

INTERNET ACCOUNTABILITY PROJECT

Secretary Marlene Dortch)
Federal Communications Commission)
445 12th Street, SW)
Washington, DC 20554)
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Re: Proceeding RM-11862

We are writing to you to express support for the Federal Communication Commission’s reexamination of Section 230 of the Telecommunications Act of 1996. This provision was enacted to protect infant technology companies near the dawn of the twenty-first century – companies that then played a small role in everyday American life. Since that time, those same companies have become some of the largest in the world – determining what consumers see and how they see it with near-total control over online information dissemination.

As a conservative group dedicated to advocating for policies that promote online competition, safeguard digital privacy, and prevent political bias, we are troubled that Section 230 is used to protect harmful online content as well as its use by digital platforms to justify arbitrary internal guidelines to allow censorship of conservative speech. Even during the COVID-19 pandemic where commerce around the world has fallen, these large tech giants have seen their valuations increase, due in part to their continued subsidization by the federal government despite harmful practices that undermine our country’s core values.

Given the size of these companies – and their outsized impact on American life – the FCC must exercise its legal authority to issue rules related to Section 230. There is a clear and fundamental need for the FCC to interpret this provision given the drastic changes that have occurred in the digital marketplace since its enactment in 1996. Put simply, times have changed. The liability shield necessary back then no longer serves its intended congressional purpose.

A. The Commission should exercise its legal authorities to protect online consumers against Big Tech’s threat to free speech.

Big Tech companies hide behind Section 230 to disclaim responsibility for explicit content uploaded and promoted by users on their platforms while earning sizable profits, exploiting conservatives as expendable consumers in the process. The need for revisiting the scope of Section 230’s liability shield is simple, especially with no apparent legislative solution in sight.

President Donald Trump, as a result, issued an Executive Order in May addressing the harmful practices of online platforms. The Order merely directs his administration to reconsider the scope of legal protections available in Section 230 that, in present form, enable tech companies to engage in selective censorship. The President, using sound authority to direct that federal agencies begin the administrative rule-making process, argued that “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.”

In simple terms, the Executive Order requests that the National Telecommunications and Information Administration (“NTIA”) petition the Commission to clarify the scope of immunity. Based on unprecedented expansion from Big Tech companies since 1996, a clear and present need exists to reconsider the liability protections broadly available to modern companies who engage in selective censorship without fault.

First, as a threshold matter, the Commission wields the authority necessary to interpret the scope of liability in Section 230. Indeed, Section 201(b) of the Telecommunications Act gives the Commission power to “prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter.”¹ Even though Congress enacted this section before Section 230, the Supreme Court has since held that the rulemaking power in 201(b) permits the issuance of regulations, and the clarification of uncertain terms, from subsequently enacted provisions.² And Section 230 contains many ambiguities in need of clarification. This ruling, in combination with congressional silence about the FCC’s rulemaking power regarding Section 230, makes possible only one conclusion. The Commission is empowered to promulgate rules in accordance with proper administrative procedures and interpret provisions throughout the entire Act, including Section 230.

Second, immunity should not extend beyond the text of the statute, shielding those who claim to provide forums for the free exchange of ideas, while controlling the dominant mode of online communication in the United States and engaging in pretextual actions that censor only certain viewpoints. In this sense, the Commission should recognize the limited purposes for which Congress provided online platforms protection from liability when it enacted Section 230. Specifically, Congress designed Section 230(c) in response to judicial decisions that classified digital platforms as the “publisher” of content uploaded by users if the platform restricted only some users from using their services.³ Section 230, therefore, provided only limited liability protection to the platforms who police their users by filtering content they believe is harmful. At the dawn of the Internet-age, Congress intended this shield, for example, to protect minors from illicit content with the belief that it would encourage platforms to take down content that fell into this category.

Third, Section 230(c)(2) expressly addresses protections made in “good faith” to filter content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing or *otherwise objectionable*” as described in Section 230(c)(1). Instead of permitting the beneficiaries of this “good faith” exception to determine what qualifies as “otherwise objectionable” content, the Commission should issue regulatory guidance interpreting these terms to prevent protecting companies that engage in pretextual actions against select viewpoints. It is clear that Section 230 was not designed to provide blanket immunity for companies that use their power to censor political speech. Although monitoring the content posted by users is admittedly important, the

¹ 47 U.S.C. § 201(b).

² *See* City of Arlington v. FCC, 668 F.3d 229, 250 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013) (“Section 201(b) of that Act empowers the Federal Communications Commission to prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions. Of course, that rulemaking authority extends to the subsequently added portions of the Act.”).

³ *See, e.g.*, Stratton Oakmont, Inc. v. Prodigy Servs., 2 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

federal government must ensure that it is not shielding those who shield the public from each other's thoughts and ideas. Americans from coast to coast too often report that online platforms flag their content as inappropriate, despite adherence to the platform's terms of service. And when the media reports on this phenomenon, platforms often then move the goalposts, making unexplained changes to their already arbitrary policies that tend to silence certain viewpoints. In no uncertain terms, companies who engage in censorship should not benefit from the good faith exception through a bloated interpretation of what qualifies as content "otherwise objectionable." Open political discourse is important to a healthy democracy, so the Commission should issue clear guidance on how and when this exception applies, as well as when companies cannot claim it.

Fourth, Congress enacted Section 230 to protect political speech, recognizing that the Internet is a "forum for a true diversity of political discourse."⁴ Yet selective censorship, meaning the censorship of conservative speech, owes its existence to the safe haven that Section 230 unintentionally created. Instead of merely providing a legal shield to nascent tech companies, the provision has propped up modern monopolies that now benefit free from meaningful competition. Competition in the digital marketplace presents separate but related threats to censorship, requiring acknowledgement that the same tech companies Congress intended to protect in their infancy have outgrown their legislative garments. Their unprecedented level of control in modern American life allows them to reign over the digital marketplace like social oligarchs, treating consumers however they please with the federal government's blessing. Such unfettered discretion vested in a private class of companies is contrary to the values held by a civil society, especially one which prides itself on free enterprise and free speech. Therefore, the Commission should exercise its legal authorities to interpret the meaning of Section 230 in accordance with plain language and purpose at the time of enactment to prevent undue censorship of political speech by Big Tech monopolies.

B. Courts have interpreted Section 230 too broadly and enabled Big Tech to become the gatekeeper of speech in the public square.

In the decades since Congress enacted Section 230 in 1996, courts have expanded liability protections beyond their original purposes. Courts once recognized that Congress enacted Section 230 "for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."⁵ Although Congress imagined protecting platform openness while allowing companies to police objectively harmful content, communications law now allows Big Tech to engage in selective censorship without legal consequence.

Far beyond policing pornographic or other objectively obscene material, Section 230 is now applied by courts to shield corporate behemoths from legal repercussions for engaging in censorship under the guise of "editorial judgment."⁶ The elaborate protections that courts afford to Big Tech often have little to do with the original dangers from which Section 230 intended to shield nascent internet companies, such as protecting a platform from defamation liability based on one comment among millions. As NTIA's petition emphasizes, courts have construed Section

⁴ 47 U.S.C. Section 230(a)(3).

⁵ See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

⁶ See, e.g., *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094–1095 (N.D. Cal. 2015).

230 to grant immunity from contracts,⁷ consumer fraud,⁸ revenge pornography,⁹ anti-discrimination civil rights obligations,¹⁰ and even facilitating terrorist activity.¹¹ Big Tech platforms are therefore given free rein to ignore laws by which other mediums and businesses are bound. By immunizing companies like Google’s YouTube, Facebook, and Twitter from these laws, for example, courts have impaired section 230’s goal “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”¹²

Perhaps most controversially, these expansive judicial interpretations of Section 230 have distorted speech by creating a cyberspace where Big Tech companies are permitted to restrict and amplify certain speakers without accountability. This stems from a judicial opinion in the U.S. Court of Appeals for the Fourth Circuit which held 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.”¹³ Courts have since relied on this language to grant Big Tech platforms immunity for their own publications, editorial decisions, content-moderation, and for flagging user posts with warning or fact-checking statements.¹⁴ As the Executive Order correctly notes, “[t]ens of thousands of Americans” have had their speech impaired by these companies “flagging” their posts, even though they do not violate any laws or stated terms of service.¹⁵ Americans have always valued the unrestricted exchange of ideas as essential to a free society, and the current implementation of Section 230 seriously endangers that right.

This is particularly apparent when one considers that Big Tech companies – Facebook, Google, and Twitter – are rapidly becoming the gatekeepers of the modern public square. Given their massive user base, wide immunity for subjective content moderation has downstream effects on independent thought, behavior, election integrity, and market access. Approximately 55 percent of Americans get their news from social media.¹⁶ Nearly half of social media consumers, 48 percent, according to Pew Research, “describe the posts about news they see there as liberal over very liberal.”¹⁷ A much smaller share, 14 percent, describe the news posts they see as conservative.¹⁸

⁷ See, e.g., *Caraccioli v. Facebook, Inc.*, 167 F. Supp.3d 1056, 1064-66 (N.D. Cal. 2016) (dismissing breach of contract claim and Cal. Bus. & Prof. Code § 17200 unfair practices claim).

⁸ See *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002); *Hinton v. Amazon*, 72 F. Supp. 3d 685, 687 (S. D. Miss. 2014);

⁹ See *Jones v. Dirty World Entertainment Holding LLC*, 755 F.3d 398 (6th Cir. 2014); *S.C. v. Dirty World LLC*, 40 Media L. Rep. 2043 (W.D. Mo. 2012).

¹⁰ See *Sikhs for Justice “SFJ”, Inc.*, 144 F. Supp. 3d 1088, 1094-1095.

¹¹ See *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019).

¹² 47 U.S.C. § 230(b)(2).

¹³ See *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹⁴ See *Okeke v. Cars.com*, 966 N.Y.S.2d 843, 846 (Civ. Ct. 2013), *citing* *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008), *aff’d*, 591 F.3d 250 (4th Cir. 2009).

¹⁵ E.O. 13925, Section 1.

¹⁶ Elisa Shearer and Elizabeth Grieco, *Americans are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RESEARCH (Oct. 2, 2019), <https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news>.

¹⁷ *Id.*

¹⁸ *Id.*

According to Pew, “Facebook is far and away the social media site Americans use most commonly for news. About half (52%) of all U.S. adults get news there.”¹⁹ As Facebook’s reach continues to grow, its ability to narrow the diversity of viewpoints accessible to billions of individuals only expands. The deleterious societal effects of this are obvious. Consider that earlier this year, Facebook removed anti-lockdown protest content that advocated for in-person gatherings which Facebook determined did not follow government health guidance.²⁰ However, it was not reported that Facebook applied such scrutiny to the ongoing riots, protests, or protest block parties that were organized on its site – despite many of these events very obviously violating government guidance on social distancing.²¹ Facebook’s dominance as a platform for speech and organizing magnifies, to a disturbing degree, its power over Americans’ ability to exercise their right to assembly.

This is also true of Big Tech’s power over independent thought. In July, platform after platform removed a video of board-certified physicians discussing alternative treatment options for COVID-19, including the use of hydroxychloroquine. One by one, the Big Tech platforms removed the video, citing its “false information about cures and treatments for COVID-19.”²² Big Tech has now appointed itself the arbiter of which board-certified medical commentary is “appropriate” for its billions of users around the world to view. This has a clear impact on the ability of individuals to decide for themselves what to believe or to discuss with their own physicians. Moreover, Big Tech’s self-appointment as a medical board threatens to tyrannize the scientific process by limiting the flow of information – particularly troubling in the sciences, where scientific discovery is routinely the consequence of upending the prevailing scientific consensus.

But this “rule,” like all of Big Tech’s content-moderation policies, is only subjectively applied. Though it yanked down with speed a video of doctors discussing alternative medical treatments for COVID-19, Twitter still hosts a tweet – from the World Health Organization, no less – proclaiming that there is “no clear evidence of human-to-human transmission of the novel #coronavirus.”²³

Google, with its massive capture of online search, has the ability to filter information for 90 percent of the world. Google’s choices to amplify, suppress, or support certain voices with its advertising services, has outsized ripple effects on the information provided to billions. A 2019 investigation by *The Wall Street Journal* found that Google tweaked its algorithm at the request of big business, and modified its search results for terms like “abortion” and “immigration,”

¹⁹ *Id.*

²⁰ Georgia Wells and Andrew Retussia, *Facebook Puts Limits on Protestors*, THE WALL STREET JOURNAL (Apr. 20, 2020), <https://www.wsj.com/articles/facebook-curbs-organizing-of-lockdown-protests-11587419628>.

²¹ New Black Panther Block Party for Self-Defense, New Black Panther Block Party, FACEBOOK (Aug. 28, 2020), [https://www.facebook.com/events/2297086643933094/?acontext=%7B%22event_action_history%22%3A\[%7B%22mechanism%22%3A%22search_results%22%2C%22surface%22%3A%22search%22%7D\]%7D](https://www.facebook.com/events/2297086643933094/?acontext=%7B%22event_action_history%22%3A[%7B%22mechanism%22%3A%22search_results%22%2C%22surface%22%3A%22search%22%7D]%7D).

²² Jon Passatino and Oliver Darcy, *Social Media Giants Remove Viral Video with False Coronavirus Claims that Trump Retweeted*, CNN (July 28, 2020), <https://www.cnn.com/2020/07/28/tech/facebook-youtube-coronavirus/index.html>.

²³ World Health Organization (@who), TWITTER, (Jan. 14, 2020, 6:18 AM), <https://twitter.com/WHO/status/1217043229427761152?s=20>.

prompting concern that Google’s decisions to suppress or amplify information can modify voter behavior.²⁴

Dr. Robert Epstein, a center-left research psychologist, has testified before Congress that Google “displays content to the American public that is biased in favor of one political party.”²⁵ Based on a study he conducted which preserved more than 13,000 election-related searches conducted by a diverse group of Americans on Google, Bing, and Yahoo in the weeks leading up to the election, Dr. Epstein concluded that Google searches were significantly biased in favor of Hillary Clinton in all 10 positions on the first page of the search results. He estimates this swung as many as 2.6 million votes to Clinton. He also estimates that Google’s algorithmic filtering has been “determining the outcomes of upwards of 25 percent of the national elections worldwide since at least 2015.”²⁶

In June, Google flexed its muscle against *The Federalist*, a conservative news site, for violating Google’s advertising policies in the site’s comment section. Troublingly, it brought the complaint against *The Federalist* at the behest of NBC News – demonstrating the power Google has to knock out entire news sites while working in tandem with a partisan media competitor.²⁷ Just a month later, Google’s search engine appeared to inexplicably blacklist a number of conservative blogs and websites.²⁸

If Google did not filter information for 90 percent of the world, the impact of its actions would be far less. But as it is the conduit for billions of people, the decisions of this single corporation, accountable to no one, can shape human thought and behavior in ways that would stagger the Congress that passed Section 230 for the original purpose of, according to one of its authors, “clean[ing] up the internet.”²⁹

Section 230 is what allows these companies to act in unaccountable ways that were unimaginable when the provision was codified. The immunity privileges actions that are widely outside of the scope of the statute itself, and in doing so, incentivizes powerful corporate interests to manipulate the speech, thought, and behavior of individuals.

While the First Amendment gives these companies the right to moderate as they see fit, no company has a constitutional right to the Section 230 privilege that shields mega-corporate tech

²⁴ Kirsten Grind, Sam Schechner, Robert McMillan, and John West, *How Google Interferes with its Search Algorithms and Changes Your Results*, THE WALL STREET JOURNAL (Nov. 15, 2019), <https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753>.

²⁵ *Why Google Poses a Serious Threat to Democracy, and How to End That Threat: Hearing Before the United States Senate Judiciary Subcomm. on the Const.*, 116 Cong. 1 (2019) (Statement of Dr. Richard Epstein), <https://www.judiciary.senate.gov/imo/media/doc/Epstein%20Testimony.pdf>.

²⁶ *Id.*

²⁷ Ben Domenech and Sean Davis, *NBC Tries to Cancel a Conservative Website*, THE WALL STREET JOURNAL (June 17, 2020), <https://www.wsj.com/articles/nbc-tries-to-cancel-a-conservative-website-11592410893>.

²⁸ Rod Dreher, *Google Blacklists Conservative Websites*, THE FEDERALIST (July 21, 2020), <https://www.theamericanconservative.com/dreher/google-blacklists-conservative-websites/>.

²⁹ Will Chase, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>.

companies from accountability to their consumers, not to mention the government's original interest in granting that immunity in the first place.

Conclusion

In short, the methods in which the FCC, along with other federal agencies, regulate tech companies no longer meets the moment. Based on the unprecedented expansion of the digital marketplace in recent decades, we ask that the Commission reevaluate the operability of Section 230 using its broad rule-making authorities impliedly authorized by the Supreme Court and demanded by a civil society that considers freedom of speech a fundamental value.

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