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

In the Matter of	)	
	)	
National Telecommunications and Information Administration	)	**RM-11862**
Petition for Rulemaking to Clarify Provisions of	)	
Section 230 of the Communications Act of 1934	)	

Reply Comments of NetChoice
SECTION 230 OF THE COMMUNICATIONS ACT OF 1934

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Statement of Interest

NetChoice[1] is dedicated to the promotion of consumer choice, competition, and free enterprise on the internet. Our membership includes a wide variety of e-commerce models and businesses of all sizes. We submit these comments with these priorities in mind, and on the basis of our two decades of experience advocating for freedom of expression and enterprise online. As is our custom, we add that the views expressed here are those of NetChoice and do not necessarily represent the views of all NetChoice members.

Executive Summary

Earlier this month, we submitted comments to the Federal Communications Commission that argued the Commission has no authority to interpret or issue regulations under Section 230 of the Communications Decency Act. As we explained, "Congress was emphatic that it was not creating new regulatory

[1] As a trade association committed to protecting free expression and free enterprise online, NetChoice has a long history of defending Section 230 so that our members can continue to innovate and deliver exceptional products and services to American consumers. With the help of our board member and Section 230's co-author, Christopher Cox, we regularly testify before state and federal lawmakers on the law's importance and file amicus briefs in lawsuits involving Section 230. For a sampling of our extensive work on this issue, visit netchoice.org/cda230. Our amicus briefs can be found at netchoice.org/230amicusbriefs, and our testimony can be found at netchoice.org/230testimony.

authority for the FCC when it enacted Section 230. This is as clear from the face of the statute as it is from the legislative history."[2]

We stand by the clear-cut conclusion that Congress meant what it said: "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] But in the event that does not end the matter, we submit these comments to encourage the Commission to stick with its commitment to free-market principles so that competition, innovation, and consumer choice continue to flourish on the internet.

I. Section 230 Boosts Investment, Innovation, Competition, and Consumer Choice in Digital Markets.

Section 230 boosts investment, innovation, and competition in digital markets, directly benefiting consumers. It does this by creating clear rules of the road for all internet services that rely upon user-created content. These rules are specific without being stifling. Within the framework that Section 230 has created, digital platforms, services, and websites are free to choose their own approach to content moderation in order to best serve their missions and users.

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[2] Comments of NetChoice, RM-11862 (filed Sept. 2, 2020), https://ecfsapi.fcc.gov/file/10902240429171/NetChoice%20FCC%20Comment%20-%20Docket%20No.%20RM-11862.pdf.

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

The legal certainty provided by Section 230 has given consumers unprecedented new services and a wide range of choices on every front. Today, Americans have access to over 200 million websites that range from Wikipedia and Westlaw to Etsy and Expedia, and to millions of apps and other digital services that let them do everything from curate content to protest for change to game with friends. Far from being a "subsidy," these rules have helped ensure that digital platforms and services of all sizes will be treated fairly and will not be punished for the illegal acts of others.

Without Section 230, as a broad range of academics and civil society organizations have noted, every platform, service, and website, including in particular "smaller services and start-ups," would face "potentially crushing liability."[4] Freed of the risk of crushing liability for the wrongful acts of others, the internet has continued to grow and innovate. And consumers have enormously benefitted from it.

The NTIA's petition for rulemaking (the "Petition"), if granted, would put that growth and innovation at risk. According to the NTIA, Section 230 is "ambiguous"—so much so that the FCC needs to step in. But that ambiguity is manufactured by the NTIA and, if acted upon, would create actual uncertainty in

[4] Coalition of 75 Academics, Scholars, and Civil Society Organizations, *Liability for User-Generated Content Online: Principles for Lawmakers* (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical (last visited Sept. 16, 2020).

the law. Should that happen, investment in startups and in established businesses will fall, innovation will slow, and consumers will suffer from both.

1. NTIA's petition is contradictory and irrational.

In place of the statutory text of Section 230 and more than two decades of jurisprudence applying the law, which together have provided certainty and predictability to the marketplace, the Petition would inject uncertainty and confusion.

At its core, the NTIA's argument is that courts in every circuit, as well as their state counterparts, have all gotten it wrong. Congress, we're told, really intended the law's liability protections to apply only when internet services act as nothing more than mere conduits for third-party content. Even then, Section 230 would not protect a digital service unless it allowed users to view user-created content in the exact order of their choosing, or by default settings publicly conveyed that users can change.

This flatly contradicts the statutory text. It also frustrates Congress's intention to eliminate the well-known "Moderator's Dilemma."[5]

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[5] *See, e.g.*, Chris Cox, *Policing the Internet: A Bad Idea in 1996—and Today*, REALCLEARPOLITICS (June 25, 2020), https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996_--_and_today.html ("If allowed to stand, this jurisprudence [creating the "Moderator's Dilemma"] would have created a powerful and perverse incentive for platforms to abandon any attempt to maintain civility on their sites. And a legal standard that protected only websites where 'anything goes' from unlimited liability for user-generated content would have been a body blow to the Internet itself."); Matthew Feeney, *Conservative Big Tech Campaign Based on Myths and Misunderstanding*, CATO (May 28, 2020), https://www.cato.org/publications/commentary/conservative-big-tech-campaign-based-myths-misunderstanding ("Congress passed Section 230 of the Communications Decency Act in 1996. Written by Reps. Chris Cox (R-CA) and Ron Wyden (D-OR), the law aimed to solve the 'Moderator's Dilemma' that had emerged in the early 1990s thanks to a few court cases dealing with alleged defamatory content posted by third party users of online services.").

NTIA would have the FCC similarly interfere with Section 230's "Good Samaritan" protection. Under subsection (c)(2), internet services acting in good faith can remove content that *they* consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." But according to the NTIA proposal, a digital service is acting in good faith only if its content moderation is based on an "objectively reasoned belief." This would repeal the statutory scheme in which each service can take its own approach to content moderation, and replace it with a one-size-fits-all, government-dictated standard.

The violence to the statutory language does not stop there. In addition, the Petition contends that the words "good faith" must be interpreted not according to their ordinary meaning, but rather as code words for a very specific list of disclosure and procedural requirements. This would stretch Section 230 beyond all recognition. Under the pretense of interpreting the words "good faith," NTIA would have the FCC require that every service deal with every user complaint of a moderation decision by providing individualized notice, a full explanation tailored to that case, and a hearing at which the complaining individual can try to overturn the decision.[6]

Meeting the test of "objective reasonableness" and complying with these new regulatory requirements would be essential preconditions for Section 230 protection from liability for user-created content. Failing one or both of these new

[6] Petition at 39-40.

requirements would leave content moderation decisions unprotected, with the result that an internet service *must* host all user-created content, or it *must* avoid hosting user-created content altogether, in order to avoid publisher liability.

In addition to being wholly unsupported by the statutory text and legislative history, these would-be regulatory amendments to Section 230 would serve only to create new ambiguities where, at present, none exists.

2. NTIA's petition would, if granted, reduce competition and stifle innovation.

Although adopting NTIA's interpretations would be a boon to lawyers, it would hurt entrepreneurs and innovators and the consumers they serve. As of now, Section 230 operates with clarity and simplicity. In litigation concerning user-generated content, a court can usually determine whether the case falls within Section 230's ambit based on the pleadings. This clarity makes it possible for courts to grant motions to dismiss in cases where Section 230 applies, thereby ensuring that the protection from liability for others' illegal acts the law was meant to provide isn't gutted by an accretion of lawsuits and legal bills that could crush many websites.

Conversely, under NTIA's proposal, virtually every lawsuit involving Section 230 would be transformed into a fact-intensive inquiry, requiring that cases would have to proceed at least through discovery. Every complaint would likely allege that the content moderation decision being challenged was not based on an "objectively reasoned belief," and at the motion to dismiss stage, such allegations must be taken as true. Having survived a motion to dismiss, a lawsuit with a new lease on life

gains significant settlement value. Along with the added exposure to liability that new FCC rules with unpredictable application would bake in, this would incentivize large settlement payouts by websites in almost every case, diverting money from innovation to litigation and threatening their viability.

The internet sector of our economy, unlike many industries, has few barriers to entry. This is in large part thanks to Section 230, which imposes liability on the wrongdoer. If digital platforms, services, and websites were forced to assume liability for the wrongs of others, at least one of two things would happen: Either the regulations would be too unclear about when liability attaches, or their clarity and extensive burdens would ward off newcomers.

In either case, startups would flounder, not flourish. This is because the venture capitalists to whom fledgling competitors must turn for funding currently look upon these fledgling enterprises favorably, knowing that they will be operating in a market governed by clear and limited liability rules.[7] Should those rules change and be replaced with rules exposing web businesses relying on user-created content to unlimited liability, investment in new entrants will dry up. That will serve only to entrench the very largest businesses that might be willing to self-insure against such exposure.

[7] Research indicates that Section 230's liability protections "likely resulted in somewhere between two to three times greater total investment in internet platforms in the US as compared to the more limited protections in the EU." Michael Masnick, *Don't Shoot the Message Board: How Intermediary Liability Harms Online Investment and Innovation*, COPIA INST. & NETCHOICE 1 (June 2019), http://netchoice.org/wp-content/uploads/Dont-Shoot-the-Message-Board-Clean-Copia.pdf. Indeed, U.S. businesses were five times as likely to raise "significant" funds (over $10 million in venture capital) and nearly ten times as likely to raise "massive" funds ($100 million or more) as compared to E.U. businesses. *Id.*

Ironically, were they successful, Section 230's critics would create the world they currently imagine exists: their revisions to the law would be a competition-destroying subsidy for large businesses.

The harm would not be limited to social media. The entire internet ecosystem relies on Section 230's rules. Without Section 230 as it currently stands, that ecosystem would become so bogged down by uncertainty and high barriers to entry that it would suffer the same fate as other highly regulated industries: stagnating growth, poor consumer service, high prices, and almost no innovation.

Today, tech companies are always looking over their shoulders, knowing full well that an innovative competitor can disrupt their business at any time. This keeps successful businesses like Microsoft innovating. But the regulations NTIA is proposing would stifle competition and slow innovation. Indeed, it would squash new startups too—indeed, it'd be only a matter of time before litigation either drove them out of the market, or into the hands of a larger competitor with the resources of a fully stocked legal department necessary to comply with the FCC's regulations and the open-ended liability they would entail.

As the FCC declared in its Restoring Internet Freedom Order, consumers are best served by lifting burdensome regulations that stifle innovation and dampen

investment.[8] This guiding principle, and not NTIA's dangerous departure from it, should direct the Commission's consideration of the Petition's proposal.

II. Section 230 Empowers Free Speech and Consumer Choice.

1. Section 230 protects and promotes consumer speech, benefitting all consumers.

Section 230's critics mischaracterize the law as protecting only commercial speech. There is no such limitation in the law, and indeed Section 230 protects far more *consumer* speech, which comprises the vast majority of user-created content. Section 230's protection for individual expression in turn benefits other consumers by arming them with more information. Under Section 230, as currently interpreted and applied, consumers are free to post reviews about local restaurants, products, businesses, services, and just about everything else online. They are able to do so because services like Yelp, Expedia, Airbnb, Turo, and eBay aren't penalized by exposure to unlimited liability for user-created content. They need not fear being inundated by crippling lawsuits for removing fake comments or crude screeds.

But should the FCC move forward with NTIA's proposed regulations, consumer speech will suffer. The reason is obvious: When platforms are exposed to increased liability for user content, they will understandably take a more cautious approach in an attempt to reduce that exposure.

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[8] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (rel. Jan. 4, 2018) ("*Restoring Internet Freedom Order*"), at ¶ 2 ("We eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs.").

Even if the FCC were to promulgate regulations limiting a platform's freedom to moderate in hopes that this would increase opportunities for individual expression, the results would not be what was intended. Consumers would still be harmed. The problem is one of incentives. As of now, businesses can remove fraudulent reviews and punish their creators without fear of being second-guessed. This content moderation increases the utility of customer reviews for all consumers by reducing the incentive for sellers to disguise their own favorable reviews of their products, or critical reviews of their competitors' products.

Likewise, Section 230 protects these services when they step in to protect their sites from being weaponized by antagonists who "downvote" or criticize products or services associated with their foes, even though they have never bought or used the products or services in question. Under NTIA's logic, these posts could not be moderated without liability, because they do not fall under its cramped view of Section 230(c)(2).

NTIA's proposal would thus likely increase online speech opportunities for spammers, self-serving sellers, and political enemies. But that increase would come with a corresponding decrease in the speech of genuine reviewers, who will see little use in posting on sites overrun with useless and menacing content. That, in turn, will hurt consumers looking for helpful consumer reviews.

2. Section 230 relies on market dynamics to influence moderation policies.

Americans disagree about almost everything, including moderation policies. As NTIA's petition makes clear, many Republicans would prefer a less-moderated

internet experience. At the same time, many Democrats in Congress are calling for changes to Section 230 that would require more moderation. Regrettably, both sides want to enlist online services as foot soldiers in their political battle. Even more regrettably, some want to go further and enlist federal agencies including the FCC. Should either side win, the casualties will include every American consumer.

The diametrically opposing views of left and right on these questions are inherently irreconcilable and therefore cannot be addressed with a single, federally administered solution. (Ironically, left and right converge on the supposed remedy of FCC regulatory revision to Section 230; they simply disagree on which direction the FCC should take the law.) Satisfying both camps can only be accomplished by policies that encourage a proliferation of platforms featuring user-created content, each tailoring its content moderation policies to market demands. In this way, consumers—users, advertisers, publishers, and all who participate in the internet ecosystem—guide the development of moderation policy.

This is the approach directed by Section 230. Because Americans have such varying preferences and views on moderation, subjecting one and all to the ukase of government—Congress, the FCC, or the White House—would only add fuel to the fire.

This market approach to moderation cannot promise perfect results from each individual website. But it comes closest to reaching optimal results overall. Consider that today, the vast majority of user-generated speech is posted without

problem. In practical terms, this means millions of Americans post and view content every day without ever running afoul of a platform's policy, in the process making billions of contributions every year to the user-generated content that is available to all on the internet. It also serves as a reminder that most moderation decisions are made at the margins.

To be sure, those margins matter. Earlier this year, for example, prominent conservatives decided that they had had it with Twitter's moderation policy. In their mind, Twitter got it all wrong on moderation. And because they thought the same of Twitter's competitors, including Facebook, they created a market demand for a new platform, one that took a more hands-off approach to moderation. Sensing that demand, Parler launched and quickly amassed a large and rapidly growing following among conservatives.

But if moderation decisions were instead responsive to the direction of government regulators, the market would be distorted in ways that would leave most worse off. Consider the effect of a "neutrality" rule: it would immediately kill the market for "shared-values platforms" like Parler. This might be counted as a win for conservatives in the moment, but that win would be short lived. Once progressives again have their turn at the controls of the executive branch, they could use the very same machinery of government that conservatives previously demanded. But progressives would likely not use this federal regulatory power for conservative ends — rather, they would seek to achieve their very different goals for content moderation.

Or consider a rule that sought to distinguish "good" content from "bad" (for example, by attempting to particularize the definition of "otherwise objectionable"). Aside from struggling to identify which is which, such a rule would stifle market forces that currently exert pressure to correct moderation deficiencies. When some years ago Facebook's moderation policy banning certain types of bloody photos was applied to photos of fetuses, pro-life groups complained. In response to arguments that this interpretation of their moderation policy stifled advocacy for the pro-life cause, and after hearing from pro-choice groups as well, Facebook amended its policy to better balance its goals. As revised, the moderation policy was more clearly aimed at removing gruesome photos that would offend most Americans. The result was that both pro-life groups and pro-choice advocates could freely argue for their cause on Facebook.

But what if instead of responding to marketplace forces, Facebook had to respond to threats of litigation and open-ended liability for all of the user-created content on its site? Its decision undoubtedly would have been quite different. Indeed, long before any such dispute could have arisen, it may have decided that it would significantly curtail the use of third-party content. Alternatively, it may have chosen to revert to an "anything goes" model, which would free Facebook from liability but instead turn Facebook into a vulgar sewer.

As the Kairos Coalition pointed out in its comment letter, "hundreds of thousands of concerned citizens … work to change the way the Big Tech companies like Facebook and Twitter approach content moderation—and specifically how tech

companies work to curb hate speech and stop disinformation. Section 230 opens the door for us to demand platforms enforce their own rules."[9]

III. Conclusion

Section 230 confers no authority upon the FCC to adopt interpretive regulations under it. Concluding otherwise, in order to adopt NTIA's recommendations would subvert the FCC's commitment to innovation, investment, and consumer choice. Were the Commission to conclude the FCC has the authority to regulate here, it would be difficult to reconcile that view with the Restoring Internet Freedom Order. For all of these reasons we urge the Commissioners to decline NTIA's invitation to exercise authority the FCC does not have, only to produce unintended outcomes its long-standing policies do not support.

Respectfully submitted,

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[9] Kairos Coalition Comment (Sept. 16, 2020), https://ecfsapi.fcc.gov/file/109162305915850/Kairos_CoalitionComment_Section230.pdf.

Certificate of Service

I hereby certify that on September 17, 2020, I sent a true copy of the Reply Comments of NetChoice, filed in Federal Communications Commission Docket No. RM-11862, via U.S. mail upon the following:

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Respectfully submitted,

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