Before the
Federal Communications Commission
Washington, DC 20554

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

COMMENTS OF TECHFREEDOM

110 Maryland Ave NE
Suite #205
Washington, DC 20002

Dated: September 2, 2020

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COMMENTS OF TECHFREEDOM: EXECUTIVE SUMMARY

Section 230 is the law that made today's Internet possible. The law has allowed websites to host content created by users without, as the bill's author, Rep. Chris Cox (R-CA), warned in 1995, "spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges." Without the broad protections of 230(c)(1) in particular, websites would face "death by ten thousand duck-bites" in the form of massive litigation risks.

NTIA asks the FCC to turn this law on its head, but the FCC has no authority to reinterpret the statute. The plain language and the legislative history of Section 230 demonstrate that Congress did not intend to grant any regulatory authority to the FCC. Instead, as Rep. Cox declared, Congress did "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet." Under the statute's express terms, the "interactive computer service" providers protected by Section 230 are not "information service providers," nor are they otherwise subject to the FCC's jurisdiction. Both the courts and the FCC itself have concluded that Section 230 confers no authority on

the Commission. The FCC's lack of delegated authority under Section 230 is demonstrated by the fact that no courts have deferred to the FCC, or awaited its opinion on the meaning of the statute before applying it. NTIA's principal argument, that Section 201(b) confers plenary rulemaking powers to interpret any provision of the Communications Act, including Section 230, fails: this provision applies only to common carrier services, as this Commission itself argued in repealing the previous Commission's broad claims of power to regulate Internet services. The FCC also lacks authority to impose disclosure requirements on social media.

NTIA proposes a new, more arbitrary Fairness Doctrine for the Internet. But because social media sites are not public fora, the First Amendment protects the editorial discretion of their operators. The Supreme Court permitted the original Fairness Doctrine only because it denied full first Amendment protection to broadcasters — whereas new media, including social media, enjoys full First Amendment protection. Conditioning eligibility for Section 230's protections on the surrender of editorial discretion violates the "unconstitutional condition" doctrine. NTIA's narrowing of Section 230 effectively seeks to compel social media to carry speech they do not wish to carry and associate themselves with views, persons and organizations they find repugnant — and places upon social media providers themselves the burden of defending the exercise of their editorial judgment. Finally, despite NTIA's rhetoric about "neutrality," its proposal will empower the government to punish or reward editorial decisions on the basis of content and viewpoint.

NTIA insists that the representations of fairness or neutrality social media make about their services must be enforced, but it is basic principles of consumer protection and contract law, grounded in the First Amendment, — *not* Section 230 — that bar such claims. Broad statements about not making decisions for political reasons simply are not actionable,

and the First Amendment does not permit the government to compel more "particular" promises. The disclosure requirements the FCC has imposed on Broadband Internet Access Service providers are utterly unlike those NTIA proposes for social media: by definition, BIAS services do not exercise editorial discretion, while social media services do. Enforcing BIAS providers' promises of "net neutrality" is nothing like second-guessing how social media provide "edited services." Only in narrow circumstances will the First Amendment permit suit against media providers based on discrepancies between clear and specific representations about their editorial practices and those practices.

NTIA's statutory interpretations would turn Section 230 on its head, placing a heavy burden on websites to defend their exercise of editorial discretion each time they are sued for content moderation decisions. Courts have correctly interpreted 230(c)(1) to protect broadly the exercise of editorial discretion. NTIA is simply mistaken that this renders 230(c)(2)(a) superfluous: it protects content moderation decisions even when providers responsible for the creation of content, and it protects against other kinds of claims. NTIA would transform 230(c)(2) into the basis for micromanaging how social media operate. Similarly, by redefining which services are eligible for the 230(c)(1) immunity, NTIA would create exactly the kind of censorship regime Section 230 was intended to prevent.

The FCC should dismiss this petition for lack of authority to implement it, and because it violates the most basic precepts of the First Amendment. Evaluating the fairness of media, both offline and online is, as a Republican FTC Chairman eloquently put it, "is a task the First Amendment leaves to the American people, not a government agency." If consumers believe bias exists, it must be remedied through the usual tools of the media marketplace: consumers must vote with their feet and their dollars.

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COMMENTS OF TECHFREEDOM

TechFreedom, pursuant to Sections 1.4 and 1.405 of the Commission's rules (47 C.F.R. §§ 1.4 & 1.405), hereby files these Comments in response to the Petition for Rulemaking filed by the National Telecommunications and Information Agency ("NTIA") on July 27, 2020 (the "NTIA Petition").[1] In support of these Comments, TechFreedom submits:

I. About TechFreedom

Founded in 2010, TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes

[1] By Public Notice, Report No. 3157, released Aug. 3, 2020, the FCC opened NTIA's Petition for comment, with comments due by Sept. 2, 2020. These Comments are timely filed. These comments were drafted by Berin Szóka, TechFreedom Senior Fellow, and James Dunstan, TechFreedom General Counsel, with contributions and vital assistance from Ashkhen Kazaryan, TechFreedom's Director of Civil Liberties and Legal Research Fellow; Andy Jung, Law Clerk, TechFreedom; and, Sara Uhlenbecker, Law Clerk, TechFreedom.

the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

For the last decade, TechFreedom has opposed expansive readings of the Communications Act that would give the FCC broad authority, and unchecked discretion, to regulate the Internet.[2] In 2015, we joined the lawsuit challenging the FCC's imposition of common carriage regulation on Internet services in the name of protecting "neutrality."[3] The arguments we made as intervenors were those then-Judge Kavanaugh and Judge Brown stressed in their dissents, arguing that the full D.C. Circuit should rehear the panel decision upholding the FCC's order.[4] We have also developed a core expertise in consumer protection law, and have provided testimony to Congress multiple times on how the Federal Trade Commission wields that authority.[5] Finally, we have devoted much of our

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[2] *TechFreedom Files in Amicus in the Latest Net Neutrality Litigation*, TECHFREEDOM (Oct. 18, 2018), https://techfreedom.org/techfreedom-files-amicus-latest-net-neutrality-litigation/; *TechFreedom Releases First Comprehensive Analysis of Federalism Obstacles to State Net Neutrality Regulations*, TECHFREEDOM (Oct. 31, 2018), https://techfreedom.org/techfreedom-releases-first-comprehensive-analysis-federalism-obstacles-state-net-neutrality-regulations/; *CRA Resolutions Cannot Legally Protect Net Neutrality*, TECHFREEDOM (May 14, 2018), https://techfreedom.org/cra-resolutions-cannot-legally-protect-net-neutrality/; TechFreedom, Comments of TechFreedom In the Matter of Notice of Proposed Rulemaking – Restoring Internet Freedom WC Docket No. 17-108 (Aug. 30, 2017), http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf; *Our Fight to Stop FCC Regulation of the Internet Continues*, TECHFREEDOM (Dec. 29, 2017), https://techfreedom.org/fight-stop-fcc-regulation-internet-continues/.

[3] Mot. of TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, & David Frankel for Leave to Intervene, Case No. 15-1063 (2015) available at http://docs.techfreedom.org/TF_FCC_OIO_Motion_to_Intevene_6.8.15.pdf; Br. for Intervenors for Pet'rs TechFreedom, CARI.net, Jeff Pulver, Charles Giancarlo, Wendell Brown, & David Frankel, Nos. 15-1063 (2015) available at http://docs.techfreedom.org/TF_Intervenor_Brief_8.6.15.pdf; Reply Br. For Intervenors for Pet'rs TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown & David Frankel, Nos. 15-1063 (2015) available at https://techfreedom.org/important-documents-open-internet-order-case/; Pet. For Reh'g En Banc for Intervenors TechFreedom, CARI.net, Jeff Pulver, Charles Giancarlo, Wendell Brown, & David Frankel, Nos. 15-1063 (2015) available at http://docs.techfreedom.org/TF_Petition_for_Rehearing_En_Banc.pdf.

[4] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 418-26 (D.C. Cir. 2017) (Kavanaugh dissenting) and *id*. at 408-17 (Brown dissenting).

[5] *Consumer Protection & Competition Regulation in A High-Tech World: Discussing the Future Of The Federal Trade Commission, Report 1.0 Of The FTC*: Technology & Reform Project 24 (Dec. 2013),

attention over the last three years on Section 230 and proposals to reform it, including providing Congressional testimony.[6] We led the drafting of a set of seven principles to guide lawmakers considering amending Section 230 — a document signed onto by 27 civil society organizations and 53 academics.[7] Finally, the First Amendment's application to the Internet has always been at the core of our work. All four areas of our work are incorporated in these comments.

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http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf; Berin Szóka & Geoffrey A. Manne, The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature 57-60 (2016), http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf [hereinafter White Paper]; Comments of TechFreedom, Hearings on Competition & Consumer Protection in the 21st Century: Topic 11: The agency's investigation, enforcement and remedial processes (Aug. 20, 2018), http://techfreedom.org/wpcontent/uploads/2018/08/ftc-august-2018-workshop-comments-topic-11.pdf; Comments of TechFreedom & International Center for Law and Economics, In the Matter of Big Data and Consumer Privacy in the Internet Economy, Docket No. 140514424–4424–01 (Aug. 5, 2014), available at http://www.laweconcenter.org/images/articles/tf-icle_ntia_big_data_comments.pdf; Geoffrey A. Manne, R. Ben Sperry & Berin Szoka, In the Matter of Nomi Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case (2015), available at http://laweconcenter.org/images/articles/icle-nomi_white_paper.pdf;

[6] Berin Szóka , *The First Amendment Bars Regulating Political Neutrality, Even Via Section 230*, TECHDIRT (July 24, 2020), https://www.techdirt.com/articles/20200724/11372744970/first-amendment-bars-regulating-political-neutrality-even-via-section-230.shtml; TechFreedom (@TechFreedom), TWITTER (May 28, 2020), https://twitter.com/techfreedom/status/1265877617519009792; Letter from TechFreedom to the Senate Judiciary Committee (Mar. 5, 2020), available at https://techfreedom.org/wp-content/uploads/2020/03/TechFreedom-Letter-re-EARN-IT-Act-3.5.2020.pdf; *EARN IT Act Could Hurt Kids and Undermine Privacy of All Americans*, TECHFREEDOM (Mar. 5, 2020), https://techfreedom.org/earn-it-act-could-hurt-kids-and-undermine-privacy-of-all-americans/; *Academics, Civil Society Caution Lawmakers Considering Amending Section 230*, TECHFREEDOM (July 11, 2019), https://techfreedom.org/academics-civil-society-caution-lawmakers-considering-amending-section-230/; Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical; *Hawley Proposes a Fairness Doctrine for the Internet*, TECHFREEDOM (June 19, 2019), https://techfreedom.org/hawley-proposes-a-fairness-doctrine-for-the-internet/; Ashkhen Kazaryan, *Some conservatives need a First Amendment refresher*, WASHINGTON EXAMINER (May 21, 2019), https://www.washingtonexaminer.com/opinion/some-conservatives-need-a-first-amendment-refresher; Letter from TechFreedom to Attorney General Jeff Sessions (Sept. 21, 2018), available at http://techfreedom.org/wp-content/uploads/2018/09/Letter_-to-Jeff-Sessions-re-Social-Media-Bias-v2.pdf; *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Apr. 26, 2018) (Testimony of TechFreedom), available at http://docs.techfreedom.org/Szoka_Testimony-Platform_Reponsibility_&_Neutrality-4-25-18.pdf; *Senate Passes Hybrid SESTA Bill, Despite Constitutional & Backfiring Concerns*, TECHFREEDOM (Mar. 21, 2018), https://techfreedom.org/senate-passes-hybrid-sesta-bill-despite-constitutional-backfiring-concerns/; *Backpage Shutdown Proves SESTA Was Rushed Unnecessarily*, TECHFREEDOM (Apr. 6, 2018), https://techfreedom.org/backpage-shutdown-proves-sesta-rushed-unncessarily/.

[7] Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical.

II. The FCC Lacks Authority to Implement the NTIA Petition

Congress passed Section 230 of the Communications Decency Act nearly 25 years ago. Since then, hundreds of reported cases,[8] courts have interpreted the meaning of Section 230, and its principle provision, Paragraph (c)(1), which has been called "the twenty-six words that created the Internet."[9] Suddenly, after the passage of so much time, NTIA now seeks to thrust the FCC into the middle of the national debate over the role and power of technology companies in America, or as many call it, "the TechLash."[10] Apparently unhappy with how courts have interpreted the language set down by Congress, NTIA would have the FCC set forth a new, radically different interpretation of what Section 230 means. The fundamental problem with this is that there simply is no role for the FCC here, and the FCC should dismiss NTIA's Petition as being beyond the scope of its delegated authority.

A. The FCC Lacks Delegated Authority to Interpret Section 230

The first fundamental question the FCC must address is whether the Commission has any authority under the Communications Act to interpret Section 230. It does not.

Empowering the FCC to conduct rulemakings about online content was the last thing the creators of Section 230 had in mind. Fundamentally, they opposed heavy-handed governmental

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[8] Eric Goldman, *Comments on the Internet Association's Empirical Study of Section 230 Cases*, Technology & Marketing Law Blog (Aug. 3, 2020), https://blog.ericgoldman.org/archives/2020/08/comments-on-the-internet-associations-empirical-study-of-section-230-cases.htm ("I think the total universe of Section 230 case citations is more like 1,200+"); *see also A Review Of Section 230'S Meaning & Application Based On More Than 500 Cases*, INTERNET ASSOCIATION (July 27, 2020), https://internetassociation.org/publications/a-review-of-section-230s-meaning-application-based-on-more-than-500-cases/ [hereinafter *IA Report*].

[9] *See, e.g.*, JEFF KOSSEFF, TWENTY SIX WORDS THAT CREATED THE INTERNET (2019).

[10] *See, e.g.*, Robert D. Atkinson Et Al., *A Policymaker's Guide to the "Techlash" - What It Is and Why It's a Threat to Growth and Progress*, Information Technology & Innovation Foundation (Oct. 28, 2019), https://itif.org/publications/2019/10/28/policymakers-guide-techlash.

regulation of the Internet, an idea very much gathering steam at the time as the Senate moved to pass the rest of the Communications Decency Act:

> the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected . . . ***I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter[s].***[11]

Enter now the NTIA Petition. Somehow the NTIA Petition manages to ignore both the statutory Congressional language and the legislative history quoted above to conclude that "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation."[12] With respect, this assertion is flatly contradicted by the text and history of the statute.[13]

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[11] *Id.* at H8470 (statement of Rep. Wyden, emphasis added).

[12] National Telecommunications and Information Administration, Petition for Rulemaking of the National Telecommunications and Information Administration at 17 (July 27, 2020) [hereinafter *NTIA Petition*], https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

[13] Interestingly, NTIA can find its way around the legislative history by discussing the fact that Congress enacted Section 230, in part, to overrule the *Stratton Oakmont* decision, and to empower parents to choose what their children saw on the Internet. *See id*. at 18, n. 51, 21, n. 64, 21, n. 65, 22, n. 67. Yet apparently NTIA cannot find any of the references quoted above, from the same Representatives, to the fact that the statute was never intended to be implemented by the FCC.

1. The Language and the Legislative History of Section 230 Demonstrate that Congress Did Not Intend to Grant Any Regulatory Authority to the FCC.

Both the plain statutory language of the CDA as well as the legislative history of Section 230 clearly indicate that Congress did not intend to grant any regulatory authority to the FCC to enforce, or even interpret, Section 230. In Subsection 230(b)(2), Congress stated that it is the 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***."[14]

> In discussing the fact that the CDA was not designed to provide the FCC with any jurisdiction, author Chris Cox said this during the floor debates: We do "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[15] Rep. Cox also pointed out that "there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time." [16]

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[14] Communication Decency Act, 47 U.S.C. § 230(b)(2) (emphasis added).

[15] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The full quote from the floor colloquy sheds additional light on what one of Section 230 author's had in mind for how the law would operate:

> Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, ***it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government***. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

Id.

[16] *Id.* at H8469 (emphasis added).

Similarly, Representatives Bob Goodlatte (R-VA)[17] and Rick White (R-WA)[18] expressed their support for Section 230 ***and*** for the notion that there was little room, if any, for the federal government to police the content online. Section 230 co-author (then) Rep. Wyden (D-OR) agreed that "The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats."[19] Wyden fully recognized that the FCC (or any other federal agency) would never be able to police the content of the Internet in a timely basis. "Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today."[20]

2. Under the Statute's Express Terms, Interactive Computer Service Providers Are not Information Service Providers or Subject to FCC Jurisdiction

NTIA argues that Section 230(f)(2) "explicitly classifies 'interactive computer services' as 'information services[.]'"[21] Yet NTIA has it exactly backwards: Section 230(f)(2) states "[t]he term 'interactive computer services' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including

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[17] "The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment." *Id.* at H8471.

[18] "I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision [as to what my children see on the Internet] is the Federal Government." *Id.*

[19] *Id.* at H8470.

[20] *Id.* at H8471.

[21] *Id.* at 47.

specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[22] Thus, while *some* information services are interactive computer services, that doesn't mean that *all* interactive computer services are information services. [23] This more limited reading of the meaning of Section 230(f)(2) is therefore consistent with the policy statement contained in Section 230(b)(2) : "It is the 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 . . . ."[24] The broad reading of the term "information service" advocated by NTIA, *to justify new federal regulation*, would stand in stark conflict with this policy finding.

3. Both the Courts and the FCC Itself Have Concluded that Section 230 Confers No Authority on the FCC

The NTIA Petition further ignores ample court precedent, and conclusions reached by the FCC itself, that Section 230 confers no regulatory authority on the FCC. In *Comcast v. FCC,*[25] the D.C. Circuit addressed the first in a series of many challenges to the authority of the FCC to regulate an Internet service provider's network management practices (so-called "net neutrality" regulation). The FCC's order[26] found that the company's limitation on peer-to-peer programs violated the FCC's 2005 Internet Policy Statement[27] On appeal, the FCC argued that, through Section 230, Congress

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[22] 47 U.S.C. § 230(f)(3).

[23] *Restoring Internet Freedom* ¶ 60, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (1) (2018) [hereinafter *RIFO*].

[24] 47 U.S.C. § 230(b)(2).

[25] *Comcast v. FCC*, 600 F.3d 642 (DC Cir 2010).

[26] *In re Formal Compl. Of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) [hereinafter *Comcast Order*).

[27] *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14,986, 14,998, ¶ 4 (2005).

provided the FCC with authority to prohibit Internet Service Providers (ISPs) from implementing any network practices that might frustrate "the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet."[28]

The *Comcast* court flatly rejected this assertion of authority. It first found that Section 230 (in conjunction with Section 1 of the Communications Act) "are statements of policy that themselves delegate no regulatory authority."[29] It also rejected the FCC's argument that Section 230 nonetheless conveyed "ancillary" authority:[30]

> We read *Southwestern Cable* and *Midwest Video I* quite differently. In those cases, the Supreme Court relied on policy statements not because, standing alone, they set out "statutorily mandated responsibilities," but rather because they did so in conjunction with an express delegation of authority to the Commission, i.e., Title III's authority to regulate broadcasting.[31]

Instead, the *Comcast* court analyzed the FCC's authority to regulate the Internet based on *Midwest Video II*,[32] wherein the Supreme Court found that, absent clear statutory authority under Title III, the FCC's cable regulations related to public access requirements were unlawful.[33] The court also relied on *NARUC II,*[34] which struck down FCC regulations of non-video uses of cable systems, to conclude that the Communications Act "commands that each and every assertion of jurisdiction

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[28] *Comcast v. FCC*, 600 F.3d at 651 (slip op. p. 17).

[29] *Id.* at 652 (slip op. p. 18).

[30] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)*; United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*).

[31] *Comcast v. FCC*, 600 F.3d at 652.

[32] *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

[33] *Comcast v. FCC*, 600 F.3d at 654, *quoting Midwest Video II*, 440 U.S. at 706.

[34] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II).

over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting."[35] The *Comcast* court thus concluded:

> The teaching of *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II* — that policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority — derives from the "axiomatic" principle that "administrative agencies may [act] only pursuant to authority delegated to them by Congress." Policy statements are just that — statements of policy. They are not delegations of regulatory authority.[36]

The *Comcast* court warned of reading expansive authority into policy statements contained in provisions from the Communications Act, without specific delegated authority:

> Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations . . . that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers. [37]

The NTIA Petition indeed seeks to shatter the limits of FCC authority by claiming the mere codification of Section 230 into the Communications Act confers upon the FCC the power to review and regulate the editorial practices of any website on the Internet that hosts comments or other content created by users. Granting an unelected independent agency such power, as NTIA suggests, should send shivers down the spine of all Americans, regardless of political party affiliation.

Since *Comcast*, the FCC has, under both Democratic and Republican leadership, either avoided claiming Section 230 as providing direct statutory authority, or disclaimed outright Section 230 as an independent source of regulatory authority. The FCC's 2015 *Open Internet Order*, for example, reissued (with significant modifications) the net neutrality rules contained in the 2010

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[35] *Comcast v. FCC*, 600 F.3d at 651, *quoting NARUC II*, 533 F.2d at 612.

[36] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

[37] *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

Order, but sought to ground them on two distinct sources of authority *other* than Section 230: (i) interpreting Section 706 as an independent grant of authority and (ii) reclassifying Broadband Internet Access Service (BIAS) as a Title II telecommunications service. In reaching the latter conclusion, the FCC held that Section 230(f)(2)'s reference to "information service" and a "system that provides access to the Internet" did not resolve the question of whether BIAS was an information service or a telecommunications service, concluding that it was "unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner, especially given the opportunity to do so when it adopted the Telecommunications Act of 1996."[38] Nowhere in the course of this discussion of the Commission's statutory authority (in Title II) did the 2015 Order say anything to suggest that Section 230 was itself a source of statutory authority.

In the *Restoring Internet Freedom Order*, the FCC found not that Section 230 provided any regulatory authority to the FCC, but the very opposite: that the policy statement (that the Internet should remain "unfettered by Federal or State regulation") in Section 230(b)(2)

> confirms that the free market approach that flows from classification as an information service is consistent with Congress's intent. In contrast, we find it hard to reconcile this statement in section 230(b)(2) with a conclusion that Congress intended the Commission to subject broadband Internet access service to common carrier regulation under Title II.[39]

The *RIFO* agreed with the *Comcast* analysis, concluding that "Section 230 did not alter any fundamental details of Congress's regulatory scheme but was part and parcel of that scheme, and confirmed what follows from a plain reading of Title I—namely, that broadband Internet access

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[38] OIO ¶ 386.

[39] *RIFO* ¶ 58.

service meets the definition of an information service."[40] Finally, in determining whether it had authority to adopt conduct rules for BIAS providers, the *RIFO* rejected an argument that Section 230 could be read as a source of authority: "section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority."[41]

On appeal, the D.C. Circuit drove the final nail in the coffin of the idea that Section 230 confers any regulatory authority:

> As the Commission has itself acknowledged, this is a "statement[] of policy," not a delegation of regulatory authority. . . . To put it even more simply, "[p]olicy statements are just that—statements of policy. They are not delegations of regulatory authority." *Comcast*, 600 F.3d at 654.[42]

4. The Lack of Delegated Authority under Section 230 is Demonstrated by the Fact that No Courts Have Deferred to the FCC.

Although NTIA would have us believe that they've discovered never-before-used authority for the FCC, it is notable that in none of 1000+ cases involving Section 230,[43] particularly the early cases, has any court refused to rule on the meaning of Section 230 out of deference to an FCC that has yet to act. One would think that if Section 230 conferred authority on the FCC to interpret its meaning, some enterprising lawyer, somewhere, would have argued for a stay of judicial proceedings, or referral to the FCC, when it lost on its Section 230 claim. The fact that no one has

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[40] *Id.* ¶ 61. The FCC added: "The legislative history of section 230 also lends support to the view that Congress did not intend the Commission to subject broadband Internet access service to Title II regulation. The congressional record reflects that the drafters of section 230 did 'not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.' See 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)." RIFO n. 235.

[41] *RIFO* ¶ 284 (emphasis added).

[42] *Mozilla v. FCC*, 940 F.3d 1, 78 (D.C. Cir. 2019).

[43] *See supra* note 8.

even tried that as a legal strategy further reinforces just how untethered from the statute the NTIA Petition really is.[44]

When it comes to interpreting most provisions contained in the Communications Act, courts generally defer to the FCC's determinations where there is a clear grant of authority. In *North County Communications, Corp. v. California Catalog & Technology*,[45] for example, the Ninth Circuit rejected an inter-carrier dispute over termination fees, concluding that the FCC had yet to provide guidance on the charges in question:

> North County essentially requests that the federal courts fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b). This we decline to do. The district court properly dismissed North County's declaratory judgment claim premised on § 201(b), because entry of a declaratory judgment "would ... put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission."[46]

Many other courts have hesitated to step in to adjudicate disputes arising out of the Communications Act, especially where the FCC has not issued rules or otherwise provided guidance on how courts should interpret those legislative provisions.[47] As one court put it, in dismissing a

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[44] *See, e.g., State of North Dakota v. EPA*, Case No. 15-1381 (D.C. Cir. 2017) (Order holding case in abeyance) (unpublished opinion.) The D.C. Circuit issued an order holding in abeyance a challenge to the Clean Air Act and Executive Order 13783 "Promoting Energy Independence and Economic Growth" (82 FR 16093, March 13, 2017) and order the EPA to file status reports on a rulemaking to implement the EO.

[45] 594 F.3d 1149 (9th Cir. 2010).

[46] *Id.* at 1158, *quoting* Greene v. Sprint Commc'ns Co., 340 F.3d 1047, 1053 (9th Cir.2003)

[47] *See, e.g. Hoffman v. Rashid*, 388 Fed. Appx. 121, 123 (3d Cir. 2010) (concluding it was the FCC's purview to determine whether a particular practice by a carrier violated Section 201(b) of the Communications Act); *Iris Wireless LLC v. Syniverse Tech.*, 2014 WL 4436021, (M.D. Fla. Sept. 8, 2014) ("a court should not 'fill in the analytical gap' where the Commission has not made a determination regarding whether a company's action violates section 201(b)") (quoting *North County*, 594 F.3d at 1158); *see also id*. ("if the Court were to make a declaratory ruling" on an issue that the Commission had not yet addressed, "it would 'put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission'") (quoting *North County*, 594 F.3d at 1158); *Free Conferencing*

claim that "it is a violation of section 201(b) for a party to 'warehouse' toll free numbers without identified subscribers," because previous Commission orders "do not address the precise type of conduct at issue in this case," the court could not "risk disturbing the delicate regulatory framework that the Commission is tasked with maintaining").[48] If similar delegated authority existed for the FCC to interpret Section 230, how have hundreds of cases proceeded without a single court stopping to analyze whether its decision would "risk disturbing the delicate regulatory framework" assigned by Congress to, supposedly, the FCC? The answer is self-evident, especially after even a cursory review of the legislative history of Section 230: Congress never intended any regulatory role for the FCC in regard to Section 230.

B. The FCC Lacks Authority Under Section 201(b) to Interpret Section 230

The NTIA Petition next invokes the FCC's broad authority under Section 201(b) to conduct rulemakings to "carry out" the provisions of the Communications Act., which just happens to include Section 230.[49] The Petition quotes from *AT&T Corp. v. Iowa Utilities Bd.* that "Section 201(b) means what it says."[50] NTIA's reliance on Section 201(b) as a "blank check" to regulate, however, is not

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Corp. v. T-Mobile US, Inc., 2014 WL 7404600, *7 (C.D. Cal. Dec. 30, 2014) (because "re-routing calls to rural LECs is an evolving area of law," and because it "is important to 'protect[ ] the integrity' of the FCC's evolving regulatory scheme," the court decided "not to meddle" in this area until the Commission had ruled on the question) (quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)); *James v. Global Tel*Link Corp.*, 2014 WL 4425818, **6-7 (D.N.J. Sept. 8, 2014) ("where the question is whether an act is reasonable" under section 201(b), "primary jurisdiction should be applied"; the reasonableness of defendants' charges and practices in providing inmate calling services "implicates technical and policy questions that the FCC has the special expertise to decide in the first instance") (internal quotation marks omitted); *Demmick v. Cellco P'ship*, 2011 WL 1253733, *6 (D.N.J. March 29, 2011) ("courts have consistently found that reasonableness determinations under [section] 201(b) lie within the primary jurisdiction of the FCC, because they involve policy considerations within the agency's discretion and particular field of expertise").

[48] *Havens v. Mobex Network Servs., LLC*, 2011 WL 6826104, *9 (D.N.J. Dec. 22, 2011).

[49] *NTIA Petition*, *supra* note 12, at 15-16.

[50] *Id.*, n. 46 (quoting *AT&T v. Iowa Utilities Bd*, 525 U.S. 366 (1999)).

supported by the statute, court precedent, or prior FCC approaches to its authority under Section 201(b).

First, the reference to the FCC's authority cited by the petition is contained in the final sentence of Section 201(b), which deals with the obligations of "common carriers" to provide services to the public whereby "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." Social media platforms are not "common carriers," (or any type of carrier, for that matter), nor are they providing a "communication service." So while the FCC may have broad regulatory authority over "carriers" and "communication services," the NTIA Petition's request that the FCC provide an interpretation of Section 230 that has nothing to do with either subject matter addressed in Section 201(b).

Even the *Iowa Utility Board* court recognized that the FCC's authority under Section 201(b) is not boundless. "JUSTICE BREYER says … that 'Congress enacted [the] language [of § 201(b)] in 1938,' and that whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates.' ***That is assuredly true***."[51] Far from the FCC attempting to impose regulations on entities not otherwise subject to the Commission's jurisdiction, as is the case with NTIA's request, the issues addressed in *Iowa Utility Board* were whether the FCC had authority to implement Sections 251 and 252 added by the 1996 Telecommunications Act — provisions that related to "pricing and nonpricing provisions" of communications carriers. The Court rejected the claims of carriers and state commissioners that the FCC's authority was limited to "interstate or foreign" communications by

[51] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis added).

carriers under Section 201(a), and hence the "means what it says" language was born.[52] Thus, we are directed by *Iowa Utility Board* itself to return to what Congress "contemplated" in adopting Section 230, which is that it clearly did not intend to grant any authority to the FCC to regulate non-common carriers under Section 230.

This interpretation is consistent with the approach taken by the *Comcast* court, which rejected the FCC's claim that it could invoke authority under Section 230 via ancillary authority to regulate carriers under Section 201(b) because the FCC had failed even to attempt to tie the two provisions together in the FCC order then on appeal.[53] Such an attempt to bootstrap authority under such ancillary jurisdiction, "if accepted[,] . . . would virtually free the Commission from its congressional tether."[54]

The only time the FCC has successfully argued that that Section 201 grants authority to regulate any part of the Internet was for the short period between 2015 and 2018 where the Commission determined that BIAS (*and only BIAS*) was a telecommunications service, and could be regulated under Title II (and thus Section 201(b)).[55] Even then, application of Section 201(b) to non-carriers was highly questionable.[56] But since the FCC rejected the *2015 Order*'s approach and

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[52] *Id.* at 378.

[53] Comcast, 600 F.3d at 652-55.

[54] *Id.* at 655.

[55] *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5724 (2015) ("In light of our Declaratory Ruling below, the rules we adopt today are also supported by our legal authority under Title II to regulate telecommunications services. For the reasons set forth below, we have found that BIAS is a telecommunications service and, for mobile broadband, commercial mobile services or its functional equivalent.").

[56] *Id.* at 5999 (O'Reilly, Comm'r, dissenting) ("Moreover, if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice "in connection with" a communications service. There is no limiting principle.").

returned BIAS to be an information service, there is no arguable basis for NTIA to claim that the FCC today has authority to regulate the activities of social media platforms under Section 201.[57]

C. The FCC Lacks Delegated Authority to Impose Disclosure Requirements on Social Media.

The NTIA Petition further argues that the FCC has authority under Sections 163 and 257 of the Communications Act to impose disclosure requirements on social media sites as "information services."[58] The multi-cushion regulatory bank shot that NTIA proposes would make Paul Newman's Fast Eddie Felson from *The Hustler* proud.

NTIA cites no court cases or even FCC decisions to support its argument that Section 163, which merely requires the FCC to submit biennial reports to Congress, somehow provides regulatory authority to the FCC.[59] Section 163 conveys to the FCC no regulatory authority

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[57] The *RIFO* openly challenged whether the *2015 Order* could be squared with the FCC's authority under Section 201(b) and *Comcast*.

> The Open Internet Order contended that ISPs that also offer telecommunications services might engage in network management practices or prioritization that reduces competition for their voice services, arguably implicating section 201(b)'s prohibition on unjust or unreasonable rates or practices in the case of common carrier voice services and/or section 251(a)(1)'s interconnection requirements for common carriers. The Open Internet Order never squares these legal theories with the statutory prohibition on treating telecommunications carriers as common carriers when they are not engaged in the provision of telecommunications service or with the similar restriction on common carrier treatment of private mobile services.1045 That Order also is ambiguous whether it is relying on these provisions for direct or ancillary authority. If claiming direct authority, the Open Internet Order fails to reconcile its theories with relevant precedent and to address key factual questions.1046 Even in the more likely case that these represented theories of ancillary authority, the Open Internet Order's failure to forthrightly engage with the theories on those terms leaves it unclear how conduct rules are sufficiently "necessary" to the implementation of section 201 and/or section 251(a)(1) to satisfy the standard for ancillary authority under Comcast. (footnotes omitted).

RIFO ¶ 286.

[58] *NTIA Petition*, *supra* note 12, at 46-51.

[59] *Id.* at 49. The NTIA Petition quotes only a portion of the statute, and do so completely out of context. A reading of the full section makes clear that the intent of Congress was not to delegate additional regulatory

whatsoever, but is merely a Congressional mechanism requiring the FCC to report to it every other year on the status "of the communications marketplace,"[60] and "describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section." It is not an independent grant of authority.

NTIA next argues that Section 257, similarly largely a reporting requirement, grants the FCC authority to require social media providers to disclose their moderation policies.[61] That's where

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authority to the FCC, but rather, that Congress merely sought more information from the FCC about its activities pursuant to other delegated authority provisions. Section 163 states in full:

> (a) In general
>
> In the last quarter of every even-numbered year, the Commission shall publish on its website and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the state of the communications marketplace.
>
> (b) Contents. Each report required by subsection (a) shall—
>
> > (1) assess the state of competition in the communications marketplace, including competition to deliver voice, video, audio, and data services among providers of telecommunications, providers of commercial mobile service (as defined in section 332 of this title), multichannel video programming distributors (as defined in section 522 of this title), broadcast stations, providers of satellite communications, Internet service providers, and other providers of communications services;
> >
> > (2) assess the state of deployment of communications capabilities, including advanced telecommunications capability (as defined in section 1302 of this title), regardless of the technology used for such deployment;
> >
> > (3) assess whether laws, regulations, regulatory practices (whether those of the Federal Government, States, political subdivisions of States, Indian tribes or tribal organizations (as such terms are defined in section 5304 of title 25), or foreign governments), or demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services;
> >
> > (4) describe the agenda of the Commission for the next 2-year period for addressing the challenges and opportunities in the communications marketplace that were identified through the assessments under paragraphs (1) through (3); and
> >
> > (5) describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section.

47 U.S.C. § 163.

[60] 47 U.S.C. § 163(a).

[61] *NTIA Petition*, *supra* note 12, at 49.

NTIA's legerdemain really kicks in. The Petition begins by claiming that "In its 2018 Internet Order, the Commission relied on section 257 to impose service transparency requirements on providers of the information service of broadband internet access."[62] From there, the Petition goes on to argue that the FCC has the power to impose disclosure requirements on all social media, because social media are also "information service[s]."[63] To reach that conclusion, however, NTIA relies on cases that ultimately either have nothing to do with Section 257, or nothing to do with what the FCC would call "Edge Providers," a broad term that includes social media sites.[64]

NTIA relies heavily on language from the *Mozilla* decision, which is inapposite because it involved BIAS providers.[65] NTIA is correct that the *Mozilla* court did uphold the FCC's authority to adopt transparency rules ***for BIAS providers*** under Section 257, which the *Mozilla* court also found to be largely a reporting statute.[66] In contrast to the "regulated entities" involved in *Mozilla*, social media companies have never been regulated by the FCC, for very good reason. Since the dawn of the "net neutrality" debate, the FCC has been extremely careful to distinguish among the three sectors of the Internet: providing broadband Internet access service; providing content, applications, services, and devices accessed over or connected to broadband Internet access service ("edge" products and services); and subscribing to a broadband Internet access service that allows access to edge products

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[62] *Id.*

[63] *Id.* at 47-48.

[64] *See infra* note 67 and associated text.

[65] *Id.* at 48, *quoting* Mozilla Corp. v. F.C.C., 940 F.3d 1, 34 (D.C. Cir. 2019).

[66] *Mozilla*, 940 F.3d at 48-49 ("Section 257(a) simply requires the FCC to consider 'market entry barriers for entrepreneurs and other small businesses.' 47 U.S.C. § 257(a). The disclosure requirements in the transparency rule are in service of this obligation. The Commission found that the elements of the transparency rule in the 2018 Order will 'keep entrepreneurs and other small businesses effectively informed of [broadband provider] practices so that they can develop, market, and maintain Internet offerings.' In fact, the Order takes care to describe the specific requirements of the rule to 'ensure that consumers, entrepreneurs, and other small businesses receive sufficient information to make [the] rule effective.'") (internal citations omitted).

and services.[67] The 2010 Order made clear that its rules, including its "transparency" rules, did not apply to Edge Providers — the very entities that NTIA would now sweep into the FCC regulatory tent:

> these rules apply only to the provision of broadband Internet access service and not to edge provider activities, such as the provision of content or applications over the Internet. First, the Communications Act particularly directs us to prevent harms related to the ***utilization of networks and spectrum to provide communication by wire and radio***. Second, these rules are an outgrowth of the Commission's *Internet Policy Statement*. The Statement was issued in 2005 when the Commission removed key regulatory protections from DSL service, and was intended to protect against the harms to the open Internet that might result from ***broadband providers'*** subsequent conduct. ***The Commission has always understood those principles to apply to broadband Internet access service only***, as have most private-sector stakeholders. Thus, insofar as these rules translate existing Commission principles into codified rules, ***it is appropriate to limit the application of the rules to broadband Internet access service***.[68]

Finally, only by focusing its rules exclusively on broadband providers, and not Edge Providers, was the 2010 Order able to dispense with the First Amendment arguments raised by some ISPs.[69]

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[67] Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905, 17972-80, ¶ 20 (2010) (*2010 Order*).

[68] *Id.* ¶ 50 (footnotes omitted, emphasis added).

[69] The Commission explained:

> In arguing that broadband service is protected by the First Amendment, AT&T compares its provision of broadband service to the operation of a cable television system, and points out that the Supreme Court has determined that cable programmers and cable operators engage in speech protected by the First Amendment. The analogy is inapt. When the Supreme Court held in Turner I that cable operators were protected by the First Amendment, the critical factor that made cable operators "speakers" was their production of programming and their exercise of "editorial discretion over which programs and stations to include" (and thus which to exclude).
>
> Unlike cable television operators, broadband providers typically are best described not as "speakers," but rather as conduits for speech. The broadband Internet access service at issue

Clearly, had the FCC attempted to extend any of its 2010 rules to Edge Providers, it would have then been subject to First Amendment scrutiny it could never have survived.[70] This regulatory "hand's off" approach to Edge Providers has been acknowledged elsewhere in government. "Edge provider activities, conducted on the 'edge' of the internet—hence the name—are not regulated by the Federal Communications Commission (FCC)."[71] The FCC has rejected attempts in the past to regulate social media and other Edge Providers, even at the height of Title II Internet regulation. "The Commission has been unequivocal in declaring that it has no intent to regulate edge providers."[72]

The NTIA Petition now seeks to erase the regulatory lines the FCC has drawn over decades to declare Edge Providers subject to FCC jurisdiction because they provide "information services." None of the cases cited in the NTIA petition relate in any way to whether the FCC has jurisdiction over Edge Providers. *Barnes v. Yahoo!*[73] involved a very narrow ruling related to whether Yahoo!

> here does not involve an exercise of editorial discretion that is comparable to cable companies' choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefiting from an editorial presence. To the contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.

Id. ¶¶ 140-41.

[70] *See infra* at 56-60.

[71] *See, e.g.*, Clare Y. Cho, Congressional Research Service, "Competition on the Edge of the Internet," Jan. 30, 2020, summary, available at: https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf.

[72] *See* In the Matter of Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests. DA 15-1266, adopted November 6, 2015, available at https://docs.fcc.gov/public/attachments/DA-15-1266A1.pdf. That order goes on to state that even after finding that the provision of BIAS was a telecommunications service, At the same time, the Commission specified that in reclassifying BIAS, it was not "regulating the Internet, per se, or any Internet applications or content." Rather, as the Commission explained, its "reclassification of broadband Internet access service involves only the transmission component of Internet access service." Quoting Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, par. 5575 (2015) (*2015 Open Internet Order*).

[73] *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir 2009).

could, notwithstanding Section 230(c)(1), be sued under a theory of promissory estoppel after an employee made a specific promise to take down revenge porn material and the company failed to do so.[74] The fact that the court referred to Yahoo! as a provider of "information services"[75] in no way speaks to whether the FCC has jurisdiction to regulate it under the Communications Act. Likewise, *FTC v. Am. eVoice*[76] is even further afield, as it ***neither*** related to FCC regulations ***nor*** the term "information services."[77] Finally, *Howard v. Am. Online Inc.*,[78] hurts, not helps, NTIA's argument. That case involved a class action suit brought against AOL under far-flung legal theories, everything from RICO to securities law fraud, and eventually, to improper billing under Section 201 of the Communications Act. The court rejected the Section 201 claim, finding that AOL provided an "enhanced service," was not a "common carrier," and thus outside the purview of the FCC's Section 201 regulations.[79]

NTIA's position that any provider of an "information service" is subject to the regulatory authority of the FCC simply is wrong as a matter of law. As we have demonstrated, that the term "information service" appears in Section 153 does not, in itself, confer independent regulatory

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[74] *Id.* at 1109 ("we conclude that, insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the Act does not preclude her cause of action. Because we have only reviewed the affirmative defense that Yahoo raised in this appeal, we do not reach the question whether Barnes has a viable contract claim or whether Yahoo has an affirmative defense under subsection 230(c)(2) of the Act").

[75] *Id.* at 1108.

[76] *FTC v. Am. eVoice, Ltd.*, 242 F. Supp. 3d 1119 (D. Mont. 2017).

[77] *See In re Second Computer Inquiry,* 77 F.C.C.2d 384, 417-23 (1980).

[78] *Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000).

[79] *Id.* at 753 ("hybrid services like those offered by AOL "are information [i.e., enhanced] services, and are not telecommunication services." This conclusion is reasonable because e-mail fits the definition of an enhanced service — the message is stored by AOL and is accessed by subscribers; AOL does not act as a mere conduit for information. Even chat rooms, where subscribers can exchange messages in "real-time," are under AOL's control and may be reformatted or edited. Plaintiffs have failed to show that AOL offers discrete basic services that should be regulated differently than its enhanced services.") (internal citations omitted).

authority on the FCC, and the FCC has properly refrained from even attempting to regulate Edge Providers merely because *some* of the services they provide may fall within that definition. The FCC recognized the danger of such a broad interpretation of its regulatory authority in its 2018 *Restoring Internet Freedom Order*:

> Our interpretation of section 706 of the 1996 Act as hortatory also is supported by the implications of the Open Internet Order's interpretation for the regulatory treatment of the Internet and information services more generally. The interpretation of section 706(a) and (b) that the Commission adopted beginning in the Open Internet Order reads those provisions to grant authority for the Commission to regulate information services so long as doing so could be said to encourage deployment of advanced telecommunications capability at least indirectly. A reading of section 706 as a grant of regulatory authority that could be used to heavily regulate information services—as under the Commission's prior interpretation—is undercut by what the Commission has found to be Congress' intent in other provisions of the Communications Act enacted in the 1996 Act—namely, to distinguish between telecommunications services and information services, ***with the latter left largely unregulated by default***.

The FCC then continued:

> In addition, the 1996 Act added section 230 of the Communications Act, which provides, among other things, that "[i]t is the 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." A necessary implication of the prior interpretation of section 706(a) and (b) as grants of regulatory authority is that the Commission could regulate not only ISPs but also edge providers or other participants in the Internet marketplace—even when they constitute information services, and notwithstanding section 230 of the Communications Act—so long as the Commission could find at least an indirect nexus to promoting the deployment of advanced telecommunications capability. For example, some commenters argue that "it is content aggregators (think Netflix, Etsy, Google, Facebook) that probably exert the greatest, or certainly the most direct, influence over access." Section 230 likewise is in tension with the view that section 706(a) and (b) grant the Commission regulatory authority as the Commission

> previously claimed. These inconsistencies are avoided, however, if the deployment directives of section 706(a) and (b) are viewed as hortatory.[80]

Finally, as noted previously, the legislative history of the 1996 Telecommunications Act reveals unequivocally that the FCC lacks this regulatory authority. Sponsors Rep. Cox, Rep. Wyden, and others never contemplated that the FCC would have this type of authority.[81] The FCC should refrain from attempting to cobble together authority that simple does not exist, is antithetical to decades of FCC and court precedent, and as we discuss fully below, would violate the First Amendment.

III. NTIA Proposes a New, More Arbitrary Fairness Doctrine for the Internet—Something the First Amendment Bars.

The President's Executive Order argues:

> When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.[82]

This requirement opens the door to punishing ICS providers for "engag[ing] in editorial conduct" of which the government — be that the FTC, state attorneys general, or judges hearing their suits or those of private plaintiffs —disapproves. Such retaliation against the exercise of editorial discretion would be a clear and egregious violation of the First Amendment. As the Supreme Court has repeatedly noted, conditioning the receipt of a

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[80] *RIFO* ¶¶ 273-74 (emphasis added, internal citations omitted).

[81] 141 Cong. Rec. H8469 (statement of Rep. Cox)

[82] Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34080 (June 2, 2020) (*Executive Order*).

benefit (such as immunity) on the surrender of First Amendment rights is no different than a direct deprivation of those rights.[83]

Over two years ago, the Chairman of the House Judiciary Committee invited TechFreedom to testify before the committee. We warned that proposals to reinterpret or amend Section 230 to require political neutrality amounted to a new "Fairness Doctrine for the Internet."[84]

The Original Fairness Doctrine required broadcasters (1) to "adequately cover issues of public importance" and (2) to ensure that "the various positions taken by responsible groups" were aired, thus mandating the availability of airtime to those seeking to voice an alternative opinion. President Reagan's FCC abolished these requirements in 1987. When Reagan vetoed Democratic legislation to restore the Fairness Doctrine, he noted that "the FCC found that the doctrine in fact inhibits broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose."[85]

The Republican Party has steadfastly opposed the Fairness Doctrine for decades. The 2016 Republican platform (re-adopted verbatim for 2020) states: "We likewise call for an

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[83] *See, e.g.*, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 713 (1996) ("While government officials may terminate at-will relationships, unmodified by any legal constraints, without cause, it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."). *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" (quoting *Speiser*, 357 U.S. at 526)).

[84] *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Apr. 26, 2018) (Testimony of TechFreedom), available at http://docs.techfreedom.org/Szoka_Testimony-Platform_Reponsibility_&_Neutrality-4-25-18.pdf.

[85] Message from the President Vetoing S. 742, S. Doc. No. 10-100, at 2 (1987), available at https://www.senate.gov/legislative/vetoes/messages/ReaganR/S742-Sdoc-100-10.pdf.

end to the so-called Fairness Doctrine, and support free-market approaches to free speech unregulated by government."[86] Yet now, under Republican leadership, NTIA proposes to have the FCC institute, without any clear statutory authority, a version of the Fairness Doctrine for the Internet that would be more vague, intrusive, and arbitrary than the original. The Supreme Court permitted the Fairness Doctrine to be imposed on broadcasters only because it denied them the full protection of the First Amendment. The Court has steadfastly refused to create such carveouts for new media. While striking down a state law restricting the purchase of violent video games, Justice Scalia declared: "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[87]

A. Because Social Media Sites Are Not Public Fora, the First Amendment Protects the Editorial Discretion of their Operators.

The NTIA petition breezily asserts that "social media and other online platforms… function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[88] NTIA cites the Supreme Court's recent *Packingham* decision: "Social media . . . are the 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

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[86] Republican Platform 2016, at 12 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

[87] *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 790 (2011).

[88] *NTIA Petition*, *supra* note 12, at 7.

thought and knowledge."[89] The Executive Order goes even further: "Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980)."[90] The Executive Order suggests that the First Amendment should *constrain*, rather than protect, the editorial discretion of social media operators because social media are *de facto* government actors.

This claim undergirds both the Executive Order and the NTIA Petition, as it is the only way they can brush aside arguments that the First Amendment bars the government from adjudging the "fairness" of social media. The Executive Order and NTIA, however, flip the First Amendment on its head, undermining the founding American ideal that "Congress shall make no law . . . abridging the freedom of speech."[91]

Both the Order and the Petition omit a critical legal detail about *Packingham*: it involved a *state law* restricting the Internet use of convicted sex offenders. Justice Kennedy's simile that social media is "a 21st century equivalent of the public square" merely conveys the gravity of the deprivation of free speech rights effected by the state law. *Packingham* says nothing whatsoever to suggest that private media companies become *de facto* state actors by virtue of providing that "public square." On the contrary, in his concurrence, Justice Alito expressed dissatisfaction with the "undisciplined dicta" in the majority's opinion and asked

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[89] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

[90] *Executive Order*, *supra* note 82, at 34082.

[91] U.S. Const. amend. I.

his colleagues to "be more attentive to the implications of its rhetoric" likening the Internet to public parks and streets.[92]

The Executive Order relies on the Supreme Court's 1980 decision in *Pruneyard Shopping Center v. Robins*, treating shopping malls as public fora under California's constitution.[93] NTIA makes essentially the same argument, by misquoting *Packingham*, even without directly citing *Pruneyard*. NTIA had good reason *not* to cite the case: it is clearly inapplicable, stands on shaky legal foundations on its own terms, and is antithetical to longstanding conservative positions regarding private property and the First Amendment. In any event, *Pruneyard* involved shopping malls (for whom speech exercised on their grounds was both incidental and unwelcome), not companies for which the exercise of editorial discretion lay at the center of their business. *Pruneyard* has *never* been applied to a media company, traditional or new. The Supreme Court ruled on a very narrow set of facts and said that states have general power to regulate property for certain free speech activities. The Supreme Court, however, has not applied the decision more broadly, and lower courts have rejected *Pruneyard*'s application to social media.[94] Social media companies are in the speech business, unlike businesses which incidentally host the speech of others or post their own speech to their storefronts (*e.g.*, "Black Lives Matter" signs).

In a line of cases following *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court consistently upheld the First Amendment right of media outlets other

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[92] *Packingham,* 137 S. Ct. at 1738, 1743 (Alito J, concurring in judgement).

[93] 447 U.S. 74, 85-89 (1980).

[94] *See hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1115–16 (N.D. Cal. 2017); *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020).

than broadcasters (a special case discussed below). In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), the Court made clear that, unlike broadcasters, digital media operators enjoy the same protections in exercising their editorial discretion as newspapers:

> some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers . . . Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television.[95]

Miami Herald struck down a 1913 state law imposing a version of the Fairness Doctrine on newspapers that required them to grant a "right of reply" to candidates for public office criticized in their pages.[96] The Court acknowledged that there had been a technological "revolution" since the enactment of the First Amendment in 1791. The arguments made then about newspapers are essentially the same arguments NTIA and the Executive Order make about digital media today. The *Miami Herald* court summarized them as follows:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market.[97]

Despite this, the Court struck down Florida's law as unconstitutional because:

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[95] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997).

[96] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[97] *Id*. at 250.

> a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. . . . Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[98]

Critically, the Court rejected the intrusion into the editorial discretion "[e]ven if a newspaper would face no additional costs to comply," because:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.[99]

In exactly the same way, the First Amendment protects a website's decisions about what user-generated content to publish, remove, highlight, or render less accessible. In *Reno,* when the Supreme Court struck down Congress' first attempt to regulate the Internet, it held: "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[100]

Lastly, media companies do not qualify as state actors merely because they provide "platforms" for others' speech. A private entity may be considered a state actor when the entity exercises a function "traditionally exclusively reserved to the State."[101] In a 2019 case *Manhattan v. Halleck*, the Supreme Court held that "operation of public access channels on a

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[98] *Id*. at 256-57.

[99] *Id*. at 258.

[100] *Reno*, 521 U.S. at 870; Brown, 564 U.S. at 790; *see also supra* note 87 and associated text.

[101] *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 352 (1974).

cable system is not a traditional, exclusive public function."[102] "Under the Court's cases, those functions include, for example, running elections and operating a company town," but not "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[103] Justice Kavanaugh, writing for the five conservatives Justices, concluded the majority opinion as follows: "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[104] While *Halleck* did not involve digital media, the majority flatly rejected the argument made by the Executive Order for treating digital media as public fora.

B. The Constitutional Basis for Regulating Broadcast Media Does Not Apply to Internet Media, which Enjoy the Full Protection of the First Amendment.

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld the Fairness Doctrine only as applied to broadcasters, which lack full First Amendment protection. "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards."[105] The Supreme Court has explicitly rejected applying the same arguments to the Internet.[106] Thus,

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[102] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1930 (June 17, 2019), available at https://www.supremecourt.gov/opinions/18pdf/17-1702_h315.pdf (holding that the private operator of a public access TV channel is not a state actor and not bound by the First Amendment in the operator's programming choices).

[103] *Id*. at 1929.

[104] *Id*.

[105] 395 U.S. 367, 386 (1969).

[106] *See supra* note 95 and associated text at 29.

Red Lion represented a singular exception to the rule set forth in *Miami Herald*, and even that exception may not survive much longer.

In *FCC v. Pacifica Foundation*, the Court upheld FCC regulation of indecency in broadcast media.[107] The NTIA Petition invokes *Pacifica*, and the FCC's ongoing regulation of indecent[108] and violent content[109] on broadcast radio and television, to justify reinterpreting Section 230(c)(2)(A) immunity to narrowly protect only content moderation directed at "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" content. Consequently, Section 230(c)(2)(A) would no longer protect moderation driven by other reasons, including political or ideological differences.

The Petition's reliance on *Pacifica* is a constitutional red herring. First, the *Reno* Court clearly held that the invasiveness rationale underlying *Pacifica* did not apply to the Internet.[110] Since 1996, it has become easier than ever for parents to rely on providers of digital media — enabled by Section 230's protections — to ensure that their children are not exposed to content they might consider harmful.[111] Indeed, many of the loudest complaints

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[107] 438 U.S. 726 (1978).

[108] *NTIA Petition*, *supra* note 12, at 34 (Section 223(d)'s (of the Communications Decency Act) "language of 'patently offensive . . .' derives from the definition of indecent speech set forth in the *Pacifica* decision and which the FCC continues to regulate to this day.").

[109] *NTIA Petition*, *supra* note 12, at 35 ("concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip. This device allows viewers to block programming according to an established rating system.")

[110] Even in 1997, the *Reno* court recognized that, "the Internet is not as 'invasive' as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' It also found that '[a]lmost all sexually explicit images are preceded by warnings as to the content,' and cited testimony that "`odds are slim' that a user would come across a sexually explicit sight by accident." 521 U.S. at 869 (internal citations omitted).

[111] *See, e.g.,* Caroline Knorr, Parents' Ultimate Guide to Parental Control, Common Sense Media (June 6, 2020), *available at* https://www.commonsensemedia.org/blog/parents-ultimate-guide-to-parental-controls

about political bias are really complaints about those controls being applied in ways that some people allege are politically harmful[112] — because they believe there is *too much* content moderation going on online. This is the very opposite of the situation undergirding *Pacifica*: the impossibility, in the 1970s, of protecting children from adult-oriented programming broadcast in primetime hours.

In its comments, American Principles Project rejects Justice Stevens' statement in *Reno* that the Internet "is not as 'invasive' as radio and television."[113] "Today," APP argues, "a seventh grader with a smartphone has unlimited access to the most grotesque pornographic live streams imaginable. Very few porn sites have implemented any sort of age verification system to prevent this from happening."[114] APP ignores, however, *Pacifica*'s clear caveat: "It is appropriate, in conclusion, to emphasize the narrowness of our holding."[115] *Pacifica* was decided at a time when the only methods available for parents to control what their children heard on the radio were (a) change the channel, (b) to unplug or hide the radio and (c) to send their children to bed by a certain hour. Thus, the FCC did not "prevent respondent Pacifica Foundation from broadcasting [George Carlin's "Seven Dirty Words"] monologue during late evening hours when fewer children are likely to be in the audience."[116]

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[112] *See infra* at 34.

[113] Americans Principles Project Comment on the NTIA Petition for Rulemaking and Section 230 of the Communications Act of 1934 (Aug. 27, 2020) (*APP Comments*), https://ecfsapi.fcc.gov/file/10827668503390/APP%20Comment%20on%20NTIA%20Petition%20Sec.%20230%20082720.pdf

[114] *Id*. at 2.

[115] 438 U.S. at 750.

[116] *Id*. at 760.

Today, Apple offers robust parental control technologies on its iOS operating system for mobile devices that allow parents to restrict not only the Internet content that their children can access, but also the "playback of music with explicit content and movies or TV shows with specific ratings."[117] Google's Android offers similar functionality for apps, games, movies, TV, books and music."[118] While the company notes that "[p]arental controls don't prevent seeing restricted content as a search result or through a direct link,"[119] a wide range of third party parental control apps can be installed on Android devices to restrict access to such content, and "parental control software tends to be more powerful on Android than on iOS, since Apple locks down app permissions and device access."[120] If a seventh grader is using their smartphone to access "grotesque pornographic live streams," it is because their parent has not taken advantage of these robust parental controls. Less restrictive alternatives need not be perfect to be preferable to regulation, as Justice Thomas has noted.[121] Finally, APP completely ignores why it is that "[v]ery few porn sites have implemented any sort of age verification system": Congress attempted to mandate such age verification in the Child Online Privacy Act (COPA) of 1998, but the Court struck this

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[117] Prevent explicit content and content ratings, Apple, https://support.apple.com/en-us/HT201304#explicit-content (last visited Sept. 2, 2020).

[118] Set up parental controls on Google Play, Google For Families Help, https://support.google.com/families/answer/1075738?hl=en (last visited Sept. 2, 2020).

[119] *Id*.

[120] Neil J. Rubenking & Ben Moore, The Best Parental Control Apps for Your Phone, PCMag (Apr. 7, 2020), https://www.pcmag.com/picks/the-best-parental-control-apps-for-your-phone.

[121] Justice Thomas has rejected the Supreme Court's rationale for "wholesale limitations [on contributions to political campaigns] that cover contributions having nothing to do with bribery": "That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored." Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 643 (1996) (Thomas, J. concurring in part and dissenting in part).

requirement down as unconstitutional.[122] But even if the rationale of *Pacifica* did somehow apply to the Internet (despite the clear holding of *Reno* that it does not), it would justify *more* aggressive content moderation, not *limits* on content moderation. Social media providers offer tools that allow parents to protect their children from potentially objectionable content — and yet have been accused of political bias for doing so. For example, when YouTube placed PragerU videos into "Restricted Mode" — an *opt-in* feature offered to parents, schools and libraries, which anyone but children (or others without device administrator privileges) could turn off — it did so because it considered the material to be "potentially mature content."[123] The logic of *Pacifica* suggests encouraging such tools, not punishing them with litigation.

C. Requiring Websites to Cede Editorial Discretion to Qualify for Section 230 Protections Imposes an Unconstitutional Condition on Their First Amendment Rights.

Lawmakers of both parties claim that Section 230 is a special privilege granted only to large websites, and that withholding this "subsidy" raises no First Amendment issues because websites are not legally entitled to it in the first place. In truth, Section 230 applies equally to *all* websites. Consequently, Section 230 protects newspapers, NationalReview.com, FoxNews.com, and every local broadcaster from liability for user

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[122] *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

[123] YouTube rates videos as mature if they contain drugs and alcohol, sexual situations, incendiary and demeaning content, mature subjects, profane and mature language, or violence. YouTube content rating, YouTube Help, https://support.google.com/youtube/answer/146399?hl=en (last visited Sept. 2, 2020). Further, YouTube breaks down videos into three subcategories: no mature content, mild mature content, and mature content that should be restricted for viewers under 18. Similarly, Facebook's community standards go far beyond what the First Amendment allows the government to regulate — limiting violence, hate speech, nudity, cruel and insensitive content, and many other categories that violate Facebook's community standards.

comments posted on their website in exactly the same way it protects social media websites for user content. Indeed, the law protects ICS users just as it protects providers. President Trump himself relied upon Section 230 to have dismissed a lawsuit against him alleging that he was liable for retweeting defamatory material posted by another Twitter user.[124] Providers and users of ICS services alike rely on Section 230, without which they would face "death by ten thousand duck-bites."[125] Thus, as the *Roommates* court explained, "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[126]

The "unconstitutional conditions" doctrine prevents the FCC —and, for that matter, Congress — from denying the protections of Section 230 to websites who choose to exercise their editorial discretion. The Supreme Court has barred the government from forcing the surrender of First Amendment rights as a condition of qualifying for a benefit or legal status.

1. The Supreme Court Has Forbidden the Use of Unconstitutional Conditions Intended to Coerce the Surrender of First Amendment Rights.

In *Speiser v. Randall*, the Supreme Court struck down a California law denying tax exemptions to World War II veterans who refused to swear a loyalty oath to the United States: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[127] The court distinguished between this case and earlier cases upholding loyalty oaths for positions of public employment, candidates for public

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[124] Cristiano Lima, Before bashing tech's legal shield, Trump used it to defend himself in court, Politico (June 4, 2020), https://www.politico.com/news/2020/06/04/tech-legal-trump-court-301861.

[125] *Fair v. Roommates,* 521 F.3d 1157, 1174 (9th Cir. 2008).

[126] *Id*.

[127] 357 U.S. 513, 521 (1958).

office, and officers of labor unions, where the "congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially."[128]

The Court articulated this distinction more fully in *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.* ("*USAID*"). The Court struck down a federal law requiring that recipients of federal funding intended to fight AIDS worldwide adopt a "policy explicitly opposing prostitution."[129] The Court noted that "Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem."[130] But, explained the Court,

> the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.[131]

Thus, in *Regan v. Taxation with Representation of Wash*, the Court ruled that, by "limiting §501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely 'chose[n] not to subsidize lobbying.'"[132] Critically, however, this limitation is not "unduly burdensome" because, by "separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3)

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[128] *Speiser*, 357 U.S. at 527 (citing *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951) (public employees); *Gerende v. Bd. of Supervisors*, 341 U.S. 56 (1951) (candidates for public office); *Am. Commc'ns Ass'n. v. Douds*, 339 U.S. 382 (1950) (labor union officers)).

[129] 570 U.S. 205 (2013).

[130] *Id*. at 216 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

[131] *Id*. at 214.

[132] 570 U.S. 205 at 215 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983)).

status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds."[133]

By contrast, in *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984), the Court had, as it later explained in *USAID*:

> struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program.[134]

In short, the Supreme Court will not allow conditions on eligibility for a government benefit to be used to do what the First Amendment forbids the government to do directly: change the decisions made by private actors about what speech they will and will not engage in (or host).

2. NTIA Proposes to Condition Eligibility for Section 230 Immunity on a Website's Surrender of Its Editorial Discretion.

The proposal would allow the government to use Section 230 to regulate the decisions ICS providers make about which speech to host. NTIA would no doubt argue that the "scope of the program" of Section 230 immunity has always intended to ensure political

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[133] Id. (citing *Regan*, 461 U.S., at 545, n.6).

[134] 570 U.S. 205, 215 (internal citations omitted) (citing and quoting *League of Women Voters of Cal.*, 468 U.S. at 399-401).

neutrality across the Internet, citing the "forum for a true diversity of political discourse" language in 230(a)(3); however, the *USAID* Court anticipated and rejected such attempts to erase the distinction it recognized across its previous decisions:

> between conditions that define the limits of the government spending program …. and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[135]

Here, the proposal would compel *every* social media operator to cede its editorial discretion to remove (or render inaccessible) content that it finds objectionable, especially for political or ideological reasons. This goes beyond laws which allow regulated entities to continue to exercise their First Amendment rights through some other vehicle, be that by setting up a separate 501(c)(4), as in *Regan*, or simply segmenting their activities into subsidized and unsubsidized buckets. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a federal program that subsidized family planning services, except "in programs where abortion is a method of family planning."[136] The Court explained:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one

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[135] *USAID*, 570 U.S. at 214.

[136] *Rust*, 500 U.S. at 216.

> activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[137]

"Because the regulations did not 'prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,' they did not run afoul of the First Amendment."[138]

With Section 230, it would be impossible to distinguish between an entity qualifying overall and specific "projects" qualifying for immunity (while the same entity could simply run other, unsubsidized projects). Just as each broadcaster in *League of Women Voters* operated only one station, social media sites cannot simply clone themselves and run two separate versions, one with limited content moderation and an alternate version unprotected by Section 230. Without the protection of Section 230, only the largest sites could manage the legal risks inherent in hosting user content.[139] Moreover, even for those largest sites, how could a social network split into two versions? Even if such a thing could be accomplished, it would be *far* more difficult than strategies which the Court has recognized as "not unduly burdensome" — such as having separate family planning "programs" or non-profits dividing their operations into separate 501(c)(3) and 501(c)(4) sister organizations.[140]

Consider how clearly the same kind of coercion would violate the First Amendment in other contexts. For example, currently pending legislation would immunize businesses

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[137] *Id*. at 192 (quoting *Regan*, 461 U.S. at 549).

[138] *USAID*, 570 U.S. at 217 (internal citations omitted) (quoting *Rust*, 500 U.S. at 196-97).

[139] *See, e.g.*, Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598 (2018).

[140] *See supra* note 133.

that re-open during the pandemic from liability for those who might be infected by COVID-19 on their premises.[141] Suppose such legislation included a provision requiring such businesses to be politically neutral in any signage displayed on their stores — such that, if a business put up or allowed a Black Lives Matter sign, they would have to allow a "right of reply" in the form of a sign from "the other side" (say, "All Lives Matter" or "Police Lives Matter"). The constitutional problem would be just as clear as it has been in cases where speech has been compelled directly.

3. The Proposal Would Compel ICS Providers to Carry Speech they Do Not Wish to Carry and Associate Themselves with Views, Persons and Organizations They Find Repugnant.

In *Pacific Gas Elec. Co. v. Public Util. Comm'n*, the Court struck down a California regulatory rule forcing a utility to include political editorials critical of the company along with the bills it mailed to its customers. "Since *all* speech inherently involves choices of what to say and what to leave unsaid …. For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[142] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, wherein the Supreme Court barred the city of Boston from forcing organizers' of St. Patrick's Day parade to include pro-LGBTQ individuals, messages, or signs that conflicted with the organizer's beliefs.[143] The "general rule" is "that the speaker

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[141] *See, e.g.*, SAFE TO WORK Act, S.4317, 116th Cong. (2020), https://tinyurl.com/y694vzxc.

[142] 475 U.S. 1, 10, 16 (1986) (plurality opinion) (emphasis in original) (internal quotations omitted) (quoting *Harper Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985)).

[143] 515 U.S. 557, 573 (1995) (citation and quotation omitted).

has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[144]

In neither case was it sufficient to overcome the constitutional violation that the utility or the parade organizer might attempt to disassociate itself with the speech to which they objected. Instead, as the *Hurley* court noted, "we use the word 'parade' to indicate marchers who are making some sort of *collective* point, not just to each other but to bystanders along the way."[145] By the same token it would be difficult, if not impossible, for a social media site to disassociate itself from user content that it found repugnant, but which it was effectively compelled to host.

In treating certain shopping malls as public fora under the California constitution, *Pruneyard* emphasized that they could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."[146] But users naturally assume speech carried by a social network reflects their decision to carry it — just as Twitter and Facebook have been attacked for *not* removing President Trump's tweets or banning him from their services.[147]

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[144] *Id*. at 573 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-342 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-798 (1988).

[145] *Id*. at 568 (emphasis added).

[146] *Pruneyard*, 447 U.S. at 87.

[147] "For the first time, Twitter has added a fact-check label to a tweet by President Donald Trump that claimed mail-in election ballots would be fraudulent. But it stopped short of removing those tweets or others he posted earlier this month about a false murder accusation that generated huge criticism against the company for failing to remove them." Danielle Abril, *Will Twitter Ever Remove Trump's inflammatory Tweets?* FORTUNE (May 26, 2020, 7:54 PM) https://fortune.com/2020/05/26/twitter-president-trump-joe-scarborough-tweet/

If anything, disclaimers may actually be *less* effective online than offline. Consider the three labels Twitter has applied to President Trump's tweets (the first two of which provoked the issuance of his Executive Order).

This example[148] illustrates how difficult it is for a website to effectively "disavow any connection with the message."[149] It fails to communicates Twitter's disavowal while creating further ambiguity: it could be interpreted to mean there really *is* some problem with mail-in ballots.

Similarly, Twitter added a "(!) Manipulated Media" label just below to Trump's tweet of a video purporting to show CNN's anti-Trump bias.[150] Twitter's label is once again ambiguous: since Trump's video claims that CNN had manipulated the original footage, the "manipulated media" claim could be interpreted to refer to either Trump's video or CNN's. Although the label links to an "event" page explaining the controversy,[151] the warning works (to whatever degree it does) only if users actually click through to see the page. It is not obvious that the label is actually a link that will take them to a page with more information.

Finally, when Trump tweeted, in reference to Black Lives Matter protests, "when the looting starts, the shooting starts,"[152] Twitter did not merely add a label below the tweet. Instead, it hid the tweet behind a disclaimer. Clicking on "view" allows the user to view the original tweet:

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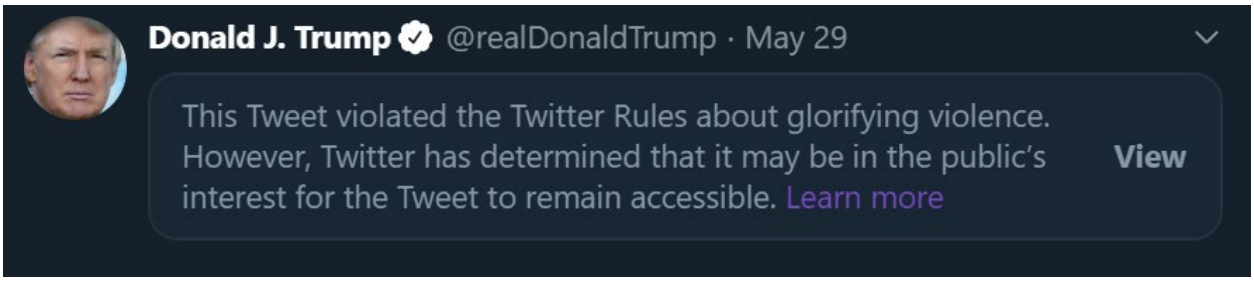
[148] @realDonaldTrump, TWITTER (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392.

[149] *Pruneyard*, 447 U.S. at 87.

[150] @realDonaldTrump, TWITTER, (June 18, 2020, 8:12 PM), https://twitter.com/realDonaldTrump/status/1273770669214490626.

[151] *Video being shared of CNN report on toddlers is doctored, journalists confirm*, Twitter (June 18, 2020), https://twitter.com/i/events/1273790055513903104.

[152] @realDonaldTrump, TWITTER (May 29, 2020, 12:53 AM), https://twitter.com/realDonaldTrump/status/1266231100780744704.



Such ambiguities are unavoidable given the difficulties of designing user interface in a medium optimized for 280 characters, with a minimum of distraction around Tweets. But no matter how clear they become, sites like Twitter will still be lambasted for choosing only to apply labels to such material, rather than to remove it completely.[153]

Further, adding such disclaimers invites further harassment and, potentially, lawsuits from scorned politicians — perhaps even more so than would simply taking down the material. For example, Twitter's decision to label (and hide) Trump's tweet about mail-in voting seems clearly to have provoked issuance of the Executive Order two days later — and the Order itself complains about the label.[154] In the end, the only truly effective way for Twitter to "expressly disavow any connection with [Trump's] message"[155] would be to ban him from their platform — precisely the kind of action the Executive Order and NTIA Petition aim to deter.

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[153] *See supra* note 147.

[154] Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34079 (June 2, 2020) ("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.").

[155] *Pruneyard*, 447 U.S. at 87.

4. The First Amendment Concerns are Compounded by the Placement of the Burden of Qualifying for Eligibility upon ICS Providers.

Today, Section 230(c)(1) draws a clear line that enables ICS providers and users to exercise their editorial discretion without bearing a heavy burden in defending their exercise of their First Amendment rights that that exercise is chilled by the threat of litigation. Specifically, if sued, they may seek to have a lawsuit against them dismissed under F.R.C.P. 12(b)(6) merely by showing that (1) that it is an ICS provider, (2) that the plaintiff seeks to hold them liable "as the publisher" of (3) of information that they are not responsible, even in part, for creating. While the defendant bears the burden of establishing these three things, it is a far lesser burden than they would bear if they had to litigate a motion to dismiss on the merits of the claim. More importantly, the plaintiff bears the initial burden of pleading facts that, if proven at trial, would suffice to prove both (a) their claim and (b) that the Section 230(c)(1) immunity does not apply.[156] While this burden is low, it is high enough to allow many such cases to be dismissed outright, because the plaintiff has simply failed even to allege facts that could show that the ICS provider or user is responsible, even in part, for the development of the content at issue.

The NTIA Petition places heavy new burdens upon ICS providers to justify their content moderation practices as a condition of claiming Section 230 immunity: Not only must they prove that their content moderation decisions were made in good faith (something (c)(1) plainly does not require, but which would, under NTIA's proposal, no longer protect content moderation), they would also have to satisfy a series of wholly new

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[156] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)*; Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

requirements to prove their good faith.[157] In *Speiser*, the Court declared: "The power to create presumptions is not a means of escape from constitutional restrictions."[158] Yet this is precisely what NTIA seeks to do. The Court will not allow such a circumventing of the First Amendment:

> ***Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion***. … The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized. ***The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens***.[159]

The NTIA petition will have precisely that effect: to force social media operators to steer as wide as possible of content moderation decisions that they fear might offend this administration, future administrations, state attorneys general, or private plaintiffs.

5. NTIA's Rewriting of Section 230 Would Facilitate Discrimination by the Government based on Both the Content at Issue and the Provider's Viewpoint, Under the Guise of Mandating "Neutrality."

NTIA's proposal, by contrast, *maximizes* the potential for viewpoint discrimination by the government in determining which companies qualify for the protections of Section 230. Consider just a few of the criteria an ICS provider would have to satisfy to establish its eligibility for immunity.

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[157] *NTIA Petition*, *supra* note 12, at 39.

[158] *Speiser*, 357 U.S. at 526.

[159] *Id*. at 525.

Requirement #1: <u>Not</u> Having a Viewpoint. NTIA proposes to exclude "presenting or prioritizing [user content] with a reasonably discernible viewpoint" from the definition of an ICS provider altogether,[160] making any ICS provider that the government decides *does* have such a viewpoint ineligible for any of Section 230's three immunities. This requirement is both far more draconian and more arbitrary than was the original Fairness Doctrine[161]as the FCC did *not* bar the broadcaster from having its own viewpoint.[162]

Requirement #2 Line-drawing Between Permitted and Disqualifying Content Moderation. Limiting the categories of content moderation that qualify for the (c)(2)(A) immunity (by reinterpreting "otherwise objectionable" very narrowly[163]) inevitably creates a difficult problem of line-drawing, in which the ICS provider would bear the burden of proof to establish proof that it "has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A)."[164] For example, all major social media platforms limit or bar the display of images of abortions being performed or aborted fetuses. Pro-life groups claim their content (or ads) have been "censored" for political reasons. Facebook and Twitter might argue that abortion imagery is "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials," but the

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[160] Petition at 42.

[161] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

[162] At most, the FCC's "political editorial rule required that when a broadcaster endorsed a particular political candidate, the broadcaster was required to provide the other qualified candidates for the same office (or their representatives) the opportunity to respond over the broadcaster's facilities." Congressional Research Service, Fairness Doctrine: History and Constitutional Issues, R40009, at 3 (2011), https://fas.org/sgp/crs/misc/R40009.pdf (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (2011)).

[163] *See infra* at 78 et seq.

[164] Petition at 39.

government may not agree. Similarly, where is the line between "excessively violent" content and the "hateful" content or conduct banned on major platforms?[165]

Requirement #3: Non-Discrimination. NTIA proposes that an ICS provider must show that its content moderation practices are not discriminatory to qualify for any Section 230 immunity — specifically, that it "does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict."[166] How could a provider prove yet another negative?

Even when a plaintiff makes a *prima facie* showing that content moderation has had politically disparate effects, this would not actually *prove* bias in moderation. Dennis Prager's *Wall Street Journal* op-ed[167] points to the empirical study conservatives have pointed to most often to prove their claims of Twitter's political bias. Richard Hanania, a Research Fellow at the Saltzman Institute of War and Peace Studies at Columbia University, assembled:

> a database of prominent, politically active users who are known to have been temporarily or permanently suspended from the platform. My results make it difficult to take claims of political neutrality seriously. Of 22 prominent, politically active individuals who are known to have been suspended since 2005 and who expressed a preference in the 2016 U.S. presidential election, 21 supported Donald Trump.[168]

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[165] Twitter will "allow limited sharing of hateful imagery, provided that it is not used to promote a terrorist or violent extremist group, that you mark this content as sensitive and don't target it at an individual." Twitter, Media Policy, https://help.twitter.com/en/rules-and-policies/media-policy (last visited Aug. 31, 2020).

[166] Petition at 39.

[167] Dennis Prager, *Don't Let Google Get Away With Censorship*, Wall St. J. (Aug. 6, 2019), https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175.

[168] Richard Hanania, *It Isn't your Imagination: Twitter Treats Conservatives More Harshly Than Liberals,* Quillette (Feb. 12, 2019), https://quillette.com/2019/02/12/it-isnt-your-imagination-twitter-treats-conservatives-more-harshly-than-liberals/.

Hanania clearly creates the impression that Twitter is anti-Trump. Nowhere does he (or those who cite him, including Prager) mention just who were among the accounts (43 in the total data set) of Trump supporters "censored" by Twitter. They include, for example, (1) the American Nazi Party; (2) the Traditionalist Worker Party, another neo-Nazi group; (3) "alt-right" leader Richard Spencer; (4) the National Policy Institute, the white supremacist group Spencer heads; (5) the League of the South, a neo-Confederate white supremacist group; (6) American Renaissance, a white supremacist online publication edited by (7) Jared Taylor; (8) the Proud Boys, a "men's rights" group founded by (9) Gavin McInnes and dedicated to promoting violence against their political opponents, (10) Alex Jones, America's leading conspiracy theorist, and publisher of (11) InfoWars; a series of people who have made careers out of spreading fake news including (12) Chuck Johnson and (13) James O'Keefe; "alt-right" personalities that repeatedly used the platform to attack other users, including (14) Milo Yiannopoulos and (15) Robert Stacy McCain; and (16) the Radix Journal, an alt-right publication founded by Spencer and dedicated to turning America into an all white "ethno-state," and so on.[169] While Prager's op-ed leaves readers of the Wall Street Journal with the impression that Hanania had proved systematic bias against ordinary conservatives like them, the truth is that Hanania made a list of users that elected Republican member of Congress would ever have identified with prior to 2016, and, one hopes, few would identify with now as "conservatives." More importantly, as Hanania notes in his database — but fails to mention in his *Quillette* article — for each of these users, Twitter had identified categories of violations of its terms of service, summarized by Hanania himself to

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[169] Richard Hanania, *Replication Data for Article on Social Media Censorship*, https://www.richardhanania.com/data (last visited Sept. 2, 2020).

include "Pro-Nazi tweets," "violent threats," "revenge porn," "anti-gay/racist slurs," "targeted abuse," *etc*.[170]

Did Twitter "discriminate" against conservatives simply because it blocked more accounts of Trump supporters than Clinton supporters? Clearly, Hanania's study does not prove that Twitter "discriminates," but under the NTIA's proposal it is Twitter that bears the burden of proof. How could it possibly disprove such claims? More importantly, how could it be assured, in advance of making content moderation decisions, that its decision-making would not be declared discriminatory after the fact?

By the same token, even if there were evidence that, say, social media service providers refused to carry ads purchased by Republican politicians at a higher rate than Democratic politicians (or refused to accept ad dollars to increase the reach of content those politicians had posted to ensure that it would be seen by people who would not have seen the "organic" posts), this disparate impact would not prove political bias, because it does not account for differences in the degree to which those ads complied with non-political requirements in the website's community standards. Similarly, it is impossible to prove political bias by showing that media outlets on the left and right are affected differently by changes to the algorithms that decide how to feature content, because those are not apples to apples comparisons: those outlets differ significantly in terms of their behavior. NewsGuard.com, a startup co-founded by Gordon Crovitz, former publisher of *The Wall Street Journal* and a lion of traditional conservative journalism, offers "detailed ratings of more than 5,800 news websites that account for 95% of online engagement with news" that

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[170] *Id.*

one can access easily alongside search results via a browser extension.[171] NewsGuard gives InfoWars a score of 25/100,[172] and GatewayPundit an even lower score: 20/100.[173] DiamondAndSilk.com ranks considerably higher: 52/100.[174] These outlets simply are not the same as serious journalistic outlets such as *The National Review*, *The Wall Street Journal* or *The Washington Post* — and it what might qualify as a "similarly situated" outlet is inherently subjective. That such outlets might be affected differently by content moderation and prioritization algorithms from serious media outlets hardly proves "discrimination" by any social media company.

Requirement #4: "Particularity" in Content Moderation Policies. Requiring companies to show that their policies were sufficiently granular to specify the grounds for moderating the content at issue in each new lawsuit would create a staggering burden. It will be impossible to describe all the reasons for moderating content while also keeping "community standards" documents short and digestible enough to serve their real purpose: informing users of the general principles on which the site makes content moderation decisions.

Requirement #5: Proving Motives for Content Moderation. As if all this were not difficult enough, NTIA would require ICS providers seeking, in each lawsuit, to qualify for the (c)(2)(A) immunity, to prove that their content moderation decision was not made on

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[171] The Internet Trust Tool, NewsGuard, https://www.newsguardtech.com/ (last visited Sep. 2, 2020).

[172] infowars.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/03/infowars-ENG-3-13x.pdf (last visited Sep. 2, 2020).

[173] thegatewaypundit.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/02/The-Gateway-Pundit-NewsGuard-Nutrition-Label.pdf (last visited Sep. 2, 2020).

[174] diamondandsilk.com, NewsGuard, https://www.newsguardtech.com/wp-content/uploads/2020/04/diamondandsilk.com-1.pdf (last visited Sep. 2, 2020).

"deceptive or pretextual grounds."[175] In short, an ICS provider would have to prove its motive — or rather, lack of ill motive — to justify its editorial discretion. If there is precedent for such an imposition on the First Amendment rights of a media entity of any kind, the NTIA does not cite it.

Requirement #6: Rights to Explanation & Appeals. Finally, NTIA would require an ICS provider to supply third parties "with timely notice describing with particularity [their] reasonable factual basis for the restriction of access and a meaningful opportunity to respond," absent exigent circumstances.[176] Thus, whenever the ICS provider claims the (c)(2)(A) immunity, they must defend not merely the adequacy of their system for providing explanation in general, but the particular explanation given in a particular case.

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Each of these six requirements would be void for vagueness, particularly because "a more stringent vagueness test should apply" to any that "interferes with the right of free speech."[177] As Justice Gorsuch recently declared, "the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power."[178] These requirements are so broad and require so much discretion in their

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[175] Petition at 39.

[176] The Petition's proposed regulation would require that a platform must "suppl[y] *the interactive computer service of the material* with timely notice describing with particularity the interactive computer service's reasonable factual basis for the restriction of access and a meaningful opportunity to respond..." Petition at 39-40. The only way to read this sentence that makes any sense is to assume that NTIA intended to require the ICS *provider* to provide the ICS *user* (which is also, in most circumstances, the "information content provider" defined by 230(f)(2)); in other words, it appears that they wrote "interactive computer service" when they meant "information content provider."

[177] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

[178] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018).

implementation that they invite lawmakers to apply them to disfavored speakers or platforms while giving them cover not to apply them to favored speakers or platforms.[179] Thus, the "Court has condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity.""[180] "It is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.'"[181] In that case, the Court recognized that "some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as 'political.'"[182] Under NTIA's proposal, both the FCC, in making rules, and judges, in applying them to determine eligibility for Section 230 immunity, would inevitably make decisions guided not by objective, workable standards, but by their own political views.

IV. It Is Not Section 230 but the First Amendment that Protects Social Media Providers, Like Other Media, from Being Sued for the Exercise of Their Editorial Discretion.

The premise of the NTIA Petition is that the rules it asks the FCC to promulgate will make it possible to sue social media providers for their content moderation practices. Just as

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[179] *Police Dept of City of Chicago v. Mosley*, 408 U.S. 92, 96-99 (1972).

[180] *Id*. at 97 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555-558 (1965); Staub v. City of Baxley, 355 U.S. 313, 321-325 (1958); *Saia* v. *New York*, 334 U.S. 558, 560-562 (1948)).

[181] *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

[182] *Id*.

the Executive Order explicitly demands enforcement of promises of neutrality,[183] NTIA argues:

> if interactive computer services' contractual representations about their own services cannot be enforced, interactive computer services cannot distinguish themselves. Consumers will not believe, nor should they believe, representations about online services. Thus, no service can credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns.[184]

This premise is false: even if the FCC had the statutory authority to issue the rules NTIA requests, forcing social media providers to "state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices"[185] would violate the First Amendment, as would attempting to enforce those promises via consumer protection, contract law or other means. What NTIA is complaining about is not, Section 230, but the Constitution. The category of "representations" about content moderation that *could*, perhaps, be enforced in court would be narrow and limited to claims that are quantifiable or otherwise verifiable without a court having to assess the way a social media company has exercised its editorial discretion.

The NTIA Petition focused on what it wants the FCC to do: make rules effectively rewriting Section 230. But the Executive Order that directed the NTIA to file this petition (and laying out the essential contours of its argument) also contemplates the FTC and state attorneys general using consumer protection law to declare unfair or deceptive "practices by entities covered by section 230 that restrict speech in ways that do not align with those

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[183] *See Executive Order*, supra note 82.

[184] Petition at 26.

[185] *Id*.

entities' public representations about those practices."[186] Without mentioning such enforcement directly, the NTIA proposal clearly contemplates it and intends to facilitate it. The proposal would create a four-prong test for assessing whether content moderation had been done in "good faith."[187] Among those is a requirement that the ICS provider "restricts access to or availability of material or bars or refuses service to any person ***consistent with publicly available terms of service or use that state plainly and with particularity*** the criteria the interactive computer service employs in its content-moderation practices."[188]

A. Community Standards Are Non-Commercial Speech, Unlike the Commercial Speech That Can Be Regulated by Consumer Protection Law.

The Federal Trade Commission has carefully grounded its deception authority in the distinction long drawn by the Supreme Court between commercial and non-commercial speech, as best articulated in *Central Hudson Gas Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Commercial speech is which "[does] no more than propose a commercial transaction."[189] In *Pittsburgh Press Co. v. Human Rel. Comm'n*, the Supreme Court upheld a local ban on referring to sex in the headings for employment ads. In ruling that the ads at issue were not non-commercial speech (which would have been fully protected by the First Amendment), it noted: "None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them

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[186] *Executive Order*, *supra* note 82, Section 4 (c).

[187] Petition at 39.

[188] *Id*.

[189] *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385 (1973) (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

criticize the Ordinance or the Commission's enforcement practices."[190] In other words, a central feature of commercial speech is that it is "devoid of expressions of opinions with respect to issues of social policy."[191] This is the distinction FTC Chairman Joe Simons was referring to when he told lawmakers that the issue of social media censorship is outside the FTC's remit because "our authority focuses on commercial speech, not political content curation."[192]

While "terms of service" for websites might count as commercial speech, the kind of statement made in "community standards" clearly "expresses a position on … matter[s] of social policy." Consider just a few such statements from Twitter's "rules":

> Violence: You may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence. Learn more about our violent threat and glorification of violence policies.
>
> Terrorism/violent extremism: You may not threaten or promote terrorism or violent extremism. …
>
> Abuse/harassment: You may not engage in the targeted harassment of someone, or incite other people to do so. This includes wishing or hoping that someone experiences physical harm.
>
> Hateful conduct: You may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, caste, sexual

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[190] *Id*. at 385.

[191] The Constitution of the United States of America, Analysis and Interpretation, Prepared by the Congressional Research Service, Library of Congress (June 28, 2020) Page 1248 https://books.google.com/books?id=kAAohNvVik8C&pg=PA1248&lpg=PA1248&dq=%22devoid+of+expressions+of+opinions+with+respect+to+issues+of+social+policy%22&source=bl&ots=Ftv1KrxXrO&sig=ACfU3U0kK1Hj2fil69UlwwZ7Rr6vPNzzcQ&hl=en&sa=X&ved=2ahUKEwj_v-WA3cPrAhWej3IE

available at *https://www.law.cornell.edu/constitution-conan/amendment-1/commercial-speech.*

[192] Leah Nylen, *Trump Aides Interviewing Replacement for Embattled FTC* Chair, POLITICO(August 28, 2020, 02:28 PM), *available at* https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479.

> orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.[193]

Each of these statements clearly "expresses a position on … a matter of social policy,"[194] and therefore is clearly non-commercial speech that merits the full protection of the First Amendment under the exacting standards of strict scrutiny. ""If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[195]

B. The First Amendment Does Not Permit Social Media Providers to Be Sued for "Violating" their Current Terms of Service, Community Standards, or Other Statements About Content Moderation.

In 2004, when MoveOn.org and Common Cause asked the FTC to proscribe Fox News' use of the slogan "Fair and Balanced" as a deceptive trade practice.[196] The Petition acknowledged that Fox News had "no obligation whatsoever, under any law, actually to present a 'fair' or 'balanced' presentation of the news,"[197] but argued: "What Fox News is not free to do, however, is to advertise its news programming—a service it offers to consumers in competition with other networks, both broadcast and cable—in a manner that is blatantly

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[193] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

[194] *Pittsburgh Press*, 413 U.S. at 385.

[195] *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[196] Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act, MoveOn.org and Common Cause (July 19, 2004), https://web.archive.org/web/20040724155405/http://cdn.moveon.org/content/pdfs/ftc_filing.pdf

[197] *Id*. at 2.

and grossly false and misleading."[198] FTC Chairman Tim Muris (a Bush appointee) responded pithily: "I am not aware of any instance in which the [FTC] has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency."[199]

Deception claims always involve comparing marketing claims against conduct.[200] Muris meant that, in this case, the nature of the claims (general claims of fairness) meant that their accuracy could not be assessed without the FTC sitting in judgment of how Fox News exercised its editorial discretion. The "Fair and Balanced" claim was not, otherwise, verifiable — which is to say that it was not *objectively* verifiable.

PragerU attempted to use the same line of argument against YouTube. The Ninth Circuit recently dismissed their deceptive marketing claims. Despite having over 2.52 million subscribers and more than a billion views, this controversialist right-wing producer[201] of "5-minute videos on things ranging from history and economics to science and happiness," sued YouTube for "unlawfully censoring its educational videos and discriminating against its right to freedom of speech."[202] Specifically, Dennis Prager alleged[203] that roughly a sixth of the

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[198] *Id*. at 3.

[199] Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris.

[200] Fed. Trade Comm'n, FTC Policy Statement on Deception, at 1 (Oct. 14, 1983) (*Deception Statement*).

[201] PragerU, YOUTUBE, https://www.youtube.com/user/PragerUniversity/about (last visited July 26, 2020).

[202] *PragerU Takes Legal Action Against Google and YouTube for Discrimination*, PragerU (2020), https://www.prageru.com/press-release/prageru-takes-legal-action-against-google-and-youtube-for-discrimination/.

[203] Dennis Prager, *Don't Let Google Get Away With Censorship*, The Wall Street Journal (Aug. 6, 2019), https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175.

site's videos had been flagged for YouTube's Restricted Mode,[204] an opt-in feature that allows parents, schools and libraries to restrict access to potentially sensitive (and is turned on by fewer than 1.5% of YouTube users). After dismissing PragerU's claims that YouTube was a state actor denied First Amendment protection, the Ninth Circuit ruled:

> YouTube's braggadocio about its commitment to free speech constitutes ***opinions*** that are not subject to the Lanham Act. Lofty but vague statements like "everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories" or that YouTube believes that "people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities" are classic, non-actionable opinions or puffery. Similarly, YouTube's statements that the platform will "help [one] grow," "discover what works best," and "giv[e] [one] tools, insights and best practices" for using YouTube's products are ***impervious to being "quantifiable," and thus are non-actionable "puffery."*** The district court correctly dismissed the Lanham Act claim.[205]

Roughly similar to the FTC's deception authority, the Lanham Act requires proof that (1) a provider of goods or services made a "false or misleading representation of fact,"[206] which (2) is "likely to cause confusion" or deceive the general public about the product.[207] Puffery fails both requirements because it "is not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact."[208] The FTC's bedrock 1983 Deception Policy Statement declares that the "Commission generally

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[204] Your content & Restricted Mode. YouTube Help (2020), https://support.google.com/youtube/answer/7354993?hl=en.

[205] *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) (internal citations omitted).

[206] 15 U.S.C. § 1125 (a)(1).

[207] 15 U.S.C. § 1125 (a)(1)(A).

[208] *Coastal Abstract Service v. First Amer. Title*, 173 F.3d 725, 731 (9th Cir. 1998).

will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously."[209]

There is simply no way social media services can be sued under either the FTC Act (or state baby FTC acts) or the Lanham Acts for the kinds of claims they make today about their content moderation practices. Twitter CEO Jack Dorsey said this in Congressional testimony in 2018: "Twitter does not use political ideology to make any decisions, whether related to ranking content on our service or how we enforce our rules."[210] How is this claim any less "impervious to being 'quantifiable'" than YouTube's claims?[211]

Moreover, "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."[212] Thus, isolated statements about neutrality or political bias (*e.g.*, in Congressional testimony) must be considered in the context of the other statements companies make in their community standards, which broadly reserve discretion to remove content or users. Furthermore, the FTC would have to establish the materiality of claims, *i.e.*, that an "act or practice is likely to affect the consumer's conduct or decision with

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[209] *Deception Statement, supra* note 200, at 4. The Commission added: "Some exaggerated claims, however, may be taken seriously by consumers and are actionable." But the Commission set an exceptionally high bar for such claims:

> For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated: Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae.

Id.

[210] United States House Committee on Energy and Commerce, *Testimony of Jack Dorsey* (September 5, 2018) *available at* https://d3i6fh83elv35t.cloudfront.net/static/2018/09/Dorsey.pdf

[211] *Prager*, 951 F.3d at 1000.

[212] *Deception Statement, supra* note 200, at 3.

regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[213] In the case of statements made in Congressional testimony or in any other format besides a traditional advertisement, the Commission could not simply presume that the statement was material.[214] Instead, the Commission would have to prove that consumers would have acted differently but for the deception.

C. The First Amendment Does Not Permit Social Media Providers to Be Compelled to Detail the Criteria for their Content Moderation Decisions.

Perhaps recognizing that the current terms of service and community standards issued by social media services do not create legally enforceable obligations regarding content moderation practices, NTIA seeks to compel them, as a condition of claiming immunity under Section 230, to "state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices."[215] The First Amendment will not permit the FCC (or Congress) to compel social media services to be more specific in describing their editorial practices.

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[213] *Id.* at 1.

[214] As the DPS notes, "the Commission presumes that express claims are material. As the Supreme Court stated recently, '[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.'" *Id*. at 5 (quoting Central Hudson, 447 U.S. at 567)).

[215] Petition at 39.

1. The FCC's Broadband Transparency Mandates Do Not Implicate the First Amendment the Way NTIA's Proposed Mandate Would.

The NTIA's proposed disclosure requirement is modeled on an analogous disclosure requirement imposed on Broadband Internet Access Service (BIAS) providers under the FCC's 2010 and 2015 Open Internet Order to provide "sufficient for consumers to make informed choices" about their BIAS service.[216] The FTC updated and expanded that requirement in its 2018 Restoring Internet Freedom Order,[217] and explained that, because the FCC had repealed its own "conduct" rules, the transparency rule would become the primary hook for addressing "open Internet" concerns in the future: "By restoring authority to the FTC to take action against deceptive ISP conduct, reclassification empowers the expert consumer protection agency to exercise the authority granted to them by Congress if ISPs fail to live up to their word and thereby harm consumers."[218]

FCC Commissioner Brendan Carr explicitly invokes this model in proposing what he calls "A Conservative Path Forward on Big Tech."[219] After complaining that "[a] handful of corporations with state-like influence now shape everything from the information we consume to the places where we shop," and that "Big Tech" censors conservatives, Carr says:

> There is a "light-touch" solution here. At the FCC, we require Internet service providers (ISPs) to comply with a transparency rule that provides a good baseline for Big Tech.
>
> Under this rule, ISPs must provide detailed disclosures about any practices that would shape Internet traffic—from blocking to prioritizing or

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[216] See 47 C.F.R. § 8.3; see also *Open Internet Order* and *RIFO*.

[217] *RIFO* ¶ 220.

[218] *RIFO* ¶ 244.

[219] Brendan Carr, *A Conservative Path Forward on Big Tech*, NEWSWEEK (July 27, 2020, 7:30 AM), *available at* https://www.newsweek.com/conservative-path-forward-big-tech-opinion-1520375.

> discriminating against content. Any violations of those disclosures are enforced by the Federal Trade Commission (FTC). The FCC and FTC should apply that same approach to Big Tech. This would ensure that all Internet users, from entrepreneurs to small businesses, have the information they need to make informed choices.[220]

In fact, the FCC's disclosure mandates for BIAS providers are fundamentally different from the disclosure mandates Carr and the NTIA want the FCC to impose on social media services.[221] The FCC's transparency rule has never compelled broadband providers to describe how they exercise their editorial discretion because it applies only to those providers that, by definition, hold themselves out as *not* exercising editorial discretion.

The FCC has been through three rounds of litigation over its "Open Internet" Orders, and, although the D.C. Circuit has blocked some of its claims of authority and struck down some of its conduct rules, the court has never struck down the transparency rule. Verizon did not challenge the 2010 Order's version of that rule.[222] The D.C. Circuit upheld the reissuance of that rule in the 2015 Order in its *US Telecom I* as a reasonable exercise of the Commission's claimed authority under Section 706.[223] The FCC's transparency rule was upheld in D.C. Circuit's decision to uphold *RIFO*.[224] But the key decision here is actually *US Telecom II*, in which the D.C. Circuit denied en banc rehearing of the *US Telecom I* panel

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[220] *Id*.

[221] In any event, Carr has no business opining on how another federal agency should wield its authority, especially given that he clearly does not understand *why* the FTC has *never* sought to bring a deception claim predicated on alleged inconsistency between a media company's exercise of editorial discretion and its public statements about its editorial practices. *See infra* at 58-62.

[222] "Verizon does not contend that these [transparency] rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would. Also, because Verizon does not direct its First Amendment or Takings Clause claims against the disclosure obligations," *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 659 (D.C. Cir. 2014).

[223] 825 F.3d at 733.

[224] *Mozilla*, 940 F.3d at 47.

decision. Then-Judge Kavanaugh penned a lengthy dissent, arguing that the 2015 Order violated the First Amendment. Judges Srinivasan and Tatel, authors of the *US Telecom I* panel decision, responded:

> In particular, "[b]roadband providers" subject to the rule "represent that their services allow Internet end users to access all or substantially all content on the Internet, *without alteration, blocking, or editorial intervention*." *[2015 Order]* ¶ 549 (emphasis added). Customers, "in turn, expect that they can obtain access to all content available on the Internet, *without the editorial intervention of their broadband provide*." *Id.* (emphasis added). Therefore, as the panel decision held and the agency has confirmed, the net neutrality rule applies only to "those broadband providers that hold themselves out as neutral, indiscriminate conduits" to any internet content of a subscriber's own choosing. *U.S. Telecom Ass'n*, 825 F.3d at 743…
>
> The upshot of the FCC's Order therefore is to "fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet" without editorial intervention. *Id.* ¶¶ 17, 549." *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 389 (D.C. Cir. 2017).[225]

Obviously, this situation is completely different from that of social media operators. The mere fact that Twitter, Facebook and other such sites have lengthy "community standards" proves the point. Contrast what Twitter says about its service —

> Twitter's purpose is to serve the public conversation. Violence, harassment and other similar types of behavior discourage people from expressing themselves, and ultimately diminish the value of global public conversation. Our rules are to ensure all people can participate in the public conversation freely and safely.[226]

— with what Comcast says:

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[225] 855 F.3d at 388-89.

[226] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

> Comcast does not discriminate against lawful Internet content, applications, services, or non-harmful devices … Comcast does not block or otherwise prevent end user access to lawful content, applications, services, or non-harmful devices. … Comcast does not degrade or impair access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device.[227]

Twitter discriminates, blocks and "throttles" while Comcast does not. *US Telecom II* makes clear that, if it wanted to, Comcast could offer an edited service comparable to Twitter's — and, in so doing, would remove itself from the scope of the FCC's "Open Internet" rules because it would no longer qualify as a "BIAS" provider:

> While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of "editorial intervention." [2015 Order] ¶ 549. For instance, Alamo Broadband, the lone broadband provider that raises a First Amendment challenge to the rule, posits the example of an ISP wishing to provide access solely to "family friendly websites." Alamo Pet. Reh'g 5. ***Such an ISP, as long as it represents itself as engaging in editorial intervention of that kind, would fall outside the rule***. … The Order thus specifies that ***an ISP remains "free to offer 'edited' services" without becoming subject to the rule's requirements***. [2015] Order ¶ 556.
>
> That would be true of an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content (e.g., family friendly websites). It would also be true of an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP's commercial interests. ***An ISP would need to make adequately clear its intention to provide "edited services" of that kind, id. ¶ 556, so as to avoid giving consumers a mistaken impression that they would enjoy indiscriminate "access to all content available on the Internet, without the***

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[227] Xfinity, Xfinity Internet Broadband Disclosures https://www.xfinity.com/policies/internet-broadband-disclosures (last visited Aug. 31, 2020).

> ***editorial intervention of their broadband provider***," *id.* ¶ 549. It would not be enough under the Order, for instance, for "consumer permission" to be "buried in a service plan—the threats of consumer deception and confusion are simply too great." *Id.* ¶ 19; *see id.* ¶ 129.[228]

US Telecom II simply recognizes that the First Amendment permits the government to compel a company that does *not* engage in editorial discretion to "disclose accurate information regarding the network management practices, performance, and commercial terms of its [unedited] services sufficient for consumers to make informed choices regarding use of such services."[229] The decision in no way supports the NTIA's proposal that media companies that *do* engage in editorial discretion may be compelled to "state plainly and with particularity the criteria" they employ in exercising their editorial discretion.[230]

2. The False Analogy between "Net Neutrality" and Regulating the Fairness of Social Media.

After strenuously opposing net neutrality regulation for over a decade, many conservatives have now contorted themselves into ideological pretzels to argue that, while "net neutrality" regulation is outrageous government interference with the free market, imposing neutrality on social media providers is vital to prevent "censorship" (of, supposedly, conservatives). For example, the American Principles Project (once a fierce opponent of neutrality mandates, but now a staunch advocate of them) attacks the Internet Association, which supported the FCC's 2015 net neutrality rules, for opposing the imposition of neutrality regulation upon its members (social media providers) now:

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[228] 855 F.3d at 389-90 (emphasis added).

[229] 47 C.F.R. § 8.3.

[230] Petition at 39.

> But now these same market-dominant Big Tech companies are arguing in favor of censorship and viewpoint discrimination? If we are to rely on these companies to disseminate information, then they must be governed by — or at least strongly incentivized to play by — a set of rules that promote free speech and expression.[231]

We have already explained the crucial legal difference between BIAS and social media in the representations they make to consumers.[232] But it is important to understand *why* these services make such completely different representations, and why this is simply the market at work, not proof that they are "market dominant." BIAS, by definition, "provides the capability to transmit data to and receive data from all or substantially all Internet endpoints…."[233] As such, BIAS operates at a lower "layer" of the Internet[234] than the "application layer," the highest layer, at which social media, like other websites, are accessed by users.[235] Blocking and throttling of content at lower layers are problematic in ways that they are not at the application layer. Thus, as the *RIFO* noted, "There is industry near-consensus that end user[s] . . . should not be subject to blocking, substantial degrading, throttling, or unreasonable discrimination by broadband ISPs. This consensus is widely reflected in the service terms that broadband ISPs furnish to their end user subscribers."[236]

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[231] APP Comments, *supra* note 113, at 4.

[232] *See supra* at 59.

[233] *RIFO* ¶ 176.

[234] 2015 Order ¶ 378 ("engineers view the Internet in terms of network 'layers' that perform distinct functions. Each network layer provides services to the layer above it. Thus the lower layers, including those that provide transmission and routing of packets, do not rely on the services provided by the higher layers.")

[235] "[The Applications] top-of-stack host layer is familiar to end users because it's home to Application Programming Interfaces (API) that allow resource sharing, remote file access, and more. It's where you'll find web browsers and apps like email clients and social media sites." Dale Norris, *The OSI Model Explained – 2020 update*, (May 2, 2020), *available at* https://www.extrahop.com/company/blog/2019/the-osi-model-explained/.

[236] *RIFO* n. 505.

By contrast, just the opposite is true among social media: *all* major social media services retain broad discretion to remove objectionable content.[237] The reason is not because "Big Tech" services have "liberal bias," but because social media would be unusable without significant content moderation. Social media services that claim to perform only limited content moderation have attracted only minimal audiences. Parler, a relatively new social media platform, bills itself as the "free speech alternative" to Twitter, but even it has established its own content moderation rules and reserved the right to remove any content for any reason at any time.[238] Sites like 8kun (formerly 8chan) and 4chan, which claim to do even less moderation, have been favored by white supremacists and used to promote mass shootings, among other forms of content all but a tiny minority of Americans would

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[237] *See, e.g.*, Pinterest, Community Guidelines, https://policy.pinterest.com/en/community-guidelines (last visited August 31, 2020). ("Pinterest isn't a place for antagonistic, explicit, false or misleading, harmful, hateful, or violent content or behavior. We may remove, limit, or block the distribution of such content and the accounts, individuals, groups and domains that create or spread it based on how much harm it poses."); *See, e.g.,* Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited August 31, 2020). Facebook, Community Standards, https://www.facebook.com/communitystandards/false_news (last visited Aug. 31, 2020). ("Our commitment to expression is paramount, but we recognize the internet creates new and increased opportunities for abuse. For these reasons, when we limit expression, we do it in service of one or more of the following values: Authenticity, Safety, Privacy, Dignity.)

[238] Parler, User Agreement, #9 https://news.parler.com/user-agreement, (last visited Aug. 31, 2020). ("Parler may remove any content and terminate your access to the Services at any time and for any reason to the extent Parler reasonably believes (a) you have violated these Terms or Parler's Community Guidelines (b) you create risk or possible legal exposure for Parler…"). Notably, Parler does not limit "risk" to legal risks, so the service retains broad discretion to remove content or users for effectively any reason.

doubtless find reprehensible.[239] Even a quick glance at the competitive metrics of such websites makes it clear that less active content moderation tends to attract fewer users.[240]

This Commission is, in significant part, to blame for increasing confusion on this these distinctions, especially among conservatives. APP notes, to justify its argument for imposing neutrality regulation upon social media: "The Commission itself has noted the reality of viewpoint suppression by market dominant tech," and proceeds to quote from the *RIFO*: "If anything, recent evidence suggests that hosting services, social media platforms, edge providers, and other providers of virtual Internet infrastructure are more likely to block content on viewpoint grounds."[241] The Commission had no business commenting on services outside its jurisdiction, and did not need to do so to justify repealing the 2015 Order. It should take care not to further compound this confusion.

3. Compelling Media Providers to Describe How They Exercise their Editorial Discretion Violates Their First Amendment Rights.

Other than the FCC's broadband transparency requirements, the Petition does not provide any other example in which the government has required private parties to disclose

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[239] Julia Carrie Wong, *8chan: the far-right website linked to the rise in hate crimes*, THE GUARDIAN (Aug. 4, 2019, 10:36 PM), https://www.theguardian.com/technology/2019/aug/04/mass-shootings-el-paso-texas-dayton-ohio-8chan-far-right-website; Gialuca Mezzofiore, Donnie O' Sullivan, *El Paso Mass Shooting at Least the Third Atrocity Linked 8chan this year*, CNN BUSINESS (Aug. 5, 2019, 7:43 AM), https://www.cnn.com/2019/08/04/business/el-paso-shooting-8chan-biz/index.html.

[240] Alexa, Statistics for 4chan, https://www.alexa.com/siteinfo/4chan.org (last visited Aug. 31, 2020); Rachel Lerman, *The conservative alternative to Twitter wants to be a place for free speech for all. It turns out, rules still apply*, THE WASHINGTON POST,(July 15, 2020 10:48 AM), *available at* https://www.washingtonpost.com/technology/2020/07/15/parler-conservative-twitter-alternative/ (2.8 million users total, as of July 2020).

[241] *RIFO* ¶ 265.

how they exercise their editorial discretion — and for good reason: such an idea is so obviously offensive to the First Amendment, it appears to be without precedent.

Does anyone seriously believe that the First Amendment would — whether through direct mandate or as the condition of tax exemption, subsidy or some other benefit — permit the government to require book publishers to publish detailed summaries of the policies by which they decide which books to publish, or newspapers to explain how they screen letters to the editor, or talk radio shows to explain which listener calls they put on the air, or TV news shows to explain which guests they book? Even the FCC's original Fairness Doctrine for broadcasting did not go this far.

Such disclosure mandates offend the First Amendment for at least three reasons. First, community standards and terms of service are themselves non-commercial speech.[242] Deciding how to craft them is a form of editorial discretion protected by the First Amendment, and forcing changes in how they are written is itself a form of compelled speech — no different from forcing a social media company's other statements about conduct it finds objectionable on, *or off*, its platform. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of Blind*, 487 U.S. 781, 795 (1988). In that case, the Court struck down a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. The Court declared that the

[242] *See supra* at 48 *et seq*.

"the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[243]

Second, forcing a social media site to attempt to articulate *all* of the criteria for its content moderation practices while also requiring those criteria to be as specific as possible will necessarily constrain what is permitted in the underlying exercise of editorial discretion. Community standards and terms of service are necessarily overly reductive; they cannot possibly anticipate every scenario. If the Internet has proven anything, it is that there is simply no limit to human creativity in finding ways to be offensive in what we say and do in in interacting with other human beings online. It is impossible to codify "plainly and with particularity" all of the reasons why online content and conduct may undermine Twitter's mission to "serve the public conversation."[244]

Third, even if NTIA argued that the criteria it seeks to compel social media providers to disclose are statements of fact (about how they conduct content moderation) rather than statements of opinion, the *Riley* Court explicitly rejected such a distinction. Citing cases in which the court had struck down compelled speech requirements, such as displaying the slogan "Live Free or Die" on a license plate,[245] the Court noted:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state

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[243] *Id*. at 797 (citing *Miami Herald*, 418 U.S. at 256).

[244] *See* Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 31, 2020).

[245] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

> during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.[246]

The same is true here: the First Amendment protects Twitter's right to be as specific, or as vague, as it wants in defining what constitutes "harassment," "hateful conduct," "violent threats," "glorification of violence," *etc*.

Finally, the Petition makes clear that the goal of mandating transparency about content moderation practices is to chill certain content moderation practices. If Facebook had to specifically identify all the conspiracy theories and false claims it considers to violate its "False News" policy,[247] the company would expose itself to even greater attack from those who have embraced, or normalized, such claims. The company would find itself in the same situation as the professional fundraisers whose speech was at issue in *Riley*:

> in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone. Again, the predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.[248]

The NTIA petition would have the same effect: by forcing social media companies to be extremely specific about their content moderation practices, NTIA would open them to further attack by those who feel persecuted, who would, metaphorically speaking, "hang up

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[246] *Riley*, 487 U.S. at 797-98.

[247] Facebook, False News, Community Standards, https://www.facebook.com/communitystandards/false_news (last visited Aug. 31, 2020).

[248] 487 U.S. at 799.

the phone" on "Big Tech." If anything, the constitutional problem here would be far greater, since the effect of NTIA's proposed regulations would be not merely to force social media operators to quit the market but to change the very nature of the editorial decisions they make, which are themselves a category of "speech" protected by the First Amendment.

D. The Circumstances in Which the First Amendment Permits Media Providers To be Sued for Violating Promises Are So Narrow as to Be of Little Relevance to NTIA's Complaints.

Even if the First Amendment permitted social media providers to be compelled to describe their content moderation practices with "particularity," or if they simply chose to be considerably more specific in describing the criteria underlying those practices, it is unlikely that the First Amendment would permit liability to be imposed upon them for are ultimately questions of how they exercise their editorial discretion, except in circumstances that are likely to be so narrow as to have little to do with NTIA's complaints. Thus, NTIA's demand that "representations about … [digital services] services [must] be enforced"[249] is unlikely to be satisfied regardless how Section 230 might be rewritten by Congress or, in effect, the FCC through the rulemaking NTIA proposes.

1. Section 230(c)(1) Protects Against Claims Based on the Exercise of Their Editorial Discretion, but not Based on Their Business Practices.

In *Mazur v. eBay*, Section 230(c)(1) did not protect eBay from liability (and the First Amendment was not even raised) when a plaintiff alleged that they had been deceived by eBay's marketing claims that bids made through the site's "Live Auctions" tool (administered

[249] Petition at 26; *see also supra* at 51.

by a third party to place bids at auctions in real time) were "were 'safe' and involved 'floor bidders' and 'international' auction houses."[250] The court rejected eBay's claims that it had made clear that "it: 1) only provides a venue; 2) is not involved in the actual transaction between buyer and seller; and 3) does not guarantee any of the goods offered in any auction…" and concluded that "these statements, as a whole, do not undermine eBay's representation that Live Auctions are safe."[251] The court concluded:

> In *Prickett* and *Barnes* CDA immunity was established because of a failure to verify the accuracy of a listing or the failure to remove unauthorized profiles. Since both acts fell squarely within the publisher's editorial function, the CDA was implicated. The case at bar, however, is opposite. eBay did not make assurances of accuracy or promise to remove unauthorized auctioneers. Instead, eBay promised that Live Auctions were safe. Though eBay styles safety as a screening function whereby eBay is responsible for the screening of safe auctioneers, this court is unconvinced. eBay's statement regarding safety affects and creates an expectation regarding the procedures and manner in which the auction is conducted and consequently goes beyond traditional editorial discretion.[252]

That last line explains why this case was different from the 2004 complaint against Fox News.[253] In *Mazur*, the conduct against which the company's marketing claims were compared was *not* the exercise of editorial discretion, but the way eBay structured a commercial service (making bids at live auctions at the direction of users online). For the same reasons, Section 230(c)(1) has not prevented the FTC (or state AGs) from bringing deception cases against social media services that fail to live up to their promises regarding, for example, privacy and data security: these claims can be assessed with reference to the

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[250] *Mazur v. Bay Inc.*, No. C 07-03967 MHP (N.D. Cal. Mar. 3, 2008).

[251] *Id*. at 14.

[252] *Id*. at *16-17.

[253] *See supra* at 59.

companies' *business* practices, not the way they exercise their editorial discretion. Section 230 does not protect a website from claiming it provides a certain level of data security, but failing to deliver on that claim.

2. Likewise, the First Amendment Protect Against Claims Based on the Exercise of Editorial Discretion, but not Based on Their Business Practices.

The First Amendment ensures that book publishers have the right to decide which books to print; producers for television and radio have the right to decide which guests to put on their shows, which calls to take from listeners, when to cut them off; and so on. But the First Amendment would *not* protect these publishers from suit if, say, a book publisher lied about whether its books were printed in the United States, whether the paper had been printed using child labor, whether the printing process was carbon-neutral, etc. Like eBay's decisions about how to configure its service, these are not aspects of "traditional editorial discretion."

It is certainly possible to imagine hypothetical cases where that line becomes blurry. Suppose that a group of leading book publishers decided, in response to public concerns about structural racism and sexism in media, decided to start publishing "transparency reports" (modeled on those pioneered by tech companies like Google) detailing the rates at which they accepted manuscripts for publication based on categories of racial groups, gender, sexual orientation, etc., how much they paid authors in each category on average, how much they spent on marketing, *etc*. Leaked documents revealed that one publisher had manipulated its statistics to make its offerings appear artificially diverse. Could that publisher be sued for deceptive marketing? While it might be difficult to establish the

materiality of such claims,[254] the First Amendment likely would not bar such a suit because, unlike the Fox News example, there *would* be "way to evaluate [the complaint] without evaluating the content of the [speech] at issue."[255]

Suppose that, instead of making general claims to be "Fair and Balanced," Fox News began publishing data summarizing the partisan affiliations of its guests, and it later turned out that those data appeared were falsified to make the network appear more "balanced" than it really was. Could Fox News be sued for deceptive marketing? Perhaps, if the FCC could show such claims were "material" in convincing consumers to consumer Fox News' products. The point of this hypothetical is that the FTC (or another plaintiff) could objectively prove the falsity of the claim *because it is measurable*. Thus, the FTC could avoid the problem Muris noted in dismissing real-world complaints against Fox: the impossibility of judging Fox's description of editorial practices from judging Fox's editorial practices themselves.[256]

What kind of objectively provable claims might be made by a social media company? If a company claimed that no human monitors were involved in selecting stories to appear in a "Trending Topics" box — or removing stories from that box — and this claim turned out to be false, this might be grounds for suit, depending on the "net impression" given by a company's statements overall (and, again, the FTC or a state AG would still have to establish the materiality of such claims). Such cases would necessarily involve objectively verifiable

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[254] *See supra* at notes 213 & 214 and associated text.

[255] *Cf. supra* 199.

[256] *See supra* at 46 and note 199.

facts,[257] and would not involve the government in second-guessing non-commercial speech decisions involving which content to publish.[258]

3. Promises Regarding Content Moderation Can Be Enforced Via Promissory Estoppel Only in Exceptionally Narrow Circumstances.

Only under exceptionally narrow circumstances have courts ruled that a website may be sued for failing to live up to a promise regarding content moderation — and properly so. In *Barnes v. Yahoo!*, Section 230(c)(1) immunity did not bar a claim, based on promissory estoppel (a branch of contract law) that Yahoo! broke a promise to one of its users, but the facts of that case are easily distinguishable from the kind of enforcement of terms of service and community standards NTIA proposes — and not merely because *Barnes* involved a failure to remove content, rather than removing too much content. NTIA cites the case five times but it in no way supports NTIA's proposed approach.

Cecilia Barnes complained to Yahoo! that her ex-boyfriend had posted revenge porn on Yahoo! After being ignored twice, the company's director of communications promised Barnes "that she would 'personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.'"[259] Yet Yahoo! failed to take down the material, so Barnes sued. Section 230(c)(1) did not bar Barnes' suit because:

> Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from

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[257] *See supra* note 205 and associated text at 55.

[258] *See supra* note 192 and associated text at 53.

[259] *Id*. at 562.

> the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle."[260]

But, as the court explained, promissory estoppel may be invoked only in exceptionally narrow circumstances:

> as a matter of contract law, the promise must "be as clear and well defined as a promise that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration." 1 Williston & Lord, supra § 8.7. "The formation of a contract," indeed, "requires a meeting of the minds of the parties, a standard that is measured by the objective manifestations of intent by both parties to bind themselves to an agreement." Rick Franklin Corp., 140 P.3d at 1140; see also Cosgrove v. Bartolotta, 150 F.3d 729, 733 (7th Cir.1998) (noting that if "[a] promise [ ] is vague and hedged about with conditions .... [the promisee] cannot plead promissory estoppel."). Thus ***a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.***[261]

Thus, a promissory estoppel claim is even harder to establish than a deception claim: in a deception claim, it is not necessary to prove a "meeting of the minds," only that a company made a claim (a) upon which consumers reasonably relied (making it "material") in deciding whether to use a product or service that was (b) false.[262] "General" policies would not suffice to establish an "intention to be bound." Social media Terms of Service and Community Standards policies are for leading social media services are, by necessity "vague and hedged about with conditions" — because they must account for an vast range of

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[260] 565 F.3d 560, 572 (9th Cir. 2009),

[261] *Id*. at 572.

[262] *Deception Statement, supra* note 200, at 4

scenarios that cannot be reduced to specific statements of what speech or conduct are and are not allowed.

Current case law allows plaintiffs to overcome the (c)(1) immunity based on promissory estoppel, but an actionable claim, like that in *Barnes*, would require a similarly specific fact pattern in which clear promises were made to specific users, and users relied upon those promises to their detriment. Changing Section 230 would do nothing to make a promissory estoppel case easier to bring or win.

V. NTIA's Interpretations Would Turn Section 230 on Its Head, Forcing Websites to Bear a Heavy Burden in Defending Their Exercise of Editorial Discretion Each Time They Are Sued for Content Moderation Decisions

Congress wrote a statute that broadly protects digital media publishers in exercising their editorial discretion, principally by saying (in (c)(1)) that it simply does not matter whether they are classified as publishers — because they may not be held liable as such. In this way, Congress overruled the trial court decisions in *Cubby, Inc. v. CompuServe Inc.*,[263] and Stratton *Oakmont, Inc. v. Prodigy Servs. Co.*[264]

NTIA seeks to have the FCC rewrite that statute to achieve precisely the opposite effect: "forcing websites to face death by ten thousand duck-bites."[265] But as the Supreme Court has noted, "immunity means more than just immunity from liability; it means

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[263] 776 F.Supp. 135 (S.D.N.Y. 1991). Unlike *Stratton Oakmont*, the *Cubby* court found no liability, but made clear that this finding depended on the fact that CompuServe had not been provided adequate notice of the defamatory content, thus implying (strongly) that such notice *would* trigger a takedown obligation under a theory of distributor liability.

[264] 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

[265] *Roommates*, supra note 125, 521 F.3d at 1174.

immunity from the burdens of defending a suit[.]"[266] If the NTIA's reinterpretations of Section 230 became law, websites would bear an impossible burden of defending their content moderation practices.

A. Courts Have Interpreted 230(c)(1) Correctly: ICS Providers May Not be Held Liable as Publishers of Content They Do Not Create.

Perhaps the most nonsensical part of the NTIA petition — after its complete misstatement of the meaning of *Packingham*[267] — is the proposal that the Commission reinterpret Subsection (c)(1) as follows:

> An interactive computer service is not being "treated as the publisher or speaker of any information provided by another information content provider" when it actually publishes its own or third-party content. [268]

There has never been any doubt that (c)(1) does not protect an ICS provider when it "publishes its own… content" — because the company would, to that extent, cease to be an ICS provider and, instead, become an information content provider "responsible, in whole or in part, for the creation or development of information."[269] But the Petition marries this self-evident fact with the preposterous claim that, when Congress said, in (c)(1), that an ICS provider may not be "treated as the publisher or speaker of any information provided by another information content provider," it intended that categorical declaration to depend on whether the provider merely "published" that third-party content or "*actually* published" that content. One has only to imagine applying such an interpretation in other contexts to

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[266] *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995).

[267] *See supra* at 30.

[268] Petition at 46.

[269] 47 U.S.C. § 230(f)(3).

see that it would allow regulatory agencies to do the exact opposite of what Congress intended, while pretending to faithfully implement the plain text of the law, simply by invoking the qualifier "actually."

B. 230(c)(1) and 230(c)(2)(A) Both Protect Certain Content Moderation Decisions, but in Clearly Different Ways.

NTIA argues that courts have read "section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity."[270] The petition claims interpreting Paragraph (c)(1) to cover decisions to remove content (as well as to host content) violates the statutory canon against surplusage because it renders (c)(2) superfluous.[271] The plain text of the statute makes clear why this is not the case. While the Petition refers repeatedly to "230(c)(2)," this provision actually contains two distinct immunities, which are clearly distinct both from each other and from the immunity contained in (c)(1). Neither subparagraph of (c)(2) is rendered a "nullity" by the essentially uniform consensus of courts that Paragraph (c)(1) covers decisions to remove user content just as it covers decisions to leave user content up.[272] Both of these immunities do things that the (c)(1) immunity does not.

NTIA also argues that the factual premises (about the technological feasibility of content moderation) underlying *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the

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[270] Petition at 28.

[271] "NTIA urges the FCC to follow the canon against surplusage in any proposed rule.88 Explaining this canon, the Supreme Court holds, '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .' The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme." Petition at 29.

[272] *IA Report, supra* note 8, at 10 ("Of the decisions reviewed pertaining to content moderation decisions made by a provider to either allow content to remain available or remove or restrict content, only 19 of the opinions focused on Section 230(c)(2). Of these, the vast majority involved disputes over provider efforts to block spam. The remainder were resolved under Section 230(c)(1), Anti-SLAPP motions, the First Amendment, or for failure to state a claim based on other deficiencies.").

first appellate decision to parse the meaning of the (c)(1) immunity, no longer hold. Neither these arguments nor NTIA's statutory construction arguments actually engage with the core of what *Zeran* said: that the (c)(1) immunity protects the First Amendment rights of digital media operators as publishers. We begin our analysis there.

1. Courts Have Correctly Interpreted the (c)(1) Immunity as Protecting the Exercise of Editorial Discretion, Co-Extensive with the First Amendment Itself.

Kenneth Zeran's suit argued "that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."[273] The Fourth Circuit dismissed the suit under (c)(1):

> By its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.
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> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . .[274]

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[273] 129 F.3d at 328.

[274] *Zeran*, 129 F.3d at 330-31.

The Petition claims that "[t]his language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or fact-checking statements."[275] Here, NTIA makes several elementary legal mistakes:

- It misses the key limiting principal upon the (c)(1) immunity: it does not protect content that the ICS provider is responsible, even in part, for creating. We discuss this issue more below,[276] but here, note that the warning or fact-checking statements affixed to someone else's content would *clearly* be first-party content created by the website operator for which it is responsible. The same goes for "their own publications" — assuming that means posting content that the operator itself creates, as opposed to deciding whether to publish content created by others.[277]
- Even when it applies, (c)(1) never provides "full and complete immunity" to anyone because it is always subject to the exceptions provided in Subsection (e), most notably for federal criminal law and sex trafficking law.
- (c)(1) protects ICS providers only from being "treated as the publisher or speaker of any information provided by another information content provider." Thus, it does not protect them from being sued for breach of contract, as in *Barnes v. Yahoo!*[278]

NTIA's characterization of *Zeran* is correct: the decision's interpretation of the (c)(1) immunity broadly protects "editorial decisions [and] content-moderating." As the Barnes

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[275] Petition at 26.

[276] *See infra* at 49.

[277] *See* Roommates, *supra* note 125, 521 F.3d at 1163.

[278] *See infra* at 37.

court noted: "Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."[279] What NTIA fails to mention is that this interpretation of (c)(1) really just protects the editorial discretion protected by the First Amendment.

NTIA proposes the following reinterpretation of the statute:

> Section 230(c)(1) applies to acts of omission—to a platform's failure to remove certain content. In contrast, section 230(c)(2) applies to acts of commission—a platform's decisions to remove. Section 230(c)(1) does not give complete immunity to all a platform's "editorial judgments."[280]

This omission/commission dichotomy may sound plausible on paper, but it fails to reflect the reality of how content moderation works, and would make Section 230(c)(1)'s protection dependent on meaningless distinctions of sequencing. The "editorial judgments" protected by (c)(1) are not simply about decisions to "remove" content that has already been posted. They may also involve automatically screening content to decide whether to reject it — and even suspend or block the user that posted it. Such decisions would not be captured by *either* prong what NTIA holds up as a complete model of content moderation. There is no significant difference between a just-in-time pre-publication "screening" publication decision (to "put up" content) and one made minutes, hours, days or weeks later (to "take down" content), after users have complained and either an algorithm or a human makes a decision to do the same thing. There is no reason that Section 230 should treat these decisions differently; both should be covered by 230(c)(1), as courts have consistently ruled.

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[279] *Barnes.*, 565 F.3d at 569.

[280] Petition at 27.

In *Batzel v. Smith*, the Ninth Circuit rejected such a distinction in a slightly different context, but its analysis helps show the incoherence of NTIA's position. The dissenting judge argued that "We should hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication."[281] While that judge wanted to distinguish between "active" and passive publication, he did not (unlike NTIA) dispute that "interactive computer service users and providers who screen the material submitted and remove offensive content are immune."[282] The majority responded:

> These two positions simply cannot logically coexist.
>
> A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either. For one thing, there is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity. Also, Congress could not have meant to favor removal of offending material over more advanced software that screens out the material before it ever appears. If anything, the goal of encouraging assistance to parents seeking to control children's access to offensive material would suggest a preference for a system in which the offensive material is not available even temporarily.[283]

In short, Section 230(c)(1) should continue to apply equally to "any exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content"[284] — regardless of whether a company decided to

To reinterpret (c)(1) otherwise would raise obvious First Amendment problems. Consider another version of the hypothetical posited at the outset: suppose Congress conditioned businesses' eligibility for COVID immunity or PPP funds on how businesses

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[281] 333 F.3d 1018, 1038 (9th Cir. 2003).

[282] *Id*. at 1032 (summarizing the dissent).

[283] *Id*.

[284] *Zeran*, 129 F.3d at 330.

handled political signage on their facades and premises. To avoid First Amendment concerns, the legislation disclaimed any intention to punish businesses for "acts of omission" (to use NTIA's term): they would not risk jeopardizing their eligibility for allowing protestors to carry signs, or leaving up signs or graffiti protestors had posted on their premises. But acts of *commission* to reflect their own "editorial judgments" — banning or taking down some or all signs carried by others — would cause the business to lose their eligibility, unless they could prove that they had acted in "good faith." The statute specified that "good faith" could not include politically discriminatory motivations (so a business would have to bar both "All Lives Matter" signs and "Black Lives Matter" signs). Furthermore, the business would have to post a detailed policy explaining what signage is and is not allowed, and would have to create an appeals process for those who felt their "free speech" rights had been violated.

Would such a law be constitutional? Obviously not: this would clearly be a grossly unconstitutional condition, requiring businesses to surrender a large part of their editorial discretion to qualify for a benefit.[285] And it would not matter that the law disclaimed any intention to interfere with the business' right to leave up signage posted by others, or to put up its own signage. The First Amendment protects that right no less than it protects the business' right to exercise editorial discretion about what third parties do on its property.[286]

Congress avoided creating such an unconstitutional condition by choosing *not* to write the version of (c)(1) that NTIA proposes. Instead, it created a broad immunity that

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[285] *See supra* at 27 et seq.

[286] *See supra* at 25.

protects ICS providers from being held liable for the way they exercise their editorial discretion.[287]

2. How 230(c)(2)(A) Differs from 230(c)(1).

The Ninth Circuit has already explained what work Subparagraph (c)(2)(A) does that Subsection (c)(1) does not:

> Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection ***(c)(2), for its part, provides an additional shield from liability***, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene ... or otherwise objectionable." § 230(c)(2)(A). Crucially, the persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates.Com,* 521 F.3d at 1162-63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[288]

Subparagraph (c)(2)(A) ensures that, even if an ICS provider is shown to be partially responsible for content creation, its decision to remove content generally will not be grounds for liability. This belt-and-suspenders approach is crucial to serving the statute's central purpose — removing disincentives against content moderation — because certain forms of content moderation may at least open the door for plaintiffs to argue that the ICS provider

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[287] See *supra* n. 279.

[288] *Barnes*, 565 F.3d at 569-70. *See also, Fyk v. Facebook, Inc.,* No. 19-16232 at *5 (9th Cir. June 12, 2020) (reaffirming *Barnes*).

had become responsible for the content, and thus subject them to the cost of litigating that question at a motion to dismiss or the even greater cost of litigating past a motion to dismiss if the trial judge rules that they may have been responsible for the creation of that content. Discovery costs alone have been estimated to account as much as 90% of litigation costs.[289]

In general, an ICS provider will not be held to be responsible, even "in part," for the creation of content posted by others merely through content moderation — unless they transform the meaning of that content in ways that contribute to its illegality, such as by editing "John is not a rapist" to read "John is a rapist.[290] Suppose that, instead of taking down objectionable posts completely, an ICS provider decides to err on the side of leaving such posts up, but with certain expletives or common slurs blacked out. To make such a policy scale for the service, such decisions are made by machines, not humans. In some cases, algorithmic removal of certain words might be said to change the meaning of the sentence, thus allowing a plaintiff to argue that the provider is responsible "in part" for the creation of such posts — and thus should lose its (c)(1) immunity. Or suppose that the provider, in response to user complaints, decides to add some degree of human moderation, which introduces the possibility of error (deleting additional words or even accidentally adding words): additional words may be deleted, increasing the likelihood that the ICS provider may be said to be responsible for that content. In either case, the ICS provider may decide to fall back on a second line of defense: deleting (or hiding) the post altogether. The (c)(1) immunity may not protect that removal decision, because company is now considered the

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[289] Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).

[290] *See infra* at 79 and note 314.

"information content provider" of that post. But the (c)(2)(A) immunity does not depend on this protection, so it will protect the removal decision.

The *Barnes* court omitted another important function of Subparagraph (c)(2)(A): like all three immunities contained in Section 230, it protects both providers and *users* of interactive computer services. If anything, Subparagraph (c)(2)(A) may be *more* important for users to the extent that they are more likely to have contributed, at least in part, to the creation of content. If multiple users collaborate on an online document, it may be difficult to determine which user is responsible for which text. If one user adds a defamatory sentence to a Wikipedia page, and another user (who happens to be an admin), rewrites the sentence in order to make it less defamatory, the admin risks being sued if the statement remains somewhat defamatory. If that admin then decides to take down the entire page, or merely to delete that sentence, and is sued for doing so, they would rely on the (c)(2)(A) immunity to protect themselves.

It is true that relatively few cases are resolved on (c)(2)(A) grounds, as compared to (c)(1). This does not make superfluous. The Supreme Court has set a very high bar for applying the canon against surplusage. For example, the Court rejected a criminal defendant's reading of the phrase "State post-conviction or other collateral review" (that it should "encompass both state and federal collateral review") because "the word 'State' [would place] no constraint on the class of applications for review that toll the limitation period. The clause instead would have *precisely the same content* were it to read 'post-conviction or other collateral review.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added). It is simply impossible to characterize the consensus current interpretationof

Subsection (c)(1) (as covering removal decisions) as amounting to "precisely the same" as their reading of Subparagraph (c)(2)(A): the two have plainly different meanings.

The fact that few cases are resolved on (c)(2)(A) grounds understates its true importance: what matters is now how many cases are brought and dismissed, but how many cases are *not* brought in the first place, because the (c)(2)(A) immunity assures both users and providers of interactive computer services that they will be shielded (subject to the good faith requirement) even if they lose their (c)(1) immunity.

In short, there is no canon of interpretation that would suggest that (c)(1) should not apply to content removal decisions — and every reason to think that the courts have applied the statute as intended.

C. NTIA Proposes to Rewrite 230(c)(2) as a Hook for Massive Regulatory Intervention in How Websites and other ICS Providers Operate.

After proposing to sharply limit the scope of the (c)(1) immunity, and to exclude *all* content moderation from it, the Petition proposes to sharply limit when the (c)(2) immunity can be invoked, and to build into the eligibility criteria a series of highly prescriptive regulatory requirements. This is plainly *not* what Congress intended.

1. The Term "Otherwise Objectionable" Has Properly Been Construed Broadly to Protect the Editorial Discretion of ICS Providers and Users.

The Petition argues that "the plain words of [(c)(2)(A)] indicate that this protection only covers decisions to restrict access to certain types of enumerated content. As discussed infra, these categories are quite limited and refer primarily to traditional areas of media regulation—also consistent with legislative history's concern that private regulation could

create family-friendly internet spaces."[291] The Petition makes two arguments to support this assertion.

First, the petition argues: "If 'otherwise objectionable means any material that any platform 'considers' objectionable, then section 230(b)(2) offers de facto immunity to all decisions to censor content."[292] NTIA is clearly referring to the wrong statutory provision here; it clearly mean 230(c)(2) — yet "makes this same erroneous substitution on page 28, so it wasn't just a slip of the fingers."[293] NTIA fails to understand how the (c)(2)(A) immunity works. This provision contains two distinct operative elements: (1) the nature of the content removed (a *subjective* standard) and (2) the requirement that the action to "restrict access to or availability" of that content be taken in good faith (an *objective* standard). Under the clear consensus of courts that have considered this question, the former *does* indeed mean "any material that any platform 'considers' objectionable" *provided* that the decision to remove it is taken in "good faith."[294] This has *not* created a "de facto immunity to all decisions to censor content" under (c)(2)(A) because, while the subjective standard of objectionability is constrained by the objective standard of good faith.

Second, the petition invokes another canon of statutory construction: "ejusdem generis, which holds that catch-all phases at the end of a statutory lists should be construed

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[291] Petition at 23.

[292] Petition at 31.

[293] Eric Goldman, *Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230,* Technology and Marketing Law Blog (Aug. 12, 2020) *available at* https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm ("I have never seen this typo by anyone who actually understands Section 230. It's so frustrating when our tax dollars are used to fund a B-team's work on this petition (sorry for the pun).")

[294] *Cf. e360Insight, LLC v. Comcast Corp.,* 546 F. Supp. 2d 605 (N.D. Ill. 2008) (dismissing unfair competition claims as inadequately pled, but implying that better pled claims might make a prima facie showing of "bad faith" sufficient to require Comcast to establish its "good faith").

in light of the other phrases."[295] The Ninth Circuit explained why this canon does not apply in its recent *Malwarebytes* decision:

> the specific categories listed in § 230(c)(2) vary greatly: Material that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing. If the enumerated categories are not similar, they provide little or no assistance in interpreting the more general category. We have previously recognized this concept. *See Sacramento Reg'l Cty. Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1270 (9th Cir. 1990) ("Where the list of objects that precedes the 'or other' phrase is dissimilar, *ejusdem generis* does not apply").
>
> We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s.[296]

The categories of objectionable material mentioned in (c)(2)(A) are obviously dissimilar in the sense that matters most: their constitutional status. Unlike the other categories, "obscenity is not within the area of constitutionally protected speech or press."[297] Note also that five of these six categories include no qualifier, but the removal of "violent"

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[295] Petition at 32 (citing Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372 (2003) ("under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words")).

[296] *Enigma Software Grp. U.S.A v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019). The *Reilly* court explained:

> The phrase "other property" added to a list of dissimilar things indicates a Congressional intent to draft a broad and all-inclusive statute. In Garcia, the phrase "other property" was intended to be expansive, so that one who assaulted, with intent to rob, any person with charge, custody, or control of property of the United States would be subject to conviction under 18 U.S.C. § 2114. Where the list of objects that precedes the "or other" phrase is dissimilar, ejusdem generis does not apply. However, the statute at issue here falls into a different category. Because section 1292(1) presents a number of similar planning and preliminary activities linked together by the conjunction "or," the principle of ejusdem generis does apply. "[O]r other necessary actions" in the statute before us refers to action of a similar nature to those set forth in the parts of the provision immediately preceding it. We have previously construed "or other" language that follows a string of similar acts and have concluded that the language in question was intended to be limited in scope — a similar conclusion to the one we reach today.

905 F.2d at 1270.

[297] *Roth v. United States*, 354 U.S. 476 (1957).

content qualifies only if it is "excessively violent." Merely asserting that the six specified categories "[a]ll deal with issues involving media and communications content regulation intended to create safe, family environments," does not make them sufficiently similar to justify the invocation of *eiusdem generis*, in part because the term "safe, family environment" itself has no clear legal meaning. Harassment, for example, obviously extends far beyond the concerns of "family environments" and into the way that adults, including in the workplace, interact with each other.

But in the end, this question is another red herring: whether *eiusdem generis* applies simply means asking whether Congress intended the term to be, in the *Reilly* decision's terms, "broad and all-inclusive" or "limited in scope."[298] This is, obviously a profound constitutional question: does the term "otherwise objectionable" protect an ICS provider's exercise of editorial discretion under the First Amendment or not? *Eiusdem generis* is a linguistic canon of construction, supporting logical inferences about the meaning of text; it is thus a far weaker canon than canons grounded in substantive constitutional principles. Here, the canon of constitutional avoidance provides ample justification for courts' interpretation of otherwise "objectionable" as "broad and all-inclusive":

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress .... 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues

[298] *Reilly*, 905 F.2d at 1270.

not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.[299]

Finally, because of the First Amendment questions involved, it is unlikely that any court would apply the deferential standard of *Chevron* to an FCC rule reinterpreting "otherwise objectionable" narrowly.[300]

2. The "Good Faith" Standard Has Been Read to Be Consistent with the First Amendment and Should Remain So.

Above, we explain why NTIA's proposed five-prong definition of "good faith" creates a host of First Amendment problems.[301] Courts have avoided these problems by reading the "good faith" standard, like other parts of the statute, to ensure that the statute's protections are co-extensive with the First Amendment's protection of editorial discretion. Any other reading of the statute necessarily creates the kind of unconstitutional condition described above,[302] because the government would be making eligibility for protection dependent on an ICS provider surrendering some of its First Amendment rights.

That does *not* render the "good faith" standard a nullity. Anticompetitive *conduct* is not protected by the First Amendment; thus, media companies are *not* categorically immune

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[299] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). *Accord, Burns v. United States*, 501 U.S. 129, 138 (1991); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

[300] *See, e.g., U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999) ("It is seductive for us to view this as just another case of reviewing agency action. However, this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees, legislative mandates, and administrative interpretation is at the heart of our responsibility. This case highlights the importance of that role.").

[301] *See supra* at 45 *et seq*.

[302] *See supra* at 37-41.

from antitrust suit.[303] However, as the Tenth Circuit has noted, "the First Amendment does not allow antitrust claims to be predicated solely on protected speech."[304] Thus, antitrust suits against web platforms — even against "virtual monopolies" — must be grounded in economic harms to competition, not the exercise of editorial discretion.[305] For example, Prof. Eugene Volokh (among the nation's top free speech scholars) explains:

> it is constitutionally permissible to stop a newspaper from "forcing advertisers to boycott a competing" media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951). But the newspaper in *Lorain Journal Co*. was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. ***The* Lorain Journal Co. *rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers***.[306]

Critically, however, that the degree of a media company's market power does not diminish the degree to which the First Amendment protects its editorial discretion:

> the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a "substantial monopoly" could not be ordered to run a movie advertisement that it wanted to exclude, because "[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." *Associates & Aldrich Co. v. Times Mirror Co*., 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that, "[n]ewspaper publishers may refuse to publish whatever

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[303] Eugene Volokh and Donald Falk, First Amendment Protection for Search Engine Search Results — White Paper Commissioned by Google at 20-22 (April 20, 2012). UCLA School of Law Research Paper No. 12-22, https://ssrn.com/abstract=2055364.

[304] Jefferson County Sch. Dist. No. R-1 v. Moody's Investor Servs., 175 F.3d 848, 860 (10th Cir. 1999).

[305] "Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).

[306] Volokh, supra *note* 303, at 22 (emphasis added).

> advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).[307]

In addition to the antitrust laws, other claims grounded in the common law of competition could be grounds for showing that an ICS provider had acted in bad faith, and thus was ineligible for the (c)(2)(A) immunity. In such cases, the provider would be published for their anti-competitive conduct, not the exercise of editorial discretion.[308]

D. 230(c)(2)(B) Does *Not* Require "Good Faith" in Protecting Those Who Offer Tools for Content Removal for Others to Use.

As noted at the outset, Paragraph 230(c)(2) contains two distinct immunities. The (c)(2)(B) immunity protects those who "make available to information content providers or others the technical means to restrict access to material described in [(c)(2)(A)]." Thus, subparagraph (c)(2)(B) incorporates by reference the list ending in "or otherwise objectionable." What it plainly does *not* incorporate is Subparagraph's (c)(2)(A) "good faith" requirement, as the Ninth Circuit recently held.[309] While the NTIA Petition does explicitly not propose to reinterpret (c)(2)(B) to require good faith, it does cite the Ninth Circuit's confused decision in arguing for a narrower interpretation of "good faith" (perhaps taking for granted

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[307] *Id.* at 23.

[308] *See supra* note 250 (discussing *Mazur*, No. C 07-03967 MHP, at *14).

[309] *Enigma Software Grp. U.S.A v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019).

that (c)(2)(B) require good faith).[310] TechFreedom amicus brief supporting Malwarebytes' petition for cert explains why the Ninth Circuit was mistaken.[311]

E. "Development of Information": When 230(c)(1) Should Apply.

NTIA proposes to redefine the line between an "interactive computer service" — the providers or users of which are covered by (c)(1) — and an "information content provider," which are never protected by (c)(1): "'responsible, in whole or in part, for the creation or development of information' includes substantively contributing to, modifying, altering, presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider."[312] Parts of this definition are uncontroversial: again, Section 230 has never applied to content that a website creates itself, so, yes, "adding special responses or warnings [to user content] appear to develop and create content in any normal use of the words."[313] There is simply no confusion in the courts about this. Similarly, "modifying" or "altering" user content may not be covered today, as the Ninth Circuit explained in *Roommates*:

> A website operator who edits user-created content — such as by correcting spelling, removing obscenity or trimming for length — retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality — such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to

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[310] Petition at 38.

[311] Brief for TechFreedom, as Amici Curiae on a Petition for Writ Certiorari in *Malwarebytes, Inc., v. Enigma Software Grp. U.S.A* 946 F.3d 1040, 1052 (9th Cir. 2019), June 12, 2012 https://techfreedom.org/wp-content/uploads/2020/06/TechFreedom_Cert_Amicus_Brief.pdf.

[312] Petition at 42 (quoting 47 U.S.C. § (f)(3)).

[313] *Id*. at 41.

> transform an innocent message into a libelous one — is directly involved in the alleged illegality and thus not immune.[314]

But then the Petition veers off into radically reshaping current law when it claims that "prioritization of content under a variety of techniques, particularly when it appears to reflect a particularly [sic] viewpoint, might render an entire platform a vehicle for expression and thus an information content provider."[315]

Once again, NTIA is trying to redefine the exercise of editorial discretion as beyond the protection of (c)(1), despite the plain language of that provision. What the Supreme Court said in *Miami Herald* is no less true of website operators: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.[316] As the Ninth Circuit has noted, "the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message."[317] NTIA is proposing a legal standard by which the government will punish digital media publishers for exercising that prerogative in ways this administration finds objectionable.

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[314] *Roommates*, supra note 125, 521 F.3d at 1169.

[315] Petition at 40.

[316] *Miami Herald*, 418 U.S. at 258; *see generally supra* at 28.

[317] *Batzel*, supra note 281,333 F.3d at 1031.

VI. Conclusion

NTIA's complaints are not really about Section 230, but about the First Amendment. The agency objects to the results of content moderation online, but the proposal leads down a dangerous road of politicized enforcement that ends in true censorship — *by the government* — not neutrality. However strongly anyone believes social media are biased against them, we all would do well to remember what President Reagan said when he vetoed legislation to restore the Fairness Doctrine back in 1987:

> We must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.[318]

By the same token, it may, in the sense of many of Justice Kennedy's grandiloquent pronouncements,[319] be true that "social media and other online platforms… function, as the Supreme Court recognized, as a 21st century equivalent of the public square."[320] Yet this does not transform the First Amendment from a shield against government interference into a sword by which the government may to ensure "a diversity of viewpoints … in any particular medium, let alone in any particular [website]." If consumers believe bias exists, it

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[318] *See supra* note 85.

[319] For example, at the outset of his majority opinion in *Obergefell v. Hodges,* Justice Kennedy declared: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." 135 S. Ct. 2584, 2591 (2015). Justice Scalia, dissenting, responded: "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." Echoing Justice Scalia's many warnings about Justice Kennedy's lofty language, Justice Alito was quite right to caution against the very line NTIA quotes from Packingham as "undisciplined dicta." 137 S. Ct. at 1738*; see also supra* note 92.

[320] Petition at 7.

must be remedied through the usual tools of the media marketplace: consumers must vote with their feet and their dollars. If they do not like a particular social media service's practices, they have every right not to use it, to boycott advertisers that continue to buy ads on that service, etc. The potential for bias in editorial judgment is simply not a problem the First Amendment permits the government to address.

Rewriting, through regulation, Section 230, or even repealing it altogether, will not actually address the concerns behind the NTIA Petition or the President's Executive Order. Instead, NTIA's reinterpretation of the statute that has made today's Internet possible will simply open a Pandora's Box of politicized enforcement: if the FTC or a state AG may sue a social media site because it believes that site did not live up to its community standards, what would prevent elected attorneys general from either party from alleging that social media sites had broken their promises to stop harassment on their services by continuing to allow any president to use their service? The First Amendment would ultimately bar liability, but it would not prevent the proliferation of such claims under the theories NTIA espouses.

Because the Constitution forbids what NTIA seeks, NTIA's petition should never have been put out for public comment in the first place. Because the FCC lacks statutory authority to issue rules reinterpreting Section 230, it should dismiss the petition on those grounds without creating further confusion about the First Amendment and consumer protection law.

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

I, Berin Szóka, hereby certify that on this 2nd day of September, 2020, a copy of the foregoing "Comments of TechFreedom" have been served by Fedex, postage prepaid, upon the following:

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Performing the Delegated Duties of the Assistant Secretary for Commerce for Communications and Information

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