Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of
Section 230 of the
Communications Act of 1996
To: The Commission

Josh Hammer Comment on the
NTIA Petition for Rulemaking and
Section 230 of the Communications Act of 1996
By: Josh Hammer

In compliance with President Trump's Executive Order on Preventing Online Censorship, signed on May 28th of this year, the National Telecommunications and Information Administration (NTIA) filed a petition to the Federal Communications Commission (FCC) asking that the FCC "expeditiously propose regulations" reflecting the Trump administration's statement of policy regarding 47 U.S.C. § 230. The FCC then opened the petition up for public comment (Docket RM-11862). Below is an official comment from Josh Hammer on 47 U.S.C. § 230 and the NTIA petition.

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To put it mildly, the Internet has changed quite a bit since its 1990s-era debut before a mass consumer national audience. What was then a bourgeoisie novelty, characterized by anachronisms such as the dial-up modem and AOL's famous "you've got mail!" notification, has, over the course of two-plus decades, transmogrified into perhaps the single most ubiquitous and indispensable element of everyday life. When we Millennials move apartments or even check into a new hotel, the very first question we often ask is, "what's the Wi-Fi password here?"

Long gone are the days of spotty instant messaging and the occasional use of then-innovative, but in retrospect quite primordial, "search engines." Instead, the Internet today provides for its countless users, at lightning-quick speed, access to something closely approximating the entire compendium of human knowledge stretching back to the evolutionary incipience of the *homo sapien* species. The advent of social media, in particular, has allowed for previously unprecedented ease and volume of (virtual) human-to-human interaction. No longer would Thomas Paine feel obliged to scamper all across the village commons, pamphleteering down to the last man. No longer, even, would epistolary communication rely upon the vagaries and ponderousness of the postal service. Instead, in the year 2020, social media is the overwhelmingly preferred method of communication for American society.

Unfortunately, as is so often the case, lawmakers and regulators have failed to adequately update our existing legal paradigms in order to reflect modern-day realities. It is possible that no single piece of legislation most embodies this dereliction of policymaker duty, in the context of Internet regulation, more than Section 230 of the Communications Decency Act of 1996 (hereinafter, "Section 230").

Under Section 230, Internet platforms were granted blanket civil immunity for moderating, editing, and deleting public platforms in order to remove offensive content—at the time, usually intended to be prurient, sexual, and/or pornographic materials. Congress's basic idea was that, in order to encourage the growth of a then-nascent industry (i.e., the mass consumer age of the Internet), online platforms should be empowered to police their users' actions and ensure general norms of societal decorum without fear of litigious reprisal.

Notably, however, Congress was also up-front about the way in which it envisioned Section 230 *furthering*, rather than *hindering*, America's venerable tradition of a proverbial "marketplace of ideas." As Congress expressly noted, Section 230 was designed to help ensure 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." This legislative purpose was absolutely crucial: As law professor Eugene Kontorovich stated in his April 2019 Senate Judiciary Committee testimony on the subject, "In enacting the immunity provisions, Congress assumed that protected internet services provide 'a forum for a true diversity of political discourse.' To the extent that assumption is weakened by online companies filtering out viewpoints that they deem ideologically impermissible, the assumptions behind Section 230 may need to be revisited."

Section 230's implied "deal," in short, was necessarily dependent on Big Tech companies—be they the AOL or Netscape of yore, or the Google and Facebook of today—acting as good corporate citizens whose internal policing habits closely tracked Congress's expressly enumerated purpose for bestowing a munificent, across-the-board blanket legal immunity. As Senator Josh Hawley (R-MO) has explained, Section 230's newfangled exemption from traditional defamation law-related rules of publisher reliability was predicated upon the recipients of online publisher immunity providing "a forum free of political censorship."

As is now obvious, that simply has not happened. Big Tech has not upheld its end of Congress's implied bargain. As scads of examples prove on a seemingly daily basis, anti-conservative, anti-Trump overt political bias is now the norm for the liberal overlords who run behemoths like Google, Amazon, Facebook, and Twitter. "Fact checks" placed beneath some of President Trump's recent COVID-related tweets underscored for many this ideologically driven and abusive censorship, but such actions occur on a much smaller scale with a shocking degree of regularity.

What's more, these companies oftentimes exert the type of monopolistic power for which our antitrust laws were expressly designed. Google, for instance, has an 87.3 percent market share for the U.S. search market; Google-owned YouTube is even more dominant, as

upward of 90 percent of U.S. Internet users access the site to watch online videos. Facebook, similarly, has a 62.89 market share in the social media space. Monopolistic power, furthermore, is arguably even more troublesome in the Internet/technology sphere than it is in virtually any other context; these conglomerates, due to their power, can both censor us way from participating in the "marketplace of ideas" and prevent us from even interacting with those ideas at all, in the first instance. As FCC Commissioner Brendan Carr recently wrote at *Newsweek*, where I serve as opinion editor, in explaining the brute power now wielded by these oftentimes monopolistic corporate entities: "A handful of corporations with state-like influence now shape everything from the information we consume to the places where we shop. …They are not simply prevailing in the free market; they are taking advantage of a landscape that has been skewed—by the government—to favor their business models over those of their competitors."

That social media companies serve the modern function that they do—"principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge," as the Supreme Court put it in the 2017 case of *Packingham v. North Carolina*—only accentuates the necessity of urgent policy reform in this area. The sad reality is that we as a society have not yet fully grappled with how to ensure our over-arching constitutional order, based as it is on limitations placed upon *public* action, comports with a modern reality where the biggest threats to the free and open exchange of ideas—and the general vibrancy of our public discourse—more often than not come from *private* actors.

At a bare minimum, it long past time for policymakers and regulators to work in tandem to narrow the scope of—or, of course, perhaps eliminate outright—Section 230's gratuitous blanket immunity. If Big Tech giants want to substantively editorialize and place a cumbersome thumb on the scales of ongoing debates that divide an increasingly divided nation, the very least conscientious citizens can request is that they legally be treated not as purely neutral forums, but as content creators. The FCC must now act accordingly.

Respectfully submitted this 2nd day of September, 2020,

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