

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

National Telecommunications and Information Administration
Petition for Rulemaking to Clarify Provisions of
Section 230 of the Communications Act of 1934

RM-11862

**REPLY COMMENTS OF CO-AUTHORS OF
SECTION 230 OF THE COMMUNICATIONS ACT OF 1934**

September 17, 2020

Table of Contents

I.	Introduction	3
II.	Reply to Commenters Asserting That Section 230 Gives the FCC Authority to Draft Rules Interpreting Its Provisions	3
III.	Reply to Commenters Asserting That Section 230 Is Outdated	7
IV.	Reply to Commenters Asserting That Section 230 Establishes Different Legal Standards for Online and Brick-and-Mortar Businesses, Which the FCC Should Rectify by Rule	10
V.	Reply to Commenters Asserting That the FCC Could Interpret Section 230 to Mandate Various Disclosure and Reporting Requirements	12
VI.	Reply to Commenters Asserting That the FCC Could Interpret Section 230 to Import Negligence Concepts into the Law	15
VII.	Reply to Commenters Asserting That Section 230 Authorizes the FCC to Create a Regulatory Regime Enforcing Viewpoint Neutrality	17
VIII.	Reply to Commenters Asserting That Section 230 Authorizes Censorship in Violation of the First Amendment	19
IX.	Conclusion	21

I. Introduction

As the co-authors of Section 230 of the Communications Act of 1934 (“Section 230”), we have an abiding interest in the application of this law in accordance with its purposes, as intended by Congress at the time of its enactment. We also have clear insight into the legislative history of Section 230 resulting from the work that we did to advance this legislation in the 104th Congress.

We have carefully reviewed the petition for rulemaking (the “Petition”) filed by the National Telecommunications and Information Administration (“NTIA”) and Executive Order 13925 to which it is responsive. We have also carefully reviewed the comments on the Petition that have been filed with the Federal Communications Commission (“FCC”). This reply addresses certain assertions of both law and fact made in several of those comments that we know to be inaccurate, based upon our experience with the law in question. We have focused in particular on points that have been raised by multiple commenters, indicating that the views expressed are commonly held.

While our personal views on the public policies advanced by Section 230 are of little consequence in the context of the Commission’s review of the Petition, our intimate knowledge of the statute—its construction, its terms and definitions, and its meaning as understood by the Congress that passed it—will, we hope, be of some use to the Commissioners and staff as you weigh the arguments and evidence before you.

II. Reply to Commenters Asserting That Section 230 Gives the FCC Authority to Draft Rules Interpreting Its Provisions

Several commenters have repeated the claim in the Petition that “[n]either section 230’s text, nor any speck of legislative history, suggests any congressional intent to preclude the

Commission’s implementation.”¹ In fact, however, as the authors of the legislation and the floor managers of the debate on the bill in the House of Representatives, we can assure you the very opposite is true. We and our colleagues in Congress on both sides of the aisle were emphatic that we were not creating new regulatory authority for the FCC or any other independent agency or executive branch department when we enacted Section 230. Not only is this clear from the legislative history, but it is written on the face of the statute. Unlike other provisions in Title II of the Communications Act, Section 230 does not invite agency rulemaking. Indeed, in a provision that judges interpreting the law have noted is “unusual,”² Section 230(b) explicitly provides:

*It 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.*³

When this legislation came to the floor of the House of Representatives for debate on August 4, 1995, the two of us, together with members on both sides of the aisle, explained that our purpose was to ensure that the FCC would *not* have regulatory authority over content on the internet. We and our colleagues, Democrats and Republicans alike, decried the unwelcome pro-regulatory alternative of giving the FCC responsibility for regulating content on the internet, which at the time was being advanced in separate legislation by Senator James Exon (D-NE).⁴

The Cox-Wyden bill under consideration was intended as a rebuke to that entire concept. As Rep. Wyden stated during the House floor debate:

¹ Petition at 17.

² *Enigma Software Group U.S.A v. Malwarebytes, Inc.*, 946 F.3d 1040 (2019).

³ 47 U.S.C. § 230(b).

⁴ For a more thorough description of the legislative history, and the tensions between the Exon legislation and our own, see Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Rich. J. L. & Tech. Blog (2020), <https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/> (last visited Sept. 16, 2020).

Now what the gentleman from California [Mr. Cox] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector.... In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges.⁵

Yet today, the NTIA would interpret this legislative history as “impliedly” authorizing the FCC to do just that: “define elusive terms.” This stands the intent of Congress on its head.

Speaker after speaker who rose in support of the Cox-Wyden measure not only extolled the bill before them, but also condemned the FCC regulatory approach then being urged by Senator Exon. Representative Zoe Lofgren (D-CA) was blunt: “Senator Exon’s approach is not the right way ... it will not work.” It was, she said, “a misunderstanding of the technology.”⁶

During the House floor debate, Rep. Wyden not only stated the legislation’s purpose of keeping FCC regulation out of this area, but also explained why this approach was superior to Senator Exon’s alternative of expanding FCC regulatory authority:

[T]he reason that this approach rather than the Senate approach is important is ... the speed at which these technologies are advancing [which will] give parents the tools they need, while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families.⁷

⁵ 104th Cong., 1st Sess., 141 Cong. Rec. Part 16, 22045-46 (August 4, 1995) (remarks of Rep. Wyden).

⁶ *Id.* at 22046 (remarks of Rep. Lofgren).

⁷ *Id.* at 22047 (remarks of Rep. Wyden).

Rep. Cox was just as clear about not following Senator Exon's invitation to extend the FCC's regulatory authority to embrace users' speech on the internet. As he put it succinctly during the House floor debate:

Some have suggested, Mr. Chairman, that we take the Federal Communications Commission and turn it into the 'Federal Computer Commission' — that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace. Frankly, there is just too much going on on the Internet for that to be effective....

[This bill] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet —that we do not wish to have a 'Federal Computer Commission' with an army of bureaucrats regulating the Internet....

The message today should be, from this Congress: we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us....⁸

If we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it

⁸ *Id.* at 22045 (remarks of Rep. Cox).

*is so important that we not have a 'Federal Computer Commission' do that.*⁹

During debate, both majority and minority concurred with this view, and not a single Representative spoke against the bill or in support of a regulatory role for the FCC. The final roll call on the Cox-Wyden legislation was 420 yeas, 4 nays.¹⁰

Far from the Petition's contention that not "a speck of legislative history" exists to show that Congress intended to keep the FCC out of this area, both the legislative history and the clear language of the law itself make it abundantly clear that this is precisely what Congress intended. And this is true of what it enacted as well. Congress not only did not give the Commission authority to regulate the internet in Section 230, but it expressly intended this law to prevent that result.

III. Reply to Commenters Asserting That Section 230 Is Outdated

Several commenters, including AT&T, assert that Section 230 was conceived as a way to protect an infant industry, and that it was written with the antiquated internet of the 1990s in mind – not the robust, ubiquitous internet we know today. As authors of the statute, we particularly wish to put this urban legend to rest.

Section 230, originally named the Internet Freedom and Family Empowerment Act, H.R. 1978, was designed to address the obviously *growing* problem of individual web portals being overwhelmed with user-created content. This is not a problem the internet will ever grow out of; as internet usage and content creation continue to grow, the problem grows ever bigger. Far from wishing to offer protection to an infant industry, our legislative aim was to recognize the sheer

⁹ *Id.* at 22047 (remarks of Rep. Cox).

¹⁰ *Id.* at 22054.

implausibility of requiring each website to monitor all of the user-created content that crossed its portal each day.

Critics of Section 230 point out the significant differences between the internet of 1996 and today. Those differences, however, are not unanticipated. When we wrote the law, we believed the internet of the future was going to be a very vibrant and extraordinary opportunity for people to become educated about innumerable subjects, from health care to technological innovation to their own fields of employment. So we began with these two propositions: let's make sure that every internet user has the opportunity to exercise their First Amendment rights; and let's deal with the slime and horrible material on the internet by giving both websites and their users the tools and the legal protection necessary to take it down.

The march of technology and the profusion of e-commerce business models over the last two decades represent precisely the kind of progress that Congress in 1996 hoped would follow from Section 230's protections for speech on the internet and for the websites that host it. The increase in user-created content in the years since then is both a desired result of the certainty the law provides, and further reason that the law is needed more than ever in today's environment.

While the internet of 1996 was but a shadow of its future self, the radical differences from the technologies of print, telegraph, radio, and television that preceded it were already plainly observable. Already millions of "publishers" were converging on individual sites. Already the technology permitted access to a global audience, and instantaneous communications among unlimited numbers of individuals. The rate of growth in internet usage in the years leading up to 1996 was even higher than in the decades that followed, so that one did not have to be a tech Nostradamus to see what it would ultimately become. A rich variety of nonprofit and e-commerce models were already in evidence. The news was filled with

commentary about the internet's promise. Given the rapid pace of innovation, those in Congress who devoted themselves to understanding the internet as it existed then had no difficulty anticipating the broad outlines of what the internet, through continued innovating, would eventually become. One need only watch the signing ceremony at which Section 230 became law, where President Clinton and Vice President Gore conversed with science students in their classroom via internet video linkup (in a session prefiguring today's ubiquitous Zoom calls), to see that this was so.¹¹

In the 1990s, when internet traffic was measured in the tens of millions, the implausibility of holding websites responsible for monitoring all of the user-created content they hosted was already apparent. Today, in the third decade of the 21st century, when billions of content creators are publishing their words, data, sounds, and images on some 200 million active websites, the reason for protecting websites from liability for other people's content is more abundantly clear than ever. The enormous growth in the volume of internet traffic and user-created content has made the potential consequences of website liability for that content far graver. Without Section 230, far fewer websites would accept the unlimited legal risk of hosting user-created content, and those willing to do so would be far more restrictive of speech.

Section 230 was not designed to assist a nascent industry, as the Petition and several commentators have wrongly asserted,¹² but rather to address a problem already recognizable in 1996 that has only grown in significance since then. A world without Section 230, in which

¹¹ Video of the signing ceremony can be viewed at <https://www.youtube.com/watch?v=z1Efl8xQ5Ok> (last visited Sept. 16, 2020).

¹² Petition at 14.

people could be sued for taking down hate speech or misinformation, would be a much more unpleasant place.

IV. Reply to Commenters Asserting That Section 230 Establishes Different Legal Standards for Online and Brick-and-Mortar Businesses, Which the FCC Should Rectify by Rule

Several commenters have asserted that Section 230 sets up a “double standard” by treating online businesses differently from “brick-and-mortar” businesses.¹³ This represents a fundamental misunderstanding of both the purpose of the law and how it operates in practice.

Section 230 serves to punish the guilty and protect the innocent. Individuals and firms are made fully responsible for their own conduct. Anyone who creates digital content and uploads it to a website is legally liable for what they have done. A website that hosts the content will likewise be liable, if it contributes to the creation or development of that content, in whole or in part. Otherwise, the website will be protected from liability for third-party content.

Section 230 was written to adapt intermediary liability rules long recognized in the analog world for the digital world, applying the wisdom accumulated over decades in legislatures and the courts to the realities of this new technological realm. As authors of the law, we understood what was evident in 1996 and is even more in evidence today: it would be unreasonable for the law to impose on websites a legal duty to monitor all user-created content.

When Section 230 was written, just as now, each of the commercial applications flourishing online had an analog in the offline world, where each had its own attendant legal responsibilities. Newspapers could be liable for defamation. Banks and brokers could be held

¹³ This canard occasionally crops up in legal journals as well. *See, e.g.,* Chris Reed, *Online and Offline Equivalence: Aspiration and Achievement*, Int'l J.L. & Info. Tech. 248 (Autumn 2010), 252 and n.22 (The result may well have been to favour online publishing over offline in some circumstances”).

responsible for failing to know their customers. Advertisers were responsible under the Federal Trade Commission Act and state consumer laws for ensuring their content was not deceptive and unfair. Merchandisers could be held liable for negligence and breach of warranty, and in some cases even subject to strict liability for defective products. In writing Section 230, we—and ultimately the entire Congress—decided that these legal rules should continue to apply on the internet just as in the offline world. Every business, whether operating through its online facility or through a brick-and-mortar facility, would continue to be responsible for all of its legal obligations.

What Section 230 added to the general body of law was the principle that individuals or an entity operating a website should not, in addition to their own legal responsibilities, be required to monitor all of the content created by third parties and thereby become derivatively liable for the illegal acts of others. Congress recognized that to require otherwise would jeopardize the quintessential function of the internet: permitting millions of people around the world to communicate simultaneously and instantaneously, a unique capability that has made the internet “the shining star of the Information Age.”¹⁴ Congress wished to “embrace” and “welcome” this, not only for its commercial potential but also for “the opportunity for education and political discourse that it offers for all of us.”¹⁵ The result is that websites are protected from liability for user-created content, but only to a point: if they are responsible, even in part, for the creation or development of that content, they lose that protection.

The fact that Section 230 established the legal framework for assessing liability in circumstances unique to the internet does not mean that either this framework or the preexisting

¹⁴ 104th Cong., 1st Sess., 141 Cong. Rec. Part 16, 22045 (August 4, 1995) (remarks of Rep. Wyden).

¹⁵ *Id.* (remarks of Rep. Cox).

legal rules do not apply equally to all online and offline businesses. Every business continues to bear the same legal responsibilities when operating in the offline world, and every business is bound by the same statutorily-defined responsibilities set out in Section 230 when operating in the e-commerce realm.

Moreover, unlike 1996 when we wrote the law, today most businesses, whether large or small, operate in both environments. Virtually every significant brick-and-mortar business of any kind, from newspapers to retailers to manufacturers to service providers, has an internet presence through which it conducts e-commerce. Dividing the world into online vs. brick-and-mortar, if it was ever reasonable, is today an entirely artificial dichotomy. Given that the law can and should take account of the now well-understood differences between the online and offline worlds, what is clear in 2020 is that the same legal rules and responsibilities today apply equally to all.

V. Reply to Commenters Asserting That the FCC Could Interpret Section 230 to Mandate Various Disclosure and Reporting Requirements

The Petition asks the FCC to interpret Section 230 as if it contained explicit requirements mandating terms of service, content moderation policies, due process notice and hearings in which content creators could dispute moderation decisions, and public disclosures concerning these and other matters. The Petition further asks that the FCC impose these specific requirements by rule. Multiple commenters, including AT&T, have endorsed this aspect of the NTIA proposal.

The Petition clearly states NTIA's understanding that Congress, with "strong bi-partisan support," intended Section 230 to be "a non-regulatory approach."¹⁶ In this they are correct. As outlined in Section II above, the legislative history clearly demonstrates that we and our

¹⁶ Petition at 22.

colleagues in Congress intended to keep the FCC and other regulators out of this area. This is reflected in the language of Section 230 itself. Both of us, as the authors of the legislation, made ourselves abundantly clear on this point when the law was being debated.

This fact—and NTIA’s admission of it—makes it all the more illogical for their Petition to ask the Commission to interpret Section 230 as statutory authorization for the FCC to regulate the very subjects that Section 230 itself covers, and which Congress wanted the Commission to stay out of. It surpasses illogic, and borders on the absurd, for the Petition to ask the FCC to use authority that Section 230 clearly does not grant it, in order to divine from the text of the statute explicit duties and burdens on websites that Section 230 itself clearly does not impose.

NTIA is quite specific about the burdens it wishes the FCC to place on websites. The specificity is worthy of new legislation, and indeed that is what would be required for the Commission to find any legal authority for such impositions. We surely did not write these requirements into our legislation. Wholesale amendment to the law that we wrote in plainly understandable language cannot be justified by calling it an “interpretation” of “ambiguous” provisions.

While it is nowhere provided for in Section 230, the Petition asks the FCC to require that each of the approximately 200 million websites active in the United States adopt terms of service that include content moderation practices defined “with particularity.” Furthermore, each website (again, we are told, this is *according to the statute*) must disclose “the criteria [it] employs in its content-moderation practices, including by any partially or fully automated processes.” From the supposedly “ambiguous” language of Section 230, the Petition is even able to discern that the

practices and processes that must thus be disclosed are those that “are in effect on the date such content is first posted.”¹⁷

All of this would require new federal legislation. None of it appears in Section 230, either in the text of the law that we can all read (and that the two of us wrote), or even in the invisible ink which NTIA must believe only it can read.

And yet there is more. The Petition would also “interpret” Section 230 as containing an explicit requirement that each website provide, to every user who complains of a content moderation decision, the following individualized guarantees:

- 1) A notice to the user “describing with particularity” its “reasonable factual basis for the restriction of access”;
- 2) A hearing process in order to provide the user with “a meaningful opportunity to respond”;
- 3) A commitment that all of this shall be provided in a “timely” fashion.

In combination, these new federal requirements would make content moderation far more onerous, risky, and expensive for the operators of the millions of websites that are subject to Section 230. It would be highly burdensome for websites to have to undertake a detailed after-the-fact review of many thousands of content moderation decisions (or many millions, depending on the scale of the particular website). It would be more burdensome still to have to provide a report on each review to the individual user in every case. Most expensive and burdensome of all would be the requirement that in every case every website provide an opportunity for hearing with respect to every content moderation decision.

¹⁷ Petition at 39. All of these very specific new regulatory burdens are teased out of just two words: “good faith.” Our response to this artifice, were it to come before a court, is also two words: “good luck.”

Apart from their illegitimacy as “interpretations” of Section 230, the requirements themselves would not be feasible for most websites. As a result, website operators would naturally seek to avoid or at least minimize the greater burden and expense they entail. They could do this by reducing the amount of content they moderate, through the adoption of less robust moderation policies; or even more simply, by reducing or eliminating user-created content on their site.

Section 230, on the other hand, is intended to protect and encourage content moderation, and to facilitate users’ ability to publish their content on the internet. These wholly imagined requirements supposedly hidden between the lines in Section 230 are directly at odds with the stated goals of the law. The Commission should reject this legerdemain out of hand.

VI. Reply to Commenters Asserting That the FCC Could Interpret Section 230 to Import Negligence Concepts into the Law

Several commenters, including Digital Frontiers Advocacy, have urged grafting onto Section 230 a requirement, derived from negligence law, upon which existing protections for content moderation would be conditioned. These requirements would add to Section 230 a “duty of care” or a “reasonableness” standard that cannot be found in the statute. As one example, the Petition (which is generically endorsed in its entirety by many individual commenters) would have the FCC require that content moderation decisions be “objectively reasonable,”¹⁸ as compared to the clear language of Section 230, which provides that the decision is to be that of “the provider or user.”¹⁹

¹⁸ Petition at 55.

¹⁹ 47 U.S.C. § 230(c)(2)(A).

As the authors of this law, and leading participants in the legislative process that led to its enactment in 1996, we can assure the Commission that the reason you do not see any such requirement on the face of the statute is that we did not intend to put one there.

The proposed introduction of subjective negligence concepts would effectively make every complaint concerning a website's content moderation into a question of fact. Since such factual disputes can only be resolved after evidentiary discovery (depositions of witnesses, written interrogatories, subpoenas of documents, and so forth), no longer could a website prove itself eligible for dismissal of a case at an early stage.

We intended to spare websites the death from a thousand paper cuts that would be the result if every user, merely by filing a complaint about a content moderation decision, could set in motion a multi-year lawsuit. We therefore wrote Section 230 with an objective standard: was the allegedly illegal material created or developed—in whole or in part—by the website itself? If the complaint adequately alleges this, then a lawsuit seeking to hold the website liable as a publisher of the material can proceed; otherwise it cannot.

Without Section 230's objective standard to determine whether lawsuits can proceed beyond the pleading stage, every website hosting user-created content would constantly be dragged into open-ended lawsuits over its decisions concerning that content. The fact that even relatively small websites frequently host content from hundreds of thousands of users means that they could quickly be overwhelmed. To protect themselves from such lawsuits and the unlimited liability they would face for others' allegedly illegal content, many would scale back or eliminate user-created content on their sites.

Currently, civil suits in the federal system that proceed beyond a motion to dismiss on the pleadings last an average of three years through trial; appeals can consume years more. For this

reason, over 90 percent of cases settle without a judge or jury actually applying the law to the facts in their case. The mere filing of a lawsuit in such circumstances can create significant settlement value for a plaintiff. The fact that a typical website could easily face hundreds or even thousands of such suits illustrates the severity of the threat to the functioning of the internet itself.

This is the reason we wrote Section 230 as we did. What the Petition and the commenters endorsing it are proposing when they ask the FCC to import negligence concepts into the law would subvert the statutory text and the intent of Congress. Ensuring that courts can continue to apply Section 230 at the motion to dismiss stage is essential to achieving the law's purposes.

VII. Reply to Commenters Asserting That Section 230 Authorizes the FCC to Create a Regulatory Regime Enforcing Viewpoint Neutrality

The Claremont Institute and scores of individual commenters have complained that particular websites are not politically neutral, and they demand that Section 230's protection from liability for content created by others be conditioned on proof that a website is in fact politically neutral in the content that it hosts, and in its moderation decisions.

There are three points that must be made in reply. The first is that Section 230 does not require political neutrality. Claiming to "interpret" Section 230 to require political neutrality, or to condition its Good Samaritan protections on political neutrality, would erase the law we wrote and substitute a completely different one, with opposite effect. The second is that any governmental attempt to enforce political neutrality on websites would be hopelessly subjective, complicated, burdensome, and unworkable. The third is that any such legislation or regulation intended to override a website's moderation decisions would amount to compelling speech, in violation of the First Amendment (regarding which, see section VIII below).

Section 230 itself states the congressional purpose of ensuring that the internet remains “a global forum for a true diversity of political discourse.” In our view as the law’s authors, this requires that government allow a thousand flowers to bloom—not that a single website has to represent every conceivable point of view. The reason that Section 230 does not require political neutrality, and was never intended to do so, is that it would enforce homogeneity: every website would have the same “neutral” point of view. This is the opposite of true diversity.

To use an obvious example, neither the Democratic National Committee nor the Republican National Committee websites would pass a political neutrality test. Government-compelled speech is not the way to ensure diverse viewpoints. Permitting websites to choose their own viewpoints is.

Section 230 is agnostic about what point of view, if any, a website chooses to adopt; but Section 230 is not the source of legal protection for platforms that wish to express a point of view. Online platforms, no less than offline publishers, have a First Amendment right to express their opinion. When a website expresses its own opinion, it is, with respect to that expression, a content creator and, under Section 230, not protected against liability for that content.

The Commission should reject any proposal that entails a government mandate of political neutrality. In Section 230, we deliberately shunned this approach, because placing the judgment of what is and is not “neutral” in the hands of political appointees in Washington is fraught with peril. It would reverse congressional intent for an “interpretive” FCC regulation to presume otherwise.

VIII. Reply to Commenters Asserting That Section 230 Authorizes Censorship in Violation of the First Amendment

Many individual commenters complained that their political viewpoints have been “censored” by websites ostensibly implementing their community guidelines, but actually suppressing speech. Several of these commenters have urged the FCC to require that all speech protected by the First Amendment be allowed on any site of sufficient size that it might be deemed an equivalent to the “public square.” In the context of this proceeding, that would mean Section 230 would somehow have to be “interpreted” to require this.

Comments within this genre share a fundamental misunderstanding of Section 230. The matter is readily clarified by reference to the plain language of the statute. The law provides that a website can moderate content “whether or not such material is constitutionally protected.”²⁰ Congress would have to repeal this language, and replace it with an explicit speech mandate, in order for the FCC to do what the commenters are urging.

Government-compelled speech, however, would be a source of further problems. Because the First Amendment not only protects expression but non-expression, any attempt to devise an FCC regulation that forces a website to publish content it otherwise would moderate would almost certainly be unconstitutional. The government may not force websites to publish material that they do not approve. As Chief Justice Roberts unequivocally put it in *Rumsfeld v. Forum for Academic and Institutional Rights* (2006), “freedom of speech prohibits the government from telling people what they must say.”²¹

Section 230 represents a deliberate congressional choice to avoid placing the government in this role. It is plainly unconstitutional under the First Amendment for the government to

²⁰ 47 U.S.C. § 230(c)(2)(A).

²¹ 547 U.S. 47, 61 (2006).

dictate which speech is acceptable online. By the same token, the government cannot force private actors to host user speech. However, even if the First Amendment issues were set aside, mandating that any and all First Amendment-protected speech be off limits for content moderators would sound the death knell for meaningful content moderation. There are many types of content that an online community might understandably choose to keep off of their site, but which are nonetheless protected from government limitation by the First Amendment. These include threats of violence, pornography, advocacy of terrorism, advocacy of illegal conduct, and a host of other noxious expressions. By explicitly providing in Section 230(c)(2)(A) that liability protection attaches to moderation of content that “*the provider or user*” considers to be objectionable, we ensured that content moderation would be a private, not a government, activity.

The answer to the commenters’ complaints of “censorship” must be twofold. First, many of the comments conflate their frustrations about Section 230 with the First Amendment. As noted, it is the First Amendment, not Section 230, that gives websites the right to choose which viewpoints, if any, to advance. Furthermore, First Amendment speech protections dictate that the government, with a few notable exceptions, may not dictate what speech is acceptable. The First Amendment places no such restrictions on private individuals or companies. Second, the purpose and effect of Section 230 is to make the internet safe for innovation and individual free speech. Without Section 230, complaints about “censorship” by the likes of Google, Facebook, and Twitter would not disappear. Instead, we would be facing a thousandfold more complaints that neither the largest online platforms nor the smallest websites are any longer willing to host material from individual content creators.

Eroding the law through regulatory revision would seriously jeopardize free speech for everyone. It would be particularly injurious to marginalized viewpoints that aren't within "the mainstream." It would present near-insuperable barriers for new entrants attempting to compete with entrenched tech giants in the social media space. Not least of all, it would set a terrible example for the rest of the world if the United States, which created the internet and so much of the vast cyber ecosystem that has enabled it to flourish globally as an informational, cultural, scientific, educational, and economic resource, were to undermine the ability that hundreds of millions of individuals have each day to contribute their content to that result.

In the absence of Section 230, the First Amendment rights of Americans, and the internet as we know it, would shrivel. Far from authorizing censorship, the law provides the legal certainty and protection from open-ended liability that permits websites large and small to host the free expression of individuals, making it available to a worldwide audience. Section 230 is a bulwark of free speech and civil discourse that is more important now than ever, especially in the current political climate that is increasingly hostile to both.

IX. Conclusion

The many comments the Commission has received on the NTIA Petition asking the FCC to open a rulemaking to "clarify" Section 230 fall generally into two camps, either opposing or supporting the proposal. In this reply to several of those comments, we have focused on those endorsing the Petition, and in particular on their various incorrect factual assertions about Section 230, its origins, its meaning, and the intent of Congress in enacting it.

That so many of the comments in support of the Petition have relied upon mistaken assumptions about Section 230—and indeed, in many cases flatly inaccurate representations of what the statute plainly says—may explain the divergence of their conclusions from our own.

From our perspective as the law’s authors, we view the NTIA’s proposals for regulatory “clarification” as a call for radical amendment of the law that only Congress can undertake. Moreover, we view the proposed amendments to Section 230 as destructive of its aims, and likely to bring about seriously negative, unintended consequences. Instead of protecting speech on the internet, the collective effect of NTIA’s proposals would be to seriously constrict it.

On one point we can speak *ex cathedra*, as it were: our intent in writing this law was to keep the FCC *out* of the business of regulating websites, content moderation policies, and the content of speech on the internet. The Petition asks the Commission to reverse more than two decades of its own policy by becoming, at this late stage in the life of Section 230, its regulatory interpreter. In so doing, the FCC would assume responsibility for regulating websites, content moderation policies, and the content of speech on the internet—precisely the result we intended Section 230 to prevent. To reach this perverse result, the FCC would “clarify” the words of Section 230 in ways that do violence to the plain meaning of the statutory text.

We therefore urge the Commission to decline the Petition’s invitation to commence a rulemaking on this subject.

Respectfully submitted,

Chris Cox
U.S. Representative (1988-2005)

Ron Wyden
U.S. Senator
U.S. Representative (1981-1996)

Certificate of Service

We hereby certify that on September 17, 2020, we caused a true copy of the Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934, as filed in Federal Communications Commission Docket No. RM-11862, to be delivered via U.S. mail upon the following:

National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

/s/ Chris Cox

Chris Cox

U.S. Representative (1988-2005)

/s/ Ron Wyden

Ron Wyden

U.S. Senator

U.S. Representative (1981-1996)