

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

In the Matter of	)	
	)	
NTIA Petition for Rulemaking to	)	
Clarify Provisions of Section	)	RM-11862
230 of the Communications Act	)	
Act of 1934, As Amended	)	

**COMMENTS OF FREE PRESS**

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## Executive Summary

Donald Trump’s tenure as President of the United States has been marked by attacks on the press, media outlets, and social media companies any time that they have sought to provide context, scrutinize, or even simply cover his statements accurately.<sup>1</sup> The NTIA’s petition for rulemaking (“Petition”) was born from those corrupt and ignoble impulses.<sup>2</sup> The president, upset after Twitter fact-checked his statements regarding mail-in voting,<sup>3</sup> promulgated an unlawful and unconstitutional executive order that seeks to use the power of the federal government to stifle, censor, and intimidate media companies that criticize him, and to force those same companies to carry and promote favorable content about him and his administration.<sup>4</sup> It is hard to think of actions more inimical to the promise of the First Amendment and the spirit of the Constitution. To protect the rule of law and uphold those values, Free Press has joined a lawsuit challenging the lawfulness of the executive order that began this process.<sup>5</sup>

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<sup>1</sup> See Committee to Protect Journalists, *The Trump Administration and the Media* (April 16, 2020) (“The Trump administration has stepped up prosecutions of news sources, interfered in the business of media owners, harassed journalists crossing U.S. borders, and empowered foreign leaders to restrict their own media. But Trump’s most effective ploy has been to destroy the credibility of the press, dangerously undermining truth and consensus even as the COVID-19 pandemic threatens to kill tens of thousands of Americans.”) <https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/>.

<sup>2</sup> Petition for Rulemaking of the National Telecommunications and Information Administration, RM-11862 (filed July 27, 2020) (“Petition”).

<sup>3</sup> See, e.g., Shirin Ghaffary, “Twitter has Finally Started Fact-Checking Trump,” *Vox* (May 26, 2020), <https://www.vox.com/recode/2020/5/26/21271210/twitter-fact-check-trump-tweets-mail-voting-fraud-rigged-election-misleading-statements>.

<sup>4</sup> Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020).

<sup>5</sup> Press Release, Free Press, “Free Press and Allies File Lawsuit Challenging Trump's Executive Order Against Social-Media Companies” (Aug. 27, 2020), <https://www.freepress.net/news/press-releases/free-press-and-allies-file-lawsuit-challenging-trumps-executive-order-against>.

As such, we are reluctant to engage in this cynical enterprise, intended by the administration to bully and intimidate social media companies into rolling back their content moderation efforts for political speech in the few months before the 2020 presidential election lest they face adverse regulation. The FCC, as Commissioner Rosenworcel said, ought not have taken this bait and entertained a proposal to turn the FCC into “the President’s speech police.”<sup>6</sup>

Yet, here we are.

The NTIA petition is shoddily reasoned and legally dubious. It unlawfully seeks to radically alter a statute by administrative fiat instead of through the legislative process. It invents ambiguity in Section 230 where there is none,<sup>7</sup> and imagines FCC rulemaking authority where there is none.<sup>8</sup> Lastly, it asks the courts to abide by FCC “expertise” on Section 230 and intermediary liability for speech where there is none (and where the FCC itself disclaims such a role),<sup>9</sup> based on authority that the FCC does not have and jurisdiction it has disavowed.

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<sup>6</sup> Press Release, “FCC Commissioner Jessica Rosenworcel on Section 230 Petition and Online Censorship” (July 27, 2020) (“If we honor the Constitution, we will reject this petition immediately.”), <https://docs.fcc.gov/public/attachments/DOC-365758A1.pdf>.

<sup>7</sup> See Eric Goldman, “Comments on NTIA’s Comments on NTIA’s Petition to the FCC Seeking to Destroy Section 230,” (Aug. 12, 2020), <https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm>.

<sup>8</sup> See *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 267 (2017) (“*RIFO*”) (“We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here.”); see also Harold Feld, “Could the FCC Regulate Social Media Under Section 230? No.”, (Aug. 14, 2020), <https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/>.

<sup>9</sup> See, for example, the Commission’s public outreach materials that expressly disclaim any such role and declare simply that “[t]he Communications Act prohibits the FCC . . . from making any regulation that would interfere with freedom of speech.” Federal Communications Commission, “The FCC and Freedom of Speech,” (Dec. 30 2019), <https://www.fcc.gov/consumers/guides/fcc-and-freedom-speech>.

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## Introduction

For over a decade now Free Press has been stalwart in its advocacy that broadband internet access service is a transmission service, or what the Communications Act defines as a “telecommunications service” properly subject to nondiscrimination rules that protect internet users, competition, speech, and the free and open internet.<sup>10</sup> Yet, the Trump FCC’s misnamed Restoring Internet Freedom Order (“RIFO”) repealed those successful rules for broadband providers, and abandoned the proper Title II authority to institute those rules.

At that time, members of the present majority at the Commission conflated broadband internet access with the content that flows over such access networks; but whatever the folly of such conflation, they doubled down on the (il)logic of their argument, and proclaimed that the FCC should never have decided “to regulate the Internet” at all.<sup>11</sup> Even Commissioner Carr agreed, crowing that the repealed rules represented a “massive regulatory overreach” because they applied nondiscrimination rules to broadband providers, which in Carr’s opinion should be treated as information services subject to no such “Internet conduct” rules at all.<sup>12</sup> The attack on conduct rules was premised not only on the same Trump FCC’s belief that there was no need for them, but – crucially – that the Commission also had no authority to adopt such rules.

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<sup>10</sup> See, e.g., Comments of Free Press, GN Docket No. 10-127, at 2 (filed July 15, 2010) (“Pursuing a limited Title-II classification restores the Commission’s authority to move forward. The factual record and relevant legal precedent unassailably support the conclusion that the proposed policy shift is both necessary and wise. And a limited Title-II classification will uphold the commonly shared principles of universal service, competition, interconnection, nondiscrimination, consumer protection, and reasoned deregulation – principles that created the Internet revolution.”).

<sup>11</sup> See, e.g., *RIFO*, Statement of Commissioner Michael O’Rielly.

<sup>12</sup> See *id.*, Statement of Commissioner Brendan Carr.

How times have changed. Though this is perhaps unsurprising, because one of the only consistent aspects of this administration and its appointees is their wild inconsistency. Yet having abdicated and rejected its own authority to adopt such rules for broadband telecommunications providers, the Commission now entertains the notion (at NTIA's behest) that it could adopt such rules after all, only for all information service providers this time. At least insofar as they qualify as "interactive computer services" pursuant to the different statutory definition in Section 230.

Regulating access networks to prevent unreasonable discrimination is still essential to ensuring free speech online, preserving access to diverse points of view and political information of all kinds, and cultivating online communities where people with common interests can meet, organize, and have moderated conversations of their choosing. That's because broadband telecommunications networks provide access to every destination online. But no matter how powerful and popular certain individual destinations on the internet have become, regulating them in the same way makes no sense. Regulating the conversations that happen on the internet, and not the pathways<sup>13</sup> that take us there, is a funhouse mirror version of the FCC's proper role, and it also would thwart all of the NTIA's alleged goals of promoting a diversity of viewpoints and conversations online.

NTIA's Petition reads Section 230 all wrong, in service of the administration's real objective: preventing commentary on and critique of the president's misinformation and unfounded utterances. Specifically, the Petition wrongly claims that the provisions in Section

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<sup>13</sup> See Matt Wood, "Private: Public Sidewalks on Private Property: Net Neutrality, Common Carriage, and Free Speech," American Constitution Society Blog (Sept. 29, 2015) <https://www.acslaw.org/expertforum/public-sidewalks-on-private-property-net-neutrality-common-carriage-and-free-speech/>.

230(c)(2)(A), which allows websites to moderate any content they deem “otherwise objectionable,” are ambiguous and in need of clarification. Yet this supposed clarification would render that provision a nullity. It would allow interactive computer services (as defined in Section 230 itself) that enable access to third-party content to moderate only when content is already unlawful or already subject to FCC regulation (like pornography or obscenity are).

No other third-party material, if it is lawful, could readily be taken down by platforms were the Commission to accept the Petition’s invitation. This lawful-versus-unlawful dichotomy plainly contradicts the statutory text in Section 230. It would effectively end the ability of social media sites to create differentiated services, and forbid them from taking down Nazi, anti-Semitic, racist, and “otherwise objectionable” content that is permitted under the First Amendment. This supposed “clarification” of Section 230, mandated that “good faith” moderation requires leaving such objectionable material up, is awful policy and unlawful too.

**I. NTIA’s Interpretation Guts One of the Most Important Protections for Online Speech, and Would Curtail Not Promote Diversity of Viewpoint on the Internet.**

Despite the emergence of Section 230 reform as a hot-button political issue on both sides of the political aisle,<sup>14</sup> and the Petition’s fanciful and evidence-free claims that this statute is somehow suppressing political expression<sup>15</sup> and other views, any claimed harm is swamped by

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<sup>14</sup> See Adi Robertson, “Lots of Politicians Hate Section 230 - But They Can’t Agree on Why,” *The Verge* (June 24, 2020), <https://www.theverge.com/21294198/section-230-tech-congress-justice-department-white-house-trump-biden>.

<sup>15</sup> See, e.g., Mathew Ingram, “The myth of social media anti-conservative bias refuses to die,” *Columbia Journalism Review* (Aug. 8, 2019), [https://www.cjr.org/the\\_media\\_today/platform-bias.php](https://www.cjr.org/the_media_today/platform-bias.php); Casey Newton, “The real bias on social networks isn’t against conservatives,” *The Verge* (April 11, 2019) (“The truth is that social networks have been a boon to partisans of every stripe – conservatives especially.”), <https://www.theverge.com/interface/2019/4/11/18305407/social-network-conservative-bias-twitter-facebook-ted-cruz>.

the benefits of Section 230. The fact remains that Section 230 greatly lowers barriers for third-party speech hosted on platforms, large and small, that these third-party speakers do not themselves own.

The speech-promoting effects of Section 230's provisions are straightforward. An interactive computer service generally will not be subject to speaker or publisher liability simply because it hosts third-party or user-generated content. Those same interactive computer services will also not create liability for themselves by removing content from their own services, if either the service itself or its users consider that content to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."<sup>16</sup>

We have discussed the origin and necessity of Section 230's provisions in other forums.<sup>17</sup> Both Section 230(c)(1) and (c)(2) are necessary for the proper functioning of the liability shield, and only together do they properly cure the confused, pre-230 liability regime which required online entities to choose a course of either no moderation at all, or moderation with the risk of exposure to publisher-liability for restricting access to any third-party content.

Together, these subsections allow people and companies of all sizes to create forums that host content of their own choosing. That means forums can organize themselves around people's identities, political affiliations, or other interests too, without having to entertain interlopers in their digital houses if they choose not to.

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<sup>16</sup> 47 U.S.C. § 230 (c)(2)(A).

<sup>17</sup> See Gaurav Laroia & Carmen Scurato, "Fighting Hate Speech Online Means Keeping Section 230, Not Burying It," *TechDirt* (Aug. 31, 2020), <https://www.techdirt.com/articles/20200821/08494445157/fighting-hate-speech-online-means-keeping-section-230-not-burying-it-gaurav-laroia-carmen-scurato.shtml>.



The NTIA's radical reinterpretation of Section 230 would shrink the congressionally mandated scope of the statute's grant to interactive computer services, taking away their generally free-hand to take down or restrict any content such services find objectionable or problematic, and restricting them to removing only material that the president and his advisors deem objectionable too: content that is already unlawful, or that fits a category the Commission itself already has regulated (like pornography, obscenity, and some spam and harrassment).

Section 230's language ensuring that takedowns of content do not give rise to liability must be broad, especially when it concerns content that is distasteful to the platform or its users. The statute itself has exemptions from the liability protections it otherwise grants – carve-outs to the carve-out – for federal criminal law, intellectual property law, and other topics. And courts have explained that this immunity is broad though not unlimited.<sup>18</sup> Yet Section 230 rightfully protects websites when they remove material that is “lawful, but awful” and allows them to set their own terms of service without fear of exposing them to liability. Shrinking this provision in the way the NTIA proposes would undermine Section 230's necessary fix to the pre-230 liability regime. That would force websites to carry objectionable third-party content, and use the structure of Section 230 to impermissibly adopt conduct rules for websites.

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<sup>18</sup> See *Enigma Software Grp. USA, v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019) (“We therefore reject Malwarebytes's position that § 230 immunity applies regardless of anticompetitive purpose. But we cannot, as Enigma asks us to do, ignore the breadth of the term ‘objectionable’ by construing it to cover only material that is sexual or violent in nature.”).

**A. NTIA’s Proposal rests on an Ahistorical and Unwarranted Read of the “Otherwise Objectionable” and “Good Faith” Provisions of Section 230.**

Though NTIA spills buckets of ink and fills dozens of pages attempting to justify its proposed changes to Section 230, we can cut to the chase and lay out plainly the statutory text that this administration wants to rewrite on Congress’s behalf – violating the separation of powers between the legislative and executive branches and usurping the power of the Commission as an independent agency in the process.

NTIA seeks to restrict the meaning of “otherwise objectionable” in Section 230(c)(2)(A), changing it to mean something far less than any material that an interactive computer service may deem offensive – whether those materials are “obscene, lewd, lascivious, filthy, excessively violent, [or] harassing” or objectionable in some other way.<sup>19</sup> In the administration’s view, the term should encompass only materials targeted by the Communications Decency Act (“CDA”) itself, and those “that were objectionable in 1996 and for which there was already regulation” – claiming that, despite the plain text of the statute, Congress merely “intended section 230 to provide incentives for free markets to emulate”<sup>20</sup> that “already-regulated” structure.

According to NTIA, that means permitted takedowns would solely be for the kind of material prohibited in the 1909 Comstock Act<sup>21</sup> and in Section 551 of the Communications Act

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<sup>19</sup> 47 U.S.C. § 230 (c)(2)(A).

<sup>20</sup> Petition at 34.

<sup>21</sup> *Id.* (“The Comstock Act prohibited the mailing of ‘every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character.’”).

titled “Parental Choice in Television Programming”<sup>22</sup>; material akin to obscene or harassing telephone calls<sup>23</sup>; and material the rest of the CDA prohibited. NTIA thereby reads the subsection as only referencing “issues involving media and communications content regulation intended to create safe, family environments.”<sup>24</sup>

NTIA’s proposal is a radical restriction of the meaning of “otherwise objectionable” in the statute, without textual or judicial support.<sup>25</sup> There is no historical evidence to tie the purposes or meaning of Section 230 to the remainder of the largely struck-down Communications Decency Act or its goals.<sup>26</sup> Courts have debated the contours of Section

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<sup>22</sup> *Id.* at 35 (“The legislation led to ratings for broadcast television that consisted of violent programming. The FCC then used this authority to require televisions to allow blocking technology.”).

<sup>23</sup> *Id.* at 37, citing 47 U.S.C. § 223 (“Thus, the cases that struggled over how to fit spam into the list of section 230(c)(2) could simply have analogized spam as similar to harassing or nuisance phone calls.”).

<sup>24</sup> *Id.* at 37.

<sup>25</sup> See *Enigma Software*, 946 F.3d at 1051 (dismissing such a narrow construction of the term “otherwise objectionable”).

<sup>26</sup> See Hon. Christopher Cox, Counsel, Morgan, Lewis & Bockius LLP; Director, NetChoice, “The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today’s Online World,” before the Commerce, Science, & Transportation Committee of the Senate (July 28, 2020) (“Cox Testimony”), <https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D7> 1. As former Representative Cox explained: “In fact, the Cox-Wyden bill was deliberately crafted as a rebuke of the Exon [Communications Decency Act] approach.” Cox also described the relationship between the remainder of the CDA, largely struck down because it sought to prohibit certain kinds of content; and Section 230, which sought instead to give parents the tools to make these choices on their own. “Perhaps part of the enduring confusion about the relationship of Section 230 to Senator Exon’s legislation has arisen from the fact that when legislative staff prepared the House-Senate conference report on the final Telecommunications Act, they grouped both Exon’s Communications Decency Act and the Internet Freedom and Family Empowerment Act into the same legislative title. So the Cox-Wyden amendment became Section 230 of the Communications Decency Act – the very piece of legislation it was designed

230(c)(2)(A) and some have declined to give interactive computer services complete carte-blanche to take down third-party content (citing possible anticompetitive motives for some content takedowns that might not be exempt),<sup>27</sup> but none have articulated a standard as restrictive as NTIA's. The administration's proposed reading collapses the universe of permissible takedowns to only those enumerated in NTIA's formulation, and not the current, ever-evolving, and inventive panoply of objectionable content on the internet. It would severely curtail platforms ability to take down propaganda, fraud, and other "lawful, but awful" content that isn't lascivious or violent but causes serious harm, like disinformation about elections or COVID-19.

NTIA then seeks to place severe limitations on the meaning of "good faith" in the statute. This "good samaritan" provision was meant to facilitate interactive computer services creating a myriad of websites and content moderation schemes that would "allow a thousand flowers to bloom."<sup>28</sup> NTIA seeks to do the exact opposite.

In its formulation a platform, its agent, or an unrelated party, would be "acting in good faith" under Section 230 only if 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)."<sup>29</sup> The Petition would restrict the ability of platforms to rapidly take down objectionable content, only permitting it if

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to counter. Ironically, now that the original CDA has been invalidated, it is Ron's and my legislative handiwork that forever bears Senator Exon's label."

<sup>27</sup> See Petition at 32, n. 98.

<sup>28</sup> Cox Testimony at 17 ("Ensuring that the internet remains a global forum for a true diversity of political discourse requires that government allow a thousand flowers to bloom – not that a single website has to represent every conceivable point of view." (internal quotation marks omitted)).

<sup>29</sup> Petition at 39.

the “interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.”<sup>30</sup>

These restrictions completely rewrite the meaning, purpose, and effect of the statute. Under this scheme a platform would open itself up to liability for (purportedly) not acting in good faith if it were to restrict or remove third-party content unless that material runs afoul of a largely invalidated law’s conception of what is “family friendly.” This reinterpretation of the meaning of “otherwise objectionable” in Section 230 would read that unambiguous, and broad but perfectly clear phrase right out of the statute Congress wrote. Just because Congress granted broad discretion to interactive computer services does not make the term “otherwise objectionable” ambiguous. Section 230(c)(2)(A) clearly leaves these moderation decisions to an interactive computer service, to restrict access to any “material that the provider or user considers to be . . . otherwise objectionable.”

**B. NTIA’s Proposal Restricts Lawful, First Amendment-Protected Activity by Interactive Computer Services, and Calls on the FCC to Regulate the Internet by Imposing Conduct Rules on Websites.**

NTIA’s proposal represents a departure from Section 230’s lauded deregulatory regime.<sup>31</sup> The Petition is incredibly proscriptive and seeks to flatten all content moderation into a few designated categories. If enacted it would curtail the rights of private businesses and individuals – all of which are First Amendment-protected speakers – from moderating their sites as they see fit. Instead of providing clarity for websites that carry third-party content, it would force them to

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<sup>30</sup> *Id.* at 40.

<sup>31</sup> See *RIFO* ¶ 61, n. 235 (“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.’”) (citing 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

either guess what speech the government chooses to abridge as “objectionable” and then stay within those contours; or else forgo moderation altogether – instituting a must-carry regime and ersatz Fairness Doctrine for the internet, and leaving sites little choice but to drown in posts from bigots, propagandists, charlatans, and trolls. The Petition is nothing more than a cynical attempt to use the guise of law to force internet platforms to carry such content, all chiefly to preserve the presence on private platforms of the falsehoods uttered by this president without any fact-checking, contextualizing, or other editorializing.

NTIA’s unlawfully proposed amendments to Section 230’s straightforward text would place huge burdens on owners and operators of websites, which are emphatically speakers in their own right.<sup>32</sup> It does so with little justification and only general paeans to the importance of protecting the free speech rights of all.<sup>33</sup> But an FCC-enforced, must-carry mandate for discourse on websites would flatten discussions across the web and destroy the countless discrete and vibrant communities that rely on some degree of moderation to ensure that typically marginalized voices can reach their audience. As former Representative Chris Cox recently testified in defense of Section 230, “Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is.”<sup>34</sup> This confusion of the sidewalk for conversation, and of the means of transmission for the speaker, fails at producing the free-speech protective outcome NTIA purportedly seeks to create.

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<sup>32</sup> *See, e.g., Reno v. ACLU*, 521 U.S. 844, 882 (1997).

<sup>33</sup> *See* Petition at 3.

<sup>34</sup> Cox Testimony at 17.

**II. The Same FCC that Wrongly Declared Itself Unable to Adopt Conduct Rules for Broadband Providers Under Far More Certain Authority Cannot Fashion Conduct Rules for the Internet Now on the Basis of Section 230 Authority It Disavowed.**

Ironically, these stringent anti-blocking rules remind us of the neutrality provisions this FCC undermined and repealed for providers of broadband internet access. Yet whatever one believes about the need for such rules as applied to broadband providers, there is no question that the statute, the courts, and the Commission itself have all denied the agency's ability to impose such stringent nondiscrimination rules on the basis of Section 230 alone.

As indicated at the outset of these comments, we believe nondiscrimination rules are not just lawful but vital for the broadband transmission networks that carry speech to every destination on the internet. But there is no question that such rules are unique. Despite this FCC's propaganda and the intense broadband industry lobbying efforts that fueled it, common carriage rules are still vital for transmission services and others that hold themselves out as providing nondiscriminatory carriage of third-party speech to different users and destinations on the internet. Twitter or Facebook, or any site that hosts third-party or user-generated content, is just such an internet endpoint. An online platform is not a transmission pathway: it's a destination, no matter how many people gather there.

The Petition ignores these kinds of distinctions, and blithely asserts that (1) Section 230 is in the Communications Act, in Title II itself no less; and that (2) Section 201(b) gives the Commission plenary power to adopt any rules it likes pursuant to such other provisions that happen to be in the Communications Act.<sup>35</sup> Because the Supreme Court has previously found FCC action valid under Section 201(b), even when the substantive statute in question did not

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<sup>35</sup> See, e.g., Petition at 15-18.

specify a role for the Commission,<sup>36</sup> the NTIA presumes that the Commission is free to act here even though Section 230 makes no mention whatsoever of the FCC (let alone any specific role or ability for the agency to weigh in court's application on Section 230's liability shield).

Having thus asserted but not proven that the Commission might issue some kind of rules under Section 230, the Petition completely ignores the question of whether the FCC could issue these kinds of rules, binding on all "interactive computer services" under Section 230 pursuant to that statute alone. The answer to this question that the Petition desperately evades is a resounding no, based on controlling court precedent and on the FCC's own view of its authority – or, more appropriately, its lack thereof – under 230.

When considering an earlier attempt at Net Neutrality protections and the kind of nondiscrimination mandate that NTIA now proposes for every website and platform on the internet, the D.C. Circuit's decision in *Verizon v. FCC* held in no uncertain terms that such nondiscrimination rules are common carriage requirements. As such, they can be placed only on regulated entities classified as common carriers subject to Title II of the Communications Act, not just on any service or entity merely mentioned in another one of the Act's provisions like Section 230. No massaging of the Communications Act could support those rules under other authorities.<sup>37</sup> So as the Commission itself subsequently recognized, *Verizon* makes plain that

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<sup>36</sup> See *id.* at 16 (citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999) and *City of Arlington v. FCC*, 569 U.S. 290 (2013)).

<sup>37</sup> See *Verizon v. FCC*, 740 F.3d 623, at 655-56 (D.C. Cir. 2014) ("We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], *pro tanto*, to common carrier status. In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold themselves out 'to serve the public indiscriminately.'" (internal citations omitted)).



such common carriage rules are only supportable under the Title II regulation that the current FCC majority rejected even for broadband transmission services.<sup>38</sup>

Adopting these rules would not only put the Commission in the position of having to ignore this *Verizon* precedent, it would require the agency to reverse its stance on whether Section 230 is a substantive grant of authority too. When it repealed its open internet rules for broadband providers in 2017, the Trump FCC’s resounding rejection of Section 230 as a source of any substantive authority whatsoever forecloses such a self-serving reversal now. Hewing closely to lessons learned from even earlier appellate losses than *Verizon*, the Commission said in no uncertain terms then that Section 230 is “hortatory,” and that this statute simply does not serve as “authority that could provide the basis for conduct rules.”<sup>39</sup>

It’s plain that the Petition would require the Commission to enforce a nondiscrimination regime for speech on websites, while having abandoned rules that prohibited discrimination by broadband providers, even though the broadband-specific rules were grounded on rock-solid common carrier authority and policies. This position would be untenable and absurd.

The Petition proposes nothing less than this kind of nondiscrimination regime, seriously curtailing the ability of different websites to create unique and differentiated experiences for different users across the internet. This “platform neutrality” notion has grown in popularity in Congress as well, even though “neutrality” wasn’t the goal of Section 230 and should not be the

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<sup>38</sup> See *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 41 (2015).

<sup>39</sup> See *RIFO* ¶ 284 (citing *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)); see also *id.* ¶ 293 (explaining that Section 230 and other tenuous authority provisions “are better read as policy pronouncements rather than grants of regulatory authority”).

goal of any intermediary liability regime.<sup>40</sup> And among the bad results that would flow from such a course of action, this would likely end the ability of people of color, women, and other groups subjected to systemic oppression and harassment to create spaces where they can share ideas and discuss topics important to them without the imposition of racist and misogynist interlopers shutting down that speech.

In sum, the Petition asks the FCC to create a “Neutrality” regime for websites, after the same agency wrongly rejected its stronger authority and similar conduct rules for broadband telecommunications.<sup>41</sup> To avoid this absurd, unlawful, and unconstitutional outcome, the Commission must reject the NTIA Petition as well as the rules it proposes, and put an end to this process.

### **Conclusion**

This proceeding was born from a corrupt and illegal desire to intimidate websites and media companies into not fact-checking the President of the United States in the months before his attempt at reelection. It is a cynical enterprise that threatens our fundamental freedoms and the rule of law. Skepticism about the wisdom and intellectual honesty of this project has already imperiled the career of one Republican Commissioner, apparently as punishment doled out by a president from the same party as him, and as retribution for the fact that this independent agency

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<sup>40</sup> Daphne Keller, “The Stubborn, Misguided Myth that Internet Platforms Must be ‘Neutral,’” *Wash. Post* (July 29, 2019) (“CDA 230 isn’t about neutrality. In fact, it explicitly encourages platforms to moderate and remove ‘offensive’ user content. That leaves platform operators and users free to choose between the free-for-all on sites like 8chan and the tamer fare on sites like Pinterest.”), <https://www.washingtonpost.com/outlook/2019/07/29/stubborn-nonsensical-myth-that-internet-platforms-must-be-neutral/>.

<sup>41</sup> *See, e.g., RIFO* ¶ 4.

commissioner would dare question the president's understanding of these issues.<sup>42</sup> The Commission should instead follow the logic of the statute, the courts, and its own past pronouncements, declining this invitation to surrender its own independence in service of the Petition's efforts to bully online platforms into silence too.

Respectfully submitted,

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<sup>42</sup> See Michael T.N. Fitch & Wesley K. Wright, "The Making – and Unmaking – of an FCC Commissioner," *The National Law Review* (Aug. 10, 2020), <https://www.natlawreview.com/article/making-and-unmaking-fcc-commissioner>.