

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
Petition for Rulemaking of the )  
National Telecommunications and )  
Information Administration to ) RM-11862  
Clarify the Provisions of Section )  
230 of the Communications Act of )  
1934 )

**Comments of Carrie A. Goldberg**

**Introduction and Statement of Interest**

I submit these comments on Section 230 of the Communications Decency Act on my own behalf. I am an attorney, owner of victims rights law firm C. A. Goldberg, PLLC, and the author of *Nobody's Victim: Fighting Psychos, Stalkers, Pervs, and Trolls*, a *New York Times* 2019 Editor's Choice. As an attorney, I have represented hundreds of victims of online crimes -- stalking, nonconsensual porn (aka "revenge porn"), sextortion, and child sexual exploitation. In my cases, and others like them, large tech companies argue that Section 230 protects them from being held liable for harms that happen on their platforms. Companies take no initiative to stop active abuses because there are zero consequences if they don't. They have zero incentive to identify or prevent harm. And in one of my cases, the court even pointed to Section 230 as a logical reason for a tech company to not take action to help a crime victim actively stalked and impersonated, because the immunity from liability meant no action was legally necessary.

Section 230 must be reformed, and some of the NTIA's recommendations to promote transparency and strengthen enforcement of online terms of service are worthwhile. However, self-reporting and rule-making by tech companies is meaningless when there's no way to hold them accountable for recklessly disregarding harms on their platforms or failing to enforce their rules. The FCC should focus on reforming Section 230 legislatively to protect victims of online crimes, rather than getting swept up in partisan debates over political bias.

**The FCC Should Reform FCC to fulfil Congress's Stated Policy of Fighting Cyberstalking and Harassment**

While the Petition correctly notes the FCC has authority to issue regulations to define the scope of 230, the agency must look at the plain text and Congressional intent when doing so. The statute's text includes the Congressional Policy to "ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, *stalking*, and *harassment* by means of

computer.”<sup>1</sup> Section 230 explicitly encourages platforms to remove content which is “obscene, lewd, lascivious, filthy, excessively violent, *harassing*, or otherwise objectionable.”<sup>2</sup>

Yet Big Tech monopolies have abused Section 230 as a license to allow the revenge porn, cyberstalking, sex trafficking, dissemination of child sexual abuse material, and criminal harassment on their platforms--the exact type of content that Section 230 was meant to stop.

### **Herrick v. Grindr: A Case Study on the Human Costs of Expanding Section 230 Beyond its Legislative Intent**

To demonstrate the human costs and absurdities of overly-broad Section 230 Immunity, I wish to discuss what happened to my client Matthew Herrick, plaintiff in the case, *Herrick v. Grindr*. This case was born from the urgent need for immediate help in a life or death situation. While the goal of most Section 230 cases—and litigations in general—is financial compensation for past injuries, Matthew’s suffering was ongoing. Matthew’s ex-boyfriend, Oscar Juan Carlos Gutierrez, was impersonating him on the popular gay dating app, Grindr, and sending men to Matthew’s home to have sex with him. It all began one day in October 2016, when a stranger appeared at Matthew’s home address insisting that he had DM’ed with him to hook up for casual sex. Later that day, another person came to Matthew’s home. Then another and another. Some days as many as 23 strangers came to Matthew’s home and his job – waiting for him in the stairwell outside his apartment and following him into the bathroom at the Manhattan restaurant where he worked the brunch shift. Gutierrez was making fake profile on the gay dating app Grindr, and later on smaller competitors Scruff and Jack’d. Using Grindr’s patented geolocation functionality, he’d pinpoint exactly where he knew Matthew to be and then he would claim that Matthew had rape fantasies and free drugs to share. Sometimes, Gutierrez would stoke Grindr users, saying racist and homophobic things to users. Matthew would never know if the random men ringing his doorbell at all hours of the day and night were there to rape him, kill him, or both. Once somebody attacked his roommate. Another time, a co-worker was accosted by somebody who thought he was Matthew.

Matthew directly contacted all the services Gutierrez was abusing -- Grindr, Scruff, and Jack’d. The Terms of Service for all the apps prohibit the use of their products to impersonate, stalk, harass or threaten. Scruff, the smallest of the companies, responded to Matthew immediately. It sent him a personal email expressing concern, took down the fake accounts, and blocked Gutierrez’s IP address, effectively banning him from the app. Jack’d also effectively banned Gutierrez from using its platform to harass Matthew.

But Grindr, a company valued at over half a billion dollars, did absolutely nothing. Matthew sent 50 separate complaints to the company reporting the fake profiles. The only

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<sup>1</sup> 47 U.S.C. § 230(b)(5).

<sup>2</sup> 47 U.S.C. § 230(c)(2). See also *Enigma Software Group USA, LLC v. MALWAREBYTES*, 946 F. 3d 1040, 1052 (9th Cir. 2019) (Congress wanted to give internet users tools to avoid not only violent or sexually explicit materials, but also harassing materials).

response the company ever sent was an automatically generated email: “Thank you for your report.”

Even though Grindr’s terms of service state that Grindr can remove any profile and deny anybody the use of their product at the company’s discretion, they refused to help. After these complaints were ignored, we sued Grindr. By this time, though, Matthew had tried everything else to get Gutierrez to stop. He’d gotten an Order of Protection from family court. And he’d made ten police reports. The Manhattan DA had an open investigation, but it would be a year before they’d actually arrest him. In the meantime, Gutierrez sent over 1200 men to Matthew in person even after there was a temporary state court order requiring that Grindr ban him.

In court, Grindr claimed it was impossible to ban fake profiles. I argued that Grindr is a defectively designed and manufactured product as it was easily exploited—presumably by spoofing apps available from Google and Apple—if didn’t have the ability, according to the courtroom admissions of Grindr’s own lawyers, to identify and exclude abusive users.

The lawsuit did not seek to hold Grindr liable as a publisher of another’s content – we weren’t suing Grindr for content Gutierrez had created – we didn’t even know the half of it – we were suing using the product liability theories – this was a dangerous product. Grindr had introduced an inherently defective product into the stream of commerce. If you engineered and are profiting off one of the world’s biggest hook-up apps and don’t factor into its design the arithmetic certainty that it will sometimes be abused by predators, stalkers, rapists – you should be responsible to those you injure because of it.

Sadly, The Southern District of New York dismissed Matthew’s lawsuit at the earliest stage possible, ruling that Section 230 completely immunized Grindr. It heavily relied on *Doe v. Backpage.com*, where the First Circuit held that Backpage was immune for intentionally allowing sex trafficking on its website. The court in *Backpage* held that even though the victims made a “persuasive case” that Backpage has tailored its website to make sex trafficking easier, and sex trafficking was integral to its “meretricious business model.”<sup>3</sup>

The SDNY ruled that “Like the claims in *Backpage.com*, Herrick's claims are based on features or missing safety features” which it claimed was only “relevant to Herrick's injury because they bear on Grindr's ability to search for and remove content posted to the app.”<sup>4</sup> In one of the more disturbing parts of the decision, the court explained that it was dismissing Matthew’s intentional infliction of emotional distress claim because by virtue of the existence of Section 230, it was neither extreme nor outrageous for Grindr to ignore Matthew’s requests for help because Section 230 protected their right to do so.

In response to the many court decisions protecting Backpage for knowingly hosting sex trafficking, Congress passed the Stop Enabling Sex Trafficking Act (FOSTA-SESTA) several months after the SDNY ruled against us. Nonetheless, even after the act was passed, the Second Circuit upheld the opinion in a summary order, we lost our motion for a rehearing *en banc*, and in October 2019 the Supreme Court denied cert.

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<sup>3</sup> 817 F.3d 12 (1st Cir. 2016).

<sup>4</sup> *Herrick v. Grindr*, 306 F.Supp.3d 579, 591 (S.D.N.Y. 2018).  
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September 2, 2020

Folks always ask why we didn't just sue Gutierrez. The answer to any victim or victim's rights attorney is easy: if the criminal justice system won't stop a deranged relentless stalker, the civil justice system most certainly will not – particularly if the defendant is judgment-proof. Instead, the civil justice system becomes a new theater for a malicious person to play cat and mouse with their victim – by filing never-ending frivolous motions, seeking discovery on all social media, bank and phone accounts, and basking in the court dates. Lawsuits against dangerous criminal stalkers would be a cruel form of torture to inflict upon a client, futile and financially devastating to the client and small law firm.

Beyond the injustice and the pain this caused Matthew, *Herrick* shows that an incremental approach to Section 230 reform, like FOSTA-SESTA, is not sufficient to solve the problem of online abuse, and more reforms are necessary.

### **The NTIA Petition Proposes Some Positive Reforms, but should Expand Beyond Political Bias.**

The bulk of the NTIA's Petition's recommendations relate to supposed political bias. While there is a legitimate debate on whether a platform is exercising editorial control via selective censorship, many bad faith users—from across the political spectrum—falsely claim free speech as a cover for harassment and violence. Moreover, Section 230 explicitly allows platforms to remove harassing and violent content, “whether or not such material is constitutionally protected.”<sup>5</sup> So, too, does the First Amendment.

The NTIA nonetheless has proposed some reforms which are commendable. The NTIA Petition asks the FCC to hold that “An interactive computer service is not being ‘treated as the publisher or speaker of any information provided by another information content provider’ when it actually publishes its own or third-party content.”<sup>6</sup> This is common sense. Section 230 is not meant to immunize online platforms for their own statements and contracts. In *Herrick* we sought to hold Grindr liable for failing to live to its terms of services, rather than just the speech of another. Adopting this reform would help victims hold online platforms responsible for enforcing their own promises. But even still, it's essential to note that not all persons harmed by products are users of that product. Matthew was not an active Grindr user when it was weaponized against him. Likewise, my client's nude pictures and underage rape videos get disseminated through platforms they don't even use. In one of my cases, photographs of my client's 17-year-old daughter's corpse, a murder which was live-posted, continue to show up on mainstream social media sites over a year later, in defiance of their terms of services.

The NTIA Petition also proposes a disclosure rule which would require that large interactive computer services

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<sup>5</sup> 47 U.S.C. 230(c)(2)(a)

<sup>6</sup> NTIA Petition at 53.

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.<sup>7</sup>

The public deserves to know how these platforms actually order, promote, and remove content. More transparency, could tackle more than bias in politics and potentially highlight platforms engaging in racial bias in their algorithms,<sup>8</sup> advertising, or disadvantaging their competitors.<sup>9</sup>

Despite these positive reforms, the NTIA Petition’s focus on political bias neglects the more important reforms we need to stop the serious online crimes; the crimes that truly up-end a person’s life. Only the wealthy and privileged sue for defamation and speech-based harms. We need to protect victims, like Matthew, of conduct-based harms that have been swept into Section 230 immunity. To restore Section 230 to its original purpose we must:

1. ***Allow Injunctive relief to help in emergency cases like Matthew’s where the plaintiff is suffering imminent harm.*** Section 230 only holds that “no *liability* may be imposed under any State or local law that is inconsistent with this section.”<sup>10</sup> Injunctive relief does not hold a platform “liable,” but unfortunately some courts have construed Section 230 to preempt any injunctions.<sup>11</sup>
2. ***Limit immunity to only publication-related torts like obscenity and defamation.*** Section 230 was passed in response to the defamation case *Stratton Oakmont v. Prodigy*, and specifically states it will not treat intermediaries as “publishers.”<sup>12</sup> It can be difficult to expect Facebook or YouTube to determine whether each post made on its platform is defamatory. However, determining whether someone is threatening violence, engaged in sex-trafficking, or offering to sell illegal drugs is far easier to detect.
3. ***Section 230 immunity should not apply when there’s constructive notice of the specific harm and damages.*** As noted, Section 230 sought to override the *Stratton Oakmont* decision. *Stratton Oakmont* ruled “PRODIGY is a publisher rather than a distributor.” Thus Congress sought to make interactive computer services as distributors, such as libraries, book sellers, newsstands. Courts have always ruled that distributors can be

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<sup>7</sup> *Id.* at 52.

<sup>8</sup> See generally Anupam Chander, *The Racist Algorithm?*, 115 Mich. L. Rev. 1023 (2016-2017).

<sup>9</sup> See generally Sheng Li & Claire (Chunying) Xie, *Rise of the Machines: Emerging Antitrust Issues Relating to Algorithm Bias and Automation*. Competition Policy International (2017)

<sup>10</sup> 47 U.S.C. § 230 (e)(3)

<sup>11</sup> *Hassell v. Bird*, 5 Cal. 5th 522 (2018).

<sup>12</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

liable for content if “they knew or had reason to know of the existence of defamatory matter contained in the matter published.”<sup>13</sup> Nonetheless, courts have wrongly interpreted Section 230 to give absolute immunity, even if they have knowledge of the illegal and tortious content.<sup>14</sup>

4. ***Section 230 immunity should not apply to advertisements or state or federal criminal conduct the platform knowingly accommodates.*** There is zero reason victims of online pornography, sextortion, child sexual abuse, or cyberstalking should not have every right to hold liable the platforms that are minting money off the user engagement (i.e. advertising revenue) of their suffering. If misinformation, disinformation, or discrimination is in the form of advertisements those harmed should be able to sue. Social media companies are directly earning money from this kind of speech and have a duty to vet it for accuracy and legality.

In sum, while I do not agree with the NTIA’s focus on political bias, the FCC should take this opportunity to enact more meaningful changes to Section 230 to protect victims of online stalking, harassment, and abuse.

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<sup>13</sup> *Prosser and Keeton on the Law of Torts* § 113, at 811 (5th ed.1984).

<sup>14</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).