attorney General to prohibit doctors in Oregon from prescribing drugs pursuant to the state's "assisted suicide" statute. The court reasoned that because Congress explicitly limited the Attorney General's power under the relevant statute to promulgate rules relating to the registration and control of controlled substances, the Attorney General could not use the statute's general permission to create rules "to carry out the functions under this act" to regulate physician behavior. *Gonzales v. Oregon*, 546 U.S. at 266-67 (2006). *Accord: MCI Telecommunications v. AT&T*, 512 U.S. 218 (1994) (presence of ambiguity does not allow FCC to assign meaning Congress clearly never intended).

III. NTIA's Proposed Statutory Construction is Contrary to Its Plain Meaning

NTIA's proposed interpretation of Section 230 is contrary to its plain meaning and has no support in its legislative history. Its errors are manifold. This comment will highlight only a few.

To begin with, 230(c)(1) and (c)(2) are not redundant as interpreted by the courts. *See Barnes v. Yahoo!*, 570 F. 3d 1096, 1105 (9th Cir. 2009). It is true that (c)(2) is primarily concerned with liability for takedowns, while (c)(1) more broadly provides immunity for

an interactive computer service, or user, from being treated as a publisher or speaker of third-party content. Because the activities of a "publisher" include decisions about what not to publish, actions that seek to hold a provider or user of an interactive computer service liable as a publisher on the basis of content removals do indeed fail under (c)(1). But (c)(2) is not just about torts that seek to hold a user or provider of an interactive computer service liable as a publisher or speaker. It is broader, in that it immunizes them from *all* causes of action, including those that have nothing to do with publishing or speaking. For example, an attempt to hold a provider of an interactive computer service liable for some sort of tortious interference with a contract because of its content removal choices might not fail under (c)(1), but could fail under (c)(2). Similarly with causes of action relating to the service providing users with tools they can use to restrict access to content they find objectionable. At the same time, (c)(2) is more limited than (c)(1) in that it (and, contrary to the NTIA's baseless assertion, not (c)(1) itself) is limited by a requirement that takedowns be done in good faith. While "good faith" is a term of art to be interpreted as the circumstances warrant by courts, this could mean, for example, that an antitrust case against a provider of an interactive computer service that removed access to a competitions' information as part of an unlawful monopolization scheme could proceed.

The NTIA claims that Section 230 has been interpreted to shield a platform from liability for its own content and asks for "specification" that this is not the case. NTIA Petition 5 (point 4). It also bizarrely claims that it has been interpreted to "provide[] full and complete immunity to the platforms for their own publications, … and affixing of warning or fact-checking statements." NTIA Petition 26. This is false and no cases support it. NTIA does not cite a single instance of a platform being shielded by Section 230 for its

own content because there are none. When Twitter labels one of the President's tweets as misinformation and explains why, it is the speaker of that explanation and is liable for it however hard it might be to imagine what the cause of action could possibly be. The context and explanation that Twitter adds to one of the President's tweets that contain false information about voting or other matters are not "information provided by another information content provider" under (c)(1). However, the fact that Twitter or any other service is liable for its own speech does not make these services liable for the speech of third parties, such as potentially tortious tweets by the President. The immunity granted by the plain words of (c)(1) is unconditional.

The NTIA claims that "Section 230(c)(1) does not give complete immunity to all a platform's 'editorial judgments.'" NTIA Petition 27. To the extent that this refers to the platform's own speech, this is trivially true. Section 230 does not shield a platform's own speech. But Section 230(c)(1) does provide complete, unqualified immunity to platforms with respect to the editorial choices they make with respect to third-party content even if those choices themselves are unavoidably expressive in nature.

Along these lines NTIA asks "at what point a platform's moderation and presentation of content becomes so pervasive that it becomes an information content provider and, therefore, outside of section 230(c)(1)'s protections." NTIA Petition 27-28. The answer to that question is "never." The "moderation and presentation" of content is simply another way of describing "publication," which the law shields. For example, an online forum for gun owners is free to delete any posts arguing for gun control, without becoming liable either for the content of the posts on this forum, or for its pro-gun point of view itself. This is necessarily entailed by 230(c)(1)'s plain statement that a user or

provider of an interactive computer service cannot be held liable as a *publisher* of third-party content. Editorial choices often involve expressing a point of view, either as to the content of a message or just quality. As *Zeran* held, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content are barred." *Zeran v. America Online*, 129 F. 3d 327, 333 (4th Cir. 1997).[3]

Section 230 embodies a policy choice, and it's a choice to treat providers and users of interactive computer services differently than any other publisher. It does not require computer services to be "neutral" if it did, it would not have immunized them from liability as publishers, as publishing is an expressive and non-neutral activity. An analogy to print publishers, who often express points of view, may help illustrate this. The New York Review of Books reissues many out-of-print books that it considers to be classics. Verso Books concentrates on left-wing titles. These two print publishers are engaged in expressive activity not just with their own speech (marketing materials and so forth) but with respect to the third-party speech they choose to amplify. Similarly, internet forums devoted to particular topics have a range of views they find acceptable, and dominant platforms have decided to take stands again election misinformation, COVID conspiracy

[3] The NTIA puts forward a bizarre interpretation of *Zeran* that, consistently with its overall approach to this issue, contradicts the language in question in such a basic way that the best way to rebut it is to simply quote the language back. The NTIA claims that this key quotation "refers to third party's exercise of traditional editorial function not those of the platforms." NTIA Petition 27. But the *Zeran* quotation, again, speaks of "lawsuits seeking to hold **a service provider** liable for **its exercise** of a publisher's traditional editorial functions." (Emphasis added.) It very clearly states that a platform can exercise editorial functions without incurring liability. Perhaps NTIA thinks that *Zeran* was wrongly decided but such an argument would run into Section 230's language which specifically permits interactive computer services to act as publishers, a function which necessarily includes editorial choices.

theories, anti-vax content, and racial hatred. Even without Section 230, most of these editorial choices would enjoy some level of First Amendment protection.[4] Section 230(c)(1) provides an additional level of protection for online platforms and their users, in order to facilitate online discourse and to avoid legal incentives that would discourage moderation and editorial choices. It states plainly that providers and users of interactive computer services cannot be held liable either for the content of the third-party speech they choose to amplify, or as "publishers," which includes expressing a point of view about third-party speech they find worthy, or objectionable. If NTIA disagrees with this policy choice it should talk to Congress about changing it, not misrepresent what the law says right now. *Cf. MCI Telecommunications v. American Telephone & Telegraph*, 512 US 218, 231-32 (1994) ("What we have here, in reality, is a fundamental revision of the statute… That may be a good idea, but it was not the idea Congress enacted into law[.]").

IV. Conclusion

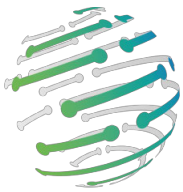
The NTIA has put forward bad legal and policy arguments in a forum that has no authority to hear them. Its misrepresentations and misstatements of the law are pervasive. To the extent it disagrees with the law that Congress passed it is free to say so, but the FCC must resist this call for it to expand its jurisdiction into regulating the content moderation and editorial choices of interactive computer services, while recognizing that the NTIA's arguments as to why the FCC has authority here are no better than its specious and trivial mischaracterizations of the statute itself.

[4] It is not necessary to decide here whether this sort of editorial expression deserves intermediate scrutiny or heightened scrutiny. *See Turner Broadcasting v. FCC*, 512 U.S. 622 (1994) (distinguishing between print and cable editorial discretion for First Amendment purposes).

Respectfully submitted,

/s/
John Bergmayer
Legal Director
PUBLIC KNOWLEDGE

September 2, 2020



INNOVATION ECONOMY INSTITUTE

IDEATE-INNOVATE-EDUCATE-MOTIVATE

2 September 2020

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: In the Matter of Section 230 of the Communications Act of 1934, RM – 11862

Dear Ms. Dortch,

The National Telecommunications and Information Administration (NTIA) has petitioned the Federal Communications Commission (FCC or Commission) to initiate a rulemaking to "clarify" the provisions of Section 230 of the Communications Act of 1934, in accordance with Executive Order 13925, "Preventing Online Censorship" (E.O. 13925).

That Executive Order was long rumored to be in the works, months before its release, because of the reaction by the executive branch to how it perceived social media works and the desire to dictate how it should work. In other words, government expressly wanted to control how business could operate, and what speech was deemed appropriate, especially if that speech was a citizen's critique of government or elected officials, or if a government speaker simply wanted to act as they pleased rather than follow community guidelines for acceptable behavior. Self-governance of a business was to be thrown out so that government could do as it pleased.

As was pointed out immediately upon its release, the Executive Order demonstrated a basic misunderstanding of our U.S. Constitution and the Bill of Rights, flipping our guaranteed protections on their head. The guarantee of freedom of speech specifically protects citizens, and groups of people who have come together for a purpose such as a corporation, from government. It does not protect government from the people. On its face the order was concerned about how to limit speech for people, expand the power of government to control speech and reduce criticism of government.

The Order sought reach these goals by requiring two independent agencies, both this FCC and the Federal Trade Commission, to functionally do the bidding of the executive branch. With increased

scrutiny on users and creating authority to open up trade secret protected algorithms, government control of what citizens could do online would expand dramatically. Each directive would be a lawyer's dream as the order seemed to dramatically expand the jurisprudence for claiming fraud.

Because the Order was merely political theatre rather than sound policy not much could be accomplished without further action which has led the NTIA to file this petition, an attempt to hoodwink the FCC into transforming itself into a sprawling regulatory agency that would become nothing less than the "Federal Computer Commission."

This dubious background is important to understand as now the FCC is called upon to be in the vanguard of the attempt to ignore clear congressional direction and to radically expand government in direct opposition to our guaranteed liberties, using Section 230 as an excuse.

Section 230, in short, provided Congressional instruction to the courts as to when liability should be imposed for certain speech online. The section made manifest personal accountability by holding the speaker themselves, not a platform on which a speaker speaking, accountable for their words. If an online service exercised no control over what was posted on their platform then they were not be liable for what was said. However, Congress also wanted to provide an incentive by creating a safe harbor for those who might operate in good faith to moderate some content, particularly to remove unlawful or abusive material. As an additional benefit this approach also stopped lawyers from bringing lawsuits against deeper pockets merely for their personal gain.

From the simple idea of personal accountability and an incentive for good actors to help clean up dirty corners of the internet, the internet as we understand it today has sprung. Finding no other way to bring this era to an end by pursuing the ends of the Order the NTIA has asserted that the FCC has jurisdiction in this area.

The jurisdictional questions for the FCC have been well covered in other comments provided in this docket but in sum, clearly Congress did not grant the FCC authority to suddenly assume control of internet content as part of its mission. In fact, the evidence shows just the opposite.

As the current Commission has argued innumerable times, Congress needs to act if in fact they intended something not on the plain face of the law. Specifically, if Congress desires to take the radical step of regulating the internet then they can follow the proper path to so doing. After Congressional action the executive branch can follow the proper order of things and sign the legislation granting such authority thereby appropriately demonstrating the express will of government. This is proper governance. Hiding behind an independent agency to do one's bidding is not.

Lacking that Congressional authority, the NTIA wrongly asserts that social media is an information service in an attempt to bring it under the FCC's purview. In today's language one might consider this claim "fake news." Again, as well documented and detailed elsewhere in the filings before you the full intention of Congress, beginning with the author of the language, was to at all turns reject the notion that the FCC did or would have any jurisdiction in this area. Some members of Congress did not agree and actually attempted to expand the authority. Such attempts were expressly rejected.

In addition, the FCC has previously declined to recognize it has authority in the area and has openly made clear it has no expertise to guide it regardless. So, now the FCC would, without any Congressional authority to do so, suddenly have to reverse itself and assert that so-called edge services were within its regulatory control and become precisely what Congress rejected, the Federal Computer Commission.

Perhaps more importantly, almost regardless of the jurisdictional legal question, is if the FCC had the authority but was not directed to use it by Congress whether it should. The clear answer here is no for a variety of reasons.

The first is apparent on its face, that the intent of the Order in trying to rope in the FCC is to place the FCC in role as an arbiter of facts. No regulatory agency will be as well equipped as the courts to determine facts and reach a final binding result. In this instance acting at the behest of the executive and without direction from Congress further weakens any result which would certainly be appealed to the courts. The best place to have a grievance addresses, and to reach an appropriate result, are the courts.

Second, this seems a curious time to massively expand the authority and policing power of the FCC. Is that the legacy this FCC would like to have?

As the nation discusses, debates and brings more attention to the use of police power, few moves could be more counter to the social temperature than to create new policing powers. In fact, the expansion here plays precisely to the point being made by the peaceful protestors on the streets, that policing power, a massive authority, has gone too far without adequate oversight. In this case, the FCC would be creating its own power that has been repeatedly, in various settings, expressly denied to it. Government abuse of the people could hardly be any more apparent than this.

The most obvious apparatus outside of the court system for these new powers to work would be empowering companies to determine what speech is allowed as dictated by government with oversight by the FCC. Ironically this places companies back in the role they are claimed to be in by some politicians, except then they would be subject to government dictates rather than their own company's beliefs, desires and rules. The desire to force companies to act as a policing force is unnerving. Again, the courts are best suited for the settlement of complaints to avoid this reality.

Next, once this new authority is wielded one thing is obvious, future commissions will wield it as well to their own ends. A massively sprawling FCC that controlled the nation's computers and online experience would be dangerous in the best of times and devastating to our freedoms at all times.

The parallels to the Title II debate are clear. Just as the Title II supporters missed the point so do those who advocate for section 230 to be eliminated, hindered or to have the FCC expand its regulatory apparatus. A point that has been made to this and previous commissions, innovation and the internet is an ecosystem and this sort of heavy-handed approach will negatively impact the entirety of it.

Platforms such as social networks, search engines, operating systems, web-based email, browsers, mobile apps, e-commerce and more are proliferating. These platforms are simply layers, that create a

"stack" as new products or services are built upon them. The relationship between these various layers of the ecosystem, including service providers, is tightly woven in part because of the vertical integration but also because of contracts and interdependencies. Upsetting or isolating one part of the stack does not necessarily lead to linear and predictable results. In fact, observation informs us that the opposite is typically true. Innovation in the internet and communications space moves rapidly but unevenly. Technology and innovation experts have only the most-slender of chances to understand where invention and innovation is headed next. Humility is the correct approach for prognosticators. But most harmful is regulatory hubris which regularly leads to any number of unintended consequences and is damaging pollution to this ecosystem. Desperate attempts to try to bring government desired order to what is not orderly are doomed to failure or only succeed in suffocating innovation.

When the internet ecosystem is under attack the entire ecosystem needs to respond, not be artificially divided by arbitrary government intervention since a change to any part of the ecosystem has an impact on all parts of the ecosystem. The well-being of the internet, at least as it exists in the U.S., is dependent on all parts being healthy and free from interference. True success in the digital world is achievable when all parties understand that they cannot stand on their own, that in fact an economically thriving digital ecosystem requires cooperation with an eye towards what is best for the broader whole. The distributed nature of the internet is a fundamental part of its design, and no one entity, no one cluster of entities, can be an island. Stakeholder cooperation, including a FCC that truly understands this dynamic, is imperative for the success of all.

Errant two-dimensional thinking leads to the wrong conclusion that there are "areas" of the ecosystem that can be altered without massively effecting the entire environment. For example, there are no such things as "edge providers." They operate like nearly all other parts of the ecosystem with new layers building upon them and various operators interconnecting with them. A designation as an "edge provider" is more akin to a marketing pitch than to a technological truth. Trying to isolate such entities for heavy regulation will negatively impact the entire space. The same is true if trying to isolate service providers for government control. Those interacting with the ecosystem will find it hard to leave, or switch, from any particular area to another be it service provider, social media, operating system, etc. This is not a negative. Consumers choose where they are most comfortable and make their place there. Government intervention merely limits those options, or preferences one part of the ecosystem over another, and is inherently harmful to consumers.

Inhabiting, using and benefiting from the ecosystem are those who often used to be called "netizens," and later, for those who do not remember a time without the internet "digital natives." The "netizens" used to be proud of the unregulated nature of the internet. Proud of a certain wild west element that promised the interesting, the cool and the cutting edge. Then, politicians regularly came to Washington, D.C. to proclaim – "Hands Off!" That was not very long ago, but something has happened.

These days, some pursuing their own visions instead of safeguarding freedom for the netizens, have tried to persuade people to believe that people now live in a state of constant fear of threats, confusion, misdirection and cannot function fully unless government firmly grasps the internet and holds it tight. These sorts of distortions of the truth trap the ecosystem, and many of those who can gain the most from using it, in a make-believe dystopian fantasy narrative. In truth, liberty frees those in the internet

ecosystem just as it does elsewhere, allowing them to pursue their lives, creating an online experience that they desire, not what is dreamt up for them in D.C. Netizens deserve an open internet ecosystem. The internet is not made more open via grater government control of speech and expression.

No one should mistake that there is anything but near unanimous belief amongst all political tribes that an open internet should exist. No advocacy group, political party, industry or consumer group is advocating for consumer harm. Only a small, loud, agenda driven cabal of populists and opportunists argues for government restriction and control. Inarguably, the best way to preserve an open internet is precisely how an open internet has been preserved for this long, that is via the free market. That is how consumers will continue to be protected, how consumers will continuously benefit from the innovation, investment and creation that follows, and how consumer experiences with content, technology, and information can be consumer driven not government determined.

Here is the goal then: less regulations so that more innovation will lead to greater consumer choice, the demand which will then drive the need for more supply, provided via greater investment, leading to even greater consumer choice. It IS an ecosystem and one thing does beget the next.

Some have argued too that the Order seeks to create a new "Fairness Doctrine" for the internet and that seems likely. The Doctrine was a decades-long government policy that forced "viewpoint neutrality" by broadcasters. It was repealed more than 35 years ago. Back then the excuse was "spectrum scarcity," that there were so few radio or television channels that some points of view had to be guaranteed to be broadcast regardless of whether the Doctrine trampled freedom of speech or the option not to speak.

That similar complaints are made today is almost laughable if some were not trying to sacrifice our rights to make the world as they prefer. The last few decades, because of the internet and its various platforms, has been an era of unprecedented video and audio content choices. Media today is ably demonstrating a creative, functioning market, frenetic with new options and new choices. Content companies attempt to anticipate what consumers want, and respond quickly to consumer choice. And those with less populist tastes have many more targeted channels at their disposal.

Precisely at this time when more people want to be heard this new fairness doctrine disaster is unwarranted. Repression is not the right choice. Consumers, and yes even politicians, have innumerable choices for expression and do not need to upend our guaranteed liberties so that they can be protected from citizens or force others to promote or host their content.

Perhaps the most important consideration is that the FCC currently has very important work to continue rather than be distracted by a major organizational shift and expansion.

To say the least, the FCC needs to continue its focus on opening up more spectrum for 5G and Wi-Fi use, and the growing needs of the country make clear that the job is far from over. A plan for making available further desirable spectrum needs to be made clear. The "spectrum pipeline" must be continuously filled with both unlicensed and licensed spectrum to meet the ever-increasing demand by consumers. Thoughtful leadership now and in the future is necessary to provide the materials for the 5G

experience in our homes and businesses, as well as in urban and rural communities alike, to grow and continue.

Another example is the needed attention to addressing the need for more rural broadband. With robust investment in broadband since 1996 of nearly $2 trillion by internet service providers more than 94% of the U.S. population has access to broadband. Even with that investment, there are still some without access.

As George Ford of the Phoenix Center has explained, a little more than 3% of those who do not have internet access at home do not have it because it is not available. The challenge might seem small, as compared to 60% who say they have no need or desire to have access, but is important to those who want access. The obstacle is that most of those without access live in hard to reach areas, areas where there is little to no business case to be made for broadband. The solution to increase connectivity for many of the unserved is fairly obvious.

The challenge can be overcome in a relatively cost-effective way by potential broadband users through attaching broadband cables to utility poles. The costs are currently being driven up by those who force a new company that wants access to a pole already at the end of its useful life, to bear the entire cost of replacement.

The FCC needs to step into a space where it is already regulating and clarify the situation. Specifically, at the least, replacement or upgrade costs should be fairly distributed between pole owners and those who seek to attach new equipment.

In general, the FCC should continue the leadership in broadband it has demonstrated during the pandemic, by continuing to focus on the challenges of increasing access to broadband. The highlighted two issues here are just a small part of what the FCC has on its to do list already. The Commission is doing a good job and for the benefit of future innovation the focus must be on the critical issues of spectrum and broadband.

Discussions about clarifying or updating Section 230 to reflect that the internet has changed since 1996 seem entirely reasonable. Nothing here should suggest otherwise. Those conversations, and certainly any changes, are the domain of Congress not the FCC, nor any other agency, independent or otherwise.

The FCC certainly does not want to risk taking its eye off the broadband ball, or placing at risk its current reputation, by taking up a political charge to regulate the internet and moderate what speech is allowed by the government. The legacy of this FCC should be of more broadband to more people more often, not the creation of the Federal Computer Commission.

Respectfully,

Bartlett D. Cleland
Executive Director
Innovation Economy Institute

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862

COMMENTS OF
THE FREE STATE FOUNDATION*

These comments are filed in response to the Commission's request for public comments regarding the Petition filed by NTIA requesting the Commission initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934, as amended. The principal point of these comments is that, a quarter century after its enactment at the dawn of the Internet Age, it is appropriate for Section 230 to be subjected to careful review, whether by Congress or the FCC, or both. Unlike the Ten Commandments handed down from Mt. Sinai, Section 230 is not etched in stone, but like most statutes, it should be periodically reviewed with an eye to considering whether any revisions are in order.

Many, but not all, of those who oppose the FCC (or Congress) examining Section 230 do so in rather apoplectic terms, suggesting that any change at all would mean the "end of the Internet as we know it." It is somewhat ironic that some, but not all, of those who are most vociferous in proclaiming doomsday scenarios if Section 230 is altered in any way, especially the largest Internet web giants such as Google, Facebook, and

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Director of Policy Studies and Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

Twitter, also predicted the "end of the Internet as we know it" if strict government-mandated "net neutrality" regulation were eliminated or loosened.

These initial comments do not stake out detailed positions regarding the meaning of Section 230's provisions and their scope. Rather, they emphasize that, in response to the NTIA petition, the FCC almost certainly has authority, within proper bounds, to issue clarifying interpretations of ambiguous Communications Act provisions like Section 230 and that it is not inherently improper for the Commission to consider exercising this authority. Review of Section 230 is warranted given dramatic changes in the Internet ecosystem over the last twenty-five years. Granting that adoption of Section 230 may have played an important role in the rise of Internet content providers that are now a key part of the American economy and social fabric does not mean that, at present, their practices or conduct, including their content moderation practices, should not be considered in relation to their impact on the public.

The debate surrounding Section 230 involves fundamental issues, including its efficacy, what the First Amendment prohibits and what it permits, the roles of the FCC and the Federal Trade Commission with respect to interpreting or enforcing the law, and the relationship between the immunity granted content providers by Sections 230(c)(1) and 230(c)(2). To provide a framework for addressing some of these issues, Free State Foundation President Randolph May, in his June 2020 *Perspectives from FSF Scholars* titled "Considering Section 230 Revisions, Rationally,"[1] outlined some fundamental propositions that are relevant here:

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[1] Randolph J. May, "Considering Section 230 Revisions, Rationally," *Perspectives from FSF Scholars*, Vol. 15, No. 35 (June 24, 2020), attached as Appendix A, and also available at: https://freestatefoundation.org/wp-content/uploads/2020/06/Considering-Section-230-Revisions-Rationally-062420.pdf.

- First, the legal immunity granted "interactive computer services" by Section 230 played a significant role in the Internet ecosystem's development, particularly in the years closer to the law's enactment in 1996.

- Second, when private sector online services remove or disable access to users' content from their websites, they do not violate the First Amendment free speech rights of the sites' users. The First Amendment prevents the government from censoring speech, not private actors.

- Third, the First Amendment does not compel Congress to grant or maintain immunity from civil liability to online services for actions that censor or stifle the speech of users of their websites. Like publishers or purveyors of print or other media, the online services remain perfectly free, absent a grant of immunity, to exercise their First Amendment rights to moderate content.

- Fourth, to the extent online services moderate and remove or disable access to user content, it is reasonable that such services specify their policies and practices for content moderation with some particularity in transparent publicly-promulgated terms of service and consistently follow them in order to show "good faith" and receive immunity from civil liability under Section 230. The Federal Trade Commission, pursuant to its consumer protection authority, may consider complaints that such terms of service have been violated – including complaints that may implicate Section 230 immunity – and may consider whether to impose sanctions for such violations.

While these propositions were offered in the context of commenting on the Department of Justice's report[2] recommending revisions to Section 230 for Congress's consideration, they are relevant to the Commission's consideration of NTIA's petition.

Section 230(c)(1) of the Communications Decency Act provides immunity from civil liability to "interactive computer services" for third-party content posted on their websites. Section 230(c)(2) provides immunity, subject to certain limitations, for a provider's actions "taken in good faith" to restrict access to material that the provider considers to be "obscene, lewd, lascivious, filthy, excessively, violent, harassing, or otherwise objectionable."[3] These two immunity provisions, particularly for major online

[2] Department of Justice, "Section 230 – Nurturing Innovation or Fostering Unaccountability?", June 2020, available at: https://www.justice.gov/file/1286331/download.
[3] 47 U.S.C. §§ 201(c) (1) and (2).

services such as Facebook, Twitter, and YouTube, have been the subject of increasing attention and public debate. In our view, there is evidence that major online services, intentionally or not, have acted in ways that are inconsistent with their terms of service, including with respect to their content moderation policies. For example, there are widespread claims that online content services moderate, restrict, or remove content in a way that is biased against "conservative" speech in ways that may contravene their terms of service.

The Department of Justice has recommended that Congress consider revisions to Section 230.[4] And NTIA has now petitioned the Commission to clarify the meaning of Section 230's provisions.[5] Given the publicly expressed concerns of the DOJ and NTIA regarding how Section 230 is sometimes understood and applied in today's Internet ecosystem, there is no good reason to view the statute as somehow off-limits to review by the FCC.

Importantly, the Commission almost certainly has authority to address the meaning of statutory terms, including Section 230. Although providers of "interactive computer services" are not Title II providers of "telecommunications," Section 230 is part of the Communications Act of 1934, as amended. And the Commission has authority pursuant to Section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter."[6]

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[4] Department of Justice, "Section 230 – Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations" (June 2020), at: https://www.justice.gov/file/1286331/download.
[5] See NTIA, Section 230 of the Communications Act of 1934, RM-11862, Petition for Rulemaking (filed July 27, 2020), at: https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[6] 47 U.S.C. § 201(b).

"Interactive computer services" are "information services" under Title I of the Communications Act.[7] Although the Commission's authority to regulate these online service providers is highly circumscribed, this does not necessarily mean that the agency lacks authority to issue rulings that interpret the meaning and application of Section 230's terms with greater particularity.

For example, NTIA's petition requests that the Commission adopt rules clarifying the relationship between Section 230(c)(1) and (c)(2), the meaning of "good faith" and "otherwise objectionable" in Section 230(c)(2), how the meaning of "interactive computer service" in Section 230(f)(2) should be read into Section 230(c)(1), and the meaning of "treated as a publisher or speaker" in Section 230(c)(1).[8] If the Commission decides to do so, those interpretations could provide guidance for courts when considering Section 230 immunity claims in individual cases. That guidance might aid in preventing Section 230(c)(1) and Section 230(c)(2) from being read as coextensive – thereby rendering Section 230(c)(2) as superfluous.

It is difficult to understand how Commission action engaging in such clarification and interpretation – as opposed to its issuing orders or regulations actually restricting, or purporting to restrict, any content providers' speech – violates any entities' First Amendment rights, as some claim, again, often in apoplectic terms. Especially today, in an era of speech codes, trigger warnings, cancel culture, and outright calls for censorship of speech some may disfavor, First Amendment protections, properly understood, are more important than ever. We are staunch defenders of First Amendment rights, but we fear that "crying First Amendment wolves," by throwing up First Amendment strawmen,

[7] See 47 U.S.C. § 230(f)(2), 47 U.S.C. § 153(24).
[8] See NTIA, RM-11862, Petition for Rulemaking, at 5-6.

will actually diminish a proper understanding of the First Amendment's free speech guarantee, to the detriment of all. Ultimately, the courts will have the final say as to Section 230's meaning, and that is the way it should be.

Consideration by the Commission as to whether adoption of transparency rules that further specify the content moderation practices of web sites, including those of the dominant providers such as Twitter, Google, Facebook, and the like, is also not improper. Within proper bounds, such transparency rules are a means to increase accountability to the public as well as to assist the courts (and the FTC as well) in determining whether online content providers meet the eligibility requirements for immunity from civil liability under Section 230.

Also, requiring providers of interactive computer services to adhere to transparency rules is in keeping with a light-touch regulatory approach to Title I information services. NTIA's assertion that the Commission's authority for transparency rules is grounded in Sections 163 and 257 of the Communications Act appears reasonable, particularly in light of the D.C. Circuit's decision in *Mozilla v. FCC* (2019) to uphold the Commission's authority under Section 257 to adopt transparency regulations in the *Restoring Internet Freedom Order* (2018).[9]

While these comments do not take any position as to whether the Commission should adopt the particular transparency rule requested in NTIA's petition, the rule requested by NTIA appears to be consonant with the four fundamental propositions identified above in the bullet points. Such a transparency requirement relating to the posting of content moderation terms would not restrict the editorial discretion of online

[9] See Mozilla Corp. v. FCC, 940 F.3d 1, 46-49 (D.C. Cir. 2019); Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report, and Order (2017), at ¶ 232.

content providers like Google, Facebook, or Twitter to moderate user content on their websites but rather provide a basis for making those providers more accountable with respect to compliance with their posted terms of service.

The Commission should consider NTIA's petition regarding Section 230 and act in accordance with the views expressed herein.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Senior Fellow and Director of Policy Studies

The Free State Foundation
P.O. Box 60680
Potomac, MD 20859
301-984-8253

September 2, 2020

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	
Communications Act of 1934	)	RM-11862
	)	

To: The Commission

COMMENTS OF THE SECTION 230 PROPONENTS

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David Honig
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September 2, 2020

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Summary and Introduction

The Commission has been called upon to decide whether one of the internet's most essential laws, 47 U.S.C. § 230 ("Section 230" of the Communications Decency Act) should be unilaterally re-interpreted to suit the President's internet agenda.[1] Certainly Section 230 is not perfect: it has failed to eliminate racial and gender discrimination, voter suppression, and other unacceptable inequities on the internet.[2] These illnesses should be cured, but the NTIA Petition does not do that; nor could it because Section 230 confers on the FCC no jurisdiction over the subject matter. Worse yet, the relief sought in the NTIA Petition would incentivize online racial and gender discrimination and hate speech online.

The NTIA Petition should be denied because (A) the FCC lacks the jurisdiction required to reform Section 230 as proposed in the NTIA Petition; and (B) even if the FCC had jurisdiction, implementation would (1) de-incentivize equitable and viewpoint-neutral content moderation by online platforms, (2) threaten small companies by creating a hostile regulatory environment, and (3) oppress marginalized peoples and activists by perpetuating discriminatory content moderation and hate speech.

For its part, Congress should take steps to better protect users from racial and gender discrimination and hate speech online.

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[1] *See NTIA Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act* ("NTIA Petition"), NTIA (filed July 27, 2020), *available at* https://www.ntia.doc.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (last visited July 31, 2020), on file at the FCC as RM-11862. *See* Annex, *infra* (listing the Section 230 Proponents). These Comments are submitted pursuant to 47 C.F.R. §1.405.

[2] *See* Part III (E) *and* note 7, *infra* (referencing online platforms' liability for using or allowing third parties to use their products to discriminate against users on the basis of their sexual orientation, race, age, or gender).

The Section 230 Proponents[3] support reforms that are made in good faith,[4] in accordance with established law,[5] by lawful authority, [6] and in a way that recompenses past, present, and future victims of online racial and gender discrimination and hate speech.[7] Unfortunately, the President has focused instead on weakening Section 230, including its imperfect but helpful incentivizing of content moderation.[8]

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[3] The six Section 230 Proponents include many of the nation's leading multicultural advancement organizations, with collectively millions of members. Each of the Section 230 Proponents, and nearly all of their respective members, regularly engage in protected speech and advocacy online.

The views expressed in these Comments are the institutional views of the commenting organizations and are not intended to reflect the individual views of each officer, director, or member of these organizations.

[4] Commissioner O'Rielly has called such opportunistic attacks on online freedom of speech "a particularly ominous development." Hon. Michael O'Rielly, Remarks Before The Media Institute's Luncheon Series at 5 (Jul. 29, 2020), *available at* https://docs.fcc.gov/public/attachments/DOC-365814A1.pdf (last visited Aug. 30, 2020) ("It is time to stop allowing purveyors of First Amendment gibberish to claim they support more speech, when their actions make clear that they would actually curtail it through government action. These individuals demean and denigrate the values of our Constitution and must be held accountable for their doublespeak and dishonesty.")

[5] *See* Part III (B), *infra* (outlining how the NTIA Petition advances changes in the law that are contrary to precedent).

[6] The NTIA Petition should be denied on its face for want of jurisdiction. *See* Part III (A), *infra*.

[7] *See*, *e.g.*, *National Fair Housing Alliance v. Facebook*, No. 1:18-cv-02689 (S.D.N.Y. 2018); Determination, *Bradley v. Capital One*, Charge Number 570-2018-01036 (EEOC Jul. 2019) (finding that Capital One unlawfully discriminated by advertising jobs on Facebook while limiting the age of people who could see the advertisement); *Divino Group v. Google*, No. 5:2019cv04749 (N.D. Cal., filed Aug. 13, 2019) (alleging that YouTube discriminates against LGBTQ+ creators); *Bradley v. T-Mobile*, Case No. 17-cv-07232-BLF, 2019 WL 2358972 (N.D. Cal. 2020), *amended complaint filed* Jun. 11, 2020 (arguing that companies unlawfully discriminated by "us[ing] Facebook's ad platform to limit the population of Facebook users who will receive their job advertisements or notices – for example, by changing the age range...from 18 to 64+...to 18 to 38"); Complaint, *Newman v. Google*, No. 5:20-cv-04011 (N.D. Cal., filed Jun. 16, 2020) (alleging that YouTube's algorithms target Black creators). *See also* Part III (E), *infra* (outlining pre-existing discrimination by content moderators and moderation algorithms against communities of color).

[8] *See* Bobby Allyn, *Stung By Twitter, Trump Signs Executive Order To Weaken Social Media Companies*, NPR (May 28, 2020), *available at* https://www.npr.org/2020/05/28/863932758/stung-by-twitter-trump-signs-executive-order-to-

If the FCC were to grant the NTIA Petition and implement the President's agenda – which would require jurisdiction that does not exist here – it would become more expensive and legally risky for platforms to neutrally moderate content shared by their users. Small internet companies would lack the capital to withstand those increased costs and regulatory changes. Therefore, the NTIA Petition should be denied because reinterpreting Section 230 according to the Petition – which would be facially unlawful[9] – would promote and perpetuate race and gender discrimination and hate speech on the internet.

I. The History and Value of Section 230

Section 230 of the Communications Decency Act of 1996 limits the liability of online platforms for third-party content. Subsection 230(c)(1) states in part that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[10] This language creates a "Good Samaritan" protection under which interactive computer services, like Facebook, Twitter, and Instagram, are generally protected from liability should a user post anything offensive or illegal. There are

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weaken-social-media-companies (last visited Sept. 2, 2020) ("President Trump signed [the] executive order . . . two days after he tore into Twitter for fact-checking two of his tweets.")

[9] *See* Parts III (A) *and* III (B), *infra*.

[10] Codified at 47 U.S.C. § 230(c)(1) (1996).

specific exceptions for material related to sex trafficking,[11] violations of copyright,[12] and federal criminal law.[13]

Critically, while protecting online content providers from liability for third-party or user-generated content, Section 230 does not interfere with longstanding legal precedents holding content creators liable for their own content posted on online service platforms.[14] For example, a Twitter user can still be liable for defamation resulting from a tweet of their own creation.[15]

Additionally, Subsection 230(c)(2) establishes an editorial discretion "safe harbor" for interactive computer service providers.[16] This "Good Samaritan" clause encourages online

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[11] *Id.* § 230(e)(5); *see also* Heidi Tripp, All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims, 124 PENN ST. L. REV. 219 (2019) ("FOSTA/SESTA amends Section 230 of the CDA to create an exception to immunity for ISPs when content posted by third parties promotes or facilitates prostitution and sex trafficking or advertises sex trafficking.")

[12] 47 U.S.C. § 230(e)(2); *see also* Madeline Byrd & Katherine J. Strandburg, *CDA 230 for A Smart Internet*, 88 FORDHAM L. REV. 405 (2019) (clarifying that online service providers are still liable for copyright infringement under the Digital Millennium Copyright Act's (DMCA) notice-and-takedown regime for distributing material illegally copied by users).

[13] 47 U.S.C. § 230(e)(1); *see also* Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. §230's Immunity*, SANTA CLARA L. DIGITAL COMMONS (July 10, 2013), *available at* https://digitalcommons.law.scu.edu/facpubs/793/ (last visited Aug. 20, 2020) (stating that Section 230 excludes all federal criminal prosecutions but preempts "any prosecutions under state or local criminal law where the crime is predicated on a website's liability for [user-generated content]").

[14] *Liability for User-Generated Content Online: Principles for Lawmakers*, NAT'L TAXPAYERS UNION (July 11, 2019), *available at* https://www.ntu.org/publications/detail/liability-for-user-generated-content-online-principles-for-lawmakers (last visited May 14, 2020).

[15] However, the nature of expression on social platforms can make it "nearly impossible" to decide whether speech, such as a tweet, is defamatory. *Boulger v. Woods*, No. 18-3170 1, 11 (6th Cir., 2019) (finding a tweet had no precise meaning and was thus not defamatory because it ended in a question mark).

[16] 47 U.S. Code § 230(c)(2)(A)(2018) (stating "No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).")

service providers to moderate third-party content by immunizing restrictions on material considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[17] This broad standard places full discretion in the hands of private technology companies and social media service providers. Companies and platforms need only show that their responsive actions (or the lack of them) were based upon moderating discretion absent some form of bad faith, such as a contractual breach or malicious intent.[18] For example, when Facebook or Twitter independently identify and "flag"[19] specific objectionable material, they also determine the process for taking down and reprimanding the responsible users.

Although technology companies and social media sites tend to voluntarily address such situations,[20] Section 230 does not explicitly impose any affirmative duty to take down content

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[17] *Id.*

[18] *Id*. (establishing that "a platform exercising extreme editorial discretion (for example, by deliberately censoring vegans or climate change activists because it doesn't like them) would still be protected – 'good faith' does not imply 'good judgment'"). Indeed, liability shielding is a necessary element of a legal system encapsulating corporate actors – especially those providing consequential goods and services used by other people. *Compare* Section 230 *with* Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U.J.L & BUS. 27, 27-8 (Fall 2017) (arguing the business judgment rule, which limits liability for decisions made by corporate boards, is the "most . . . important standard of judicial review under corporate law.")

[19] *See generally* Kate Crawford & Tarleton Gillespie, *What is a flag for? Social Media reporting tools and the vocabulary of complaint*, NEW MEDIA & SOCIETY (Mar. 2016), *available at* https://doi.org/10.1177/1461444814543163 (last visited Aug. 20, 2020) ("The flag is now a common mechanism for reporting offensive content to an online platform, and is used widely across most popular social media sites"); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech,* 131 HARV. L. REV. 1598, 1639–40 (2018) ("When content is flagged or reported, it is sent to a server where it awaits review by a human content moderator. At Facebook, there are three basic tiers of content moderators: 'Tier 3' moderators, who do the majority of the day-to-day reviewing of content; 'Tier 2' moderators, who supervise Tier 3 moderators and review prioritized or escalated content; and 'Tier 1' moderators, who are typically lawyers or policymakers based at company headquarters.")

[20] *See* Evangeline Elsa, *Twitter to test new feature to let users rethink before posting "offensive or hurtful" tweets*, GULF NEWS (May 6, 2020), *available at* https://gulfnews.com/world/twitter-to-test-new-feature-to-let-users-rethink-before-posting-offensive-or-hurtful-tweets-1.1588763796071 (last visited Aug. 20, 2020) (describing Twitter's

that does not fit a stated exception.[21] Thus, providers cannot be held liable for content they either miss or choose to ignore. Section 230 also immunizes service providers' edits[22] and promotions.[23] For example, an online platform may correct the spelling of a post, replace swear words with an asterisk, or delete a paragraph of a post, without forfeiting Section 230 immunity.[24]

The "Good Samaritan" protection was influenced by prior case law that imposed liability upon online platforms for moderating objectionable content. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court held that a computer network that hosted online bulletin boards was strictly liable for defamatory statements made by a third-party user because it engaged in moderation by removing some offensive content on its boards.[25] Relying on this precedent, online platforms concluded that, to avoid liability for user content, it was best to not moderate

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plan to test a new feature that will inform users prior to posting if their tweet replies contain offensive language).

[21] *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1105 (9th Cir. 2009) (reasoning that, although Section 230 was designed to encourage sites to implement their own policing efforts, "[s]ubsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties").

[22] *See* John Bergmayer, *What Section 230 Is and Does—Yet Another Explanation of One of the Internet's Most Important Laws*, PUBLIC KNOWLEDGE (May 14, 2019), *available at* https://www.publicknowledge.org/blog/what-section-230-is-and-does-yet-another-explanation-of-one-of-the-internets-most-important-laws/ (last visited Aug. 20, 2020) (explaining that, because editing is not equated with authorship, "a platform, after content is posted, can correct the spelling of a post, replace swear words with asterisks, and even delete a problematic paragraph" without incurring liability); *see also* Sara Gold, *When Policing Social Media Becomes A "Hassell",* 55 CAL. W. L. REV. 445 (2019) (maintaining that "basic editing, formatting, and content screening do not jeopardize CDA immunity.")

[23] *See* Bergmayer, *supra* note 22 (stating that Section 230 protects platforms' editorial discretion in "*promoting a political, moral, or social viewpoint*…[thus,] if Twitter or Facebook chose tomorrow to ban all conservatives, or all socialists, Section 230 would still apply") (emphasis in original).

[24] *Id.*

[25] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 at *1 (Sup. Ct. May 24, 1995) (hereinafter "*Stratton*").

any content – an illustration of the "law of unintended consequences."[26] Congress was encouraged to enact Section 230's "Good Samaritan" provision to address the case law that discouraged online service platforms from engaging in content moderation, because moderation is socially beneficial.[27]

II. The Current Debate Surrounding Section 230

Section 230 has generated calls for repeal or weakening. Critics have argued that the section should be eliminated altogether, reasoning that private technology companies should be held fully liable for content they allow to be posted on their platforms.[28] On the other hand, the Section 230 Proponents contend that such companies should not be expected to ceaselessly weed through the ever-compounding volume of user-generated content. Further, such companies do not operate only in America, and it may be difficult to impose legislation on companies with a global presence.

On May 28, 2020, President Trump issued an executive order ("E.O.") in an attempt to bypass the legislative process to weaken Section 230.[29] The E.O. came just two days after Twitter began fact-checking the President's tweets, labeling two of them as false and providing

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[26] See *id; see also* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (Dec. 1936).

[27] Naturally, Section 230 has provided online platforms with the legal certainty needed to fairly moderate user content by precluding liability for any objectionable content that might slip through. *See Liability for User-Generated Content Online: Principles for Lawmakers*, *supra* note 13*; Section 230 as a First Amendment Rule*, *infra* note 58, at 2039 ("Various websites credit § 230 with their very existence."). *See also* Patrick Kulp, *Airbnb Ad Touts New Anti-Discrimination Pledge* (Nov. 12, 2016), *available at* http://mashable.com/2016/11/12/airbnb-ad-campaign-discrimination/#WtMrwpDfI5q7 (last visited Sept. 2, 2020).

[28] Madeline Byrd & Katherine J. Strandburg*, CDA 230 for A Smart Internet*, 88 FORDHAM L. REV. 405, 407-08 (2019) (identifying that "proponents of strong CDA 230 immunity now fear that service providers will engage in overly cautious 'collateral censorship'").

[29] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) ("E.O.")

sources that refuted the President's assertions.[30] In the E.O., President Trump referred to the "immense, if not unprecedented, power to shape the interpretation of public events" that Twitter, Facebook, and other major online platforms possess.[31] The President maintains that platforms have engaged in selective proscription of speech by conservative speakers.[32] The President also believes Section 230 should be reinterpreted or changed so that it no longer protects such platforms.[33]

The E.O. contains four sections describing the actions to follow. First, the E.O. directs the head of each executive agency to review that agency's spending on advertising on online platforms. The Department of Justice will then determine whether the online platforms identified in those reviews impose any "viewpoint-based speech restrictions," but the E.O. does not define this critical term.[34] Second, the E.O. asks the Federal Trade Commission to act under its "unfair or deceptive acts" authority[35] to ensure that online platforms do not restrict speech in ways that violate their own terms of service. Third, the E.O. instructs the Attorney General to establish a working group to investigate enforcement and further development of state statutes that prohibit online platforms from engaging in deceptive acts or practices. Finally, the E.O. instructs the

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[30] *See* Kate Conger & Mike Isaac, *Defying Trump, Twitter Doubles Down on Labeling Tweets*, N.Y. TIMES (May 28, 2020), *available at* https://www.nytimes.com/2020/05/28/technology/trump-twitter-fact-check.html (last visited June 3, 2020).

[31] E.O., *supra* note 29.

[32] *But see*, *e.g.*, Erik Lawson, *Twitter, Facebook Win Appeal in Anticonservative-Bias Suit*, BLOOMBERG (May 27, 2020), *available at* https://www.bloomberg.com/news/articles/2020-05-27/twitter-facebook-win-appeal-over-alleged-anti-conservative-bias (last visited Sept. 1, 2020). We are unaware of any evidence that supports the President's assertion of anti-conservative bias.

[33] *Id*.

[34] *Id.*

[35] 15 U.S.C. § 45 (2006).

Secretary of Commerce, acting through NTIA, to file a petition for rulemaking (the "NTIA Petition") with the FCC to clarify parts of Section 230.[36]

The Section 230 Proponents recognize that online platforms have imperfectly moderated objectionable online content; the internet is host to discrimination, targeted suppression, and other unacceptable inequities between users.[37] It is not acceptable that adult internet users must still navigate hate speech or be targeted for voter suppression while browsing Facebook in 2020.[38] Here, Congress has the lawmaking authority, and it should exercise that power to bolster protections for multicultural and marginalized internet users.[39]

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[36] NTIA filed its Petition with the FCC on July 27, 2020. *See* NTIA Petition, *supra* note 1. In particular, the E.O. asks for clarification regarding (1) the interaction between subparagraphs (c)(1) and (c)(2), and (2) the conditions that qualify an action as "taken in good faith" as the phrase is used in subparagraph (c)(2)(A). *Id*. *See also* Part III (B) *infra*.

[37] *See National Fair Housing Alliance v. Facebook* and other cases detailed *supra* at note 7.

[38] Lawmakers must be cognizant of how historical forms of discrimination and racism have been hidden and worsened by technological progress. *See* Federal Trade Commission, *Big Data: A Tool For Inclusion Or Exclusion* (2016), *available at* https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf (last visited September 2, 2020); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2017). *Compare The Unexamined Mind*, ECONOMIST (Feb. 17, 2018), *available at* https://www.economist.com/news/science-and-technology/21737018-if-it-cannot-who-will-trust-it-artificial-intelligence-thrive-it-must (last visited Sept. 2, 2020) (highlighting risks associated with complicated decision-making algorithms that "no one truly understands") *with supra* note 7 (outlining recent litigation involving algorithmic discrimination).

[39] *See especially* Spencer Overton, President, Joint Center for Pol. & Econ. Studies, Testimony of Before the Subcomm. On Comm's & Tech. *et al.,* Hearing on *A Country in Crisis: How Disinformation Online is Dividing the Nation* at 2 (Jun. 24, 2020), *available at* https://jointcenter.org/wp-content/uploads/2020/06/Overton-Final-Testimony-for-6-24-20-Disinformation-Hearing.pdf (last visited Sept. 2, 2020) ("If legal reforms are needed, the debates should occur in Congress and should center the voices of people of color who have been disproportionately affected by the negative consequences of social media through targeted voter suppression and other disinformation campaigns.")

III. The NTIA Petition Should Be Denied

There are at least five major issues that should preclude NTIA's Petition from being granted.

A. The FCC does not have the legal authority to issue any regulations or interpretations contemplated by the NTIA Petition.

At the threshold, the FCC lacks the jurisdiction required to reinterpret Section 230 as requested in the NTIA Petition.[40] The Congressional Research Service recently affirmed that the courts – not the Executive Branch and not the NTIA – would decide whether the FCC has the authority to issue binding interpretations of Section 230.[41] No court has decided the issue of the FCC's authority to interpret Section 230,[42] and the statute itself does not even mention the FCC.[43] The Executive Branch also has no legislative or judicial power – neither the President nor NTIA can grant the FCC authority to interpret Section 230, let alone unilaterally amend it.[44] And

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[40] *See* Valerie C. Brannon *et al.*, Cong. Research Serv., *Section 230 and the Executive Order Preventing Online Censorship*, LSB10484 at 3, 4 (Jun. 3, 2020) (noting that it is unclear whether an FCC interpretation of Section 230, which is what the NTIA Petition seeks, would have "legal import").

[41] *See id.* at 4 (stating that even if a court found the FCC has jurisdiction to issue rules interpreting Section 230, the FCC's interpretation would be binding only to the extent it was consistent with Section 230). The FTC's authority would only derive from the FTC Act, which similarly grants no authority without changing Section 230 or a contrary court ruling. *See id.* (explaining that the FTC's authority to act to prevent "unfair or deceptive acts" by companies is limited by Section 230).

[42] *Id.*

[43] *Id.* (noting that Section 230 does not mention the FCC, and that the statute's scope and meaning are generally determined without the FCC). To be sure, Section 230 is codified in Title 47, but its location in the U.S. Code does not confer jurisdiction on an agency the statute does not even name. We could place a ham sandwich in Title 47, but that would not license the FCC to eat it for lunch.

[44] Even if a court had previously held that the FCC has authority to issue binding interpretations of Section 230, that interpretation would be invalid where it was contrary to Section 230 itself. *See*, *e.g.*, Ronald M. Levin, *Rulemaking and the Guidance Exception*, 70 ADMIN. L. REV. 264, 336-37 n. 336 (2018) (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (refusing to accept an FCC interpretive rule construing a federal statute where the act of interpretation was contrary to the statute being interpreted). Commissioner Rosenworcel

even if lawful authority existed here and the NTIA Petition was granted, any resultant changes to Section 230 would be invalid because the Petition's proposed interpretations of Section 230 are contrary to Section 230 and its related precedents.[45] Nonetheless, NTIA requested the FCC issue a binding interpretation of Section 230. That should facially preclude the Petition from being granted.[46]

B. The relief sought in the NTIA Petition would incentivize deceptive and viewpoint-based content moderation.

Even if jurisdiction existed, which it does not, granting the NTIA Petition would handicap Section 230's intended purposes by promoting deceptive practices and viewpoint-based content moderation.[47] NTIA proposes several express conditions for a platform to be shielded from liability, but hedges those conditions with "catch-all" exemptions; under this framework, the platforms are protected even if they patently violate Section 230 so long as their conduct is "consistent with [the platform's] terms of service or use."[48] Such changes would induce

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commented that the Executive Branch's attempt to change Section 230 "does not work." Statement by FCC Commissioner Jessica Rosenworcel on Executive Order, FCC (May 28, 2020), *available at* https://www.fcc.gov/document/statement-fcc-commissioner-jessica-rosenworcel-executive-order (last visited Aug. 30, 2020) (declaring that the E.O. seeks to turn the FCC into "the President's speech police.")

[45] *See* Levin, *supra* note 44. *See also* Part III (B), *infra*.

[46] Even though the FCC lacks jurisdiction to issue binding interpretations of Section 230 as requested by the NTIA Petition, the language of the statute can be lawfully amended by the legislature. *But see Section 230 as a First Amendment Rule*, *infra* note 58, at 2028 (arguing the courts should recognize "§ 230's more stable constitutional provenance," by holding that the Section is rooted in the First Amendment). However, it would simply be unacceptable for the FCC in this case to issue a binding interpretation of Section 230 at the behest of NTIA, which issued its Petition at the behest of the President. *Accord* John A. Fairlie, 21 *The Separation of Powers*, MICH. L. REV. 393, 397 (1923) ("Wherever the right of making and enforcing the law is vested in the same man . . . there can be no public liberty.")

[47] *See* NTIA Petition, *supra* note 1, at 53–55 (compiling the proposed amendments).

[48] *Id*. at 53 ("An interactive computer service is not a publisher or speaker of information provided by another information content provider solely on account of actions voluntarily taken in good faith to restrict access to or availability of specific material in accordance with subsection (c)(2)(A) or consistent with its terms of service or use.")

platforms to broaden their terms of service – including their content moderation policies – to accommodate content moderation practices that would not be allowed under Section 230 without a catch-all exemption. It would be untenable to revise or interpret Section 230 in a way that gives platforms more power to delete truthful user content.[49]

NTIA also recommends changes to Section 230(c)(1)[50] and (c)(2)[51] that would give platforms open-ended authority to discriminate against content based on viewpoint *and* defy precedent.[52] NTIA seeks to define "otherwise objectionable [content]," which platforms can currently moderate without incurring liability, as content that is "*similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials."[53] That definition is legally erroneous in the face of precedent; no court has applied such a standard when interpreting "otherwise objectionable."[54]

And, as stated above, NTIA's re-definition incentivizes viewpoint discrimination. Content moderators applying NTIA's definition would have to decide – likely according to their

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[49] *See also* Part III (E) *infra* (outlining how marginalized communities disproportionately have their content taken down when online platforms over-moderate content).

[50] Section 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")

[51] Section 230(c)(2) (shielding providers and users for, *inter alia*, "any action voluntarily taken in good faith to restrict access to or availability of . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable [content], whether or not such material is constitutionally protected.")

[52] *See* NTIA Petition, *supra* note 1, at 27 (arguing "Section 230(c)(1) applies to acts of omission—to a platform's failure to remove certain content. In contrast, subsection 230(c)(2) applies to acts of commission—a platform's decisions to remove content. Subsection 230(c)(1) does not give complete immunity to all a platform's 'editorial judgments.'")

[53] *Id.* at 32 (emphasis supplied).

[54] *See, e.g.*, *Domen v. Vimeo, Inc.*, 2020 U.S. Dist. L 7935 (S.D.N.Y. Jan. 15, 2020), appeal filed No 20-616 (Feb. 18, 2020) ("Section 230(c)(2) is focused upon the provider's subjective intent of what is 'obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.' That section 'does not require that the material actually be objectionable; rather, it affords protection for blocking material "that the provider or user considers to be" objectionable.'")

corporate terms of use – whether content is "similar in type" to NTIA's listed content. The NTIA Petition would thus leave the onus of finding unacceptable content on platforms, but also force them to moderate content according to a discrete set of criteria.[55] When online content moderators do not have freedom to consider nuance when they judge user content, real-world biases are more likely to spread as online suppression.[56] The NTIA Petition should thus be denied because it proposes to saddle Section 230 with unsound,[57] unduly restrictive conditions.

C. The relief sought in the NTIA Petition would cause unnecessary harm to smaller online platforms.

Under NTIA's proposed interpretations of Section 230, viewpoint-neutral content moderation would become inherently riskier and likely much more expensive for online platforms.[58] At the same time, the relief sought in the NTIA Petition would invite a flood of easily-pled claims that Section 230 was designed to prevent.[59] This new regulatory environment

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[55] For example, platforms have to moderate seemingly benign content to prevent the spread of harmful health advice and information during the COVID-19 pandemic. At the same time, platforms that have to moderate content according to policy tend to perpetuate real-life discrimination online. *See* Kurt Wagner & Sarah Frier, *Twitter and Facebook Block Trump Video, Citing Covid Misinformation*, BLOOMBERG (Aug. 5, 2020), *available at* https://www.bloomberg.com/news/articles/2020-08-06/twitter-blocks-trump-campaign-account-over-covid-misinformation (last visited Aug. 28, 2020) (reporting how Twitter, Facebook, and YouTube blocked a video, shared by accounts associated with President Trump, claiming COVID "doesn't have an impact on [children]"); *see also* Part III (E) *infra* (outlining how online content moderators tend to target marginalized communities when applying content moderation policies).

[56] *See* Part III (E) *infra* (outlining how online content moderators tend to target marginalized communities when applying content moderation policies).

[57] Such unsound amendments to consequential laws also portend circuit splits, overrulings, and judicial inefficiencies.

[58] *See* Note, *Section 230 as a First Amendment Rule*, 131 HARV. L. REV. 2027, 2036 (2018) (citing Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 858 n.172 (2006)) ("[C]ontent moderation to cope with intermediary liability is difficult, and therefore costly.")

[59] *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A* Warning, NPR (May 30, 2020), *available at* https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning (last visited Aug. 28, 2020) (stating that

would separate tech giants like Facebook from the majority of internet companies; the capital-rich giants can afford litigating, accounting for new costs, and changing their content moderation practices.[60] Conversely, small and new internet companies would be crushed without the requisite capital and experience to navigate complex litigation[61] and withstand unexpected expenses.[62]

Section 230 was designed to address the legal dilemma caused by the "wave of defamation lawsuits" facing online platforms that moderate user content); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Ac*t, 43 LOY. L.A. L. REV. 373, 452 (2010) ("Defamation-type claims were far and away the most numerous claims in the section 230 case law, and the courts consistently held that these claims fell within section 230's protections.")

[60] Specifically, platforms would be incentivized to either over-moderate to the point of discrimination or under-moderate to the point of non-moderation. *See Section 230 as a First Amendment Rule*, *supra* note 58, at 2047 (explaining further that "collateral censorship is a major threat to vulnerable voices online."); *see also* Hon. Geoffrey Starks, *Statement on NTIA's Section 230 Petition* (July 27, 2020), *available at* https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf (last visited Aug. 30, 2020) (stating that "[i]mposing intermediary liability on [platforms]—or creating an environment in which [platforms] have an incentive not to moderate content at all—would prove devastating to competition, diversity, and vibrant public spaces online.")

[61] *See* Ron Wyden, *Corporations are working with the Trump administration to control online speech*, WASH. POST OPINIONS (Feb. 17, 2020), *available at* http://washingtonpost.com/opinions/corporations-are-working-with-the-trump-administration-to-control-online-speech/2020/02/14/4d3078c8-4e9d-11ea-bf44-f5043eb3918a_story.html (last visited Aug. 20, 2020) ("It's the start-ups seeking to displace Big Tech that would be hammered by the constant threat of lawsuits"); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635 (2018) ("Content moderation at YouTube and Facebook developed from an early system of standards to an intricate system of rules due to (1) the rapid increase in both users and volume of content; (2) the globalization and diversity of the online community; and (3) the increased reliance on teams of human moderators with diverse backgrounds.")

[62] *See Section 230 as a First Amendment Rule, supra* note 58, at 2038 (citing MATTHEW LE MERLE ET AL., BOOZ & CO., THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY=STAGE INVESTMENT 19 (2011); *see also* Jerry Berman, *Policy Architecture and Internet Freedom*, LAW.COM: THE RECORDER (Nov. 10, 2017, 3:53 AM), *available at* https://www.law.com/therecorder/sites/therecorder/2017/11/10/policy-architecture-and-internet-freedom/ (last visited Sept. 2, 2020) ("[T]he anticipated costs of moderation and litigation could prevent" controversial, new, and emerging websites "from even securing capital or launching" if Section 230 protections were weakened). *See also* Berman, *supra* ("Without § 230 . . . speech

It is well documented that algorithms tend to drive users to "echo chambers" of content that reaffirm preexisting beliefs and sometimes push users to more extreme viewpoints through fringe content.[63] Platforms such as YouTube and Twitter have systems in place that attempt to curb this phenomenon by, for example, allowing users to report certain video content,[64] or fact-checking and labelling misinformation as false.[65] As stated in Section I, *supra*, the "Good Samaritan" clause encourages online service providers to moderate third-party content by immunizing restrictions on material considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[66] This broad standard already places full discretion in the hands of private technology companies and social media service providers.

However, the relief sought by the NTIA Petition would treat platforms – large and small – as publishers, revoking their liability shield for any content they present "pursuant to a reasonably discernible viewpoint or message," or any content they "affirmatively vouc[h] for,

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would be limited and new applications might never have emerged if required to finance costly legal overhead to do business on the Internet.")

[63] *See*, *e.g.*, Kevin Rose, *The Making of a YouTube Radical*, THE NEW YORK TIMES (June 8, 2019)*, available at* https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html (last visited Aug. 30, 2020) ("Over years of reporting on internet culture, I've heard countless versions of Mr. Cain's story: an aimless young man — usually white, frequently interested in video games — visits YouTube looking for direction or distraction and is seduced by a community of far-right creators. […] The common thread in many of these stories is YouTube and its recommendation algorithm, the software that determines which videos appear on users' home pages and inside the 'Up Next' sidebar next to a video that is playing. The algorithm is responsible for more than 70 percent of all time spent on the site.")

[64] *See, e.g.,* YouTube Community Guidelines, *available at* https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#community-guidelines (last visited Aug. 30, 2020). *See also* Enforcing Policies, *available at* https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#enforcing-policies (last visited Aug. 30, 2020).

[65] *See, e.g.,* Yoel Roth and Nick Pickles, *Updating Our Approach to Misleading Information* (May 11, 2020), *available at* https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html (last visited Aug. 30, 2020).

[66] 47 U.S.C. § 230 (c)(2)(A) (2018).

editorializ[e], recommend[d], or promot[e] … on the basis of the content's substance."[67] This applies to platforms even if they deploy algorithms rather than humans to moderate content.[68] The cost to manually moderate all content on any internet platform would be astronomical.[69] At the same time, moderating content using algorithms requires capital, expertise, and also risks litigation involving under-adjudicated questions of law.[70] Either way, the financial cost and legal risk associated with viewpoint-neutral content moderation will have been expanded by the relief sought in NTIA's Petition.[71] Content moderators and courts would face a wave of easily pled claims that would have to be adjudicated using under-developed law.

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[67] NTIA Petition, *supra* note 1, at 53, 55 (further seeking public disclosure of platforms' "content moderation, promotion, and other curation practices.")

[68] *Id.* Such a modification would make YouTube liable for every word spoken in a video that ends up on a user's recommended videos list, which is algorithmically generated.

[69] *See Section 230 as a First Amendment Rule*, *supra* note 58, at 2037 (citing Lauren Weber & Deepa Seetharaman, *The Worst Job in Technology: Staring at Human Depravity to Keep It Off Facebook*, WALL ST. J. (Dec. 27, 2017, 10:42 PM), *available at* https://www.wsj.com/articles/the-worst-job-in-technology-staring-at-human-depravity-to-keep-it-off-facebook-1514398398 (last visited Sept. 1, 2020) ("It would be even more difficult for artificial intelligence to properly identify defamation and quite costly to develop that software. And humans are not happy performing the task.")

[70] *See id.; see also* Ashley Deeks, *The Judicial Demand for Explainable Artificial Intelligence*, 119 Colum. L. Rev. 1829, 1831 (2019) (noting that there is presently little or no common law "sensitive to the requirements of" the adjudicative process). *Compare* Deeks, *supra*, *with* Aaron Klein, *Reducing bias in AI-based financial services*, BROOKINGS (July 10, 2020), *available at* https://www.brookings.edu/research/reducing-bias-in-ai-based-financial-services/ (last visited Aug. 28, 2020) (stating that existing legal frameworks are "ill-suited" to address legal issues caused by big data and "significant growth in [machine learning] and [artificial intelligence]").

[71] NTIA similarly seeks to have companies publicly disclose their moderation policies, which amplifies issues of litigation exposure. NTIA Petition, *supra* note 1, at 14, 55 (seeking public disclosure of platforms' "content moderation, promotion, and other curation practices" to promote competition). *But see Liability for User-Generated Content Online: Principles for Lawmakers*, *supra*, note 14; Part III (C), *supra* (explaining the difference between small and large internet companies' ability to withstand increased costs and navigate prolonged litigation); Part III (D) *infra* (discussing how a litigation flood would be a natural and detrimental consequence of granting the NTIA Petition). *See also* Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech Companies*, N.Y. TIMES (Oct. 16, 2019), *available at*

D. Content moderators and courts would face a wave of easily pled claims that would have to be adjudicated under under-developed law.

The increased costs and risks created by the NTIA Petition would catastrophically coincide with the flood of litigation guaranteed by NTIA's recommendations.[72] Common law precedent is difficult to properly apply to questions involving edge technology, yet litigants would have to apply dated case law to adjudicate the many new cases, or tangle courts in the development of new case law. Plaintiffs could rely on precedents like *Stratton* to file suits against online platforms for any defamatory statements that it hosts.[73] For example, in 2019 Congressman Devin Nunes filed a complaint against Twitter for $250 million, alleging that Twitter hosted and facilitated defamation on its platform when parody Twitter accounts about Nunes published tweets he found insulting.[74]

The scale[75] of litigation combined with the lack of clear legal outcomes would either force content platforms to disengage from moderation or over-moderate – otherwise, they would face

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https://www.nytimes.com/2019/10/16/opinion/section-230-freedom-speech.html (last visited Sept. 2, 2020).

[72] *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A* Warning, NPR (May 30, 2020), *available at* https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning (last visited Aug. 28, 2020) (stating that Section 230 was designed to address the legal dilemma caused by the "wave of defamation lawsuits" facing online platforms that moderate user content).

[73] *Compare id. with*, *e.g.*, Report, *Facebook by the Numbers: Stats, Demographics & Fun Facts*, Omnicore (Apr. 22, 2020), *available at* https://www.omnicoreagency.com/facebook-statistics/ (last visited Aug. 28, 2020) ("Every 60 seconds, 317,000 status updates; 400 new users; 147,000 photos uploaded; and 54,000 shared links.") Judicial economy concerns arise here as well, given that every status update would be a potential inroad for a defamation claim under a weakened Section 230.

[74] Daniel Victor, *Devin Nunes Sues Twitter for Allowing Accounts to Insult Him*, N.Y. TIMES (Mar. 19, 2019), *available at* https://www.nytimes.com/2019/03/19/us/politics/devin-nunes-twitter-lawsuit.html (last visited May 14, 2020).

[75] In 2019, there were more than 474,000 tweets posted per minute, and in 2016, there were over 3 million posts on Facebook per minute. Jeff Schultz, *How Much Data is Created on the Internet Each Day?* MICROFOCUS BLOG (Aug. 6, 2019), *available at*

the fatal combination of increased moderation cost and increased risk of litigation due to moderation,[76] which disproportionately impact smaller companies and controversial content platforms.[77] Any recommended new interpretations of Section 230 should take such possibilities into account and address them, such as the handling of parody accounts. The NTIA Petition's broad and sweeping approach fails to allow for any nuance or flexibility in solving the problems it attempts to address, throwing open the door for litigation.

E. Grant of the NTIA Petition would facilitate the silencing of minorities and civil rights advocates.

Most critically to us, weakening Section 230 would result in continued and exacerbated censorship of marginalized communities on the internet. NTIA's Petition would incentivize over-moderation of user speech; similar circumstances in the past have already been shown to promote, not eliminate, discrimination against marginalized peoples.[78] Given that marginalized groups were over-policed[79] by content moderators prior to NTIA's Petition, it follows that accepting NTIA's proposed interpretations of Section 230 would worsen online oppression on that front.

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https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/ (last visited May 15, 2020).

[76] Part III (E) *infra*.

[77] *Id. See also* Part III (C) *supra*.

[78] *See Section 230 as a First Amendment Rule*, *supra* note 58 at 2038, 2047 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))) (explaining how strict regulatory environments promote strict content moderation by humans and algorithms that disproportionately targets "groups that already face discrimination.") *See also* Part III (E) *infra* (outlining examples of discriminatory outcomes resulting from online content moderation).

[79] *See Section 230 as a First Amendment Rule*, *supra* note 58.

When online platforms have implemented content moderation policies in line with NTIA's proposals, minorities and civil rights advocates were oppressed, not empowered.[80] For example, in 2019 Facebook implemented a "real names" policy to make the platform safer by confirming user's identities; however, the policy led to the deactivation of an account by a Native American with the real name of Shane Creepingbear.[81] Further, in 2017 Google created an algorithm designed to flag toxicity in online discussions; however, legitimate statements like, "I am a black man" were flagged because the tool could not differentiate between users talking about themselves and users making statements about historically and politically-marginalized groups.[82] Because minorities are more vulnerable to online defamation, content moderation tools disproportionately target and remove the speech of minorities based on the content of their speech.[83] Such oppressive content moderation that discriminates against marginalized groups will only worsen if Section 230 is weakened.

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[80] *Id.* at 2047 ("[C]ollateral censorship is a major threat to vulnerable voices online.") *See also* Maarten Sap *et al*., *The Risk of Racial Bias in Hate Speech Detection*, 1 PROCEEDINGS OF THE 57TH ANNUAL MEETING OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 1668 (2019), *available at* https://homes.cs.washington.edu/~msap/pdfs/sap2019risk.pdf (last visited Sept. 1, 2020) investigating how content moderators' insensitivity to differences in cultural dialect can "amplif[y] harm against minority populations" online); *see also* Thomas Davidson *et al*., *Racial Bias in Hate Speech and Abusive Language Detection Datasets*, 1 PROCEEDINGS OF THE THIRD WORKSHOP ON ABUSIVE LANGUAGE ONLINE 25 (2019), *available at* https://www.aclweb.org/anthology/W19-3504.pdf (last visited Sept. 1, 2020) (concluding that abusive language detection systems "may discriminate against the groups who are often the targets of the abuse" the systems seek to prevent). *See also* Julia Angwin, *Facebook's Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (Jun. 28, 2017), *available at* https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms (last visited Sept. 1, 2020).

[81] *See* Harmon, *supra* note 71.

[82] *See* Elliot Harmon & Jeremy Gillula, *Stop SESTA: Whose Voices Will SESTA Silence?* ELEC. FRONTIER FOUND. (Sept. 13, 2017), *available at* https://www.eff.org/deeplinks/2017/09/stop-sesta-whose-voices-will-sesta-silence (last visited May 14, 2020).

[83] *Section 230 as a First Amendment Rule*, *supra* note 58**,** at 2038, 2047 (citing Corynne McSherry *et al.*, *Private Censorship Is Not the Best Way to Fight Hate or Defend Democracy:*

Relatedly, the relief sought in the NTIA Petition would amplify preexisting risk of oppressive content moderation because it would effectively incentivize or induce online platforms to double-down on oppressive content moderation strategies.[84] Users of all backgrounds would more likely have their constitutionally protected speech removed because platforms will have to adjust their services and policies to account for increased liability.[85] Tweets, posts, videos, and more would be at risk of removal if the platform believed they *might* be defamatory, or if they were politically controversial to the point that the platform would rather block them than risk litigation.[86] Marginalized communities like ethnic minorities and political activists will carry the bulk of these harms because these communities are over-policed by content moderation tools and procedures even without any weakening of Section 230.[87]

Here Are Some Better Ideas, ELECTRONIC FRONTIER FOUND. (Jan. 30, 2018)), *available at* https://www.eff.org/deeplinks/2018/01/private-censorship-not-best-way-fight-hate-or-defenddemocracy-here-are-some (last visited Aug. 26, 2020) ("Content moderation has 'shut down conversations among women of color about the harassment they receive online,' 'censor[ed] women who share childbirth images in private groups,' and 'disappeared documentation of police brutality, the Syrian war, and the human rights abuses suffered by the Rohingya.'")

[84] And similarly, users on platforms that choose to under-moderate in response to increased cost and exposure will be silenced by clearly harmful content like hate speech.

[85] *Section 230 as a First Amendment Rule*, *supra* note 58, at 2027 (internal citation omitted) (explaining that Section 230 "encourages websites to engage in content moderation" without fear of exposure to "liability for defamatory material that slips through.")

[86] *Id*. (stating that without Section 230's protection, "websites would have an incentive to censor constitutionally protected speech in order to avoid potential lawsuits.") Over half of internet users engage in politically controversial speech. Monica Anderson *et al., Public Attitudes Toward Political Engagement on Social Media*, PEW RES. CTR. (July 11, 2018), *available at* https://www.pewresearch.org/internet/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/ (last visited Aug. 26, 2020) (reporting that over the span of one year 53% of American adults engaged in some form of political or social-minded activity, such as using a hashtag related to a political or social issue, on social media).

[87] *See Section 230 as a First Amendment Rule*, *supra* note 58 at 2047 ("Given the cost of litigation, our most marginalized citizens are the ones least likely to be able to take advantage of a new liability regime"); *see also* Parts III (C) and (E) *supra* (outlining how the increased costs and risks associated with content moderation will harm small and marginalized groups if the NTIA Petition were to be granted).

IV. Recommendations for Reform

A. Platforms should not be immune from liability when they let their users create and spread discriminatory content like racial hate speech.

If Section 230 needs to be improved, that is a task for Congress – not the Executive Branch. The Section 230 Proponents encourage Congress to incentivize platforms to advance equity and anti-discrimination through their content moderation practices. We support reforming Section 230 to hold platforms more accountable when their products are used to violate users' civil rights.[88] Platforms should be protected when they moderate content to prevent such violations. In essence, the Proponents support protecting platforms when they moderate content to preserve equity and safety in their products, but also holding platforms liable when they negligently or purposefully allow their products to discriminate against users.

Platforms should not be immune from liability when they let their users create and spread discriminatory content like hate speech. Over the past few years, major online platforms have used Section 230 as a defense to a variety of civil rights lawsuits.[89] Social media giants, for example, have argued that Section 230 exculpates them even though companies used their products to prevent specific racial groups from seeing online job advertisements.[90] Similarly, platforms like YouTube have claimed Section 230 immunity when presented with evidence that their content-blocking algorithms targeted videos referencing Black culture.[91] Congress should

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[88] *See* Part III (E) *and* note 7 *supra* (discussing how online platforms have themselves or through their users facilitated civil rights violation in such fields as transportation, housing, and law enforcement).

[89] *Id.*

[90] *Id.*

[91] *Id.*

amend Section 230, or adopt new legislation, to the extent that current law allows platforms to intentionally or irresponsibly foster such an oppressive environment.[92]

That being said, Congress should broadly proscribe online platforms from engaging in or negligently facilitating online racial and gender discrimination, voter suppression, or hate speech. Section 230 is not the only law relevant to online platforms' influence of public discourse and communication between people.[93] Section 230 is one of many internet regulations; and internet regulations are but one genre of regulation in America's diverse legal library. Therefore, a complete reform process must consider how common law civil rights protections can be fully reflected in laws like Section 230.[94] Similarly, Congress should consider whether amending Section 230 itself is the best way to advance internet equity. There are many pathways that can be taken toward a more equitable and diverse internet.

B. Platforms should be immune from liability when they work to prevent users from creating and spreading discriminatory content like racial hate speech.

On the other hand, current law should be preserved when it shields platforms from liability for moderating content to foster user equity, equality, and safety online. Congress should craft new law to the extent that platforms in that context are unprotected. Because of liability shielding, platforms can confidently leverage their expertise to protect billions of people from harmful misinformation.[95] Relatedly, platforms can design their services to prevent hate speech by users; particularly innovative companies are deploying content moderation systems that not only have anti-discrimination policies in their terms of service, but actively look for evidence

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[92] *Id. See also* Overton, *supra* note 39.

[93] To the contrary, the regulatory and civil rights implications of platform-driven technology innovations are broad and too new to fully understand. *See supra* notes 38-39.

[94] *Accord.* Overton, *supra* note 39.

[95] *See* Wagner *et al*., *supra* note 55.

that their services are being used in a discriminatory way.[96] Section 230 as it stands thus incentivizes platforms to obey the word and spirit of the law, in large part because it can grant platforms immunity when they moderate content.[97]

Congress also should bolster immunity for content moderators, insofar as laws like Section 230 currently may discourage platforms from promoting equitable practice and freedom of expression online. If large and small internet companies are confident they can moderate user content without going bankrupt, organizations like the Section 230 Proponents will have more opportunities to participate in the internet economy. Relatedly, marginalized communities and activists online will be able to sing, speak, write, and type in celebration of their constitutional freedom to do so. Barring discriminatory expression like hate speech, America's philosophical bedrock is made of the collaboration, controversy, and indeed the truth, that is enabled by free expression. Internet companies are the architects and gatekeepers of history's largest public squares with history's biggest crowds. Those companies must be free to preserve that environment.

Conclusion

Even if the FCC had the requisite authority, the NTIA Petition lacks the precision required to amend or reinterpret Section 230 in a way that facilitates content moderation while protecting internet users from discrimination and hate speech. Critics of Section 230 have misstated the immense costs that would result from weakening or repealing Section 230 while failing to focus on the true needs for reform to prevent the internet from being misused to discriminate and intimidate. Reforms to Section 230, or new legislation, are needed to allow marginalized groups

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[96] *See* Kulp, *supra* note 27.

[97] *See Liability for User-Generated Content Online: Principles for Lawmakers*, *supra* note 14*; Section 230 as a First Amendment Rule*, *infra* note 58, at 2039 ("Various websites credit § 230 with their very existence.")

to have a place to engage in discussion, unrestricted by overbearing, or inadequate, content moderation policies that have a disproportionate harm on marginalized voices. Reform of Section 230 is a job for lawmakers who must craft internet laws that foster equity and equality. In the meantime, the NTIA Petition should be denied.

Respectfully submitted,

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September 2, 2020

ANNEX: THE SECTION 230 PROPONENTS

The **Multicultural Media, Telecom and Internet Council (MMTC)** is a non-partisan, national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecom and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for multicultural advancement in communications.

The mission of the **Hispanic Federation** is to empower and advance the Hispanic community. Hispanic Federation provides grants and services to a broad network of Latino non-profit agencies serving the most vulnerable members of the Hispanic community and advocates nationally on vital issues of education, health, immigration, civil rights, economic empowerment, civic engagement, and the environment.

The **League of United Latin American Citizens (LULAC)** is the nation's largest and oldest Hispanic civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 1,000 councils around the United States and Puerto Rico, LULAC's programs, services, and advocacy address the most important issues for Latinos, meeting the critical needs of today and the future.

The **National Coalition on Black Civic Participation (The National Coalition)** is a non-profit, non-partisan organization dedicated to increasing civic engagement and voter participation in Black and underserved communities. The National Coalition strives to create an enlightened community by engaging people in all aspects of public life through service/ volunteerism, advocacy, leadership development and voting.

The **National Council of Negro Women (NCNW),** founded 85 years ago by Dr. Mary McLeod Bethune, seeks to lead, advocate for and empower women of African descent, their families and communities. NCNW reaches more than two million persons through its 300 community and campus based sections in 32 states and its 32 affiliated women's national organizations. NCNW works to promote sound public policy, promote economic prosperity, encourage STEAM education and fight health disparities.

The **National Urban League (NUL)** is an historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. NUL reaches nearly two million people nationwide through direct services, programs, and research through its network of 90 professionally staffed affiliates serving 300 communities in 36 states and the District of Columbia.

Certificate of Service

Pursuant to 47 C.F.R. §1.405(b)), I hereby certify that I have on this 2nd day of September caused the foregoing "Comments of Section 230 Proponents" to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

Douglas Kinkoph, Esq.
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

David Honig

David Honig

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	(RM-11862)

COMMENTS OF
THOUGHT DELIVERY SYSTEMS, INC.[1]

These comments are filed in response to the Commission's request for public comments regarding the Petition filed by the National Telecommunications & Information Administration (NTIA) requesting the Commission initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934, as amended.

Remove any Section 230 immunities currently enjoyed by Twitter, Facebook, Google, YouTube, Amazon and Microsoft. They are enjoying the benefits of publishing while impermissibly enjoying Section 230 immunity from the risks of publishing.

Section 230 governs perhaps the largest segment of the U.S. economy.[2] Twitter, Facebook, Google, YouTube, Amazon and Microsoft and their contemporaries are using their

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Thought Delivery Systems, Inc. ("TDSI") is a technology media conglomerate and laboratory dedicated to developing highly scalable solutions in broadband media. It developed a software protocol that methodically grades news content using scientific, legal and professional standard objective measures. Other projects integrate geographic information system (GIS) with first-to-market technologies and Atlases. It holds broadband network and radio-magnetic spectrum expertise and assets that it is researching, developing and deploying in the 5G and broadband internet environment. www.ThoughtDelivery.com

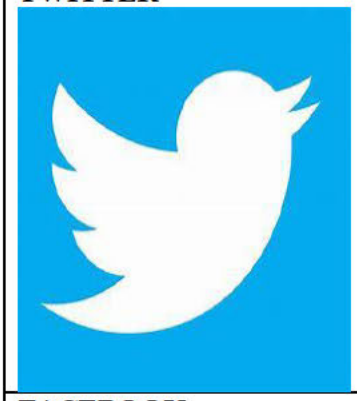
[2] *"The Economy Is in Record Decline, but Not for the Tech Giants: Even though the tech industry's four biggest companies were stung by a slowdown in spending, they reported a combined $28 billion in profits on Thursday",* New York Times, July 31, 2020, https://www.nytimes.com/2020/07/30/technology/tech-company-earnings-amazon-apple-facebook-google.html

unfair Section 230 immunities to boost their record growth during the Covid-19 pandemic. For example: "Amazon's sales were up 40 percent from a year ago and its profit doubled. Facebook's profit jumped 98 percent."[3]

Section 230 requires regular review, like most statutes.

Those opposed to the FCC (or Congress) carefully, mindfully and regularly examining whether Section 230 is operating and being interpreted in the public interest, preemptively suggest that any change at all would mean the "end of the Internet as we know it." It is alarming that those same corporations literally control vast swaths of the social media landscape and its underpinnings. Twitter, Google, Facebook, Microsoft, Amazon and other contemporaries' opposition or lukewarm responses (or non-responses) to re-examining Section 230 raise red flags. Worse, there is empirical data about how Big Tech titans (i) actively censor people and publications, (ii) are inextricably-intertwined with each other, and (iii) invest heavily in controlling other publishers as well as media influencers, thus using the cash acquired through their unfair Section 230 immunity to exercising publishing-style controls over vast media sectors.

[3] *Id.*

SOCIAL MEDIA COMPANY	EXECUTIVE AND/OR MAJOR SHAREHOLDER WRONGLY BENEFITTING FROM SECTION 230 PROTECTIONS	REPORTs THAT IT ACTS AS A PUBLISHER, THUS VIOLATING SECTION 230 (ie., DATA THAT CENSORSHIP IS SUBJECTIVE)	BIG TECH RELATIONSHIPS EXAMPLES
TWITTER 	JACK DORSEY	-Acts as a publisher: Uses subjective and impermissibly vague and arbitrary 'criteria' to censor or otherwise edit content.[4]	MICROSOFT[5] AMAZON[6] GOOGLE[7]
FACEBOOK 	MARK ZUCKERBERG	-Acts as a publisher: Uses subjective and impermissibly vague and arbitrary 'criteria' to censor or	MICROSOFT[9] AMAZON[10]

[4] Re, Gregg, Herridge, Catherine. "Nunes sues Twitter, some users, seeks over $250M alleging anti-conservative 'shadow bans,' smears." FoxNews. March 18, 2019. https://www.foxnews.com/politics/nunes-files-bombshell-defamation-suit-against-twitter-seeks-250m-for-anti-conservative-shadow-bans-smears Volz, Dustin. "Justice Department to Examine Whether Social-Media Giants Are 'Intentionally Stifling' Some Viewpoints." The Wall Street Journal. September 5, 2018. https://www.wsj.com/articles/facebooks-sandberg-and-twitters-dorsey-to-face-questions-on-capitol-hill-about-russian-meddling-bias-1536145201?st=wev8dfm3gwoqfnk Wells, Georgia. "Writer Sues Twitter Over Ban for Criticizing Transgender People." The Wall Street Journal. February 11, 2019. https://www.wsj.com/articles/writer-sues-twitter-over-ban-for-mocking-transgender-people-11549946725?

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		otherwise edit content.[8]	
GOOGLE/YOUTUBE  	SUNDAR PICHAI (GOOGLE), SUSAN WOJCICKI (YOUTUBE)	-Acts as a publisher: Uses subjective and impermissibly vague and arbitrary 'criteria' to censor or otherwise edit content.[11]	SNAPCHAT[12]
AMAZON 	JEFF BEZOS	-Subjectively deletes books and comments about books of the Amazon website;[13]thus acting as a publisher; -Influence major media directly as personal owner of the *WASHINGTON POST*	HOSTS: TWITCH LINKEDIN FACEBOOK THRID-PARTIES TWITTER PINTEREST

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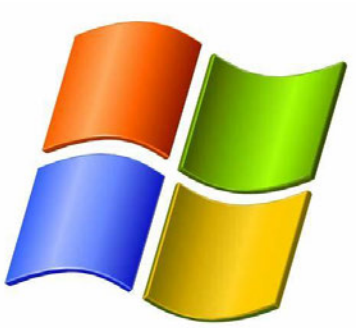
MICROSOFT 	BILL GATES	-Invests over $250M in media influence operations[14];	MAKES MONEY FROM BIG SOCIAL MEDIA COMPANIES;

Bill Gates: Columbia Journalism Review Investigation:

"I recently examined nearly twenty thousand charitable grants the Gates Foundation had made through the end of June and found more than $250 million going toward journalism. Recipients included news operations like the BBC, NBC, Al Jazeera, ProPublica, National Journal, The Guardian, Univision, Medium, the Financial Times, The Atlantic, the Texas Tribune, Gannett, Washington Monthly, Le Monde, and the Center for Investigative Reporting; charitable organizations affiliated with news outlets, like BBC Media Action and the New York Times' Neediest Cases Fund; media companies such as Participant, whose documentary Waiting for "Superman" supports Gates's agenda on charter schools; journalistic organizations such as the Pulitzer Center on Crisis Reporting, the National Press Foundation, and the International Center for Journalists; and a variety of other groups creating news content or working on journalism, such as the Leo Burnett Company, an ad agency that Gates commissioned to create a "news site" to promote the success of aid groups. In some cases, recipients say they

[14] Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

distributed part of the funding as subgrants to other journalistic organizations—which makes it difficult to see the full picture of Gates's funding into the fourth estate."

And

"Gates's generosity appears to have helped foster an increasingly friendly media environment for the world's most visible charity. Twenty years ago, journalists scrutinized Bill Gates's initial foray into philanthropy as a vehicle to enrich his software company, or a PR exercise to salvage his battered reputation following Microsoft's bruising antitrust battle with the Department of Justice. Today, the foundation is most often the subject of soft profiles and glowing editorials describing its good works."

And

"A larger worry is the precedent the prevailing coverage of Gates sets for how we report on the next generation of tech billionaires–turned-philanthropists, including Jeff Bezos and Mark Zuckerberg. Bill Gates has shown how seamlessly the most controversial industry captain can transform his public image from tech villain to benevolent philanthropist. Insofar as journalists are supposed to scrutinize wealth and power, Gates should probably be one of the most investigated people on earth—not the most admired."[15]

Jeff Bezos: Amazon CEO, Owner of Washington Post, Executive of Kuiper:

[15] Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

Jeff Bezos owns The Washington Post — and the journalism it's practicing[16]

Amazon's Jeff Bezos Will Launch 3,236 Satellites For Global Internet Like Elon Musk[17]

Make no mistake, Big Tech titans are acting as publishers while trying to evade the liabilities of publishing, and they are misusing Section 230 to get away with it. They are actively and subjectively censoring on a gargantuan scale what Americans write, post or see on social media and in traditional media.[18] Moreover, they are using their illegitimate Section 230 protections to garner historic ill-gotten profits to perpetuate and accelerate these abuses. It must stop.

The Commission should consider NTIA's petition regarding Section 230 and act in accordance with the views expressed herein.

Respectfully submitted,

Joseph M. Sandri, Jr.
Founder & CEO,
Thought Delivery Systems, Inc.

September 2, 2020

[16] Maines, Patrick. "Jeff Bezos owns The Washington Post Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

[17] Khanna, Monit. "Amazon's Jeff Bezos Will Launch 3,236 Satellites For Global Internet Like Elon Musk." India Times. July 31, 2020. https://www.indiatimes.com/technology/news/kuiper-satellite-internet-jeff-bezos-519269.html

[18] Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

From: Candeub, Adam
To: Roddy, Carolyn
Date: Wednesday, September 16, 2020 10:30:26 AM
Attachments: Binder1.pdf
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	

COMMENTS OF VIMEO, INC., AUTOMATTIC INC., AND REDDIT, INC. IN OPPOSITION TO THE PETITION OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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September 2, 2020

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
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To: The Commission

COMMENTS OF VIMEO, INC., AUTOMATTIC INC., AND REDDIT, INC. IN OPPOSITION TO THE PETITION OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

INTRODUCTION AND SUMMARY

The United States has produced the world's most vibrant and innovative market for online services. The companies who file these Comments are examples of the nation's success. They are medium-sized companies that collectively host, stream, and power millions of user communications, web pages, and video streams per day and allow people throughout the nation to work, practice their religion, educate, entertain, and express themselves. They are diverse in focus and business model, but what they all have in common is that they rely on Section 230 of the Communications Decency Act of 1996 to do what they do.

Congress had the foresight in 1996 to realize the promise of the Internet and understood that it needed intermediaries—websites, apps, and other services—to work and that intermediaries wouldn't be in business long if they were held liable for user content and didn't have the freedom to remove offensive content. Section 230 delivers that freedom by providing certain immunities to both providers *and users* with respect to user content. By doing so, the

statute helps "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[1]

Despite this clear Congressional mandate, the National Telecommunications and Information Administration ("NTIA") invites the Commission to, in effect, repeal Section 230 by administrative fiat and plunge head-first into "the constitutionally sensitive area of content regulation."[2] In particular, NTIA asks the Commission to gut Section 230 by (1) repealing its core immunity for publishing user content; and (2) imposing heavy-handed regulations on platforms by telling them what content they can remove and how they can remove it.[3] The Commission should decline this invitation to regulate the Internet.

First, the Commission lacks both subject matter jurisdiction and rulemaking authority over Internet content—which Congress specifically wanted to leave unregulated. *Second*, the proposed rules cannot issue because they would effectively repeal and rewrite Section 230 in the guise of interpreting it. *Third*, there is no market failure that justifies burdensome *ex ante* regulations.

Fourth, the proposed rules would harm the Internet. They would leave platforms exposed to liability for hosting third-party content, thereby reintroducing the very problems Congress sought to avoid in passing Section 230. They would eliminate protections for removing hate speech and other highly problematic content. They would discourage the

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[1] 47 U.S.C. § 230(b)(2) (emphasis added).

[2] Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, *Report*, 102 F.C.C.2d 142, 157 ¶ 20 (1985).

[3] National Telecommunications and Information Administration, Petition for Rulemaking, RM-11862 (July 27, 2020) ("Pet.") at 53-55. The petition is the result of Executive Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

development of automated technologies that help platforms combat spam and inauthentic content. All of this would burden and chill speech, dampen investment, and stifle competition. In short, the rules are unauthorized, anti-speech, anti-business, and anti-competition. They should be rejected without any further proceeding.[4]

STATEMENT OF INTEREST OF COMMENTING PARTIES

The commenting parties are medium-sized businesses that host and share a wide variety of user content. Section 230 has allowed them to thrive and to develop unique self-regulatory practices that are tailored to their services and the communities they serve. They are thus emblematic of the innovation that Congress sought to unlock by enacting Section 230.:

Automattic is the company behind WordPress.com, WooCommerce, Jetpack, and Tumblr. Automattic is a globally distributed company with 1,255 employees living and working in 76 countries. Automattic is committed to diversity and inclusion, with a common goal of democratizing publishing so that anyone with a story can tell it, regardless of income, gender, politics, language, or where they live in the world.

Automattic strives to carefully balance automation and human review across all of its platforms' content moderation practices. It leverages machine learning to enhance and improve its trust and safety decisions; however, it is Automattic's highly trained trust and safety moderators that allow it to apply context and nuance to ensure a fair outcome for our user communities. Whether it is hate speech or copyright infringement, Automattic strives to prioritize user safety and freedom of expression.

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[4] Commenters have focused on the primary problems with NTIA's petition. These are not the only problems, and we reserve all rights.

Reddit, Inc. is a user-generated content sharing platform whose mission is to bring community and belonging to everyone in the world. Founded in 2005 and with around 650 employees, Reddit comprises more than 130,000 communities, known as "subreddits," based on shared interests regarding everything from history and science to relationships, parenting, and pet ownership. Each of these communities is created and moderated not by Reddit employees, but by the users themselves, democratizing the content moderation process.

Reddit's content moderation approach is unique in the industry. Reddit relies on a governance model akin to our own democracy—where everyone follows a set of rules, has the ability to vote and self-organize, and ultimately shares some responsibility for how the platform works. Each subreddit is governed by rules set and enforced not by Reddit employees, but by volunteer community moderators, who execute more than 99.7% of all non-spam content removals on Reddit. Their efforts are complemented by the work of specialized Reddit employees and automated tooling to protect against illegal content like CSAM and foreign terrorist content, ensuring that such material is reported to the proper authorities.

Vimeo, Inc. operates a global video platform for creative professionals, small and medium businesses, organizations and enterprises to connect with their audiences, customers and employees. Vimeo provides cloud-based Software-as-a-Service offerings that allow customers to create, host, stream, monetize, analyze and distribute videos online and across devices. Launched in 2005, Vimeo has over 600 employees, nearly 1.4 million paying subscribers, and approximately 175 million users.

Vimeo has a dedicated Trust & Safety team with a global presence to help keep its services free of materials that infringe third-party rights, violate laws, or cause harm. In addition to human content moderation, Vimeo uses a number of automated methods to detect and remove

a variety of harmful content, ranging from spam and fraud to child sexual abuse materials and terrorist propaganda.

ARGUMENT

I. NTIA's Petition Asks for Rules that Are Beyond the FCC's Powers to Make.

A. The FCC Lacks Subject Matter Jurisdiction.

The FCC may not regulate matters outside its subject matter jurisdiction delineated in Section 2(a) of the Communications Act.[5] In *American Library Association v. FCC*, an ancillary jurisdiction case, the D.C. Circuit explained that subject matter jurisdiction is a precondition to the Commission's assertion of authority: "the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act, which . . . encompasses 'all interstate and foreign communications by wire or video.'"[6] In *Verizon v. FCC*, the Court held that subject matter jurisdiction is an important "limiting principle" that holds true whether the Commission seeks to make rules based upon a specific source of rulemaking authority or the Commission's ancillary authority.[7]

NTIA's proposed rules exceed the Commission's subject matter authority because they seek to regulate the act of *deciding* whether or not to publish content (or deciding to remove previously published content). This act is undertaken after a communication ends, or before it begins, and is separable from the act of transmitting it via communications. In this regard, the

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[5] 47 U.S.C. § 152(a).

[6] 406 F.3d 689, 692-93 (D.C. Cir. 2005) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 167 (1968)).

[7] 740 F.3d 623, 640 (D.C. Cir. 2014) ("Any regulatory action authorized by section 706(a) would thus have to fall within the Commission's subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction.").

proposed rules are analogous to those in *American Library Association*, in which the Commission sought to require all television sets to incorporate a chip that would implement certain prohibitions on copying content. The D.C. Circuit held that the Commission exceeded its subject matter authority by attempting "to regulate apparatus that can receive television broadcasts when those apparatus are not engaged in the process of receiving a broadcast transmission."[8] Critical to the opinion was the fact that the rules did not "not regulate the actual transmission of the DTV broadcast" but instead regulated "devices that receive communications after those communications have occurred," and not "communications themselves."[9] Here, too, the Commission would be regulating content selection and moderation decisions, not actual transmissions or communications themselves.

B. The FCC Lacks Statutory Rulemaking Authority.

NTIA's reliance on Section 201(b) of the Communications Act for statutory rulemaking authority[10] is misplaced, as that provision grants the Commission authority to regulate common carriers like telephone companies. Section 2 is titled "Service and charges" and it is the lead provision in Part 1 of the Communications Act (also known as Title 2), titled "Common Carrier Regulation."[11] Section 201(a) begins with the words, "It shall be the duty of every *common carrier* engaged in interstate or foreign communication by wire or radio . . . "[12] and Section 201(b) begins with "[a]ll charges, practices, classifications, and regulations for and in connection

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[8] *Am. Library Ass'n*, 406 F.3d at 691.
[9] *Id*. at 703.
[10] Pet. at 15-18.
[11] 47 U.S.C. § 201.
[12] 47 U.S.C. § 201(a) (emphasis added).

with *such communication service*, shall be just and reasonable . . . ."[13] After describing a litany of common-carrier related subject matter—including the right of common carriers to "furnish reports on the positions of ships at sea"—Section 201(b) ends with a limited grant of authority: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to *carry out* the provisions of this chapter."[14]

NTIA unmoors this last sentence from its proper common carrier-specific context and argues that because Section 230 falls within Title 2 of Title 47, it is fair game for rulemaking under that section. NTIA cites two Supreme Court decisions to support its position,[15] but these cases stand for the unremarkable proposition that Section 201(b) permits rulemaking to implement Title 2 enactments subsequent to that of Section 201. NTIA omits the crucial passage from *Iowa Utilities* making clear that Section 201 does not apply to later Title 2 provisions regardless of what they say or do. Commenting on Justice Breyer's dissent, the majority states: "Justice Breyer says . . . that 'Congress enacted [the] language [of § 201(b)] in 1938,' and that whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute depends upon *what that later enacted statute contemplates*.' *That is assuredly true."*[16]

True to that statement, both Supreme Court cases invoked by NTIA involved Title 2 provisions governing common carrier matters. In *AT&T Corp. v. Iowa Utilities Board* concerned the 1996 addition of local competition provisions, which improve network sharing, service

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[13] 47 U.S.C. § 201(b) (emphasis added).

[14] *Id.* (emphasis added).

[15] Pet. at 16-17, 16 n.46.

[16] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis added) (internal citation omitted).

resale, and interconnection obligations on the most heavily regulated of all common carriers—incumbent local exchange carriers (*i.e.*, the progeny of the Bell telephone companies).[17] Similarly, *City of Arlington v. FCC* involved a provision that concerned state regulation of siting applications for "personal wireless services," another common carrier service.[18] Consequently, the orders in these cases carried out common carrier regulation.

No such mandate is in play here. Section 230 does not concern, or even refer to, common carriers. Instead, its subject matter is "providers *and users*" of interactive computer services—entities who are certainly not common carriers.[19] Moreover, there is nothing for the Commission to "carry out" in Section 230. The Commission is not tasked with doing anything and is not even mentioned once. Instead, the statute, which was prompted by inconsistent judicial decisions,[20] seeks to limit "civil liability"[21] of providers and users and is self-enforcing on its face. The Commission has no role in adjudicating disputes in which Section 230(c)'s immunities might arise. Tellingly, these immunities have been interpreted and applied by the state and federal courts for 24 years without the FCC's intervention. Accordingly, the Commission does not have statutory authority to make rules under Section 230.

Nor does the Commission have ancillary authority. The D.C. Circuit has rejected attempts to claim plenary authority over a subject "simply because Congress has endowed it

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[17] *Id*. (involving 47 U.S.C. §§ 251 and 252).

[18] 569 U.S. 290 (2013) (involving 47 U.S.C. § 332).

[19] 47 U.S.C. § 230(c)(1) (emphasis added).

[20] *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (Section 230 "assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions applying traditional defamation law to internet providers"); *see also* Pet. at 18 ("Section 230 reflects a congressional response to a New York state case").

[21] 47 U.S.C. § 230(c) (heading).

with *some* authority to act in that area."[22] As discussed below, the target of the rulemaking—Section 230—does not permit rulemaking and likely forbids it.

C. Section 230 Does Not Permit Rulemaking.

Section 230 is a deregulatory statute that is fundamentally at odds with an agency rulemaking. In the first sentence of its *Restoring Internet Freedom Order*, the Commission cited Section 230 as a mandate to *de*regulate Internet service providers (ISPs):

> Over twenty years ago, in the Telecommunications Act of 1996, President Clinton and a Republican Congress established the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." Today, we honor that bipartisan commitment to a free and open Internet by rejecting government control of the Internet.[23]

The quoted language is one of the statutory goals set forth in Section 230(b). Because Congress took the "rather unusual step"[24] of expressing its policy objectives directly in the statute, these words are the conclusive evidence of Congress' intent. Even if there were any lingering doubt about what Congress meant by these words, Section 230's co-sponsor, Representative Christopher Cox, made clear in his floor statement that Section 230:

> will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats

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[22] *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir.), *amended*, 38 F.3d 1224 (D.C. Cir. 1994); *see also EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 (D.C. Cir. 2013) ("[W]e refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of commercial availability of navigation devices.").

[23] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311, 312 (2018) (quoting 47 U.S.C. § 230(b)(2)), *aff'd in part, remanded in part, and vacated in part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (per curiam); *see also* Restoring Internet Freedom, 33 FCC Rcd at 348-50.

[24] *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1047 (9th Cir. 2019)

> regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.[25]

Consistent with both the language of the statute and Representative Cox's statement, the Commission itself has explained that Section evinces a "deregulatory policy . . . adopted as part of the 1996 Act."[26]

Not surprisingly, prior attempts by the Commission to ground ancillary authority in Section 230 have run aground.[27] Today, the Commission "remains persuaded that section 230(b) is hortatory" only and, even if it provided some degree of regulatory authority, it cannot "be invoked to impose regulatory obligations on ISPs."[28] In any event, given the Commission's decision, right or wrong, not to regulate ISPs' *transmission* of Internet traffic based in part on Section 230(b), it would be ironic if the Commission nonetheless determined that it had right to regulate the *content decisions* of, not only ISPs, but also websites, blogs, and ordinary users, under Section 230(c).

D. The Rules Would Impose Unlawful Common Carrier Obligations.

The Communications Act distinguishes between "telecommunications services" and "information services."[29] As the Commission has explained, "information services"—which include blogs, websites, search engines, and other Internet services—are "largely unregulated by

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[25] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[26] Restoring Internet Freedom, *supra*, 33 FCC Rcd at 349 ¶ 61.

[27] *Comcast v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010) (criticizing attempt as "seek[ing] to shatter" the outer limits of the Commission's jurisdiction).

[28] Restoring Internet Freedom, *supra*, 33 FCC Rcd at 480 ¶ 284.

[29] *See* 47 U.S.C. § 153(24) (defining "information service" as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing"); *compare id*. §§ 153(50) (defining "telecommunications"), 153(51) (defining "telecommunications carrier").

default."[30] In fact, the definition of "telecommunications carrier" actually prohibits FCC from regulating any entity as a common carrier except "to the extent that it is engaged in providing telecommunications services . . . ."[31] As a result, non-carriers are "statutorily immune . . . from treatment as common carriers."[32]

Here, NTIA's proposed rules would impose a panoply of common carrier regulations on non-carriers such as websites and users. For example, the proposed requirement that a social media platform may not restrict access to material that is similarly situated to material that the platform intentionally declines to restrict amounts to a prohibition on "unreasonable discrimination." Similarly, by limiting the categories of content that may be removed,[33] the rules leave no "room for individualized bargaining and discrimination in terms" or to account for "individualized circumstances."[34] And the obligation to support an "objectively reasonable belief" with "reasonably factual bases" amounts to a requirement that access restrictions be "just and reasonable."[35] Indeed, requiring carriers to provide factual support is a hallmark of the Commission's application of the "just and reasonable" standard used in traditional common carrier regulation.[36]

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[30] Restoring Internet Freedom, *supra*, 33 FCC Rcd. at 474 ¶ 273.
[31] 47 U.S.C. § 153(51)
[32] *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).
[33] *See* Pet. at 55 (proposed rule 47 C.F.R. 130.02(e)).
[34] *Verizon*, 740 F.3d at 652 (quoting *Cellco P'ship*, 700 F.3d at 548).
[35] *Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005), *aff'd*, 550 U.S. 45 (2007).
[36] *See* Ameritech Operating Companies' New Expanded Interconnection Tariff, *Order Designating Issues for Investigation*, CC Docket No. 96-185, DA 97-523, 1997 WL 106488, at *10 (Mar. 11, 1997).

As yet another example, NTIA would condition a user's or provider's immunity in Section 230(c)(2) for removing offensive content on, *inter alia*, providing advance notice and an opportunity to respond.[37] The near-impossibility of this burden would effectively require covered entities to continue hosting content that they believe is objectionable for an uncertain period of time, thus requiring them to "'to serve the public indiscriminately.'"[38]

E. The Commission Is Being Asked to Regulate Internet Participants More Heavily Than It Does Broadcasters.

The sweeping breadth of NTIA's content regulations is confirmed by the fact that they would regulate companies and individuals who are not Commission-licensed broadcasters more heavily than broadcasters themselves. In fact, even for broadcasters, the Commission has abandoned its erstwhile fairness doctrine, which required broadcast licensees to air contrasting political viewpoints. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court had upheld the fairness doctrine for broadcasters based on the scarcity of broadcast spectrum and the "unique medium" of broadcasting.[39] But the authority of *Red Lion* has been devitalized.[40] In 1987, the Commission stopped enforcing the fairness doctrine as no longer serving the public interest and

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[37] *See* Pet. at 55 (proposed rule 47 C.F.R. 130.02(e)(viii)).

[38] *Verizon*, 740 F.3d at 655-56 (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976)).

[39] 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

[40] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530 (2009) (Thomas, J., concurring) ("*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."); *id.* at 533 ("[E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions.").

inconsistent with First Amendment values; in 2011, it officially eliminated the rule.[41] Just as important, even before it took these actions, the Commission had explained that the fairness doctrine should not be applied to other media, particularly where the rules would "affect the constitutionally sensitive area of content regulation . . . ."[42]

Oblivious to this history, NTIA essentially seeks to resurrect the fairness doctrine in a new medium and require the airing of contrasting viewpoints. Thus, for example, an online forum for citizens dedicated to the President's reelection would not be able to exclude supporters of the former Vice President without potentially undertaking liability. By purporting to tell users and online providers what categories of speech they can and cannot remove without liability, the proposed rules veer into content-based regulation of speech in contravention of the First Amendment.[43] This should give the Commission great pause, particularly as the Internet does not possess any of the "unique" characteristics of traditional broadcast television that justified the fairness doctrine in the first place.[44]

II. NTIA'S PROPOSED RULES ARE INCONSISTENT WITH THE STATUTE

A. NTIA's Proposed Rules Would Overrule Congress.

The Constitution vests the legislative branch with the exclusive power to enact laws—statutes like Section 230—and the judiciary with the exclusive power to interpret them. Agencies are creatures of statute and thus must act in accordance with the limited set of powers

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[41] Amendment of Parts 1, 73 and 76 of the Commission's Rules, *Order*, 26 FCC Rcd 11422, 11422 ¶ 3 (2011).

[42] Inquiry into Section 73.1910, *supra*, 102 F.C.C.2d at 157 ¶ 20.

[43] *See*, *e.g.*, *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346-47 (2020) (striking down TCPA exemptions for robocalls for government debt as content-based discrimination).

[44] *Red Lion*, 395 U.S at 390-91.

granted to them by Congress. While agencies are entitled to a degree of deference to interpret genuine statutory ambiguities, they cannot rewrite the statute in the guise of interpretation: As Justice Scalia observed, "It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"[45] When an agency does so, it "risks trampling the constitutional design," as Justice Gorsuch has put it.[46]

This concern is particularly apt here, where the proposed changes are at odds with Congress's goal of leaving interactive computer services "unfettered by Federal or State regulation"[47] and Congress's acceptance of the judicial consensus that Section 230 be interpreted "broadly" in favor of immunity.[48] NTIA's rules thwart Congress's intent by (1) effectively repealing the core protection for users and online providers when they are sued for acting as "publishers or speakers" under Section 230(c)(1); and (2) replacing Section 230(c)(2)'s straightforward immunity for removing content a user or provider considers objectionable with a complicated set of regulations, the text of which is longer than the entirety of Section 230 itself.[49]

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[45] *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring).

[46] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

[47] 47 U.S.C. § 230(b)(2).

[48] *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) ("In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity."). Congress has impliedly ratified this consensus by not disturbing it on all of the occasions that it has amended Section 230. *See*, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 385-87 (1982) (Congress ratified judicially-recognized private rights of action when it amended the Commodities Exchange Act, but declined to eliminate private remedies). Congress last amended Section 230 in 2018, with the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

[49] The entirety of Section 230, as amended, takes up less than 1,000 words; NTIA's proposed regulations add more than 1,180.

B. NTIA's Rules Would Effectively Repeal Section 230(c)(1).

Section 230(c)(1) states that no service provider "shall be treated as the publisher or speaker of any information provided by another information content provider."[50] Courts agree that Section 230(c)(1) applies when: (1) the defendant provides an "interactive computer service"; (2) the defendant did not create the "information content" at issue; and (3) the plaintiff's claims "seek[] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[51] In other words, "any activity that can be boiled down to *deciding whether to exclude material* that third parties seek to post online is perforce immune[.]"[52]

Courts have applied Section 230(c)(1) to two principal fact patterns: (1) cases involving situations where a service provider has published allegedly illegal user content; and (2) cases where the service provider restricts or removes user content.[53] NTIA's proposed rules would eliminate Section 230(c)(1)'s application to both scenarios.

1. *The Proposed Rules Eliminate Section 230(c)(1)'s Protection for Publishing Third-Party Content*

NTIA asks the Commission to "clarify" that "[a]n interactive computer service is not being 'treated as the publisher or speaker of any information provided by another information content provider' when it actually publishes its own or *third-party content*."[54] This strikes at the

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[50] 47 U.S.C. § 230(c)(1).

[51] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[52] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (*en banc*) (emphasis added).

[53] *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 602 (S.D.N.Y. 2020) (describing both scenarios and collecting cases); *see also Fyk v. Facebook*, 808 F. App'x 597, 598 (9th Cir. 2020).

[54] Pet. at 53 (proposed 47 C.F.R. 130.01(c)) (emphasis added). In addition, NTIA would make users and providers responsible for third-party content that they "present[] with a reasonably

heart of Section 230(c)(1). The whole point of the immunity is that a website should not be liable for tortious or illegal user content that it makes available. Since the words "actually publishes" can be read to include any act of making third-party content available, Section 230(c)(1) would cease to serve any purpose.[55]

2. The Proposed Rules Eliminate Section 230(c)(1)'s Protection for Removing Content

NTIA next proposes that Section 230(c)(1) should be read to exclude any content-removal act covered by Section 230(c)(2).[56] There is no textual basis for this change. Notably, the Section 230(c)(1) immunity is not limited to the affirmative act of making content available. Instead, it covers "any information provided by another information content provider" and therefore any decision concerning that information, including the traditional editorial function of whether to publish it.[57] Because "removing content is something publishers do,"[58] Section 230(c)(1) necessarily covers content removal.[59]

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discernible viewpoint." *Id*. at 55 (proposed rule 47 C.F.R. 130.03). This would have the same effect as eliminating immunity for publishing as virtually every website presents content for some content-based reason.

[55] NTIA's regulations proceed to describe *examples* of when a website "actually publishes" third-party content (*see id*.), but because there are illustrative only, they in no way cabin the above language.

[56] Pet. at 30.

[57] *See Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) ("decisions relating to the monitoring, screening, and deletion of content" are "quintessentially related to a publisher's role"); *cf. Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (in First Amendment context, decision *not* to publish a response from a politician to a critical op-ed "constitute[s] the exercise of editorial control and judgment").

[58] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). And courts have adopted "'a capacious conception of what it means to treat a website operator as the publisher . . . of information provided by a third party.'" *Force*, 934 F.3d at 65 (ellipses in original; quotation marks and citation omitted) (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)).

[59] Had Congress had intended that Section 230(c)(1) apply only to the act of making content available, it could have omitted the word "publisher" entirely and simply protected services

Nor is there any merit to NTIA's argument that applying Section 230(c)(1) to content removal decisions renders Section 230(c)(2) mere surplusage.[60] This is because Section 230(c)(2) "still has work to do"[61] even when Section 230(c)(1) applies to content removal decisions. In particular, there are at least three types of cases in which Section 230(c)(2) does something that Section 230(c)(1) does not:

- Section 230(c)(1) does not apply where the content at issue was created or developed, in whole or in part, by the defendant service provider itself. Because Section 230(c)(2) covers the removal of any "materials," not just content created by "another," it applies to a different class of entities who may have "developed, even in part, the content at issue,"[62] including the defendant itself. For this reason, the Ninth Circuit recently stated that, "as we have explained, § 230(c)(2)(a) 'provides an *additional shield* from liability.'"[63] An interactive computer service may wish to restrict access to content it has created itself because, for example, it may wish (or be required) to restrict access to certain materials (like R-rated movies) to people over a certain age. In this case, only Section 230(c)(2) would protect the service.
- Section 230(c)(1) might not apply where the service provider has allegedly breached an express promise with respect to user content.[64] To the extent it does not provide

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providers from situations where they are treated as the "speaker" of content. Thus, NTIA's arguments read the word "publisher" out of the statute.

[60] *See* Pet. 28-29.

[61] *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (in different statutory context, declining to apply canon regarding surplusage interpretations).

[62] *Barnes*, 570 F.3d at 1105.

[63] *Fyk*, 808 F. App'x at 598 (emphasis in original) (quoting *Barnes*, 570 F.3d at 1105).

[64] *See Barnes*, 570 F.3d at 1109 (Section 230(c)(1) did not bar promissory estoppel based upon express promise).

coverage, Section 230(c)(2) clearly "insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices."[65]

- Section 230(c)(2)(B) provides a distinct immunity to entities that create and distribute tools that allow others to restrict access to content as permitted under Section 230(c)(2)(A).[66] There is no analog to this immunity in Section 230(c)(1).

These use cases demonstrate that Section 230(c)(2) was Congress' way of, to paraphrase Justice Kavanaugh, making "doubly sure" that Section 230 covered content removals and restrictions.[67] The sole case cited by NTIA—*e-Ventures Worldwide*, *LLC v. Google, Inc*.[68]—fails to address any of these cases and has not been followed for precisely this reason.[69] Accordingly, NTIA's attempt to limit Section 230(c)(1) in light of Section 230(c)(2) fails.

C. NTIA's Rules Would Rewrite Section 230(c)(2).

Section 230(c)(2) states that no service provider shall be liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user

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[65] *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003), superseded in part by statute on other grounds.

[66] *See*, *e.g.*, *Fehrenbach v. Zedlin*, No. 17 Civ. 5282, 2018 WL 4242452, at *5 (E.D.N.Y. Aug. 6, 2018) (Section 230(c)(2)(B) precluded lawsuit that "charges the Facebook defendants with enabling users to restrict access to material.").

[67] Statutory redundancy is often a feature, not a bug. This makes sense because "members of Congress often want to be redundant" to be "doubly sure about things." Brett Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 718 (2014).

[68] No. 2:14-cv-646, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017).

[69] *See Domen*, 433 F. Supp. 3d at 603 ("The Court does not find *e-ventures* persuasive since Section 230(c)(2)'s grant of immunity, while "overlapping" with that of Section 230(c)(1), *see Force*, 934 F.3d at 79 (Katzmann, C.J., concurring), also applies to situations not covered by Section 230(c)(1). Thus, there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage.").

considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[70] NTIA's proposed rules rewrite this provision by:

- Transforming the standard of subjective good faith to a supposedly objective one[71];
- Effectively eliminating the catch-all term "otherwise objectionable"[72]; and
- Adding affirmative requirements that the user or provider of the interactive computer service give, among other things: (1) advance written notice of its decision to remove or restrict content; (2) a reasoned explanation therefor; and (3) an opportunity for the affected user to challenge the decision.[73]

Each proposed change cannot be reconciled with the statutory text. *First*, NTIA cannot replace Section 230(c)(2)'s subjective good faith element. By its terms, Section 230(c)(2) applies to a "good faith" action to remove content that the service provider "considers to be" objectionable.[74] The words "good faith" and "considers to be" speak to subjective good faith, which focuses on "the actor's state of mind and, above all, to her honesty and sincerity."[75] This is the polar opposite of an objective standard of reasonableness.

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[70] 47 U.S.C. § 230(c)(2)(A).

[71] *See* Pet. at 55 (proposed rule 47 C.F.R. 130.02(e)) (provider must have "an objectively reasonable belief").

[72] *Id*. (subject-matter of removal limited to "one of the listed categories").

[73] *Id.* (requiring provision of "timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others").

[74] 47 U.S.C. § 230(c)(2)(A).

[75] David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 892 (2016).

Second, NTIA cannot erase the catch-all "otherwise objectionable." The statutory interpretation canon *esjudem generis*, on which NTIA relies,[76] limits catch-all terms only where the preceding terms are closely related. That is not the case here where the enumerated terms speak to vastly different matters, from adult content to harassment to violence. As the Ninth Circuit has concluded, because the enumerated terms "vary greatly . . ., the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s."[77]

Third, NTIA cannot add detailed notice and redress procedures to a statute that contains none.[78] Good faith does not require a whole panoply of due process rights.[79] Congress knows how to draft user redress procedures. The Digital Millennium Copyright Act of 1998—a companion statute dealing with online intermediary liability—sets forth a detailed notice and takedown framework for submitting complaints of copyright infringement along with an equally detailed redress procedure for affected users.[80] Nothing close to this appears in Section 230. Indeed, Section 230 imposes only one affirmative obligation on service providers.[81] This

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[76] Pet. at 32.

[77] *Enigma Software*, 946 F.3d at 1051-52.

[78] *See*, *e.g.*, *Holomaxx Tech. Corp. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1105 (C.D. Cal. 2011) (imposing "duty [on Microsoft] to discuss in detail its reasons for blocking Holomaxx's communications or to provide a remedy for such blocking . . . would be inconsistent with [Congressional] intent").

[79] Many judicial and governmental decisions are made every day without providing grounds. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995) (examples include the Supreme Court denying certiorari; appellate judges ruling from the bench; and trial judges overruling objections).

[80] 17 U.S.C. § 512(c).

[81] 47 U.S.C. § 230(d) (requirement that service providers inform users that filtering technologies are available). Even then, Congress did not condition the Section 230(c) immunities upon its compliance or provide a remedy for violation thereof.

confirms that Congress did not intend to impose any other affirmative obligations for providers to take advantage of Section 230(c)(2).

Finally, the whole point of Section 230(c) is to encourage voluntary self-regulation—"Good Samaritan" behavior as Congress put it.[82] In doing so, Congress decided against requiring content moderation.[83] It would make no sense for Congress to fail to tell service providers when to remove content, and yet regulate in a detailed, prescriptive manner if and when they actually remove content. Congress is not known to "hide elephants in mouseholes,"[84] and so it would be surprising if Congress sought to undermine its own self-regulatory goals by burdening them with undisclosed content-moderation regulations. This plainly does not produce the "unfettered market[]" that Congress wanted.[85]

III. NTIA'S PROPOSED RULES ARE UNECESSARY.

NTIA's proposed rules are a classic "solution in search of a problem."[86] The Commission has previously rejected regulatory initiatives when there is "sparse evidence" of a market failure.[87] NTIA supplies no evidence for its view that Internet platforms are systematically discriminating against certain political viewpoints such that people holding those views are effectively unable to speak. Moreover, platforms have no incentive to alienate a

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[82] 47 U.S.C. § 230(c).

[83] Notably, the immunity applies "even when self-regulation is unsuccessful, or completely unattempted." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006) (discussing lack of obligations under Section 230(c)(1)); *Green*, 318 F.3d at 472 ("Section 230(c)(2) does not *require* AOL to restrict speech; rather it allows AOL to establish standards of decency without risking liability for doing so.").

[84] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[85] 47 U.S.C. §§ 230(b)(2)-(b)(4).

[86] Restoring Internet Freedom, *supra*, 33 FCC Rcd 375 ¶ 109 (heading).

[87] *Id.* ¶ 109.

substantial portion of the population through arbitrary actions or discrimination against a widely-held political view or affiliation. On the contrary, because they earn money from subscriptions or advertising, they have a strong economic incentive to cater to as many people as possible. To this end, companies have every reason to make their rules clear, to provide notice of decisions (when possible), and to consider user appeals.

Even if NTIA's policy views were supported by evidence, amending Section 230 to address the perceived practices of a "handful of large social media platforms"[88] is a vastly overbroad solution. Because Section 230 protects "users" and "providers," NTIA's rules would not just regulate the world's largest Internet platforms—they would affect all Internet participants of all shapes and sizes, including everyone from individual users to small businesses to the companies who submit these comments. Such a massive policy change should not be undertaken lightly.

IV. NTIA'S PROPOSED RULES WOULD HARM THE INTERNET BY DAMPENING INNOVATION, CHILLING SPEECH, AND STIFLING COMPETITION.

A. The Rules Would Return the Internet to the Pre-Section 230 Days.

The proposed rules would effectively reinstate the pre-Section 230 common-law rules that imposed liability on platforms that engaged in self-regulation. Yet, the same concerns that animated Section 230 remain true, and indeed have become even truer, today. As the Fourth Circuit observed in 1997:

> The amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive

[88] Pet. at 4; *see also id*. at 43 (referring to "tech giants").

> computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[89]

The difference today, perhaps, is that content moderation is more essential than ever. First of all, the typical consumer does not want to use a platform that is swimming with spam, pornography, and hate speech. Second, platforms are under tremendous pressure to proactively remove all sorts of content, including the most pernicious kinds, *e.g.*, hate speech, terror and extremist propaganda, child sexual abuse materials (CSAM).[90] Third, content has mushroomed exponentially.

NTIA argues that times have changed "with artificial intelligence and automated methods of textual analysis to flag harmful content now available,"[91] but fails to grasp that these very technologies were made possible because of Section 230's robust immunities. Removing protections for editorial decisions and requiring notice and detailed reasons every time a platform removes a post precludes the operation of most automated technologies and thus returns us to a world where platforms actually do "need to manually review each individual post."[92]

In addition to the sheer burden associated with it, manual review is unlikely to be successful unless it is combined with automated tools. This is particularly true in the case of content like spam, fraud, inauthentic content, where bad actors have the resources to inundate

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[89] *Zeran*, 129 F.3d at 331.

[90] *See* John Samples, "Why the Government Should Not Regulate Content Moderation of Social Media," *Policy Analysis* No. 865, at pp. 1-2 (Cato Inst. Apr. 9, 2019) (describing criticism of platforms' moderation decisions), available at https://www.cato.org/sites/cato.org/files/pubs/pdf/pa_865.pdf.

[91] Pet. at 4.

[92] *Id*.

sites with bots, scripts, and other automated means. This content can ruin the user experience and harm a platform's brand.[93] For this reason, businesses like the commenting parties have invested heavily in content moderation tools (as described earlier). These are but a sampling of techniques, and they are all examples of innovating "blocking and filtering technologies" that Congress sought to encourage.[94] Tying the hands of platforms will limit the continued development of such technologies. This will make for a markedly poorer Internet experience for everyone.

B. The Rules Would Harm Online Communities.

By removing protections for editorial decisions and severely constraining content removal decisions, NTIA's rules would harm online interest-based communities. NTIA makes a nonsensical claim about platforms being unable to distinguish themselves in today's environment based upon their contractual terms,[95] but the reality is that communities of all kinds do in fact distinguish themselves based upon shared identities and interests. Yet, NTIA's rules would discourage these communities from controlling their own messages by, among other things, setting content rules and excluding off-topic content. This decreases the value of the community and discourages people from participating in it.

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[93] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625 (2018) ("Platforms create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users' speech and community norms.").

[94] 47 U.S.C. § 230(b)(4).

[95] Pet. at 26.

C. The Rules Would Discourage the Removal of Hate Speech and Other Pernicious Content.

NTIA's rules would remove protections for a wide variety of content that platforms currently work hard to fight. Most glaringly, NTIA's rules would expose platforms to liability for removing hate speech.[96] Hate speech is one of the most pernicious categories of unwanted content. It is different from other kinds of speech because its harm is twofold: it incites hatred and violence upon targeted groups *and* it chills speech and public participation by targeted groups in the first place. Indeed, one Second Circuit judge, in voting to allow the President to block users in his own Twitter feed, explained that having a forum "overrun with harassment, trolling, and *hate speech*" will lead to less speech, not more.[97] NTIA's rules would lead to exactly that.

In addition to hate speech, there are innumerable categories of unwanted content that have the potential to cause harm. Take inauthentic content. People want to use a service that they can trust to deliver honest user feedback about a business, product, or vacation spot. A review site has value when consumers believe that it is a source of genuine feedback from other consumers. Fake reviews—whether bad reviews manufactured by a rival or glowing "consumer" reviews created by a proprietor—diminish the platform's value by making it difficult to know when one is reading a genuine or fake review. This ultimately leads to disengagement and thus less speech in the first place.

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[96] The rules do this by limiting immunity for content removal decisions to the enumerated grounds in Section 230(c)(2), which the rules construe narrowly. Hate speech, and many other harmful categories, are not among the enumerated grounds. In fact, the petition never once mentions hate speech in spite of the problem it poses for online platforms.

[97] *Knight First Am. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 231 (2d Cir. 2019) (Park, J., dissenting from denial of rehearing *en banc*) (emphasis added).

D. The Rules Would Dampen Investment and Stifle Competition.

All told, the rules will impose costly burdens on businesses that host and facilitate user content by exposing them to liability for user content and by penalizing content moderation. This will erect new barriers to entry and discourage investment in startups. This in turn will make it harder for the next generation of Internet platforms to succeed. Thus, while NTIA's petition complains about large tech firms that dominate "highly concentrated markets,"[98] its rules would actually entrench them by making it more unlikely that competitors can challenge their dominance. There are, of course, remedies in the event a company were to abuse its market power, but they lie beyond the purview of this rulemaking.

CONCLUSION

For the reasons set forth above, the Commission should not undertake a rulemaking proceeding based upon NTIA's petition.

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Respectfully Submitted,

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[98] Pet. at 14.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking of the National	)	RM No. 11862
Telecommunications and Information	)	
Administration Regarding Section 230	)	
of the Communications Act of 1934	)	

COMMENTS OF AT&T SERVICES, INC.

America's tech platforms have grown from humble beginnings in the late 20th century into the most powerful forces in the global economy today. They now account for the top five U.S. companies by market capitalization, and those five alone "made up about 25% of the S&P 500 at the end of July."[1] The decisions these companies make on a daily basis—which search results to rank first, which products to promote, which news stories to feature, and which third parties they will deal with and on what terms—shape every aspect of America's economic and political life. Yet those decisions are shrouded in obscurity, away from public view. And the companies that make them still enjoy extraordinary legal immunities designed a quarter century ago to protect nascent innovators, not trillion-dollar corporations. This corner of "the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled."[2] Members of both parties in Congress are engaged in discussions regarding these issues, and AT&T welcomes the opportunity to contribute to that bipartisan dialogue. In particular, as discussed below, we support the growing consensus that online platforms should be more accountable for, and more transparent about, the decisions that fundamentally shape American society today.

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1 Amrith Ramkumar, *Apple Surges to $2 Trillion Market Value*, Wall St. J. (Aug. 20, 2020).

2 *Fair Housing Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008) (en banc).

Much of the current debate focuses on reforming Section 230 of the Communications Act, the subject of NTIA's petition here.[3] Congress enacted that provision in 1996 to address a narrow set of concerns involving a nascent online ecosystem that, at the time, still played only a marginal role in American life. Although there were bulletin boards, there were no social networks in the modern sense. No e-commerce company competed to any significant degree with brick-and-mortar businesses, let alone served as an essential distribution platform for all of its rivals. No app stores mediated between consumers and third-party Internet services. Americans still obtained most of their news from a multitude of traditional news sources rather than from a few online news aggregators. And although rudimentary search engines and "directories" helped consumers navigate the then-fledgling Internet, no one company's algorithmic choices had any material effect on competition or public discourse.

Against that backdrop, Congress enacted Section 230 to insulate the first Internet platforms from liability risks they might otherwise face as "publisher[s]" or "speaker[s]"—risks that Congress feared would weaken their incentives to block "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content, particularly from underage users.[4] Congress did not foresee that some courts would construe that provision to confer near-absolute immunity for online conduct that bears no relation to that objective—or, in some cases, affirmatively subverts it.[5] Congress also did not foresee that such overbroad immunity would extend not only to financially vulnerable startups, but to the largest and most powerful

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[3] Petition for Rulemaking of the National Telecommunications and Information Administration, *Section 230 of the Communications Act of 1934*, RM-11862 (July 27, 2020); *see* 47 U.S.C. § 230.

[4] 47 U.S.C. § 230(c)(1).

[5] *See*, *e.g.*, Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 403 (2017) (observing that courts "have extended this safe harbor far beyond what the provision's words, context, and purpose support," in some cases "to immunize from liability sites *designed* to purvey offensive material") (emphasis added).

companies in the world—companies whose black-box algorithms and back room decisions pick winners and losers in every sphere of public life, from markets to political contests.

Of course, the stratospheric growth of the Internet over the ensuing quarter century has brought inestimable benefits to American consumers. And for the most part, today's leading platforms should be commended, not condemned, for the innovations that have fueled their extraordinary success. But with great success comes great responsibility. And policymakers thus should undertake at least two basic reforms to make these platforms more accountable to the American public.

First, the largest online platforms owe the public greater transparency about the algorithmic choices that so profoundly shape the American economic and political landscape. As Chairman Pai has observed, "the FCC imposes strict transparency requirements on companies that operate broadband networks—how they manage their networks, performance characteristics. Yet consumers have virtually no insight into similar business practices by tech giants."[6] Given the unrivaled influence of these platforms, he added, steps may now "need to be taken to ensure that consumers receive more information about how these companies operate."[7]

Just as AT&T and other ISPs disclose the basics of their network management practices to the public, leading tech platforms should now be required to make disclosures about how they collect and use data, how they rank search results, how they interconnect and interoperate with others, and more generally how their algorithms preference some content, products and services over others. Such disclosures would help consumers and other companies make better educated choices among online services and help policymakers determine whether more substantive

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6 Ajit Pai, *What I Hope to Learn from the Tech Giants*, Medium (Sept. 4, 2018), https://www.fcc.gov/news-events/blog/2018/09/04/what-i-hope-learn-tech-giants.

7 *Id.*

oversight is needed. This is not to say that online platforms must divulge the granular details of their "secret sauce." Many types of disclosure would cast much-needed light on the enormously consequential decisions of online platforms while raising no serious concern about compromised trade secrets or third-party manipulation.[8] For example, policymakers and consumers have a right to know whether and how a dominant search engine, e-commerce platform, or app store designs its algorithms to privilege its own vertically integrated services over competing services.[9] And they also have a right to know whether, in the words of British regulators, a dominant ad tech company exploits its "strong position at each level of the intermediation value chain … to favour its own sources of supply and demand" and "self-preferenc[e] its own activities" to the detriment of its customers and competitors.[10]

Second, Section 230 immunity should be modernized to reduce gross disparities in legal treatment between dominant online platforms and similarly situated companies in the traditional economy. Few dispute that Section 230 should continue to shield online platforms in the paradigmatic cases for which that provision was enacted. For example, even if online platforms should have continued immunity from defamation liability when, like the bulletin boards of 1996, they act as more or less passive hosts of third-party content and intervene mainly to

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[8] Significantly, the High Level Group of tech advisors to the European Commission—a group that includes experts from leading tech companies—recently agreed that platforms can and should "provide transparent and relevant information on the functioning of algorithms that select and display information without prejudice to platforms IPRs [intellectual property rights]." *Report of the Independent High Level Group on Fake News and Online Disinformation*, European Commission 23 (2018) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271; *see also* Natasha Lomas, *Report Calls for Algorithmic Transparency and Education to Fight Fake News*, TechCrunch (Mar. 12, 2018), https://techcrunch.com/2018/03/12/report-calls-for-algorithmic-transparency-and-education-to-fight-fake-news/ (noting that leading tech companies "are listed as members" of the Group and "are directly involved in shaping these recommendations").

[9] *See*, *e.g.*, Competition & Markets Authority (U.K.), *Online Platforms and Digital Advertising: Market Study Final Report* 361 (July 1, 2020), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study (proposing greater transparency).

[10] *Id.* at 20.

address the categories of objectionable conduct set forth in Section 230(c)(1), leading platforms today often play a much more active curation role. They routinely amplify some content over other content and shape how it appears, often for financially driven reasons that have nothing to do with the original content-filtering goal of Section 230.[11] There is nothing inherently wrong with such business models, and many are pro-competitive. But there is also no clear reason why such platforms should play by radically different liability rules than traditional purveyors of third-party content, such as book publishers, newspapers, or radio or television businesses.[12]

Although AT&T endorses no specific proposal for Section 230 reform here, it does urge federal policymakers to adopt a single set of nationally consistent rules. Federal and state courts across the country have interpreted that provision in widely divergent ways. The resulting legal hodge-podge prescribes different liability rules in different jurisdictions, and the lines drawn in any given jurisdiction are themselves often obscure and unhinged from sound public policy. As Section 230 nears its 25th anniversary, it is time for federal policymakers to step back, return to first principles, and revisit whether and when the nation's largest online platforms should enjoy legal immunities unavailable to similar companies in similar circumstances.

* * *

[11] *See* U.S. Dep't of Justice, *Section 230—Nurturing Innovation or Fostering Unaccountability?*, at 24 (June 2020), https://www.justice.gov/file/1286331/download); John Bergmayer, *How to Go Beyond Section 230 Without Crashing the Internet*, Public Knowledge (May 21, 2019), https://www.publicknowledge.org/blog/how-to-go-beyond-section-230-without-crashing-the-internet/ ("While shielding platforms from liability for content developed by third parties has a number of legitimate justifications, the rationale for shielding them from liability when they actively amplify such content seems weaker."); *see also Roommates.com*, *supra* (addressing fact-intensive issue of when a website crosses the indistinct line from an "interactive computer service," which is entitled to Section 230(a)(1) immunity, to an "information content provider" in its own right, which is not).

[12] Citron & Wittes, *supra*, at 420 (expressing "skeptic[ism] that online providers really need dramatically more protection than do newspapers to protect free expression in the digital age").

AT&T appreciates the opportunity to express these high-level views on the legal regimes governing today's online platforms, and it looks forward to engaging with Congress, the Commission, and other policymakers as the debate about these critical issues evolves.

Respectfully submitted,

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September 2, 2020

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
National Telecommunications and Information Administration	)	RM-11862
	)	
	)	
Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934	)	
	)	

REPLY COMMENTS OF PROFESSORS CHRISTOPHER TERRY AND DANIEL LYONS

We respectfully submit these comments in response to the Public Notice in the above-captioned proceeding. Christopher Terry is an assistant professor at the University of Minnesota's Hubbard School of Journalism and Mass Communication. Daniel Lyons is a professor at Boston College Law School.[1] We both specialize in telecommunications law and have extensive experience in practice before the Federal Communications Commission. We hail from opposite sides of the political spectrum and often disagree about the nuances of communications policy. But we are united in our opposition to the National Telecommunications & Information Administration's Petition requesting that this agency interpret Section 230. NTIA's proposal offends fundamental First Amendment principles and offers an interpretation of Section 230 that is inconsistent with the statute's language, legislative history, and interpretation by this agency and by courts.

I. The NTIA Petition Offends Fundamental First Amendment Principles

There can be little debate that any FCC action on the NTIA petition raises immediate and significant First Amendment implications, none of which fall in the favor of further action on the

[1] Affiliations are listed for identification purposes only.

petition. Section 230 of the CDA follows a long legacy of law and regulations in the United States which collectively act to promote the quantity of free speech, political discussion, and access to information. These key values on which communication processes in the United States are based cannot or should not be forgotten and must be considered when taking up the speech regulation issues that are explicit in the NTIA petition, including the clear request for the FCC to engage in a content-based regulation of speech that cannot survive even the thinnest application of strict scrutiny or legal precedent.

The NTIA petition is short sighted because Section 230 promotes free expression online by creating and protecting the pathways for a range of expression, including political speech. Political speech has preferred position, the highest First Amendment protection, as laid out by the Supreme Court in *New York Times v. Sullivan* and *Hustler Magazine, Inc. v. Falwell*.[2] Section 230 provides the mechanism which implements similar protections by ensuring platforms, such as social media or newspaper comment sections, are not the subject of lawsuits about the third-party speech which occurs on their platforms.

Functionally, the NTIA is asking the FCC to develop and enforce a content compelling regulation for the purposes of mitigating perceived political bias. Setting aside the incredibly subjective nature of regulating for bias in media content, for nearly 40 years the agency has correctly moved away from trying to influence licensee decision-making in informational programming content. The inquiry related to this petition seems like an odd time for the FCC to abruptly abandon this extended course of action, especially in order to develop a regulation that would apply to internet platforms and edge providers that, unlike broadcasters, over whom the agency has standing no licensing authority.

[2] See generally: NY Times v. Sullivan, 376 U.S. 254 (1964) and Hustler v. Falwell, 485 U.S. 46 (1988).

While the FCC's regulatory history includes balancing mechanisms like the Equal Time Provisions for political advertising,[3] these provisions are entirely quantitative, rather than subjective in nature. In fact, the Equal Time Rules specifically prevent a balancing mechanism based on content bias as the FCC and licensees are not permitted to interfere with the content or speech of legally qualified candidates under these provisions.[4] While these advertising focused provisions do not apply to non-candidate political advertising, any decisions about the content of ads, including the decision on whether or not to run those ads, lies with the licensee operating as a public trustee rather than the agency's oversight.

While what the NTIA is asking for is essentially a modern-day Fairness Doctrine and Political Editorial rule for the internet, this idea cannot work outside of a licensed broadcast setting. While the Supreme Court recognized in both *NBC*[5] and *Red Lion*[6] that FCC regulations which increase speech are constitutional under the First Amendment, this conclusion was tied to the physical realities caused by limited availability, and the licensed use of spectrum by broadcasters. This standard cannot be applied to edge providers or internet platforms, which are private entities.

Further, when given the opportunity to apply a similar access and response provision to newspapers just a few years later in *Tornillo*,[7] the Supreme Court entirely rejected the premise

[3] 47 USC § 315.
[4] "[A] licensee shall have no power of censorship over the material broadcast under the provisions of this section." 47 U.S § 315(a).
[5] "…we are asked to regard the Commission as a kind of traffic officer…but the act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." National Broadcasting Co. v. United States, 319 U.S. 190 (1943) at 215-216.
[6] "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), FN28 at 401.
[7] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

that compelled speech created through a mandated access provision was even remotely constitutional. Likewise, as a result of the Supreme Court decision in *Reno v. ACLU*, state regulation of internet content is subject to strict scrutiny review,[8] making the action sought by the NTIA petition the legal equivalent of a compelled speech provision on newspapers, a requirement that has long been universally rejected as a valid legal premise in the United States.

Beyond questions of authority or constitutionality, both of which are high hurdles for the FCC to cross, there is also an important question of practicality. Could the agency meaningfully enforce a hypothetical regulation in a reasonable time frame without enduring substantial process burdens, not the least of which would be the resource costs of adjudication? The agency's own enforcement history illustrates that the logical conclusion to this question is a resounding no.

While the FCC still enforces content-based regulations including Children's Television,[9] Sponsorship Id,[10] and provisions for reporting political advertising,[11] the FCC has largely abandoned the enforcement of regulations for which an adjudication requires a subjective analysis of media content by the agency. In the closest historical example to what the NTIA petitions the FCC to implement, a balancing mechanism that operates like a Fairness Doctrine, the agency itself argued that a rule that mandated access for alternative viewpoints actually reduced the availability of informational programming.[12] Even after the agency curtailed

[8] "The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media-the history of extensive Government regulation of broadcasting,…the scarcity of available frequencies at its inception… and its "invasive" nature…are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet." *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 868.
[9] 34 FCC Rcd 5822 (2019).
[10] 47 C.F.R 73.1212.
[11] 47 USC § 315(e).
[12] "..the doctrine often worked to dissuade broadcasters from presenting any treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes." Syracuse Peace Council v. FCC, 867 F. 2d 654 (1989).

enforcement in 1987, the ever present specter of the FCC's reimplementation of the Fairness Doctrine haunted broadcasters like a boogeyman until Congress finally acted to formally repeal the rule in 2011. Each of these content-based regulations require that a broadcaster affirmatively include elements related to specific programming while the judgements about that programming remain with the licensee, in turn requiring no subjective enforcement decisions by the Commission.

In 2020, the final legacies of the FCC's enforcement regime on indecency is the closest remaining regulation to what the NTIA petition is proposing. Although indecency enforcement actions have been limited since the adoption of the so called Egregious Standard in 2013,[13] indecency enforcement requires the FCC to analyze content and placing the Enforcement Bureau into the position where it must make a series of subjective judgments as part of the adjudication process. Since the airing of George Carlin's infamous list of 7 dirty words, the indecency standard has covered only a relatively narrow range of speech, during a limited time period each day, and again, only on broadcast stations licensed by the FCC.

Acting upon the proposal the NTIA petition requests would force the FCC into a position where the agency would not only have to make judgements about content but it would also have to do so by reviewing potentially charged political content at the same time as making decisions about how to best "balance" the viewpoint of that content before compelling the transmission of viewpoint specific speech through a privately-owned venue. This places the FCC into the role of deciding the value of political viewpoints, a process which quickly becomes state action against protected expression that implicates the First Amendment.

[13] 28 FCC Rcd 4082 (2013).

Setting aside the important legal differences between a time place and manner restriction on offensive depictions or descriptions of sexual or execratory organs or activities and regulations compelling political speech in private venues, even when indecency rules were most stringently enforced, especially in the period of time after the 2004 Super Bowl, the FCC could not adjudicate complaints quickly. The regulatory and enforcement process is lengthy by design, so much so, that in at least one case, the agency did not even make a decision before the statute of limitations expired on the violation.[14] Disputes the FCC would be asked to mediate under the NTIA petition, would force the agency to resolve complaints over bias in online content that would be, at best, done so in a manner that was untimely for a response and of course, subject to a lengthy period of stringent judicial review.

Perhaps most importantly, if one follows the NTIA petition to a logical conclusion, the FCC also would be under the burden of potentially adjudicating what could amount to a near unlimited quantity of individual complaints about biased online content, and to do so in what amounted to real-time. Even if the agency could cross the barriers of the jurisdictional questions we address at length below, while successfully navigating a range of treacherous First Amendment issues, the FCC simply lacks the resources to engage in the amount of adjudication that the NTIA petition would most certainly require for a meaningful enforcement regime.

In short, on First Amendment issues alone, the NTIA petition should be rejected outright. The FCC has none of the necessary mechanisms in place and lacks the resources to engage in the quantity of enforcement the petition would require, even if the agency suddenly finds the desire to engage in the subjective analysis of political content in private venues the agency has only the thinnest of authority over.

[14] 19 FCC Rcd. 10,751 (2004).

II. Section 230 Does Not Give the FCC Authority to Act

The NTIA Petition also overstates the FCC's authority to regulate edge providers under Section 230. The petition correctly notes that Section 201(b) gives the FCC broad rulemaking authority to implement the Communications Act of 1934.[15] That authority "extends to subsequently added portions of the Act"[16] such as Section 230, which was adopted as part of the 1996 Telecommunications Act's amendment of the original statute.[17] But this jurisdiction is unavailing: while the FCC has authority to implement provisions of the Act, in this case there is nothing to implement, as Section 230 unequivocally precludes the FCC from regulating edge providers as NTIA requests.

This conclusion flows inexorably from the plain language of the statute. On its face, Section 230 is a shield that protects interactive computer services from being treated as the publisher or speaker of user content and from liability for removing objectionable content. But NTIA asks this agency to turn that *shield* into a *sword* to combat those very interactive computer services that the statute is designed to protect. This request is inconsistent with Section 230(b)(2), which states that "[i]t is the policy of the United States…to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, ***unfettered by Federal or State regulation.***"[18] Particularly in light of this language, it stretches the statute beyond the breaking point to transform a statute conferring legal rights into regulations mandating legal duties.[19]

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[15] AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 377 (1999).
[16] City of Arlington v. FCC, 569 U.S. 290, 293 (2013).
[17] See Pub. L. 104-104 (1996).
[18] 47 U.S.C. § 230(b)(2) (emphasis added).
[19] Notably, Section 230(d) is titled "**Obligations** of Interactive Computer Service." By comparison, Section 230(c), which is the subject of NTIA's petition, is captioned "**Protection** for 'Good Samaritan' Blocking and Screening of Offensive Material." It flows from this structure that any duties Congress intended to impose on interactive computer services should flow from Section 230(d), not 230(c).

The legislative history also demonstrates that Congress did not intend the FCC to regulate online conduct. Representative Christopher Cox, the bill's author, stated without qualification that the statute "will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[20] Earlier this year, in testimony before the United States Senate, former Representative Cox had the chance to elaborate upon the meaning of the statute amidst the modern criticism that inspired the NTIA petition. He explained that, contrary to NTIA's claims, "Section 230 does not require political neutrality, and was never intended to do so…Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is."[21]

Courts have also rejected the argument that Section 230 gives the FCC authority to regulate interactive computer services. In *Comcast v. FCC*, the D.C. Circuit reviewed this agency's decision to sanction Comcast, an Internet service provider, for throttling BitTorrent content on its network in violation of its 2005 Internet Policy Statement.[22] The FCC claimed authority to act under Section 230(b). But the court found that this provision "delegate[s] no regulatory authority" to the agency, nor does it support an exercise of the Commission's ancillary authority.[23]

While the *Comcast* decision examined Section 230(b) rather than 230(c), its rationale is applicable to the NTIA Petition. To exercise its ancillary authority, the Commission must show that its proposed regulation is reasonably ancillary to "an express delegation of authority to the

[20] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).
[21] Testimony of Former U.S. Rep. Chris Cox, Hearing Before Subcommittee on Communications, Technology, Innovation, and the Internet, United States Senate Committee on Commerce, Science, and Transportation, July 28, 2020, available at https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71.
[22] Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
[23] Id. at 652.

Commission."[24] The NTIA has not, and cannot, identify express delegation of authority to support its proposed regulation of interactive computer services. NTIA's citation to *City of Arlington v. FCC* and *AT&T Corp. v. Iowa Utilities Board* is inapposite, as the statutory provisions at issue in those cases (Section 332(c)(7) and Section 251/252) were reasonably ancillary to the Commission's expressly delegated authority to regulate wireless communication and telecommunications services, respectively.

Finally, NTIA's petition conflicts with this Commission's previous interpretation of Section 230, expressed most recently in the Restoring Internet Freedom Order. In that decision, the Commission repeatedly cited Section 230's commitment to a "digital free market unfettered by Federal or State Regulation."[25] Notably, the Commission explained that "[w]e are not persuaded that section 230 of the Communications Act grants the Commission authority" to regulate, and "even assuming arguendo that section 230 could be viewed as a grant of Commission authority, we are not persuaded it could be invoked to impose regulatory obligations on ISPs."[26] Rather, it explained, "[a]dopting requirements that would impose federal regulation on broadband Internet access service would be in tension with that [Section 230(b)] policy, and we thus are skeptical such requirements could be justified by section 230 even if it were a grant of authority as relevant here."[27] This logic should apply equally to obligations placed on edge providers such as social media platforms, which are further removed from FCC authority than ISPs.

[24] Id. at 653; see also NARUC v. FCC, 533 F.3d 601, 612 (D.C. Cir. 1976) (requiring ancillary authority to be "incidental to, and contingent upon, specifically delegated powers under the Act").
[25] In re Restoring Internet Freedom, 33 FCC Rcd. 311, 434 (2018); see also id. at 348.
[26] Id. at 480-481.
[27] Id. at 481.

In fact, the Restoring Internet Freedom Order rejected Section 706 as a source of regulatory authority precisely *because* the logical implication would be to allow the FCC to regulate edge providers, which it found inconsistent with Section 230. Under Section 706, the Commission is to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[28] If this constituted an independent grant of authority, said the Commission, a "necessary implication" would be that "the Commission could regulate not only ISPs but also edge providers or other participants in the Internet marketplace…so long as the Commission could find at least an indirect nexus to promoting the deployment of advanced telecommunications capability. For example, some commenters argue that 'it is content aggregators (think Netflix, Etsy, Google, Facebook) that probably exert the greatest, or certainly the most direct, influence over access.'" The Commission explained that such a claim—that the Commission could regulate Google or Facebook because these companies exert influence over online activity—is "in tension" with Section 230.[29]

This finding directly contradicts NTIA's claim that Section 230 *supports* such intervention. At a minimum, were the Commission to grant NTIA's petition, it would face significant difficulty harmonizing these two contradictory readings of Section 230 in a way that would survive arbitrary and capricious review.

III. NTIA Fails to Identify or Reasonably Resolve Ambiguities in Section 230

Even if the NTIA petition were to clear these jurisdictional hurdles, its proposed regulations would struggle on judicial review. Under the familiar *Chevron* standard, an agency's statutory interpretation will be upheld only if the statute is ambiguous and if the agency has offered a reasonable resolution of that ambiguity. Many of NTIA's proposed regulations fail to

[28] 47 U.S.C. § 1302(a).
[29] Id. at 474.

identify genuine ambiguities in the statute, and where they do, the proposed interpretation is unreasonable because it is inconsistent with the statutory language.

A. There is No Ambiguity Between Sections (c)1 and (c)2, and NTIA's Proposed Regulations are Problematic

NTIA first argues that there is "[a]mbiguity in the relationship between subparagraphs (c)(1) and (c)(2)." To support this claim, the petition cites several court decisions that have applied Section 230(c)(1) to defeat claims involving removal of content. Because Section 230(c)(2) applies a "good faith" standard to content removal, NTIA argues that this expansive application of subparagraph (c)(1) "risks rendering (c)(2) a nullity."

As an initial matter, the claim that an expansive reading of (c)(1) makes (c)(2) superfluous is simply false. The Ninth Circuit addressed this concern in *Barnes v. Yahoo! Inc.*[30] Consistent with NTIA's complaint, the Ninth Circuit interprets (c)(1) broadly to include decisions to remove "content generated entirely by third parties."[31] But the court explained that this does not render (c)(2) a nullity:

> Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[32]

But assuming NTIA is correct that courts are erroneously reading (c)(1) too broadly, the alleged defect in judicial reasoning is not the result of any ambiguity in the statute itself. Section

[30] 570 F.3d 1096 (9th Cir. 2009).
[31] Id. at 1105.
[32] Id.

230(c)(1) is fairly straightforward about the protection that it grants: it assures that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." NTIA does not explain which part of this statute is ambiguous and in need of clarification. Rather, its complaint is that courts have applied (c)(1) to conduct that is unambiguously outside the scope of the statute. If so, the appropriate remedy is to appeal the erroneous decision, or perhaps secure an additional statute from Congress. But there is no ambiguity in Section 230(c)(1) for the Commission to resolve.

Moreover, NTIA's proposed regulation is unreasonable. The petition asks the Commission to clarify that "Section 230(c)(1) has *no application* to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service. Any applicable immunity for matters described in the immediately preceding sentence shall be provided *solely* by 47 U.S.C. § 230(c)(2)." The problems with this language are two-fold. First, as noted in Section I above, social media platforms retain a First Amendment right of editorial control, which could be implicated when a platform is accused of improperly removing content. Therefore it is erroneous (and potentially unconstitutional) to assert that platform immunity is provided "solely" by Section 230(c)(2).

Second, several Section 230(c)(1) cases involve claims stemming from an interactive computer service's failure to remove offending content. In the *Barnes* case referenced above, for example, a Yahoo! user published nude pictures of his ex-girlfriend online. The victim complained, and Yahoo! agreed to remove the offending pictures, but failed to do so. The victim sued, alleging negligent provision or non-provision of services which Yahoo! undertook to

provide.[33] Similarly, in the landmark case of *Zeran v. America Online, Inc.*, the plaintiff sued for negligent delay after AOL agreed to remove his personal information from the company's bulletin board, but did not do so in a timely fashion.[34] Both cases involve an "interactive computer service's decision [or] agreement…to restrict access to or availability of" third party material—in each case the defendant agreed to remove the content but failed, which gave rise to the complaint. It would be wrong to state that Section 230(c)(1) has "no application" to these cases—they are quintessential cases to which (c)(1) should apply.

B. NTIA's Proposed Objective Definitions of Offensive Material Contradict the Statute's Plain Language

NTIA next complains that the immunity for providers and users of interactive computer services under Section 230(c)(2) is too broad. The statute provides immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." NTIA is concerned that "[i]f 'otherwise objectionable' means any material that any platform 'considers' objectionable, then section 230(b)(2) [sic] offers de facto immunity to all decisions to censor content." To avoid this purported problem, NTIA recommends that the Commission define "otherwise objectionable" narrowly to include only material "similar in type" to the preceding adjectives in the statute—and then, for good measure, suggests objective definitions for each of these other terms as well.

Once again, NTIA's request is inconsistent with the plain language of the statute. By its terms, Section 230(c)(2) establishes an *subjective*, not *objective*, standard for objectionable

[33] Id. at 1099.
[34] Zeran v. America Online, Inc., 129 F.3d 327, 329, 332 (4th Cir. 1997).

content: Congress explicitly exempted any action to restrict access to material that "**the provider or user considers to be**" objectionable. The only statutory limit on the exercise of a provider or user's judgment is that the decision be made in "good faith." While NTIA may be troubled that this gives de facto immunity to all decisions to censor content, it was Congress's unambiguous choice to empower providers and users to make their own judgments about such material. Any attempt to provide objective definitions of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content would be inconsistent with the words "the provider or user considers to be" objectionable, and therefore would be unreasonable.

NTIA's proposed limitation on "otherwise objectionable" is separately problematic. Concerned about the potential breadth of the phrase, NTIA proposes limiting "otherwise objectionable" to content that is "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." Although this is perhaps a closer question, this narrowing also seems inconsistent with the statute's language. Congress deliberately chose not to adopt a closed list of problematic content. Instead, it added "or otherwise objectionable," which is most naturally read as an inclusive, catch-all phrase. Particularly when coupled with the language establishing a subjective standard, the phrase is best read as broadening, rather than narrowing, the scope of material that a provider or user may block. To read "objectionable" as simply "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing" would fail to give meaning to the word "otherwise." Congress's use of "otherwise" as a modifier to "objectionable" suggests the phrase is best understood to mean "objectionable even if it does not fall into the afore-mentioned categories."

C. NTIA's Proposed Definition of "Good Cause" is Unreasonable

Next, NTIA proposes that that the Commission define "good cause" so that courts can better discern when the Section 230(c)(2) defense applies. NTIA is correct that the phrase "good cause" is ambiguous. But its proposed definition is unreasonable.

NTIA would correlate "good faith" with transparency. But the two are distinct phenomena. A requirement that a party act in "good faith" means the party's proffered reason is honest and not pretextual. This is different from transparency, which requires that the actor publish its decision criteria in advance and not deviate from that criteria. A provider can block content in accordance with published criteria and still act in bad faith, if the published criteria are merely a pretext for the provider or user's animus toward the speaker. Conversely, a provider can have a good faith belief that a speaker's content is obscene or otherwise objectionable and on that basis block it, even if the provider had not indicated in advance that it would do so. NTIA's proposal would require that a provider predict what material it would expect its users to post—and the failure to predict user behavior accurately would require the provider to leave objectionable content up or lose the statute's protection, which contradicts congressional intent.

Moreover, NTIA's suggested notice and comment procedure finds no grounding anywhere in the statute. With limited exceptions, this proposal would require platforms to notify a user and give that user a reasonable opportunity to respond before removing objectionable content. Unlike in the Digital Millennium Copyright Act, Congress chose not to adopt a notice and comment regime for Section 230 content, choosing instead to vest discretion in providers and users to choose whether and how to display content. While NTIA fails to define "reasonable," the effect of this suggested provision would be to require a provider to make content available on its platform against its will, at least during the notice and comment period—

a result that violates both the intent of the statute and the provider's First Amendment right of editorial control.

Finally, it is worth noting that in its attempt to clarify the ambiguous phrase "good faith," NTIA has added several more ambiguous phrases that would likely generate additional litigation. Issues such as whether a belief is "objectively reasonable," whether the platform restricts access to material that is "similarly situated" to material that the platform declines to restrict, whether notice is "timely" given to speakers or whether speakers had a "reasonable opportunity" to respond, are all open to interpretation. The net effect of this compound ambiguity is likely to be fewer cases dismissed and more cases going to trial, which strips Section 230 of one of its biggest advantages: avoiding the litigation costs of discovery.

D. NTIA's Proposed Clarification of Section 230(f) is Unnecessary and Overbroad

Finally, NTIA requests that the Commission clarify when an interactive computer service is responsible, in whole or in part, for the creation or development of information (and therefore cannot take advantage of the Section 230(c)(1) defense). As NTIA notes, numerous courts have addressed this issue, and have largely settled on the Ninth Circuit's standard that one loses Section 230(c)(1) protection if that person "materially contributes" to the alleged illegality of the content. There is little disagreement that a platform's own speech is not protected. So, for example, if a platform posts an editorial comment, special response, or warning attached to a user's post, the platform is potentially liable for the content of that comment or warning. NTIA's suggestion that this is somehow an open question is baffling—under any interpretation of Section 230(f)(3), the platform would umambiguously be responsible for the creation or development of that addendum.

NTIA uses this purported ambiguity to alter Section 230(f)(3) in ways that unquestionably impose liability for a publisher's editorial choices. For example, NTIA suggests that "presenting or prioritizing" a user's statement "with a reasonably discernable viewpoint" would make the platform responsible in part for the statement. Given that every platform presents and prioritizes user content, this suggested exception could swallow Section 230(c)(1) entirely. Similarly, NTIA's proposal seems to suggest that a platform is responsible for any user content that it comments upon or editorializes about. Thus, while everyone agrees that a platform that comments on a user's post is liable for the content of the comment, NTIA suggests that commenting would also make the platform a partial creator of the underlying post and therefore lose Section 230(c)(1) protection. NTIA's proposed definition of when an interactive computer services is "treated as a publisher or speaker" of third-party content is equally problematic. It includes when a platform "vouches for," "recommends," or "promotes" content, terms which are so ambiguous and potentially broad as to swallow the immunity completely.

The statutory touchstone for distinguishing first-party from third-party content is creation: an information content provider is responsible for a statement if it is "responsible, in whole or in part, for the *creation* or *development* of information." Acts such as commenting on, presenting, prioritizing, editorializing about, vouching for, recommending, or promoting particular content have nothing to do with *creation* of the content. Instead, these activities all relate to publicizing content once it has been created—or in other words, *publishing* content. The cornerstone of Section 230(c)(1) is that a platform shall not be held liable as publisher of someone else's content. It would turn the statute on its head to limit that defense by redefining publishing activity in a way that makes the publisher a content creator.

IV. Conclusion

NTIA spends several pages explaining how the Internet ecosystem today differs from the environment in which Section 230 was drafted. While this is unquestionably true, one cannot understate the crucial role that Section 230 has played in helping the evolution of that ecosystem. It may be that, as NTIA suggests, technological advancements have made portions of the statute less effective or obsolete. But if that's the case, the proper remedy lies with Congress, not the FCC. NTIA's proposal invites the FCC to freelance beyond the outer boundary of its statutory authority, in ways that would contradict the plain language of the statute and raise serious constitutional concerns. The Commission would be wise to decline this invitation.

Respectfully submitted,

___/s/_____

10 September 2020

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Before the
Federal Communications Commission
Washington, D.C.

In the matter of	
Section 230 of the Communications Act of 1934	RM-11862

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the Federal Communications Commission (FCC)'s August 3, 2020 Public Notice,[1] the Computer & Communications Industry Association (CCIA)[2] submits the following comments. By requesting that the FCC regulate based on Section 230, NTIA has acted beyond the scope of its legal authority. Granting this request would similarly exceed the authority delegated to the FCC. The FCC has no role in regulating speech on the Internet, and NTIA's proposed narrowing of the phrase "otherwise objectionable" would lead to the proliferation of objectionable content online.

I. Federal Agencies Must Act Within the Bounds of Their Statutory Grant of Authority

On May 28, 2020, the Administration issued an Executive Order on "Preventing Online Censorship,"[3] which directed NTIA to file a petition for rulemaking with the FCC requesting that the FCC expeditiously propose regulations to clarify elements of 47 U.S.C. § 230. As an independent government agency,[4] the FCC is not required to adhere to the directives of the

[1] Public Notice, Consumer & Governmental Affairs Bureau – Petition for Rulemakings Filed, Report No. 3157 (Aug. 3, 2020), *available at* https://docs fcc.gov/public/attachments/DOC-365914A1.pdf.

[2] The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 45 years, to promoting innovation and preserving full, fair and open competition throughout our industry. Our members employ more than 1.6 million workers and generate annual revenues in excess of $870 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[3] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[4] Dissenting Statement of Commissioner Robert M. McDowell, Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 20, 2008) ("We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers."), *available at* https://docs fcc.gov/public/attachments/FCC-08-183A6.pdf; *see also* Harold H. Bruff, *Bringing the Independent*

Executive branch. By issuing this Executive Order, the President has taken the extraordinary step of directing NTIA to urge the FCC, an independent government agency, to engage in speech regulation that the President himself is unable to do.

As explained below, NTIA is impermissibly acting beyond the scope of its authority because an agency cannot exercise its discretion where the statute is clear and unambiguous, and the statute and legislative history are clear that the FCC does not have the authority to promulgate regulations under Section 230.

A. NTIA Is Acting Beyond Its Authority

NTIA's action exceeds what it is legally authorized to do. NTIA has jurisdiction over telecommunications[5] and advises on domestic and international telecommunications and information policy. NTIA is charged with developing and advocating policies concerning the regulation of the telecommunications industry, including policies "[f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets."[6] Nowhere does the statute grant NTIA jurisdiction over Internet speech. When Congress has envisioned a regulatory role for NTIA beyond its established telecommunications function, it has done so explicitly.[7] Therefore, NTIA's development of a proposed national regulatory policy for Internet speech is outside the scope of NTIA's Congressionally-assigned responsibilities. Accordingly, the very impetus for this proceeding is an organ of the Administration acting beyond the scope of its authority.

B. An Agency Cannot Exercise Its Discretion Where the Statute Is Clear and Unambiguous

Even worse, NTIA's *ultra vires* action involves a request that another agency exceed its authority. NTIA's petition either misunderstands or impermissibly seeks to interpret Section 230 because it requests the FCC to provide clarification on the unambiguous language in 47 U.S.C. § 230(c)(1) and § 230(c)(2). Specifically, NTIA's petition asks for clarification on the terms "otherwise objectionable" and "good faith." The term "otherwise objectionable" is not unclear because of the applicable and well-known canon of statutory interpretation, *ejusdem generis*, that

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Agencies in from the Cold, 62 Vand. L. Rev. En Banc 62 (Nov. 2009), *available at* https://www.supremecourt.gov/opinions/URLs_Cited/OT2009/08-861/Bruff_62_Vanderbilt_Law_Rev_63.pdf (noting the independent agencies' independence from Executive interference).

[5] 47 U.S.C. § 902(b).

[6] 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I).

[7] *See, e.g.*, 17 U.S.C. § 1201(a)(1)(C) (providing a rulemaking function which articulates a role for "the Assistant Secretary for Communications and Information of the Department of Commerce", which is established as the head of NTIA under 47 U.S.C. § 902(a)(2)).

the general follows the specific. Propounding regulations regarding the scope of "good faith" would confine courts to an inflexible rule that would lend itself to the kind of inflexibility that was not intended by the original drafters of the statute.[8] Courts have consistently held that Section 230 is clear and unambiguous, with the Ninth Circuit noting that "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition" and there is a "consensus developing across other courts of appeals that § 230(c) provides broad immunity. . . ."[9]

Under *Chevron*, when a statute is clear and unambiguous an agency cannot exercise discretion but must follow the clear and unambiguous language of the statute.[10] The Administration cannot simply, because it may be convenient, declare a statute to be unclear and seek a construction that is contrary to the prevailing law and explicit Congressional intent.

C. The FCC Does Not Have the Authority to Issue Regulations Under Section 230

Neither the statute nor the applicable case law confer upon the FCC any authority to promulgate regulations under 47 U.S.C. § 230. The FCC has an umbrella of jurisdiction defined by Title 47, Chapter 5. That jurisdiction has been interpreted further by seminal telecommunications cases to establish the contours of the FCC's authority.[11]

Title 47 is unambiguous about the scope of this authority and jurisdiction. The FCC was created "[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*"[12] and "[t]he provisions of this chapter shall apply to all interstate and foreign

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[8] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. . . . We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents.").

[9] *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (citing *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 328-29 (4th Cir. 1997)); *see also Fair Housing Coun. of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) ("The *plain language* and structure of the CDA *unambiguously* demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes *congressional intent* and violates the spirit and serendipity of the Internet.") (*emphasis added*).

[10] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[11] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

[12] 47 U.S.C. § 151 *(emphasis added)*.

communication by wire or radio".[13] The statute does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC's jurisdiction. What NTIA proposes is not included in the scope of the FCC's enabling statute, which only gives the FCC the following duties and powers: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary *in the execution of its functions*."[14] Additionally, Section 230(b)(2) explicitly provides that the Internet should be "unfettered by Federal or State regulation."[15] Even the legislative history of 47 U.S.C. § 230, including floor statements from the sponsors, demonstrates that Congress explicitly intended that the FCC should not be able to narrow these protections, and supports "prohibiting the FCC from imposing content or any regulation of the Internet."[16] Indeed, the FCC's powers have regularly been interpreted narrowly by courts.[17]

The FCC's 2018 Restoring Internet Freedom Order (the Order),[18] reaffirms that the FCC is without authority to regulate the Internet as NTIA proposes. In the Order, the FCC said it has no authority to regulate "interactive computer services."[19] Although the FCC considered Section 230 in the context of net neutrality rules, its analysis concluded that Section 230 renders further regulation unwarranted.[20] If the FCC had sufficiently broad jurisdiction over Internet speech under Section 230 to issue NTIA's requested interpretation, litigation over net neutrality, including the *Mozilla* case, would have been entirely unnecessary. As *Mozilla* found, agency

[13] 47 U.S.C. § 152 *(emphasis added)*.
[14] 47 U.S.C. § 154(i) *(emphases added)*.
[15] 47 U.S.C. § 230(b)(2).
[16] H.R. Rep. No. 104-223, at 3 (1996) (Conf. Rep.) (describing the Cox-Wyden amendment as "protecting from liability those providers and users seeking to clean up the Internet and prohibiting the FCC from imposing content or any regulation of the Internet"); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (rebuking attempts to "take the Federal Communications Commission and turn it into the Federal Computer Commission", because "we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet").
[17] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[18] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.
[19] *Id*. at 164-66.
[20] *Id*. at 167 and 284.

"discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating."[21]

The D.C. Circuit explained in *MPAA v. FCC* that the FCC can only promulgate regulations if the statute grants it authority to do so.[22] There is no statutory grant of authority as Section 230 does not explicitly mention the FCC, the legislative intent of Section 230 does not envision a role for FCC, and the statute is unambiguous. As discussed above, the FCC lacks authority to regulate, and even if it had authority, the statute is unambiguous and its interpretation would not receive any deference under *Chevron*.

II. The FCC Lacks Authority to Regulate The Content of Online Speech

Even if the FCC were to conclude that Congress did not mean what it explicitly said in Section 230(b)(2), regarding preserving an Internet "unfettered by Federal or State regulation",[23] NTIA's petition asks the FCC to engage in speech regulation far outside of its narrow authority with respect to content. Moreover, NTIA's request cannot be assessed in isolation from the Administration's public statements. It followed on the President's claim, voiced on social media, that "Social Media Platforms totally silence conservatives voices."[24] The President threatened that "[w]e will strongly regulate, or close them down, before we can ever allow this to happen."[25] NTIA's petition must therefore be analyzed in the context of the President's threat to shutter American enterprises which he believed to disagree with him.

Within that context, NTIA's claim that the FCC has expansive jurisdiction — jurisdiction Commission leadership has disclaimed — lacks credibility. When dissenting from the 2015 Open Internet Order, which sought to impose limited non-discrimination obligations on telecommunications infrastructure providers with little or no competition, FCC Chairman Pai characterized the rule as "impos[ing] intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have".[26] It is inconsistent to contend that the FCC has no legal authority to impose limited non-discrimination obligations on infrastructure providers operating under the supervision of public service and utilities

[21] *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, J., concurring).
[22] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[23] 47 U.S.C. § 230(b)(2).
[24] Elizabeth Dwoskin, *Trump lashes out at social media companies after Twitter labels tweets with fact checks*, Wash. Post (May 27, 2020), https://www.washingtonpost.com/technology/2020/05/27/trump-twitter-label/ (orthography in original).
[25] *Id*.
[26] Dissenting Statement of Commissioner Ajit Pai, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, *available at* https://www fcc.gov/document/fcc-releases-open-internet-order/pai-statement, at 1.

commissions, while also arguing that the FCC possesses authority to enact retaliatory content policy for digital services whose competitors are a few clicks away.

The FCC has an exceptionally limited role in the regulation of speech, and the narrow role it does possess is constrained by its mission to supervise the use of scarce public goods. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, whatever limited speech regulation powers the FCC possesses are rooted in "the scarcity of radio frequencies."[27] No such scarcity exists online.

Rather than engaging with the precedents that narrowly construe the FCC's role in content policy, NTIA's petition relies upon a criminal appeal, *Packingham v. North Carolina*, in asserting that "[t]hese platforms function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[28] But the Supreme Court did not recognize this. The language NTIA quotes from *Packingham* presents the uncontroversial proposition that digital services collectively play an important role in modern society. If there were any doubt whether the *dicta* in *Packingham*, a case which struck down impermissible government overreach, could sustain the overreach here, that doubt was dispelled by *Manhattan Community Access Corp. v. Halleck*.[29] In *Halleck*, the Court held that "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[30]

III. NTIA's Proposal Would Promote Objectionable Content Online

As discussed, neither NTIA nor the FCC have the authority to regulate Internet speech. Assuming arguendo, the FCC did have the authority, NTIA's proposed regulations "interpreting" Section 230 are unwise. They would have the effect of promoting various types of highly objectionable content not included in NTIA's proposed rules by discouraging companies from removing lawful but objectionable content.[31]

Section 230(c)(2)(A) incentivizes digital services to "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively

[27] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[28] Petition for Rulemaking of the Nat'l Telecomms. & Info. Admin. (July 27, 2020), *available at* https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "NTIA Petition"), at 7, note 21 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017)).

[29] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

[30] *Id.* at 1930.

[31] Matt Schruers, *What Is Section 230's "Otherwise Objectionable" Provision?*, Disruptive Competition Project (July 29, 2020), https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/.

violent, harassing, or otherwise objectionable." NTIA, however, would have the term "otherwise objectionable" interpreted to mean "any material that is *similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials"[32] — terms that NTIA's proposed rules also define narrowly — and confine harassment to "any specific person."

Presently, a digital service cannot be subject to litigation when, for example, it determines that the accounts of self-proclaimed Nazis engaged in hate speech are "otherwise objectionable" and subject to termination, consistent with its Terms of Service. Digital services similarly remove content promoting racism and intolerance; advocating animal cruelty or encouraging self-harm, such as suicide or eating disorders; public health-related misinformation; and disinformation operations by foreign agents, among other forms of reprehensible content. Fitting these crucial operations into NTIA's cramped interpretation of "otherwise objectionable" presents a significant challenge.

Under NTIA's proposed rules, digital services therefore would be discouraged from acting against a considerable amount of potentially harmful and unquestionably appalling content online, lest moderating it lead to litigation. Avoiding this scenario was one of the chief rationales for enacting Section 230.[33]

The term "otherwise objectionable" foresaw problematic content that may not be illegal but nevertheless would violate some online communities' standards and norms. Congress's decision to use the more flexible term here acknowledged that it could not anticipate and legislate every form of problematic online content and behavior. There are various forms of "otherwise objectionable" content that Congress did not explicitly anticipate in 1996, but which may violate the norms of at least some online communities. It is unlikely that Congress could have anticipated in 1996 that a future Internet user might encourage dangerous activity like consuming laundry detergent pods, or advise that a pandemic could be fought by drinking bleach. Section 230(c)(2)(A)'s "otherwise objectionable" acknowledges this. Congress wanted to encourage services to respond to this kind of problematic — though not necessarily unlawful — content, and prevent it from proliferating online.

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[32] NTIA Petition, *supra* note 28, at 54 (emphasis supplied).

[33] H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how under recent New York precedent, "the existing legal system provides a massive disincentive" and the Cox-Wyden amendment "will protect them from taking on liability such as occurred in the Prodigy case in New York").

NTIA's proposed rules "clarifying" the phrase "otherwise objectionable" would also open the door to anti-American lies by militant extremists, religious and ethnic intolerance, racism and hate speech. Such speech unquestionably falls within Congress's intended scope of "harassing" and "otherwise objectionable" and thus might reasonably be prohibited by digital services under their Terms of Service. NTIA's petition, however, proposes confining harassment to content directed at *specific* individuals. This tacitly condones racism, misogyny, religious intolerance, and hate speech which is general in nature, and even that which is specific in nature provided the hateful speech purports to have "literary value."

IV. Conclusion

For the foregoing reasons, the FCC should decline NTIA's invitation to issue regulations on Section 230.

Respectfully submitted,

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September 2, 2020

Before the
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Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	))))))	RM No. 11862

COMMENT OF
AMERICANS FOR PROSPERITY FOUNDATION
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SEPTEMBER 1, 2020

Introduction and Executive Summary

The Internet, and the untold commerce and free expression it enables, would not exist as we know it today without Section 230.[1] The National Telecommunications and Information Administration's ("NTIA") petition for rulemaking,[2] if adopted, threatens to end all of that. The free market has allowed internet-based companies to rise and fall over the years, innovating and providing new technologies to consumers. Some, like Facebook or Amazon, have grown from seemingly implausible ideas to successful businesses. Others, like MySpace or LiveJournal, seemed dominant at the time only to be replaced by newer, better options. And some, like Twitter, are only now entering their teen years.

These websites have offered people unprecedented access to each other, information, leaders, commerce, and expression. If someone wants to instantly share his opinion on breaking news with 500 of his friends on Facebook, he can. If he wants to reply to the President's tweet and let him—and the world—know what he thinks about it, he can do that too. On top of all that, online technology platforms have enabled small businesses and entrepreneurs to innovate and flourish. It is modern innovation that allows us to make a product in our home and then instantly market and sell it to someone across the globe. So many businesses, large and small, would

[1] *See* Adam Thierer, *Celebrating 20 Years of Internet Free Speech & Free Exchange*, Plain Text (June 21, 2017), *available at* https://bit.ly/32kHyIC ("Section 230 was hugely important in that it let online speech and commerce flourish without the constant threat of frivolous lawsuits looming overhead.").

[2] Nat'l Telecomm. & Info. Admin., Pet. for Rulemaking of the NTIA (July 27, 2020) [hereinafter "Pet."].

not exist without this sort of technology. And many of these opportunities only exist because of Section 230.

NTIA's petition imperils this freedom. It asks the Federal Communications Commission ("Commission" or "FCC") to promulgate new regulations, despite Section 230 being an unambiguous edict from Congress that ultimately limits courts and litigants. Importantly, Section 230 contains *no* affirmative commands to the FCC. NTIA supports this its petition by misreading the statute and misstating case law—wrongly arguing that courts have expanded Section 230 protections beyond Congress's intent and allowed some Section 230 provisions to swallow others. Through a careful reading of the jurisprudence, this comment shows NTIA is wrong.

Further, the remedy NTIA asks for would not only be *ultra vires*, but also would violate the First Amendment by compelling individuals to engage in or host speech they otherwise find objectionable. What's more, NTIA does not even have the statutory authority to petition the FCC for a rulemaking, as it is an agency and cannot be an "interested party." Its request that the FCC classify edge providers as "information services" is out of bounds of its primary petition. Finally, the rulemaking NTIA asks for is bad policy. It could drive small businesses and entrepreneurs out of business, chill online speech, and create impossible barriers to entry for new competitors.

The Commission should deny NTIA's petition in full.

Argument

I. The FCC has no authority under the Communications Act to regulate under Section 230.

Section 230 does not delegate any rulemaking authority to the FCC, whether implicitly or explicitly. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."[3] And when agencies act "improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."[4]

A. Section 230 is unambiguous.

When Congress enacted Section 230, it spoke clearly and directly. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[5] Once Congress enacts a statute, the *only* role left for an agency is to "fill any gap left, implicitly or explicitly, by Congress."[6]

Before diving into the case law, "we begin with the text."[7] "Of all the tools of statutory interpretation, '[t]he most traditional tool, of course, is to read the text.'"[8] As the Supreme Court has repeatedly held, "[t]he preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it

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[3] *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).
[4] *City of Arlington v. Fed Commc'ns Comm'n*, 569 U.S. 290, 297 (2013).
[5] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Although many have called the wisdom of *Chevron* into question, it is still the law of the land. And when it precludes deference to an agency, as it does here, the FCC must respect it.
[6] *Id.*
[7] *City of Clarksville v. Fed. Energy Regulatory Comm'n*, 888 F.3d 477, 482 (D.C. Cir. 2018).
[8] *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020) (citing *Engine Mfrs. Ass'n v. Envtl. Prot. Agency*, 88 F.3d 1075, 1088 (D.C. Cir. 1996)).

means and means in a statute what it says there."[9] "Only the written word is the law, and all persons are entitled to its benefit."[10]

The relevant text here is 47 U.S.C. § 230(c), which reads:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[11]

NTIA makes a fundamental error when it writes that "[n]either section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has power to issue regulations under section 230."[12] But silence

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[9] *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)).
[10] *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1737 (2020).
[11] "So in original. Probably should be 'subparagraph (A)." 47 U.S.C.A. § 230 (West), n.1.
[12] Pet. at 17.

does not convey authority. This is not how administrative law works, as decades of case law illuminates. Courts should never "presume a delegation of power absent an express withholding of such power" as this logic means agencies "would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[13] For an agency to claim authority whenever "a statute does not expressly *negate* the existence of a claimed administrative power is both flatly unfaithful to the principle of administrative law and refuted by precedent."[14] Even assuming there were any uncertain terms in the statute, "[m]ere ambiguity in a statute . . . is not evidence of congressional delegation of authority."[15]

B. Legislative intent is clear.

Former Representative Chris Cox, one of authors and co-sponsors of the Section 230 legislation, has written at length on its history and background.[16] As a threshold matter, "Section 230 was not part of the [Communications Decency Act ("CDA")] . . . it was a freestanding bill" that was ultimately wrapped into the CDA during conference negotiations.[17] Representative Cox, along with his co-author,

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[13] *Ethyl Corp. v. Envt'l Prot. Agency*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see N.Y. Stock Exch. LLC v. Sec. & Exch. Comm'n*, 962 F.3d 541 (D.C. Cir. 2020) (same quote, 15 years later).
[14] *N.Y. Stock Exch. LLC*, 962 F.3d at 553 (citation omitted).
[15] *Id.*
[16] *See The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World*, 116th Cong. (2020) [hereinafter "Cox Testimony"] (testimony of Former U.S. Rep. Chris Cox), *available at* https://bit.ly/2YuyrE4. The Commission should incorporate the whole of Representative's Cox testimony and detailed history of Section 230 as part of any decision.
[17] *Id.* at 5.

Senator Ron Wyden, wrote Section 230 to "ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others."[18]

When speaking about the bill on the floor, Representative Cox plainly rejected the idea of having a "Federal Computer Commission" made up of "bureaucrats and regulators who will attempt . . . to punish people by catching them in the act of putting something into cyberspace."[19] The whole point of the bill "was to recognize the sheer implausibility of requiring each website to monitor all of the user-created content that crossed its portal each day."[20] But this is exactly what NTIA's petition would have social media companies and the Commission do, contrary to legislative intent.

C. NTIA is asking the FCC to engage in a legislative function that the Constitution reserves only to Congress.

NTIA's grievances about Section 230 hurting free speech and limiting public participation are ill-founded.[21] But assume, for the sake of argument, that NTIA were correct. Could this Commission still act? No—because what NTIA really seeks here is a legislative amendment to Section 230. For example, following a paragraph detailing what "Congress intended" with Section 230, NTIA argues that "[t]imes have changed, and the liability rules appropriate in 1996 may no longer further Congress's

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[18] *Id.* at 8.

[19] 141 Cong. Rec. H8469–71 (Aug. 4, 1995) (statement of Rep. Cox). The FCC relied on this statement in its Restoring Internet Freedom Order. Fed. Commc'ns Comm'n, FCC 17-166, Restoring Internet Freedom at 40 n.235 [hereinafter "RIFO"].

[20] Cox Testimony at 13.

[21] *See, e.g.*, Robby Soave, *Big Tech Is Not a Big Threat to Conservative Speech. The RNC Just Proved It.*, Reason (Aug. 25, 2020), *available at* https://bit.ly/2Yy5nvy ("If social media were to be regulated out of existence—and make no mistake, proposals to abolish Section 230 could accomplish precisely this—then the Republican Party would return itself to the world where traditional media gatekeepers have significantly more power to restrict access to conservative speech.").

purpose that section 230 further a 'true diversity of political discourse.'"[22] NTIA then (erroneously) argues that things are different now, "unlike the time of *Stratton Oakmont*[.]"[23] Later, it states that "free speech faces new threats."[24] It also argues that "liability protections appropriate to internet firms in 1996 are different because modern firms have much greater economic power" and "play a bigger, if not dominant, role in American political and social discourse[.]"[25] Even if NTIA's observations had merit,[26] they would be beside the point because NTIA's complaints, as it repeatedly concedes through its comment, relate to *what Congress passed*.

Thus, NTIA wants the FCC to amend an unambiguous statute that NTIA believes is outdated. But agencies cannot amend statutes, no matter how old they may be. That is the role of Congress. Legislative power resides there—and nowhere else.[27] As James Madison wrote, "[w]ere the federal Constitution . . . really chargeable with the accumulation of power, or with a mixture of powers . . . no further arguments would be necessary to inspire a universal reprobation of the system."[28] For "[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty[.]"[29]

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[22] Pet. at 4.
[23] *Id.*
[24] *Id.* at 6
[25] *Id.* at 9.
[26] In responding to this argument that Section 230 is no longer needed, Representative Cox recently wrote, "[a]s co-author of [Section 230], I can verify that this is an entirely fictious narrative." Cox Testimony at 13.
[27] *See, e.g.*, U.S. Const. art. I ("All legislative Powers herein granted shall be vested in a Congress of the United States".)
[28] Federalist No. 47 (James Madison).
[29] *Id.* (quoting Montesquieu).

As discussed below, the impact of granting NTIA's petition would be widespread and have drastic economic consequence. To borrow NTIA's own language, "[n]either section 230's text, nor any speck of legislative history" shifts this rulemaking responsibility to the FCC.[30] After all, Congress would not "delegate a decision of such economic and political significance to an agency in so cryptic [or silent, in this case] a fashion."[31] And when regulating speech, Congress does not grant "broad and unusual authority through an implicit delegation[.]"[32] It does not "hide elephants in mouseholes."[33] If Congress wanted to grant the FCC rulemaking authority under Section 230, it knows how to do so and would have done so. But it did not. Instead, it adopted unambiguous language that contains *no affirmative commands* to the FCC.[34] The FCC cannot invoke "its ancillary jurisdiction"—in this case, Section 201(b) rulemaking authority—"to override Congress's clearly expressed will."[35] To grant NTIA's petition would be to engage in unlawful, *ultra vires* action. For this reason, the petition should be denied.

D. Section 230 provides no affirmative command to the FCC.

Section 230 does not actually tell the FCC to *do* anything. It grants no new powers. It does not ask, explicitly or implicitly, for the Commission's guidance. Instead, it limits litigation. And it expands on First Amendment protections for both

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[30] Pet. at 17.
[31] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).
[32] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).
[33] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[34] *See infra* at § I(D).
[35] *EchoStar Sat. LLC v. Fed Commc'ns Comm'n*, 704 F.3d 992, 1000 (D.C. Cir. 2013).

providers and users of internet services. Congress's whole point, as petitioners openly concede, was to overrule *Stratton Oakmont*.[36] Thus, Section 230 speaks to the courts and private litigants, not the FCC. If a statute "does not compel [an agency's] interpretation, it would be patently unreasonable—not to say outrageous—for [an agency] to insist on seizing expansive power that it admits the statute is not designed to grant."[37] In fact, Section 230 explicitly counsels *against* regulation, finding that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*[.]"[38]

E. NTIA and, by extension, the FCC cannot artificially inject ambiguity into the statute.

Throughout its Petition, NTIA tries to inject—and thus asks the FCC to inject—ambiguity into the statute in an attempt to conjure up some sort of rulemaking authority where none exists. NTIA consistently misreads case law to create jurisprudential confusion that simply is not there. The FCC should not follow suit. "[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'"[39]

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[36] Pet. at 18 n.51 (citing Sen. Rep. No. 104-230, 2d Sess. at 194 (1996) ("One of the specific purposes of [section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions.") & H.R. Conf. Rep. No. 104-458 at 208 (disparaging *Stratton Oakmont*)).

[37] *Utility Air Reg. Grp. v. Envt'l Prot. Agency*, 573 U.S. 302, 324 (2014).

[38] 47 U.S.C. § 230(b)(2) (emphasis added).

[39] *Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (cleaned up) (quoting *PDK Labs., Inc. v. Drug Enf't Agency*, 362 F.3d 786, 798 (D.C. Cir. 2004)).

And subsection (c)(1) is abundantly clear: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[40] There is no ambiguity to be found here or elsewhere in the statute.[41] The law explicitly defines "interactive computer service" and "information content provider."[42] And the words "publish," "publication," and "speaker" are well-known and have accepted legal definitions that are particularly relevant to defamation and slander. To wit:

> Publish, vb. (14c) 1. To distribute copies (of a work) to the public. 2. To communicate (defamatory words) to someone other than the person defamed.[43]
>
> Publication, v. (14c) 1. Generally, the act of declaring or announcing to the public. 2. *Copyright*. The offering or distribution of copies of a work to the public.[44]
>
> Speaker. 1. One who speaks or makes a speech <the slander claim was viable only against the speaker>[45]

When evaluating Section 230 claims, courts have had no difficulty defining the word "publisher," adopting to the word's ordinary meaning.[46] Courts also have properly

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[40] 47 U.S.C. § 230(c)(1).
[41] And even if the terms are broad, as NTIA implies, that does not render them necessarily ambiguous, especially if they have a plainly accepted meaning.
[42] 47 U.S.C. § 230(f)(2).
[43] Black's Law Dictionary (9th ed. 2009) (alternative definitions and explanation omitted).
[44] *Id.* (same)
[45] *Id.* (same)
[46] *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) ("This Circuit and others have generally looked to [publisher's] ordinary meaning: 'one that makes public'; 'the reproducer of a work intended for public consumption,' and 'one whose business is publication.'") (cleaned up and internal citations omitted).

construed the protection from "publisher" liability to mean both decisions to affirmatively publish and decisions to "withdraw, postpone, or alter content."[47]

Subsection (c)(2) is similarly clear. "Good faith" is a commonly understood and applied term in common law. It is "honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."[48] In the D.C. Circuit, courts have construed the meaning of "good faith" given the relevant context.[49] And the term appears frequently throughout FCC statutes and rules.[50] No other rulemaking is necessary to define a term already well-understood by the Commission and the courts.

The rest of subsection (c)(2) is detailed, complete, and unambiguous. For the uncommon situation when a court must address a claim of (c)(2)(A) immunity, the statute establishes a safe harbor for certain content moderation decisions.[51] And a litany of cases, cited by NTIA itself, affirm Congress's intent that the safe harbor operate as it has.[52] NTIA cites only two cases for the proposition that "some district courts have . . . construed" (c)(2) immunity overbroadly.[53] The first, *Langdon v. Google, Inc.*, is a district court case filed by a *pro se* plaintiff in 2007, alleging that

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[47] *See, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).
[48] *Good faith*, Black's Law Dictionary (9th ed. 2009).
[49] *See, e.g.*, *Barnes v. Whelan*, 689 F.2d 193, 199 (D.C. Cir. 1982); *Window Specialists, Inc. v. Forney Enters., Inc.*, 106 F. Supp. 3d 64, 89 (D.D.C. 2015).
[50] *See, e.g.*, 47 U.S.C. §§ 230, 251, 252, 325; 47 C.F.R. §§ 76.65, 76.7.
[51] *See infra* at § 2(G).
[52] *See* Pet. at 32 n.98.
[53] Pet. at 31.

Google had injured him by refusing to run ads on two websites.[54] One website purported to expose "fraud perpetrated by North Carolina government officials" and the other delineated "atrocities committed by the Chinese government."[55] The *Langdon* court ruled against the *pro se* plaintiff and held that he failed to address the otherwise-fatal provision of (c)(2), omitting it from his argument.[56]

The second—which is currently on appeal—does not support NTIA's argument that courts are reading subsection (c)(2) overbroadly.[57] Instead, the court there easily understood the provision in (c)(2) that asks what "the provider or user considers to be" objectionable.[58] "That section 'does not require that the material actually be objectionable, rather it affords protection for blocking material 'that the provider or user considers to be' objectionable."[59] Thus what matters is "Vimeo's *subjective* intent[,]" which the Court found by looking at Vimeo's guidelines which explicitly "define hateful, harassing, defamatory, and discriminatory content[.]"[60] The Court also found Vimeo explicitly warned the plaintiffs against videos that promoted certain content.[61] This case is a prime example of a *successful* application of (c)(2)'s safe harbor provision. NTIA is thus left with a single *pro se* case summarily decided in

[54] 474 F. Supp. 2d 622 (D. Del. 2007).
[55] *Id.* at 626.
[56] *Id.* at 631. Thus, there was no substantive discussion of what "otherwise objectionable" covers.
[57] *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592 (S.D.N.Y. 2020).
[58] *Id.* at 603.
[59] *Id.* at 603–04.
[60] *Id.* at 604 (emphasis added).
[61] *Id.*

2007 to support its demand that this Commission enact broad rulemaking. NTIA's argument cannot be propped up on so thin a reed.

F. If the FCC were to adopt NTIA's rubric, it would lead to bad outcomes.

NTIA's request that the FCC define each word in subsection (c)(2) according to an objective standard is both unnecessary and unlawful. For example, NTIA wants "excessively violent" to be limited to the "[FCC's] V-chip regulatory regime and TV parental guidance" or content that promotes terrorism.[62] It asks the FCC to limit "harassing" to malicious computer code, content covered under the CAN-SPAM Act, and material "sent by an information content provider that has the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value[.]"[63]

With those definitions in mind, consider two hypothetical situations. Suppose a ministry created a social media site called ChristianTimesTube that targeted a Christian audience.[64] The site explodes in popularity, with millions of Christians—adults and children—from all around the world watching content on it. The site considers it "harassing" or "otherwise objectionable" if users post content that blasphemes God or mocks religious belief, so it removes this content. An atheist user,

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[62] Pet. at 37–38.

[63] Pet. at 38.

[64] The idea of a "Christian monitored version" of a site like TikTok is not far-fetched. *See* ye (@KanyeWest), Twitter (Aug. 17, 2020, 4:36 PM), https://bit.ly/34RcT8I (last accessed Aug. 18, 2020). Mr. West's idea was endorsed by Senator Josh Hawley. Josh Hawley (@HawleyMO), Twitter (Aug. 17, 2020, 5:16 PM), https://bit.ly/34VaolW ("Best idea I've heard in weeks[.]") (last accessed Aug. 18, 2020). Other faith-based sites that allow user or third-party generated content currently exist. *See, e.g.*, https://www.patheos.com/, https://www.godtube.com/.

however, accesses the site. He uses its functionality to share videos from atheist commentators. The videos directly attack the Christian faith and encourage people, including children, to apostatize. He does not direct them at any specific individual, and the videos include several atheist academics. ChristianTimesTube deletes the videos and bans the user. They offer him no explanation—it should be clear—or procedure to appeal his ban. He sues. Should the Christian site be forced to live under what a court deems is "objectively harassing" or should it instead moderate its own content as it sees fit and tailored to its users? Should it be forced to expend scarce dollars to litigate through discovery? After all, the site deleted his content in "bad faith"—as NTIA would define it—because they disagree with his view on the world and did not offer "adequate notice, reasoned explanation, or a meaningful opportunity to be heard."[65] And the atheist user supported it with "serious literary" or "scientific" material by referring to academic sources. According to NTIA, ChristianTimesTube could be liable. No business can survive under this standard, much less entrepreneurs or communities with scant resources or few employees.

Suppose again that a social media network is created for survivors of gun violence, called WeHealTogetherTube. The site bans and routinely deletes videos that show any firearms. This is because both users and operators of WeHealTogetherTube, who have been victims of gun crime, subjectively view such videos as "excessively violent." A gun-rights activist, however, finds that there is nothing "excessively violent" or "otherwise objectionable" about target shooting. He

[65] Pet. at 39.

joins WeHealTogetherTube and begins to post videos of target shooting to share with his friends—and perhaps to acclimatize the site's users to the non-violent use of guns. Some of the videos are his own, and others are from a local broadcast news segment on a new gun range. WeHealTogetherTube deletes the videos and bans the user; he sues. Should the gun-survivor network be forced to live under what a court deems is "excessively violent" or should it moderate its own content as it sees fit? After all, the posted videos would not fit under any of NITA's proposed definitions,[66] and some videos were even aired on the local news. According to NTIA, WeHealTogetherTube—a small, tight-knit community of people trying to support each other—is possibly liable and must litigate an expensive case.

The second hypothetical is particularly apt because one of NTIA's grievances is that an "interactive computer service [*i.e.*, Facebook] made the editorial decision to exclude content pertaining to firearms, content that was deemed acceptable for broadcast television, thereby chilling the speech of a political candidate supportive of gun rights."[67] Ignoring for a moment that private fora do not "chill speech" in the First Amendment context, Facebook is within its rights to *subjectively* deem such content "excessively violent." Our hypothetical gun-crime survivors group perfectly exemplifies why Congress selected subjective rather than objective standards.

And it would not stop there. Religious groups that suddenly lose Section 230's safe harbor may be forced to host blasphemous or other objectionable content—or at

[66] *Id.* at 37–38.
[67] *Id.* at 43.

least engage in expensive and lengthy litigation for refusing to allow or share it. They may even need to hire compliance counsel just to get the site started, imposing new barriers to entry, stifling competition among online platforms, and *actually* chilling speech due to government policymaking. If NTIA's petition is granted in full, government officials (judges and bureaucrats)[68] will soon be deciding what every owner or operator of every private internet forum must host. This is offensive to American's founding principles. The Commission must reject it.

G. NTIA's definitions would violate the First Amendment.

Thankfully for WeHealTogetherTube and ChristianTimesTube, NTIA's view of the world is unconstitutional. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[69] This freedom is not limited to when an individual chooses not to speak at all, but also applies when an organization has chosen to speak and invited others to speak too. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court held that the government could not compel the organizers of a parade to include individuals, messages, or signs that conflicted with the organizer's beliefs.[70] This is because "*all* speech inherently involves choices of what to say and what to leave

[68] Of course, the First Amendment would hopefully stop this. *See infra* at § I(G).
[69] *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.").
[70] 515 U.S. 557, 573 (1995) (citation and quotation omitted).

unsaid"[71] and includes not only the right to "tailor the speech" but also "statements of fact the speaker would rather avoid[.]"[72] This logic extends to other applications, such as newspapers where "'the choice of material and the decisions made as to limitations on the size and content and treatment of public issues—whether fair or unfair—constitute the exercise of editorial control and judgment' upon which the State cannot intrude."[73] The First Amendment protects our hypothetical platforms, other users of internet services, and even Facebook and Twitter. They do not sacrifice their own freedom of speech just because they provide an opportunity for billions of users around the globe to speak.[74]

II. NTIA misreads the current state of the law.

There is a concerning pattern throughout NTIA's Petition. The agency consistently misreads or misapplies relevant case law. A few examples outlined below display the actual state of the law on Section 230.

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[71] *Id.*

[72] *Id.* at 575 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)) (cleaned up). Petitioners may point to *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 648 (1994), but that case concerned a content-neutral restriction and thus only applied intermediate scrutiny. NTIA's proposed definitions under subsection (c)(2) are not content neutral.

[73] *Hurley*, 515 U.S. at 581. This applies also to state conscription to carry a message. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *see Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

[74] For further discussion of how Section 230 promotes innovation, *see* Eric Goldman, *Why Section 230 is Better than the First Amendment*, 95 Notre Dame L. Rev. Online 33 (2019), *available at* https://bit.ly/2QlOP5v.

A. NTIA misconstrues the case law on Section 230 "immunity."

Let's start at the top. As NTIA concedes, Congress passed Section 230 in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*[75] There, a state court held that Prodigy "acted more like an original publisher than a distributor both because it advertised the practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin board."[76] In response, "Congress enacted [Section] 230 to remove the disincentives to selfregulation [sic] created by the *Stratton Oakmont* decision."[77] Since then, courts have held that "[Section] 230 forbids the imposition of publisher liability on a service provider *for the exercise of its editorial and self-regulatory functions*."[78] NTIA's petition correctly articulates that *Stratton Oakmont*, and a related case, "presented internet platforms with a difficult choice: voluntarily moderate and thereby become liable for all messages on their bulletin boards, or do nothing and allow unlawful and obscene content to cover their bulletin boards unfiltered."[79] But, thankfully, Congress intervened.

This is where things start to go awry for NTIA. It cites many cases for the proposition that "ambiguous language . . . allowed some courts to broadly expand section 230's immunity from beyond its original purpose into a bar [on] any legal action or claim that involves even tangentially 'editorial judgement.'"[80] It claims Section 230 "offers immunity from contract[] [claims], consumer fraud, revenge

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[75] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)
[76] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).
[77] *Id.*
[78] *Id.* (emphasis added).
[79] Pet. at 20.
[80] Pet. at 24.

pornography, anti-discrimination civil rights obligations, and even assisting in terrorism."[81] This sounds bad. Fortunately, it's not true.

First, what Section 230 does do is prevent courts from construing content providers, such as Twitter or Facebook, as the speaker of third-party content communicated on their service. It does not immunize Twitter from lawsuits. If Twitter, for example, posted a blog tomorrow that falsely said, "John Smith is a murderer. I saw him do it. -Twitter.com," then Section 230 affords Twitter no protection from a tort suit. Similarly, if John Smith tweeted "the sky is blue" and then, in response, Twitter posted an editorial note that falsely said, "This tweet is a lie. John Smith dyed the sky blood red," Section 230 would not bar Smith from bringing a suit against Twitter for its statements. But if Jane Doe tweeted, "John Smith is a murderer. I saw him do it," then Jane Doe would be the proper defendant, not Twitter. It's pretty straightforward.

The case law reflects this structure. For example, in support of its contention that Section 230 provides "immunity from contract[]" claims, NTIA cites five cases—none of which demonstrate that Section 230 immunizes platforms from contract liability.

- The first case involved a *pro se* complaint that alleged numerous claims, including a breach of contract claim.[82] Several of these claims failed under Section 230 because the plaintiff did not allege "that Facebook actually created,

[81] Pet. at 24–25.
[82] *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016).

developed or posted the content on the suspect account."[83] The word "contract" was *never mentioned by the court* in its Section 230 analysis.[84] The breach of contract claim failed for a reason *entirely unrelated* to Section 230, because "while Facebook's Terms of Service place restrictions on users' behavior, they do not create affirmative obligations."[85]

- The second case did apply Section 230, this time to a claim of a "breach of the covenant of good faith and fair dealing."[86] But this claim was in response to YouTube removing the plaintiff's videos from its channel, a moderation decision by YouTube that is within the purview of Section 230.[87] Importantly, the court held that "Plaintiff fail[ed] to plead any facts to support a reasonable finding that Defendants issued copyright claims, strikes, and blocks in bad faith as part of a conspiracy to steal Plaintiffs' YouTube partner earnings"—claims that required factual support separate from simple moderation.[88] A poorly pled complaint does not mean YouTube has some global "immunity from contracts."

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[83] *Id.* at 1066.
[84] *Id.* at 1064–66.
[85] *Id.* at 1064. (quotation marks omitted) (citing *Young v. Facebook, Inc.*, No. 10-cv-03579, 2010 WL 4269304, at *3 (N.D. Cal. Oct. 25, 2010)). *Young* contains no discussion of Section 230.
[86] *Lancaster v. Alphabet*, No. 15-05299, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016).
[87] *Id.*
[88] *Id.*

- The third case did not allege a breach of contract between the plaintiff and Google.[89] Instead, it dealt with several interference with contract claims, among other claims, such as fraud.[90] The court applied Section 230 and correctly held that Google did not create the ads in question, but merely provided hosting for them on its site.[91] It also found that suggesting keywords was not nearly enough to turn Google into an "information content provider."[92]
- The fourth case, again, related to content not created by the defendant, Facebook, but instead by the plaintiff.[93] The plaintiff was a Russian corporation whose account Facebook shut down because it "allegedly sought to inflame social and political tensions in the United States" and the account was "similar or connected to that of Russian Facebook accounts . . . that were allegedly controlled by the Russia-based Internet Research Agency."[94] By citing this case, does NTIA mean to suggest that Facebook should be liable for shutting down accounts allegedly controlled by Russian disinformation agencies? This is the sort of critical content moderation that Section 230 protects.

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[89] *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010).
[90] *Id.* at 1122–23 ("The purpose of [Section 230] is to encourage open, robust, and creative use of the internet . . . . Ultimately, Defendant's Adwords program simply allows competitors to post their digital fliers where they might be most readily received in the cyber-marketplace.").
[91] *Id.*
[92] *Id.*
[93] *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1304–05 (N.D. Cal. 2019).
[94] *Id.* at 1300.

- The fifth case lacks the word "contract."[95] It does include a "promissory estoppel" claim, but that claim failed because "Plaintiff has not alleged that any such legally enforceable promise was made to remove any content by the Defendants."[96] Instead, the court held that refusal to moderate content is "nothing more than an exercise of a publisher's traditional editorial functions, and is preempted by [Section 230]."[97]

Section 230's protections can of course apply to contract claims when the complained-of behavior is by third parties, not the site itself. And the cases above involved courts faithfully applying Section 230 as Petitioner's own words describe it: to relieve "platforms of the burden of reading millions of messages for defamation as *Stratton Oakmont* would require."[98] These courts adhered strictly to Congress's intent and did not overstep their authority. It is a fiction that "Big Tech" companies are immune from virtually all litigation due to Section 230.[99] Instead, courts have properly stayed within the bounds established by Congress. If, for example, a company contracted with Facebook to create and publish content, and Facebook failed to do so—it could face a suit for breach. Section 230 would have no relevance.

Second, NTIA cites three cases to allege that Section 230 creates "immunity from . . . consumer fraud" claims.[100]

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[95] *Obado v. Magedson*, No. 13-2382, 2014 WL 3778261 (D.N.J., July 31, 2014).
[96] *Id.* at *8.
[97] *Id.*
[98] Pet. at 24.
[99] *See* 47 U.S.C. 230(e).
[100] Pet. at 24.

- The first case is a standard Section 230 case in which a plaintiff sought to hold eBay liable for hosting allegedly fraudulent auctions on its site.[101] eBay did not select the allegedly false product descriptions, nor were the people who did choose them defendants in the action.[102] eBay just hosted them. Section 230 worked as planned. If eBay needed to investigate every single auction posting for any possible allegations of fraud, its business model would break.[103]
- The second case again dealt with products sold on eBay by third-party sellers.[104] The judge, though, made an important point that NTIA should heed: "Plaintiff's public policy arguments, some of which have appeal, *are better addressed to Congress*, who has the *ability to make and change the laws*."[105]
- The third case is currently on appeal before an *en banc* Third Circuit, which is awaiting a response to a certified question to the Pennsylvania Supreme Court on a products liability theory that does not mention Section 230.[106]

These cases do not support the proposition that tech companies are immune from liability for engaging in consumer fraud. For example, if eBay were to draft allegedly fraudulent product descriptions and then sell allegedly fraudulent products *itself*,

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[101] *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).
[102] *Id.* at 832.
[103] *See id.* at 833 (enforcement of state law here would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").
[104] *Hinton v. Arizona.com.dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014).
[105] *Id.* at 692 (emphasis added).
[106] *See* Certification of Question of Law, *Oberdorf v. Amazon.com, Inc.*, No. 18-1041 (3d Cir. June 2, 2020), ECF No. 189. The Third Circuit vacated a prior panel opinion when it granted *en banc* review, so it is unclear what impact Section 230 may ultimately have on this case. *See Oberdorf v. Amazon.com Inc.*, 936 F.3d 182 (3d Cir. 2019).

then it could be liable—and Section 230 would be no impediment to an action. Section 230 does apply to claims of consumer fraud, but only when the claims allege bad behavior by a third party, not the site itself.[107]

Third, an examination of one final case that NTIA relies on deserves special attention because it explains a critical doctrine. NTIA alleges that Section 230 has led to immunity for "assisting in terrorism."[108] In the cited case, the plaintiffs alleged that "Hamas used Facebook to post content that encouraged terrorist attacks in Israel during the time period of the attacks [relevant to] this case."[109] The plaintiffs argued that because Facebook uses algorithms to promote content, that practice rendered it a non-publisher.[110] The Second Circuit rejected that argument, found "no basis [for the claim] in the ordinary meaning of 'publisher,' or the other text of Section 230," and concluded that an "interactive computer service is not the 'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests."[111]

The Second Circuit next considered whether Facebook was itself an "information content provider" or whether Hamas was responsible for the content that allegedly spurred terrorist activity.[112] The court applied its "material contribution" test, asking whether "defendant directly and materially contributed to

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[107] *See, e.g.*, *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).
[108] Pet. at 25.
[109] *Force v. Facebook*, 934 F. 3d 53, 59 (2d Cir. 2019).
[110] *Id*. at 65.
[111] *Id*. at 66.
[112] *Id*. at 68

what made the content itself unlawful."[113] Relying on a D.C. Circuit decision, it held that "a website's display of third-party information does not cross the line into content development."[114] It reasoned that Facebook "does not edit (or suggest edits) for the content that its users—including Hamas—publish."[115] And the algorithms Facebook uses are "neutral" and "based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers."[116] Using these algorithms did not open Facebook to liability.

This case, which NTIA cites to support its petition, is a perfect example of a court easily understanding Section 230 and applying it in a situation Congress intended to cover. If the Court held otherwise—and had the case not failed for other reasons—Facebook would have been expected to monitor *every post made on its site* by its 2.7 billion monthly active users[117] to ensure none of them could be considered to be inciting terrorism anywhere in the world. It would also have been barred from using algorithms to do so, which would leave it virtually unable to use any technology to manage its site. Such a Herculean task that would end Facebook as we know it.

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[113] *Id.*

[114] *Id.* (citing *Marshall's Locksmith Serv. v. Google*, 925 F.3d 1263 (D.C. Cir. 2019). In *Marshall's Locksmith*, the D.C. Circuit held that simply translating information into "textual and pictorial 'pinpoints' on maps . . . did not develop that information (or create new content) because the underlying" data was provided by a third party." *Id.* (citing *Marshall's Locksmith Serv.* at 1269–70).

[115] *Id.* at 70.

[116] *Id.*

[117] Dan Noyes, *The Top 20 Valuable Facebook Statistics – Updated August 2020*, Zephora Digital Marketing (Aug. 2020), *available at* https://bit.ly/34yMKLx.

Contrary to NTIA's contention, these cases track not only the text of the Act, but also what NTIA readily admits was Congress's intent. Any of these cases, had they been decided the other way, would transform Section 230 to require onerous moderation of every product listed, post shared, account created, and video uploaded that would make it virtually impossible to sell products, host social media, or share advertisements. Amazon, for example, may be relegated to selling only its own products, shutting many third-party small businesses and entrepreneurs out of its marketplace.[118] Facebook would have to pre-approve all posts to ensure they do not contain potentially unlawful content. eBay would need to investigate every product listing, including perhaps the physical product itself, to ensure no fraud or danger existed. These are not sustainable business models. Congress knew that, which is why it adopted Section 230. Perhaps NTIA believes Congress was wrong and that these businesses should not exist. If so, NTIA should petition Congress, not the FCC.

B. Section 230 does not provide immunity for a site's *own actions*.

NTIA cites a foundational case in Section 230 jurisprudence, *Zeran v. America Online, Inc.*, and claims it "arguably provides full and complete immunity to the platforms for *their own publications*, editorial decisions, content-moderating, and *affixing of warning or fact-checking statements*."[119] But NTIA references no other authority to support its reading of the case. It fails to cite either a case where a company received Section 230 immunity for *its own publication* or a case where a

[118] It is an open question of whether courts may still find Amazon strictly liable for certain third-party products despite Section 230. This is currently on review in front of the *en banc* Third Circuit. *See supra* n.106.
[119] Pet. at 26.

court has read *Zeran* the way NTIA has. Instead, courts routinely and vigorously evaluate whether the defendant in a case was the publisher itself or was simply hosting third-party content.

Zeran was decided over twenty years ago. If NTIA's interpretation were correct, the natural momentum of precedent would have led to NTIA's parade of horribles by now, or surely at least one case adopting that interpretation. But it hasn't. Instead, cases like a recent Second Circuit decision are typical.[120] The plaintiff there, La Liberte, alleged that Joy Reid, a member of the news media, defamed La Liberte when Ms. Reid "authored and published her own Instagram post . . . which attributed to La Liberte" certain remarks.[121] La Liberte claimed these remarks were defamatory. Ms. Reid, among other defenses, asserted that Section 230 immunized her because she reshared someone else's video, arguing that her post "merely repeated what countless others had previously shared before her[.]"[122] But the Court properly found that Ms. Reid added "commentary" and "went way beyond her earlier retweet . . . in ways that intensified and specified the vile conduct that she was attributing to La Liberte."[123] Reid tried to argue that the Circuit's "material contribution" test, which contrasts between displaying "actionable content and, on the other hand, responsibility *for what makes the displayed content [itself] illegal or actionable*,"[124] should save her. But because "she authored both Posts at issue[,]" she

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[120] *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020).
[121] *Id*. at 89.
[122] *Id*. at 89–90.
[123] *Id*.
[124] *Id*. (quoting and citing *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019)).

is potentially liable.[125] Replace Ms. Reid in this fact pattern with any corporation, such as Twitter, Facebook, or Google, and you would get the same result.

Similarly, in *Federal Trade Commission v. LeadClick Media, LLC,* the Second Circuit found an internet advertising company liable as the company itself engaged in "deceptive acts or practices."[126] Because it directly participated in the deceptive scheme "by recruiting, managing, and paying a network of affiliates to generate consumer traffic through the use of deceptive advertising and allowing the use of deceptive advertising where it had the authority to control the affiliates participating in its network,"[127] Section 230 rightly provided no shelter. That case is no outlier. Both *La Liberte* and *Force* rely on it. Unlike NTIA's purely hypothetical outcomes, courts have shown a willingness and ability to only apply Section 230 protection where Congress intended—and no broader.

C. NTIA misreads the law on the distinction between subsections (c)(1) and (c)(2).

One of NTIA's key claims—and the centerpiece of its petition[128]—is that courts have read subsection (c)(1) to swallow (c)(2) and thus (c)(2) must mean something more than it does. On the back of this claim, NTIA asks the FCC to initiate a rulemaking to redefine (c)(2) in a way that is not only contrary to both the statutory text and congressional intent but will cast a shadow of regulation over the Internet.

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[125] *Id.*
[126] *Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 171 (2d Cir. 2016).
[127] *Id.* at 172.
[128] As Professor Goldman puts it, this is NTIA's "payload." *See* Eric Goldman, Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230 (Aug. 12, 2020), *available at* https://bit.ly/31swytu.

NTIA relies on *Domen v. Vimeo*[129] for the proposition that the two sections "are co-extensive, rather than aimed at very different issues."[130] Thus, according to NTIA, "the court rendered section 230(c)(2) superfluous—reading its regulation of content removal as completely covered by 230(c)(1)'s regulation of liability for user-generated third party content."[131] This is backwards. The *Domen* court expressly held "there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage."[132] It also explained, relying on a Ninth Circuit decision, that "even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue . . . can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable."[133] The proposition that *Domen* stands for is that in some situations one can avail oneself of (c)(2), despite not receiving immunity under (c)(1), and that is why (c)(2) is not surplusage. While *Domen* ultimately found the defendant immune under either subsection—litigants often avail themselves of multiple protections in a statute—it did not hold that the sections were "co-extensive."[134]

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[129] 433 F. Supp. 3d 592 (S.D.N.Y. 2020) (*appeal pending*, No. 20616 (2d Cir.)).
[130] Pet. at 28.
[131] *Id*. at 28–29.
[132] *Domen* at 603.
[133] *Id*. (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009)).
[134] NTIA's misunderstanding of *Domen* also conflicts with its extensive citations to cases holding "that the provisions cover separate issues and 'address different concerns.'" Pet. at 30. And NTIA is only able to cite one case, *e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), to support its contention that courts may be construing (c)(1) overbroadly. The *Domen*

D. NTIA confuses the meaning of subsection (c)(2).

NTIA makes the same error regarding the terms enumerated in subsection (c)(2), claiming that "[u]nderstanding how the section 230(c)(2) litany of terms has proved difficult for courts in determining how spam filtering and filtering for various types of malware fits into the statutory framework."[135] Perhaps NTIA believes courts have struggled with parsing what the words in (c)(2) mean. But this supposition is undermined by NTIA's impressive string cite of courts applying well-worn canons of statutory construction and determining what the law means. There is no support for the idea that courts have "struggled." Yes, courts needed to apply canons to interpret statutes. That is what courts do, and they do so here successfully.

NTIA also claims that, "[a]s the United States Court of Appeals for the Ninth Circuit explains, unless" there is some sort of "good faith limitation" then "immunity might stretch to cover conduct Congress very likely did not intend to immunize."[136] But this quotation is from a concurrence. In a later case, the Ninth Circuit adopted a portion of this concurrence, holding that "'otherwise objectionable' does not include software that the provider finds objectionable for anticompetitive reasons[.]"[137] This

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court explicitly declined to follow this unpublished case, finding it unpersuasive in the face of *Force*. *Domen*, 433 F. Supp. 3d. at 603. But even if *e-ventures* were rightly decided, it deals directly with content moderation of spam, not defamation or other claims relating to publication. *See* 2017 WL 2210029, at *1. And defendants ultimately prevailed there on an alternate ground, the First Amendment, so there was no incentive to appeal. *Id*. at *4.

[135] Pet. at 32.

[136] *Id.* at 38.

[137] *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1045 (9th Cir. 2019).

adheres to Section 230's text and reinforces that courts are not struggling to parse (c)(2). NTIA's proposed redefinition of subsection (c)(2) should be rejected.[138]

E. NTIA misstates the law on "information content providers."

NTIA next turns its eye toward "information content providers," seeking a new definition from the Commission.[139] It concedes that "[n]umerous cases have found that interactive computer service's designs and policies render it an internet content provider, outside of section 230(c)(1)'s protection."[140] This is, of course, true and is well supported. Yet then NTIA confoundingly argues that "the point at which a platform's form and policies are so intertwined with users' so as to render the platform an 'information content provider' is not clear."[141] This is simply not the case—courts consistently engage in clear analysis to determine whether defendants are "information content providers."

Fair Housing Council of San Fernando Valley v. Roommates.com, which NTIA relies on, provides such an example. In *Roommates*, the Ninth Circuit found the defendant could be liable because it provided users "a limited set of pre-populated answers" in response to a set of "unlawful questions" thus becoming "much more than a passive transmitter of information."[142] NTIA argues "this definition has failed to provide clear guidance, with courts struggling to define 'material contribution,'"[143]

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[138] *See* Pet. at 37.
[139] *Id*. at 42.
[140] *Id*. at 40.
[141] *Id*.
[142] *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1166–67 (9th Cir. 2008); Pet. at 40.
[143] Pet. at 40.

citing *People v. Bollaert*[144] as an example of "confusion." But the court in *Bollaert* actually did the opposite, easily holding "that like the Web site in *Roommates*, [the defendant here] forced users to answer a series of questions with the damaging content in order to create an account and post photographs."[145] It also cited a "material contribution" case, finding that the defendant did not fit the definition.[146] There is no sign of a struggle—this is a clear decision that applies precedent.

NTIA also argues that "not all courts accept the material contribution standard,"[147] citing a case that does not address or explicitly reject the "material contribution" standard at all.[148] That case instead is a straightforward inquiry into whether the defendant, Gawker, was responsible for "creating and posting, inducing another to post, or otherwise actively participating in the posting of a defamatory statement in a forum that the company maintains."[149] The Seventh Circuit found that it could be liable[150] because "Gawker itself was an information content provider" including encouraging and inviting users to defame, choreographing the content it received, and employing "individuals who authored at least some of the comments themselves."[151] This is another example of Section 230 working: a company that

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[144] 248 Cal. App. 4th 699, 717 (2016)
[145] *Id*. at 833.
[146] *Id*. at 834.
[147] Pet. at 41.
[148] *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016).
[149] *Id*. at 742.
[150] *Huon* merely reviewed a motion to dismiss, rather than a final judgment. *Id*. at 738.
[151] *Id*. at 742.

allegedly *actively participated* in creating defamatory content faced liability. It was not—as NTIA might argue—magically immune.

NTIA's proposed definition for "information content provider" differs from the statute and is unnecessary given courts' application of the law as written.

F. NTIA wrongly argues that "publisher or speaker" is undefined.

Finally, NTIA argues that "the ambiguous term 'treated as publisher or speaker' is a fundamental question for interpreting that courts in general have not addressed squarely."[152] But as both the cases NTIA cites and this comment demonstrate, courts have had no difficulty defining these terms. And, not surprisingly, NTIA cites no authority to back up this statement. Instead, NTIA enumerates a list of grievances about moderation decisions, implying the current state of the law holds that "content-moderating can never, no matter how extreme or arbitrary, become editorializing that no longer remains the 'speech of another,'" and thus subsection (c)(2) will be swallowed whole.[153] Of course, as the spam cases and others show—and NTIA itself details—this is not the case. And one can easily imagine a situation when Section 230 would not provide immunity on a bad faith content moderation decision. Imagine, for example, that John Smith tweeted "I am not a murderer." Then, a Twitter moderator places a flag on John Smith's post that reads, "False: Smith is a murderer." This creates new content, deliberately misrepresents reality, and is done in bad faith. This would be actionable, and Section 230 would provide Twitter with no relief. For these reasons, NTIA's proposed

[152] Pet. at 42.
[153] *Id*. at 43.

redefinition of Section 230(f)(2) is both unnecessary and unlawful. It should be rejected.[154]

G. Studies show that NTIA's view of the law is flawed.

This Commission need not look only to the cases described above. The Internet Association recently did a survey of over 500 Section 230 lawsuits.[155] The Association's thorough report had some important key findings:

- A wide cross-section of individuals and entities rely on Section 230.
- Section 230 immunity was the primary basis for a court's decision in only forty-two percent of decisions reviewed.
- A significant number of claims in the decisions failed without application of Section 230 because courts determined that they lacked merit or dismissed them for other reasons.
- Forty-three percent of decisions' core claims related to allegations of defamation, just like in the *Stratton Oakmont v. Prodigy Services* case that spurred the passage of Section 230.[156]

The Internet Association's "review found that, far from acting as a 'blanket immunity,' most courts conducted a careful analysis of the allegations in the complaint, and/or of the facts developed through discovery, to determine whether or not Section 230 should apply."[157] While the report did find that subsection (c)(2) is

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[154] *See id*. at 46.
[155] Elizabeth Banker, A Review of Section 230's Meaning & Application Based On More Than 500 Cases, Internet Association (July 7, 2020) [hereinafter "Association Report"], *available at* https://bit.ly/3b7NlFD.
[156] *Id.* at 2.
[157] *Id*. at 6 (citing *Gen. Steel v. Chumley*, 840 F.3d 1178 (10th Cir. 2016); *Samsel v. DeSoto Cty. School Dist.*, 242 F. Supp.3d 496 (N.D. Miss. 2017); *Pirozzi v. Apple*, 913 F. Supp. 2d 840 (N.D. Cal. 2012); *Cornelius v. Delca*, 709 F. Supp. 2d 1003 (D. Idaho 2010); *Best Western v. Furber*, No. 06-1537 (D. Ariz. Sept. 5, 2008); *Energy Automation Sys. v. Xcentric Ventures*, No. 06-1079, 2007 WL 1557202 (M.D. Tenn.

used in a small minority of Section 230 cases, "the vast majority involved disputes over provider efforts to block spam."[158] And it added that "another reason" (c)(2) cases are limited is "that many of those lawsuits are based on assertions that the provider has violated the First Amendment rights of the user whose content was removed, but the First Amendment only applies to government actors."[159] The Commission should consider and incorporate the Internet Association's report in its decisionmaking.

III. NITA's request for transparency rules would require the FCC to classify social media as information services, which is outside the boundaries of the petition.

At the end of its petition, NTIA argues that social media services are "information services" and asks the FCC to impose disclosure requirements on them.[160] But the FCC has previously declined to classify edge services, including social media services, as information services: "[W]e need not and do not address with greater specificity the specific category or categories into which particular edge services fall."[161] NTIA's petition never actually requests that the FCC classify social media as an information service—it just asks for disclosure requirements. And, critically, this docket lists the "Nature of Petition" as "Clarify provisions of Section 230 of the Communications Act of 1934, as amended."[162] It would be legally

May. 25, 2007); *Hy Cite v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142 (D. Ariz. 2005)).

[158] *Id*. at 3.

[159] *Id*. at 3.

[160] Pet. at 47.

[161] RIFO at 137 n.849.

[162] Fed. Commc'ns Comm'n, Report No. 3157, RM No. 11862 (Aug. 3, 2020).

momentous and beyond the scope of this proceeding for the FCC to determine the regulatory classification of social media services and potentially other edge providers.

Furthermore, NTIA erroneously argues that "Section 230(f)(2) "explicitly classifies 'interactive computer services' as 'information services[.]'"[163] What the statute says, instead, is "[t]he term 'interactive computer services' means any information service, system, or access software provider[.]" 47 U.S.C. 230(f)(3). Thus, one can be an "interactive computer service" but not an "information service." NTIA's definition is like saying "all apples are red" and turning it into "all red things are apples." Therefore, the FCC must engage in new action to render this classification. Such a decision should be noticed properly and not be decided in response to a petition that fails to request it.

IV. There is no statutory authority for NTIA to petition the FCC.

In its petition, NTIA invoked an FCC regulation that allows "[a]ny interested person [to] petition for the issuance, amendment or repeal of a rule or regulation."[164] Correspondingly, the FCC opened this rulemaking by citing Sections 1.4 and 1.405 of its rules. But NTIA is not an "interested person" and therefore cannot petition the FCC as it has sought to do. The FCC should reject the petition on this basis alone.

The term "interested person" is not defined in Chapter I of Title 47 of the Code of Federal Regulations. In its 1963 reorganization and revision of its regulatory code, the FCC cited the original 1946 Administrative Procedure Act ("APA") as the basis of

[163] Pet. at 47.
[164] Pet. at 1 (citing 47 C.F.R. § 1.401(a)).

authority for Section 1.401(a) and its petition-for-rulemaking process.[165] The original Section 4(d) of the APA, now codified at 5. U.S.C. § 553(e), requires that "[e]very agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."[166] While the APA did not, and still does not, define "interested person," it did define "person" as "individuals, partnerships, corporations, associations, or public or private organizations . . . *other than agencies*."[167] This term is contrasted with the definition of a "party," which explicitly *includes* agencies.[168]

NTIA is an Executive Branch agency within the Department of Commerce and an "agency" under the APA.[169] Agencies cannot be a "person" or "interested person" under the statute. Because it is not an "interested person," NTIA cannot petition an agency for a rule. And because the FCC based its petitioning process on the APA and has identified no source for a more expansive definition of the term "interested person,"[170] NTIA's attempted petition on Section 230 is a legal nullity. The FCC has no obligation to respond to it.

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[165] *See* Reorganization and Revision of Chapter, 28 Fed. Reg. 12386, 12432 (Nov. 22, 1963) (citing "sec. 4, 60 Stat. 238; 5 U.S.C. 1003" as the basis of its authority).
[166] *See* 60 Stat. 238; *see also* 5 U.S.C. § 553(e).
[167] Sec. 2(b), 60 Stat. 238; 5 U.S.C. § 551(2) (emphasis added).
[168] Sec. 2(b), 60 Stat. 238; 5 U.S.C. § 551(3) ("'Party' includes any person or agency . . .").
[169] *See* Our Mission, ntia.doc.gov (last accessed Aug. 14, 2020); 47 U.S.C. § 901 (NTIA, "an agency in the Department of Commerce"); Sec. 2(a), 60 Stat. 238; 5 U.S.C. § 551(1) (defining "agency").
[170] The FCC rulemaking procedure is governed by the APA. See, e.g., *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1115 (D.C. Cir. 2019).

V. This petition is bad policy.

A recent book, arguably the definitive history of Section 230, refers to it as "The Twenty-Six Words that Created the Internet."[171] Without Section 230, the Internet as we know it today may not exist. Throughout this comment, hypotheticals, real-life situations, and other policy arguments show that the disappearance of Section 230 would imperil internet providers, hurt small businesses, and restrain innovation. But it would do more than that by chilling participation in the public square, both commercial and purely communicative.

A. Granting the petition will harm free expression.

People have many online forums available to express themselves. If NTIA attains its goal, these forums will change dramatically. Due to the risk of litigation, platforms would begin to engage in severe content moderation. Rather than erring to the side of speech, they may err to the side of caution, removing any content that could potentially trigger a lawsuit. This moderation comes at a cost, not only to pay moderators but also for a legal budget to deal with litigation, even if it meritless.

Thus, no longer would citizens have virtually free access to commenting on politicians, such as the President. No longer would journalists be able to easily promote their work on social media—all claims would need to be independently vetted by the social media network itself, making it near impossible to distribute news. And no longer would sites be willing—or able—to allow third parties, such as bloggers, journalists, or others, to promote content without fear of retribution. And ultimately,

[171] Jeff Kosseff, The Twenty-Six Words That Created the Internet (1st ed. 2019).

all this will do is further consolidate the market. Legal and compliance requirements create massive barriers to entry, further entrenching existing "Big Tech" companies and making it near impossible for small entrepreneurs to compete.[172]

B. Granting the petition will harm commerce and entrepreneurship.

Granting the petition would also significantly impact online commerce. Sites like Amazon, Etsy, and eBay may need to stop providing third-party products that are not first thoroughly vetted. The costs of internet advertising would skyrocket, as each ad would require detailed review by the placement company.[173] No longer would small businesses and entrepreneurs be able to advertise, promote, and sell their products online.[174] As Representative Cox wrote, "[w]ithout Section 230, millions of American websites—facing unlimited liability for what their users create—would not be able to host user-generated content at all."[175]

C. NTIA's petition is anti-free market.

What NTIA demands would harm the free market. It attacks small businesses, innovators, and entrepreneurs. As President Ronald Reagan once remarked:

> Too often, entrepreneurs are forgotten heroes. We rarely hear about them. But look into the heart of America, and you'll see them. They're the owners of that store down the street, the faithfuls who support our churches, schools, and communities, the brave people everywhere who produce our goods, feed a hungry world, and keep our homes and

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[172] *See generally* Statement of Neil Chilson, U.S. Dep't of Justice Workshop: Section 230 – Nurturing Innovation or Fostering Unaccountability? (Feb. 19, 2020), *available at* https://bit.ly/32tfZNc.

[173] This is assuming that it would even be possible to conduct such a review as different people have different opinions and experiences with products—hence the popularity of third-party "review" functionality.

[174] *See generally* Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* (June 5, 2017), *available at* https://bit.ly/2Eyv5sy.

[175] Cox Testimony at 2.

> families warm while they invest in the future to build a better America.[176]

NTIA's proposal threatens all of that because it may disagree—whether rightly or wrongly—with certain "Big Tech" business decisions. But the answer is not government regulation. The answer is not the courts. The answer is America and her free market principles.[177] As Milton Friedman argued, the free market "gives people what they want instead of *what a particular group thinks they ought to want*."[178] NTIA does not speak for the consumer, the consumer does. "Underlying most arguments against the free market is the lack of belief in freedom itself."[179] Although Friedman conceded the need for some government, he maintained that "[t]he characteristic feature of action through political channels is that it tends to require or enforce substantial conformity."[180] He warned that "economic freedom" is threatened by "the power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority."[181] Or a federal agency. As Chairman Pai wrote, we do not want a government that is "in the business of picking winners and losers in the internet economy. We should have a level playing field and let consumers

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[176] Ronald Reagan, Radio Address to the Nation on Small Business (May 14, 1983), *available at* https://bit.ly/31oDYOq.
[177] *See, e.g.*, Diane Katz, *Free Enterprise is the Best Remedy for Online Bias Concerns*, Heritage Found. (Nov. 19, 2019), *available at* https://herit.ag/2YxFImC.
[178] *Milton Friedman: In His Own Words* (Nov. 16, 2006), *available at* https://on.wsj.com/34yjVPw (emphasis added).
[179] *Id.*
[180] *Id.*
[181] *Id.*

decide who prevails."[182] President Reagan warned that "[t]he whole idea is to trust people. Countries that don't[,] like the U.S.S.R. and Cuba, will never prosper."[183]

These words may seem drastic, perhaps not fit for the subject of this comment. But they are. Should this Commission adopt NTIA's rule, the impact on American entrepreneurship would be extreme. What NTIA seeks would cripple one of humanity's greatest innovations, the Internet and the technology sector. "In contrast to other nations, in the United States the government does not dictate what can be published on the internet and who can publish it."[184] Yet NTIA would risk this because they do not like how some corporations have moderated things in the past few years.[185] The FCC should not fall prey to this thinking—the stakes are too high.

VI. Granting NTIA's petition would threaten the success of the Commission's Restoring Internet Freedom Order.

The Commission's Restoring Internet Freedom Order ("RIFO") took an important step by re-establishing the FCC's devotion to using a "light touch" style of regulation on internet service providers, returning "Internet traffic exchange to the longstanding free market framework under which the Internet grew and flourished for decades."[186] While there is no question pending before the FCC on classifying social media sites under Title II, what NTIA's petition does ask for—unlawful Section 230 rules—may have same effect by imposing heavy-handed content regulation. As the Commission stated in RIFO, "The Internet thrived for decades under the light-

[182] RIFO at 222 (Statement of Chairman Ajit Pai).
[183] Reagan, *supra* n.176.
[184] Cox Testimony at 2.
[185] *See* Exec. Order on Preventing Online Censorship, 85 Fed. Reg. 34079 (2020).
[186] RIFO at 99.

touch regulatory regime" noting that "[e]dge providers have been able to disrupt a multitude of markets—finance, transportation, education, music, video distribution, *social media*, health and fitness, and many more—through innovation[.]"[187]

Following RIFO's precedent, the Commission should hold here that it does "not believe hypothetical harms, unsupported by empirical data, economic theory, or even recent anecdotes, provide a basis for . . . regulation[.]"[188] The free market does a much better job, particularly because providers realize "that their businesses depend on their customers' demand for edge content."[189] Furthermore, when contemplating RIFO, the Commission held it was "not persuaded that Section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here."[190] Specifically, it found "requirements that would impose federal regulation on broadband Internet services would be in tension" with the policy of Section 230(b)(2).[191] If that is the case for broadband Internet services—classified as information services—then it must be doubly so for edge providers.[192] Thus, to grant NTIA's petition here could not only jeopardize the economic and legal reasoning undergirding the RIFO decision, but it may also start the FCC on a path back to the Fairness Doctrine, a failed approach that enabled government control of speech.[193]

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[187] *Id*. at 65 (emphasis added).
[188] *Id*. at 68.
[189] *Id*. at 69.
[190] *Id*. at 161.
[191] *Id*. at 171.
[192] Edge providers are not currently classified as "information services" nor is that an appropriate consideration for this petition. *See supra* at § III.
[193] *See Red Lion Broadcasting Co. v. Fed Commc'ns Comm'n*, 395 U.S. 367 (1969).

As Chairman Pai wrote, "[t]he Internet is the greatest free-market innovation in history. It has changed the way we live, play, work, learn, and speak."[194] And "[w]hat is responsible for the phenomenal development of the Internet? It certainly wasn't heavy-handed government regulation."[195] Innovators need room to take risks, create new products, and test out consumer interests—as they have for decades. "In a free market of permissionless innovation, online services blossomed."[196] This includes many of the critical commerce and social media platforms targeted by NTIA's order. And now NTIA asks this Commission to step in with "heavy-handed micromanagement."[197] But as this Commission well knows, "[e]ntrepreneuers and innovators guided the Internet far better than the clumsy hand of government ever could have."[198] The Internet should be "driven by engineers and entrepreneurs and consumers, rather than lawyers and accountants and bureaucrats."[199] Instead of limiting consumers through the wolves of litigation and regulation, "[w]e need to empower all Americans with digital opportunity [and] not deny them the benefits of greater access and competition."[200] This Commission took a critical step in empowering free market participants—both creators and consumers—through RIFO. It should not imperil all of that now on the back of this meritless Petition.

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[194] *Id.* at 219 (Statement of Chairman Ajit Pai).
[195] *Id.*
[196] *Id.* (listing the many accomplishments of Internet innovation).
[197] *Id.*
[198] *Id.*
[199] *Id.* at 22.
[200] *Id.* at 220.

Conclusion

For all the above reasons, the Commission should reject NTIA's petition.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September 2020, a copy of the foregoing comments was served via First Class Mail upon:

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Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

/s/ Eric R. Bolinder

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A Modest Proposal to Pare Back Section 230 Immunity

The purpose of Section 230 of the Communications Decency Act of 1996 was to immunize online service providers from liability when posting third-party content: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by *another* information content provider." *See* 47 U.S.C. § 230 (emphasis added).

As the Electronic Frontier Foundation (EFF) describes it, Section 230 is "one of the most valuable tools for protecting freedom of expression and innovation on the Internet." If the tech platforms were exposed to liability for third-party content, the logic goes, they would be forced to engage in a level of censorship that many would find objectionable. Small platforms might even shut down to limit their legal risk. EFF credits Section 230 for making the United States a "safe haven" that induces the "most prominent online services" to locate here. Indeed, U.S. online platforms have thrived, relative to their foreign counterparts, at least in part due to the protections from Section 230.

The protected intermediaries under Section 230 include Internet Service Providers (ISPs), as well as "interactive computer service providers," or what are now understood as tech platforms such as Facebook and Twitter (hosting third-party micro-bloggers), Google (hosting third-party content), YouTube (hosting third-party videos), and Amazon (hosting third-party reviews and merchandise).

The Concerns with Unbounded Section 230 Protections

In the last few years, Section 230 has come under fire from multiple political factions as being a tool for the largest platform companies to evade regulation writ large. Left-leaning politicians blame Section 230 for enabling misinformation (from Covid-19 to voting rights) and hate speech. And Senator Josh Hawley (R-MO) offered legislation that extends Section 230 protections only to platforms "operating in good faith," defined as not selectively enforcing terms of service or acting dishonestly.

Current laws shield Amazon from liability when experimental products end up killing or hurting Amazon.com shoppers. A Texas judge recently ruled that Amazon could not be held liable for failing to warn shoppers that a knockoff Apple TV remote control lacked a childproof seal on the battery compartment, which resulted in injury to at least one customer's child who swallowed the battery. That the product description came from a third-party Chinese vendor gave Amazon immunity under Section 230, despite the fact that Amazon may have recruited the low-cost supplier to its platform.

As noted by *American Prospect* editor David Dayen, Section 230 is "being extended by companies like Airbnb (claiming the home rentals of their users are 'third-party content') and Amazon (the same for the product sold by third parties on their marketplace) in ways that are downright dangerous, subverting consumer

protection and safety laws." Dayen proposes tying Section 230 protection to the banning of targeted advertising, "in the hopes that eliminating a click-bait business model would make hosting valuable content the only path to success." George Washington Law Professor Spencer Overton argues that Congress should explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting, especially those aimed to suppress voting by Black Americans.

The Justice Department has proposed to limit Section 230 immunity if platforms violate free speech rights, "facilitate" violations of federal law or show "reckless disregard" to such violations happening on their sites.

Thwarting Congressional Intent

Implicit from the plain language of the statute is that the liability protections do not pertain when the online service provider offers its own content; else the phrase "another information content provider" serves no purpose.

By vertically integrating into content, and still claiming the liability shield of Section 230, the tech platforms have thwarted the original intent of Congress—not being held liable for content generated by "another information content provider." When the legislation was drafted in 1996, the tech platforms had not yet integrated into adjacent content markets, which likely explains why the statute is silent on the issue of content generated by the platform itself. In the 1990s, and even late into the 2000s, the tech platforms offered to steer users to the best content and then, in the infamous words of Google's Larry Page, "get out of the way and just let you get your work done."

Only in the past decade have platforms begun to leverage their platform power into the "edge" of their networks. For example, Google figured out that delivering clicks to third-party content providers was not as profitable as steering those clicks to Google-affiliated properties. According to a Yelp complaint filed with the European Commission in 2018, Google's local search tools, such as business listings and reviews from Google Maps, receive top billing in results while links to Yelp and other independent sources of potentially more helpful information are listed much lower. Because local queries account for approximately one third of all search traffic, Google has strong incentives to keep people within its search engine, where it can sell ads.

Google is not the only dominant tech platform to enter adjacent content markets. Amazon recently launched its own private-label products, often by cloning an independent merchant's wares and then steering users to the affiliated clone. Apple sells its own apps against independent app developers in the App Store, also benefitting from self-preferencing. And Facebook has allegedly appropriated app functionality, often during acquisition talks with independent developers. Facebook also integrated into news content via its Instant Articles program, by forcing news

publishers to port their content to Facebook's website, else face degraded download speeds. News publishers can avoid this degradation by complying with Facebook's porting requirement, but at a cost of losing clicks (that would have occurred on their own sites) and thus advertising dollars.

After holding hearings this summer, the House Antitrust Subcommittee is set to issue a report to address self-preferencing by the tech platforms. There are strong policy reasons for intervening here, including the threat posed to edge innovation as well as the limited scope of antitrust laws under the consumer-welfare standard. Among the potential remedies, there are two approaches being considered. Congress could impose a line-of-business restriction, along the lines of the 1933 Glass-Steagall Act, forcing the platforms to divest any holdings or operations in the edges of their platforms. This remedy is often referred to as "structural separation" or "breaking up the platform," and it is embraced by Senator Warren (D-MA) as well as Open Markets, a prominent think tank. Alternatively, Congress could tolerate vertical integration by the platforms, but subject self-preferencing to a nondiscrimination standard on a case-by-case basis. This remedy is fashioned after Section 616 of the 1992 Cable Act, and has been embraced in some form by the Stigler Center, Public Knowledge and former Senator Al Franken.

Tying Section 230 Immunity to Structural Separation

Consistent with this policy concern, and with the plain language of Section 230, the Federal Communications Commission (FCC) could issue an order clarifying that Section 230 immunity only applies when online service providers are carrying third-party content, but does not apply when online service providers are carrying their content.

As a practical matter, this clarification would have no effect on platforms such as Twitter or WhatsApp that do not carry their own content. In contrast, integrated platforms that carry their own content, or carry their own content plus third-party content, could only invoke Section 230 immunity with respect to their third-party content. This light-touch approach would not prevent Amazon, for example, from invoking Section 230 immunity when it sells a dangerous Chinese product.

An alternative and more aggressive approach would be to revoke 230 immunity for *any* content offered by an integrated online service provider. Under this approach, vertically integrated platforms such as Amazon and Google could retain Section 230 immunity only by divesting their operations in the edges of their platforms. Vertically integrated platforms that elect not to divest their edge operations would lose Section 230 immunity. The same choice—integration or immunity—would be presented to vertically integrated ISPs such as Comcast. This proposal could be understood as a tax on integration. Such a tax could be desirable because private platforms, especially those with market power such as Amazon and Facebook, do not take into account the social costs from lost edge innovation that results from self-preferencing and cloning.

The ideal regulatory environment would apply equally to all platforms—regardless of whether they operate physical infrastructure or virtual platforms—so as to eliminate any distortions in investment activity that come about from regulatory arbitrage. Under the current regulatory asymmetry, however, cable operators are subject to nondiscrimination standards when it comes to carrying independent cable networks, while Amazon is free to block HBO Max from Amazon's Fire TV Cube and Fire TV Stick, or from Amazon's Prime Video Channels platform. These issues deserve more attention and analysis than is presented here.

It's clear the original purpose of Section 230 is no longer being served, and the law is instead being exploited by the online platforms to maintain their immunity and to thwart any attempts to regulate them.

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CENTER FOR DEMOCRACY & TECHNOLOGY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	**)**	**RM-11862**
Section 230 of the Communications Act	**)**	
	)	

Comments of the Center for Democracy & Technology
Opposing the National Telecommunications and Information Administration's
Petition for Rulemaking

August 31, 2020

Introduction

This petition is the product of an unconstitutional Executive Order that seeks to use the FCC as a partisan weapon. The petition, and the Order, attack the constitutionally protected right of social media services to moderate content on their platforms, limiting those services' ability to respond to misinformation and voter suppression in an election year, and depriving their users of access to information and of access to services that operate free from government coercion. Any one of the constitutional, statutory, and policy deficiencies in the NTIA's petition requires that the FCC reject it without further consideration.

CDT's comments focus on three key issues: the unconstitutionality of the Order itself, the FCC's lack of authority to do what the petition asks, and the petition's fundamental errors about the key issue it purports to request action on: content moderation. These issues are fatal to the petition, and, as such, the FCC should reject it. To do otherwise is to act contrary to the Constitution of the United States and especially to the principles of free speech which it enshrines.

CENTER FOR DEMOCRACY & TECHNOLOGY

1. **The FCC should dismiss the NTIA petition because it is unconstitutional, stemming from an unconstitutional Executive Order**

The petition is the result of an unconstitutional attempt by the President to regulate speech through threats and retaliation. Social media services have a constitutionally protected right to respond to hate speech, incitement, misinformation, and coordinated disinformation efforts on their platforms. The President seeks to embroil the FCC in a political effort to coerce social media companies into moderating user-generated content only as the President sees fit. The FCC should reject this unconstitutional and partisan effort in its entirety.

As CDT alleges in our lawsuit challenging the Order for its violation of the First Amendment,[1] the Order seeks to retaliate directly against social media companies that have moderated and commented upon President Trump's own speech. The Order names specific media companies that have, consistent with their community guidelines regarding election-related misinformation, appended messages to the President's misleading tweets linking to accurate third-party information about mail-in voting.[2] The Order directs several federal agencies to begin proceedings with the goal of increasing the liability risk that intermediaries face for such actions.

These threats of liability chill online intermediaries' willingness to engage in fact-checking and other efforts to combat misinformation–and indeed, to host controversial user speech at all. To host users' speech without fear of ruinous lawsuits over illegal material, intermediaries depend on a clear and stable legal framework that establishes the limited circumstances in which they could be held liable for illegal material posted by third-parties. Section 230 has provided just such a stable framework, on which intermediaries rely, since it was enacted by Congress in 1996. Courts have consistently interpreted and applied Section 230, in accordance with their constitutional function to interpret the law.

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[1] Complaint, *Center for Democracy & Technology v. Donald J. Trump* (D.D.C. 2020), *available at* https://cdt.org/wp-content/uploads/2020/06/1-2020-cv-01456-0001-COMPLAINT-against-DONALD-J-TRUMP-filed-by-CENTER-FO-et-seq.pdf.

[2] For example, the Order is framed in part as a response to Twitter's own speech that was appended to President Trump's May 26, 2020, tweet. The Order states President Trump's view that his tweets are being selectively targeted: "Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias." https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[3] Threatening unilateral and capricious changes to the structure and function of Section 230 directly threatens intermediaries' ability and willingness to host people's speech, and to respond to misinformation and other potentially harmful content consistent with their community guidelines.

The President's unconstitutional desire to chill speech is clear in the Order itself, and the NTIA's petition clearly aims to advance that goal. For example, the NTIA proposes that the FCC effectively rewrite Section 230 to deny its liability shield to any intermediary that is "...commenting upon, or editorializing about content provided by another information content provider."[4] This perhaps reflects a fundamental misunderstanding of the law: intermediaries have never been shielded from liability under Section 230 for content that they directly create and provide–that is, where they are the information content provider. But the sort of content explicitly targeted by the Order–accurate information about the security and integrity of voting systems–could not credibly be considered illegal itself. Thus, the Order, and now the NTIA petition, seek to suppress that kind of information by revoking intermediaries' Section 230 protection for hosting *user-generated content*, solely on the basis that the intermediary has also posted its own lawful speech.

In practice, this would mean that any fact-checking or independent commentary that an intermediary engages in would also expose it to potential liability for defamation, harassment, privacy torts, or any other legal claim that could arise out of the associated user-generated content. It would be trivially easy for bad actors intent on sowing misinformation about the upcoming election, for example, to pair whatever inaccurate information they sought to peddle with inflammatory false statements about a person, or harassing commentary, or publication of their personal information. Intermediaries would face the difficult choice of staying silent (and letting several kinds of abuse go unaddressed, including lies about how to vote) or speaking out with accurate information and also exposing themselves to lawsuits as an entity "responsible, in whole or in part, for the creation or development of" illegal content that they are specifically seeking to refute.

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[3] *See, e.g., Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–93 (N.D. Cal. 2015); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Green v. America Online,* 318 F.3d 465, 470-71 (3d Cir. 2003).

[4] National Telecommunications & Information Administration, *Petition for Rulemaking of the NTIA* (July 27, 2020), 42, *available at* https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "Petition").

The Order's efforts to destabilize the Section 230 framework, and thus coerce intermediaries into editorial practices favorable to the President, violate the First Amendment. The First Amendment prohibits the President from retaliating against individuals or entities for engaging in speech.[5] Government power also may not be used with the intent or effect of chilling protected speech,[6] either directly or by threatening intermediaries.[7]

The Order has other constitutional deficiencies. It runs roughshod over the separation of powers required by the Constitution: Congress writes laws, and courts–not independent agencies– interpret them. Congress may, of course, delegate rulemaking authority to the FCC, but, as discussed below, it has not done so here.[8]

The FCC should not be drawn any further into the President's unconstitutional campaign to dictate the editorial practices of the private online service providers that host individuals' online speech. Although it is couched in the language of free speech, the petition would have the Commission regulate the speech of platforms, and by extension, the speech to which internet users have access. The FCC should deny this petition.

[5] *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.") (internal citations omitted).

[6] "Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment." *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (citing *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 794 (1988)).

[7] *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" constitutes "informal censorship" that violates the First Amendment).

[8] *See* Harold Feld, *Could the FCC Regulate Social Media Under Section 230? No.* Public Knowledge, (August 14, 2019) https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/.

2. Even if it were not constitutionally infirm, the FCC should dismiss the NTIA petition because the FCC has no statutory authority to "clarify" Section 230.

a. The text and structure of Section 230 require no agency implementation.

Section 230 is entirely self-executing. There is nothing in the statute requiring agency implementation: no directions to the FCC, not even a mention of the FCC or any other regulatory agency. Instead, the statute is a clear statement of how courts should treat intermediaries when they face claims based on content provided by users. Beyond its unconstitutional origin, the NTIA's petition asks the Commission to do something Congress did not authorize: to interpret the meaning of a provision giving explicit instructions to courts. That the NTIA asks the Commission to act on Section 230 by issuing regulations also conflicts with the statute's statement that the policy of the United States is to preserve the open market of the internet, unfettered by federal regulation.[9] The Commission has cited this provision as potential support for its deregulatory actions regarding net neutrality, as demonstrated in the Restoring Internet Freedom docket.[10] It would be wildly contradictory and inconsistent for the FCC to suggest that it now has authority to issue rules under the very statute it said previously should leave the internet "unfettered" from regulation. The Commission should decline to take any further action on this petition.

b. Nothing in the Communications Act authorizes the FCC to reimagine the meaning or structure of Section 230.

The petition says the FCC has authority where it does not. It tries to draw a false equivalence between other statutory provisions under Title II (47 U.S.C. §§ 251, 252, and 332), claiming that because the FCC has authority to conduct rulemakings addressing those provisions, it must also be able to do so to "implement" Section 230.[11] But the petition mischaracterizes the nature of those provisions and the extent of the FCC's authority under Section 201.

[9] 47 U.S.C. 230(b)(2).
[10] In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4467 (2017).
[11] Petition at 17.

First, Section 201 gives the FCC broad power to regulate telecommunications services.[12] This part of the Act is titled "Common carrier regulation," while the Executive Order is about an entirely different set of companies, the "interactive computer services" who moderate content as intermediaries. Because the FCC's authority under Section 201 pertains only to common carriers, the FCC's authority to "implement" Section 230 must then either be limited to Section 230's impact on common carriers, or dismissed as a misunderstanding of the scope of FCC authority under Section 201.

Second, all three of the other provisions cited by the NTIA to support its theory of FCC authority directly address common carriers, not intermediaries that host user-generated content.[13] Therefore, the Commission's authority to conduct rulemakings to address these Sections (332, 251, 252) derives from Section 201's broad grant of authority to implement the act ***for the regulation of common carriers***. But Section 230 has nothing to do with telecommunications services or common carriers.[14]

Unlike these other provisions, Section 230 does not even mention the FCC. This omission is not accidental–as discussed above, there is simply nothing in Section 230 that asks or authorizes the FCC to act. A rulemaking to "clarify" the statute is plainly inconsistent with what Congress has written into law.

Moreover, the NTIA takes a particularly expansive view of Congressional delegation to agencies that also misrepresents the role of statutory "ambiguity" in an agency's authority. The NTIA claims the Commission has authority because Congress did not explicitly foreclose the FCC's power to issue regulations interpreting Section 230. But an assessment of agency authority begins with the opposite presumption: that Congress meant only what it said. Agencies only have the authority explicitly granted by statute, unless ambiguity warrants agency action. No such ambiguity exists here, as reflected by decades of consistent judicial interpretation.[15]

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[12] 47 U.S.C. § 201.
[13] 47 U.S.C. § 251 sets out the duties and obligations of telecommunications carriers; 47 U.S.C. § 252 describes procedures for negotiation, arbitration, and approval of agreements between telecommunications carriers; 47 U.S.C. § 332(c) prescribes common carrier treatment for providers of commercial mobile services.
[14] 47 U.S.C. § 230. The statute addresses only "interactive computer services" and "information services," which may not be treated as common carriers according to *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[15] *See* footnote 3.

For the FCC to determine it has authority here, it must first ignore the intent of Congress and then contradict the Chairman's own approach toward congressional delegation. Chairman Pai has said that, when Congress wants the FCC to weigh in, it says so. "*Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (e.g., "[t]he Commission shall prescribe regulations to implement the requirements of this subsection" or "the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section"), and it has done so more generally (e.g., "[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e Communications] Act"). Congress did not do either in section 706.*"[16] Although we disagree with the Chairman's assessment with respect to Section 706 (which says "the Commission shall...take immediate action to promote deployment...by promoting competition,") the Commission cannot now take the opposite approach and find that it has authority in a provision that contains no instructions (or even references) to the Commission.[17]

Make no mistake, rewriting the statute is exactly what the petition (and the Executive Order) seek, but the FCC should reject this unconstitutional effort.

c. The FCC has disavowed its own authority to regulate information services.

"*We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here*." Restoring Internet Freedom Order at para. 267.

The FCC has disavowed its ability and desire to regulate the speech of private companies, in part basing its policy justifications for internet deregulation on this rationale.[18] Moreover, it recently revoked its own rules preventing internet service providers from exercising their power as gatekeepers through such acts as blocking, slowing, or giving preferential treatment to specific content, on the rationale that

[16] Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5971 (2015).
[17] 47 U.S.C. 1302(b).
[18] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order* (hereinafter, "RIF Order"), 33 FCC Rcd 311, paras. 1-2 (2018).

internet service providers are "information services" whom the FCC cannot regulate in this way.[19] While CDT fundamentally disagrees with the Commission's characterization of internet service providers as "information services,"[20] the Commission cannot have it both ways. It would be absurd for the FCC to claim regulatory authority over intermediaries of user-generated content when it has said repeatedly that it lacks regulatory authority over providers of internet access. The FCC has never claimed regulatory authority over the content policies of social media services or other edge providers, and NTIA's attempt to force this inconsistency flies in the face of agency precedent and common sense.

3. The FCC should dismiss the NTIA petition because the petition is fundamentally incorrect on the facts.

If the constitutional and statutory authority problems were not enough to warrant dismissal of this petition–which they are–the factual errors in the NTIA's petition reflect a fundamental misunderstanding of the operation of content moderation at scale. This is yet another reason to reject the petition.

As an example, the petition states that "[W]ith artificial intelligence and automated methods of textual analysis to flag harmful content now available ... platforms no longer need to manually review each individual post but can review, at much lower cost, millions of posts."[21] It goes on to argue that, because some social media companies employ some automation in their content moderation systems, the entire rationale for Section 230 has changed.[22] This is wrong. "Artificial intelligence" is a general concept that does not describe concrete technologies currently in use in content moderation. Some providers may use automated systems that employ relatively simple technology, like keyword filters, to help screen out unwanted terms and phrases, but such filters are notoriously easy to circumvent and lack any kind of

[19] RIF Order, 33 FCC Rcd at 407-08, para 161.
[20] In the matter of Restoring Internet Freedom, WC Docket 17-108, *Amended Comments of the Center for Democracy & Technology* (July 19, 2017), available at https://cdt.org/wp-content/uploads/2017/07/CDT-2017-FCC-NPRM-Amended-Comment.pdf.
[21] Petition 4-5. The source that NTIA cites for this statement, the 2019 Freedom on the Net Report, in fact is discussing the risks to human rights from overbroad government surveillance of social media--one of those threats being the *inaccuracy* of automated tools in parsing the meaning of speech. *See, e.g.,* Marissa Lang, "Civil rights groups worry about government monitoring of social media", San Francisco Chronicle (October 25, 2017), *available at* https://www.sfchronicle.com/business/article/Civil-rights-groups-worry-about-government-12306370.php.
[22] Petition at 12-15.

consideration of context.[23] Content moderation also requires much more than textual analysis, and automated analysis of images, video, and audio content present distinct technical challenges.[24]

Some of the largest online services do use more sophisticated machine learning classifiers as part of their systems for detecting potentially problematic content,[25] but, as CDT and others have explained, these automated tools are prone to inaccuracies that disproportionately affect under-represented speakers.[26] A tool designed to detect "toxicity" in online comments may not be able to parse the nuances in communication of a small, tight-knit community (such as the drag queen community)[27] and may identify benign comments as "toxic" and warranting takedown. Automated content analysis is no substitute, legally or practically, for human evaluation of content.

The NTIA fundamentally misapprehends the state of technology and the complexities of hosting and moderating user-generated content at scale. Content filters do not, and cannot, create the presumption that intermediaries are able to reliably and effectively pre-screen user-generated content in order to detect illegal material. Any policy proposals built on that presumption are destined to fail in practice and in the courts.

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[23] *See* N. Duarte, E. Llansó, A. Loup, *Mixed Messages? The Limits of Automated Social Media Content Analysis* (November 2017), https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf.

[24] E. Llansó, J. van Hoboken, P. Leerssen & J. Harambam, *Artificial Intelligence, Content Moderation, and Freedom of Expression* (February 2020), *available at* https://www.ivir.nl/publicaties/download/AI-Llanso-Van-Hoboken-Feb-2020.pdf. For example, tools to detect images and video depicting nudity often use "flesh tone analysis" to identify a high proportion of pixels in an image or frame that meet certain color values. These tools can generate false positives when analyzing desert landscape scenes and other images that happen to include those color values. *Id.* at 6.

[25] For a discussion of the use of automation in content moderation by several major social media services, *see* Facebook, *Community Standards Enforcement Report* (August 2020), https://transparency.facebook.com/community-standards-enforcement; Twitter, *An update on our continuity strategy during COVID-19* (April 1, 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html; Youtube, *Community Guidelines enforcement* (August 2020): https://transparencyreport.google.com/youtube-policy/removals.

[26] *Supra* n.24; *see also,* Brennan Center, *Social Media Monitoring* (March 2020), https://www.brennancenter.org/our-work/research-reports/social-media-monitoring.

[27] Internet Lab, *Drag queens and Artificial Intelligence: should computers decide what is 'toxic' on the internet?* (June 28, 2019), https://www.internetlab.org.br/en/freedom-of-expression/drag-queens-and-artificial-intelligence-should-computers-decide-what-is-toxic-on-the-internet/.

CENTER FOR DEMOCRACY & TECHNOLOGY

Conclusion

The FCC is not an arbiter of online speech. If it attempts to assume that role, it will be violating the First Amendment and many other provisions of law. The only way forward for the FCC is to reject the petition and end this attack on free speech and free elections in America.

Respectfully submitted,

Emma Llanso, Director, Free Expression Project

Stan Adams, Open Internet Counsel

Avery Gardiner, General Counsel

August 31, 2020

Before the

Federal Communications Commission

Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	)	RM No. 11862

COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE

September 2, 2020

Prepared by:

Patrick Hedger
Research Fellow

Introduction

On behalf of the Competitive Enterprise Institute ("CEI"), I respectfully submit these comments to the Federal Communications Commission ("FCC") in response to the the National Telecommunications & Information Administration's ("NTIA") Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended (RM No. 11862) ("The NTIA petition" or "NTIA's petition").

CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective. It is our view that the NTIA petition is extremely problematic on process grounds. This comment letter will briefly address our concerns. Ultimately we recommend FCC reject NTIA's petition outright.

Process Objections

In 2015, then-Commissioner Ajit Pai took a stance that ought to hold in this instance. Writing in his dissent to the *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 ("*Open Internet Order*"), Pai stated the following:

> "This isn't how the FCC should operate. We should be an independent agency making decisions in a transparent manner based on the law and the facts in the record. We shouldn't be a rubber stamp for political decisions made by the White House."[1]

[1] Dissenting Statement of Commissioner Ajit Pai Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, accessed at https://www.fcc.gov/document/fcc-releases-open-internet-order/pai-statement

Now-Chairman Pai was responding to blatant pressure by President Obama on FCC to adopt Title II, or *de facto* public utility classification of Internet service providers in order to preserve the amorphous concept of "net neutrality."[2] Then-Chairman Tom Wheeler even testified before Congress that President Obama's open support for Title II changed his thinking on the matter.[3]

Chairman Pai and others were right to object to a president openly steering the agenda of a supposed independent regulatory agency like the FCC. As NTIA's own website states, "The Federal Communications Commission (FCC) is an independent Federal regulatory agency responsible directly to Congress."[4]

Such agencies are indeed explicitly designed to not "rubber stamp political decisions made by the White House."

While all decisions by a politician, including a president, are fundamentally political, NTIA's petition goes a step beyond what Pai lamented in his dissent on the *Open Internet Order*. President Obama had expressed his support for "net neutrality" as early as 2007.[5] His pressure on

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[2] Press Release, Free Press, "President Obama Calls for Title II as the Best Way to Protect Real Net Neutrality," November 10, 2014 https://www freepress.net/news/press-releases/president-obama-calls-title-ii-best-way-protect-real-net-neutrality

[3] Ryan Knutson, "FCC Chairman Says Obama's Net Neutrality Statement Influenced Rule," The Wall Street Journal, March 17, 2015, https://www.wsj.com/articles/fcc-chairman-says-obamas-net-neutrality-statement-influenced-rule-1426616133

[4] National Telecommunications and Information Administration website, accessed at https://www.ntia.doc.gov/book-page/federal-communications-commission-fcc on September 2, 2020

[5] President Obama's Plan for a Free and Open Internet, accessed at https://obamawhitehouse.archives.gov/net-neutrality on September 2, 2020

FCC stemmed from a long-held difference of opinion on policy, not any sort of direct political challenge to him, especially considering that President Obama's most-overt lobbying for the kind of changes made in the *Open Internet Order* came during his second term.

NTIA's petition all-but outright asks FCC to rubber stamp a political priority of the White House. As it states at the outset, NTIA's petition is "in accordance with Executive Order 13925 (E.O. 13925)[.]"[6] In E.O. 13925, President Trump references specific firms and instances where content moderation decisions were made contrary to his own political agenda:

> "Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called 'Site Integrity' has flaunted his political bias in his own tweets."[7]

If Congress established FCC to be independent of the policy agenda of the president, then it certainly did not intend for FCC to become a campaign arm of the president. For this reason

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[6] Petition for Rulemaking of the National Telecommunications and Information Administration, In the Matter of Section 230 of the Communications Act of 1934, July 27, 2020 https://ecfsapi.fcc.gov/file/10803289876764/ntia_petition_for_rulemaking_7.27.20.pdf

[7] E.O. 13925 of May 28, 2020, Preventing Online Censorship, https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship

alone, it would be entirely inappropriate for FCC to accept and consider this petition. It would dramatically erode the credibility of any claim of the Commission's independence going forward, not to mention one of the bedrock arguments against the *Open Internet Order,* as largely-reversed by the 2017 *Restoring Internet Freedom Order*.

In the hypothetical case that the requests of the NTIA petition found their genesis entirely within FCC, there would still be major constitutional hurdles.

Nowhere does Congress provide FCC authority to regulate under Section 230. NTIA's petition claims FCC's power to interpret Section rests under Section 201(b) of the Communications Act.[8] However, 201(b) explicitly only applies to services that have been declared common carriers.[9] Section 230, on the other hand, applies to "interactive computer services" and "information content providers." According to the D.C. Circuit Court, as held in *Verizon v. FCC*, these services may not be treated as common carriers.[10] Therefore, Section 201(b) authority has nothing to do with Section 230.

FCC itself acknowledged in the *Restoring Internet Freedom Order* that Section 230 is not a license to regulate:

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8 Petition for Rulemaking of the National Telecommunications and Information Administration, In the Matter of Section 230 of the Communications Act of 1934, July 27, 2020, https://ecfsapi fcc.gov/file/10803289876764/ntia_petition_for_rulemaking_7.27.20.pdf (pages 15-16)

9 Federal Communications Commission Memorandum and Order, Bruce Gilmore, Claudia McGuire, The Great Frame Up Systems, Inc., and Pesger, Inc., d/b/a The Great Frame Up v. Southwestern Bell Mobile Systems, L.L.C., d/b/a Cingular Wireless, September 1, 2005, File No. EB-02-TC-F-006 (page 4)

10 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

> "We are not persuaded that Section 230 of the Communications Act grants the Commission authority that could provide the basis for conduct rules here. In *Comcast,* the DC Circuit observed that the Commission there 'acknowledge[d] that Section 230(b)' is a 'statement [ ] of policy that [itself] delegate[s] no regulatory authority.'"[11]

Conclusion

The facts are that FCC is an independent regulatory agency, answerable to Congress, not the president. The NTIA petition is a direct product of President Trump's E.O. 13925, a nakedly-political document. Congress has granted FCC no power to reinterpret or regulate under Section 230. For these reasons, any FCC action in accordance with the requests of NTIA would cost the agency's credibility on several matters, including its independence, only to ultimately fail in court. The FCC should reject the NTIA's petition and take no further action on the matter.

Respectfully submitted,

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[11] Restoring Internet Freedom Order, 83 FR 7852, paragraph 290, accessed at: https://www.federalregister.gov/d/2018-03464/p-290

A copy of the above comments was served via First Class Mail on September 2, 2020 upon:

Douglas Kinkoph
National Telecommunications and Information Administration Herbert C. Hoover Building (HCHB)
U.S. Department of Commerce 1401 Constitution Avenue, NW Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
Section 230 of the Communications Act Of 1934	)	Docket No. RM-11862

COMMENT OF THE COPIA INSTITUTE OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

I. Preliminary Statement

The NTIA petition must be **rejected**. The rulemaking it demands represents an unconstitutional power grab not authorized by any statute. It also represents bad policy. The petition is rife with misstatements and misapprehensions about how Section 230 operates and has been interpreted over the years. The most egregious is at page 14 of the petition:

"[L]iability shields can deter entrance."

Not only is that statement utterly incorrect, but if any of the recommendations NTIA makes were to somehow take on the force of law, it is these changes themselves that would be catastrophic to new entrants. Far from vindicating competitive interests, what NTIA proposes would be destructive to them, as well as the First Amendment interests of Internet users and platforms. Every policy value NTIA suggests it cares about in its petition, including speech and competition, would be hurt by giving any of its language suggestions the force of law. In this comment the Copia Institute explains why.

II. About the Copia Institute

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com, an online publication that has chronicled technology law and policy for more than 20 years. These efforts are animated by the belief in the importance of promoting innovation and expression and aimed at educating lawmakers, courts, and other regulators, as well as innovators, entrepreneurs, and the public, on the policy choices needed to achieve these values. The Copia Institute regularly files regulatory comments, amicus briefs, and other advocacy instruments on subjects ranging from freedom of expression, platform liability, patents, copyright, trademark, privacy, innovation policy and more, while Techdirt has published more than 70,000 posts commenting on these subjects. The site regularly receives more than a million page views per month, and its posts have also attracted more than a million reader comments—itself user-generated speech that advances discovery and discussion around these topics. Techdirt depends on Section 230 to both enable the robust public discourse found on its website and for its own speech to be shared and read throughout the Internet.[1]

III. Argument

A. FCC action to codify amendments to statutory language are unconstitutional.

The Constitution vests the power to legislate with Congress.[2] Consistent with that authority Congress passed Section 230. That statutory language has been in force for more than 20 years. Even if it were no longer suited to achieve Congress's intended policy goals,[3] or even if those policy goals no longer suited the nation,[4] it is up to Congress, and only

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[1] See Comment of Michael Masnick, founder and editor of Techdirt for further insight in how Section 230 makes his small business possible.

[2] U.S. Const. art. 1, § 1.

[3] As this comment explains, *infra*, the original language is well-suited to meeting its objectives, and to the extent that any improvements might be warranted to better achieve those policy goals, none of the language proposed by the NTIA would constitute an effective improvement. Rather, it would all exacerbate the problems the NTIA complains of.

[4] Even the NTIA concedes that free speech and competition that Congress hoped to foster when it passed Section 230 remain desirable policy goals. *See*, *e.g.*, NTIA Petition at 6.

Congress, to change that statutory language to better vindicate this or any other policy value.

The United States Supreme Court recently drove home the supremacy of Congress's legislative role. In *Bostock v. Clayton County, Ga.* the Supreme Court made clear that courts do not get to rewrite the statute to infer the presence of additional language Congress did not include.[5] This rule holds even when it might lead to results that were not necessarily foreseen at the time the legislation was passed.[6] Courts do not get to second guess what Congress might have meant just because it may be applying that statutory text many years later, even after the world has changed. Of course the world changes, and Congress knows it will when it passes its legislation. If in the future Congress thinks that a law hasn't scaled to changed circumstances it can change that law. But, per the Supreme Court, courts don't get to make that change for Congress. The statute means what it says, and courts are obligated to enforce it the way Congress wrote it, regardless of whether they like the result.[7]

While the *Bostock* decision does not explicitly spell out that agencies are prohibited from making changes to legislation, the Constitution is clear that legislating is the domain of Congress. If Article III courts, who are charged with statutory interpretation,[8] do not get to read new language into a statute, there is even less reason to believe that Article II Executive Branch agencies get to either.

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[5] *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1754 (2020) ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.").

[6] *Id.* at 1737 ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[7] *Id.* at 1753 ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.").

[8] *Marbury v. Madison*, 5 U.S. 137 (1803).

But that is what NTIA is attempting to do with its petition to the FCC: usurp Congress's power to legislate by having the FCC overwrite the original language Congress put into the statute with its own and give this alternative language the force of law. Even if Congress had made a grievous error with its statutory language choices back in 1996 when it originally passed the law, even if it had been bad policy, or even if it was language that failed to achieve Congress's intended policy, it is not up to the FCC or any other agency to fix it for Congress. Even if Congress's chosen language simply no longer meets its intended policy goals today, or the policy goals have evolved, it is still not up to any agency to change it.

If the statute is to change, it is Congress's job to make that policy decision and implement the appropriate language that will achieve it. It is not the job of the FCC, NTIA, or any other member of the Executive Branch[9] to claim for itself the power to legislate, no matter how well-intentioned or how much better its language or policy choices might be.

But, as explained further below, these recommendations are not better. The petition is rife with inaccuracies, misunderstandings, and contradictory policy goals. Under the best of circumstances the FCC should not speak here. And these are hardly the best.

Congress's legislative goal to foster online speech and innovation with Section 230 was a good one. Furthermore, the language it chose to implement this policy was well-suited to meet it then, and it remains well-suited to meet it now. Allowing the Executive Branch to overwrite this chosen language with the alternate language it proposes would turn the statute into an entirely different law advancing entirely different policy goals than Congress intended when it passed Section 230 in order to ensure that the Internet could continue to grow to be vibrant and competitive. And it would do it at their expense.

The NTIA petition must therefore be **rejected**.

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[9] *See* Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020).

B. The NTIA's recommendation for language changes to Section 230 are misguided and counter-productive.

The NTIA's petition is full of mistakes and misunderstandings about Section 230, its operation, its intended policy goals, and how courts have interpreted it over the past two decades. But none are as profoundly misguided as the statement that "liability shields can deter [market] entrance." In reality, the exact opposite is true.

Liability shields are critical to enabling new market entrants. Without them the barriers to entry for new Internet platforms and services can be insurmountable. If Internet platforms and services could be held liable for their users' activity, as soon as they took on users, they would also take on potentially crippling liability. Even if ultimately there is nothing legally wrong with their users' activity, or even if they would not ultimately be found liable for it, the damage will have already been done just by having to take on the defense costs.

What is critically important for policymakers to understand is that liability shields are about more than ultimate liability. Litigation in the United States is cripplingly expensive. Even simply having a lawyer respond to a demand letter can cost four figures, answering complaints five figures, and full-blown litigation can easily cost well into the six or even seven figures.[10] And those numbers presume a successful defense. Multiply this financial risk by the number of users, and scale it to the volume of user-generated content they create, and the amount of financial risk a new platform would face is staggering. Few could ever afford to enter the market, assuming they could even get capitalized in the first place. Needed investment would be deterred, because instead of underwriting platforms' future success, investors' cash would be more likely spent underwriting legal costs.

We know this market-obliviating risk is not hypothetical because we can see what happens in the fortunately still-few areas where Section 230 is not available for Internet

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[10] *See* Engine, Section 230 Cost Report (last accessed Sept. 2, 2020), http://www.engine.is/s/Section-230-cost-study.pdf.

platforms and services. For instance, if the thing allegedly wrong with user-supplied content is that it infringes an intellectual property right, Section 230 is not available to protect the platform.[11] In the case of potential copyright infringement, the Digital Millennium Copyright Act provides some protection,[12] but that protection is much more limited and conditional. Lawsuits naming the platforms as defendants can rapidly deplete the them and drive them to bankruptcy, even when they might ultimately not be held liable.

A salient example of this ruinous reality arose in *UMG v. Shelter Capital*.[13] In this case UMG sued Veoh Networks, a video-hosting platform similar to YouTube, for copyright infringement. Eventually Veoh Networks was found not to be liable, but not before the company had been bankrupted and the public lost a market competitor to YouTube.[14] Indeed, as that case also demonstrates, sometimes driving out a competitor may itself be the goal of the litigation.[15] Litigation is so costly that lawsuits are often battles of attrition rather than merit. The point of Section 230 is to protect platforms from being obliterated by litigiousness. It is likely a policy failure that Section 230 does not cover allegations of intellectual property infringement because it has led to this sort of market harm. But in its recommendations the NTIA does not suggest plugging this hole in its coverage. Instead it demands that the FCC make more.

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[11] 47 U.S.C. § 230(e)(2).
[12] *See* 17 U.S.C. § 512.
[13] *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006 (9th Cir. 2013).
[14] Peter Kafka, Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/ (describing how the startup platform in UMG v. Shelter Capital, supra, could not get funding and thus went out of business while it was litigating the lawsuit it later won).
[15] *See*, *e.g.*, Dmitry Shapiro, UNCENSORED – A personal experience with DMCA, The World Wide Water Cooler (Jan. 18, 2012), available at https://web.archive.org/web/20120119032819/http://minglewing.com/w/sopapipa/4f15f882e2c68903d2000004/uncensored-a-personal-experience-with-dmca-umg ("UMG scoffed at their responsibilities to notify us of infringement and refused to send us a single DMCA take down notice. They believed that the DMCA didn't apply. They were not interested in making sure their content was taken down, but rather that Veoh was taken down! As you can imagine the lawsuit dramatically impacted our ability to operate the company. The financial drain of millions of dollars going to litigation took away our power to compete, countless hours of executive's time was spent in dealing with various responsibilities of litigation, and employee morale was deeply impacted with a constant threat of shutdown.").

If we are unhappy that today there are not enough alternatives to YouTube we only have ourselves to blame by having not adequately protected its potential competitors so that there today could now be more of them. Limiting Section 230's protection is certainly not something we should be doing more of if we actually wish to foster these choices. The more Section 230 becomes limited or conditional in its coverage, the more these choices are reduced as fewer platforms are available to enable user activity.

This point was driven home recently when Congress amended Section 230 with FOSTA.[16] By making Section 230's critical statutory protection more limited and conditional, it made it unsafe for many platforms that hoped to continue to exist to remain available to facilitate even lawful user expression.[17]

We cannot and should not invite more of these sorts of harms that reduce the ability for Americans to engage online. Therefore we cannot and should not further limit Section 230. But this limitation is exactly what the NTIA calls for in its petition with each of its proposed language changes. And thus this depletion of online resources is exactly what will result if any of this proposed language is given effect. The NTIA is correct that there should be plenty of forums available for online activity. But the only way to achieve that end is to **reject** every one of the textual changes it proposes for Section 230.

C. The NTIA's recommendation for language changes to Section 230 are misguided and counter-productive.

In its petition the NTIA alleges that changes are needed to Section 230 to vindicate First Amendment values. In reality, the exact opposite is true. Not only would the changes proposed by the NTIA limit the number of platforms available to facilitate user expression,[18] and their ability to facilitate lawful speech,[19] but its animus toward existing

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[16] Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA").
[17] Craigslist notably turned off its online personals section in response to FOSTA. See https://www.craigslist.org/about/FOSTA. It also prohibited the advertisements of lawful services. *Woodhull Freedom Foundation v. U.S.*, 948 F. 3d 363, 374 (D.C. Cir. 2020) (finding that a masseuse who could no longer advertise on Craigslist had standing to challenge FOSTA).
[18] See discussion *supra* Section III.B.
[19] *Id.*

platforms' moderation practices ignores their First Amendment rights to exercise that editorial discretion. The changes the NTIA proposes, purposefully designed to limit that editorial discretion, would thus unconstitutionally offend these rights if put into effect.

An initial failing here is a lack of understanding of what Section 230 protects. It is not just the large, commercial platforms the NTIA takes issue with; Section 230 protects everyone, including ordinary Internet users.[20] Because it is not just large commercial platforms that intermediate third-party content; individual people can too, and Section 230 is just as much about insulating them as it does the larger platforms.[21]

For example, individuals with Facebook posts may allow comments on their posts. If one of those comments happens to be wrongful in some way, the Facebook user with the parent post is not liable for that wrongfulness. Section 230 makes clear that whoever imbued the content with its wrongful quality is responsible for it, but not whoever provided the forum for that content.[22] It isn't just Facebook that offered the forum for the content; so did the Facebook user who provided the parent post, and both are equally protected.

It's easy to see, however, that a Facebook user who allows comments on their post should not be obligated to keep a comment that they find distasteful, or be forced to delete a comment they enjoy. The First Amendment protects those decisions.

It also protects those decisions even if, instead of Facebook, it was the person's blog where others could comment, or an online message board they host. The First Amendment would protect those decisions even if the message board host monetized this user activity, such as with ads. And it would protect those decisions if the message board host ran it with their friend, perhaps even as an corporation. That editorial discretion would remain.[23]

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[20] *See*, *e.g.*, *Barrett v. Rosenthal*, 146 P. 3d 510 (Cal. 2006).

[21] Section 230 also protects online publications, including newspapers, that accept user comments. Were the FCC to take upon itself the authority to change Section 230, it would inherently change it for media that has never been part of its regulatory purview, including traditional press.

[22] *See*, *e.g.*, *Force v. Facebook, Inc.*, 934 F. 3d 53 (2d. Cir. 2019).

[23] Requiring "transparency" into these editorial decisions also itself attacks this discretion. The NTIA's proposal to require "transparency" into these editorial decisions also itself attacks this discretion. True discretion includes the ability to be arbitrary, but having to document these decisions both chills them and raises issues of compelled speech, which is itself constitutionally dubious.

The changes the NTIA proposes are predicated on the unconstitutional notion that there is some size a platform or company could reach that warrants it to be stripped of its discretion. There is not, and NTIA suggests no Constitutional basis for why companies of a certain size should be allowed to have their First Amendment rights taken from them. Even if there were some basis in competition law that could justify different treatment of some platforms, simply being large, successful, and popular does not make a business anti-competitive. Yet the NTIA offers no other principled rationale for targeting them, while also proposing changes to the functioning language of Section 230 that will hit far more platforms than just the large ones that are the targets of the NTIA's ire.

Indeed, as long as new platforms can continue to be launched to facilitate user expression, stripping any of their editorial discretion is insupportable. The "irony" is that these attempts to strip these platforms of their Section 230 protection and editorial discretion are what jeopardizes the ability to get new platforms and risks entrenching the large incumbents further. The NTIA is correct to want to encourage greater platform competition. But the only way to do that is to ensure that platforms retain the rights and protections they have enjoyed to date. It is when we meddle with them that we doom ourselves to the exact situation we are trying to avoid.

IV. Conclusion

For the forgoing reasons, the NTIA petition must be **rejected**.

Dated: September 2, 2020

Respectfully submitted,

/s/ Catherine R. Gellis

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Before the
Federal Communications Commission
Washington, D.C.

In the matter of	
Section 230 of the Communications Act of 1934	RM-11862

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the Federal Communications Commission (FCC)'s August 3, 2020 Public Notice,[1] the Computer & Communications Industry Association (CCIA)[2] submits the following comments. By requesting that the FCC regulate based on Section 230, NTIA has acted beyond the scope of its legal authority. Granting this request would similarly exceed the authority delegated to the FCC. The FCC has no role in regulating speech on the Internet, and NTIA's proposed narrowing of the phrase "otherwise objectionable" would lead to the proliferation of objectionable content online.

I. Federal Agencies Must Act Within the Bounds of Their Statutory Grant of Authority

On May 28, 2020, the Administration issued an Executive Order on "Preventing Online Censorship,"[3] which directed NTIA to file a petition for rulemaking with the FCC requesting that the FCC expeditiously propose regulations to clarify elements of 47 U.S.C. § 230. As an independent government agency,[4] the FCC is not required to adhere to the directives of the

[1] Public Notice, Consumer & Governmental Affairs Bureau – Petition for Rulemakings Filed, Report No. 3157 (Aug. 3, 2020), *available at* https://docs fcc.gov/public/attachments/DOC-365914A1.pdf.

[2] The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 45 years, to promoting innovation and preserving full, fair and open competition throughout our industry. Our members employ more than 1.6 million workers and generate annual revenues in excess of $870 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[3] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[4] Dissenting Statement of Commissioner Robert M. McDowell, Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 20, 2008) ("We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers."), *available at* https://docs fcc.gov/public/attachments/FCC-08-183A6.pdf; *see also* Harold H. Bruff, *Bringing the Independent*

Executive branch. By issuing this Executive Order, the President has taken the extraordinary step of directing NTIA to urge the FCC, an independent government agency, to engage in speech regulation that the President himself is unable to do.

As explained below, NTIA is impermissibly acting beyond the scope of its authority because an agency cannot exercise its discretion where the statute is clear and unambiguous, and the statute and legislative history are clear that the FCC does not have the authority to promulgate regulations under Section 230.

A. NTIA Is Acting Beyond Its Authority

NTIA's action exceeds what it is legally authorized to do. NTIA has jurisdiction over telecommunications[5] and advises on domestic and international telecommunications and information policy. NTIA is charged with developing and advocating policies concerning the regulation of the telecommunications industry, including policies "[f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets."[6] Nowhere does the statute grant NTIA jurisdiction over Internet speech. When Congress has envisioned a regulatory role for NTIA beyond its established telecommunications function, it has done so explicitly.[7] Therefore, NTIA's development of a proposed national regulatory policy for Internet speech is outside the scope of NTIA's Congressionally-assigned responsibilities. Accordingly, the very impetus for this proceeding is an organ of the Administration acting beyond the scope of its authority.

B. An Agency Cannot Exercise Its Discretion Where the Statute Is Clear and Unambiguous

Even worse, NTIA's *ultra vires* action involves a request that another agency exceed its authority. NTIA's petition either misunderstands or impermissibly seeks to interpret Section 230 because it requests the FCC to provide clarification on the unambiguous language in 47 U.S.C. § 230(c)(1) and § 230(c)(2). Specifically, NTIA's petition asks for clarification on the terms "otherwise objectionable" and "good faith." The term "otherwise objectionable" is not unclear because of the applicable and well-known canon of statutory interpretation, *ejusdem generis*, that

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Agencies in from the Cold, 62 Vand. L. Rev. En Banc 62 (Nov. 2009), *available at* https://www.supremecourt.gov/opinions/URLs_Cited/OT2009/08-861/Bruff_62_Vanderbilt_Law_Rev_63.pdf (noting the independent agencies' independence from Executive interference).

[5] 47 U.S.C. § 902(b).

[6] 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I).

[7] *See, e.g.*, 17 U.S.C. § 1201(a)(1)(C) (providing a rulemaking function which articulates a role for "the Assistant Secretary for Communications and Information of the Department of Commerce", which is established as the head of NTIA under 47 U.S.C. § 902(a)(2)).

the general follows the specific. Propounding regulations regarding the scope of "good faith" would confine courts to an inflexible rule that would lend itself to the kind of inflexibility that was not intended by the original drafters of the statute.[8] Courts have consistently held that Section 230 is clear and unambiguous, with the Ninth Circuit noting that "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition" and there is a "consensus developing across other courts of appeals that § 230(c) provides broad immunity. . . ."[9]

Under *Chevron*, when a statute is clear and unambiguous an agency cannot exercise discretion but must follow the clear and unambiguous language of the statute.[10] The Administration cannot simply, because it may be convenient, declare a statute to be unclear and seek a construction that is contrary to the prevailing law and explicit Congressional intent.

C. The FCC Does Not Have the Authority to Issue Regulations Under Section 230

Neither the statute nor the applicable case law confer upon the FCC any authority to promulgate regulations under 47 U.S.C. § 230. The FCC has an umbrella of jurisdiction defined by Title 47, Chapter 5. That jurisdiction has been interpreted further by seminal telecommunications cases to establish the contours of the FCC's authority.[11]

Title 47 is unambiguous about the scope of this authority and jurisdiction. The FCC was created "[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*"[12] and "[t]he provisions of this chapter shall apply to all interstate and foreign

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[8] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. . . . We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents.").

[9] *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (citing *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 328-29 (4th Cir. 1997)); *see also Fair Housing Coun. of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) ("The *plain language* and structure of the CDA *unambiguously* demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes *congressional intent* and violates the spirit and serendipity of the Internet.") (*emphasis added*).

[10] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[11] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

[12] 47 U.S.C. § 151 *(emphasis added)*.

communication by wire or radio".[13] The statute does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC's jurisdiction. What NTIA proposes is not included in the scope of the FCC's enabling statute, which only gives the FCC the following duties and powers: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary *in the execution of its functions*."[14] Additionally, Section 230(b)(2) explicitly provides that the Internet should be "unfettered by Federal or State regulation."[15] Even the legislative history of 47 U.S.C. § 230, including floor statements from the sponsors, demonstrates that Congress explicitly intended that the FCC should not be able to narrow these protections, and supports "prohibiting the FCC from imposing content or any regulation of the Internet."[16] Indeed, the FCC's powers have regularly been interpreted narrowly by courts.[17]

The FCC's 2018 Restoring Internet Freedom Order (the Order),[18] reaffirms that the FCC is without authority to regulate the Internet as NTIA proposes. In the Order, the FCC said it has no authority to regulate "interactive computer services."[19] Although the FCC considered Section 230 in the context of net neutrality rules, its analysis concluded that Section 230 renders further regulation unwarranted.[20] If the FCC had sufficiently broad jurisdiction over Internet speech under Section 230 to issue NTIA's requested interpretation, litigation over net neutrality, including the *Mozilla* case, would have been entirely unnecessary. As *Mozilla* found, agency

[13] 47 U.S.C. § 152 *(emphasis added)*.
[14] 47 U.S.C. § 154(i) *(emphases added)*.
[15] 47 U.S.C. § 230(b)(2).
[16] H.R. Rep. No. 104-223, at 3 (1996) (Conf. Rep.) (describing the Cox-Wyden amendment as "protecting from liability those providers and users seeking to clean up the Internet and prohibiting the FCC from imposing content or any regulation of the Internet"); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (rebuking attempts to "take the Federal Communications Commission and turn it into the Federal Computer Commission", because "we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet").
[17] *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[18] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.
[19] *Id*. at 164-66.
[20] *Id*. at 167 and 284.

"discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating."[21]

The D.C. Circuit explained in *MPAA v. FCC* that the FCC can only promulgate regulations if the statute grants it authority to do so.[22] There is no statutory grant of authority as Section 230 does not explicitly mention the FCC, the legislative intent of Section 230 does not envision a role for FCC, and the statute is unambiguous. As discussed above, the FCC lacks authority to regulate, and even if it had authority, the statute is unambiguous and its interpretation would not receive any deference under *Chevron*.

II. The FCC Lacks Authority to Regulate The Content of Online Speech

Even if the FCC were to conclude that Congress did not mean what it explicitly said in Section 230(b)(2), regarding preserving an Internet "unfettered by Federal or State regulation",[23] NTIA's petition asks the FCC to engage in speech regulation far outside of its narrow authority with respect to content. Moreover, NTIA's request cannot be assessed in isolation from the Administration's public statements. It followed on the President's claim, voiced on social media, that "Social Media Platforms totally silence conservatives voices."[24] The President threatened that "[w]e will strongly regulate, or close them down, before we can ever allow this to happen."[25] NTIA's petition must therefore be analyzed in the context of the President's threat to shutter American enterprises which he believed to disagree with him.

Within that context, NTIA's claim that the FCC has expansive jurisdiction — jurisdiction Commission leadership has disclaimed — lacks credibility. When dissenting from the 2015 Open Internet Order, which sought to impose limited non-discrimination obligations on telecommunications infrastructure providers with little or no competition, FCC Chairman Pai characterized the rule as "impos[ing] intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have".[26] It is inconsistent to contend that the FCC has no legal authority to impose limited non-discrimination obligations on infrastructure providers operating under the supervision of public service and utilities

[21] *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, J., concurring).
[22] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[23] 47 U.S.C. § 230(b)(2).
[24] Elizabeth Dwoskin, *Trump lashes out at social media companies after Twitter labels tweets with fact checks*, Wash. Post (May 27, 2020), https://www.washingtonpost.com/technology/2020/05/27/trump-twitter-label/ (orthography in original).
[25] *Id*.
[26] Dissenting Statement of Commissioner Ajit Pai, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, *available at* https://www fcc.gov/document/fcc-releases-open-internet-order/pai-statement, at 1.

commissions, while also arguing that the FCC possesses authority to enact retaliatory content policy for digital services whose competitors are a few clicks away.

The FCC has an exceptionally limited role in the regulation of speech, and the narrow role it does possess is constrained by its mission to supervise the use of scarce public goods. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, whatever limited speech regulation powers the FCC possesses are rooted in "the scarcity of radio frequencies."[27] No such scarcity exists online.

Rather than engaging with the precedents that narrowly construe the FCC's role in content policy, NTIA's petition relies upon a criminal appeal, *Packingham v. North Carolina*, in asserting that "[t]hese platforms function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[28] But the Supreme Court did not recognize this. The language NTIA quotes from *Packingham* presents the uncontroversial proposition that digital services collectively play an important role in modern society. If there were any doubt whether the *dicta* in *Packingham*, a case which struck down impermissible government overreach, could sustain the overreach here, that doubt was dispelled by *Manhattan Community Access Corp. v. Halleck*.[29] In *Halleck*, the Court held that "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[30]

III. NTIA's Proposal Would Promote Objectionable Content Online

As discussed, neither NTIA nor the FCC have the authority to regulate Internet speech. Assuming arguendo, the FCC did have the authority, NTIA's proposed regulations "interpreting" Section 230 are unwise. They would have the effect of promoting various types of highly objectionable content not included in NTIA's proposed rules by discouraging companies from removing lawful but objectionable content.[31]

Section 230(c)(2)(A) incentivizes digital services to "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively

[27] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[28] Petition for Rulemaking of the Nat'l Telecomms. & Info. Admin. (July 27, 2020), *available at* https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "NTIA Petition"), at 7, note 21 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017)).

[29] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

[30] *Id.* at 1930.

[31] Matt Schruers, *What Is Section 230's "Otherwise Objectionable" Provision?*, Disruptive Competition Project (July 29, 2020), https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/.

violent, harassing, or otherwise objectionable." NTIA, however, would have the term "otherwise objectionable" interpreted to mean "any material that is *similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials"[32] — terms that NTIA's proposed rules also define narrowly — and confine harassment to "any specific person."

Presently, a digital service cannot be subject to litigation when, for example, it determines that the accounts of self-proclaimed Nazis engaged in hate speech are "otherwise objectionable" and subject to termination, consistent with its Terms of Service. Digital services similarly remove content promoting racism and intolerance; advocating animal cruelty or encouraging self-harm, such as suicide or eating disorders; public health-related misinformation; and disinformation operations by foreign agents, among other forms of reprehensible content. Fitting these crucial operations into NTIA's cramped interpretation of "otherwise objectionable" presents a significant challenge.

Under NTIA's proposed rules, digital services therefore would be discouraged from acting against a considerable amount of potentially harmful and unquestionably appalling content online, lest moderating it lead to litigation. Avoiding this scenario was one of the chief rationales for enacting Section 230.[33]

The term "otherwise objectionable" foresaw problematic content that may not be illegal but nevertheless would violate some online communities' standards and norms. Congress's decision to use the more flexible term here acknowledged that it could not anticipate and legislate every form of problematic online content and behavior. There are various forms of "otherwise objectionable" content that Congress did not explicitly anticipate in 1996, but which may violate the norms of at least some online communities. It is unlikely that Congress could have anticipated in 1996 that a future Internet user might encourage dangerous activity like consuming laundry detergent pods, or advise that a pandemic could be fought by drinking bleach. Section 230(c)(2)(A)'s "otherwise objectionable" acknowledges this. Congress wanted to encourage services to respond to this kind of problematic — though not necessarily unlawful — content, and prevent it from proliferating online.

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[32] NTIA Petition, *supra* note 28, at 54 (emphasis supplied).

[33] H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how under recent New York precedent, "the existing legal system provides a massive disincentive" and the Cox-Wyden amendment "will protect them from taking on liability such as occurred in the Prodigy case in New York").

NTIA's proposed rules "clarifying" the phrase "otherwise objectionable" would also open the door to anti-American lies by militant extremists, religious and ethnic intolerance, racism and hate speech. Such speech unquestionably falls within Congress's intended scope of "harassing" and "otherwise objectionable" and thus might reasonably be prohibited by digital services under their Terms of Service. NTIA's petition, however, proposes confining harassment to content directed at *specific* individuals. This tacitly condones racism, misogyny, religious intolerance, and hate speech which is general in nature, and even that which is specific in nature provided the hateful speech purports to have "literary value."

IV. Conclusion

For the foregoing reasons, the FCC should decline NTIA's invitation to issue regulations on Section 230.

Respectfully submitted,

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September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, I caused a copy of the foregoing comments to be served via FedEx upon:

Douglas Kinkoph
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230

/s/ Ali Sternburg
Ali Sternburg

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Public Interest Comment[1] on

The National Telecommunications and Information Administration's

Petition to the Federal Communications Commission

for Rulemaking on Section 230 of the Communications Act

Docket No. RM-11862

September 2, 2020

Jerry Ellig, Research Professor[2]

The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the National Telecommunications and Information Administration's (NTIA's) petition for rulemaking[3] does not represent the views of any particular affected party or special interest, but is designed to help the Federal Communications Commission (FCC) evaluate the effect of the proposal on overall consumer welfare.

The NTIA proposal includes several provisions that would narrow the scope of Internet intermediaries' liability when they remove or restrict access to content provided by others. It would also require the intermediaries to disclose their content moderation policies in a form that is understandable by consumers and small businesses. Those two sentences of course do not capture all of the legal subtleties involved, and this comment takes no position on the legal issues raised by the petition. However, I believe that in deciding whether to propose a regulation in

[1] This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

[2] The author is a research professor at the George Washington University Regulatory Studies Center.

[3] "Petition for Rulemaking of the National Telecommunications and Information Administration," In the Matter of Section 230 of the Communications Act of 1934 (July 27, 2020).

response to the NTIA petition, the FCC should be fully aware of the analysis required to identify the likely economic effects of the NITA proposal and other alternatives the FCC may consider.

The duties of the FCC's Office of Economics and Analytics include preparing "a rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of $100 million or more."[4] Relevant economic effects could be costs, benefits, transfers, or other positive or negative economic effects. A rulemaking based on the NTIA petition would likely require a full benefit-cost analysis.

The rules requested by the NTIA could create significant economic impacts by altering Internet intermediaries' content moderation practices and/or altering investment in new and improved services or innovative new companies. Given the large value consumers receive from Internet intermediaries and the size of investments in this industry, even a small regulation-induced change in the companies' economic incentives would likely generate an annual economic impact exceeding $100 million.

Consumers clearly derive enormous benefits from Internet intermediaries. For example, a 2019 National Bureau of Economic Research (NBER) study estimated that use of Facebook created $213 billion in consumer surplus between 2003 and 2017.[5] Another NBER study estimated that one month of Facebook use creates a total of $31 billion of consumer surplus in the US.[6] Laboratory experiments found that students place significant value on other Internet intermediaries as well.[7] Indeed, since there are 172 million[8] US users of Facebook alone, a regulatory change that altered the average value of the service by just 59 cents per user would have more than $100 million in economic impact. Similarly, a National Economic Research Associates study estimated that adding five seconds of advertising per web search would increase web browsers' ad revenues by about $400 million annually;[9] thus, if a regulatory change led to a two-second increase in advertising per search, the effect would exceed the $100 million threshold.

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[4] Federal Communications Commission, "In the Matter of Establishment of the Office of Economics and Analytics," MD Docket No. 18-3 (adopted January 30, 2018), Appendix.

[5] Eric Byrnjolfsson et. al., "GDP-B: Accounting for the Value of New and Free Goods in the Digital Economy," National Bureau of Economic Research Working Paper 25695 (March 2019), 29.

[6] Hunt Allcott et.al, "The Welfare Effects of Social Media," National Bureau of Economic Research Working Paper No. 25514 (November 2019), 32. The authors caution that this calculation, based on experimental subjects' willingness to accept compensation for deactivating their Facebook accounts, may over-state the value to users because the average compensation users required to forego Facebook after they spent a month without using it fell by 14 percent. Even assuming the lower figure represents users' "true" demand, the consumer surplus number is huge.

[7] Brynjolfsson et. al., *supra* note 5, at 33-38.

[8] Allcott et. al., *supra* note 6, at 5.

[9] Christian M. Dippon, "Economic Value of Internet Intermediaries and the Role of Liability Protections," National Economic Research Associates report produced for the Internet Association (June 5, 2017), 13.

The rule NTIA requests could have economic impacts beyond its direct effect on consumer surplus generated by incumbent firms offering their current suites of services. A 2019 study by the Copia Institute presents some comparisons which suggest that Section 230 liability protections (or similar policies) help companies attract more venture capital investment and improve their chances of survival.[10] The study compares the experience of companies in the US versus the European Union; US digital music companies versus US social media and cloud computing companies; and intermediaries in several other countries where liability protections identifiably changed. This study does not control for other factors that might affect the results, so its conclusions are only suggestive, but the pattern suggests that more extensive data analysis could be informative.[11]

A 2015 study by Oxera took a different approach, combining literature reviews with interviews of 20 experts to assess how liability protections for intermediaries affect intermediary start-ups. It found that stronger liability protections are associated with higher success rates and greater profitability for start-ups.[12]

Whether a regulation-induced change in venture capital funding for Internet intermediaries, or their success rate or profitability, should count as a benefit or a cost depends on whether the current level of startup activity is above or below the economically optimal level. That is a key question a full benefit-cost analysis should help answer. My point here is a much more limited one: the NTIA's proposal could very well affect investment flows by more than $100 million annually.

Thus, in one way or another, the NTIA proposal is likely to have economic effects that exceed the $100 million annual threshold and hence require a full benefit-cost analysis.

[10] Michael Masnick, "Don't Shoot the Message Board: How Intermediary Liability Harms Investment and Innovation," Copia Institute and NetChoice (June 2019).

[11] The results are thus analogous to the comparisons of raw data on broadband investment discussed in the Restoring Internet Freedom order. See FCC, *In the Matter of Restoring Internet Freedom: Declaratory Ruling, Report and Order* (Adopted Dec 14, 2017; Released Jan. 4, 2018), para. 92.

[12] "The Economic Impact of Safe Harbours on Internet Intermediary Startups," study prepared for Google (February 2015).

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	)))))	RM No. 11862

Comment of
Engine

SEPTEMBER 2, 2020

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Introduction and Executive Summary

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues.

Given Engine's focus on startups, entrepreneurship, innovation, and competition, we are particularly troubled by the anti-competitive impacts of NTIA's proposed changes to Section 230. While hundreds of pages could—and likely will—be written on the factual inaccuracies contained in the petition regarding Section 230's legislative history and subsequent legal interpretation, our comments will focus on the ways in which NTIA's petition for rulemaking is predicated on wholly unsupported allegations about how Section 230 shapes the Internet ecosystem and how its proposed changes to Section 230 would harm smaller and newer platforms and their ability to compete in the market.

The petition fundamentally misunderstands several things about both Section 230 and today's Internet ecosystem. The petition claims that Section 230 has become unnecessary in a world with a mature Internet industry and that the law's legal framework has anticompetitive effects. Both of those claims are untrue. The Internet ecosystem has not changed so dramatically since the law's passage, and it is still made up of the new, innovative, and competition companies that Congress sought to protect in 1996. At the same time, the dramatic rise in the increase of usage of Internet platforms means that perfect content moderation has

become—despite the petition's completely unsupported claims to the contrary—more impossible every day, increasingly making the legal liability limitations under Section 230 a necessity for a platform of any size that hosts user-generated content. Section 230 is what allows new and small platforms to launch and compete in the market, and making the changes envisioned by the petition would make it harder to launch and compete—a burden that will fall disproportionately on startups.

The rewriting of Section 230 envisioned by the petition is especially egregious because the NTIA has failed to identify any justification for that rewriting. The petition acknowledges that there is no empirical evidence to support its repeatedly disproven claims that major social media platforms are exhibiting "anti-conservtative bias," and it doesn't even attempt to justify the absurd claim that limiting platforms' legal liability somehow reduces competition, including by deterring new companies from entering the market. Without managing to accurately identify a competitive or consumer harm currently being suffered, the petition envisions significant policy changes to a fundamental law that will ultimately hurt competition and consumers.

The petition is predicated on unsupported and inaccurate claims about Section 230 and the Internet ecosystem

Simply put, NTIA's petition asks the FCC to usurp the roles of Congress and the judiciary to rewrite settled law. Such sweeping changes to a foundational legal regime that has allowed private companies to build the most powerful medium for human expression and economic growth in history are beyond the scope of the FCC's proper authority. If, as the

petition claims, courts have applied Section 230 in a manner contrary to Congress's intent for decades, the responsibility for updating the regime lies with Congress, not the FCC.

Putting aside the obvious deficiencies with NTIA's theory of FCC authority, the petition fails to provide a single plausible policy justification for its attempt to rewrite Section 230. Rather than citing empirical evidence, the petition relies on ahistorical reinterpretations of Congress's intent in passing 230, debunked conspiracies about alleged political bias amongst social media companies, and economically illiterate theories of startup competition to paper over its true motivation: to punish platforms over political grievances. The President's May 28, 2020 executive order and resulting NTIA petition came after a social media company correctly flagged a post from the President as inaccurate, and they are little more than an attempt to "work the refs" by threatening private Internet companies with a flood of meritless litigation if they do not allow politically advantageous falsehoods to proliferate on their platforms. If policy changes to Section 230's critical framework are deemed necessary, Congress should take a comprehensive view of the current Internet ecosystem and the impacts any policy changes would have on that ecosystem, rather than take at face value the many misrepresentations presented in the petition.

The Internet ecosystem is made up of thousands of smaller, newer online platforms that continue to rely on Section 230's commonsense liability framework

The petition, like many critics of Section 230, incorrectly asserts that the Internet industry has grown so large and mature that its companies no longer need Section 230's legal framework as they did when the law was written in 1996:

> "Times have changed, and the liability rules appropriate in 1996 may no longer further Congress's purpose that section 230 further a 'true diversity of political discourse'" when "[a] handful of large if large social media platforms delivering varied types of content over high-speed Internet have replaced the sprawling world of dial-up Internet Service Providers (ISPs) and countless bulletin boards hosting static postings."[1]

This could not be further from the truth; the Internet ecosystem is not a monolith, and anyone with a connection to the open Internet can find—and even contribute to—a sprawling world of diverse platforms hosting user-generated content.

Despite policymakers' and the media's attention on a few, large companies, the Internet is made up of thousands of small, young companies. Section 230 helped create the legal framework that supports the Twitters and Facebooks of the world—where a platform can host an untold amount of user-generated content without being held liable for each individual piece of content it did not create—but it also supports any website or online service that hosts user-generated content. From file sharing services, to e-commerce websites with third-party sellers, to comment sections across the Internet, Section 230 enables all kinds of platforms to host all kinds of user communities creating all kinds of content.

Take, for instance, Newsbreak.com, a news aggregation website cited in the petition for its reposting of an article from Breitbart.com.[2] Newsbreak.com posts previews of news stories

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[1] Petition of the National Telecommunications and Information Administration, Docket RM-11862, (July 27, 2020), at 4. Available at https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf ("Petition").

[2] Petition at 26.

from around the Internet and allows users to comment on those stories. A quick scan of the website's front page shows stories with thousands of comments on each of them. Section 230 protects Newsbreak.com from being held liable for anything posted in those comments. At the same time, Newsbreak.com also has a "Commenting Policy" prohibiting comments containing hate speech, harassment, and misrepresentations.[3] The applicability of Section 230 to Newsbreak.com's comments does not—and should not—change based on the steps they take to keep their platform free from hate speech, harassment, and misrepresentations, but that's the kind of detrimental policy change the petition envisions.

Additionally, the argument that the Internet has matured past the stage of being a "nascent industry"—and therefore can survive such a dramatic shift in the legal landscape as the fundamental rethinking of Section 230 as envisioned by the petition—fails to take into account that as Internet usage grows, so does the amount of content on the Internet that would need to be individually moderated were it not for Section 230. Twitter is a perfect example of that kind of typical explosion in content. The year after Twitter's launch, "[f]olks were tweeting 5,000 times a day in 2007. By 2008, that number was 300,000, and by 2009 it had grown to 2.5 million per day."[4] By 2010, the site was seeing 50 million tweets per day.[5] By 2013, Twitter was averaging more than 500 million tweets per day.[6] What was impractical within a year of the company's launch—monitoring and moderating, if necessary, every one of the 5,000 tweets per day—was

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[3] News Break, "News Break Commenting Policy" (June 2020), available at https://help.newsbreak.com/hc/en-us/articles/360045028691-News-Break-Commenting-Policy

[4] Twitter, "Measuring Tweets" (Feb. 22, 2010), available at https://blog.twitter.com/official/en_us/a/2010/measuring-tweets.html

[5] Id.

[6] Twitter, "New Tweets per second record, and how!" (Aug. 16, 2013), available at https://blog.twitter.com/engineering/en_us/a/2013/new-tweets-per-second-record-and-how.html

impossible within a year and would be inconceivable now. Section 230 creates the legal certainty a platform needs to host user-generated content whether or not it has the ability to monitor and moderate a small number of posts at launch of hundreds of millions of posts after a few years of growth.

At the same time the petition misunderstands the nature and scope of online content moderation in the modern era, it also overstates the ability of technological tools to handle content moderation at scale and the availability of those tools. The petition repeatedly makes claims like, "[m]odern firms…with machine learning and other artificial techniques [sic], have and exercise much greater power to control and monitor content and users,"[7] and overestimates the efficacy of technological content moderation tools. "[W]ith artificial intelligence and automated methods of textual analysis to flag harmful content now available...platforms no longer need to manually review each individual post but can review, at much lower cost, millions of posts,"[8] the petition states, citing only—and rather ironically—a 2019 Freedom House report that warns about the dangers of the use of social media analytics tools by government officials for mass surveillance. The report notes that technologies exist to "map users' relationships through link analysis; assign a meaning or attitude to their social media posts using natural-language processing and sentiment analysis; and infer their past, present, or future locations" in ways that risk civil liberties of social media users. However, nothing in the report suggests that Internet platforms have within reach well-functioning tools to automatically, consistently, and perfectly identify problematic speech as nuanced as defamation, hate speech, harassment, or the many other types of dangerous speech that platforms prohibit to protect their

[7] Petition at 9.
[8] Petition at 5.

users. In fact, the report's policy recommendations include "[p]reserving broad protections against intermediary liability" and warn that "[p]olicies designed to enforce political neutrality would negatively impact 'Good Samaritan' rules that enable companies to moderate harmful content without fear of unfair legal consequences and, conversely, would open the door for government interference."

In reality, perfect content moderation tools do not exist, and the tools that do exist cannot be used alone, especially without chilling user speech. Human moderation will always be a necessary step to understand the context of speech, and, as exemplified by Twitter's growth pattern described above, human moderation of each piece of user-generated content quickly becomes impossible and carries its own steep costs. Even where platforms have supplemented their human moderation efforts with automated content moderation tools, they have been extremely expensive, and they work imperfectly, often removing legal content and other speech that does not violate a platform's acceptable use policies.

Take, for instance, YouTube's work on ContentID, a tool to help rightsholders identify copyrighted material uploaded to the video sharing site. According to the company, YouTube's parent company Google had invested more than $100 million in ContentID as of 2018. The problems with ContentID incorrectly flagging non-infringing content are well documented,[9] despite that substantial investment from one of the world's largest technology companies. The petition even recognizes the overwhelming costs of building content moderation tools, acknowledging that the largest companies have "invested immense resources into both

[9] Washington Journal of Law, Technology & Arts, "YouTube (Still) Has a Copyright Problem" (Feb. 28, 2019), available at https://wjlta.com/2019/02/28/youtube-still-has-a-copyright-problem/

professional manual moderation and automated content screening for promotion, demotion, monetization, and removal."[10] Content moderation tools, and the "immense resources" needed to build them, are far out of the reach of startups, which launch with, on average, $78,000 in funding.[11] If automated content filtering tools are not the silver bullet—as the petition implies—for the biggest and best positioned technology companies in the world, they will certainly fail to solve all content moderation problems for small and new Internet platforms.

The petition's claims about alleged online platform bias are unsupported and cannot support its proposed rewrite of Section 230

In laying out the case for its sweeping reimagining of Section 230, the petition cherry picks one of the statute's findings, claiming that "Congress's purpose [in enacting] section 230 [was to] further a 'true diversity of political discourse,'" but that "times have changed, and the liability rules appropriate in 1996 may no longer further" this purpose.[12] Putting aside the fact that the petition conveniently omits that one of the statute's other stated policy goals "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"[13] militates against its proposed rulemaking, the petition fails to provide any evidence that Section 230 no longer promotes a diversity of political discourse.

[10] Petition at 13.
[11] Fundable, "A Look Back at Startup Funding in 2014," (2014), available at https://www.fundable.com/learn/resources/infographics/look-back-startup-funding-2014
[12] Petition at 4.
[13] 47 U.S.C. § 230(b)(2).

The petition is full of unsupported claims that "large online platforms appear to engage in selective censorship that is harming our national discourse"[14] and that "tens of thousands of Americans have reported, among other troubling behaviors, online platforms 'flagging' content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse,"[15] but it does not present any evidence supporting these claims. Transparently, it attempts to buttress its assertions about "tens of thousands" of reports of Internet platform censorship by citing to the EO, which, not surprisingly, itself fails to provide any evidence beyond conclusory allegations that any such censorship (or even the purported complaints themselves) actually happened.[16] The best evidentiary support the petition can muster for these claims of political bias amongst online platforms is an unsupported assertion from FCC Commissioner Brendan Carr that "there's no question that [large social media platforms] are engaging in editorial conduct, that these are not neutral platforms," and a reference to a pending lawsuit against a single online platform alleging bias.[17] Factually baseless claims—even from an FCC Commissioner—cannot support such a drastic reversal of settled law.

NTIA reveals its hand by openly admitting that it has no factual basis for its assertions of political bias, admitting that "few academic empirical studies exist of the phenomenon of social

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[14] Petition at 7.
[15] Id. at 25.
[16] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020), available at https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship; Petition at 7.
[17] Id. at 7-8.

media bias."[18] Curiously, it does not actually cite any of these studies, likely because they undermine the petition's thesis. In fact, as two studies from Media Matters for America regarding the reach of partisan content on Facebook demonstrated, "right-leaning and left-leaning pages had virtually the same engagement numbers based on weekly interactions (reactions, comments, and shares) and interaction rates (a metric calculated by dividing the total number of interactions per post on an individual page by the number of likes the page has)."[19] Far from proving that Internet companies engage in widespread censorship of political speech they disapprove of, these studies make clear what is evident to anyone who spends any amount of time on the Internet: opinions from across the political spectrum are widely available online to anyone at any time. The only reason that this diversity of political opinion has flourished online is because Section 230 prevents websites from being sued out of existence for user speech—particularly political speech—that it cannot fully control. Removing 230's protections to promote "a diversity of political discourse" online is like fasting to prevent hunger. Contrary to the petition's claims, Section 230 is more necessary than ever for fostering a diverse range of speech online.

The petition's claims that Section 230 inhibits competition are absurd

To support its claim that Section 230 is outdated, the petition argues "that the liability protections appropriate to internet firms in 1996 are different because modern firms have much

[18] Id.
[19] Natalie Martinez, "Study: Analysis of top Facebook pages covering American political news," Media Matters (July 16, 2018), available at https://www.mediamatters.org/facebook/study-analysis-top-facebook-pages-covering-american-political-news; Natalie Martinez, "Study: Facebook is still not censoring conservatives," Media Matters (April 9, 2019), available at https://www.mediamatters.org/facebook/study-facebook-still-not-censoring-conservatives.

greater economic power, play a bigger, if not dominant, role in American political and social discourse,"[20] and that in light of these market developments, "liability shields [like Section 230] can deter market entrance."[21] The notion that protections from virtually unlimited legal liability could somehow be bad for early-stage startups is so perplexing that NTIA predictably makes no effort to justify this claim with anything beyond mere supposition. It is, of course, simple common sense that as the cost of launching and operating a company increases, the rate of new firm formation will decrease. One study of investors found that 78 percent of venture capitalists said they would be deterred from investing in online platforms if new regulations increased secondary legal liability for hosting user content.[22] Given the high cost of litigation, even a slight increase in legal exposure will have a significant negative impact on startup success. Both Congress and the judiciary recognized the problems of unlimited legal exposure for early-stage companies when they passed and interpreted Section 230, respectively.[23] NTIA has failed to identify any changed circumstances in the intervening years to suggest that subjecting early-stage companies to such unlimited legal exposure would now enhance startup formation and competition.

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[20] Petition at 9.
[21] Id. at 14.
[22] Evan Engstrom, Matthew Le Merle, and Tallulah Le Merle, "The Impact of Internet Regulation on Early Stage Investment," Fifth Era and Engine Advocacy, (November 2014), at 5. Available at https://bit.ly/2YKwmnz. Because this study specifically focused on potential increased secondary liability for copyright infringement, it is likely that increasing secondary liability for a much larger range of non-IP claims as NTIA recommends would have an even larger negative impact on investment in new entrants.
[23] Jeff Kosseff, "What's in a Name? Quite a Bit, If You're Talking About Section 230," Lawfare, (Dec. 19, 2019), available at https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230

Equally implausibly, the petition argues that Section 230 hinders competition because it blocks lawsuits to enforce "interactive computer services' contractual representations about their own services," such that "interactive computer services cannot distinguish themselves."[24] According to NTIA's petition, because "[c]onsumers will not believe, nor should they believe, representations about online services," websites cannot "credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns."[25] As with its other arguments, the petition's claims are not supported by evidence or logic.

NTIA's argument is based on the notion that websites are routinely failing to comply with their own terms of service and representations regarding their content moderation practices—an allegation that the petition does not support with any evidence. Moreover, even if the petition were able to cite examples of platforms not complying with their "contractual representations about their own services," it has failed to present any evidence that consumers make decisions about which platforms to use because of their stated content moderation practices rather than, say, the quality of their services. The petition also fails to explain the supposed causal connection between some platforms allegedly failing to comply with their terms of service and a decrease in platform competition. If consumers do not believe that incumbents are fairly moderating user content in accordance with their stated policies, new entrants will be able to compete by deploying better content moderation policies. This is, of course, how the free market works. NTIA's petition seems to believe that users would be more willing to bring costly lawsuits with specious damages claims against platforms that fail to comply with their stated moderation practices than simply switch to a different platform that abides by its moderation

[24] Petition at 26.
[25] Id.

commitments. Not only does the petition fail to present any evidence at all supporting such a bizarre theory of consumer behavior, but it makes the absurd claim that the FCC would bolster competition by drastically changing the legal framework created by Section 230.

Changing Section 230, especially as envisioned by the petition, will do harm to innovation and competition in the online platform space

Section 230 remains one of the most pro-competition laws supporting the U.S. Internet ecosystem. Changing the legal framework that allows Internet platforms to host user-generated content, especially as envisioned by petition, will harm the ability of small and new companies to launch and compete without providing any meaningful benefits to consumers or competition. To quote Chairman Pai, NTIA's petition for rulemaking isn't merely "a solution in search of a problem—it's a government solution that creates a real-world problem."[26]

Modifying Section 230 in the way envisioned by the petition will cement large platforms' market power by making it too costly for smaller companies to host user-generated content. Even with the current legal framework created by Section 230, it costs platforms tens of thousands of dollars per lawsuit to fend off meritless litigation when such a lawsuit can be dismissed at the earliest stages.[27] If platforms lose the ability to quickly dismiss those lawsuits, the costs quickly run into the hundreds of thousands of dollars per lawsuit.[28] At the same time, the petition evisions creating regulatory burdens in the form of transparency requirements around

[26] Oral Dissenting Statement of Commissioner Ajit Pai Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, at 5. Available at https://bit.ly/3lHMujI
[27] Evan Engstrom, "Primer: Value of Section 230," Engine (Jan. 31, 2019), available at https://www.engine.is/news/primer/section230costs
[28] Id.

"content-management mechanisms" and "any other content moderation...practices" that will fall disproportionately on smaller companies. Only the largest, most established platforms with the deepest pockets will be able to compete in a world with a modified Section 230. That will mean there are dramatically fewer places on the Internet where users can go to express themselves, making it harder for diverse viewpoints to find a home online.

Not only would the changes envisioned by the petition make it harder for small and new platforms to launch and grow, changes to the application of the term "otherwise objectionable" would create a legal framework that disincentivizes differentiation in content moderation practices as a way to appeal to unique communities of users online. Take, for instance, the Reddit community "Cats Standing Up." This subreddit features user-submitted images of cats standing up. Their community rules prohibit content that is "[a]nything that isn't a housecat standing."[29] If Section 230's framework were changed such that Reddit would be held liable for user-generated content if they remove content not specifically defined by a narrowed reading of Section 230 (c)(2)(A), they would open themselves up to risk by allowing communities to have rules such as those enabling communities to cater to users who only want to see images of cats standing up. Platforms that launch with the goal of catering to specific communities by hosting specific kinds of content would have to risk legal liability for all user-generated content—which, as established above, is impossible to police in real-time—if they want to engage in content moderation to do anything besides prevent against content that is illegal, obscene, lews, lascivious, filthy, excessively violent, or harassing. This would have the effect of hindering

[29] Reddit, "Cats Standing Up" (March 14, 2012), available at https://www.reddit.com/r/CatsStandingUp/

competition by making it prohibitively expensive to host only specific kinds of user-generated content, or by forcing platforms to forfeit their ability to host niche communities online.

Conclusion

Leaving aside the worthy criticisms of the petition for its inaccuracies surrounding the FCC's authority and the congressional intent of Section 230, the petition fails to identify a justification for such dramatic changes to the law, especially changes that would so disproportionately harm small and new companies and hamper competition in the Internet ecosystem. If the goal of the petition is to "promot[e] Internet diversity and a free flow of ideas" and address a "particularly troubling" alleged lack of competition, the federal government should be strengthening Section 230's legal framework, not taking politically-motivated shots at the law that underpins the creation and sharing of user-generated speech online.

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via First Class mail upon:

Douglas Kinkoph
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for
Commerce for Communications and Information

/s/ 

Evan Engstrom

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	**)**	
Section 230 of the Communications Decency Act	**)**	**RM-11862**
	)	

COMMENTS OF CONSUMER REPORTS
RE: THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

September 2, 2020

Consumer Reports (CR) is an independent, nonprofit member organization that works side by side with consumers for truth, transparency, and fairness in the marketplace. In defense of those principles, CR strongly encourages the Federal Communications Commission (FCC) to reject the National Telecommunications and Information Administration's (NTIA) petition for rulemaking[1] submitted to the FCC on July 27, 2020 regarding Section 230 of the Communications Decency Act of 1996 (Section 230).[2]

Neither the NTIA nor the FCC have the legal authority to act on these issues. Moreover, platforms should be encouraged to exercise more moderation of their platforms to remediate fraud, harassment, misinformation, and other illegal activity; the policies requested in the NTIA petition for rulemaking would make it more difficult for platforms to police for abuse, resulting in a worse internet ecosystem for consumers.

I. Introduction and Background

On May 26, 2020 the President tweeted two statements about mail-in voting.[3] Twitter applied fact-checks—adding constitutionally-protected speech—to those tweets.[4] Six days later, the President issued the Executive Order on Preventing Online Censorship,[5] which directed the Secretary of Commerce, by way of the NTIA, to file the Petition which would further encourage an FCC rulemaking to reinterpret Section 230. The regulatory proposals offered to the FCC by the NTIA would introduce contingencies to, and ultimately reduce, the scope of immunities that Section 230 grants to interactive computer services. If enacted, these new measures would expose platforms to significantly more liability than they currently face and could thereby disincentivize content moderation and editorial comment

[1] National Telecommunications & Information Administration, Petition for Rulemaking of the NTIA (July 27, 2020), 42, available at https://www ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf ("Petition").
[2] 47 USC § 230 (*available at:* https://www.law.cornell.edu/uscode/text/47/230).
[3] Kate Conger and Davy Alba, "Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting" New York Times (May 26, 2020), https://www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots html.
[4] *Id.*
[5] Executive Order on Preventing Online Censorship (May 28, 2020), *available at:* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/. ("Executive Order").

expressed by platforms—the very sort of actions taken by Twitter that seem to have spurred the Executive Order in the first place.

Notwithstanding Twitter's very sporadic fact-checks, online platforms generally fail consumers in the quality of their content moderation. Contrary to the Executive Order's presumed intent, the law needs to do more, not less, to encourage the transparent remediation of harmful content on internet platforms. Any honest appraisal of the amount of online misinformation in 2020 reveals the failure by platforms to better mitigate the viral spread of lies, dangerous conspiracy theories, scams, counterfeit goods, and other falsehoods.[6]

To adequately protect and empower consumers, existing platforms should make efforts to strengthen and improve moderation capacity, technique, nuance, and quality. However, any government-designed incentives to this end, either through the modification of Section 230 or the enactment of alternative regulatory frameworks to better incentivize thoughtful platform moderation is not the job of the NTIA or the FCC. Moreover, the mere exercise of debating the Petition in this proceeding has the potential to chill free expression online, threaten the open internet, and accelerate a myriad of consumer harms caused by inadequate platform moderation that fails to mitigate harmful content.

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[6] Deepa Seetharaman, "QAnon Booms on Facebook as Conspiracy Group Gains Mainstream Traction" Wall Street Journal (August 13, 2020), https://www.wsj.com/articles/qanon-booms-on-facebook-as-conspiracy-group-gains-mainstream-traction-11597367457; *see also* Kaveh Waddell, "Facebook Approved Ads with Coronavirus Misinformation" Consumer Reports (April 7. 2020), https://www.consumerreports.org/social-media/facebook-approved-ads-with-coronavirus-misinformation/; Elyse Samuels, "How Misinformation on WhatsApp Led to a Mob Killing in India" Washington Post (February 21, 2020), https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/; Ryan Felton, "Why Did It Take a Pandemic for the FDA to Crack Down on a Bogus Bleach 'Miracle' Cure?" Consumer Reports (May 14, 2020), https://www.consumerreports.org/scams-fraud/bogus-bleach-miracle-cure-fda-crackdown-miracle-mineral-solution-genesis-ii-church/; *and* Ryan Felton, "Beware of Products Touting False Coronavirus Claims" Consumer Reports (March 9, 2020), https://www.consumerreports.org/coronavirus/beware-of-products-touting-fake-covid-19-coronavirus-claims/. The article highlighted: "...a spot check by CR uncovered a number of questionable products with claims that they help fight and even prevent COVID-19. A brimmed hat with an 'anti-COVID-19 all-purpose face protecting shield' was available for $40. A 'COVID-19 protective hat for women' could be purchased for $6. And if you happened to search for 'COVID-19,' listings for multivitamins and a wide array of e-books on the topic popped up."

As it stands, the NTIA Petition to the FCC has no basis in legitimate constitutional or agency authority. Therefore, the FCC should reject the Petition in its entirety. The Petition's very existence stems from an unconstitutional Executive Order and lacks legal authority to be implemented for two reasons. First, NTIA lacks the authority to file such a petition. Second, the FCC possesses no authority to rulemake on this matter, to interpret section 230, or to regulate platforms. Ultimately, the concerns raised regarding Section 230 are appropriately and best addressed by Congress. As discussed at length in CR's testimony delivered at a House Energy & Commerce hearing earlier this year, and made clear above, we agree that online misinformation is an urgent and crucial issue affecting the online marketplace.[7] However, to punish those platforms who are attempting to mitigate those harms runs counter to public welfare, common sense, and even the underlying intent and purpose of Section 230 immunity.

II. A Lack of Constitutional and Regulatory Authority

The First Amendment prohibits both retaliatory action by government officials in response to protected speech and the use of government power or authority to chill protected speech.[8] The Executive Order's issuance in response to the fact-checks applied to the President's Twitter account make clear that the attempt to alter Section 230 immunity in ways that will open the platforms up to more liability is a punitive retaliatory action. This act alone offends the sensibilities of the First Amendment.

Furthermore, the issuance of the Executive Order, the NTIA's subsequent Petition, and even the FCC's consideration, rather than outright denial of the Petition—are all forms of government action that, taken as a whole, chill constitutionally-protected speech. These efforts represent an executive branch attempt to increase platform content liability because

[7] Testimony of David Friedman, ""Buyer Beware: Fake and Unsafe Products on Online Marketplaces" House Energy and Commerce Committee Hearing, (March 4, 2020), https://advocacy.consumerreports.org/wp-content/uploads/2020/03/HHRG-116-IF17-Wstate-FriedmanD-20200304.pdf.

[8] For an excellent citation of federal court cases that elaborate upon First Amendment protection against government action that chills free speech, *see* footnotes 5-7 found on page 4 of the Comments of the Center of Democracy and Technology, "Opposing the National Telecommunications and Information Administration's Petition for Rulemaking", FCC Docket RM-11862, (August 31, 2020), https://cdt.org/wp-content/uploads/2020/08/CDT-Opposition-to-NTIA-Petition-on-Section-230.pdf ("CDT Comments").

the President disagreed with Twitter's editorial fact-checks. Not only could Twitter be chilled by this action, platforms considering similar mitigation efforts to curtail and fact-check misinformation on their platforms could also be reluctant to exercise their constitutionally-protected free speech rights.

A. The NTIA Lacks Authority to File the Petition

Even if we could presume the Executive Order is constitutionally sound, it is unclear, at best, whether the NTIA maintains the legal authority to file the Petition. The NTIA filed the Petition to the FCC on the basis of its mandate to, "ensure that the views of the executive branch on telecommunications matters are effectively presented to the [Federal Communications] Commission*"*[9] and its authority to, "develop and set forth telecommunications policies pertaining to the Nation's economic and technological advancement and to the regulation of the telecommunications industry."[10] However, "telecommunications" refer specifically to the "transmission" of information,[11] and the cited authorities do not reference "information" or "information services."[12] The NTIA's scope of expertise has been primarily rooted in access to telecommunications services, international telecommunications negotiations, funding research for new technologies and applications, and managing federal agency spectrum use.[13] Even the agency's FY 2020 budget proposal reflects these priorities: undeniably centered on infrastructure, the budget explicitly prioritized broadband availability, spectrum management, and advanced communications research—and, even where policy was concerned, focused on cybersecurity, supply-chain security, and 5G.[14]

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[9] 47 U.S.C. § 902(b)(2)(J).
[10] 47 U.S.C. § 902(b)(2)(I).
[11] 47 USC § 153(50).
[12] 47 U.S.C. § 902(b)(2).
[13] U.S. Congressional Research Service, *The National Telecommunications and Information Administration (NTIA): An Overview of Programs and Funding*, R43866 (May 19, 2017), https://crsreports.congress.gov/product/pdf/R/R43866.
[14] U.S. Department of Commerce, *National Telecommunications and Information Administration FY 2020 Budget as Presented to Congress*, (March 2019), https://www.ntia.doc.gov/files/ntia/publications/fy2020_ntia_congressional_budget_justification.pdf.

Section 230 of the Communications Decency Act, however, concerns the information itself—the content—as published on the internet and moderated by platforms, rather than the technical infrastructure over which that content is passed. Said another way, the NTIA mission centers upon the systems that power technology, not the creative cargo that travels on top of it. Therefore, dabbling with regulations concerning content moderation and liability are well outside the expertise of the NTIA. Perhaps most tellingly, the NTIA has never before seen fit to comment on Section 230—despite nearly a quarter century of vigorous debate since its passage in 1996.[15]

B. The FCC Lacks Authority To Rulemake on Section 230 and Lacks Jurisdiction Over Platforms in Question

The type of rules sought by the NTIA at the President's behest are also outside the scope of the Federal Communications Commission's authority.[16] First and foremost, there is no mention of the FCC in Section 230.[17] As such, there is no grant of Congressional authority for the Commission to promulgate the rules envisioned by the NTIA's Petition. Try as it might, the Petition cannot by fiat create FCC authority to act where no such power exists with respect to Section 230. The simple reality is that Section 230 is a self-executing statute enforced by the courts, and not the FCC.

If the FCC were to agree with and act pursuant to the NTIA's Petition, it would run contrary to the Commission's citation to Section 230 as a reason for liberating internet service providers (ISPs) from internet regulation in the name of preserving an open internet in 2017.[18] Furthermore, the *Restoring Internet Freedom Order (RIFO)* also reclassified ISPs

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[15] Vimeo, Inc. "Petition Of Vimeo, Inc. To Dismiss The National Telecommunications And Information Administration's Petition For Rulemaking," FCC Docket RM-11862, p. 3, (August 4, 2020), https://ecfsapi fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf.

[16] For a fuller discussion of the FCC's lack of authority regarding Sec. 230, *see* Harold Feld, "Could the FCC Regulate Social Media Under Section 230? No." Public Knowledge, (August 14, 2019). https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/.

[17] CDT Comments, p. 6.

[18] In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4467 (2017).

as "information" services rather than "telecommunications" services[19] (CR has strongly argued that ISPs plainly are the latter)—but the NTIA's justification for FCC jurisdiction relies upon the Commission's ability to regulate telecommunications services as common carriers. If an ISP like Comcast or AT&T no longer qualifies as a telecommunications service, then neither, surely, does an edge provider or social media network like Twitter or Google.[20]

Even before *RIFO* was adopted in 2017, the Commission lacked authority to promulgate rules interpreting Section 230. Nearly three years later, the effect of that order further cements the FCC's lack of power to do anything that the NTIA asks of it regarding Section 230. To do otherwise could represent the sort of internet regulation that the Commission feared when it repealed its own net neutrality rules, and would constitute an about-face with respect to FCC authority over the internet ecosystem.

III. Limits on Content Moderation Under Existing Law and the Need for Stronger—Not Weaker—Incentives for Platform Responsibility

While Section 230 broadly immunizes internet platforms for curation and moderation decisions, it is important to note that there are existing legal constraints on platform behavior. If a platform editorializes about someone else's content—as Twitter did when it fact-checked the President's tweet regarding mail-in voting—the platform itself is responsible for that speech. In that case, it may be held liable for its own defamatory content, though American libel laws are famously narrow to accord with our free speech values.[21] If a platform suborns or induces another to behave illegally, it may bear responsibility for its own role in encouraging such behavior.[22] Further, if a platform mislabels or misidentifies another's

[19] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order (hereinafter, "RIF Order"), 33 FCC Rcd 311 (2018).
[20] CDT Comments, p. 6.
[21] Ari Shapiro, "On Libel And The Law, U.S. And U.K. Go Separate Ways" NPR (March 21, 2015), https://www.npr.org/sections/parallels/2015/03/21/394273902/on-libel-and-the-law-u-s-and-u-k-go-separate-ways.
[22] *See Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th. Cir. 2008).

content for commercial advantage, it may violate Section 5 of the Federal Trade Commision (FTC) Act's prohibition on deceptive or unfair business practices.[23]

Indeed, Section 5 may affirmatively *require* some degree of content moderation to protect platform users from harmful content. For at least fifteen years, the FTC has interpreted its Section 5 unfairness authority to require companies to use reasonable data security to prevent third-party abuse of their networks. In a number of other contexts, too, the FTC has interpreted Section 5 to require policing of others' actions: Neovi and LeadClick are just two examples of the FTC holding platforms liable for third-party abuses.[24] Given the vital role that large online platforms play in the modern economy, these companies should have an even greater responsibility to curate and remediate harmful content—even and especially where they have historically done a poor job of addressing such issues.[25]

In many cases, platforms today have material disincentives to moderate deceptive and harmful activity: fake reviews, views, accounts, and other social engagement artificially amplify the metrics by which they are judged by users and investors.[26] Perhaps, in part, it is for this reason that social media sorting algorithms tend to prioritize posts that receive more engagement from users with higher followers—providing further incentives for marketers to use deceptive tactics to augment those numbers.

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[23] *See* Lesley Fair, "A Date With Deception? FTC Sues Match.com For Misleading And Unfair Practices" Federal Trade Commission (September 25, 2019), https://www ftc.gov/news-events/blogs/business-blog/2019/09/date-deception-ftc-sues-matchcom-misleading-unfair-practices.

[24] *See* Footnote 6. *See also* Press Release, "FTC Action Results in Contempt Order Against Online Check Writing Marketers", Fed. Trade Comm'n (Jul. 27, 2012), https://www.ftc.gov/news-events/press-releases/2012/07/ftc-action-results-contempt-order-against-online-check-writing; Press Release, "U.S. Circuit Court Finds Operator of Affiliate Marketing Network Responsible for Deceptive Third-Party Claims Made for Lean-Spa Weight-Loss Supplement" Fed. Trade Comm'n (Oct. 4, 2016), https://www ftc.gov/news-events/press-releases/2016/10/us-circuit-court-finds-operator-affiliate-marketing-network.

[25] Alexandra Berzon, Shane Shifflett and Justin Scheck, "Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products" Wall Street Journal (August 23, 2019), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990; *see also* Olivia Solon, "Facebook Management Ignored Internal Research Showing Racial Bias, Employees Say" NBC News (July 23, 2020), https://www.nbcnews.com/tech/tech-news/facebook-management-ignored-internal-research-showing-racial-bias-current-former-n1234746 https://www.nytimes.com/2019/11/28/business/online-reviews-fake html.

[26] Nicholas Confessore et al., "The Follower Factory*"* New York Times (Jan. 27, 2018), https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots html.

Policymakers should explore solutions that incentivize remediating the worst sorts of harms that platforms currently enable. As currently written and interpreted, Section 230's "Good Samaritan" provision *allows* for good faith moderation, but it does *not* encourage it. Setting aside its lack of legal basis, this Petition wrongly urges the FCC to go in the opposite direction, and could further discourage platforms from taking responsibility for the potential harm that misinformation facilitates. If somehow the NTIA's proposed framework were enacted by the Commission, it would make it considerably more risky and costly for platforms to act on behalf of their users to address illegitimate third-party behavior. Such a policy would exacerbate the many ills caused by online misinformation, and we fear would lead to more, not less, consumer harm.

IV. Conclusion

Ultimately, the power to substantively re-clarify, expand or narrow protections, or otherwise functionally modify Section 230 immunity belongs with our elected representatives in Congress, and even then, should be undertaken with great caution. Subsection (c)(1) of Section 230 has been referred to as "the twenty-six words that created the internet."[27] This statute simultaneously allows smaller online platforms and edge providers to compete by shielding them from ruinous litigation, and allows all platforms to moderate harmful content in accordance with their own terms of use without being deterred by liability for every piece of user-generated content on the platform.

Nevertheless, Congress can and should strengthen the incentives for platforms to carefully moderate harmful or false content on their sites and networks. Lawmakers should also hold platforms responsible, commensurate with their power and resources, for protecting consumers from content that causes demonstrable harm. This is no easy task. Any alteration of Section 230 that risks or reduces the incentive to fact-check or mitigate the damage caused

[27] *See* Jeff Kosseff "The Twenty-Six Words That Created the Internet" Cornell University Press; 1st Edition (April 15, 2019).

by misinformation would be irresponsible legislation with the unintended consequence of increasing, not decreasing, online misinformation.

Consumer access to accurate information is crucial to a safe, fair marketplace, particularly in the midst of a global pandemic and an election cycle fraught with misinformation that leads to real consequences. Yet the authority to weigh these costs and rewrite Section 230 of the Communications Decency Act lies exclusively with Congress. The FCC has no legal authority to do so and the NTIA further lacks the legal authority to file the Petition as directed by the President's Executive Order. For these reasons, the Commission should reject the NTIA Petition in its entirety.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
NTIA Petition for Rulemaking to	)	
Clarify Provisions of Section	)	RM-11862
230 of the Communications Act	)	
Act of 1934, As Amended	)	

COMMENTS OF FREE PRESS

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Executive Summary

Donald Trump's tenure as President of the United States has been marked by attacks on the press, media outlets, and social media companies any time that they have sought to provide context, scrutinize, or even simply cover his statements accurately.[1] The NTIA's petition for rulemaking ("Petition") was born from those corrupt and ignoble impulses.[2] The president, upset after Twitter fact-checked his statements regarding mail-in voting,[3] promulgated an unlawful and unconstitutional executive order that seeks to use the power of the federal government to stifle, censor, and intimidate media companies that criticize him, and to force those same companies to carry and promote favorable content about him and his administration.[4] It is hard to think of actions more inimical to the promise of the First Amendment and the spirit of the Constitution. To protect the rule of law and uphold those values, Free Press has joined a lawsuit challenging the lawfulness of the executive order that began this process.[5]

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[1] *See* Committee to Protect Journalists, *The Trump Administration and the Media* (April 16, 2020) ("The Trump administration has stepped up prosecutions of news sources, interfered in the business of media owners, harassed journalists crossing U.S. borders, and empowered foreign leaders to restrict their own media. But Trump's most effective ploy has been to destroy the credibility of the press, dangerously undermining truth and consensus even as the COVID-19 pandemic threatens to kill tens of thousands of Americans.") https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/.

[2] Petition for Rulemaking of the National Telecommunications and Information Administration, RM-11862 (filed July 27, 2020) ("Petition").

[3] *See, e.g.*, Shirin Ghaffary, "Twitter has Finally Started Fact-Checking Trump," *Vox* (May 26, 2020), https://www.vox.com/recode/2020/5/26/21271210/twitter-fact-check-trump-tweets-mail-voting-fraud-rigged-election-misleading-statements.

[4] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020).

[5] Press Release, Free Press, "Free Press and Allies File Lawsuit Challenging Trump's Executive Order Against Social-Media Companies" (Aug. 27, 2020), https://www.freepress.net/news/press-releases/free-press-and-allies-file-lawsuit-challenging-trumps-executive-order-against.

As such, we are reluctant to engage in this cynical enterprise, intended by the administration to bully and intimidate social media companies into rolling back their content moderation efforts for political speech in the few months before the 2020 presidential election lest they face adverse regulation. The FCC, as Commissioner Rosenworcel said, ought not have taken this bait and entertained a proposal to turn the FCC into "the President's speech police."[6]

Yet, here we are.

The NTIA petition is shoddily reasoned and legally dubious. It unlawfully seeks to radically alter a statute by administrative fiat instead of through the legislative process. It invents ambiguity in Section 230 where there is none,[7] and imagines FCC rulemaking authority where there is none.[8] Lastly, it asks the courts to abide by FCC "expertise" on Section 230 and intermediary liability for speech where there is none (and where the FCC itself disclaims such a role),[9] based on authority that the FCC does not have and jurisdiction it has disavowed.

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[6] Press Release, "FCC Commissioner Jessica Rosenworcel on Section 230 Petition and Online Censorship" (July 27, 2020) ("If we honor the Constitution, we will reject this petition immediately."), https://docs.fcc.gov/public/attachments/DOC-365758A1.pdf.

[7] *See* Eric Goldman, "Comments on NTIA's Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230," (Aug. 12, 2020), https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm.

[8] *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 267 (2017) ("*RIFO*") ("We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here."); *see also* Harold Feld, "Could the FCC Regulate Social Media Under Section 230? No.", (Aug. 14, 2020), https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/.

[9] See, for example, the Commission's public outreach materials that expressly disclaim any such role and declare simply that "[t]he Communications Act prohibits the FCC . . . from making any regulation that would interfere with freedom of speech." Federal Communications Commission, "The FCC and Freedom of Speech," (Dec. 30 2019), https://www.fcc.gov/consumers/guides/fcc-and-freedom-speech.

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Introduction

For over a decade now Free Press has been stalwart in its advocacy that broadband internet access service is a transmission service, or what the Communications Act defines as a "telecommunications service" properly subject to nondiscrimination rules that protect internet users, competition, speech, and the free and open internet.[10] Yet, the Trump FCC's misnamed Restoring Internet Freedom Order ("RIFO") repealed those successful rules for broadband providers, and abandoned the proper Title II authority to institute those rules.

At that time, members of the present majority at the Commission conflated broadband internet access with the content that flows over such access networks; but whatever the folly of such conflation, they doubled down on the (il)logic of their argument, and proclaimed that the FCC should never have decided "to regulate the Internet" at all.[11] Even Commissioner Carr agreed, crowing that the repealed rules represented a "massive regulatory overreach" because they applied nondiscrimination rules to broadband providers, which in Carr's opinion should be treated as information services subject to no such "Internet conduct" rules at all.[12] The attack on conduct rules was premised not only on the same Trump FCC's belief that there was no need for them, but – crucially – that the Commission also had no authority to adopt such rules.

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[10] *See, e.g.*, Comments of Free Press, GN Docket No. 10-127, at 2 (filed July 15, 2010) ("Pursuing a limited Title-II classification restores the Commission's authority to move forward. The factual record and relevant legal precedent unassailably support the conclusion that the proposed policy shift is both necessary and wise. And a limited Title-II classification will uphold the commonly shared principles of universal service, competition, interconnection, nondiscrimination, consumer protection, and reasoned deregulation – principles that created the Internet revolution.").

[11] *See, e.g., RIFO*, Statement of Commissioner Michael O'Rielly.

[12] *See id.*, Statement of Commissioner Brendan Carr.

How times have changed. Though this is perhaps unsurprising, because one of the only consistent aspects of this administration and its appointees is their wild inconsistency. Yet having abdicated and rejected its own authority to adopt such rules for broadband telecommunications providers, the Commission now entertains the notion (at NTIA's behest) that it could adopt such rules after all, only for all information service providers this time. At least insofar as they qualify as "interactive computer services" pursuant to the different statutory definition in Section 230.

Regulating access networks to prevent unreasonable discrimination is still essential to ensuring free speech online, preserving access to diverse points of view and political information of all kinds, and cultivating online communities where people with common interests can meet, organize, and have moderated conversations of their choosing. That's because broadband telecommunications networks provide access to every destination online. But no matter how powerful and popular certain individual destinations on the internet have become, regulating them in the same way makes no sense. Regulating the conversations that happen on the internet, and not the pathways[13] that take us there, is a funhouse mirror version of the FCC's proper role, and it also would thwart all of the NTIA's alleged goals of promoting a diversity of viewpoints and conversations online.

NTIA's Petition reads Section 230 all wrong, in service of the administration's real objective: preventing commentary on and critique of the president's misinformation and unfounded utterances. Specifically, the Petition wrongly claims that the provisions in Section

[13] *See* Matt Wood, "Private: Public Sidewalks on Private Property: Net Neutrality, Common Carriage, and Free Speech," American Constitution Society Blog (Sept. 29, 2015) https://www.acslaw.org/expertforum/public-sidewalks-on-private-property-net-neutrality-common-carriage-and-free-speech/.

230(c)(2)(A), which allows websites to moderate any content they deem "otherwise objectionable," are ambiguous and in need of clarification. Yet this supposed clarification would render that provision a nullity. It would allow interactive computer services (as defined in Section 230 itself) that enable access to third-party content to moderate only when content is already unlawful or already subject to FCC regulation (like pornography or obscenity are).

No other third-party material, if it is lawful, could readily be taken down by platforms were the Commission to accept the Petition's invitation. This lawful-versus-unlawful dichotomy plainly contradicts the statutory text in Section 230. It would effectively end the ability of social media sites to create differentiated services, and forbid them from taking down Nazi, anti-Semitic, racist, and "otherwise objectionable" content that is permitted under the First Amendment. This supposed "clarification" of Section 230, mandated that "good faith" moderation requires leaving such objectionable material up, is awful policy and unlawful too.

I. NTIA's Interpretation Guts One of the Most Important Protections for Online Speech, and Would Curtail Not Promote Diversity of Viewpoint on the Internet.

Despite the emergence of Section 230 reform as a hot-button political issue on both sides of the political aisle,[14] and the Petition's fanciful and evidence-free claims that this statute is somehow suppressing political expression[15] and other views, any claimed harm is swamped by

[14] *See* Adi Robertson, "Lots of Politicians Hate Section 230 - But They Can't Agree on Why," *The Verge* (June 24, 2020), https://www.theverge.com/21294198/section-230-tech-congress-justice-department-white-house-trump-biden.

[15] *See, e.g.*, Mathew Ingram, "The myth of social media anti-conservative bias refuses to die," *Columbia Journalism Review* (Aug. 8, 2019), https://www.cjr.org/the_media_today/platform-bias.php; Casey Newton, "The real bias on social networks isn't against conservatives," *The Verge* (April 11, 2019) ("The truth is that social networks have been a boon to partisans of every stripe – conservatives especially."), https://www.theverge.com/interface/2019/4/11/18305407/social-network-conservative-bias-twitter-facebook-ted-cruz.

the benefits of Section 230. The fact remains that Section 230 greatly lowers barriers for third-party speech hosted on platforms, large and small, that these third-party speakers do not themselves own.

The speech-promoting effects of Section 230's provisions are straightforward. An interactive computer service generally will not be subject to speaker or publisher liability simply because it hosts third-party or user-generated content. Those same interactive computer services will also not create liability for themselves by removing content from their own services, if either the service itself or its users consider that content to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[16]

We have discussed the origin and necessity of Section 230's provisions in other forums.[17] Both Section 230(c)(1) and (c)(2) are necessary for the proper functioning of the liability shield, and only together do they properly cure the confused, pre-230 liability regime which required online entities to choose a course of either no moderation at all, or moderation with the risk of exposure to publisher-liability for restricting access to any third-party content.

Together, these subsections allow people and companies of all sizes to create forums that host content of their own choosing. That means forums can organize themselves around people's identities, political affiliations, or other interests too, without having to entertain interlopers in their digital houses if they choose not to.

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[16] 47 U.S.C. § 230 (c)(2)(A).

[17] *See* Gaurav Laroia & Carmen Scurato, "Fighting Hate Speech Online Means Keeping Section 230, Not Burying It," *TechDirt* (Aug. 31, 2020), https://www.techdirt.com/articles/20200821/08494445157/fighting-hate-speech-online-means-keeping-section-230-not-burying-it-gaurav-laroia-carmen-scurato.shtml.

The NTIA's radical reinterpretation of Section 230 would shrink the congressionally mandated scope of the statute's grant to interactive computer services, taking away their generally free-hand to take down or restrict any content such services find objectionable or problematic, and restricting them to removing only material that the president and his advisors deem objectionable too: content that is already unlawful, or that fits a category the Commission itself already has regulated (like pornography, obscenity, and some spam and harrassment).

Section 230's language ensuring that takedowns of content do not give rise to liability must be broad, especially when it concerns content that is distasteful to the platform or its users. The statute itself has exemptions from the liability protections it otherwise grants – carve-outs to the carve-out – for federal criminal law, intellectual property law, and other topics. And courts have explained that this immunity is broad though not unlimited.[18] Yet Section 230 rightfully protects websites when they remove material that is "lawful, but awful" and allows them to set their own terms of service without fear of exposing them to liability. Shrinking this provision in the way the NTIA proposes would undermine Section 230's necessary fix to the pre-230 liability regime. That would force websites to carry objectionable third-party content, and use the structure of Section 230 to impermissibly adopt conduct rules for websites.

[18] *See Enigma Software Grp. USA, v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019) ("We therefore reject Malwarebytes's position that § 230 immunity applies regardless of anticompetitive purpose. But we cannot, as Enigma asks us to do, ignore the breadth of the term 'objectionable' by construing it to cover only material that is sexual or violent in nature.").

A. NTIA's Proposal rests on an Ahistorical and Unwarranted Read of the "Otherwise Objectionable" and "Good Faith" Provisions of Section 230.

Though NTIA spills buckets of ink and fills dozens of pages attemptinging to justify its proposed changes to Section 230, we can cut to the chase and lay out plainly the statutory text that this administration wants to rewrite on Congress's behalf – violating the separation of powers between the legislative and executive branches and usurping the power of the Commission as an independent agency in the process.

NTIA seeks to restrict the meaning of "otherwise objectionable" in Section 230(c)(2)(A), changing it to mean something far less than any material that an interactive computer service may deem offensive – whether those materials are "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" or objectionable in some other way.[19] In the administration's view, the term should encompass only materials targeted by the Communications Decency Act ("CDA") itself, and those "that were objectionable in 1996 and for which there was already regulation" – claiming that, despite the plain text of the statute, Congress merely "intended section 230 to provide incentives for free markets to emulate"[20] that "already-regulated" structure.

According to NTIA, that means permitted takedowns would solely be for the kind of material prohibited in the 1909 Comstock Act[21] and in Section 551 of the Communications Act

[19] 47 U.S.C. § 230 (c)(2)(A).

[20] Petition at 34.

[21] *Id.* ("The Comstock Act prohibited the mailing of 'every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character.'").

titled "Parental Choice in Television Programming"[22]; material akin to obscene or harassing telephone calls[23]; and material the rest of the CDA prohibited. NTIA thereby reads the subsection as only referencing "issues involving media and communications content regulation intended to create safe, family environments."[24]

NTIA's proposal is a radical restriction of the meaning of "otherwise objectionable" in the statute, without textual or judicial support.[25] There is no historical evidence to tie the purposes or meaning of Section 230 to the remainder of the largely struck-down Communications Decency Act or its goals.[26] Courts have debated the contours of Section

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[22] *Id.* at 35 ("The legislation led to ratings for broadcast television that consisted of violent programming. The FCC then used this authority to require televisions to allow blocking technology.").

[23] *Id.* at 37, citing 47 U.S.C. § 223 ("Thus, the cases that struggled over how to fit spam into the list of section 230(c)(2) could simply have analogized spam as similar to harassing or nuisance phone calls.").

[24] *Id.* at 37.

[25] *See Enigma Software*, 946 F.3d at 1051 (dismissing such a narrow construction of the term "otherwise objectionable").

[26] *See* Hon. Christopher Cox, Counsel, Morgan, Lewis & Bockius LLP; Director, NetChoice, "The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World," before the Commerce, Science, & Transportation Committee of the Senate (July 28, 2020) ("Cox Testimony"), https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71. As former Representative Cox explained: "In fact, the Cox-Wyden bill was deliberately crafted as a rebuke of the Exon [Communications Decency Act] approach." Cox also described the relationship between the remainder of the CDA, largely struck down because it sought to prohibit certain kinds of content; and Section 230, which sought instead to give parents the tools to make these choices on their own. "Perhaps part of the enduring confusion about the relationship of Section 230 to Senator Exon's legislation has arisen from the fact that when legislative staff prepared the House-Senate conference report on the final Telecommunications Act, they grouped both Exon's Communications Decency Act and the Internet Freedom and Family Empowerment Act into the same legislative title. So the Cox-Wyden amendment became Section 230 of the Communications Decency Act – the very piece of legislation it was designed

230(c)(2)(A) and some have declined to give interactive computer services complete carte-blanche to take down third-party content (citing possible anticompetitive motives for some content takedowns that might not be exempt),[27] but none have articulated a standard as restrictive as NTIA's. The administration's proposed reading collapses the universe of permissible takedowns to only those enumerated in NTIA's formulation, and not the current, ever-evolving, and inventive panoply of objectionable content on the internet. It would severely curtail platforms ability to take down propaganda, fraud, and other "lawful, but awful" content that isn't lascivious or violent but causes serious harm, like disinformation about elections or COVID-19.

NTIA then seeks to place severe limitations on the meaning of "good faith" in the statute. This "good samaritan" provision was meant to facilitate interactive computer services creating a myriad of websites and content moderation schemes that would "allow a thousand flowers to bloom."[28] NTIA seeks to do the exact opposite.

In its formulation a platform, its agent, or an unrelated party, would be "acting in good faith" under Section 230 only if it "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[29] The Petition would restrict the ability of platforms to rapidly take down objectionable content, only permitting it if

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to counter. Ironically, now that the original CDA has been invalidated, it is Ron's and my legislative handiwork that forever bears Senator Exon's label."

[27] *See* Petition at 32, n. 98.

[28] Cox Testimony at 17 ("Ensuring that the internet remains a global forum for a true diversity of political discourse requires that government allow a thousand flowers to bloom – not that a single website has to represent every conceivable point of view." (internal quotation marks omitted).

[29] Petition at 39.

the "interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others."[30]

These restrictions completely rewrite the meaning, purpose, and effect of the statute. Under this scheme a platform would open itself up to liability for (purportedly) not acting in good faith if it were to restrict or remove third-party content unless that material runs afoul of a largely invalidated law's conception of what is "family friendly." This reinterpretation of the meaning of "otherwise objectionable" in Section 230 would read that unambiguous, and broad but perfectly clear phrase right out of the statute Congress wrote. Just because Congress granted broad discretion to interactive computer services does not make the term "otherwise objectionable" ambiguous. Section 230(c)(2)(A) clearly leaves these moderation decisions to an interactive computer service, to restrict access to any "material that the provider or user considers to be . . . otherwise objectionable."

B. NTIA's Proposal Restricts Lawful, First Amendment-Protected Activity by Interactive Computer Services, and Calls on the FCC to Regulate the Internet by Imposing Conduct Rules on Websites.

NTIA's proposal represents a departure from Section 230's lauded deregulatory regime.[31] The Petition is incredibly proscriptive and seeks to flatten all content moderation into a few designated categories. If enacted it would curtail the rights of private businesses and individuals – all of which are First Amendment-protected speakers – from moderating their sites as they see fit. Instead of providing clarity for websites that carry third-party content, it would force them to

[30] *Id.* at 40.

[31] *See RIFO* ¶ 61, n. 235 ("The congressional record reflects that the drafters of section 230 did 'not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.'") (citing 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

either guess what speech the government chooses to abridge as "objectionable" and then stay within those contours; or else forgo moderation altogether – instituting a must-carry regime and ersatz Fairness Doctrine for the internet, and leaving sites little choice but to drown in posts from bigots, propagandists, charlatans, and trolls. The Petition is nothing more than a cynical attempt to use the guise of law to force internet platforms to carry such content, all chiefly to preserve the presence on private platforms of the falsehoods uttered by this president without any fact-checking, contextualizing, or other editorializing.

NTIA's unlawfully proposed amendments to Section 230's straightforward text would place huge burdens on owners and operators of websites, which are emphatically speakers in their own right.[32] It does so with little justification and only general paeans to the importance of protecting the free speech rights of all.[33] But an FCC-enforced, must-carry mandate for discourse on websites would flatten discussions across the web and destroy the countless discrete and vibrant communities that rely on some degree of moderation to ensure that typically marginalized voices can reach their audience. As former Representative Chris Cox recently testified in defense of Section 230, "Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is."[34] This confusion of the sidewalk for conversation, and of the means of transmission for the speaker, fails at producing the free-speech protective outcome NTIA purportedly seeks to create.

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[32] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 882 (1997).

[33] *See* Petition at 3.

[34] Cox Testimony at 17.

II. The Same FCC that Wrongly Declared Itself Unable to Adopt Conduct Rules for Broadband Providers Under Far More Certain Authority Cannot Fashion Conduct Rules for the Internet Now on the Basis of Section 230 Authority It Disavowed.

Ironically, these stringent anti-blocking rules remind us of the neutrality provisions this FCC undermined and repealed for providers of broadband internet access. Yet whatever one believes about the need for such rules as applied to broadband providers, there is no question that the statute, the courts, and the Commission itself have all denied the agency's ability to impose such stringent nondiscrimination rules on the basis of Section 230 alone.

As indicated at the outset of these comments, we believe nondiscrimination rules are not just lawful but vital for the broadband transmission networks that carry speech to every destination on the internet. But there is no question that such rules are unique. Despite this FCC's propaganda and the intense broadband industry lobbying efforts that fueled it, common carriage rules are still vital for transmission services and others that hold themselves out as providing nondiscriminatory carriage of third-party speech to different users and destinations on the internet. Twitter or Facebook, or any site that hosts third-party or user-generated content, is just such an internet endpoint. An online platform is not a transmission pathway: it's a destination, no matter how many people gather there.

The Petition ignores these kinds of distinctions, and blithely asserts that (1) Section 230 is in the Communications Act, in Title II itself no less; and that (2) Section 201(b) gives the Commission plenary power to adopt any rules it likes pursuant to such other provisions that happen to be in the Communications Act.[35] Because the Supreme Court has previously found FCC action valid under Section 201(b), even when the substantive statute in question did not

[35] *See, e.g.*, Petition at 15-18.

specify a role for the Commission,[36] the NTIA presumes that the Commission is free to act here even though Section 230 makes no mention whatsoever of the FCC (let alone any specific role or ability for the agency to weigh in court's application on Section 230's liability shield).

Having thus asserted but not proven that the Commission might issue some kind of rules under Section 230, the Petition completely ignores the question of whether the FCC could issue these kinds of rules, binding on all "interactive computer services" under Section 230 pursuant to that statute alone. The answer to this question that the Petition desperately evades is a resounding no, based on controlling court precedent and on the FCC's own view of its authority – or, more appropriately, its lack thereof – under 230.

When considering an earlier attempt at Net Neutrality protections and the kind of nondiscrimination mandate that NTIA now proposes for every website and platform on the internet, the D.C. Circuit's decision in *Verizon v. FCC* held in no uncertain terms that such nondiscrimination rules are common carriage requirements. As such, they can be placed only on regulated entities classified as common carriers subject to Title II of the Communications Act, not just on any service or entity merely mentioned in another one of the Act's provisions like Section 230. No massaging of the Communications Act could support those rules under other authorities.[37] So as the Commission itself subsequently recognized, *Verizon* makes plain that

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[36] *See id.* at 16 (citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999) and *City of Arlington v. FCC*, 569 U.S. 290 (2013)).

[37] *See Verizon v. FCC*, 740 F.3d 623, at 655-56 (D.C. Cir. 2014) ("We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], *pro tanto*, to common carrier status. In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold themselves out 'to serve the public indiscriminately.'" (internal citations omitted)).

such common carriage rules are only supportable under the Title II regulation that the current FCC majority rejected even for broadband transmission services.[38]

Adopting these rules would not only put the Commission in the position of having to ignore this *Verizon* precedent, it would require the agency to reverse its stance on whether Section 230 is a substantive grant of authority too. When it repealed its open internet rules for broadband providers in 2017, the Trump FCC's resounding rejection of Section 230 as a source of any substantive authority whatsoever forecloses such a self-serving reversal now. Hewing closely to lessons learned from even earlier appellate losses than *Verizon*, the Commission said in no uncertain terms then that Section 230 is "hortatory," and that this statute simply does not serve as "authority that could provide the basis for conduct rules."[39]

It's plain that the Petition would require the Commission to enforce a nondiscrimination regime for speech on websites, while having abandoned rules that prohibited discrimination by broadband providers, even though he broadband-specific rules were grounded on rock-solid common carrier authority and policies. This position would be untenable and absurd.

The Petition proposes nothing less than this kind of nondiscrimination regime, seriously curtailing the ability of different websites to create unique and differentiated experiences for different users across the internet. This "platform neutrality" notion has grown in popularity in Congress as well, even though "neutrality" wasn't the goal of Section 230 and should not be the

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[38] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 41 (2015).

[39] *See RIFO* ¶ 284 (citing *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)); *see also id.* ¶ 293 (explaining that Section 230 and other tenuous authority provisions "are better read as policy pronouncements rather than grants of regulatory authority").

goal of any intermediary liability regime.[40] And among the bad results that would flow from such a course of action, this would likely end the ability of people of color, women, and other groups subjected to systemic oppression and harassment to create spaces where they can share ideas and discuss topics important to them without the imposition of racist and misogynist interlopers shutting down that speech.

In sum, the Petition asks the FCC to create a "Neutrality" regime for websites, after the same agency wrongly rejected its stronger authority and similar conduct rules for broadband telecommunications.[41] To avoid this absurd, unlawful, and unconstitutional outcome, the Commission must reject the NTIA Petition as well as the rules it proposes, and put an end to this process.

Conclusion

This proceeding was born from a corrupt and illegal desire to intimidate websites and media companies into not fact-checking the President of the United States in the months before his attempt at reelection. It is a cynical enterprise that threatens our fundamental freedoms and the rule of law. Skepticism about the wisdom and intellectual honesty of this project has already imperiled the career of one Republican Commissioner, apparently as punishment doled out by a president from the same party as him, and as retribution for the fact that this independent agency

[40] Daphne Keller, "The Stubborn, Misguided Myth that Internet Platforms Must be 'Neutral,'" *Wash. Post* (July 29, 2019) ("CDA 230 isn't about neutrality. In fact, it explicitly encourages platforms to moderate and remove 'offensive' user content. That leaves platform operators and users free to choose between the free-for-all on sites like 8chan and the tamer fare on sites like Pinterest."), https://www.washingtonpost.com/outlook/2019/07/29/stubborn-nonsensical-myth-that-internet-platforms-must-be-neutral/.

[41] *See, e.g., RIFO* ¶ 4.

commissioner would dare question the president's understanding of these issues.[42] The Commission should instead follow the logic of the statute, the courts, and its own past pronouncements, declining this invitation to surrender its own independence in service of the Petition's efforts to bully online platforms into silence too.

Respectfully submitted,

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[42] *See* Michael T.N. Fitch & Wesley K. Wright, "The Making – and Unmaking – of an FCC Commissioner," *The National Law Review* (Aug. 10, 2020), https://www.natlawreview.com /article/making-and-unmaking-fcc-commissioner.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Section 230 of the Communications Act of 1934	Docket No. RM-11862

Opposition of the Internet Infrastructure Coalition

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I. Introduction and Summary

Section 230, as it is understood today, is fundamental to free and robust speech on the Internet. In addition to the protections it provides social media companies, Section 230 is also essential to the companies that operate the infrastructure on which speakers depend. While social media platforms dominate the headlines, everything online depends on the Internet's infrastructure, including the services provided by hosting companies, data centers, domain registrars and registries, cloud infrastructure providers, managed services providers, and related services. Many of these companies are members of the Internet Infrastructure Coalition (i2Coalition), an organization formed to ensure that those who build the infrastructure of the Internet have a voice in public policy.

Internet infrastructure providers play a critical role in promoting open and robust Internet speech by not only providing the infrastructure on which much of the Internet depends, but also by providing services that minimize barriers to entry for anyone with a message, no matter their viewpoint. Internet infrastructure providers also drive economic growth by providing small businesses with greater reach and flexibility to innovate. Therefore, we agree with NTIA that protecting the Internet from stagnation and excessive restrictions is a critical goal.

Unfortunately, NTIA's proposal poses a far greater risk to free and open speech on the Internet than the moderation practices of a few private companies ever could. NTIA focuses narrowly on Section 230 of the Communications Decency Act as it applies to a handful of the largest social media platforms and seeks to narrow its protections to combat alleged political biases in these companies' content moderation practices.[1] Unfortunately, in so doing, NTIA not

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[1] *See* Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079, 34,081 (June 2, 2020) (E.O. 13925).

only ignores the law but also misses the vastly diverse array of services and speakers beyond those platforms. And it overlooks the role of the free market — and the marketplace of ideas — in ensuring that fora will always exist for speech for which there is a willing and interested audience, in the absence of government restrictions.

NTIA's proposed regulations would upend the liability protections Internet infrastructure companies rely on to protect them against litigation over content posted by users. Although it would not strip these protections away overtly, it proposes new rules that would call this liability shield into question for any provider that makes decisions that even arguably evince a "discernable viewpoint" — a meaningless standard that invites abuse and subjectivity. NTIA's proposal therefore attempts to force providers into the untenable position of being unable to engage in any form of content moderation or even to choose with whom they do business. In so doing, it exposes Internet infrastructure providers to new risks and requires them to contemplate measures such as pre-screening content and, ironically, far more aggressive content moderation and removal than they would ever have considered otherwise. Not only would such measures stifle a great deal of Internet speech, they would raise costs and erect other new barriers, particularly for small businesses and individuals seeking to build an online presence.

NTIA's proposal would also be illegal. The text of Section 230, its legislative history, and its purpose all clearly indicate that Congress intended Section 230 to be interpreted by the courts, not to serve as a font for vast new FCC regulatory authority. Moreover, NTIA's proposed rules, while putatively promoting free speech, would actually violate the First Amendment by conditioning providers' liability protections on their compliance with content-based distinctions.

II. NTIA overlooks the foundational importance of Section 230 protections throughout our connected economy.

Internet infrastructure providers rely on the protections of Section 230 to make their businesses work. It offers crucial assurances that their companies will not be treated as the publishers or speakers of content made available by others — assurances that have become foundational to the economic diversity and low barriers to entry that characterize today's Internet. These assurances are vital because the nature of critical Internet infrastructure services, such as website hosting and content distribution networks, may create a superficial association between the infrastructure provider and third-party content. Indeed, Section 230(c)(1) has played a key role in protecting such companies against lawsuits relating to content posted by independent third parties, which the infrastructure provider never reviewed and in no way endorsed.

In one dramatic example, the family of one of the victims of the tragic 2019 mass shooting in El Paso, TX,[2] brought a wrongful death suit against Cloudflare, an i2Coalition member, as well as its CEO and numerous other parties.[3] The basis for these allegations was apparently the fact that 8chan, the platform on which the shooter posted racist messages, used one or more of Cloudflare's services before Cloudflare terminated service in August 2019. Cloudflare's cybersecurity services, in some cases, can result in Cloudflare's name appearing in public Domain Name System records associated with its users' websites. This can lead people to misunderstand Cloudflare's relationship with websites and their content, and seek to hold it

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[2] *See* Molly Hennessy-Fiske, El Paso shooting victim remembered at funeral: 'She was just a beautiful person,' LA TIMES (Aug. 9, 2019, 4:00 PM), https://www.latimes.com/world-nation/story/2019-08-09/funerals-begin-for-shooting-victims-in-el-paso.

[3] *See* Pls.' Pet., Englisbee, et al. v. Cloudflare Inc., et al., 2019 DCV 4202 (Tex. El Paso County Ct. filed Oct. 29, 2019).

liable for this content even though Cloudflare has no opportunity to review it and, in fact, cannot even access content posted on user-generated content sites like 8chan. Cloudflare defended itself in that case by asserting the protections of Section 230(c)(1), among other things, which prevents Cloudflare from being "treated as the publisher or speaker of any information provided by another information content provider."

The facts of this case are thankfully atypical, but Internet infrastructure companies know that there is nothing abnormal about aggrieved parties seeking to hold them liable for content posted by users. Whether they host the content on their servers, accelerate users' access to it using their content distribution network, or use their network to protect the content from cyberattacks, Internet infrastructure companies are the targets of lawsuits even with the robust liability protections of Section 230. Without its protections, or if its protections were restricted, such lawsuits would proliferate, and Internet infrastructure companies would lose a fundamental tool in managing their risk.

Unfortunately, NTIA's proposed restriction of Section 230 threatens to do just that. NTIA proposes a "clarification" of the statute's definition of "information content provider" that would extend that term to cover any service provider that moderates content in a way that evinces "a reasonably discernible viewpoint." Far from a mere "clarification," this extremely broad concept would allow virtually any plaintiff to allege that a service has a "viewpoint," even if the service has moderated or terminated service only rarely and with great care and discretion. This, in turn, would vitiate the protections of Section 230(c)(1) by placing the service provider in the position of an Internet content provider speaking on its own behalf — rather than a service standing apart from content provided by "another information content provider."[4] As the petition

[4] 47 U.S.C. § 230(c)(1).

unabashedly explains, "prioritization of content under a variety of techniques, particularly when it appears to reflect a particular[] viewpoint, might render an entire platform a vehicle for expression and thus an information content provider."[5]

This change would thrust Internet infrastructure companies back into the "moderator's dilemma" created by cases like *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[6] that Section 230 was specifically designed to correct. Hosting providers and other critical builders of the nation's Internet infrastructure would have to make a choice. They could choose to maintain their liability protections by abstaining from any moderation of objectionable content. Or they could choose to moderate content on their network, consistent with their business needs, but accept that doing so could strip them of their liability protection under Section 230(c)(1). For Internet infrastructure companies, neither option is tenable.

A business that abstains from any moderation would be forced to maintain content on its network regardless of the threat that it may pose to its legitimate business goals. For example, failing to remove some types of content may result in the blacklisting of a provider's Internet Protocol ("IP") addresses either by third-party email providers seeking to block spam or third-party Internet content filtering services. This can have a major impact on a provider's business because the available pool of IP addresses is severely limited and, therefore, each of a provider's IP addresses is commonly shared among numerous customers. In addition, some types of content draw a significantly greater intensity of cyberattacks, greatly increasing the costs of hosting it.

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[5] Petition for Rulemaking of the National Telecommunications and Information Administration at 42, Docket No. RM-11862 (filed July 27, 2020) ("Petition").

[6] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished).

For example, Endurance International Group offers web hosting, domain registration, email marketing, and other Internet infrastructure services through a number of brands including Bluehost, Domain.com, and Constant Contact. Because Endurance recognizes the important role its industry plays in ensuring that anyone can have a presence on the Internet, it exercises great restraint in deciding when content must be removed from its platform. As a general matter, Endurance's policy is not to remove customer content unless a compelling case can be made for doing so. Nonetheless, Endurance has encountered situations where, due to its content, one of its hosted sites attracts incessant cyberattacks. Although Endurance believes that it is not its role to block unpopular content from the Internet, it simply cannot host sites that place such extreme demands on its network, including where a website under attack is hosted on a shared server that might host up to thousands of other websites — one of the most economical options for small businesses, bloggers, and others to try an idea or establish an online presence at very little cost. Today, Section 230 protects Endurance's ability to make such operational decisions, including removing content, to ensure that it can continue to serve its customers reliably and affordably. Under NTIA's proposal, however, such a move could endanger Endurance's Section 230(c)(1) liability protection by inviting litigants to claim that such decisions were made in bad faith or manifest a discernible viewpoint.

Challenges to hosted content on legal grounds would also present major risks under NTIA's proposal. i2Coalition members including Endurance, Rackspace, and others commonly receive requests to take down content that is allegedly defamatory or illegal in other ways that cannot readily be ascertained based on a review of the content alone. However, in the absence of a judgment or other final legal decision, there is often no way for an infrastructure provider to know whether a decision to take the material down or to leave it up would be most in the public

interest or least likely to trigger liability. In a claim that a provider is hosting defamatory content, for example, a provider cannot know whether the complaint is legitimate and leaving the content on its network would perpetuate the defamation — or whether the complaint is spurious and taking the content down would be unjustified and potentially injurious to the content owner or the public at large. For example, review sites are often targets of defamation claims, but they may also warn viewers of fraud or other bad behavior.

Today, Section 230 allows providers to limit their liability in such situations. But NTIA's proposed restrictions would increase the risks associated with such routine decisions, no matter what course the provider chooses. A decision to take the content down could invite arguments that the provider has acted in bad faith or with bias. But a decision to leave it up could increase the provider's risk of liability and perpetuate an ongoing public harm.

Some i2Coalition members have faced similar decisions relating to the ongoing public health crisis caused by the SARS-CoV-2 pandemic. As the U.S. Department of Justice and other law enforcement have cracked down on those who seek to take advantage of the pandemic for their own gain,[7] i2Coalition members have received notices from law enforcement notifying them of *potentially* fraudulent COVID-19-related content. Determining with certainty which content is fraudulent and which is not, however, requires investigative resources well beyond those that Internet infrastructure companies can bring to bear. Indeed, i2Coalition members have, in at least one case, received notice from law enforcement officials that identified a hosted site as providing fraudulent information about COVID-19 testing, only later to learn the site was operated by a small business offering real testing services. Therefore, hosting providers must

[7] *See* Memorandum from the Deputy Attorney Gen., U.S. Dep't. of Justice to All Heads of Law Enforcement Components, Heads of Litigating Divisions, and U.S. Attorneys (Mar. 24, 2020), https://www.justice.gov/file/1262771/download.

decide whether to take such content down, and risk withholding valuable information from the public, or leave it up and risk perpetuating a fraud. Again, today's Section 230 protects businesses' ability to make these difficult decisions without undue risk of liability. NTIA's proposal could strip away this protection whether they leave the information up or take it down — causing utter chaos in the Internet ecosystem.

Worse still, many Internet infrastructure providers, due to their role in the broader Internet infrastructure system, have only blunt tools at their disposal for policing content that could potentially expose them to liability. For example, one i2Coalition member, Donuts, provides domain name registry services for 242 top-level domains, including .live, .photography, and .consulting. As a registry, they perform a role analogous to a wholesaler, providing the services to companies like Domain.com that interact directly with individuals and organizations and allow them to register domain names. Because of this role, however, Donuts's only recourse to avoid liability from problematic content hosted on a .live domain name, for example, would be to suspend or terminate the domain name, essentially disconnecting any associated website, email, application, or other services. Therefore, Donuts only takes action to block content in extremely narrow and serious circumstances. However, erosion of Section 230's liability protections would make such a policy of restraint more difficult to maintain.

Similarly, another i2Coalition member, cPanel, provides management software for website hosts and other types of providers. Some cPanel tools, however, allow users to upload, edit, and manage content in a way that has sometimes caused cPanel to become incorrectly associated with content managed using their tools. However, cPanel has no ability to police individual users' use of its tools. Rather, it licenses its software to website hosts that, in turn, make the tools available to their users. Therefore, cPanel's only potential recourse is to disable software licenses

barring entire companies from using its tools, and disrupting the service provided to all of that host's users. Because this is such a drastic remedy, cPanel has only taken this action in one very unusual case. But NTIA's proposal would greatly increase the risks for businesses that — rightly — take such a hands-off approach.

NTIA's proposal, therefore, would disrupt the basic infrastructure of the Internet even as it drives increased costs for individuals and small businesses. By raising barriers to entry, it would perversely undercut a broad array of competitive services, leaving only well-funded companies with the resources to maintain their own websites. Others, ironically, may be driven onto more closely moderated and tightly structured platforms, such as those offered by large social media companies, which have the greater resources required to take on content screening and increased liability.

III. Internet infrastructure companies cannot rely on automated content screening to mitigate risk.

NTIA glosses over the impact that its proposals would have on tech companies, including Internet infrastructure providers.[8] It asserts that the loss of liability protection under Section 230 is acceptable in the current environment because a platform provider can use artificial intelligence technology and other high-tech tools to ensure that its service remains free of harmful content, thus controlling their liability. Unfortunately, however, NTIA is simply wrong. No technology exists that would allow operators to meaningfully limit their liability in the absence of Section 230's protections.

The most obvious flaw in NTIA's assertion relates to defamatory content. It is extremely doubtful that any company — including the largest social media platforms — will have the

[8] *See, e.g.*, Petition at 9-14.

technology to automatically flag defamatory content today or in the foreseeable future. This is simply because a statement must be false in order to be defamatory.[9] But the truth or falsity of an assertion requires access to information, and the capability to analyze this information, beyond the reach of any automated system that platform providers could foreseeably create. Obscenity presents similar challenges by requiring a highly nuanced understanding of evolving community norms in order to be reliably identified.[10] Justice Stewart may have known obscenity when he saw it,[11] but it is unlikely a computer will have the same degree of skill anytime soon. Any AI-based system is also likely to have a large number of both false positives and false negatives. Thus, it would block a substantial amount of speech that should have been permitted even as it fails to fully control a platform's liability. Simply put, there is no technology today that would automatically flag content with any reliability.

But even if the largest social media platforms could use artificial intelligence to help ease the burden of screening billions of social media posts, this advantage would not be available to Internet infrastructure providers who currently rely on Section 230 protections to host third-party content without undue risk of liability. Unlike social media platforms, Internet infrastructure companies often do not have unrestricted access to users' content — many have no access at all — and have no way of knowing what type of content a third-party has uploaded or in what format, making AI-based screening impossible. At the same time, the services provided by Internet infrastructure companies typically do not involve AI-based categorization, prioritization, or targeting, meaning that they do not have existing AI-based tools that could be repurposed for screening content.

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[9] Restatement 2d of Torts § 558 (1977).

[10] Roth v. United States, 354 U.S. 476, 489 (1957).

[11] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring.).

One i2Coalition member, Rackspace Technology, Inc., for example, provides a wide range of cloud-based services including data management, datacenter colocation, managed clouds, and virtual hosting. In these roles, Rackspace services often host websites and other data that could include content that could expose Rackspace to liability, were it not for the protections afforded providers of "interactive computer services" under Section 230. Indeed, Rackspace devotes considerable resources to ensuring that its network remains "clean" and free of prohibited content, processing as many as 6 million complaints per year.

Given the nature of Rackspace's services, however, there would be no way to effectively screen this content before it can be made available on Rackspace's network. For Rackspace to review and approve every website created, every file uploaded, and every email sent on its network would be literally impossible. And attempting to do so would be profoundly inconsistent with the expectations of Rackspace's customers, and the customers of any other hosting service, who expect that they will enjoy unfettered access to the hosting platform they have purchased.

Unfortunately, the harm of eroding Section 230's liability protections cannot, therefore, be waved away. By undermining the liability protections of Section 230, NTIA's petition would force Internet infrastructure companies to restructure their operations and business practices in ways that would raise costs for consumers and small businesses and potentially curtail important services. For example, U.S. providers may struggle to provide the low-cost hosting services that millions of small businesses rely on today in the absence of reliable legal tools that allow them to limit their liability for hosted content. This would be a major blow for America's small businesses that rely on these services and a major setback for online speech.

IV. The Commission lacks authority to make regulations under Section 230.

For more than twenty years, it has been widely understood that Congress intended Section 230 — directed as it was to insulating providers from common-law tort claims and other forms of legal liability — to be interpreted and applied by the courts. And over those intervening decades that is exactly what has occurred, with courts developing a robust body of case law, with no serious suggestion by the FCC or any other regulator that they might have a role to play in interpreting Section 230's protections.

NTIA now asserts, in effect, that prior Commissions, prior administrations, established industry consensus, and thousands of judicial decisions all got it wrong. Simply because of where it was codified in the U.S. Code, NTIA claims that the FCC possesses previously undiscovered powers to deeply enmesh itself in content-based speech regulation of the Internet by rendering interpretations of, and potentially restrictions on, Section 230's protections. It cannot be denied that the Commission has broad powers to interpret the provisions of the Communications Act. However, this authority does not extend so far as to allow the Commission to make regulations to override longstanding judicial interpretations of Section 230.

Most obviously, the statute includes no language hinting at a regulatory role for the FCC. In fact, it does the opposite: Section 230(a)(4) announces Congress's finding that the Internet has flourished "to the benefit of all Americans, with a minimum of government regulation." Likewise, Section 230(b)(2) explicitly states that it is the policy of the United States to maintain a free market on the Internet "unfettered by Federal or State regulation." The D.C. Circuit has held that such statements of policy "can help delineate the contours of statutory authority."[12] In this case, these findings and policy statements demonstrate that Congress was not silent on the

[12] Comcast Corp. v. F.C.C., 600 F.3d 642, 654 (D.C. Cir. 2010).

question of Commission authority. Congress clearly intended there to be no federal regulation under Section 230.

Even if Congress had not been clear, there are good reasons to conclude that the Commission lacks regulatory authority under Section 230. The regulatory authority NTIA posits in its petition would put the FCC in the position of dictating what types of content are "objectionable," and how a provider should go about making its moderation decisions "in good faith."[13] These decisions would dictate the daily business of Internet infrastructure companies, including cloud providers and content distribution networks whose services support large enterprises, small businesses, blogs, and personal websites, among others. This regulatory authority would therefore reach into virtually every corner of the Internet, influencing the content that may be posted and restructuring longstanding industry relationships by pushing companies to unwillingly step into the role of censor.

But the Supreme Court has held that, when Congress grants a regulatory agency such sweeping authority, it must do so clearly. Just as Congress would not surreptitiously grant the Food and Drug Administration the power to regulate tobacco,[14] or quietly give the Environmental Protection Agency authority to regulate small emitters of greenhouse gases,[15] Section 230 cannot be interpreted as conferring upon the FCC vast authority over Internet content without even a word of explanation. Such claims to sweeping regulatory authority are especially dubious when an agency claims to "discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy."[16] All the more so when, as in

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[13] Petition at 31-39.

[14] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[15] Util. Air Regulatory Grp. v. E.P.A., 573 U.S. 302, 324 (2014).

[16] *Id*. (internal quotation marks omitted).

this case, the agency's claim to authority would "render the statute unrecognizable to the Congress that designed it."[17]

Such reservations are amplified, in this case, by the fact that the newly discovered authority not only would grant the FCC new regulatory powers over a significant portion of the U.S. economy, but also would do so in a manner that installs the Commission as an arbiter of acceptable speech. If courts demand a clear expression of congressional intent before allowing a regulator to claim authority over tobacco or greenhouse gases, surely at least this level of scrutiny should be applied when an agency seeks to interpose itself in the exercise of one of our most closely guarded constitutional rights. That NTIA's proposed rules would violate these rights out of the starting gate confirms that restraint is the only prudent course.

V. NTIA's proposed rules violate the First Amendment.

NTIA's proposed rules would impose content-based regulations on private actors' speech in violation of the First Amendment. NTIA proposes a series of definitions for the various categories of content that a provider may remove without liability under Section 230(c)(2)(a). For example, the petition proposes to constrain the definition of the terms "obscene," "lewd," "lascivious," and "filthy" so that they encompass only content that would constitute obscenity under prevailing First Amendment jurisprudence[18] or that would have constituted "obscene libel" banned from the U.S. Mail under the Comstock Act.[19] It defines "excessively violent" to mean either content that is "violent and for mature audiences" or that promotes or constitutes

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[17] *Id*. (internal quotation marks omitted).

[18] *Compare* Petition at 37 *with* Roth, 354 U.S. at 489 (1957).

[19] Section 3893 of the Revised Statutes made by section 211 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129. NTIA does not address the fact that this Comstock Act language was held to be constitutional only to the extent that it is coextensive with the definition of obscenity articulated in Roth, 354 U.S. at 492.

terrorism. And it constrains the term "otherwise objectionable" to only content which "is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials."

Thus, NTIA's proposal — like Section 230 itself — acknowledges that providers and users of interactive computer services may make certain editorial decisions regarding the content they are willing to allow on their platforms. A platform that seeks to be an appropriate venue for children may, for example, prohibit depictions or descriptions of violence. But it may also choose not to. Similarly, under NTIA's proposal, platforms may choose to bar obscenity, whether or not applicable state laws would require them to do so. In short, platforms may choose — or be forced, for business reasons — not to function as neutral conduits for the speech of others. But, in making decisions such as whether to bar violence and obscenity, they also assume the role of speakers. When they do so, the D.C. Circuit has recognized that "entities that serve as conduits for speech produced by others receive First Amendment protection."[20]

Yet, beyond the narrow categories targeted under NTIA's proposed rules, the petition seeks to penalize the platforms that choose to disassociate themselves from any *other* form of speech. To promote health and human safety online, Donuts, an i2Coalition member, for example, and other leading domain name registries and registrars have agreed to voluntarily take steps to "disrupt the illegal distribution of child sexual abuse materials, illegal distribution of opioids, human trafficking, and material with specific, credible incitements to violence."[21] Removal of some of these categories of content, such as distribution of malware, would be

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[20] United States Telecom Ass'n v. F.C.C., 825 F.3d 674, 742 (D.C. Cir. 2016). *See also* Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997) (explaining that Section 230 protects a service provider's "exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content").

[21] Framework to Address Abuse, DONUTS (Oct. 8, 2019), https://donuts.news/framework-to-address-abuse.

permissible under NTIA's proposed rules. But these efforts to prevent abuse go farther and could include voluntary actions against, for example, websites engaged in the unlicensed distribution of pharmaceuticals. NTIA's rules would penalize Donuts for acting on their belief that such material is dangerous and should not be allowed to proliferate online. Other services may seek to adopt analogous policies seeking to curb types of content even less similar to those targeted by NTIA.

Thus, NTIA's proposed rules plainly disadvantage speakers that seek to limit the speech with which they are associated in ways inconsistent with NTIA's own vision for discourse on the Internet. Users and providers that do so would be excluded from the protections of Section 230(c)(2)(a), raising the specter of liability for such removals. Speakers that only moderate content in a manner with which NTIA agrees, however, would remain insulated from liability. *In other words, NTIA's proposal discriminates between speakers based on the content of their speech.*

It is foundational to our First Amendment jurisprudence, however, that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[22] It makes no difference that NTIA's proposed rules would withhold the benefit of a liability shield rather than imposing a penalty. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech."[23] Nor does it matter that the proposed

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[22] Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984).

[23] Perry v. Sindermann, 408 U.S. 593, 597 (1972). A parallel line of cases has held that the government may, under limited circumstances, condition the receipt of government funding in ways that burden constitutionally protected interests. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 195, n. 4 (1991). *See also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 206 (2013) (the government may impose speech-based "conditions that define the limits of the government spending program" but may not "seek to leverage funding to regulate speech outside the contours of the federal program itself"). But this jurisprudence is irrelevant here as

rules would punish speakers for what they choose not to say rather than what is said. In fact, the Supreme Court has held that regulations that compel speech are often more pernicious than those that proscribe it:

> Free speech serves many ends. It is essential to our democratic form of government and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.
>
> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence.[24]

Notably, NTIA's proposed interpretation of Section 230(c)(2) would render the statute unconstitutional by reading a key feature out of its text. First, although NTIA proposes detailed, objective definitions for the various terms listed in 230(c)(2)(a), the statute's standard is subjective: it extends liability protections for decisions to take down content that "*the provider or user considers to be* obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[25] This subjective standard avoids the pernicious viewpoint-based discrimination inherent in NTIA's attempt to reframe the rule in objective terms. NTIA's omission of this subjective component renders it plainly inconsistent with the statutory test it purports to interpret — another fatal flaw in NTIA's proposal. Second, and even more importantly, however, NTIA's proposed interpretation would convert a viewpoint-neutral statutory provision into one that

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it deals only with government funding programs. It is animated by the Spending Clause, Art. I, § 8, cl. 1, a distinct source of congressional authority not implicated by NTIA's petition.

[24] Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2464 (2018) (internal citations and quotation marks omitted).

[25] 47 U.S.C. § 230(c)(2)(a) (emphasis added).

unconstitutionally conditions its benefits on a speaker's compliance with a program of speech restrictions devised by the president and proposed by NTIA under his direction. Such a regulation would clearly violate the First Amendment.

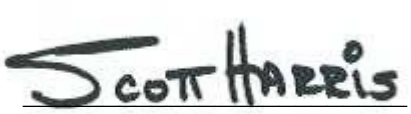
VI. Conclusion

NTIA's petition asks the FCC to vastly expand its regulatory jurisdiction to include decisions made by private companies to keep up or take down content posted by others. This radical expansion of the FCC's authority, however, would overstep the bounds set by both Section 230 and the First Amendment.

Even if the Commission could lawfully exercise these powers, however, the public interest would weigh decisively against doing so. NTIA's proposal would erode or eliminate liability protections that Internet infrastructure providers rely on every day to help small businesses, individuals, and even new Internet services reach their customers and users. Section 230's liability protections allow these infrastructure companies to offer their services on a neutral basis without pre-screening or intrusive content moderation, while retaining the flexibility to address truly harmful content in response to complaints, requests by law enforcement, or other special circumstances. NTIA's proposal would force many infrastructure

providers to choose between these goals, undermining the free and open forum for speech that today's Internet provides and limiting the Internet's potential as an engine for continued economic growth and innovation.

Respectfully submitted,



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September 2, 2020

Certificate of Service

I, Allison O'Connor, certify that on this 2nd day of September, 2020, I caused a copy of the foregoing comments to be served by postage pre-paid mail on the following:

Douglas Kinkoph
National Telecommunications and
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U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

/s/ Allison O'Connor

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications	)	RM - 11862
Act of 1934 (as amended)	)	

COMMENTS OF INTERNET ASSOCIATION OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

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September 2, 2020

EXECUTIVE SUMMARY

Section 230 simultaneously allows for free speech and expression online, while also providing critical protections to internet companies to set and enforce policies for acceptable behavior on their services. Disrupting the careful balance created by Section 230 and elucidated through two decades of case law would cause serious public policy harms and would detrimentally affect the robust internet ecosystem that society has come to rely upon. Therefore, IA urges the Federal Communications Commission ("FCC") to carefully consider whether: (1) the FCC's statutory authority extends to promulgating rules interpreting Section 230; (2) NTIA's proposed rules are consistent with the text of the statute, congressional intent, and the First Amendment; and (3) the FCC has the ability to require interactive computer services to publicly disclose their content moderation practices. IA believes that careful consideration will show that the Petition is misguided, lacks grounding in law, and poses serious public policy concerns. Therefore, the FCC should deny NTIA's Petition to clarify Section 230.

First, the FCC lacks the appropriate authority to issue the rules proposed by NTIA ("Proposed Rules") in the Petition. Section 230 does not explicitly grant the FCC authority and it should not be implied. To do so would be contrary to the clear text of Section 230's policy findings and the legislative history. Unlike the provisions discussed in *AT&T v. Iowa Utilities Board* and *City of Arlington v. FCC*, Section 230 was enacted as a private-sector driven alternative to government regulation and was a

clear rejection of FCC regulatory authority in this space. Additionally, after more than twenty years of court interpretations, NTIA's proposal to have the FCC introduce new rules contradicting well-established case law would adversely impact a large sector of the economy and would be viewed with skepticism by any court due to the agency's lack of designated authority.

Second, the Proposed Rules clearly conflict with the plain language of the statute, congressional intent, and interpretation by courts. The Proposed Rules would significantly narrow the application of Section 230's protections to content removal decisions by proposing a new interpretation of how the immunities in Section 230(c)(1) and (c)(2) operate. Section 230(c)(1) protections would be lost to any provider who removes content or makes any decisions about placement, prioritization, arrangement or other editorial decisions. The immunity in Section 230(c)(2) would have new limitations through newly introduced definitions of "good faith" and "otherwise objectionable." These definitions would result in a loss of Section 230 protections for any provider who removes content based on a change of rules after the content was originally posted, engages in selective enforcement, or fails to provide a poster of content with notice of the intent to remove content and the opportunity to respond. In addition, providers could not benefit from Section 230's protections for action taken against content that the provider considers objectionable, unless it is "obscene, lewd, lascivious, filthy, excessive violent, or harassing." This would result in a loss of Section 230 protections for removals of fraudulent schemes, scams, dangerous content

promoting suicide or eating disorders to teens, and a wide range of other types of "otherwise objectionable" content clearly covered by Section 230 today. Moreover, the Proposed Rules conflict with the plain meaning of statute as it has been understood by almost all courts to examine the provision.

Third, the Proposed Rules also run afoul of the First Amendment, failing to observe critical guardrails:

- ⇒ Private entities, even those that provide a forum for speech, are not subject to the First Amendment's limitations when it comes to choosing which speech to allow and which to prohibit.
- ⇒ Private entities have their own free expression interests in decisions about what to allow and what to prohibit on their services and that these interests are protected by the First Amendment.
- ⇒ The First Amendment prohibits the government from imposing strict liability for content on distributors.
- ⇒ The government cannot do indirectly that which it would be prohibited from doing directly, which means that coercing providers into allowing or disallowing certain speech by withholding a government benefit raises significant constitutional concerns.

The FCC should draw on its experience with the Fairness Doctrine to recognize the constitutional pitfalls and inherent practical challenges with attempting to regulate content decisions.

Fourth, NTIA's proposed mandatory disclosure rule likewise exceeds the FCC's jurisdiction. NTIA claims that "interactive computer services" ("ICSs"), covered by Section 230, are "information services" and that its expansive disclosure requirement is authorized by Sections 163 and 257(a) of the Communications Act. Those provisions

require the FCC to publish and submit to Congress a biennial report assessing the state of competition and identifying barriers to entry, particularly for entrepreneurs and small businesses, in various communications marketplaces. NTIA's Petition proposes using this congressional reporting requirement to exponentially expand the FCC's authority to reach the entire internet and beyond. This expansion of FCC authority is not supported by law, both because the FCC has not treated *all* ICSs as "information services" and the proposed transparency requirements would have nothing to do with communications market entry barriers. Moreover, this sort of compelled speech also raises significant First Amendment concerns.

Finally, there are important public policy reasons why NTIA's Petition should be rejected. The prevailing interpretation of Section 230 over the last two decades has spurred significant innovation and growth in the U.S. internet sector, far more than has been seen in jurisdictions with different legal regimes resulting in U.S. leadership. Changes to Section 230 will hamper the continued growth and innovation of services, and the higher costs of litigation and potential liability will cripple startups and small online services who will not be able to fund their legal defenses or obtain the necessary investments to grow their businesses. Section 230 is critical to a wide range of ICSs who offer interactive components as an adjunct to their core missions. These ICSs include newspapers, employers, universities, churches, labor unions, professional associations, sports leagues, nonprofits dedicated to supporting those struggling with diseases, and many more organizations for whom liability for posting or refusing to

post user content would clearly make it cost-prohibitive to continue their services. It would be devastating to lose the diversity of voices and content, due to overly invasive and unreasonable rules that are not based in properly delegated congressional authority.

Ultimately, it would not benefit the public and the users of online services for providers to be subject to lawsuits for every content decision they make. It would create, or rather re-institute from the pre-Section 230 era, disincentives to content moderation and reward providers who take a hands-off approach. This result is contrary to the specific goal Section 230 was enacted to advance, and will impede the important work that providers engage in voluntarily today to address harmful content online. Therefore, the FCC must deny NTIA's Petition for Rulemaking and allow courts to continue their decades long analysis of the language of Section 230.

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COMMENTS OF INTERNET ASSOCIATION OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

Internet Association ("IA") appreciates the opportunity to comment on the Petition for Rulemaking of the National Telecommunications and Information Administration ("NTIA") of the Department of Commerce ("DOC") in the matter of Section 230 of the Communications Act of 1996 ("the Petition").[1]

IA is the only trade association that exclusively represents global internet companies on matters of public policy.[2] IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. IA believes

[1] *Public Notice*, Department of Commerce's Section 230 Petition for Rulemaking, File No. RM-11862, (August 3, 2020), https://docs.fcc.gov/public/attachments/DOC-365904A1.pdf; Petition for Rulemaking of the National Telecommunications and Information Administration, File No. RM-11862 (filed July 27, 2020) ("Petition").

[2] IA represents the interests of companies including Airbnb, Amazon, Ancestry, DoorDash, Dropbox, eBay, Etsy, Eventbrite, Expedia, Facebook, Google, Groupon, Handy, IAC, Indeed, Intuit, LinkedIn, Lyft, Match Group, Microsoft, PayPal, Pinterest, Postmates, Quicken Loans, Rackspace, Rakuten, Reddit, Snap Inc., Spotify, Stripe, SurveyMonkey, Thumbtack, Tripadvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Vivid Seats, Vrbo, Zillow Group, and ZipRecruiter. IA's member list is available at: https://internetassociation.org/our-members/.

the internet creates unprecedented benefits for society, and as the voice of the world's leading internet companies, we ensure stakeholders understand these benefits. Section 230 plays a critical role in allowing IA member companies to set rules for appropriate use of their services and to enforce those rules for the safety of their users and the public, without the fear of constant lawsuits challenging such decisions. Thus, Section 230 is essential to realizing the benefits of the wide range of products and services offered by IA member companies, as well as by the extraordinarily broad group of entities and individuals covered by Section 230 protections.

Unfortunately, NTIA's Petition focuses exclusively on a particular type of online service, namely social media, that implicates only a few of IA's over 40 member companies. IA's membership spans a range of business models and types of online services. It is critically important to understand that the businesses, non-profit organizations, and individuals who rely on Section 230 expand far beyond the small handful of companies that are targeted in the Petition[3] and that the changes the Petition proposes would adversely impact all of these entities and individuals.

[3] For a further discussion of the broad range of entities that benefit from Section 230, see IA's recent report, *A Review Of Section 230's Meaning & Application Based On More Than 500 Cases*, at p. 6 (July 27, 2020)(available at: https://internetassociation.org/publications/a-review-of-section-230s-meaning-application-based-on-more-than-500-cases/). For additional background on the specific companies that are targets of this rulemaking, *see* the President's Executive on Preventing Online Censorship, which identifies companies by name. Exec. Order No. 13925, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020). (Executive Order Preventing Online Censorship).

I. THE IMPORTANCE OF SECTION 230 TO THE INTERNET INDUSTRY

Section 230 plays an essential role in fostering an environment conducive to startup internet companies and new market entrants across a wide variety of services. It has been critical in the development and success of the U.S. internet industry. Without Section 230 it is difficult to imagine that we would have seen the range of innovative services leveraging user-generated content that exist today. The costs and burdens of litigation and the risks of liability would have made such business models untenable. It is no coincidence that the leading global online services and most of IA's members are U.S.-based — it is because Section 230's protections create a unique and properly balanced legal environment that supports innovation.

Section 230 was enacted in response to a pair of court decisions that exposed internet companies to liability based on their efforts to block objectionable third-party content.[4] Congress feared that if internet companies could be liable due to efforts to monitor and moderate objectionable content, they would be discouraged from performing even basic safety removals in order to avoid being subjected to the costs of litigation and the specter of liability. Section 230 removes this disincentive by shielding service providers from claims that would hold them liable as a result of their attempts

[4] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *Cubby Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). *See also* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (discussing *Stratton Oakmont* and *Cubby* decisions).

to moderate certain content. As a consequence, Section 230 has enabled and effectively encouraged service providers to engage in responsible self-regulation.

Passed as part of the Communications Decency Act in 1996, Section 230 codified two key legal principles. First, internet companies that provide platforms for user-generated content generally cannot be held liable based on their users' content, whether it consists of blogs, social media posts, photos, professional or dating profiles, product and travel reviews, job openings, or apartments for rent. And second, online services—whether newspapers with comment sections, employers, universities, neighbors who run listservs in our communities, volunteers who run soccer leagues, bloggers, churches, labor unions, or anyone else that may offer a space for online communications—can moderate and delete harmful or illegal content posted on their platform without being held liable based on their actions to block or remove that content. Most online providers—and all of IA's members—have robust terms of service, and Section 230 allows the providers to formulate, adapt, and enforce them, largely without fear of litigation and liability.

Without Section 230's protection, internet companies would be left with a strong economic disincentive to moderate content. By removing this disincentive, Section 230 creates essential breathing space for internet companies to adopt policies and deploy technologies to identify and combat objectionable or unlawful content—or to develop other innovative solutions to address such content. Under Section 230, it is

the originators of unlawful content, not the platforms who carry it, who are appropriately subject to liability. Despite the protection from liability for hosting third party content, providers have been successfully encouraged to engage in content moderation, as evidenced by the substantial investments that online services make into fighting a range of harmful activities from the most clearly illegal, such as child abuse imagery, harassment, and fraud, to content that is harmful and disruptive to their services or inappropriate for the nature of the service or the chosen audience.

As Congress intended, the broad construction of Section 230 that courts across the country have nearly unanimously adopted has succeeded in encouraging online providers to adopt and enforce effective content moderation policies, while preserving and encouraging free expression. Community standards are easily accessible through providers' websites and, in general, users must accept them as a pre-condition to posting content or otherwise accessing the service.

Online providers are clear about why they have adopted their respective online terms or rules, which are often tailored to achieve the specific goals of their services and developed in partnership with a wide range of external industry and policy experts as well as based on direct feedback from users. The rules adopted by online providers reflect the diversity of the internet itself, with each online provider adopting standards specifically tailored to the various needs of its particular community of users. While online providers that seek to create family-oriented platforms may broadly prohibit

violent or graphic content, others may allow such content in limited contexts, such as for educational, newsworthy, artistic, satire or documentary purposes, or may require the user posting the content to self-identify it (by, for example, flagging it as "Not Safe For Work") so other users can easily avoid it. Social network providers may implement protections to prevent harassment of younger users or "cyberbullying" given that such content can have more of an emotional impact on minors. Retail and rental providers may prohibit users from posting inaccurate product information given the importance of buyers knowing what they are purchasing. Platforms that compile user reviews may prohibit users from posting irrelevant reviews or may prevent users from reviewing their own, friends' or relatives' businesses. And providers frequented by influential figures may prohibit users from misleadingly impersonating such figures, which could create confusion leading to disruptions in financial markets or other arenas.

Online providers likewise take a range of different approaches to enforcing their standards. Many providers offer special "modes" that restrict access to content otherwise available on the platform. Providers may allow users to voluntarily opt-in to these modes, such as YouTube's "Restricted Mode," which allows users (like parents or schools) to block access on their accounts to videos containing potentially mature content. Or providers may require users to affirmatively opt-out of such modes, such as Twitter's "Sensitive media policy," which requires users to click past a warning message to view certain content. Providers may also remove content and terminate

accounts, frequently after providing warnings. For less severe violations, providers may use techniques designed to educate users about provider policies such as requiring a user to edit or delete content to comply with rules or virtual "time outs."

Further, IA members employ a multitude of technologies to support their content moderation efforts, such as providing users with "report abuse" buttons and other mechanisms to flag problematic content or contact the companies with complaints. Members also devote significant staff and resources to monitoring, analyzing and enforcing compliance with their respective community guidelines. In addition, providers have developed sophisticated software and algorithms to detect and remove harmful content. In many instances, they have shared these technologies to help others eradicate that harmful content as well. Some providers also dedicate large teams of staff—for example, Facebook employs approximately 15,000 content moderators in the U.S.—to enhance their ability to provide quick responses to evolving problems.

The scale of content moderation efforts is staggering. Depending on the size of the platform, moderators must enforce rules against millions or hundreds of millions new pieces of content a day. For example, consider the actions taken by just a few IA member companies to enforce rules against spam:

- ⇒ Facebook: In the three-month period from July to September 2019, Facebook took action against 1.9 billion pieces of content for spam.[5]
- ⇒ Twitter: During the first six months of 2019, Twitter received over 3 million user reports of spam and challenged over 97 million suspected spam accounts.[6]
- ⇒ YouTube: In the first quarter of 2020, 87.5 percent of channel removals were for violations that were related to spam, scams, and other misleading content resulting in 1.7 million channels being removed. In addition, in the same period, YouTube removed over 470 million spam comments.[7]

Flexibility has played a critical role in enabling providers to experiment and thereby refine their approaches to content moderation over time. Moderating content is not easy given the almost unfathomable volumes of content online and the need to make sometimes-nuanced distinctions. Without Section 230, providers would face powerful disincentives for even the most basic steps to enforce their rules.[8]

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[5] Facebook Transparency, Community Standards Enforcement Report. Available at: https://transparency.facebook.com/community-standards-enforcement#dangerous-organizations.

[6] Twitter Transparency Report, Jan. - June 2019, Rules Enforcement. Available at: https://transparency.twitter.com/en/twitter-rules-enforcement.html.

[7] Google Transparency Report, YouTube Community Guidelines Enforcement, Video Removals by Reason. Available at: https://transparencyreport.google.com/youtube-policy/removals?hl=en&total_removed_videos=period:Y2020Q1;exclude_automated:human_only&lu=total_removed_videos.

[8] This not risk is not hypothetical. Even with Section 230, providers regularly face lawsuits. Returning to the spam example, there have been multiple lawsuits brought by spammers against providers who attempted to block their messages. *See. e.g.*, *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. 10-cv-04926 JF (PSG) (N.D. Cal. August 23, 2011), *e360Insight, LLC v. Comcast Corp.*, 546 F.Supp.2d 605 (N.D. Ill. 2008); *Pallorium v. Jared*, G036124 (Cal. Ct. App. Jan. 11, 2007); *America Online, Inc. v. GreatDeals. Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999).

II. NTIA'S PETITION LACKS AN ADEQUATE LEGAL BASIS FOR THE PROPOSED RULEMAKING

The Petition grounds its request for the rulemaking on the FCC's supposed authority under the Communications Act, NTIA's perception that there is a lack of evidence of Congressional intent to avoid such regulations, and the belief that there are ambiguities in Section 230 should be resolved through rulemaking. IA urges the FCC to carefully examine the assertions in the Petition in light of clear evidence that the type of regulation NTIA proposed is exactly the type of regulation that Section 230 was enacted to prevent. IA believes that the Petition errs in describing the legal basis on which the FCC could enact the rules proposed in the Petition ("Proposed Rules") and, in fact, further examination of the text and legislative history of Section 230 shows that the FCC does not have the authority necessary to issue Proposed Rules.

A. FCC Lacks Authority To Adopt Section 230 Regulations

The Petition proposes that the FCC adopt regulations to implement Section 230. But the FCC can only act pursuant to authority delegated by Congress, not at the direction of the executive branch.[9] Because Congress has delegated no such authority to the FCC, NTIA's proposed revisions to Section 230's implementation cannot be acted upon by the FCC.

[9] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[As the Commission has explained] [a]n agency literally has no power to act . . . unless and until Congress confers power upon it. And so our role is to achieve the outcomes Congress instructs, invoking the authorities that Congress has given us--not to assume that Congress *must* have given us authority to address any problems the Commission identifies").

NTIA asserts that the Commission has authority to adopt all but one of NTIA's Proposed Rules pursuant solely to Section 201(b) of the Communications Act.[10] Specifically, NTIA claims the authority provided by Section 201(b) "includes the power to clarify the language of [a] provision [within the Act]."[11] But Section 230 is clear and unambiguously affords the FCC no such authority. To the contrary, Section 230 is a self-executing provision directed at private parties and courts seeking to resolve civil complaints against covered service providers. Congress intended that the courts, not the FCC, construe Section 230 in the context of particular disputes.

NTIA relies on two cases, *City of Arlington v. FCC* and *AT&T v. Iowa Utilities Board*, each of which held that the incorporation of a statutory provision into the Communications Act was sufficient to afford the Commission jurisdiction to exercise its Section 201(b) rulemaking authority.[12] But, as described in detail below, Section 230 is distinguishable from the provisions at issue in those cases. Both *City of Arlington* and *Iowa Utilities Board* involved FCC regulations that would guide state and local decision-making over telecommunications network pricing and siting decisions against a

[10] 47 U.S.C. § 201(b) ("[The Commission may] "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter").

[11] Petition at 16.

[12] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (holding that the FCC could exercise its section 201(b) authority to establish pricing standards "interconnection and network element charges" under Section 251, which authorized state commissions to resolve disputes); *City of Arlington v. FCC*, 569 U.S. 290 (2013) (upholding FCC authority to adopt rules determining what constitutes a "reasonable period of time" under 47 U.S.C. § 332(c)(7)(B)(ii) for a municipality to make a decision on an application by a wireless provider seeking to construct a cell tower).

backdrop of a larger, specifically authorized, FCC regulatory program. Unlike those provisions, Section 230's (1) text, (2) legislative history, and (3) structure and purpose all provide affirmative evidence that Congress intended that the FCC would not, in fact, regulate here.

First, contrary to NTIA's assertion, the text of Section 230 is not "silen[t]" when it comes to the FCC's rulemaking authority.[13] Rather, Section 230's policy section expressly states that Congress intended to keep the Internet a "free market" that is "unfettered by Federal or State Regulation."[14] However, even if NTIA were correct, "silence" alone would not be a sufficient basis for the FCC to conclude that it has authority. Courts have repeatedly declined to "presume a delegation of power absent an express withholding of such power."[15] Furthermore, if NTIA could somehow find support for its assertion of FCC authority in Section 230's policy statements, the D.C. Circuit in *Comcast v. FCC*[16] already specified that Section 230's policy statement is not an independent source of FCC authority in and of itself. Instead, the court explained that Section 230's policy statements "help [to] delineate the contours of the statutory authority."[17] Indeed, the FCC has previously taken the view that Section 230 does not

[13] Petition at 17.
[14] 47 U.S.C. § 230(b)(2).
[15] *Motion Pictures Association of America, Inc. v. Federal Communications Commission*, 309 F.3d 796 (D.C. Cir. 2002) (quoting *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)).
[16] 600 F.3d 642, 654 (D.C. Cir. 2010).
[17] *Id.*

itself provide the agency with statutory authority to issue rules.[18] That holds true when delineating the contours of the FCC's rulemaking authority under Section 230 itself. In evaluating the Petition, the FCC must adhere to the text of Section 230, which specifically disclaims federal regulation and establishes legal immunities to be addressed by the courts in the litigation context.

Section 230 is thus different from the provisions at issue in the cases relied on by NTIA, which include no such statutory language. The question in *City of Arlington*, for example, was whether Congress intentionally left the statute ambiguous with the "'understand[ing] that the ambiguity would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[19] As the Court explained, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[20] Unlike *City of Arlington* and *Iowa Utilities Board*, Section 230's plain text is not silent on the FCC's role, but rather unambiguously states that the internet should be "unfettered by Federal or State Regulation."[21]

Second, NTIA also inaccurately asserts in its Petition that Section 230 lacks "[a] speck of legislative history [to] suggest congressional intent preclud[ing] the

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[18] *See, Restoring Internet Freedom*, Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 590 (2018). [hereinafter Restoring Internet Freedom Order]

[19] *See City of Arlington*, 569 U.S. at294 (quoting *Smiley v. Citibank* (South Dakota), N.A., 517 U.S. 735, 740-741 (1996)).

[20] *City of Arlington,* 569 U.S. at 294.

[21] 47 U.S.C § 230(b)(2).

Commission's implementation."[22] In fact, the cosponsors[23] of the Cox-Wyden Amendment that created Section 230, specifically designed the legislation as a *private-sector-driven* alternative to the Exon Amendment, which directed the FCC to regulate online obscene materials.[24] During the congressional markup and review of the bill both Reps. Wyden and Cox specifically expressed their concerns about the FCC being involved with regulating content on the newly budding Internet. Rep. Wyden explained that private parties "are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats."[25] He also asserted that an alternative FCC regulatory approach would "involve the Federal Government spending vast sums of money trying to define elusive terms that [would] lead to a flood of legal challenges."[26] Moreover, Representative Cox emphasized that "[the amendment] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the

[22] Petition at 17.

[23] The cosponsors of the amendment that eventually became Section 230 were Sen. Ron Wyden (D-OR) (then Rep. Wyden) and Former Rep. Christopher Cox (R-CA).

[24] 141 Cong. Rec. Pt. 11, 16007 (June 14, 1995) (remarks of Sen. Exon). *See also*, Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Rich. J. L. & Tech. Blog (Aug. 27, 2020)(available at: https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/) (describing the history of the Exon Amendment and its ultimate demise when the Supreme Court struck down the vast majority of the original Communications Decency Act as unconstitutional).

[25] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

[26] *Id.*

Internet."[27] T these statements of Section 230 's authors provide unequivocal evidentiary support that Congress *did not* intend for the FCC (or any government agency) to have a rulemaking role under Section 230.

Indeed, NTIA appears to concede as much. Elsewhere in the Petition, NTIA explains that Section 230 was specifically adopted as a "*non-regulatory* approach...intended to provide incentives for "Good Samaritan" blocking and screening of offensive materials."[28] But NTIA nowhere explains how its claim of FCC authority can be reconciled with this legislative history. To the contrary, NTIA appears well aware that Congress intended to create a legal environment free from government regulation and designed to stimulate a consistently vibrant and growing internet economy while still allowing companies within that ecosystem to set and enforce content moderation policies and procedures to protect their users. Confusingly, NTIA nonetheless asserts the FCC's jurisdiction to regulate.

Third, Section 230's structure and purpose also militate against FCC authority and are distinguishable from the provisions at issue in the cases relied on by NTIA. Congress adopted the provisions at issue in the *Iowa Utilities Board* and *City of Arlington* cases to establish a uniform federal regulatory regime to drive deployment and competition among former state-regulated local monopolies. As noted above, Section 230 involves no larger FCC federal program—or any regulatory scheme at all.

[27] *Id.* (statement of Rep. Cox).
[28] Petition at 22.

Rather, it is a self-executing statute focused on civil litigation. This is nothing like *Iowa Utilities Board*. There, Congress adopted extensive provisions designed to open local telecommunications markets to competition for the first time by allowing new entrants to lease "network elements" from the incumbent monopolists. The complex provisions called for state regulatory commissions to resolve disputes between the incumbents and new entrants concerning which network elements could be leased and at what cost. It was necessary and desirable for the FCC to establish rules governing those matters, rather than state regulatory commissions creating a patchwork of rules that would slow the development of intrastate and interstate competition. In contrast, Section 230 presents nothing like the complex regulatory scheme involving 50 state regulatory commissions in *Iowa Utilities Board*.

City of Arlington is likewise inapposite. In that case, the Court assessed whether Section 201(b) provided the FCC with rulemaking authority under Section 332(c)(7)(B)(ii), which requires state or local governments to act on applications to place, construct, or modify wireless facilities "within a reasonable period of time after the request is duly filed."[29] Congress adopted that provision to encourage local infrastructure decisions that would advance network deployment for FCC-regulated wireless services. Accordingly, it made sense for the FCC to provide guidance on what constitutes a "reasonable period" to facilitate and standardize the local authorization

[29] 47 U.S.C. § § 201(b), 332(c)(7)(B)(ii); *City of Arlington v. FCC*, 569 U.S. 290 (2013).

process as part of the larger regulatory scheme governing mobile communications services, over which Congress has expressly given the FCC lead regulatory authority.[30]

In short, NTIA's reliance on *Iowa Utilities Board* and *City of Arlington* to extend the FCC's Section 201(b) rulemaking authority over Section 230 is misplaced. Here, the specific evidence that Congress affirmatively intended to deny the FCC any authority over implementing Section 230(c) overcomes the mere incorporation of Section 230 into an Act with general rulemaking language. Because NTIA is asking the FCC to go beyond the authority delegated to it by Congress, the Commission must deny NTIA's request.

But even if that were not the case, and some ambiguity with respect to FCC authority remained, it would be unreasonable for the FCC to attempt to exercise it here. NTIA's Proposed Rules would bring within the Commission's purview huge swaths of the U.S. economy. As the Supreme Court explained in *Utility Air Regulatory Group v. EPA*, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' by exercising the power to interpret an ambiguous term within its organic statute, 'we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and

[30] 47 U.S.C. § 332.

political significance.'"[31] Applied here, the courts—not the Commission—have interpreted Section 230 for decades, with no indication of, let alone need for, Commission intervention. As a whole, NTIA's Petition would have the FCC upend well-established judicial interpretations of Section 230 in ways that would be hugely disruptive to the internet economy and undermine interactive computer service ("ICS") providers' ability to set and enforce necessary content policies and practices. Like the EPA rule in *Utility Air Regulatory Group*, the exercise of rulemaking authority over Section 230 would be "unreasonable because it would bring about an enormous and transformative expansion in. . .regulatory authority without clear congressional authorization."[32]

Finally, the FCC cannot adopt rules that would violate the First Amendment. As described below, NTIA's proposed regulations are inconsistent with fundamental First Amendment principles.[33] The Commission (like any reviewing court) should interpret its authority in ways that avoid such serious constitutional questions.

Under the constitutional avoidance canon of statutory construction "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the agency should construe the statute to avoid such problems unless such

[31] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2013). *See also US Telecom Ass'n v. FCC*, 855 F.3d 381 (DC Cir. 2017) (dissents from rehearing *en banc* of Brown, J., and Kavanaugh, J.).
[32] *Id.*
[33] *See infra* at Section IV. Proposed Rules Are Inconsistent With First Amendment Principles, pp. 46-55.

construction is plainly contrary to the intent of Congress."[34] In particular, the Supreme Court has invoked the need for the "clearest indication" of congressional intent to limit the reach of agency authority that would raise serious First Amendment concerns.[35] As the Court explained in *N.L.R.B. v. Catholic Bishop of Chicago,* where an agency's "exercise of its jurisdiction ... would give rise to serious constitutional questions," the court "must first identify the 'affirmative intention of the Congress clearly expressed'" before concluding that the Act grants jurisdiction.[36] Applied here, notwithstanding Section 230's incorporation into the Communications Act, there is no "affirmative intention of Congress clearly expressed." Absent the clear intent of Congress to afford the FCC rulemaking authority over Section 230, the Commission should decline to exercise jurisdiction here given the serious constitutional concerns raised by NTIA's Proposed Rules.

B. Section 230 Is Unambiguous And Leaves No Room For FCC Regulation

In addition to asking the Commission to exceed its jurisdiction, NTIA's petition rests on the incorrect premise that there is ambiguity in Section 230 that should be

[34] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (denying *Chevron* deference and rejecting the NLRB's interpretation of the National Labor Relations Act ("NLRA") as banning peaceful hand-billing, where the NLRA contained no clear expression of congressional intent to do so).

[35] *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 501 (1979) (holding that, given the First Amendment implications, the National Labor Relations Board's jurisdiction did not extend to religious school-teachers absent evidence of congressional intent).

[36] *Id.*

clarified through rules.[37] Section 230, however, is unambiguous as has been repeatedly demonstrated by courts in the twenty plus years since its passage. Even courts that have raised public policy concerns with Section 230 based on the outcomes in specific cases in which they have ruled have noted that the law is clear in terms of text and intent and that only Congress can alter it.[38] Perhaps even more importantly, Congress has ratified the very interpretation of Section 230 in *Zeran v. America Online*[39] on which NTIA relies for its assertion that Section 230 is ambiguous.[40]

The Petition characterizes the nearly 25 years of case law on Section 230 as based on a quote from the *Zeran* decision that was taken out of context.[41] To evaluate the claim in the Petition, it is critical to look specifically at the language of the Petition and the relevant passage from the Fourth Circuit's opinion in *Zeran*. The Petition claims,

> Much of this overly expansive reading of section 230 rests on a selective focus on certain language from *Zeran*, a case from the United States of Appeals for the Fourth Circuit. The line of court decisions expanding section 230 in such extravagant ways relies on

[37] Petition at 15-17.

[38] *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F. 3d 12, 29 (1st Cir. 2016), cert. denied 137 S. Ct. 622 (2017) ("If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation."); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998) (noting that "Congress made a different policy choice" and that "the statutory language is clear."). *See also*, *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, n. 5 (E.D. Va. 2003) ("Plaintiff argues that providing ISPs immunity against federal civil rights is bad policy. Yet it is not the role of the federal courts to second-guess a clearly stated Congressional policy decision.").

[39] 129 F.3d 327 (4th Cir. 1997).

[40] Petition at 26-27.

[41] *Zeran*, 129 F.3d at 330.

> *Zeran*'s reference to: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." This language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or factchecking statements. But, it is an erroneous interpretation, plucked from its surrounding context and thus removed from its more accurate meaning."[42]

The irony is that the argument the Petitioner makes is itself an "erroneous interpretation, plucked from its surrounding context."[43] NTIA has mistakenly omitted the sentence that is actually "immediately prior" to the sentence it believes has been taken out of context, as is demonstrated by the full quotation from the court's opinion below. The language the Petition quotes, appears as part of the court's analysis of Section 230(c)(1), in which it states,

> By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. **Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.** Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred."[44]

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[42] Petition at 26 (citations omitted). To the extent that this language in the Petition suggests that *Zeran* has been erroneously construed to mean that Section 230 to protect a provider's own statements, this is not the case. There are numerous cases refusing to apply Section 230 to content developed, in whole or in part, by providers. *See, e.g.*, *Enigma Software Group v. Bleeping Computer*, 194 F. Supp. 3d 263 (2016); *Tanisha Systems v. Chandra*, 2015 U.S. Dist. LEXIS 177164 (N.D. Ga. 2015); *Perkins v. LinkedIn*, 53 F. Supp. 3d 1222 (2014); *Anthony v. Yahoo!, Inc.*, 421 F.Supp.2d 1257 (N.D. Cal. 2006); *Maynard v. Snapchat*, 816 SE 2d 77 (Ga. Ct. App. 2018); *Dimetriades v. Yelp*, 228 Cal. App. 4th 294 (2014).

[43] Petition at 26.

[44] *Zeran*, 129 F.3d at 330 (emphasis added).

In light of the clear statement of the court that the claims barred are those which treat the service provider liable as though they were a publisher, it is difficult to understand how the Petition concludes from the court's opinion that Zeran intended Section 230(c)(1) to only protect the editorial decisions of information content provider, stating,

> ... the quotation refers to third party's exercise of traditional editorial function—not those of the platforms. As the sentence in *Zeran* that is immediately prior shows, section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." In other words, the liability from which section 230(c)(1) protects platforms is that arising from the content that the third-party posts—i.e. the "information" posted by "another information provider" and those information providers' editorial judgments."[45]

While NTIA may believe that courts have erred in their interpretation of Section 230, Congress has not only acquiesced to the courts' interpretation of Section 230, but rather has specifically endorsed the application of Section 230 adopted in leading cases such as *Zeran*.[46] For example, House Report Number 107-449, on the creation of the new kids.us domain, specifically states that *Zeran* "correctly interpreted section

[45] *Id.*

[46] *See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("The protection provided by § 230 has been understood to merit expansion. Congress has extended the protection of § 230 into new areas. See 28 U.S.C. § 4102(c)(1) (providing that U.S. courts 'shall not recognize or enforce' foreign defamation judgments that are inconsistent with § 230); 47 U.S.C. § 941(e)(1) (extending § 230 protection to new class of entities)").

230(c)."[47] In 2010, Congress expanded the application of Section 230 in the ''Securing the Protection of our Enduring and Established Constitutional Heritage Act'' or "SPEECH Act."[48] Codified at 28 U.S.C. § 4102, the SPEECH Act prevents the enforcement of foreign defamation judgements by U.S. courts, if the courts determine that enforcing the judgement against an ICS would be inconsistent with Section 230.[49]

In addition, Congress has shown that when it disapproves of judicial application of Section 230, it will not hesitate to act. For example, after the First Circuit held that Section 230 barred claims against an online site that assisted in drafting advertisements for underage sex-trafficking,[50] Congress instead of eliminating Section 230, amended the law to create an exception for civil actions brought under anti-trafficking laws.[51]

The other examples provided of how Section 230 is purportedly "ambiguous" fail to recognize the clear consensus among courts or focus on isolated instances in nearly a quarter-century of jurisprudence to attempt to justify the FCC's intervention.[52]

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[47] *See* H.R. Rep. No. 107-449, at 13 (2002) (providing that the interpretation from *Zeran* should apply to the new "kids.us" subdomain, established in 47 U.S.C. § 941); 28 U.S.C. § 4102(c)(1) (applying § 230 to foreign judgments).

[48] Pub. L. No. 111–223 (2010).

[49] 28 U.S.C. § 4102(c).

[50] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F. 3d 12.

[51] Pub. L. No. 115-164, 132 Stat. 1253 (2018).

[52] Petition at 27-28; *cf., Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) ("It is clear that § 230 was intended to provide immunity for service providers like Google on exactly the claims Plaintiff raises here"); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d at 1262 (quoting *Ben Ezra, Weinstein, & Company, Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir.2000), "Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Green v. America Online Inc.*, 318 F.3d 465 (3rd Cir. 2003) ("By its terms, § 230

III. THE PROPOSED RULES ARE INCONSISTENT WITH THE TEXT AND INTENT OF SECTION 230

Even if the FCC determines that it has an adequate legal basis to issue rules interpreting Section 230, the FCC may not issue rules that conflict with the language of the statute and the intent of Congress.[53] The substance of the Proposed Rules are contrary to the plain meaning of Section 230 and Congress' clear intent.

A. Overview Of Proposed Rules

The Proposed Rules would make several changes to Section 230 which are best understood by examining how the Proposed Rules would alter the protections provided by (c)(1) and (c)(2).

The Proposed Rules would restrict application of Section 230(c)(1) to claims based on a failure to remove content developed by a third party, specifically excluding any claims related to the removal of content or other exercise of editorial discretion. Today, Section 230(c)(1) may be asserted by a provider in response to claims based on hosting of content or removal of content, so long as the content is from "another information content provider." In addition, the Proposed Rules would alter (c)(1)'s

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provides immunity to AOL as a publisher or speaker of information originating from another information content provider"); *Blumenthal v. Drudge*, 992 F. Sup. at 50 ("Congress has said quite clearly that such a provider shall not be treated as a 'publisher or speaker' and therefore may not be held liable in tort.").

[53] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("When a court reviews an agency's construction of the statute which it administers it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress").

operation by adding a new definition of "information content provider" that would cause an ICS to be treated as an "information content provider" for "presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing" a third party's content.[54] Today, providers have protection under (c)(1) for performing traditional editorial functions including deciding which content to publish or withdraw, arranging the content, and editing the content (subject to limitations).[55] Obviously, if a provider comments on third party content that comment is content "developed in whole or in part" by the provider and not "another information content provider" and thus is not covered by (c)(1)'s existing language or its interpretation by courts.[56] The Proposed Rules would further limit Section 230(c)(1) through NTIA's proposed definition of what it means to treat a service provider as a "publisher or speaker" of third party content.[57] This would cause a provider to lose the protections of (c)(1) if the provider—whether manually or through an algorithm—selects, recommends, promotes, or arranges third party content. Today, a provider's decisions about how to display third party content are protected by (c)(1), thus the Proposed Rule would result in a substantial change in the law.

[54] Petition at 40-42.

[55] *See* discussion of *Zeran*, *infra* p. 34 n. 83. "Subject to limitations" refers to the current law which would treat an interactive computer service as an information content provider if the service edited content in such a way that it "materially contributed to the illegality" of the content. *See, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[56] *See supra* p. 20 n. 42.

[57] Petition at 46-47.

The Proposed Rules would also restrict the application of Section 230(c)(2), with a particular focus on (c)(2)(A). Under the Proposed Rules, the immunity in (c)(2)(A) would become the exclusive immunity that applies to a service provider's decision to remove or reject content. As noted above, today Section 230's protections in (c)(1) and (c)(2) both potentially apply to removal decisions, though how and when they apply differs. In addition, protections for content removals would be limited by new definitions of "good faith" and "otherwise objectionable." The details of these definitions are important for understanding their impact.

The Proposed Rules put forward an all-encompassing definition of "good faith" restricting Section 230(c)(2)(A)'s protections to only provider removal decisions that meet all of the following requirements:

- ⇒ restricts access to or availability of material or bars or refuses service to any person consistent with publicly available terms of service or use that state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices, including by any partially or fully automated processes, and that are in effect on the date such content is first posted;
- ⇒ has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A);
- ⇒ does not restrict access to or availability of material on deceptive or pretextual grounds, and does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict; and

⇒ supplies the interactive computer service[58] of the material with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.[59]

These changes to (c)(2)(A) would dramatically limit the ability of providers to assert Section 230 protections in lawsuits resulting from content removal and substantially burden the process by which "interactive computer services" exercise their discretion to determine which content to allow on their services. For example, if a social media platform decides to change its policies to explicitly prohibit a new type of content it would not be able to rely on Section 230 for protection from lawsuits if it removed content that was posted before the policy change (even if advance notice of the change was provided). Thus, Section 230 would not apply if a service decided to become more family-friendly by prohibiting pornography and it sought to remove pornography posted before the change to its rules. In addition, service providers would be unable to benefit from Section 230 if they decided to enforce a rule in one instance but not in another. Thus, in order to qualify to assert (c)(2)(A) a provider would not be able to have a "public figure" or "newsworthiness" exception without the risk of

[58] While the text of the Petition does say "interactive computer service," we are operating under the presumption that NTIA intended to use the term "information content provider" in this part of the Proposed Rule. Therefore, our comments respond to the text with that presumption in mind.
[59] Petition at 39-40.

litigation or if they have a rule against nudity they would not be able to make exceptions for works of art, science, or journalism. Additionally, providers would have to provide notice and an opportunity to appeal for each removal decision unless there was an "objectively reasonable" belief that the content was related to criminal activity or that notice would create a risk of "imminent physical harm." Thus, a provider who fails to provide notice to an individual related to a content removal because they have a subjective belief that it will cause a significant risk of physical harm to a person will not be able to assert Section 230 without burdensome litigation if there is a question of fact as to whether it is objectively reasonable to believe that the risk of harm is "imminent." Therefore, an operator of an online forum for victims of domestic abuse would be forced to face a potential litigation or to provide notice and the opportunity to respond to a user that it believes is an abuser who is trying to ascertain the location of a victim who uses the forum for the purpose of causing physical harm.

It is also notable that the Proposed Rules seek to define "good faith" using an objective standard ("objectively reasonable"), replacing the subjective test in place today[60] and displacing the provider discretion intended by Congress in crafting the immunity and the plain language of the provision itself.[61] This is a significant change

[60] *See, e.g.*, *Holomaxx v. Yahoo!*, Case Number 10-cv-4926-JF ("Indeed, the good faith immunity is focused upon the provider's subjective intent."); *Holomaxx v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (same).

[61] *See e.g.*, *Shulman v. Facebook*, Civil Action No. 17-764 (JMV) (LDW) (D.N.J. Feb. 4, 2019) ("Importantly, Section 230(c)(2)(A) does not require the user or provider of an interactive computer service to demonstrate that the otherwise "objectionable" material is actually objectionable.").

that will impact how and when the (c)(2)(A) immunity can be asserted and how a court will assess whether to apply the immunity.

Finally, the Proposed Rules would introduce a new requirement for transparency regarding content moderation practices in mass-market products. "Any person providing an interactive computer service in a manner through a mass-market retail offering to the public shall publicly disclose accurate information regarding its content-management mechanisms as well as any other content moderation, promotion, and other curation practices of its interactive computer service sufficient to enable (i) consumers to make informed choices regarding the purchase and use of such service and (ii) entrepreneurs and other small businesses to develop, market, and maintain offerings by means of such service."[62] This requirement has no basis in Section 230 and thus does not impact the operation of the statute. Further, the implications of promulgating such a rule could provide a roadmap for bad actors to navigate their way around enforcement of the ICS's content moderation policies. As a result, this Proposed Rule could place the safety of users at risk and create a more restrictive internet environment, which directly conflicts with Congress's intended purpose of this statute.

[62] Petition at 52.

B. The Proposed Rules Conflict With The Language And Intent Of Section 230

Congress intended to encourage content moderation through Section 230, but the Proposed Rules disincentivize it by creating more protection for leaving up potentially harmful content than removing it. The Proposed Rules do this in two significant ways: (1) putting forward a reading of Section 230 that links (c)(1) and (c)(2); and (2) adopting novel definitions of key terms in (c)(2) such as "good faith" and "otherwise objectionable."

1. Linking (c)(1) And (c)(2)

The Petition's Proposed Rules seek to advance dramatic new interpretations of Section 230's twin immunities — the protection from publisher liability for decisions related to third party content and protections for moderation activities. Courts have long held that these two provisions operate as two independent immunities. However, the Proposed Rules would deprive these two provisions of their independence and stand to disrupt the careful balance of the statute by providing more protection for *leaving up* harmful content than removing it. As a result of the Proposed Rules, providers would continue to enjoy the broad immunity granted in Section 230(c)(1) only for decisions to leave up third-party content. Decisions to remove third-party content would be subject to Section 230(c)(2)'s more narrow protections for "good faith" removals of content deemed by the provider to be "obscene, lewd, lascivious,

filthy, excessively violent, harassing, or otherwise objectionable."[63] As is discussed more fully below, the Proposed Rules put forward an interpretation of (c)(2) that is substantially narrowed due to new definitions of "good faith" and "otherwise objectionable." This would clearly tip the balance of Section 230 away from the intended goal of encouraging online services to self-regulate, since to benefit from Section 230's full protection from litigation and liability a provider would have to leave third-party content untouched as a matter of policy and practice. This result stands in stark contrast to the language of the statute and the intent of Congress. The statute is titled "Protection for private blocking and screening of offensive material."[64] And the title of subsection (c)—which encompasses both of the Section 230 immunities at issue here—is "Protection for 'Good Samaritan' blocking and screening of offensive material."[65]

In addition, contrary to NTIA's assertion, this interpretation is not necessary to avoid surplusage as (c)(1) and (c)(2) are not coextensive.[66] Federal courts have repeatedly rejected this specific argument.[67] Pointing to dicta in a lone district court

[63] 47 U.S.C. § 230(c)(2)(A).
[64] *Id.* § 230.
[65] *Id.* § 230(c).
[66] Petition at 29-30.
[67] *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F. 3d at 23 (stating "The appellants' suggestion of superfluity is likewise misplaced. Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites. *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009); *Chi. Lawyers' Comm. for Civil Rights Under Law Inc. v. Craigslist Inc.*, 519 F.3d 666, 670-71 (7th Cir. 2008); *Batzel v. Smith*, 333 F.3d 1018, 1030 n. 14 (9th Cir.2003), and nothing about the district court's analysis is at odds with that conclusion.").

opinion in *E-ventures Worldwide, LLC v. Google Inc.*, NTIA argues that allowing Section 230(c)(1) to immunize decisions to remove content would render Section 230(c)(2)(A) "superfluous."[68] *E-ventures*'s interpretation—which does not appear to have been cited favorably by any other court—is unpersuasive because "Section 230(c)(2)'s grant of immunity, while overlapping with that of Section 230(c)(1), also applies to situations not covered by Section 230(c)(1)."[69] As the Ninth Circuit explained in *Barnes v. Yahoo!, Inc.*,[70] Section 230(c)(1) "shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."[71] Section 230(c)(2)(A) simply "provides an additional shield from liability," encompassing, for example, those service providers "who cannot take advantage of subsection (c)(1) ... because they developed, even in part, the content at issue."[72] The Ninth Circuit recently reiterated that conclusion in *Fyk v. Facebook*,[73] holding that Section 230(c)(1) immunized Facebook against claims based on its alleged "de-publishing" of user content and explicitly rejecting the argument that applying Section 230(c)(1) to content removal decisions makes Section 230(c)(2) superfluous.[74]

[68] *Id.* at 30.
[69] *E-ventures Worldwide, LLC v. Google Inc.*, 2017 U.S. Dist. LEXIS 88650 at *7 (M.S. Fla. Feb. 8, 2017.
[70] 570 F.3d 1096 (9th Cir. 2009).
[71] *Id.* at 1105.
[72] *Id.* (emphasis added).
[73] 808 F. App'x 597 (9th Cir. 2020).
[74] *Id.* at 598.

The immunity in (c)(2)(B) is clearly distinct from the immunity in (c)(1). Section 230(c)(2)(B) states, a "provider or user of an interactive computer service" shall not be held liable for—"any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."[75] Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an ICS. In addition, nowhere in (c)(2)(B) is there any mention of the protections being limited to legal claims seeking to treat the provider or user as a "publisher or speaker" of content. This has two important consequences — (1) the immunity provision is available to users and ICSs who have played roles in content removal but are not hosting or "publishing" the content at issue; and (2) the claims against which the (c)(2) immunities can be asserted include claims that are not based on treating the user or provider as the "speaker or publisher" of content. For example, (c)(2)(B) has been applied to protect a provider of security tools from liability for their decision within their tool to treat a specific piece of downloadable software as malicious code.[76] The provision also clearly applies to tools that providers make available to the "information content providers" that use their services and to the manner in which those "information content providers" may use those tools. These tools include options to mute or block other users, keyword filters, parental control tools, and "Not Safe for

[75] 47 U.S.C. § 230(c)(2)(B).

[76] *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F. 3d 1169 (9th Cir. 2009).

Work" or other warning designations that content providers can apply. It is exactly these types of tools that (c)(2) was designed to promote.[77]

Section (c)(2) provides an important backstop to ensure Section 230 broadly protects provider efforts to restrict or remove inappropriate content as Congress intended.[78] Unlike (c)(1), the protections of (c)(2)(A) are not restricted to when service providers are being treated as the "publisher or speaker" of the third party content and thus provide an important additional protection for cases where courts may determine the claims are of a nature that does not implicate (c)(1). In its recent amicus brief in the California Court of Appeals case *Murphy v. Twitter*, IA noted the long line of cases in which plaintiffs have tried to circumvent Section 230(c)(1) "through the creative pleading of barred claims."[79] Many courts, including the California Supreme Court and the California Court of Appeal, have wisely rejected those attempts.[80] Other courts have reached similar results and dismissed claims sounding in breach of contract,

[77] *See, e.g.*, 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.").

[78] *Donato v. Moldow*, 865 A.2d 711, 727 (N.J. Super. Ct. App. Div. 2005) (noting one court's interpretation of the purpose of the good samaritan provision, that "[i]t was inserted not to diminish the broad general immunity provided by § 230(c)(1), but to assure that it not be diminished by the exercise of traditional publisher functions. If the conduct falls within the scope of the traditional publisher's functions, it cannot constitute, within the context of § 230(c)(2)(A), bad faith.").

[79] *Hassell v. Bird*, 5 Cal. 5th 522, 541-542 (2018) (internal citation and quotation marks omitted).

[80] *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (rejecting "artful skirting of the CDA's safe harbor provision"); *Hassell*, 5 Cal. 5th at 541; *Cross v. Facebook*, Cal. App. 5th 190, 201-02 (2017); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573 (2009); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (2002).

promissory estoppel, and unfair competition.[81] Section 230(c)(2) ensures that regardless of the nature of the claim, there remains broad immunity for a provider's efforts to remove content.

NTIA's proposed interpretation would have an enormous impact on providers because it would cut to the heart of how they have benefited from the protections of Section 230(c)(1). A growing number of courts have held that Section 230(c)(1) bars claims based on a provider's removal of content or "deplatforming" of a user.[82] These courts have found support for this approach in the plain language of Section 230(c)(1) and many earlier cases, dating back to the seminal *Zeran* decision. "At its core, § 230 bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish [or] withdraw ... content."[83] Courts of Appeals have widely held that a provider's decision about whether to remove a third-party's content, or "prevent its posting," is "precisely the

[81] *See, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 599 (9th Cir. 2020) (affirming dismissal of UCL claim and fraud claim, among others); *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119-20 (N.D.Cal. 2020) (breach of contract claim); *Brittain v. Twitter, Inc.*, No. 19-cv-00114-YGR, 2019 WL 2423375, at *3 (N.D. Cal. June 10, 2019) (breach of contract and promissory estoppel); *Dehen v. Does 1-100*, 2018 WL 4502336 at *3-4 (S.D. Cal. Sept. 19, 2018) (breach of contract).

[82] *See, e.g.*, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015), aff'd sub nom. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (barring claims alleging that a platform had "engaged in blatant discriminatory conduct" by publishing some content and removing other content); *Domen v. Vimeo, Inc.*, 2020 WL 217048, at *6 (S.D.N.Y. Jan. 15, 2020), appeal docketed, No. 20-616 (2d Cir. Feb. 18, 2020); *Mezey v. Twitter, Inc.*, 2018 WL 5306769 at *1 (S.D. Fla. July 19, 2018).

[83] *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (quotations omitted).

kind of activity for which Section 230 was meant to provide immunity."[84] And this is for good reason. In *Batzel v. Smith*, the Ninth Circuit observed that treating decisions regarding what to publish versus what not to publish differently "is not a viable" and that "[t]he scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance."[85]

Given the clear differences between the (c)(1) and (c)(2) immunities, NTIA's argument for disrupting over twenty years of jurisprudence fails. There is no basis on which the FCC could issue a valid rule to overturn existing interpretations of (c)(1) and (c)(2) given the clarity and consistency of court interpretations of the statutory text,[86] the plain language of the statute, and the legislative history. As previously noted, the

[84] *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1170; *see Force v. Facebook, Inc.*, 934 F. 3d 53, 65 (2d Cir. 2019).

[85] *Batzel v. Smith*, 333 F.3d 1018 (paragraph 64) (9th Cir. 2003).

[86] *See e.g.*, *Sikhs for Justice*, 697 F. App'x at 526 (holding that Section 230(c)(1) barred a lawsuit claiming that Facebook had unlawfully discriminated against the plaintiff by "hosting, and later blocking, [plaintiff's] online content" in India); *see also Fyk*, 808 F. App'x at 598 (providing immunity for "de-publishing pages that [plaintiff] created and then re-publishing them for another third party"); *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (affirming dismissal under Section 230(c)(1) of claims challenging MySpace's deletion of fake user profiles); *Fed. Agency of News v. Facebook*, 432 F. Supp. 3d 1107 (applying Section 230(c)(1) to dismiss claims challenging Facebook's decision to remove accounts that Facebook believed to be controlled by Russian intelligence); *Taylor v. Twitter, Inc.*, No. CGC 18-564460 (Cal. Superior Ct. Mar. 8, 2019) (dismissing claims under Section 230(c)(1) challenging Twitter's decision to suspend the account for violations of Twitter's rule against violent extremism); *Johnson v. Twitter, Inc.*, No. 18CECG00078 (Cal. Superior Ct. June 6, 2018) (ruling that Section 230(c)(1) barred a lawsuit challenging Twitter's decision to suspend a user after he attempted to raise money to "tak[e] out" an activist).

application of (c)(1) to content removal decisions has been explicitly ratified by Congress.[87]

In addition, the Proposed Rule's attempts to exclude from Section 230(c)(1) other traditional publisher functions, such as determining the placement and prioritization of content, must also be rejected in light of the clear meaning of the text, correctly interpreted by courts and endorsed by Congress, that (c)(1) protects all traditional publisher functions. The justification in the Petition strains credibility, stating "NTIA suggests that the FCC can clarify the ambiguous phrase 'speaker or publisher' by establishing that section 230(c)(1) does not immunize the conduct of an interactive service provider that is actually acting as a publisher or speaker in the traditional sense."[88] Without any indication from Congress that it intended the words chosen for the statute to have a meaning other than "actually acting" as a "publisher" or a "speaker," the FCC must decline to adopt alternative meanings of those terms.[89] Courts have already evaluated these terms in Section 230, and relying on their terms plain meaning, rejected the argument that (c)(1) should not apply to arranging third party content. In *Force v. Facebook*, the Second Circuit Court of Appeals stated,

> We disagree with plaintiffs' contention that Facebook's use of algorithms renders it a non-publisher. First, we find no basis in the ordinary meaning of "publisher," the other text of Section 230, or decisions interpreting Section 230, for concluding that an

[87] *See supra* pp. 21-22.

[88] Petition at 46.

[89] *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (undefined terms should be given their "plain meaning.").

> interactive computer service is not the "publisher" of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests.[90]

The Court also noted, correctly, that

> Accepting plaintiffs' argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties.[91]

Courts have also made clear that there is no basis in Section 230 to distinguish between manual and automated editorial decisions regarding the placement of content. For example, Section 230(c)(1) has been applied to the "'automated editorial acts' of search engines."[92] Courts have also noted that arguments intended to narrow (c)(1) and exclude automated editorial decisions would be inconsistent with Congress's intent.[93] At a practical level, this Proposed Rule would have a dramatic effect on the online products and services that many of us rely on a daily basis. As a

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[90] *Force v. Facebook, Inc.*, 934 F. 3d at 66 (citing to *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d at 1172; *Carafano v. Metrosplash.com Inc.*, 339 F. 3d 1119, 1124-25 (9th Cir. 2003); and *Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019), cases which all rejected similar arguments).

[91] *Id.*

[92] *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F. 3d 1263, 1271(D.C. Cir. 2019) (quoting *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016)).

[93] *Force v. Facebook*, 934 F. 3d at 67 ("We disagree with plaintiffs that in enacting Section 230 to, *inter alia*, "promote the continued development of the Internet," 47 U.S.C. § 230(b)(1), and "preserve the vibrant and competitive free market," *id.* § 230(b)(2), Congress implicitly intended to restrain the automation of interactive computer services' publishing activities in order for them to retain immunity" and "it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.").

result of the Proposed Rule, these products and services would be subject to potential lawsuits for any of the millions of automated decisions required to elucidate the incredible volume of content available via today's internet.[94]

For these reasons, the FCC should deny the NTIA's Petition including Proposed Rules for 47 C.F.R. § 130.01 and § 130.03.

2. Novel Definitions Of Terms In (c)(2) Narrow The Immunity

The Proposed Rules also seek to substantially narrow provider protections for removal of content by making changes to Section 230(c)(2)(A). As previously discussed, Congress clearly intended Section 230 to remove disincentives to moderating content, namely the threat of endless litigation and specter of potential liability, that existed at the time Section 230 was enacted.[95] Thus, proposals to further narrow Section 230's protections available to providers who engage in content moderation directly contravene the will of Congress and cannot succeed.

The strong protections for content moderation in Section 230 have played a particularly important role in creating space for online platforms to refine their approaches to content moderation over time. Moderating content is not easy given the enormous volume of content online and the sometimes-nuanced distinctions that providers must make to strike the right balance between which content to remove and

[94] For example, Google has indexed hundreds of billions of webpages. (https://www.google.com/search/howsearchworks/crawling-indexing/).
[95] *See supra* p. 3 n. 4.

which to leave up. Our member companies recognize that they do not always achieve the perfect balance, but they are constantly learning, adapting, and updating their approaches. Section 230 allows online companies the room to experiment in this way without having to worry that they will face the heavy costs of litigation each time a mistake is made or someone is unhappy with a moderation decision. Companies can learn and make adjustments—an essential process that they engage in constantly.

The Proposed Rules would dramatically change the scope of the immunity in Section 230(c)(2)(A)[96] by introducing new and unsupported definitions of key terms, including "good faith" and "otherwise objectionable" and pose great risks to the ability of providers to continue many of the voluntary efforts engaged in today to make services higher quality and safe to use. The Proposed Rule for 47 C.F.R. § 130.02(e) introduces a novel interpretation of "good faith" that spans from unfair and deceptive trade practices, already regulated by the Federal Trade Commission, to new requirements for publishing policies, providing notice to users, and allowing appeals for content removal decisions. The Petition's only support for the notion that "good faith" requires private entities to afford users of their services some form of "procedural due process"[97] to qualify as acting in "good faith" is the Executive Order

[96] 47 U.S.C. § 230(c)(2)(A).

[97] "Procedural due process" is used as a shorthand to reference user notice and appeal processes in content moderation and should not be confused with legal "due process" or circumstances under which legal due process is required.

on Preventing Online Censorship.[98] NTIA offers no support in law or legislative history to reinforce its recommendation of an objective standard that deviates from two decades of jurisprudence interpreting "good faith" as used in Section 230(c)(2)(A) as a subjective standard.[99] Further, the Petition speaks of "ambiguity" among the courts in interpreting this provision of Section 230 without citing cases that conflict. In other words, the Petition provides no concrete evidence for why the FCC should substitute its judgement for that of Congress and the courts in interpreting the meaning of "good faith." For that reason alone the FCC should reject this recommendation, however, there are other compelling reasons why the Commission should refuse to redefine good faith.

The text of Section 230(c)(2)(A) does not support interpreting the good faith requirement as including some elements of procedural due process. Moreover, this proposition is inconsistent with precedent[100] and additional First Amendment concerns arise. Section 230's protections apply to a wide range of "interactive computer services." Among these services are many institutions that have been created for a specific purpose or among individuals holding shared values. The practical impact of the Proposed Rule changing the definition of good faith is to impose a series of costs

[98] Petition at 38-39. The Executive Order on Preventing Online Censorship provides a questionable basis for any agency action, as significant concerns have been raised regarding the legal basis for the Order and whether it is constitutional.

[99] *Id.*

[100] *See e.g., Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097

and restrictions on the exercise of these institutions' constitutionally-protected First Amendment rights to choose which speech to publish and which to reject or else face consequences in the form of expensive litigation. This impermissibly burdens free expression without any appropriate justification. Additionally, the institutions that would be most substantially burdened are those that offer platforms for communication among a community that is organized around shared values, such as church groups, religious organizations, schools, or those working on common political causes.

The text of Section 230 also does not support defining "good faith" in such a way that it would exclude imperfect or selective enforcement. "A mere claim of selective enforcement is not sufficient to show a lack of good faith under Section 230(c)(2)(A). Indeed, this provision was expressly enacted to provide immunity for providers that 'remove[] some—but not all—offensive material from their websites.'"[101] And because wholly uniform application of content-moderation policies at scale is almost impossible, allowing Section 230(c)(2)(A) immunity to be defeated by an allegation that someone else's similar content was not removed would render the statute a virtual dead letter. That is not the result Congress intended. Section 230's authors were well aware of the risks of allowing liability to attach to instances of

[101] *Bennett v. Google*, 882 F.3d 1163, 1166 (D.C. Cir. 2018); *see also Force v. Facebook*, 934 F. 3d at 71 (finding that Section 230 immunity applies where a provider "undertake[s] efforts to eliminate objectionable" content even where it "has not been effective or consistent in those efforts.").

imperfect content moderation and acted with the specific intent of addressing such risks.

The text of Section 230 also makes it clear that (c)(2)(A) is intended to be a subjective standard focused on what the provider or user believes is an appropriate response to potentially objectionable content.[102] The provision states it protects actions taken in good faith to voluntarily restrict content that the "*provider or user considers* to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[103] Thus, the Proposed Rules frequent use of "objectively reasonable" in proposed Section 130.02 conflicts with the language of the statute. In particular, proposed Section 130.2(e)(ii)'s addition to the definition of "good faith" directly conflicts with and cannot be reconciled with this language from Section 230(c)(2)(A).[104] Section 130.02(e)(ii) states that good faith requires that the provider "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[105] Rather than adopt a single national standard for objectionable content, Congress pegged immunity to what a provider "considers to be"

[102] *See Holomaxx v. Yahoo!*, 783 F. Supp. 2d at 1104 (internal citation omitted) (concluding that "virtually total deference to provider's subjective determination is appropriate").
[103] 47 U.S.C. § 230(c)(2)(A) (emphasis added).
[104] Petition at 39.
[105] *Id.*

objectionable.[106] Section 230(c)(2)(A) allows online providers to establish "standards of decency without risking liability for doing so."[107] Given the wide range of platforms on the internet, there can be no one objective "standard[] of decency."[108] A website about veganism, for example, might find material about hunting objectionable. Or a forum for Catholics might find material about reproductive rights objectionable. Accordingly courts have easily determined that "Section 230(c)(2)(A)...does not require that the material actually be objectionable; rather it affords protection for blocking material that the provider or user considers to be objectionable."[109] Courts have also noted that "[t]his standard furthers one of section 230's goals "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."[110]

The Proposed Rule's effort to re-define "otherwise objectionable" and the other descriptors of content in Section 230(c)(2)(A) also conflict with the plain language of the statute and clear precedent interpreting that language. Proposed Rule Section

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[106] 47 U.S.C. § 230(c)(2)(A) (emphasis added); *see Enigma Software Group v. Malwarebytes*, 946 F.3d at 1052; *see also Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006) ("[T]o promote active screening by service providers," in other words, Congress "contemplated self-regulation, rather than regulation compelled at the sword point of tort liability").

[107] *Green v. America Online Inc.*, 318 F.3d at 472.

[108] *Id.*

[109] *Zango, Inc. v. Kaspersky Lab, Inc.*, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007) (emphasis added), aff'd 568 F.3d 1169 (9th Cir. 2009)).

[110] *e360 Insight v. Comcast Corp.*, 546 F. Supp.2d at 608 (citing § 230(b)(3)).

130.02(a)-(d) attempts to define for the first time in more than 20 years what Congress meant by "obscene, lewd, lascivious, filthy"; "excessively violent"; "harassing"; or "otherwise objectionable."[111] In addition to eliminating the provider discretion explicitly included in the statute, the new definitions seek to restrict the types of content that could be removed under the protections of Section 230(c)(2)(A). For example, the Proposed Rules would limit "excessively violent" to only to content regulated by the FCC under the V-chip rules and content promoting terrorism.[112] This proposal replaces provider discretion with government regulations of content, an outcome Congress specifically sought to avoid in enacting Section 230.[113]

The focus on "otherwise objectionable" and the Petition's effort to limit interpretation of the term by reference to the other types of content contained in the preceding list is likewise misguided. As the Petition itself notes, one of the few courts to raise concerns about an expansive reading of "otherwise objectionable" also noted that attempting to restrict its meaning by relying on similarities among the preceding terms is difficult, because those terms have dramatically different meanings and address distinct problems.[114] It would also deprive the term "otherwise objectionable"

[111] Petition at 37-38.

[112] *Id.*

[113] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)("[the amendment] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.").

[114] Petition at 31-32.

of fulfilling its clearly intended purpose in Section 230(c)(2)(A), which is to ensure that forms of objectionable content that could not be imagined in 1995 would be covered by Section 230's protections today. Providers rely on "otherwise objectionable" language to protect their decisions to remove or restrict a range of problematic content that does not fall under the specifically identified categories such as content promoting suicide and eating disorders (which has proven dangerous content for younger users), platform manipulation, and misleading synthetic or manipulated media. Depending on the nature of a service, providers may define "otherwise objectionable content" based on what content is appropriate for the specific purpose of service. Content that is appropriate for a dating site is likely not appropriate for a job search site. Review sites may limit posts to only those that contain reviews or may impose additional restrictions, such as a requirement that reviews be posted only by individuals who have used the product or service being reviewed. If former employees want to complain about treatment by a hotel manager, that content is not appropriate for a site dedicated to reviews of hotels for travelers but would be perfectly at home on a service dedicated to sharing information about employers (where a post about what a nice stay an individual enjoyed at that hotel would likely be considered inappropriate). At the time Section 230 was written many of these types of inappropriate content would have been unimaginable and thus exactly the type of thing a catch-all would be intended to cover.

NTIA's argument also fails, because it merely seeks to replace Congress' judgment with the agency's judgment. If Congress wanted to limit provider discretion to only types of content similar to the largely dissimilar categories identified, it should be presumed that it would have done so explicitly.[115] Instead, Congress chose the term "otherwise objectionable."[116] Congress also specifically added the qualifier at the end of the list, "even if otherwise constitutionally protected," making clear that these categories should not be considered narrowly and limited to only illegal content.[117]

IV. THE PROPOSED RULES ARE INCONSISTENT WITH FIRST AMENDMENT PRINCIPLES

Any regulations purporting to interpret Section 230 must take careful account of three First Amendment guardrails.

First, providers are not state actors and consequently need not refrain from moderating speech protected by the First Amendment.[118] Some have suggested that social media sites should be treated as public forums subject to First Amendment restrictions. The Supreme Court has made clear that the bar is high to convert private activity into state action and requires that the private party is serving a "traditional,

[115] *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 176-77 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words "aid" and "abet" in the statutory text.").

[116] 47 U.S.C. § 230(c)(2)(A).

[117] *Id.*

[118] *See Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 295-296 (2001); *Hudgens v. N.L.R.B.*, 424 U.S. 507, 520-521 (1976) (providing some kind of forum for speech is not an activity that only government entities have traditionally performed).

exclusive public function."[119] In addition, "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor"[120] because "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed."[121] Courts have consistently held that internet providers are not state actors bound to follow the strictures of the First Amendment.[122] And most users would not want the First Amendment to dictate internet providers' content moderation practices as though they were state actors. If that were to happen, providers would be prevented from blocking or screening a wide-range of problematic content that courts have held to be constitutionally protected including pornography, hate speech, and depictions of violence.

Second, the First Amendment protects the rights of the providers themselves. When providers determine what kind of platform to be and what kinds of content to host or prohibit, those are forms of free expression protected by the First Amendment.[123] It is bedrock First Amendment doctrine that such editorial decision-

[119] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). There are other bases for finding state action which are not relevant here, including when the government compels private action or when the government acts jointly with a private entity.

[120] *Id.* at 1930.

[121] *Id.*

[122] *See, e.g.*, *Freedom Watch, Inc. v. Google Inc.*, 2020 WL 3096365, at *1 (D.C. Cir. May 27, 2020) (per curiam); *Prager Univ. v. Google LLC*, 951 F.3d 991, 996-999 (9th Cir. 2020).

[123] In *Halleck*, Justice Kavanaugh, delivering the opinion of the Court, also noted that restricting a private party's ability to determine what to allow or prohibit would interfere with that party's property interests. "[T]o hold that private property owners providing a forum for speech are constrained by the First Amendment would be 'to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.'" *Halleck* at 1931.

making is constitutionally protected. In *Miami Herald Publishing Co. v. Tornillo*,[124] for instance, the Supreme Court held that a statute requiring newspapers to provide political candidates with a right of reply to critical editorials violated the newspaper's First Amendment right to exercise "editorial control and judgment" in deciding the "content of the paper."[125] Several courts have applied this reasoning in the online context, holding that providers possess the First Amendment right to decide what content to carry.[126] Recognizing this principle has never been more important. It is critical to allowing online communities and services to develop around common interests, shared beliefs, and specific purposes. It is also critical to allowing online services to cater to different audiences, including the ability to design rules to make their services age-appropriate or purpose-appropriate.

Third, the First Amendment sets a constitutional floor that ensures that online platforms that carry vast quantities of third-party content cannot be held liable for harms arising from that content based on a standard of strict liability or mere negligence. Applying such non-protective standards of liability to entities that distribute large volumes of third-party material would violate bedrock First Amendment principles. The Supreme Court examined this issue over six decades ago,

[124] 418 U.S. 241 (1974).

[125] *Id.* at 258.

[126] *See, e.g.*, *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 436-443 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-630 (D. Del. 2007).

in *Smith v. California*.[127] There, a city ordinance prohibited bookstores from selling obscene or indecent books regardless of whether the store owners knew the books were obscene or indecent.[128] The ordinance violated the First Amendment, the Court explained, because it would cause a bookseller to "restrict the books he sells to those he has inspected" and thus "impose a severe limitation on the public's access to constitutionally protected matter."[129] This principle—that the First Amendment gives special protection to those who act as clearinghouses for large quantities of third-party content—applies with especially great force to internet platforms, given the exponentially greater volumes of content that they host and the important role they play in societal discourse. Were these platforms to face liability for distributing unlawful third-party material absent circumstances in which they both knew of that particular content and yet failed to remove it, internet users' access to vital constitutionally protected speech would be severely stifled.

The petition proposes regulations that do not respect these guardrails and that would violate the First Amendment in several respects.

To start, the proposed regulations would be an unconstitutional content-based regulation of speech. The First Amendment does not permit the government to grant

[127] 361 U.S. 147 (1959).
[128] *Id.* at 148-149.
[129] *Id.* at 153.

immunity to some speakers but not others, based on the content of their speech.[130] Yet that is what the proposed regulations would do. Under the proposed regulations, immunity would be available only when a provider chooses to block or remove "obscene, lewd, lascivious, filthy, excessively violent, or harassing material" but not for any other content that a provider considers to be "objectionable."[131] The First Amendment does not permit the government to favor certain content-based editorial choices over others in this way.

These content-based lines likewise violate the unconstitutional conditions doctrine. Under the unconstitutional conditions doctrine, the government may not deny a benefit—including a discretionary one—based on a person or company's exercise of a constitutional right.[132] When constitutional rights are at stake, the government cannot accomplish indirectly what it is constitutionally prohibited from doing directly. Under the regime envisioned by the regulations, the government would be conditioning the receipt of an important government benefit—the long-standing, full protections of Section 230—on companies' limiting the exercise of their editorial rights to only "obscene, lewd, lascivious, filthy, excessively violent, or harassing material"

[130] *See Waremart Foods v. N.L.R.B.*, 354 F.3d 870, 875 (D.C. Cir. 2004) (invalidating rule that allowed union picketing but not other picketing on employers' private property as an unconstitutional content-based restriction on speech); *see also Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16-17 (1986) (the government may not impose a "content-based grant of access to private party" absent a "compelling interest").

[131] *See* Petition at 37-38 (narrowing scope of subsection (c)(2)(A)); *see also id.* at 31 (narrowing scope of subsection (c)(1)).

[132] *Frost and Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926).

but not to any other content that a provider considers to be "objectionable."[133] The First Amendment bars the government from conditioning immunity on providers abandoning their own First Amendment right to decide what kind of content to host or prohibit.

Furthermore, the FCC's unsuccessful experience with the Fairness Doctrine ("Doctrine") and the bipartisan consensus to repeal it demonstrate how the Proposed Rules would impermissibly interfere with First Amendment rights. The Fairness Doctrine ostensibly required the Commission to determine only whether broadcasters acted in good faith to provide balanced airtime on controversial issues, but in practice, the Doctrine injected the Commission into the editorial decision-making process in ways that proved both chilling to speech and unadministrable. Similarly, NTIA's Proposed Rules asking the Commission to again define and interpret good faith would replicate the well-established failures of the Fairness Doctrine.

Adopted in 1949, the Fairness Doctrine required broadcasters "(1) to provide coverage of vitally important controversial issues of interest in the community served by the licensee; and (2) to afford a reasonable opportunity for the presentation of contrasting viewpoints on such issues[134] The Commission later codified related requirements, including the Personal Attack Rule (requiring broadcasters to notify the

[133] Petition at 31, 37-38.

[134] *Inquiry into Section 73.1910 of the Commission's Rules & Regulations Concerning Alternatives to the Gen. Fairness Doctrine Obligations of Broad. Licensees*, Report, 2 FCC Rcd. 5272, ¶ 2 (1987) ("*1987 Fairness Report*").

person attacked within one week of the broadcast, provide a copy of the broadcast, and allow the person the opportunity to respond).[135] To determine compliance with the Fairness Doctrine, the Commission's animating standard was whether the broadcaster "acted reasonably and in good faith."[136]

The Supreme Court upheld the Fairness Doctrine and the related Personal Attack Rule against a First Amendment challenge in *Red Lion Broadcasting Co. v. FCC*.[137] But it did so on spectrum scarcity and interference grounds inapplicable to the Proposed Rules and the internet ecosystem.[138] In fact, the Court took the opposite view outside of the spectrum context, striking down a similar state right-of-reply requirement on the newspaper industry as violating the First Amendment.[139] And the Supreme Court specifically declined to extend *Red Lion* to its review of the Commission's must-carry regulations "because cable television does not suffer from

[135] 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679. The Commission grounded its authority to adopt the Fairness Doctrine in the Communications Act's requirement that "licenses . . . be issued only where the public interest, convenience or necessity would be served thereby." *Editorializing by Broadcast Licensees*, 13 F.C.C. 1242, 1248 (1949).

[136] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Pub. Importance*, Public Notice, 40 F.C.C. 598, 599 (1964) ("*1964 Fairness Report*") (emphasis added).

[137] 395 U.S. 367, 394 (1969).

[138] *Id.* ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.")

[139] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257-258 (1974) (striking under the First Amendment a state law requiring right of reply access to the newspaper on grounds that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'").

the inherent limitations that characterize the broadcast medium."[140] To the contrary, the Court explained, "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium."[141] Moreover, in *Red Lion* itself, the Court noted that "if experience with the administration of [the Fairness Doctrine and Personal Attack rule] indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[142]

Ultimately, the FCC did exactly that—finding that the Fairness Doctrine regulations chilled rather than promoted discussion of public issues, and repealing them on both constitutional and statutory grounds as contrary to the public interest.[143] By the mid-1980s, the Commission determined that the proliferation of additional broadcast outlets obviated the need and constitutional basis for the Doctrine.[144] In

[140] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 639 (1994). Ultimately, the Court applied intermediate scrutiny and upheld the FCC's must-carry rules. *See Turner Broad. Sys. v. FCC*. 520 U.S. 180, 224 (1997).

[141] *Turner Broad. Sys.*, 512 U.S. at 639.

[142] *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. at 393.

[143] *See, e.g., Inquiry into Section 73.1910 of the Commission's Rules & Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d 142, ¶ 72 (1985) ("*1985 Fairness Report*") ("[T]he doctrine has the inexorable effect of interjecting the Commission into the editorial decision-making process."); *See also Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C. Rcd. 5043 (1987) (concluding that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest").

[144] *Meredith Corp. v. FCC*, 809 F.2d 863, 872–74 (D.C. Cir. 1987) (remanding Fairness Doctrine case for consideration of constitutional issues, especially in light of 1985 Commission Report that "quite clearly determined that the fairness doctrine as embodied in its regulations no longer serves the statutory public interest Congress charges the Commission with advancing").

particular, the Commission found that the threat and expense of compliance with the Fairness Doctrine rules produced a perceived and actual chilling effect on broadcaster speech.[145] The Commission expressed unease with its role in "second guessing [broadcasters'] good faith, professional determinations with regard to program content" and explained that, without the "fear" of such oversight, broadcasters might increase their coverage of "issues of public importance."[146] Moreover, the Commission became "extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another."[147]

Like the Fairness Doctrine, the Proposed Rules would violate fundamental First Amendment principles. None of the spectrum scarcity or interference concerns relied on in *Red Lion* are present in the internet ecosystem. Rather, just as the *Turner* Court foresaw with cable television, there are "no practical limitations on the number of speakers who may use the [internet] medium,"[148] obviating any basis for a government mandated right of access. And just as the Commission ultimately concluded with the Fairness Doctrine, the threat and expense produced by NTIA's Proposed Rules will result in a perceived and actual chilling effect on internet speech. For example, NTIA's

[145] Dominic E. Markwordt, *More Folly Than Fairness: The Fairness Doctrine, the First Amendment, and the Internet Age*, 22 Regent U. L. Rev. 405, 430 (2010) (detailing "strong evidence indicating that the Fairness Doctrine chilled speech").
[146] *1987 Fairness Report* ¶ 129.
[147] *1985 Fairness Report* ¶ 71.
[148] *Turner Broad.Sys.*, 512 U.S. at 639.

proposed good faith requirement that ICSs must treat all "similarly situated" content on the internet the same way.[149] Echoing the Fairness Doctrine, this will give rise to disputes over whether content removed by an online provider is "similar" to other content that the online provider has not removed and unavoidably involve second-guessing the provider's decision-making about internet content.[150] The result will be to chill an ICS's ability to moderate content on their platform which is protected First Amendment activity.

Beyond that, however, the Commission's Fairness Doctrine experience also reveals how poorly suited the FCC is to regulating fairness and good faith when it comes to content decisions. Despite emphasizing that the Commission's role was "limited to a determination of whether the licensee has acted reasonably and in good faith"[151] and despite its stated "attempt[] to minimize our role in evaluating program content in administering the fairness doctrine,"[152] in practice, the Commission was forced to scrutinize program content and duration on a case-by-case, minute-by-minute basis to ensure that broadcasters provided a "reasonable opportunity" to respond to controversial issues. As a result, the FCC is no better suited to regulations for Section 230 and online content moderators. Like the Fairness Doctrine, the Proposed Rule would similarly graft onto the good faith definition a requirement that

[149] Petition at 39.
[150] *Id.*
[151] *1974 Fairness Report* ¶ 21.
[152] *1985 Fairness Report* ¶ 72.

ICSs provide "timely notice" and a "meaningful opportunity to respond" to content moderation. Examination of such conditions would suffer from the same flaws that caused the FCC to abandon the Fairness Doctrine.

V. THE PROPOSED MANDATORY DISCLOSURE REQUIREMENT GOES BEYOND FCC JURISDICTION AND VIOLATES THE FIRST AMENDMENT

NTIA's proposed mandatory disclosure rule likewise exceeds the FCC's jurisdiction. NTIA claims that ICSs are "information services" and that its expansive disclosure requirement is authorized by Sections 163 and 257(a) of the Communications Act.[153] Those provisions require the FCC to publish and submit to Congress a biennial report assessing the state of competition and identifying barriers to entry, particularly for entrepreneurs and small businesses, in various communications marketplaces.[154] NTIA's Petition proposes using this congressional reporting requirement to massively expand the FCC's authority over the entire internet and beyond. That's wrong for multiple reasons.

To begin with, the FCC has never classified the diverse array of ICSs as "information services," let alone found that they are covered by Sections 163 and 257(a). In fact, the Commission specifically declined to do so[155] and the *Mozilla*

[153] Petition at 47-52.

[154] 47 U.S.C. § 163.

[155] Restoring Internet Freedom Order at n. 849 ("[w]e need not and do not address with greater specificity the specific category or categories into which particular edge services fall; *Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5749 n.900 (2015) (declining to "reach the question of whether and how" services outside the scope of broadband internet access "are classified under the Communications Act").

decision did not reach the question.[156] The FCC has never before reached out to regulate such a broad swath of the American economy. And for good reason. There is no indication that Congress intended a reporting requirement to so dramatically expand the Commission's authority. Moreover, even if certain ICSs could be covered by Sections 163 and 257(a), the Proposed Rule does not identify market entry barriers as required by the statute and, thus, falls outside the scope of those provisions. NTIA asserts that the disclosures will improve consumers' online experiences[157] and help develop better filtering products.[158] Maybe so or maybe not, but those objectives have nothing to do with entry into the telecommunications or information services markets. Finally, the vague terms and overbroad scope of NTIA's mandatory disclosure rule, would *raise*—not *lower*—market entry barriers, particularly for small ICS providers, by increasing administrative costs and exposing them to new liability.

Furthermore, the First Amendment also precludes adoption of the proposed disclosure regulation.[159] Freedom of speech "includes both the right to

[156] In *Mozilla v. FCC*, the court upheld Section 163 and 257(a) as authority for the FCC's broadband disclosure requirement. In that case, however, the Commission had expressly classified broadband as an information service and the court upheld the FCC's reasoning that disclosures of broadband's technical characteristics, rates and terms (as opposed to editorial policies) would identify barriers to entry by telecommunications and information service providers reliant on the underlying broadband service to reach their customers. *See* 930 F.3d 1, 47 (2019); Restoring Internet Freedom Order at 445-450.

[157] Petition at 50-51.

[158] *Id.* at 50.

[159] *See* Petition at 47-52.

speak freely and the right to refrain from speaking at all."[160] Accordingly, except in limited circumstances not presented here, the government cannot "force" an online provider "to speak in a way that [it] would not otherwise."[161] This protection is especially important here because the proposed regulation would "intru[de]" into the very heart of platforms' First Amendment rights by compelling each platform to disclose how it "exercise[s] ... editorial control and judgment" over the "content" it chooses to display online.[162] An online platform—like a newspaper—might *voluntarily* choose to inform the public how it chooses to exercise that discretion. But the government cannot *force* an online platform to disclose internal editorial standards or deliberations—just as the government cannot *force* a newspaper to reveal how it selects letters to the editor or op-eds for publication. For these reasons, the First Amendment does not permit the Commission to compel providers to "disclose" their "content-management mechanisms" or any other "content moderation, promotion, and other curation practices."[163]

[160] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
[161] *Washington Post v. McManus*, 944 F.3d 506, 517 (4th Cir. 2019) (affirming preliminary injunction against state law that would have compelled "online platforms" to disclose certain information).
[162] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[163] Petition at 52.

VI. PUBLIC POLICY CONSEQUENCES OF THE PROPOSED RULES

The Petition and the President's Executive Order on Preventing Online Censorship will not achieve the public policy result they seek. By all accounts, the goal is to expose large social media companies to liability for engaging in what is perceived to be "viewpoint discrimination." As explained in the Executive Order,

> Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.[164]

The crux of this appears to be the notion that if social media companies are treated like traditional editors and publishers, then they will face liability for their editorial decisions over what to publish and what to withdraw. As has been discussed in Section IV, however, traditional publishers are not subject to liability for their editorial decisions. In fact, it is a hallmark of the First Amendment to protect these editorial decisions. Thus, if online services become subject to the same legal regime as traditional publishers, "viewpoint discrimination" actually becomes sacrosanct

[164] Exec. Order No. 13925, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020).

constitutionally-protected activity. And the rejection of any content that has even a scintilla of factually inaccurate or misleading content becomes essential to the continued viability of the service—because publication of such content could give rise to legal liability.

The First Amendment is a powerful tool in quickly disposing of claims seeking to hold providers liable for exercising editorial discretion.[165] However, Section 230 remains an important protection against these types of lawsuits.

Section 230's primary benefit is as a protection from protracted litigation. The Proposed Rules introduce a host of new factual issues that will require discovery and argument before a decision could be rendered on the applicability of the Section 230 immunity. This would result in a reversal of Section 230's incentive structure—providers who take an "anything goes" approach to their services would be protected and providers who attempt to engage in responsible content moderation would be exposed to significant litigation deterring providers from taking action due to the resulting risk and financial harm. This is precisely the equation that Section 230 was intended to alter. Section 230 was intended to remove disincentives to content moderation and to encourage providers to engage to promote safer online services without the interference of government regulation and burdens of endless litigation.

[165] *Prager Univ. v. Google LLC*, 951 F.3d 991, 996-999 (9th Cir. 2020); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d at 436-443; *Langdon v. Google, Inc.*, 474 F. Supp. 2d at 629-630.

Society benefits from online services and communities who are able to set and enforce rules for appropriate conduct. Most online providers–and all of IA's members–have robust codes of conduct, and Section 230 allows the providers to enforce them.

Returning to the world before Section 230 was law would result in stark choices for ICSs. On the one hand, providers would be discouraged from moderating content out of fear that moderation could create liability. And on the other hand, there would be providers that would supply only highly-curated content to reduce legal risk, but they would give representation to significantly fewer voices. The now-flourishing middle ground where average citizens can create and consume content subject to reasonable rules set by individual platforms and services would contract dramatically.

Section 230 undergirds this flourishing middle ground by enabling services that allows internet users to post their own content and engage with the content of others, whether that's friends, family, co-workers, companies posting jobs, someone posting an apartment for rent, gamers, or complete strangers from the other side of the globe with a shared experience or interest.

The stable and predictable legal environment established by Section 230 has spurred innovation, resulting in U.S. leadership and a multi-faceted online ecosystem. There are now user-generated content components to almost everything we do, whether it be school, work, newspapers, entertainment, travel, religion or politics. In many instances this is an adjunct to the core purpose of an entity.

Contrary to the unsupported assertion in the Petition that limitations on liability harm new market entrants,[166] Section 230 is essential to fostering an environment conducive to startup internet companies and new market entrants.[167] Without Section 230, small and medium-sized businesses would be exposed to, but unable to quickly end, litigation arising from their hosting of third-party content. While some internet companies are no longer upstarts, IA represents more than 40 internet industry companies of which the vast majority are unlikely to be considered "titans." The technology industry still features a vibrant pipeline of startups that fuels continued innovation. Weakening Section 230 by imposing additional exposure to litigation and potential liability would be a burden felt disproportionately by new market entrants and small and medium-sized companies. Litigation is expensive, even when it lacks merit.[168] Even when defendants are awarded attorney fees after successfully defending

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[166] *See* Petition at 14 ("Understanding how new entrants can or cannot participate in these intermediary markets is therefore key in understanding appropriate liability regimes; this is particularly important because liability shields can deter entrance").

[167] Engine Advocacy, *Startup Perspective Critical to 230 Review*, February 19, 2020 (available at: https://www.engine.is/news/startup-perspective-critical-in-230-review); Engine Advocacy, *Intermediary Liability Protections Have Allowed Startups to Thrive*, October 16, 2010 (available at: https://www.engine.is/news/intermediary-liability-protections-have-allowed-startups-to-thrive). *See also*, Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639-694 (2014) (discussing how intermediary liability protections gave rise to web 2.0); Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech Companies*, New York Times, (October 16, 2019) (arguing that changes to Section 230 would help solidify the position of large companies).

[168] Engine Advocacy, *Primer: The Value of Section 230*, January 31, 2019 (available at: https://www.engine.is/news/primer/section230costs) (last accessed February 26, 2020) (noting that filing a single motion to dismiss can cost between $15,000-$80,000 and that the average startup begins with around $80,000 in funds). This estimate does not account for the reality that defendants may have to file multiple motions to dismiss in the same action as a result of plaintiffs amending complaints. *See, e.g.*, *Colon v. Twitter,* Case No. 6:18-cv-00515 (M.D. Fla.) (Defendants' motion to dismiss the *third*

a case, recovering those fees is difficult.[169] And the cost of litigating an expensive case to its conclusion are often too daunting for a startup company to bear.

Section 230 plays a critical role in protecting the ability of online services to operate responsibly on a global basis. Foreign jurisdictions generally lack Good Samaritan protections for online services that moderate content. This creates exposure to liability in foreign courts for content that not only doesn't violate U.S. laws, but that is protected expression under the First Amendment. Section 230 provides important protections when international courts are willing to apply forum selection and choice of law clauses from contracts and apply U.S. law. Also, under the SPEECH Act, U.S. courts are barred from enforcing foreign libel judgements when they are inconsistent with Section 230.[170] For this reason, Section 230 is a critical bulwark against foreign efforts to engage in censorship of content on U.S. platforms.

VII. Conclusion

IA urges the FCC to carefully consider NTIA's Petition and its Proposed Rules. IA believes that careful consideration of the full record of legislative history and case law applying Section 230 will clearly show that Congress intended, and has subsequently

amended complaint is pending before the court).

[169] *See, e.g.*, *Eade v. Investorshub.com*, Case No. CV11-01315 (C.D. Cal. Sept. 27, 2011) (review of the docket shows that after winning a Motion to Strike under an Anti-SLAPP statute and being awarded $49,000 in attorneys fees in 2011, defendant is still trying to recover the fees from plaintiff, an attorney, in 2020).

[170] 28 U.S.C. § 4102(c)(1). *See, e.g.*, *Joude v. Wordpress*, 2014 WL 3107441 (N.D. Cal. July 3, 2014) (declining to enforce a foreign defamation judgment under the SPEECH Act).

endorsed, the broad application of Section 230 to protect online services from potential liability, not only for decisions about what to allow, but equally for decisions about what not to allow. These decisions cannot be separated and treated differently whether under Section 230, the First Amendment, or practically—they are simply two sides of the same coin. The Proposed Rules would turn Section 230 on its head by applying more protection to leaving up objectionable content, than to the removal of objectionable content. This is the opposite of what Congress intended and the FCC may not adopt rules that contravene the clear intent of Congress. Thus, for these and the other reasons raised, the FCC should reject NTIA's Petition.

Respectfully submitted,

/s/ Jonathan Berroya
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September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via FedEx upon:

Douglas Kinkoph
National Telecommunications and Information
Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

/s/ Allison O'Connor
Allison O'Connor

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	RM-11862
Communications Act of 1934	)	

COMMENTS OF IMGUR, INC.

Imgur submits this comment in opposition to the petition.

Section 230 of the Communications Act – CDA §230 – contains at its core the provision that many have said "created the Internet":

> *No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*

Section 230 is the bedrock upon which the diverse and astonishingly successful universe of interactive online activity – from blogging to social networking to photo and video sharing sites to consumer reviews of products and services— has been able to flourish. It is a major factor why the United States has led the world in the growth of online technology and creative content, none of which would have been possible had every online provider been subject to liability for the material posted by every user.

Imgur, Inc. is a privately-owned company based in San Francisco and runs www.imgur.com, one of the top 100 websites in the world (daily active users, according to the Alexa ranking service) and related smartphone apps. Imgur users post millions of images, short videos, and comments every day, reflective of what users all over the world are doing for

adventure, creativity, fun, love, or silliness. Only a tiny portion of user-posted content violates our terms of service, our community rules, or the law. Multiple levels of monitoring, reporting, and correction are in place with respect to that small number of problematic images: Our community of users instantly alerts us to any disallowed material. We have implemented automatic image-scanning software that identifies known CSAM (child sexual abuse material), which, whenever found, is reported to the National Center for Missing and Exploited Children (NCMEC) and has more than once resulted in the arrest and imprisonment of lawbreakers. Our moderators quickly respond to user or law enforcement requests. Within the context of CDA §230, private enterprise works and enables individual, creativity without stifling governmental regulation.

Imgur is a small company with fewer than 50 employees. If onerous pre-monitoring regulations and liability were imposed as the Petition proposes, Imgur (and thousands of small online companies that allow user content) would cease to exist, online content would become the fiefdom of large and monopolistic tech companies, and innovation would be stifled accordingly.

Respectfully submitted,

DocuSigned by:
Alan Schaaf
307A73FF81B34E7...

Alan Schaaf, founder and CEO

Imgur, Inc.

Dated: September 2, 2020

ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Rulemaking of the National Telecommunications and Information Administration to Clarify the Provisions of Section 230 of the Communications Act of 1934	))))))	RM-11862

Comments of ITIF

The National Telecommunications and Information Administration (NTIA) has petitioned the Federal Communications Commission (FCC or Commission) to initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934,[1] in accordance with Executive Order 13925, "Preventing Online Censorship" (E.O. 13925).[2] The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on this petition.[3] ITIF supports efforts to clarify or update Section 230 to reflect the ways the Internet has changed since the Communications Act was amended in 1996. However, it is the role of Congress, not the FCC, to provide this clarification or update.

Congress originally passed Section 230 in response to a pair of court decisions that had troubling implications for the future of the Internet. In the first of these decisions, *Cubby v. CompuServe* (1991), the U.S. District Court for the Southern District of New York ruled that an online service that has no firsthand knowledge of the third-party content published on its platform, has no control over the publication of this content, and has no opportunity to review the content is not liable for illegal third-party content on the platform.[4] Four years later, in *Stratton Oakmont v. Prodigy* (1995), the New York Supreme Court ruled that an online service that exercises "editorial control" over third-party content on its platform—in the form of content moderation

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[1] Petition of the National Telecommunications and Information Administration, Docket RM-11862, (July 2020), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[2] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020) (E.O. 13925).
[3] Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytic rigor, policy pragmatism, and independence from external direction or bias. *See* About ITIF: A Champion for Innovation, http://itif.org/about.
[4] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

tools such as rules for user-generated content, software programs that filter out offensive language, and moderators who enforce content guidelines—is liable for illegal third-party content.[5]

These decisions were counter to how Congress believed the Internet should operate. Online services that exercised no control over what was posted on their platforms and allowed any and all content—including potentially unlawful or abusive content—were protected. On the other hand, service that exercised good faith efforts to moderate content and remove potentially unlawful or abusive material were punished. Section 230 addressed this discrepancy by allowing online services to engage in content moderation without fear of liability. In doing so, the law played a significant role in creating the Internet we know it, enabling the growth of business models that rely on user-generated content, including social media platforms, smaller blogs and forums, knowledge-sharing websites, comments sections, and product and business reviews.

Given the context and history of Section 230, ITIF agrees with FCC Commissioner Geoffrey Starks' statement that, in its petition, "NTIA has not made the case that Congress gave the FCC any role here. Section 230 is best understood as it has long been understood: as an instruction to courts about when liability should not be imposed."[6]

The specific clarifications the NTIA has petitioned the FCC to make are best left either up to the interpretation of the courts, as they have been since the law's passage, or for Congress to clarify in an amendment to Section 230.

First, the NTIA requests that the FCC clarify the relationship between Section 230(c)(1) and (c)(2). Section 230(c)(1) protects online services from civil liability for failing to remove illegal third-party content,[7] while (c)(2) protects them from civil liability for "good faith" content moderation in the form of removing objectionable material.[8] E.O. 13925 and the NTIA suggest that the FCC determine whether an online service that has not acted in good faith when removing content, as per (c)(2), would also lose its liability protection under (c)(1). This would drastically change the effect of the law. If Congress had intended for platforms that remove content in bad faith to lose not only (c)(2) but also (c)(1) liability protection, it would have written such a provision into the law. And if the way the Internet has changed since 1996 necessitates such a change, it would be Congress' role, not the FCC's, to make it.

Second, the NTIA requests that the FCC clarify the meaning of Section 230(c)(2), specifically when content moderation actions are considered to be "taken in good faith." This determination has always been up to the courts to decide. If the way courts currently interpret Section 230(c)(2) is hindering the freedom of expression online, as the NTIA suggests, it would still be Congress' role to amend the law to resolve this, much as it amended the Communications Act in 1996 to address the *Cubby* and *Stratton Oakmont* rulings.

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[5] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).
[6] Geoffrey Starks, "Commissioner Starks Statement on NTIA's Section 230 Petition," Federal Communications Commission press release, July 27, 2020, https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf.
[7] 47 U.S.C. § 230(c)(1).
[8] 47 U.S.C. § 230(c)(2).

Similarly, the NTIA's other proposals to the FCC—that the Commission make further clarifications to Section 230(c)(1), establish rules on when an online service would not qualify for Section 230 liability protection, and create transparency requirements—are best left to Congress because the FCC does not have the statutory authority to make these changes.

Congress is considering reforms to Section 230 with multiple bills introduced in the last few months.[9] Section 230 is one of the foundational laws of the Internet, and any changes of this magnitude that would affect such a broad swath of the Internet ecosystem require the type of careful consideration that, by design, takes place in Congress. The FCC should step back and let Congress continue its work.

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September 2, 2020

[9] Ashley Johnson and Daniel Castro, "PACT Act Would Increase Platform Transparency, But Undercut Intermediary Liability," *Information Technology and Innovation Foundation*, August 7, 2020, https://itif.org/publications/2020/08/07/pact-act-would-increase-platform-transparency-undercut-intermediary.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OPPOSITION OF NEXT CENTURY CITIES TO THE PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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Next Century Cities

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Next Century Cities

September 2, 2020

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OPPOSITION OF NEXT CENTURY CITIES TO THE PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

I. Introduction

Next Century Cities ("NCC")[1] submits this in opposition to the petition filed by the National Telecommunications Information Administration ("NTIA").[2] Free speech online is critical to creating a meaningful discourse. Yet, NTIA's petition provides a roadmap for creating new barriers that can disadvantage some in order to increase a perceived sense of "fairness" for others, which is antithetical to the freedom of expression principles that have allowed the internet to thrive.

As society becomes more dependent on technology, our public forums have moved from town halls to the digital platforms made up of social media, message boards, and messaging applications. Eroding the foundations of the 21st century public square would not only chill free

[1] Next Century Cities is a nonprofit nonpartisan 501(c)(3) coalition of over 200 member municipalities that works collaboratively with local leaders to ensure reliable and affordable broadband access for every community, while helping others realize the economic, social and public health importance of high-speed connectivity.
[2] *Petition for Rulemaking of the National Telecommunications and Information Administration*, RM-11862 (filed July 27, 2020), https://ecfsapi fcc.gov/file/10803289876764/ntia_petition_for_rulemaking_7.27.20.pdf (NTIA 230 Petition).

speech, but would underscore just how unconstitutional the Executive Order,[3] the NTIA petition is born from, is. Accordingly, the Federal Communications Commission ("FCC" or "Commission") should refuse to open a rulemaking.

First, the NTIA lacks the authority to seek a rulemaking, and this petition exceeds their jurisdiction. NTIA has historically acted as an advisor to the President and executive branch on matters and policies regarding spectrum allocation, scientific research programs, and technological innovation and development. In its first foray into content moderation, the NTIA has exceeded their authority and is asking the Commission to participate in a retaliatory campaign to regulate online speech.

Secondly, the petition submitted by NTIA seeks to chill free speech at the behest of the highest government official. This petition clearly seeks to punish private entities for engaging in political speech. It is clear that this administration is seeking to compel these private entities into promoting opinions that it agrees with and silencing those it does not. The Commission should not excuse unconstitutional attempts to suppress speech by considering this request.

Thirdly, per its *Restoring Internet Freedom Order*,[4] the Commission relinquished any authority to regulate online platforms, and cannot promulgate new rules to regulate the content hosted on social media platforms.

Finally, the Commission should remain focused on one of its most important goals to promote programs and promulgate rules aimed at bringing broadband within reach for the millions of Americans that still do not have affordable and reliable high-speed connections. The Coronavirus (COVID-19) pandemic has shown that connectivity is more important than ever,

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[3] *See* Exec. Order No. 13925, 85 FR 34079 (June 02, 2020) (hereinafter " Executive Order No. 13925"), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[4] *See generally,* Restoring Internet Freedom, Declaratory Ruling, Report and Order, 33 FCC Rcd 311 ("RIF Order").

and the Commission should not divert any time or resources away from its indispensable work to close the digital divide.

II. The NTIA Lacks Authority to Seek a Rulemaking

The NTIA was envisioned to serve as the President's principal advisor on telecommunications policies pertaining to economic and technological advancement in the telecommunications industry.[5] Section 230 of the Communications Decency Act ("Section 230") does not purport to regulate "Telecommunications" defined by the Communications Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[6] Section 230 does not purport to regulate telecommunications, but is explicit about its intent to regulate "interactive computer services."[7] Section 230 regulates user generated content online whereas "telecommunications" applies to the infrastructure through which user-generated content flows.

It follows that the NTIA does not have authority to seek this rulemaking under its codified policy mandates under the Communications Act. As stated in statute the NTIA must seek to advance policies that promote the benefits of technological development,[8] facilitate and contribute to the full development of competition, efficiency, and the free flow of commerce in

[5] Exec. Order No. 12046, 43 FR 13349 (Mar. 29, 1978), *reprinted as amended in* 47 U.S.C. §§ 901-04 (1992).
[6] 47 U.S.C. § 153 (50) (2018).
[7] 47 U.S.C § 230 (f)(2) (2018) (Interactive Computer Service is defined as "any information services, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.").
[8] 47 U.S.C. § 901 (c)(1) (2018).

telecommunications markets,[9] foster full and efficient use of telecommunications resources,[10] and further scientific knowledge about telecommunications and information.[11] However, critically, the petition does nothing to advance any of these institutional policy priorities. Instead, the NTIA petition threatens to interfere with the efficient and free flow of commerce in online markets by inserting a government content moderator into the business of private companies. This further disrupts the full and efficient use of telecommunications resources by forcing telecommunications regulators to assign time, resources, and personnel to determine which political speech is acceptable, and which is not.

This is the first time that the NTIA has ever expressed that Section 230 is under its authority. Notably, however, the petition under consideration by the Commission actively works against policies and protocol previously set by the NTIA.

III. Promulgating Rules To Modify Section 230 Will Chill Free Speech

The NTIA petition was born from Executive Order 13925.[12] This Executive Order tasked the NTIA with seeking to garner a rulemaking from the FCC that would compel online platforms to promote certain speech, while living in fear that at any time a regulatory action could be brought against them at the whim of political actors. As Justice Robert H. Jackson asserted, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[13] However, this is exactly what the

[9] 47 U.S.C. § 901 (c)(3) (2018).
[10] 47 U.S.C. § 901 (c)(4) (2018).
[11] 47 U.S.C. § 901 (c)(5) (2018).
[12] *See* Executive Order No. 13925.
[13] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

petition before the Commission seeks to do. The rules the NTIA are urging the Commission to adopt would limit what types of information private actors can host on their platforms and punish them with potential regulatory action if they were to publish, or fail to publish, something the administration disagreed or agreed with respectively.

The NTIA petition correctly points out that many American's use social media to follow news, connect with friends and family, share their views on current events, and act as the present day public square.[14] The NTIA argues that social media firms are engaging in selective censorship with regards to the incredible dearth of content that is hosted on their sites every day. However, even if this were true, the NTIA is asking the Commission to force these private actors to take a more active role in censorship to the point that they would lose their protections under Section 230 even if it were in alignment with the political winds.

The internet was created with the intent of it being a place where people can freely share information. Changing the calculus so that it is unclear which information will stay and which information will go while forcing private actors to bend to political wills was never envisioned by the internet's founders. Simply, it's wrong. The commission should refuse to participate in this exercise aimed at stifling free speech.

IV. The Federal Communications Commission Lacks Authority to Promulgate Rules Regulating Section 230

If the Commission were to undertake a rulemaking at the request of the NTIA petition, it would be acting outside the scope of its rulemaking authority. The Commission does not have subject matter jurisdiction to promulgate any proposed rules. In fact, it voluntarily shed its

[14] NTIA 230 Petition at 6-7 (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017)).

authority to regulate broadband and any implied authority to regulate the online content it supports. In its 2018 *Restoring Internet Freedom Order* ("RIF Order"), the Commission reclassified broadband providers from telecommunications services to information services. As a consequence, these providers are relegated to a category of entities "left largely unregulated by default."[15] The Commission would have to do an about-face and impose regulatory obligations to accommodate this request.

Moreover, the Commission lacks the proper jurisdiction to promulgate the requested rules. As courts have decided in the past the Commission's jurisdiction encompasses the transmission of covered material. This means the Commission's jurisdiction does not extend to what happens before that transmission is sent, nor does it cover what occurs after the transmission is received by the intended recipient.[16]

The language of Section 230 protects "providers" and "users" of interactive computer services from liability in the editorial decision making they decide to undertake with regards to online content.[17] As the NTIA petition points out "social media offers primarily third-party content. Rather than charge fees, social media platforms profile users in order to categorize them and connect them to advertisers and other parties interested in user information."[18]

Clearly, NTIA understands that the social media companies must wait until a user has hosted content on their website in order to take action. At no point are social media companies taking actions while the data from users is in transit. Nevertheless, NTIA's proposal seeks to regulate providers and users before they transmit content, and after it has been received. As

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[15] RIF Order at ¶ 203 (emphasis added) (quotation marks and citations omitted).
[16] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).
[17] 47 U.S.C. § 230 (c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider").
[18] NTIA 230 Petition at 12-13.

Vimeo noted, the analog equivalent is telling individuals what they must consider before they decide to answer a ringing phone.[19]

In the past, the Commission has cited Section 230 as a justification for it's deregulation of broadband providers.[20] The Commission has been clear that it intended to take a hands-off approach to internet regulation. The Commission claimed, in the RIF Order, that it sought to end utility-style regulation of the internet in favor of market based policies that would preserve the future of internet freedom.[21] Currently, The NTIA is urging the Commission to make a decision that would have not only far reaching implications for social media, but for all internet platforms that host third party content. If the Commission were to undertake this rulemaking, it would be in stark contrast to agency precedent and undermine its current stated objectives. To the contrary, even if the Commission finds justification for this rulemaking, it is missing a critical jurisdictional piece required to promulgate a rule – direction from Congress.

Generally there are two instances where an agency may regulate. The first is when there is a direct ask from Congress to do something or to take some action. The second is when Congress uses ambiguous language in a statute. If there is ambiguous language, under the Chevron Doctrine, Congress delegates its authority to an agency to "fill in the gaps" and resolve the ambiguity.[22] However, Section 230 provides no explicit commands to the FCC to do anything, nor are there any ambiguities that the Commission would be able to act upon without reconciling with the RIF Order.

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[19] Petition of Vimeo, Inc. to Dismiss the National Telecommunications and Information Administration's Petition for Rulemaking, RM-11962, at 4 (filed Aug. 4, 2020), https://ecfsapi.fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf.

[20] RIF Order, 33 FCC Rcd 311 ¶ 1, 2 (2018).

[21] *Id.* at ¶ 2.

[22] *See Generally, Chevron, U.S.A. v. Natural Resources Defence Council, Inc.*, 467 U.S. 837 (1984).

The Commission clearly took the stance in 2018 that it wished to wash its hands of internet regulation. In order to take up a new rulemaking now would cause the FCC to need to reconcile its prior decisions in order to avoid having a new rule be challenged as arbitrary and capricious. It is important to note that, in April 2020, the Commission denied a request by the organization Free Press to investigate the spread of COVID-19 misinformation during White House broadcasts,[23] citing that it does not wish to be an arbiter of free speech and to take up rulemaking now would force it to reconcile with recent, persuasive precedent to the contrary.

Beyond lacking the jurisdiction to promulgate the rules sought by the NTIA, the Commission has documented its opposition, and does not have cause, to regulate speech online.

VI. Reforming Section 230 Will Hinder the Commission in its Main Goal of Granting Universal Internet Access Across the Nation

The purpose of the Federal Communications Commission is to "make available, so far as possible, to all the people of the United States, without discriminaton. . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service. . ."[24] The Coronavirus (COVID-19) pandemic has shown that, now more than ever, access to reliable high-speed connectivity is essential. As students begin the new school year from home, parents continue to telework, and we rely on video and voice conferencing to stay connected with friends and family, the Commission must remain focused on expanding high-speed connectivity for every community, helping unserved and underserved populations gain access to affordable and reliable

[23] Letter from Michelle M. Carey, Chief, Federal Communications Commission Media Bureau and Thomas M. Johnson, General Counsel, Federal Communications Commission, to Jessica J. González, Co-CEO, Free Press and Gaurav Laroia, Senior Policy Counsel, Free Press (Apr. 6, 2020), *available at* https://www.fcc.gov/document/fcc-defends-1st-amendment-and-denies-petition-filed-free-press.
[24] 47 U.S.C. § 151 (2018).

broadband. However, the petition currently before the Commission is a distraction. It supports diverting critical time, resources, and manpower from furthering the Commission's core goal of universal connectivity.

It's mission is essential. The work is urgent. The Commission must continue to work diligently to bring connectivity to all corners of the country as there is no "one size fits all" technological solution to achieve universal connectivity. Some communities may respond better to the deployment of wireless solutions. Others may require more robust fiber optic connections to meet the demands placed on their networks. Either way, millions of Americans are waiting and are counting on the Commission.

Local and state government leaders are working feverishly to fill in the connectivity gaps. Working from home, shutting down schools, closing down businesses, etc. has forced every member of government and the general public to confront the reality that, in a digital society, high-speed connectivity is essential. We have an obligation to support broadband networks and the community partnerships that increase adoption. In the midst of one of the largest connectivity crises of the modern age, this is not time for the Commission to switch gears and manufacture opportunities to police speech.

VII. Conclusion

More than 30 years ago the Commission struck down the "Fairness Doctrine." Expressing its discomfort with its role in the editorial decisions being made by broadcasters, the Commission argued that government involvement in such decisions ran contrary to the First Amendment. The Doctrine was implemented to serve the public interest, however, as the

Commission stated, it ended up stifling speech and inhibited free and open debate on the public airwaves.[25]

Granting NTIA's petition requires the Commission to abandon those concerns today. It is an unconstitutional request that should be denied as it flies in the face of shared goals to ensure that every American can enjoy the benefits of digital citizenship. Instead, the Commission should concentrate its time and resources on the millions who are still waiting for affordable and reliable opportunities to get online.

[25] *See* Amendment of the Rules Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Order, 50 FR 35418 (Aug. 30, 1985).

New Civil Liberties Alliance

September 2, 2020

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Submitted via FCC E-filing

Re: *National Telecommunications and Information Administration's Petition for Rulemaking, Docket RM-11862*

The New Civil Liberties Alliance (NCLA) submits the following letter urging the Federal Communications Commission (FCC) to reject the National Telecommunications and Information Administration's (NTIA) Petition for Rulemaking concerning Section 230 of the Communications Decency Act (CDA), Docket RM-11862. NTIA's petition invites the Commission to run roughshod over the constitutional limits on its authority and substantively rewrite a federal statute to mean the opposite of what Congress enacted. Regardless of whatever merit the petition's policy objectives might have (or not), FCC cannot adopt NTIA's proposed regulations without violating its constitutional role as an entity subservient to both Congress and the judiciary.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be governed only by laws passed by Congress. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because lawmakers, federal administrative agencies and department

heads, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people on a daily basis. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[1] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention. To this end, NCLA has filed lawsuits against federal agencies that have attempted to usurp Congress' core legislative function.

Even where NCLA has not yet brought a suit to challenge the unconstitutional exercise of regulatory or executive power, it encourages government officials themselves to curb unlawful administrative power by establishing meaningful limitations on their exercise of authority. NCLA believes that administrative agencies—including the Commissioners of the FCC—should ensure that they are not disregarding their constitutional obligations.

II. BACKGROUND

On May 28, 2020, President Trump issued Executive Order 13925, *Preventing Online Censorship*, 85 Fed. Reg. 34079 (June 2, 2020). Among other things, the Order directed the Secretary of Commerce, in consultation with the Attorney General, and acting through NTIA, to file a petition for rulemaking with FCC concerning Section 230 of the Communications Decency Act. *Id.* at 34081.

Consistent with the Order, NTIA filed a petition for rulemaking on July 27, 2020. The petition asked the Commission to substantively rewrite Section 230 (47 U.S.C. § 230) by providing extensive regulatory revisions to the statutory text. NTIA Pet. at Appx. A. Specifically, NTIA proposed that FCC amend Section 230 to provide that immunity for liability under Section 230(c)(1) not be available to an internet-service provider that "restrict[ed] access to or availability of material provided by another information content provider." NTIA Pet. at Appx. A, Proposed 47 C.F.R. § 130.01(a). NTIA also proposed that Section 230(c)(1)'s immunity be restricted as to any service provider that does any of the following—"substantively contributing to, modifying, altering, presenting with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider." NTIA Pet. at Appx. A, Proposed 47

[1] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

C.F.R. §130.03. Finally, NTIA proposed that FCC rewrite Section 230(c)(2)'s more limited immunity provision by narrowing the circumstances in which a provider will be considered to have acted in "good faith" and by limiting the types of material a provider may restrict. NTIA Pet. at Appx. A, Proposed 47 C.F.R. §§ 130.02(d), (e).

Chairman Pai opened NTIA's petition for public comment on August 3, 2020.

III. FCC LACKS THE AUTHORITY TO ACCEPT NTIA'S INVITATION TO SUBSTANTIVELY REWRITE FEDERAL LAW

NCLA takes no position on the policy goals of either President Trump's Executive Order or NTIA's Petition. Reasonable minds can and do differ about the need to reform Section 230. But FCC may not settle that debate through rulemaking, absent further legislation from Congress. NCLA urges the Commission to recognize the core limits of its authority and decline NTIA's Petition, which asks FCC to exceed the bounds of proper administrative functions.

Indeed, NTIA argues, in defiance of longstanding court interpretation, that FCC has the power to rewrite Section 230 entirely. But the Commission has no such authority. Section 230's language is clear, and there is no legal "gap" for FCC, or any agency, to fill. More fundamentally, FCC has no power to *revise* the statutory language to reach legal outcomes that are specifically precluded by existing law. NTIA would have the Commission act as a super-legislature—issuing new laws in defiance of both Congress and the judiciary. The Constitution does not and cannot tolerate NTIA's proposed course of action.

A. FCC'S CONSTITUTIONAL AUTHORITY

Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress. Article I, § 7, Clauses 2 and 3 of the Constitution require that "Every Bill" shall be passed by both the House of Representatives and the Senate and signed by the President "before it [may] become a Law." Article II, § 3 of the Constitution directs that the President "shall take Care that the Laws be faithfully executed[.]"

This constitutional structure divides the branches of government. "Even before the birth of this country, separation of powers was known to be a defense against tyranny," and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 756-57 (1996).

No agency has any inherent power to make law. Thus, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355,

374 (1986).

And an agency may only "fill [] statutory gap[s]" left by "ambiguities in statutes within an agency's jurisdiction to administer" to the extent Congress "delegated" such responsibility to the agency. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (there must exist "a gap for the agency to fill" to authorize lawful agency action). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). A statute that is unambiguous "means that there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (quoting *Brand X Internet Servs.*, 545 U.S. at 982-83).

In "review[ing] an agency's construction of [a] statute which it administers," the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Under this analysis, the court "must reject administrative constructions which are contrary to clear congressional intent," because the "judiciary is the final authority on issues of statutory construction." *Id.* at n.9; *see also Webster v. Luther*, 163 U.S. 331, 342 (1896) ("[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.").

B. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

"Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014). It "marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others." *Id.* (citing *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003)).

CDA's protection comes in two distinct sections. Section 230(c)(1) states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Courts of appeals have consistently and uniformly "recognized the provision to protect internet service providers for the display of content created by someone else." *Jones*, 755 F.3d at 406 (collecting cases).

The protections of Section 230(c)(1) do not consider the good faith, or lack thereof, on the

part of the service provider or user. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19, 23 (1st Cir. 2016) ("assertions about [the defendant's] behavior" were irrelevant for § 230(c)(1)).

Instead, the only question relevant to Section 230(c)(1) is whether a defendant is in a "publisher's role." The statute bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Zeran v. America Online, Inc. (AOL)*, 129 F.3d 327, 330 (4th Cir. 1997); *see also, e.g.*, *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."). When a defendant acts in a publisher's role, Section 230(c)(1) provides the defendant with immunity from liability in connection with a wide variety of causes of action, including housing discrimination, see *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008), negligence, *see Doe*, 528 F.3d at 418; *Green*, 318 F.3d at 470-71, and even securities fraud and cyberstalking, *see Universal Comm's Systems Inc. v. Lycos, Inc.*, 478 F.3d 413, 421-22 (1st Cir. 2007).

By contrast, Section 230(c)(2) "provides an additional shield from liability, but only for 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene ... or otherwise objectionable.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (quoting 47 U.S.C. § 230(c)(2)(A)). "Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service." *Id.* "Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue … can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable." *Id.* (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc)); *see also Doe*, 817 F.3d at 22-23 ("Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites.") (collecting cases).

The interplay between the two subsections of 230(c) in the CDA is not subject to confusion or even debate in the courts of appeals. The statutory language is quite clear. "It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language." *Barnes*, 570 F.3d at 1105.

C. FCC CANNOT REWRITE SECTION 230

Undeterred by the statutory text and consistent court interpretation thereof, NTIA has advanced three purported ambiguities in Section 230 it says allow the Commission to act. First, it says there is "uncertainty about the interplay between section 230(c)(1) and (c)(2)." NTIA Pet. at 27. Second, NTIA says that "what it means to be an 'information content provider' or to be 'treated as a publisher or speaker' is not clear in light of today's new technology and business practices." NTIA Pet. at 28. Third, NTIA claims that Section 230's terms "otherwise objectionable" and "good faith" "are ambiguous on their face." NTIA Pet. at 28. Based on these contrived ambiguities, NTIA then proposes a radical rewrite of each statutory section to fundamentally alter what each provision does. *See* NTIA Pet. at Appx. A.

NTIA does not appear to appreciate the difference between true ambiguity that would allow for rulemaking versus its own simple disagreement with the law's plain text as consistently interpreted by the courts. Indeed, NTIA says, "Section 230 contains a number of ambiguities that courts have interpreted broadly in ways that are harmful to American consumers, free speech, and the original objective of the statute." NTIA Pet. at 27. Pointing to consistent interpretation by the judiciary of plain statutory terms does not provide the Commission with *any* power to take the law into its own hands through NTIA's requested rulemaking. NTIA's argument boils down to a simple disagreement with court interpretation of the plain language of the statute. The Commission should not accept NTIA's invitation to vastly exceed its authority.

i. FCC Cannot Rewrite Section 230(c)(1) to Remove Immunity for Restricting Access to Material

First, NTIA's request to have FCC "determine whether the two subsections' scope is additive or not" flies in the face of both clear statutory language and consistent court interpretations. *See* NTIA Pet. at 29. NTIA briefly, and without any analysis, asserts that the "relationship between subparagraphs (c)(1) and (c)(2)" is "ambiguous" because "courts [have] read[] section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity." NTIA Pet. at 28. This contention is both false and a distraction from the ambiguity analysis. Expansive is different than ambiguous. Courts have just disagreed with NTIA's view of what the statute *should* be. That provides no basis for the Commission to act.

A court has a duty to "exhaust all the traditional tools of construction" before "wav[ing] the ambiguity flag." *Kisor*, 139 S. Ct. at 2415 (internal citations and quotation marks omitted). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a

judge conclude that it is more one of policy than of law." *Id.* (internal citations and quotation marks omitted). And these same rules of statutory interpretation "bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring).

NTIA never really identifies what is ambiguous about the statute—because any principled application of the test for ambiguity comes up short. NTIA has hardly "exhaust[ed] all the traditional tools of construction." *See Kisor*, 139 S. Ct. at 2415. Instead, courts have explained that the plain language of the statute sets up two distinct liability shields. Section 230(c)(1) applies to publishers who are not information content providers, whereas (c)(2) applies to "*any* provider of an interactive computer service," whether or not it also provides information. *Barnes*, 570 F.3d at 1105. There is nothing odd, much less *ambiguous*, about Congress' choice to have different protections for different parties.

NTIA even recognizes that courts have uniformly interpreted the plain text of Section 230 to explain the interplay between these sections. *See* NTIA Pet. at 29 (citing *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019)). It just disagrees with those court decisions. Disagreement with an outcome is hardly identification of ambiguity. Instead, it illuminates what NTIA really wants the Commission to do—*change the law*.

If there were any doubt about NTIA's goals, it would be answered by the text of NTIA's proposed regulation. Proceeding from an unidentified ambiguity, NTIA proposes a regulation that explicitly contradicts the statute and prevailing case law, artificially narrowing Section 230(c)(1) so that it provides *no* protection for service providers that "restrict access to or availability of material provided by another information content provider." *See* NTIA Pet at 30-31. But as the Ninth Circuit explained in *Barnes*, Section 230(c)(1) "by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." 570 F.3d at 1105. Restricting *access* to third-party content is at the heart of what Section 230(c)(1) protects. The Commission cannot limit that protection through rulemaking.

ii. FCC Cannot Rewrite Section 230 to Penalize Providers Who Make Editorial Decisions About Content

NTIA's next request, to have the Commission redefine the term "information content provider" must also be rejected as antithetical to the agency's proper role. *See* NTIA Pet. at 42.

Whereas Section 230(c)(1) provides immunity when a service provider is not acting as a "publisher or speaker" of certain information, it does not protect any "information content

providers" who are "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).[2] Thus, as a secondary line of argument, litigants have often tried to argue that an internet service provider is really an *information content provider* because they have made certain editorial decisions about what content to display or prioritize or merely have encouraged creation of certain content. *See, e.g.*, *Jones*, 755 F.3d at 413-14 (collecting cases).

But the unanimous view of the courts is that the statutory language plainly applies to "creation or development" of material, not the exclusion or prioritization of content. *See, e.g.*, *Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."). As the Sixth Circuit said in joining every other court of appeals on this question, "an encouragement test would inflate the meaning of 'development' to the point of eclipsing the immunity from publisher-liability that Congress established." *Jones*, 755 F.3d at 414.

NTIA asks FCC to sweep that law aside and adopt a new definition of an information content provider, treating a service provider as the publisher or speaker of content when it merely "recommends, or promotes" content, even if it does so with an algorithm or other automated means. NTIA Pet. at 46-47. In short, NTIA wants to eliminate protection when a service provider does something far less concrete than the "creation or development" of content.

As a threshold matter, NTIA's petition yet again pretends that there is some ambiguity in the statutory text, as it asks FCC to overrule these courts and rewrite the scope of the law. Rather than engage meaningfully with the statutory text, NTIA just says that "[c]ourts have proposed numerous interpretations" of what it means to be an information content provider. NTIA Pet. at 40.

But there is no ambiguity in the text of the statute. Indeed, Section 230(f)(2) provides a detailed statutory definition of what it means to be an information content provider. NTIA does not really argue otherwise, it just suggests that there could always be an additional level of definitions. *See* NTIA Pet. at 40.

Of course, in construing statutes, courts "give undefined terms their ordinary meanings," and not every undefined term is ambiguous. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018); *see also United States v. Day*, 700 F.3d 713, 725 (4th Cir. 2012) ("It is beyond cavil that a criminal statute need not define explicitly every last term within its text[.]"). If agencies can rewrite statutes by defining

[2] As discussed, this definition does not apply to Section 230(c)(2). That subsection provides liability even for information content providers, which is part of what differentiates the provisions. *See Barnes*, 570 F.3d at 1105.

every undefined term, Congress cannot control the law. No matter how clear the statute or its *definitions*, some term will always be left undefined—or else the definitions themselves will have undefined terms in them. But "silence does not always constitute a gap an agency may fill"; often it "simply marks the point where Congress decided to stop authorization to regulate." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc on behalf of 10 judges). Indeed, reading Congress' silence as an implicit grant of authority is both "a caricature of *Chevron*" and a "notion [] entirely alien to our system of laws." *Id.* at 359-60.

NTIA invites the Commission to make the rudimentary mistake of believing that it has unlimited authority to define *every* open-ended term on the premise of ambiguity. But if that were so, where would it end? Surely not every term in a definition is itself defined. Indeed, NTIA wants a new definition of the terms within the statute's definitions. Congress did not bestow on the Commission unlimited power over Section 230, and NTIA's passing suggestion otherwise should be rejected.

In any event, and contrary to NTIA's suggestion, the courts have adopted clear limits based on the text of the statute. Indeed, whereas NTIA cites to *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016), and *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199-1200 (10th Cir. 2009), as evidence of disagreement in the courts, *see* NTIA Pet. at 40-41, both cases adopted and applied the "material contribution test." And *Huon* even dealt with a provider that "authored" allegedly defamatory content. 841 F.3d at 743. Thus, *Huon* and *Accusearch, Inc.* demonstrate nothing more than the consensus view that information content providers must do something much more than simply promote or prioritize material in order to become liable. NTIA's suggestion about the state of the law is, at best, disingenuous.

More importantly, the courts have based their rulings on the clear statutory text. *See Jones*, 755 F.3d at 414. NTIA's suggestion that FCC can somehow overrule those courts is an affront to the proper role of an agency. *See Brand X Internet Servs.*, 545 U.S. at 982-83. Thus, the Commission cannot lawfully adopt NTIA's proposed rewrite to Section 230(f)(2).

iii. FCC Cannot Drastically Revise Section 230(c)(2) to Make Providers Liable for Good Faith Efforts to Restrict Objectionable Content

Finally, the Commission should reject NTIA's request to redefine the statutory terms "otherwise objectionable" and "good faith" in ways that run counter to their plain meaning. *See* NTIA Pet. at 31, 38.

Section 230(c)(2) grants a limited protection. It immunizes all service and content providers who "in good faith" "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).

NTIA objects to this broad statutory standard, yet again under the pretense of asking the Commission to fill in ambiguities. First, NTIA says that the term "otherwise objectionable" is "ambiguous" because courts routinely consider it to be separate and apart from the other enumerated types of material—*e.g.*, obscene or violent material. *See* NTIA Pet. at 31. NTIA wishes instead that courts would limit this phrase to mean only what the enumerated terms already encompass—"any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." *See* NTIA Pet. at 31-32, 38.

Needless to say, disagreement over court decisions is not the same thing as identifying an ambiguity. And courts have often been called upon to construe the broad term "objectionable." *See, e.g.*, *Zimmerman v. Bd. of Trustees of Ball State Univ.*, 940 F. Supp. 2d 875, 890 (S.D. Ind. 2013). There is "nothing ambiguous" about that term. *Id.*

What NTIA seeks to do is have the Commission write the term "objectionable" out of the statute. Indeed, courts have recognized that Congress intended to give the term "otherwise objectionable" *some* meaning, and not just reiterate the list of other forms of content. *See Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019). Rejecting the argument advanced by NTIA, the Ninth Circuit said, "We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s. But even if *ejusdem generis* did apply, it would not support [a] narrow interpretation of 'otherwise objectionable.' Congress wanted to give internet users tools to avoid not only violent or sexually explicit materials, but also harassing materials." *Id.* FCC may not alter statutory language just because NTIA wishes Congress would have written a different law.

NTIA also says, yet again without analysis, that the "phrase 'good faith' in section 230(c) is also ambiguous." NTIA Pet. at 38. But instead of explaining why that phrase is purportedly incapable of being readily understood, NTIA does what it does best—it argues against courts that have interpreted the phrase in its ordinary sense. *See* NTIA Pet. at 38-39.

NTIA's attempt to create ambiguity around the meaning of "good faith" is particularly misplaced because the phrase "good faith" is "a legal term that has a well understood meaning." *See Wilder v. World of Boxing LLC*, 220 F. Supp. 3d 473, 480 (S.D.N.Y. 2016). And courts have applied

this understanding to Section 230 consistently—looking for bad motives on the part of the provider. *See, e.g.*, *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 603 n.9 (S.D.N.Y. 2020).

Consistent with its pattern of framing disagreement with settled law as ambiguity, NTIA acknowledges that the law runs counter to its proffered regulation. It just argues that, as a policy matter, good faith should be read unnaturally to "require[] transparency about content moderation dispute processes." *See* NTIA Pet. at 39. And its proposed regulation takes that idea and runs with it—defining good faith with a four-part definitional test that forbids a finding of good faith in a host of circumstances, including where automated content moderation fails to perfectly align with a provider's terms of service. *See* NTIA Pet. at 39. This definition is not the plain meaning of good faith—it is not even arguably so. NTIA apparently wants to completely scrap the statutory language in favor of something very different.

IV. CONCLUSION

NCLA urges FCC to reject NTIA's Petition. Even if the Commission shared NTIA's view about what Section 230 *should* look like, it has a constitutional obligation to leave such complex policy decisions in the hands of Congress and the President. FCC simply cannot revise an act of Congress, under the pretense of rulemaking, so that it means the opposite of what Congress set out in law. To allow such *sub rosa* lawmaking would be an affront to constitutional order.

Sincerely,

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Litigation Counsel
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Mark Chenoweth
General Counsel
New Civil Liberties Alliance

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
National Telecommunications	)	RM – 11862
and Information Administration	)	
	)	
Petition for Rulemaking to	)	
Clarify provisions of Section 230	)	
Of the Communications Act of 1934	)	

COMMENTS OF TECHFREEDOM

110 Maryland Ave NE
Suite #205
Washington, DC 20002

Dated: September 2, 2020

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
National Telecommunications	)	RM – 11862
and Information Administration	)	
	)	
Petition for Rulemaking to	)	
Clarify provisions of Section 230	)	
Of the Communications Act of 1934	)	

COMMENTS OF TECHFREEDOM: EXECUTIVE SUMMARY

Section 230 is the law that made today's Internet possible. The law has allowed websites to host content created by users without, as the bill's author, Rep. Chris Cox (R-CA), warned in 1995, "spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges." Without the broad protections of 230(c)(1) in particular, websites would face "death by ten thousand duck-bites" in the form of massive litigation risks.

NTIA asks the FCC to turn this law on its head, but the FCC has no authority to reinterpret the statute. The plain language and the legislative history of Section 230 demonstrate that Congress did not intend to grant any regulatory authority to the FCC. Instead, as Rep. Cox declared, Congress did "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet." Under the statute's express terms, the "interactive computer service" providers protected by Section 230 are not "information service providers," nor are they otherwise subject to the FCC's jurisdiction. Both the courts and the FCC itself have concluded that Section 230 confers no authority on

the Commission. The FCC's lack of delegated authority under Section 230 is demonstrated by the fact that no courts have deferred to the FCC, or awaited its opinion on the meaning of the statute before applying it. NTIA's principal argument, that Section 201(b) confers plenary rulemaking powers to interpret any provision of the Communications Act, including Section 230, fails: this provision applies only to common carrier services, as this Commission itself argued in repealing the previous Commission's broad claims of power to regulate Internet services. The FCC also lacks authority to impose disclosure requirements on social media.

NTIA proposes a new, more arbitrary Fairness Doctrine for the Internet. But because social media sites are not public fora, the First Amendment protects the editorial discretion of their operators. The Supreme Court permitted the original Fairness Doctrine only because it denied full first Amendment protection to broadcasters — whereas new media, including social media, enjoys full First Amendment protection. Conditioning eligibility for Section 230's protections on the surrender of editorial discretion violates the "unconstitutional condition" doctrine. NTIA's narrowing of Section 230 effectively seeks to compel social media to carry speech they do not wish to carry and associate themselves with views, persons and organizations they find repugnant — and places upon social media providers themselves the burden of defending the exercise of their editorial judgment. Finally, despite NTIA's rhetoric about "neutrality," its proposal will empower the government to punish or reward editorial decisions on the basis of content and viewpoint.

NTIA insists that the representations of fairness or neutrality social media make about their services must be enforced, but it is basic principles of consumer protection and contract law, grounded in the First Amendment, — *not* Section 230 — that bar such claims. Broad statements about not making decisions for political reasons simply are not actionable,

and the First Amendment does not permit the government to compel more "particular" promises. The disclosure requirements the FCC has imposed on Broadband Internet Access Service providers are utterly unlike those NTIA proposes for social media: by definition, BIAS services do not exercise editorial discretion, while social media services do. Enforcing BIAS providers' promises of "net neutrality" is nothing like second-guessing how social media provide "edited services." Only in narrow circumstances will the First Amendment permit suit against media providers based on discrepancies between clear and specific representations about their editorial practices and those practices.

NTIA's statutory interpretations would turn Section 230 on its head, placing a heavy burden on websites to defend their exercise of editorial discretion each time they are sued for content moderation decisions. Courts have correctly interpreted 230(c)(1) to protect broadly the exercise of editorial discretion. NTIA is simply mistaken that this renders 230(c)(2)(a) superfluous: it protects content moderation decisions even when providers responsible for the creation of content, and it protects against other kinds of claims. NTIA would transform 230(c)(2) into the basis for micromanaging how social media operate. Similarly, by redefining which services are eligible for the 230(c)(1) immunity, NTIA would create exactly the kind of censorship regime Section 230 was intended to prevent.

The FCC should dismiss this petition for lack of authority to implement it, and because it violates the most basic precepts of the First Amendment. Evaluating the fairness of media, both offline and online is, as a Republican FTC Chairman eloquently put it, "is a task the First Amendment leaves to the American people, not a government agency." If consumers believe bias exists, it must be remedied through the usual tools of the media marketplace: consumers must vote with their feet and their dollars.

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Federal Communications Commission
Washington, DC 20554

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Clarify provisions of Section 230	)	
Of the Communications Act of 1934	)	

COMMENTS OF TECHFREEDOM

TechFreedom, pursuant to Sections 1.4 and 1.405 of the Commission's rules (47 C.F.R. §§ 1.4 & 1.405), hereby files these Comments in response to the Petition for Rulemaking filed by the National Telecommunications and Information Agency ("NTIA") on July 27, 2020 (the "NTIA Petition").[1] In support of these Comments, TechFreedom submits:

I. About TechFreedom

Founded in 2010, TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes

[1] By Public Notice, Report No. 3157, released Aug. 3, 2020, the FCC opened NTIA's Petition for comment, with comments due by Sept. 2, 2020. These Comments are timely filed. These comments were drafted by Berin Szóka, TechFreedom Senior Fellow, and James Dunstan, TechFreedom General Counsel, with contributions and vital assistance from Ashkhen Kazaryan, TechFreedom's Director of Civil Liberties and Legal Research Fellow; Andy Jung, Law Clerk, TechFreedom; and, Sara Uhlenbecker, Law Clerk, TechFreedom.

the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

For the last decade, TechFreedom has opposed expansive readings of the Communications Act that would give the FCC broad authority, and unchecked discretion, to regulate the Internet.[2] In 2015, we joined the lawsuit challenging the FCC's imposition of common carriage regulation on Internet services in the name of protecting "neutrality."[3] The arguments we made as intervenors were those then-Judge Kavanaugh and Judge Brown stressed in their dissents, arguing that the full D.C. Circuit should rehear the panel decision upholding the FCC's order.[4] We have also developed a core expertise in consumer protection law, and have provided testimony to Congress multiple times on how the Federal Trade Commission wields that authority.[5] Finally, we have devoted much of our

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[2] *TechFreedom Files in Amicus in the Latest Net Neutrality Litigation*, TECHFREEDOM (Oct. 18, 2018), https://techfreedom.org/techfreedom-files-amicus-latest-net-neutrality-litigation/; *TechFreedom Releases First Comprehensive Analysis of Federalism Obstacles to State Net Neutrality Regulations*, TECHFREEDOM (Oct. 31, 2018), https://techfreedom.org/techfreedom-releases-first-comprehensive-analysis-federalism-obstacles-state-net-neutrality-regulations/; *CRA Resolutions Cannot Legally Protect Net Neutrality*, TECHFREEDOM (May 14, 2018), https://techfreedom.org/cra-resolutions-cannot-legally-protect-net-neutrality/; TechFreedom, Comments of TechFreedom In the Matter of Notice of Proposed Rulemaking – Restoring Internet Freedom WC Docket No. 17-108 (Aug. 30, 2017), http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf; *Our Fight to Stop FCC Regulation of the Internet Continues*, TECHFREEDOM (Dec. 29, 2017), https://techfreedom.org/fight-stop-fcc-regulation-internet-continues/.

[3] Mot. of TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, & David Frankel for Leave to Intervene, Case No. 15-1063 (2015) available at http://docs.techfreedom.org/TF_FCC_OIO_Motion_to_Intevene_6.8.15.pdf; Br. for Intervenors for Pet'rs TechFreedom, CARI.net, Jeff Pulver, Charles Giancarlo, Wendell Brown, & David Frankel, Nos. 15-1063 (2015) available at http://docs.techfreedom.org/TF_Intervenor_Brief_8.6.15.pdf; Reply Br. For Intervenors for Pet'rs TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown & David Frankel, Nos. 15-1063 (2015) available at https://techfreedom.org/important-documents-open-internet-order-case/; Pet. For Reh'g En Banc for Intervenors TechFreedom, CARI.net, Jeff Pulver, Charles Giancarlo, Wendell Brown, & David Frankel, Nos. 15-1063 (2015) available at http://docs.techfreedom.org/TF_Petition_for_Rehearing_En_Banc.pdf.

[4] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 418-26 (D.C. Cir. 2017) (Kavanaugh dissenting) and *id*. at 408-17 (Brown dissenting).

[5] *Consumer Protection & Competition Regulation in A High-Tech World: Discussing the Future Of The Federal Trade Commission, Report 1.0 Of The FTC*: Technology & Reform Project 24 (Dec. 2013),

attention over the last three years on Section 230 and proposals to reform it, including providing Congressional testimony.[6] We led the drafting of a set of seven principles to guide lawmakers considering amending Section 230 — a document signed onto by 27 civil society organizations and 53 academics.[7] Finally, the First Amendment's application to the Internet has always been at the core of our work. All four areas of our work are incorporated in these comments.

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http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf; Berin Szóka & Geoffrey A. Manne, The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature 57-60 (2016), http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf [hereinafter White Paper]; Comments of TechFreedom, Hearings on Competition & Consumer Protection in the 21st Century: Topic 11: The agency's investigation, enforcement and remedial processes (Aug. 20, 2018), http://techfreedom.org/wpcontent/uploads/2018/08/ftc-august-2018-workshop-comments-topic-11.pdf; Comments of TechFreedom & International Center for Law and Economics, In the Matter of Big Data and Consumer Privacy in the Internet Economy, Docket No. 140514424–4424–01 (Aug. 5, 2014), available at http://www.laweconcenter.org/images/articles/tf-icle_ntia_big_data_comments.pdf; Geoffrey A. Manne, R. Ben Sperry & Berin Szoka, In the Matter of Nomi Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case (2015), available at http://laweconcenter.org/images/articles/icle-nomi_white_paper.pdf;

[6] Berin Szóka , *The First Amendment Bars Regulating Political Neutrality, Even Via Section 230*, TECHDIRT (July 24, 2020), https://www.techdirt.com/articles/20200724/11372744970/first-amendment-bars-regulating-political-neutrality-even-via-section-230.shtml; TechFreedom (@TechFreedom), TWITTER (May 28, 2020), https://twitter.com/techfreedom/status/1265877617519009792; Letter from TechFreedom to the Senate Judiciary Committee (Mar. 5, 2020), available at https://techfreedom.org/wp-content/uploads/2020/03/TechFreedom-Letter-re-EARN-IT-Act-3.5.2020.pdf; *EARN IT Act Could Hurt Kids and Undermine Privacy of All Americans*, TECHFREEDOM (Mar. 5, 2020), https://techfreedom.org/earn-it-act-could-hurt-kids-and-undermine-privacy-of-all-americans/; *Academics, Civil Society Caution Lawmakers Considering Amending Section 230*, TECHFREEDOM (July 11, 2019), https://techfreedom.org/academics-civil-society-caution-lawmakers-considering-amending-section-230/; Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical; *Hawley Proposes a Fairness Doctrine for the Internet*, TECHFREEDOM (June 19, 2019), https://techfreedom.org/hawley-proposes-a-fairness-doctrine-for-the-internet/; Ashkhen Kazaryan, *Some conservatives need a First Amendment refresher*, WASHINGTON EXAMINER (May 21, 2019), https://www.washingtonexaminer.com/opinion/some-conservatives-need-a-first-amendment-refresher; Letter from TechFreedom to Attorney General Jeff Sessions (Sept. 21, 2018), available at http://techfreedom.org/wp-content/uploads/2018/09/Letter_-to-Jeff-Sessions-re-Social-Media-Bias-v2.pdf; *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Apr. 26, 2018) (Testimony of TechFreedom), available at http://docs.techfreedom.org/Szoka_Testimony-Platform_Reponsibility_&_Neutrality-4-25-18.pdf; *Senate Passes Hybrid SESTA Bill, Despite Constitutional & Backfiring Concerns*, TECHFREEDOM (Mar. 21, 2018), https://techfreedom.org/senate-passes-hybrid-sesta-bill-despite-constitutional-backfiring-concerns/; *Backpage Shutdown Proves SESTA Was Rushed Unnecessarily*, TECHFREEDOM (Apr. 6, 2018), https://techfreedom.org/backpage-shutdown-proves-sesta-rushed-unncessarily/.

[7] Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical.

II. The FCC Lacks Authority to Implement the NTIA Petition

Congress passed Section 230 of the Communications Decency Act nearly 25 years ago. Since then, hundreds of reported cases,[8] courts have interpreted the meaning of Section 230, and its principle provision, Paragraph (c)(1), which has been called "the twenty-six words that created the Internet."[9] Suddenly, after the passage of so much time, NTIA now seeks to thrust the FCC into the middle of the national debate over the role and power of technology companies in America, or as many call it, "the TechLash."[10] Apparently unhappy with how courts have interpreted the language set down by Congress, NTIA would have the FCC set forth a new, radically different interpretation of what Section 230 means. The fundamental problem with this is that there simply is no role for the FCC here, and the FCC should dismiss NTIA's Petition as being beyond the scope of its delegated authority.

A. The FCC Lacks Delegated Authority to Interpret Section 230

The first fundamental question the FCC must address is whether the Commission has any authority under the Communications Act to interpret Section 230. It does not.

Empowering the FCC to conduct rulemakings about online content was the last thing the creators of Section 230 had in mind. Fundamentally, they opposed heavy-handed governmental

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[8] Eric Goldman, *Comments on the Internet Association's Empirical Study of Section 230 Cases*, Technology & Marketing Law Blog (Aug. 3, 2020), https://blog.ericgoldman.org/archives/2020/08/comments-on-the-internet-associations-empirical-study-of-section-230-cases.htm ("I think the total universe of Section 230 case citations is more like 1,200+"); *see also A Review Of Section 230'S Meaning & Application Based On More Than 500 Cases*, INTERNET ASSOCIATION (July 27, 2020), https://internetassociation.org/publications/a-review-of-section-230s-meaning-application-based-on-more-than-500-cases/ [hereinafter *IA Report*].

[9] *See, e.g.*, JEFF KOSSEFF, TWENTY SIX WORDS THAT CREATED THE INTERNET (2019).

[10] *See, e.g.*, Robert D. Atkinson Et Al., *A Policymaker's Guide to the "Techlash" - What It Is and Why It's a Threat to Growth and Progress*, Information Technology & Innovation Foundation (Oct. 28, 2019), https://itif.org/publications/2019/10/28/policymakers-guide-techlash.

regulation of the Internet, an idea very much gathering steam at the time as the Senate moved to pass the rest of the Communications Decency Act:

> the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected . . . ***I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter[s].***[11]

Enter now the NTIA Petition. Somehow the NTIA Petition manages to ignore both the statutory Congressional language and the legislative history quoted above to conclude that "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation."[12] With respect, this assertion is flatly contradicted by the text and history of the statute.[13]

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[11] *Id.* at H8470 (statement of Rep. Wyden, emphasis added).

[12] National Telecommunications and Information Administration, Petition for Rulemaking of the National Telecommunications and Information Administration at 17 (July 27, 2020) [hereinafter *NTIA Petition*], https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

[13] Interestingly, NTIA can find its way around the legislative history by discussing the fact that Congress enacted Section 230, in part, to overrule the *Stratton Oakmont* decision, and to empower parents to choose what their children saw on the Internet. *See id*. at 18, n. 51, 21, n. 64, 21, n. 65, 22, n. 67. Yet apparently NTIA cannot find any of the references quoted above, from the same Representatives, to the fact that the statute was never intended to be implemented by the FCC.

1. The Language and the Legislative History of Section 230 Demonstrate that Congress Did Not Intend to Grant Any Regulatory Authority to the FCC.

Both the plain statutory language of the CDA as well as the legislative history of Section 230 clearly indicate that Congress did not intend to grant any regulatory authority to the FCC to enforce, or even interpret, Section 230. In Subsection 230(b)(2), Congress stated that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, ***unfettered by Federal or State regulation***."[14]

> In discussing the fact that the CDA was not designed to provide the FCC with any jurisdiction, author Chris Cox said this during the floor debates: We do "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[15] Rep. Cox also pointed out that "there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time." [16]

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[14] Communication Decency Act, 47 U.S.C. § 230(b)(2) (emphasis added).

[15] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The full quote from the floor colloquy sheds additional light on what one of Section 230 author's had in mind for how the law would operate:

> Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, ***it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government***. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

Id.

[16] *Id.* at H8469 (emphasis added).

Similarly, Representatives Bob Goodlatte (R-VA)[17] and Rick White (R-WA)[18] expressed their support for Section 230 ***and*** for the notion that there was little room, if any, for the federal government to police the content online. Section 230 co-author (then) Rep. Wyden (D-OR) agreed that "The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats."[19] Wyden fully recognized that the FCC (or any other federal agency) would never be able to police the content of the Internet in a timely basis. "Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today."[20]

2. Under the Statute's Express Terms, Interactive Computer Service Providers Are not Information Service Providers or Subject to FCC Jurisdiction

NTIA argues that Section 230(f)(2) "explicitly classifies 'interactive computer services' as 'information services[.]'"[21] Yet NTIA has it exactly backwards: Section 230(f)(2) states "[t]he term 'interactive computer services' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including

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[17] "The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment." *Id.* at H8471.

[18] "I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision [as to what my children see on the Internet] is the Federal Government." *Id.*

[19] *Id.* at H8470.

[20] *Id.* at H8471.

[21] *Id.* at 47.

specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[22] Thus, while *some* information services are interactive computer services, that doesn't mean that *all* interactive computer services are information services. [23] This more limited reading of the meaning of Section 230(f)(2) is therefore consistent with the policy statement contained in Section 230(b)(2) : "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . ."[24] The broad reading of the term "information service" advocated by NTIA, *to justify new federal regulation*, would stand in stark conflict with this policy finding.

3. Both the Courts and the FCC Itself Have Concluded that Section 230 Confers No Authority on the FCC

The NTIA Petition further ignores ample court precedent, and conclusions reached by the FCC itself, that Section 230 confers no regulatory authority on the FCC. In *Comcast v. FCC,*[25] the D.C. Circuit addressed the first in a series of many challenges to the authority of the FCC to regulate an Internet service provider's network management practices (so-called "net neutrality" regulation). The FCC's order[26] found that the company's limitation on peer-to-peer programs violated the FCC's 2005 Internet Policy Statement[27] On appeal, the FCC argued that, through Section 230, Congress

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[22] 47 U.S.C. § 230(f)(3).

[23] *Restoring Internet Freedom* ¶ 60, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (1) (2018) [hereinafter *RIFO*].

[24] 47 U.S.C. § 230(b)(2).

[25] *Comcast v. FCC*, 600 F.3d 642 (DC Cir 2010).

[26] *In re Formal Compl. Of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) [hereinafter *Comcast Order*).

[27] *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14,986, 14,998, ¶ 4 (2005).

provided the FCC with authority to prohibit Internet Service Providers (ISPs) from implementing any network practices that might frustrate "the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet."[28]

The *Comcast* court flatly rejected this assertion of authority. It first found that Section 230 (in conjunction with Section 1 of the Communications Act) "are statements of policy that themselves delegate no regulatory authority."[29] It also rejected the FCC's argument that Section 230 nonetheless conveyed "ancillary" authority:[30]

> We read *Southwestern Cable* and *Midwest Video I* quite differently. In those cases, the Supreme Court relied on policy statements not because, standing alone, they set out "statutorily mandated responsibilities," but rather because they did so in conjunction with an express delegation of authority to the Commission, i.e., Title III's authority to regulate broadcasting.[31]

Instead, the *Comcast* court analyzed the FCC's authority to regulate the Internet based on *Midwest Video II*,[32] wherein the Supreme Court found that, absent clear statutory authority under Title III, the FCC's cable regulations related to public access requirements were unlawful.[33] The court also relied on *NARUC II,*[34] which struck down FCC regulations of non-video uses of cable systems, to conclude that the Communications Act "commands that each and every assertion of jurisdiction

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[28] *Comcast v. FCC*, 600 F.3d at 651 (slip op. p. 17).

[29] *Id.* at 652 (slip op. p. 18).

[30] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)*; United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*).

[31] *Comcast v. FCC*, 600 F.3d at 652.

[32] *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

[33] *Comcast v. FCC*, 600 F.3d at 654, *quoting Midwest Video II*, 440 U.S. at 706.

[34] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II).

over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting."[35] The *Comcast* court thus concluded:

> The teaching of *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II* — that policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority — derives from the "axiomatic" principle that "administrative agencies may [act] only pursuant to authority delegated to them by Congress." Policy statements are just that — statements of policy. They are not delegations of regulatory authority.[36]

The *Comcast* court warned of reading expansive authority into policy statements contained in provisions from the Communications Act, without specific delegated authority:

> Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations . . . that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers. [37]

The NTIA Petition indeed seeks to shatter the limits of FCC authority by claiming the mere codification of Section 230 into the Communications Act confers upon the FCC the power to review and regulate the editorial practices of any website on the Internet that hosts comments or other content created by users. Granting an unelected independent agency such power, as NTIA suggests, should send shivers down the spine of all Americans, regardless of political party affiliation.

Since *Comcast*, the FCC has, under both Democratic and Republican leadership, either avoided claiming Section 230 as providing direct statutory authority, or disclaimed outright Section 230 as an independent source of regulatory authority. The FCC's 2015 *Open Internet Order*, for example, reissued (with significant modifications) the net neutrality rules contained in the 2010

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[35] *Comcast v. FCC*, 600 F.3d at 651, *quoting NARUC II*, 533 F.2d at 612.

[36] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

[37] *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

Order, but sought to ground them on two distinct sources of authority *other* than Section 230: (i) interpreting Section 706 as an independent grant of authority and (ii) reclassifying Broadband Internet Access Service (BIAS) as a Title II telecommunications service. In reaching the latter conclusion, the FCC held that Section 230(f)(2)'s reference to "information service" and a "system that provides access to the Internet" did not resolve the question of whether BIAS was an information service or a telecommunications service, concluding that it was "unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner, especially given the opportunity to do so when it adopted the Telecommunications Act of 1996."[38] Nowhere in the course of this discussion of the Commission's statutory authority (in Title II) did the 2015 Order say anything to suggest that Section 230 was itself a source of statutory authority.

In the *Restoring Internet Freedom Order*, the FCC found not that Section 230 provided any regulatory authority to the FCC, but the very opposite: that the policy statement (that the Internet should remain "unfettered by Federal or State regulation") in Section 230(b)(2)

> confirms that the free market approach that flows from classification as an information service is consistent with Congress's intent. In contrast, we find it hard to reconcile this statement in section 230(b)(2) with a conclusion that Congress intended the Commission to subject broadband Internet access service to common carrier regulation under Title II.[39]

The *RIFO* agreed with the *Comcast* analysis, concluding that "Section 230 did not alter any fundamental details of Congress's regulatory scheme but was part and parcel of that scheme, and confirmed what follows from a plain reading of Title I—namely, that broadband Internet access

[38] OIO ¶ 386.

[39] *RIFO* ¶ 58.

service meets the definition of an information service."[40] Finally, in determining whether it had authority to adopt conduct rules for BIAS providers, the *RIFO* rejected an argument that Section 230 could be read as a source of authority: "section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority."[41]

On appeal, the D.C. Circuit drove the final nail in the coffin of the idea that Section 230 confers any regulatory authority:

> As the Commission has itself acknowledged, this is a "statement[] of policy," not a delegation of regulatory authority. . . . To put it even more simply, "[p]olicy statements are just that—statements of policy. They are not delegations of regulatory authority." *Comcast*, 600 F.3d at 654.[42]

4. The Lack of Delegated Authority under Section 230 is Demonstrated by the Fact that No Courts Have Deferred to the FCC.

Although NTIA would have us believe that they've discovered never-before-used authority for the FCC, it is notable that in none of 1000+ cases involving Section 230,[43] particularly the early cases, has any court refused to rule on the meaning of Section 230 out of deference to an FCC that has yet to act. One would think that if Section 230 conferred authority on the FCC to interpret its meaning, some enterprising lawyer, somewhere, would have argued for a stay of judicial proceedings, or referral to the FCC, when it lost on its Section 230 claim. The fact that no one has

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[40] *Id.* ¶ 61. The FCC added: "The legislative history of section 230 also lends support to the view that Congress did not intend the Commission to subject broadband Internet access service to Title II regulation. The congressional record reflects that the drafters of section 230 did 'not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.' See 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)." RIFO n. 235.

[41] *RIFO* ¶ 284 (emphasis added).

[42] *Mozilla v. FCC*, 940 F.3d 1, 78 (D.C. Cir. 2019).

[43] *See supra* note 8.

even tried that as a legal strategy further reinforces just how untethered from the statute the NTIA Petition really is.[44]

When it comes to interpreting most provisions contained in the Communications Act, courts generally defer to the FCC's determinations where there is a clear grant of authority. In *North County Communications, Corp. v. California Catalog & Technology*,[45] for example, the Ninth Circuit rejected an inter-carrier dispute over termination fees, concluding that the FCC had yet to provide guidance on the charges in question:

> North County essentially requests that the federal courts fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b). This we decline to do. The district court properly dismissed North County's declaratory judgment claim premised on § 201(b), because entry of a declaratory judgment "would ... put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission."[46]

Many other courts have hesitated to step in to adjudicate disputes arising out of the Communications Act, especially where the FCC has not issued rules or otherwise provided guidance on how courts should interpret those legislative provisions.[47] As one court put it, in dismissing a

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[44] *See, e.g., State of North Dakota v. EPA*, Case No. 15-1381 (D.C. Cir. 2017) (Order holding case in abeyance) (unpublished opinion.) The D.C. Circuit issued an order holding in abeyance a challenge to the Clean Air Act and Executive Order 13783 "Promoting Energy Independence and Economic Growth" (82 FR 16093, March 13, 2017) and order the EPA to file status reports on a rulemaking to implement the EO.

[45] 594 F.3d 1149 (9th Cir. 2010).

[46] *Id.* at 1158, *quoting* Greene v. Sprint Commc'ns Co., 340 F.3d 1047, 1053 (9th Cir.2003)

[47] *See, e.g. Hoffman v. Rashid*, 388 Fed. Appx. 121, 123 (3d Cir. 2010) (concluding it was the FCC's purview to determine whether a particular practice by a carrier violated Section 201(b) of the Communications Act); *Iris Wireless LLC v. Syniverse Tech.*, 2014 WL 4436021, (M.D. Fla. Sept. 8, 2014) ("a court should not 'fill in the analytical gap' where the Commission has not made a determination regarding whether a company's action violates section 201(b)") (quoting *North County*, 594 F.3d at 1158); *see also id*. ("if the Court were to make a declaratory ruling" on an issue that the Commission had not yet addressed, "it would 'put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission'") (quoting *North County*, 594 F.3d at 1158); *Free Conferencing*

claim that "it is a violation of section 201(b) for a party to 'warehouse' toll free numbers without identified subscribers," because previous Commission orders "do not address the precise type of conduct at issue in this case," the court could not "risk disturbing the delicate regulatory framework that the Commission is tasked with maintaining").[48] If similar delegated authority existed for the FCC to interpret Section 230, how have hundreds of cases proceeded without a single court stopping to analyze whether its decision would "risk disturbing the delicate regulatory framework" assigned by Congress to, supposedly, the FCC? The answer is self-evident, especially after even a cursory review of the legislative history of Section 230: Congress never intended any regulatory role for the FCC in regard to Section 230.

B. The FCC Lacks Authority Under Section 201(b) to Interpret Section 230

The NTIA Petition next invokes the FCC's broad authority under Section 201(b) to conduct rulemakings to "carry out" the provisions of the Communications Act., which just happens to include Section 230.[49] The Petition quotes from *AT&T Corp. v. Iowa Utilities Bd.* that "Section 201(b) means what it says."[50] NTIA's reliance on Section 201(b) as a "blank check" to regulate, however, is not

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Corp. v. T-Mobile US, Inc., 2014 WL 7404600, *7 (C.D. Cal. Dec. 30, 2014) (because "re-routing calls to rural LECs is an evolving area of law," and because it "is important to 'protect[ ] the integrity' of the FCC's evolving regulatory scheme," the court decided "not to meddle" in this area until the Commission had ruled on the question) (quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)); *James v. Global Tel*Link Corp.*, 2014 WL 4425818, **6-7 (D.N.J. Sept. 8, 2014) ("where the question is whether an act is reasonable" under section 201(b), "primary jurisdiction should be applied"; the reasonableness of defendants' charges and practices in providing inmate calling services "implicates technical and policy questions that the FCC has the special expertise to decide in the first instance") (internal quotation marks omitted); *Demmick v. Cellco P'ship*, 2011 WL 1253733, *6 (D.N.J. March 29, 2011) ("courts have consistently found that reasonableness determinations under [section] 201(b) lie within the primary jurisdiction of the FCC, because they involve policy considerations within the agency's discretion and particular field of expertise").

[48] *Havens v. Mobex Network Servs., LLC*, 2011 WL 6826104, *9 (D.N.J. Dec. 22, 2011).

[49] *NTIA Petition*, *supra* note 12, at 15-16.

[50] *Id.*, n. 46 (quoting *AT&T v. Iowa Utilities Bd*, 525 U.S. 366 (1999)).

supported by the statute, court precedent, or prior FCC approaches to its authority under Section 201(b).

First, the reference to the FCC's authority cited by the petition is contained in the final sentence of Section 201(b), which deals with the obligations of "common carriers" to provide services to the public whereby "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." Social media platforms are not "common carriers," (or any type of carrier, for that matter), nor are they providing a "communication service." So while the FCC may have broad regulatory authority over "carriers" and "communication services," the NTIA Petition's request that the FCC provide an interpretation of Section 230 that has nothing to do with either subject matter addressed in Section 201(b).

Even the *Iowa Utility Board* court recognized that the FCC's authority under Section 201(b) is not boundless. "JUSTICE BREYER says … that 'Congress enacted [the] language [of § 201(b)] in 1938,' and that whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates.' ***That is assuredly true***."[51] Far from the FCC attempting to impose regulations on entities not otherwise subject to the Commission's jurisdiction, as is the case with NTIA's request, the issues addressed in *Iowa Utility Board* were whether the FCC had authority to implement Sections 251 and 252 added by the 1996 Telecommunications Act — provisions that related to "pricing and nonpricing provisions" of communications carriers. The Court rejected the claims of carriers and state commissioners that the FCC's authority was limited to "interstate or foreign" communications by

[51] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis added).

carriers under Section 201(a), and hence the "means what it says" language was born.[52] Thus, we are directed by *Iowa Utility Board* itself to return to what Congress "contemplated" in adopting Section 230, which is that it clearly did not intend to grant any authority to the FCC to regulate non-common carriers under Section 230.

This interpretation is consistent with the approach taken by the *Comcast* court, which rejected the FCC's claim that it could invoke authority under Section 230 via ancillary authority to regulate carriers under Section 201(b) because the FCC had failed even to attempt to tie the two provisions together in the FCC order then on appeal.[53] Such an attempt to bootstrap authority under such ancillary jurisdiction, "if accepted[,] . . . would virtually free the Commission from its congressional tether."[54]

The only time the FCC has successfully argued that that Section 201 grants authority to regulate any part of the Internet was for the short period between 2015 and 2018 where the Commission determined that BIAS (*and only BIAS*) was a telecommunications service, and could be regulated under Title II (and thus Section 201(b)).[55] Even then, application of Section 201(b) to non-carriers was highly questionable.[56] But since the FCC rejected the *2015 Order*'s approach and

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[52] *Id.* at 378.

[53] Comcast, 600 F.3d at 652-55.

[54] *Id.* at 655.

[55] *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5724 (2015) ("In light of our Declaratory Ruling below, the rules we adopt today are also supported by our legal authority under Title II to regulate telecommunications services. For the reasons set forth below, we have found that BIAS is a telecommunications service and, for mobile broadband, commercial mobile services or its functional equivalent.").

[56] *Id.* at 5999 (O'Reilly, Comm'r, dissenting) ("Moreover, if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice "in connection with" a communications service. There is no limiting principle.").

returned BIAS to be an information service, there is no arguable basis for NTIA to claim that the FCC today has authority to regulate the activities of social media platforms under Section 201.[57]

C. The FCC Lacks Delegated Authority to Impose Disclosure Requirements on Social Media.

The NTIA Petition further argues that the FCC has authority under Sections 163 and 257 of the Communications Act to impose disclosure requirements on social media sites as "information services."[58] The multi-cushion regulatory bank shot that NTIA proposes would make Paul Newman's Fast Eddie Felson from *The Hustler* proud.

NTIA cites no court cases or even FCC decisions to support its argument that Section 163, which merely requires the FCC to submit biennial reports to Congress, somehow provides regulatory authority to the FCC.[59] Section 163 conveys to the FCC no regulatory authority

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[57] The *RIFO* openly challenged whether the *2015 Order* could be squared with the FCC's authority under Section 201(b) and *Comcast*.

> The Open Internet Order contended that ISPs that also offer telecommunications services might engage in network management practices or prioritization that reduces competition for their voice services, arguably implicating section 201(b)'s prohibition on unjust or unreasonable rates or practices in the case of common carrier voice services and/or section 251(a)(1)'s interconnection requirements for common carriers. The Open Internet Order never squares these legal theories with the statutory prohibition on treating telecommunications carriers as common carriers when they are not engaged in the provision of telecommunications service or with the similar restriction on common carrier treatment of private mobile services.1045 That Order also is ambiguous whether it is relying on these provisions for direct or ancillary authority. If claiming direct authority, the Open Internet Order fails to reconcile its theories with relevant precedent and to address key factual questions.1046 Even in the more likely case that these represented theories of ancillary authority, the Open Internet Order's failure to forthrightly engage with the theories on those terms leaves it unclear how conduct rules are sufficiently "necessary" to the implementation of section 201 and/or section 251(a)(1) to satisfy the standard for ancillary authority under Comcast. (footnotes omitted).

RIFO ¶ 286.

[58] *NTIA Petition*, *supra* note 12, at 46-51.

[59] *Id.* at 49. The NTIA Petition quotes only a portion of the statute, and do so completely out of context. A reading of the full section makes clear that the intent of Congress was not to delegate additional regulatory

whatsoever, but is merely a Congressional mechanism requiring the FCC to report to it every other year on the status "of the communications marketplace,"[60] and "describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section." It is not an independent grant of authority.

NTIA next argues that Section 257, similarly largely a reporting requirement, grants the FCC authority to require social media providers to disclose their moderation policies.[61] That's where

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authority to the FCC, but rather, that Congress merely sought more information from the FCC about its activities pursuant to other delegated authority provisions. Section 163 states in full:

> (a) In general
>
> In the last quarter of every even-numbered year, the Commission shall publish on its website and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the state of the communications marketplace.
>
> (b) Contents. Each report required by subsection (a) shall—
>
> > (1) assess the state of competition in the communications marketplace, including competition to deliver voice, video, audio, and data services among providers of telecommunications, providers of commercial mobile service (as defined in section 332 of this title), multichannel video programming distributors (as defined in section 522 of this title), broadcast stations, providers of satellite communications, Internet service providers, and other providers of communications services;
> >
> > (2) assess the state of deployment of communications capabilities, including advanced telecommunications capability (as defined in section 1302 of this title), regardless of the technology used for such deployment;
> >
> > (3) assess whether laws, regulations, regulatory practices (whether those of the Federal Government, States, political subdivisions of States, Indian tribes or tribal organizations (as such terms are defined in section 5304 of title 25), or foreign governments), or demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services;
> >
> > (4) describe the agenda of the Commission for the next 2-year period for addressing the challenges and opportunities in the communications marketplace that were identified through the assessments under paragraphs (1) through (3); and
> >
> > (5) describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section.

47 U.S.C. § 163.

[60] 47 U.S.C. § 163(a).

[61] *NTIA Petition*, *supra* note 12, at 49.

NTIA's legerdemain really kicks in. The Petition begins by claiming that "In its 2018 Internet Order, the Commission relied on section 257 to impose service transparency requirements on providers of the information service of broadband internet access."[62] From there, the Petition goes on to argue that the FCC has the power to impose disclosure requirements on all social media, because social media are also "information service[s]."[63] To reach that conclusion, however, NTIA relies on cases that ultimately either have nothing to do with Section 257, or nothing to do with what the FCC would call "Edge Providers," a broad term that includes social media sites.[64]

NTIA relies heavily on language from the *Mozilla* decision, which is inapposite because it involved BIAS providers.[65] NTIA is correct that the *Mozilla* court did uphold the FCC's authority to adopt transparency rules ***for BIAS providers*** under Section 257, which the *Mozilla* court also found to be largely a reporting statute.[66] In contrast to the "regulated entities" involved in *Mozilla*, social media companies have never been regulated by the FCC, for very good reason. Since the dawn of the "net neutrality" debate, the FCC has been extremely careful to distinguish among the three sectors of the Internet: providing broadband Internet access service; providing content, applications, services, and devices accessed over or connected to broadband Internet access service ("edge" products and services); and subscribing to a broadband Internet access service that allows access to edge products

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[62] *Id.*

[63] *Id.* at 47-48.

[64] *See infra* note 67 and associated text.

[65] *Id.* at 48, *quoting* Mozilla Corp. v. F.C.C., 940 F.3d 1, 34 (D.C. Cir. 2019).

[66] *Mozilla*, 940 F.3d at 48-49 ("Section 257(a) simply requires the FCC to consider 'market entry barriers for entrepreneurs and other small businesses.' 47 U.S.C. § 257(a). The disclosure requirements in the transparency rule are in service of this obligation. The Commission found that the elements of the transparency rule in the 2018 Order will 'keep entrepreneurs and other small businesses effectively informed of [broadband provider] practices so that they can develop, market, and maintain Internet offerings.' In fact, the Order takes care to describe the specific requirements of the rule to 'ensure that consumers, entrepreneurs, and other small businesses receive sufficient information to make [the] rule effective.'") (internal citations omitted).

and services.[67] The 2010 Order made clear that its rules, including its "transparency" rules, did not apply to Edge Providers — the very entities that NTIA would now sweep into the FCC regulatory tent:

> these rules apply only to the provision of broadband Internet access service and not to edge provider activities, such as the provision of content or applications over the Internet. First, the Communications Act particularly directs us to prevent harms related to the ***utilization of networks and spectrum to provide communication by wire and radio***. Second, these rules are an outgrowth of the Commission's *Internet Policy Statement*. The Statement was issued in 2005 when the Commission removed key regulatory protections from DSL service, and was intended to protect against the harms to the open Internet that might result from ***broadband providers'*** subsequent conduct. ***The Commission has always understood those principles to apply to broadband Internet access service only***, as have most private-sector stakeholders. Thus, insofar as these rules translate existing Commission principles into codified rules, ***it is appropriate to limit the application of the rules to broadband Internet access service***.[68]

Finally, only by focusing its rules exclusively on broadband providers, and not Edge Providers, was the 2010 Order able to dispense with the First Amendment arguments raised by some ISPs.[69]

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[67] Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905, 17972-80, ¶ 20 (2010) (*2010 Order*).

[68] *Id.* ¶ 50 (footnotes omitted, emphasis added).

[69] The Commission explained:

> In arguing that broadband service is protected by the First Amendment, AT&T compares its provision of broadband service to the operation of a cable television system, and points out that the Supreme Court has determined that cable programmers and cable operators engage in speech protected by the First Amendment. The analogy is inapt. When the Supreme Court held in Turner I that cable operators were protected by the First Amendment, the critical factor that made cable operators "speakers" was their production of programming and their exercise of "editorial discretion over which programs and stations to include" (and thus which to exclude).
>
> Unlike cable television operators, broadband providers typically are best described not as "speakers," but rather as conduits for speech. The broadband Internet access service at issue

Clearly, had the FCC attempted to extend any of its 2010 rules to Edge Providers, it would have then been subject to First Amendment scrutiny it could never have survived.[70] This regulatory "hand's off" approach to Edge Providers has been acknowledged elsewhere in government. "Edge provider activities, conducted on the 'edge' of the internet—hence the name—are not regulated by the Federal Communications Commission (FCC)."[71] The FCC has rejected attempts in the past to regulate social media and other Edge Providers, even at the height of Title II Internet regulation. "The Commission has been unequivocal in declaring that it has no intent to regulate edge providers."[72]

The NTIA Petition now seeks to erase the regulatory lines the FCC has drawn over decades to declare Edge Providers subject to FCC jurisdiction because they provide "information services." None of the cases cited in the NTIA petition relate in any way to whether the FCC has jurisdiction over Edge Providers. *Barnes v. Yahoo!*[73] involved a very narrow ruling related to whether Yahoo!

> here does not involve an exercise of editorial discretion that is comparable to cable companies' choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefiting from an editorial presence. To the contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.

Id. ¶¶ 140-41.

[70] *See infra* at 56-60.

[71] *See, e.g.*, Clare Y. Cho, Congressional Research Service, "Competition on the Edge of the Internet," Jan. 30, 2020, summary, available at: https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf.

[72] *See* In the Matter of Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests. DA 15-1266, adopted November 6, 2015, available at https://docs.fcc.gov/public/attachments/DA-15-1266A1.pdf. That order goes on to state that even after finding that the provision of BIAS was a telecommunications service, At the same time, the Commission specified that in reclassifying BIAS, it was not "regulating the Internet, per se, or any Internet applications or content." Rather, as the Commission explained, its "reclassification of broadband Internet access service involves only the transmission component of Internet access service." Quoting Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, par. 5575 (2015) (*2015 Open Internet Order*).

[73] *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir 2009).

could, notwithstanding Section 230(c)(1), be sued under a theory of promissory estoppel after an employee made a specific promise to take down revenge porn material and the company failed to do so.[74] The fact that the court referred to Yahoo! as a provider of "information services"[75] in no way speaks to whether the FCC has jurisdiction to regulate it under the Communications Act. Likewise, *FTC v. Am. eVoice*[76] is even further afield, as it ***neither*** related to FCC regulations ***nor*** the term "information services."[77] Finally, *Howard v. Am. Online Inc.*,[78] hurts, not helps, NTIA's argument. That case involved a class action suit brought against AOL under far-flung legal theories, everything from RICO to securities law fraud, and eventually, to improper billing under Section 201 of the Communications Act. The court rejected the Section 201 claim, finding that AOL provided an "enhanced service," was not a "common carrier," and thus outside the purview of the FCC's Section 201 regulations.[79]

NTIA's position that any provider of an "information service" is subject to the regulatory authority of the FCC simply is wrong as a matter of law. As we have demonstrated, that the term "information service" appears in Section 153 does not, in itself, confer independent regulatory

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[74] *Id.* at 1109 ("we conclude that, insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the Act does not preclude her cause of action. Because we have only reviewed the affirmative defense that Yahoo raised in this appeal, we do not reach the question whether Barnes has a viable contract claim or whether Yahoo has an affirmative defense under subsection 230(c)(2) of the Act").

[75] *Id.* at 1108.

[76] *FTC v. Am. eVoice, Ltd.*, 242 F. Supp. 3d 1119 (D. Mont. 2017).

[77] *See In re Second Computer Inquiry,* 77 F.C.C.2d 384, 417-23 (1980).

[78] *Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000).

[79] *Id.* at 753 ("hybrid services like those offered by AOL "are information [i.e., enhanced] services, and are not telecommunication services." This conclusion is reasonable because e-mail fits the definition of an enhanced service — the message is stored by AOL and is accessed by subscribers; AOL does not act as a mere conduit for information. Even chat rooms, where subscribers can exchange messages in "real-time," are under AOL's control and may be reformatted or edited. Plaintiffs have failed to show that AOL offers discrete basic services that should be regulated differently than its enhanced services.") (internal citations omitted).

authority on the FCC, and the FCC has properly refrained from even attempting to regulate Edge Providers merely because *some* of the services they provide may fall within that definition. The FCC recognized the danger of such a broad interpretation of its regulatory authority in its 2018 *Restoring Internet Freedom Order*:

> Our interpretation of section 706 of the 1996 Act as hortatory also is supported by the implications of the Open Internet Order's interpretation for the regulatory treatment of the Internet and information services more generally. The interpretation of section 706(a) and (b) that the Commission adopted beginning in the Open Internet Order reads those provisions to grant authority for the Commission to regulate information services so long as doing so could be said to encourage deployment of advanced telecommunications capability at least indirectly. A reading of section 706 as a grant of regulatory authority that could be used to heavily regulate information services—as under the Commission's prior interpretation—is undercut by what the Commission has found to be Congress' intent in other provisions of the Communications Act enacted in the 1996 Act—namely, to distinguish between telecommunications services and information services, ***with the latter left largely unregulated by default***.

The FCC then continued:

> In addition, the 1996 Act added section 230 of the Communications Act, which provides, among other things, that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." A necessary implication of the prior interpretation of section 706(a) and (b) as grants of regulatory authority is that the Commission could regulate not only ISPs but also edge providers or other participants in the Internet marketplace—even when they constitute information services, and notwithstanding section 230 of the Communications Act—so long as the Commission could find at least an indirect nexus to promoting the deployment of advanced telecommunications capability. For example, some commenters argue that "it is content aggregators (think Netflix, Etsy, Google, Facebook) that probably exert the greatest, or certainly the most direct, influence over access." Section 230 likewise is in tension with the view that section 706(a) and (b) grant the Commission regulatory authority as the Commission

> previously claimed. These inconsistencies are avoided, however, if the deployment directives of section 706(a) and (b) are viewed as hortatory.[80]

Finally, as noted previously, the legislative history of the 1996 Telecommunications Act reveals unequivocally that the FCC lacks this regulatory authority. Sponsors Rep. Cox, Rep. Wyden, and others never contemplated that the FCC would have this type of authority.[81] The FCC should refrain from attempting to cobble together authority that simple does not exist, is antithetical to decades of FCC and court precedent, and as we discuss fully below, would violate the First Amendment.

III. NTIA Proposes a New, More Arbitrary Fairness Doctrine for the Internet—Something the First Amendment Bars.

The President's Executive Order argues:

> When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.[82]

This requirement opens the door to punishing ICS providers for "engag[ing] in editorial conduct" of which the government — be that the FTC, state attorneys general, or judges hearing their suits or those of private plaintiffs —disapproves. Such retaliation against the exercise of editorial discretion would be a clear and egregious violation of the First Amendment. As the Supreme Court has repeatedly noted, conditioning the receipt of a

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[80] *RIFO* ¶¶ 273-74 (emphasis added, internal citations omitted).

[81] 141 Cong. Rec. H8469 (statement of Rep. Cox)

[82] Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34080 (June 2, 2020) (*Executive Order*).

benefit (such as immunity) on the surrender of First Amendment rights is no different than a direct deprivation of those rights.[83]

Over two years ago, the Chairman of the House Judiciary Committee invited TechFreedom to testify before the committee. We warned that proposals to reinterpret or amend Section 230 to require political neutrality amounted to a new "Fairness Doctrine for the Internet."[84]

The Original Fairness Doctrine required broadcasters (1) to "adequately cover issues of public importance" and (2) to ensure that "the various positions taken by responsible groups" were aired, thus mandating the availability of airtime to those seeking to voice an alternative opinion. President Reagan's FCC abolished these requirements in 1987. When Reagan vetoed Democratic legislation to restore the Fairness Doctrine, he noted that "the FCC found that the doctrine in fact inhibits broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose."[85]

The Republican Party has steadfastly opposed the Fairness Doctrine for decades. The 2016 Republican platform (re-adopted verbatim for 2020) states: "We likewise call for an

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[83] *See, e.g.*, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 713 (1996) ("While government officials may terminate at-will relationships, unmodified by any legal constraints, without cause, it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."). *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" (quoting *Speiser*, 357 U.S. at 526)).

[84] *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Apr. 26, 2018) (Testimony of TechFreedom), available at http://docs.techfreedom.org/Szoka_Testimony-Platform_Reponsibility_&_Neutrality-4-25-18.pdf.

[85] Message from the President Vetoing S. 742, S. Doc. No. 10-100, at 2 (1987), available at https://www.senate.gov/legislative/vetoes/messages/ReaganR/S742-Sdoc-100-10.pdf.

end to the so-called Fairness Doctrine, and support free-market approaches to free speech unregulated by government."[86] Yet now, under Republican leadership, NTIA proposes to have the FCC institute, without any clear statutory authority, a version of the Fairness Doctrine for the Internet that would be more vague, intrusive, and arbitrary than the original. The Supreme Court permitted the Fairness Doctrine to be imposed on broadcasters only because it denied them the full protection of the First Amendment. The Court has steadfastly refused to create such carveouts for new media. While striking down a state law restricting the purchase of violent video games, Justice Scalia declared: "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[87]

A. Because Social Media Sites Are Not Public Fora, the First Amendment Protects the Editorial Discretion of their Operators.

The NTIA petition breezily asserts that "social media and other online platforms… function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[88] NTIA cites the Supreme Court's recent *Packingham* decision: "Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human

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[86] Republican Platform 2016, at 12 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

[87] *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 790 (2011).

[88] *NTIA Petition*, *supra* note 12, at 7.

thought and knowledge."[89] The Executive Order goes even further: "Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980)."[90] The Executive Order suggests that the First Amendment should *constrain*, rather than protect, the editorial discretion of social media operators because social media are *de facto* government actors.

This claim undergirds both the Executive Order and the NTIA Petition, as it is the only way they can brush aside arguments that the First Amendment bars the government from adjudging the "fairness" of social media. The Executive Order and NTIA, however, flip the First Amendment on its head, undermining the founding American ideal that "Congress shall make no law . . . abridging the freedom of speech."[91]

Both the Order and the Petition omit a critical legal detail about *Packingham*: it involved a *state law* restricting the Internet use of convicted sex offenders. Justice Kennedy's simile that social media is "a 21st century equivalent of the public square" merely conveys the gravity of the deprivation of free speech rights effected by the state law. *Packingham* says nothing whatsoever to suggest that private media companies become *de facto* state actors by virtue of providing that "public square." On the contrary, in his concurrence, Justice Alito expressed dissatisfaction with the "undisciplined dicta" in the majority's opinion and asked

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[89] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

[90] *Executive Order*, *supra* note 82, at 34082.

[91] U.S. Const. amend. I.

his colleagues to "be more attentive to the implications of its rhetoric" likening the Internet to public parks and streets.[92]

The Executive Order relies on the Supreme Court's 1980 decision in *Pruneyard Shopping Center v. Robins*, treating shopping malls as public fora under California's constitution.[93] NTIA makes essentially the same argument, by misquoting *Packingham*, even without directly citing *Pruneyard*. NTIA had good reason *not* to cite the case: it is clearly inapplicable, stands on shaky legal foundations on its own terms, and is antithetical to longstanding conservative positions regarding private property and the First Amendment. In any event, *Pruneyard* involved shopping malls (for whom speech exercised on their grounds was both incidental and unwelcome), not companies for which the exercise of editorial discretion lay at the center of their business. *Pruneyard* has *never* been applied to a media company, traditional or new. The Supreme Court ruled on a very narrow set of facts and said that states have general power to regulate property for certain free speech activities. The Supreme Court, however, has not applied the decision more broadly, and lower courts have rejected *Pruneyard*'s application to social media.[94] Social media companies are in the speech business, unlike businesses which incidentally host the speech of others or post their own speech to their storefronts (*e.g.*, "Black Lives Matter" signs).

In a line of cases following *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court consistently upheld the First Amendment right of media outlets other

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[92] *Packingham,* 137 S. Ct. at 1738, 1743 (Alito J, concurring in judgement).

[93] 447 U.S. 74, 85-89 (1980).

[94] *See hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1115–16 (N.D. Cal. 2017); *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020).

than broadcasters (a special case discussed below). In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), the Court made clear that, unlike broadcasters, digital media operators enjoy the same protections in exercising their editorial discretion as newspapers:

> some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers . . . Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television.[95]

Miami Herald struck down a 1913 state law imposing a version of the Fairness Doctrine on newspapers that required them to grant a "right of reply" to candidates for public office criticized in their pages.[96] The Court acknowledged that there had been a technological "revolution" since the enactment of the First Amendment in 1791. The arguments made then about newspapers are essentially the same arguments NTIA and the Executive Order make about digital media today. The *Miami Herald* court summarized them as follows:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market.[97]

Despite this, the Court struck down Florida's law as unconstitutional because:

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[95] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997).

[96] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[97] *Id*. at 250.

> a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. . . . Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[98]

Critically, the Court rejected the intrusion into the editorial discretion "[e]ven if a newspaper would face no additional costs to comply," because:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.[99]

In exactly the same way, the First Amendment protects a website's decisions about what user-generated content to publish, remove, highlight, or render less accessible. In *Reno,* when the Supreme Court struck down Congress' first attempt to regulate the Internet, it held: "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[100]

Lastly, media companies do not qualify as state actors merely because they provide "platforms" for others' speech. A private entity may be considered a state actor when the entity exercises a function "traditionally exclusively reserved to the State."[101] In a 2019 case *Manhattan v. Halleck*, the Supreme Court held that "operation of public access channels on a

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[98] *Id*. at 256-57.

[99] *Id*. at 258.

[100] *Reno*, 521 U.S. at 870; Brown, 564 U.S. at 790; *see also supra* note 87 and associated text.

[101] *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 352 (1974).

cable system is not a traditional, exclusive public function."[102] "Under the Court's cases, those functions include, for example, running elections and operating a company town," but not "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[103] Justice Kavanaugh, writing for the five conservatives Justices, concluded the majority opinion as follows: "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[104] While *Halleck* did not involve digital media, the majority flatly rejected the argument made by the Executive Order for treating digital media as public fora.

B. The Constitutional Basis for Regulating Broadcast Media Does Not Apply to Internet Media, which Enjoy the Full Protection of the First Amendment.

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld the Fairness Doctrine only as applied to broadcasters, which lack full First Amendment protection. "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards."[105] The Supreme Court has explicitly rejected applying the same arguments to the Internet.[106] Thus,

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[102] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1930 (June 17, 2019), available at https://www.supremecourt.gov/opinions/18pdf/17-1702_h315.pdf (holding that the private operator of a public access TV channel is not a state actor and not bound by the First Amendment in the operator's programming choices).

[103] *Id*. at 1929.

[104] *Id*.

[105] 395 U.S. 367, 386 (1969).

[106] *See supra* note 95 and associated text at 29.

Red Lion represented a singular exception to the rule set forth in *Miami Herald*, and even that exception may not survive much longer.

In *FCC v. Pacifica Foundation*, the Court upheld FCC regulation of indecency in broadcast media.[107] The NTIA Petition invokes *Pacifica*, and the FCC's ongoing regulation of indecent[108] and violent content[109] on broadcast radio and television, to justify reinterpreting Section 230(c)(2)(A) immunity to narrowly protect only content moderation directed at "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" content. Consequently, Section 230(c)(2)(A) would no longer protect moderation driven by other reasons, including political or ideological differences.

The Petition's reliance on *Pacifica* is a constitutional red herring. First, the *Reno* Court clearly held that the invasiveness rationale underlying *Pacifica* did not apply to the Internet.[110] Since 1996, it has become easier than ever for parents to rely on providers of digital media — enabled by Section 230's protections — to ensure that their children are not exposed to content they might consider harmful.[111] Indeed, many of the loudest complaints

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[107] 438 U.S. 726 (1978).

[108] *NTIA Petition*, *supra* note 12, at 34 (Section 223(d)'s (of the Communications Decency Act) "language of 'patently offensive . . .' derives from the definition of indecent speech set forth in the *Pacifica* decision and which the FCC continues to regulate to this day.").

[109] *NTIA Petition*, *supra* note 12, at 35 ("concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip. This device allows viewers to block programming according to an established rating system.")

[110] Even in 1997, the *Reno* court recognized that, "the Internet is not as 'invasive' as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' It also found that '[a]lmost all sexually explicit images are preceded by warnings as to the content,' and cited testimony that "`odds are slim' that a user would come across a sexually explicit sight by accident." 521 U.S. at 869 (internal citations omitted).

[111] *See, e.g.,* Caroline Knorr, Parents' Ultimate Guide to Parental Control, Common Sense Media (June 6, 2020), *available at* https://www.commonsensemedia.org/blog/parents-ultimate-guide-to-parental-controls

about political bias are really complaints about those controls being applied in ways that some people allege are politically harmful[112] — because they believe there is *too much* content moderation going on online. This is the very opposite of the situation undergirding *Pacifica*: the impossibility, in the 1970s, of protecting children from adult-oriented programming broadcast in primetime hours.

In its comments, American Principles Project rejects Justice Stevens' statement in *Reno* that the Internet "is not as 'invasive' as radio and television."[113] "Today," APP argues, "a seventh grader with a smartphone has unlimited access to the most grotesque pornographic live streams imaginable. Very few porn sites have implemented any sort of age verification system to prevent this from happening."[114] APP ignores, however, *Pacifica*'s clear caveat: "It is appropriate, in conclusion, to emphasize the narrowness of our holding."[115] *Pacifica* was decided at a time when the only methods available for parents to control what their children heard on the radio were (a) change the channel, (b) to unplug or hide the radio and (c) to send their children to bed by a certain hour. Thus, the FCC did not "prevent respondent Pacifica Foundation from broadcasting [George Carlin's "Seven Dirty Words"] monologue during late evening hours when fewer children are likely to be in the audience."[116]

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[112] *See infra* at 34.

[113] Americans Principles Project Comment on the NTIA Petition for Rulemaking and Section 230 of the Communications Act of 1934 (Aug. 27, 2020) (*APP Comments*), https://ecfsapi.fcc.gov/file/10827668503390/APP%20Comment%20on%20NTIA%20Petition%20Sec.%20230%20082720.pdf

[114] *Id*. at 2.

[115] 438 U.S. at 750.

[116] *Id*. at 760.

Today, Apple offers robust parental control technologies on its iOS operating system for mobile devices that allow parents to restrict not only the Internet content that their children can access, but also the "playback of music with explicit content and movies or TV shows with specific ratings."[117] Google's Android offers similar functionality for apps, games, movies, TV, books and music."[118] While the company notes that "[p]arental controls don't prevent seeing restricted content as a search result or through a direct link,"[119] a wide range of third party parental control apps can be installed on Android devices to restrict access to such content, and "parental control software tends to be more powerful on Android than on iOS, since Apple locks down app permissions and device access."[120] If a seventh grader is using their smartphone to access "grotesque pornographic live streams," it is because their parent has not taken advantage of these robust parental controls. Less restrictive alternatives need not be perfect to be preferable to regulation, as Justice Thomas has noted.[121] Finally, APP completely ignores why it is that "[v]ery few porn sites have implemented any sort of age verification system": Congress attempted to mandate such age verification in the Child Online Privacy Act (COPA) of 1998, but the Court struck this

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[117] Prevent explicit content and content ratings, Apple, https://support.apple.com/en-us/HT201304#explicit-content (last visited Sept. 2, 2020).

[118] Set up parental controls on Google Play, Google For Families Help, https://support.google.com/families/answer/1075738?hl=en (last visited Sept. 2, 2020).

[119] *Id*.

[120] Neil J. Rubenking & Ben Moore, The Best Parental Control Apps for Your Phone, PCMag (Apr. 7, 2020), https://www.pcmag.com/picks/the-best-parental-control-apps-for-your-phone.

[121] Justice Thomas has rejected the Supreme Court's rationale for "wholesale limitations [on contributions to political campaigns] that cover contributions having nothing to do with bribery": "That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored." Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 643 (1996) (Thomas, J. concurring in part and dissenting in part).

requirement down as unconstitutional.[122] But even if the rationale of *Pacifica* did somehow apply to the Internet (despite the clear holding of *Reno* that it does not), it would justify *more* aggressive content moderation, not *limits* on content moderation. Social media providers offer tools that allow parents to protect their children from potentially objectionable content — and yet have been accused of political bias for doing so. For example, when YouTube placed PragerU videos into "Restricted Mode" — an *opt-in* feature offered to parents, schools and libraries, which anyone but children (or others without device administrator privileges) could turn off — it did so because it considered the material to be "potentially mature content."[123] The logic of *Pacifica* suggests encouraging such tools, not punishing them with litigation.

C. Requiring Websites to Cede Editorial Discretion to Qualify for Section 230 Protections Imposes an Unconstitutional Condition on Their First Amendment Rights.

Lawmakers of both parties claim that Section 230 is a special privilege granted only to large websites, and that withholding this "subsidy" raises no First Amendment issues because websites are not legally entitled to it in the first place. In truth, Section 230 applies equally to *all* websites. Consequently, Section 230 protects newspapers, NationalReview.com, FoxNews.com, and every local broadcaster from liability for user

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[122] *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

[123] YouTube rates videos as mature if they contain drugs and alcohol, sexual situations, incendiary and demeaning content, mature subjects, profane and mature language, or violence. YouTube content rating, YouTube Help, https://support.google.com/youtube/answer/146399?hl=en (last visited Sept. 2, 2020). Further, YouTube breaks down videos into three subcategories: no mature content, mild mature content, and mature content that should be restricted for viewers under 18. Similarly, Facebook's community standards go far beyond what the First Amendment allows the government to regulate — limiting violence, hate speech, nudity, cruel and insensitive content, and many other categories that violate Facebook's community standards.

comments posted on their website in exactly the same way it protects social media websites for user content. Indeed, the law protects ICS users just as it protects providers. President Trump himself relied upon Section 230 to have dismissed a lawsuit against him alleging that he was liable for retweeting defamatory material posted by another Twitter user.[124] Providers and users of ICS services alike rely on Section 230, without which they would face "death by ten thousand duck-bites."[125] Thus, as the *Roommates* court explained, "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[126]

The "unconstitutional conditions" doctrine prevents the FCC —and, for that matter, Congress — from denying the protections of Section 230 to websites who choose to exercise their editorial discretion. The Supreme Court has barred the government from forcing the surrender of First Amendment rights as a condition of qualifying for a benefit or legal status.

1. The Supreme Court Has Forbidden the Use of Unconstitutional Conditions Intended to Coerce the Surrender of First Amendment Rights.

In *Speiser v. Randall*, the Supreme Court struck down a California law denying tax exemptions to World War II veterans who refused to swear a loyalty oath to the United States: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[127] The court distinguished between this case and earlier cases upholding loyalty oaths for positions of public employment, candidates for public

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[124] Cristiano Lima, Before bashing tech's legal shield, Trump used it to defend himself in court, Politico (June 4, 2020), https://www.politico.com/news/2020/06/04/tech-legal-trump-court-301861.

[125] *Fair v. Roommates,* 521 F.3d 1157, 1174 (9th Cir. 2008).

[126] *Id*.

[127] 357 U.S. 513, 521 (1958).

office, and officers of labor unions, where the "congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially."[128]

The Court articulated this distinction more fully in *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.* ("*USAID*"). The Court struck down a federal law requiring that recipients of federal funding intended to fight AIDS worldwide adopt a "policy explicitly opposing prostitution."[129] The Court noted that "Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem."[130] But, explained the Court,

> the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.[131]

Thus, in *Regan v. Taxation with Representation of Wash*, the Court ruled that, by "limiting §501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely 'chose[n] not to subsidize lobbying.'"[132] Critically, however, this limitation is not "unduly burdensome" because, by "separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3)

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[128] *Speiser*, 357 U.S. at 527 (citing *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951) (public employees); *Gerende v. Bd. of Supervisors*, 341 U.S. 56 (1951) (candidates for public office); *Am. Commc'ns Ass'n. v. Douds*, 339 U.S. 382 (1950) (labor union officers)).

[129] 570 U.S. 205 (2013).

[130] *Id*. at 216 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

[131] *Id*. at 214.

[132] 570 U.S. 205 at 215 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983)).

status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds."[133]

By contrast, in *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984), the Court had, as it later explained in *USAID*:

> struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program.[134]

In short, the Supreme Court will not allow conditions on eligibility for a government benefit to be used to do what the First Amendment forbids the government to do directly: change the decisions made by private actors about what speech they will and will not engage in (or host).

2. NTIA Proposes to Condition Eligibility for Section 230 Immunity on a Website's Surrender of Its Editorial Discretion.

The proposal would allow the government to use Section 230 to regulate the decisions ICS providers make about which speech to host. NTIA would no doubt argue that the "scope of the program" of Section 230 immunity has always intended to ensure political

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[133] Id. (citing *Regan*, 461 U.S., at 545, n.6).

[134] 570 U.S. 205, 215 (internal citations omitted) (citing and quoting *League of Women Voters of Cal.*, 468 U.S. at 399-401).

neutrality across the Internet, citing the "forum for a true diversity of political discourse" language in 230(a)(3); however, the *USAID* Court anticipated and rejected such attempts to erase the distinction it recognized across its previous decisions:

> between conditions that define the limits of the government spending program …. and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[135]

Here, the proposal would compel *every* social media operator to cede its editorial discretion to remove (or render inaccessible) content that it finds objectionable, especially for political or ideological reasons. This goes beyond laws which allow regulated entities to continue to exercise their First Amendment rights through some other vehicle, be that by setting up a separate 501(c)(4), as in *Regan*, or simply segmenting their activities into subsidized and unsubsidized buckets. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a federal program that subsidized family planning services, except "in programs where abortion is a method of family planning."[136] The Court explained:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one

[135] *USAID*, 570 U.S. at 214.

[136] *Rust*, 500 U.S. at 216.

> activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[137]

"Because the regulations did not 'prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,' they did not run afoul of the First Amendment."[138]

With Section 230, it would be impossible to distinguish between an entity qualifying overall and specific "projects" qualifying for immunity (while the same entity could simply run other, unsubsidized projects). Just as each broadcaster in *League of Women Voters* operated only one station, social media sites cannot simply clone themselves and run two separate versions, one with limited content moderation and an alternate version unprotected by Section 230. Without the protection of Section 230, only the largest sites could manage the legal risks inherent in hosting user content.[139] Moreover, even for those largest sites, how could a social network split into two versions? Even if such a thing could be accomplished, it would be *far* more difficult than strategies which the Court has recognized as "not unduly burdensome" — such as having separate family planning "programs" or non-profits dividing their operations into separate 501(c)(3) and 501(c)(4) sister organizations.[140]

Consider how clearly the same kind of coercion would violate the First Amendment in other contexts. For example, currently pending legislation would immunize businesses

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[137] *Id*. at 192 (quoting *Regan*, 461 U.S. at 549).

[138] *USAID*, 570 U.S. at 217 (internal citations omitted) (quoting *Rust*, 500 U.S. at 196-97).

[139] *See, e.g.*, Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598 (2018).

[140] *See supra* note 133.

that re-open during the pandemic from liability for those who might be infected by COVID-19 on their premises.[141] Suppose such legislation included a provision requiring such businesses to be politically neutral in any signage displayed on their stores — such that, if a business put up or allowed a Black Lives Matter sign, they would have to allow a "right of reply" in the form of a sign from "the other side" (say, "All Lives Matter" or "Police Lives Matter"). The constitutional problem would be just as clear as it has been in cases where speech has been compelled directly.

3. The Proposal Would Compel ICS Providers to Carry Speech they Do Not Wish to Carry and Associate Themselves with Views, Persons and Organizations They Find Repugnant.

In *Pacific Gas Elec. Co. v. Public Util. Comm'n*, the Court struck down a California regulatory rule forcing a utility to include political editorials critical of the company along with the bills it mailed to its customers. "Since *all* speech inherently involves choices of what to say and what to leave unsaid …. For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[142] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, wherein the Supreme Court barred the city of Boston from forcing organizers' of St. Patrick's Day parade to include pro-LGBTQ individuals, messages, or signs that conflicted with the organizer's beliefs.[143] The "general rule" is "that the speaker

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[141] *See, e.g.*, SAFE TO WORK Act, S.4317, 116th Cong. (2020), https://tinyurl.com/y694vzxc.

[142] 475 U.S. 1, 10, 16 (1986) (plurality opinion) (emphasis in original) (internal quotations omitted) (quoting *Harper Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985)).

[143] 515 U.S. 557, 573 (1995) (citation and quotation omitted).

has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[144]

In neither case was it sufficient to overcome the constitutional violation that the utility or the parade organizer might attempt to disassociate itself with the speech to which they objected. Instead, as the *Hurley* court noted, "we use the word 'parade' to indicate marchers who are making some sort of *collective* point, not just to each other but to bystanders along the way."[145] By the same token it would be difficult, if not impossible, for a social media site to disassociate itself from user content that it found repugnant, but which it was effectively compelled to host.

In treating certain shopping malls as public fora under the California constitution, *Pruneyard* emphasized that they could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."[146] But users naturally assume speech carried by a social network reflects their decision to carry it — just as Twitter and Facebook have been attacked for *not* removing President Trump's tweets or banning him from their services.[147]

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[144] *Id*. at 573 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-342 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-798 (1988).

[145] *Id*. at 568 (emphasis added).

[146] *Pruneyard*, 447 U.S. at 87.

[147] "For the first time, Twitter has added a fact-check label to a tweet by President Donald Trump that claimed mail-in election ballots would be fraudulent. But it stopped short of removing those tweets or others he posted earlier this month about a false murder accusation that generated huge criticism against the company for failing to remove them." Danielle Abril, *Will Twitter Ever Remove Trump's inflammatory Tweets?* FORTUNE (May 26, 2020, 7:54 PM) https://fortune.com/2020/05/26/twitter-president-trump-joe-scarborough-tweet/

If anything, disclaimers may actually be *less* effective online than offline. Consider the three labels Twitter has applied to President Trump's tweets (the first two of which provoked the issuance of his Executive Order).

This example[148] illustrates how difficult it is for a website to effectively "disavow any connection with the message."[149] It fails to communicates Twitter's disavowal while creating further ambiguity: it could be interpreted to mean there really *is* some problem with mail-in ballots.

Similarly, Twitter added a "(!) Manipulated Media" label just below to Trump's tweet of a video purporting to show CNN's anti-Trump bias.[150] Twitter's label is once again ambiguous: since Trump's video claims that CNN had manipulated the original footage, the "manipulated media" claim could be interpreted to refer to either Trump's video or CNN's. Although the label links to an "event" page explaining the controversy,[151] the warning works (to whatever degree it does) only if users actually click through to see the page. It is not obvious that the label is actually a link that will take them to a page with more information.

Finally, when Trump tweeted, in reference to Black Lives Matter protests, "when the looting starts, the shooting starts,"[152] Twitter did not merely add a label below the tweet. Instead, it hid the tweet behind a disclaimer. Clicking on "view" allows the user to view the original tweet:

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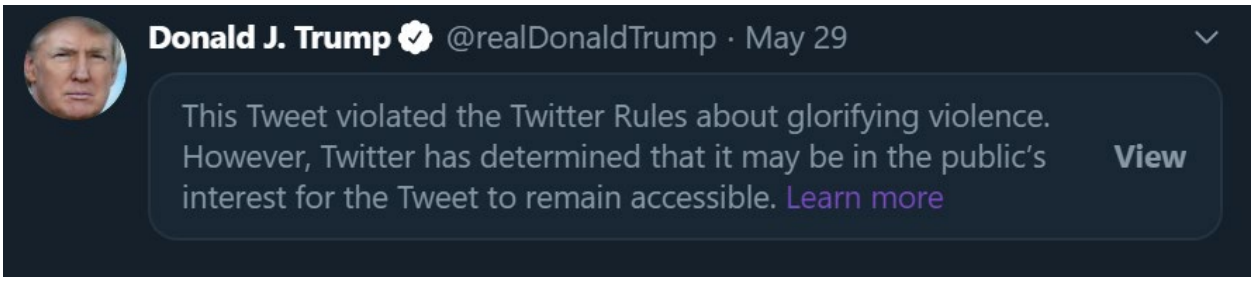
[148] @realDonaldTrump, TWITTER (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392.

[149] *Pruneyard*, 447 U.S. at 87.

[150] @realDonaldTrump, TWITTER, (June 18, 2020, 8:12 PM), https://twitter.com/realDonaldTrump/status/1273770669214490626.

[151] *Video being shared of CNN report on toddlers is doctored, journalists confirm*, Twitter (June 18, 2020), https://twitter.com/i/events/1273790055513903104.

[152] @realDonaldTrump, TWITTER (May 29, 2020, 12:53 AM), https://twitter.com/realDonaldTrump/status/1266231100780744704.



Such ambiguities are unavoidable given the difficulties of designing user interface in a medium optimized for 280 characters, with a minimum of distraction around Tweets. But no matter how clear they become, sites like Twitter will still be lambasted for choosing only to apply labels to such material, rather than to remove it completely.[153]

Further, adding such disclaimers invites further harassment and, potentially, lawsuits from scorned politicians — perhaps even more so than would simply taking down the material. For example, Twitter's decision to label (and hide) Trump's tweet about mail-in voting seems clearly to have provoked issuance of the Executive Order two days later — and the Order itself complains about the label.[154] In the end, the only truly effective way for Twitter to "expressly disavow any connection with [Trump's] message"[155] would be to ban him from their platform — precisely the kind of action the Executive Order and NTIA Petition aim to deter.

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[153] *See supra* note 147.

[154] Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34079 (June 2, 2020) ("Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet.").

[155] *Pruneyard*, 447 U.S. at 87.

4. The First Amendment Concerns are Compounded by the Placement of the Burden of Qualifying for Eligibility upon ICS Providers.

Today, Section 230(c)(1) draws a clear line that enables ICS providers and users to exercise their editorial discretion without bearing a heavy burden in defending their exercise of their First Amendment rights that that exercise is chilled by the threat of litigation. Specifically, if sued, they may seek to have a lawsuit against them dismissed under F.R.C.P. 12(b)(6) merely by showing that (1) that it is an ICS provider, (2) that the plaintiff seeks to hold them liable "as the publisher" of (3) of information that they are not responsible, even in part, for creating. While the defendant bears the burden of establishing these three things, it is a far lesser burden than they would bear if they had to litigate a motion to dismiss on the merits of the claim. More importantly, the plaintiff bears the initial burden of pleading facts that, if proven at trial, would suffice to prove both (a) their claim and (b) that the Section 230(c)(1) immunity does not apply.[156] While this burden is low, it is high enough to allow many such cases to be dismissed outright, because the plaintiff has simply failed even to allege facts that could show that the ICS provider or user is responsible, even in part, for the development of the content at issue.

The NTIA Petition places heavy new burdens upon ICS providers to justify their content moderation practices as a condition of claiming Section 230 immunity: Not only must they prove that their content moderation decisions were made in good faith (something (c)(1) plainly does not require, but which would, under NTIA's proposal, no longer protect content moderation), they would also have to satisfy a series of wholly new

[156] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)*; Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

requirements to prove their good faith.[157] In *Speiser*, the Court declared: "The power to create presumptions is not a means of escape from constitutional restrictions."[158] Yet this is precisely what NTIA seeks to do. The Court will not allow such a circumventing of the First Amendment:

> ***Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion***. … The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized. ***The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens***.[159]

The NTIA petition will have precisely that effect: to force social media operators to steer as wide as possible of content moderation decisions that they fear might offend this administration, future administrations, state attorneys general, or private plaintiffs.

5. NTIA's Rewriting of Section 230 Would Facilitate Discrimination by the Government based on Both the Content at Issue and the Provider's Viewpoint, Under the Guise of Mandating "Neutrality."

NTIA's proposal, by contrast, *maximizes* the potential for viewpoint discrimination by the government in determining which companies qualify for the protections of Section 230. Consider just a few of the criteria an ICS provider would have to satisfy to establish its eligibility for immunity.

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[157] *NTIA Petition*, *supra* note 12, at 39.

[158] *Speiser*, 357 U.S. at 526.

[159] *Id*. at 525.

Requirement #1: <u>Not</u> Having a Viewpoint. NTIA proposes to exclude "presenting or prioritizing [user content] with a reasonably discernible viewpoint" from the definition of an ICS provider altogether,[160] making any ICS provider that the government decides *does* have such a viewpoint ineligible for any of Section 230's three immunities. This requirement is both far more draconian and more arbitrary than was the original Fairness Doctrine[161]as the FCC did *not* bar the broadcaster from having its own viewpoint.[162]

Requirement #2 Line-drawing Between Permitted and Disqualifying Content Moderation. Limiting the categories of content moderation that qualify for the (c)(2)(A) immunity (by reinterpreting "otherwise objectionable" very narrowly[163]) inevitably creates a difficult problem of line-drawing, in which the ICS provider would bear the burden of proof to establish proof that it "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[164] For example, all major social media platforms limit or bar the display of images of abortions being performed or aborted fetuses. Pro-life groups claim their content (or ads) have been "censored" for political reasons. Facebook and Twitter might argue that abortion imagery is "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials," but the

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[160] Petition at 42.

[161] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

[162] At most, the FCC's "political editorial rule required that when a broadcaster endorsed a particular political candidate, the broadcaster was required to provide the other qualified candidates for the same office (or their representatives) the opportunity to respond over the broadcaster's facilities." Congressional Research Service, Fairness Doctrine: History and Constitutional Issues, R40009, at 3 (2011), https://fas.org/sgp/crs/misc/R40009.pdf (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (2011)).

[163] *See infra* at 78 et seq.

[164] Petition at 39.

government may not agree. Similarly, where is the line between "excessively violent" content and the "hateful" content or conduct banned on major platforms?[165]

Requirement #3: Non-Discrimination. NTIA proposes that an ICS provider must show that its content moderation practices are not discriminatory to qualify for any Section 230 immunity — specifically, that it "does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict."[166] How could a provider prove yet another negative?

Even when a plaintiff makes a *prima facie* showing that content moderation has had politically disparate effects, this would not actually *prove* bias in moderation. Dennis Prager's *Wall Street Journal* op-ed[167] points to the empirical study conservatives have pointed to most often to prove their claims of Twitter's political bias. Richard Hanania, a Research Fellow at the Saltzman Institute of War and Peace Studies at Columbia University, assembled:

> a database of prominent, politically active users who are known to have been temporarily or permanently suspended from the platform. My results make it difficult to take claims of political neutrality seriously. Of 22 prominent, politically active individuals who are known to have been suspended since 2005 and who expressed a preference in the 2016 U.S. presidential election, 21 supported Donald Trump.[168]

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[165] Twitter will "allow limited sharing of hateful imagery, provided that it is not used to promote a terrorist or violent extremist group, that you mark this content as sensitive and don't target it at an individual." Twitter, Media Policy, https://help.twitter.com/en/rules-and-policies/media-policy (last visited Aug. 31, 2020).

[166] Petition at 39.

[167] Dennis Prager, *Don't Let Google Get Away With Censorship*, Wall St. J. (Aug. 6, 2019), https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175.

[168] Richard Hanania, *It Isn't your Imagination: Twitter Treats Conservatives More Harshly Than Liberals,* Quillette (Feb. 12, 2019), https://quillette.com/2019/02/12/it-isnt-your-imagination-twitter-treats-conservatives-more-harshly-than-liberals/.

Hanania clearly creates the impression that Twitter is anti-Trump. Nowhere does he (or those who cite him, including Prager) mention just who were among the accounts (43 in the total data set) of Trump supporters "censored" by Twitter. They include, for example, (1) the American Nazi Party; (2) the Traditionalist Worker Party, another neo-Nazi group; (3) "alt-right" leader Richard Spencer; (4) the National Policy Institute, the white supremacist group Spencer heads; (5) the League of the South, a neo-Confederate white supremacist group; (6) American Renaissance, a white supremacist online publication edited by (7) Jared Taylor; (8) the Proud Boys, a "men's rights" group founded by (9) Gavin McInnes and dedicated to promoting violence against their political opponents, (10) Alex Jones, America's leading conspiracy theorist, and publisher of (11) InfoWars; a series of people who have made careers out of spreading fake news including (12) Chuck Johnson and (13) James O'Keefe; "alt-right" personalities that repeatedly used the platform to attack other users, including (14) Milo Yiannopoulos and (15) Robert Stacy McCain; and (16) the Radix Journal, an alt-right publication founded by Spencer and dedicated to turning America into an all white "ethno-state," and so on.[169] While Prager's op-ed leaves readers of the Wall Street Journal with the impression that Hanania had proved systematic bias against ordinary conservatives like them, the truth is that Hanania made a list of users that elected Republican member of Congress would ever have identified with prior to 2016, and, one hopes, few would identify with now as "conservatives." More importantly, as Hanania notes in his database — but fails to mention in his *Quillette* article — for each of these users, Twitter had identified categories of violations of its terms of service, summarized by Hanania himself to

[169] Richard Hanania, *Replication Data for Article on Social Media Censorship*, https://www.richardhanania.com/data (last visited Sept. 2, 2020).

include "Pro-Nazi tweets," "violent threats," "revenge porn," "anti-gay/racist slurs," "targeted abuse," *etc*.[170]

Did Twitter "discriminate" against conservatives simply because it blocked more accounts of Trump supporters than Clinton supporters? Clearly, Hanania's study does not prove that Twitter "discriminates," but under the NTIA's proposal it is Twitter that bears the burden of proof. How could it possibly disprove such claims? More importantly, how could it be assured, in advance of making content moderation decisions, that its decision-making would not be declared discriminatory after the fact?

By the same token, even if there were evidence that, say, social media service providers refused to carry ads purchased by Republican politicians at a higher rate than Democratic politicians (or refused to accept ad dollars to increase the reach of content those politicians had posted to ensure that it would be seen by people who would not have seen the "organic" posts), this disparate impact would not prove political bias, because it does not account for differences in the degree to which those ads complied with non-political requirements in the website's community standards. Similarly, it is impossible to prove political bias by showing that media outlets on the left and right are affected differently by changes to the algorithms that decide how to feature content, because those are not apples to apples comparisons: those outlets differ significantly in terms of their behavior. NewsGuard.com, a startup co-founded by Gordon Crovitz, former publisher of *The Wall Street Journal* and a lion of traditional conservative journalism, offers "detailed ratings of more than 5,800 news websites that account for 95% of online engagement with news" that

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[170] *Id.*

one can access easily alongside search results via a browser extension.[171] NewsGuard gives InfoWars a score of 25/100,[172] and GatewayPundit an even lower score: 20/100.[173] DiamondAndSilk.com ranks considerably higher: 52/100.[174] These outlets simply are not the same as serious journalistic outlets such as *The National Review*, *The Wall Street Journal* or *The Washington Post* — and it what might qualify as a "similarly situated" outlet is inherently subjective. That such outlets might be affected differently by content moderation and prioritization algorithms from serious media outlets hardly proves "discrimination" by any social media company.

Requirement #4: "Particularity" in Content Moderation Policies. Requiring companies to show that their policies were sufficiently granular to specify the grounds for moderating the content at issue in each new lawsuit would create a staggering burden. It will be impossible to describe all the reasons for moderating content while also keeping "community standards" documents short and digestible enough to serve their real purpose: informing users of the general principles on which the site makes content moderation decisions.

Requirement #5: Proving Motives for Content Moderation. As if all this were not difficult enough, NTIA would require ICS providers seeking, in each lawsuit, to qualify for the (c)(2)(A) immunity, to prove that their content moderation decision was not made on

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[171] The Internet Trust Tool, NewsGuard, https://www.newsguardtech.com/ (last visited Sep. 2, 2020).

[172] infowars.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/03/infowars-ENG-3-13x.pdf (last visited Sep. 2, 2020).

[173] thegatewaypundit.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/02/The-Gateway-Pundit-NewsGuard-Nutrition-Label.pdf (last visited Sep. 2, 2020).

[174] diamondandsilk.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/04/diamondandsilk.com-1.pdf (last visited Sep. 2, 2020).

"deceptive or pretextual grounds."[175] In short, an ICS provider would have to prove its motive — or rather, lack of ill motive — to justify its editorial discretion. If there is precedent for such an imposition on the First Amendment rights of a media entity of any kind, the NTIA does not cite it.

Requirement #6: Rights to Explanation & Appeals. Finally, NTIA would require an ICS provider to supply third parties "with timely notice describing with particularity [their] reasonable factual basis for the restriction of access and a meaningful opportunity to respond," absent exigent circumstances.[176] Thus, whenever the ICS provider claims the (c)(2)(A) immunity, they must defend not merely the adequacy of their system for providing explanation in general, but the particular explanation given in a particular case.

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Each of these six requirements would be void for vagueness, particularly because "a more stringent vagueness test should apply" to any that "interferes with the right of free speech."[177] As Justice Gorsuch recently declared, "the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power."[178] These requirements are so broad and require so much discretion in their

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[175] Petition at 39.

[176] The Petition's proposed regulation would require that a platform must "suppl[y] *the interactive computer service of the material* with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond..." Petition at 39-40. The only way to read this sentence that makes any sense is to assume that NTIA intended to require the ICS *provider* to provide the ICS *user* (which is also, in most circumstances, the "information content provider" defined by 230(f)(2)); in other words, it appears that they wrote "interactive computer service" when they meant "information content provider."

[177] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

[178] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018).

implementation that they invite lawmakers to apply them to disfavored speakers or platforms while giving them cover not to apply them to favored speakers or platforms.[179] Thus, the "Court has condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity.""[180] "It is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.'"[181] In that case, the Court recognized that "some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as 'political.'"[182] Under NTIA's proposal, both the FCC, in making rules, and judges, in applying them to determine eligibility for Section 230 immunity, would inevitably make decisions guided not by objective, workable standards, but by their own political views.

IV. It Is Not Section 230 but the First Amendment that Protects Social Media Providers, Like Other Media, from Being Sued for the Exercise of Their Editorial Discretion.

The premise of the NTIA Petition is that the rules it asks the FCC to promulgate will make it possible to sue social media providers for their content moderation practices. Just as

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[179] *Police Dept of City of Chicago v. Mosley*, 408 U.S. 92, 96-99 (1972).

[180] *Id*. at 97 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555-558 (1965); Staub v. City of Baxley, 355 U.S. 313, 321-325 (1958); *Saia* v. *New York*, 334 U.S. 558, 560-562 (1948)).

[181] *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

[182] *Id*.

the Executive Order explicitly demands enforcement of promises of neutrality,[183] NTIA argues:

> if interactive computer services' contractual representations about their own services cannot be enforced, interactive computer services cannot distinguish themselves. Consumers will not believe, nor should they believe, representations about online services. Thus, no service can credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns.[184]

This premise is false: even if the FCC had the statutory authority to issue the rules NTIA requests, forcing social media providers to "state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices"[185] would violate the First Amendment, as would attempting to enforce those promises via consumer protection, contract law or other means. What NTIA is complaining about is not, Section 230, but the Constitution. The category of "representations" about content moderation that *could*, perhaps, be enforced in court would be narrow and limited to claims that are quantifiable or otherwise verifiable without a court having to assess the way a social media company has exercised its editorial discretion.

The NTIA Petition focused on what it wants the FCC to do: make rules effectively rewriting Section 230. But the Executive Order that directed the NTIA to file this petition (and laying out the essential contours of its argument) also contemplates the FTC and state attorneys general using consumer protection law to declare unfair or deceptive "practices by entities covered by section 230 that restrict speech in ways that do not align with those

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[183] *See Executive Order*, supra note 82.

[184] Petition at 26.

[185] *Id*.

entities' public representations about those practices."[186] Without mentioning such enforcement directly, the NTIA proposal clearly contemplates it and intends to facilitate it. The proposal would create a four-prong test for assessing whether content moderation had been done in "good faith."[187] Among those is a requirement that the ICS provider **"**restricts access to or availability of material or bars or refuses service to any person ***consistent with publicly available terms of service or use that state plainly and with particularity*** the criteria the interactive computer service employs in its content-moderation practices."[188]

A. Community Standards Are Non-Commercial Speech, Unlike the Commercial Speech That Can Be Regulated by Consumer Protection Law.

The Federal Trade Commission has carefully grounded its deception authority in the distinction long drawn by the Supreme Court between commercial and non-commercial speech, as best articulated in *Central Hudson Gas Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Commercial speech is which "[does] no more than propose a commercial transaction."[189] In *Pittsburgh Press Co. v. Human Rel. Comm'n*, the Supreme Court upheld a local ban on referring to sex in the headings for employment ads. In ruling that the ads at issue were not non-commercial speech (which would have been fully protected by the First Amendment), it noted: "None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them

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[186] *Executive Order*, *supra* note 82, Section 4 (c).

[187] Petition at 39.

[188] *Id*.

[189] *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385 (1973) (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

criticize the Ordinance or the Commission's enforcement practices."[190] In other words, a central feature of commercial speech is that it is "devoid of expressions of opinions with respect to issues of social policy."[191] This is the distinction FTC Chairman Joe Simons was referring to when he told lawmakers that the issue of social media censorship is outside the FTC's remit because "our authority focuses on commercial speech, not political content curation."[192]

While "terms of service" for websites might count as commercial speech, the kind of statement made in "community standards" clearly "expresses a position on … matter[s] of social policy." Consider just a few such statements from Twitter's "rules":

> Violence: You may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence. Learn more about our violent threat and glorification of violence policies.
>
> Terrorism/violent extremism: You may not threaten or promote terrorism or violent extremism. …
>
> Abuse/harassment: You may not engage in the targeted harassment of someone, or incite other people to do so. This includes wishing or hoping that someone experiences physical harm.
>
> Hateful conduct: You may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, caste, sexual

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[190] *Id*. at 385.

[191] The Constitution of the United States of America, Analysis and Interpretation, Prepared by the Congressional Research Service, Library of Congress (June 28, 2020) Page 1248 https://books.google.com/books?id=kAAohNvVik8C&pg=PA1248&lpg=PA1248&dq=%22devoid+of+expressions+of+opinions+with+respect+to+issues+of+social+policy%22&source=bl&ots=Ftv1KrxXrO&sig=ACfU3U0kK1Hj2fil69UlwwZ7Rr6vPNzzcQ&hl=en&sa=X&ved=2ahUKEwj_v-WA3cPrAhWej3IE

available at *https://www.law.cornell.edu/constitution-conan/amendment-1/commercial-speech.*

[192] Leah Nylen, *Trump Aides Interviewing Replacement for Embattled FTC* Chair, POLITICO(August 28, 2020, 02:28 PM), *available at* https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479.

> orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.[193]

Each of these statements clearly "expresses a position on … a matter of social policy,"[194] and therefore is clearly non-commercial speech that merits the full protection of the First Amendment under the exacting standards of strict scrutiny. ""If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[195]

B. The First Amendment Does Not Permit Social Media Providers to Be Sued for "Violating" their Current Terms of Service, Community Standards, or Other Statements About Content Moderation.

In 2004, when MoveOn.org and Common Cause asked the FTC to proscribe Fox News' use of the slogan "Fair and Balanced" as a deceptive trade practice.[196] The Petition acknowledged that Fox News had "no obligation whatsoever, under any law, actually to present a 'fair' or 'balanced' presentation of the news,"[197] but argued: "What Fox News is not free to do, however, is to advertise its news programming—a service it offers to consumers in competition with other networks, both broadcast and cable—in a manner that is blatantly

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[193] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

[194] *Pittsburgh Press*, 413 U.S. at 385.

[195] *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[196] Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act, MoveOn.org and Common Cause (July 19, 2004), https://web.archive.org/web/20040724155405/http://cdn.moveon.org/content/pdfs/ftc_filing.pdf

[197] *Id*. at 2.

and grossly false and misleading."[198] FTC Chairman Tim Muris (a Bush appointee) responded pithily: "I am not aware of any instance in which the [FTC] has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency."[199]

Deception claims always involve comparing marketing claims against conduct.[200] Muris meant that, in this case, the nature of the claims (general claims of fairness) meant that their accuracy could not be assessed without the FTC sitting in judgment of how Fox News exercised its editorial discretion. The "Fair and Balanced" claim was not, otherwise, verifiable — which is to say that it was not *objectively* verifiable.

PragerU attempted to use the same line of argument against YouTube. The Ninth Circuit recently dismissed their deceptive marketing claims. Despite having over 2.52 million subscribers and more than a billion views, this controversialist right-wing producer[201] of "5-minute videos on things ranging from history and economics to science and happiness," sued YouTube for "unlawfully censoring its educational videos and discriminating against its right to freedom of speech."[202] Specifically, Dennis Prager alleged[203] that roughly a sixth of the

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[198] *Id*. at 3.

[199] Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris.

[200] Fed. Trade Comm'n, FTC Policy Statement on Deception, at 1 (Oct. 14, 1983) (*Deception Statement*).

[201] PragerU, YOUTUBE, https://www.youtube.com/user/PragerUniversity/about (last visited July 26, 2020).

[202] *PragerU Takes Legal Action Against Google and YouTube for Discrimination*, PragerU (2020), https://www.prageru.com/press-release/prageru-takes-legal-action-against-google-and-youtube-for-discrimination/.

[203] Dennis Prager, *Don't Let Google Get Away With Censorship*, The Wall Street Journal (Aug. 6, 2019), https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175.

site's videos had been flagged for YouTube's Restricted Mode,[204] an opt-in feature that allows parents, schools and libraries to restrict access to potentially sensitive (and is turned on by fewer than 1.5% of YouTube users). After dismissing PragerU's claims that YouTube was a state actor denied First Amendment protection, the Ninth Circuit ruled:

> YouTube's braggadocio about its commitment to free speech constitutes ***opinions*** that are not subject to the Lanham Act. Lofty but vague statements like "everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories" or that YouTube believes that "people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities" are classic, non-actionable opinions or puffery. Similarly, YouTube's statements that the platform will "help [one] grow," "discover what works best," and "giv[e] [one] tools, insights and best practices" for using YouTube's products are ***impervious to being "quantifiable," and thus are non-actionable "puffery."*** The district court correctly dismissed the Lanham Act claim.[205]

Roughly similar to the FTC's deception authority, the Lanham Act requires proof that (1) a provider of goods or services made a "false or misleading representation of fact,"[206] which (2) is "likely to cause confusion" or deceive the general public about the product.[207] Puffery fails both requirements because it "is not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact."[208] The FTC's bedrock 1983 Deception Policy Statement declares that the "Commission generally

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[204] Your content & Restricted Mode. YouTube Help (2020), https://support.google.com/youtube/answer/7354993?hl=en.

[205] *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) (internal citations omitted).

[206] 15 U.S.C. § 1125 (a)(1).

[207] 15 U.S.C. § 1125 (a)(1)(A).

[208] *Coastal Abstract Service v. First Amer. Title*, 173 F.3d 725, 731 (9th Cir. 1998).

will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously."[209]

There is simply no way social media services can be sued under either the FTC Act (or state baby FTC acts) or the Lanham Acts for the kinds of claims they make today about their content moderation practices. Twitter CEO Jack Dorsey said this in Congressional testimony in 2018: "Twitter does not use political ideology to make any decisions, whether related to ranking content on our service or how we enforce our rules."[210] How is this claim any less "impervious to being 'quantifiable'" than YouTube's claims?[211]

Moreover, "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."[212] Thus, isolated statements about neutrality or political bias (*e.g.*, in Congressional testimony) must be considered in the context of the other statements companies make in their community standards, which broadly reserve discretion to remove content or users. Furthermore, the FTC would have to establish the materiality of claims, *i.e.*, that an "act or practice is likely to affect the consumer's conduct or decision with

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[209] *Deception Statement, supra* note 200, at 4. The Commission added: "Some exaggerated claims, however, may be taken seriously by consumers and are actionable." But the Commission set an exceptionally high bar for such claims:

> For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated: Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae.

Id.

[210] United States House Committee on Energy and Commerce, *Testimony of Jack Dorsey* (September 5, 2018) *available at* https://d3i6fh83elv35t.cloudfront.net/static/2018/09/Dorsey.pdf

[211] *Prager*, 951 F.3d at 1000.

[212] *Deception Statement, supra* note 200, at 3.

regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[213] In the case of statements made in Congressional testimony or in any other format besides a traditional advertisement, the Commission could not simply presume that the statement was material.[214] Instead, the Commission would have to prove that consumers would have acted differently but for the deception.

C. The First Amendment Does Not Permit Social Media Providers to Be Compelled to Detail the Criteria for their Content Moderation Decisions.

Perhaps recognizing that the current terms of service and community standards issued by social media services do not create legally enforceable obligations regarding content moderation practices, NTIA seeks to compel them, as a condition of claiming immunity under Section 230, to "state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices."[215] The First Amendment will not permit the FCC (or Congress) to compel social media services to be more specific in describing their editorial practices.

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[213] *Id.* at 1.

[214] As the DPS notes, "the Commission presumes that express claims are material. As the Supreme Court stated recently, '[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.'" *Id*. at 5 (quoting Central Hudson, 447 U.S. at 567)).

[215] Petition at 39.

1. The FCC's Broadband Transparency Mandates Do Not Implicate the First Amendment the Way NTIA's Proposed Mandate Would.

The NTIA's proposed disclosure requirement is modeled on an analogous disclosure requirement imposed on Broadband Internet Access Service (BIAS) providers under the FCC's 2010 and 2015 Open Internet Order to provide "sufficient for consumers to make informed choices" about their BIAS service.[216] The FTC updated and expanded that requirement in its 2018 Restoring Internet Freedom Order,[217] and explained that, because the FCC had repealed its own "conduct" rules, the transparency rule would become the primary hook for addressing "open Internet" concerns in the future: "By restoring authority to the FTC to take action against deceptive ISP conduct, reclassification empowers the expert consumer protection agency to exercise the authority granted to them by Congress if ISPs fail to live up to their word and thereby harm consumers."[218]

FCC Commissioner Brendan Carr explicitly invokes this model in proposing what he calls "A Conservative Path Forward on Big Tech."[219] After complaining that "[a] handful of corporations with state-like influence now shape everything from the information we consume to the places where we shop," and that "Big Tech" censors conservatives, Carr says:

> There is a "light-touch" solution here. At the FCC, we require Internet service providers (ISPs) to comply with a transparency rule that provides a good baseline for Big Tech.
>
> Under this rule, ISPs must provide detailed disclosures about any practices that would shape Internet traffic—from blocking to prioritizing or

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[216] See 47 C.F.R. § 8.3; see also *Open Internet Order* and *RIFO*.

[217] *RIFO* ¶ 220.

[218] *RIFO* ¶ 244.

[219] Brendan Carr, *A Conservative Path Forward on Big Tech*, NEWSWEEK (July 27, 2020, 7:30 AM), *available at* https://www.newsweek.com/conservative-path-forward-big-tech-opinion-1520375.

> discriminating against content. Any violations of those disclosures are enforced by the Federal Trade Commission (FTC). The FCC and FTC should apply that same approach to Big Tech. This would ensure that all Internet users, from entrepreneurs to small businesses, have the information they need to make informed choices.[220]

In fact, the FCC's disclosure mandates for BIAS providers are fundamentally different from the disclosure mandates Carr and the NTIA want the FCC to impose on social media services.[221] The FCC's transparency rule has never compelled broadband providers to describe how they exercise their editorial discretion because it applies only to those providers that, by definition, hold themselves out as *not* exercising editorial discretion.

The FCC has been through three rounds of litigation over its "Open Internet" Orders, and, although the D.C. Circuit has blocked some of its claims of authority and struck down some of its conduct rules, the court has never struck down the transparency rule. Verizon did not challenge the 2010 Order's version of that rule.[222] The D.C. Circuit upheld the reissuance of that rule in the 2015 Order in its *US Telecom I* as a reasonable exercise of the Commission's claimed authority under Section 706.[223] The FCC's transparency rule was upheld in D.C. Circuit's decision to uphold *RIFO*.[224] But the key decision here is actually *US Telecom II*, in which the D.C. Circuit denied en banc rehearing of the *US Telecom I* panel

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[220] *Id*.

[221] In any event, Carr has no business opining on how another federal agency should wield its authority, especially given that he clearly does not understand *why* the FTC has *never* sought to bring a deception claim predicated on alleged inconsistency between a media company's exercise of editorial discretion and its public statements about its editorial practices. *See infra* at 58-62.

[222] "Verizon does not contend that these [transparency] rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would. Also, because Verizon does not direct its First Amendment or Takings Clause claims against the disclosure obligations," *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 659 (D.C. Cir. 2014).

[223] 825 F.3d at 733.

[224] *Mozilla*, 940 F.3d at 47.

decision. Then-Judge Kavanaugh penned a lengthy dissent, arguing that the 2015 Order violated the First Amendment. Judges Srinivasan and Tatel, authors of the *US Telecom I* panel decision, responded:

> In particular, "[b]roadband providers" subject to the rule "represent that their services allow Internet end users to access all or substantially all content on the Internet, *without alteration, blocking, or editorial intervention*." *[2015 Order]* ¶ 549 (emphasis added). Customers, "in turn, expect that they can obtain access to all content available on the Internet, *without the editorial intervention of their broadband provide*." *Id.* (emphasis added). Therefore, as the panel decision held and the agency has confirmed, the net neutrality rule applies only to "those broadband providers that hold themselves out as neutral, indiscriminate conduits" to any internet content of a subscriber's own choosing. *U.S. Telecom Ass'n*, 825 F.3d at 743…
>
> The upshot of the FCC's Order therefore is to "fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet" without editorial intervention. *Id.* ¶¶ 17, 549." *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 389 (D.C. Cir. 2017).[225]

Obviously, this situation is completely different from that of social media operators. The mere fact that Twitter, Facebook and other such sites have lengthy "community standards" proves the point. Contrast what Twitter says about its service —

> Twitter's purpose is to serve the public conversation. Violence, harassment and other similar types of behavior discourage people from expressing themselves, and ultimately diminish the value of global public conversation. Our rules are to ensure all people can participate in the public conversation freely and safely.[226]

— with what Comcast says:

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[225] 855 F.3d at 388-89.

[226] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

> Comcast does not discriminate against lawful Internet content, applications, services, or non-harmful devices … Comcast does not block or otherwise prevent end user access to lawful content, applications, services, or non-harmful devices. … Comcast does not degrade or impair access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device.[227]

Twitter discriminates, blocks and "throttles" while Comcast does not. *US Telecom II* makes clear that, if it wanted to, Comcast could offer an edited service comparable to Twitter's — and, in so doing, would remove itself from the scope of the FCC's "Open Internet" rules because it would no longer qualify as a "BIAS" provider:

> While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of "editorial intervention." [2015 Order] ¶ 549. For instance, Alamo Broadband, the lone broadband provider that raises a First Amendment challenge to the rule, posits the example of an ISP wishing to provide access solely to "family friendly websites." Alamo Pet. Reh'g 5. ***Such an ISP, as long as it represents itself as engaging in editorial intervention of that kind, would fall outside the rule***. … The Order thus specifies that ***an ISP remains "free to offer 'edited' services" without becoming subject to the rule's requirements***. [2015] Order ¶ 556.
>
> That would be true of an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content (e.g., family friendly websites). It would also be true of an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP's commercial interests. ***An ISP would need to make adequately clear its intention to provide "edited services" of that kind, id. ¶ 556, so as to avoid giving consumers a mistaken impression that they would enjoy indiscriminate "access to all content available on the Internet, without the***

[227] Xfinity, Xfinity Internet Broadband Disclosures https://www.xfinity.com/policies/internet-broadband-disclosures (last visited Aug. 31, 2020).

> ***editorial intervention of their broadband provider***," *id.* ¶ 549. It would not be enough under the Order, for instance, for "consumer permission" to be "buried in a service plan—the threats of consumer deception and confusion are simply too great." *Id.* ¶ 19; *see id.* ¶ 129.[228]

US Telecom II simply recognizes that the First Amendment permits the government to compel a company that does *not* engage in editorial discretion to "disclose accurate information regarding the network management practices, performance, and commercial terms of its [unedited] services sufficient for consumers to make informed choices regarding use of such services."[229] The decision in no way supports the NTIA's proposal that media companies that *do* engage in editorial discretion may be compelled to "state plainly and with particularity the criteria" they employ in exercising their editorial discretion.[230]

2. The False Analogy between "Net Neutrality" and Regulating the Fairness of Social Media.

After strenuously opposing net neutrality regulation for over a decade, many conservatives have now contorted themselves into ideological pretzels to argue that, while "net neutrality" regulation is outrageous government interference with the free market, imposing neutrality on social media providers is vital to prevent "censorship" (of, supposedly, conservatives). For example, the American Principles Project (once a fierce opponent of neutrality mandates, but now a staunch advocate of them) attacks the Internet Association, which supported the FCC's 2015 net neutrality rules, for opposing the imposition of neutrality regulation upon its members (social media providers) now:

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[228] 855 F.3d at 389-90 (emphasis added).

[229] 47 C.F.R. § 8.3.

[230] Petition at 39.

> But now these same market-dominant Big Tech companies are arguing in favor of censorship and viewpoint discrimination? If we are to rely on these companies to disseminate information, then they must be governed by — or at least strongly incentivized to play by — a set of rules that promote free speech and expression.[231]

We have already explained the crucial legal difference between BIAS and social media in the representations they make to consumers.[232] But it is important to understand *why* these services make such completely different representations, and why this is simply the market at work, not proof that they are "market dominant." BIAS, by definition, "provides the capability to transmit data to and receive data from all or substantially all Internet endpoints…."[233] As such, BIAS operates at a lower "layer" of the Internet[234] than the "application layer," the highest layer, at which social media, like other websites, are accessed by users.[235] Blocking and throttling of content at lower layers are problematic in ways that they are not at the application layer. Thus, as the *RIFO* noted, "There is industry near-consensus that end user[s] . . . should not be subject to blocking, substantial degrading, throttling, or unreasonable discrimination by broadband ISPs. This consensus is widely reflected in the service terms that broadband ISPs furnish to their end user subscribers."[236]

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[231] APP Comments, *supra* note 113, at 4.

[232] *See supra* at 59.

[233] *RIFO* ¶ 176.

[234] 2015 Order ¶ 378 ("engineers view the Internet in terms of network 'layers' that perform distinct functions. Each network layer provides services to the layer above it. Thus the lower layers, including those that provide transmission and routing of packets, do not rely on the services provided by the higher layers.")

[235] "[The Applications] top-of-stack host layer is familiar to end users because it's home to Application Programming Interfaces (API) that allow resource sharing, remote file access, and more. It's where you'll find web browsers and apps like email clients and social media sites." Dale Norris, *The OSI Model Explained – 2020 update*, (May 2, 2020), *available at* https://www.extrahop.com/company/blog/2019/the-osi-model-explained/.

[236] *RIFO* n. 505.

By contrast, just the opposite is true among social media: *all* major social media services retain broad discretion to remove objectionable content.[237] The reason is not because "Big Tech" services have "liberal bias," but because social media would be unusable without significant content moderation. Social media services that claim to perform only limited content moderation have attracted only minimal audiences. Parler, a relatively new social media platform, bills itself as the "free speech alternative" to Twitter, but even it has established its own content moderation rules and reserved the right to remove any content for any reason at any time.[238] Sites like 8kun (formerly 8chan) and 4chan, which claim to do even less moderation, have been favored by white supremacists and used to promote mass shootings, among other forms of content all but a tiny minority of Americans would

[237] *See, e.g.*, Pinterest, Community Guidelines, https://policy.pinterest.com/en/community-guidelines (last visited August 31, 2020). ("Pinterest isn't a place for antagonistic, explicit, false or misleading, harmful, hateful, or violent content or behavior. We may remove, limit, or block the distribution of such content and the accounts, individuals, groups and domains that create or spread it based on how much harm it poses."); *See, e.g.,* Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited August 31, 2020). Facebook, Community Standards, https://www.facebook.com/communitystandards/false_news (last visited Aug. 31, 2020). ("Our commitment to expression is paramount, but we recognize the internet creates new and increased opportunities for abuse. For these reasons, when we limit expression, we do it in service of one or more of the following values: Authenticity, Safety, Privacy, Dignity.)

[238] Parler, User Agreement, #9 https://news.parler.com/user-agreement, (last visited Aug. 31, 2020). ("Parler may remove any content and terminate your access to the Services at any time and for any reason to the extent Parler reasonably believes (a) you have violated these Terms or Parler's Community Guidelines (b) you create risk or possible legal exposure for Parler…"). Notably, Parler does not limit "risk" to legal risks, so the service retains broad discretion to remove content or users for effectively any reason.

doubtless find reprehensible.[239] Even a quick glance at the competitive metrics of such websites makes it clear that less active content moderation tends to attract fewer users.[240]

This Commission is, in significant part, to blame for increasing confusion on this these distinctions, especially among conservatives. APP notes, to justify its argument for imposing neutrality regulation upon social media: "The Commission itself has noted the reality of viewpoint suppression by market dominant tech," and proceeds to quote from the *RIFO*: "If anything, recent evidence suggests that hosting services, social media platforms, edge providers, and other providers of virtual Internet infrastructure are more likely to block content on viewpoint grounds."[241] The Commission had no business commenting on services outside its jurisdiction, and did not need to do so to justify repealing the 2015 Order. It should take care not to further compound this confusion.

3. Compelling Media Providers to Describe How They Exercise their Editorial Discretion Violates Their First Amendment Rights.

Other than the FCC's broadband transparency requirements, the Petition does not provide any other example in which the government has required private parties to disclose

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[239] Julia Carrie Wong, *8chan: the far-right website linked to the rise in hate crimes*, THE GUARDIAN (Aug. 4, 2019, 10:36 PM), https://www.theguardian.com/technology/2019/aug/04/mass-shootings-el-paso-texas-dayton-ohio-8chan-far-right-website; Gialuca Mezzofiore, Donnie O' Sullivan, *El Paso Mass Shooting at Least the Third Atrocity Linked 8chan this year*, CNN BUSINESS (Aug. 5, 2019, 7:43 AM), https://www.cnn.com/2019/08/04/business/el-paso-shooting-8chan-biz/index.html.

[240] Alexa, Statistics for 4chan, https://www.alexa.com/siteinfo/4chan.org (last visited Aug. 31, 2020); Rachel Lerman, *The conservative alternative to Twitter wants to be a place for free speech for all. It turns out, rules still apply*, THE WASHINGTON POST,(July 15, 2020 10:48 AM), *available at* https://www.washingtonpost.com/technology/2020/07/15/parler-conservative-twitter-alternative/ (2.8 million users total, as of July 2020).

[241] *RIFO* ¶ 265.

how they exercise their editorial discretion — and for good reason: such an idea is so obviously offensive to the First Amendment, it appears to be without precedent.

Does anyone seriously believe that the First Amendment would — whether through direct mandate or as the condition of tax exemption, subsidy or some other benefit — permit the government to require book publishers to publish detailed summaries of the policies by which they decide which books to publish, or newspapers to explain how they screen letters to the editor, or talk radio shows to explain which listener calls they put on the air, or TV news shows to explain which guests they book? Even the FCC's original Fairness Doctrine for broadcasting did not go this far.

Such disclosure mandates offend the First Amendment for at least three reasons. First, community standards and terms of service are themselves non-commercial speech.[242] Deciding how to craft them is a form of editorial discretion protected by the First Amendment, and forcing changes in how they are written is itself a form of compelled speech — no different from forcing a social media company's other statements about conduct it finds objectionable on, *or off*, its platform. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of Blind*, 487 U.S. 781, 795 (1988). In that case, the Court struck down a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. The Court declared that the

[242] *See supra* at 48 *et seq*.

"the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[243]

Second, forcing a social media site to attempt to articulate *all* of the criteria for its content moderation practices while also requiring those criteria to be as specific as possible will necessarily constrain what is permitted in the underlying exercise of editorial discretion. Community standards and terms of service are necessarily overly reductive; they cannot possibly anticipate every scenario. If the Internet has proven anything, it is that there is simply no limit to human creativity in finding ways to be offensive in what we say and do in in interacting with other human beings online. It is impossible to codify "plainly and with particularity" all of the reasons why online content and conduct may undermine Twitter's mission to "serve the public conversation."[244]

Third, even if NTIA argued that the criteria it seeks to compel social media providers to disclose are statements of fact (about how they conduct content moderation) rather than statements of opinion, the *Riley* Court explicitly rejected such a distinction. Citing cases in which the court had struck down compelled speech requirements, such as displaying the slogan "Live Free or Die" on a license plate,[245] the Court noted:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state

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[243] *Id*. at 797 (citing *Miami Herald*, 418 U.S. at 256).

[244] *See* Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

[245] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

> during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.[246]

The same is true here: the First Amendment protects Twitter's right to be as specific, or as vague, as it wants in defining what constitutes "harassment," "hateful conduct," "violent threats," "glorification of violence," *etc*.

Finally, the Petition makes clear that the goal of mandating transparency about content moderation practices is to chill certain content moderation practices. If Facebook had to specifically identify all the conspiracy theories and false claims it considers to violate its "False News" policy,[247] the company would expose itself to even greater attack from those who have embraced, or normalized, such claims. The company would find itself in the same situation as the professional fundraisers whose speech was at issue in *Riley*:

> in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone. Again, the predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.[248]

The NTIA petition would have the same effect: by forcing social media companies to be extremely specific about their content moderation practices, NTIA would open them to further attack by those who feel persecuted, who would, metaphorically speaking, "hang up

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[246] *Riley*, 487 U.S. at 797-98.

[247] Facebook, False News, Community Standards, https://www.facebook.com/communitystandards/false_news (last visited Aug. 31, 2020).

[248] 487 U.S. at 799.

the phone" on "Big Tech." If anything, the constitutional problem here would be far greater, since the effect of NTIA's proposed regulations would be not merely to force social media operators to quit the market but to change the very nature of the editorial decisions they make, which are themselves a category of "speech" protected by the First Amendment.

D. The Circumstances in Which the First Amendment Permits Media Providers To be Sued for Violating Promises Are So Narrow as to Be of Little Relevance to NTIA's Complaints.

Even if the First Amendment permitted social media providers to be compelled to describe their content moderation practices with "particularity," or if they simply chose to be considerably more specific in describing the criteria underlying those practices, it is unlikely that the First Amendment would permit liability to be imposed upon them for are ultimately questions of how they exercise their editorial discretion, except in circumstances that are likely to be so narrow as to have little to do with NTIA's complaints. Thus, NTIA's demand that "representations about … [digital services] services [must] be enforced"[249] is unlikely to be satisfied regardless how Section 230 might be rewritten by Congress or, in effect, the FCC through the rulemaking NTIA proposes.

1. Section 230(c)(1) Protects Against Claims Based on the Exercise of Their Editorial Discretion, but not Based on Their Business Practices.

In *Mazur v. eBay*, Section 230(c)(1) did not protect eBay from liability (and the First Amendment was not even raised) when a plaintiff alleged that they had been deceived by eBay's marketing claims that bids made through the site's "Live Auctions" tool (administered

[249] Petition at 26; *see also supra* at 51.

by a third party to place bids at auctions in real time) were "were 'safe' and involved 'floor bidders' and 'international' auction houses."[250] The court rejected eBay's claims that it had made clear that "it: 1) only provides a venue; 2) is not involved in the actual transaction between buyer and seller; and 3) does not guarantee any of the goods offered in any auction…" and concluded that "these statements, as a whole, do not undermine eBay's representation that Live Auctions are safe."[251] The court concluded:

> In *Prickett* and *Barnes* CDA immunity was established because of a failure to verify the accuracy of a listing or the failure to remove unauthorized profiles. Since both acts fell squarely within the publisher's editorial function, the CDA was implicated. The case at bar, however, is opposite. eBay did not make assurances of accuracy or promise to remove unauthorized auctioneers. Instead, eBay promised that Live Auctions were safe. Though eBay styles safety as a screening function whereby eBay is responsible for the screening of safe auctioneers, this court is unconvinced. eBay's statement regarding safety affects and creates an expectation regarding the procedures and manner in which the auction is conducted and consequently goes beyond traditional editorial discretion.[252]

That last line explains why this case was different from the 2004 complaint against Fox News.[253] In *Mazur*, the conduct against which the company's marketing claims were compared was *not* the exercise of editorial discretion, but the way eBay structured a commercial service (making bids at live auctions at the direction of users online). For the same reasons, Section 230(c)(1) has not prevented the FTC (or state AGs) from bringing deception cases against social media services that fail to live up to their promises regarding, for example, privacy and data security: these claims can be assessed with reference to the

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[250] *Mazur v. Bay Inc.*, No. C 07-03967 MHP (N.D. Cal. Mar. 3, 2008).

[251] *Id*. at 14.

[252] *Id*. at *16-17.

[253] *See supra* at 59.

companies' *business* practices, not the way they exercise their editorial discretion. Section 230 does not protect a website from claiming it provides a certain level of data security, but failing to deliver on that claim.

2. Likewise, the First Amendment Protect Against Claims Based on the Exercise of Editorial Discretion, but not Based on Their Business Practices.

The First Amendment ensures that book publishers have the right to decide which books to print; producers for television and radio have the right to decide which guests to put on their shows, which calls to take from listeners, when to cut them off; and so on. But the First Amendment would *not* protect these publishers from suit if, say, a book publisher lied about whether its books were printed in the United States, whether the paper had been printed using child labor, whether the printing process was carbon-neutral, etc. Like eBay's decisions about how to configure its service, these are not aspects of "traditional editorial discretion."

It is certainly possible to imagine hypothetical cases where that line becomes blurry. Suppose that a group of leading book publishers decided, in response to public concerns about structural racism and sexism in media, decided to start publishing "transparency reports" (modeled on those pioneered by tech companies like Google) detailing the rates at which they accepted manuscripts for publication based on categories of racial groups, gender, sexual orientation, etc., how much they paid authors in each category on average, how much they spent on marketing, *etc*. Leaked documents revealed that one publisher had manipulated its statistics to make its offerings appear artificially diverse. Could that publisher be sued for deceptive marketing? While it might be difficult to establish the

materiality of such claims,[254] the First Amendment likely would not bar such a suit because, unlike the Fox News example, there *would* be "way to evaluate [the complaint] without evaluating the content of the [speech] at issue."[255]

Suppose that, instead of making general claims to be "Fair and Balanced," Fox News began publishing data summarizing the partisan affiliations of its guests, and it later turned out that those data appeared were falsified to make the network appear more "balanced" than it really was. Could Fox News be sued for deceptive marketing? Perhaps, if the FCC could show such claims were "material" in convincing consumers to consumer Fox News' products. The point of this hypothetical is that the FTC (or another plaintiff) could objectively prove the falsity of the claim *because it is measurable*. Thus, the FTC could avoid the problem Muris noted in dismissing real-world complaints against Fox: the impossibility of judging Fox's description of editorial practices from judging Fox's editorial practices themselves.[256]

What kind of objectively provable claims might be made by a social media company? If a company claimed that no human monitors were involved in selecting stories to appear in a "Trending Topics" box — or removing stories from that box — and this claim turned out to be false, this might be grounds for suit, depending on the "net impression" given by a company's statements overall (and, again, the FTC or a state AG would still have to establish the materiality of such claims). Such cases would necessarily involve objectively verifiable

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[254] *See supra* at notes 213 & 214 and associated text.

[255] *Cf. supra* 199.

[256] *See supra* at 46 and note 199.

facts,[257] and would not involve the government in second-guessing non-commercial speech decisions involving which content to publish.[258]

3. Promises Regarding Content Moderation Can Be Enforced Via Promissory Estoppel Only in Exceptionally Narrow Circumstances.

Only under exceptionally narrow circumstances have courts ruled that a website may be sued for failing to live up to a promise regarding content moderation — and properly so. In *Barnes v. Yahoo!*, Section 230(c)(1) immunity did not bar a claim, based on promissory estoppel (a branch of contract law) that Yahoo! broke a promise to one of its users, but the facts of that case are easily distinguishable from the kind of enforcement of terms of service and community standards NTIA proposes — and not merely because *Barnes* involved a failure to remove content, rather than removing too much content. NTIA cites the case five times but it in no way supports NTIA's proposed approach.

Cecilia Barnes complained to Yahoo! that her ex-boyfriend had posted revenge porn on Yahoo! After being ignored twice, the company's director of communications promised Barnes "that she would 'personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.'"[259] Yet Yahoo! failed to take down the material, so Barnes sued. Section 230(c)(1) did not bar Barnes' suit because:

> Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from

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[257] *See supra* note 205 and associated text at 55.

[258] *See supra* note 192 and associated text at 53.

[259] *Id*. at 562.

> the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle."[260]

But, as the court explained, promissory estoppel may be invoked only in exceptionally narrow circumstances:

> as a matter of contract law, the promise must "be as clear and well defined as a promise that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration." 1 Williston & Lord, supra § 8.7. "The formation of a contract," indeed, "requires a meeting of the minds of the parties, a standard that is measured by the objective manifestations of intent by both parties to bind themselves to an agreement." Rick Franklin Corp., 140 P.3d at 1140; see also Cosgrove v. Bartolotta, 150 F.3d 729, 733 (7th Cir.1998) (noting that if "[a] promise [ ] is vague and hedged about with conditions .... [the promisee] cannot plead promissory estoppel."). Thus ***a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability***. ***This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.***[261]

Thus, a promissory estoppel claim is even harder to establish than a deception claim: in a deception claim, it is not necessary to prove a "meeting of the minds," only that a company made a claim (a) upon which consumers reasonably relied (making it "material") in deciding whether to use a product or service that was (b) false.[262] "General" policies would not suffice to establish an "intention to be bound." Social media Terms of Service and Community Standards policies are for leading social media services are, by necessity "vague and hedged about with conditions" — because they must account for an vast range of

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[260] 565 F.3d 560, 572 (9th Cir. 2009),

[261] *Id*. at 572.

[262] *Deception Statement, supra* note 200, at 4

scenarios that cannot be reduced to specific statements of what speech or conduct are and are not allowed.

Current case law allows plaintiffs to overcome the (c)(1) immunity based on promissory estoppel, but an actionable claim, like that in *Barnes*, would require a similarly specific fact pattern in which clear promises were made to specific users, and users relied upon those promises to their detriment. Changing Section 230 would do nothing to make a promissory estoppel case easier to bring or win.

V. NTIA's Interpretations Would Turn Section 230 on Its Head, Forcing Websites to Bear a Heavy Burden in Defending Their Exercise of Editorial Discretion Each Time They Are Sued for Content Moderation Decisions

Congress wrote a statute that broadly protects digital media publishers in exercising their editorial discretion, principally by saying (in (c)(1)) that it simply does not matter whether they are classified as publishers — because they may not be held liable as such. In this way, Congress overruled the trial court decisions in *Cubby, Inc. v. CompuServe Inc.*,[263] and Stratton *Oakmont, Inc. v. Prodigy Servs. Co.*[264]

NTIA seeks to have the FCC rewrite that statute to achieve precisely the opposite effect: "forcing websites to face death by ten thousand duck-bites."[265] But as the Supreme Court has noted, "immunity means more than just immunity from liability; it means

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[263] 776 F.Supp. 135 (S.D.N.Y. 1991). Unlike *Stratton Oakmont*, the *Cubby* court found no liability, but made clear that this finding depended on the fact that CompuServe had not been provided adequate notice of the defamatory content, thus implying (strongly) that such notice *would* trigger a takedown obligation under a theory of distributor liability.

[264] 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

[265] *Roommates*, supra note 125, 521 F.3d at 1174.

immunity from the burdens of defending a suit[.]"[266] If the NTIA's reinterpretations of Section 230 became law, websites would bear an impossible burden of defending their content moderation practices.

A. Courts Have Interpreted 230(c)(1) Correctly: ICS Providers May Not be Held Liable as Publishers of Content They Do Not Create.

Perhaps the most nonsensical part of the NTIA petition — after its complete misstatement of the meaning of *Packingham*[267] — is the proposal that the Commission reinterpret Subsection (c)(1) as follows:

> An interactive computer service is not being "treated as the publisher or speaker of any information provided by another information content provider" when it actually publishes its own or third-party content. [268]

There has never been any doubt that (c)(1) does not protect an ICS provider when it "publishes its own… content" — because the company would, to that extent, cease to be an ICS provider and, instead, become an information content provider "responsible, in whole or in part, for the creation or development of information."[269] But the Petition marries this self-evident fact with the preposterous claim that, when Congress said, in (c)(1), that an ICS provider may not be "treated as the publisher or speaker of any information provided by another information content provider," it intended that categorical declaration to depend on whether the provider merely "published" that third-party content or "*actually* published" that content. One has only to imagine applying such an interpretation in other contexts to

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[266] *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995).

[267] *See supra* at 30.

[268] Petition at 46.

[269] 47 U.S.C. § 230(f)(3).

see that it would allow regulatory agencies to do the exact opposite of what Congress intended, while pretending to faithfully implement the plain text of the law, simply by invoking the qualifier "actually."

B. 230(c)(1) and 230(c)(2)(A) Both Protect Certain Content Moderation Decisions, but in Clearly Different Ways.

NTIA argues that courts have read "section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity."[270] The petition claims interpreting Paragraph (c)(1) to cover decisions to remove content (as well as to host content) violates the statutory canon against surplusage because it renders (c)(2) superfluous.[271] The plain text of the statute makes clear why this is not the case. While the Petition refers repeatedly to "230(c)(2)," this provision actually contains two distinct immunities, which are clearly distinct both from each other and from the immunity contained in (c)(1). Neither subparagraph of (c)(2) is rendered a "nullity" by the essentially uniform consensus of courts that Paragraph (c)(1) covers decisions to remove user content just as it covers decisions to leave user content up.[272] Both of these immunities do things that the (c)(1) immunity does not.

NTIA also argues that the factual premises (about the technological feasibility of content moderation) underlying *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the

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[270] Petition at 28.

[271] "NTIA urges the FCC to follow the canon against surplusage in any proposed rule.88 Explaining this canon, the Supreme Court holds, '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .' The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme." Petition at 29.

[272] *IA Report, supra* note 8, at 10 ("Of the decisions reviewed pertaining to content moderation decisions made by a provider to either allow content to remain available or remove or restrict content, only 19 of the opinions focused on Section 230(c)(2). Of these, the vast majority involved disputes over provider efforts to block spam. The remainder were resolved under Section 230(c)(1), Anti-SLAPP motions, the First Amendment, or for failure to state a claim based on other deficiencies.").

first appellate decision to parse the meaning of the (c)(1) immunity, no longer hold. Neither these arguments nor NTIA's statutory construction arguments actually engage with the core of what *Zeran* said: that the (c)(1) immunity protects the First Amendment rights of digital media operators as publishers. We begin our analysis there.

1. Courts Have Correctly Interpreted the (c)(1) Immunity as Protecting the Exercise of Editorial Discretion, Co-Extensive with the First Amendment Itself.

Kenneth Zeran's suit argued "that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."[273] The Fourth Circuit dismissed the suit under (c)(1):

> By its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.
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> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . .[274]

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[273] 129 F.3d at 328.

[274] *Zeran*, 129 F.3d at 330-31.

The Petition claims that "[t]his language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or fact-checking statements."[275] Here, NTIA makes several elementary legal mistakes:

- It misses the key limiting principal upon the (c)(1) immunity: it does not protect content that the ICS provider is responsible, even in part, for creating. We discuss this issue more below,[276] but here, note that the warning or fact-checking statements affixed to someone else's content would *clearly* be first-party content created by the website operator for which it is responsible. The same goes for "their own publications" — assuming that means posting content that the operator itself creates, as opposed to deciding whether to publish content created by others.[277]
- Even when it applies, (c)(1) never provides "full and complete immunity" to anyone because it is always subject to the exceptions provided in Subsection (e), most notably for federal criminal law and sex trafficking law.
- (c)(1) protects ICS providers only from being "treated as the publisher or speaker of any information provided by another information content provider." Thus, it does not protect them from being sued for breach of contract, as in *Barnes v. Yahoo!*[278]

NTIA's characterization of *Zeran* is correct: the decision's interpretation of the (c)(1) immunity broadly protects "editorial decisions [and] content-moderating." As the Barnes

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[275] Petition at 26.

[276] *See infra* at 49.

[277] *See* Roommates, *supra* note 125, 521 F.3d at 1163.

[278] *See infra* at 37.

court noted: "Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."[279] What NTIA fails to mention is that this interpretation of (c)(1) really just protects the editorial discretion protected by the First Amendment.

NTIA proposes the following reinterpretation of the statute:

> Section 230(c)(1) applies to acts of omission—to a platform's failure to remove certain content. In contrast, section 230(c)(2) applies to acts of commission—a platform's decisions to remove. Section 230(c)(1) does not give complete immunity to all a platform's "editorial judgments."[280]

This omission/commission dichotomy may sound plausible on paper, but it fails to reflect the reality of how content moderation works, and would make Section 230(c)(1)'s protection dependent on meaningless distinctions of sequencing. The "editorial judgments" protected by (c)(1) are not simply about decisions to "remove" content that has already been posted. They may also involve automatically screening content to decide whether to reject it — and even suspend or block the user that posted it. Such decisions would not be captured by *either* prong what NTIA holds up as a complete model of content moderation. There is no significant difference between a just-in-time pre-publication "screening" publication decision (to "put up" content) and one made minutes, hours, days or weeks later (to "take down" content), after users have complained and either an algorithm or a human makes a decision to do the same thing. There is no reason that Section 230 should treat these decisions differently; both should be covered by 230(c)(1), as courts have consistently ruled.

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[279] *Barnes.*, 565 F.3d at 569.

[280] Petition at 27.

In *Batzel v. Smith*, the Ninth Circuit rejected such a distinction in a slightly different context, but its analysis helps show the incoherence of NTIA's position. The dissenting judge argued that "We should hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication."[281] While that judge wanted to distinguish between "active" and passive publication, he did not (unlike NTIA) dispute that "interactive computer service users and providers who screen the material submitted and remove offensive content are immune."[282] The majority responded:

> These two positions simply cannot logically coexist.
>
> > A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either. For one thing, there is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity. Also, Congress could not have meant to favor removal of offending material over more advanced software that screens out the material before it ever appears. If anything, the goal of encouraging assistance to parents seeking to control children's access to offensive material would suggest a preference for a system in which the offensive material is not available even temporarily.[283]

In short, Section 230(c)(1) should continue to apply equally to "any exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content"[284] — regardless of whether a company decided to

To reinterpret (c)(1) otherwise would raise obvious First Amendment problems. Consider another version of the hypothetical posited at the outset: suppose Congress conditioned businesses' eligibility for COVID immunity or PPP funds on how businesses

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[281] 333 F.3d 1018, 1038 (9th Cir. 2003).

[282] *Id*. at 1032 (summarizing the dissent).

[283] *Id*.

[284] *Zeran*, 129 F.3d at 330.

handled political signage on their facades and premises. To avoid First Amendment concerns, the legislation disclaimed any intention to punish businesses for "acts of omission" (to use NTIA's term): they would not risk jeopardizing their eligibility for allowing protestors to carry signs, or leaving up signs or graffiti protestors had posted on their premises. But acts of *commission* to reflect their own "editorial judgments" — banning or taking down some or all signs carried by others — would cause the business to lose their eligibility, unless they could prove that they had acted in "good faith." The statute specified that "good faith" could not include politically discriminatory motivations (so a business would have to bar both "All Lives Matter" signs and "Black Lives Matter" signs). Furthermore, the business would have to post a detailed policy explaining what signage is and is not allowed, and would have to create an appeals process for those who felt their "free speech" rights had been violated.

Would such a law be constitutional? Obviously not: this would clearly be a grossly unconstitutional condition, requiring businesses to surrender a large part of their editorial discretion to qualify for a benefit.[285] And it would not matter that the law disclaimed any intention to interfere with the business' right to leave up signage posted by others, or to put up its own signage. The First Amendment protects that right no less than it protects the business' right to exercise editorial discretion about what third parties do on its property.[286]

Congress avoided creating such an unconstitutional condition by choosing *not* to write the version of (c)(1) that NTIA proposes. Instead, it created a broad immunity that

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[285] *See supra* at 27 et seq.

[286] *See supra* at 25.

protects ICS providers from being held liable for the way they exercise their editorial discretion.[287]

2. How 230(c)(2)(A) Differs from 230(c)(1).

The Ninth Circuit has already explained what work Subparagraph (c)(2)(A) does that Subsection (c)(1) does not:

> Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection ***(c)(2), for its part, provides an additional shield from liability***, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene ... or otherwise objectionable." § 230(c)(2)(A). Crucially, the persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates.Com,* 521 F.3d at 1162-63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[288]

Subparagraph (c)(2)(A) ensures that, even if an ICS provider is shown to be partially responsible for content creation, its decision to remove content generally will not be grounds for liability. This belt-and-suspenders approach is crucial to serving the statute's central purpose — removing disincentives against content moderation — because certain forms of content moderation may at least open the door for plaintiffs to argue that the ICS provider

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[287] See *supra* n. 279.

[288] *Barnes*, 565 F.3d at 569-70. *See also, Fyk v. Facebook, Inc.,* No. 19-16232 at *5 (9th Cir. June 12, 2020) (reaffirming *Barnes*).

had become responsible for the content, and thus subject them to the cost of litigating that question at a motion to dismiss or the even greater cost of litigating past a motion to dismiss if the trial judge rules that they may have been responsible for the creation of that content. Discovery costs alone have been estimated to account as much as 90% of litigation costs.[289]

In general, an ICS provider will not be held to be responsible, even "in part," for the creation of content posted by others merely through content moderation — unless they transform the meaning of that content in ways that contribute to its illegality, such as by editing "John is not a rapist" to read "John is a rapist.[290] Suppose that, instead of taking down objectionable posts completely, an ICS provider decides to err on the side of leaving such posts up, but with certain expletives or common slurs blacked out. To make such a policy scale for the service, such decisions are made by machines, not humans. In some cases, algorithmic removal of certain words might be said to change the meaning of the sentence, thus allowing a plaintiff to argue that the provider is responsible "in part" for the creation of such posts — and thus should lose its (c)(1) immunity. Or suppose that the provider, in response to user complaints, decides to add some degree of human moderation, which introduces the possibility of error (deleting additional words or even accidentally adding words): additional words may be deleted, increasing the likelihood that the ICS provider may be said to be responsible for that content. In either case, the ICS provider may decide to fall back on a second line of defense: deleting (or hiding) the post altogether. The (c)(1) immunity may not protect that removal decision, because company is now considered the

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[289] Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).

[290] *See infra* at 79 and note 314.

"information content provider" of that post. But the (c)(2)(A) immunity does not depend on this protection, so it will protect the removal decision.

The *Barnes* court omitted another important function of Subparagraph (c)(2)(A): like all three immunities contained in Section 230, it protects both providers and *users* of interactive computer services. If anything, Subparagraph (c)(2)(A) may be *more* important for users to the extent that they are more likely to have contributed, at least in part, to the creation of content. If multiple users collaborate on an online document, it may be difficult to determine which user is responsible for which text. If one user adds a defamatory sentence to a Wikipedia page, and another user (who happens to be an admin), rewrites the sentence in order to make it less defamatory, the admin risks being sued if the statement remains somewhat defamatory. If that admin then decides to take down the entire page, or merely to delete that sentence, and is sued for doing so, they would rely on the (c)(2)(A) immunity to protect themselves.

It is true that relatively few cases are resolved on (c)(2)(A) grounds, as compared to (c)(1). This does not make superfluous. The Supreme Court has set a very high bar for applying the canon against surplusage. For example, the Court rejected a criminal defendant's reading of the phrase "State post-conviction or other collateral review" (that it should "encompass both state and federal collateral review") because "the word 'State' [would place] no constraint on the class of applications for review that toll the limitation period. The clause instead would have *precisely the same content* were it to read 'post-conviction or other collateral review.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added). It is simply impossible to characterize the consensus current interpretationof

Subsection (c)(1) (as covering removal decisions) as amounting to "precisely the same" as their reading of Subparagraph (c)(2)(A): the two have plainly different meanings.

The fact that few cases are resolved on (c)(2)(A) grounds understates its true importance: what matters is now how many cases are brought and dismissed, but how many cases are *not* brought in the first place, because the (c)(2)(A) immunity assures both users and providers of interactive computer services that they will be shielded (subject to the good faith requirement) even if they lose their (c)(1) immunity.

In short, there is no canon of interpretation that would suggest that (c)(1) should not apply to content removal decisions — and every reason to think that the courts have applied the statute as intended.

C. NTIA Proposes to Rewrite 230(c)(2) as a Hook for Massive Regulatory Intervention in How Websites and other ICS Providers Operate.

After proposing to sharply limit the scope of the (c)(1) immunity, and to exclude *all* content moderation from it, the Petition proposes to sharply limit when the (c)(2) immunity can be invoked, and to build into the eligibility criteria a series of highly prescriptive regulatory requirements. This is plainly *not* what Congress intended.

1. The Term "Otherwise Objectionable" Has Properly Been Construed Broadly to Protect the Editorial Discretion of ICS Providers and Users.

The Petition argues that "the plain words of [(c)(2)(A)] indicate that this protection only covers decisions to restrict access to certain types of enumerated content. As discussed infra, these categories are quite limited and refer primarily to traditional areas of media regulation—also consistent with legislative history's concern that private regulation could

create family-friendly internet spaces."[291] The Petition makes two arguments to support this assertion.

First, the petition argues: "If 'otherwise objectionable means any material that any platform 'considers' objectionable, then section 230(b)(2) offers de facto immunity to all decisions to censor content."[292] NTIA is clearly referring to the wrong statutory provision here; it clearly mean 230(c)(2) — yet "makes this same erroneous substitution on page 28, so it wasn't just a slip of the fingers."[293] NTIA fails to understand how the (c)(2)(A) immunity works. This provision contains two distinct operative elements: (1) the nature of the content removed (a *subjective* standard) and (2) the requirement that the action to "restrict access to or availability" of that content be taken in good faith (an *objective* standard). Under the clear consensus of courts that have considered this question, the former *does* indeed mean "any material that any platform 'considers' objectionable" *provided* that the decision to remove it is taken in "good faith."[294] This has *not* created a "de facto immunity to all decisions to censor content" under (c)(2)(A) because, while the subjective standard of objectionability is constrained by the objective standard of good faith.

Second, the petition invokes another canon of statutory construction: "ejusdem generis, which holds that catch-all phases at the end of a statutory lists should be construed

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[291] Petition at 23.

[292] Petition at 31.

[293] Eric Goldman, *Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230,* Technology and Marketing Law Blog (Aug. 12, 2020) *available at* https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm ("I have never seen this typo by anyone who actually understands Section 230. It's so frustrating when our tax dollars are used to fund a B-team's work on this petition (sorry for the pun).")

[294] *Cf. e360Insight, LLC v. Comcast Corp.,* 546 F. Supp. 2d 605 (N.D. Ill. 2008) (dismissing unfair competition claims as inadequately pled, but implying that better pled claims might make a prima facie showing of "bad faith" sufficient to require Comcast to establish its "good faith").

in light of the other phrases."[295] The Ninth Circuit explained why this canon does not apply in its recent *Malwarebytes* decision:

> the specific categories listed in § 230(c)(2) vary greatly: Material that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing. If the enumerated categories are not similar, they provide little or no assistance in interpreting the more general category. We have previously recognized this concept. *See Sacramento Reg'l Cty. Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1270 (9th Cir. 1990) ("Where the list of objects that precedes the 'or other' phrase is dissimilar, *ejusdem generis* does not apply").
>
> We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s.[296]

The categories of objectionable material mentioned in (c)(2)(A) are obviously dissimilar in the sense that matters most: their constitutional status. Unlike the other categories, "obscenity is not within the area of constitutionally protected speech or press."[297] Note also that five of these six categories include no qualifier, but the removal of "violent"

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[295] Petition at 32 (citing Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372 (2003) ("under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words")).

[296] *Enigma Software Grp. U.S.A v. Malwarebytes, Inc*., 946 F.3d 1040, 1052 (9th Cir. 2019). The *Reilly* court explained:

> The phrase "other property" added to a list of dissimilar things indicates a Congressional intent to draft a broad and all-inclusive statute. In Garcia, the phrase "other property" was intended to be expansive, so that one who assaulted, with intent to rob, any person with charge, custody, or control of property of the United States would be subject to conviction under 18 U.S.C. § 2114. Where the list of objects that precedes the "or other" phrase is dissimilar, ejusdem generis does not apply. However, the statute at issue here falls into a different category. Because section 1292(1) presents a number of similar planning and preliminary activities linked together by the conjunction "or," the principle of ejusdem generis does apply. "[O]r other necessary actions" in the statute before us refers to action of a similar nature to those set forth in the parts of the provision immediately preceding it. We have previously construed "or other" language that follows a string of similar acts and have concluded that the language in question was intended to be limited in scope — a similar conclusion to the one we reach today.

905 F.2d at 1270.

[297] *Roth v. United States*, 354 U.S. 476 (1957).

content qualifies only if it is "excessively violent." Merely asserting that the six specified categories "[a]ll deal with issues involving media and communications content regulation intended to create safe, family environments," does not make them sufficiently similar to justify the invocation of *eiusdem generis*, in part because the term "safe, family environment" itself has no clear legal meaning. Harassment, for example, obviously extends far beyond the concerns of "family environments" and into the way that adults, including in the workplace, interact with each other.

But in the end, this question is another red herring: whether *eiusdem generis* applies simply means asking whether Congress intended the term to be, in the *Reilly* decision's terms, "broad and all-inclusive" or "limited in scope."[298] This is, obviously a profound constitutional question: does the term "otherwise objectionable" protect an ICS provider's exercise of editorial discretion under the First Amendment or not? *Eiusdem generis* is a linguistic canon of construction, supporting logical inferences about the meaning of text; it is thus a far weaker canon than canons grounded in substantive constitutional principles. Here, the canon of constitutional avoidance provides ample justification for courts' interpretation of otherwise "objectionable" as "broad and all-inclusive":

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress .... 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues

[298] *Reilly*, 905 F.2d at 1270.

> not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.[299]

Finally, because of the First Amendment questions involved, it is unlikely that any court would apply the deferential standard of *Chevron* to an FCC rule reinterpreting "otherwise objectionable" narrowly.[300]

2. The "Good Faith" Standard Has Been Read to Be Consistent with the First Amendment and Should Remain So.

Above, we explain why NTIA's proposed five-prong definition of "good faith" creates a host of First Amendment problems.[301] Courts have avoided these problems by reading the "good faith" standard, like other parts of the statute, to ensure that the statute's protections are co-extensive with the First Amendment's protection of editorial discretion. Any other reading of the statute necessarily creates the kind of unconstitutional condition described above,[302] because the government would be making eligibility for protection dependent on an ICS provider surrendering some of its First Amendment rights.

That does *not* render the "good faith" standard a nullity. Anticompetitive *conduct* is not protected by the First Amendment; thus, media companies are *not* categorically immune

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[299] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). *Accord, Burns v. United States*, 501 U.S. 129, 138 (1991); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

[300] *See, e.g., U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999) ("It is seductive for us to view this as just another case of reviewing agency action. However, this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees, legislative mandates, and administrative interpretation is at the heart of our responsibility. This case highlights the importance of that role.").

[301] *See supra* at 45 *et seq*.

[302] *See supra* at 37-41.

from antitrust suit.[303] However, as the Tenth Circuit has noted, "the First Amendment does not allow antitrust claims to be predicated solely on protected speech."[304] Thus, antitrust suits against web platforms — even against "virtual monopolies" — must be grounded in economic harms to competition, not the exercise of editorial discretion.[305] For example, Prof. Eugene Volokh (among the nation's top free speech scholars) explains:

> it is constitutionally permissible to stop a newspaper from "forcing advertisers to boycott a competing" media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951). But the newspaper in *Lorain Journal Co*. was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. ***The* Lorain Journal Co. *rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers***.[306]

Critically, however, that the degree of a media company's market power does not diminish the degree to which the First Amendment protects its editorial discretion:

> the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a "substantial monopoly" could not be ordered to run a movie advertisement that it wanted to exclude, because "[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." *Associates & Aldrich Co. v. Times Mirror Co*., 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that, "[n]ewspaper publishers may refuse to publish whatever

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[303] Eugene Volokh and Donald Falk, First Amendment Protection for Search Engine Search Results — White Paper Commissioned by Google at 20-22 (April 20, 2012). UCLA School of Law Research Paper No. 12-22, https://ssrn.com/abstract=2055364.

[304] Jefferson County Sch. Dist. No. R-1 v. Moody's Investor Servs., 175 F.3d 848, 860 (10th Cir. 1999).

[305] "Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).

[306] Volokh, supra *note* 303, at 22 (emphasis added).

> advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).[307]

In addition to the antitrust laws, other claims grounded in the common law of competition could be grounds for showing that an ICS provider had acted in bad faith, and thus was ineligible for the (c)(2)(A) immunity. In such cases, the provider would be published for their anti-competitive conduct, not the exercise of editorial discretion.[308]

D. 230(c)(2)(B) Does *Not* Require "Good Faith" in Protecting Those Who Offer Tools for Content Removal for Others to Use.

As noted at the outset, Paragraph 230(c)(2) contains two distinct immunities. The (c)(2)(B) immunity protects those who "make available to information content providers or others the technical means to restrict access to material described in [(c)(2)(A)]." Thus, subparagraph (c)(2)(B) incorporates by reference the list ending in "or otherwise objectionable." What it plainly does *not* incorporate is Subparagraph's (c)(2)(A) "good faith" requirement, as the Ninth Circuit recently held.[309] While the NTIA Petition does explicitly not propose to reinterpret (c)(2)(B) to require good faith, it does cite the Ninth Circuit's confused decision in arguing for a narrower interpretation of "good faith" (perhaps taking for granted

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[307] *Id.* at 23.

[308] *See supra* note 250 (discussing *Mazur*, No. C 07-03967 MHP, at *14).

[309] *Enigma Software Grp. U.S.A v. Malwarebytes, Inc*., 946 F.3d 1040, 1052 (9th Cir. 2019).

that (c)(2)(B) require good faith).[310] TechFreedom amicus brief supporting Malwarebytes' petition for cert explains why the Ninth Circuit was mistaken.[311]

E. "Development of Information": When 230(c)(1) Should Apply.

NTIA proposes to redefine the line between an "interactive computer service" — the providers or users of which are covered by (c)(1) — and an "information content provider," which are never protected by (c)(1): "'responsible, in whole or in part, for the creation or development of information' includes substantively contributing to, modifying, altering, presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider."[312] Parts of this definition are uncontroversial: again, Section 230 has never applied to content that a website creates itself, so, yes, "adding special responses or warnings [to user content] appear to develop and create content in any normal use of the words."[313] There is simply no confusion in the courts about this. Similarly, "modifying" or "altering" user content may not be covered today, as the Ninth Circuit explained in *Roommates*:

> A website operator who edits user-created content — such as by correcting spelling, removing obscenity or trimming for length — retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality — such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to

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[310] Petition at 38.

[311] Brief for TechFreedom, as Amici Curiae on a Petition for Writ Certiorari in *Malwarebytes, Inc., v. Enigma Software Grp. U.S.A* 946 F.3d 1040, 1052 (9th Cir. 2019), June 12, 2012 https://techfreedom.org/wp-content/uploads/2020/06/TechFreedom_Cert_Amicus_Brief.pdf.

[312] Petition at 42 (quoting 47 U.S.C. § (f)(3)).

[313] *Id*. at 41.

> transform an innocent message into a libelous one — is directly involved in the alleged illegality and thus not immune.[314]

But then the Petition veers off into radically reshaping current law when it claims that "prioritization of content under a variety of techniques, particularly when it appears to reflect a particularly [sic] viewpoint, might render an entire platform a vehicle for expression and thus an information content provider."[315]

Once again, NTIA is trying to redefine the exercise of editorial discretion as beyond the protection of (c)(1), despite the plain language of that provision. What the Supreme Court said in *Miami Herald* is no less true of website operators: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.[316] As the Ninth Circuit has noted, "the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message."[317] NTIA is proposing a legal standard by which the government will punish digital media publishers for exercising that prerogative in ways this administration finds objectionable.

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[314] *Roommates*, supra note 125, 521 F.3d at 1169.

[315] Petition at 40.

[316] *Miami Herald*, 418 U.S. at 258; *see generally supra* at 28.

[317] *Batzel*, supra note 281,333 F.3d at 1031.

VI. Conclusion

NTIA's complaints are not really about Section 230, but about the First Amendment. The agency objects to the results of content moderation online, but the proposal leads down a dangerous road of politicized enforcement that ends in true censorship — *by the government* — not neutrality. However strongly anyone believes social media are biased against them, we all would do well to remember what President Reagan said when he vetoed legislation to restore the Fairness Doctrine back in 1987:

> We must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.[318]

By the same token, it may, in the sense of many of Justice Kennedy's grandiloquent pronouncements,[319] be true that "social media and other online platforms… function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[320] Yet this does not transform the First Amendment from a shield against government interference into a sword by which the government may to ensure "a diversity of viewpoints … in any particular medium, let alone in any particular [website]." If consumers believe bias exists, it

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[318] *See supra* note 85.

[319] For example, at the outset of his majority opinion in *Obergefell v. Hodges,* Justice Kennedy declared: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." 135 S. Ct. 2584, 2591 (2015). Justice Scalia, dissenting, responded: "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." Echoing Justice Scalia's many warnings about Justice Kennedy's lofty language, Justice Alito was quite right to caution against the very line NTIA quotes from Packingham as "undisciplined dicta." 137 S. Ct. at 1738*; see also supra* note 92.

[320] Petition at 7.

must be remedied through the usual tools of the media marketplace: consumers must vote with their feet and their dollars. If they do not like a particular social media service's practices, they have every right not to use it, to boycott advertisers that continue to buy ads on that service, etc. The potential for bias in editorial judgment is simply not a problem the First Amendment permits the government to address.

Rewriting, through regulation, Section 230, or even repealing it altogether, will not actually address the concerns behind the NTIA Petition or the President's Executive Order. Instead, NTIA's reinterpretation of the statute that has made today's Internet possible will simply open a Pandora's Box of politicized enforcement: if the FTC or a state AG may sue a social media site because it believes that site did not live up to its community standards, what would prevent elected attorneys general from either party from alleging that social media sites had broken their promises to stop harassment on their services by continuing to allow any president to use their service? The First Amendment would ultimately bar liability, but it would not prevent the proliferation of such claims under the theories NTIA espouses.

Because the Constitution forbids what NTIA seeks, NTIA's petition should never have been put out for public comment in the first place. Because the FCC lacks statutory authority to issue rules reinterpreting Section 230, it should dismiss the petition on those grounds without creating further confusion about the First Amendment and consumer protection law.

Respectfully submitted,

_____/s/_____

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Suite #205
Washington, DC 20002

CERTIFICATE OF SERVICE

I, Berin Szóka, hereby certify that on this 2nd day of September, 2020, a copy of the foregoing "Comments of TechFreedom" have been served by Fedex, postage prepaid, upon the following:

Douglas Kinkoph
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

_____/s/_____
Berin Szóka
110 Maryland Ave NE
Suite #205
Washington, DC 20002

NATIONAL TAXPAYERS UNION

September 2, 2020

Federal Communications Commission
Consumer and Governmental Affairs Bureau
445 12th Street SW
Washington, D.C. 20554

RE: RM-11862, "Section 230 of the Communications Act of 1934"

Introduction

On behalf of National Taxpayers Union (NTU), I write in response to the Federal Communications Commission's invitation for public input on the Department of Commerce's Petition for Rulemaking regarding Section 230 of the Communications Decency Act of 1996.[1] NTU urges the Commission to reject the Department's recommendations for changes to Section 230, which we believe would improperly substitute regulatory overreach for Congressional action and do substantial harm to the numerous platforms that millions of Americans rely on every day. We urge the Commission to take no further action on the Department's petition, thereby leaving most of the debate over Section 230 to Congress - the proper venue for such discussions.

NTU's Stake in Technology and Telecommunications Policy

NTU has been the leading advocate for America's taxpayers since 1969, predating most of the platforms discussed below. Technology and telecommunications policy broadly - and more recently, Section 230 specifically - have long been a core part of our goals and priorities:

- Light-touch regulatory policy at the federal and state levels enables companies, workers, and entrepreneurs to grow and thrive, and this is true of the technology and information services sectors more than most. Section 230 is properly called 'the twenty-six words that created the Internet,'[2] and represents a rare area of federal policymaking restraint that has brought immeasurable growth to the American economy and innumerable benefits to society.
- Heavy-handed regulation, especially when handed down by federal bureaucrats, creates deadweight loss in the affected sectors and erects barriers to entry for would-be entrants to a new and/or thriving market. This adversely impacts competition, raising costs for consumers and taxpayers.

[1] NTU uses "Federal Communications Commission," "FCC," and "the Commission" interchangeably throughout this comment. NTU also uses "Department of Commerce" and "the Department" interchangeably throughout this comment.
[2] "The Twenty-Six Words That Created the Internet." Jeff Kosseff. Retrieved from: https://www.jeffkosseff.com/home (Accessed August 31, 2020.)

- Technological advancement has saved government agencies time and money, notwithstanding the challenges many bloated bureaucracies face in modernizing and updating their digital infrastructure. Policymaking that chokes off or slows innovation and growth, in turn, impacts taxpayers when the public sector cannot provide similar speed, reliability, and efficiency in goods or services as the private sector - and history has shown the public sector almost never can.

Therefore, NTU is invested in policies that support robust private technology and information services sectors, which benefit tens of millions of consumers and taxpayers across the country every single day. Threats to Section 230 are threats to all of the progress made in the Internet age, just one major reason why NTU is deeply concerned with the Department of Commerce's petition for rulemaking recently submitted to the FCC.[3]

The Department's Recommendations Would Represent an Improper Use of Regulatory Authority

Though NTU will argue against the Department's recommendations on the merits below, we believe that the Commission should reject the Department's petition out of hand because the Department's recommendations would represent an improper use of regulatory authority by the Commission.

Most of the recommendations made by the Department appear to substitute hasty but significant regulatory overreach for deliberative and measured policymaking in Congress, the venue where debates over Section 230 belong. At one point in the petition, the Department argues:

> "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation [of the law]."[4]

Section 230's text does not permit the Commission's wholesale *re*implementation or reinterpretation of the statute, though, and 24 years after its passage at that. The Department is correct that the Internet has changed dramatically since the Communications Decency Act of 1996 became law.[5] The expansion of the Internet in that time, though, does not automatically expand either the Commission's regulatory authorities or the Department's authorities.

The Department argues at another point:

> "Congress did not intend a vehicle to absolve internet and social media platforms—which, in the age of dial-up internet bulletin boards, such as Prodigy, did not exist—from all liability for their editorial decisions."[6]

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[3] National Telecommunications and Information Administration. (July 27, 2020). "Petition for Rulemaking of the National Telecommunications and Information Administration." Retrieved from: https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (Accessed August 31, 2020.)
[4] *Ibid*., page 17.
[5] *Ibid*., page 9.
[6] *Ibid*., page 21.

This reading of Congressional intent may or may not be correct. Even if the Department is correct in its interpretation here, though, that does not give the Department or the Commission the ability to create or assemble a *separate* "vehicle" - one that would, in the Department's estimation, *not* "absolve internet and social media platforms … from all liability for their editorial decisions." Such a vehicle, if desired, would have to be assembled by Congress.

Lastly, the Department writes that:

> "The Commission's expertise makes it well equipped to address and remedy section 230's ambiguities and provider greater clarity for courts, platforms, and users."[7]

The Commission certainly has plenty of expertise on telecommunications matters, and NTU has worked productively with the Commission on several initiatives recently. However, that still does not allow the Commission (or the Department) the license to wholesale reinterpret or reimplement portions of the law that were enacted a quarter-century ago. If Congress wanted the Commission's rulemaking assistance here, and we assume they would, then lawmakers could write a bill that gives the Commission a role in modifying or reinterpreting Section 230. The Department cannot compel the Commission to do so just because the Department would like to see the law treated in a different manner.

The Department's Recommendations Would Do Substantial Harm to the Digital Economy and the Free Movement of Ideas on Digital Platforms

Notwithstanding NTU's belief that neither the Commission nor the Department has the authority to completely reinterpret Section 230 of the Communications Decency Act, we must challenge some of the assumptions and recommendations the Department makes throughout their petition.

Many of the Department's Statements Are Contradictory

The Department states near the beginning of their petition:

> "Since its inception in 1978, NTIA has consistently supported pro-competitive, proconsumer telecommunications and internet policies."[8]

Unfortunately, none of the Department's proposed remedies would be pro-competitive or pro-consumer. By proposing to enact new and significant regulatory burdens on digital companies, the Department erects barriers to entry for would-be competitors to existing technology companies. By raising the cost of regulatory compliance for new and existing companies, the Department's recommendations also risk raising the cost of goods and services for consumers and taxpayers.

In defending the burdensome standards the Department proposes for assessing platforms' content moderation, they complain that the courts have:

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[7] *Ibid*., page 28.
[8] *Ibid*., page 3.

> "...extend[ed] to platforms a privilege to ignore laws that every other communications medium and business must follow and that are no more costly or difficult for internet platforms to follow than any other business."[9]

In dismissing any added burdens the Department proposes for technology companies, though, they contradict a plain fact acknowledged by the Department earlier in their petition: that both manual and automated content moderation require "immense resources."

> "Online platforms like Twitter, Facebook, and YouTube have content moderation at the heart of their business models. Unlike the early internet platforms, they have invested immense resources into both professional manual moderation and automated content screening for promotion, demotion, monetization, and removal."[10]

Either content moderation is a low and easy standard for any company to meet, even if it requires reviewing millions of pieces of content per day, or it is a tremendous financial and logistical burden that requires significant resources. NTU would argue it is the latter, but at minimum it cannot be both. Therefore, the Department's argument that their proposed standards for technology companies are easy to meet - an argument it makes throughout the petition - makes little sense.

Elsewhere in the petition, the Department's proposed remedy of more "transparency" from technology platforms seems to contradict their proposed definition for what makes a platform "responsible, in whole or in part, for the creation or development of information."[11] The Department argues that defining a "[g]ood faith effort" from technology companies moderating their platforms "requires transparency about content moderation disputes processes." However, the Department also proposes a far more rigorous standard for when "an interactive computer service becomes an information content provider" and loses Section 230 immunity, a standard in which any service "commenting upon, or editorializing about content provided by another information content provider" becomes responsible for the information. This could create a scenario where a platform, such as Facebook or Twitter, providing the public with *transparent* information about why they moderated a piece of content from a public figure, could be seen as "commenting upon" the content and, therefore, becoming an "information service provider" partially or fully responsible for the content. It seems the Department is asking for more transparency, but also warning technology platforms that more transparency could strip them of Section 230 liability protections.

The Department's Proposed Remedies Would Harm the Digital Economy and the Free Movement of Ideas

More important than the contradictions above are the proposed changes to the Commission's interpretation of Section 230 that would significantly expand platform liability and kneecap the digital economy in the middle of America's economic recovery.

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[9] *Ibid*., page 25.
[10] *Ibid*., page 13.
[11] *Ibid*., page 42.

The Department proposes, among other items, 1) narrowing Section 230(c)(1) protections, so that they only "[apply] to liability directly stemming from the information provided by third-party users," 2) limiting the definition of "otherwise objectionable" content that platforms can moderate in the law to, essentially, "obscene, violent, or otherwise disturbing matters," 3) making Section 230 protections conditional on all sorts of "transparency" measures not otherwise prescribed by law, and 4) narrowing the law's definition of what makes a content platform a "speaker or publisher."[12] The Department is requesting a significant distortion of a quarter-century old law, and asking the Commission to do so by regulatory fiat. This is contradictory to this Administration's deregulatory agenda, and - as mentioned above - the Commission is an improper venue for such changes.

NTU has also written before about how changes like those mentioned above are counterproductive even if proposed through proper channels like legislation:

> "[Sen. Josh] Hawley's legislation [S. 1914] would hold Section 230 liability protections for internet services hostage to a cumbersome and vague regulatory process, which is deeply troubling. While details of what the Trump administration would do are not exactly clear, moving in the same policy direction of the Hawley bill would be extremely ill-advised. Such proposals undermine a prudent legal provision that has helped the internet flourish and grow in the last several decades. A thriving internet, in turn, has brought countless benefits to American consumers, workers, and taxpayers."[13]

NTU wrote this roughly a year ago. Now that details of what the Administration would do are clear, we are even more concerned than we were when efforts to change Section 230 through regulation were merely theoretical.

More broadly, as a coalition of civil society organizations, including NTU, wrote in July 2019:

> "Section 230 encourages innovation in Internet services, especially by smaller services and start-ups who most need protection from potentially crushing liability. The law must continue to protect intermediaries not merely from liability, but from having to defend against excessive, often-meritless suits—what one court called 'death by ten thousand duck-bites.' Without such protection, compliance, implementation, and litigation costs could strangle smaller companies even before they emerge, while larger, incumbent technology companies would be much better positioned to absorb these costs. Any amendment to Section 230 that is calibrated to what might be possible for the Internet giants will necessarily mis-calibrate the law for smaller services."[14]

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[12] *Ibid*.
[13] Lautz, Andrew. "The Trump Administration Should Do No Harm to Section 230." National Taxpayers Union, August 23, 2019. Retrieved from: https://www.ntu.org/publications/detail/the-trump-administration-should-do-no-harm-to-section-230
[14] "Liability for User-Generated Content Online: Principles for Lawmakers." National Taxpayers Union, July 11, 2019. Retrieved from: https://www.ntu.org/publications/detail/liability-for-user-generated-content-online-principles-for-lawmakers

The Department's proposed changes to Section 230 would be a miscalibration for both larger and smaller services, but the impacts of these regulatory changes might be most harmful to small, up-and-coming technology platforms. By choking off opportunities to grow and thrive in the Internet era, the Department's proposed changes would do significant harm to the digital economy, consumers who benefit from digital platforms, and taxpayers who benefit from more efficient and effective technology in government.

Conclusion

NTU urges the FCC to reject the Department of Commerce's recommendations. Gutting Section 230 is a counterproductive and harmful move in any venue, but it is particularly misplaced for the Department to suggest doing so through regulation rather than in legislation. Both process and substance matter here, and the Department's proposed changes would violate prudent policymaking in both. Section 230 has been vital to the growth of innovative and often free services provided by America's digital economy, and significant changes to this bedrock law could have multibillion-dollar impacts on companies, workers, consumers, and taxpayers. We urge the Commission to avoid major adjustments to the law.

Sincerely,

Andrew Lautz
Policy and Government Affairs Manager

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	
	)	

To: The Commission

COMMENTS BY NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE AND RANKING DIGITAL RIGHTS URGING DENIAL OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

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September 2, 2020

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	
	)	

To: The Commission

COMMENTS BY NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE AND RANKING DIGITAL RIGHTS URGING DENIAL OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

Introduction

New America's Open Technology Institute (OTI) and Ranking Digital Rights (RDR) appreciate the opportunity to submit a statement in response to the Petition for Rulemaking of the National Telecommunications and Information Administration (NTIA). OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technologies that are open and secure, and their benefits. RDR works to promote freedom of expression and privacy on the internet by creating global standards and incentives for companies to respect and protect users' rights. We support and defend the right to privacy and freedom of expression, and press internet platforms to provide greater transparency and accountability around their operations, technologies, and impacts. For the reasons outlined below, we urge the Commission to deny the petition on the grounds that the petition does not warrant consideration and the Commission should not proceed further in the rulemaking process.[1]

We support many of the statements in NTIA's petition regarding the importance of safeguarding free expression online, including where it states, "Only in a society that protects free expression can citizens criticize their leaders without fear, check their

[1] 47 C.F.R. § 1.401(e) (2007)

excesses, and expose their abuses."[2] Further, we agree with the NTIA that "times have changed"[3] since the passage of Section 230 of the Communications Decency Act of 1996, and the internet ecosystem now reflects a diversity of opinions across a myriad of online platforms. However, any further consideration of NTIA's petition would improperly broaden the statutory authority of the Commission, violate the First Amendment, and chill the free speech of users online. The NTIA's petition seeks to censor, not protect, the freedom of expression of users. To ensure that our governing institutions maintain their proper and constitutionally valid roles in our democratic system, the Commission should deny this petition.

I. The Commission lacks statutory authority to promulgate a Section 230 rulemaking.

A. NTIA's assertion that social media platforms are information services subject to FCC rulemaking is incorrect and inconsistent with FCC precedent.

The Commission should deny the NTIA petition because it is inconsistent with the Title I authority over information services[4] and contradicts previous Commission statements on Section 230. The Commission has never interpreted Section 230 as a grant of rulemaking authority and has repeatedly asserted the opposite position, both in litigation and in agency orders. The NTIA petition's classification of social media platforms as information services is incorrect, and the claims the petition makes about the Commission's authority to regulate social media are inaccurate and inconsistent with Commission precedent.

The NTIA's claim that the definition of "interactive computer services" in Section 230(f)(2) classifies such services as "information services" is in direct conflict with the text of the statute, which actually says the opposite. The statutory definition includes "information service" in a list with "system" and "access software provider" as types of services that can be "interactive computer services" if they satisfy the rest of the definition.[5] Therefore, information services can also be interactive computer services, but it does not follow that all interactive computer services are always information

[2] Petition for Rulemaking, RM-11862 (filed July 27, 2020) ("NTIA Rulemaking Petition"), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[3] *Id.*
[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-163).
[5] 47 USC § 230(f)(2). "The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

services. The Commission declined to classify edge providers, including social media, as "information services" in the Restoring Internet Freedom Order.

Moreover, in the Restoring Internet Freedom Order, the Commission repeatedly asserted that Section 230 could not provide the basis for rulemaking. The Commission reclassified broadband Internet access service as an information service rather than a telecommunications service to justify a deregulatory policy, interpreting the 1996 act to confirm "Congress's approval of our preemptive federal policy of nonregulation for information services."[6] And the Commission agreed with the D.C. Circuit opinion stating that section 230(b) is a "statement [] of policy that [itself] delegate[s] no regulatory authority."[7] The Commission has abdicated its authority on net neutrality by reclassifying broadband Internet access service under Title I information service, therefore to claim regulatory authority now over information services is inconsistent with agency precedent.

B. Congressional silence does not grant the Commission rulemaking authority.

The Commission should deny NTIA's petition because Congress has not delegated authority to the Commission to promulgate regulations on Section 230. NTIA claims that Congress's silence on the issue implies delegated authority, but this argument is not supported and is, in fact, contradicted by case law.[8] OTI and RDR agree with Commissioner Starks that "NTIA has not made the case that Congress gave the FCC any role here."[9]

NTIA claims that the Commission has appropriate authority to promulgate rules related to Section 230 because Congress failed to explicitly say that it did not have authority to do so.[10] NTIA assumes that Congress must explicitly state when it has not delegated authority to the Commission, and concludes that because "Congress did not

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[6] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 at 122 (2017).
[7] *Id*. at 171.
[8] *See, e.g., Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.), amended, 38 F.3d 1224 (D.C. Cir. 1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995) ("We refuse ... to presume a delegation of power merely because Congress has not expressly withheld such power.").
[9] William Davenport, *COMMISSIONER STARKS STATEMENT ON NTIA'S SECTION 230 PETITION*, Federal Communications Commission (July 27, 2020), https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf.
[10] NTIA Rulemaking Petition at 17 ("[n]either section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude . . . the presumption that the Commission has power to issue regulations under section 230.").

do so ...[it] opens an ambiguity in section 230 that the Commission may fill pursuant to its section 201(b) rulemaking authority."[11] The petition ignores the body of case law that consistently rejects this argument.

The D.C. Circuit has rejected earlier attempts by the Commission to derive implied authority from Congressional silence.[12] In *MPAA v. FCC*, the question was whether, in addition to its statutory mandate to issue closed captioning regulations, the Commission had been delegated authority by Congress "to promulgate visual description regulations."[13] The Court rejected the Commission's argument that "the adoption of rules ... is permissible because Congress did not expressly foreclose the possibility," calling it "an entirely untenable position."[14] The D.C. Circuit held that Congress could have decided to provide the Commission with authority to adopt rules and that the statute's "silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations."[15] Likewise, in *ALA v. FCC*, the Court rejected the Commission's broadcast flag regulations because they had "no apparent statutory foundation and, thus, appear[ed] to be ancillary to nothing."[16]

Congressional silence on the FCC's authority is a reflection of the nature of Section 230. The statute is self-executing because it is a grant of immunity from civil liability that is enforced through private litigation. Congress did not mention the Commission in Section 230 because, unlike other statutes the Commission enforces, implements, and oversees, it does not require agency action to implement or enforce. The Commission has never had a role in implementing or enforcing Section 230, and it would be inaccurate to use Congressional silence to read one into the statute now.

II. NTIA's draft regulation language seeks to create content-based regulation that poses grave threats to First Amendment protections.

NTIA's goal of having federal regulations dictate what type of content interactive computer services can host or remove to benefit from Section 230's liability shield would amount to content-based regulation that likely violates the First Amendment. As the Court has said, "Content-based laws -- those that target speech based on its communicative content -- are presumptively unconstitutional and may be justified only if

[11] *Id*.
[12] *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796 (D.C. Cir. 2002).
[13] *Id*. at 801.
[14] *Id*. at 805.
[15] *Id*. at 806.
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the government proves that they are narrowly tailored to serve compelling state interests."[17]

NTIA, through its proposed regulations, attempts to protect a certain type of content from being removed by interactive computer services. Specifically, the proposed regulations remove an interactive computer service's classification as a publisher when it "restricts access or availability" of content. This classification is a core part of the Section 230 liability shield[18] and removing this shield for certain actions would push services to avoid removing content, including posts that violate their own terms of services. In essence, NTIA's proposal would prescribe the limited conditions for when a service can benefit from a liability shield and when it can be subject to liability for its decisions concerning user-generated content. By attempting to dictate when liability attaches to a certain type of content moderation action by platforms, the proposed regulation amounts to content-based restrictions that run afoul of the First Amendment.[19] Even if the NTIA or the Commission are able to establish a compelling state interest, such content-based regulations will likely be found unconstitutional since the path to regulating speech here is not narrowly-tailored.

III. The Commission's rulemaking would chill free speech of internet users.

While NTIA's petition purports to advance the cause of freedom of expression for American internet users, if the Commission accepts the petition for rulemaking this would instead chill user speech by enabling the targeted harassment of members of protected classes, by disincentivizing platforms from moderating most types of user content, and by raising the specter of government surveillance, censorship, and reprisal.

NTIA contends that social media platforms moderate user speech in a manner that is "selective censorship."[20] Many of the anecdotes put forth as evidence of ideological bias concern the removal either of user speech that threatens, harasses, or intimidates other users on the basis of their membership in a protected class, or of factually incorrect information about the voting process among other topics.[21] The first type of speech is intended to, and frequently has the effect of, driving members of protected classes away from the social media "public square" and chilling their speech, while the second is intended to dissuade Americans from exercising their constitutionally protected right to vote. The NTIA's petition appears to be designed to

[17] Reed v. Town of Gilbert, Ariz. 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015).
[18] Domen v. Vimeo 433 F. Supp 3d 592, 601 (S.D.N.Y. 2020).
[19] Matal v. Tam 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017) "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'").
[20] NTIA Rulemaking Petition at 7.
[21] NTIA Rulemaking Petition at 25, 43-44.

prevent social media platforms from moderating such objectionable content. But this would have the effect of first, disproportionately chilling the speech of members of protected classes in service of enabling other speakers to engage in threatening, harassing, and intimidating speech, and second, of reducing voter participation by sowing doubts about the legality of absentee ballots distributed through the mail.

NTIA's petition urges adoption of rules that would enable harassment and deliberate disinformation -- two types of content that many platforms currently prohibit -- and diminish the voices of members of protected classes. First, the petition urges the FCC to clarify that "section 230(c)(1) applies to liability directly stemming from the information provided by third-party users" and that it "does not immunize a platforms' own speech, its own editorial decisions or comments, or its decisions to restrict access to content or its bar user from a platform."[22] In other words, under NTIA's proposal, interactive computer services would be open to lawsuits when they remove a user's speech for running afoul of the company's terms of service, or when they append a "fact check" or other supplementary information to a user's original post. These rules would create an incentive for platforms to avoid enforcing their rules against users they believe are likely to file suit, regardless of the underlying merits of such litigation. This is precisely the scenario that Section 230 was enacted to avoid.

Second, the petition urges the FCC to redefine "otherwise objectionable" in section 230(3)(b) in a way that strictly limits the content that platforms can moderate without risking litigation. Specifically, NTIA wants the meaning of "otherwise objectionable" to be limited to "obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." This proposed definition would disincentive platforms from removing harmful content that the original drafters of Section 230 in 1996 could never have foreseen, content that was originally covered by the current category of "otherwise objectionable." NTIA seeks to remove the immunity shield that applies whenever platforms take down or fact-check misinformation and disinformation around voting or Census participation, as well as racist comments that are not deemed to rise to the level of "harassing" an individual. As a result, individuals who belong to a protected class would have their voices in the digital space diminished because services fear that removing or fact-checking such negative material will open them to lawsuits.

Third, conditioning Section 230 immunity on a service's ability to demonstrate that a content moderation action meets the standard set by the proposed definition of "good faith" would incentivize companies to refrain from moderating user content in order to avoid burdensome litigation. Most concerningly, the proposed standard would require companies to achieve perfect consistency in the enforcement of their content

[22] NTIA Rulemaking Petition at 30.

rules against “similarly situated” material.[23] This bar would be extremely difficult, if not impossible, to achieve at a global scale and proving compliance with this metric in litigation would be very costly. Again, this is precisely the scenario that Section 230 was intended to avoid, and it would be inappropriate for the FCC to circumvent the will of Congress by engaging in the rulemaking urged by the NTIA petition.

More generally, even the perception of governmental monitoring and regulation of citizen speech has demonstrated chilling effects. A 2016 study found that simply being aware of government monitoring "significantly reduced the likelihood of speaking out in hostile opinion climates."[24] Similarly, a 2017 study confirmed not only that various types of government intervention causes chilling effects, but also “that younger people and women are more likely to be chilled; younger people and women are less likely to take steps to resist regulatory actions and defend themselves; and anti-cyberbullying laws may have a salutary impact on women’s willingness to share content online suggesting, contrary to critics, that such laws may lead to more speech and sharing, than less.”[25]

IV. Conclusion

The Commission should cease to go any further in considering this petition. If Congress wanted to delegate authority to the FCC to make rules defining Section 230, it could do so. Instead, Congress wrote 230 in a way that has been implemented and enforced for decades without the involvement of the FCC. Section 230 is a self-executing statute because it is a grant of immunity from civil liability that is enforced through private litigation. The FCC has never had a role in implementing or enforcing Section 230, and it would be inaccurate to read one into the statute now. Further, NTIA’s proposal would violate the First Amendment by imposing a content-based regulation that picks and chooses what type of content provides interactive computer services with an immunity shield and what type of editorial discretion opens them up to liability. Finally, by disincentivizing social media platforms from removing harmful content that threatens or negatively impacts marginalized communities, NTIA’s proposal would chill the speech of those who are members of a protected class.

Therefore, OTI and RDR urge the Commission to deny NTIA’s petition. For the reasons outlined in these comments, the Commission has no reason to move forward with the petition or seek public comment on this matter.

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[23] NTIA Rulemaking Petition at 39.
[24] Elizabeth Stoycheff, Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring, 93 J.ism & Mass Comm. Q. (2016).
[25] Jonathon W. Penney, Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study, 6 Internet Pol’y Rev. (2017).

Respectfully submitted,

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Washington, D.C. 20005

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	
	)	

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excesses, and expose their abuses."[2] Further, we agree with the NTIA that "times have changed"[3] since the passage of Section 230 of the Communications Decency Act of 1996, and the internet ecosystem now reflects a diversity of opinions across a myriad of online platforms. However, any further consideration of NTIA's petition would improperly broaden the statutory authority of the Commission, violate the First Amendment, and chill the free speech of users online. The NTIA's petition seeks to censor, not protect, the freedom of expression of users. To ensure that our governing institutions maintain their proper and constitutionally valid roles in our democratic system, the Commission should deny this petition.

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services. The Commission declined to classify edge providers, including social media, as "information services" in the Restoring Internet Freedom Order.

Moreover, in the Restoring Internet Freedom Order, the Commission repeatedly asserted that Section 230 could not provide the basis for rulemaking. The Commission reclassified broadband Internet access service as an information service rather than a telecommunications service to justify a deregulatory policy, interpreting the 1996 act to confirm "Congress's approval of our preemptive federal policy of nonregulation for information services."[6] And the Commission agreed with the D.C. Circuit opinion stating that section 230(b) is a "statement [] of policy that [itself] delegate[s] no regulatory authority."[7] The Commission has abdicated its authority on net neutrality by reclassifying broadband Internet access service under Title I information service, therefore to claim regulatory authority now over information services is inconsistent with agency precedent.

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More generally, even the perception of governmental monitoring and regulation of citizen speech has demonstrated chilling effects. A 2016 study found that simply being aware of government monitoring "significantly reduced the likelihood of speaking out in hostile opinion climates."[24] Similarly, a 2017 study confirmed not only that various types of government intervention causes chilling effects, but also “that younger people and women are more likely to be chilled; younger people and women are less likely to take steps to resist regulatory actions and defend themselves; and anti-cyberbullying laws may have a salutary impact on women’s willingness to share content online suggesting, contrary to critics, that such laws may lead to more speech and sharing, than less.”[25]

IV. Conclusion

The Commission should cease to go any further in considering this petition. If Congress wanted to delegate authority to the FCC to make rules defining Section 230, it could do so. Instead, Congress wrote 230 in a way that has been implemented and enforced for decades without the involvement of the FCC. Section 230 is a self-executing statute because it is a grant of immunity from civil liability that is enforced through private litigation. The FCC has never had a role in implementing or enforcing Section 230, and it would be inaccurate to read one into the statute now. Further, NTIA’s proposal would violate the First Amendment by imposing a content-based regulation that picks and chooses what type of content provides interactive computer services with an immunity shield and what type of editorial discretion opens them up to liability. Finally, by disincentivizing social media platforms from removing harmful content that threatens or negatively impacts marginalized communities, NTIA’s proposal would chill the speech of those who are members of a protected class.

Therefore, OTI and RDR urge the Commission to deny NTIA’s petition. For the reasons outlined in these comments, the Commission has no reason to move forward with the petition or seek public comment on this matter.

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[23] NTIA Rulemaking Petition at 39.

[24] Elizabeth Stoycheff, Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring, 93 J.ism & Mass Comm. Q. (2016).

[25] Jonathon W. Penney, Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study, 6 Internet Pol’y Rev. (2017).

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via UPS upon:

Douglas Kinkoph
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Performing the Delegated Duties of the Assistant Secretary
for Commerce for Communications and Information

/s/ Christine Bannan
Christine Bannan
Policy Counsel
New America's Open Technology Institute

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	
National Telecommunications and Information Administration Petition to "Clarify" Provisions of Section 230 of the Communications Act of 1934, as Amended	RM 11862

COMMENTS OF PUBLIC KNOWLEDGE

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September 2, 2020

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I. Introduction

The National Telecommunications and Information Administration (NTIA), at the direction of President Donald Trump, has asked the FCC to "clarify" a statute the Commission has no role in administering, in a way that contradicts the unambiguous, plain meaning of the text. Its petition must be rejected.

At its core Section 230, 47 U.S.C. § 230, is about promoting free speech online. It allows platforms to host user content without fear of becoming liable for everything their users write. It also allows platforms to take down content they find objectionable, which encourages free speech by allowing multiple platforms to develop and to create spaces where particular viewpoints and voices can be heard, or where multiple voices and views can be heard. There are of course legitimate debates to be had about the interpretation of Section 230 in some cases, and even ways it could be amended. But this is not the right place for that. The FCC does not administer this statute, has been assigned no role in doing so, and its opinions about its meaning would and should be given no weight by the courts. In any event the construction the NTIA has asked the FCC to give Section 230 contradicts its plain meaning and is likely unconstitutional, seeking to punish companies for taking points of view that the current administration disagrees with.

The NTIA's recommendations are also bad policy. Online platforms cannot and should not necessarily be "neutral., although some may choose to do so. While platforms that seek to have mass market appeal naturally have an incentive to be welcoming to a wide range of points of view on various controversial matters, they also have an incentive to weed out hate speech, obscenity, extremism, misinformation, and many other kinds of content, which may be constitutionally protected. *See* 47 U.S.C. 230(c)(2) (granting

immunity to providers and users of interactive computer services for removing or limiting access to material "whether or not such material is constitutionally protected"). If followed, the NTIA's view of how platforms should moderate content would turn them into something like common carriers, a concept that makes sense for some transmission, delivery and infrastructure companies but as applied to online speech platforms could lead to their being overrun with extremist content, abuse, and pornography. Or, it would turn them into dull wastelands where all user content had to be approved prior to publication, eliminating the vibrancy and dynamism of online discourse.

While these high-level concerns are interesting and worthy of discussion in the correct forum, this comment will focus particularly on the FCC's lack of jurisdiction to create rules "clarifying" Section 230.

II. Congress Has Not Delegated Authority Over Section 230 to the FCC

Congress may give agencies the power to administer a statute by issuing rules to fill in "gaps" either explicitly or implicitly. *Morton v. Ruiz*, 415 US 199, 231 (1974). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron USA v. Natural Resources Defense Council*, 467 US 837 (1984). However, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit," *id.*, and "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco*, 529 US 120, 159 (2000).

Congress has not delegated rulemaking or interpretive authority to the FCC over Section 230 either explicitly or implicitly. The NTIA's attempts to argue otherwise are unavailing.

A. There Has Been No Explicit Delegation

While Section 230 is codified in the Communications Act for reasons having to do with its legislative history,[1] this does not mean that the FCC has any role in implementing or interpreting the statute. NTIA has it exactly backwards when it states the FCC has authority because "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has the power to issue regulations under Section 230." NTIA Petition 17. The law is that "[t]he FCC may only take action that Congress has authorized," not merely just those actions it has not forbidden." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir.) (Kavanaugh, J.)) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)). *Accord: Motion Picture Ass'n of America, Inc. v. FCC*, 309 F. 3d 796, (DC Cir. 2002) ("*MPAA*") (When Congress declined to give the Commission authority to adopt video description rules, "This silence cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the … regulations.").

Because Congress has not expressly delegated any interpretive authority to the FCC with respect to this provision, even if the agency were to pronounce upon its meaning, courts would owe it no deference. As the Supreme Court explained in *United States v. Mead,*

[1] Section 230 was an amendment to the Communications Decency Act, itself Title V of the Telecommunications Act of 1996, amending the Communications Act of 1934.

"We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." 533 US 218, 229. Such authorization is absent here.

1. Section 201(b) Does Not Grant the FCC Authority to Change the Meaning of Section 230

The NTIA rests much of its argument for FCC authority on Section 201(b) of the Communications Act, which states in part that "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." Section 201 in general gives the FCC broad authority over the services and charges of common carriers not over the "interactive computer services" Section 230 is concerned with. By itself this provides reason enough to disregard the NTIA's attempt to bootstrap FCC authority over online services. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). *See also Gonzales v. Oregon*, 546 U.S. 243, 263 (2006) ("it is not enough that the terms 'public interest,' 'public health and safety,' and 'Federal law' are used in the part of the statute over which the Attorney General has authority.")

But even looking past the context of the language the NTIA puts so much weight on, and considering the language in isolation, the purported grant of rulemaking authority is no such thing, because the Commission has nothing whatever to do to "carry out" the provision. Section 230 concerns liability for various torts as litigated between private parties. The FCC has no role in this. The parties, and state and federal judges do. The FCC

may not interject its opinions into lawsuits that have nothing to do with its duties or jurisdiction merely because the President, via the NTIA, has asked it to.

Nor has the FCC seen any need to "carry out" this provision in the past through rulemakings or otherwise instead, as Blake Reid has documented, it has primarily cited to Section 230 as general evidence of federal technology policy, declining to use it as a direct source of authority. *See Blake Reid, Section 230 as Telecom Law*, https://blakereid.org/section-230-as-telecom-law (cataloging the FCC's scattered citations to this provision over the years). If the FCC was in fact charged by Congress in 1996 with "carrying out" this law, presumably it would have done so at some point, and its drafters would have wondered why it had not done so by now. *See Gonzales v. Oregon,* 546 at 257 (no deference due to agency when its sole rulemaking over decades is simply to "parrot" the statutory language in its regulations).

In a more fundamental sense, the NTIA's attempt to expand FCC authority by pointing to where the statute is codified is simply a version of the error made by the losing party in *City of Arlington*. There, the Court explained that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington, TX v. FCC*, 569 US 290, 297 (2013). Under this analysis the question before the agency is not whether it has "jurisdiction" over the matter in question but whether it is acting consistently with the statute. Even if successful, the NTIA's attempts to put this matter before the FCC do not in themselves give the FCC authority to act contrary to the plain meaning of the statute.

2. DC Circuit Precedent Forbids Imposing "Neutrality" Requirements on Interactive Computer Services

The NTIA's proposal would punish providers and users of interactive computer services for having a particular point of view as to what content is "objectionable." *See* NTIA Petition 37-38; 38-40. In other words, it imposes anti-discrimination and anti-blocking rules on interactive computer services, providing them with only a short list of types of content they may be permitted to block without incurring a legal penalty. The DC Circuit held that requirements of this kind amount to common carrier rules. *Verizon v FCC*, 740 F.3d 623, 628, 653-54 (DC Cir. 2014). As a policy matter common carriage is appropriate for some kinds of communication services, like telephony and broadband access, but imposing common carrier requirements on online speech platforms makes no more sense than imposing them on newspapers. Further, even with policy and sense aside, the DC Circuit has held it's illegal: it has interpreted the definition of "telecommunications carrier" in 47 U.S.C. 153(51), which includes the language that "A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services," to mean that the FCC can impose common carrier requirements *only* on services classified as telecommunications services. *Verizon* at 650. Interactive computer services are not so classified, of course, and could not be. This provides another reason for the FCC to reject the NTIA's request.[2]

[2] It is notable that following the NTIA's request would involve the FCC at least partially repealing the Restoring Internet Freedom Order, 33 FCC Rcd 311 (2017). Imposing any form of non-discrimination requirements on ISPs (who are included in the meaning of "interactive computer services" under Section 230), or even asserting jurisdiction over them, would constitute a significant departure from the current FCC's deregulatory approach.

3. The FCC Needs Express Authority to Regulate Content, Which It Lacks Here

The NTIA also seeks to have the FCC directly regulate the content of interactive computer services, an activity that the FCC cannot do without express statutory authority, which it lacks. In *MPAA,* the court held that where "the FCC promulgates regulations that significantly implicate program content" it cannot rely on a general grant of authority such as § 1 of the Communications Act (47 U.S.C. § 151). *MPAA* at 799, 803-04. Similarly here, even if Section 201 were viewed as a general grant of authority, the FCC lacks the specific grant of content-regulation authority that DC Circuit found it would need. The MPAA court is not alone in this. Other courts have also required the FCC to demonstrate clear statutory authority when it seeks to expand its purview to cover things other than the actual transmission of electronic communications. *See American Library Ass'n. v. FCC*, 406 F. 3d 689, 700 (DC Cir. 2005) (the FCC's "general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission"); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F. 2d 1397, 1400 (7th Cir. 1972) (FCC jurisdiction does not extend to activities that merely "affect communications" because this "would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature.")

B. There Has Been No Implicit Delegation

Congress has not implicitly delegated authority to the FCC to interpret Section 230, either. Implicit delegation occurs when the statute an agency is charged to administer contains ambiguous terms that must be resolved to give a statute effect. But while "*Chevron*

establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency," *Christensen v. Harris County*, 529 US 576, 590 (Scalia, J. concurring), there is no reason to think that Congress intended the FCC to "administer" Section 230. Further, the NTIA's attempts to concoct "ambiguity" where there is none fall short on their own terms. "The implausibility of Congress's leaving a highly significant issue unaddressed (and thus "delegating" its resolution to the administering agency) is assuredly one of the factors to be considered *in determining whether there is ambiguity*[.]" *Id. See also King v. Burwell*, 576 U.S. 473, 487 (2015) (because who should receive tax credits was "a question of deep 'economic and political significance' that is central to this statutory scheme" Congress would have assigned the decision to an agency "expressly.")

1. "Otherwise Objectionable" and "Good Faith" Are Not Ambiguous in this Context

While a subsequent section of this comment will explain in more detail how the NTIA's alleged understanding of the statute defies its plain meaning, here it is worth explaining that the phrases "otherwise objectionable" and "good faith" in 230(c)(2) are not ambiguous in a way that calls for or could support agency clarification.

"Otherwise objectionable" is a subjective term, not an ambiguous one. The fact that one platform might find content objectionable, and others might not, does not mean that the FCC (or even federal courts) can substitute their own judgment for the editorial, content moderation decisions of platforms. In fact, different platforms having different views as to what is an is not "objectionable" is exactly what is intended by Section 230, which seeks to foster "a true diversity of political discourse" on the internet as a whole across a multiplicity of forums (not to require the whole range of views within specific

private services, which remain free to draw the boundaries of acceptable discourse in their own way). It is a fundamental error to confuse a subjective standard with an "ambiguous" one.

In this context, "good faith" is not an ambiguous technical term, either it is a common law term of art that state and federal courts are accustomed to applying in a great variety of contexts. Article 3 federal courts are not crying out to the FCC for help in determining what "good faith" means in the context of litigation between private parties, which as discussed above, is what Section 230 addresses. The courts interpret this term in a variety of contexts as a matter of course, and generally employ a fact-specific approach that is not compatible with the simple interpretive rubric the NTIA provides. *See, e.g.*, *United States v. United States Gypsum*, 438 U.S. 422, 454-455 (1978) (discussing the "fact-specific nature" of a good faith inquiry in a different area of law); *Arenas v. United States Trustee*, 535 B.R. 845, 851 (10th Cir. BAP 2015) ("Courts evaluate a debtor's good faith case by case, examining the totality of circumstances."); *Alt v. United States*, 305 F.3d 413 (6th Cir. 2002) ("good faith is a fact-specific and flexible determination"); *Reserve Supply v. Owens-Corning Fiberglas*, 639 F. Supp. 1457, 1466 (N.D. Ill. 1986) ("[T]he inquiry into good faith is fact-specific, with the relevant factors varying somewhat from case to case.") Such legal determinations are the bread and butter of courts and the FCC has no helpful guidance to give, nor authority to do so. This is not a matter of determining what "good faith" means in complex areas fully subject to FCC oversight, such as retransmission consent negotiations, where the FCC itself, in addition to issuing rules, adjudicates the underlying disputes. *See* 47 C.F.R. § 76.65.

2. Circumstances Do Not Suggest That Congress Intended to Delegate Authority over Section 230 to the FCC

There are further reasons to conclude that the FCC has no authority to act on this matter. In *Brown & Williamson*, the Court explained that in some cases it is unlikely that Congress intended to delegate the resolution of major policy questions to agencies implicitly. In that case, the FDA "asserted jurisdiction to regulate an industry constituting a significant portion of the American economy." *FDA v. Brown & Williamson Tobacco*, 529 US 120, 159 (2000). Just as it was unlikely that Congress had delegated authority to the FDA to regulate the tobacco industry, here it is unlikely that Congress has delegated authority to regulate "interactive computer services" to the FCC, which are an even more significant portion of the economy. Given "the breadth of the authority" that NTIA would have the FCC seize for itself, the Commission must reject its "expansive construction of the statute" that goes far beyond Congressional intent and the words of the law itself. *Id.* at 160.

In *King v. Burwell*, the Court added that there was not likely to be delegation was when the agency has "no expertise in crafting" the policies purportedly delegated to it. 576 U.S. at 486 (Congress did not delegate authority over healthcare policy to IRS). Had Congress intended for the FCC to assert authority over the content moderation practices of online platforms and websites it would have said so explicitly. It did not, and there is no evidence it intended to.

This is especially clear in that the FCC has no particular expertise or experience in managing the moderation policies of interactive computer services. As mentioned above the FCC, in its various duties, has never relied on Section 230 as a direct source of rulemaking authority. Nor is it clear where in the FCC's internal structure organized by bureau into subject matters such as "Public Safety" and "Wireless Telecommunications"--

supervision of the content moderation practices of Twitter and Facebook would even fit. The FCC lacks the institutional capacity, history, staff, or resources to tackle the issues the NTIA wants to put before it. This is understandable because the FCC is a creature of Congress, and Congress never intended for it to take the sweeping actions the NTIA now requests. Because the FCC has no expertise in regulating internet content or liability generally, it is therefore "especially unlikely that Congress would have delegated this decision to" the FCC. *King v. Burwell,* 576 U.S. at 487.

Similarly, in *Gonzales v. Oregon*, the Supreme Court rejected the effort of the Attorney General to prohibit doctors in Oregon from prescribing drugs pursuant to the state's "assisted suicide" statute. The court reasoned that because Congress explicitly limited the Attorney General's power under the relevant statute to promulgate rules relating to the registration and control of controlled substances, the Attorney General could not use the statute's general permission to create rules "to carry out the functions under this act" to regulate physician behavior. *Gonzales v. Oregon*, 546 U.S. at 266-67 (2006). *Accord: MCI Telecommunications v. AT&T*, 512 U.S. 218 (1994) (presence of ambiguity does not allow FCC to assign meaning Congress clearly never intended).

III. NTIA's Proposed Statutory Construction is Contrary to Its Plain Meaning

NTIA's proposed interpretation of Section 230 is contrary to its plain meaning and has no support in its legislative history. Its errors are manifold. This comment will highlight only a few.

To begin with, 230(c)(1) and (c)(2) are not redundant as interpreted by the courts. *See Barnes v. Yahoo!*, 570 F. 3d 1096, 1105 (9th Cir. 2009). It is true that (c)(2) is primarily concerned with liability for takedowns, while (c)(1) more broadly provides immunity for

an interactive computer service, or user, from being treated as a publisher or speaker of third-party content. Because the activities of a "publisher" include decisions about what not to publish, actions that seek to hold a provider or user of an interactive computer service liable as a publisher on the basis of content removals do indeed fail under (c)(1). But (c)(2) is not just about torts that seek to hold a user or provider of an interactive computer service liable as a publisher or speaker. It is broader, in that it immunizes them from *all* causes of action, including those that have nothing to do with publishing or speaking. For example, an attempt to hold a provider of an interactive computer service liable for some sort of tortious interference with a contract because of its content removal choices might not fail under (c)(1), but could fail under (c)(2). Similarly with causes of action relating to the service providing users with tools they can use to restrict access to content they find objectionable. At the same time, (c)(2) is more limited than (c)(1) in that it (and, contrary to the NTIA's baseless assertion, not (c)(1) itself) is limited by a requirement that takedowns be done in good faith. While "good faith" is a term of art to be interpreted as the circumstances warrant by courts, this could mean, for example, that an antitrust case against a provider of an interactive computer service that removed access to a competitions' information as part of an unlawful monopolization scheme could proceed.

The NTIA claims that Section 230 has been interpreted to shield a platform from liability for its own content and asks for "specification" that this is not the case. NTIA Petition 5 (point 4). It also bizarrely claims that it has been interpreted to "provide[] full and complete immunity to the platforms for their own publications, … and affixing of warning or fact-checking statements." NTIA Petition 26. This is false and no cases support it. NTIA does not cite a single instance of a platform being shielded by Section 230 for its

own content because there are none. When Twitter labels one of the President's tweets as misinformation and explains why, it is the speaker of that explanation and is liable for it however hard it might be to imagine what the cause of action could possibly be. The context and explanation that Twitter adds to one of the President's tweets that contain false information about voting or other matters are not "information provided by another information content provider" under (c)(1). However, the fact that Twitter or any other service is liable for its own speech does not make these services liable for the speech of third parties, such as potentially tortious tweets by the President. The immunity granted by the plain words of (c)(1) is unconditional.

The NTIA claims that "Section 230(c)(1) does not give complete immunity to all a platform's 'editorial judgments.'" NTIA Petition 27. To the extent that this refers to the platform's own speech, this is trivially true. Section 230 does not shield a platform's own speech. But Section 230(c)(1) does provide complete, unqualified immunity to platforms with respect to the editorial choices they make with respect to third-party content even if those choices themselves are unavoidably expressive in nature.

Along these lines NTIA asks "at what point a platform's moderation and presentation of content becomes so pervasive that it becomes an information content provider and, therefore, outside of section 230(c)(1)'s protections." NTIA Petition 27-28. The answer to that question is "never." The "moderation and presentation" of content is simply another way of describing "publication," which the law shields. For example, an online forum for gun owners is free to delete any posts arguing for gun control, without becoming liable either for the content of the posts on this forum, or for its pro-gun point of view itself. This is necessarily entailed by 230(c)(1)'s plain statement that a user or

provider of an interactive computer service cannot be held liable as a *publisher* of third-party content. Editorial choices often involve expressing a point of view, either as to the content of a message or just quality. As *Zeran* held, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content are barred." *Zeran v. America Online*, 129 F. 3d 327, 333 (4th Cir. 1997).[3]

Section 230 embodies a policy choice, and it's a choice to treat providers and users of interactive computer services differently than any other publisher. It does not require computer services to be "neutral" if it did, it would not have immunized them from liability as publishers, as publishing is an expressive and non-neutral activity. An analogy to print publishers, who often express points of view, may help illustrate this. The New York Review of Books reissues many out-of-print books that it considers to be classics. Verso Books concentrates on left-wing titles. These two print publishers are engaged in expressive activity not just with their own speech (marketing materials and so forth) but with respect to the third-party speech they choose to amplify. Similarly, internet forums devoted to particular topics have a range of views they find acceptable, and dominant platforms have decided to take stands again election misinformation, COVID conspiracy

[3] The NTIA puts forward a bizarre interpretation of *Zeran* that, consistently with its overall approach to this issue, contradicts the language in question in such a basic way that the best way to rebut it is to simply quote the language back. The NTIA claims that this key quotation "refers to third party's exercise of traditional editorial function not those of the platforms." NTIA Petition 27. But the *Zeran* quotation, again, speaks of "lawsuits seeking to hold **a service provider** liable for **its exercise** of a publisher's traditional editorial functions." (Emphasis added.) It very clearly states that a platform can exercise editorial functions without incurring liability. Perhaps NTIA thinks that *Zeran* was wrongly decided but such an argument would run into Section 230's language which specifically permits interactive computer services to act as publishers, a function which necessarily includes editorial choices.

theories, anti-vax content, and racial hatred. Even without Section 230, most of these editorial choices would enjoy some level of First Amendment protection.[4] Section 230(c)(1) provides an additional level of protection for online platforms and their users, in order to facilitate online discourse and to avoid legal incentives that would discourage moderation and editorial choices. It states plainly that providers and users of interactive computer services cannot be held liable either for the content of the third-party speech they choose to amplify, or as "publishers," which includes expressing a point of view about third-party speech they find worthy, or objectionable. If NTIA disagrees with this policy choice it should talk to Congress about changing it, not misrepresent what the law says right now. *Cf. MCI Telecommunications v. American Telephone & Telegraph*, 512 US 218, 231-32 (1994) ("What we have here, in reality, is a fundamental revision of the statute… That may be a good idea, but it was not the idea Congress enacted into law[.]").

IV. Conclusion

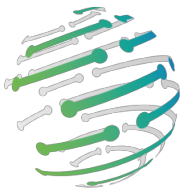
The NTIA has put forward bad legal and policy arguments in a forum that has no authority to hear them. Its misrepresentations and misstatements of the law are pervasive. To the extent it disagrees with the law that Congress passed it is free to say so, but the FCC must resist this call for it to expand its jurisdiction into regulating the content moderation and editorial choices of interactive computer services, while recognizing that the NTIA's arguments as to why the FCC has authority here are no better than its specious and trivial mischaracterizations of the statute itself.

[4] It is not necessary to decide here whether this sort of editorial expression deserves intermediate scrutiny or heightened scrutiny. *See Turner Broadcasting v. FCC*, 512 U.S. 622 (1994) (distinguishing between print and cable editorial discretion for First Amendment purposes).

Respectfully submitted,

/s/
John Bergmayer
Legal Director
PUBLIC KNOWLEDGE

September 2, 2020



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2 September 2020

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: In the Matter of Section 230 of the Communications Act of 1934, RM – 11862

Dear Ms. Dortch,

The National Telecommunications and Information Administration (NTIA) has petitioned the Federal Communications Commission (FCC or Commission) to initiate a rulemaking to "clarify" the provisions of Section 230 of the Communications Act of 1934, in accordance with Executive Order 13925, "Preventing Online Censorship" (E.O. 13925).

That Executive Order was long rumored to be in the works, months before its release, because of the reaction by the executive branch to how it perceived social media works and the desire to dictate how it should work. In other words, government expressly wanted to control how business could operate, and what speech was deemed appropriate, especially if that speech was a citizen's critique of government or elected officials, or if a government speaker simply wanted to act as they pleased rather than follow community guidelines for acceptable behavior. Self-governance of a business was to be thrown out so that government could do as it pleased.

As was pointed out immediately upon its release, the Executive Order demonstrated a basic misunderstanding of our U.S. Constitution and the Bill of Rights, flipping our guaranteed protections on their head. The guarantee of freedom of speech specifically protects citizens, and groups of people who have come together for a purpose such as a corporation, from government. It does not protect government from the people. On its face the order was concerned about how to limit speech for people, expand the power of government to control speech and reduce criticism of government.

The Order sought reach these goals by requiring two independent agencies, both this FCC and the Federal Trade Commission, to functionally do the bidding of the executive branch. With increased

scrutiny on users and creating authority to open up trade secret protected algorithms, government control of what citizens could do online would expand dramatically. Each directive would be a lawyer's dream as the order seemed to dramatically expand the jurisprudence for claiming fraud.

Because the Order was merely political theatre rather than sound policy not much could be accomplished without further action which has led the NTIA to file this petition, an attempt to hoodwink the FCC into transforming itself into a sprawling regulatory agency that would become nothing less than the "Federal Computer Commission."

This dubious background is important to understand as now the FCC is called upon to be in the vanguard of the attempt to ignore clear congressional direction and to radically expand government in direct opposition to our guaranteed liberties, using Section 230 as an excuse.

Section 230, in short, provided Congressional instruction to the courts as to when liability should be imposed for certain speech online. The section made manifest personal accountability by holding the speaker themselves, not a platform on which a speaker speaking, accountable for their words. If an online service exercised no control over what was posted on their platform then they were not be liable for what was said. However, Congress also wanted to provide an incentive by creating a safe harbor for those who might operate in good faith to moderate some content, particularly to remove unlawful or abusive material. As an additional benefit this approach also stopped lawyers from bringing lawsuits against deeper pockets merely for their personal gain.

From the simple idea of personal accountability and an incentive for good actors to help clean up dirty corners of the internet, the internet as we understand it today has sprung. Finding no other way to bring this era to an end by pursuing the ends of the Order the NTIA has asserted that the FCC has jurisdiction in this area.

The jurisdictional questions for the FCC have been well covered in other comments provided in this docket but in sum, clearly Congress did not grant the FCC authority to suddenly assume control of internet content as part of its mission. In fact, the evidence shows just the opposite.

As the current Commission has argued innumerable times, Congress needs to act if in fact they intended something not on the plain face of the law. Specifically, if Congress desires to take the radical step of regulating the internet then they can follow the proper path to so doing. After Congressional action the executive branch can follow the proper order of things and sign the legislation granting such authority thereby appropriately demonstrating the express will of government. This is proper governance. Hiding behind an independent agency to do one's bidding is not.

Lacking that Congressional authority, the NTIA wrongly asserts that social media is an information service in an attempt to bring it under the FCC's purview. In today's language one might consider this claim "fake news." Again, as well documented and detailed elsewhere in the filings before you the full intention of Congress, beginning with the author of the language, was to at all turns reject the notion that the FCC did or would have any jurisdiction in this area. Some members of Congress did not agree and actually attempted to expand the authority. Such attempts were expressly rejected.

In addition, the FCC has previously declined to recognize it has authority in the area and has openly made clear it has no expertise to guide it regardless. So, now the FCC would, without any Congressional authority to do so, suddenly have to reverse itself and assert that so-called edge services were within its regulatory control and become precisely what Congress rejected, the Federal Computer Commission.

Perhaps more importantly, almost regardless of the jurisdictional legal question, is if the FCC had the authority but was not directed to use it by Congress whether it should. The clear answer here is no for a variety of reasons.

The first is apparent on its face, that the intent of the Order in trying to rope in the FCC is to place the FCC in role as an arbiter of facts. No regulatory agency will be as well equipped as the courts to determine facts and reach a final binding result. In this instance acting at the behest of the executive and without direction from Congress further weakens any result which would certainly be appealed to the courts. The best place to have a grievance addresses, and to reach an appropriate result, are the courts.

Second, this seems a curious time to massively expand the authority and policing power of the FCC. Is that the legacy this FCC would like to have?

As the nation discusses, debates and brings more attention to the use of police power, few moves could be more counter to the social temperature than to create new policing powers. In fact, the expansion here plays precisely to the point being made by the peaceful protestors on the streets, that policing power, a massive authority, has gone too far without adequate oversight. In this case, the FCC would be creating its own power that has been repeatedly, in various settings, expressly denied to it. Government abuse of the people could hardly be any more apparent than this.

The most obvious apparatus outside of the court system for these new powers to work would be empowering companies to determine what speech is allowed as dictated by government with oversight by the FCC. Ironically this places companies back in the role they are claimed to be in by some politicians, except then they would be subject to government dictates rather than their own company's beliefs, desires and rules. The desire to force companies to act as a policing force is unnerving. Again, the courts are best suited for the settlement of complaints to avoid this reality.

Next, once this new authority is wielded one thing is obvious, future commissions will wield it as well to their own ends. A massively sprawling FCC that controlled the nation's computers and online experience would be dangerous in the best of times and devastating to our freedoms at all times.

The parallels to the Title II debate are clear. Just as the Title II supporters missed the point so do those who advocate for section 230 to be eliminated, hindered or to have the FCC expand its regulatory apparatus. A point that has been made to this and previous commissions, innovation and the internet is an ecosystem and this sort of heavy-handed approach will negatively impact the entirety of it.

Platforms such as social networks, search engines, operating systems, web-based email, browsers, mobile apps, e-commerce and more are proliferating. These platforms are simply layers, that create a

"stack" as new products or services are built upon them. The relationship between these various layers of the ecosystem, including service providers, is tightly woven in part because of the vertical integration but also because of contracts and interdependencies. Upsetting or isolating one part of the stack does not necessarily lead to linear and predictable results. In fact, observation informs us that the opposite is typically true. Innovation in the internet and communications space moves rapidly but unevenly. Technology and innovation experts have only the most-slender of chances to understand where invention and innovation is headed next. Humility is the correct approach for prognosticators. But most harmful is regulatory hubris which regularly leads to any number of unintended consequences and is damaging pollution to this ecosystem. Desperate attempts to try to bring government desired order to what is not orderly are doomed to failure or only succeed in suffocating innovation.

When the internet ecosystem is under attack the entire ecosystem needs to respond, not be artificially divided by arbitrary government intervention since a change to any part of the ecosystem has an impact on all parts of the ecosystem. The well-being of the internet, at least as it exists in the U.S., is dependent on all parts being healthy and free from interference. True success in the digital world is achievable when all parties understand that they cannot stand on their own, that in fact an economically thriving digital ecosystem requires cooperation with an eye towards what is best for the broader whole. The distributed nature of the internet is a fundamental part of its design, and no one entity, no one cluster of entities, can be an island. Stakeholder cooperation, including a FCC that truly understands this dynamic, is imperative for the success of all.

Errant two-dimensional thinking leads to the wrong conclusion that there are "areas" of the ecosystem that can be altered without massively effecting the entire environment. For example, there are no such things as "edge providers." They operate like nearly all other parts of the ecosystem with new layers building upon them and various operators interconnecting with them. A designation as an "edge provider" is more akin to a marketing pitch than to a technological truth. Trying to isolate such entities for heavy regulation will negatively impact the entire space. The same is true if trying to isolate service providers for government control. Those interacting with the ecosystem will find it hard to leave, or switch, from any particular area to another be it service provider, social media, operating system, etc. This is not a negative. Consumers choose where they are most comfortable and make their place there. Government intervention merely limits those options, or preferences one part of the ecosystem over another, and is inherently harmful to consumers.

Inhabiting, using and benefiting from the ecosystem are those who often used to be called "netizens," and later, for those who do not remember a time without the internet "digital natives." The "netizens" used to be proud of the unregulated nature of the internet. Proud of a certain wild west element that promised the interesting, the cool and the cutting edge. Then, politicians regularly came to Washington, D.C. to proclaim – "Hands Off!" That was not very long ago, but something has happened.

These days, some pursuing their own visions instead of safeguarding freedom for the netizens, have tried to persuade people to believe that people now live in a state of constant fear of threats, confusion, misdirection and cannot function fully unless government firmly grasps the internet and holds it tight. These sorts of distortions of the truth trap the ecosystem, and many of those who can gain the most from using it, in a make-believe dystopian fantasy narrative. In truth, liberty frees those in the internet

ecosystem just as it does elsewhere, allowing them to pursue their lives, creating an online experience that they desire, not what is dreamt up for them in D.C. Netizens deserve an open internet ecosystem. The internet is not made more open via grater government control of speech and expression.

No one should mistake that there is anything but near unanimous belief amongst all political tribes that an open internet should exist. No advocacy group, political party, industry or consumer group is advocating for consumer harm. Only a small, loud, agenda driven cabal of populists and opportunists argues for government restriction and control. Inarguably, the best way to preserve an open internet is precisely how an open internet has been preserved for this long, that is via the free market. That is how consumers will continue to be protected, how consumers will continuously benefit from the innovation, investment and creation that follows, and how consumer experiences with content, technology, and information can be consumer driven not government determined.

Here is the goal then: less regulations so that more innovation will lead to greater consumer choice, the demand which will then drive the need for more supply, provided via greater investment, leading to even greater consumer choice. It IS an ecosystem and one thing does beget the next.

Some have argued too that the Order seeks to create a new "Fairness Doctrine" for the internet and that seems likely. The Doctrine was a decades-long government policy that forced "viewpoint neutrality" by broadcasters. It was repealed more than 35 years ago. Back then the excuse was "spectrum scarcity," that there were so few radio or television channels that some points of view had to be guaranteed to be broadcast regardless of whether the Doctrine trampled freedom of speech or the option not to speak.

That similar complaints are made today is almost laughable if some were not trying to sacrifice our rights to make the world as they prefer. The last few decades, because of the internet and its various platforms, has been an era of unprecedented video and audio content choices. Media today is ably demonstrating a creative, functioning market, frenetic with new options and new choices. Content companies attempt to anticipate what consumers want, and respond quickly to consumer choice. And those with less populist tastes have many more targeted channels at their disposal.

Precisely at this time when more people want to be heard this new fairness doctrine disaster is unwarranted. Repression is not the right choice. Consumers, and yes even politicians, have innumerable choices for expression and do not need to upend our guaranteed liberties so that they can be protected from citizens or force others to promote or host their content.

Perhaps the most important consideration is that the FCC currently has very important work to continue rather than be distracted by a major organizational shift and expansion.

To say the least, the FCC needs to continue its focus on opening up more spectrum for 5G and Wi-Fi use, and the growing needs of the country make clear that the job is far from over. A plan for making available further desirable spectrum needs to be made clear. The "spectrum pipeline" must be continuously filled with both unlicensed and licensed spectrum to meet the ever-increasing demand by consumers. Thoughtful leadership now and in the future is necessary to provide the materials for the 5G

experience in our homes and businesses, as well as in urban and rural communities alike, to grow and continue.

Another example is the needed attention to addressing the need for more rural broadband. With robust investment in broadband since 1996 of nearly $2 trillion by internet service providers more than 94% of the U.S. population has access to broadband. Even with that investment, there are still some without access.

As George Ford of the Phoenix Center has explained, a little more than 3% of those who do not have internet access at home do not have it because it is not available. The challenge might seem small, as compared to 60% who say they have no need or desire to have access, but is important to those who want access. The obstacle is that most of those without access live in hard to reach areas, areas where there is little to no business case to be made for broadband. The solution to increase connectivity for many of the unserved is fairly obvious.

The challenge can be overcome in a relatively cost-effective way by potential broadband users through attaching broadband cables to utility poles. The costs are currently being driven up by those who force a new company that wants access to a pole already at the end of its useful life, to bear the entire cost of replacement.

The FCC needs to step into a space where it is already regulating and clarify the situation. Specifically, at the least, replacement or upgrade costs should be fairly distributed between pole owners and those who seek to attach new equipment.

In general, the FCC should continue the leadership in broadband it has demonstrated during the pandemic, by continuing to focus on the challenges of increasing access to broadband. The highlighted two issues here are just a small part of what the FCC has on its to do list already. The Commission is doing a good job and for the benefit of future innovation the focus must be on the critical issues of spectrum and broadband.

Discussions about clarifying or updating Section 230 to reflect that the internet has changed since 1996 seem entirely reasonable. Nothing here should suggest otherwise. Those conversations, and certainly any changes, are the domain of Congress not the FCC, nor any other agency, independent or otherwise.

The FCC certainly does not want to risk taking its eye off the broadband ball, or placing at risk its current reputation, by taking up a political charge to regulate the internet and moderate what speech is allowed by the government. The legacy of this FCC should be of more broadband to more people more often, not the creation of the Federal Computer Commission.

Respectfully,

Bartlett D. Cleland
Executive Director
Innovation Economy Institute

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862

COMMENTS OF
THE FREE STATE FOUNDATION*

These comments are filed in response to the Commission's request for public comments regarding the Petition filed by NTIA requesting the Commission initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934, as amended. The principal point of these comments is that, a quarter century after its enactment at the dawn of the Internet Age, it is appropriate for Section 230 to be subjected to careful review, whether by Congress or the FCC, or both. Unlike the Ten Commandments handed down from Mt. Sinai, Section 230 is not etched in stone, but like most statutes, it should be periodically reviewed with an eye to considering whether any revisions are in order.

Many, but not all, of those who oppose the FCC (or Congress) examining Section 230 do so in rather apoplectic terms, suggesting that any change at all would mean the "end of the Internet as we know it." It is somewhat ironic that some, but not all, of those who are most vociferous in proclaiming doomsday scenarios if Section 230 is altered in any way, especially the largest Internet web giants such as Google, Facebook, and

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Director of Policy Studies and Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

Twitter, also predicted the "end of the Internet as we know it" if strict government-mandated "net neutrality" regulation were eliminated or loosened.

These initial comments do not stake out detailed positions regarding the meaning of Section 230's provisions and their scope. Rather, they emphasize that, in response to the NTIA petition, the FCC almost certainly has authority, within proper bounds, to issue clarifying interpretations of ambiguous Communications Act provisions like Section 230 and that it is not inherently improper for the Commission to consider exercising this authority. Review of Section 230 is warranted given dramatic changes in the Internet ecosystem over the last twenty-five years. Granting that adoption of Section 230 may have played an important role in the rise of Internet content providers that are now a key part of the American economy and social fabric does not mean that, at present, their practices or conduct, including their content moderation practices, should not be considered in relation to their impact on the public.

The debate surrounding Section 230 involves fundamental issues, including its efficacy, what the First Amendment prohibits and what it permits, the roles of the FCC and the Federal Trade Commission with respect to interpreting or enforcing the law, and the relationship between the immunity granted content providers by Sections 230(c)(1) and 230(c)(2). To provide a framework for addressing some of these issues, Free State Foundation President Randolph May, in his June 2020 *Perspectives from FSF Scholars* titled "Considering Section 230 Revisions, Rationally,"[1] outlined some fundamental propositions that are relevant here:

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[1] Randolph J. May, "Considering Section 230 Revisions, Rationally," *Perspectives from FSF Scholars*, Vol. 15, No. 35 (June 24, 2020), attached as Appendix A, and also available at: https://freestatefoundation.org/wp-content/uploads/2020/06/Considering-Section-230-Revisions-Rationally-062420.pdf.

- First, the legal immunity granted "interactive computer services" by Section 230 played a significant role in the Internet ecosystem's development, particularly in the years closer to the law's enactment in 1996.

- Second, when private sector online services remove or disable access to users' content from their websites, they do not violate the First Amendment free speech rights of the sites' users. The First Amendment prevents the government from censoring speech, not private actors.

- Third, the First Amendment does not compel Congress to grant or maintain immunity from civil liability to online services for actions that censor or stifle the speech of users of their websites. Like publishers or purveyors of print or other media, the online services remain perfectly free, absent a grant of immunity, to exercise their First Amendment rights to moderate content.

- Fourth, to the extent online services moderate and remove or disable access to user content, it is reasonable that such services specify their policies and practices for content moderation with some particularity in transparent publicly-promulgated terms of service and consistently follow them in order to show "good faith" and receive immunity from civil liability under Section 230. The Federal Trade Commission, pursuant to its consumer protection authority, may consider complaints that such terms of service have been violated – including complaints that may implicate Section 230 immunity – and may consider whether to impose sanctions for such violations.

While these propositions were offered in the context of commenting on the Department of Justice's report[2] recommending revisions to Section 230 for Congress's consideration, they are relevant to the Commission's consideration of NTIA's petition.

Section 230(c)(1) of the Communications Decency Act provides immunity from civil liability to "interactive computer services" for third-party content posted on their websites. Section 230(c)(2) provides immunity, subject to certain limitations, for a provider's actions "taken in good faith" to restrict access to material that the provider considers to be "obscene, lewd, lascivious, filthy, excessively, violent, harassing, or otherwise objectionable."[3] These two immunity provisions, particularly for major online

[2] Department of Justice, "Section 230 – Nurturing Innovation or Fostering Unaccountability?", June 2020, available at: https://www.justice.gov/file/1286331/download.
[3] 47 U.S.C. §§ 201(c) (1) and (2).

services such as Facebook, Twitter, and YouTube, have been the subject of increasing attention and public debate. In our view, there is evidence that major online services, intentionally or not, have acted in ways that are inconsistent with their terms of service, including with respect to their content moderation policies. For example, there are widespread claims that online content services moderate, restrict, or remove content in a way that is biased against "conservative" speech in ways that may contravene their terms of service.

The Department of Justice has recommended that Congress consider revisions to Section 230.[4] And NTIA has now petitioned the Commission to clarify the meaning of Section 230's provisions.[5] Given the publicly expressed concerns of the DOJ and NTIA regarding how Section 230 is sometimes understood and applied in today's Internet ecosystem, there is no good reason to view the statute as somehow off-limits to review by the FCC.

Importantly, the Commission almost certainly has authority to address the meaning of statutory terms, including Section 230. Although providers of "interactive computer services" are not Title II providers of "telecommunications," Section 230 is part of the Communications Act of 1934, as amended. And the Commission has authority pursuant to Section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter."[6]

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[4] Department of Justice, "Section 230 – Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations" (June 2020), at: https://www.justice.gov/file/1286331/download.
[5] See NTIA, Section 230 of the Communications Act of 1934, RM-11862, Petition for Rulemaking (filed July 27, 2020), at: https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[6] 47 U.S.C. § 201(b).

"Interactive computer services" are "information services" under Title I of the Communications Act.[7] Although the Commission's authority to regulate these online service providers is highly circumscribed, this does not necessarily mean that the agency lacks authority to issue rulings that interpret the meaning and application of Section 230's terms with greater particularity.

For example, NTIA's petition requests that the Commission adopt rules clarifying the relationship between Section 230(c)(1) and (c)(2), the meaning of "good faith" and "otherwise objectionable" in Section 230(c)(2), how the meaning of "interactive computer service" in Section 230(f)(2) should be read into Section 230(c)(1), and the meaning of "treated as a publisher or speaker" in Section 230(c)(1).[8] If the Commission decides to do so, those interpretations could provide guidance for courts when considering Section 230 immunity claims in individual cases. That guidance might aid in preventing Section 230(c)(1) and Section 230(c)(2) from being read as coextensive – thereby rendering Section 230(c)(2) as superfluous.

It is difficult to understand how Commission action engaging in such clarification and interpretation – as opposed to its issuing orders or regulations actually restricting, or purporting to restrict, any content providers' speech – violates any entities' First Amendment rights, as some claim, again, often in apoplectic terms. Especially today, in an era of speech codes, trigger warnings, cancel culture, and outright calls for censorship of speech some may disfavor, First Amendment protections, properly understood, are more important than ever. We are staunch defenders of First Amendment rights, but we fear that "crying First Amendment wolves," by throwing up First Amendment strawmen,

[7] See 47 U.S.C. § 230(f)(2), 47 U.S.C. § 153(24).
[8] See NTIA, RM-11862, Petition for Rulemaking, at 5-6.

will actually diminish a proper understanding of the First Amendment's free speech guarantee, to the detriment of all. Ultimately, the courts will have the final say as to Section 230's meaning, and that is the way it should be.

Consideration by the Commission as to whether adoption of transparency rules that further specify the content moderation practices of web sites, including those of the dominant providers such as Twitter, Google, Facebook, and the like, is also not improper. Within proper bounds, such transparency rules are a means to increase accountability to the public as well as to assist the courts (and the FTC as well) in determining whether online content providers meet the eligibility requirements for immunity from civil liability under Section 230.

Also, requiring providers of interactive computer services to adhere to transparency rules is in keeping with a light-touch regulatory approach to Title I information services. NTIA's assertion that the Commission's authority for transparency rules is grounded in Sections 163 and 257 of the Communications Act appears reasonable, particularly in light of the D.C. Circuit's decision in *Mozilla v. FCC* (2019) to uphold the Commission's authority under Section 257 to adopt transparency regulations in the *Restoring Internet Freedom Order* (2018).[9]

While these comments do not take any position as to whether the Commission should adopt the particular transparency rule requested in NTIA's petition, the rule requested by NTIA appears to be consonant with the four fundamental propositions identified above in the bullet points. Such a transparency requirement relating to the posting of content moderation terms would not restrict the editorial discretion of online

[9] See Mozilla Corp. v. FCC, 940 F.3d 1, 46-49 (D.C. Cir. 2019); Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report, and Order (2017), at ¶ 232.

content providers like Google, Facebook, or Twitter to moderate user content on their websites but rather provide a basis for making those providers more accountable with respect to compliance with their posted terms of service.

The Commission should consider NTIA's petition regarding Section 230 and act in accordance with the views expressed herein.

Respectfully submitted,

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September 2, 2020

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	
Communications Act of 1934	)	RM-11862
	)	

To: The Commission

COMMENTS OF THE SECTION 230 PROPONENTS

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September 2, 2020

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Summary and Introduction

The Commission has been called upon to decide whether one of the internet's most essential laws, 47 U.S.C. § 230 ("Section 230" of the Communications Decency Act) should be unilaterally re-interpreted to suit the President's internet agenda.[1] Certainly Section 230 is not perfect: it has failed to eliminate racial and gender discrimination, voter suppression, and other unacceptable inequities on the internet.[2] These illnesses should be cured, but the NTIA Petition does not do that; nor could it because Section 230 confers on the FCC no jurisdiction over the subject matter. Worse yet, the relief sought in the NTIA Petition would incentivize online racial and gender discrimination and hate speech online.

The NTIA Petition should be denied because (A) the FCC lacks the jurisdiction required to reform Section 230 as proposed in the NTIA Petition; and (B) even if the FCC had jurisdiction, implementation would (1) de-incentivize equitable and viewpoint-neutral content moderation by online platforms, (2) threaten small companies by creating a hostile regulatory environment, and (3) oppress marginalized peoples and activists by perpetuating discriminatory content moderation and hate speech.

For its part, Congress should take steps to better protect users from racial and gender discrimination and hate speech online.

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[1] *See NTIA Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act* ("NTIA Petition"), NTIA (filed July 27, 2020), *available at* https://www.ntia.doc.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (last visited July 31, 2020), on file at the FCC as RM-11862. *See* Annex, *infra* (listing the Section 230 Proponents). These Comments are submitted pursuant to 47 C.F.R. §1.405.

[2] *See* Part III (E) *and* note 7, *infra* (referencing online platforms' liability for using or allowing third parties to use their products to discriminate against users on the basis of their sexual orientation, race, age, or gender).

The Section 230 Proponents[3] support reforms that are made in good faith,[4] in accordance with established law,[5] by lawful authority, [6] and in a way that recompenses past, present, and future victims of online racial and gender discrimination and hate speech.[7] Unfortunately, the President has focused instead on weakening Section 230, including its imperfect but helpful incentivizing of content moderation.[8]

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[3] The six Section 230 Proponents include many of the nation's leading multicultural advancement organizations, with collectively millions of members. Each of the Section 230 Proponents, and nearly all of their respective members, regularly engage in protected speech and advocacy online.

The views expressed in these Comments are the institutional views of the commenting organizations and are not intended to reflect the individual views of each officer, director, or member of these organizations.

[4] Commissioner O'Rielly has called such opportunistic attacks on online freedom of speech "a particularly ominous development." Hon. Michael O'Rielly, Remarks Before The Media Institute's Luncheon Series at 5 (Jul. 29, 2020), *available at* https://docs.fcc.gov/public/attachments/DOC-365814A1.pdf (last visited Aug. 30, 2020) ("It is time to stop allowing purveyors of First Amendment gibberish to claim they support more speech, when their actions make clear that they would actually curtail it through government action. These individuals demean and denigrate the values of our Constitution and must be held accountable for their doublespeak and dishonesty.")

[5] *See* Part III (B), *infra* (outlining how the NTIA Petition advances changes in the law that are contrary to precedent).

[6] The NTIA Petition should be denied on its face for want of jurisdiction. *See* Part III (A), *infra*.

[7] *See*, *e.g.*, *National Fair Housing Alliance v. Facebook*, No. 1:18-cv-02689 (S.D.N.Y. 2018); Determination, *Bradley v. Capital One*, Charge Number 570-2018-01036 (EEOC Jul. 2019) (finding that Capital One unlawfully discriminated by advertising jobs on Facebook while limiting the age of people who could see the advertisement); *Divino Group v. Google*, No. 5:2019cv04749 (N.D. Cal., filed Aug. 13, 2019) (alleging that YouTube discriminates against LGBTQ+ creators); *Bradley v. T-Mobile*, Case No. 17-cv-07232-BLF, 2019 WL 2358972 (N.D. Cal. 2020), *amended complaint filed* Jun. 11, 2020 (arguing that companies unlawfully discriminated by "us[ing] Facebook's ad platform to limit the population of Facebook users who will receive their job advertisements or notices – for example, by changing the age range...from 18 to 64+...to 18 to 38"); Complaint, *Newman v. Google*, No. 5:20-cv-04011 (N.D. Cal., filed Jun. 16, 2020) (alleging that YouTube's algorithms target Black creators). *See also* Part III (E), *infra* (outlining pre-existing discrimination by content moderators and moderation algorithms against communities of color).

[8] *See* Bobby Allyn, *Stung By Twitter, Trump Signs Executive Order To Weaken Social Media Companies*, NPR (May 28, 2020), *available at* https://www.npr.org/2020/05/28/863932758/stung-by-twitter-trump-signs-executive-order-to-

If the FCC were to grant the NTIA Petition and implement the President's agenda – which would require jurisdiction that does not exist here – it would become more expensive and legally risky for platforms to neutrally moderate content shared by their users. Small internet companies would lack the capital to withstand those increased costs and regulatory changes. Therefore, the NTIA Petition should be denied because reinterpreting Section 230 according to the Petition – which would be facially unlawful[9] – would promote and perpetuate race and gender discrimination and hate speech on the internet.

I. The History and Value of Section 230

Section 230 of the Communications Decency Act of 1996 limits the liability of online platforms for third-party content. Subsection 230(c)(1) states in part that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[10] This language creates a "Good Samaritan" protection under which interactive computer services, like Facebook, Twitter, and Instagram, are generally protected from liability should a user post anything offensive or illegal. There are

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weaken-social-media-companies (last visited Sept. 2, 2020) ("President Trump signed [the] executive order . . . two days after he tore into Twitter for fact-checking two of his tweets.")

[9] *See* Parts III (A) *and* III (B), *infra*.

[10] Codified at 47 U.S.C. § 230(c)(1) (1996).

specific exceptions for material related to sex trafficking,[11] violations of copyright,[12] and federal criminal law.[13]

Critically, while protecting online content providers from liability for third-party or user-generated content, Section 230 does not interfere with longstanding legal precedents holding content creators liable for their own content posted on online service platforms.[14] For example, a Twitter user can still be liable for defamation resulting from a tweet of their own creation.[15]

Additionally, Subsection 230(c)(2) establishes an editorial discretion "safe harbor" for interactive computer service providers.[16] This "Good Samaritan" clause encourages online

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[11] *Id.* § 230(e)(5); *see also* Heidi Tripp, All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims, 124 PENN ST. L. REV. 219 (2019) ("FOSTA/SESTA amends Section 230 of the CDA to create an exception to immunity for ISPs when content posted by third parties promotes or facilitates prostitution and sex trafficking or advertises sex trafficking.")

[12] 47 U.S.C. § 230(e)(2); *see also* Madeline Byrd & Katherine J. Strandburg, *CDA 230 for A Smart Internet*, 88 FORDHAM L. REV. 405 (2019) (clarifying that online service providers are still liable for copyright infringement under the Digital Millennium Copyright Act's (DMCA) notice-and-takedown regime for distributing material illegally copied by users).

[13] 47 U.S.C. § 230(e)(1); *see also* Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. §230's Immunity*, SANTA CLARA L. DIGITAL COMMONS (July 10, 2013), *available at* https://digitalcommons.law.scu.edu/facpubs/793/ (last visited Aug. 20, 2020) (stating that Section 230 excludes all federal criminal prosecutions but preempts "any prosecutions under state or local criminal law where the crime is predicated on a website's liability for [user-generated content]").

[14] *Liability for User-Generated Content Online: Principles for Lawmakers*, NAT'L TAXPAYERS UNION (July 11, 2019), *available at* https://www.ntu.org/publications/detail/liability-for-user-generated-content-online-principles-for-lawmakers (last visited May 14, 2020).

[15] However, the nature of expression on social platforms can make it "nearly impossible" to decide whether speech, such as a tweet, is defamatory. *Boulger v. Woods*, No. 18-3170 1, 11 (6th Cir., 2019) (finding a tweet had no precise meaning and was thus not defamatory because it ended in a question mark).

[16] 47 U.S. Code § 230(c)(2)(A)(2018) (stating "No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).")

service providers to moderate third-party content by immunizing restrictions on material considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[17] This broad standard places full discretion in the hands of private technology companies and social media service providers. Companies and platforms need only show that their responsive actions (or the lack of them) were based upon moderating discretion absent some form of bad faith, such as a contractual breach or malicious intent.[18] For example, when Facebook or Twitter independently identify and "flag"[19] specific objectionable material, they also determine the process for taking down and reprimanding the responsible users.

Although technology companies and social media sites tend to voluntarily address such situations,[20] Section 230 does not explicitly impose any affirmative duty to take down content

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[17] *Id.*

[18] *Id*. (establishing that "a platform exercising extreme editorial discretion (for example, by deliberately censoring vegans or climate change activists because it doesn't like them) would still be protected – 'good faith' does not imply 'good judgment'"). Indeed, liability shielding is a necessary element of a legal system encapsulating corporate actors – especially those providing consequential goods and services used by other people. *Compare* Section 230 *with* Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U.J.L & BUS. 27, 27-8 (Fall 2017) (arguing the business judgment rule, which limits liability for decisions made by corporate boards, is the "most . . . important standard of judicial review under corporate law.")

[19] *See generally* Kate Crawford & Tarleton Gillespie, *What is a flag for? Social Media reporting tools and the vocabulary of complaint*, NEW MEDIA & SOCIETY (Mar. 2016), *available at* https://doi.org/10.1177/1461444814543163 (last visited Aug. 20, 2020) ("The flag is now a common mechanism for reporting offensive content to an online platform, and is used widely across most popular social media sites"); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech,* 131 HARV. L. REV. 1598, 1639–40 (2018) ("When content is flagged or reported, it is sent to a server where it awaits review by a human content moderator. At Facebook, there are three basic tiers of content moderators: 'Tier 3' moderators, who do the majority of the day-to-day reviewing of content; 'Tier 2' moderators, who supervise Tier 3 moderators and review prioritized or escalated content; and 'Tier 1' moderators, who are typically lawyers or policymakers based at company headquarters.")

[20] *See* Evangeline Elsa, *Twitter to test new feature to let users rethink before posting "offensive or hurtful" tweets*, GULF NEWS (May 6, 2020), *available at* https://gulfnews.com/world/twitter-to-test-new-feature-to-let-users-rethink-before-posting-offensive-or-hurtful-tweets-1.1588763796071 (last visited Aug. 20, 2020) (describing Twitter's

that does not fit a stated exception.[21] Thus, providers cannot be held liable for content they either miss or choose to ignore. Section 230 also immunizes service providers' edits[22] and promotions.[23] For example, an online platform may correct the spelling of a post, replace swear words with an asterisk, or delete a paragraph of a post, without forfeiting Section 230 immunity.[24]

The "Good Samaritan" protection was influenced by prior case law that imposed liability upon online platforms for moderating objectionable content. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court held that a computer network that hosted online bulletin boards was strictly liable for defamatory statements made by a third-party user because it engaged in moderation by removing some offensive content on its boards.[25] Relying on this precedent, online platforms concluded that, to avoid liability for user content, it was best to not moderate

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plan to test a new feature that will inform users prior to posting if their tweet replies contain offensive language).

[21] *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1105 (9th Cir. 2009) (reasoning that, although Section 230 was designed to encourage sites to implement their own policing efforts, "[s]ubsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties").

[22] *See* John Bergmayer, *What Section 230 Is and Does—Yet Another Explanation of One of the Internet's Most Important Laws*, PUBLIC KNOWLEDGE (May 14, 2019), *available at* https://www.publicknowledge.org/blog/what-section-230-is-and-does-yet-another-explanation-of-one-of-the-internets-most-important-laws/ (last visited Aug. 20, 2020) (explaining that, because editing is not equated with authorship, "a platform, after content is posted, can correct the spelling of a post, replace swear words with asterisks, and even delete a problematic paragraph" without incurring liability); *see also* Sara Gold, *When Policing Social Media Becomes A "Hassell",* 55 CAL. W. L. REV. 445 (2019) (maintaining that "basic editing, formatting, and content screening do not jeopardize CDA immunity.")

[23] *See* Bergmayer, *supra* note 22 (stating that Section 230 protects platforms' editorial discretion in "*promoting a political, moral, or social viewpoint*…[thus,] if Twitter or Facebook chose tomorrow to ban all conservatives, or all socialists, Section 230 would still apply") (emphasis in original).

[24] *Id.*

[25] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 at *1 (Sup. Ct. May 24, 1995) (hereinafter "*Stratton*").

any content – an illustration of the "law of unintended consequences."[26] Congress was encouraged to enact Section 230's "Good Samaritan" provision to address the case law that discouraged online service platforms from engaging in content moderation, because moderation is socially beneficial.[27]

II. The Current Debate Surrounding Section 230

Section 230 has generated calls for repeal or weakening. Critics have argued that the section should be eliminated altogether, reasoning that private technology companies should be held fully liable for content they allow to be posted on their platforms.[28] On the other hand, the Section 230 Proponents contend that such companies should not be expected to ceaselessly weed through the ever-compounding volume of user-generated content. Further, such companies do not operate only in America, and it may be difficult to impose legislation on companies with a global presence.

On May 28, 2020, President Trump issued an executive order ("E.O.") in an attempt to bypass the legislative process to weaken Section 230.[29] The E.O. came just two days after Twitter began fact-checking the President's tweets, labeling two of them as false and providing

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[26] See *id; see also* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (Dec. 1936).

[27] Naturally, Section 230 has provided online platforms with the legal certainty needed to fairly moderate user content by precluding liability for any objectionable content that might slip through. *See Liability for User-Generated Content Online: Principles for Lawmakers*, *supra* note 13*; Section 230 as a First Amendment Rule*, *infra* note 58, at 2039 ("Various websites credit § 230 with their very existence."). *See also* Patrick Kulp, *Airbnb Ad Touts New Anti-Discrimination Pledge* (Nov. 12, 2016), *available at* http://mashable.com/2016/11/12/airbnb-ad-campaign-discrimination/#WtMrwpDfI5q7 (last visited Sept. 2, 2020).

[28] Madeline Byrd & Katherine J. Strandburg*, CDA 230 for A Smart Internet*, 88 FORDHAM L. REV. 405, 407-08 (2019) (identifying that "proponents of strong CDA 230 immunity now fear that service providers will engage in overly cautious 'collateral censorship'").

[29] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) ("E.O.")

sources that refuted the President's assertions.[30] In the E.O., President Trump referred to the "immense, if not unprecedented, power to shape the interpretation of public events" that Twitter, Facebook, and other major online platforms possess.[31] The President maintains that platforms have engaged in selective proscription of speech by conservative speakers.[32] The President also believes Section 230 should be reinterpreted or changed so that it no longer protects such platforms.[33]

The E.O. contains four sections describing the actions to follow. First, the E.O. directs the head of each executive agency to review that agency's spending on advertising on online platforms. The Department of Justice will then determine whether the online platforms identified in those reviews impose any "viewpoint-based speech restrictions," but the E.O. does not define this critical term.[34] Second, the E.O. asks the Federal Trade Commission to act under its "unfair or deceptive acts" authority[35] to ensure that online platforms do not restrict speech in ways that violate their own terms of service. Third, the E.O. instructs the Attorney General to establish a working group to investigate enforcement and further development of state statutes that prohibit online platforms from engaging in deceptive acts or practices. Finally, the E.O. instructs the

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[30] *See* Kate Conger & Mike Isaac, *Defying Trump, Twitter Doubles Down on Labeling Tweets*, N.Y. TIMES (May 28, 2020), *available at* https://www.nytimes.com/2020/05/28/technology/trump-twitter-fact-check.html (last visited June 3, 2020).

[31] E.O., *supra* note 29.

[32] *But see*, *e.g.*, Erik Lawson, *Twitter, Facebook Win Appeal in Anticonservative-Bias Suit*, BLOOMBERG (May 27, 2020), *available at* https://www.bloomberg.com/news/articles/2020-05-27/twitter-facebook-win-appeal-over-alleged-anti-conservative-bias (last visited Sept. 1, 2020). We are unaware of any evidence that supports the President's assertion of anti-conservative bias.

[33] *Id*.

[34] *Id.*

[35] 15 U.S.C. § 45 (2006).

Secretary of Commerce, acting through NTIA, to file a petition for rulemaking (the "NTIA Petition") with the FCC to clarify parts of Section 230.[36]

The Section 230 Proponents recognize that online platforms have imperfectly moderated objectionable online content; the internet is host to discrimination, targeted suppression, and other unacceptable inequities between users.[37] It is not acceptable that adult internet users must still navigate hate speech or be targeted for voter suppression while browsing Facebook in 2020.[38] Here, Congress has the lawmaking authority, and it should exercise that power to bolster protections for multicultural and marginalized internet users.[39]

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[36] NTIA filed its Petition with the FCC on July 27, 2020. *See* NTIA Petition, *supra* note 1. In particular, the E.O. asks for clarification regarding (1) the interaction between subparagraphs (c)(1) and (c)(2), and (2) the conditions that qualify an action as "taken in good faith" as the phrase is used in subparagraph (c)(2)(A). *Id*. *See also* Part III (B) *infra*.

[37] *See National Fair Housing Alliance v. Facebook* and other cases detailed *supra* at note 7.

[38] Lawmakers must be cognizant of how historical forms of discrimination and racism have been hidden and worsened by technological progress. *See* Federal Trade Commission, *Big Data: A Tool For Inclusion Or Exclusion* (2016), *available at* https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf (last visited September 2, 2020); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2017). *Compare The Unexamined Mind*, ECONOMIST (Feb. 17, 2018), *available at* https://www.economist.com/news/science-and-technology/21737018-if-it-cannot-who-will-trust-it-artificial-intelligence-thrive-it-must (last visited Sept. 2, 2020) (highlighting risks associated with complicated decision-making algorithms that "no one truly understands") *with supra* note 7 (outlining recent litigation involving algorithmic discrimination).

[39] *See especially* Spencer Overton, President, Joint Center for Pol. & Econ. Studies, Testimony of Before the Subcomm. On Comm's & Tech. *et al.,* Hearing on *A Country in Crisis: How Disinformation Online is Dividing the Nation* at 2 (Jun. 24, 2020), *available at* https://jointcenter.org/wp-content/uploads/2020/06/Overton-Final-Testimony-for-6-24-20-Disinformation-Hearing.pdf (last visited Sept. 2, 2020) ("If legal reforms are needed, the debates should occur in Congress and should center the voices of people of color who have been disproportionately affected by the negative consequences of social media through targeted voter suppression and other disinformation campaigns.")

III. The NTIA Petition Should Be Denied

There are at least five major issues that should preclude NTIA's Petition from being granted.

A. The FCC does not have the legal authority to issue any regulations or interpretations contemplated by the NTIA Petition.

At the threshold, the FCC lacks the jurisdiction required to reinterpret Section 230 as requested in the NTIA Petition.[40] The Congressional Research Service recently affirmed that the courts – not the Executive Branch and not the NTIA – would decide whether the FCC has the authority to issue binding interpretations of Section 230.[41] No court has decided the issue of the FCC's authority to interpret Section 230,[42] and the statute itself does not even mention the FCC.[43] The Executive Branch also has no legislative or judicial power – neither the President nor NTIA can grant the FCC authority to interpret Section 230, let alone unilaterally amend it.[44] And

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[40] *See* Valerie C. Brannon *et al.*, Cong. Research Serv., *Section 230 and the Executive Order Preventing Online Censorship*, LSB10484 at 3, 4 (Jun. 3, 2020) (noting that it is unclear whether an FCC interpretation of Section 230, which is what the NTIA Petition seeks, would have "legal import").

[41] *See id.* at 4 (stating that even if a court found the FCC has jurisdiction to issue rules interpreting Section 230, the FCC's interpretation would be binding only to the extent it was consistent with Section 230). The FTC's authority would only derive from the FTC Act, which similarly grants no authority without changing Section 230 or a contrary court ruling. *See id.* (explaining that the FTC's authority to act to prevent "unfair or deceptive acts" by companies is limited by Section 230).

[42] *Id.*

[43] *Id.* (noting that Section 230 does not mention the FCC, and that the statute's scope and meaning are generally determined without the FCC). To be sure, Section 230 is codified in Title 47, but its location in the U.S. Code does not confer jurisdiction on an agency the statute does not even name. We could place a ham sandwich in Title 47, but that would not license the FCC to eat it for lunch.

[44] Even if a court had previously held that the FCC has authority to issue binding interpretations of Section 230, that interpretation would be invalid where it was contrary to Section 230 itself. *See*, *e.g.*, Ronald M. Levin, *Rulemaking and the Guidance Exception*, 70 ADMIN. L. REV. 264, 336-37 n. 336 (2018) (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (refusing to accept an FCC interpretive rule construing a federal statute where the act of interpretation was contrary to the statute being interpreted). Commissioner Rosenworcel

even if lawful authority existed here and the NTIA Petition was granted, any resultant changes to Section 230 would be invalid because the Petition's proposed interpretations of Section 230 are contrary to Section 230 and its related precedents.[45] Nonetheless, NTIA requested the FCC issue a binding interpretation of Section 230. That should facially preclude the Petition from being granted.[46]

B. The relief sought in the NTIA Petition would incentivize deceptive and viewpoint-based content moderation.

Even if jurisdiction existed, which it does not, granting the NTIA Petition would handicap Section 230's intended purposes by promoting deceptive practices and viewpoint-based content moderation.[47] NTIA proposes several express conditions for a platform to be shielded from liability, but hedges those conditions with "catch-all" exemptions; under this framework, the platforms are protected even if they patently violate Section 230 so long as their conduct is "consistent with [the platform's] terms of service or use."[48] Such changes would induce

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commented that the Executive Branch's attempt to change Section 230 "does not work." Statement by FCC Commissioner Jessica Rosenworcel on Executive Order, FCC (May 28, 2020), *available at* https://www.fcc.gov/document/statement-fcc-commissioner-jessica-rosenworcel-executive-order (last visited Aug. 30, 2020) (declaring that the E.O. seeks to turn the FCC into "the President's speech police.")

[45] *See* Levin, *supra* note 44. *See also* Part III (B), *infra*.

[46] Even though the FCC lacks jurisdiction to issue binding interpretations of Section 230 as requested by the NTIA Petition, the language of the statute can be lawfully amended by the legislature. *But see Section 230 as a First Amendment Rule*, *infra* note 58, at 2028 (arguing the courts should recognize "§ 230's more stable constitutional provenance," by holding that the Section is rooted in the First Amendment). However, it would simply be unacceptable for the FCC in this case to issue a binding interpretation of Section 230 at the behest of NTIA, which issued its Petition at the behest of the President. *Accord* John A. Fairlie, 21 *The Separation of Powers*, MICH. L. REV. 393, 397 (1923) ("Wherever the right of making and enforcing the law is vested in the same man . . . there can be no public liberty.")

[47] *See* NTIA Petition, *supra* note 1, at 53–55 (compiling the proposed amendments).

[48] *Id*. at 53 ("An interactive computer service is not a publisher or speaker of information provided by another information content provider solely on account of actions voluntarily taken in good faith to restrict access to or availability of specific material in accordance with subsection (c)(2)(A) or consistent with its terms of service or use.")

platforms to broaden their terms of service – including their content moderation policies – to accommodate content moderation practices that would not be allowed under Section 230 without a catch-all exemption. It would be untenable to revise or interpret Section 230 in a way that gives platforms more power to delete truthful user content.[49]

NTIA also recommends changes to Section 230(c)(1)[50] and (c)(2)[51] that would give platforms open-ended authority to discriminate against content based on viewpoint *and* defy precedent.[52] NTIA seeks to define "otherwise objectionable [content]," which platforms can currently moderate without incurring liability, as content that is "*similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials."[53] That definition is legally erroneous in the face of precedent; no court has applied such a standard when interpreting "otherwise objectionable."[54]

And, as stated above, NTIA's re-definition incentivizes viewpoint discrimination. Content moderators applying NTIA's definition would have to decide – likely according to their

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[49] *See also* Part III (E) *infra* (outlining how marginalized communities disproportionately have their content taken down when online platforms over-moderate content).

[50] Section 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")

[51] Section 230(c)(2) (shielding providers and users for, *inter alia*, "any action voluntarily taken in good faith to restrict access to or availability of . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable [content], whether or not such material is constitutionally protected.")

[52] *See* NTIA Petition, *supra* note 1, at 27 (arguing "Section 230(c)(1) applies to acts of omission—to a platform's failure to remove certain content. In contrast, subsection 230(c)(2) applies to acts of commission—a platform's decisions to remove content. Subsection 230(c)(1) does not give complete immunity to all a platform's 'editorial judgments.'")

[53] *Id.* at 32 (emphasis supplied).

[54] *See, e.g.*, *Domen v. Vimeo, Inc.*, 2020 U.S. Dist. L 7935 (S.D.N.Y. Jan. 15, 2020), appeal filed No 20-616 (Feb. 18, 2020) ("Section 230(c)(2) is focused upon the provider's subjective intent of what is 'obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.' That section 'does not require that the material actually be objectionable; rather, it affords protection for blocking material "that the provider or user considers to be" objectionable.'")

corporate terms of use – whether content is "similar in type" to NTIA's listed content. The NTIA Petition would thus leave the onus of finding unacceptable content on platforms, but also force them to moderate content according to a discrete set of criteria.[55] When online content moderators do not have freedom to consider nuance when they judge user content, real-world biases are more likely to spread as online suppression.[56] The NTIA Petition should thus be denied because it proposes to saddle Section 230 with unsound,[57] unduly restrictive conditions.

C. The relief sought in the NTIA Petition would cause unnecessary harm to smaller online platforms.

Under NTIA's proposed interpretations of Section 230, viewpoint-neutral content moderation would become inherently riskier and likely much more expensive for online platforms.[58] At the same time, the relief sought in the NTIA Petition would invite a flood of easily-pled claims that Section 230 was designed to prevent.[59] This new regulatory environment

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[55] For example, platforms have to moderate seemingly benign content to prevent the spread of harmful health advice and information during the COVID-19 pandemic. At the same time, platforms that have to moderate content according to policy tend to perpetuate real-life discrimination online. *See* Kurt Wagner & Sarah Frier, *Twitter and Facebook Block Trump Video, Citing Covid Misinformation*, BLOOMBERG (Aug. 5, 2020), *available at* https://www.bloomberg.com/news/articles/2020-08-06/twitter-blocks-trump-campaign-account-over-covid-misinformation (last visited Aug. 28, 2020) (reporting how Twitter, Facebook, and YouTube blocked a video, shared by accounts associated with President Trump, claiming COVID "doesn't have an impact on [children]"); *see also* Part III (E) *infra* (outlining how online content moderators tend to target marginalized communities when applying content moderation policies).

[56] *See* Part III (E) *infra* (outlining how online content moderators tend to target marginalized communities when applying content moderation policies).

[57] Such unsound amendments to consequential laws also portend circuit splits, overrulings, and judicial inefficiencies.

[58] *See* Note, *Section 230 as a First Amendment Rule*, 131 HARV. L. REV. 2027, 2036 (2018) (citing Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 858 n.172 (2006)) ("[C]ontent moderation to cope with intermediary liability is difficult, and therefore costly.")

[59] *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A* Warning, NPR (May 30, 2020), *available at* https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning (last visited Aug. 28, 2020) (stating that

would separate tech giants like Facebook from the majority of internet companies; the capital-rich giants can afford litigating, accounting for new costs, and changing their content moderation practices.[60] Conversely, small and new internet companies would be crushed without the requisite capital and experience to navigate complex litigation[61] and withstand unexpected expenses.[62]

Section 230 was designed to address the legal dilemma caused by the "wave of defamation lawsuits" facing online platforms that moderate user content); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Ac*t, 43 LOY. L.A. L. REV. 373, 452 (2010) ("Defamation-type claims were far and away the most numerous claims in the section 230 case law, and the courts consistently held that these claims fell within section 230's protections.")

[60] Specifically, platforms would be incentivized to either over-moderate to the point of discrimination or under-moderate to the point of non-moderation. *See Section 230 as a First Amendment Rule*, *supra* note 58, at 2047 (explaining further that "collateral censorship is a major threat to vulnerable voices online."); *see also* Hon. Geoffrey Starks, *Statement on NTIA's Section 230 Petition* (July 27, 2020), *available at* https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf (last visited Aug. 30, 2020) (stating that "[i]mposing intermediary liability on [platforms]—or creating an environment in which [platforms] have an incentive not to moderate content at all—would prove devastating to competition, diversity, and vibrant public spaces online.")

[61] *See* Ron Wyden, *Corporations are working with the Trump administration to control online speech*, WASH. POST OPINIONS (Feb. 17, 2020), *available at* http://washingtonpost.com/opinions/corporations-are-working-with-the-trump-administration-to-control-online-speech/2020/02/14/4d3078c8-4e9d-11ea-bf44-f5043eb3918a_story.html (last visited Aug. 20, 2020) ("It's the start-ups seeking to displace Big Tech that would be hammered by the constant threat of lawsuits"); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635 (2018) ("Content moderation at YouTube and Facebook developed from an early system of standards to an intricate system of rules due to (1) the rapid increase in both users and volume of content; (2) the globalization and diversity of the online community; and (3) the increased reliance on teams of human moderators with diverse backgrounds.")

[62] *See Section 230 as a First Amendment Rule, supra* note 58, at 2038 (citing MATTHEW LE MERLE ET AL., BOOZ & CO., THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY=STAGE INVESTMENT 19 (2011); *see also* Jerry Berman, *Policy Architecture and Internet Freedom*, LAW.COM: THE RECORDER (Nov. 10, 2017, 3:53 AM), *available at* https://www.law.com/therecorder/sites/therecorder/2017/11/10/policy-architecture-and-internet-freedom/ (last visited Sept. 2, 2020) ("[T]he anticipated costs of moderation and litigation could prevent" controversial, new, and emerging websites "from even securing capital or launching" if Section 230 protections were weakened). *See also* Berman, *supra* ("Without § 230 . . . speech

It is well documented that algorithms tend to drive users to "echo chambers" of content that reaffirm preexisting beliefs and sometimes push users to more extreme viewpoints through fringe content.[63] Platforms such as YouTube and Twitter have systems in place that attempt to curb this phenomenon by, for example, allowing users to report certain video content,[64] or fact-checking and labelling misinformation as false.[65] As stated in Section I, *supra*, the "Good Samaritan" clause encourages online service providers to moderate third-party content by immunizing restrictions on material considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[66] This broad standard already places full discretion in the hands of private technology companies and social media service providers.

However, the relief sought by the NTIA Petition would treat platforms – large and small – as publishers, revoking their liability shield for any content they present "pursuant to a reasonably discernible viewpoint or message," or any content they "affirmatively vouc[h] for,

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would be limited and new applications might never have emerged if required to finance costly legal overhead to do business on the Internet.")

[63] *See*, *e.g.*, Kevin Rose, *The Making of a YouTube Radical*, THE NEW YORK TIMES (June 8, 2019)*, available at* https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html (last visited Aug. 30, 2020) ("Over years of reporting on internet culture, I've heard countless versions of Mr. Cain's story: an aimless young man — usually white, frequently interested in video games — visits YouTube looking for direction or distraction and is seduced by a community of far-right creators. […] The common thread in many of these stories is YouTube and its recommendation algorithm, the software that determines which videos appear on users' home pages and inside the 'Up Next' sidebar next to a video that is playing. The algorithm is responsible for more than 70 percent of all time spent on the site.")

[64] *See, e.g.,* YouTube Community Guidelines, *available at* https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#community-guidelines (last visited Aug. 30, 2020). *See also* Enforcing Policies, *available at* https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#enforcing-policies (last visited Aug. 30, 2020).

[65] *See, e.g.,* Yoel Roth and Nick Pickles, *Updating Our Approach to Misleading Information* (May 11, 2020), *available at* https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html (last visited Aug. 30, 2020).

[66] 47 U.S.C. § 230 (c)(2)(A) (2018).

editorializ[e], recommend[d], or promot[e] … on the basis of the content's substance."[67] This applies to platforms even if they deploy algorithms rather than humans to moderate content.[68] The cost to manually moderate all content on any internet platform would be astronomical.[69] At the same time, moderating content using algorithms requires capital, expertise, and also risks litigation involving under-adjudicated questions of law.[70] Either way, the financial cost and legal risk associated with viewpoint-neutral content moderation will have been expanded by the relief sought in NTIA's Petition.[71] Content moderators and courts would face a wave of easily pled claims that would have to be adjudicated using under-developed law.

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[67] NTIA Petition, *supra* note 1, at 53, 55 (further seeking public disclosure of platforms' "content moderation, promotion, and other curation practices.")

[68] *Id.* Such a modification would make YouTube liable for every word spoken in a video that ends up on a user's recommended videos list, which is algorithmically generated.

[69] *See Section 230 as a First Amendment Rule*, *supra* note 58, at 2037 (citing Lauren Weber & Deepa Seetharaman, *The Worst Job in Technology: Staring at Human Depravity to Keep It Off Facebook*, WALL ST. J. (Dec. 27, 2017, 10:42 PM), *available at* https://www.wsj.com/articles/the-worst-job-in-technology-staring-at-human-depravity-to-keep-it-off-facebook-1514398398 (last visited Sept. 1, 2020) ("It would be even more difficult for artificial intelligence to properly identify defamation and quite costly to develop that software. And humans are not happy performing the task.")

[70] *See id.; see also* Ashley Deeks, *The Judicial Demand for Explainable Artificial Intelligence*, 119 Colum. L. Rev. 1829, 1831 (2019) (noting that there is presently little or no common law "sensitive to the requirements of" the adjudicative process). *Compare* Deeks, *supra*, *with* Aaron Klein, *Reducing bias in AI-based financial services*, BROOKINGS (July 10, 2020), *available at* https://www.brookings.edu/research/reducing-bias-in-ai-based-financial-services/ (last visited Aug. 28, 2020) (stating that existing legal frameworks are "ill-suited" to address legal issues caused by big data and "significant growth in [machine learning] and [artificial intelligence]").

[71] NTIA similarly seeks to have companies publicly disclose their moderation policies, which amplifies issues of litigation exposure. NTIA Petition, *supra* note 1, at 14, 55 (seeking public disclosure of platforms' "content moderation, promotion, and other curation practices" to promote competition). *But see Liability for User-Generated Content Online: Principles for Lawmakers*, *supra*, note 14; Part III (C), *supra* (explaining the difference between small and large internet companies' ability to withstand increased costs and navigate prolonged litigation); Part III (D) *infra* (discussing how a litigation flood would be a natural and detrimental consequence of granting the NTIA Petition). *See also* Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech Companies*, N.Y. TIMES (Oct. 16, 2019), *available at*

D. Content moderators and courts would face a wave of easily pled claims that would have to be adjudicated under under-developed law.

The increased costs and risks created by the NTIA Petition would catastrophically coincide with the flood of litigation guaranteed by NTIA's recommendations.[72] Common law precedent is difficult to properly apply to questions involving edge technology, yet litigants would have to apply dated case law to adjudicate the many new cases, or tangle courts in the development of new case law. Plaintiffs could rely on precedents like *Stratton* to file suits against online platforms for any defamatory statements that it hosts.[73] For example, in 2019 Congressman Devin Nunes filed a complaint against Twitter for $250 million, alleging that Twitter hosted and facilitated defamation on its platform when parody Twitter accounts about Nunes published tweets he found insulting.[74]

The scale[75] of litigation combined with the lack of clear legal outcomes would either force content platforms to disengage from moderation or over-moderate – otherwise, they would face

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https://www.nytimes.com/2019/10/16/opinion/section-230-freedom-speech.html (last visited Sept. 2, 2020).

[72] *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A* Warning, NPR (May 30, 2020), *available at* https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning (last visited Aug. 28, 2020) (stating that Section 230 was designed to address the legal dilemma caused by the "wave of defamation lawsuits" facing online platforms that moderate user content).

[73] *Compare id. with*, *e.g.*, Report, *Facebook by the Numbers: Stats, Demographics & Fun Facts*, Omnicore (Apr. 22, 2020), *available at* https://www.omnicoreagency.com/facebook-statistics/ (last visited Aug. 28, 2020) ("Every 60 seconds, 317,000 status updates; 400 new users; 147,000 photos uploaded; and 54,000 shared links.") Judicial economy concerns arise here as well, given that every status update would be a potential inroad for a defamation claim under a weakened Section 230.

[74] Daniel Victor, *Devin Nunes Sues Twitter for Allowing Accounts to Insult Him*, N.Y. TIMES (Mar. 19, 2019), *available at* https://www.nytimes.com/2019/03/19/us/politics/devin-nunes-twitter-lawsuit.html (last visited May 14, 2020).

[75] In 2019, there were more than 474,000 tweets posted per minute, and in 2016, there were over 3 million posts on Facebook per minute. Jeff Schultz, *How Much Data is Created on the Internet Each Day?* MICROFOCUS BLOG (Aug. 6, 2019), *available at*

the fatal combination of increased moderation cost and increased risk of litigation due to moderation,[76] which disproportionately impact smaller companies and controversial content platforms.[77] Any recommended new interpretations of Section 230 should take such possibilities into account and address them, such as the handling of parody accounts. The NTIA Petition's broad and sweeping approach fails to allow for any nuance or flexibility in solving the problems it attempts to address, throwing open the door for litigation.

E. Grant of the NTIA Petition would facilitate the silencing of minorities and civil rights advocates.

Most critically to us, weakening Section 230 would result in continued and exacerbated censorship of marginalized communities on the internet. NTIA's Petition would incentivize over-moderation of user speech; similar circumstances in the past have already been shown to promote, not eliminate, discrimination against marginalized peoples.[78] Given that marginalized groups were over-policed[79] by content moderators prior to NTIA's Petition, it follows that accepting NTIA's proposed interpretations of Section 230 would worsen online oppression on that front.

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https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/ (last visited May 15, 2020).

[76] Part III (E) *infra*.

[77] *Id. See also* Part III (C) *supra*.

[78] *See Section 230 as a First Amendment Rule*, *supra* note 58 at 2038, 2047 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))) (explaining how strict regulatory environments promote strict content moderation by humans and algorithms that disproportionately targets "groups that already face discrimination.") *See also* Part III (E) *infra* (outlining examples of discriminatory outcomes resulting from online content moderation).

[79] *See Section 230 as a First Amendment Rule*, *supra* note 58.

When online platforms have implemented content moderation policies in line with NTIA's proposals, minorities and civil rights advocates were oppressed, not empowered.[80] For example, in 2019 Facebook implemented a "real names" policy to make the platform safer by confirming user's identities; however, the policy led to the deactivation of an account by a Native American with the real name of Shane Creepingbear.[81] Further, in 2017 Google created an algorithm designed to flag toxicity in online discussions; however, legitimate statements like, "I am a black man" were flagged because the tool could not differentiate between users talking about themselves and users making statements about historically and politically-marginalized groups.[82] Because minorities are more vulnerable to online defamation, content moderation tools disproportionately target and remove the speech of minorities based on the content of their speech.[83] Such oppressive content moderation that discriminates against marginalized groups will only worsen if Section 230 is weakened.

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[80] *Id.* at 2047 ("[C]ollateral censorship is a major threat to vulnerable voices online.") *See also* Maarten Sap *et al*., *The Risk of Racial Bias in Hate Speech Detection*, 1 PROCEEDINGS OF THE 57TH ANNUAL MEETING OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 1668 (2019), *available at* https://homes.cs.washington.edu/~msap/pdfs/sap2019risk.pdf (last visited Sept. 1, 2020) investigating how content moderators' insensitivity to differences in cultural dialect can "amplif[y] harm against minority populations" online); *see also* Thomas Davidson *et al*., *Racial Bias in Hate Speech and Abusive Language Detection Datasets*, 1 PROCEEDINGS OF THE THIRD WORKSHOP ON ABUSIVE LANGUAGE ONLINE 25 (2019), *available at* https://www.aclweb.org/anthology/W19-3504.pdf (last visited Sept. 1, 2020) (concluding that abusive language detection systems "may discriminate against the groups who are often the targets of the abuse" the systems seek to prevent). *See also* Julia Angwin, *Facebook's Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (Jun. 28, 2017), *available at* https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms (last visited Sept. 1, 2020).

[81] *See* Harmon, *supra* note 71.

[82] *See* Elliot Harmon & Jeremy Gillula, *Stop SESTA: Whose Voices Will SESTA Silence?* ELEC. FRONTIER FOUND. (Sept. 13, 2017), *available at* https://www.eff.org/deeplinks/2017/09/stop-sesta-whose-voices-will-sesta-silence (last visited May 14, 2020).

[83] *Section 230 as a First Amendment Rule*, *supra* note 58**,** at 2038, 2047 (citing Corynne McSherry *et al.*, *Private Censorship Is Not the Best Way to Fight Hate or Defend Democracy:*

Relatedly, the relief sought in the NTIA Petition would amplify preexisting risk of oppressive content moderation because it would effectively incentivize or induce online platforms to double-down on oppressive content moderation strategies.[84] Users of all backgrounds would more likely have their constitutionally protected speech removed because platforms will have to adjust their services and policies to account for increased liability.[85] Tweets, posts, videos, and more would be at risk of removal if the platform believed they *might* be defamatory, or if they were politically controversial to the point that the platform would rather block them than risk litigation.[86] Marginalized communities like ethnic minorities and political activists will carry the bulk of these harms because these communities are over-policed by content moderation tools and procedures even without any weakening of Section 230.[87]

Here Are Some Better Ideas, ELECTRONIC FRONTIER FOUND. (Jan. 30, 2018)), *available at* https://www.eff.org/deeplinks/2018/01/private-censorship-not-best-way-fight-hate-or-defenddemocracy-here-are-some (last visited Aug. 26, 2020) ("Content moderation has 'shut down conversations among women of color about the harassment they receive online,' 'censor[ed] women who share childbirth images in private groups,' and 'disappeared documentation of police brutality, the Syrian war, and the human rights abuses suffered by the Rohingya.'")

[84] And similarly, users on platforms that choose to under-moderate in response to increased cost and exposure will be silenced by clearly harmful content like hate speech.

[85] *Section 230 as a First Amendment Rule*, *supra* note 58, at 2027 (internal citation omitted) (explaining that Section 230 "encourages websites to engage in content moderation" without fear of exposure to "liability for defamatory material that slips through.")

[86] *Id*. (stating that without Section 230's protection, "websites would have an incentive to censor constitutionally protected speech in order to avoid potential lawsuits.") Over half of internet users engage in politically controversial speech. Monica Anderson *et al., Public Attitudes Toward Political Engagement on Social Media*, PEW RES. CTR. (July 11, 2018), *available at* https://www.pewresearch.org/internet/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/ (last visited Aug. 26, 2020) (reporting that over the span of one year 53% of American adults engaged in some form of political or social-minded activity, such as using a hashtag related to a political or social issue, on social media).

[87] *See Section 230 as a First Amendment Rule*, *supra* note 58 at 2047 ("Given the cost of litigation, our most marginalized citizens are the ones least likely to be able to take advantage of a new liability regime"); *see also* Parts III (C) and (E) *supra* (outlining how the increased costs and risks associated with content moderation will harm small and marginalized groups if the NTIA Petition were to be granted).

IV. Recommendations for Reform

A. Platforms should not be immune from liability when they let their users create and spread discriminatory content like racial hate speech.

If Section 230 needs to be improved, that is a task for Congress – not the Executive Branch. The Section 230 Proponents encourage Congress to incentivize platforms to advance equity and anti-discrimination through their content moderation practices. We support reforming Section 230 to hold platforms more accountable when their products are used to violate users' civil rights.[88] Platforms should be protected when they moderate content to prevent such violations. In essence, the Proponents support protecting platforms when they moderate content to preserve equity and safety in their products, but also holding platforms liable when they negligently or purposefully allow their products to discriminate against users.

Platforms should not be immune from liability when they let their users create and spread discriminatory content like hate speech. Over the past few years, major online platforms have used Section 230 as a defense to a variety of civil rights lawsuits.[89] Social media giants, for example, have argued that Section 230 exculpates them even though companies used their products to prevent specific racial groups from seeing online job advertisements.[90] Similarly, platforms like YouTube have claimed Section 230 immunity when presented with evidence that their content-blocking algorithms targeted videos referencing Black culture.[91] Congress should

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[88] *See* Part III (E) *and* note 7 *supra* (discussing how online platforms have themselves or through their users facilitated civil rights violation in such fields as transportation, housing, and law enforcement).

[89] *Id.*

[90] *Id.*

[91] *Id.*

amend Section 230, or adopt new legislation, to the extent that current law allows platforms to intentionally or irresponsibly foster such an oppressive environment.[92]

That being said, Congress should broadly proscribe online platforms from engaging in or negligently facilitating online racial and gender discrimination, voter suppression, or hate speech. Section 230 is not the only law relevant to online platforms' influence of public discourse and communication between people.[93] Section 230 is one of many internet regulations; and internet regulations are but one genre of regulation in America's diverse legal library. Therefore, a complete reform process must consider how common law civil rights protections can be fully reflected in laws like Section 230.[94] Similarly, Congress should consider whether amending Section 230 itself is the best way to advance internet equity. There are many pathways that can be taken toward a more equitable and diverse internet.

B. Platforms should be immune from liability when they work to prevent users from creating and spreading discriminatory content like racial hate speech.

On the other hand, current law should be preserved when it shields platforms from liability for moderating content to foster user equity, equality, and safety online. Congress should craft new law to the extent that platforms in that context are unprotected. Because of liability shielding, platforms can confidently leverage their expertise to protect billions of people from harmful misinformation.[95] Relatedly, platforms can design their services to prevent hate speech by users; particularly innovative companies are deploying content moderation systems that not only have anti-discrimination policies in their terms of service, but actively look for evidence

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[92] *Id. See also* Overton, *supra* note 39.

[93] To the contrary, the regulatory and civil rights implications of platform-driven technology innovations are broad and too new to fully understand. *See supra* notes 38-39.

[94] *Accord.* Overton, *supra* note 39.

[95] *See* Wagner *et al*., *supra* note 55.

that their services are being used in a discriminatory way.[96] Section 230 as it stands thus incentivizes platforms to obey the word and spirit of the law, in large part because it can grant platforms immunity when they moderate content.[97]

Congress also should bolster immunity for content moderators, insofar as laws like Section 230 currently may discourage platforms from promoting equitable practice and freedom of expression online. If large and small internet companies are confident they can moderate user content without going bankrupt, organizations like the Section 230 Proponents will have more opportunities to participate in the internet economy. Relatedly, marginalized communities and activists online will be able to sing, speak, write, and type in celebration of their constitutional freedom to do so. Barring discriminatory expression like hate speech, America's philosophical bedrock is made of the collaboration, controversy, and indeed the truth, that is enabled by free expression. Internet companies are the architects and gatekeepers of history's largest public squares with history's biggest crowds. Those companies must be free to preserve that environment.

Conclusion

Even if the FCC had the requisite authority, the NTIA Petition lacks the precision required to amend or reinterpret Section 230 in a way that facilitates content moderation while protecting internet users from discrimination and hate speech. Critics of Section 230 have misstated the immense costs that would result from weakening or repealing Section 230 while failing to focus on the true needs for reform to prevent the internet from being misused to discriminate and intimidate. Reforms to Section 230, or new legislation, are needed to allow marginalized groups

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[96] *See* Kulp, *supra* note 27.

[97] *See Liability for User-Generated Content Online: Principles for Lawmakers*, *supra* note 14*; Section 230 as a First Amendment Rule*, *infra* note 58, at 2039 ("Various websites credit § 230 with their very existence.")

to have a place to engage in discussion, unrestricted by overbearing, or inadequate, content moderation policies that have a disproportionate harm on marginalized voices. Reform of Section 230 is a job for lawmakers who must craft internet laws that foster equity and equality. In the meantime, the NTIA Petition should be denied.

Respectfully submitted,

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September 2, 2020

ANNEX: THE SECTION 230 PROPONENTS

The **Multicultural Media, Telecom and Internet Council (MMTC)** is a non-partisan, national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecom and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for multicultural advancement in communications.

The mission of the **Hispanic Federation** is to empower and advance the Hispanic community. Hispanic Federation provides grants and services to a broad network of Latino non-profit agencies serving the most vulnerable members of the Hispanic community and advocates nationally on vital issues of education, health, immigration, civil rights, economic empowerment, civic engagement, and the environment.

The **League of United Latin American Citizens (LULAC)** is the nation's largest and oldest Hispanic civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 1,000 councils around the United States and Puerto Rico, LULAC's programs, services, and advocacy address the most important issues for Latinos, meeting the critical needs of today and the future.

The **National Coalition on Black Civic Participation (The National Coalition)** is a non-profit, non-partisan organization dedicated to increasing civic engagement and voter participation in Black and underserved communities. The National Coalition strives to create an enlightened community by engaging people in all aspects of public life through service/ volunteerism, advocacy, leadership development and voting.

The **National Council of Negro Women (NCNW),** founded 85 years ago by Dr. Mary McLeod Bethune, seeks to lead, advocate for and empower women of African descent, their families and communities. NCNW reaches more than two million persons through its 300 community and campus based sections in 32 states and its 32 affiliated women's national organizations. NCNW works to promote sound public policy, promote economic prosperity, encourage STEAM education and fight health disparities.

The **National Urban League (NUL)** is an historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. NUL reaches nearly two million people nationwide through direct services, programs, and research through its network of 90 professionally staffed affiliates serving 300 communities in 36 states and the District of Columbia.

Certificate of Service

Pursuant to 47 C.F.R. §1.405(b)), I hereby certify that I have on this 2nd day of September caused the foregoing "Comments of Section 230 Proponents" to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

Douglas Kinkoph, Esq.
Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

David Honig

David Honig

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	(RM-11862)

COMMENTS OF
THOUGHT DELIVERY SYSTEMS, INC.[1]

These comments are filed in response to the Commission's request for public comments regarding the Petition filed by the National Telecommunications & Information Administration (NTIA) requesting the Commission initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934, as amended.

Remove any Section 230 immunities currently enjoyed by Twitter, Facebook, Google, YouTube, Amazon and Microsoft. They are enjoying the benefits of publishing while impermissibly enjoying Section 230 immunity from the risks of publishing.

Section 230 governs perhaps the largest segment of the U.S. economy.[2] Twitter, Facebook, Google, YouTube, Amazon and Microsoft and their contemporaries are using their

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Thought Delivery Systems, Inc. ("TDSI") is a technology media conglomerate and laboratory dedicated to developing highly scalable solutions in broadband media. It developed a software protocol that methodically grades news content using scientific, legal and professional standard objective measures. Other projects integrate geographic information system (GIS) with first-to-market technologies and Atlases. It holds broadband network and radio-magnetic spectrum expertise and assets that it is researching, developing and deploying in the 5G and broadband internet environment. www.ThoughtDelivery.com

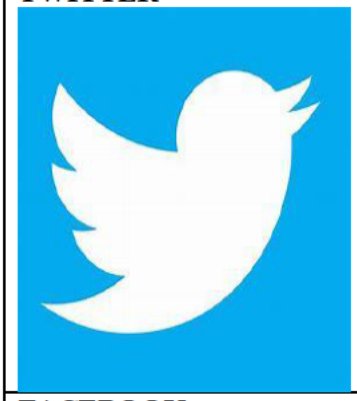
[2] *"The Economy Is in Record Decline, but Not for the Tech Giants: Even though the tech industry's four biggest companies were stung by a slowdown in spending, they reported a combined $28 billion in profits on Thursday",* New York Times, July 31, 2020, https://www.nytimes.com/2020/07/30/technology/tech-company-earnings-amazon-apple-facebook-google.html

unfair Section 230 immunities to boost their record growth during the Covid-19 pandemic. For example: "Amazon's sales were up 40 percent from a year ago and its profit doubled. Facebook's profit jumped 98 percent."[3]

Section 230 requires regular review, like most statutes.

Those opposed to the FCC (or Congress) carefully, mindfully and regularly examining whether Section 230 is operating and being interpreted in the public interest, preemptively suggest that any change at all would mean the "end of the Internet as we know it." It is alarming that those same corporations literally control vast swaths of the social media landscape and its underpinnings. Twitter, Google, Facebook, Microsoft, Amazon and other contemporaries' opposition or lukewarm responses (or non-responses) to re-examining Section 230 raise red flags. Worse, there is empirical data about how Big Tech titans (i) actively censor people and publications, (ii) are inextricably-intertwined with each other, and (iii) invest heavily in controlling other publishers as well as media influencers, thus using the cash acquired through their unfair Section 230 immunity to exercising publishing-style controls over vast media sectors.

[3] *Id.*

SOCIAL MEDIA COMPANY	EXECUTIVE AND/OR MAJOR SHAREHOLDER WRONGLY BENEFITTING FROM SECTION 230 PROTECTIONS	REPORTs THAT IT ACTS AS A PUBLISHER, THUS VIOLATING SECTION 230 (ie., DATA THAT CENSORSHIP IS SUBJECTIVE)	BIG TECH RELATIONSHIPS EXAMPLES
TWITTER 	JACK DORSEY	-Acts as a publisher: Uses subjective and impermissibly vague and arbitrary 'criteria' to censor or otherwise edit content.[4]	MICROSOFT[5] AMAZON[6] GOOGLE[7]
FACEBOOK 	MARK ZUCKERBERG	-Acts as a publisher: Uses subjective and impermissibly vague and arbitrary 'criteria' to censor or	MICROSOFT[9] AMAZON[10]

[4] Re, Gregg, Herridge, Catherine. "Nunes sues Twitter, some users, seeks over $250M alleging anti-conservative 'shadow bans,' smears." FoxNews. March 18, 2019. https://www.foxnews.com/politics/nunes-files-bombshell-defamation-suit-against-twitter-seeks-250m-for-anti-conservative-shadow-bans-smears Volz, Dustin. "Justice Department to Examine Whether Social-Media Giants Are 'Intentionally Stifling' Some Viewpoints." The Wall Street Journal. September 5, 2018. https://www.wsj.com/articles/facebooks-sandberg-and-twitters-dorsey-to-face-questions-on-capitol-hill-about-russian-meddling-bias-1536145201?st=wev8dfm3gwoqfnk Wells, Georgia. "Writer Sues Twitter Over Ban for Criticizing Transgender People." The Wall Street Journal. February 11, 2019. https://www.wsj.com/articles/writer-sues-twitter-over-ban-for-mocking-transgender-people-11549946725?

[5] Twitter Help. "How to use Twitter for Windows 10." Twitter. https://help.twitter.com/en/using-twitter/twitter-windows-10

[6] Saunders, Ben. "Who's Using Amazon Web Services? [2020 Update]" Continio. January 28, 2020.

[7] Google. "Twitter migrates Data to Google Cloud to keep the world tweeting." Google Cloud. (Site last visited 9/2/2020.) https://cloud.google.com/twitter/

[9] Warren, Tom. "Microsoft is shutting down Mixer and partnering with Facebook Gaming." The Verge. June 22, 2020. https://www.theverge.com/2020/6/22/21299032/microsoft-mixer-closing-facebook-gaming-partnership-xcloud-features

[10] Saunders, Ben. "Who's Using Amazon Web Services? [2020 Update]" Continio. January 28, 2020. https://www.contino.io/insights/whos-using-aws

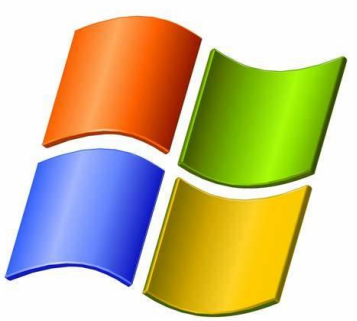
		otherwise edit content.[8]	
GOOGLE/YOUTUBE  	SUNDAR PICHAI (GOOGLE), SUSAN WOJCICKI (YOUTUBE)	-Acts as a publisher: Uses subjective and impermissibly vague and arbitrary 'criteria' to censor or otherwise edit content.[11]	SNAPCHAT[12]
AMAZON 	JEFF BEZOS	-Subjectively deletes books and comments about books of the Amazon website;[13]thus acting as a publisher; -Influence major media directly as personal owner of the *WASHINGTON POST*	HOSTS: TWITCH LINKEDIN FACEBOOK THRID-PARTIES TWITTER PINTEREST

[8] White, Chris. "Report Details Nature Of Facebook's Secret Rulebook Governing Global Speech." The Daily Caller. December 27, 2018. https://dailycaller.com/2018/12/27/facebook-privacy-hate-speech/ Zeiser, Bill. "Was Facebook's Suppression of News Story Fair Play?" Real Clear Politics. November 13, 2018. https://www.realclearpolitics.com/articles/2018/11/13/was_facebooks_suppression_of_news_story_fair_play_138631.html

[11] Ruvic, Dado. "YouTube perma-bans Stefan Molyneux as it reports '5x spike' in removals after launching crackdown on 'supremacist content'." RT. June 30, 2020. https://on.rt.com/akn2 Morgans, Melissa J. "Freedom of Speech, The War on Terror, and What's YouTube Got to Do with It." Federal Communications Law Journal. August, 2017. http://www.fclj.org/wp-content/uploads/2017/10/69.2.3-Morgans.pdf

[12] Dignan, Larry. "Snapchat spending $2 billion over 5 years for Google Cloud." ZDNet. February 3, 2017. https://www.zdnet.com/article/snapchat-spending-2-billion-over-5-years-for-google-cloud/

[13] Mangalindan, JP. "Amazon self-published authors: Our books were banned for no reason." Yahoo Finance. August 10, 2018. https://finance.yahoo.com/news/amazon-self-published-authors-books-banned-no-reason-134606120.html Jones, E. Michael. "BANNED! E. Michael Jones Books Removed." Culture Wars Magazine. June 23, 2020. https://culturewars.com/podcasts/banned-e-michael-jones-books-removed

MICROSOFT 	BILL GATES	-Invests over $250M in media influence operations[14];	MAKES MONEY FROM BIG SOCIAL MEDIA COMPANIES;

Bill Gates: Columbia Journalism Review Investigation:

"I recently examined nearly twenty thousand charitable grants the Gates Foundation had made through the end of June and found more than $250 million going toward journalism. Recipients included news operations like the BBC, NBC, Al Jazeera, ProPublica, National Journal, The Guardian, Univision, Medium, the Financial Times, The Atlantic, the Texas Tribune, Gannett, Washington Monthly, Le Monde, and the Center for Investigative Reporting; charitable organizations affiliated with news outlets, like BBC Media Action and the New York Times' Neediest Cases Fund; media companies such as Participant, whose documentary Waiting for "Superman" supports Gates's agenda on charter schools; journalistic organizations such as the Pulitzer Center on Crisis Reporting, the National Press Foundation, and the International Center for Journalists; and a variety of other groups creating news content or working on journalism, such as the Leo Burnett Company, an ad agency that Gates commissioned to create a "news site" to promote the success of aid groups. In some cases, recipients say they

[14] Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

distributed part of the funding as subgrants to other journalistic organizations—which makes it difficult to see the full picture of Gates's funding into the fourth estate."

And

"Gates's generosity appears to have helped foster an increasingly friendly media environment for the world's most visible charity. Twenty years ago, journalists scrutinized Bill Gates's initial foray into philanthropy as a vehicle to enrich his software company, or a PR exercise to salvage his battered reputation following Microsoft's bruising antitrust battle with the Department of Justice. Today, the foundation is most often the subject of soft profiles and glowing editorials describing its good works."

And

"A larger worry is the precedent the prevailing coverage of Gates sets for how we report on the next generation of tech billionaires–turned-philanthropists, including Jeff Bezos and Mark Zuckerberg. Bill Gates has shown how seamlessly the most controversial industry captain can transform his public image from tech villain to benevolent philanthropist. Insofar as journalists are supposed to scrutinize wealth and power, Gates should probably be one of the most investigated people on earth—not the most admired."[15]

Jeff Bezos: Amazon CEO, Owner of Washington Post, Executive of Kuiper:

[15] Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

Jeff Bezos owns The Washington Post — and the journalism it's practicing[16]

Amazon's Jeff Bezos Will Launch 3,236 Satellites For Global Internet Like Elon Musk[17]

Make no mistake, Big Tech titans are acting as publishers while trying to evade the liabilities of publishing, and they are misusing Section 230 to get away with it. They are actively and subjectively censoring on a gargantuan scale what Americans write, post or see on social media and in traditional media.[18] Moreover, they are using their illegitimate Section 230 protections to garner historic ill-gotten profits to perpetuate and accelerate these abuses. It must stop.

The Commission should consider NTIA's petition regarding Section 230 and act in accordance with the views expressed herein.

Respectfully submitted,

Joseph M. Sandri, Jr.
Founder & CEO,
Thought Delivery Systems, Inc.

September 2, 2020

[16] Maines, Patrick. "Jeff Bezos owns The Washington Post Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

[17] Khanna, Monit. "Amazon's Jeff Bezos Will Launch 3,236 Satellites For Global Internet Like Elon Musk." India Times. July 31, 2020. https://www.indiatimes.com/technology/news/kuiper-satellite-internet-jeff-bezos-519269.html

[18] Schwab, Tim. "Journalism's Gates Keepers." Columbia Journalism Review. August 21, 2020. https://www.cjr.org/criticism/gates-foundation-journalism-funding.php

38 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Roddy, Carolyn; Simington, Nathan
Subject: FW: <no subject>
Date: Monday, June 29, 2020 10:01:18 AM
Attachments: Potential 47 CFR Chapter I Subchapter E.docx

I have a call with Nathan now—and I'll circle back to Carolyn—when's a good time to chat, Carolyn?

From: Candeub, Adam (b) (6)
Sent: Monday, June 29, 2020 9:58 AM
To: Candeub, Adam <acandeub@ntia.gov>
Subject: <no subject>

3 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Candeub, Adam
Subject: RE: <no subject>
Date: Wednesday, September 9, 2020 11:14:25 PM
Attachments: APA concerns.docx

From: Candeub, Adam (b) (6)
Sent: Wednesday, September 9, 2020 9:08 PM
To: Candeub, Adam <acandeub@ntia.gov>
Subject: <no subject>

(b) (5)

[redacted]

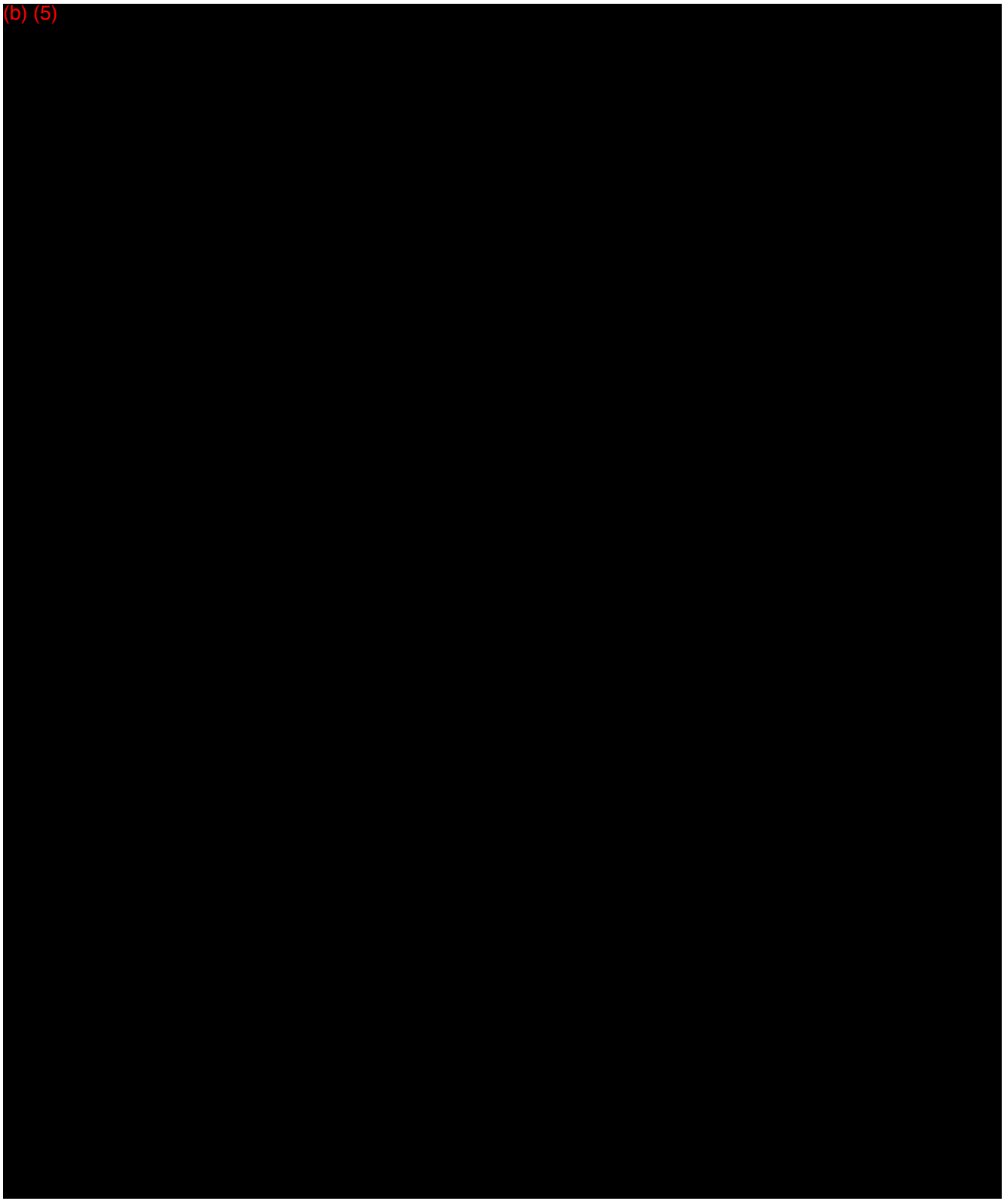

(b) (5)

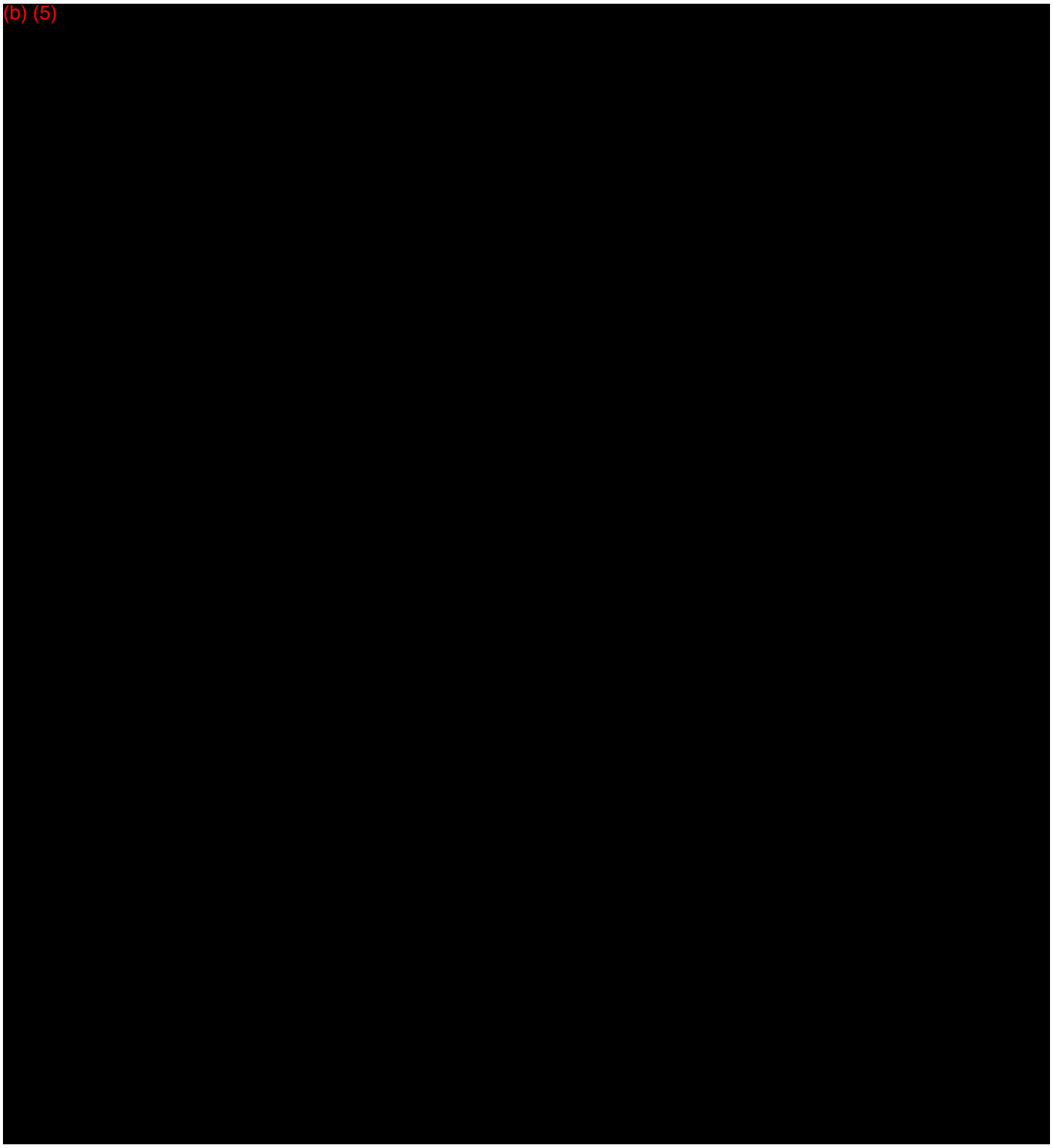
8 Pages (1 Record) Withheld in their Entirety Pursuant to FOIA Exemption 5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Hahn, Julia A. EOP/WHO
Subject: talking points
Date: Monday, July 27, 2020 12:34:58 PM

Hey, Julia, Thanks so much for checking in. Here's something we came up with. Please let me know if you have any questions or concerns. Hope this is helpful to you. 202 360 5586

(b) (5)




(b) (5)

From:	Candeub, Adam
To:	Roddy, Carolyn
Subject:	RE: u around?
Date:	Monday, September 14, 2020 1:37:17 PM
Attachments:	image001.png NTIA_REPLY_9_14.docx

Would you mind turning to proofing now?

From: Roddy, Carolyn <croddy@ntia.gov>
Sent: Monday, September 14, 2020 1:35 PM
To: Candeub, Adam <acandeub@ntia.gov>
Subject: RE: u around?

Just saw this. In my office. Finishing Opposition summaries. Plan to go grab lunch and bring it back to the office. Want something? Have 2 pm staff meeting.

Carolyn Tatum Roddy
National Telecommmunications & Information Administration
United States Department of Commerce
1401 Constitution Avenue, NW, Room 4899
Washington, DC 20230
Office 202-482-3480 | Cell: 404-234-8376

From: Candeub, Adam <acandeub@ntia.gov>
Sent: Monday, September 14, 2020 11:24 AM
To: Roddy, Carolyn <croddy@ntia.gov>
Subject: u around?

Adam Candeub
Acting Assistant Secretary
National Telecommunications and Information Administration
(202) 360-5586

35 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption 5
(5 U.S.C. § 552 (b)(5))

From:	Candeub, Adam
To:	Willard, Lauren (OAG); Grieco, Christopher (ODAG); Barnett, Gary (OAG)
Cc:	Simington, Nathan; Roddy, Carolyn
Subject:	RE: deliberative/draft
Date:	Thursday, July 16, 2020 10:17:27 PM
Attachments:	social media_information service_Title I_ac.docx

Deliberative Process

Hi All, In preparation for tomorrow's meeting, here's a brief 2 page set of discussion points. I hope it will be useful/save time. Thanks, Adam

2 Pages (1 Record) Withheld in their Entirety Pursuant to FOIA Exemption 5 (5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Coley, Andrew
Subject: Batch 2
Date: Sunday, September 13, 2020 1:45:16 PM
Attachments: NTIA_reply_AMBIG.docx

13 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA
Exemption
5
(5 U.S.C. § 552 (b)(5))

From: Simington, Nathan
To: Candeub, Adam
Subject: Cleanups to Petition
Date: Sunday, July 26, 2020 4:26:22 PM
Attachments: 330pm NS edits to AC_Social Media Petition_ac_.7_26.docx

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Hi Adam,

Thankfully Sherk's comments were very limited. Please find my cleaned-up draft attached. As discussed, please text me for one last look at (b) (5) before you distribute to Kathy.

Thanks,
Nathan

--
Nathan A. Simington, Sr. Adviser, NTIA
nsimington@ntia.gov
(b) (6)

60 Pages (1 Record)
Withheld in their
Entirety
Pursuant to FOIA
Exemption
5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Kinkoph, Douglas
Subject: decision memo
Date: Tuesday, July 21, 2020 7:35:59 PM
Attachments: NTIA Decision Memo for Sec. Ross_Soc_Media_FCC_Petition.docx

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Doug, Here's the decision memo. I HOPE we'll have close to a final draft Thursday or Friday. Does that work? Please let me know. And, apologies for not being the checkin meeting today. Things are a bit busy . . . .

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

3 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Simington, Nathan
Subject: DELIBERATIVE/PREDECISIONAL
Date: Thursday, July 9, 2020 8:36:07 PM
Attachments: Outline for NTIA Petition DRAFT 07.09 AC.docx

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

7 Pages (1 Record)
Withheld in their Entirety
Pursuant to FOIA Exemption
5
(5 U.S.C. § 552 (b)(5))

From: Candeub, Adam
To: Keller, Catherine (Federal); Blair, Robert (Federal)
Subject: final filed NTIA Reply comments
Date: Thursday, September 17, 2020 6:32:26 PM
Attachments: NTIA Reply Comments in RM No. 11862.pdf

Dear Catherine, Per your request, here are the as filed comments in the FCC social media petition. There were some very slight changes from the version you saw. (DOJ got them in at the last minute.) But NOTHING substantive. Thanks again, Adam

Adam Candeub
Acting Assistant Secretary
National Telecommunications and Information Administration
(202) 360-5586

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	File No. RM-11862
Communications Act of 1934	)	

To: The Commission

REPLY COMMENTS

National Telecommunications and
Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230
(202) 482-1816

September 17, 2020

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Summary of the Argument

The National Telecommunications and Information Administration's Petition for Rulemaking[1] spurred hope for the American people. Thousands of Americans submitted comments to the Federal Communications Commission (Commission or FCC), writing of their frustration and anger at the major social media platforms' censorship and de-platforming. These commenters spoke of their exclusion from political, social, and cultural activity—our nation's public square—due to social media platforms' unfair and arbitrary content moderation policies.

These Americans called upon the FCC to ensure that section 230 no longer renders the internet a "no man's land" where major social media platforms ignore with impunity contract, consumer fraud, and anti-discrimination laws. These Americans recognized an obvious truth: when social media companies edit, moderate, comment upon, or shape user-generated content to a degree that renders them speakers in their own right, they fall outside of section 230's protections. Finally, these comments called upon the FCC to impose the same disclosure requirements on the major social media platforms that broadband internet access service providers (BIASs) now face. In a democracy, control of public discourse should take place in sunlight.

There were, in addition, critical comments to the NTIA Petition, which this Reply categorizes and rebuts. First, many comments claim that the FCC lacks the jurisdiction to prescribe implementing regulations under section 230. This position either ignores section 201(b)'s general grant of regulatory authority, or misconstrues it in a way that would invalidate swathes of existing FCC regulation.

[1] National Telecommunications and Information Administration, Petition for Rulemaking, Docket No. RM- 11862 at 27-31 (Filed July 27, 2020) (Petition).

Second, commenters claim that the Petition's proffered reading of section 230(c)(1) and its relationship to section 230(c)(2) conflicts with case law or precedent. Yet, case law does not bind the FCC's judgment concerning ambiguous terms in statutes; rather, it has a duty to make an independent judgment when faced with statutory ambiguities. While much of the case law supports NTIA's proffered reading, certain outlier cases have stretched the meaning of section 230 beyond its original purpose. These expansive court decisions reinforce the need for the FCC to issue regulations to clarify the proper scope of section 230 for the benefit of the courts, platforms, and public.

Third, some commenters claim the Petition, in seeking to clarify the relationship between section 230(c)(1) and section 230(f)(3) by showing when an "interactive computer service" becomes an "information content provider," find ambiguity where none exists. Unfortunately, however, courts have not interpreted the definition of "information content provider" in (f)(3) consistently or as broadly as it was intended and the text indicates. Further, this position ignores the inherent difficulty distinguishing between promoting, editing, and blocking content and creating content. The FCC's clarification of section 230(c)(1) and 230(f)(3) will provide a discernable distinction.

Fourth, commenters claim that the FCC lacks jurisdiction to impose disclosure requirements because social media are not "information services." This assertion ignores the Petition's exhaustive analysis of the term as used in the 1996 Telecommunications Act and FCC regulation. Instead, commenters make inconclusive textual arguments from the definitional section 230(f)(2) and ignore the numerous court rulings, as well as the FCC's own definitions, classifying social media services as information services falling under the FCC's Title I jurisdiction.

Fifth, commenters claim that the Petition's interpretation of section 230 violates the First Amendment because the Petition, through its proposed liability rule, encourages certain types of speech but not others. But policy fears that present parades of horribles marching in opposite directions lack foundation. Commenters fail to cite any case in which a facially neutral liability relief standard was ruled unconstitutional —because there are none. And, as proof, it should be noted that section 230(c)(2) itself is a liability rule that encourages certain types of speech, but no critical commenter has argued or court has ever found it unconstitutional.

Sixth, commenters also predict that the Petition's interpretation of section 230 will result in either too much or too little content moderation. When policy fears present parades of horribles that march in opposite directions, these policy insights likely lack firm foundation. Given the difficulty of prediction, the best course is to follow the Petition's close reading of the statues' text and legislative history.

Last, commenters assert that the Petition's proposed rules will have an impact greater than $100 million. But, largely relying on unpublished economic laboratory studies, commenters present no evidence that these estimates have any validity in the real world.

I. The FCC's Authority to Issue Regulations Implementing Section 230

The Supreme Court has ruled that "the grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of [the 1934 Communications] Act.'"[2] The Telecommunications Act of 1996 (1996 Act),[3] in turn, incorporated Section 230 into the

[2] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 (1999); City of Arlington, Tex. v. FCC, 569 U.S. 290, 293 (2013) (noting that Section 201(b) of that Act empowers the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions. Of course, that rulemaking authority extends to the subsequently added portions of the Act.").
[3] Pub. L. No. 104-104 (1996).

1934 Communications Act. The Supreme Court and lower courts repeatedly have held that the Commission's section 201(b) rulemaking "[o]f course . . . extends to the subsequently added portions of the Act."[4] "Section 201(b) gives the Commission broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' including sections that were added later by the Telecommunications Act of 1996."[5]

Following this understanding of the FCC's regulatory authority, the Supreme Court has applied section 201(b) to sections 251 and 252, and section 332.[6] The U.S. Court of Appeals for the Ninth Circuit ruled that section 201(b) authorizes rulemaking for section 276.[7] And, the Commission has applied section 201's rulemaking authority to numerous other sections of the Telecommunications Act.[8]

A. Section 201(b)'s Authority Does Not Turn on the Text of Section 230

Numerous commenters allege that the lack of explicit implementing authority within section 230 renders it beyond the reach of section 201(b)'s grant of regulatory authority.[9] But,

[4] City of Arlington, 569 U.S. at 293.
[5] Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc., 423 F.3d 1056, 1067–68 (9th Cir. 2005) (citations omitted).
[6] City of Arlington, 569 U.S. at 293; Iowa Utilities Bd., 525 U.S. at 378; 47 U.S.C. §§ 251, 252, 332.
[7] Metrophones Telecommunications, 423 F.3d at 1067–68.
[8] Numerous commenters recognize as obvious this statutory analysis. Comments of the Free State Foundation, Docket No. RM-11862 at 4-5 (Filed Sept. 2, 2020) (Free State Comments); Comments of the Internet Accountability Project, Docket No. RM-11862 at 2 (Filed Sept. 2, 2020) (IAP Comments); Comments of Organizations Promoting a Safe, Secret, and Sustainable Internet for All, Docket No. RM-11862 at 6-7 (Filed Sept. 3 2020) (Internet for All Comments).
[9] Comments of Americans for Prosperity, Docket No. RM-11862 at 22-26 (Filed Sept. 2, 2020) (Americans for Prosperity Comments); Comments for the Center for Democracy and Technology, Docket No. RM-11862 at 5-6 (Filed Sept. 1, 2020) (CDT Comments); Comments of the Internet Association, Docket No. RM-11862 at 5-6 (Filed Sept. 3, 2020) (Internet Association Comments); Comments of TechFreedom, Docket No. RM-11862 at 14-16 (Filed Sept. 2, 2020) (TechFreedom Comments); Comments of Public Knowledge, Docket No. RM-11862 at 4-6 (Filed Sept. 2, 2020) (Public Knowledge Comments); Comments of Vimeo, Inc.,

this argument contradicts Supreme Court precedent, which extends section 201(b) authority to sections codified in 1934 Act, regardless of whether the particular section specifically mentions or contemplates FCC regulation. For instance, section 332(c)(7), which was also added to the 1934 Act by the 1996 Act,[10] limits State and local decision-making on the placement, construction, or modification of certain wireless service facilities. The section makes no mention of FCC authority, only alluding to the Commission in passing and giving it no role in the provision's implementation. The Supreme Court, nonetheless, upheld the Commission's authority to issue regulations pursuant to section 332(c)(7) for the simple reason that it was codified within the 1934 Act, and section 201(b) empowers the Commission to promulgate rules interpreting and implementing the entire Act.[11]

Similarly, in Iowa Utilities, the Supreme Court ruled that the FCC had rulemaking authority to implement sections 251 and 252 of the Act.[12] As with section 332(c)(7), section 252 does not explicitly grant the Commission power over all aspects of its implementation. Despite this silence, the Court ruled that "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[13] These two decisions, and their underlying rationales, compel the same result for a Commission rulemaking to interpret section 230: if Congress chooses to codify a section into the 1934 Communications Act, then section 201(b) gives the FCC the power to clarify and implement it through regulation.

Automattic Inc., Reddit, Inc., Docket No. RM-11862 at 6-9 (Filed Sept. 2, 2020) (VAR Comments).

[10] Telecommunications Act of 1996, Pub. Law 104-104 § 704. Facilities Siting; Radio Frequency Emission Standards, 47 U.S.C. § 332(c)(7).

[11] City of Arlington, 569 U.S. at 293 (affirming "[o]f course that rulemaking authority [of section 201(b)] extends to the subsequently added portions of the Act").

[12] Iowa Util. Bd., 525 U.S. at 378-87.

[13] Id. at 380.

The Commission, itself, has never limited application of section 201(b) to a given section of the Act depending on whether the section, itself, calls for Commission implementation. Following Supreme Court precedent, the Commission will apply section 201(b) to a section of 1934 Act that does not mention implementing authority. For instance, the Commission has issued regulations under sections 271,[14] which has no implementing language and section 260,[15] which only calls for procedural regulation.

B. Section 201's Requirement that Rules be "Necessary in the Public Interest"

Some commenters argue that section 201 is qualified by its language that all rules issued under its authority must be "necessary in the public interest."[16] But, courts have not read this language to limit the Commission's power to issue rules that further a legitimate regulatory objective. The Courts of Appeals for the Third and D.C. Circuits recognize that "necessary' is a 'chameleon-like' word whose 'meaning ... may be influenced by its context' [and] the Cellco Court determined that it would uphold any reasonable interpretation that did not contravene the express provisions of the Communications Act."[17] In Cellco, the D.C. Circuit stated that "[u]nder 47 U.S.C. § 201(b), the Commission can adopt rules upon finding that they advance a legitimate regulatory objective; it need not find that they are indispensable."[18] The Petition advances rules that clearly advance a "legitimate regulatory objective." It asks the Commission

[14] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 64 FR 51910 (Sept. 27, 1999).
[15] Accounting Safeguards Under the Telecommunications Act of 1996, 62 FR 2918 (Jan. 21, 1997).
[16] CDT Comments at 6-7; VAR Comments at 7-8.
[17] Prometheus Radio Project v. FCC, 373 F.3d 372, 393 (3d Cir. 2004), as amended (June 3, 2016), *citing* Cellco P'ship v. FCC, 357 F.3d 88 (D.C.Cir.2004).
[18] Cellco P'ship, 357 F.3d at 96. (citations omitted).

to return section 230 to its original meaning and purpose and expand transparency and consumer protection.

C. The Commission's Power to Implement Statutory Regulations Does Not Turn on Whether Such Statute Has Requires Regulatory Implementation

Numerous commenters allege that section 230 is a self-executing law controlling private parties and, therefore, precludes any federal regulatory implementation.[19] Again, this claim contradicts the Supreme Court rulings that found section 201(b) authority to issue regulations regarding section 252 procedures before a state utility commission and section 332(c)(7) which regulates local cellphone siting. These statutes are explicit and could easily be implemented without further Commission action, but the Supreme Court ruled that section 201(b) gave the Commission the right to further clarify and implement them. Further, the largely private scope of section 230 presents no bar to the FCC's power to implement regulations and the statute duplicates public interest because it blocks state criminal and civil enforcement. Agency statutory interpretations and implementation regulations receive full deference and have full effect even when governing actions between private litigation or disputes in which the agency plays no role.[20]

[19] Comments of Professors Christopher Terry and Daniel Lyons, Docket No. RM-11862 at 3 (filed Sept. 10, 2020) (Terry and Lyons Comments); Public Knowledge Comments at 4.
[20] Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 58 (2007); Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 650–51 (7th Cir. 2015); Leyse v. Clear Channel Broad., Inc., 697 F.3d 360, 372 (6th Cir. 2012); Schafer v. Astrue, 641 F.3d 49, 61 (4th Cir. 2011); Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 221 (2d Cir. 2009); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 949 (9th Cir. 2009).

D. Section 201(b) Is Not Limited to Common Carriers

Some argue that because some of section 201(b)'s provisions refer to common carriage, the entire implementing authority is also limited.[21] As a textual matter, this argument has no support. Parts of section 201(b) refer to common carriage; others do not. The Petition relies upon the complete sentence appearing at the end of section that does not involve or mention common carriage: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[22] Section 230 is in "this chapter" and section 201(b) "means what it says."[23]

Neither the Commission nor any court has ever recognized a common carriage limitation to the Commission's power in implementing appropriate regulation. To the contrary, the Commission has regulated non-common carrier issues pursuant to section 201 authority. For instance, City of Arlington demonstrates that this limitation has no basis in law. There, the FCC relied upon section 201(b) to promulgate rules about localities' decisions about cellphone tower siting—nothing to do with common carriage.[24] Section 201(b) authority has also been used to justify the Commission's regulations on matters as diverse as alarm monitoring services in 47 U.S.C. § 275[25] and pole attachments in 47 U.S.C. § 224.[26]

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[21] CDT Comments at 6; TechFreedom Comments at ii, 11; VAR Comments at 6-9.
[22] 47 U.S.C. § 201(b).
[23] Iowa Utilities Bd., 525 U.S. at 278.
[24] City of Arlington, 569 U.S. at 293.
[25] In the Matter of Enforcement of Section 275(a)(2) of the Communications Act of 1934 Against Ameritech, FCC 98-226, 13 FCC Rcd. 19046 (Sept. 15, 1998).
[26] In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, FCC 14-153, 29 FCC Rcd. 12865 (Oct. 21, 2014).

E. The Petition Does Not Call on the FCC to Regulate Speech or Impose Anti-Discrimination Requirements

Some argue that the Petition calls upon the Commission to regulate speech or impose non-discrimination requirements.[27] The Petition, however, does not prescribe speech nor impose unconstitutional conditions on speech as discussed infra and does not ask the Commission to regulate speech. It simply asks to return section 230 to its original meaning—to clarify a special legal exemption that interactive computer services enjoy. Nothing in the Petition prescribes or limits what anyone or any platform can say or express. Similarly, the Petition does not present "anti-discrimination" requirements and commenters fail to identify any place in the Petition that does so.[28] Rather, commenters assert that reading Section 230(c)(2)'s "otherwise objectionable" language according to ejusdem generis as discussed below, imposes anti-discrimination, common carriage so-called "network neutrality" requirements in violation of Verizon v. FCC.[29] This is an apples and oranges comparison. First, section 230(b)(2) is not an anti-discrimination provision; it is a liability protection provision. Platforms are free to carry whatever content they wish. Second, the Verizon court, in rejecting the FCC's anti-discrimination rule, took the Commission to task for an extravagant assertion of power over non-common carriers pursuant to

[27] Comments of the Computer and Communications Industry Association, Docket No. RM-11862 at 4 (Filed Sept. 3, 2020) (CCIA Comments) ("The Communications Act of 1934 does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC's jurisdiction. What NTIA proposes is not included in the scope of the FCC's enabling statute…"); Public Knowledge Comments at 5; TechFreedom Comments at 49; VAR Comments at 11.

[28] Public Knowledge Comments at 6.

[29] Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

section 706 of the Act.[30] Here, section 230 is not limited to common carriers thus Verizon's limitation has no application.

F. Section 230(b) and the Comcast decision

Section 230's policy statements found in Section 230(b)(2) state inter alia that the internet should be "unfettered by Federal or State regulation." Commenters argue this language precludes FCC's regulatory implementation of section 230.[31] But, this is not the case. "Policy statements are just that—statements of policy. They are not delegations of regulatory authority."[32] They do not create "statutorily mandated responsibilities."[33]

Regardless, section 230(b)(2) supports the Petition. Section 230 is a regulatory text, creating an exception to common law obligations. By limiting and clarifying its scope, the Petition is urging a de-regulatory approach. And, in addition, the Petition furthers other policies of section 230(b).[34]

G. Legislative History and Statements

Commenters point to statements made by congressmen, before and after the passage of section 230, to claim that the FCC lacks rulemaking authority.[35] For instance, legislators made statements such as "there is just too much going on the Internet for that to be effective. No

[30] Id. at 655 (identifying that "the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], pro tanto, to common carrier status'").
[31] Americans for Prosperity Comments at 9; CCIA Comments at 4-5; Terry & Lyons Comments at 3; VAR Comments at 7.
[32] Comcast Corp. v. FCC, 600 F.3d 642, 655 (D.C. Cir. 2010).
[33] Comcast Corp., 600 F.3d at 652; Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. 2005).
[34] 47 U.S.C. § 230(b)(3) ("It is the policy of the United States to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.").
[35] Americans For Prosperity Comments at 6; CCIA Comments at 4; Internet Association Comments at 13; TechFreedom Comments at 4.

matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time."[36]

These quotations' antiregulatory attitude reflected congressional support for section 230's free market, incentivizing approach to the problem of children viewing pornography on the internet. These comments do not evidence a congressional intent to strip the Commission of its regulatory authority under section 230. After all, section 230 *is* a regulation. All the Petition asks the Commission to do is narrow section 230's scope, making it *less* regulatory.

Section 230 is "deregulatory" in the sense that it created special, market incentives to regulate speech offensive to children and families, as opposed to more hands-on regulation that was proposed at the time in a competing legislation offered by Senator Exon. Representatives Christopher Cox and Ron Wyden floated the bill that became section 230—entitled the "Online Family Empowerment amendment"-- as an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors.[37] In public comments, Representative Cox explained that the section 230 would reverse Stratton Oakmont and advance the regulatory goal of allowing families greater power to control online content.[38] The final

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[36] 141 Cong Rec H 8460 (Statement of Mr. Cox); see also TechFreedom Comments at 6-7.

[37] Robert Cannon, The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 Fed. Comm. L.J. 51 (1996); Felix T. Wu, Collateral Censorship and the Limits of Intermediary Immunity, 87 Notre Dame L. Rev. 293, 316 (2011); 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995); Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 564 (2002) (noting that the Communications Decency Act reflected "Congress's response to the proliferation of pornographic, violent and indecent content on the web Congress' first attempt to protect children from exposure to pornographic material on the Internet.").

[38] See 141 Cong. Rec. H8469-70 (1995) (daily ed. Aug. 4, 1995) (statement of Rep. Cox); see also Reno v. Am. Civil Liberties Union, 521 U.S. 844, 859 n. 24 (1997) ("Some Members of the House of Representatives opposed the Exon Amendment because they thought it 'possible for our parents now to child-proof the family computer with these products available in the private sector.' They also thought the Senate's approach would 'involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of

statute reflected his stated policy: "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services."[39] The comments in the Congressional Record reveal bipartisan support and an understanding that section 230 was a non-regulatory approach to protecting children from pornography.[40] But, Congress intended section 230, and the FCC's regulatory authority, to further the goal of empowering families.

Finally, some commenters make the erroneous claim that the Restoring Internet Freedom Order, the FCC found that Section 230 provides no regulatory authority.[41] But, that is irrelevant. The point here is that section 201(b) –not section 230 itself—grants authority to issue regulations interpreting section 230(c).

H. Timing Issues

Some commenters argue that because the FCC has not before exerted regulatory authority to interpret section 230, it may not do so now. Or, relatedly, because no court has ever referred to the Commission a section 230 case on primary jurisdiction grounds, the Commission now

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legal challenges while our kids are unprotected.' These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled 'Online Family Empowerment.' See 110 Stat. 137, 47 U.S.C. § 230 (Supp. 1997); 141 Cong. Rec. H8458-H8472 (1995)." This amendment, as revised, became § 502 of the Telecommunications Act of 1996 [codified at section 230]).

[39] 47 U.S.C. § 230(b)(3) (emphasis added).

[40] See 141 Cong. Rec. H8470 (statement of Rep. White) ("I want to be sure we can protect [children] from the wrong influences on the Internet. But ... the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent. That is why I was proud to cosponsor this bill that is what this bill does ...."); (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment ....").

[41] TechFreedom Comments at 8-1.

lacks authority to issue regulations.[42] Commenters fail to cite a case in which a court's ruling on a statutory section precludes an agency from issuing regulations or a failure for courts to make referrals of primacy jurisdiction to the FCC strips it of its rulemaking authority. To the contrary, cases say the opposite. Administrative law, as the Supreme Court repeatedly has held, holds no such limit to the FCC's power. Under Chevron, the FCC has authority to implement any reasonable interpretation of ambiguities in section 230.[43] Under Brand X, prior court rulings do not bind—and must not have a bearing—on an agency's independent duty to arrive at interpretations of ambiguous terms in statutes it implements.[44] There is no time limit at which an agency's power to regulate expires. This Petition offers the opportunity for the FCC to examine section 230 with fresh eyes—to examine whether the legal rules created in the 1990's, in a very different internet economy, and which extend by precedent to this day, need revision.

II. Returning Section 230 to Its Textual Moorings and Congressional Intent

Some commenters have claimed that the FCC lacks authority to implement section 230 because it self-executes and lacks any ambiguity to clarify.[45] Yet, a cursory review of the comments reveal commenters offering manifold interpretations different from those for which the Petitions argues—revealing numerous ambiguities and echoing the conflicting views that

[42] Comments of the National Taxpayers Union, Docket No. RM-11862 at 3-5 (Filed Sept. 2, 2020) (NTU Comments); TechFreedom Comments at 12-14.
[43] City of Arlington, 569 U.S. at 296 (applying Chevron deference to section 332 under the analysis that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").
[44] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982, 125 S. Ct. 2688, 2700, 162 L. Ed. 2d 820 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").
[45] CDT Comments at 5; Internet Association Comments at 18-22; Terry and Lyons Comments at 10-11; VAR Comments at 14.

courts have put forth.[46] This section shows that Section 230 has ambiguities that the FCC must resolve and offers a resolution of these that best accords with the statute's text, intent, and purpose.

A. Defining Ambiguity

While commenters have claimed that section 230 contains no ambiguities, [47] commenters fail to cite the legal standard of ambiguity. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.[48] A statute is considered ambiguous if it can be read more than one way.[49] And, of course, when a statute is ambiguous or leaves key terms undefined, a court must defer to the federal agency's interpretation of the statute, so long as such interpretation is reasonable.[50] As the following shows, numerous aspects of section 230 are ambiguous, and the Petition offers an interpretation that faithfully follows the statutory text and stays true to congressional intent.

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[46] See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) ("The plain language and structure of the CDA unambiguously demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes congressional intent and violates the spirit and serendipity of the Internet."); see e.g., Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F.Supp.3d 1088, 1094–1095 (N.D.Cal. 2015).

[47] CCIA Comments at 2-3; Public Knowledge Comments at 8-9; TechFreedom Comments at 88.

[48] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

[49] United States v. Nofziger, 878 F.2d 442, 446–47 (D.C.Cir.1989).

[50] Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1067 (9th Cir.2005) (citing Chevron, 467 U.S. at 845, 104 S.Ct. 2778).

B. "Shall Be Treated as the Publisher or Speakers"

Section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The term "treated as the publisher or speaker" is ambiguous. Most cases have determined that the phrase relieves platforms of the legal liability they would face if they were presumed speakers or publishers of third-party user-generated content on their platform.[51] Thus, section 230(c)(1) protects platforms against liability for their users' libelous statements or criminal threats.

On the other hand, a handful of commenters and a few district courts—largely ruling in pro se cases, claim that this phrase relieves platforms of all liability relating to content. Section 230 protects them from legal liability resulting from exercising their "editorial function."[52]

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[51] Petition at 27-31.

[52] Internet Association Comments at 21-24; TechFreedom Comments at 86; Comments of the New Civil Liberties Alliance, Docket No. RM-11862 at 5-6 (Filed Sept. 2, 2020) (NCLA Comments); Jones v. Dirty World Entm't Recordings LLC,755 F.3d 398, 409 (reasoning that the core immunity that § 230(c) provides for the "exercise of a publisher's traditional editorial functions"); Doe II v. MySpace Inc., 175 Cal. App. 4th 561, 572, 96 Cal. Rptr. 3d 148, 156 (2009) (noting a classic kind of claim that Zeran found to be preempted by section 230, ... one that seeks to hold eBay liable for its exercise of a publisher's traditional editorial functions); Hassell v. Bird, 5 Cal. 5th 522, 532 (2018), cert. denied sub nom. Hassell v. Yelp, Inc., 139 S. Ct. 940 (2019) (holding that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred").

[52] Internet Association Comments at 21-24; NCLA Comments at 5-6; TechFreedom Comments at 86; Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398, 409 (the core immunity that § 230(c) provides for the "exercise of a publisher's traditional editorial functions"); Doe II v. MySpace Inc., 175 Cal. App. 4th 561, 572, 96 Cal. Rptr. 3d 148, 156 (2009) (classic kind of claim that Zeran found to be preempted by section 230, ... one that seeks to hold eBay liable for its exercise of a publisher's traditional editorial functions); Hassell v. Bird, 5 Cal. 5th 522, 532 (2018), cert. denied sub nom. Hassell v. Yelp, Inc., 139 S. Ct. 940 (2019) ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred").

Following this argument, section 230 would immunize platforms not simply from liability deriving from third party content on their platform, but also platforms' decision to remove content. This reading frees platforms to discriminate against certain users and throw them off their platforms, and section 230(c)(1) would protect them from contract, consumer fraud or even civil rights claims.[53] Contrary to some commenters who claim otherwise,[54] courts are relying upon Section 230 to immunize platforms for their own speech and actions--from contract liability with their own users,[55] their own consumer fraud,[56] their own violation of users' civil rights,[57] and assisting in terrorism.[58]

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[53] Comments of the American Principles Project, Docket No. RM-11862 at 3-4 (Filed Aug. 28, 2020) (APP Comments) ("lawsuits challenging Big Tech bans against specific viewpoints have failed, making Big Tech virtually immune to civil litigation"); Comments of Hal Singer and Robert Seamans, Docket No. RM-11-862 at 1-2 (Filed Sept. 3, 2020) ("As noted by American Prospect editor David Dayen, Section 230 is "being extended by companies like Airbnb (claiming the home rentals of their users are 'third-party content') and Amazon (the same for the product sold by third parties on their marketplace) in ways that are downright dangerous, subverting consumer protection and safety laws").

[54] Americans For Prosperity Comments at 19; but see Comment of Contract Law Professors, Docket No. RM-11862 at 1-2 (Filed Sept. 3, 2020) (Contract Professors Comments) (describing in detail a case of section 230 immunizing against contract obligations); Free State Comments at 2-3; Comments of Dr. Christos A. Makridis, Docket No. RM 11-862 (Filed Sept. 2, 2020) (Makridis Comments).

[55] For instance, some commenters claim that courts did not rely on section 230 immunity in rejecting contact claims. But see Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), aff'd, 700 F. App'x 588 (9th Cir. 2017) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all [including contract] of Plaintiff's claims against Facebook"); Lancaster v. Alphabet Inc., No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract . . . CDA precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[56] Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 836, 121 Cal. Rptr. 2d 703 (2002) (interpreting that "Appellants' UCL cause of action is based upon . . . [the claim]: that eBay misrepresented the forged collectibles offered for sale in its auctions").

[57] Sikhs for Justice "SFJ", Inc., 144 F.Supp.3d at 1094–1095 (N.D.Cal. 2015).

[58] Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019).

The text of section 230(c)(1), therefore, presents a classic ambiguity, with courts taking two very different interpretations. Most courts have resolved this ambiguity by the first approach because it best fits the statute's text and purpose. Section 230 relieves platforms of liability for information third party users post—if speaking or publishing such information were imputed to the platform. Its text, therefore, only covers liability that arises from third party speech, i.e., defamation or criminal threat or solicitation. Roping in immunity for "editorial function," i.e., the platforms' own speech when it edits, removes, moderates, shapes, promotes content or users simply ignores the text.

Much of the support for the "editorial function" interpretation derives from a mischaracterization of language from the Zeran opinion: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[59] This language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or fact-checking statements. But, it is an erroneous interpretation, plucked from its surrounding context and thus removed from its more accurate meaning. In addition, this approach misreads the statute—further showing its ambiguity and the need for FCC interpretation.

In fact, the quotation refers to third party's exercise of traditional editorial function—not those of the platforms. As the sentence in Zeran that is immediately prior shows, section 230 "creates a federal immunity to any cause of action that would make service providers liable for

[59] Zeran, 129 F.3d at 330. One commenter takes issues with this interpretation arguing that "its" refers to a "service provider." Public Knowledge Comments at 14. A reading of the complete passage makes clear that this commenter simply plays upon a vagueness in the pronoun antecedent of "its." Zeran was clearly referring to the editorial functions of third parties—not those of service providers.

information originating with a third-party user of the service." In other words, the liability from which section 230(c)(1) protects platforms is that arising from the content that the third-party posts—i.e., the "information" posted by "another information provider" and those information providers' editorial judgments.

Arguing section 230 protects all of a platform's "editorial function" —instead of certain types of function, i.e., removal under section 230(c)(2)-- also ignores Congress' stated purpose in passing section 230: to overturn the Stratton Oakmont decision. That decision treated platforms as the speaker of their users' defamatory content. Congress passed section 230 to reverse that decision and give immunity to those platforms, like Prodigy, which wanted to create open bulletin boards and allow their users to post freely.

Commenters mischaracterize this purpose proposing that section 230 was meant to protect platforms' ability to censor, "moderate content," and de-platform, i.e., "editorial functions."[60] But, this position upends the statute. In overturning Stratton Oakmont, Congress wanted to give platforms the legal protection to be open. Congress wanted platforms to comment as they wish without bearing the crippling legal liability for defamation and other unlawful statements that their users might make—or at least not penalize good actors. In contrast, commenters seek to use section 230 to protect their affirmative editorial decisions to censor, de-platform, shape, and control users content. Even worse, some commenters claim that section 230 gives immunity to platforms to ignore contracts with advertisers and users concerning carriage of content because such contracts would interfere with their First Amendment rights.[61]

[60] Internet Association Comments at 34; Comments of the Internet Infrastructure Coalition, Docket No. RM-11862 at 15 (Filed Sept. 3, 2020) (IIC Comments); NCLA Comments at 5.
[61] TechFreedom Comments at 101-125.

Of course, platforms, under the First Amendment, are free to exercise affirmative editorial control over user content. But, they do not receive section 230 immunity for these actions, unless removing content in good faith under the narrow categories of section 230(c)(2). Rather, their contracts, consumer fraud, antidiscrimination statutes, and all generally applicable laws govern their decisions concerning these actions. Section 230 only provides immunity from liability if a platform would face if third party speech were imputed to them. And, section 230(c)(2) protects against removals of content for certain specified reasons as subsequent sections explain.

C. "Publisher"

The word "publisher" is fundamentally ambiguous. On one hand, it refers to someone who "actually" publishes or speaks something; on the other hand, it also refers to someone who re-publishes or distributes, as the Restatement (Second) indicates.[62] Thus, like the term "congressman" which refers to both senators and representatives, but usually refers to representatives, "publisher" refers both to those who "actually publish" and those who re-publish or distribute. Both "publishers" and "distributers" fall under the generic term "publisher." It is not clear whether Congress intended the generic or the specific meaning of publisher.

These generic and specific meanings of "publisher" stem from common law concepts. The common law recognized a "narrow exception to the rule that there must be an affirmative act of publishing a statement."[63] A person "while not actually publishing—will be subjected to

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[62] Restatement (Second) of Torts § 578 (1977) ("Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability. Thus one who reprints and sells a libel already published by another becomes himself a publisher and is subject to liability to the same extent as if he had originally published it . . . the same is true of one who merely circulates, distributes or hands on a libel already so published").

[63] Benjamin C. Zipursky, Online Defamation, Legal Concepts, and the Good Samaritan, 51 Val. U. L. Rev. 1, 20 (2016).

liability for the reputational injury that is attributable to the defendant's failure to remove a defamatory statement published by another person."[64] This type of liability describes that which platforms face when they distribute content of another person—a distinction between "actually" publishing and re-publishing or distributing.

The distinction is important because it shows that, under common law, liability adheres to entities, like bookstores, newsstands, or social media platforms for the "omission" of failing to remove content. It was precisely this type of liability that section 230(c)(1) eliminated.[65] Some commenters reject the omission/commission dichotomy because it fails to account for screening, i.e., the decision to allow something on the platform, and places removal decisions outside of section 230(c)(1) and squarely in section 230(c)(2).[66] But, tracking the common law distinctions between screening affirmative acts of publication and removal, Section 230 simply does not address the question of liability for screening. And because it is silent, section 230 offers no immunity. That silence does not mean that the First Amendment does not protect platforms' decision to screen and allow individuals onto platforms. They may screen as they wish, and nothing in the Petition derogates in any way this essential First Amendment right. The Petition merely points out that generally applicable law govern decisions to screen and remove, and section 230(c)(1) provides no immunity from such law. Under the petition's proposed interpretation of section 230(c)(2), however, platforms would continue to receive immunity for their decisions to screen for the enumerated categories of content. Commenters may maintain that it makes no sense to distinguish between decisions to put up content from decisions, which

[64] Id. at 21 (citing Restatement (Second) of Torts § 577(2) (Am. Law Inst. 1977)).
[65] Comments of the Attorneys General for the States of Texas, Indiana, Louisiana, and Missouri, Docket No. RM-11-862 at 2 (Filed Sept. 3, 2020) (Attorneys General Comments).
[66] IIC Comments at 9; TechFreedom Comments at 85; VAR Comments at 15-16.

could occur but minutes after, to "take down."[67] The assertion is contrary to the text and purpose of section 230. From a policy perspective, the distinction also makes sense. Bookstores, social media, and other distributors make decisions and implement policies about who and what access their platforms. Once material is accepted, the law of defamation holds these firms responsible for those decisions. Congress in section 230 wanted to protect platforms' take down of certain types of content to promote certain types of editorial conduct—but still wanted to keep platforms accountable for access policies, consistent with common law understanding

D. Ambiguities in Section 230(c)(2)

Section 230(c)(2) immunizes "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." This provision presents two ambiguities: the meaning of "good faith" and "otherwise objectionable." Numerous commentators claim that these phrases are not ambiguous.

But not only is, "good faith" ambiguous on its face,[68] Section 230(b)(2)'s context renders "good faith" even more ambiguous. Censoring content in good faith entails a degree of transparency, consistency, honesty, and procedural fairness. The precise degree is not clear and requires Commission clarification.

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[67] TechFreedom Comments at 85; see also Internet Association Comments at 36, 47; IIC Comments at 9-12.

[68] See Colorado Dept. of Social Services v Dept. of Health & Human Services, 928 F2d 961, 964 [10th Cir 1991] (highlighting that "Congress's intent in requiring "good faith and due diligence" is ambiguous"); State of Ark. by Yamauchi v Sullivan, 969 F2d 622, 625 [8th Cir 1992] (issuing that "[b]ecause the statute does not define 'good faith and due diligence,' the statute must be considered to be ambiguous or silent on this issue, and we must determine whether the Secretary's interpretation of 'good faith and due diligence' in the regulation is reasonable").

"Otherwise objectionable" is also ambiguous. While most courts read it following the canon of ejusdem generis so that it refers to other matters of the kind enumerated prior in the list, some commentators (and courts) argue that the phrase refers to any material that a platform considers objectionable. Resolving the ambiguity as commenters urge—allowing platforms to remove any content they subjectively deem objectionable undermines the statute's text, the purpose and structure.[69]

As a textual matter, the Supreme Court mandates the use of ejusdem generis, which holds that catch-all phases at the end of a statutory lists should be construed in light of the other phrases. This is based on the premise that the legislature would not go to the trouble of making a list of specific things if the catch-all phrase were to include a broad swatch of unrelated things.

The vast majority of courts that have examined this issue have either relied upon ejusdem generis or, at least, recognized that interpreting "otherwise objectionable" as anything the platform finds objectionable is absurd. A recent Ninth Circuit case perceptively sees the challenge: On one hand, "decisions recognizing limitations in the scope of immunity [are] persuasive," and "interpreting the statute to give providers unbridled discretion to block online content would . . . enable and potentially motivate internet-service providers to act for their own, and not the public, benefit." [70] In addition, the court did recognize that "the specific categories listed in § 230(c)(2) vary greatly: [m]aterial that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing. If the enumerated categories are not similar,

[69] Comments of the Open Technology Institute, Docket No. RM-11862 at 7 (Filed Sept. 2, 2020) (Open Technology Comments); NTU Comments at 3-6; TechFreedom Comments at 91-94; Terry & Lyons Comments at 11.
[70] Enigma Software Grp. USA, v. Malwarebytes, Inc., 946 F.3d 1040, 1050 (9th Cir. 2019).

they provide little or no assistance in interpreting the more general category. We have previously recognized this concept." [71]

NTIA's Petition, however, through careful statutory analysis and examination of the legislative history and context persuasively showed that these terms all come from existing communications and media content regulation contemplated by the Communications Decency Act. The first four adjectives in subsection (c)(2), "obscene, lewd, lascivious, filthy," are found in the Comstock Act as amended in 1909. In addition, the CDA used the terms "obscene or indecent," prohibiting the transmission of "obscene or indecent message." The next two terms in the list "excessively violent" and "harassing" also refer to typical concerns of communications regulation which were, in fact, stated concerns of the CDA itself.[72] Congress and the FCC have long been concerned about the effect of violent television shows, particularly upon children; indeed, concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip, which allowed content blocking based on ratings for broadcast television that consisted of violent programming.[73] Last, Section 223, Title 47, the provision which the CDA amended and into which the CDA was in part codified, is a statute that prohibits the making of "obscene or harassing" telecommunications. These harassing calls include "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to

[71] Id. at 1051; see also Attorneys General Comments at 3 ("the Petition ensures that platforms may continue to preserve public spaces free of objectively obscene, harassing, and harmful material without unduly expanding immunity to conduct that tramples core First Amendment speech").
[72] 47 U.S.C. § 223(a) (May 1996 Supp.).
[73] 47 U.S.C. § 303(x).

harass any person at the called number" or "mak[ing] repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication."[74] This historical understanding of 230(c)(2)'s text reveals its scope. It protects platforms' removal decisions designed to create "family friendly" internet spaces of the sort that other regulation did for broadcast television, radio, and telephonic communications.

Some claim that this interpretation prevents platforms from removing, for example, the accounts of self-proclaimed Nazis engaged in "otherwise objectionable hate speech"[75] This could not be further from the truth. Platforms, pursuant to their terms of service, are free to block people from their websites.[76] They can remove all sorts of objectionable content including hate speech.[77] Indeed, as with questions of screening, so with removal: platforms are free to remove whatever content they wish. The First Amendment protects this removal. But section 230 only protects removals for the explicitly enumerated categories of speech that are harmful to children, and only when platforms act in "good faith."

E. The Interaction Between Subsection 230(c)(1) and Subsection 230(c)(2) is Ambiguous

Where section 230(c)(1) has been read to immunize "editorial function," the line between whether a platform's action is governed by (c)(1) versus (c)(2) is ambiguous. If section 230(c)(1) protects editorial function, then it limits not only liability for user-generated speech imputed to the platforms that host it, which is the natural reading as discussed above, but also

[74] 47 U.S.C. § 223(a)(1)(D) & (E) (2012).
[75] CCIA Comments at 4; NTU Comments at 7; Open Technology Comments at 7.
[76] Internet for All Comments at 3-4.
[77] Internet Association Comments at i-iii.

decisions to remove and de-platform. But, section 230(c)(2) by its text governs decisions to remove content. Thus, reading section 230(c)(1) as protecting "editorial functions" risks rendering section 230(c)(2) superfluous because two sections would govern the same act: removing content or users. And, since section 230(c)(1) is the broader provision, courts read it to render section 230(c)(2) superfluous.

Some courts have invited this confusing superfluity. For instance, in Domen v. Vimeo,[78] a federal district court upheld the removal of videos posted by a religious groups' questioning a California law's prohibition on so-called sexual orientation change efforts (SOCE), and the law's effect on pastoral counseling. Finding the videos were "harassing," the court upheld their removal under both section 230(c)(1) and section (c)(2), ruling that these sections are co-extensive, rather than aimed at very different issues.

Similarly, commenters have urged this duplicative reading of the statute largely on policy grounds—but never state what that policy is.[79] While early cases might have read the provision broadly to protect a nascent industry, today's internet behemoths no longer need it.

But, this judicial "rule," announced by lower courts and simply followed without any justification, gives way to Supreme Court direction on statutory interpretation, which requires application of the canon against surplusage. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[80] The canon "is strongest when an interpretation would render superfluous another part of

[78] Domen v. Vimeo, Inc., 433 F. Supp. 3d 592 (S.D.N.Y. 2020).
[79] TechFreedom Comments at iii; Terry & Lyons Comments at 11; VAR Comments at 14.
[80] Corley v. United States, 556 U.S. 303, 314 (2009), quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004).

the same statutory scheme." Here, the provisions are right next to each other. The anti-surplusage canon is a "cardinal principle of statutory construction."[81]

Thus, the FCC should resolve the ambiguity of whether to apply section (c)(1) or (c)(2) to removal of content: Section 230(c)(1) governs liability for content already on platforms; section 230(c)(2) governs removal of content for reasons related to legal content regulation in 1996, when the provision was passed; and, every other action is controlled by contract and other generally applicable laws.

Alternatively, some argue that section 230(c)(1) and (2) should be read duplicatively because this interpretation makes lawsuits easier to dismiss and immunity for faulty content moderation that changes the meaning of posts.[82] It may be that it is easier for a defendant to gain a dismissal under section 230(c)(1) than (c)(2) for a claim of unlawful deletion or editing, but Congress never intended section 230(c)(1) to protect against platforms' own speech or content moderation. Section 230(c)(2) provides that protection.

F. Section (c)(1) and Section (f)(3): The Developer Exception

Section 230(c)(1) places "information content providers," i.e., entities that create and post content, outside its protections. This means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet, does not receive the statute's shield. This so-called "developer exception" is essential to the structure of section 230. Just as the editor of an anthology of poems or essays presents his own speech and expression, so does a platform that significantly shapes others' content. This is an obvious point.

[81] Williams v. Taylor, 529 U.S. 362, 404 (2000).
[82] CDT Comments at 2; Open Technology at 7-8; TechFreedom Comments at 89-90.

The Petition pointed to FTC Commissioner Rohit Chopra's recognition that platforms, through manipulation of content, can become speakers.[83]

Numerous cases have found that interactive computer service's designs and policies render it an internet content provider, outside of section 230(c)(1)'s protection. But the point at which a platform's form and policies are so intertwined with users' content so as to render the platform an "information content provider" is an ambiguous line that calls forth for regulatory explication to resolve conflicting court decisions.[84]

Courts have proposed differing ways to draw this difficult line, most influentially in the Ninth Circuit in Fair Housing Council of San Fernando Valley v. Roommates.Com. There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[85] But, this definition has failed to provide clear guidance, with courts struggling to define "material contribution," and not all courts accept the material contribution standard. "[86] Other circuits conclude that a website becomes an information content provider by "solicit[ing] requests" for the information and then "pa[ying] researchers to obtain it."[87]

Recognizing the ambiguities, commenters opposed to the Petition argue simply that creating a rule to implement the provision would effect a change in the law[88] Commenters

[83] Petition at 45; see also Comments of the Claremont Institute, RM-Docket No. 11-852 at 4, (2020) (Claremont Comments) ("If dominant online platforms wish to act like editors and publishers, they will be free to do so. However, they will have to assume the same legal responsibilities as other publishers and editors").
[84] Id. at 43-46.
[85] Fair Hous. Council, 521 F.3d at 1166.
[86] Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016).
[87] FTC v. Accusearch Inc., 570 F.3d 1187, 1199–1200 (10th Cir. 2009).
[88] Internet Association Comments at 30-31.

declare that the distinction was not meant to involve content moderation decision,[89] or they lament that applying the developer exception would have a major regulatory impact.[90] Regardless of these policy concerns, the FCC has a duty to bring independent judgment in its interpretation of section 230 and clarify its ambiguous statutory mandates.

III. The FCC Has the Power to Regulate Social Media Firm under Title I

With roots in the Modified Final Judgment for the break-up of AT&T[91] and codified by the Telecommunications Act of 1996,[92] the term "information service" refers to making information available via telecommunications. Under FCC and judicial precedent, social media sites are "information services." As such, courts have long recognized the Commission's power to require disclosure of these services under sections 163 and 257 of the Communications Act.

Some commenters claim that neither section 167 nor 257 grant authority to the Commission to impose transparency regulation because these provisions only direct the Commission to provide reports to Congress, or identify barriers to entry.[93] But, the D.C. Circuit has rejected that argument already. In Mozilla Corp. v. Fed. Commc'ns Comm'n, the Court ruled the "Commission's reliance on 47 U.S.C. § 257 to issue the transparency rule was proper," with

[89] Americans for Prosperity Comments at 21-22; Comments of New America, Docket No. RM-11862 at 19-22 (Filed Sept. 2, 2020); Public Knowledge Comments at 13-14.
[90] Comments of NetChoice, Docket No. RM-11862 at 22 (Filed Sept. 2, 2020).
[91] United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 179 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (observing that "'Information services' are defined in the proposed decree at Section IV(J) as: the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications").
[92] 47 U.S.C. § 153(24). Commenters broadly recognize the value of this transparency; Comments of AT&T, Docket No. RM-11862 at 2-3 (Filed Sept. 3 2020) (AT&T Comments); Makridis Comments at 3.
[93] Comments of the Consumer Technology Association, Docket No. RM-11862 at 28 (Filed Sept. 2, 2020) (CTA Comments); TechFreedom Comments at 17-19.

regard to broadband internet access providers.[94] Even commenters strongly opposing the disclosure regulations, concede this point.[95]

Given that the Commission has power to mandate disclosure for information services, the remaining question is whether social media are information services. Numerous courts have ruled that search engines, browsers and internet social media precursors such as chat rooms are information services.[96] In short, courts have long recognized edge providers as information services under Title I.

Some suggest the definition of the statutory term "interactive computer service" excludes social media from the information service category.[97] The term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[98] Commenters argue that under the statute an entity can be an information content provider but not an information service.[99] True enough, but that argument does not respond to the Petition's demonstration that social media are,

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[94] Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 47 (D.C. Cir. 2019).
[95] Internet Association Comments at 57.
[96] Mozilla Corp., 940 F.3d at 34 ("But quite apart from the fact that the role of ISP-provided browsers and search engines appears very modest compared to that of DNS and caching in ISPs' overall provision of Internet access, Petitioners are in a weak posture to deny that inclusion of 'search engines and web browsers' could support an 'information service' designation . . . since those appear to be examples of the 'walled garden' services that Petitioners hold up as models of 'information service'-eligible offerings in their gloss of Brand X") (internal citations omitted); FTC v. Am. eVoice, Ltd., 242 F. Supp. 3d 1119 (D. Mont. 2017) (email and online "chat rooms" "were enhanced services because they utilized transmission lines to function, as opposed to acting as a pipeline for the transfer of information . . . .'This conclusion is reasonable because e-mail fits the definition of an enhanced service'" (quoting Howard v. Am. Online Inc., 208 F.3d 741, 746 (9th Cir. 2000)); H.R. Rep. No. 103-827, at 18 (1994), as reprinted in 1994 U.S.C.C.A.N. 3489, 3498. ("Also excluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line").
[97] Americans for Prosperity Comments at 36; Open Technology Comments at 3.
[98] 47 U.S.C. § 230(f)(2).
[99] Americans for Prosperity Comments at 36.

by the FCC's own definitions, an information service—and they are certainly not, nor has any argued, either a "system or access software provider."[100] Similarly, some commenters argue that three terms in the list are conjunctive, not disjunctive, meaning that an "interactive computer service" is all three—an interpretation at odds with the plain meaning of "or."[101]

Courts, however, follow the provisions plain meaning. Search engines and social media platforms are interactive computer services—a statutory term that includes three types of things: information service, system, or access software provider. Search engines and social media belong to the first category. For instance, "Ask.com [an early search engine] is an 'interactive computer service' because it is an internet search engine that allows members of the public to search its directory of web pages and is therefore an "information service."[102]

Some Petitioners dispute that courts have long classified social media as information services. They claim that these numerous cases did not speak to the exact issue here: whether the FCC may impose disclosure on information service under the Communications Act.[103] Classifying social media as information services is a question that presents itself in a variety of contexts—and if social media is an information service in one context, it is in another. Some commenters have argued because the Commission has never answered the question of whether Title I disclosure applies to social media, it cannot now.[104]

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[100] Petition at 47-48.
[101] Open Technology Comments at 3.
[102] Murawski v. Pataki, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); see also Kinderstart.com LLC v. Google, Inc., No. C06-2057JFRS, 2007 WL 831806 (N.D. Cal. Mar. 16, 2007).
[103] TechFreedom Comments at 22.
[104] Internet Association Comments at 56.

Others argue that because the Commission in the Preserving the Open Internet Order did not impose Title II on edge providers renders, Title I regulation is now inappropriate.[105] This argument lacks force. In the *Preserving the Open Internet Order*, the FCC deemed BIASs to be an information service, and the D.C. Circuit in Verizon v. FCC struck down many common carriage-like rules, such as non-discrimination, the FCC imposed pursuant to its regulation of information services under Title I.[106] Verizon is inapposite because the Petition does not ask for imposition of common carriage rules which the FCC can apply to BIASs only when regulated under its Title II jurisdiction. Rather, Verizon *upheld* the imposition of the FCC's disclosure rules on BIASs when regulated as information services.[107] Thus, social media and other edge providers, which have always been regulated as information services, are subject to the FCC's power to compel disclosure.

Commenters argue that the Commission cannot impose disclosure requirements because statutory provisions only allow disclosure to show "barriers to entry by telecommunications and information service providers reliant on the underlying broadband" service to reach their customers.[108] But, of course, social media content providers' network management and content promotion strategies are vital to the many competitors and other information service. They need

[105] In the Matter of Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010); Internet Association Comments at 56-57.
[106] Verizon, 740 F.3d at 649–50.
[107] Id. at 659 ("The disclosure rules are another matter. Verizon does not contend that these rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would").
[108] TechFreedom Comments at 21.

this information to determine how best to promote their traffic to market their services and reach clients.[109]

And, finally, commenters argue disclosure would violate First Amendment principles.[110] But, again, if the D.C. Circuit accepted this disclosure for one type of information service provider, i.e., BIASs, as upheld in Verizon, it is hard to see why the First Amendment would preclude it for another.[111] Without providing any specific example, commenters present parades of horrible competitive harms, intellectual property violations, and regulatory burdens.[112] But, to the degree any of this information and disclosure is protectable under trade secret law, it could be reviewed confidentially by the Commission. Further, these requirements have existed for years for BIASs, yet they have generated no reported competitive harm.[113]

Contradicting themselves, some commenters argue that disclosure for BIASs are different than for social media content because the latter involves "editorial discretion."[114] But this argument undermines the claim that social media's content moderation is not speech. If it is, then section 230(c)(1) cannot applies because it only protects information provide by *"another* internet content provider."

IV. The First Amendment Supports NTIA's Recommendations

The Petition urges the Commission to return section 230 to its original purpose and meaning. The Petition's suggested rules only violate the First Amendment if section 230, itself,

[109] Commenters recognized the value of disclosure to market entry, the economy in general and our political life. See AT&T Comments at 3-4; Attorneys General Comments at 3-4; Free State Comments at 6.
[110] Internet Association Comments at 57-58.
[111] AT&T Comments at 3-4.
[112] CTA Comments at 31-32.
[113] AT&T Comments.
[114] TechFreedom Comments at iii, 63-64.

is deemed to violate the First Amendment—something none of the commenters suggest.[115] As an initial matter, many commenters compare Petition's suggested regulations to the "Fairness Doctrine," the regulation that required television and radio broadcasters to offer time to present opposing views to any editorial position the broadcasters took.[116] Commenters claim that NTIA's proposed regulation to say the same thing.[117]

NTIA's Petition has nothing to do with Fairness Doctrine. It does not mandate any sort of content at all. Rather, it asks to limit section 230(c)(1)'s protections to third party content, which if spoken or published by the platform, would be unlawful. This is simply the liability regime that all newspapers and cable systems face. Second, the Petition asks to limit protections for removal to certain situations, enumerated by the statute. Limiting special protections in this way does not mandate content because platforms are always free to remove content for *any reason.* But, if they do so for reasons other than those section 230(c)(2) enumerates, generally applicable law applies.

The Petition presents no forced speech issues. Platforms are free to accept or remove content for any reason. Thus commenter veer off-point when the cite to such cases as Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, in which the Supreme Court held that the government could not compel the organizers of a parade to include individuals, messages, or

[115] Some commenters call many First Amendment arguments presented as "crying First Amendment wolves," that will "diminish a proper understanding of the First Amendment's free speech guarantee" Free State Comments at 5-6.
[116] Comments of the Innovation Economy Institute, Docket No. RM-11862 at 5 (Filed Sept. 3, 2020); TechFreedom Comments at i, 24; Terry & Lyons Comments at 3; VAR Comments at 12-13.
[117] Terry & Lyons Comments at 2-3; Internet Association Comment at 51-53; VAR Comments at 13.

signs that conflicted with the organizer's beliefs.[118] Here, the government compels no one; the platforms may include or exclude any one or any message.

Similarly, the Petition's interpretation of section 230 impinges on no editorial decision-making. Commenters claim that the Petition's proposed regulation creates a "right to respond" principle, which the Supreme Court in Miami Herald Publishing Co. v. Tornillo,[119] declared unconstitutional for newspapers, is off-base.[120] Just like newspapers, social media may allow on their platforms anyone they like, pursuant to their own rules and contracts. Thus, the parade of horribles include forcing Christian websites to accept the postings of Satanists is misguided. Under the Petition, any website is free to exclude for any reason. Section 230, however, does not protect decisions to restrict access; contract and generally applicable law does. Section 230 only protects takedowns if done for the enumerated reasons.

Some commenters, conceding that the Petition advocates no content-based regulation or control of the editorial process, argue that failing to give section 230's special liability protection to all entities and all speech violates the First Amendment by preferring certain types of speech and speakers.[121] But, if these claims are correct, then section 230, itself, is unconstitutional. Its protections only extend to internet content service providers, not newspapers or cable systems. Similarly, section 230(c)(1) only protects certain types of speech from take down, i.e., they types of speech enumerated in section 230(c)(2). And no court has ever questioned section 230's constitutionality under the First Amendment.

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[118] Americans for Prosperity Comments at 15-16.
[119] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
[120] Several commenters point to the Tornillo case, see, e.g., Americans For Prosperity Comments 17-18; Terry & Lyons Comments 3-4.
[121] IIC Comments at 14-15; Internet Association Comments at 50.

To the contrary, the Supreme Court has upheld the constitutionality of offers special liability protections in exchange for *mandated* speech. In Farmer's Union v. WDAY,[122] the Court held that when the federal government mandates equal time requirement for political candidates—*a requirement still in effect,* this requirement negates state law holding station liable for defamation for statements made during the mandated period. In other words, the Court upheld federal compelled speech in exchange for liability protections. Section 230's liability protections, which are carefully drawn but come nowhere near to compelling speech, are just as constitutionally unproblematic if not more so.

One commenter points to Barr v. Am. Ass'n of Political Consultants, Inc., for the principle that section 230 must apply to all entities.[123] This case struck down exemptions found in a provision of the Telephone Consumer Protection Act of 1991 (TCPA)[124] for robocalls seeking to collect government debt as content-based discrimination under the First Amendment. TCPA imposed various restrictions on the use of automated telephone equipment. The statute, however, "exempted automated telephone calls to collect a debt owed to or guaranteed by the United States' after 'charged for the call.'"[125] In other words, Congress carved out a new government-debt exception to the general robocall restriction.[126] Once again, this is a punitive statute that punishes speech and is inapposite.

Some claim that it makes no difference that NTIA's proposed rule would withhold the benefit of a liability shield rather than impose a penalty—both raise First Amendment

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[122] Farmer's Union v. WDAY, 360 U.S. 525, 526-28 (1958).
[123] Americans for Prosperity Comments at 14-15; see also Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2346-47 (2020).
[124] 47 U.S.C.S. § 227(b)(1)(A)(iii).
[125] See Barr, 140 S. Ct. at 2341.
[126] Id. at 2344.

concerns.[127] But, there is no case cited in the voluminous comments that liability exceptions to common law that are content neutral raise First Amendment concerns. If they did, then newspapers would have a First Amendment claim that section 230 violated *their* rights as they are not covered by its protections. Indeed, the closest cases commenters cite--those dealing with government spending--demonstrate that the First Amendment plays little, if any role, in limiting government's role in bestowing benefits or granting subsidies.[128] Rather, the First Amendment only limits government's speech-based conditions for funding if they "seek to leverage funding to regulate speech outside the contours of the federal program itself."[129] Here, the Petition merely asks that the Commission return section 230 to its textual moorings and congressional design.

V. Policy Considerations

Many commenters predict bad policy outcomes should the Commission return section 230 to its textual moorings and congressional design. Many allege that the Petition's proffered interpretation will increase incentives for platforms to remove content and censor due to the risk of litigation.[130] Others foresee that litigation risks combined with the lack of clear legal outcomes would force content platforms to disengage from moderation.[131] The effect of the incentives section 230 creates is complex and difficult to predict with precision. In light of this uncertainty, the best the Commission can do is follow Congress's text and intent.

[127] Americans for Prosperity Comments at 16.
[128] Rust v. Sullivan, 500 U.S. 173, 195 (1991).
[129] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 206 (2013).
[130] American for Prosperity Comments at 38.
[131] Comments of the Section 230 Proponents, Docket No. RM-11862 at 17-18 (Filed Sept. 2, 2020).

Finally, it is claimed that the effect on the economy of the Petition's reforms likely would exceed $100 million or more, requiring the FCC to conduct a cost/benefit analysis. This claim lacks serious empirical support. The economic effect caused by the Commission adopting the Petition would be impossible to measure in any noncontroversial way.

To support its estimate that the Petition would have an effect greater than $100 million, a commenter points to two working papers: Brynjolfsson et al. that furthers a novel measurement of gross domestic product that purports to capture the "value" of social media and then looks to laboratory experiments for verification of this new metric—and Allcott et al. that reports additional laboratory results.[132] Commenters thus present no real world measurements of social media but simply report laboratory results that have an unclear, if any, application to the real economic behavior. Further, commenters offer no evidence that liability rules, in fact, change consumer usage or advertising behavior.[133] Finally, these critiques about economic impact fail to balance the harm to users, society, and national discourse, when platforms can hide behind section 230 protections to censor lawful speech without transparency or accountability.

VI. Conclusion

For the foregoing reasons, NTIA respectfully requests that the Commission grant its Petition.

Respectfully submitted,

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[132] Comments of Research Professor Jerry Ellig at the George Washington University, Docket No. RM-11862 at 2 (Filed Sept. 2, 2020).
[133] Id. at 3.

From: Candeub, Adam
To: Coley, Andrew
Subject: First batch
Date: Sunday, September 13, 2020 10:04:36 AM
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OK Andrew, I need you to proof, to respond to some of the questions in the text, and in general to provide citations where appropriate As well as do all formatting. I will be working on this all day. Please feel free to call me if you have any questions.

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