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

Jonathan Berroya
Interim President and CEO

Elizabeth Banker
Deputy General Counsel

Alexandra McLeod
Legal and Policy Counsel

Internet Association
660 North Capitol St. NW, #200
Washington, DC 20001
(202) 869-8680

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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.

TABLE OF CONTENTS

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	)	
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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 "'understanding 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

[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

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

[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

[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

Jonathan Berroya
Interim President and CEO

Elizabeth Banker
Deputy General Counsel

Alexandra McLeod
Legal and Policy Counsel

Internet Association
660 North Capitol St. NW, #200
Washington, DC 20001
(202) 869-8680

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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 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