



**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of) **RM-11862**
Section 230 of the Communications Act)
)

**Comments of the Center for Democracy & Technology
Opposing the National Telecommunications and Information Administration’s
Petition for Rulemaking**

August 31, 2020

Introduction

This petition is the product of an unconstitutional Executive Order that seeks to use the FCC as a partisan weapon. The petition, and the Order, attack the constitutionally protected right of social media services to moderate content on their platforms, limiting those services’ ability to respond to misinformation and voter suppression in an election year, and depriving their users of access to information and of access to services that operate free from government coercion. Any one of the constitutional, statutory, and policy deficiencies in the NTIA’s petition requires that the FCC reject it without further consideration.

CDT’s comments focus on three key issues: the unconstitutionality of the Order itself, the FCC’s lack of authority to do what the petition asks, and the petition’s fundamental errors about the key issue it purports to request action on: content moderation. These issues are fatal to the petition, and, as such, the FCC should reject it. To do otherwise is to act contrary to the Constitution of the United States and especially to the principles of free speech which it enshrines.

1. The FCC should dismiss the NTIA petition because it is unconstitutional, stemming from an unconstitutional Executive Order

The petition is the result of an unconstitutional attempt by the President to regulate speech through threats and retaliation. Social media services have a constitutionally protected right to respond to hate speech, incitement, misinformation, and coordinated disinformation efforts on their platforms. The President seeks to embroil the FCC in a political effort to coerce social media companies into moderating user-generated content only as the President sees fit. The FCC should reject this unconstitutional and partisan effort in its entirety.

As CDT alleges in our lawsuit challenging the Order for its violation of the First Amendment,¹ the Order seeks to retaliate directly against social media companies that have moderated and commented upon President Trump's own speech. The Order names specific media companies that have, consistent with their community guidelines regarding election-related misinformation, appended messages to the President's misleading tweets linking to accurate third-party information about mail-in voting.² The Order directs several federal agencies to begin proceedings with the goal of increasing the liability risk that intermediaries face for such actions.

These threats of liability chill online intermediaries' willingness to engage in fact-checking and other efforts to combat misinformation—and indeed, to host controversial user speech at all. To host users' speech without fear of ruinous lawsuits over illegal material, intermediaries depend on a clear and stable legal framework that establishes the limited circumstances in which they could be held liable for illegal material posted by third-parties. Section 230 has provided just such a stable framework, on which intermediaries rely, since it was enacted by Congress in 1996. Courts have consistently interpreted and applied Section 230, in accordance with their constitutional function to interpret the law.

¹ Complaint, *Center for Democracy & Technology v. Donald J. Trump* (D.D.C. 2020), available at <https://cdt.org/wp-content/uploads/2020/06/1-2020-cv-01456-0001-COMPLAINT-against-DONALD-J-TRUMP-filed-by-CENTER-FO-et-seq.pdf>.

² For example, the Order is framed in part as a response to Twitter's own speech that was appended to President Trump's May 26, 2020, tweet. The Order states President Trump's view that his tweets are being selectively targeted: "Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias." <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

³ Threatening unilateral and capricious changes to the structure and function of Section 230 directly threatens intermediaries' ability and willingness to host people's speech, and to respond to misinformation and other potentially harmful content consistent with their community guidelines.

The President's unconstitutional desire to chill speech is clear in the Order itself, and the NTIA's petition clearly aims to advance that goal. For example, the NTIA proposes that the FCC effectively rewrite Section 230 to deny its liability shield to any intermediary that is "...commenting upon, or editorializing about content provided by another information content provider."⁴ This perhaps reflects a fundamental misunderstanding of the law: intermediaries have never been shielded from liability under Section 230 for content that they directly create and provide—that is, where they are the information content provider. But the sort of content explicitly targeted by the Order—accurate information about the security and integrity of voting systems—could not credibly be considered illegal itself. Thus, the Order, and now the NTIA petition, seek to suppress that kind of information by revoking intermediaries' Section 230 protection for hosting *user-generated content*, solely on the basis that the intermediary has also posted its own lawful speech.

In practice, this would mean that any fact-checking or independent commentary that an intermediary engages in would also expose it to potential liability for defamation, harassment, privacy torts, or any other legal claim that could arise out of the associated user-generated content. It would be trivially easy for bad actors intent on sowing misinformation about the upcoming election, for example, to pair whatever inaccurate information they sought to peddle with inflammatory false statements about a person, or harassing commentary, or publication of their personal information. Intermediaries would face the difficult choice of staying silent (and letting several kinds of abuse go unaddressed, including lies about how to vote) or speaking out with accurate information and also exposing themselves to lawsuits as an entity "responsible, in whole or in part, for the creation or development of" illegal content that they are specifically seeking to refute.

³ See, e.g., *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–93 (N.D. Cal. 2015); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Green v. America Online*, [318 F.3d 465, 470-71](#) (3d Cir. 2003).

⁴ National Telecommunications & Information Administration, *Petition for Rulemaking of the NTIA* (July 27, 2020), 42, available at https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "Petition").

The Order's efforts to destabilize the Section 230 framework, and thus coerce intermediaries into editorial practices favorable to the President, violate the First Amendment. The First Amendment prohibits the President from retaliating against individuals or entities for engaging in speech.⁵ Government power also may not be used with the intent or effect of chilling protected speech,⁶ either directly or by threatening intermediaries.⁷

The Order has other constitutional deficiencies. It runs roughshod over the separation of powers required by the Constitution: Congress writes laws, and courts—not independent agencies—interpret them. Congress may, of course, delegate rulemaking authority to the FCC, but, as discussed below, it has not done so here.⁸

The FCC should not be drawn any further into the President's unconstitutional campaign to dictate the editorial practices of the private online service providers that host individuals' online speech. Although it is couched in the language of free speech, the petition would have the Commission regulate the speech of platforms, and by extension, the speech to which internet users have access. The FCC should deny this petition.

⁵ See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“Official reprisal for protected speech ‘offends the Constitution [because] it threatens to inhibit exercise of the protected right,’ and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.”) (internal citations omitted).

⁶ “Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment.” *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (citing *Riley v. Nat’l Fed’n of the Blind of North Carolina*, 487 U.S. 781, 794 (1988)).

⁷ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (“[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” constitutes “informal censorship” that violates the First Amendment).

⁸ See Harold Feld, *Could the FCC Regulate Social Media Under Section 230? No*. Public Knowledge, (August 14, 2019) <https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/>.

2. Even if it were not constitutionally infirm, the FCC should dismiss the NTIA petition because the FCC has no statutory authority to “clarify” Section 230.

a. The text and structure of Section 230 require no agency implementation.

Section 230 is entirely self-executing. There is nothing in the statute requiring agency implementation: no directions to the FCC, not even a mention of the FCC or any other regulatory agency. Instead, the statute is a clear statement of how courts should treat intermediaries when they face claims based on content provided by users. Beyond its unconstitutional origin, the NTIA’s petition asks the Commission to do something Congress did not authorize: to interpret the meaning of a provision giving explicit instructions to courts. That the NTIA asks the Commission to act on Section 230 by issuing regulations also conflicts with the statute’s statement that the policy of the United States is to preserve the open market of the internet, unfettered by federal regulation.⁹ The Commission has cited this provision as potential support for its deregulatory actions regarding net neutrality, as demonstrated in the Restoring Internet Freedom docket.¹⁰ It would be wildly contradictory and inconsistent for the FCC to suggest that it now has authority to issue rules under the very statute it said previously should leave the internet “unfettered” from regulation. The Commission should decline to take any further action on this petition.

b. Nothing in the Communications Act authorizes the FCC to reimagine the meaning or structure of Section 230.

The petition says the FCC has authority where it does not. It tries to draw a false equivalence between other statutory provisions under Title II (47 U.S.C. §§ 251, 252, and 332), claiming that because the FCC has authority to conduct rulemakings addressing those provisions, it must also be able to do so to “implement” Section 230.¹¹ But the petition mischaracterizes the nature of those provisions and the extent of the FCC’s authority under Section 201.

⁹ 47 U.S.C. 230(b)(2).

¹⁰ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4467 (2017).

¹¹ Petition at 17.

First, Section 201 gives the FCC broad power to regulate telecommunications services.¹² This part of the Act is titled “Common carrier regulation,” while the Executive Order is about an entirely different set of companies, the “interactive computer services” who moderate content as intermediaries. Because the FCC’s authority under Section 201 pertains only to common carriers, the FCC’s authority to “implement” Section 230 must then either be limited to Section 230’s impact on common carriers, or dismissed as a misunderstanding of the scope of FCC authority under Section 201.

Second, all three of the other provisions cited by the NTIA to support its theory of FCC authority directly address common carriers, not intermediaries that host user-generated content.¹³ Therefore, the Commission’s authority to conduct rulemakings to address these Sections (332, 251, 252) derives from Section 201’s broad grant of authority to implement the act **for the regulation of common carriers**. But Section 230 has nothing to do with telecommunications services or common carriers.¹⁴

Unlike these other provisions, Section 230 does not even mention the FCC. This omission is not accidental—as discussed above, there is simply nothing in Section 230 that asks or authorizes the FCC to act. A rulemaking to “clarify” the statute is plainly inconsistent with what Congress has written into law.

Moreover, the NTIA takes a particularly expansive view of Congressional delegation to agencies that also misrepresents the role of statutory “ambiguity” in an agency’s authority. The NTIA claims the Commission has authority because Congress did not explicitly foreclose the FCC’s power to issue regulations interpreting Section 230. But an assessment of agency authority begins with the opposite presumption: that Congress meant only what it said. Agencies only have the authority explicitly granted by statute, unless ambiguity warrants agency action. No such ambiguity exists here, as reflected by decades of consistent judicial interpretation.¹⁵

¹² 47 U.S.C. § 201.

¹³ 47 U.S.C. § 251 sets out the duties and obligations of telecommunications carriers; 47 U.S.C. § 252 describes procedures for negotiation, arbitration, and approval of agreements between telecommunications carriers; 47 U.S.C. § 332(c) prescribes common carrier treatment for providers of commercial mobile services.

¹⁴ 47 U.S.C. § 230. The statute addresses only “interactive computer services” and “information services,” which may not be treated as common carriers according to *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

¹⁵ See footnote 3.

For the FCC to determine it has authority here, it must first ignore the intent of Congress and then contradict the Chairman’s own approach toward congressional delegation. Chairman Pai has said that, when Congress wants the FCC to weigh in, it says so. *“Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (e.g., “[t]he Commission shall prescribe regulations to implement the requirements of this subsection” or “the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section”), and it has done so more generally (e.g., “[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e Communications] Act”). Congress did not do either in section 706.”*¹⁶ Although we disagree with the Chairman’s assessment with respect to Section 706 (which says “the Commission shall...take immediate action to promote deployment...by promoting competition,”) the Commission cannot now take the opposite approach and find that it has authority in a provision that contains no instructions (or even references) to the Commission.¹⁷

Make no mistake, rewriting the statute is exactly what the petition (and the Executive Order) seek, but the FCC should reject this unconstitutional effort.

c. The FCC has disavowed its own authority to regulate information services.

“We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here.” Restoring Internet Freedom Order at para. 267.

The FCC has disavowed its ability and desire to regulate the speech of private companies, in part basing its policy justifications for internet deregulation on this rationale.¹⁸ Moreover, it recently revoked its own rules preventing internet service providers from exercising their power as gatekeepers through such acts as blocking, slowing, or giving preferential treatment to specific content, on the rationale that

¹⁶ Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5971 (2015).

¹⁷ 47 U.S.C. 1302(b).

¹⁸ Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order* (hereinafter, “RIF Order”), 33 FCC Rcd 311, paras. 1-2 (2018).

internet service providers are “information services” whom the FCC cannot regulate in this way.¹⁹ While CDT fundamentally disagrees with the Commission’s characterization of internet service providers as “information services,”²⁰ the Commission cannot have it both ways. It would be absurd for the FCC to claim regulatory authority over intermediaries of user-generated content when it has said repeatedly that it lacks regulatory authority over providers of internet access. The FCC has never claimed regulatory authority over the content policies of social media services or other edge providers, and NTIA’s attempt to force this inconsistency flies in the face of agency precedent and common sense.

3. The FCC should dismiss the NTIA petition because the petition is fundamentally incorrect on the facts.

If the constitutional and statutory authority problems were not enough to warrant dismissal of this petition—which they are—the factual errors in the NTIA’s petition reflect a fundamental misunderstanding of the operation of content moderation at scale. This is yet another reason to reject the petition.

As an example, the petition states that “[W]ith artificial intelligence and automated methods of textual analysis to flag harmful content now available ... platforms no longer need to manually review each individual post but can review, at much lower cost, millions of posts.”²¹ It goes on to argue that, because some social media companies employ some automation in their content moderation systems, the entire rationale for Section 230 has changed.²² This is wrong. “Artificial intelligence” is a general concept that does not describe concrete technologies currently in use in content moderation. Some providers may use automated systems that employ relatively simple technology, like keyword filters, to help screen out unwanted terms and phrases, but such filters are notoriously easy to circumvent and lack any kind of

¹⁹ RIF Order, 33 FCC Rcd at 407-08, para 161.

²⁰ In the matter of Restoring Internet Freedom, WC Docket 17-108, *Amended Comments of the Center for Democracy & Technology* (July 19, 2017), available at <https://cdt.org/wp-content/uploads/2017/07/CDT-2017-FCC-NPRM-Amended-Comment.pdf>.

²¹ Petition 4-5. The source that NTIA cites for this statement, the 2019 Freedom on the Net Report, in fact is discussing the risks to human rights from overbroad government surveillance of social media—one of those threats being the *inaccuracy* of automated tools in parsing the meaning of speech. See, e.g., Marissa Lang, “Civil rights groups worry about government monitoring of social media”, San Francisco Chronicle (October 25, 2017), available at <https://www.sfchronicle.com/business/article/Civil-rights-groups-worry-about-government-12306370.php>.

²² Petition at 12-15.

consideration of context.²³ Content moderation also requires much more than textual analysis, and automated analysis of images, video, and audio content present distinct technical challenges.²⁴

Some of the largest online services do use more sophisticated machine learning classifiers as part of their systems for detecting potentially problematic content,²⁵ but, as CDT and others have explained, these automated tools are prone to inaccuracies that disproportionately affect under-represented speakers.²⁶ A tool designed to detect “toxicity” in online comments may not be able to parse the nuances in communication of a small, tight-knit community (such as the drag queen community)²⁷ and may identify benign comments as “toxic” and warranting takedown. Automated content analysis is no substitute, legally or practically, for human evaluation of content.

The NTIA fundamentally misapprehends the state of technology and the complexities of hosting and moderating user-generated content at scale. Content filters do not, and cannot, create the presumption that intermediaries are able to reliably and effectively pre-screen user-generated content in order to detect illegal material. Any policy proposals built on that presumption are destined to fail in practice and in the courts.

²³ See N. Duarte, E. Llansó, A. Loup, *Mixed Messages? The Limits of Automated Social Media Content Analysis* (November 2017), <https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf>.

²⁴ E. Llansó, J. van Hoboken, P. Leerssen & J. Harambam, *Artificial Intelligence, Content Moderation, and Freedom of Expression* (February 2020), available at <https://www.ivir.nl/publicaties/download/AI-Llanso-Van-Hoboken-Feb-2020.pdf>. For example, tools to detect images and video depicting nudity often use “flesh tone analysis” to identify a high proportion of pixels in an image or frame that meet certain color values. These tools can generate false positives when analyzing desert landscape scenes and other images that happen to include those color values. *Id.* at 6.

²⁵ For a discussion of the use of automation in content moderation by several major social media services, see Facebook, *Community Standards Enforcement Report* (August 2020), <https://transparency.facebook.com/community-standards-enforcement>; Twitter, *An update on our continuity strategy during COVID-19* (April 1, 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html; Youtube, *Community Guidelines enforcement* (August 2020): <https://transparencyreport.google.com/youtube-policy/removals>.

²⁶ *Supra* n.24; see also, Brennan Center, *Social Media Monitoring* (March 2020), <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>.

²⁷ Internet Lab, *Drag queens and Artificial Intelligence: should computers decide what is ‘toxic’ on the internet?* (June 28, 2019), <https://www.internetlab.org.br/en/freedom-of-expression/drag-queens-and-artificial-intelligence-should-computers-decide-what-is-toxic-on-the-internet/>.

Conclusion

The FCC is not an arbiter of online speech. If it attempts to assume that role, it will be violating the First Amendment and many other provisions of law. The only way forward for the FCC is to reject the petition and end this attack on free speech and free elections in America.

Respectfully submitted,

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