Before the
Federal Communications Commission
Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	))))))	RM No. 11862

COMMENT OF
AMERICANS FOR PROSPERITY FOUNDATION
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SEPTEMBER 1, 2020

Introduction and Executive Summary

The Internet, and the untold commerce and free expression it enables, would not exist as we know it today without Section 230.[1] The National Telecommunications and Information Administration's ("NTIA") petition for rulemaking,[2] if adopted, threatens to end all of that. The free market has allowed internet-based companies to rise and fall over the years, innovating and providing new technologies to consumers. Some, like Facebook or Amazon, have grown from seemingly implausible ideas to successful businesses. Others, like MySpace or LiveJournal, seemed dominant at the time only to be replaced by newer, better options. And some, like Twitter, are only now entering their teen years.

These websites have offered people unprecedented access to each other, information, leaders, commerce, and expression. If someone wants to instantly share his opinion on breaking news with 500 of his friends on Facebook, he can. If he wants to reply to the President's tweet and let him—and the world—know what he thinks about it, he can do that too. On top of all that, online technology platforms have enabled small businesses and entrepreneurs to innovate and flourish. It is modern innovation that allows us to make a product in our home and then instantly market and sell it to someone across the globe. So many businesses, large and small, would

[1] *See* Adam Thierer, *Celebrating 20 Years of Internet Free Speech & Free Exchange*, Plain Text (June 21, 2017), *available at* https://bit.ly/32kHyIC ("Section 230 was hugely important in that it let online speech and commerce flourish without the constant threat of frivolous lawsuits looming overhead.").

[2] Nat'l Telecomm. & Info. Admin., Pet. for Rulemaking of the NTIA (July 27, 2020) [hereinafter "Pet."].

not exist without this sort of technology. And many of these opportunities only exist because of Section 230.

NTIA's petition imperils this freedom. It asks the Federal Communications Commission ("Commission" or "FCC") to promulgate new regulations, despite Section 230 being an unambiguous edict from Congress that ultimately limits courts and litigants. Importantly, Section 230 contains *no* affirmative commands to the FCC. NTIA supports this its petition by misreading the statute and misstating case law—wrongly arguing that courts have expanded Section 230 protections beyond Congress's intent and allowed some Section 230 provisions to swallow others. Through a careful reading of the jurisprudence, this comment shows NTIA is wrong.

Further, the remedy NTIA asks for would not only be *ultra vires*, but also would violate the First Amendment by compelling individuals to engage in or host speech they otherwise find objectionable. What's more, NTIA does not even have the statutory authority to petition the FCC for a rulemaking, as it is an agency and cannot be an "interested party." Its request that the FCC classify edge providers as "information services" is out of bounds of its primary petition. Finally, the rulemaking NTIA asks for is bad policy. It could drive small businesses and entrepreneurs out of business, chill online speech, and create impossible barriers to entry for new competitors.

The Commission should deny NTIA's petition in full.

Argument

I. The FCC has no authority under the Communications Act to regulate under Section 230.

Section 230 does not delegate any rulemaking authority to the FCC, whether implicitly or explicitly. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."[3] And when agencies act "improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."[4]

A. Section 230 is unambiguous.

When Congress enacted Section 230, it spoke clearly and directly. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[5] Once Congress enacts a statute, the *only* role left for an agency is to "fill any gap left, implicitly or explicitly, by Congress."[6]

Before diving into the case law, "we begin with the text."[7] "Of all the tools of statutory interpretation, '[t]he most traditional tool, of course, is to read the text.'"[8] As the Supreme Court has repeatedly held, "[t]he preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it

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[3] *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).
[4] *City of Arlington v. Fed Commc'ns Comm'n*, 569 U.S. 290, 297 (2013).
[5] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Although many have called the wisdom of *Chevron* into question, it is still the law of the land. And when it precludes deference to an agency, as it does here, the FCC must respect it.
[6] *Id.*
[7] *City of Clarksville v. Fed. Energy Regulatory Comm'n*, 888 F.3d 477, 482 (D.C. Cir. 2018).
[8] *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020) (citing *Engine Mfrs. Ass'n v. Envtl. Prot. Agency*, 88 F.3d 1075, 1088 (D.C. Cir. 1996)).

means and means in a statute what it says there."[9] "Only the written word is the law, and all persons are entitled to its benefit."[10]

The relevant text here is 47 U.S.C. § 230(c), which reads:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
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> (1) Treatment of publisher or speaker
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> 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.
>
> (2) Civil liability
>
> 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).[11]

NTIA makes a fundamental error when it writes that "[n]either section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has power to issue regulations under section 230."[12] But silence

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[9] *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)).
[10] *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1737 (2020).
[11] "So in original. Probably should be 'subparagraph (A)." 47 U.S.C.A. § 230 (West), n.1.
[12] Pet. at 17.

does not convey authority. This is not how administrative law works, as decades of case law illuminates. Courts should never "presume a delegation of power absent an express withholding of such power" as this logic means agencies "would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[13] For an agency to claim authority whenever "a statute does not expressly *negate* the existence of a claimed administrative power is both flatly unfaithful to the principle of administrative law and refuted by precedent."[14] Even assuming there were any uncertain terms in the statute, "[m]ere ambiguity in a statute . . . is not evidence of congressional delegation of authority."[15]

B. Legislative intent is clear.

Former Representative Chris Cox, one of authors and co-sponsors of the Section 230 legislation, has written at length on its history and background.[16] As a threshold matter, "Section 230 was not part of the [Communications Decency Act ("CDA")] . . . it was a freestanding bill" that was ultimately wrapped into the CDA during conference negotiations.[17] Representative Cox, along with his co-author,

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[13] *Ethyl Corp. v. Envt'l Prot. Agency*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see N.Y. Stock Exch. LLC v. Sec. & Exch. Comm'n*, 962 F.3d 541 (D.C. Cir. 2020) (same quote, 15 years later).

[14] *N.Y. Stock Exch. LLC*, 962 F.3d at 553 (citation omitted).

[15] *Id.*

[16] *See 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*, 116th Cong. (2020) [hereinafter "Cox Testimony"] (testimony of Former U.S. Rep. Chris Cox), *available at* https://bit.ly/2YuyrE4. The Commission should incorporate the whole of Representative's Cox testimony and detailed history of Section 230 as part of any decision.

[17] *Id.* at 5.

Senator Ron Wyden, wrote Section 230 to "ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others."[18]

When speaking about the bill on the floor, Representative Cox plainly rejected the idea of having a "Federal Computer Commission" made up of "bureaucrats and regulators who will attempt . . . to punish people by catching them in the act of putting something into cyberspace."[19] The whole point of the bill "was to recognize the sheer implausibility of requiring each website to monitor all of the user-created content that crossed its portal each day."[20] But this is exactly what NTIA's petition would have social media companies and the Commission do, contrary to legislative intent.

C. NTIA is asking the FCC to engage in a legislative function that the Constitution reserves only to Congress.

NTIA's grievances about Section 230 hurting free speech and limiting public participation are ill-founded.[21] But assume, for the sake of argument, that NTIA were correct. Could this Commission still act? No—because what NTIA really seeks here is a legislative amendment to Section 230. For example, following a paragraph detailing what "Congress intended" with Section 230, NTIA argues that "[t]imes have changed, and the liability rules appropriate in 1996 may no longer further Congress's

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[18] *Id.* at 8.

[19] 141 Cong. Rec. H8469–71 (Aug. 4, 1995) (statement of Rep. Cox). The FCC relied on this statement in its Restoring Internet Freedom Order. Fed. Commc'ns Comm'n, FCC 17-166, Restoring Internet Freedom at 40 n.235 [hereinafter "RIFO"].

[20] Cox Testimony at 13.

[21] *See, e.g.*, Robby Soave, *Big Tech Is Not a Big Threat to Conservative Speech. The RNC Just Proved It.*, Reason (Aug. 25, 2020), *available at* https://bit.ly/2Yy5nvy ("If social media were to be regulated out of existence—and make no mistake, proposals to abolish Section 230 could accomplish precisely this—then the Republican Party would return itself to the world where traditional media gatekeepers have significantly more power to restrict access to conservative speech.").

purpose that section 230 further a 'true diversity of political discourse.'"[22] NTIA then (erroneously) argues that things are different now, "unlike the time of *Stratton Oakmont*[.]"[23] Later, it states that "free speech faces new threats."[24] It also argues that "liability protections appropriate to internet firms in 1996 are different because modern firms have much greater economic power" and "play a bigger, if not dominant, role in American political and social discourse[.]"[25] Even if NTIA's observations had merit,[26] they would be beside the point because NTIA's complaints, as it repeatedly concedes through its comment, relate to *what Congress passed*.

Thus, NTIA wants the FCC to amend an unambiguous statute that NTIA believes is outdated. But agencies cannot amend statutes, no matter how old they may be. That is the role of Congress. Legislative power resides there—and nowhere else.[27] As James Madison wrote, "[w]ere the federal Constitution . . . really chargeable with the accumulation of power, or with a mixture of powers . . . no further arguments would be necessary to inspire a universal reprobation of the system."[28] For "[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty[.]"[29]

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[22] Pet. at 4.
[23] *Id.*
[24] *Id.* at 6
[25] *Id.* at 9.
[26] In responding to this argument that Section 230 is no longer needed, Representative Cox recently wrote, "[a]s co-author of [Section 230], I can verify that this is an entirely fictious narrative." Cox Testimony at 13.
[27] *See, e.g.*, U.S. Const. art. I ("All legislative Powers herein granted shall be vested in a Congress of the United States".)
[28] Federalist No. 47 (James Madison).
[29] *Id.* (quoting Montesquieu).

As discussed below, the impact of granting NTIA's petition would be widespread and have drastic economic consequence. To borrow NTIA's own language, "[n]either section 230's text, nor any speck of legislative history" shifts this rulemaking responsibility to the FCC.[30] After all, Congress would not "delegate a decision of such economic and political significance to an agency in so cryptic [or silent, in this case] a fashion."[31] And when regulating speech, Congress does not grant "broad and unusual authority through an implicit delegation[.]"[32] It does not "hide elephants in mouseholes."[33] If Congress wanted to grant the FCC rulemaking authority under Section 230, it knows how to do so and would have done so. But it did not. Instead, it adopted unambiguous language that contains *no affirmative commands* to the FCC.[34] The FCC cannot invoke "its ancillary jurisdiction"—in this case, Section 201(b) rulemaking authority—"to override Congress's clearly expressed will."[35] To grant NTIA's petition would be to engage in unlawful, *ultra vires* action. For this reason, the petition should be denied.

D. Section 230 provides no affirmative command to the FCC.

Section 230 does not actually tell the FCC to *do* anything. It grants no new powers. It does not ask, explicitly or implicitly, for the Commission's guidance. Instead, it limits litigation. And it expands on First Amendment protections for both

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[30] Pet. at 17.
[31] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).
[32] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).
[33] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[34] *See infra* at § I(D).
[35] *EchoStar Sat. LLC v. Fed Commc'ns Comm'n*, 704 F.3d 992, 1000 (D.C. Cir. 2013).

providers and users of internet services. Congress's whole point, as petitioners openly concede, was to overrule *Stratton Oakmont*.[36] Thus, Section 230 speaks to the courts and private litigants, not the FCC. If a statute "does not compel [an agency's] interpretation, it would be patently unreasonable—not to say outrageous—for [an agency] to insist on seizing expansive power that it admits the statute is not designed to grant."[37] In fact, Section 230 explicitly counsels *against* regulation, finding that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*[.]"[38]

E. NTIA and, by extension, the FCC cannot artificially inject ambiguity into the statute.

Throughout its Petition, NTIA tries to inject—and thus asks the FCC to inject—ambiguity into the statute in an attempt to conjure up some sort of rulemaking authority where none exists. NTIA consistently misreads case law to create jurisprudential confusion that simply is not there. The FCC should not follow suit. "[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'"[39]

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[36] Pet. at 18 n.51 (citing Sen. Rep. No. 104-230, 2d Sess. at 194 (1996) ("One of the specific purposes of [section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions.") & H.R. Conf. Rep. No. 104-458 at 208 (disparaging *Stratton Oakmont*)).

[37] *Utility Air Reg. Grp. v. Envt'l Prot. Agency*, 573 U.S. 302, 324 (2014).

[38] 47 U.S.C. § 230(b)(2) (emphasis added).

[39] *Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (cleaned up) (quoting *PDK Labs., Inc. v. Drug Enf't Agency*, 362 F.3d 786, 798 (D.C. Cir. 2004)).

And subsection (c)(1) is abundantly clear: "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."[40] There is no ambiguity to be found here or elsewhere in the statute.[41] The law explicitly defines "interactive computer service" and "information content provider."[42] And the words "publish," "publication," and "speaker" are well-known and have accepted legal definitions that are particularly relevant to defamation and slander. To wit:

> Publish, vb. (14c) 1. To distribute copies (of a work) to the public. 2. To communicate (defamatory words) to someone other than the person defamed.[43]
>
> Publication, v. (14c) 1. Generally, the act of declaring or announcing to the public. 2. *Copyright*. The offering or distribution of copies of a work to the public.[44]
>
> Speaker. 1. One who speaks or makes a speech <the slander claim was viable only against the speaker>[45]

When evaluating Section 230 claims, courts have had no difficulty defining the word "publisher," adopting to the word's ordinary meaning.[46] Courts also have properly

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[40] 47 U.S.C. § 230(c)(1).
[41] And even if the terms are broad, as NTIA implies, that does not render them necessarily ambiguous, especially if they have a plainly accepted meaning.
[42] 47 U.S.C. § 230(f)(2).
[43] Black's Law Dictionary (9th ed. 2009) (alternative definitions and explanation omitted).
[44] *Id.* (same)
[45] *Id.* (same)
[46] *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) ("This Circuit and others have generally looked to [publisher's] ordinary meaning: 'one that makes public'; 'the reproducer of a work intended for public consumption,' and 'one whose business is publication.'") (cleaned up and internal citations omitted).

construed the protection from "publisher" liability to mean both decisions to affirmatively publish and decisions to "withdraw, postpone, or alter content."[47]

Subsection (c)(2) is similarly clear. "Good faith" is a commonly understood and applied term in common law. It is "honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."[48] In the D.C. Circuit, courts have construed the meaning of "good faith" given the relevant context.[49] And the term appears frequently throughout FCC statutes and rules.[50] No other rulemaking is necessary to define a term already well-understood by the Commission and the courts.

The rest of subsection (c)(2) is detailed, complete, and unambiguous. For the uncommon situation when a court must address a claim of (c)(2)(A) immunity, the statute establishes a safe harbor for certain content moderation decisions.[51] And a litany of cases, cited by NTIA itself, affirm Congress's intent that the safe harbor operate as it has.[52] NTIA cites only two cases for the proposition that "some district courts have . . . construed" (c)(2) immunity overbroadly.[53] The first, *Langdon v. Google, Inc.*, is a district court case filed by a *pro se* plaintiff in 2007, alleging that

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[47] *See, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).
[48] *Good faith*, Black's Law Dictionary (9th ed. 2009).
[49] *See, e.g.*, *Barnes v. Whelan*, 689 F.2d 193, 199 (D.C. Cir. 1982); *Window Specialists, Inc. v. Forney Enters., Inc.*, 106 F. Supp. 3d 64, 89 (D.D.C. 2015).
[50] *See, e.g.*, 47 U.S.C. §§ 230, 251, 252, 325; 47 C.F.R. §§ 76.65, 76.7.
[51] *See infra* at § 2(G).
[52] *See* Pet. at 32 n.98.
[53] Pet. at 31.

Google had injured him by refusing to run ads on two websites.[54] One website purported to expose "fraud perpetrated by North Carolina government officials" and the other delineated "atrocities committed by the Chinese government."[55] The *Langdon* court ruled against the *pro se* plaintiff and held that he failed to address the otherwise-fatal provision of (c)(2), omitting it from his argument.[56]

The second—which is currently on appeal—does not support NTIA's argument that courts are reading subsection (c)(2) overbroadly.[57] Instead, the court there easily understood the provision in (c)(2) that asks what "the provider or user considers to be" objectionable.[58] "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."[59] Thus what matters is "Vimeo's *subjective* intent[,]" which the Court found by looking at Vimeo's guidelines which explicitly "define hateful, harassing, defamatory, and discriminatory content[.]"[60] The Court also found Vimeo explicitly warned the plaintiffs against videos that promoted certain content.[61] This case is a prime example of a *successful* application of (c)(2)'s safe harbor provision. NTIA is thus left with a single *pro se* case summarily decided in

[54] 474 F. Supp. 2d 622 (D. Del. 2007).
[55] *Id.* at 626.
[56] *Id.* at 631. Thus, there was no substantive discussion of what "otherwise objectionable" covers.
[57] *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592 (S.D.N.Y. 2020).
[58] *Id.* at 603.
[59] *Id.* at 603–04.
[60] *Id.* at 604 (emphasis added).
[61] *Id.*

2007 to support its demand that this Commission enact broad rulemaking. NTIA's argument cannot be propped up on so thin a reed.

F. If the FCC were to adopt NTIA's rubric, it would lead to bad outcomes.

NTIA's request that the FCC define each word in subsection (c)(2) according to an objective standard is both unnecessary and unlawful. For example, NTIA wants "excessively violent" to be limited to the "[FCC's] V-chip regulatory regime and TV parental guidance" or content that promotes terrorism.[62] It asks the FCC to limit "harassing" to malicious computer code, content covered under the CAN-SPAM Act, and material "sent by an information content provider that has the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value[.]"[63]

With those definitions in mind, consider two hypothetical situations. Suppose a ministry created a social media site called ChristianTimesTube that targeted a Christian audience.[64] The site explodes in popularity, with millions of Christians—adults and children—from all around the world watching content on it. The site considers it "harassing" or "otherwise objectionable" if users post content that blasphemes God or mocks religious belief, so it removes this content. An atheist user,

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[62] Pet. at 37–38.

[63] Pet. at 38.

[64] The idea of a "Christian monitored version" of a site like TikTok is not far-fetched. *See* ye (@KanyeWest), Twitter (Aug. 17, 2020, 4:36 PM), https://bit.ly/34RcT8I (last accessed Aug. 18, 2020). Mr. West's idea was endorsed by Senator Josh Hawley. Josh Hawley (@HawleyMO), Twitter (Aug. 17, 2020, 5:16 PM), https://bit.ly/34VaolW ("Best idea I've heard in weeks[.]") (last accessed Aug. 18, 2020). Other faith-based sites that allow user or third-party generated content currently exist. *See, e.g.*, https://www.patheos.com/, https://www.godtube.com/.

however, accesses the site. He uses its functionality to share videos from atheist commentators. The videos directly attack the Christian faith and encourage people, including children, to apostatize. He does not direct them at any specific individual, and the videos include several atheist academics. ChristianTimesTube deletes the videos and bans the user. They offer him no explanation—it should be clear—or procedure to appeal his ban. He sues. Should the Christian site be forced to live under what a court deems is "objectively harassing" or should it instead moderate its own content as it sees fit and tailored to its users? Should it be forced to expend scarce dollars to litigate through discovery? After all, the site deleted his content in "bad faith"—as NTIA would define it—because they disagree with his view on the world and did not offer "adequate notice, reasoned explanation, or a meaningful opportunity to be heard."[65] And the atheist user supported it with "serious literary" or "scientific" material by referring to academic sources. According to NTIA, ChristianTimesTube could be liable. No business can survive under this standard, much less entrepreneurs or communities with scant resources or few employees.

Suppose again that a social media network is created for survivors of gun violence, called WeHealTogetherTube. The site bans and routinely deletes videos that show any firearms. This is because both users and operators of WeHealTogetherTube, who have been victims of gun crime, subjectively view such videos as "excessively violent." A gun-rights activist, however, finds that there is nothing "excessively violent" or "otherwise objectionable" about target shooting. He

[65] Pet. at 39.

joins WeHealTogetherTube and begins to post videos of target shooting to share with his friends—and perhaps to acclimatize the site's users to the non-violent use of guns. Some of the videos are his own, and others are from a local broadcast news segment on a new gun range. WeHealTogetherTube deletes the videos and bans the user; he sues. Should the gun-survivor network be forced to live under what a court deems is "excessively violent" or should it moderate its own content as it sees fit? After all, the posted videos would not fit under any of NITA's proposed definitions,[66] and some videos were even aired on the local news. According to NTIA, WeHealTogetherTube—a small, tight-knit community of people trying to support each other—is possibly liable and must litigate an expensive case.

The second hypothetical is particularly apt because one of NTIA's grievances is that an "interactive computer service [*i.e.*, Facebook] made the editorial decision to exclude content pertaining to firearms, content that was deemed acceptable for broadcast television, thereby chilling the speech of a political candidate supportive of gun rights."[67] Ignoring for a moment that private fora do not "chill speech" in the First Amendment context, Facebook is within its rights to *subjectively* deem such content "excessively violent." Our hypothetical gun-crime survivors group perfectly exemplifies why Congress selected subjective rather than objective standards.

And it would not stop there. Religious groups that suddenly lose Section 230's safe harbor may be forced to host blasphemous or other objectionable content—or at

[66] *Id.* at 37–38.
[67] *Id.* at 43.

least engage in expensive and lengthy litigation for refusing to allow or share it. They may even need to hire compliance counsel just to get the site started, imposing new barriers to entry, stifling competition among online platforms, and *actually* chilling speech due to government policymaking. If NTIA's petition is granted in full, government officials (judges and bureaucrats)[68] will soon be deciding what every owner or operator of every private internet forum must host. This is offensive to American's founding principles. The Commission must reject it.

G. NTIA's definitions would violate the First Amendment.

Thankfully for WeHealTogetherTube and ChristianTimesTube, NTIA's view of the world is unconstitutional. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[69] This freedom is not limited to when an individual chooses not to speak at all, but also applies when an organization has chosen to speak and invited others to speak too. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court held that the government could not compel the organizers of a parade to include individuals, messages, or signs that conflicted with the organizer's beliefs.[70] This is because "*all* speech inherently involves choices of what to say and what to leave

[68] Of course, the First Amendment would hopefully stop this. *See infra* at § I(G).
[69] *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.").
[70] 515 U.S. 557, 573 (1995) (citation and quotation omitted).

unsaid"[71] and includes not only the right to "tailor the speech" but also "statements of fact the speaker would rather avoid[.]"[72] This logic extends to other applications, such as newspapers where "'the choice of material and the decisions made as to limitations on the size and content and treatment of public issues—whether fair or unfair—constitute the exercise of editorial control and judgment' upon which the State cannot intrude."[73] The First Amendment protects our hypothetical platforms, other users of internet services, and even Facebook and Twitter. They do not sacrifice their own freedom of speech just because they provide an opportunity for billions of users around the globe to speak.[74]

II. NTIA misreads the current state of the law.

There is a concerning pattern throughout NTIA's Petition. The agency consistently misreads or misapplies relevant case law. A few examples outlined below display the actual state of the law on Section 230.

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[71] *Id.*

[72] *Id.* at 575 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)) (cleaned up). Petitioners may point to *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 648 (1994), but that case concerned a content-neutral restriction and thus only applied intermediate scrutiny. NTIA's proposed definitions under subsection (c)(2) are not content neutral.

[73] *Hurley*, 515 U.S. at 581. This applies also to state conscription to carry a message. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *see Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

[74] For further discussion of how Section 230 promotes innovation, *see* Eric Goldman, *Why Section 230 is Better than the First Amendment*, 95 Notre Dame L. Rev. Online 33 (2019), *available at* https://bit.ly/2QlOP5v.

A. NTIA misconstrues the case law on Section 230 "immunity."

Let's start at the top. As NTIA concedes, Congress passed Section 230 in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*[75] There, a state court held that Prodigy "acted more like an original publisher than a distributor both because it advertised the practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin board."[76] In response, "Congress enacted [Section] 230 to remove the disincentives to selfregulation [sic] created by the *Stratton Oakmont* decision."[77] Since then, courts have held that "[Section] 230 forbids the imposition of publisher liability on a service provider *for the exercise of its editorial and self-regulatory functions*."[78] NTIA's petition correctly articulates that *Stratton Oakmont*, and a related case, "presented internet platforms with a difficult choice: voluntarily moderate and thereby become liable for all messages on their bulletin boards, or do nothing and allow unlawful and obscene content to cover their bulletin boards unfiltered."[79] But, thankfully, Congress intervened.

This is where things start to go awry for NTIA. It cites many cases for the proposition that "ambiguous language . . . allowed some courts to broadly expand section 230's immunity from beyond its original purpose into a bar [on] any legal action or claim that involves even tangentially 'editorial judgement.'"[80] It claims Section 230 "offers immunity from contract[] [claims], consumer fraud, revenge

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[75] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)
[76] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).
[77] *Id.*
[78] *Id.* (emphasis added).
[79] Pet. at 20.
[80] Pet. at 24.

pornography, anti-discrimination civil rights obligations, and even assisting in terrorism."[81] This sounds bad. Fortunately, it's not true.

First, what Section 230 does do is prevent courts from construing content providers, such as Twitter or Facebook, as the speaker of third-party content communicated on their service. It does not immunize Twitter from lawsuits. If Twitter, for example, posted a blog tomorrow that falsely said, "John Smith is a murderer. I saw him do it. -Twitter.com," then Section 230 affords Twitter no protection from a tort suit. Similarly, if John Smith tweeted "the sky is blue" and then, in response, Twitter posted an editorial note that falsely said, "This tweet is a lie. John Smith dyed the sky blood red," Section 230 would not bar Smith from bringing a suit against Twitter for its statements. But if Jane Doe tweeted, "John Smith is a murderer. I saw him do it," then Jane Doe would be the proper defendant, not Twitter. It's pretty straightforward.

The case law reflects this structure. For example, in support of its contention that Section 230 provides "immunity from contract[]" claims, NTIA cites five cases—none of which demonstrate that Section 230 immunizes platforms from contract liability.

- The first case involved a *pro se* complaint that alleged numerous claims, including a breach of contract claim.[82] Several of these claims failed under Section 230 because the plaintiff did not allege "that Facebook actually created,

[81] Pet. at 24–25.
[82] *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016).

developed or posted the content on the suspect account."[83] The word "contract" was *never mentioned by the court* in its Section 230 analysis.[84] The breach of contract claim failed for a reason *entirely unrelated* to Section 230, because "while Facebook's Terms of Service place restrictions on users' behavior, they do not create affirmative obligations."[85]

- The second case did apply Section 230, this time to a claim of a "breach of the covenant of good faith and fair dealing."[86] But this claim was in response to YouTube removing the plaintiff's videos from its channel, a moderation decision by YouTube that is within the purview of Section 230.[87] Importantly, the court held that "Plaintiff fail[ed] to plead any facts to support a reasonable finding that Defendants issued copyright claims, strikes, and blocks in bad faith as part of a conspiracy to steal Plaintiffs' YouTube partner earnings"—claims that required factual support separate from simple moderation.[88] A poorly pled complaint does not mean YouTube has some global "immunity from contracts."

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[83] *Id.* at 1066.
[84] *Id.* at 1064–66.
[85] *Id.* at 1064. (quotation marks omitted) (citing *Young v. Facebook, Inc.*, No. 10-cv-03579, 2010 WL 4269304, at *3 (N.D. Cal. Oct. 25, 2010)). *Young* contains no discussion of Section 230.
[86] *Lancaster v. Alphabet*, No. 15-05299, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016).
[87] *Id.*
[88] *Id.*

- The third case did not allege a breach of contract between the plaintiff and Google.[89] Instead, it dealt with several interference with contract claims, among other claims, such as fraud.[90] The court applied Section 230 and correctly held that Google did not create the ads in question, but merely provided hosting for them on its site.[91] It also found that suggesting keywords was not nearly enough to turn Google into an "information content provider."[92]
- The fourth case, again, related to content not created by the defendant, Facebook, but instead by the plaintiff.[93] The plaintiff was a Russian corporation whose account Facebook shut down because it "allegedly sought to inflame social and political tensions in the United States" and the account was "similar or connected to that of Russian Facebook accounts . . . that were allegedly controlled by the Russia-based Internet Research Agency."[94] By citing this case, does NTIA mean to suggest that Facebook should be liable for shutting down accounts allegedly controlled by Russian disinformation agencies? This is the sort of critical content moderation that Section 230 protects.

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[89] *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010).
[90] *Id.* at 1122–23 ("The purpose of [Section 230] is to encourage open, robust, and creative use of the internet . . . . Ultimately, Defendant's Adwords program simply allows competitors to post their digital fliers where they might be most readily received in the cyber-marketplace.").
[91] *Id.*
[92] *Id.*
[93] *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1304–05 (N.D. Cal. 2019).
[94] *Id.* at 1300.

- The fifth case lacks the word "contract."[95] It does include a "promissory estoppel" claim, but that claim failed because "Plaintiff has not alleged that any such legally enforceable promise was made to remove any content by the Defendants."[96] Instead, the court held that refusal to moderate content is "nothing more than an exercise of a publisher's traditional editorial functions, and is preempted by [Section 230]."[97]

Section 230's protections can of course apply to contract claims when the complained-of behavior is by third parties, not the site itself. And the cases above involved courts faithfully applying Section 230 as Petitioner's own words describe it: to relieve "platforms of the burden of reading millions of messages for defamation as *Stratton Oakmont* would require."[98] These courts adhered strictly to Congress's intent and did not overstep their authority. It is a fiction that "Big Tech" companies are immune from virtually all litigation due to Section 230.[99] Instead, courts have properly stayed within the bounds established by Congress. If, for example, a company contracted with Facebook to create and publish content, and Facebook failed to do so—it could face a suit for breach. Section 230 would have no relevance.

Second, NTIA cites three cases to allege that Section 230 creates "immunity from . . . consumer fraud" claims.[100]

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[95] *Obado v. Magedson*, No. 13-2382, 2014 WL 3778261 (D.N.J., July 31, 2014).
[96] *Id.* at *8.
[97] *Id.*
[98] Pet. at 24.
[99] *See* 47 U.S.C. 230(e).
[100] Pet. at 24.

- The first case is a standard Section 230 case in which a plaintiff sought to hold eBay liable for hosting allegedly fraudulent auctions on its site.[101] eBay did not select the allegedly false product descriptions, nor were the people who did choose them defendants in the action.[102] eBay just hosted them. Section 230 worked as planned. If eBay needed to investigate every single auction posting for any possible allegations of fraud, its business model would break.[103]
- The second case again dealt with products sold on eBay by third-party sellers.[104] The judge, though, made an important point that NTIA should heed: "Plaintiff's public policy arguments, some of which have appeal, *are better addressed to Congress*, who has the *ability to make and change the laws*."[105]
- The third case is currently on appeal before an *en banc* Third Circuit, which is awaiting a response to a certified question to the Pennsylvania Supreme Court on a products liability theory that does not mention Section 230.[106]

These cases do not support the proposition that tech companies are immune from liability for engaging in consumer fraud. For example, if eBay were to draft allegedly fraudulent product descriptions and then sell allegedly fraudulent products *itself*,

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[101] *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).
[102] *Id.* at 832.
[103] *See id.* at 833 (enforcement of state law here would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").
[104] *Hinton v. Arizona.com.dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014).
[105] *Id.* at 692 (emphasis added).
[106] *See* Certification of Question of Law, *Oberdorf v. Amazon.com, Inc.*, No. 18-1041 (3d Cir. June 2, 2020), ECF No. 189. The Third Circuit vacated a prior panel opinion when it granted *en banc* review, so it is unclear what impact Section 230 may ultimately have on this case. *See Oberdorf v. Amazon.com Inc.*, 936 F.3d 182 (3d Cir. 2019).

then it could be liable—and Section 230 would be no impediment to an action. Section 230 does apply to claims of consumer fraud, but only when the claims allege bad behavior by a third party, not the site itself.[107]

Third, an examination of one final case that NTIA relies on deserves special attention because it explains a critical doctrine. NTIA alleges that Section 230 has led to immunity for "assisting in terrorism."[108] In the cited case, the plaintiffs alleged that "Hamas used Facebook to post content that encouraged terrorist attacks in Israel during the time period of the attacks [relevant to] this case."[109] The plaintiffs argued that because Facebook uses algorithms to promote content, that practice rendered it a non-publisher.[110] The Second Circuit rejected that argument, found "no basis [for the claim] in the ordinary meaning of 'publisher,' or the other text of Section 230," and concluded that an "interactive computer service is not the 'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests."[111]

The Second Circuit next considered whether Facebook was itself an "information content provider" or whether Hamas was responsible for the content that allegedly spurred terrorist activity.[112] The court applied its "material contribution" test, asking whether "defendant directly and materially contributed to

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[107] *See, e.g.*, *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).
[108] Pet. at 25.
[109] *Force v. Facebook*, 934 F. 3d 53, 59 (2d Cir. 2019).
[110] *Id*. at 65.
[111] *Id*. at 66.
[112] *Id*. at 68

what made the content itself unlawful."[113] Relying on a D.C. Circuit decision, it held that "a website's display of third-party information does not cross the line into content development."[114] It reasoned that Facebook "does not edit (or suggest edits) for the content that its users—including Hamas—publish."[115] And the algorithms Facebook uses are "neutral" and "based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers."[116] Using these algorithms did not open Facebook to liability.

This case, which NTIA cites to support its petition, is a perfect example of a court easily understanding Section 230 and applying it in a situation Congress intended to cover. If the Court held otherwise—and had the case not failed for other reasons—Facebook would have been expected to monitor *every post made on its site* by its 2.7 billion monthly active users[117] to ensure none of them could be considered to be inciting terrorism anywhere in the world. It would also have been barred from using algorithms to do so, which would leave it virtually unable to use any technology to manage its site. Such a Herculean task that would end Facebook as we know it.

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[113] *Id.*
[114] *Id.* (citing *Marshall's Locksmith Serv. v. Google*, 925 F.3d 1263 (D.C. Cir. 2019). In *Marshall's Locksmith*, the D.C. Circuit held that simply translating information into "textual and pictorial 'pinpoints' on maps . . . did not develop that information (or create new content) because the underlying" data was provided by a third party." *Id.* (citing *Marshall's Locksmith Serv.* at 1269–70).
[115] *Id.* at 70.
[116] *Id.*
[117] Dan Noyes, *The Top 20 Valuable Facebook Statistics – Updated August 2020*, Zephora Digital Marketing (Aug. 2020), *available at* https://bit.ly/34yMKLx.

Contrary to NTIA's contention, these cases track not only the text of the Act, but also what NTIA readily admits was Congress's intent. Any of these cases, had they been decided the other way, would transform Section 230 to require onerous moderation of every product listed, post shared, account created, and video uploaded that would make it virtually impossible to sell products, host social media, or share advertisements. Amazon, for example, may be relegated to selling only its own products, shutting many third-party small businesses and entrepreneurs out of its marketplace.[118] Facebook would have to pre-approve all posts to ensure they do not contain potentially unlawful content. eBay would need to investigate every product listing, including perhaps the physical product itself, to ensure no fraud or danger existed. These are not sustainable business models. Congress knew that, which is why it adopted Section 230. Perhaps NTIA believes Congress was wrong and that these businesses should not exist. If so, NTIA should petition Congress, not the FCC.

B. Section 230 does not provide immunity for a site's *own actions*.

NTIA cites a foundational case in Section 230 jurisprudence, *Zeran v. America Online, Inc.*, and claims it "arguably provides full and complete immunity to the platforms for *their own publications*, editorial decisions, content-moderating, and *affixing of warning or fact-checking statements*."[119] But NTIA references no other authority to support its reading of the case. It fails to cite either a case where a company received Section 230 immunity for *its own publication* or a case where a

[118] It is an open question of whether courts may still find Amazon strictly liable for certain third-party products despite Section 230. This is currently on review in front of the *en banc* Third Circuit. *See supra* n.106.
[119] Pet. at 26.

court has read *Zeran* the way NTIA has. Instead, courts routinely and vigorously evaluate whether the defendant in a case was the publisher itself or was simply hosting third-party content.

Zeran was decided over twenty years ago. If NTIA's interpretation were correct, the natural momentum of precedent would have led to NTIA's parade of horribles by now, or surely at least one case adopting that interpretation. But it hasn't. Instead, cases like a recent Second Circuit decision are typical.[120] The plaintiff there, La Liberte, alleged that Joy Reid, a member of the news media, defamed La Liberte when Ms. Reid "authored and published her own Instagram post . . . which attributed to La Liberte" certain remarks.[121] La Liberte claimed these remarks were defamatory. Ms. Reid, among other defenses, asserted that Section 230 immunized her because she reshared someone else's video, arguing that her post "merely repeated what countless others had previously shared before her[.]"[122] But the Court properly found that Ms. Reid added "commentary" and "went way beyond her earlier retweet . . . in ways that intensified and specified the vile conduct that she was attributing to La Liberte."[123] Reid tried to argue that the Circuit's "material contribution" test, which contrasts between displaying "actionable content and, on the other hand, responsibility *for what makes the displayed content [itself] illegal or actionable*,"[124] should save her. But because "she authored both Posts at issue[,]" she

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[120] *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020).
[121] *Id*. at 89.
[122] *Id*. at 89–90.
[123] *Id*.
[124] *Id*. (quoting and citing *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019)).

is potentially liable.[125] Replace Ms. Reid in this fact pattern with any corporation, such as Twitter, Facebook, or Google, and you would get the same result.

Similarly, in *Federal Trade Commission v. LeadClick Media, LLC,* the Second Circuit found an internet advertising company liable as the company itself engaged in "deceptive acts or practices."[126] Because it directly participated in the deceptive scheme "by recruiting, managing, and paying a network of affiliates to generate consumer traffic through the use of deceptive advertising and allowing the use of deceptive advertising where it had the authority to control the affiliates participating in its network,"[127] Section 230 rightly provided no shelter. That case is no outlier. Both *La Liberte* and *Force* rely on it. Unlike NTIA's purely hypothetical outcomes, courts have shown a willingness and ability to only apply Section 230 protection where Congress intended—and no broader.

C. NTIA misreads the law on the distinction between subsections (c)(1) and (c)(2).

One of NTIA's key claims—and the centerpiece of its petition[128]—is that courts have read subsection (c)(1) to swallow (c)(2) and thus (c)(2) must mean something more than it does. On the back of this claim, NTIA asks the FCC to initiate a rulemaking to redefine (c)(2) in a way that is not only contrary to both the statutory text and congressional intent but will cast a shadow of regulation over the Internet.

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[125] *Id.*
[126] *Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 171 (2d Cir. 2016).
[127] *Id.* at 172.
[128] As Professor Goldman puts it, this is NTIA's "payload." *See* Eric Goldman, Comments on NTIA's Petition to the FCC Seeking to Destroy Section 230 (Aug. 12, 2020), *available at* https://bit.ly/31swytu.

NTIA relies on *Domen v. Vimeo*[129] for the proposition that the two sections "are co-extensive, rather than aimed at very different issues."[130] Thus, according to NTIA, "the court rendered section 230(c)(2) superfluous—reading its regulation of content removal as completely covered by 230(c)(1)'s regulation of liability for user-generated third party content."[131] This is backwards. The *Domen* court expressly held "there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage."[132] It also explained, relying on a Ninth Circuit decision, that "even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue . . . can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable."[133] The proposition that *Domen* stands for is that in some situations one can avail oneself of (c)(2), despite not receiving immunity under (c)(1), and that is why (c)(2) is not surplusage. While *Domen* ultimately found the defendant immune under either subsection—litigants often avail themselves of multiple protections in a statute—it did not hold that the sections were "co-extensive."[134]

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[129] 433 F. Supp. 3d 592 (S.D.N.Y. 2020) (*appeal pending*, No. 20616 (2d Cir.)).
[130] Pet. at 28.
[131] *Id*. at 28–29.
[132] *Domen* at 603.
[133] *Id*. (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009)).
[134] NTIA's misunderstanding of *Domen* also conflicts with its extensive citations to cases holding "that the provisions cover separate issues and 'address different concerns.'" Pet. at 30. And NTIA is only able to cite one case, *e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), to support its contention that courts may be construing (c)(1) overbroadly. The *Domen*

D. NTIA confuses the meaning of subsection (c)(2).

NTIA makes the same error regarding the terms enumerated in subsection (c)(2), claiming that "[u]nderstanding how the section 230(c)(2) litany of terms has proved difficult for courts in determining how spam filtering and filtering for various types of malware fits into the statutory framework."[135] Perhaps NTIA believes courts have struggled with parsing what the words in (c)(2) mean. But this supposition is undermined by NTIA's impressive string cite of courts applying well-worn canons of statutory construction and determining what the law means. There is no support for the idea that courts have "struggled." Yes, courts needed to apply canons to interpret statutes. That is what courts do, and they do so here successfully.

NTIA also claims that, "[a]s the United States Court of Appeals for the Ninth Circuit explains, unless" there is some sort of "good faith limitation" then "immunity might stretch to cover conduct Congress very likely did not intend to immunize."[136] But this quotation is from a concurrence. In a later case, the Ninth Circuit adopted a portion of this concurrence, holding that "'otherwise objectionable' does not include software that the provider finds objectionable for anticompetitive reasons[.]"[137] This

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court explicitly declined to follow this unpublished case, finding it unpersuasive in the face of *Force*. *Domen*, 433 F. Supp. 3d. at 603. But even if *e-ventures* were rightly decided, it deals directly with content moderation of spam, not defamation or other claims relating to publication. *See* 2017 WL 2210029, at *1. And defendants ultimately prevailed there on an alternate ground, the First Amendment, so there was no incentive to appeal. *Id*. at *4.

[135] Pet. at 32.

[136] *Id.* at 38.

[137] *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1045 (9th Cir. 2019).

adheres to Section 230's text and reinforces that courts are not struggling to parse (c)(2). NTIA's proposed redefinition of subsection (c)(2) should be rejected.[138]

E. NTIA misstates the law on "information content providers."

NTIA next turns its eye toward "information content providers," seeking a new definition from the Commission.[139] It concedes that "[n]umerous cases have found that interactive computer service's designs and policies render it an internet content provider, outside of section 230(c)(1)'s protection."[140] This is, of course, true and is well supported. Yet then NTIA confoundingly argues that "the point at which a platform's form and policies are so intertwined with users' so as to render the platform an 'information content provider' is not clear."[141] This is simply not the case—courts consistently engage in clear analysis to determine whether defendants are "information content providers."

Fair Housing Council of San Fernando Valley v. Roommates.com, which NTIA relies on, provides such an example. In *Roommates*, the Ninth Circuit found the defendant could be liable because it provided users "a limited set of pre-populated answers" in response to a set of "unlawful questions" thus becoming "much more than a passive transmitter of information."[142] NTIA argues "this definition has failed to provide clear guidance, with courts struggling to define 'material contribution,'"[143]

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[138] *See* Pet. at 37.
[139] *Id*. at 42.
[140] *Id*. at 40.
[141] *Id*.
[142] *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1166–67 (9th Cir. 2008); Pet. at 40.
[143] Pet. at 40.

citing *People v. Bollaert*[144] as an example of "confusion." But the court in *Bollaert* actually did the opposite, easily holding "that like the Web site in *Roommates*, [the defendant here] forced users to answer a series of questions with the damaging content in order to create an account and post photographs."[145] It also cited a "material contribution" case, finding that the defendant did not fit the definition.[146] There is no sign of a struggle—this is a clear decision that applies precedent.

NTIA also argues that "not all courts accept the material contribution standard,"[147] citing a case that does not address or explicitly reject the "material contribution" standard at all.[148] That case instead is a straightforward inquiry into whether the defendant, Gawker, was responsible for "creating and posting, inducing another to post, or otherwise actively participating in the posting of a defamatory statement in a forum that the company maintains."[149] The Seventh Circuit found that it could be liable[150] because "Gawker itself was an information content provider" including encouraging and inviting users to defame, choreographing the content it received, and employing "individuals who authored at least some of the comments themselves."[151] This is another example of Section 230 working: a company that

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[144] 248 Cal. App. 4th 699, 717 (2016)
[145] *Id*. at 833.
[146] *Id*. at 834.
[147] Pet. at 41.
[148] *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016).
[149] *Id*. at 742.
[150] *Huon* merely reviewed a motion to dismiss, rather than a final judgment. *Id*. at 738.
[151] *Id*. at 742.

allegedly *actively participated* in creating defamatory content faced liability. It was not—as NTIA might argue—magically immune.

NTIA's proposed definition for "information content provider" differs from the statute and is unnecessary given courts' application of the law as written.

F. NTIA wrongly argues that "publisher or speaker" is undefined.

Finally, NTIA argues that "the ambiguous term 'treated as publisher or speaker' is a fundamental question for interpreting that courts in general have not addressed squarely."[152] But as both the cases NTIA cites and this comment demonstrate, courts have had no difficulty defining these terms. And, not surprisingly, NTIA cites no authority to back up this statement. Instead, NTIA enumerates a list of grievances about moderation decisions, implying the current state of the law holds that "content-moderating can never, no matter how extreme or arbitrary, become editorializing that no longer remains the 'speech of another,'" and thus subsection (c)(2) will be swallowed whole.[153] Of course, as the spam cases and others show—and NTIA itself details—this is not the case. And one can easily imagine a situation when Section 230 would not provide immunity on a bad faith content moderation decision. Imagine, for example, that John Smith tweeted "I am not a murderer." Then, a Twitter moderator places a flag on John Smith's post that reads, "False: Smith is a murderer." This creates new content, deliberately misrepresents reality, and is done in bad faith. This would be actionable, and Section 230 would provide Twitter with no relief. For these reasons, NTIA's proposed

[152] Pet. at 42.
[153] *Id*. at 43.

redefinition of Section 230(f)(2) is both unnecessary and unlawful. It should be rejected.[154]

G. Studies show that NTIA's view of the law is flawed.

This Commission need not look only to the cases described above. The Internet Association recently did a survey of over 500 Section 230 lawsuits.[155] The Association's thorough report had some important key findings:

- A wide cross-section of individuals and entities rely on Section 230.
- Section 230 immunity was the primary basis for a court's decision in only forty-two percent of decisions reviewed.
- A significant number of claims in the decisions failed without application of Section 230 because courts determined that they lacked merit or dismissed them for other reasons.
- Forty-three percent of decisions' core claims related to allegations of defamation, just like in the *Stratton Oakmont v. Prodigy Services* case that spurred the passage of Section 230.[156]

The Internet Association's "review found that, far from acting as a 'blanket immunity,' most courts conducted a careful analysis of the allegations in the complaint, and/or of the facts developed through discovery, to determine whether or not Section 230 should apply."[157] While the report did find that subsection (c)(2) is

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[154] *See id*. at 46.
[155] Elizabeth Banker, A Review of Section 230's Meaning & Application Based On More Than 500 Cases, Internet Association (July 7, 2020) [hereinafter "Association Report"], *available at* https://bit.ly/3b7NlFD.
[156] *Id.* at 2.
[157] *Id*. at 6 (citing *Gen. Steel v. Chumley*, 840 F.3d 1178 (10th Cir. 2016); *Samsel v. DeSoto Cty. School Dist.*, 242 F. Supp.3d 496 (N.D. Miss. 2017); *Pirozzi v. Apple*, 913 F. Supp. 2d 840 (N.D. Cal. 2012); *Cornelius v. Delca*, 709 F. Supp. 2d 1003 (D. Idaho 2010); *Best Western v. Furber*, No. 06-1537 (D. Ariz. Sept. 5, 2008); *Energy Automation Sys. v. Xcentric Ventures*, No. 06-1079, 2007 WL 1557202 (M.D. Tenn.

used in a small minority of Section 230 cases, "the vast majority involved disputes over provider efforts to block spam."[158] And it added that "another reason" (c)(2) cases are limited is "that many of those lawsuits are based on assertions that the provider has violated the First Amendment rights of the user whose content was removed, but the First Amendment only applies to government actors."[159] The Commission should consider and incorporate the Internet Association's report in its decisionmaking.

III. NITA's request for transparency rules would require the FCC to classify social media as information services, which is outside the boundaries of the petition.

At the end of its petition, NTIA argues that social media services are "information services" and asks the FCC to impose disclosure requirements on them.[160] But the FCC has previously declined to classify edge services, including social media services, as information services: "[W]e need not and do not address with greater specificity the specific category or categories into which particular edge services fall."[161] NTIA's petition never actually requests that the FCC classify social media as an information service—it just asks for disclosure requirements. And, critically, this docket lists the "Nature of Petition" as "Clarify provisions of Section 230 of the Communications Act of 1934, as amended."[162] It would be legally

May. 25, 2007); *Hy Cite v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142 (D. Ariz. 2005)).

[158] *Id*. at 3.

[159] *Id*. at 3.

[160] Pet. at 47.

[161] RIFO at 137 n.849.

[162] Fed. Commc'ns Comm'n, Report No. 3157, RM No. 11862 (Aug. 3, 2020).

momentous and beyond the scope of this proceeding for the FCC to determine the regulatory classification of social media services and potentially other edge providers.

Furthermore, NTIA erroneously argues that "Section 230(f)(2) "explicitly classifies 'interactive computer services' as 'information services[.]'"[163] What the statute says, instead, is "[t]he term 'interactive computer services' means any information service, system, or access software provider[.]" 47 U.S.C. 230(f)(3). Thus, one can be an "interactive computer service" but not an "information service." NTIA's definition is like saying "all apples are red" and turning it into "all red things are apples." Therefore, the FCC must engage in new action to render this classification. Such a decision should be noticed properly and not be decided in response to a petition that fails to request it.

IV. There is no statutory authority for NTIA to petition the FCC.

In its petition, NTIA invoked an FCC regulation that allows "[a]ny interested person [to] petition for the issuance, amendment or repeal of a rule or regulation."[164] Correspondingly, the FCC opened this rulemaking by citing Sections 1.4 and 1.405 of its rules. But NTIA is not an "interested person" and therefore cannot petition the FCC as it has sought to do. The FCC should reject the petition on this basis alone.

The term "interested person" is not defined in Chapter I of Title 47 of the Code of Federal Regulations. In its 1963 reorganization and revision of its regulatory code, the FCC cited the original 1946 Administrative Procedure Act ("APA") as the basis of

[163] Pet. at 47.
[164] Pet. at 1 (citing 47 C.F.R. § 1.401(a)).

authority for Section 1.401(a) and its petition-for-rulemaking process.[165] The original Section 4(d) of the APA, now codified at 5. U.S.C. § 553(e), requires that "[e]very agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."[166] While the APA did not, and still does not, define "interested person," it did define "person" as "individuals, partnerships, corporations, associations, or public or private organizations . . . *other than agencies*."[167] This term is contrasted with the definition of a "party," which explicitly *includes* agencies.[168]

NTIA is an Executive Branch agency within the Department of Commerce and an "agency" under the APA.[169] Agencies cannot be a "person" or "interested person" under the statute. Because it is not an "interested person," NTIA cannot petition an agency for a rule. And because the FCC based its petitioning process on the APA and has identified no source for a more expansive definition of the term "interested person,"[170] NTIA's attempted petition on Section 230 is a legal nullity. The FCC has no obligation to respond to it.

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[165] *See* Reorganization and Revision of Chapter, 28 Fed. Reg. 12386, 12432 (Nov. 22, 1963) (citing "sec. 4, 60 Stat. 238; 5 U.S.C. 1003" as the basis of its authority).
[166] *See* 60 Stat. 238; *see also* 5 U.S.C. § 553(e).
[167] Sec. 2(b), 60 Stat. 238; 5 U.S.C. § 551(2) (emphasis added).
[168] Sec. 2(b), 60 Stat. 238; 5 U.S.C. § 551(3) ("'Party' includes any person or agency . . .").
[169] *See* Our Mission, ntia.doc.gov (last accessed Aug. 14, 2020); 47 U.S.C. § 901 (NTIA, "an agency in the Department of Commerce"); Sec. 2(a), 60 Stat. 238; 5 U.S.C. § 551(1) (defining "agency").
[170] The FCC rulemaking procedure is governed by the APA. See, e.g., *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1115 (D.C. Cir. 2019).

V. This petition is bad policy.

A recent book, arguably the definitive history of Section 230, refers to it as "The Twenty-Six Words that Created the Internet."[171] Without Section 230, the Internet as we know it today may not exist. Throughout this comment, hypotheticals, real-life situations, and other policy arguments show that the disappearance of Section 230 would imperil internet providers, hurt small businesses, and restrain innovation. But it would do more than that by chilling participation in the public square, both commercial and purely communicative.

A. Granting the petition will harm free expression.

People have many online forums available to express themselves. If NTIA attains its goal, these forums will change dramatically. Due to the risk of litigation, platforms would begin to engage in severe content moderation. Rather than erring to the side of speech, they may err to the side of caution, removing any content that could potentially trigger a lawsuit. This moderation comes at a cost, not only to pay moderators but also for a legal budget to deal with litigation, even if it meritless.

Thus, no longer would citizens have virtually free access to commenting on politicians, such as the President. No longer would journalists be able to easily promote their work on social media—all claims would need to be independently vetted by the social media network itself, making it near impossible to distribute news. And no longer would sites be willing—or able—to allow third parties, such as bloggers, journalists, or others, to promote content without fear of retribution. And ultimately,

[171] Jeff Kosseff, The Twenty-Six Words That Created the Internet (1st ed. 2019).

all this will do is further consolidate the market. Legal and compliance requirements create massive barriers to entry, further entrenching existing "Big Tech" companies and making it near impossible for small entrepreneurs to compete.[172]

B. Granting the petition will harm commerce and entrepreneurship.

Granting the petition would also significantly impact online commerce. Sites like Amazon, Etsy, and eBay may need to stop providing third-party products that are not first thoroughly vetted. The costs of internet advertising would skyrocket, as each ad would require detailed review by the placement company.[173] No longer would small businesses and entrepreneurs be able to advertise, promote, and sell their products online.[174] As Representative Cox wrote, "[w]ithout Section 230, millions of American websites—facing unlimited liability for what their users create—would not be able to host user-generated content at all."[175]

C. NTIA's petition is anti-free market.

What NTIA demands would harm the free market. It attacks small businesses, innovators, and entrepreneurs. As President Ronald Reagan once remarked:

> Too often, entrepreneurs are forgotten heroes. We rarely hear about them. But look into the heart of America, and you'll see them. They're the owners of that store down the street, the faithfuls who support our churches, schools, and communities, the brave people everywhere who produce our goods, feed a hungry world, and keep our homes and

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[172] *See generally* Statement of Neil Chilson, U.S. Dep't of Justice Workshop: Section 230 – Nurturing Innovation or Fostering Unaccountability? (Feb. 19, 2020), *available at* https://bit.ly/32tfZNc.

[173] This is assuming that it would even be possible to conduct such a review as different people have different opinions and experiences with products—hence the popularity of third-party "review" functionality.

[174] *See generally* Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* (June 5, 2017), *available at* https://bit.ly/2Eyv5sy.

[175] Cox Testimony at 2.

> families warm while they invest in the future to build a better America.[176]

NTIA's proposal threatens all of that because it may disagree—whether rightly or wrongly—with certain "Big Tech" business decisions. But the answer is not government regulation. The answer is not the courts. The answer is America and her free market principles.[177] As Milton Friedman argued, the free market "gives people what they want instead of *what a particular group thinks they ought to want*."[178] NTIA does not speak for the consumer, the consumer does. "Underlying most arguments against the free market is the lack of belief in freedom itself."[179] Although Friedman conceded the need for some government, he maintained that "[t]he characteristic feature of action through political channels is that it tends to require or enforce substantial conformity."[180] He warned that "economic freedom" is threatened by "the power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority."[181] Or a federal agency. As Chairman Pai wrote, we do not want a government that is "in the business of picking winners and losers in the internet economy. We should have a level playing field and let consumers

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[176] Ronald Reagan, Radio Address to the Nation on Small Business (May 14, 1983), *available at* https://bit.ly/31oDYOq.
[177] *See, e.g.*, Diane Katz, *Free Enterprise is the Best Remedy for Online Bias Concerns*, Heritage Found. (Nov. 19, 2019), *available at* https://herit.ag/2YxFImC.
[178] *Milton Friedman: In His Own Words* (Nov. 16, 2006), *available at* https://on.wsj.com/34yjVPw (emphasis added).
[179] *Id.*
[180] *Id.*
[181] *Id.*

decide who prevails."[182] President Reagan warned that "[t]he whole idea is to trust people. Countries that don't[,] like the U.S.S.R. and Cuba, will never prosper."[183]

These words may seem drastic, perhaps not fit for the subject of this comment. But they are. Should this Commission adopt NTIA's rule, the impact on American entrepreneurship would be extreme. What NTIA seeks would cripple one of humanity's greatest innovations, the Internet and the technology sector. "In contrast to other nations, in the United States the government does not dictate what can be published on the internet and who can publish it."[184] Yet NTIA would risk this because they do not like how some corporations have moderated things in the past few years.[185] The FCC should not fall prey to this thinking—the stakes are too high.

VI. Granting NTIA's petition would threaten the success of the Commission's Restoring Internet Freedom Order.

The Commission's Restoring Internet Freedom Order ("RIFO") took an important step by re-establishing the FCC's devotion to using a "light touch" style of regulation on internet service providers, returning "Internet traffic exchange to the longstanding free market framework under which the Internet grew and flourished for decades."[186] While there is no question pending before the FCC on classifying social media sites under Title II, what NTIA's petition does ask for—unlawful Section 230 rules—may have same effect by imposing heavy-handed content regulation. As the Commission stated in RIFO, "The Internet thrived for decades under the light-

[182] RIFO at 222 (Statement of Chairman Ajit Pai).
[183] Reagan, *supra* n.176.
[184] Cox Testimony at 2.
[185] *See* Exec. Order on Preventing Online Censorship, 85 Fed. Reg. 34079 (2020).
[186] RIFO at 99.

touch regulatory regime" noting that "[e]dge providers have been able to disrupt a multitude of markets—finance, transportation, education, music, video distribution, *social media*, health and fitness, and many more—through innovation[.]"[187]

Following RIFO's precedent, the Commission should hold here that it does "not believe hypothetical harms, unsupported by empirical data, economic theory, or even recent anecdotes, provide a basis for . . . regulation[.]"[188] The free market does a much better job, particularly because providers realize "that their businesses depend on their customers' demand for edge content."[189] Furthermore, when contemplating RIFO, the Commission held it was "not persuaded that Section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here."[190] Specifically, it found "requirements that would impose federal regulation on broadband Internet services would be in tension" with the policy of Section 230(b)(2).[191] If that is the case for broadband Internet services—classified as information services—then it must be doubly so for edge providers.[192] Thus, to grant NTIA's petition here could not only jeopardize the economic and legal reasoning undergirding the RIFO decision, but it may also start the FCC on a path back to the Fairness Doctrine, a failed approach that enabled government control of speech.[193]

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[187] *Id*. at 65 (emphasis added).
[188] *Id*. at 68.
[189] *Id*. at 69.
[190] *Id*. at 161.
[191] *Id*. at 171.
[192] Edge providers are not currently classified as "information services" nor is that an appropriate consideration for this petition. *See supra* at § III.
[193] *See Red Lion Broadcasting Co. v. Fed Commc'ns Comm'n*, 395 U.S. 367 (1969).

As Chairman Pai wrote, "[t]he Internet is the greatest free-market innovation in history. It has changed the way we live, play, work, learn, and speak."[194] And "[w]hat is responsible for the phenomenal development of the Internet? It certainly wasn't heavy-handed government regulation."[195] Innovators need room to take risks, create new products, and test out consumer interests—as they have for decades. "In a free market of permissionless innovation, online services blossomed."[196] This includes many of the critical commerce and social media platforms targeted by NTIA's order. And now NTIA asks this Commission to step in with "heavy-handed micromanagement."[197] But as this Commission well knows, "[e]ntrepreneuers and innovators guided the Internet far better than the clumsy hand of government ever could have."[198] The Internet should be "driven by engineers and entrepreneurs and consumers, rather than lawyers and accountants and bureaucrats."[199] Instead of limiting consumers through the wolves of litigation and regulation, "[w]e need to empower all Americans with digital opportunity [and] not deny them the benefits of greater access and competition."[200] This Commission took a critical step in empowering free market participants—both creators and consumers—through RIFO. It should not imperil all of that now on the back of this meritless Petition.

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[194] *Id*. at 219 (Statement of Chairman Ajit Pai).
[195] *Id*.
[196] *Id*. (listing the many accomplishments of Internet innovation).
[197] *Id*.
[198] *Id*.
[199] *Id*. at 22.
[200] *Id*. at 220.

Conclusion

For all the above reasons, the Commission should reject NTIA's petition.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September 2020, a copy of the foregoing comments was served via First Class Mail upon:

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/s/ Eric R. Bolinder

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