

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION AND SUMMARY	1
II. THE REGULATION OF ONLINE CONTENT WILL HARM ONLINE COMPETITION, INNOVATION, AND INVESTMENT.	2
III. NTIA'S PETITION INAPPROPRIATELY ASKS THE FCC TO LEGISLATE ON SECTION 230.	7
IV. THE FCC HAS A TRADITION OF NOT REGULATING ONLINE CONTENT.	10
V. CONCLUSION	11

which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

As discussed below, INCOMPAS and its members believe in the importance of online competition, innovation, and investment. The U.S. currently has a diverse internet ecosystem that allows companies to compete based on the content they offer. As a result, consumers have seen a diverse array of content and services online as well as new competitive services that compete against one another and traditional content providers, which is driving better services for consumers across every economic sector. These services are also allowing for more informed consumers who often rely on the third-party content that is protected by Section 230 of the Communications Decency Act (“Section 230”).² However, if the FCC moves forward with the NTIA’s Petition and limits the protections that have led to the proliferation of online content and competition, it would be much harder for companies, especially new entrants and small companies, to meet the requirements of the proposed NTIA regulations, and could harm the availability of new, competitive online services for consumers. To the extent that Section 230 should be revisited to further refine the liability protections under Section 230, Congress should, and is, taking the lead in considering any modifications to Section 230. In addition, granting NTIA’s Petition would place the FCC in an illogical position of regulating the content of online services, but not the BIAS services that deliver these edge services. Accordingly, INCOMPAS opposes NTIA’s Petition.

II. THE REGULATION OF ONLINE CONTENT WILL HARM ONLINE COMPETITION, INNOVATION, AND INVESTMENT.

Today, American consumers are served by online platforms and services in numerous ways. For example, consumers read and comment on the news on their favorite publications’

² 47 U.S.C. § 230.

websites; they post stories, pictures, and videos on their preferred social media platforms; they comment on, retweet, and like others' posts; they watch videos and post comments and ratings on professional and amateur videos on hundreds of websites; and they blog, review restaurants, choose car services, hotels, homes, make major purchasing decisions and minor purchasing decisions—all online. Section 230 has led to this ecosystem that we know and use every day. Without Section 230, these services would either not exist or would be very different. The success of online content, services, and how they now permeate through every American industry likewise can be tied directly to Section 230. We have seen more innovation and investment in online services in the U.S. and new opportunities to serve consumers as a result.

Section 230's purpose was to enable online platforms to develop to both allow free expression and create a safe and productive internet ecosystem rather than be stifled by huge liability risks. The idea was to allow the competitive free market to determine how online services are developed and consumed, including by providing the opportunity for various services to flourish based on consumer choice. In fact, this Commission's *Restoring Internet Freedom Order* states: "Congress codified its view in section 230(b)(2) of the Act, stating that 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

Indeed, Congress offered these liability protections to encourage providers to moderate content in order to ensure that the Internet offered socially acceptable or "family friendly" content, as well as to enable an environment where new services could be developed that rely on

³ *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 ¶ 58.

third party content, that allow individuals to engage in free speech and expression, and for the free market to flourish. However, NTIA, at the behest of the current Administration, is now asking the FCC to intervene and interpret Section 230 to promulgate rules on how Section 230's liability protections apply to all online content providers. These new rules would apply to every online service in the U.S.

While Section 230 has always been about online companies, it has also been about consumer empowerment, consumer choice, and free expression online. The U.S. currently has a rich, diverse internet ecosystem that allows companies and individuals to offer content based on their own customers desires and needs. Section 230 has provided the opportunity to engage and have third-parties submit their own content and have their voices heard via liability protection. Section 230 has provided so many opportunities for new businesses that have brought more competition in industries across the economy, and has allowed for improved services and better informed consumers. With the protections of Section 230, an online provider can offer content that their consumers want to see and remove content that their customers do not want to see, such as videos that are violent or explicit. As the Commission explained in the *Restoring Internet Freedom Order*, “[n]otably, under section 230(b) of the Communications Act, increased user control is an express objective of modern telecommunications policy.”⁴ And we have seen the Internet grow and flourish, and consumers benefitting as a result.

The various platforms and online websites currently compete for consumers based on the content they offer, and NTIA's Petition highlights the diversity and competition among them.

⁴ *Restoring Internet Freedom Order*, at n.336 (citing 47 U.S.C. § 230(b)(3) (directing policymakers “to encourage the development of technologies which maximize user control over what information is received by individuals . . . who use the Internet and other interactive computer services”).

NTIA characterizes the various content moderation policies as “highly inconsistent, baffling, and even ideologically driven content moderating decisions that the large interactive computer services have made.”⁵ It then points to various decisions by these platforms, such as Facebook’s decision “to exclude legal content pertaining to firearms,” Twitter’s decision to hide President Trump’s tweet for “glorying violence,” and Google’s decision to delete a paper on COVID-19 because it was “in violation of the site[’s] terms of service.”⁶ While NTIA may view these decisions negatively, the purpose of Section 230 is allow these companies to decide the types of content its consumers will benefit from on their platforms and websites and to moderate accordingly.⁷ Indeed, narrowing Section 230 liability can be harmful in unforeseeable ways. For example, one member company explained that, if granted, NTIA’s Petition could affect its company’s ability to provide content from self-published authors because the company’s assistance with editing could be considered a substantial contribution and make it liable for what an author wrote in their book. This same company also makes content moderation decisions around customer reviews, which is relevant to the products for sale. If the company decides to leave funny or quirky reviews for a fun customer experience, it could be considered a

⁵ *NTIA Petition*, at 43.

⁶ *NTIA Petition*, at 43-44.

⁷ NTIA’s Petition states: “[t]he problem of overly expansive interpretations for section 230 is not merely hypothetical. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms ‘flagging’ content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse. As FCC Commissioner Brendan Carr has observed, social media such as Twitter ‘punis[h] speakers based on whether it approves or disapproves of their politics.’” *NTIA Petition*, at 77. INCOMPAS would like to bring to the FCC’s attention that there is not a single source cited to substantiate this claim, except for Commissioner Carr’s observation.

contribution to the speech and make the company liable for what customers say about products sold on its website.

Section 230 has resulted in an important era of free expression on the Internet not only by protecting platforms from liability for user actions, but also by allowing them to build and maintain vibrant and safe platforms for their users. NTIA's Petition would micromanage the way online platforms operate and invite trial lawyers to second guess every decision to organize, rank, recommend, or remove content. Free speech also means the freedom for private companies to decide what content they want to carry. In its Petition, NTIA quotes Commissioner Carr who said: "there's no question that [large social media platforms] are engaging in editorial conduct, that these are not neutral platforms."⁸ Yet this misses the point. Private online companies do not have to be neutral and can choose how to moderate their own content according to their own Terms of Service. Courts have repeatedly upheld that the First Amendment applies to state actors, not private entities.

Moreover, the President may have signed an Executive Order in response to the actions of a particular, well-known technology company,⁹ but that does not mean this proceeding will only affect established service providers. As an echo of the President's Executive Order, NTIA's Petition unsurprisingly focuses on well-known online platforms as well. As the Petition states: "modern firms have much greater economic power, play a bigger, if not dominant, role in American political and social discourse" and "[o]nline platforms like Twitter, Facebook, and YouTube have content moderation at the heart of their business models."¹⁰ But the consequences

⁸ *NTIA Petition*, at 8.

⁹ *Executive Order on Preventing Online Censorship* (issued on May 28, 2020).

¹⁰ *NTIA Petition*, at 9, 13.

of granting NTIA's Petition will be felt far beyond these platforms, and arguably even more by smaller and emerging online companies. If the FCC moves forward with NTIA's Petition and adopts regulations, it would be much harder for new entrants to meet the regulatory requirements, which could harm availability of new online services for consumers as well as new competitive entry and investment. Startups and smaller businesses that fear endless lawsuits and financial liability for the content on their websites and significant uncertainty of FCC oversight in complying with its content moderation rules may be prevented from entering and competing in their respectable markets. This will undoubtedly affect the broader internet's ability to continue to grow as consumers would see fewer new entrants and online services. If companies both large and small fear endless liability, investors will fear so as well. In fact, this fear of a lack of investment was a motivating factor for then-Representatives Cox and Wyden to propose the text that evolved into Section 230 as they were worried that no one would invest in these emerging companies without legal protections.¹¹ Overall, granting NTIA's Petition would harm online competition, free expression, innovation, and investment.

III. NTIA'S PETITION INAPPROPRIATELY ASKS THE FCC TO LEGISLATE ON SECTION 230.

NTIA's Petition asks the FCC to legislate on Section 230. However, legislating is the job of Congress, not that of the Commission. In its Petition, NTIA states: "if Congress wished to exclude the Commission from the interpretation of section 230, one would expect it to have done so explicitly."¹² However, one can just as easily argue the exact opposite—if Congress wished to

¹¹ See Jeff Kosseff, *The Twenty-Six Words That Created The Internet*, at 60 ("Why would anybody invest in the a technology company if they thought they would be held personally liable?" . . . [Wyden and Cox] realized that overregulation could imperil the development of new online services.").

¹² *NTIA Petition*, at 17.

include the Commission in interpreting Section 230, it could have done so explicitly, and yet it did not. In fact, the legislative history demonstrates that Congress intended to exclude the Commission from interpreting Section 230, and the FCC has agreed that was Congress' intent. As explained just a few years ago by this FCC in the *Restoring Internet Freedom Order*, “[t]he congressional record reflects that the drafters of section 230 did ‘not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.’”¹³

Moreover, NTIA's Petition asks the FCC to go far beyond a traditional rulemaking role. Rather than asking the Commission to implement a statute via rules (which is highly questionable given the legislative intent as discussed above), NTIA is requesting that the Commission provide new interpretations of a statute, rendering its request as an appeal for new legislation. Specifically, NTIA requests that the Commission propose rules so that:

“(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(a) may also not be able to claim protection under subparagraph (c)(1) . . . (ii) the conditions under which an action restricting access to or availability of material is not “taken in good faith” within the meaning of subparagraph (c)(2)(A) of section 230 . . . and (iii) any another proposed regulation that NTIA concludes may be appropriate to advance the policy described in subsection (a) of E.O. 13925.”¹⁴

NTIA's Petition also “urges the FCC to promulgate rules addressing the following points:

(1) Clarify the relationship between subsections (c)(1) and (c)(2) . . . (2) Specify that Section 230(c)(1) has no application to any interactive computer service's decision, agreement, or action to restrict access to or availability of material provided by another information content provider or to bar any information content provider from using an interactive computer service; (3) Provide clearer guidance to courts, platforms, and users, on what content falls within (c)(2) immunity, particularly section 230(c)(2)'s “otherwise objectionable” language and its requirement that all removals be done in “good faith; (4)

¹³ *Restoring Internet Freedom Order*, at n.235. (citing 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

¹⁴ *NTIA Petition*, at 1-2.

Specify that “responsible, in whole or in part, for the creation or development of information” in the definition of “information content provider,” 47 U.S.C. § 230(f)(3), includes editorial decisions that modify or alter content, including but not limited to substantively contributing to, commenting upon, editorializing about, or presenting with a discernible viewpoint content provided by another information content provider.”¹⁵

As can be seen, NTIA’s requests of the FCC are highly specific and are not just interpretations of Section 230. Rather, these would be significant amendments to Section 230. The FCC is not the legislative body. The changes the Administration seeks for Section 230 are up to Congress, not the FCC. The Administration should work with Congress in figuring out how, if at all, to modify Section 230. In fact, Congress is currently considering modifications to Section 230. While Congress and the Administration should carefully consider the potential impact of such changes on online content, competition, and free expression, there is currently a lot of attention on Section 230 in Congress, which is evidenced by the various congressional hearings and proposed bills. That is the appropriate forum for the Administration’s focus, not the FCC.

In addition, NTIA is asking the FCC to intervene where the statute already has been interpreted by the courts, which overall have been interpreting Section 230 responsibly. NTIA’s Petition states that “[t]he FCC should use its authorities to clarify ambiguities in section 230 so as to make its interpretation appropriate to the current internet marketplace and provide clearer guidance to courts, platforms, and users.”¹⁶ However, Congress’ expectation was that courts would interpret the statute and, as a result, the courts have a tremendous amount of experience and precedent doing so; and in turn, companies have relied on those interpretations in their business practices. FCC intervention now would be disruptive, potentially significantly harmful

¹⁵ *NTIA Petition*, at 5.

¹⁶ *Id.*

to the availability of online content, and would require the FCC to legislate—which is not its appropriate role.

IV. THE FCC HAS A TRADITION OF NOT REGULATING ONLINE CONTENT.

The FCC has a tradition of not regulating online content. This perspective is represented in the current Commission’s analysis of Section 230 as stated in the *Restoring Internet Freedom Order*.¹⁷ The *Order* shows that this FCC has decided on light-touch regulation of internet information services, yet NTIA’s Petition contemplates that the FCC would regulate the online services being delivered via BIAS. It would be illogical and quite odd for this FCC to regulate online content and services of all types, which are far removed from the Commission’s experience and expertise, but not to regulate BIAS that is used to deliver those services. An FCC that stood by its decision not to regulate BIAS, but the information that flows over BIAS, would be the equivalent of not regulating telephone service but regulating what users can talk about when they make phone calls. And although NTIA’s Petition explains that the *Restoring Internet Freedom Order* relied on Section 257 to impose transparency requirements on providers of BIAS information service, NTIA’s Petition is not about transparency.¹⁸ Rather, it is a means to regulate all online content.

In the *Restoring Internet Freedom Order*, the FCC relied on Section 230 to show the importance of the free market and as evidence for the need and authority to prevent government

¹⁷ As the Commission is aware, INCOMPAS’ view concerning the BIAS service is that the FCC has jurisdiction over it either as a Title II telecommunications service and/or through its authority in Section 706, and we asserted in the RIFO proceeding that the Commission should maintain its light-touch net neutrality rules so that consumers can obtain the content of their choice online without disruption of its BIAS provider. *See generally* INCOMPAS Comments, WC Docket No. 17-108 (July 17, 2020).

¹⁸ *NTIA Petition*, at 49.

regulation. The FCC found that Section 230 was intended to enable the development of the internet, free from federal or state regulation in order to preserve the vibrant and competitive free market that presently exists for the Internet.¹⁹ As the FCC explained throughout the *Order*:

- “[T]he similarity of circumstances confirms the presumption of similar meaning, as the deregulatory approach to information services embodied in Titles I and II, as well as the deregulatory policy of section 230 . . . we agree that “it is hardly ‘oblique’ for Congress to confirm in section 230 that Internet access should be classified as an unregulated information service when elsewhere in the same legislation Congress codifies a definition of ‘information services’ that was long understood to include gateway services such as Internet access.”²⁰
- “We are not persuaded that section 230 of the Communications Act grants the Commission authority that could provide the basis for conduct rules here . . . we remain persuaded that section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority.”²¹
- “...The two provisions most directly on point—section 706 of the 1996 Act and section 230(b) of the Communications Act—are better read as policy pronouncements rather than grants of regulatory authority. In addition, section 230(b)(2) identifies Congress’ deregulatory policy for the Internet . . . [t]his policy is reinforced by the deregulatory objectives of the 1996 Act more generally.”²²

This Commission must abide by its own precedent and deny NTIA’s Petition for Rulemaking.

V. CONCLUSION

The Administration is demanding that the FCC should regulate online content contrary to the First Amendment, Congress’ intent in Section 230, and the FCC’s own precedent.

INCOMPAS urges the Commission to deny NTIA’s Petition for Rulemaking. If granted, NTIA’s

¹⁹ *Restoring Internet Freedom Order*, ¶ 58

²⁰ *Id.* at ¶ 61.

²¹ *Id.* at ¶ 284.

²² *Id.* at ¶ 293.

Petition will harm online competition, innovation, and investment. Any modifications to Section 230 is a legislative issue that should be left for Congress' consideration.

Respectfully submitted,

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