Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	
National Telecommunications and Information Administration Petition to "Clarify" Provisions of Section 230 of the Communications Act of 1934, as Amended	RM 11862

COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

The National Telecommunications and Information Administration (NTIA), at the direction of President Donald Trump, has asked the FCC to "clarify" a statute the Commission has no role in administering, in a way that contradicts the unambiguous, plain meaning of the text. Its petition must be rejected.

At its core Section 230, 47 U.S.C. § 230, is about promoting free speech online. It allows platforms to host user content without fear of becoming liable for everything their users write. It also allows platforms to take down content they find objectionable, which encourages free speech by allowing multiple platforms to develop and to create spaces where particular viewpoints and voices can be heard, or where multiple voices and views can be heard. There are of course legitimate debates to be had about the interpretation of Section 230 in some cases, and even ways it could be amended. But this is not the right place for that. The FCC does not administer this statute, has been assigned no role in doing so, and its opinions about its meaning would and should be given no weight by the courts. In any event the construction the NTIA has asked the FCC to give Section 230 contradicts its plain meaning and is likely unconstitutional, seeking to punish companies for taking points of view that the current administration disagrees with.

The NTIA's recommendations are also bad policy. Online platforms cannot and should not necessarily be "neutral," although some may choose to do so. While platforms that seek to have mass market appeal naturally have an incentive to be welcoming to a wide range of points of view on various controversial matters, they also have an incentive to weed out hate speech, obscenity, extremism, misinformation, and many other kinds of content, which may be constitutionally protected. *See* 47 U.S.C. 230(c)(2) (granting

immunity to providers and users of interactive computer services for removing or limiting access to material "whether or not such material is constitutionally protected"). If followed, the NTIA's view of how platforms should moderate content would turn them into something like common carriers, a concept that makes sense for some transmission, delivery and infrastructure companies but as applied to online speech platforms could lead to their being overrun with extremist content, abuse, and pornography. Or, it would turn them into dull wastelands where all user content had to be approved prior to publication, eliminating the vibrancy and dynamism of online discourse.

While these high-level concerns are interesting and worthy of discussion in the correct forum, this comment will focus particularly on the FCC's lack of jurisdiction to create rules "clarifying" Section 230.

II. Congress Has Not Delegated Authority Over Section 230 to the FCC

Congress may give agencies the power to administer a statute by issuing rules to fill in "gaps" either explicitly or implicitly. *Morton v. Ruiz*, 415 US 199, 231 (1974). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron USA v. Natural Resources Defense Council*, 467 US 837 (1984). However, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit," *id.*, and "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco*, 529 US 120, 159 (2000).

Congress has not delegated rulemaking or interpretive authority to the FCC over Section 230 either explicitly or implicitly. The NTIA's attempts to argue otherwise are unavailing.

A. There Has Been No Explicit Delegation

While Section 230 is codified in the Communications Act for reasons having to do with its legislative history,[1] this does not mean that the FCC has any role in implementing or interpreting the statute. NTIA has it exactly backwards when it states the FCC has authority because "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation. This silence further underscores the presumption that the Commission has the power to issue regulations under Section 230." NTIA Petition 17. The law is that "[t]he FCC may only take action that Congress has authorized," not merely just those actions it has not forbidden." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir.) (Kavanaugh, J.)) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)). *Accord: Motion Picture Ass'n of America, Inc. v. FCC*, 309 F. 3d 796, (DC Cir. 2002) ("*MPAA*") (When Congress declined to give the Commission authority to adopt video description rules, "This silence cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the … regulations.").

Because Congress has not expressly delegated any interpretive authority to the FCC with respect to this provision, even if the agency were to pronounce upon its meaning, courts would owe it no deference. As the Supreme Court explained in *United States v. Mead,*

[1] Section 230 was an amendment to the Communications Decency Act, itself Title V of the Telecommunications Act of 1996, amending the Communications Act of 1934.

"We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." 533 US 218, 229. Such authorization is absent here.

1. Section 201(b) Does Not Grant the FCC Authority to Change the Meaning of Section 230

The NTIA rests much of its argument for FCC authority on Section 201(b) of the Communications Act, which states in part that "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." Section 201 in general gives the FCC broad authority over the services and charges of common carriers—not over the "interactive computer services" Section 230 is concerned with. By itself this provides reason enough to disregard the NTIA's attempt to bootstrap FCC authority over online services. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). *See also Gonzales v. Oregon*, 546 U.S. 243, 263 (2006) ("it is not enough that the terms 'public interest,' 'public health and safety,' and 'Federal law' are used in the part of the statute over which the Attorney General has authority.")

But even looking past the context of the language the NTIA puts so much weight on, and considering the language in isolation, the purported grant of rulemaking authority is no such thing, because the Commission has nothing whatever to do to "carry out" the provision. Section 230 concerns liability for various torts as litigated between private parties. The FCC has no role in this. The parties, and state and federal judges do. The FCC

may not interject its opinions into lawsuits that have nothing to do with its duties or jurisdiction merely because the President, via the NTIA, has asked it to.

Nor has the FCC seen any need to "carry out" this provision in the past through rulemakings or otherwise—instead, as Blake Reid has documented, it has primarily cited to Section 230 as general evidence of federal technology policy, declining to use it as a direct source of authority. *See Blake Reid, Section 230 as Telecom Law*, https://blakereid.org/section-230-as-telecom-law (cataloging the FCC's scattered citations to this provision over the years). If the FCC was in fact charged by Congress in 1996 with "carrying out" this law, presumably it would have done so at some point, and its drafters would have wondered why it had not done so by now. *See Gonzales v. Oregon,* 546 at 257 (no deference due to agency when its sole rulemaking over decades is simply to "parrot" the statutory language in its regulations).

In a more fundamental sense, the NTIA's attempt to expand FCC authority by pointing to where the statute is codified is simply a version of the error made by the losing party in *City of Arlington*. There, the Court explained that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington, TX v. FCC*, 569 US 290, 297 (2013). Under this analysis the question before the agency is not whether it has "jurisdiction" over the matter in question but whether it is acting consistently with the statute. Even if successful, the NTIA's attempts to put this matter before the FCC do not in themselves give the FCC authority to act contrary to the plain meaning of the statute.

2. DC Circuit Precedent Forbids Imposing "Neutrality" Requirements on Interactive Computer Services

The NTIA's proposal would punish providers and users of interactive computer services for having a particular point of view as to what content is "objectionable." *See* NTIA Petition 37-38; 38-40. In other words, it imposes anti-discrimination and anti-blocking rules on interactive computer services, providing them with only a short list of types of content they may be permitted to block without incurring a legal penalty. The DC Circuit held that requirements of this kind amount to common carrier rules. *Verizon v FCC*, 740 F.3d 623, 628, 653-54 (DC Cir. 2014). As a policy matter common carriage is appropriate for some kinds of communication services, like telephony and broadband access, but imposing common carrier requirements on online speech platforms makes no more sense than imposing them on newspapers. Further, even with policy and sense aside, the DC Circuit has held it's illegal: it has interpreted the definition of "telecommunications carrier" in 47 U.S.C. 153(51), which includes the language that "A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services," to mean that the FCC can impose common carrier requirements *only* on services classified as telecommunications services. *Verizon* at 650. Interactive computer services are not so classified, of course, and could not be. This provides another reason for the FCC to reject the NTIA's request.[2]

[2] It is notable that following the NTIA's request would involve the FCC at least partially repealing the Restoring Internet Freedom Order, 33 FCC Rcd 311 (2017). Imposing any form of non-discrimination requirements on ISPs (who are included in the meaning of "interactive computer services" under Section 230), or even asserting jurisdiction over them, would constitute a significant departure from the current FCC's deregulatory approach.

3. The FCC Needs Express Authority to Regulate Content, Which It Lacks Here

The NTIA also seeks to have the FCC directly regulate the content of interactive computer services, an activity that the FCC cannot do without express statutory authority, which it lacks. In *MPAA,* the court held that where "the FCC promulgates regulations that significantly implicate program content" it cannot rely on a general grant of authority such as § 1 of the Communications Act (47 U.S.C. § 151). *MPAA* at 799, 803-04. Similarly here, even if Section 201 were viewed as a general grant of authority, the FCC lacks the specific grant of content-regulation authority that DC Circuit found it would need. The MPAA court is not alone in this. Other courts have also required the FCC to demonstrate clear statutory authority when it seeks to expand its purview to cover things other than the actual transmission of electronic communications. *See American Library Ass'n. v. FCC*, 406 F. 3d 689, 700 (DC Cir. 2005) (the FCC's "general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission"); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F. 2d 1397, 1400 (7th Cir. 1972) (FCC jurisdiction does not extend to activities that merely "affect communications" because this "would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature.")

B. There Has Been No Implicit Delegation

Congress has not implicitly delegated authority to the FCC to interpret Section 230, either. Implicit delegation occurs when the statute an agency is charged to administer contains ambiguous terms that must be resolved to give a statute effect. But while "*Chevron*

establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency," *Christensen v. Harris County*, 529 US 576, 590 (Scalia, J. concurring), there is no reason to think that Congress intended the FCC to "administer" Section 230. Further, the NTIA's attempts to concoct "ambiguity" where there is none fall short on their own terms. "The implausibility of Congress's leaving a highly significant issue unaddressed (and thus "delegating" its resolution to the administering agency) is assuredly one of the factors to be considered *in determining whether there is ambiguity*[.]" *Id. See also King v. Burwell*, 576 U.S. 473, 487 (2015) (because who should receive tax credits was "a question of deep 'economic and political significance' that is central to this statutory scheme" Congress would have assigned the decision to an agency "expressly.")

1. "Otherwise Objectionable" and "Good Faith" Are Not Ambiguous in this Context

While a subsequent section of this comment will explain in more detail how the NTIA's alleged understanding of the statute defies its plain meaning, here it is worth explaining that the phrases "otherwise objectionable" and "good faith" in 230(c)(2) are not ambiguous in a way that calls for or could support agency clarification.

"Otherwise objectionable" is a subjective term, not an ambiguous one. The fact that one platform might find content objectionable, and others might not, does not mean that the FCC (or even federal courts) can substitute their own judgment for the editorial, content moderation decisions of platforms. In fact, different platforms having different views as to what is an is not "objectionable" is exactly what is intended by Section 230, which seeks to foster "a true diversity of political discourse" on the internet as a whole across a multiplicity of forums (not to require the whole range of views within specific

private services, which remain free to draw the boundaries of acceptable discourse in their own way). It is a fundamental error to confuse a subjective standard with an "ambiguous" one.

In this context, "good faith" is not an ambiguous technical term, either—it is a common law term of art that state and federal courts are accustomed to applying in a great variety of contexts. Article 3 federal courts are not crying out to the FCC for help in determining what "good faith" means in the context of litigation between private parties, which as discussed above, is what Section 230 addresses. The courts interpret this term in a variety of contexts as a matter of course, and generally employ a fact-specific approach that is not compatible with the simple interpretive rubric the NTIA provides. *See, e.g.*, *United States v. United States Gypsum*, 438 U.S. 422, 454-455 (1978) (discussing the "fact-specific nature" of a good faith inquiry in a different area of law); *Arenas v. United States Trustee*, 535 B.R. 845, 851 (10th Cir. BAP 2015) ("Courts evaluate a debtor's good faith case by case, examining the totality of circumstances."); *Alt v. United States*, 305 F.3d 413 (6th Cir. 2002) ("good faith is a fact-specific and flexible determination"); *Reserve Supply v. Owens-Corning Fiberglas*, 639 F. Supp. 1457, 1466 (N.D. Ill. 1986) ("[T]he inquiry into good faith is fact-specific, with the relevant factors varying somewhat from case to case.") Such legal determinations are the bread and butter of courts and the FCC has no helpful guidance to give, nor authority to do so. This is not a matter of determining what "good faith" means in complex areas fully subject to FCC oversight, such as retransmission consent negotiations, where the FCC itself, in addition to issuing rules, adjudicates the underlying disputes. *See* 47 C.F.R. § 76.65.

2. Circumstances Do Not Suggest That Congress Intended to Delegate Authority over Section 230 to the FCC

There are further reasons to conclude that the FCC has no authority to act on this matter. In *Brown & Williamson*, the Court explained that in some cases it is unlikely that Congress intended to delegate the resolution of major policy questions to agencies implicitly. In that case, the FDA "asserted jurisdiction to regulate an industry constituting a significant portion of the American economy." *FDA v. Brown & Williamson Tobacco*, 529 US 120, 159 (2000). Just as it was unlikely that Congress had delegated authority to the FDA to regulate the tobacco industry, here it is unlikely that Congress has delegated authority to regulate "interactive computer services" to the FCC, which are an even more significant portion of the economy. Given "the breadth of the authority" that NTIA would have the FCC seize for itself, the Commission must reject its "expansive construction of the statute" that goes far beyond Congressional intent and the words of the law itself. *Id.* at 160.

In *King v. Burwell*, the Court added that there was not likely to be delegation was when the agency has "no expertise in crafting" the policies purportedly delegated to it. 576 U.S. at 486 (Congress did not delegate authority over healthcare policy to IRS). Had Congress intended for the FCC to assert authority over the content moderation practices of online platforms and websites it would have said so explicitly. It did not, and there is no evidence it intended to.

This is especially clear in that the FCC has no particular expertise or experience in managing the moderation policies of interactive computer services. As mentioned above the FCC, in its various duties, has never relied on Section 230 as a direct source of rulemaking authority. Nor is it clear where in the FCC's internal structure—organized by bureau into subject matters such as "Public Safety" and "Wireless Telecommunications"--

supervision of the content moderation practices of Twitter and Facebook would even fit. The FCC lacks the institutional capacity, history, staff, or resources to tackle the issues the NTIA wants to put before it. This is understandable because the FCC is a creature of Congress, and Congress never intended for it to take the sweeping actions the NTIA now requests. Because the FCC has no expertise in regulating internet content or liability generally, it is therefore "especially unlikely that Congress would have delegated this decision to" the FCC. *King v. Burwell,* 576 U.S. at 487.

Similarly, in *Gonzales v. Oregon*, the Supreme Court rejected the effort of the Attorney General to prohibit doctors in Oregon from prescribing drugs pursuant to the state's "assisted suicide" statute. The court reasoned that because Congress explicitly limited the Attorney General's power under the relevant statute to promulgate rules relating to the registration and control of controlled substances, the Attorney General could not use the statute's general permission to create rules "to carry out the functions under this act" to regulate physician behavior. *Gonzales v. Oregon*, 546 U.S. at 266-67 (2006). *Accord: MCI Telecommunications v. AT&T*, 512 U.S. 218 (1994) (presence of ambiguity does not allow FCC to assign meaning Congress clearly never intended).

III. NTIA's Proposed Statutory Construction is Contrary to Its Plain Meaning

NTIA's proposed interpretation of Section 230 is contrary to its plain meaning and has no support in its legislative history. Its errors are manifold. This comment will highlight only a few.

To begin with, 230(c)(1) and (c)(2) are not redundant as interpreted by the courts. *See Barnes v. Yahoo!*, 570 F. 3d 1096, 1105 (9th Cir. 2009). It is true that (c)(2) is primarily concerned with liability for takedowns, while (c)(1) more broadly provides immunity for

an interactive computer service, or user, from being treated as a publisher or speaker of third-party content. Because the activities of a "publisher" include decisions about what not to publish, actions that seek to hold a provider or user of an interactive computer service liable as a publisher on the basis of content removals do indeed fail under (c)(1). But (c)(2) is not just about torts that seek to hold a user or provider of an interactive computer service liable as a publisher or speaker. It is broader, in that it immunizes them from *all* causes of action, including those that have nothing to do with publishing or speaking. For example, an attempt to hold a provider of an interactive computer service liable for some sort of tortious interference with a contract because of its content removal choices might not fail under (c)(1), but could fail under (c)(2). Similarly with causes of action relating to the service providing users with tools they can use to restrict access to content they find objectionable. At the same time, (c)(2) is more limited than (c)(1) in that it (and, contrary to the NTIA's baseless assertion, not (c)(1) itself) is limited by a requirement that takedowns be done in good faith. While "good faith" is a term of art to be interpreted as the circumstances warrant by courts, this could mean, for example, that an antitrust case against a provider of an interactive computer service that removed access to a competitions' information as part of an unlawful monopolization scheme could proceed.

The NTIA claims that Section 230 has been interpreted to shield a platform from liability for its own content and asks for "specification" that this is not the case. NTIA Petition 5 (point 4). It also bizarrely claims that it has been interpreted to "provide[] full and complete immunity to the platforms for their own publications, … and affixing of warning or fact-checking statements." NTIA Petition 26. This is false and no cases support it. NTIA does not cite a single instance of a platform being shielded by Section 230 for its

own content because there are none. When Twitter labels one of the President's tweets as misinformation and explains why, it is the speaker of that explanation and is liable for it—however hard it might be to imagine what the cause of action could possibly be. The context and explanation that Twitter adds to one of the President's tweets that contain false information about voting or other matters are not "information provided by another information content provider" under (c)(1). However, the fact that Twitter or any other service is liable for its own speech does not make these services liable for the speech of third parties, such as potentially tortious tweets by the President. The immunity granted by the plain words of (c)(1) is unconditional.

The NTIA claims that "Section 230(c)(1) does not give complete immunity to all a platform's 'editorial judgments.'" NTIA Petition 27. To the extent that this refers to the platform's own speech, this is trivially true. Section 230 does not shield a platform's own speech. But Section 230(c)(1) does provide complete, unqualified immunity to platforms with respect to the editorial choices they make with respect to third-party content—even if those choices themselves are unavoidably expressive in nature.

Along these lines NTIA asks "at what point a platform's moderation and presentation of content becomes so pervasive that it becomes an information content provider and, therefore, outside of section 230(c)(1)'s protections." NTIA Petition 27-28. The answer to that question is "never." The "moderation and presentation" of content is simply another way of describing "publication," which the law shields. For example, an online forum for gun owners is free to delete any posts arguing for gun control, without becoming liable either for the content of the posts on this forum, or for its pro-gun point of view itself. This is necessarily entailed by 230(c)(1)'s plain statement that a user or

provider of an interactive computer service cannot be held liable as a *publisher* of third-party content. Editorial choices often involve expressing a point of view, either as to the content of a message or just quality. As *Zeran* held, "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." *Zeran v. America Online*, 129 F. 3d 327, 333 (4th Cir. 1997).[3]

Section 230 embodies a policy choice, and it's a choice to treat providers and users of interactive computer services differently than any other publisher. It does not require computer services to be "neutral"—if it did, it would not have immunized them from liability as publishers, as publishing is an expressive and non-neutral activity. An analogy to print publishers, who often express points of view, may help illustrate this. The New York Review of Books reissues many out-of-print books that it considers to be classics. Verso Books concentrates on left-wing titles. These two print publishers are engaged in expressive activity not just with their own speech (marketing materials and so forth) but with respect to the third-party speech they choose to amplify. Similarly, internet forums devoted to particular topics have a range of views they find acceptable, and dominant platforms have decided to take stands again election misinformation, COVID conspiracy

[3] The NTIA puts forward a bizarre interpretation of *Zeran* that, consistently with its overall approach to this issue, contradicts the language in question in such a basic way that the best way to rebut it is to simply quote the language back. The NTIA claims that this key quotation "refers to third party's exercise of traditional editorial function—not those of the platforms." NTIA Petition 27. But the *Zeran* quotation, again, speaks of "lawsuits seeking to hold **a service provider** liable for **its exercise** of a publisher's traditional editorial functions." (Emphasis added.) It very clearly states that a platform can exercise editorial functions without incurring liability. Perhaps NTIA thinks that *Zeran* was wrongly decided—but such an argument would run into Section 230's language which specifically permits interactive computer services to act as publishers, a function which necessarily includes editorial choices.

theories, anti-vax content, and racial hatred. Even without Section 230, most of these editorial choices would enjoy some level of First Amendment protection.[4] Section 230(c)(1) provides an additional level of protection for online platforms and their users, in order to facilitate online discourse and to avoid legal incentives that would discourage moderation and editorial choices. It states plainly that providers and users of interactive computer services cannot be held liable either for the content of the third-party speech they choose to amplify, or as "publishers," which includes expressing a point of view about third-party speech they find worthy, or objectionable. If NTIA disagrees with this policy choice it should talk to Congress about changing it, not misrepresent what the law says right now. *Cf. MCI Telecommunications v. American Telephone & Telegraph*, 512 US 218, 231-32 (1994) ("What we have here, in reality, is a fundamental revision of the statute… That may be a good idea, but it was not the idea Congress enacted into law[.]").

IV. Conclusion

The NTIA has put forward bad legal and policy arguments in a forum that has no authority to hear them. Its misrepresentations and misstatements of the law are pervasive. To the extent it disagrees with the law that Congress passed it is free to say so, but the FCC must resist this call for it to expand its jurisdiction into regulating the content moderation and editorial choices of interactive computer services, while recognizing that the NTIA's arguments as to why the FCC has authority here are no better than its specious and trivial mischaracterizations of the statute itself.

[4] It is not necessary to decide here whether this sort of editorial expression deserves intermediate scrutiny or heightened scrutiny. *See Turner Broadcasting v. FCC*, 512 U.S. 622 (1994) (distinguishing between print and cable editorial discretion for First Amendment purposes).

Respectfully submitted,

/s/
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PUBLIC KNOWLEDGE

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