Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 230 of the	)	File No. RM-11862
Communications Act of 1934	)	

To: The Commission

REPLY COMMENTS

National Telecommunications and
Information Administration
U.S. Department of Commerce
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September 17, 2020

TABLE OF CONTENTS

Summary of the Argument

The National Telecommunications and Information Administration's Petition for Rulemaking[1] spurred hope for the American people. Thousands of Americans submitted comments to the Federal Communications Commission (Commission or FCC), writing of their frustration and anger at the major social media platforms' censorship and de-platforming. These commenters spoke of their exclusion from political, social, and cultural activity—our nation's public square—due to social media platforms' unfair and arbitrary content moderation policies.

These Americans called upon the FCC to ensure that section 230 no longer renders the internet a "no man's land" where major social media platforms ignore with impunity contract, consumer fraud, and anti-discrimination laws. These Americans recognized an obvious truth: when social media companies edit, moderate, comment upon, or shape user-generated content to a degree that renders them speakers in their own right, they fall outside of section 230's protections. Finally, these comments called upon the FCC to impose the same disclosure requirements on the major social media platforms that broadband internet access service providers (BIASs) now face. In a democracy, control of public discourse should take place in sunlight.

There were, in addition, critical comments to the NTIA Petition, which this Reply categorizes and rebuts. First, many comments claim that the FCC lacks the jurisdiction to prescribe implementing regulations under section 230. This position either ignores section 201(b)'s general grant of regulatory authority, or misconstrues it in a way that would invalidate swathes of existing FCC regulation.

[1] National Telecommunications and Information Administration, Petition for Rulemaking, Docket No. RM- 11862 at 27-31 (Filed July 27, 2020) (Petition).

Second, commenters claim that the Petition's proffered reading of section 230(c)(1) and its relationship to section 230(c)(2) conflicts with case law or precedent. Yet, case law does not bind the FCC's judgment concerning ambiguous terms in statutes; rather, it has a duty to make an independent judgment when faced with statutory ambiguities. While much of the case law supports NTIA's proffered reading, certain outlier cases have stretched the meaning of section 230 beyond its original purpose. These expansive court decisions reinforce the need for the FCC to issue regulations to clarify the proper scope of section 230 for the benefit of the courts, platforms, and public.

Third, some commenters claim the Petition, in seeking to clarify the relationship between section 230(c)(1) and section 230(f)(3) by showing when an "interactive computer service" becomes an "information content provider," find ambiguity where none exists. Unfortunately, however, courts have not interpreted the definition of "information content provider" in (f)(3) consistently or as broadly as it was intended and the text indicates. Further, this position ignores the inherent difficulty distinguishing between promoting, editing, and blocking content and creating content. The FCC's clarification of section 230(c)(1) and 230(f)(3) will provide a discernable distinction.

Fourth, commenters claim that the FCC lacks jurisdiction to impose disclosure requirements because social media are not "information services." This assertion ignores the Petition's exhaustive analysis of the term as used in the 1996 Telecommunications Act and FCC regulation. Instead, commenters make inconclusive textual arguments from the definitional section 230(f)(2) and ignore the numerous court rulings, as well as the FCC's own definitions, classifying social media services as information services falling under the FCC's Title I jurisdiction.

Fifth, commenters claim that the Petition's interpretation of section 230 violates the First Amendment because the Petition, through its proposed liability rule, encourages certain types of speech but not others. But policy fears that present parades of horribles marching in opposite directions lack foundation. Commenters fail to cite any case in which a facially neutral liability relief standard was ruled unconstitutional —because there are none. And, as proof, it should be noted that section 230(c)(2) itself is a liability rule that encourages certain types of speech, but no critical commenter has argued or court has ever found it unconstitutional.

Sixth, commenters also predict that the Petition's interpretation of section 230 will result in either too much or too little content moderation. When policy fears present parades of horribles that march in opposite directions, these policy insights likely lack firm foundation. Given the difficulty of prediction, the best course is to follow the Petition's close reading of the statues' text and legislative history.

Last, commenters assert that the Petition's proposed rules will have an impact greater than $100 million. But, largely relying on unpublished economic laboratory studies, commenters present no evidence that these estimates have any validity in the real world.

I. The FCC's Authority to Issue Regulations Implementing Section 230

The Supreme Court has ruled that "the grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of [the 1934 Communications] Act.'"[2] The Telecommunications Act of 1996 (1996 Act),[3] in turn, incorporated Section 230 into the

[2] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 (1999); City of Arlington, Tex. v. FCC, 569 U.S. 290, 293 (2013) (noting that Section 201(b) of that Act empowers the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions. Of course, that rulemaking authority extends to the subsequently added portions of the Act.").
[3] Pub. L. No. 104-104 (1996).

1934 Communications Act. The Supreme Court and lower courts repeatedly have held that the Commission's section 201(b) rulemaking "[o]f course . . . extends to the subsequently added portions of the Act."[4] "Section 201(b) gives the Commission broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' including sections that were added later by the Telecommunications Act of 1996."[5]

Following this understanding of the FCC's regulatory authority, the Supreme Court has applied section 201(b) to sections 251 and 252, and section 332.[6] The U.S. Court of Appeals for the Ninth Circuit ruled that section 201(b) authorizes rulemaking for section 276.[7] And, the Commission has applied section 201's rulemaking authority to numerous other sections of the Telecommunications Act.[8]

A. Section 201(b)'s Authority Does Not Turn on the Text of Section 230

Numerous commenters allege that the lack of explicit implementing authority within section 230 renders it beyond the reach of section 201(b)'s grant of regulatory authority.[9] But,

[4] City of Arlington, 569 U.S. at 293.
[5] Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc., 423 F.3d 1056, 1067–68 (9th Cir. 2005) (citations omitted).
[6] City of Arlington, 569 U.S. at 293; Iowa Utilities Bd., 525 U.S. at 378; 47 U.S.C. §§ 251, 252, 332.
[7] Metrophones Telecommunications, 423 F.3d at 1067–68.
[8] Numerous commenters recognize as obvious this statutory analysis. Comments of the Free State Foundation, Docket No. RM-11862 at 4-5 (Filed Sept. 2, 2020) (Free State Comments); Comments of the Internet Accountability Project, Docket No. RM-11862 at 2 (Filed Sept. 2, 2020) (IAP Comments); Comments of Organizations Promoting a Safe, Secret, and Sustainable Internet for All, Docket No. RM-11862 at 6-7 (Filed Sept. 3 2020) (Internet for All Comments).
[9] Comments of Americans for Prosperity, Docket No. RM-11862 at 22-26 (Filed Sept. 2, 2020) (Americans for Prosperity Comments); Comments for the Center for Democracy and Technology, Docket No. RM-11862 at 5-6 (Filed Sept. 1, 2020) (CDT Comments); Comments of the Internet Association, Docket No. RM-11862 at 5-6 (Filed Sept. 3, 2020) (Internet Association Comments); Comments of TechFreedom, Docket No. RM-11862 at 14-16 (Filed Sept. 2, 2020) (TechFreedom Comments); Comments of Public Knowledge, Docket No. RM-11862 at 4-6 (Filed Sept. 2, 2020) (Public Knowledge Comments); Comments of Vimeo, Inc.,

this argument contradicts Supreme Court precedent, which extends section 201(b) authority to sections codified in 1934 Act, regardless of whether the particular section specifically mentions or contemplates FCC regulation. For instance, section 332(c)(7), which was also added to the 1934 Act by the 1996 Act,[10] limits State and local decision-making on the placement, construction, or modification of certain wireless service facilities. The section makes no mention of FCC authority, only alluding to the Commission in passing and giving it no role in the provision's implementation. The Supreme Court, nonetheless, upheld the Commission's authority to issue regulations pursuant to section 332(c)(7) for the simple reason that it was codified within the 1934 Act, and section 201(b) empowers the Commission to promulgate rules interpreting and implementing the entire Act.[11]

Similarly, in Iowa Utilities, the Supreme Court ruled that the FCC had rulemaking authority to implement sections 251 and 252 of the Act.[12] As with section 332(c)(7), section 252 does not explicitly grant the Commission power over all aspects of its implementation. Despite this silence, the Court ruled that "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[13] These two decisions, and their underlying rationales, compel the same result for a Commission rulemaking to interpret section 230: if Congress chooses to codify a section into the 1934 Communications Act, then section 201(b) gives the FCC the power to clarify and implement it through regulation.

Automattic Inc., Reddit, Inc., Docket No. RM-11862 at 6-9 (Filed Sept. 2, 2020) (VAR Comments).

[10] Telecommunications Act of 1996, Pub. Law 104-104 § 704. Facilities Siting; Radio Frequency Emission Standards, 47 U.S.C. § 332(c)(7).

[11] City of Arlington, 569 U.S. at 293 (affirming "[o]f course that rulemaking authority [of section 201(b)] extends to the subsequently added portions of the Act").

[12] Iowa Util. Bd., 525 U.S. at 378-87.

[13] Id. at 380.

The Commission, itself, has never limited application of section 201(b) to a given section of the Act depending on whether the section, itself, calls for Commission implementation. Following Supreme Court precedent, the Commission will apply section 201(b) to a section of 1934 Act that does not mention implementing authority. For instance, the Commission has issued regulations under sections 271,[14] which has no implementing language and section 260,[15] which only calls for procedural regulation.

B. Section 201's Requirement that Rules be "Necessary in the Public Interest"

Some commenters argue that section 201 is qualified by its language that all rules issued under its authority must be "necessary in the public interest."[16] But, courts have not read this language to limit the Commission's power to issue rules that further a legitimate regulatory objective. The Courts of Appeals for the Third and D.C. Circuits recognize that "necessary' is a 'chameleon-like' word whose 'meaning ... may be influenced by its context' [and] the Cellco Court determined that it would uphold any reasonable interpretation that did not contravene the express provisions of the Communications Act."[17] In Cellco, the D.C. Circuit stated that "[u]nder 47 U.S.C. § 201(b), the Commission can adopt rules upon finding that they advance a legitimate regulatory objective; it need not find that they are indispensable."[18] The Petition advances rules that clearly advance a "legitimate regulatory objective." It asks the Commission

[14] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 64 FR 51910 (Sept. 27, 1999).
[15] Accounting Safeguards Under the Telecommunications Act of 1996, 62 FR 2918 (Jan. 21, 1997).
[16] CDT Comments at 6-7; VAR Comments at 7-8.
[17] Prometheus Radio Project v. FCC, 373 F.3d 372, 393 (3d Cir. 2004), as amended (June 3, 2016), *citing* Cellco P'ship v. FCC, 357 F.3d 88 (D.C.Cir.2004).
[18] Cellco P'ship, 357 F.3d at 96. (citations omitted).

to return section 230 to its original meaning and purpose and expand transparency and consumer protection.

C. The Commission's Power to Implement Statutory Regulations Does Not Turn on Whether Such Statute Has Requires Regulatory Implementation

Numerous commenters allege that section 230 is a self-executing law controlling private parties and, therefore, precludes any federal regulatory implementation.[19] Again, this claim contradicts the Supreme Court rulings that found section 201(b) authority to issue regulations regarding section 252 procedures before a state utility commission and section 332(c)(7) which regulates local cellphone siting. These statutes are explicit and could easily be implemented without further Commission action, but the Supreme Court ruled that section 201(b) gave the Commission the right to further clarify and implement them. Further, the largely private scope of section 230 presents no bar to the FCC's power to implement regulations and the statute duplicates public interest because it blocks state criminal and civil enforcement. Agency statutory interpretations and implementation regulations receive full deference and have full effect even when governing actions between private litigation or disputes in which the agency plays no role.[20]

[19] Comments of Professors Christopher Terry and Daniel Lyons, Docket No. RM-11862 at 3 (filed Sept. 10, 2020) (Terry and Lyons Comments); Public Knowledge Comments at 4.
[20] Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 58 (2007); Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 650–51 (7th Cir. 2015); Leyse v. Clear Channel Broad., Inc., 697 F.3d 360, 372 (6th Cir. 2012); Schafer v. Astrue, 641 F.3d 49, 61 (4th Cir. 2011); Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 221 (2d Cir. 2009); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 949 (9th Cir. 2009).

D. Section 201(b) Is Not Limited to Common Carriers

Some argue that because some of section 201(b)'s provisions refer to common carriage, the entire implementing authority is also limited.[21] As a textual matter, this argument has no support. Parts of section 201(b) refer to common carriage; others do not. The Petition relies upon the complete sentence appearing at the end of section that does not involve or mention common carriage: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[22] Section 230 is in "this chapter" and section 201(b) "means what it says."[23]

Neither the Commission nor any court has ever recognized a common carriage limitation to the Commission's power in implementing appropriate regulation. To the contrary, the Commission has regulated non-common carrier issues pursuant to section 201 authority. For instance, City of Arlington demonstrates that this limitation has no basis in law. There, the FCC relied upon section 201(b) to promulgate rules about localities' decisions about cellphone tower siting—nothing to do with common carriage.[24] Section 201(b) authority has also been used to justify the Commission's regulations on matters as diverse as alarm monitoring services in 47 U.S.C. § 275[25] and pole attachments in 47 U.S.C. § 224.[26]

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[21] CDT Comments at 6; TechFreedom Comments at ii, 11; VAR Comments at 6-9.
[22] 47 U.S.C. § 201(b).
[23] Iowa Utilities Bd., 525 U.S. at 278.
[24] City of Arlington, 569 U.S. at 293.
[25] In the Matter of Enforcement of Section 275(a)(2) of the Communications Act of 1934 Against Ameritech, FCC 98-226, 13 FCC Rcd. 19046 (Sept. 15, 1998).
[26] In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, FCC 14-153, 29 FCC Rcd. 12865 (Oct. 21, 2014).

E. The Petition Does Not Call on the FCC to Regulate Speech or Impose Anti-Discrimination Requirements

Some argue that the Petition calls upon the Commission to regulate speech or impose non-discrimination requirements.[27] The Petition, however, does not prescribe speech nor impose unconstitutional conditions on speech as discussed infra and does not ask the Commission to regulate speech. It simply asks to return section 230 to its original meaning—to clarify a special legal exemption that interactive computer services enjoy. Nothing in the Petition prescribes or limits what anyone or any platform can say or express. Similarly, the Petition does not present "anti-discrimination" requirements and commenters fail to identify any place in the Petition that does so.[28] Rather, commenters assert that reading Section 230(c)(2)'s "otherwise objectionable" language according to ejusdem generis as discussed below, imposes anti-discrimination, common carriage so-called "network neutrality" requirements in violation of Verizon v. FCC.[29] This is an apples and oranges comparison. First, section 230(b)(2) is not an anti-discrimination provision; it is a liability protection provision. Platforms are free to carry whatever content they wish. Second, the Verizon court, in rejecting the FCC's anti-discrimination rule, took the Commission to task for an extravagant assertion of power over non-common carriers pursuant to

[27] Comments of the Computer and Communications Industry Association, Docket No. RM-11862 at 4 (Filed Sept. 3, 2020) (CCIA Comments) ("The Communications Act of 1934 does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC's jurisdiction. What NTIA proposes is not included in the scope of the FCC's enabling statute…"); Public Knowledge Comments at 5; TechFreedom Comments at 49; VAR Comments at 11.

[28] Public Knowledge Comments at 6.

[29] Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

section 706 of the Act.[30] Here, section 230 is not limited to common carriers thus Verizon's limitation has no application.

F. Section 230(b) and the Comcast decision

Section 230's policy statements found in Section 230(b)(2) state inter alia that the internet should be "unfettered by Federal or State regulation." Commenters argue this language precludes FCC's regulatory implementation of section 230.[31] But, this is not the case. "Policy statements are just that—statements of policy. They are not delegations of regulatory authority."[32] They do not create "statutorily mandated responsibilities."[33]

Regardless, section 230(b)(2) supports the Petition. Section 230 is a regulatory text, creating an exception to common law obligations. By limiting and clarifying its scope, the Petition is urging a de-regulatory approach. And, in addition, the Petition furthers other policies of section 230(b).[34]

G. Legislative History and Statements

Commenters point to statements made by congressmen, before and after the passage of section 230, to claim that the FCC lacks rulemaking authority.[35] For instance, legislators made statements such as "there is just too much going on the Internet for that to be effective. No

[30] Id. at 655 (identifying that "the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], pro tanto, to common carrier status'").
[31] Americans for Prosperity Comments at 9; CCIA Comments at 4-5; Terry & Lyons Comments at 3; VAR Comments at 7.
[32] Comcast Corp. v. FCC, 600 F.3d 642, 655 (D.C. Cir. 2010).
[33] Comcast Corp., 600 F.3d at 652; Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. 2005).
[34] 47 U.S.C. § 230(b)(3) ("It is the policy of the United States to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.").
[35] Americans For Prosperity Comments at 6; CCIA Comments at 4; Internet Association Comments at 13; TechFreedom Comments at 4.

matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time."[36]

These quotations' antiregulatory attitude reflected congressional support for section 230's free market, incentivizing approach to the problem of children viewing pornography on the internet. These comments do not evidence a congressional intent to strip the Commission of its regulatory authority under section 230. After all, section 230 *is* a regulation. All the Petition asks the Commission to do is narrow section 230's scope, making it *less* regulatory.

Section 230 is "deregulatory" in the sense that it created special, market incentives to regulate speech offensive to children and families, as opposed to more hands-on regulation that was proposed at the time in a competing legislation offered by Senator Exon. Representatives Christopher Cox and Ron Wyden floated the bill that became section 230—entitled the "Online Family Empowerment amendment"-- as an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors.[37] In public comments, Representative Cox explained that the section 230 would reverse Stratton Oakmont and advance the regulatory goal of allowing families greater power to control online content.[38] The final

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[36] 141 Cong Rec H 8460 (Statement of Mr. Cox); see also TechFreedom Comments at 6-7.

[37] Robert Cannon, The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 Fed. Comm. L.J. 51 (1996); Felix T. Wu, Collateral Censorship and the Limits of Intermediary Immunity, 87 Notre Dame L. Rev. 293, 316 (2011); 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995); Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 564 (2002) (noting that the Communications Decency Act reflected "Congress's response to the proliferation of pornographic, violent and indecent content on the web Congress' first attempt to protect children from exposure to pornographic material on the Internet.").

[38] See 141 Cong. Rec. H8469-70 (1995) (daily ed. Aug. 4, 1995) (statement of Rep. Cox); see also Reno v. Am. Civil Liberties Union, 521 U.S. 844, 859 n. 24 (1997) ("Some Members of the House of Representatives opposed the Exon Amendment because they thought it 'possible for our parents now to child-proof the family computer with these products available in the private sector.' They also thought the Senate's approach would 'involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of

statute reflected his stated policy: "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services."[39] The comments in the Congressional Record reveal bipartisan support and an understanding that section 230 was a non-regulatory approach to protecting children from pornography.[40] But, Congress intended section 230, and the FCC's regulatory authority, to further the goal of empowering families.

Finally, some commenters make the erroneous claim that the Restoring Internet Freedom Order, the FCC found that Section 230 provides no regulatory authority.[41] But, that is irrelevant. The point here is that section 201(b) –not section 230 itself—grants authority to issue regulations interpreting section 230(c).

H. Timing Issues

Some commenters argue that because the FCC has not before exerted regulatory authority to interpret section 230, it may not do so now. Or, relatedly, because no court has ever referred to the Commission a section 230 case on primary jurisdiction grounds, the Commission now

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legal challenges while our kids are unprotected.' These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled 'Online Family Empowerment.' See 110 Stat. 137, 47 U.S.C. § 230 (Supp. 1997); 141 Cong. Rec. H8458-H8472 (1995)." This amendment, as revised, became § 502 of the Telecommunications Act of 1996 [codified at section 230]).

[39] 47 U.S.C. § 230(b)(3) (emphasis added).

[40] See 141 Cong. Rec. H8470 (statement of Rep. White) ("I want to be sure we can protect [children] from the wrong influences on the Internet. But ... the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent. That is why I was proud to cosponsor this bill that is what this bill does ...."); (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment ....").

[41] TechFreedom Comments at 8-1.

lacks authority to issue regulations.[42] Commenters fail to cite a case in which a court's ruling on a statutory section precludes an agency from issuing regulations or a failure for courts to make referrals of primacy jurisdiction to the FCC strips it of its rulemaking authority. To the contrary, cases say the opposite. Administrative law, as the Supreme Court repeatedly has held, holds no such limit to the FCC's power. Under Chevron, the FCC has authority to implement any reasonable interpretation of ambiguities in section 230.[43] Under Brand X, prior court rulings do not bind—and must not have a bearing—on an agency's independent duty to arrive at interpretations of ambiguous terms in statutes it implements.[44] There is no time limit at which an agency's power to regulate expires. This Petition offers the opportunity for the FCC to examine section 230 with fresh eyes—to examine whether the legal rules created in the 1990's, in a very different internet economy, and which extend by precedent to this day, need revision.

II. Returning Section 230 to Its Textual Moorings and Congressional Intent

Some commenters have claimed that the FCC lacks authority to implement section 230 because it self-executes and lacks any ambiguity to clarify.[45] Yet, a cursory review of the comments reveal commenters offering manifold interpretations different from those for which the Petitions argues—revealing numerous ambiguities and echoing the conflicting views that

[42] Comments of the National Taxpayers Union, Docket No. RM-11862 at 3-5 (Filed Sept. 2, 2020) (NTU Comments); TechFreedom Comments at 12-14.
[43] City of Arlington, 569 U.S. at 296 (applying Chevron deference to section 332 under the analysis that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").
[44] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982, 125 S. Ct. 2688, 2700, 162 L. Ed. 2d 820 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").
[45] CDT Comments at 5; Internet Association Comments at 18-22; Terry and Lyons Comments at 10-11; VAR Comments at 14.

courts have put forth.[46] This section shows that Section 230 has ambiguities that the FCC must resolve and offers a resolution of these that best accords with the statute's text, intent, and purpose.

A. Defining Ambiguity

While commenters have claimed that section 230 contains no ambiguities, [47] commenters fail to cite the legal standard of ambiguity. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.[48] A statute is considered ambiguous if it can be read more than one way.[49] And, of course, when a statute is ambiguous or leaves key terms undefined, a court must defer to the federal agency's interpretation of the statute, so long as such interpretation is reasonable.[50] As the following shows, numerous aspects of section 230 are ambiguous, and the Petition offers an interpretation that faithfully follows the statutory text and stays true to congressional intent.

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[46] See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) ("The plain language and structure of the CDA unambiguously demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes congressional intent and violates the spirit and serendipity of the Internet."); see e.g., Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F.Supp.3d 1088, 1094–1095 (N.D.Cal. 2015).

[47] CCIA Comments at 2-3; Public Knowledge Comments at 8-9; TechFreedom Comments at 88.

[48] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

[49] United States v. Nofziger, 878 F.2d 442, 446–47 (D.C.Cir.1989).

[50] Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1067 (9th Cir.2005) (citing Chevron, 467 U.S. at 845, 104 S.Ct. 2778).

B. "Shall Be Treated as the Publisher or Speakers"

Section 230(c)(1) states: "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." The term "treated as the publisher or speaker" is ambiguous. Most cases have determined that the phrase relieves platforms of the legal liability they would face if they were presumed speakers or publishers of third-party user-generated content on their platform.[51] Thus, section 230(c)(1) protects platforms against liability for their users' libelous statements or criminal threats.

On the other hand, a handful of commenters and a few district courts—largely ruling in pro se cases, claim that this phrase relieves platforms of all liability relating to content. Section 230 protects them from legal liability resulting from exercising their "editorial function."[52]

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[51] Petition at 27-31.

[52] Internet Association Comments at 21-24; TechFreedom Comments at 86; Comments of the New Civil Liberties Alliance, Docket No. RM-11862 at 5-6 (Filed Sept. 2, 2020) (NCLA Comments); Jones v. Dirty World Entm't Recordings LLC,755 F.3d 398, 409 (reasoning that the core immunity that § 230(c) provides for the "exercise of a publisher's traditional editorial functions"); Doe II v. MySpace Inc., 175 Cal. App. 4th 561, 572, 96 Cal. Rptr. 3d 148, 156 (2009) (noting a classic kind of claim that Zeran found to be preempted by section 230, ... one that seeks to hold eBay liable for its exercise of a publisher's traditional editorial functions); Hassell v. Bird, 5 Cal. 5th 522, 532 (2018), cert. denied sub nom. Hassell v. Yelp, Inc., 139 S. Ct. 940 (2019) (holding that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred").

[52] Internet Association Comments at 21-24; NCLA Comments at 5-6; TechFreedom Comments at 86; Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398, 409 (the core immunity that § 230(c) provides for the "exercise of a publisher's traditional editorial functions"); Doe II v. MySpace Inc., 175 Cal. App. 4th 561, 572, 96 Cal. Rptr. 3d 148, 156 (2009) (classic kind of claim that Zeran found to be preempted by section 230, ... one that seeks to hold eBay liable for its exercise of a publisher's traditional editorial functions); Hassell v. Bird, 5 Cal. 5th 522, 532 (2018), cert. denied sub nom. Hassell v. Yelp, Inc., 139 S. Ct. 940 (2019) ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred").

Following this argument, section 230 would immunize platforms not simply from liability deriving from third party content on their platform, but also platforms' decision to remove content. This reading frees platforms to discriminate against certain users and throw them off their platforms, and section 230(c)(1) would protect them from contract, consumer fraud or even civil rights claims.[53] Contrary to some commenters who claim otherwise,[54] courts are relying upon Section 230 to immunize platforms for their own speech and actions--from contract liability with their own users,[55] their own consumer fraud,[56] their own violation of users' civil rights,[57] and assisting in terrorism.[58]

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[53] Comments of the American Principles Project, Docket No. RM-11862 at 3-4 (Filed Aug. 28, 2020) (APP Comments) ("lawsuits challenging Big Tech bans against specific viewpoints have failed, making Big Tech virtually immune to civil litigation"); Comments of Hal Singer and Robert Seamans, Docket No. RM-11-862 at 1-2 (Filed Sept. 3, 2020) ("As noted by American Prospect editor David Dayen, Section 230 is "being extended by companies like Airbnb (claiming the home rentals of their users are 'third-party content') and Amazon (the same for the product sold by third parties on their marketplace) in ways that are downright dangerous, subverting consumer protection and safety laws").

[54] Americans For Prosperity Comments at 19; but see Comment of Contract Law Professors, Docket No. RM-11862 at 1-2 (Filed Sept. 3, 2020) (Contract Professors Comments) (describing in detail a case of section 230 immunizing against contract obligations); Free State Comments at 2-3; Comments of Dr. Christos A. Makridis, Docket No. RM 11-862 (Filed Sept. 2, 2020) (Makridis Comments).

[55] For instance, some commenters claim that courts did not rely on section 230 immunity in rejecting contact claims. But see Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), aff'd, 700 F. App'x 588 (9th Cir. 2017) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all [including contract] of Plaintiff's claims against Facebook"); Lancaster v. Alphabet Inc., No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract . . . CDA precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[56] Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 836, 121 Cal. Rptr. 2d 703 (2002) (interpreting that "Appellants' UCL cause of action is based upon . . . [the claim]: that eBay misrepresented the forged collectibles offered for sale in its auctions").

[57] Sikhs for Justice "SFJ", Inc., 144 F.Supp.3d at 1094–1095 (N.D.Cal. 2015).

[58] Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019).

The text of section 230(c)(1), therefore, presents a classic ambiguity, with courts taking two very different interpretations. Most courts have resolved this ambiguity by the first approach because it best fits the statute's text and purpose. Section 230 relieves platforms of liability for information third party users post—if speaking or publishing such information were imputed to the platform. Its text, therefore, only covers liability that arises from third party speech, i.e., defamation or criminal threat or solicitation. Roping in immunity for "editorial function," i.e., the platforms' own speech when it edits, removes, moderates, shapes, promotes content or users simply ignores the text.

Much of the support for the "editorial function" interpretation derives from a mischaracterization of language from the Zeran opinion: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[59] This language arguably provides full and complete immunity to the platforms for their own publications, editorial decisions, content-moderating, and affixing of warning or fact-checking statements. But, it is an erroneous interpretation, plucked from its surrounding context and thus removed from its more accurate meaning. In addition, this approach misreads the statute—further showing its ambiguity and the need for FCC interpretation.

In fact, the quotation refers to third party's exercise of traditional editorial function—not those of the platforms. As the sentence in Zeran that is immediately prior shows, section 230 "creates a federal immunity to any cause of action that would make service providers liable for

[59] Zeran, 129 F.3d at 330. One commenter takes issues with this interpretation arguing that "its" refers to a "service provider." Public Knowledge Comments at 14. A reading of the complete passage makes clear that this commenter simply plays upon a vagueness in the pronoun antecedent of "its." Zeran was clearly referring to the editorial functions of third parties—not those of service providers.

information originating with a third-party user of the service." In other words, the liability from which section 230(c)(1) protects platforms is that arising from the content that the third-party posts—i.e., the "information" posted by "another information provider" and those information providers' editorial judgments.

Arguing section 230 protects all of a platform's "editorial function" —instead of certain types of function, i.e., removal under section 230(c)(2)-- also ignores Congress' stated purpose in passing section 230: to overturn the Stratton Oakmont decision. That decision treated platforms as the speaker of their users' defamatory content. Congress passed section 230 to reverse that decision and give immunity to those platforms, like Prodigy, which wanted to create open bulletin boards and allow their users to post freely.

Commenters mischaracterize this purpose proposing that section 230 was meant to protect platforms' ability to censor, "moderate content," and de-platform, i.e., "editorial functions."[60] But, this position upends the statute. In overturning Stratton Oakmont, Congress wanted to give platforms the legal protection to be open. Congress wanted platforms to comment as they wish without bearing the crippling legal liability for defamation and other unlawful statements that their users might make—or at least not penalize good actors. In contrast, commenters seek to use section 230 to protect their affirmative editorial decisions to censor, de-platform, shape, and control users content. Even worse, some commenters claim that section 230 gives immunity to platforms to ignore contracts with advertisers and users concerning carriage of content because such contracts would interfere with their First Amendment rights.[61]

[60] Internet Association Comments at 34; Comments of the Internet Infrastructure Coalition, Docket No. RM-11862 at 15 (Filed Sept. 3, 2020) (IIC Comments); NCLA Comments at 5.
[61] TechFreedom Comments at 101-125.

Of course, platforms, under the First Amendment, are free to exercise affirmative editorial control over user content. But, they do not receive section 230 immunity for these actions, unless removing content in good faith under the narrow categories of section 230(c)(2). Rather, their contracts, consumer fraud, antidiscrimination statutes, and all generally applicable laws govern their decisions concerning these actions. Section 230 only provides immunity from liability if a platform would face if third party speech were imputed to them. And, section 230(c)(2) protects against removals of content for certain specified reasons as subsequent sections explain.

C. "Publisher"

The word "publisher" is fundamentally ambiguous. On one hand, it refers to someone who "actually" publishes or speaks something; on the other hand, it also refers to someone who re-publishes or distributes, as the Restatement (Second) indicates.[62] Thus, like the term "congressman" which refers to both senators and representatives, but usually refers to representatives, "publisher" refers both to those who "actually publish" and those who re-publish or distribute. Both "publishers" and "distributers" fall under the generic term "publisher." It is not clear whether Congress intended the generic or the specific meaning of publisher.

These generic and specific meanings of "publisher" stem from common law concepts. The common law recognized a "narrow exception to the rule that there must be an affirmative act of publishing a statement."[63] A person "while not actually publishing—will be subjected to

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[62] Restatement (Second) of Torts § 578 (1977) ("Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability. Thus one who reprints and sells a libel already published by another becomes himself a publisher and is subject to liability to the same extent as if he had originally published it . . . the same is true of one who merely circulates, distributes or hands on a libel already so published").

[63] Benjamin C. Zipursky, Online Defamation, Legal Concepts, and the Good Samaritan, 51 Val. U. L. Rev. 1, 20 (2016).

liability for the reputational injury that is attributable to the defendant's failure to remove a defamatory statement published by another person."[64] This type of liability describes that which platforms face when they distribute content of another person—a distinction between "actually" publishing and re-publishing or distributing.

The distinction is important because it shows that, under common law, liability adheres to entities, like bookstores, newsstands, or social media platforms for the "omission" of failing to remove content. It was precisely this type of liability that section 230(c)(1) eliminated.[65] Some commenters reject the omission/commission dichotomy because it fails to account for screening, i.e., the decision to allow something on the platform, and places removal decisions outside of section 230(c)(1) and squarely in section 230(c)(2).[66] But, tracking the common law distinctions between screening affirmative acts of publication and removal, Section 230 simply does not address the question of liability for screening. And because it is silent, section 230 offers no immunity. That silence does not mean that the First Amendment does not protect platforms' decision to screen and allow individuals onto platforms. They may screen as they wish, and nothing in the Petition derogates in any way this essential First Amendment right. The Petition merely points out that generally applicable law govern decisions to screen and remove, and section 230(c)(1) provides no immunity from such law. Under the petition's proposed interpretation of section 230(c)(2), however, platforms would continue to receive immunity for their decisions to screen for the enumerated categories of content. Commenters may maintain that it makes no sense to distinguish between decisions to put up content from decisions, which

[64] Id. at 21 (citing Restatement (Second) of Torts § 577(2) (Am. Law Inst. 1977)).
[65] Comments of the Attorneys General for the States of Texas, Indiana, Louisiana, and Missouri, Docket No. RM-11-862 at 2 (Filed Sept. 3, 2020) (Attorneys General Comments).
[66] IIC Comments at 9; TechFreedom Comments at 85; VAR Comments at 15-16.

could occur but minutes after, to "take down."[67] The assertion is contrary to the text and purpose of section 230. From a policy perspective, the distinction also makes sense. Bookstores, social media, and other distributors make decisions and implement policies about who and what access their platforms. Once material is accepted, the law of defamation holds these firms responsible for those decisions. Congress in section 230 wanted to protect platforms' take down of certain types of content to promote certain types of editorial conduct—but still wanted to keep platforms accountable for access policies, consistent with common law understanding

D. Ambiguities in Section 230(c)(2)

Section 230(c)(2) immunizes "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." This provision presents two ambiguities: the meaning of "good faith" and "otherwise objectionable." Numerous commentators claim that these phrases are not ambiguous.

But not only is, "good faith" ambiguous on its face,[68] Section 230(b)(2)'s context renders "good faith" even more ambiguous. Censoring content in good faith entails a degree of transparency, consistency, honesty, and procedural fairness. The precise degree is not clear and requires Commission clarification.

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[67] TechFreedom Comments at 85; see also Internet Association Comments at 36, 47; IIC Comments at 9-12.

[68] See Colorado Dept. of Social Services v Dept. of Health & Human Services, 928 F2d 961, 964 [10th Cir 1991] (highlighting that "Congress's intent in requiring "good faith and due diligence" is ambiguous"); State of Ark. by Yamauchi v Sullivan, 969 F2d 622, 625 [8th Cir 1992] (issuing that "[b]ecause the statute does not define 'good faith and due diligence,' the statute must be considered to be ambiguous or silent on this issue, and we must determine whether the Secretary's interpretation of 'good faith and due diligence' in the regulation is reasonable").

"Otherwise objectionable" is also ambiguous. While most courts read it following the canon of ejusdem generis so that it refers to other matters of the kind enumerated prior in the list, some commentators (and courts) argue that the phrase refers to any material that a platform considers objectionable. Resolving the ambiguity as commenters urge—allowing platforms to remove any content they subjectively deem objectionable undermines the statute's text, the purpose and structure.[69]

As a textual matter, the Supreme Court mandates the use of ejusdem generis, which holds that catch-all phases at the end of a statutory lists should be construed in light of the other phrases. This is based on the premise that the legislature would not go to the trouble of making a list of specific things if the catch-all phrase were to include a broad swatch of unrelated things.

The vast majority of courts that have examined this issue have either relied upon ejusdem generis or, at least, recognized that interpreting "otherwise objectionable" as anything the platform finds objectionable is absurd. A recent Ninth Circuit case perceptively sees the challenge: On one hand, "decisions recognizing limitations in the scope of immunity [are] persuasive," and "interpreting the statute to give providers unbridled discretion to block online content would . . . enable and potentially motivate internet-service providers to act for their own, and not the public, benefit." [70] In addition, the court did recognize that "the specific categories listed in § 230(c)(2) vary greatly: [m]aterial that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing. If the enumerated categories are not similar,

[69] Comments of the Open Technology Institute, Docket No. RM-11862 at 7 (Filed Sept. 2, 2020) (Open Technology Comments); NTU Comments at 3-6; TechFreedom Comments at 91-94; Terry & Lyons Comments at 11.
[70] Enigma Software Grp. USA, v. Malwarebytes, Inc., 946 F.3d 1040, 1050 (9th Cir. 2019).

they provide little or no assistance in interpreting the more general category. We have previously recognized this concept." [71]

NTIA's Petition, however, through careful statutory analysis and examination of the legislative history and context persuasively showed that these terms all come from existing communications and media content regulation contemplated by the Communications Decency Act. The first four adjectives in subsection (c)(2), "obscene, lewd, lascivious, filthy," are found in the Comstock Act as amended in 1909. In addition, the CDA used the terms "obscene or indecent," prohibiting the transmission of "obscene or indecent message." The next two terms in the list "excessively violent" and "harassing" also refer to typical concerns of communications regulation which were, in fact, stated concerns of the CDA itself.[72] Congress and the FCC have long been concerned about the effect of violent television shows, particularly upon children; indeed, concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip, which allowed content blocking based on ratings for broadcast television that consisted of violent programming.[73] Last, Section 223, Title 47, the provision which the CDA amended and into which the CDA was in part codified, is a statute that prohibits the making of "obscene or harassing" telecommunications. These harassing calls include "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to

[71] Id. at 1051; see also Attorneys General Comments at 3 ("the Petition ensures that platforms may continue to preserve public spaces free of objectively obscene, harassing, and harmful material without unduly expanding immunity to conduct that tramples core First Amendment speech").
[72] 47 U.S.C. § 223(a) (May 1996 Supp.).
[73] 47 U.S.C. § 303(x).

harass any person at the called number" or "mak[ing] repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication."[74] This historical understanding of 230(c)(2)'s text reveals its scope. It protects platforms' removal decisions designed to create "family friendly" internet spaces of the sort that other regulation did for broadcast television, radio, and telephonic communications.

Some claim that this interpretation prevents platforms from removing, for example, the accounts of self-proclaimed Nazis engaged in "otherwise objectionable hate speech"[75] This could not be further from the truth. Platforms, pursuant to their terms of service, are free to block people from their websites.[76] They can remove all sorts of objectionable content including hate speech.[77] Indeed, as with questions of screening, so with removal: platforms are free to remove whatever content they wish. The First Amendment protects this removal. But section 230 only protects removals for the explicitly enumerated categories of speech that are harmful to children, and only when platforms act in "good faith."

E. The Interaction Between Subsection 230(c)(1) and Subsection 230(c)(2) is Ambiguous

Where section 230(c)(1) has been read to immunize "editorial function," the line between whether a platform's action is governed by (c)(1) versus (c)(2) is ambiguous. If section 230(c)(1) protects editorial function, then it limits not only liability for user-generated speech imputed to the platforms that host it, which is the natural reading as discussed above, but also

[74] 47 U.S.C. § 223(a)(1)(D) & (E) (2012).
[75] CCIA Comments at 4; NTU Comments at 7; Open Technology Comments at 7.
[76] Internet for All Comments at 3-4.
[77] Internet Association Comments at i-iii.

decisions to remove and de-platform. But, section 230(c)(2) by its text governs decisions to remove content. Thus, reading section 230(c)(1) as protecting "editorial functions" risks rendering section 230(c)(2) superfluous because two sections would govern the same act: removing content or users. And, since section 230(c)(1) is the broader provision, courts read it to render section 230(c)(2) superfluous.

Some courts have invited this confusing superfluity. For instance, in Domen v. Vimeo,[78] a federal district court upheld the removal of videos posted by a religious groups' questioning a California law's prohibition on so-called sexual orientation change efforts (SOCE), and the law's effect on pastoral counseling. Finding the videos were "harassing," the court upheld their removal under both section 230(c)(1) and section (c)(2), ruling that these sections are co-extensive, rather than aimed at very different issues.

Similarly, commenters have urged this duplicative reading of the statute largely on policy grounds—but never state what that policy is.[79] While early cases might have read the provision broadly to protect a nascent industry, today's internet behemoths no longer need it.

But, this judicial "rule," announced by lower courts and simply followed without any justification, gives way to Supreme Court direction on statutory interpretation, which requires application of the canon against surplusage. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[80] The canon "is strongest when an interpretation would render superfluous another part of

[78] Domen v. Vimeo, Inc., 433 F. Supp. 3d 592 (S.D.N.Y. 2020).
[79] TechFreedom Comments at iii; Terry & Lyons Comments at 11; VAR Comments at 14.
[80] Corley v. United States, 556 U.S. 303, 314 (2009), quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004).

the same statutory scheme." Here, the provisions are right next to each other. The anti-surplusage canon is a "cardinal principle of statutory construction."[81]

Thus, the FCC should resolve the ambiguity of whether to apply section (c)(1) or (c)(2) to removal of content: Section 230(c)(1) governs liability for content already on platforms; section 230(c)(2) governs removal of content for reasons related to legal content regulation in 1996, when the provision was passed; and, every other action is controlled by contract and other generally applicable laws.

Alternatively, some argue that section 230(c)(1) and (2) should be read duplicatively because this interpretation makes lawsuits easier to dismiss and immunity for faulty content moderation that changes the meaning of posts.[82] It may be that it is easier for a defendant to gain a dismissal under section 230(c)(1) than (c)(2) for a claim of unlawful deletion or editing, but Congress never intended section 230(c)(1) to protect against platforms' own speech or content moderation. Section 230(c)(2) provides that protection.

F. Section (c)(1) and Section (f)(3): The Developer Exception

Section 230(c)(1) places "information content providers," i.e., entities that create and post content, outside its protections. This means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet, does not receive the statute's shield. This so-called "developer exception" is essential to the structure of section 230. Just as the editor of an anthology of poems or essays presents his own speech and expression, so does a platform that significantly shapes others' content. This is an obvious point.

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[81] Williams v. Taylor, 529 U.S. 362, 404 (2000).
[82] CDT Comments at 2; Open Technology at 7-8; TechFreedom Comments at 89-90.

The Petition pointed to FTC Commissioner Rohit Chopra's recognition that platforms, through manipulation of content, can become speakers.[83]

Numerous 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. But the point at which a platform's form and policies are so intertwined with users' content so as to render the platform an "information content provider" is an ambiguous line that calls forth for regulatory explication to resolve conflicting court decisions.[84]

Courts have proposed differing ways to draw this difficult line, most influentially in the Ninth Circuit in Fair Housing Council of San Fernando Valley v. Roommates.Com. There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[85] But, this definition has failed to provide clear guidance, with courts struggling to define "material contribution," and not all courts accept the material contribution standard. "[86] Other circuits conclude that a website becomes an information content provider by "solicit[ing] requests" for the information and then "pa[ying] researchers to obtain it."[87]

Recognizing the ambiguities, commenters opposed to the Petition argue simply that creating a rule to implement the provision would effect a change in the law[88] Commenters

[83] Petition at 45; see also Comments of the Claremont Institute, RM-Docket No. 11-852 at 4, (2020) (Claremont Comments) ("If dominant online platforms wish to act like editors and publishers, they will be free to do so. However, they will have to assume the same legal responsibilities as other publishers and editors").
[84] Id. at 43-46.
[85] Fair Hous. Council, 521 F.3d at 1166.
[86] Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016).
[87] FTC v. Accusearch Inc., 570 F.3d 1187, 1199–1200 (10th Cir. 2009).
[88] Internet Association Comments at 30-31.

declare that the distinction was not meant to involve content moderation decision,[89] or they lament that applying the developer exception would have a major regulatory impact.[90] Regardless of these policy concerns, the FCC has a duty to bring independent judgment in its interpretation of section 230 and clarify its ambiguous statutory mandates.

III. The FCC Has the Power to Regulate Social Media Firm under Title I

With roots in the Modified Final Judgment for the break-up of AT&T[91] and codified by the Telecommunications Act of 1996,[92] the term "information service" refers to making information available via telecommunications. Under FCC and judicial precedent, social media sites are "information services." As such, courts have long recognized the Commission's power to require disclosure of these services under sections 163 and 257 of the Communications Act.

Some commenters claim that neither section 167 nor 257 grant authority to the Commission to impose transparency regulation because these provisions only direct the Commission to provide reports to Congress, or identify barriers to entry.[93] But, the D.C. Circuit has rejected that argument already. In Mozilla Corp. v. Fed. Commc'ns Comm'n, the Court ruled the "Commission's reliance on 47 U.S.C. § 257 to issue the transparency rule was proper," with

[89] Americans for Prosperity Comments at 21-22; Comments of New America, Docket No. RM-11862 at 19-22 (Filed Sept. 2, 2020); Public Knowledge Comments at 13-14.
[90] Comments of NetChoice, Docket No. RM-11862 at 22 (Filed Sept. 2, 2020).
[91] United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 179 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (observing that "'Information services' are defined in the proposed decree at Section IV(J) as: the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications").
[92] 47 U.S.C. § 153(24). Commenters broadly recognize the value of this transparency; Comments of AT&T, Docket No. RM-11862 at 2-3 (Filed Sept. 3 2020) (AT&T Comments); Makridis Comments at 3.
[93] Comments of the Consumer Technology Association, Docket No. RM-11862 at 28 (Filed Sept. 2, 2020) (CTA Comments); TechFreedom Comments at 17-19.

regard to broadband internet access providers.[94] Even commenters strongly opposing the disclosure regulations, concede this point.[95]

Given that the Commission has power to mandate disclosure for information services, the remaining question is whether social media are information services. Numerous courts have ruled that search engines, browsers and internet social media precursors such as chat rooms are information services.[96] In short, courts have long recognized edge providers as information services under Title I.

Some suggest the definition of the statutory term "interactive computer service" excludes social media from the information service category.[97] The term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[98] Commenters argue that under the statute an entity can be an information content provider but not an information service.[99] True enough, but that argument does not respond to the Petition's demonstration that social media are,

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[94] Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 47 (D.C. Cir. 2019).
[95] Internet Association Comments at 57.
[96] Mozilla Corp., 940 F.3d at 34 ("But quite apart from the fact that the role of ISP-provided browsers and search engines appears very modest compared to that of DNS and caching in ISPs' overall provision of Internet access, Petitioners are in a weak posture to deny that inclusion of 'search engines and web browsers' could support an 'information service' designation . . . since those appear to be examples of the 'walled garden' services that Petitioners hold up as models of 'information service'-eligible offerings in their gloss of Brand X") (internal citations omitted); FTC v. Am. eVoice, Ltd., 242 F. Supp. 3d 1119 (D. Mont. 2017) (email and online "chat rooms" "were enhanced services because they utilized transmission lines to function, as opposed to acting as a pipeline for the transfer of information . . . .'This conclusion is reasonable because e-mail fits the definition of an enhanced service'" (quoting Howard v. Am. Online Inc., 208 F.3d 741, 746 (9th Cir. 2000)); H.R. Rep. No. 103-827, at 18 (1994), as reprinted in 1994 U.S.C.C.A.N. 3489, 3498. ("Also excluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line").
[97] Americans for Prosperity Comments at 36; Open Technology Comments at 3.
[98] 47 U.S.C. § 230(f)(2).
[99] Americans for Prosperity Comments at 36.

by the FCC's own definitions, an information service—and they are certainly not, nor has any argued, either a "system or access software provider."[100] Similarly, some commenters argue that three terms in the list are conjunctive, not disjunctive, meaning that an "interactive computer service" is all three—an interpretation at odds with the plain meaning of "or."[101]

Courts, however, follow the provisions plain meaning. Search engines and social media platforms are interactive computer services—a statutory term that includes three types of things: information service, system, or access software provider. Search engines and social media belong to the first category. For instance, "Ask.com [an early search engine] is an 'interactive computer service' because it is an internet search engine that allows members of the public to search its directory of web pages and is therefore an "information service."[102]

Some Petitioners dispute that courts have long classified social media as information services. They claim that these numerous cases did not speak to the exact issue here: whether the FCC may impose disclosure on information service under the Communications Act.[103] Classifying social media as information services is a question that presents itself in a variety of contexts—and if social media is an information service in one context, it is in another. Some commenters have argued because the Commission has never answered the question of whether Title I disclosure applies to social media, it cannot now.[104]

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[100] Petition at 47-48.
[101] Open Technology Comments at 3.
[102] Murawski v. Pataki, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); see also Kinderstart.com LLC v. Google, Inc., No. C06-2057JFRS, 2007 WL 831806 (N.D. Cal. Mar. 16, 2007).
[103] TechFreedom Comments at 22.
[104] Internet Association Comments at 56.

Others argue that because the Commission in the Preserving the Open Internet Order did not impose Title II on edge providers renders, Title I regulation is now inappropriate.[105] This argument lacks force. In the *Preserving the Open Internet Order*, the FCC deemed BIASs to be an information service, and the D.C. Circuit in Verizon v. FCC struck down many common carriage-like rules, such as non-discrimination, the FCC imposed pursuant to its regulation of information services under Title I.[106] Verizon is inapposite because the Petition does not ask for imposition of common carriage rules which the FCC can apply to BIASs only when regulated under its Title II jurisdiction. Rather, Verizon *upheld* the imposition of the FCC's disclosure rules on BIASs when regulated as information services.[107] Thus, social media and other edge providers, which have always been regulated as information services, are subject to the FCC's power to compel disclosure.

Commenters argue that the Commission cannot impose disclosure requirements because statutory provisions only allow disclosure to show "barriers to entry by telecommunications and information service providers reliant on the underlying broadband" service to reach their customers.[108] But, of course, social media content providers' network management and content promotion strategies are vital to the many competitors and other information service. They need

[105] In the Matter of Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010); Internet Association Comments at 56-57.
[106] Verizon, 740 F.3d at 649–50.
[107] Id. at 659 ("The disclosure rules are another matter. Verizon does not contend that these rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would").
[108] TechFreedom Comments at 21.

this information to determine how best to promote their traffic to market their services and reach clients.[109]

And, finally, commenters argue disclosure would violate First Amendment principles.[110] But, again, if the D.C. Circuit accepted this disclosure for one type of information service provider, i.e., BIASs, as upheld in Verizon, it is hard to see why the First Amendment would preclude it for another.[111] Without providing any specific example, commenters present parades of horrible competitive harms, intellectual property violations, and regulatory burdens.[112] But, to the degree any of this information and disclosure is protectable under trade secret law, it could be reviewed confidentially by the Commission. Further, these requirements have existed for years for BIASs, yet they have generated no reported competitive harm.[113]

Contradicting themselves, some commenters argue that disclosure for BIASs are different than for social media content because the latter involves "editorial discretion."[114] But this argument undermines the claim that social media's content moderation is not speech. If it is, then section 230(c)(1) cannot applies because it only protects information provide by *"another* internet content provider."

IV. The First Amendment Supports NTIA's Recommendations

The Petition urges the Commission to return section 230 to its original purpose and meaning. The Petition's suggested rules only violate the First Amendment if section 230, itself,

[109] Commenters recognized the value of disclosure to market entry, the economy in general and our political life. See AT&T Comments at 3-4; Attorneys General Comments at 3-4; Free State Comments at 6.
[110] Internet Association Comments at 57-58.
[111] AT&T Comments at 3-4.
[112] CTA Comments at 31-32.
[113] AT&T Comments.
[114] TechFreedom Comments at iii, 63-64.

is deemed to violate the First Amendment—something none of the commenters suggest.[115] As an initial matter, many commenters compare Petition's suggested regulations to the "Fairness Doctrine," the regulation that required television and radio broadcasters to offer time to present opposing views to any editorial position the broadcasters took.[116] Commenters claim that NTIA's proposed regulation to say the same thing.[117]

NTIA's Petition has nothing to do with Fairness Doctrine. It does not mandate any sort of content at all. Rather, it asks to limit section 230(c)(1)'s protections to third party content, which if spoken or published by the platform, would be unlawful. This is simply the liability regime that all newspapers and cable systems face. Second, the Petition asks to limit protections for removal to certain situations, enumerated by the statute. Limiting special protections in this way does not mandate content because platforms are always free to remove content for *any reason.* But, if they do so for reasons other than those section 230(c)(2) enumerates, generally applicable law applies.

The Petition presents no forced speech issues. Platforms are free to accept or remove content for any reason. Thus commenter veer off-point when the cite to such cases as Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, in which the Supreme Court held that the government could not compel the organizers of a parade to include individuals, messages, or

[115] Some commenters call many First Amendment arguments presented as "crying First Amendment wolves," that will "diminish a proper understanding of the First Amendment's free speech guarantee" Free State Comments at 5-6.
[116] Comments of the Innovation Economy Institute, Docket No. RM-11862 at 5 (Filed Sept. 3, 2020); TechFreedom Comments at i, 24; Terry & Lyons Comments at 3; VAR Comments at 12-13.
[117] Terry & Lyons Comments at 2-3; Internet Association Comment at 51-53; VAR Comments at 13.

signs that conflicted with the organizer's beliefs.[118] Here, the government compels no one; the platforms may include or exclude any one or any message.

Similarly, the Petition's interpretation of section 230 impinges on no editorial decision-making. Commenters claim that the Petition's proposed regulation creates a "right to respond" principle, which the Supreme Court in Miami Herald Publishing Co. v. Tornillo,[119] declared unconstitutional for newspapers, is off-base.[120] Just like newspapers, social media may allow on their platforms anyone they like, pursuant to their own rules and contracts. Thus, the parade of horribles include forcing Christian websites to accept the postings of Satanists is misguided. Under the Petition, any website is free to exclude for any reason. Section 230, however, does not protect decisions to restrict access; contract and generally applicable law does. Section 230 only protects takedowns if done for the enumerated reasons.

Some commenters, conceding that the Petition advocates no content-based regulation or control of the editorial process, argue that failing to give section 230's special liability protection to all entities and all speech violates the First Amendment by preferring certain types of speech and speakers.[121] But, if these claims are correct, then section 230, itself, is unconstitutional. Its protections only extend to internet content service providers, not newspapers or cable systems. Similarly, section 230(c)(1) only protects certain types of speech from take down, i.e., they types of speech enumerated in section 230(c)(2). And no court has ever questioned section 230's constitutionality under the First Amendment.

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[118] Americans for Prosperity Comments at 15-16.
[119] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
[120] Several commenters point to the Tornillo case, see, e.g., Americans For Prosperity Comments 17-18; Terry & Lyons Comments 3-4.
[121] IIC Comments at 14-15; Internet Association Comments at 50.

To the contrary, the Supreme Court has upheld the constitutionality of offers special liability protections in exchange for *mandated* speech. In Farmer's Union v. WDAY,[122] the Court held that when the federal government mandates equal time requirement for political candidates—*a requirement still in effect,* this requirement negates state law holding station liable for defamation for statements made during the mandated period. In other words, the Court upheld federal compelled speech in exchange for liability protections. Section 230's liability protections, which are carefully drawn but come nowhere near to compelling speech, are just as constitutionally unproblematic if not more so.

One commenter points to Barr v. Am. Ass'n of Political Consultants, Inc., for the principle that section 230 must apply to all entities.[123] This case struck down exemptions found in a provision of the Telephone Consumer Protection Act of 1991 (TCPA)[124] for robocalls seeking to collect government debt as content-based discrimination under the First Amendment. TCPA imposed various restrictions on the use of automated telephone equipment. The statute, however, "exempted automated telephone calls to collect a debt owed to or guaranteed by the United States' after 'charged for the call.'"[125] In other words, Congress carved out a new government-debt exception to the general robocall restriction.[126] Once again, this is a punitive statute that punishes speech and is inapposite.

Some claim that it makes no difference that NTIA's proposed rule would withhold the benefit of a liability shield rather than impose a penalty—both raise First Amendment

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[122] Farmer's Union v. WDAY, 360 U.S. 525, 526-28 (1958).
[123] Americans for Prosperity Comments at 14-15; see also Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2346-47 (2020).
[124] 47 U.S.C.S. § 227(b)(1)(A)(iii).
[125] See Barr, 140 S. Ct. at 2341.
[126] Id. at 2344.

concerns.[127] But, there is no case cited in the voluminous comments that liability exceptions to common law that are content neutral raise First Amendment concerns. If they did, then newspapers would have a First Amendment claim that section 230 violated *their* rights as they are not covered by its protections. Indeed, the closest cases commenters cite--those dealing with government spending--demonstrate that the First Amendment plays little, if any role, in limiting government's role in bestowing benefits or granting subsidies.[128] Rather, the First Amendment only limits government's speech-based conditions for funding if they "seek to leverage funding to regulate speech outside the contours of the federal program itself."[129] Here, the Petition merely asks that the Commission return section 230 to its textual moorings and congressional design.

V. Policy Considerations

Many commenters predict bad policy outcomes should the Commission return section 230 to its textual moorings and congressional design. Many allege that the Petition's proffered interpretation will increase incentives for platforms to remove content and censor due to the risk of litigation.[130] Others foresee that litigation risks combined with the lack of clear legal outcomes would force content platforms to disengage from moderation.[131] The effect of the incentives section 230 creates is complex and difficult to predict with precision. In light of this uncertainty, the best the Commission can do is follow Congress's text and intent.

[127] Americans for Prosperity Comments at 16.
[128] Rust v. Sullivan, 500 U.S. 173, 195 (1991).
[129] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 206 (2013).
[130] American for Prosperity Comments at 38.
[131] Comments of the Section 230 Proponents, Docket No. RM-11862 at 17-18 (Filed Sept. 2, 2020).

Finally, it is claimed that the effect on the economy of the Petition's reforms likely would exceed $100 million or more, requiring the FCC to conduct a cost/benefit analysis. This claim lacks serious empirical support. The economic effect caused by the Commission adopting the Petition would be impossible to measure in any noncontroversial way.

To support its estimate that the Petition would have an effect greater than $100 million, a commenter points to two working papers: Brynjolfsson et al. that furthers a novel measurement of gross domestic product that purports to capture the "value" of social media and then looks to laboratory experiments for verification of this new metric—and Allcott et al. that reports additional laboratory results.[132] Commenters thus present no real world measurements of social media but simply report laboratory results that have an unclear, if any, application to the real economic behavior. Further, commenters offer no evidence that liability rules, in fact, change consumer usage or advertising behavior.[133] Finally, these critiques about economic impact fail to balance the harm to users, society, and national discourse, when platforms can hide behind section 230 protections to censor lawful speech without transparency or accountability.

VI. Conclusion

For the foregoing reasons, NTIA respectfully requests that the Commission grant its Petition.

Respectfully submitted,

Adam Candeub

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Adam Candeub
Acting Assistant Secretary of Commerce for Communications and Information

[132] Comments of Research Professor Jerry Ellig at the George Washington University, Docket No. RM-11862 at 2 (Filed Sept. 2, 2020).
[133] Id. at 3.