BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act	)	RM-11862
	)	

To: The Commission

PETITION OF VIMEO, INC. TO DISMISS THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

INTRODUCTION

Vimeo, Inc. ("Vimeo") respectfully requests that the Commission summarily and promptly dismiss the petition for rulemaking filed by the National Telecommunications and Information Administration ("NTIA"). While the Commission is generally expected to place petitions for rulemaking "promptly" on public notice,[1] and has just done so,[2] it was not necessary to do so here because NTIA's petition "plainly do[es] not warrant consideration by the Commission."[3] The petition should be therefore dismissed without need to await comments.

NTIA asks the Commission to make rules that would amend Section 230 of the Communications Decency Act of 1996[4] without Congress's involvement. Specifically, NTIA wants to narrow the immunities conferred by Section 230 upon "providers" and "users" of interactive computer services when they remove or restrict access to third-party content. This

[1] 47 C.F.R. § 1.403.

[2] Public Notice, Consumer & Governmental Affairs Bureau – Petition for Rulemakings Filed, Report No. 3157 (Aug. 3, 2020), https://docs.fcc.gov/public/attachments/DOC-365914A1.pdf.

[3] 47 C.F.R. § 1.401(e).

[4] 47 U.S.C. § 230.

petition is not merely ill-advised; it does not warrant the Commission's consideration for a host of reasons:

1. *NTIA lacks authority to file the petition*. NTIA's jurisdiction is over "telecommunications" matters and information policies having to do with technological developments and scientific research. The agency has stepped far outside that domain in asking the FCC to regulate websites, blogs, and even end users anytime they make editorial decisions to remove or restrict access to content online.

2. *The Commission lacks authority to act on the petition*. NTIA seeks rules that are light years outside of Commission's subject matter jurisdiction as they would regulate end user behavior before any communication is sent or received. The rules also far exceed the agency's rulemaking discretion under 47 U.S.C. § 201, as NTIA does not invoke any of the Commission's powers to regulate common carriers. What is more, the petition requests regulation under a statute that calls for free markets "unfettered by Federal or State regulation."[5]

3. *NTIA's petition offends free speech*. NTIA's petition is part of an effort by a government official—the highest official in the land—to retaliate against a private entity for publicly criticizing him, and is therefore itself a First Amendment violation. The Commission should not condone this attempt to suppress speech by even considering it.

DISCUSSION

I. NTIA LACKS AUTHORITY TO PETITION FOR THIS RULEMAKING.

NTIA has no business trying to limit Section 230. Its proposed rules do not implicate its core mandate of "ensur[ing] that the views of the executive branch on *telecommunications*

[5] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order* (hereinafter, "RIF Order"), 33 FCC Rcd 311 ¶ 1, 2 (2018) (quoting 47 U.S.C. § 230(b)(2)).

matters are effectively presented to the Commission."[6] "Telecommunications"[7] is not a term used in Section 230, which is instead directed to users and providers of "interactive computer services."[8] Regardless of the definitions, Section 230 does not regulate telecommunications—which is about communications *infrastructure*—but instead grants immunity to users and service providers with respect to user-generated *content*.[9] Perhaps not surprisingly, the NTIA has never before appeared to assert that Section 230 is within its field of expertise.

II. THE FCC LACKS AUTHORITY TO MAKE THE REQUESTED RULES.

NTIA's proposed rules are *ultra vires* of the Commission's subject matter jurisdiction and rulemaking authority. No amount of agency deference can cure those defects: Agency "discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating."[10]

First, the Commission lacks subject matter jurisdiction to make the proposed rules. Section 2 of the Communications Act defines the Commission's subject matter jurisdiction as interstate and foreign communications by wire or radio (and interstate and foreign transmissions

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[6] 47 U.S.C. § 902(b)(2)(J) (emphasis added); *see also id*. § 901(c)(3) ("Facilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international *telecommunications* markets.") (emphasis added); *id*. § 902(b)(2)(I) ("The authority to develop and set forth *telecommunications* policies pertaining to the Nation's economic and technological advancement and to the regulation of the *telecommunications* industry.") (emphasis added).

[7] 47 U.S.C. § 153(50) ("telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

[8] The term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ." 47 U.S.C. § 230(f)(2). This term is not coextensive with a "telecommunications service." *See* RIF Order, 33 FCC Rcd 311 ¶¶ 59-60.

[9] The information policies assigned to NTIA under the statute are equally inapplicable. The petition neither "[p]romot[es] the benefits of technological developments for all users of telecommunications and information facilities," 47 U.S.C. § 901(c)(1), nor does it "[f]urther[] scientific knowledge about telecommunications and information," *id*. § 901(c)(5).

[10] *See Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, J., concurring).

of energy by radio).[11] It is well-settled that the Commission's subject matter jurisdiction begins and ends when a covered transmission starts and when its reception ends; the Commission's jurisdiction does not extend to conduct that occurs before or after such a transmission.[12]

Because Section 230(c) immunizes "providers" and "users" in their editorial decision-making as to online content,[13] NTIA's proposal to limit those immunities necessarily regulates providers and users before they even initiate a transmission. The offline equivalent would be telling individuals what they must consider before deciding whether to answer a ringing telephone. This conduct plainly does not implicate the Commission's subject matter jurisdiction: As the D.C. Circuit observed in *American Library Association*, "the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in 'communication by wire or radio.'"[14]

Second, even if subject matter jurisdiction existed, Section 201(b) of the Communications Act—the sole source of authority cited by NTIA—would not authorize the proposed rulemaking. Section 201(b) authorizes the Commission to make rules "to *carry out the provisions*" of Chapter

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[11] 47 U.S.C. § 2.

[12] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

[13] Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The upshot of this provision is that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230(c)(2) immunizes providers and users from "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

[14] 406 F.3d at 702 (quoting *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975)). In *American Library Association*, the FCC had attempted to regulate end users' usage of consumer electronics. The D.C. Circuit found this *ultra vires* of the Commission's subject matter jurisdiction: "The insurmountable hurdle facing the FCC in this case is that the agency's general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission." *Id.* at 700.

2 of the Communications Act,[15] which is to say, the Commission's mandate to ensure "[a]ll charges, practices, classifications, and regulations for and in connection with [Title II common carriers], . . . be just and reasonable."[16] The D.C. Circuit has aptly described Section 201(b)'s grant of authority as "common carrier authority."[17]

NTIA does not expressly invoke any of the Commission's common carrier powers under Title II,[18] and the Commission has no mandate whatsoever to "carry out" in Section 230. Section 230 does not assign a single task to the Commission. Indeed, it never once mentions the Commission. Instead, Section 230 provides defenses to "civil liability"[19] and is therefore properly subject to the jurisdiction of the courts, not an administrative agency. And courts have been broadly reading Section 230 for a quarter of a century without the Commission's help.[20] Accordingly, the Commission should not entertain NTIA's novel argument that Section 201(b) somehow allows the FCC to regulate entities who are not common carriers under Section 230.[21]

Third, Section 230 is a wildly inappropriate candidate for the assertion of regulatory authority. Built into Section 230 is Congress's finding that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with *a minimum of*

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[15] 47 U.S.C. § 201(b) (emphasis added).

[16] *Id.*

[17] *Comcast v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010).

[18] Nor could it: The FCC may only impose common carrier regulations on an entity "to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51); *Verizon v. FCC*, 740 F.3d 623, 655-56 (D.C. Cir. 2014) (striking down non-discrimination regulation of information services as unlawful common-carrier regulation).

[19] 47 U.S.C. § 230(c)(2) (heading).

[20] *See Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) ("In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity."), *cert denied*., No. 19-858, 2020 WL 2515485 (May 20, 2020).

[21] Congress, as they say, does not usually "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

government regulation,"[22] and its goal to "preserve the vibrant and competitive *free market* that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[23] The Commission has stated that the latter goal "makes clear that 'federal authority [is] preeminent in the area of information services' and that information services 'should remain *free of regulation*.'"[24] Thus, if anything, Section 230 serves as a limit upon, not a source of, rulemaking authority.

In its 2018 *Restoring Internet Freedom Order*, the FCC invoked Section 230's "deregulatory policy"[25] as justification for *de*regulating broadband providers.[26] In declassifying broadband from a telecommunications service to a mere information service, the Commission relegated broadband providers to a category of entities that are "left largely *unregulated* by default."[27] When considering whether Section 230 could be invoked to regulate broadband providers as declassified, the Commission stated that it "remain[ed] persuaded that section 230(b) [Congress's goals] is hortatory" only and, even if it provided some degree of regulatory authority, it cannot "be invoked to impose regulatory obligations on ISPs."[28]

Given these conclusions, it would be ironic, to say the least, to turn around and claim that Section 230 actually does regulate these entities, as well as websites, blogs, and individual users, in their editorial decisions about online content—a far greater exercise of regulatory power than

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[22] 47 U.S.C. § 230(a)(4) (emphasis added).

[23] 47 U.S.C. § 230(b)(2) (emphasis added).

[24] RIF Order, 33 FCC Rcd 311 ¶ 203 (emphasis added) (quotation marks and citations omitted).

[25] *Id.* ¶ 61.

[26] *Id.* ¶ 1.

[27] *Id*. ¶ 273 (emphasis added).

[28] *Id*. ¶ 284.

the net neutrality rules issued in 2015's *Open Internet Order*[29] and vacated in 2018's *Restoring Internet Freedom Order*. Such a move would be analogous to deregulating telephone companies, but then telling telephone users who they can and can't call.

III. THE PROPOSAL OFFENDS AND UNDERMINES FREE SPEECH.

The petition follows an Executive Order[30] that was issued in response to a private platform (Twitter) labelling one of the President's tweets on voting by mail as misleading.[31] Given this context, any rulemaking proceeding would be the product of retaliation by the highest government official in the country against a private speaker's unquestionable exercise of free speech.[32] While NTIA, an agency belonging to the Commerce Department, could effectively be unable to refuse the administration's request, the Commission is an independent agency that can and should do so, if nothing else than to make clear that it will not participate in this attempted suppression of free speech.

CONCLUSION

For the reasons set forth above, NTIA's petition plainly does not warrant consideration by the Commission. The Commission should therefore dismiss it without consideration or public comment.

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[29] Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015), *aff'd*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Ironically, NTIA cites this order, since overruled by the Commission, in support of its petition. *See* Petition at p. 7 n.23.

[30] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020).

[31] Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 5:17 AM),

https://twitter.com/realDonaldTrump/status/1265255845358645254; Twitter, Politics, *Trump Makes Unsubstantiated Claim That Mail-In Ballots Will Lead to Voter Fraud* (May 26, 2020), https://twitter.com/i/events/1265330601034256384; Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 4:40 PM), https://twitter.com/realDonaldTrump/status/1265427538140188676.

[32] *See Ctr. for Democracy & Tech. v. Trump*, Case No. 20-1456, Dkt. 1, ¶¶ 9-12 (D.D.C.) (alleging that the Executive Order violates the First Amendment).

Respectfully Submitted,

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