



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 2, 2020

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: RM-11862 Section 230 of the Communications Act of 1934

Dear Ms. Dortch:

As Attorneys General for the States of Texas, Indiana, Louisiana, and Missouri, we support the National Telecommunications and Information Agency's ("NTIA") Petition to the FCC for a Rulemaking to Clarify Provisions of Section 230 of the Communications Act (the "Petition"). While Section 230 provides some important legal protections that have fostered the growth of the internet technology sector, erroneous and overly broad interpretations of Section 230 have threatened to expand that statute into a total immunity for misconduct by some of tech's largest players, necessitating the reforms proposed in NTIA's Petition.

Section 230 was intended to promote free speech, competition, and enforcement of criminal laws online. Improper expansion of Section 230 by some courts, however, has allowed the largest and most powerful companies in the world the ability to violate state laws, exclude rivals, and squelch political speech. The Petition clarifies the scope of Section 230 and will empower states to properly enforce their laws without undermining protections for moderation of traditionally regulated content. And it does so while promoting free speech through market transparency.

1. The Petition clarifies that Section 230 cannot be used to immunize unlawful conduct that falls within states' traditional enforcement powers.

The Petition properly clarifies the interplay between section 230(c)(1) and 230(c)(2) to avoid immunizing conduct that violates state laws, including those prohibiting consumer fraud. The Petition notes that, "[f]ar and above initially intended viewer protection, courts have ruled section 230(c)(1) offers immunity from contracts, consumer fraud, revenge pornography, anti-discrimination civil rights obligations, and even assisting in terrorism."¹ These overbroad decisions infringe on core state functions, including policing consumer fraud and law enforcement,

¹ Petition at 24-25.

by providing tech companies with a legal shield that cannot be supported by the plain text of Section 230.

The Petition makes a much-needed adjustment. It states: “Section 230(c)(1) applies to acts of omission—to a platform’s failure to remove certain content. In contrast, section 230(c)(2) applies to acts of commission—a platform’s decision to remove. Section 230(c)(1) does not give complete immunity to all a platform’s ‘editorial judgments.’”² In addition, the Petition takes a modest, and appropriate, textualist approach to interpreting section 230(c)(2)’s scope of immunity, limiting it to moderation of “obscene, violent, or other disturbing matters.”³ Moreover, the Petition makes clear that online platforms receive no immunity when they affirmatively use third-party content to advance their businesses: “[W]hen a platform reviews third-party content already displayed on the internet and affirmatively vouches for it, editorializes, recommends, or promotes such content on the basis of the content’s substance or message, the platform receives no section 230(c)(1) immunity.”⁴

By clearly delineating the separate functions of section 230(c)(1) and 230(c)(2) and cabining the immunity conferred thereunder, the Petition leaves room for states to enforce consumer protection laws when fraudulent conduct occurs. We fully support this modest, and correct, interpretation of Section 230 because it affirms core state functions while continuing to allow for appropriate moderation of traditionally regulated and exploitative content.

2. The Petition re-affirms the important role online platforms play in combating traditionally regulated online conduct, including illegal sex trafficking.

The Petition balances an appropriately narrow construction of its immunity provisions with strong encouragement for companies to combat obscene and exploitative material. Among Section 230’s stated policy goals are to “empower parents to restrict their children’s access to objectionable or inappropriate online material,” and “deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”⁵ Despite these lofty goals, Section 230 has been deployed by companies to ward off legal action against plainly illicit material. Witness the notorious website, Backpage, which fostered human trafficking via thinly disguised solicitations for commercial sex. Backpage’s efforts to shelter under Section 230 ultimately led Congress to pass the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act in 2018 (FOSTA-SESTA), which limited Section 230 immunity for sex trafficking and prostitution.

The Petition leaves in place FOSTA-SESTA and reaffirms Section 230’s core grant of immunity to companies that, in good faith, restrict access to material that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”⁶ This immunity covers content falling within “traditional areas of media regulation” aimed at creating “safe, family environments.”⁷ Critically, the Petition emphasizes that immunity should not stretch, via the

² *Id.* at 27.

³ *Id.* at 32.

⁴ *Id.* at 46.

⁵ 47 U.S.C. § 230(b)(4), (b)(5).

⁶ Petition at 23.

⁷ *Id.* at 23, 37.

“otherwise objectionable” category, to moderation of material that is not “similar in type to” the preceding well-understood categories.⁸ And the Petition requires that determinations about whether content falls within these categories must be based on publicly available terms of service, made in good faith and not on pretextual grounds, and based on an “objectively reasonable belief” that material falls within a prohibited category.⁹ By so doing, the Petition ensures that platforms may continue to preserve public spaces free of objectively obscene, harassing, and harmful material without unduly expanding immunity to conduct that tramples core First Amendment speech.

3. The Petition promotes freedom of speech by ensuring competition through transparency.

Section 230 recognizes that the internet “offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁰ Indeed, courts have observed that one of the policy goals driving passage of Section 230 was a desire “to promote the free exchange of information and ideas over the Internet.”¹¹

Unfortunately, examples are legion of online platforms downplaying, editing, or even suppressing political speech that bears no relationship to the traditionally regulated categories of speech listed in Section 230(c)(2). For instance, Twitter recently “fact checked” a tweet by President Trump warning about the risk of election fraud posed by mail-in ballots. Twitter claimed the tweet was supported by “no evidence” despite the fact that many experts—including signatories to this letter—can validate that claim.¹² YouTube and Facebook, in turn, have removed content—including materials posted by licensed physicians, that, in their view, constitutes “misinformation” about COVID-19.¹³

The Petition recognizes the dangers posed by this sort of online censorship unmoored from any connection to traditionally regulated forms of speech. “For social media, it is particularly important to ensure that large firms avoid ‘deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints,’ or engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree.”¹⁴ The Petition answers this challenge, correctly, by requiring large online platforms to “publicly disclose accurate information regarding [their] content-management mechanisms as well as any other

⁸ *Id.* at 38.

⁹ *Id.* at 39.

¹⁰ 47 U.S.C. § 230(a)(3).

¹¹ *Carafano v. Metrosplash.com, Inc.*, 339 f.3d 1119, 1122 (9th Cir. 2003).

¹² See Greg Re, *Twitter puts warning label on a Trump tweet on mail-in ballots, despite experts backing up Trump’s concerns*, FoxNews.com, May 27, 2020, available at <https://www.foxnews.com/politics/twitter-applies-warning-label-to-trump-tweet-warning-of-mail-in-ballot-fraud-risk>.

¹³ See John Koetsier, *Facebook Deleting Coronavirus Posts, Leading to Charges of Censorship*, Forbes, March 17, 2020, available at <https://www.forbes.com/sites/johnkoetsier/2020/03/17/facebook-deleting-coronavirus-posts-leading-to-charges-of-censorship/#4729f4535962>; Yael Halon, *Tucker rips YouTube for pulling ‘problematic’ coronavirus video: ‘Censorship never is about science’*, FoxNews.com, April 29, 2020, available at <https://www.foxnews.com/media/tucker-carlson-youtube-coronavirus-censorship-science>.

¹⁴ Petition at 51.

content moderation, promotion, and other curation practices.”¹⁵ This increased transparency, in turn, will “enable users to make more informed choices about competitive alternatives.”¹⁶

Focusing on transparency is particularly important given that “today’s online platforms exist in highly concentrated markets.”¹⁷ Those same platforms “are the principal source for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring vast realms of human thought and knowledge.”¹⁸ These online public squares cannot be truly free, however, unless the participants understand the rules of the forum, and competition is able to provide alternatives when speech restrictions go too far. That market cannot operate, or even come into being, unless those who use online platforms and those who wish to compete with them have timely access to accurate information about critical content moderation policies.

For the foregoing reasons, the undersigned state attorneys general support the NTIA’s Petition and urge its adoption.

Respectfully Submitted,



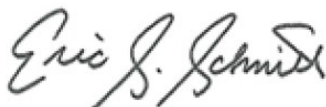
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¹⁵ *Id.* at 52.

¹⁶ *Id.* at 50.

¹⁷ *Id.* at 14.

¹⁸ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).