

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

In the Matter of)
)
Petition for Rulemaking of the National) RM No. 11862
Telecommunications and Information)
Administration Regarding Section 230)
of the Communications Act of 1934)

COMMENTS OF AT&T SERVICES, INC.

America’s tech platforms have grown from humble beginnings in the late 20th century into the most powerful forces in the global economy today. They now account for the top five U.S. companies by market capitalization, and those five alone “made up about 25% of the S&P 500 at the end of July.”¹ The decisions these companies make on a daily basis—which search results to rank first, which products to promote, which news stories to feature, and which third parties they will deal with and on what terms—shape every aspect of America’s economic and political life. Yet those decisions are shrouded in obscurity, away from public view. And the companies that make them still enjoy extraordinary legal immunities designed a quarter century ago to protect nascent innovators, not trillion-dollar corporations. This corner of “the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled.”² Members of both parties in Congress are engaged in discussions regarding these issues, and AT&T welcomes the opportunity to contribute to that bipartisan dialogue. In particular, as discussed below, we support the growing consensus that online platforms should be more accountable for, and more transparent about, the decisions that fundamentally shape American society today.

¹ Amrith Ramkumar, *Apple Surges to \$2 Trillion Market Value*, Wall St. J. (Aug. 20, 2020).
² *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008) (en banc).

Much of the current debate focuses on reforming Section 230 of the Communications Act, the subject of NTIA’s petition here.³ Congress enacted that provision in 1996 to address a narrow set of concerns involving a nascent online ecosystem that, at the time, still played only a marginal role in American life. Although there were bulletin boards, there were no social networks in the modern sense. No e-commerce company competed to any significant degree with brick-and-mortar businesses, let alone served as an essential distribution platform for all of its rivals. No app stores mediated between consumers and third-party Internet services. Americans still obtained most of their news from a multitude of traditional news sources rather than from a few online news aggregators. And although rudimentary search engines and “directories” helped consumers navigate the then-fledgling Internet, no one company’s algorithmic choices had any material effect on competition or public discourse.

Against that backdrop, Congress enacted Section 230 to insulate the first Internet platforms from liability risks they might otherwise face as “publisher[s]” or “speaker[s]”—risks that Congress feared would weaken their incentives to block “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” content, particularly from underage users.⁴ Congress did not foresee that some courts would construe that provision to confer near-absolute immunity for online conduct that bears no relation to that objective—or, in some cases, affirmatively subverts it.⁵ Congress also did not foresee that such overbroad immunity would extend not only to financially vulnerable startups, but to the largest and most powerful

³ Petition for Rulemaking of the National Telecommunications and Information Administration, *Section 230 of the Communications Act of 1934*, RM-11862 (July 27, 2020); see 47 U.S.C. § 230.

⁴ 47 U.S.C. § 230(c)(1).

⁵ See, e.g., Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 403 (2017) (observing that courts “have extended this safe harbor far beyond what the provision’s words, context, and purpose support,” in some cases “to immunize from liability sites *designed* to purvey offensive material”) (emphasis added).

companies in the world—companies whose black-box algorithms and back room decisions pick winners and losers in every sphere of public life, from markets to political contests.

Of course, the stratospheric growth of the Internet over the ensuing quarter century has brought inestimable benefits to American consumers. And for the most part, today’s leading platforms should be commended, not condemned, for the innovations that have fueled their extraordinary success. But with great success comes great responsibility. And policymakers thus should undertake at least two basic reforms to make these platforms more accountable to the American public.

First, the largest online platforms owe the public greater transparency about the algorithmic choices that so profoundly shape the American economic and political landscape. As Chairman Pai has observed, “the FCC imposes strict transparency requirements on companies that operate broadband networks—how they manage their networks, performance characteristics. Yet consumers have virtually no insight into similar business practices by tech giants.”⁶ Given the unrivaled influence of these platforms, he added, steps may now “need to be taken to ensure that consumers receive more information about how these companies operate.”⁷

Just as AT&T and other ISPs disclose the basics of their network management practices to the public, leading tech platforms should now be required to make disclosures about how they collect and use data, how they rank search results, how they interconnect and interoperate with others, and more generally how their algorithms preference some content, products and services over others. Such disclosures would help consumers and other companies make better educated choices among online services and help policymakers determine whether more substantive

⁶ Ajit Pai, *What I Hope to Learn from the Tech Giants*, Medium (Sept. 4, 2018), <https://www.fcc.gov/news-events/blog/2018/09/04/what-i-hope-learn-tech-giants>.

⁷ *Id.*

oversight is needed. This is not to say that online platforms must divulge the granular details of their “secret sauce.” Many types of disclosure would cast much-needed light on the enormously consequential decisions of online platforms while raising no serious concern about compromised trade secrets or third-party manipulation.⁸ For example, policymakers and consumers have a right to know whether and how a dominant search engine, e-commerce platform, or app store designs its algorithms to privilege its own vertically integrated services over competing services.⁹ And they also have a right to know whether, in the words of British regulators, a dominant ad tech company exploits its “strong position at each level of the intermediation value chain ... to favour its own sources of supply and demand” and “self-preferenc[e] its own activities” to the detriment of its customers and competitors.¹⁰

Second, Section 230 immunity should be modernized to reduce gross disparities in legal treatment between dominant online platforms and similarly situated companies in the traditional economy. Few dispute that Section 230 should continue to shield online platforms in the paradigmatic cases for which that provision was enacted. For example, even if online platforms should have continued immunity from defamation liability when, like the bulletin boards of 1996, they act as more or less passive hosts of third-party content and intervene mainly to

⁸ Significantly, the High Level Group of tech advisors to the European Commission—a group that includes experts from leading tech companies—recently agreed that platforms can and should “provide transparent and relevant information on the functioning of algorithms that select and display information without prejudice to platforms IPRs [intellectual property rights].” *Report of the Independent High Level Group on Fake News and Online Disinformation*, European Commission 23 (2018) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271; see also Natasha Lomas, *Report Calls for Algorithmic Transparency and Education to Fight Fake News*, TechCrunch (Mar. 12, 2018), <https://techcrunch.com/2018/03/12/report-calls-for-algorithmic-transparency-and-education-to-fight-fake-news/> (noting that leading tech companies “are listed as members” of the Group and “are directly involved in shaping these recommendations”).

⁹ See, e.g., Competition & Markets Authority (U.K.), *Online Platforms and Digital Advertising: Market Study Final Report* 361 (July 1, 2020), <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> (proposing greater transparency).

¹⁰ *Id.* at 20.

address the categories of objectionable conduct set forth in Section 230(c)(1), leading platforms today often play a much more active curation role. They routinely amplify some content over other content and shape how it appears, often for financially driven reasons that have nothing to do with the original content-filtering goal of Section 230.¹¹ There is nothing inherently wrong with such business models, and many are pro-competitive. But there is also no clear reason why such platforms should play by radically different liability rules than traditional purveyors of third-party content, such as book publishers, newspapers, or radio or television businesses.¹²

Although AT&T endorses no specific proposal for Section 230 reform here, it does urge federal policymakers to adopt a single set of nationally consistent rules. Federal and state courts across the country have interpreted that provision in widely divergent ways. The resulting legal hodge-podge prescribes different liability rules in different jurisdictions, and the lines drawn in any given jurisdiction are themselves often obscure and unhinged from sound public policy. As Section 230 nears its 25th anniversary, it is time for federal policymakers to step back, return to first principles, and revisit whether and when the nation’s largest online platforms should enjoy legal immunities unavailable to similar companies in similar circumstances.

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¹¹ See U.S. Dep’t of Justice, *Section 230—Nurturing Innovation or Fostering Unaccountability?*, at 24 (June 2020), <https://www.justice.gov/file/1286331/download>; John Bergmayer, *How to Go Beyond Section 230 Without Crashing the Internet*, Public Knowledge (May 21, 2019), <https://www.publicknowledge.org/blog/how-to-go-beyond-section-230-without-crashing-the-internet/> (“While shielding platforms from liability for content developed by third parties has a number of legitimate justifications, the rationale for shielding them from liability when they actively amplify such content seems weaker.”); see also *Roommates.com*, *supra* (addressing fact-intensive issue of when a website crosses the indistinct line from an “interactive computer service,” which is entitled to Section 230(a)(1) immunity, to an “information content provider” in its own right, which is not).

¹² Citron & Wittes, *supra*, at 420 (expressing “skept[ic]ism that online providers really need dramatically more protection than do newspapers to protect free expression in the digital age”).

AT&T appreciates the opportunity to express these high-level views on the legal regimes governing today's online platforms, and it looks forward to engaging with Congress, the Commission, and other policymakers as the debate about these critical issues evolves.

Respectfully submitted,

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