

**Before the
Federal Communications Commission
Washington, DC 20554**

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



**COMMENTS OF CONSUMER REPORTS
RE: THE NATIONAL TELECOMMUNICATIONS AND INFORMATION
ADMINISTRATION'S PETITION FOR RULEMAKING**

September 2, 2020

Consumer Reports (CR) is an independent, nonprofit member organization that works side by side with consumers for truth, transparency, and fairness in the marketplace. In defense of those principles, CR strongly encourages the Federal Communications Commission (FCC) to reject the National Telecommunications and Information Administration’s (NTIA) petition for rulemaking¹ submitted to the FCC on July 27, 2020 regarding Section 230 of the Communications Decency Act of 1996 (Section 230).²

Neither the NTIA nor the FCC have the legal authority to act on these issues. Moreover, platforms should be encouraged to exercise more moderation of their platforms to remediate fraud, harassment, misinformation, and other illegal activity; the policies requested in the NTIA petition for rulemaking would make it more difficult for platforms to police for abuse, resulting in a worse internet ecosystem for consumers.

I. Introduction and Background

On May 26, 2020 the President tweeted two statements about mail-in voting.³ Twitter applied fact-checks—adding constitutionally-protected speech—to those tweets.⁴ Six days later, the President issued the Executive Order on Preventing Online Censorship,⁵ which directed the Secretary of Commerce, by way of the NTIA, to file the Petition which would further encourage an FCC rulemaking to reinterpret Section 230. The regulatory proposals offered to the FCC by the NTIA would introduce contingencies to, and ultimately reduce, the scope of immunities that Section 230 grants to interactive computer services. If enacted, these new measures would expose platforms to significantly more liability than they currently face and could thereby disincentivize content moderation and editorial comment

¹National 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 (“Petition”).

² 47 USC § 230 (*available at*: <https://www.law.cornell.edu/uscode/text/47/230>).

³ Kate Conger and Davy Alba, “Twitter Refutes Inaccuracies in Trump’s Tweets About Mail-In Voting” New York Times (May 26, 2020), <https://www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots.html>.

⁴ *Id.*

⁵ Executive Order on Preventing Online Censorship (May 28, 2020), *available at*: <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>. (“Executive Order”).

expressed by platforms—the very sort of actions taken by Twitter that seem to have spurred the Executive Order in the first place.

Notwithstanding Twitter’s very sporadic fact-checks, online platforms generally fail consumers in the quality of their content moderation. Contrary to the Executive Order’s presumed intent, the law needs to do more, not less, to encourage the transparent remediation of harmful content on internet platforms. Any honest appraisal of the amount of online misinformation in 2020 reveals the failure by platforms to better mitigate the viral spread of lies, dangerous conspiracy theories, scams, counterfeit goods, and other falsehoods.⁶

To adequately protect and empower consumers, existing platforms should make efforts to strengthen and improve moderation capacity, technique, nuance, and quality. However, any government-designed incentives to this end, either through the modification of Section 230 or the enactment of alternative regulatory frameworks to better incentivize thoughtful platform moderation is not the job of the NTIA or the FCC. Moreover, the mere exercise of debating the Petition in this proceeding has the potential to chill free expression online, threaten the open internet, and accelerate a myriad of consumer harms caused by inadequate platform moderation that fails to mitigate harmful content.

⁶ Deepa Seetharaman, “QAnon Booms on Facebook as Conspiracy Group Gains Mainstream Traction” Wall Street Journal (August 13, 2020), <https://www.wsj.com/articles/qanon-booms-on-facebook-as-conspiracy-group-gains-mainstream-traction-11597367457>; *see also* Kaveh Waddell, “Facebook Approved Ads with Coronavirus Misinformation” Consumer Reports (April 7, 2020), <https://www.consumerreports.org/social-media/facebook-approved-ads-with-coronavirus-misinformation/>; Elyse Samuels, “How Misinformation on WhatsApp Led to a Mob Killing in India” Washington Post (February 21, 2020), <https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/>; Ryan Felton, “Why Did It Take a Pandemic for the FDA to Crack Down on a Bogus Bleach ‘Miracle’ Cure?” Consumer Reports (May 14, 2020), <https://www.consumerreports.org/scams-fraud/bogus-bleach-miracle-cure-fda-crackdown-miracle-mineral-solution-genesis-ii-church/>; *and* Ryan Felton, “Beware of Products Touting False Coronavirus Claims” Consumer Reports (March 9, 2020), <https://www.consumerreports.org/coronavirus/beware-of-products-touting-fake-covid-19-coronavirus-claims/>. The article highlighted: “...a spot check by CR uncovered a number of questionable products with claims that they help fight and even prevent COVID-19. A brimmed hat with an ‘anti-COVID-19 all-purpose face protecting shield’ was available for \$40. A ‘COVID-19 protective hat for women’ could be purchased for \$6. And if you happened to search for ‘COVID-19,’ listings for multivitamins and a wide array of e-books on the topic popped up.”

As it stands, the NTIA Petition to the FCC has no basis in legitimate constitutional or agency authority. Therefore, the FCC should reject the Petition in its entirety. The Petition’s very existence stems from an unconstitutional Executive Order and lacks legal authority to be implemented for two reasons. First, NTIA lacks the authority to file such a petition. Second, the FCC possesses no authority to rulemake on this matter, to interpret section 230, or to regulate platforms. Ultimately, the concerns raised regarding Section 230 are appropriately and best addressed by Congress. As discussed at length in CR’s testimony delivered at a House Energy & Commerce hearing earlier this year, and made clear above, we agree that online misinformation is an urgent and crucial issue affecting the online marketplace.⁷ However, to punish those platforms who are attempting to mitigate those harms runs counter to public welfare, common sense, and even the underlying intent and purpose of Section 230 immunity.

II. A Lack of Constitutional and Regulatory Authority

The First Amendment prohibits both retaliatory action by government officials in response to protected speech and the use of government power or authority to chill protected speech.⁸ The Executive Order’s issuance in response to the fact-checks applied to the President’s Twitter account make clear that the attempt to alter Section 230 immunity in ways that will open the platforms up to more liability is a punitive retaliatory action. This act alone offends the sensibilities of the First Amendment.

Furthermore, the issuance of the Executive Order, the NTIA’s subsequent Petition, and even the FCC’s consideration, rather than outright denial of the Petition—are all forms of government action that, taken as a whole, chill constitutionally-protected speech. These efforts represent an executive branch attempt to increase platform content liability because

⁷ Testimony of David Friedman, ““Buyer Beware: Fake and Unsafe Products on Online Marketplaces” House Energy and Commerce Committee Hearing, (March 4, 2020), <https://advocacy.consumerreports.org/wp-content/uploads/2020/03/HHRG-116-IF17-Wstate-FriedmanD-20200304.pdf>.

⁸ For an excellent citation of federal court cases that elaborate upon First Amendment protection against government action that chills free speech, *see* footnotes 5-7 found on page 4 of the Comments of the Center of Democracy and Technology, “Opposing the National Telecommunications and Information Administration’s Petition for Rulemaking”, FCC Docket RM-11862, (August 31, 2020), <https://cdt.org/wp-content/uploads/2020/08/CDT-Opposition-to-NTIA-Petition-on-Section-230.pdf> (“CDT Comments”).

the President disagreed with Twitter’s editorial fact-checks. Not only could Twitter be chilled by this action, platforms considering similar mitigation efforts to curtail and fact-check misinformation on their platforms could also be reluctant to exercise their constitutionally-protected free speech rights.

A. The NTIA Lacks Authority to File the Petition

Even if we could presume the Executive Order is constitutionally sound, it is unclear, at best, whether the NTIA maintains the legal authority to file the Petition. The NTIA filed the Petition to the FCC on the basis of its mandate to, “ensure that the views of the executive branch on telecommunications matters are effectively presented to the [Federal Communications] Commission”⁹ and its authority to, “develop and set forth telecommunications policies pertaining to the Nation’s economic and technological advancement and to the regulation of the telecommunications industry.”¹⁰ However, “telecommunications” refer specifically to the “transmission” of information,¹¹ and the cited authorities do not reference “information” or “information services.”¹² The NTIA’s scope of expertise has been primarily rooted in access to telecommunications services, international telecommunications negotiations, funding research for new technologies and applications, and managing federal agency spectrum use.¹³ Even the agency’s FY 2020 budget proposal reflects these priorities: undeniably centered on infrastructure, the budget explicitly prioritized broadband availability, spectrum management, and advanced communications research—and, even where policy was concerned, focused on cybersecurity, supply-chain security, and 5G.¹⁴

⁹ 47 U.S.C. § 902(b)(2)(J).

¹⁰ 47 U.S.C. § 902(b)(2)(I).

¹¹ 47 USC § 153(50).

¹² 47 U.S.C. § 902(b)(2).

¹³ U.S. Congressional Research Service, *The National Telecommunications and Information Administration (NTIA): An Overview of Programs and Funding*, R43866 (May 19, 2017), <https://crsreports.congress.gov/product/pdf/R/R43866>.

¹⁴ U.S. Department of Commerce, *National Telecommunications and Information Administration FY 2020 Budget as Presented to Congress*, (March 2019), https://www.ntia.doc.gov/files/ntia/publications/fy2020_ntia_congressional_budget_justification.pdf.

Section 230 of the Communications Decency Act, however, concerns the information itself—the content—as published on the internet and moderated by platforms, rather than the technical infrastructure over which that content is passed. Said another way, the NTIA mission centers upon the systems that power technology, not the creative cargo that travels on top of it. Therefore, dabbling with regulations concerning content moderation and liability are well outside the expertise of the NTIA. Perhaps most tellingly, the NTIA has never before seen fit to comment on Section 230—despite nearly a quarter century of vigorous debate since its passage in 1996.¹⁵

B. The FCC Lacks Authority To Rulemake on Section 230 and Lacks Jurisdiction Over Platforms in Question

The type of rules sought by the NTIA at the President’s behest are also outside the scope of the Federal Communications Commission’s authority.¹⁶ First and foremost, there is no mention of the FCC in Section 230.¹⁷ As such, there is no grant of Congressional authority for the Commission to promulgate the rules envisioned by the NTIA’s Petition. Try as it might, the Petition cannot by fiat create FCC authority to act where no such power exists with respect to Section 230. The simple reality is that Section 230 is a self-executing statute enforced by the courts, and not the FCC.

If the FCC were to agree with and act pursuant to the NTIA’s Petition, it would run contrary to the Commission’s citation to Section 230 as a reason for liberating internet service providers (ISPs) from internet regulation in the name of preserving an open internet in 2017.¹⁸ Furthermore, the *Restoring Internet Freedom Order (RIFO)* also reclassified ISPs

¹⁵ Vimeo, Inc. “Petition Of Vimeo, Inc. To Dismiss The National Telecommunications And Information Administration’s Petition For Rulemaking,” FCC Docket RM-11862, p. 3, (August 4, 2020), [https://ecfsapi.fcc.gov/file/1080410753378/\(as%20filed\)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf](https://ecfsapi.fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf).

¹⁶ For a fuller discussion of the FCC’s lack of authority regarding Sec. 230, 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/>.

¹⁷ CDT Comments, p. 6.

¹⁸ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4467 (2017).

as “information” services rather than “telecommunications” services¹⁹ (CR has strongly argued that ISPs plainly are the latter)—but the NTIA’s justification for FCC jurisdiction relies upon the Commission’s ability to regulate telecommunications services as common carriers. If an ISP like Comcast or AT&T no longer qualifies as a telecommunications service, then neither, surely, does an edge provider or social media network like Twitter or Google.²⁰

Even before *RIFO* was adopted in 2017, the Commission lacked authority to promulgate rules interpreting Section 230. Nearly three years later, the effect of that order further cements the FCC’s lack of power to do anything that the NTIA asks of it regarding Section 230. To do otherwise could represent the sort of internet regulation that the Commission feared when it repealed its own net neutrality rules, and would constitute an about-face with respect to FCC authority over the internet ecosystem.

III. Limits on Content Moderation Under Existing Law and the Need for Stronger—Not Weaker—Incentives for Platform Responsibility

While Section 230 broadly immunizes internet platforms for curation and moderation decisions, it is important to note that there are existing legal constraints on platform behavior. If a platform editorializes about someone else’s content—as Twitter did when it fact-checked the President’s tweet regarding mail-in voting—the platform itself is responsible for that speech. In that case, it may be held liable for its own defamatory content, though American libel laws are famously narrow to accord with our free speech values.²¹ If a platform suborns or induces another to behave illegally, it may bear responsibility for its own role in encouraging such behavior.²² Further, if a platform mislabels or misidentifies another’s

¹⁹ Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order (hereinafter, “RIF Order”), 33 FCC Red 311 (2018).

²⁰ CDT Comments, p. 6.

²¹ Ari Shapiro, “On Libel And The Law, U.S. And U.K. Go Separate Ways” NPR (March 21, 2015), <https://www.npr.org/sections/parallels/2015/03/21/394273902/on-libel-and-the-law-u-s-and-u-k-go-separate-ways>.

²² See *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th. Cir. 2008).

content for commercial advantage, it may violate Section 5 of the Federal Trade Commission (FTC) Act’s prohibition on deceptive or unfair business practices.²³

Indeed, Section 5 may affirmatively *require* some degree of content moderation to protect platform users from harmful content. For at least fifteen years, the FTC has interpreted its Section 5 unfairness authority to require companies to use reasonable data security to prevent third-party abuse of their networks. In a number of other contexts, too, the FTC has interpreted Section 5 to require policing of others’ actions: Neovi and LeadClick are just two examples of the FTC holding platforms liable for third-party abuses.²⁴ Given the vital role that large online platforms play in the modern economy, these companies should have an even greater responsibility to curate and remediate harmful content—even and especially where they have historically done a poor job of addressing such issues.²⁵

In many cases, platforms today have material disincentives to moderate deceptive and harmful activity: fake reviews, views, accounts, and other social engagement artificially amplify the metrics by which they are judged by users and investors.²⁶ Perhaps, in part, it is for this reason that social media sorting algorithms tend to prioritize posts that receive more engagement from users with higher followers—providing further incentives for marketers to use deceptive tactics to augment those numbers.

²³ See Lesley Fair, “A Date With Deception? FTC Sues Match.com For Misleading And Unfair Practices” Federal Trade Commission (September 25, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/09/date-deception-ftc-sues-matchcom-misleading-unfair-practices>.

²⁴ See Footnote 6. See also Press Release, “FTC Action Results in Contempt Order Against Online Check Writing Marketers”, Fed. Trade Comm’n (Jul. 27, 2012), <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-action-results-contempt-order-against-online-check-writing>; Press Release, “U.S. Circuit Court Finds Operator of Affiliate Marketing Network Responsible for Deceptive Third-Party Claims Made for Lean-Spa Weight-Loss Supplement” Fed. Trade Comm’n (Oct. 4, 2016), <https://www.ftc.gov/news-events/press-releases/2016/10/us-circuit-court-finds-operator-affiliate-marketing-network>.

²⁵ Alexandra Berzon, Shane Shifflett and Justin Scheck, “Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products” Wall Street Journal (August 23, 2019), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>; see also Olivia Solon, “Facebook Management Ignored Internal Research Showing Racial Bias, Employees Say” NBC News (July 23, 2020), <https://www.nbcnews.com/tech/tech-news/facebook-management-ignored-internal-research-showing-racial-bias-current-former-n1234746> <https://www.nytimes.com/2019/11/28/business/online-reviews-fake.html>.

²⁶ Nicholas Confessore et al., “The Follower Factory” New York Times (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.

Policymakers should explore solutions that incentivize remediating the worst sorts of harms that platforms currently enable. As currently written and interpreted, Section 230's "Good Samaritan" provision *allows* for good faith moderation, but it does *not* encourage it. Setting aside its lack of legal basis, this Petition wrongly urges the FCC to go in the opposite direction, and could further discourage platforms from taking responsibility for the potential harm that misinformation facilitates. If somehow the NTIA's proposed framework were enacted by the Commission, it would make it considerably more risky and costly for platforms to act on behalf of their users to address illegitimate third-party behavior. Such a policy would exacerbate the many ills caused by online misinformation, and we fear would lead to more, not less, consumer harm.

IV. Conclusion

Ultimately, the power to substantively re-clarify, expand or narrow protections, or otherwise functionally modify Section 230 immunity belongs with our elected representatives in Congress, and even then, should be undertaken with great caution. Subsection (c)(1) of Section 230 has been referred to as "the twenty-six words that created the internet."²⁷ This statute simultaneously allows smaller online platforms and edge providers to compete by shielding them from ruinous litigation, and allows all platforms to moderate harmful content in accordance with their own terms of use without being deterred by liability for every piece of user-generated content on the platform.

Nevertheless, Congress can and should strengthen the incentives for platforms to carefully moderate harmful or false content on their sites and networks. Lawmakers should also hold platforms responsible, commensurate with their power and resources, for protecting consumers from content that causes demonstrable harm. This is no easy task. Any alteration of Section 230 that risks or reduces the incentive to fact-check or mitigate the damage caused

²⁷ See Jeff Kossseff "The Twenty-Six Words That Created the Internet" Cornell University Press; 1st Edition (April 15, 2019).

by misinformation would be irresponsible legislation with the unintended consequence of increasing, not decreasing, online misinformation.

Consumer access to accurate information is crucial to a safe, fair marketplace, particularly in the midst of a global pandemic and an election cycle fraught with misinformation that leads to real consequences. Yet the authority to weigh these costs and rewrite Section 230 of the Communications Decency Act lies exclusively with Congress. The FCC has no legal authority to do so and the NTIA further lacks the legal authority to file the Petition as directed by the President's Executive Order. For these reasons, the Commission should reject the NTIA Petition in its entirety.

Respectfully submitted,

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