

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

In the Matter of)
)
Section 230 of the Communications Act of) RM-11862
1934)

COMMENTS OF CONSUMER TECHNOLOGY ASSOCIATION

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I. INTRODUCTION AND SUMMARY

Consumer Technology Association[®] (“CTA”),¹ through its counsel, responds to the Federal Communications Commission’s (“FCC” or “Commission”) *Public Notice* on the Petition for Rulemaking (“Petition”) filed by the National Telecommunications and Information Administration (“NTIA”) seeking regulation of providers of online products and services that host third party content.² Specifically, NTIA asks the Commission to “interpret” Section 230 of the Communications Decency Act of 1996—a statute that protects such providers from liability for content created by third parties and the moderation thereof—to drastically limit its applicability. NTIA separately asks the Commission to create “transparency” requirements that would mandate expansive disclosures about how internet companies curate content for users.

NTIA’s Petition is as dangerous as it is legally flawed. Section 230 has made the internet a platform for connectivity that enables communication, expression, and economic transactions,

¹ As North America’s largest technology trade association, CTA[®] is the tech sector. Our members are the world’s largest innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES[®]– the most influential tech event in the world. Find us at CTA.tech. Follow us at @CTAtech.

² Petition for Rulemaking of the National Telecommunications and Information Administration, RM-11862 (filed July 27, 2020) (“Petition”); *Consumer & Governmental Affairs Bureau, Reference Information Center, Petition for Rulemakings Filed*, Public Notice, No. 3157 (Aug. 3, 2020).

and plays a vital and beneficial role in the lives of hundreds of millions of Americans. The unique balance of protections afforded by Section 230 has enabled the United States to be the global leader in internet innovation. In the United States, with a few important exceptions,³ internet companies are not subject to countless lawsuits and legal liability for allegedly unlawful statements made by their users or other third parties, or for the companies' attempts to remove objectionable content from their platforms. This deliberate design has catalyzed enormous growth and innovation in the internet ecosystem. It differentiates the United States from other countries, like China, that suppress internet speech and exercise heavy-handed control over the online platforms that enable it. Section 230's protections remain vital, both for large providers with tens of millions of users and for startups building the internet platforms of the future, to continue providing services to consumers and to maintain America's leading role in the innovation economy.

NTIA, acting at the direction of the President, asks the Commission to usurp the role of Congress and rewrite Section 230 to significantly limit or essentially eliminate the legal protections provided by the statute and to impose new, competitively harmful disclosure requirements. The Petition asks the FCC to adopt regulations that are inconsistent with statutory text, exceed the Commission's legal authority and would undercut the ability of internet companies to provide a wide variety of services to meet consumer demand, contribute to a robust internet economy, and experiment with innovative business models without fear of crippling liability. NTIA's requested rewriting of Section 230 threatens the continued viability of the modern internet and asks the federal government, through the FCC, to curtail the First Amendment freedoms of all American companies that have hosted or will ever host third party content online. In this respect, the political

³ 47 U.S.C. § 230(e) (explaining that Section 230 provides no immunity in the context of federal criminal statutes, intellectual property law, state law that is consistent with Section 230, and the Electronic Communications Privacy Act of 1986, and that only subsection (c)(2) applies in the context of sex trafficking laws).

context of the Petition is particularly troubling and confirms the institutional and constitutional superiority of Congress to resolve any legitimate questions about possible revisions to Section 230.

The Commission should deny NTIA’s Petition.

II. THE PROTECTIONS AFFORDED BY SECTION 230 ARE THE BEDROCK OF THE UNITED STATES’ INNOVATION LEADERSHIP AND THE VIABILITY OF THE INTERNET ECONOMY.

Section 230 affords two critical types of legal protection to “interactive computer service” providers, or online companies that allow third-party users to access content and services and post their own content: subsection (c)(1) provides that neither those providers nor their users are to “be treated as the publisher or speaker of any information provided by another information content provider,”⁴ and subsection (c)(2) provides that neither interactive computer service providers nor their users are to be held liable for either “action[s] voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, . . . excessively violent, harassing, or otherwise objectionable” or “action[s] taken to enable or make available . . . the technical means to restrict access” to any such objectionable material.⁵

These provisions ensure that companies are able to provide online services that host third party content without becoming vulnerable to a flood of lawsuits challenging that content or alleging that they did not do enough—or did too much—to filter out objectionable content. More, these provisions ensure that internet users themselves are free to navigate and use these platforms, posting their own content and interacting with or screening the content of others, without similarly being subject to liability for the content posted by fellow users or decisions to interact with that content. The robust legal protections afforded by Section 230 have been critical to the growth of

⁴ 47 U.S.C. § 230(c)(1).

⁵ *Id.* § 230(c)(2).

the modern internet and America’s leadership in the innovation economy. It is no accident that the largest, most successful and most innovative internet companies were developed and are based in the United States.⁶ As summarized by CTA’s president and CEO Gary Shapiro, “[o]ur nation's pro-free speech, low-touch regulation philosophy is part of what makes American innovators the most successful in the world. Companies can innovate without fear of being sued repeatedly over third-party content. Likewise, consumers have the power of choice—they can decide which platforms to use or even start their own.”⁷ Section 230 protections continue to be necessary both to maintain the thriving ecosystem of platforms and services on which consumers depend and to ensure that American innovators will develop the extraordinary platforms and solutions of tomorrow.

A. CTA and its members will continue to drive the internet economy if governing law and policy facilitate growth and innovation.

CTA’s members include a wide range of companies that rely on the internet to bring innovative, transformative applications and services to consumers. They include trillion-dollar companies and household names as well as the yet-unknown startups that will drive the technological revolutions of the future. These companies have launched groundbreaking products that are essential to Americans’ daily lives. Their products and services include social media platforms, retail services, content streaming, gaming and entertainment platforms, and “internet of things” devices and applications.

⁶ For example, the U.S. leads the world in the number of “unicorn companies,” startups worth over \$1 billion. Gary Shapiro, President and CEO, Consumer Technology Association, *The U.S. risks being outpaced on innovation within the next 10 years*, VentureBeat (Feb. 7, 2019); Sintia Radu, *Which Countries Have the Most Unicorn Companies?* U.S. News & World Report (Oct. 22, 2019), <https://www.usnews.com/news/best-countries/slideshows/these-countries-have-the-most-unicorn-companies>.

⁷ Press Release, CTA, CTA Statement on White House Executive Order Weakening Section 230 Protections (May 28, 2020), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2020/May/CTA-Statement-on-White-House-Executive-Order-Weake>.

The United States has been the world’s innovation leader since the internet’s inception, and countless U.S. companies have been able to bring consumers online products and services that meet a diversity of needs. CTA members’ innovations fundamentally transform and improve how citizens live, work, and connect. Consumers today have access to an incredible and expanding range of online products and services that solve problems and provide new capabilities and ways to connect that a pre-internet world could not have dreamed. The importance of this internet ecosystem has been evident in the COVID-19 pandemic, as Americans increasingly rely on internet products and services to do their jobs, stay connected to loved ones, receive food and critical goods, access medical care, stay informed, educate their children, and enjoy entertainment and recreation.⁸

As the world moves to fifth generation (“5G”) wireless services and other next generation technologies, unparalleled high-speed, low-latency, high-bandwidth connections will enable a range of new internet applications and possibilities and “will be the platform for tomorrow’s innovation.”⁹ CTA members are poised to propel the United States into another era of unsurpassed global success.¹⁰ However, this can happen only if America remains a bastion for freedom and innovation online—a status that depends on commonsense legal frameworks, including the ability

⁸ Press Release, CTA, Video Conferencing Use Sees Big Jump Amid COVID-19, Shows CTA’s New Weekly Tracker (Apr. 8, 2020), <https://cta.tech/Resources/Newsroom/Media-Releases/2020/March/Video-Conferencing-Use-Sees-Big-Jump-Amid-COVID-19>; Press Release, CTA, Video Streaming, Contactless Grocery Delivery Use Soars Amid COVID-19 Outbreak, CTA Study Finds (Mar. 27, 2020), <https://cta.tech/Resources/Newsroom/Media-Releases/2020/April/Video-Streaming.-Contactless-Grocery-Delivery-Use>.

⁹ Gary Shapiro, *What 5G can do for DC*, Washington Examiner (Mar. 4, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/what-5g-can-do-for-dc>.

¹⁰ *Id.*; Press Release, CTA, Verizon CEO to Keynote at CES 2019 (Nov. 1, 2018), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2018/Verizon-CEO-to-Keynote-at-CES-2019>; Press Release, CTA, CES 2020 Wraps: AI and 5G Define the Future of Innovation (Jan 10, 2020), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2020/January/CES-2020-Wraps-AI-and-5G-Define-the-Future-of-Inno>.

to innovate without fear of being sued for the content of others. This guiding philosophy must be maintained to continue the American success story of unparalleled growth and transformative innovation in the internet ecosystem.

B. From its passage nearly 25 years ago, Section 230 has promoted and protected online speech, enabling the internet economy to flourish.

In enacting Section 230, Congress sought to preclude the threat of ruinous liability for interactive computer service providers, creating a foundation where innovative business models could be developed and tested by protecting freedom of speech and encouraging the continued growth of a competitive free market on the internet. As CTA recently explained, “Section 230 allows U.S. companies and startups to thrive as global innovation leaders. It is the key reason why the U.S. is the global leader in online entertainment, communications and commerce, and it underpins our \$172B trade surplus in digital services. More, America’s support of free expression embodied by Section 230 sends a clear and positive signal to the world, especially as compared to countries where online speech is subject to government approval.”¹¹

To make this possible in the novel context of the internet, “Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.”¹² Without Section 230, “an interactive computer service that published or distributed offensive speech over the internet could be held liable even if [the service] was not the author of the defamatory text.”¹³

¹¹ Press Release, CTA, Section 230 Protects American Innovation and Online Freedom of Expression, CTA Says (July 29, 2020), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2020/July/Section-230-Protects-American-Innovation-and-Online>.

¹² *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (internal quotation marks and citation omitted).

¹³ *Id.* at 1026-27.

Congress chose “to treat cyberspace differently” in order “to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.”¹⁴

Section 230 expressly makes that clear. In the law’s factual findings Congress stated that, among other things, “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” and “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”¹⁵ Similarly, in stating its policy objectives for Section 230, Congress identified, among other things, “promot[ing] the continued development of the Internet and other interactive computer services and other interactive media,” and “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁶ Destructive, innovation-killing regulation can take several forms, including legislative enactments and the application of common law tort principles in civil litigation.

Section 230 has protected free speech and propelled the internet economy by providing internet platforms with two complementary protections from civil liability. First, Section 230(c)(1) protects internet platforms from liability for content posted on the platforms by someone else; it mandates that the platforms are not treated as the publisher or speaker of such content.¹⁷ Notably, “[i]n light of Congress's objectives, the [U.S. Circuit Courts of Appeals] are in general

¹⁴ *Id.* at 1027.

¹⁵ 47 U.S.C. § 230(a).

¹⁶ *Id.* § 230(b).

¹⁷ *E.g., Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016).

agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.”¹⁸ Second, Section 230(c)(2) provides an “additional shield from liability” to internet platforms that in good faith restrict access to various types of objectionable content.¹⁹

In the 25 years since its passage, Section 230 “has been lauded as ‘the most important law protecting internet speech’ and called ‘perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive.’”²⁰ One recent book, which focuses on the enactment of Section 230, termed it “The Twenty-Six Words that Created the Internet.”²¹ With respect to free speech on the internet, courts interpreting Section 230 have recognized the “statute’s speech-protective purpose,”²² and that Congress enacted Section 230 in order to counter the “threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”²³

A recent report compares the American and EU regulatory regimes for online service providers and finds that “the broad immunity offered by Section 230 . . . likely resulted in somewhere between two to three times greater total investment in internet platforms in the US as compared to the more limited protections offered in the EU under the E-Commerce Directive.”²⁴ The report further finds that “the evidence strongly suggests that platform companies following the Section 230 regime in the US were 5 times as likely in the US to be able to raise significant

¹⁸ *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019).

¹⁹ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009), *as amended* (Sept. 28, 2009); *see also Fyk v. Facebook, Inc.*, 808 F. App’x 597, 598 (9th Cir. 2020).

²⁰ *Section 230 as First Amendment Rule*, 131 Harv. L. Rev. 2027, 2027 (2018) (citation omitted).

²¹ Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (2019).

²² *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015).

²³ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

²⁴ Copia Institute & NetChoice, *Don’t Shoot the Message Board: How intermediary liability harms online investment & innovation*, at 1 (June 2019), <http://netchoice.org/wp-content/uploads/Dont-Shoot-the-Message-Board-Clean-Copia.pdf>.

funds (over \$10 million in venture capital) and nearly 10 times as likely in the US to raise massive funds (defined as over \$100 million in venture capital) as compared to the EU.”²⁵ Based on these findings, the report concludes “Internet platform companies built under a CDA 230 regime[] are much more likely to receive the significant investment necessary to grow and succeed.”²⁶

This confirms CTA’s firm view that Section 230 is the bedrock of the modern internet, enabling “[o]nline platforms [that] thrive under [its] protections” to “facilitate important activities among third-party consumers and businesses including the exchange of information, communications and commercial transactions.”²⁷ Section 230 stands for the common-sense principle that responsibility for online speech lies with the speaker and ensures that internet platforms can remove offensive or inappropriate speech without fear of liability. It has protected the right to free speech online and the ability to freely exchange ideas with the world. Combined with the First Amendment, Section 230 is a key reason why U.S. companies are the world leaders in communications, business and entertainment.²⁸

C. Section 230 remains vital both to maintain the existing internet ecosystem and to ensure freedom of speech and continued growth and innovation.

Some commentators—including NTIA in its Petition—have asserted that the internet has sufficiently matured such that Section 230 is no longer needed. Proponents of Section 230 reform quote the Ninth Circuit’s observation that “[t]he [i]nternet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws

²⁵ *Id.*

²⁶ *Id.* at 8.

²⁷ Brief for the Internet Association & Consumer Technology Association as Amici Curiae Supporting Non-Party Yelp Inc. at 31, *Hassell v. Bird*, No. S235968 (Cal. Apr. 17, 2017).

²⁸ CTA, Online Speech: Section 230, <https://cta.tech/Advocacy/Issues/Online-Speech> (last visited Aug. 28, 2020).

and regulations applicable to brick-and-mortar businesses.”²⁹ But development of the internet is not a linear matter in which some “destination” can be reached. The internet economy, and the applications and services that have been developed to take advantage of it, are continually growing, evolving, and changing. And they face continual challenges from abroad, as some countries and companies seek to level (or tilt) the playing field by adding to American companies’ regulatory burdens. Section 230’s protection from lawsuits plays a vital role in the continued growth of American internet-based companies, from well-established platforms to small businesses and startups.

Of course, well-established internet platforms rely on Section 230’s protections daily to encourage speech on their platforms. Given the scale of these platforms, it would be impossible for them to screen millions of user posts for content that someone else might find objectionable. Accordingly, if faced with potential liability for each user post, established internet platforms may be forced to restrict the number and type of posts, which would be detrimental to robust speech on the internet and the provision of online services.

Importantly, Section 230 does not protect only large platforms. As the case law shows, the category of “interactive computer service providers” includes “many entities operating online, including broadband Internet access service providers (e.g., Verizon FIOS and Comcast Xfinity), Internet hosting companies (e.g., DreamHost and GoDaddy), search engines (e.g., Google and Yahoo! Search), online message boards, and many varieties of online platforms.”³⁰ The law also covers small and emerging companies, such as the startups, small and medium sized companies

²⁹ Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 Cath. U. L. Rev. 597, 619 (2019), <https://scholarship.law.edu/lawreview/vol68/iss3/11> (quoting *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165 n.15 (9th Cir. 2008)).

³⁰ Congressional Research Service, *How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act*, at 1 (Feb. 21, 2018), <https://fas.org/sgp/crs/misc/LSB10082.pdf>.

that comprise most CTA members. Since these businesses do not have well-stocked legal or litigation departments, Section 230’s liability protections are even more critical for nurturing the next generation of the internet economy than they are for ensuring the continued viability of existing platforms. As a recent report explains, “[Section 230(c)(1)’s speaker/publisher immunity] is particularly important for early-stage companies, since the cost of defending even a frivolous claim can exceed a startup’s valuation. . . . [W]ithout Section 230, startups would face ‘death by ten thousand duck-bites’ fighting off lawsuits. Section 230 allows startups to end such lawsuits at an early stage, avoiding ruinous legal costs.”³¹

The idea that the internet has “matured” past the need for Section 230’s legal protections is completely wrong; while many of the internet companies of today did not exist in 1996, the internet as a whole has grown explosively and continues to evolve and innovate today. Significantly paring back Section 230’s protections would “jeopardize[] small businesses that did nothing wrong and have no knowledge of illegal activity by allowing them to be targeted in class-action lawsuits.”³² It would “be devastating to our startup economy,”³³ hampering startup and small business innovation and forcing many of them to close their doors.

The benefits of Section 230 for startups and economic growth do not stop at the online service providers that enjoy its protections. Small businesses that are not themselves online service providers depend on the diverse entities that benefit from Section 230 in the promotion of a vibrant

³¹ Engine, *Section 230: Cost Report*, at 1, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84c/1551984843007/Engine_Primer_230cost2019.pdf (last visited Aug. 28, 2020) (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008)).

³² Press Release, CTA, EARN IT Act Creates False Choice Between Child Safety and Internet Safety, says CTA’s Shapiro (Mar. 5, 2020), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2020/February/EARN-IT-Act-Creates-False-Choice-Between-Child-Saf>.

³³ *Id.*

innovation economy. As one small business owner recently explained, “[t]he internet has completely changed how businesses operate. It has leveled the playing field for small businesses [and] if websites and social media platforms abandon online reviews, then millions of small businesses will be collateral damage.”³⁴

Section 230 has provided American innovators flexibility and protection that allows companies to create without fear of being drowned by lawsuits or collateral liability. It was not by chance that the United States has produced global internet leaders, along with the world’s most dynamic startup economy, while other countries have no similar record. Section 230 is in large part responsible for that success.

III. NTIA ASKS THE FCC TO REWRITE SECTION 230, WHICH WOULD EXCEED THE FCC’S PROPER ROLE AND HAVE DISASTROUS CONSEQUENCES FOR THE MODERN INTERNET.

NTIA urges a drastic reinterpretation of Section 230 that is inconsistent with the statute’s text, operation, and purpose, and would undermine the ability of American companies to provide products and services to consumers. Indeed, the very notion of adopting regulations to “interpret” the text of Section 230—a self-effectuating, unambiguous statute—raises serious legal questions about the FCC’s authority and would contradict Congressional intent.³⁵ Such an interpretation would represent a dramatic about-face on the FCC’s longstanding, bipartisan history of declining to regulate the content, applications, and services that are provided to consumers over an internet connection (“edge provider” products and services). More, the specific interpretations that the

³⁴ Kimberly Vincent, *Don’t let Josh Hawley kill online reviews and my small business for his political gain*, The Kansas City Star (July 5, 2020), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article243957677.html>.

³⁵ NTIA cites Section 201, 47 U.S.C. § 201, to assert the FCC has broad authority to interpret and implement the Communications Act. But this unremarkable claim cannot justify NTIA’s ask here, that the Commission “clarify” words that are plain and enact “implementing regulations” for a self-effectuating statute that would subvert its purpose. The FCC lacks the authority to take either action, regardless of Section 201.

Petition would have the FCC adopt contradict the text and operation of Section 230 and would make compliance all but impossible, basically eliminating these important protections and subverting the objectives they were intended to achieve. Finally, by attempting to hold Section 230’s liability protections hostage in order to influence the editorial conduct of interactive computer services—particularly at the President’s behest—the regulations proposed by NTIA would infringe directly on the First Amendment rights of online companies.

A. NTIA’s proposed regulations to “implement” Section 230 are inconsistent with Congressional intent, longstanding FCC policy with respect to edge providers, and the FCC’s role as a regulatory agency.

NTIA asks the Commission to do something unprecedented: to adopt regulations to “implement” Section 230, specifically the provisions of Section 230 that immunize interactive computer services from liability related to third party content and the moderation thereof. Section 230, and in particular Section 230(c), is self-effectuating. It is deregulatory by design; it does not impose affirmative obligations on any party, but instead identifies the circumstances where certain types of online service providers are *not* subject to legal liability. Its terms are clear and have been applied by courts for decades since its passage. The text of the statute seeks, expressly, “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.*”³⁶ This, coupled with its legislative history³⁷ reveal the clear Congressional intent that the statute would remain, consistent

³⁶ 47 U.S.C. § 230(b)(2) (emphasis added).

³⁷ *See Internet Freedom and Family Empowerment Act*, H.R. 1978, 104th Cong. § 230(d) (1995) (introducing a version of Section 230 containing an amendment stating that “[n]othing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services”); Sen. Conf. Rep. 104-230, at 194 (1996) (Conf. Rep.) (stating that the version of Section 230 adopted through the reconciliation process for the Telecommunications Act of 1996, which did not contain the provision expressly describing FCC authority, as being “adopt[ed] . . . with minor modifications”).

with its design and plain purpose, self-executing, and that the FCC would not adopt regulations in the wake of its passage.

Adopting the regulations proposed by NTIA, which seek to constrain the circumstances in which Section 230’s legal protections apply, would contravene the Commission’s longstanding bipartisan approach to edge providers. Although, as discussed in Section IV, *infra*, the Commission has changed its approach to broadband internet *access* services, the Commission has consistently declined to regulate providers of edge products and services. In fact, a central objective of regulating (or deregulating) internet access services, held by every Commission that undertook to do so, was to spur “investment and innovation” in the “content, applications, services, and devices” that use the internet.³⁸ It is difficult to see how the Commission that in 2017 held that the Communications Act requires deregulation of internet access service, found that there were no “sources of legal authority that could justify . . . comprehensive conduct rules governing [internet service providers],”³⁹ characterized Section 230 as “deregulatory policy,”⁴⁰ and observed that “[e]dge providers have been able to disrupt a multitude of markets . . . through innovation, all without subjecting the networks that carried them to onerous utility regulation,”⁴¹ could in its next breath find that it has the legal authority to impose unprecedented obligations on interactive computer service providers.

³⁸ *Preserving the Open Internet Broadband Indus. Practices*, Report and Order, 25 FCC Rcd 17905, ¶ 3 (2010) (“*2010 Open Internet Order*”); see also, e.g., *Protecting & Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 8 (2014); *Protecting & Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 20 (2015) (“*2015 Open Internet Order*”); *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 20 (2017) (“*Restoring Internet Freedom Order*”).

³⁹ *Restoring Internet Freedom Order* ¶ 4.

⁴⁰ *Id.* ¶ 61.

⁴¹ *Id.* ¶ 110.

Further, even if the FCC had the statutory authority to issue regulations implementing Section 230, it plainly lacks authority to issue the regulations sought here. NTIA asks the Commission to take Section 230—a statute disclaiming legal liability for a category of entities—and invert it, conditioning the legal protections granted by the statute on providers’ ability to meet affirmative, onerous, and in many instances, technically infeasible, regulatory obligations. As discussed further below, NTIA’s proposals are in tension with the plain text of the statute, contrary to its operation, and anathema to its purpose. The Petition’s proposed regulations are not “based on a permissible construction of the statute,”⁴² and therefore, as a matter of law, could not stand.

B. The regulations proposed by NTIA are in tension with the text and function of Section 230 and would have significant deleterious consequences.

1. NTIA asks the Commission to render subsection (c)(1) a nullity.

Subsection (c)(1) immunizes interactive computer service providers from liability by providing, unequivocally, that such providers are not to “be treated as the publisher or speaker of any information provided by another information content provider.”⁴³ The Petition’s proposed interpretations of “information content provider,” what it means to be “treated as the publisher or speaker” of content, and the “interaction” between subsections (c)(1) and (c)(2) are thoroughly inconsistent with the text and operation of the statute. In practice, these rewrites would drastically limit or eliminate the ability of providers to qualify for legal immunity, utterly subverting the purpose of Section 230. At a bare minimum, the proposed regulations invite significant litigation by introducing ambiguity into an otherwise clear statute.

The Petition attempts to nullify the protections afforded by (c)(1) in two separate, but related, ways: *first*, by asking the FCC to interpret what it means to be “treated as the publisher or

⁴² *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

⁴³ 47 U.S.C. § 230(c)(1).

speaker” of third-party content, and thus entitled to protection from liability for such content, to exclude those circumstances where a provider “actually publishes” the content—and then by defining “publishing” to include nearly all of the actions taken by interactive computer services on a day-to-day basis. From the beginning, courts understood 230(c)(1)’s reference to “treated as a publisher or speaker” as encompassing all of the decisions traditionally made by publishers, “such as deciding whether to publish, withdraw, postpone or alter content.”⁴⁴ Yet the proposed regulations would reverse this decades-old understanding by sweeping most of these decisions into the new “actually publishes” exception. Under the NTIA proposal, “actually publish[ing]” the content would cover an immensely broad range of circumstances, including where the provider “selects to display information or content . . . pursuant to a reasonably discernible viewpoint” or “vouches for, editorializes, recommends or promotes [third-party] content to other Internet users on the basis of the content’s substance.”⁴⁵

Second, the Petition asks the FCC to “interpret” the definition of “information content provider” by adding a series of new words that have no basis in the text. Under Section 230, “information content provider” means only those who are “responsible, in whole or in part for the creation or development of information,” but NTIA would broaden that definition beyond recognition, to “include[] substantively contributing to, modifying, altering, presenting with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider.”⁴⁶

These two proposals each undermine, and in concert would effectively eliminate, the broad liability shield afforded by subsection (c)(1) for companies that host third party content online.

⁴⁴ *Zeran v. America Online, Inc.* 129 F.3d 327, 330 (4th Cir. 1997).

⁴⁵ Petition at 46 (proposed § 130.04(c)).

⁴⁶ *Id.* at 42 (proposed § 130.03).

Under the capacious “actual publisher” exception to subsection (c)(1) that the rules would create, an interactive computer service provider would be a “publisher” and thus liable for the substance of content created entirely by third parties if the provider “promotes” the content by, for example, prioritizing it in a user’s newsfeed because of the user’s prior interaction with that type of content, by displaying it with other “trending” content, or even, arguably, just by placing it anywhere on the provider’s site at all.⁴⁷ A provider likewise would be liable for the substance of third party content where the provider “display[s]” that content “pursuant to a reasonably discernible viewpoint,” which could be understood to include all of these typical content curation techniques, even arguably basic organizational practices like nesting user comments on a third party post underneath the original post.

Under the similarly broad proposed rule defining “information content provider,” an interactive computer service would be considered the provider of content any time its actions fell under NTIA’s expansive definition. Thus, it could not claim protection because the content is not “provided by another” in circumstances where content is generated entirely by third parties but the interactive computer service provider either groups it together with other content or associates its own content. Meaning, for example, a provider would become liable for the *substance* of a user’s statement that incites violence or harasses or defames a person by placing a label underneath that says “we have flagged this statement as problematic because it may violate our terms of service.” This result would directly contradict the statute which, again, provides unequivocally that an interactive computer service provider is never to be “treated as the publisher or speaker of any information provided by another.” Further, it would undermine its central purpose—to enable

⁴⁷ See *Promote*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/promote> (last accessed Sept. 1, 2020) (“to contribute to the growth or prosperity of”); see also *Promote*, Dictionary.com based on Random House Unabridged Dictionary, <https://www.dictionary.com/browse/promote> (last accessed Sept. 1, 2020) (“to help or encourage to exist or flourish; further”).

interactive computer service providers to improve the user experience by moderating content, without fear of liability. Collectively, the proposed strained definitions of terms governing subsection (c)(1) would essentially disable numerous practices that CTA’s members have developed over years of innovation that connect consumers to information, entertainment, and other users; create a positive online experience that complements users’ daily lives; and have become a hallmark of our collective experience.

NTIA’s inclusion of language in both proposed rules invalidating protections for actions taken “pursuant to a reasonably discernible viewpoint” plainly seeks to insert a viewpoint neutrality requirement into Section 230 where the statute, particularly subsection (c)(1)’s unequivocal grant of legal protection, contains none—subverting the principles of free speech that have fostered significant growth and development in online products and services.

NTIA purports to create two safe harbors from the “actual publisher” standard, under which the subsection (c)(1) liability shield would be preserved, but they are either technically impossible or unworkable or attempt to rewrite the statute to impose affirmative obligations. The first safe harbor would allow providers to arrange content “in a form or manner the user chooses” or pursuant to a “default setting,” as long as the provider “fully informs the user of this default and allows its disabling.”⁴⁸ Disabling the arrangement of content hosted by an interactive computer service is likely to be in many cases literally impossible; it is an *interactive* computer service. The purpose of such a service is to allow third parties to post content and interact with the content of others; there is no way to present the information with no organization whatsoever, particularly with respect to large platforms that host millions of users and trillions of pieces of third party content. NTIA’s petition appears to imagine an internet stuck in the days of dial up modems and

⁴⁸ Petition at 47 (proposed § 130.04(d)).

bulletin boards, with trickles of content arranged chronologically. It utterly fails to grasp the complexity of curating and presenting twenty-first century levels of information.

The second safe harbor would apply where the provider was “transmitting, displaying, or otherwise distributing such content, or merely . . . moderating third-party content consistent with a good faith application of its terms of service in force at the time content is first posted.”⁴⁹ Here too, NTIA asks the FCC to create a category that would contain a null set: an interactive computer service that merely “transmit[s]” the content of its users without applying any type of organization. Alternatively, NTIA seeks to impose a “good faith” obligation on content curation where the statute has none: an interactive computer service provider is never to be treated as the publisher or speaker of third party content under Section 230, irrespective of whether it follows its terms of service in good faith or in bad faith, or has no terms of service at all. NTIA also seeks to impose temporal limits on the application of terms of service, requiring providers to subject different types of content to different standards and requiring objectionable content to remain—even if the content has become unlawful or deeply offensive as societal winds have shifted—simply because of the terms of service in place at the time it was posted.

In addition to defining relevant terms in subsection (c)(1) to eliminate its applicability as a liability shield, NTIA’s Petition seeks to narrow subsection (c)(1) by proposing new regulations on the “interaction” between subsections (c)(1) and (c)(2). Here too, NTIA’s proposals would distort the operation of the statute. Section 230(c) provides two liability shields, intended together to confer broad protections to interactive computer service providers. The operation of one shield is not conditioned on the availability of the other, and one or both may apply depending on the

⁴⁹ *Id.*

circumstances. Subsection (c)(1) is broad and unconditional, and subsection (c)(2) “provides an additional shield from liability.”⁵⁰ “Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable.”⁵¹ And, crucially, granting immunity for a content moderation decision under subsection (c)(1) does not “render[] [subsection (c)(2)] mere surplusage.”⁵²

NTIA seeks to narrow the applicability of subsection (c)(1) by rewriting it to cover different types of conduct than subsection (c)(2), using an analytical dividing line that defies both the text of the statute and common sense. Under NTIA’s proposal, subsection (c)(1) would cover “acts of omission”—failure to remove content, while subsection (c)(2) would apply to “acts of commission”—specific actions taken to restrict access to content.⁵³ However, nothing in subsection (c)(1) permits such a distinction. Subsection (c)(1) shields interactive computer services from liability stemming from content created by third parties, full stop. If the source of a litigant’s alleged harm is the substance of third-party content hosted by an interactive computer service provider, it is irrelevant whether the provider did something or did nothing with respect to that content—the provider is not to be held liable as the speaker or publisher.

If NTIA’s rules are adopted, CTA’s members and others will be unable to moderate, curate or potentially even *enable posting* of content created by third parties, without becoming subject to liability for the substance of that content. Those that attempt to meet the hollow safe harbors will be forced to invest significant resources to create something that may not be technically feasible.

⁵⁰ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009), *as amended* (Sept. 28, 2009).

⁵¹ *Id.*

⁵² *Fyk v. Facebook, Inc.*, 808 F. App’x 597, 598 (9th Cir. 2020).

⁵³ Petition at 27.

And they will still be subject to a flood of litigation as courts are forced to settle the ambiguities created by NTIA’s proposed regulations—including what it means to “promote” content, to arrange it “pursuant to a reasonably discernible viewpoint,” or to enable a user to “disabl[e]” content organization practices. As CTA has explained, even if large companies were able to manage additional burdens that come with opening the door to liability for simple content curation, “[s]tartups and small businesses, however, could not. Instead, these upstarts would be deluged by opportunistic lawsuits from all corners of the Internet. Small businesses would quickly go bankrupt, start-ups would not launch, and investors would not invest. America’s vibrant culture of innovation would grow dim.”⁵⁴

2. NTIA asks the Commission to drastically limit the scope of subsection (c)(2).

NTIA also seeks to have the Commission adopt significantly limiting interpretations of terms that appear in subsection (c)(2). The intention is not only to limit the circumstances under which an interactive computer service can take advantage of subsection (c)(2)’s protections, but to impose affirmative obligations on content moderation practices that will disincentivize, if not entirely prevent, content moderation, thoroughly undermining the plain intent of the statute.

First, NTIA seeks to drastically limit the circumstances under which content moderation decisions receive the protection of subsection (c)(2) by significantly narrowing the catch-all category for restricted content. As set forth above, subsection (c)(2) shields an interactive computer service provider from liability for good faith attempts to restrict access to “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent,

⁵⁴ Michael Petricone, *Why dismantling Section 230 would shatter free speech and innovation*, The Hill (Nov. 11, 2019), <https://thehill.com/blogs/congress-blog/politics/472481-why-dismantling-section-230-would-shatter-free-speech-and> (cleaned up).

harassing, or otherwise objectionable.”⁵⁵ NTIA asks the FCC to interpret “otherwise objectionable” to mean “material that is similar in type to” the other enumerated categories.⁵⁶

Although this language sounds in the statutory interpretation canon of *ejusdem generis* (requiring interpretation general terms as “of the same kind” as enumerated specific terms), “*ejusdem generis* . . . cannot be employed to render general words meaningless.”⁵⁷ More, the canon “is to be resorted to not to obscure and defeat the intent and purpose of Congress, but to elucidate its words and effectuate its intent.”⁵⁸ NTIA’s proposed interpretation would commit both transgressions: it would give the language “otherwise objectionable” little if any meaning outside of the enumerated categories, and, more fundamentally, it would undermine the objectives that Congress sought to achieve. The purpose of subsection (c)(2) is to encourage interactive computer service providers to moderate content *without fear* of being sued for their moderation decisions. Accordingly, the flexibility to determine what content is “objectionable” necessarily must lie with the provider doing the moderating.⁵⁹ Imposing a new obligation that the content be “of the same kind” as other categories of objectionable content—and placing the onus on courts to determine whether content is sufficiently similar—thoroughly subverts the legal and competitive environment that Congress sought to create, hampering the ability of CTA’s members to remove harmful content from their sites and diminishing the flexibility and deference that has been central to their online innovation.

⁵⁵ 47 U.S.C. § 230(c)(2)(A).

⁵⁶ Petition at 38 (proposed § 130.02(d)).

⁵⁷ *United States v. Alpers*, 338 U.S. 680, 682 (1950).

⁵⁸ *Id.*

⁵⁹ *See, e.g., Domen v. Vimeo, Inc.*, 433 F.Supp.3d 592, 604 (2nd Cir. 2020) (holding that subsection (c)(2) immunity applied, and refusing to second guess interactive computer service provider’s view with respect to objectionable material, in suit stemming from takedown of videos related to sexual orientation change efforts).

NTIA’s proposed interpretations of what it means to moderate content in “good faith” would cause similarly perverse results. First, NTIA would have the FCC limit the ability of interactive computer service providers to assert that they moderated in good faith to those circumstances where the provider “has an objectively reasonable belief that the material falls within one of the listed [objectionable content] categories set forth in [subsection (c)(2)].”⁶⁰ This flatly contradicts the statute, which extends the liability shield to all instances where the provider “considers” the material to be objectionable. NTIA seeks to have the provider not just hold a view about the content, but to be required to defend it according to an exacting standard. Most important, this interpretation undermines the statute’s intent of imposing a broad liability shield, as providers would then be subject to numerous lawsuits centered around the “reasonability” and “objectivity” of the provider’s view of the problematic content.

Second, NTIA would have the FCC interpret “good faith” to require platforms to give “timely notice describing with particularity the interactive computer service’s reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.”⁶¹ This new requirement seeks to create, without any statutory basis, what are essentially new due process rights for users of private online platforms, which would in practice prevent timely and effective content moderation. As CTA has explained, without the protections afforded by Section 230, “internet platforms may choose not to moderate any third-party content at all.”⁶² And for platforms that do choose to

⁶⁰ Petition at 39 (proposed § 130.02(e)).

⁶¹ *Id.* at 39-40 (proposed § 130.02(e)).

⁶² Michael Petricone, *Why dismantling Section 230 would shatter free speech and innovation*, The Hill (Nov. 11, 2019), <https://thehill.com/blogs/congress-blog/politics/472481-why-dismantling-section-230-would-shatter-free-speech-and>.

moderate content, the moderation will be far less effective, to the detriment of consumers. Harmful content will remain posted longer as providers work through the lengthy hearing process for content takedown, and some harmful content will be unremovable under the narrow definition of “otherwise objectionable.” These outcomes stand in direct tension with the purpose of the statute, which was to enable and encourage content moderation by online platforms.

Further, because NTIA proposes to extremely limit subsection (c)(1) and rewrite the interaction between subsections (c)(1) and (c)(2), NTIA intends not just to impose gating requirements for when subsection (c)(2) immunity applies, but to convert those requirements into affirmative obligations on providers. Indeed, as discussed above, to the extent a litigant’s harm stems from the substance of third party content, subsection (c)(1) is intended to give platforms unconditional protection from liability, even if the platform made content moderation decisions with respect to the platform.⁶³ By making it impossible for platforms that do routine content curation to take advantage of subsection (c)(1) immunity, and by expressly stating that subsection (c)(1) never applies to decisions to restrict access to content, the proposed rules would extend the unworkable “good faith” obligations and “otherwise objectionable” limitation not just to those cases where subsection (c)(2) applies and subsection (c)(1) does not, but to all instances where a provider moderates content.

NTIA’s proposed rules would destroy the ability to moderate content the same way the proposed changes to subsection (c)(1) would destroy curation. It is unclear what if any platforms would survive in this legal environment, but they certainly would not meet the needs and preferences of consumers, nor would they represent the forefront of internet innovation or catalyze future growth and development. Plainly, NTIA’s proposed rules would utterly dismantle “the

⁶³ See, e.g., *Fyk v. Facebook*, 808 F. App’x 597, 598-99 (9th Cir. 2020).

policy of the United States . . . 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.”⁶⁴

C. NTIA’s proposed rules would contravene the First Amendment.

The Petition seeks the promulgation of FCC regulations that would not only contravene the statute that they purport to implement—they would violate the First Amendment rights of all interactive computer service providers. “The First Amendment guarantees an individual the right to free speech, ‘a term necessarily comprising the decision of both what to say and what not to say.’”⁶⁵ Accordingly, “the exercise of editorial control and judgment”⁶⁶—including that of interactive computer service providers⁶⁷—cannot be undertaken “consistent with First Amendment guarantees” when that editorial judgment is subject to government regulation.⁶⁸ That undoubtedly includes judgments made in accordance with a particular viewpoint, which lie at the heart of First Amendment protections. NTIA does not deal expressly with these well-established constitutional principles; indeed, its Petition does not even mention them. But the effect of the Petition would be to create a legal environment that compels and suppresses the speech of interactive computer service providers by infringing upon their editorial choices.

NTIA’s proposed rules take an unconstitutional axe to the very heart of editorial decision making by conditioning the availability of legal protections for third party content and moderation

⁶⁴ 47 U.S.C. § 230(b)(2).

⁶⁵ *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007) (citing *Riley v. National Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796–97 (1988)).

⁶⁶ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁶⁷ *See, e.g., Langdon*, 474 F. Supp. 2d at 630.

⁶⁸ *Tornillo*, 418 U.S. at 258.

on a series of explicitly content-based restrictions on providers' speech:⁶⁹ (1) that providers display content in a manner that has no "discernible viewpoint," (2) that they in no way "editorialize," "comment on," "recommend" or "promote" that content, and (3) that they only remove or restrict access to content which a court would find sufficiently objectionable based on a belief of the provider that a court would find to be "objectively reasonable." NTIA's proposed rules would punish platforms that do not agree to these practices by subjecting them to a flood of lawsuits potentially at least as large as the number of individual pieces of third-party content they host. Further, by subjecting platforms to the threat of liability and introducing ambiguous concepts into an otherwise clear statute, the proposed rules would have an unconstitutional chilling effect on any editorial discretion that would remain.⁷⁰ In the same way that, as Chairman Pai has explained, "the FCC does not have authority to revoke a license of a broadcast station based on the content of a particular newscast,"⁷¹ the agency does not have the authority to withdraw the legal protections afforded to a platform by Section 230 based on particular editorial decisions.

Indeed, the very submission of the Petition raises serious First Amendment concerns that exacerbate the infirmities of the specific conditions it seeks to impose on private speakers' editorial discretion. As NTIA explains, it submitted the Petition to the FCC pursuant to an Executive Order directing its filing.⁷² That Executive Order is an act of retribution against interactive computer service providers because of specific instances where content moderation decisions made by online

⁶⁹ See, e.g., *Elrod v. Burns*, 427 U.S. 347, 359 (1976); *Crawford-El v. Britton*, 523 U.S. 574, 589 n.10 (1998); *Elron*.

⁷⁰ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) ("[F]ears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech.") (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986)).

⁷¹ Letter from Chairman Pai, FCC, to Senator Markey (Feb. 1, 2018), <https://www.fcc.gov/chairman-pais-letters-congress>.

⁷² Petition at 1.

platforms displeased the President.⁷³ “The law is settled”⁷⁴ that “[a]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.”⁷⁵ The Petition sends a clear message to Americans that their protected expression could be subject at any moment to swift, retaliatory government action, chilling individuals who might otherwise speak.

IV. THE “DISCLOSURE REQUIREMENTS” THAT NTIA ASKS THE FCC TO IMPOSE ON INTERNET PLATFORMS HAVE NO BASIS IN LAW AND ARE UNWORKABLE IN PRACTICE.

Separate from the Petition’s effort to undo the legal protections in Section 230, NTIA seeks to weaken innovative internet platforms and services by imposing new affirmative regulatory obligations on interactive computer service providers. Sought in the interests of “transparency” and “reduc[ing] entry barriers,”⁷⁶ NTIA’s proposed disclosure requirements suffer from the same infirmities as the rest of its Petition: they lack a legal basis, run counter to the Commission’s regulatory philosophy, and present a grave threat to the industry they purport to help.

The Petition asks the Commission to adopt “transparency” regulations for interactive computer service providers that borrow language from regulations applicable to broadband internet access service (“BIAS”) providers. These regulations were adopted by the Wheeler Commission

⁷³ *Exec. Order No. 13925: Preventing Online Censorship*, 85 Fed. Reg. 34,079 (June 2, 2020) (“Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events . . . Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician’s tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called ‘Site Integrity’ has flaunted his political bias in his own tweets. . . . As a Nation, we must foster and protect diverse viewpoints in today’s digital communications environment where all Americans can and should have a voice.”)

⁷⁴ *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

⁷⁵ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

⁷⁶ Petition at 49.

in its 2015 *Protecting and Promoting the Open Internet Order* when it classified BIAS as a telecommunications service, and were then retained in large part by the Pai Commission in its 2017 *Restoring Internet Freedom Order* when it returned BIAS to its prior regulatory classification as an information service. Importantly, although the Commission in both orders decided to impose disclosure requirements on providers of BIAS—the means of transmission to access the internet—it declined to impose such requirements on *edge providers*, including interactive computer service providers governed by Section 230 that do not offer BIAS.⁷⁷ Yet NTIA asks the Commission to take an unprecedented step that undermines the bipartisan view of the FCC under multiple chairpersons, and impose regulations that would require interactive computer services to “publicly disclose accurate information regarding [their] content-management mechanisms as well as any other content moderation, promotion, and other curation practices.”⁷⁸

CTA takes no position on the propriety of disclosure requirements on BIAS providers. Yet NTIA fails to make a case for the FCC to diverge from its prior decisions declining to regulate edge providers. The only statutory authorities that the Petition cites in support of its disclosure proposal are Sections 163 and 257 of the Communications Act, both of which pertain to competition and barriers to entry in the communications marketplace. Section 163 is irrelevant because it merely directs the Commission to provide reports to Congress; it does not authorize the Commission to impose regulations.⁷⁹

Section 257 is also a poor fit here; it merely directs the Commission to “identify[] and eliminat[e]... market entry barriers for entrepreneurs and other small business in the provision and

⁷⁷ See 2015 *Open Internet Order* ¶¶ 20-21, ¶¶ 41-43; *Restoring Internet Freedom Order* ¶¶ 20, 31.

⁷⁸ Petition at 52 (proposed § 8.2).

⁷⁹ 47 U.S.C. § 163.

ownership of telecommunications services and information services[.]”⁸⁰ It does not provide the statutory authority for the disclosure obligations NTIA seeks. The statute does not implicitly or explicitly empower the FCC to impose regulations on interactive computer service providers, nor does NTIA identify any other independent authority authorizing the FCC to do so. NTIA also fails to identify any specific market failure that these obligations would seek to correct. More, the new mandates would raise edge providers’ compliance and litigation costs and erect barriers to entry, a result flatly contrary to the purpose of Section 257.

NTIA asserts, without support, that the vast disclosures about content curation sought in the proposed rules “would help enterprising content providers fashion their offerings so that they can be provided across multiple platforms with reduced costs and friction for the provider and fewer disruptions to user experiences.”⁸¹ But one of the “enterprising content providers” envisioned by NTIA that would like to provide information over the internet can use any number of platforms or services to do that. The platforms or services that host content have business incentives to disclose information sufficient to allow users to place content on the platform; if they did not, users would simply find another platform to use. Nothing about the content curation practices of edge providers prevents companies from sharing their own information or providing their own services over the internet; accordingly, there is no barrier to entry. The proposed transparency regulations for entities governed by Section 230 therefore “appear to [be] a solution in search of a problem” that are not authorized by statutory provisions pertaining to market entry.⁸²

Far from requiring the disclosure of certain technical information that may be relevant to determining whether a service or content can be physically transmitted over internet networks,

⁸⁰ 47 U.S.C. § 257(a).

⁸¹ Petition at 49-50.

⁸² *Restoring Internet Freedom Order* ¶ 87.

NTIA’s disclosure requirements would be far-reaching and would require edge providers to divulge significant information about their services. By asking for disclosure of “content-management mechanisms,” and “content moderation, promotion, and other curation practices,”⁸³ NTIA seeks broad disclosure of complex, competitively sensitive, and proprietary information that has allowed interactive computer services to create positive experiences for their users and meet consumer demand. This information includes proprietary algorithms that help to improve the user experience, and to allow the provider to stand out in a competitive environment that gives consumers countless ways to connect and share information with others. The information that NTIA would force into the public square is the product of significant investment undertaken by companies to understand consumer preferences, the services and capabilities that make online services easy to navigate and fun to use, and the technical procedures and practices that can curate a desirable user experience—in many cases, this intellectual property and the corresponding trade secrets constitute most of the value of these companies, which at the end of the day live or die based on their ability to successfully curate content. Further, even if a provider is able to undertake the significant, costly, and onerous task of identifying all of the information related to its products and services that properly fall within the broad scope of the proposed disclosure rule, ensuring that the information can be presented in a way that consumers actually can understand, as the proposed rule also requires,⁸⁴ would create yet more significant and costly compliance burdens.

If this nearly unlimited range of confidential, technically complex, and competitively sensitive information held by interactive computer service providers was rendered unprotectable by virtue of an FCC disclosure regime, providers may be unable to compete and succeed in the

⁸³ Petition at 52 (proposed § 8.2).

⁸⁴ *See id.* (proposing to require disclosure sufficient “to enable . . . consumers to make informed choices regarding the purchase and use of such service”).

marketplace for online services that are so valuable to modern consumers; this may stifle the incentive to innovate. The proposed regulations not only are not justified under NTIA’s stated purpose of enhancing competition—they are anathema to that purpose. Adopting these regulations under the guise of correcting a market failure under Section 257 of the Communications Act would convert that narrow section into a broad justification for further regulation. The Commission should not open that door.

The Petition also misunderstands the plain scope of Section 257. NTIA appears to presume that the “enterprising content providers” that it claims face barriers to entry,⁸⁵ are the sort of beneficiaries to be served by regulations adopted under Section 257. But Section 257 does not call for the removal of barriers to entry for “enterprising content providers”; that language is found nowhere in the statute. Instead, it narrowly directs the Commission to remove barriers to entry of “entrepreneurs and other small businesses *in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.*”⁸⁶ Thus, merely being inhibited in some way from providing “content” online is not a type of barrier that Section 257 authorizes the Commission to remove. At a minimum, in order to adopt NTIA’s proposal, the FCC would need to develop a record, and affirmatively determine that the “enterprising content providers” that NTIA seeks to benefit do indeed include “information service providers and/or providers of parts and services to providers of telecommunications and information services.”

Finally, NTIA suggests that the proposed disclosure requirements are lawful or warranted because, in NTIA’s view, they would “directly advance section 230’s policy of encouraging ‘the

⁸⁵ Petition at 49-50.

⁸⁶ 47 U.S.C. § 257 (emphasis added).

development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.”⁸⁷ To the extent NTIA is implying that the policy statements in Section 230 provide or support legal authority of the FCC to adopt disclosure regulations against interactive computer service providers, it is mistaken. As the D.C. Circuit has held, Section 230(b) does not “by itself create[] ‘statutorily mandated responsibilities’ sufficient to support the exercise of [the Commission’s] ancillary authority.”⁸⁸ This Commission agreed, stating, “we remain persuaded that section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority.”⁸⁹ Any contrary conclusion, much like attempting to justify these proposed regulations under Section 257, “would virtually free the Commission from its congressional tether.”⁹⁰

While the Commission’s regulatory approach to the transmission of internet access service and the networks that enable that transmission has varied under the leadership of different FCC chairpersons, an important principle has remained steady: the recognition that any regulations governing the means of transmission are not appropriately applied to the *users* of the internet, including individual consumers and edge providers. As the developers of online content and services that drive demand for the internet, edge providers are central to the “virtuous cycle” of innovation that the Commission repeatedly has recognized and sought to promote.⁹¹ NTIA’s proposed disclosure regulations would destroy that cycle by dismantling the competitive

⁸⁷ Petition at 50 (citing 47 U.S.C. § 230(a)(3)).

⁸⁸ *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 655 (D.C. Cir. 2010).

⁸⁹ *Restoring Internet Freedom Order* ¶ 284.

⁹⁰ *Comcast*, 600 F.3d at 655.

⁹¹ *Restoring Internet Freedom Order* ¶ 118; *2015 Open Internet Order* ¶ 7; *2010 Open Internet Order* ¶ 14.

environment that has enabled growth of online platforms, with grave consequences for America's global competitiveness. The NTIA proposal has no authority in the Communications Act, runs counter to decades of bipartisan Commission policy, and undermines American technology innovation and entrepreneurship.

V. THE COMMISSION SHOULD DENY NTIA'S PETITION IN ORDER TO PROTECT ITS ROLE AS AN INDEPENDENT AGENCY THAT RESPECTS THE FIRST AMENDMENT AND THE SEPARATION OF POWERS.

Although NTIA's Petition (and the Executive Order that required it) seek to involve the FCC in the Administration's plan to fundamentally rewrite Section 230, these issues are part of a larger debate that need not—and indeed, should not—involve the FCC. The proposals put forth by NTIA emanate from deep political and policy divisions and headline-grabbing disputes over political speech online. High-profile politicians on both sides of the aisle have criticized editorial decisions and moderation practices of online platforms. Some argue that platforms censor political speech unfairly,⁹² while others assert that they do not do enough to police hate speech⁹³ or disinformation.⁹⁴ The Executive Order that directed NTIA to file this petition specifically names Twitter, Facebook, Instagram, and YouTube—platforms the Administration has criticized for their content curation practices—and recounts instances triggering those criticisms.⁹⁵ Yet the Executive

⁹² Senator Tom Cotton, *Sen. Tom Cotton: Twitter tried to censor me – and they lost*, Fox News (June 17, 2020), <https://www.foxnews.com/opinion/twitter-tried-censor-me-they-lost-sen-tom-cotton>; Makena Kelly, Donald Trump escalates Twitter feud by cross-posting blocked message, *The Verge* (May 29, 2020), <https://www.theverge.com/2020/5/29/21274493/donald-trump-twitter-feud-blocked-message-social-media-executive-order>.

⁹³ Shirin Ghaffary, *Civil rights leaders are still fed up with Facebook over hate speech*, *Vox* (July 7, 2020), <https://www.vox.com/recode/2020/7/7/21316681/facebook-mark-zuckerberg-civil-rights-hate-speech-stop-hate-for-profit>.

⁹⁴ Elizabeth Schulze, *Facebook, Google and Twitter need to do more to tackle fake news, EU says*, *CNBC* (June 14, 2019), <https://www.cnn.com/2019/06/14/facebook-google-twitter-need-to-do-more-to-tackle-fake-news-eu-says.html>.

⁹⁵ *See Exec. Order No. 13925* (“Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label

Order is just one in a series of public disputes and policy debates over content curation and online activity. Well before the Executive Order and the Petition, some in Congress have called for a revamp of Section 230 and have introduced several pieces of new legislation designed to accomplish that goal, in a variety of different ways.⁹⁶

CTA has opposed legislative proposals to rewrite Section 230.⁹⁷ But given the importance of Section 230, its status as a legislative enactment that “created the Internet,”⁹⁸ and the range of disputes over possible reform, if any part of government is to consider the scope of Section 230 or act on the ideas offered by NTIA and the President, it is Congress. The FCC should decline NTIA’s invitation to preempt these Congressional debates by rewriting Section 230, particularly given the constitutional issues raised by NTIA’s proposed regulations.

Furthermore, the Commission must exercise caution and humility when it considers regulation that encroaches on core protected speech; as Commissioner Carr has explained, the agency should be “guided in [its] approach by what some might refer to in the judicial context as

on another politician’s tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets.”)

⁹⁶ The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today’s Online World, Senate Commerce Committee, Subcommittee on Communications, Technology, Innovation, and the Internet (July 28, 2020); FOSTERING A HEALTHIER INTERNET TO PROTECT CONSUMERS" House Energy & Commerce Committee, Subcommittees on Communications & Technology and Consumer Protection & Commerce (Oct. 16, 2019); Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci. & Transp., 115th Cong. (Apr. 10, 2018); Foreign Influence Operations’ Use of Social Media Platforms: Hearing Before the S. Select Comm. on Intelligence, 115th Cong. (Sept. 5, 2018); Twitter: Transparency and Accountability: Hearing Before the H. Comm. on Energy & Commerce, 115th Cong. (Sept. 5, 2018).

⁹⁷ See, e.g., Press Release, CTA, Hawley Internet Bill is Anti-Free Speech, Anti-Innovation, Says CTA (June 20, 2019), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2019/June/Hawley-Internet-Bill-is-Anti-Free-Speech.-Anti-Inn>.

⁹⁸ Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (2019).

the doctrine of constitutional avoidance.”⁹⁹ This regulatory humility, which seeks to avoid putting the FCC in the position of infringing free speech rights, has long been invoked by the agency to inform legal and policy determinations, and it should do so here. “[W]e have an obligation under Supreme Court precedent to construe a statute where fairly possible to avoid substantial constitutional questions and not to impute to Congress an intent to pass legislation that is inconsistent with the Constitution.”¹⁰⁰

For 25 years, courts around the country have applied Section 230 consistent with its plain text and in keeping with the Constitution. NTIA’s Petition would seek to reverse these decades of precedent in the interest of making Section 230 protection a quid pro quo for which speakers could qualify only if they were sufficiently “neutral” in their speech or in their presentation of speakers they chose to host. In addition to the weighty constitutional questions that the FCC would need to adjudicate in this proceeding (and defend on appeal), the FCC would be committing itself to decades of primary jurisdiction referrals and requests to intervene or participate as amicus in future litigation arising out of its new internet content regulatory regime. Once it embarks down this path, it may not be possible to turn back. The Commission should proceed with caution. The best way for the FCC to avoid entanglement in this dangerous constitutional thicket is for the agency to decline to adopt a wholesale reinterpretation of statutory language that courts have long held is plain, direct, and consistent with the Constitution’s guarantee of free speech.

⁹⁹ Statement of Commissioner Brendan Carr, Approving In Part And Concurring In Part, *Re: Leased Commercial Access, MB Docket No. 07-42; Modernization of Media Regulation Initiative, MB Docket No. 17-105*, FCC 20-95 (July 17, 2020).

¹⁰⁰ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 62 Fed. Reg. 16,093, 16,095 (Apr. 4, 1997).

NTIA’s Petition also asks the agency to jump on another constitutional grenade: interpreting the language of a statute in a way that contradicts dozens of court decisions across the country. Of course, the Commission generally has authority to interpret ambiguous statutory text consistent with *Chevron*, regardless of whether courts have previously adopted contrary interpretations.¹⁰¹ For the reasons set forth above, that precedent is inapplicable here, both because Section 230 speaks in unambiguous terms and because the positions NTIA asks the Commission to adopt would be unreasonable in the context of any ambiguity that may exist in the statute.¹⁰² But some have questioned whether the agency has the authority to overrule judicial interpretations,¹⁰³ and adopting a set of regulations so clearly at odds with longstanding judicial precedent would create substantial tensions about deference to agency action. That is especially so here, where the regulations that NTIA seeks are so clearly at odds with the language, structure, purpose and intent of the statute that NTIA asks the FCC to “interpret.” Rather than raise potential separation of powers concerns that could threaten the continued ability of administrative agencies to interpret their organic statutes, the FCC should decline to act on NTIA’s Petition—something that is well within its authority to do.

¹⁰¹ *National Cable and Telecomms. Ass’n v. Brand X Internet Svcs., et al.*, 545 U.S. 967 (2005).

¹⁰² *See* Section III, *supra*.

¹⁰³ *See Baldwin v. US*, 589 U.S. ____ (2020) (Thomas, J., dissenting from denial of cert) (asserting that “Brand X appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation”).

VI. CONCLUSION

Consumer Technology Association urges the Commission to deny NTIA's Petition for Rulemaking seeking the adoption of regulations related to Section 230 of the Communications Act and the operations of interactive computer service providers.

Respectfully Submitted,

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