

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Section 230 of the)	
Communications Act of 1934)	RM-11862
)	
To: The Commission		

COMMENTS OF THE SECTION 230 PROPONENTS

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Summary and Introduction

The Commission has been called upon to decide whether one of the internet's most essential laws, 47 U.S.C. § 230 ("Section 230" of the Communications Decency Act) should be unilaterally re-interpreted to suit the President's internet agenda.¹ Certainly Section 230 is not perfect: it has failed to eliminate racial and gender discrimination, voter suppression, and other unacceptable inequities on the internet.² These illnesses should be cured, but the NTIA Petition does not do that; nor could it because Section 230 confers on the FCC no jurisdiction over the subject matter. Worse yet, the relief sought in the NTIA Petition would incentivize online racial and gender discrimination and hate speech online.

The NTIA Petition should be denied because (A) the FCC lacks the jurisdiction required to reform Section 230 as proposed in the NTIA Petition; and (B) even if the FCC had jurisdiction, implementation would (1) de-incentivize equitable and viewpoint-neutral content moderation by online platforms, (2) threaten small companies by creating a hostile regulatory environment, and (3) oppress marginalized peoples and activists by perpetuating discriminatory content moderation and hate speech.

For its part, Congress should take steps to better protect users from racial and gender discrimination and hate speech online.

¹ See *NTIA Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act* ("NTIA Petition"), NTIA (filed July 27, 2020), available at https://www.ntia.doc.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (last visited July 31, 2020), on file at the FCC as RM-11862. See Annex, *infra* (listing the Section 230 Proponents). These Comments are submitted pursuant to 47 C.F.R. §1.405.

² See Part III (E) and note 7, *infra* (referencing online platforms' liability for using or allowing third parties to use their products to discriminate against users on the basis of their sexual orientation, race, age, or gender).

The Section 230 Proponents³ support reforms that are made in good faith,⁴ in accordance with established law,⁵ by lawful authority,⁶ and in a way that recompenses past, present, and future victims of online racial and gender discrimination and hate speech.⁷ Unfortunately, the President has focused instead on weakening Section 230, including its imperfect but helpful incentivizing of content moderation.⁸

³ The six Section 230 Proponents include many of the nation's leading multicultural advancement organizations, with collectively millions of members. Each of the Section 230 Proponents, and nearly all of their respective members, regularly engage in protected speech and advocacy online.

The views expressed in these Comments are the institutional views of the commenting organizations and are not intended to reflect the individual views of each officer, director, or member of these organizations.

⁴ Commissioner O'Rielly has called such opportunistic attacks on online freedom of speech "a particularly ominous development." Hon. Michael O'Rielly, Remarks Before The Media Institute's Luncheon Series at 5 (Jul. 29, 2020), *available at* <https://docs.fcc.gov/public/attachments/DOC-365814A1.pdf> (last visited Aug. 30, 2020) ("It is time to stop allowing purveyors of First Amendment gibberish to claim they support more speech, when their actions make clear that they would actually curtail it through government action. These individuals demean and denigrate the values of our Constitution and must be held accountable for their doublespeak and dishonesty.")

⁵ See Part III (B), *infra* (outlining how the NTIA Petition advances changes in the law that are contrary to precedent).

⁶ The NTIA Petition should be denied on its face for want of jurisdiction. See Part III (A), *infra*.

⁷ See, e.g., *National Fair Housing Alliance v. Facebook*, No. 1:18-cv-02689 (S.D.N.Y. 2018); Determination, *Bradley v. Capital One*, Charge Number 570-2018-01036 (EEOC Jul. 2019) (finding that Capital One unlawfully discriminated by advertising jobs on Facebook while limiting the age of people who could see the advertisement); *Divino Group v. Google*, No. 5:2019cv04749 (N.D. Cal., filed Aug. 13, 2019) (alleging that YouTube discriminates against LGBTQ+ creators); *Bradley v. T-Mobile*, Case No. 17-cv-07232-BLF, 2019 WL 2358972 (N.D. Cal. 2020), *amended complaint filed* Jun. 11, 2020 (arguing that companies unlawfully discriminated by "us[ing] Facebook's ad platform to limit the population of Facebook users who will receive their job advertisements or notices – for example, by changing the age range...from 18 to 64+...to 18 to 38"); Complaint, *Newman v. Google*, No. 5:20-cv-04011 (N.D. Cal., filed Jun. 16, 2020) (alleging that YouTube's algorithms target Black creators). See also Part III (E), *infra* (outlining pre-existing discrimination by content moderators and moderation algorithms against communities of color).

⁸ See Bobby Allyn, *Stung By Twitter, Trump Signs Executive Order To Weaken Social Media Companies*, NPR (May 28, 2020), *available at* <https://www.npr.org/2020/05/28/863932758/stung-by-twitter-trump-signs-executive-order-to->

If the FCC were to grant the NTIA Petition and implement the President’s agenda – which would require jurisdiction that does not exist here – it would become more expensive and legally risky for platforms to neutrally moderate content shared by their users. Small internet companies would lack the capital to withstand those increased costs and regulatory changes. Therefore, the NTIA Petition should be denied because reinterpreting Section 230 according to the Petition – which would be facially unlawful⁹ – would promote and perpetuate race and gender discrimination and hate speech on the internet.

I. The History and Value of Section 230

Section 230 of the Communications Decency Act of 1996 limits the liability of online platforms for third-party content. Subsection 230(c)(1) states in part that, “No 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.”¹⁰ This language creates a “Good Samaritan” protection under which interactive computer services, like Facebook, Twitter, and Instagram, are generally protected from liability should a user post anything offensive or illegal. There are

weaken-social-media-companies (last visited Sept. 2, 2020) (“President Trump signed [the] executive order . . . two days after he tore into Twitter for fact-checking two of his tweets.”)

⁹ See Parts III (A) and III (B), *infra*.

¹⁰ Codified at 47 U.S.C. § 230(c)(1) (1996).

specific exceptions for material related to sex trafficking,¹¹ violations of copyright,¹² and federal criminal law.¹³

Critically, while protecting online content providers from liability for third-party or user-generated content, Section 230 does not interfere with longstanding legal precedents holding content creators liable for their own content posted on online service platforms.¹⁴ For example, a Twitter user can still be liable for defamation resulting from a tweet of their own creation.¹⁵

Additionally, Subsection 230(c)(2) establishes an editorial discretion “safe harbor” for interactive computer service providers.¹⁶ This “Good Samaritan” clause encourages online

¹¹ *Id.* § 230(e)(5); *see also* Heidi Tripp, All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims, 124 PENN ST. L. REV. 219 (2019) (“FOSTA/SESTA amends Section 230 of the CDA to create an exception to immunity for ISPs when content posted by third parties promotes or facilitates prostitution and sex trafficking or advertises sex trafficking.”)

¹² 47 U.S.C. § 230(e)(2); *see also* Madeline Byrd & Katherine J. Strandburg, *CDA 230 for A Smart Internet*, 88 FORDHAM L. REV. 405 (2019) (clarifying that online service providers are still liable for copyright infringement under the Digital Millennium Copyright Act’s (DMCA) notice-and-takedown regime for distributing material illegally copied by users).

¹³ 47 U.S.C. § 230(e)(1); *see also* Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. §230’s Immunity*, SANTA CLARA L. DIGITAL COMMONS (July 10, 2013), available at <https://digitalcommons.law.scu.edu/facpubs/793/> (last visited Aug. 20, 2020) (stating that Section 230 excludes all federal criminal prosecutions but preempts “any prosecutions under state or local criminal law where the crime is predicated on a website’s liability for [user-generated content]”).

¹⁴ *Liability for User-Generated Content Online: Principles for Lawmakers*, NAT’L TAXPAYERS UNION (July 11, 2019), available at <https://www.ntu.org/publications/detail/liability-for-user-generated-content-online-principles-for-lawmakers> (last visited May 14, 2020).

¹⁵ However, the nature of expression on social platforms can make it “nearly impossible” to decide whether speech, such as a tweet, is defamatory. *Boulger v. Woods*, No. 18-3170 1, 11 (6th Cir., 2019) (finding a tweet had no precise meaning and was thus not defamatory because it ended in a question mark).

¹⁶ 47 U.S. Code § 230(c)(2)(A)(2018) (stating “No provider or user of an interactive computer service shall be held liable on account of (A) 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; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”)

service providers to moderate third-party content by immunizing restrictions on material considered “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”¹⁷ This broad standard places full discretion in the hands of private technology companies and social media service providers. Companies and platforms need only show that their responsive actions (or the lack of them) were based upon moderating discretion absent some form of bad faith, such as a contractual breach or malicious intent.¹⁸ For example, when Facebook or Twitter independently identify and “flag”¹⁹ specific objectionable material, they also determine the process for taking down and reprimanding the responsible users.

Although technology companies and social media sites tend to voluntarily address such situations,²⁰ Section 230 does not explicitly impose any affirmative duty to take down content

¹⁷ *Id.*

¹⁸ *Id.* (establishing that “a platform exercising extreme editorial discretion (for example, by deliberately censoring vegans or climate change activists because it doesn’t like them) would still be protected – ‘good faith’ does not imply ‘good judgment’”). Indeed, liability shielding is a necessary element of a legal system encapsulating corporate actors – especially those providing consequential goods and services used by other people. *Compare* Section 230 with Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U.J.L & BUS. 27, 27-8 (Fall 2017) (arguing the business judgment rule, which limits liability for decisions made by corporate boards, is the “most . . . important standard of judicial review under corporate law.”)

¹⁹ See generally Kate Crawford & Tarleton Gillespie, *What is a flag for? Social Media reporting tools and the vocabulary of complaint*, NEW MEDIA & SOCIETY (Mar. 2016), available at <https://doi.org/10.1177/1461444814543163> (last visited Aug. 20, 2020) (“The flag is now a common mechanism for reporting offensive content to an online platform, and is used widely across most popular social media sites”); see also Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1639–40 (2018) (“When content is flagged or reported, it is sent to a server where it awaits review by a human content moderator. At Facebook, there are three basic tiers of content moderators: ‘Tier 3’ moderators, who do the majority of the day-to-day reviewing of content; ‘Tier 2’ moderators, who supervise Tier 3 moderators and review prioritized or escalated content; and ‘Tier 1’ moderators, who are typically lawyers or policymakers based at company headquarters.”)

²⁰ See Evangeline Elsa, *Twitter to test new feature to let users rethink before posting “offensive or hurtful” tweets*, GULF NEWS (May 6, 2020), available at <https://gulfnnews.com/world/twitter-to-test-new-feature-to-let-users-rethink-before-posting-offensive-or-hurtful-tweets-1.1588763796071> (last visited Aug. 20, 2020) (describing Twitter’s

that does not fit a stated exception.²¹ Thus, providers cannot be held liable for content they either miss or choose to ignore. Section 230 also immunizes service providers' edits²² and promotions.²³ For example, an online platform may correct the spelling of a post, replace swear words with an asterisk, or delete a paragraph of a post, without forfeiting Section 230 immunity.²⁴

The "Good Samaritan" protection was influenced by prior case law that imposed liability upon online platforms for moderating objectionable content. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court held that a computer network that hosted online bulletin boards was strictly liable for defamatory statements made by a third-party user because it engaged in moderation by removing some offensive content on its boards.²⁵ Relying on this precedent, online platforms concluded that, to avoid liability for user content, it was best to not moderate

plan to test a new feature that will inform users prior to posting if their tweet replies contain offensive language).

²¹ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (reasoning that, although Section 230 was designed to encourage sites to implement their own policing efforts, "[s]ubsection (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").

²² See John Bergmayer, *What Section 230 Is and Does—Yet Another Explanation of One of the Internet's Most Important Laws*, PUBLIC KNOWLEDGE (May 14, 2019), available at <https://www.publicknowledge.org/blog/what-section-230-is-and-does-yet-another-explanation-of-one-of-the-internets-most-important-laws/> (last visited Aug. 20, 2020) (explaining that, because editing is not equated with authorship, "a platform, after content is posted, can correct the spelling of a post, replace swear words with asterisks, and even delete a problematic paragraph" without incurring liability); see also Sara Gold, *When Policing Social Media Becomes A "Hassell"*, 55 CAL. W. L. REV. 445 (2019) (maintaining that "basic editing, formatting, and content screening do not jeopardize CDA immunity.")

²³ See Bergmayer, *supra* note 22 (stating that Section 230 protects platforms' editorial discretion in "promoting a political, moral, or social viewpoint...[thus,] if Twitter or Facebook chose tomorrow to ban all conservatives, or all socialists, Section 230 would still apply") (emphasis in original).

²⁴ *Id.*

²⁵ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 at *1 (Sup. Ct. May 24, 1995) (hereinafter "*Stratton*").

any content – an illustration of the “law of unintended consequences.”²⁶ Congress was encouraged to enact Section 230’s “Good Samaritan” provision to address the case law that discouraged online service platforms from engaging in content moderation, because moderation is socially beneficial.²⁷

II. The Current Debate Surrounding Section 230

Section 230 has generated calls for repeal or weakening. Critics have argued that the section should be eliminated altogether, reasoning that private technology companies should be held fully liable for content they allow to be posted on their platforms.²⁸ On the other hand, the Section 230 Proponents contend that such companies should not be expected to ceaselessly weed through the ever-compounding volume of user-generated content. Further, such companies do not operate only in America, and it may be difficult to impose legislation on companies with a global presence.

On May 28, 2020, President Trump issued an executive order (“E.O.”) in an attempt to bypass the legislative process to weaken Section 230.²⁹ The E.O. came just two days after Twitter began fact-checking the President’s tweets, labeling two of them as false and providing

²⁶ See *id.*; see also Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (Dec. 1936).

²⁷ Naturally, Section 230 has provided online platforms with the legal certainty needed to fairly moderate user content by precluding liability for any objectionable content that might slip through. See *Liability for User-Generated Content Online: Principles for Lawmakers*, *supra* note 13; *Section 230 as a First Amendment Rule*, *infra* note 58, at 2039 (“Various websites credit § 230 with their very existence.”). See also Patrick Kulp, *Airbnb Ad Touts New Anti-Discrimination Pledge* (Nov. 12, 2016), available at <http://mashable.com/2016/11/12/airbnb-ad-campaign-discrimination/#WtMrwpDfI5q7> (last visited Sept. 2, 2020).

²⁸ Madeline Byrd & Katherine J. Strandburg, *CDA 230 for A Smart Internet*, 88 FORDHAM L. REV. 405, 407-08 (2019) (identifying that “proponents of strong CDA 230 immunity now fear that service providers will engage in overly cautious ‘collateral censorship’”).

²⁹ Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) (“E.O.”)

sources that refuted the President’s assertions.³⁰ In the E.O., President Trump referred to the “immense, if not unprecedented, power to shape the interpretation of public events” that Twitter, Facebook, and other major online platforms possess.³¹ The President maintains that platforms have engaged in selective proscription of speech by conservative speakers.³² The President also believes Section 230 should be reinterpreted or changed so that it no longer protects such platforms.³³

The E.O. contains four sections describing the actions to follow. First, the E.O. directs the head of each executive agency to review that agency’s spending on advertising on online platforms. The Department of Justice will then determine whether the online platforms identified in those reviews impose any “viewpoint-based speech restrictions,” but the E.O. does not define this critical term.³⁴ Second, the E.O. asks the Federal Trade Commission to act under its “unfair or deceptive acts” authority³⁵ to ensure that online platforms do not restrict speech in ways that violate their own terms of service. Third, the E.O. instructs the Attorney General to establish a working group to investigate enforcement and further development of state statutes that prohibit online platforms from engaging in deceptive acts or practices. Finally, the E.O. instructs the

³⁰ See Kate Conger & Mike Isaac, *Defying Trump, Twitter Doubles Down on Labeling Tweets*, N.Y. TIMES (May 28, 2020), available at <https://www.nytimes.com/2020/05/28/technology/trump-twitter-fact-check.html> (last visited June 3, 2020).

³¹ E.O., *supra* note 29.

³² *But see, e.g.*, Erik Lawson, *Twitter, Facebook Win Appeal in Anticonservative-Bias Suit*, BLOOMBERG (May 27, 2020), available at <https://www.bloomberg.com/news/articles/2020-05-27/twitter-facebook-win-appeal-over-alleged-anti-conservative-bias> (last visited Sept. 1, 2020). We are unaware of any evidence that supports the President’s assertion of anti-conservative bias.

³³ *Id.*

³⁴ *Id.*

³⁵ 15 U.S.C. § 45 (2006).

Secretary of Commerce, acting through NTIA, to file a petition for rulemaking (the “NTIA Petition”) with the FCC to clarify parts of Section 230.³⁶

The Section 230 Proponents recognize that online platforms have imperfectly moderated objectionable online content; the internet is host to discrimination, targeted suppression, and other unacceptable inequities between users.³⁷ It is not acceptable that adult internet users must still navigate hate speech or be targeted for voter suppression while browsing Facebook in 2020.³⁸ Here, Congress has the lawmaking authority, and it should exercise that power to bolster protections for multicultural and marginalized internet users.³⁹

³⁶ NTIA filed its Petition with the FCC on July 27, 2020. *See* NTIA Petition, *supra* note 1. In particular, the E.O. asks for clarification regarding (1) the interaction between subparagraphs (c)(1) and (c)(2), and (2) the conditions that qualify an action as “taken in good faith” as the phrase is used in subparagraph (c)(2)(A). *Id.* *See also* Part III (B) *infra*.

³⁷ *See National Fair Housing Alliance v. Facebook* and other cases detailed *supra* at note 7.

³⁸ Lawmakers must be cognizant of how historical forms of discrimination and racism have been hidden and worsened by technological progress. *See* Federal Trade Commission, *Big Data: A Tool For Inclusion Or Exclusion* (2016), available at <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> (last visited September 2, 2020); CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* (2016); VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2017). *Compare The Unexamined Mind*, *ECONOMIST* (Feb. 17, 2018), available at <https://www.economist.com/news/science-and-technology/21737018-if-it-cannot-who-will-trust-it-artificial-intelligence-thrive-it-must> (last visited Sept. 2, 2020) (highlighting risks associated with complicated decision-making algorithms that “no one truly understands”) *with supra* note 7 (outlining recent litigation involving algorithmic discrimination).

³⁹ *See especially* Spencer Overton, President, Joint Center for Pol. & Econ. Studies, Testimony of Before the Subcomm. On Comm’s & Tech. *et al.*, Hearing on *A Country in Crisis: How Disinformation Online is Dividing the Nation* at 2 (Jun. 24, 2020), available at <https://jointcenter.org/wp-content/uploads/2020/06/Overton-Final-Testimony-for-6-24-20-Disinformation-Hearing.pdf> (last visited Sept. 2, 2020) (“If legal reforms are needed, the debates should occur in Congress and should center the voices of people of color who have been disproportionately affected by the negative consequences of social media through targeted voter suppression and other disinformation campaigns.”)

III. The NTIA Petition Should Be Denied

There are at least five major issues that should preclude NTIA's Petition from being granted.

A. The FCC does not have the legal authority to issue any regulations or interpretations contemplated by the NTIA Petition.

At the threshold, the FCC lacks the jurisdiction required to reinterpret Section 230 as requested in the NTIA Petition.⁴⁰ The Congressional Research Service recently affirmed that the courts – not the Executive Branch and not the NTIA – would decide whether the FCC has the authority to issue binding interpretations of Section 230.⁴¹ No court has decided the issue of the FCC's authority to interpret Section 230,⁴² and the statute itself does not even mention the FCC.⁴³ The Executive Branch also has no legislative or judicial power – neither the President nor NTIA can grant the FCC authority to interpret Section 230, let alone unilaterally amend it.⁴⁴ And

⁴⁰ See Valerie C. Brannon *et al.*, Cong. Research Serv., *Section 230 and the Executive Order Preventing Online Censorship*, LSB10484 at 3, 4 (Jun. 3, 2020) (noting that it is unclear whether an FCC interpretation of Section 230, which is what the NTIA Petition seeks, would have “legal import”).

⁴¹ See *id.* at 4 (stating that even if a court found the FCC has jurisdiction to issue rules interpreting Section 230, the FCC's interpretation would be binding only to the extent it was consistent with Section 230). The FTC's authority would only derive from the FTC Act, which similarly grants no authority without changing Section 230 or a contrary court ruling. See *id.* (explaining that the FTC's authority to act to prevent “unfair or deceptive acts” by companies is limited by Section 230).

⁴² *Id.*

⁴³ *Id.* (noting that Section 230 does not mention the FCC, and that the statute's scope and meaning are generally determined without the FCC). To be sure, Section 230 is codified in Title 47, but its location in the U.S. Code does not confer jurisdiction on an agency the statute does not even name. We could place a ham sandwich in Title 47, but that would not license the FCC to eat it for lunch.

⁴⁴ Even if a court had previously held that the FCC has authority to issue binding interpretations of Section 230, that interpretation would be invalid where it was contrary to Section 230 itself. See, e.g., Ronald M. Levin, *Rulemaking and the Guidance Exception*, 70 ADMIN. L. REV. 264, 336-37 n. 336 (2018) (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (refusing to accept an FCC interpretive rule construing a federal statute where the act of interpretation was contrary to the statute being interpreted). Commissioner Rosenworcel

even if lawful authority existed here and the NTIA Petition was granted, any resultant changes to Section 230 would be invalid because the Petition’s proposed interpretations of Section 230 are contrary to Section 230 and its related precedents.⁴⁵ Nonetheless, NTIA requested the FCC issue a binding interpretation of Section 230. That should facially preclude the Petition from being granted.⁴⁶

B. The relief sought in the NTIA Petition would incentivize deceptive and viewpoint-based content moderation.

Even if jurisdiction existed, which it does not, granting the NTIA Petition would handicap Section 230’s intended purposes by promoting deceptive practices and viewpoint-based content moderation.⁴⁷ NTIA proposes several express conditions for a platform to be shielded from liability, but hedges those conditions with “catch-all” exemptions; under this framework, the platforms are protected even if they patently violate Section 230 so long as their conduct is “consistent with [the platform’s] terms of service or use.”⁴⁸ Such changes would induce

commented that the Executive Branch’s attempt to change Section 230 “does not work.” Statement by FCC Commissioner Jessica Rosenworcel on Executive Order, FCC (May 28, 2020), *available at* <https://www.fcc.gov/document/statement-fcc-commissioner-jessica-rosenworcel-executive-order> (last visited Aug. 30, 2020) (declaring that the E.O. seeks to turn the FCC into “the President’s speech police.”)

⁴⁵ See Levin, *supra* note 44. See also Part III (B), *infra*.

⁴⁶ Even though the FCC lacks jurisdiction to issue binding interpretations of Section 230 as requested by the NTIA Petition, the language of the statute can be lawfully amended by the legislature. *But see Section 230 as a First Amendment Rule*, *infra* note 58, at 2028 (arguing the courts should recognize “§ 230’s more stable constitutional provenance,” by holding that the Section is rooted in the First Amendment). However, it would simply be unacceptable for the FCC in this case to issue a binding interpretation of Section 230 at the behest of NTIA, which issued its Petition at the behest of the President. *Accord* John A. Fairlie, 21 *The Separation of Powers*, MICH. L. REV. 393, 397 (1923) (“Wherever the right of making and enforcing the law is vested in the same man . . . there can be no public liberty.”)

⁴⁷ See NTIA Petition, *supra* note 1, at 53–55 (compiling the proposed amendments).

⁴⁸ *Id.* at 53 (“An interactive computer service is not a publisher or speaker of information provided by another information content provider solely on account of actions voluntarily taken in good faith to restrict access to or availability of specific material in accordance with subsection (c)(2)(A) or consistent with its terms of service or use.”)

platforms to broaden their terms of service – including their content moderation policies – to accommodate content moderation practices that would not be allowed under Section 230 without a catch-all exemption. It would be untenable to revise or interpret Section 230 in a way that gives platforms more power to delete truthful user content.⁴⁹

NTIA also recommends changes to Section 230(c)(1)⁵⁰ and (c)(2)⁵¹ that would give platforms open-ended authority to discriminate against content based on viewpoint *and* defy precedent.⁵² NTIA seeks to define “otherwise objectionable [content],” which platforms can currently moderate without incurring liability, as content that is “*similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials.”⁵³ That definition is legally erroneous in the face of precedent; no court has applied such a standard when interpreting “otherwise objectionable.”⁵⁴

And, as stated above, NTIA’s re-definition incentivizes viewpoint discrimination. Content moderators applying NTIA’s definition would have to decide – likely according to their

⁴⁹ See also Part III (E) *infra* (outlining how marginalized communities disproportionately have their content taken down when online platforms over-moderate content).

⁵⁰ Section 230(c)(1) (“No 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.”)

⁵¹ Section 230(c)(2) (shielding providers and users for, *inter alia*, “any action voluntarily taken in good faith to restrict access to or availability of . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable [content], whether or not such material is constitutionally protected.”)

⁵² See NTIA Petition, *supra* note 1, at 27 (arguing “Section 230(c)(1) applies to acts of omission—to a platform’s failure to remove certain content. In contrast, subsection 230(c)(2) applies to acts of commission—a platform’s decisions to remove content. Subsection 230(c)(1) does not give complete immunity to all a platform’s ‘editorial judgments.’”)

⁵³ *Id.* at 32 (emphasis supplied).

⁵⁴ See, e.g., *Domen v. Vimeo, Inc.*, 2020 U.S. Dist. L 7935 (S.D.N.Y. Jan. 15, 2020), appeal filed No 20-616 (Feb. 18, 2020) (“Section 230(c)(2) is focused upon the provider’s subjective intent of what is ‘obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.’ That section ‘does not require that the material actually be objectionable; rather, it affords protection for blocking material “that the provider or user considers to be” objectionable.’”)

corporate terms of use – whether content is “similar in type” to NTIA’s listed content. The NTIA Petition would thus leave the onus of finding unacceptable content on platforms, but also force them to moderate content according to a discrete set of criteria.⁵⁵ When online content moderators do not have freedom to consider nuance when they judge user content, real-world biases are more likely to spread as online suppression.⁵⁶ The NTIA Petition should thus be denied because it proposes to saddle Section 230 with unsound,⁵⁷ unduly restrictive conditions.

C. The relief sought in the NTIA Petition would cause unnecessary harm to smaller online platforms.

Under NTIA’s proposed interpretations of Section 230, viewpoint-neutral content moderation would become inherently riskier and likely much more expensive for online platforms.⁵⁸ At the same time, the relief sought in the NTIA Petition would invite a flood of easily-pled claims that Section 230 was designed to prevent.⁵⁹ This new regulatory environment

⁵⁵ For example, platforms have to moderate seemingly benign content to prevent the spread of harmful health advice and information during the COVID-19 pandemic. At the same time, platforms that have to moderate content according to policy tend to perpetuate real-life discrimination online. *See* Kurt Wagner & Sarah Frier, *Twitter and Facebook Block Trump Video, Citing Covid Misinformation*, BLOOMBERG (Aug. 5, 2020), available at <https://www.bloomberg.com/news/articles/2020-08-06/twitter-blocks-trump-campaign-account-over-covid-misinformation> (last visited Aug. 28, 2020) (reporting how Twitter, Facebook, and YouTube blocked a video, shared by accounts associated with President Trump, claiming COVID “doesn’t have an impact on [children]”); *see also* Part III (E) *infra* (outlining how online content moderators tend to target marginalized communities when applying content moderation policies).

⁵⁶ *See* Part III (E) *infra* (outlining how online content moderators tend to target marginalized communities when applying content moderation policies).

⁵⁷ Such unsound amendments to consequential laws also portend circuit splits, overrulings, and judicial inefficiencies.

⁵⁸ *See* Note, *Section 230 as a First Amendment Rule*, 131 HARV. L. REV. 2027, 2036 (2018) (citing Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 858 n.172 (2006)) (“[C]ontent moderation to cope with intermediary liability is difficult, and therefore costly.”)

⁵⁹ *See* Bobby Allyn, *As Trump Targets Twitter’s Legal Shield, Experts Have A Warning*, NPR (May 30, 2020), available at <https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning> (last visited Aug. 28, 2020) (stating that

would separate tech giants like Facebook from the majority of internet companies; the capital-rich giants can afford litigating, accounting for new costs, and changing their content moderation practices.⁶⁰ Conversely, small and new internet companies would be crushed without the requisite capital and experience to navigate complex litigation⁶¹ and withstand unexpected expenses.⁶²

Section 230 was designed to address the legal dilemma caused by the “wave of defamation lawsuits” facing online platforms that moderate user content); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 452 (2010) (“Defamation-type claims were far and away the most numerous claims in the section 230 case law, and the courts consistently held that these claims fell within section 230’s protections.”)

⁶⁰ Specifically, platforms would be incentivized to either over-moderate to the point of discrimination or under-moderate to the point of non-moderation. *See Section 230 as a First Amendment Rule*, *supra* note 58, at 2047 (explaining further that “collateral censorship is a major threat to vulnerable voices online.”); *see also* Hon. Geoffrey Starks, *Statement on NTIA’s Section 230 Petition* (July 27, 2020), *available at* <https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf> (last visited Aug. 30, 2020) (stating that “[i]mposing intermediary liability on [platforms]—or creating an environment in which [platforms] have an incentive not to moderate content at all—would prove devastating to competition, diversity, and vibrant public spaces online.”)

⁶¹ *See* Ron Wyden, *Corporations are working with the Trump administration to control online speech*, WASH. POST OPINIONS (Feb. 17, 2020), *available at* http://washingtonpost.com/opinions/corporations-are-working-with-the-trump-administration-to-control-online-speech/2020/02/14/4d3078c8-4e9d-11ea-bf44-f5043eb3918a_story.html (last visited Aug. 20, 2020) (“It’s the start-ups seeking to displace Big Tech that would be hammered by the constant threat of lawsuits”); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635 (2018) (“Content moderation at YouTube and Facebook developed from an early system of standards to an intricate system of rules due to (1) the rapid increase in both users and volume of content; (2) the globalization and diversity of the online community; and (3) the increased reliance on teams of human moderators with diverse backgrounds.”)

⁶² *See Section 230 as a First Amendment Rule*, *supra* note 58, at 2038 (citing MATTHEW LE MERLE ET AL., BOOZ & CO., *THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT* 19 (2011); *see also* Jerry Berman, *Policy Architecture and Internet Freedom*, LAW.COM: THE RECORDER (Nov. 10, 2017, 3:53 AM), *available at* <https://www.law.com/therecorder/sites/therecorder/2017/11/10/policy-architecture-and-internet-freedom/> (last visited Sept. 2, 2020) (“[T]he anticipated costs of moderation and litigation could prevent” controversial, new, and emerging websites “from even securing capital or launching” if Section 230 protections were weakened). *See also* Berman, *supra* (“Without § 230 . . . speech

It is well documented that algorithms tend to drive users to “echo chambers” of content that reaffirm preexisting beliefs and sometimes push users to more extreme viewpoints through fringe content.⁶³ Platforms such as YouTube and Twitter have systems in place that attempt to curb this phenomenon by, for example, allowing users to report certain video content,⁶⁴ or fact-checking and labelling misinformation as false.⁶⁵ As stated in Section I, *supra*, the “Good Samaritan” clause encourages online service providers to moderate third-party content by immunizing restrictions on material considered “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”⁶⁶ This broad standard already places full discretion in the hands of private technology companies and social media service providers.

However, the relief sought by the NTIA Petition would treat platforms – large and small – as publishers, revoking their liability shield for any content they present “pursuant to a reasonably discernible viewpoint or message,” or any content they “affirmatively vouc[h] for,

would be limited and new applications might never have emerged if required to finance costly legal overhead to do business on the Internet.”)

⁶³ See, e.g., Kevin Rose, *The Making of a YouTube Radical*, THE NEW YORK TIMES (June 8, 2019), available at <https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html> (last visited Aug. 30, 2020) (“Over years of reporting on internet culture, I’ve heard countless versions of Mr. Cain’s story: an aimless young man — usually white, frequently interested in video games — visits YouTube looking for direction or distraction and is seduced by a community of far-right creators. [...] The common thread in many of these stories is YouTube and its recommendation algorithm, the software that determines which videos appear on users’ home pages and inside the ‘Up Next’ sidebar next to a video that is playing. The algorithm is responsible for more than 70 percent of all time spent on the site.”)

⁶⁴ See, e.g., YouTube Community Guidelines, available at <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#community-guidelines> (last visited Aug. 30, 2020). See also Enforcing Policies, available at <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#enforcing-policies> (last visited Aug. 30, 2020).

⁶⁵ See, e.g., Yoel Roth and Nick Pickles, *Updating Our Approach to Misleading Information* (May 11, 2020), available at https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html (last visited Aug. 30, 2020).

⁶⁶ 47 U.S.C. § 230 (c)(2)(A) (2018).

editorializ[e], recommend[d], or promot[e] ... on the basis of the content's substance.”⁶⁷ This applies to platforms even if they deploy algorithms rather than humans to moderate content.⁶⁸ The cost to manually moderate all content on any internet platform would be astronomical.⁶⁹ At the same time, moderating content using algorithms requires capital, expertise, and also risks litigation involving under-adjudicated questions of law.⁷⁰ Either way, the financial cost and legal risk associated with viewpoint-neutral content moderation will have been expanded by the relief sought in NTIA's Petition.⁷¹ Content moderators and courts would face a wave of easily pled claims that would have to be adjudicated using under-developed law.

⁶⁷ NTIA Petition, *supra* note 1, at 53, 55 (further seeking public disclosure of platforms' "content moderation, promotion, and other curation practices.")

⁶⁸ *Id.* Such a modification would make YouTube liable for every word spoken in a video that ends up on a user's recommended videos list, which is algorithmically generated.

⁶⁹ See *Section 230 as a First Amendment Rule*, *supra* note 58, at 2037 (citing Lauren Weber & Deepa Seetharaman, *The Worst Job in Technology: Staring at Human Depravity to Keep It Off Facebook*, WALL ST. J. (Dec. 27, 2017, 10:42 PM), available at <https://www.wsj.com/articles/the-worst-job-in-technology-staring-at-human-depravity-to-keep-it-off-facebook-1514398398> (last visited Sept. 1, 2020) ("It would be even more difficult for artificial intelligence to properly identify defamation and quite costly to develop that software. And humans are not happy performing the task."))

⁷⁰ See *id.*; see also Ashley Deeks, *The Judicial Demand for Explainable Artificial Intelligence*, 119 Colum. L. Rev. 1829, 1831 (2019) (noting that there is presently little or no common law "sensitive to the requirements of" the adjudicative process). Compare Deeks, *supra*, with Aaron Klein, *Reducing bias in AI-based financial services*, BROOKINGS (July 10, 2020), available at <https://www.brookings.edu/research/reducing-bias-in-ai-based-financial-services/> (last visited Aug. 28, 2020) (stating that existing legal frameworks are "ill-suited" to address legal issues caused by big data and "significant growth in [machine learning] and [artificial intelligence]").

⁷¹ NTIA similarly seeks to have companies publicly disclose their moderation policies, which amplifies issues of litigation exposure. NTIA Petition, *supra* note 1, at 14, 55 (seeking public disclosure of platforms' "content moderation, promotion, and other curation practices" to promote competition). But see *Liability for User-Generated Content Online: Principles for Lawmakers*, *supra*, note 14; Part III (C), *supra* (explaining the difference between small and large internet companies' ability to withstand increased costs and navigate prolonged litigation); Part III (D) *infra* (discussing how a litigation flood would be a natural and detrimental consequence of granting the NTIA Petition). See also Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech Companies*, N.Y. TIMES (Oct. 16, 2019), available at

D. Content moderators and courts would face a wave of easily pled claims that would have to be adjudicated under under-developed law.

The increased costs and risks created by the NTIA Petition would catastrophically coincide with the flood of litigation guaranteed by NTIA’s recommendations.⁷² Common law precedent is difficult to properly apply to questions involving edge technology, yet litigants would have to apply dated case law to adjudicate the many new cases, or tangle courts in the development of new case law. Plaintiffs could rely on precedents like *Stratton* to file suits against online platforms for any defamatory statements that it hosts.⁷³ For example, in 2019 Congressman Devin Nunes filed a complaint against Twitter for \$250 million, alleging that Twitter hosted and facilitated defamation on its platform when parody Twitter accounts about Nunes published tweets he found insulting.⁷⁴

The scale⁷⁵ of litigation combined with the lack of clear legal outcomes would either force content platforms to disengage from moderation or over-moderate – otherwise, they would face

<https://www.nytimes.com/2019/10/16/opinion/section-230-freedom-speech.html> (last visited Sept. 2, 2020).

⁷² See Bobby Allyn, *As Trump Targets Twitter’s Legal Shield, Experts Have A Warning*, NPR (May 30, 2020), available at <https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning> (last visited Aug. 28, 2020) (stating that Section 230 was designed to address the legal dilemma caused by the “wave of defamation lawsuits” facing online platforms that moderate user content).

⁷³ Compare *id.* with, e.g., Report, *Facebook by the Numbers: Stats, Demographics & Fun Facts*, Omnicore (Apr. 22, 2020), available at <https://www.omnicoreagency.com/facebook-statistics/> (last visited Aug. 28, 2020) (“Every 60 seconds, 317,000 status updates; 400 new users; 147,000 photos uploaded; and 54,000 shared links.”) Judicial economy concerns arise here as well, given that every status update would be a potential inroad for a defamation claim under a weakened Section 230.

⁷⁴ Daniel Victor, *Devin Nunes Sues Twitter for Allowing Accounts to Insult Him*, N.Y. TIMES (Mar. 19, 2019), available at <https://www.nytimes.com/2019/03/19/us/politics/devin-nunes-twitter-lawsuit.html> (last visited May 14, 2020).

⁷⁵ In 2019, there were more than 474,000 tweets posted per minute, and in 2016, there were over 3 million posts on Facebook per minute. Jeff Schultz, *How Much Data is Created on the Internet Each Day?* MICROFOCUS BLOG (Aug. 6, 2019), available at

the fatal combination of increased moderation cost and increased risk of litigation due to moderation,⁷⁶ which disproportionately impact smaller companies and controversial content platforms.⁷⁷ Any recommended new interpretations of Section 230 should take such possibilities into account and address them, such as the handling of parody accounts. The NTIA Petition's broad and sweeping approach fails to allow for any nuance or flexibility in solving the problems it attempts to address, throwing open the door for litigation.

E. Grant of the NTIA Petition would facilitate the silencing of minorities and civil rights advocates.

Most critically to us, weakening Section 230 would result in continued and exacerbated censorship of marginalized communities on the internet. NTIA's Petition would incentivize over-moderation of user speech; similar circumstances in the past have already been shown to promote, not eliminate, discrimination against marginalized peoples.⁷⁸ Given that marginalized groups were over-policed⁷⁹ by content moderators prior to NTIA's Petition, it follows that accepting NTIA's proposed interpretations of Section 230 would worsen online oppression on that front.

<https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/> (last visited May 15, 2020).

⁷⁶ Part III (E) *infra*.

⁷⁷ *Id.* See also Part III (C) *supra*.

⁷⁸ See Section 230 as a First Amendment Rule, *supra* note 58 at 2038, 2047 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))) (explaining how strict regulatory environments promote strict content moderation by humans and algorithms that disproportionately targets “groups that already face discrimination.”) See also Part III (E) *infra* (outlining examples of discriminatory outcomes resulting from online content moderation).

⁷⁹ See Section 230 as a First Amendment Rule, *supra* note 58.

When online platforms have implemented content moderation policies in line with NTIA’s proposals, minorities and civil rights advocates were oppressed, not empowered.⁸⁰ For example, in 2019 Facebook implemented a “real names” policy to make the platform safer by confirming user’s identities; however, the policy led to the deactivation of an account by a Native American with the real name of Shane Creepingbear.⁸¹ Further, in 2017 Google created an algorithm designed to flag toxicity in online discussions; however, legitimate statements like, “I am a black man” were flagged because the tool could not differentiate between users talking about themselves and users making statements about historically and politically-marginalized groups.⁸² Because minorities are more vulnerable to online defamation, content moderation tools disproportionately target and remove the speech of minorities based on the content of their speech.⁸³ Such oppressive content moderation that discriminates against marginalized groups will only worsen if Section 230 is weakened.

⁸⁰ *Id.* at 2047 (“[C]ollateral censorship is a major threat to vulnerable voices online.”) *See also* Maarten Sap *et al.*, *The Risk of Racial Bias in Hate Speech Detection*, 1 PROCEEDINGS OF THE 57TH ANNUAL MEETING OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 1668 (2019), *available at* <https://homes.cs.washington.edu/~msap/pdfs/sap2019risk.pdf> (last visited Sept. 1, 2020) investigating how content moderators’ insensitivity to differences in cultural dialect can “amplif[y] harm against minority populations” online); *see also* Thomas Davidson *et al.*, *Racial Bias in Hate Speech and Abusive Language Detection Datasets*, 1 PROCEEDINGS OF THE THIRD WORKSHOP ON ABUSIVE LANGUAGE ONLINE 25 (2019), *available at* <https://www.aclweb.org/anthology/W19-3504.pdf> (last visited Sept. 1, 2020) (concluding that abusive language detection systems “may discriminate against the groups who are often the targets of the abuse” the systems seek to prevent). *See also* Julia Angwin, *Facebook’s Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (Jun. 28, 2017), *available at* <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms> (last visited Sept. 1, 2020).

⁸¹ *See* Harmon, *supra* note 71.

⁸² *See* Elliot Harmon & Jeremy Gillula, *Stop SESTA: Whose Voices Will SESTA Silence?* ELEC. FRONTIER FOUND. (Sept. 13, 2017), *available at* <https://www.eff.org/deeplinks/2017/09/stop-sesta-whose-voices-will-sesta-silence> (last visited May 14, 2020).

⁸³ *Section 230 as a First Amendment Rule*, *supra* note 58, at 2038, 2047 (citing Corynne McSherry *et al.*, *Private Censorship Is Not the Best Way to Fight Hate or Defend Democracy*:

Relatedly, the relief sought in the NTIA Petition would amplify preexisting risk of oppressive content moderation because it would effectively incentivize or induce online platforms to double-down on oppressive content moderation strategies.⁸⁴ Users of all backgrounds would more likely have their constitutionally protected speech removed because platforms will have to adjust their services and policies to account for increased liability.⁸⁵ Tweets, posts, videos, and more would be at risk of removal if the platform believed they *might* be defamatory, or if they were politically controversial to the point that the platform would rather block them than risk litigation.⁸⁶ Marginalized communities like ethnic minorities and political activists will carry the bulk of these harms because these communities are over-policed by content moderation tools and procedures even without any weakening of Section 230.⁸⁷

Here Are Some Better Ideas, ELECTRONIC FRONTIER FOUND. (Jan. 30, 2018)), *available at* <https://www.eff.org/deeplinks/2018/01/private-censorship-not-best-way-fight-hate-or-defenddemocracy-here-are-some> (last visited Aug. 26, 2020) (“Content moderation has ‘shut down conversations among women of color about the harassment they receive online,’ ‘censor[ed] women who share childbirth images in private groups,’ and ‘disappeared documentation of police brutality, the Syrian war, and the human rights abuses suffered by the Rohingya.’”)

⁸⁴ And similarly, users on platforms that choose to under-moderate in response to increased cost and exposure will be silenced by clearly harmful content like hate speech.

⁸⁵ *Section 230 as a First Amendment Rule*, *supra* note 58, at 2027 (internal citation omitted) (explaining that Section 230 “encourages websites to engage in content moderation” without fear of exposure to “liability for defamatory material that slips through.”)

⁸⁶ *Id.* (stating that without Section 230’s protection, “websites would have an incentive to censor constitutionally protected speech in order to avoid potential lawsuits.”) Over half of internet users engage in politically controversial speech. Monica Anderson *et al.*, *Public Attitudes Toward Political Engagement on Social Media*, PEW RES. CTR. (July 11, 2018), *available at* <https://www.pewresearch.org/internet/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/> (last visited Aug. 26, 2020) (reporting that over the span of one year 53% of American adults engaged in some form of political or social-minded activity, such as using a hashtag related to a political or social issue, on social media).

⁸⁷ *See Section 230 as a First Amendment Rule*, *supra* note 58 at 2047 (“Given the cost of litigation, our most marginalized citizens are the ones least likely to be able to take advantage of a new liability regime”); *see also* Parts III (C) and (E) *supra* (outlining how the increased costs and risks associated with content moderation will harm small and marginalized groups if the NTIA Petition were to be granted).

IV. Recommendations for Reform

A. Platforms should not be immune from liability when they let their users create and spread discriminatory content like racial hate speech.

If Section 230 needs to be improved, that is a task for Congress – not the Executive Branch. The Section 230 Proponents encourage Congress to incentivize platforms to advance equity and anti-discrimination through their content moderation practices. We support reforming Section 230 to hold platforms more accountable when their products are used to violate users’ civil rights.⁸⁸ Platforms should be protected when they moderate content to prevent such violations. In essence, the Proponents support protecting platforms when they moderate content to preserve equity and safety in their products, but also holding platforms liable when they negligently or purposefully allow their products to discriminate against users.

Platforms should not be immune from liability when they let their users create and spread discriminatory content like hate speech. Over the past few years, major online platforms have used Section 230 as a defense to a variety of civil rights lawsuits.⁸⁹ Social media giants, for example, have argued that Section 230 exculpates them even though companies used their products to prevent specific racial groups from seeing online job advertisements.⁹⁰ Similarly, platforms like YouTube have claimed Section 230 immunity when presented with evidence that their content-blocking algorithms targeted videos referencing Black culture.⁹¹ Congress should

⁸⁸ See Part III (E) and note 7 *supra* (discussing how online platforms have themselves or through their users facilitated civil rights violation in such fields as transportation, housing, and law enforcement).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

amend Section 230, or adopt new legislation, to the extent that current law allows platforms to intentionally or irresponsibly foster such an oppressive environment.⁹²

That being said, Congress should broadly proscribe online platforms from engaging in or negligently facilitating online racial and gender discrimination, voter suppression, or hate speech. Section 230 is not the only law relevant to online platforms' influence of public discourse and communication between people.⁹³ Section 230 is one of many internet regulations; and internet regulations are but one genre of regulation in America's diverse legal library. Therefore, a complete reform process must consider how common law civil rights protections can be fully reflected in laws like Section 230.⁹⁴ Similarly, Congress should consider whether amending Section 230 itself is the best way to advance internet equity. There are many pathways that can be taken toward a more equitable and diverse internet.

B. Platforms should be immune from liability when they work to prevent users from creating and spreading discriminatory content like racial hate speech.

On the other hand, current law should be preserved when it shields platforms from liability for moderating content to foster user equity, equality, and safety online. Congress should craft new law to the extent that platforms in that context are unprotected. Because of liability shielding, platforms can confidently leverage their expertise to protect billions of people from harmful misinformation.⁹⁵ Relatedly, platforms can design their services to prevent hate speech by users; particularly innovative companies are deploying content moderation systems that not only have anti-discrimination policies in their terms of service, but actively look for evidence

⁹² *Id.* See also Overton, *supra* note 39.

⁹³ To the contrary, the regulatory and civil rights implications of platform-driven technology innovations are broad and too new to fully understand. See *supra* notes 38-39.

⁹⁴ *Accord.* Overton, *supra* note 39.

⁹⁵ See Wagner *et al.*, *supra* note 55.

that their services are being used in a discriminatory way.⁹⁶ Section 230 as it stands thus incentivizes platforms to obey the word and spirit of the law, in large part because it can grant platforms immunity when they moderate content.⁹⁷

Congress also should bolster immunity for content moderators, insofar as laws like Section 230 currently may discourage platforms from promoting equitable practice and freedom of expression online. If large and small internet companies are confident they can moderate user content without going bankrupt, organizations like the Section 230 Proponents will have more opportunities to participate in the internet economy. Relatedly, marginalized communities and activists online will be able to sing, speak, write, and type in celebration of their constitutional freedom to do so. Barring discriminatory expression like hate speech, America's philosophical bedrock is made of the collaboration, controversy, and indeed the truth, that is enabled by free expression. Internet companies are the architects and gatekeepers of history's largest public squares with history's biggest crowds. Those companies must be free to preserve that environment.

Conclusion

Even if the FCC had the requisite authority, the NTIA Petition lacks the precision required to amend or reinterpret Section 230 in a way that facilitates content moderation while protecting internet users from discrimination and hate speech. Critics of Section 230 have misstated the immense costs that would result from weakening or repealing Section 230 while failing to focus on the true needs for reform to prevent the internet from being misused to discriminate and intimidate. Reforms to Section 230, or new legislation, are needed to allow marginalized groups

⁹⁶ See Kulp, *supra* note 27.

⁹⁷ See *Liability for User-Generated Content Online: Principles for Lawmakers*, *supra* note 14; *Section 230 as a First Amendment Rule*, *infra* note 58, at 2039 ("Various websites credit § 230 with their very existence.")

to have a place to engage in discussion, unrestricted by overbearing, or inadequate, content moderation policies that have a disproportionate harm on marginalized voices. Reform of Section 230 is a job for lawmakers who must craft internet laws that foster equity and equality. In the meantime, the NTIA Petition should be denied.

Respectfully submitted,

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September 2, 2020

ANNEX: THE SECTION 230 PROPONENTS

The **Multicultural Media, Telecom and Internet Council (MMTC)** is a non-partisan, national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecom and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for multicultural advancement in communications.

The mission of the **Hispanic Federation** is to empower and advance the Hispanic community. Hispanic Federation provides grants and services to a broad network of Latino non-profit agencies serving the most vulnerable members of the Hispanic community and advocates nationally on vital issues of education, health, immigration, civil rights, economic empowerment, civic engagement, and the environment.

The **League of United Latin American Citizens (LULAC)** is the nation's largest and oldest Hispanic civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 1,000 councils around the United States and Puerto Rico, LULAC's programs, services, and advocacy address the most important issues for Latinos, meeting the critical needs of today and the future.

The **National Coalition on Black Civic Participation (The National Coalition)** is a non-profit, non-partisan organization dedicated to increasing civic engagement and voter participation in Black and underserved communities. The National Coalition strives to create an enlightened community by engaging people in all aspects of public life through service/volunteerism, advocacy, leadership development and voting.

The **National Council of Negro Women (NCNW)**, founded 85 years ago by Dr. Mary McLeod Bethune, seeks to lead, advocate for and empower women of African descent, their families and communities. NCNW reaches more than two million persons through its 300 community and campus based sections in 32 states and its 32 affiliated women's national organizations. NCNW works to promote sound public policy, promote economic prosperity, encourage STEAM education and fight health disparities.

The **National Urban League (NUL)** is an historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. NUL reaches nearly two million people nationwide through direct services, programs, and research through its network of 90 professionally staffed affiliates serving 300 communities in 36 states and the District of Columbia.

Certificate of Service

Pursuant to 47 C.F.R. §1.405(b)), I hereby certify that I have on this 2nd day of September caused the foregoing “Comments of Section 230 Proponents” to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

Douglas Kinkoph, Esq.

Performing the Delegated Duties of the Assistant Secretary for Commerce for
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