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

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

COMMENTS OF
THE FREE STATE FOUNDATION*

These comments are filed in response to the Commission's request for public comments regarding the Petition filed by NTIA requesting the Commission initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934, as amended. The principal point of these comments is that, a quarter century after its enactment at the dawn of the Internet Age, it is appropriate for Section 230 to be subjected to careful review, whether by Congress or the FCC, or both. Unlike the Ten Commandments handed down from Mt. Sinai, Section 230 is not etched in stone, but like most statutes, it should be periodically reviewed with an eye to considering whether any revisions are in order.

Many, but not all, of those who oppose the FCC (or Congress) examining Section 230 do so in rather apoplectic terms, suggesting that any change at all would mean the "end of the Internet as we know it." It is somewhat ironic that some, but not all, of those who are most vociferous in proclaiming doomsday scenarios if Section 230 is altered in any way, especially the largest Internet web giants such as Google, Facebook, and

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Director of Policy Studies and Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

Twitter, also predicted the "end of the Internet as we know it" if strict government-mandated "net neutrality" regulation were eliminated or loosened.

These initial comments do not stake out detailed positions regarding the meaning of Section 230's provisions and their scope. Rather, they emphasize that, in response to the NTIA petition, the FCC almost certainly has authority, within proper bounds, to issue clarifying interpretations of ambiguous Communications Act provisions like Section 230 and that it is not inherently improper for the Commission to consider exercising this authority. Review of Section 230 is warranted given dramatic changes in the Internet ecosystem over the last twenty-five years. Granting that adoption of Section 230 may have played an important role in the rise of Internet content providers that are now a key part of the American economy and social fabric does not mean that, at present, their practices or conduct, including their content moderation practices, should not be considered in relation to their impact on the public.

The debate surrounding Section 230 involves fundamental issues, including its efficacy, what the First Amendment prohibits and what it permits, the roles of the FCC and the Federal Trade Commission with respect to interpreting or enforcing the law, and the relationship between the immunity granted content providers by Sections 230(c)(1) and 230(c)(2). To provide a framework for addressing some of these issues, Free State Foundation President Randolph May, in his June 2020 *Perspectives from FSF Scholars* titled "Considering Section 230 Revisions, Rationally,"[1] outlined some fundamental propositions that are relevant here:

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[1] Randolph J. May, "Considering Section 230 Revisions, Rationally," *Perspectives from FSF Scholars*, Vol. 15, No. 35 (June 24, 2020), attached as Appendix A, and also available at: https://freestatefoundation.org/wp-content/uploads/2020/06/Considering-Section-230-Revisions-Rationally-062420.pdf.

- First, the legal immunity granted "interactive computer services" by Section 230 played a significant role in the Internet ecosystem's development, particularly in the years closer to the law's enactment in 1996.

- Second, when private sector online services remove or disable access to users' content from their websites, they do not violate the First Amendment free speech rights of the sites' users. The First Amendment prevents the government from censoring speech, not private actors.

- Third, the First Amendment does not compel Congress to grant or maintain immunity from civil liability to online services for actions that censor or stifle the speech of users of their websites. Like publishers or purveyors of print or other media, the online services remain perfectly free, absent a grant of immunity, to exercise their First Amendment rights to moderate content.

- Fourth, to the extent online services moderate and remove or disable access to user content, it is reasonable that such services specify their policies and practices for content moderation with some particularity in transparent publicly-promulgated terms of service and consistently follow them in order to show "good faith" and receive immunity from civil liability under Section 230. The Federal Trade Commission, pursuant to its consumer protection authority, may consider complaints that such terms of service have been violated – including complaints that may implicate Section 230 immunity – and may consider whether to impose sanctions for such violations.

While these propositions were offered in the context of commenting on the Department of Justice's report[2] recommending revisions to Section 230 for Congress's consideration, they are relevant to the Commission's consideration of NTIA's petition.

Section 230(c)(1) of the Communications Decency Act provides immunity from civil liability to "interactive computer services" for third-party content posted on their websites. Section 230(c)(2) provides immunity, subject to certain limitations, for a provider's actions "taken in good faith" to restrict access to material that the provider considers to be "obscene, lewd, lascivious, filthy, excessively, violent, harassing, or otherwise objectionable."[3] These two immunity provisions, particularly for major online

[2] Department of Justice, "Section 230 – Nurturing Innovation or Fostering Unaccountability?", June 2020, available at: https://www.justice.gov/file/1286331/download.
[3] 47 U.S.C. §§ 201(c) (1) and (2).

services such as Facebook, Twitter, and YouTube, have been the subject of increasing attention and public debate. In our view, there is evidence that major online services, intentionally or not, have acted in ways that are inconsistent with their terms of service, including with respect to their content moderation policies. For example, there are widespread claims that online content services moderate, restrict, or remove content in a way that is biased against "conservative" speech in ways that may contravene their terms of service.

The Department of Justice has recommended that Congress consider revisions to Section 230.[4] And NTIA has now petitioned the Commission to clarify the meaning of Section 230's provisions.[5] Given the publicly expressed concerns of the DOJ and NTIA regarding how Section 230 is sometimes understood and applied in today's Internet ecosystem, there is no good reason to view the statute as somehow off-limits to review by the FCC.

Importantly, the Commission almost certainly has authority to address the meaning of statutory terms, including Section 230. Although providers of "interactive computer services" are not Title II providers of "telecommunications," Section 230 is part of the Communications Act of 1934, as amended. And the Commission has authority pursuant to Section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out this chapter."[6]

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[4] Department of Justice, "Section 230 – Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations" (June 2020), at: https://www.justice.gov/file/1286331/download.
[5] See NTIA, Section 230 of the Communications Act of 1934, RM-11862, Petition for Rulemaking (filed July 27, 2020), at: https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.
[6] 47 U.S.C. § 201(b).

"Interactive computer services" are "information services" under Title I of the Communications Act.[7] Although the Commission's authority to regulate these online service providers is highly circumscribed, this does not necessarily mean that the agency lacks authority to issue rulings that interpret the meaning and application of Section 230's terms with greater particularity.

For example, NTIA's petition requests that the Commission adopt rules clarifying the relationship between Section 230(c)(1) and (c)(2), the meaning of "good faith" and "otherwise objectionable" in Section 230(c)(2), how the meaning of "interactive computer service" in Section 230(f)(2) should be read into Section 230(c)(1), and the meaning of "treated as a publisher or speaker" in Section 230(c)(1).[8] If the Commission decides to do so, those interpretations could provide guidance for courts when considering Section 230 immunity claims in individual cases. That guidance might aid in preventing Section 230(c)(1) and Section 230(c)(2) from being read as coextensive – thereby rendering Section 230(c)(2) as superfluous.

It is difficult to understand how Commission action engaging in such clarification and interpretation – as opposed to its issuing orders or regulations actually restricting, or purporting to restrict, any content providers' speech – violates any entities' First Amendment rights, as some claim, again, often in apoplectic terms. Especially today, in an era of speech codes, trigger warnings, cancel culture, and outright calls for censorship of speech some may disfavor, First Amendment protections, properly understood, are more important than ever. We are staunch defenders of First Amendment rights, but we fear that "crying First Amendment wolves," by throwing up First Amendment strawmen,

[7] See 47 U.S.C. § 230(f)(2), 47 U.S.C. § 153(24).
[8] See NTIA, RM-11862, Petition for Rulemaking, at 5-6.

will actually diminish a proper understanding of the First Amendment's free speech guarantee, to the detriment of all. Ultimately, the courts will have the final say as to Section 230's meaning, and that is the way it should be.

Consideration by the Commission as to whether adoption of transparency rules that further specify the content moderation practices of web sites, including those of the dominant providers such as Twitter, Google, Facebook, and the like, is also not improper. Within proper bounds, such transparency rules are a means to increase accountability to the public as well as to assist the courts (and the FTC as well) in determining whether online content providers meet the eligibility requirements for immunity from civil liability under Section 230.

Also, requiring providers of interactive computer services to adhere to transparency rules is in keeping with a light-touch regulatory approach to Title I information services. NTIA's assertion that the Commission's authority for transparency rules is grounded in Sections 163 and 257 of the Communications Act appears reasonable, particularly in light of the D.C. Circuit's decision in *Mozilla v. FCC* (2019) to uphold the Commission's authority under Section 257 to adopt transparency regulations in the *Restoring Internet Freedom Order* (2018).[9]

While these comments do not take any position as to whether the Commission should adopt the particular transparency rule requested in NTIA's petition, the rule requested by NTIA appears to be consonant with the four fundamental propositions identified above in the bullet points. Such a transparency requirement relating to the posting of content moderation terms would not restrict the editorial discretion of online

[9] See Mozilla Corp. v. FCC, 940 F.3d 1, 46-49 (D.C. Cir. 2019); Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report, and Order (2017), at ¶ 232.

content providers like Google, Facebook, or Twitter to moderate user content on their websites but rather provide a basis for making those providers more accountable with respect to compliance with their posted terms of service.

The Commission should consider NTIA's petition regarding Section 230 and act in accordance with the views expressed herein.

Respectfully submitted,

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