Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
National Telecommunications and Information Administration	)	RM-11862
	)	
	)	
Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934	)	
	)	

REPLY COMMENTS OF PROFESSORS CHRISTOPHER TERRY AND DANIEL LYONS

We respectfully submit these comments in response to the Public Notice in the above-captioned proceeding. Christopher Terry is an assistant professor at the University of Minnesota's Hubbard School of Journalism and Mass Communication. Daniel Lyons is a professor at Boston College Law School.[1] We both specialize in telecommunications law and have extensive experience in practice before the Federal Communications Commission. We hail from opposite sides of the political spectrum and often disagree about the nuances of communications policy. But we are united in our opposition to the National Telecommunications & Information Administration's Petition requesting that this agency interpret Section 230. NTIA's proposal offends fundamental First Amendment principles and offers an interpretation of Section 230 that is inconsistent with the statute's language, legislative history, and interpretation by this agency and by courts.

I. The NTIA Petition Offends Fundamental First Amendment Principles

There can be little debate that any FCC action on the NTIA petition raises immediate and significant First Amendment implications, none of which fall in the favor of further action on the

[1] Affiliations are listed for identification purposes only.

petition. Section 230 of the CDA follows a long legacy of law and regulations in the United States which collectively act to promote the quantity of free speech, political discussion, and access to information. These key values on which communication processes in the United States are based cannot or should not be forgotten and must be considered when taking up the speech regulation issues that are explicit in the NTIA petition, including the clear request for the FCC to engage in a content-based regulation of speech that cannot survive even the thinnest application of strict scrutiny or legal precedent.

The NTIA petition is short sighted because Section 230 promotes free expression online by creating and protecting the pathways for a range of expression, including political speech. Political speech has preferred position, the highest First Amendment protection, as laid out by the Supreme Court in *New York Times v. Sullivan* and *Hustler Magazine, Inc. v. Falwell.*[2] Section 230 provides the mechanism which implements similar protections by ensuring platforms, such as social media or newspaper comment sections, are not the subject of lawsuits about the third-party speech which occurs on their platforms.

Functionally, the NTIA is asking the FCC to develop and enforce a content compelling regulation for the purposes of mitigating perceived political bias. Setting aside the incredibly subjective nature of regulating for bias in media content, for nearly 40 years the agency has correctly moved away from trying to influence licensee decision-making in informational programming content. The inquiry related to this petition seems like an odd time for the FCC to abruptly abandon this extended course of action, especially in order to develop a regulation that would apply to internet platforms and edge providers that, unlike broadcasters, over whom the agency has standing no licensing authority.

[2] See generally: NY Times v. Sullivan, 376 U.S. 254 (1964) and Hustler v. Falwell, 485 U.S. 46 (1988).

While the FCC's regulatory history includes balancing mechanisms like the Equal Time Provisions for political advertising,[3] these provisions are entirely quantitative, rather than subjective in nature. In fact, the Equal Time Rules specifically prevent a balancing mechanism based on content bias as the FCC and licensees are not permitted to interfere with the content or speech of legally qualified candidates under these provisions.[4] While these advertising focused provisions do not apply to non-candidate political advertising, any decisions about the content of ads, including the decision on whether or not to run those ads, lies with the licensee operating as a public trustee rather than the agency's oversight.

While what the NTIA is asking for is essentially a modern-day Fairness Doctrine and Political Editorial rule for the internet, this idea cannot work outside of a licensed broadcast setting. While the Supreme Court recognized in both *NBC*[5] and *Red Lion*[6] that FCC regulations which increase speech are constitutional under the First Amendment, this conclusion was tied to the physical realities caused by limited availability, and the licensed use of spectrum by broadcasters. This standard cannot be applied to edge providers or internet platforms, which are private entities.

Further, when given the opportunity to apply a similar access and response provision to newspapers just a few years later in *Tornillo*,[7] the Supreme Court entirely rejected the premise

[3] 47 USC § 315.
[4] "[A] licensee shall have no power of censorship over the material broadcast under the provisions of this section." 47 U.S § 315(a).
[5] "…we are asked to regard the Commission as a kind of traffic officer…but the act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." National Broadcasting Co. v. United States, 319 U.S. 190 (1943) at 215-216.
[6] "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), FN28 at 401.
[7] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

that compelled speech created through a mandated access provision was even remotely constitutional. Likewise, as a result of the Supreme Court decision in *Reno v. ACLU,* state regulation of internet content is subject to strict scrutiny review,[8] making the action sought by the NTIA petition the legal equivalent of a compelled speech provision on newspapers, a requirement that has long been universally rejected as a valid legal premise in the United States.

Beyond questions of authority or constitutionality, both of which are high hurdles for the FCC to cross, there is also an important question of practicality. Could the agency meaningfully enforce a hypothetical regulation in a reasonable time frame without enduring substantial process burdens, not the least of which would be the resource costs of adjudication? The agency's own enforcement history illustrates that the logical conclusion to this question is a resounding no.

While the FCC still enforces content-based regulations including Children's Television,[9] Sponsorship Id,[10] and provisions for reporting political advertising,[11] the FCC has largely abandoned the enforcement of regulations for which an adjudication requires a subjective analysis of media content by the agency. In the closest historical example to what the NTIA petitions the FCC to implement, a balancing mechanism that operates like a Fairness Doctrine, the agency itself argued that a rule that mandated access for alternative viewpoints actually reduced the availability of informational programming.[12] Even after the agency curtailed

[8] "The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media-the history of extensive Government regulation of broadcasting,…the scarcity of available frequencies at its inception… and its "invasive" nature…are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet." *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 868.
[9] 34 FCC Rcd 5822 (2019).
[10] 47 C.F.R 73.1212.
[11] 47 USC § 315(e).
[12] "..the doctrine often worked to dissuade broadcasters from presenting any treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes." Syracuse Peace Council v. FCC, 867 F. 2d 654 (1989).

enforcement in 1987, the ever present specter of the FCC's reimplementation of the Fairness Doctrine haunted broadcasters like a boogeyman until Congress finally acted to formally repeal the rule in 2011. Each of these content-based regulations require that a broadcaster affirmatively include elements related to specific programming while the judgements about that programming remain with the licensee, in turn requiring no subjective enforcement decisions by the Commission.

In 2020, the final legacies of the FCC's enforcement regime on indecency is the closest remaining regulation to what the NTIA petition is proposing. Although indecency enforcement actions have been limited since the adoption of the so called Egregious Standard in 2013,[13] indecency enforcement requires the FCC to analyze content and placing the Enforcement Bureau into the position where it must make a series of subjective judgments as part of the adjudication process. Since the airing of George Carlin's infamous list of 7 dirty words, the indecency standard has covered only a relatively narrow range of speech, during a limited time period each day, and again, only on broadcast stations licensed by the FCC.

Acting upon the proposal the NTIA petition requests would force the FCC into a position where the agency would not only have to make judgements about content but it would also have to do so by reviewing potentially charged political content at the same time as making decisions about how to best "balance" the viewpoint of that content before compelling the transmission of viewpoint specific speech through a privately-owned venue. This places the FCC into the role of deciding the value of political viewpoints, a process which quickly becomes state action against protected expression that implicates the First Amendment.

[13] 28 FCC Rcd 4082 (2013).

Setting aside the important legal differences between a time place and manner restriction on offensive depictions or descriptions of sexual or execratory organs or activities and regulations compelling political speech in private venues, even when indecency rules were most stringently enforced, especially in the period of time after the 2004 Super Bowl, the FCC could not adjudicate complaints quickly. The regulatory and enforcement process is lengthy by design, so much so, that in at least one case, the agency did not even make a decision before the statute of limitations expired on the violation.[14] Disputes the FCC would be asked to mediate under the NTIA petition, would force the agency to resolve complaints over bias in online content that would be, at best, done so in a manner that was untimely for a response and of course, subject to a lengthy period of stringent judicial review.

Perhaps most importantly, if one follows the NTIA petition to a logical conclusion, the FCC also would be under the burden of potentially adjudicating what could amount to a near unlimited quantity of individual complaints about biased online content, and to do so in what amounted to real-time. Even if the agency could cross the barriers of the jurisdictional questions we address at length below, while successfully navigating a range of treacherous First Amendment issues, the FCC simply lacks the resources to engage in the amount of adjudication that the NTIA petition would most certainly require for a meaningful enforcement regime.

In short, on First Amendment issues alone, the NTIA petition should be rejected outright. The FCC has none of the necessary mechanisms in place and lacks the resources to engage in the quantity of enforcement the petition would require, even if the agency suddenly finds the desire to engage in the subjective analysis of political content in private venues the agency has only the thinnest of authority over.

[14] 19 FCC Rcd. 10,751 (2004).

II. Section 230 Does Not Give the FCC Authority to Act

The NTIA Petition also overstates the FCC's authority to regulate edge providers under Section 230. The petition correctly notes that Section 201(b) gives the FCC broad rulemaking authority to implement the Communications Act of 1934.[15] That authority "extends to subsequently added portions of the Act"[16] such as Section 230, which was adopted as part of the 1996 Telecommunications Act's amendment of the original statute.[17] But this jurisdiction is unavailing: while the FCC has authority to implement provisions of the Act, in this case there is nothing to implement, as Section 230 unequivocally precludes the FCC from regulating edge providers as NTIA requests.

This conclusion flows inexorably from the plain language of the statute. On its face, Section 230 is a shield that protects interactive computer services from being treated as the publisher or speaker of user content and from liability for removing objectionable content. But NTIA asks this agency to turn that *shield* into a *sword* to combat those very interactive computer services that the statute is designed to protect. This request is inconsistent with Section 230(b)(2), which states 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.***"[18] Particularly in light of this language, it stretches the statute beyond the breaking point to transform a statute conferring legal rights into regulations mandating legal duties.[19]

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[15] AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 377 (1999).
[16] City of Arlington v. FCC, 569 U.S. 290, 293 (2013).
[17] See Pub. L. 104-104 (1996).
[18] 47 U.S.C. § 230(b)(2) (emphasis added).
[19] Notably, Section 230(d) is titled "**Obligations** of Interactive Computer Service." By comparison, Section 230(c), which is the subject of NTIA's petition, is captioned "**Protection** for 'Good Samaritan' Blocking and Screening of Offensive Material." It flows from this structure that any duties Congress intended to impose on interactive computer services should flow from Section 230(d), not 230(c).

The legislative history also demonstrates that Congress did not intend the FCC to regulate online conduct. Representative Christopher Cox, the bill's author, stated without qualification that the statute "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."[20] Earlier this year, in testimony before the United States Senate, former Representative Cox had the chance to elaborate upon the meaning of the statute amidst the modern criticism that inspired the NTIA petition. He explained that, contrary to NTIA's claims, "Section 230 does not require political neutrality, and was never intended to do so…Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is."[21]

Courts have also rejected the argument that Section 230 gives the FCC authority to regulate interactive computer services. In *Comcast v. FCC*, the D.C. Circuit reviewed this agency's decision to sanction Comcast, an Internet service provider, for throttling BitTorrent content on its network in violation of its 2005 Internet Policy Statement.[22] The FCC claimed authority to act under Section 230(b). But the court found that this provision "delegate[s] no regulatory authority" to the agency, nor does it support an exercise of the Commission's ancillary authority.[23]

While the *Comcast* decision examined Section 230(b) rather than 230(c), its rationale is applicable to the NTIA Petition. To exercise its ancillary authority, the Commission must show that its proposed regulation is reasonably ancillary to "an express delegation of authority to the

[20] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).
[21] Testimony of Former U.S. Rep. Chris Cox, Hearing Before Subcommittee on Communications, Technology, Innovation, and the Internet, United States Senate Committee on Commerce, Science, and Transportation, July 28, 2020, available at https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71.
[22] Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
[23] Id. at 652.

Commission."[24] The NTIA has not, and cannot, identify express delegation of authority to support its proposed regulation of interactive computer services. NTIA's citation to *City of Arlington v. FCC* and *AT&T Corp. v. Iowa Utilities Board* is inapposite, as the statutory provisions at issue in those cases (Section 332(c)(7) and Section 251/252) were reasonably ancillary to the Commission's expressly delegated authority to regulate wireless communication and telecommunications services, respectively.

Finally, NTIA's petition conflicts with this Commission's previous interpretation of Section 230, expressed most recently in the Restoring Internet Freedom Order. In that decision, the Commission repeatedly cited Section 230's commitment to a "digital free market unfettered by Federal or State Regulation."[25] Notably, the Commission explained that "[w]e are not persuaded that section 230 of the Communications Act grants the Commission authority" to regulate, and "even assuming arguendo that section 230 could be viewed as a grant of Commission authority, we are not persuaded it could be invoked to impose regulatory obligations on ISPs."[26] Rather, it explained, "[a]dopting requirements that would impose federal regulation on broadband Internet access service would be in tension with that [Section 230(b)] policy, and we thus are skeptical such requirements could be justified by section 230 even if it were a grant of authority as relevant here."[27] This logic should apply equally to obligations placed on edge providers such as social media platforms, which are further removed from FCC authority than ISPs.

[24] Id. at 653; see also NARUC v. FCC, 533 F.3d 601, 612 (D.C. Cir. 1976) (requiring ancillary authority to be "incidental to, and contingent upon, specifically delegated powers under the Act").
[25] In re Restoring Internet Freedom, 33 FCC Rcd. 311, 434 (2018); see also id. at 348.
[26] Id. at 480-481.
[27] Id. at 481.

In fact, the Restoring Internet Freedom Order rejected Section 706 as a source of regulatory authority precisely *because* the logical implication would be to allow the FCC to regulate edge providers, which it found inconsistent with Section 230. Under Section 706, the Commission is to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[28] If this constituted an independent grant of authority, said the Commission, a "necessary implication" would be that "the Commission could regulate not only ISPs but also edge providers or other participants in the Internet marketplace…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.'" The Commission explained that such a claim—that the Commission could regulate Google or Facebook because these companies exert influence over online activity—is "in tension" with Section 230.[29]

This finding directly contradicts NTIA's claim that Section 230 *supports* such intervention. At a minimum, were the Commission to grant NTIA's petition, it would face significant difficulty harmonizing these two contradictory readings of Section 230 in a way that would survive arbitrary and capricious review.

III. NTIA Fails to Identify or Reasonably Resolve Ambiguities in Section 230

Even if the NTIA petition were to clear these jurisdictional hurdles, its proposed regulations would struggle on judicial review. Under the familiar *Chevron* standard, an agency's statutory interpretation will be upheld only if the statute is ambiguous and if the agency has offered a reasonable resolution of that ambiguity. Many of NTIA's proposed regulations fail to

[28] 47 U.S.C. § 1302(a).
[29] Id. at 474.

identify genuine ambiguities in the statute, and where they do, the proposed interpretation is unreasonable because it is inconsistent with the statutory language.

A. There is No Ambiguity Between Sections (c)1 and (c)2, and NTIA's Proposed Regulations are Problematic

NTIA first argues that there is "[a]mbiguity in the relationship between subparagraphs (c)(1) and (c)(2)." To support this claim, the petition cites several court decisions that have applied Section 230(c)(1) to defeat claims involving removal of content. Because Section 230(c)(2) applies a "good faith" standard to content removal, NTIA argues that this expansive application of subparagraph (c)(1) "risks rendering (c)(2) a nullity."

As an initial matter, the claim that an expansive reading of (c)(1) makes (c)(2) superfluous is simply false. The Ninth Circuit addressed this concern in *Barnes v. Yahoo! Inc.*[30] Consistent with NTIA's complaint, the Ninth Circuit interprets (c)(1) broadly to include decisions to remove "content generated entirely by third parties."[31] But the court explained that this does not render (c)(2) a nullity:

> Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. 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.[32]

But assuming NTIA is correct that courts are erroneously reading (c)(1) too broadly, the alleged defect in judicial reasoning is not the result of any ambiguity in the statute itself. Section

[30] 570 F.3d 1096 (9th Cir. 2009).
[31] Id. at 1105.
[32] Id.

230(c)(1) is fairly straightforward about the protection that it grants: it assures that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." NTIA does not explain which part of this statute is ambiguous and in need of clarification. Rather, its complaint is that courts have applied (c)(1) to conduct that is unambiguously outside the scope of the statute. If so, the appropriate remedy is to appeal the erroneous decision, or perhaps secure an additional statute from Congress. But there is no ambiguity in Section 230(c)(1) for the Commission to resolve.

Moreover, NTIA's proposed regulation is unreasonable. The petition asks the Commission to clarify that "Section 230(c)(1) has *no application* to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service. Any applicable immunity for matters described in the immediately preceding sentence shall be provided *solely* by 47 U.S.C. § 230(c)(2)." The problems with this language are two-fold. First, as noted in Section I above, social media platforms retain a First Amendment right of editorial control, which could be implicated when a platform is accused of improperly removing content. Therefore it is erroneous (and potentially unconstitutional) to assert that platform immunity is provided "solely" by Section 230(c)(2).

Second, several Section 230(c)(1) cases involve claims stemming from an interactive computer service's failure to remove offending content. In the *Barnes* case referenced above, for example, a Yahoo! user published nude pictures of his ex-girlfriend online. The victim complained, and Yahoo! agreed to remove the offending pictures, but failed to do so. The victim sued, alleging negligent provision or non-provision of services which Yahoo! undertook to

provide.[33] Similarly, in the landmark case of *Zeran v. America Online, Inc.*, the plaintiff sued for negligent delay after AOL agreed to remove his personal information from the company's bulletin board, but did not do so in a timely fashion.[34] Both cases involve an "interactive computer service's decision [or] agreement…to restrict access to or availability of" third party material—in each case the defendant agreed to remove the content but failed, which gave rise to the complaint. It would be wrong to state that Section 230(c)(1) has "no application" to these cases—they are quintessential cases to which (c)(1) should apply.

B. NTIA's Proposed Objective Definitions of Offensive Material Contradict the Statute's Plain Language

NTIA next complains that the immunity for providers and users of interactive computer services under Section 230(c)(2) is too broad. The statute provides immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." NTIA is concerned that "[i]f 'otherwise objectionable' means any material that any platform 'considers' objectionable, then section 230(b)(2) [sic] offers de facto immunity to all decisions to censor content." To avoid this purported problem, NTIA recommends that the Commission define "otherwise objectionable" narrowly to include only material "similar in type" to the preceding adjectives in the statute—and then, for good measure, suggests objective definitions for each of these other terms as well.

Once again, NTIA's request is inconsistent with the plain language of the statute. By its terms, Section 230(c)(2) establishes an *subjective*, not *objective*, standard for objectionable

[33] Id. at 1099.
[34] Zeran v. America Online, Inc., 129 F.3d 327, 329, 332 (4th Cir. 1997).

content: Congress explicitly exempted any action to restrict access to material that "**the provider or user considers to be**" objectionable. The only statutory limit on the exercise of a provider or user's judgment is that the decision be made in "good faith." While NTIA may be troubled that this gives de facto immunity to all decisions to censor content, it was Congress's unambiguous choice to empower providers and users to make their own judgments about such material. Any attempt to provide objective definitions of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content would be inconsistent with the words "the provider or user considers to be" objectionable, and therefore would be unreasonable.

NTIA's proposed limitation on "otherwise objectionable" is separately problematic. Concerned about the potential breadth of the phrase, NTIA proposes limiting "otherwise objectionable" to content that is "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." Although this is perhaps a closer question, this narrowing also seems inconsistent with the statute's language. Congress deliberately chose not to adopt a closed list of problematic content. Instead, it added "or otherwise objectionable," which is most naturally read as an inclusive, catch-all phrase. Particularly when coupled with the language establishing a subjective standard, the phrase is best read as broadening, rather than narrowing, the scope of material that a provider or user may block. To read "objectionable" as simply "similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing" would fail to give meaning to the word "otherwise." Congress's use of "otherwise" as a modifier to "objectionable" suggests the phrase is best understood to mean "objectionable even if it does not fall into the afore-mentioned categories."

C. NTIA's Proposed Definition of "Good Cause" is Unreasonable

Next, NTIA proposes that that the Commission define "good cause" so that courts can better discern when the Section 230(c)(2) defense applies. NTIA is correct that the phrase "good cause" is ambiguous. But its proposed definition is unreasonable.

NTIA would correlate "good faith" with transparency. But the two are distinct phenomena. A requirement that a party act in "good faith" means the party's proffered reason is honest and not pretextual. This is different from transparency, which requires that the actor publish its decision criteria in advance and not deviate from that criteria. A provider can block content in accordance with published criteria and still act in bad faith, if the published criteria are merely a pretext for the provider or user's animus toward the speaker. Conversely, a provider can have a good faith belief that a speaker's content is obscene or otherwise objectionable and on that basis block it, even if the provider had not indicated in advance that it would do so. NTIA's proposal would require that a provider predict what material it would expect its users to post—and the failure to predict user behavior accurately would require the provider to leave objectionable content up or lose the statute's protection, which contradicts congressional intent.

Moreover, NTIA's suggested notice and comment procedure finds no grounding anywhere in the statute. With limited exceptions, this proposal would require platforms to notify a user and give that user a reasonable opportunity to respond before removing objectionable content. Unlike in the Digital Millennium Copyright Act, Congress chose not to adopt a notice and comment regime for Section 230 content, choosing instead to vest discretion in providers and users to choose whether and how to display content. While NTIA fails to define "reasonable," the effect of this suggested provision would be to require a provider to make content available on its platform against its will, at least during the notice and comment period—

a result that violates both the intent of the statute and the provider's First Amendment right of editorial control.

Finally, it is worth noting that in its attempt to clarify the ambiguous phrase "good faith," NTIA has added several more ambiguous phrases that would likely generate additional litigation. Issues such as whether a belief is "objectively reasonable," whether the platform restricts access to material that is "similarly situated" to material that the platform declines to restrict, whether notice is "timely" given to speakers or whether speakers had a "reasonable opportunity" to respond, are all open to interpretation. The net effect of this compound ambiguity is likely to be fewer cases dismissed and more cases going to trial, which strips Section 230 of one of its biggest advantages: avoiding the litigation costs of discovery.

D. NTIA's Proposed Clarification of Section 230(f) is Unnecessary and Overbroad

Finally, NTIA requests that the Commission clarify when an interactive computer service is responsible, in whole or in part, for the creation or development of information (and therefore cannot take advantage of the Section 230(c)(1) defense). As NTIA notes, numerous courts have addressed this issue, and have largely settled on the Ninth Circuit's standard that one loses Section 230(c)(1) protection if that person "materially contributes" to the alleged illegality of the content. There is little disagreement that a platform's own speech is not protected. So, for example, if a platform posts an editorial comment, special response, or warning attached to a user's post, the platform is potentially liable for the content of that comment or warning. NTIA's suggestion that this is somehow an open question is baffling—under any interpretation of Section 230(f)(3), the platform would umambiguously be responsible for the creation or development of that addendum.

NTIA uses this purported ambiguity to alter Section 230(f)(3) in ways that unquestionably impose liability for a publisher's editorial choices. For example, NTIA suggests that "presenting or prioritizing" a user's statement "with a reasonably discernable viewpoint" would make the platform responsible in part for the statement. Given that every platform presents and prioritizes user content, this suggested exception could swallow Section 230(c)(1) entirely. Similarly, NTIA's proposal seems to suggest that a platform is responsible for any user content that it comments upon or editorializes about. Thus, while everyone agrees that a platform that comments on a user's post is liable for the content of the comment, NTIA suggests that commenting would also make the platform a partial creator of the underlying post and therefore lose Section 230(c)(1) protection. NTIA's proposed definition of when an interactive computer services is "treated as a publisher or speaker" of third-party content is equally problematic. It includes when a platform "vouches for," "recommends," or "promotes" content, terms which are so ambiguous and potentially broad as to swallow the immunity completely.

The statutory touchstone for distinguishing first-party from third-party content is creation: an information content provider is responsible for a statement if it is "responsible, in whole or in part, for the *creation* or *development* of information." Acts such as commenting on, presenting, prioritizing, editorializing about, vouching for, recommending, or promoting particular content have nothing to do with *creation* of the content. Instead, these activities all relate to publicizing content once it has been created—or in other words, *publishing* content. The cornerstone of Section 230(c)(1) is that a platform shall not be held liable as publisher of someone else's content. It would turn the statute on its head to limit that defense by redefining publishing activity in a way that makes the publisher a content creator.

IV. Conclusion

NTIA spends several pages explaining how the Internet ecosystem today differs from the environment in which Section 230 was drafted. While this is unquestionably true, one cannot understate the crucial role that Section 230 has played in helping the evolution of that ecosystem. It may be that, as NTIA suggests, technological advancements have made portions of the statute less effective or obsolete. But if that's the case, the proper remedy lies with Congress, not the FCC. NTIA's proposal invites the FCC to freelance beyond the outer boundary of its statutory authority, in ways that would contradict the plain language of the statute and raise serious constitutional concerns. The Commission would be wise to decline this invitation.

Respectfully submitted,

___/s/_____

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