Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
Section 230 of the Communications Act Of 1934	)	Docket No. RM-11862

COMMENT OF THE COPIA INSTITUTE OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

I. Preliminary Statement

The NTIA petition must be **rejected**. The rulemaking it demands represents an unconstitutional power grab not authorized by any statute. It also represents bad policy. The petition is rife with misstatements and misapprehensions about how Section 230 operates and has been interpreted over the years. The most egregious is at page 14 of the petition:

"[L]iability shields can deter entrance."

Not only is that statement utterly incorrect, but if any of the recommendations NTIA makes were to somehow take on the force of law, it is these changes themselves that would be catastrophic to new entrants. Far from vindicating competitive interests, what NTIA proposes would be destructive to them, as well as the First Amendment interests of Internet users and platforms. Every policy value NTIA suggests it cares about in its petition, including speech and competition, would be hurt by giving any of its language suggestions the force of law. In this comment the Copia Institute explains why.

II. About the Copia Institute

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com, an online publication that has chronicled technology law and policy for more than 20 years. These efforts are animated by the belief in the importance of promoting innovation and expression and aimed at educating lawmakers, courts, and other regulators, as well as innovators, entrepreneurs, and the public, on the policy choices needed to achieve these values. The Copia Institute regularly files regulatory comments, amicus briefs, and other advocacy instruments on subjects ranging from freedom of expression, platform liability, patents, copyright, trademark, privacy, innovation policy and more, while Techdirt has published more than 70,000 posts commenting on these subjects. The site regularly receives more than a million page views per month, and its posts have also attracted more than a million reader comments—itself user-generated speech that advances discovery and discussion around these topics. Techdirt depends on Section 230 to both enable the robust public discourse found on its website and for its own speech to be shared and read throughout the Internet.[1]

III. Argument

A. FCC action to codify amendments to statutory language are unconstitutional.

The Constitution vests the power to legislate with Congress.[2] Consistent with that authority Congress passed Section 230. That statutory language has been in force for more than 20 years. Even if it were no longer suited to achieve Congress's intended policy goals,[3] or even if those policy goals no longer suited the nation,[4] it is up to Congress, and only

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[1] See Comment of Michael Masnick, founder and editor of Techdirt for further insight in how Section 230 makes his small business possible.

[2] U.S. Const. art. 1, § 1.

[3] As this comment explains, *infra*, the original language is well-suited to meeting its objectives, and to the extent that any improvements might be warranted to better achieve those policy goals, none of the language proposed by the NTIA would constitute an effective improvement. Rather, it would all exacerbate the problems the NTIA complains of.

[4] Even the NTIA concedes that free speech and competition that Congress hoped to foster when it passed Section 230 remain desirable policy goals. *See, e.g.*, NTIA Petition at 6.

Congress, to change that statutory language to better vindicate this or any other policy value.

The United States Supreme Court recently drove home the supremacy of Congress's legislative role. In *Bostock v. Clayton County, Ga.* the Supreme Court made clear that courts do not get to rewrite the statute to infer the presence of additional language Congress did not include.[5] This rule holds even when it might lead to results that were not necessarily foreseen at the time the legislation was passed.[6] Courts do not get to second guess what Congress might have meant just because it may be applying that statutory text many years later, even after the world has changed. Of course the world changes, and Congress knows it will when it passes its legislation. If in the future Congress thinks that a law hasn't scaled to changed circumstances it can change that law. But, per the Supreme Court, courts don't get to make that change for Congress. The statute means what it says, and courts are obligated to enforce it the way Congress wrote it, regardless of whether they like the result.[7]

While the *Bostock* decision does not explicitly spell out that agencies are prohibited from making changes to legislation, the Constitution is clear that legislating is the domain of Congress. If Article III courts, who are charged with statutory interpretation,[8] do not get to read new language into a statute, there is even less reason to believe that Article II Executive Branch agencies get to either.

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[5] *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1754 (2020) ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.").

[6] *Id.* at 1737 ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[7] *Id.* at 1753 ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.").

[8] *Marbury v. Madison*, 5 U.S. 137 (1803).

But that is what NTIA is attempting to do with its petition to the FCC: usurp Congress's power to legislate by having the FCC overwrite the original language Congress put into the statute with its own and give this alternative language the force of law. Even if Congress had made a grievous error with its statutory language choices back in 1996 when it originally passed the law, even if it had been bad policy, or even if it was language that failed to achieve Congress's intended policy, it is not up to the FCC or any other agency to fix it for Congress. Even if Congress's chosen language simply no longer meets its intended policy goals today, or the policy goals have evolved, it is still not up to any agency to change it.

If the statute is to change, it is Congress's job to make that policy decision and implement the appropriate language that will achieve it. It is not the job of the FCC, NTIA, or any other member of the Executive Branch[9] to claim for itself the power to legislate, no matter how well-intentioned or how much better its language or policy choices might be.

But, as explained further below, these recommendations are not better. The petition is rife with inaccuracies, misunderstandings, and contradictory policy goals. Under the best of circumstances the FCC should not speak here. And these are hardly the best.

Congress's legislative goal to foster online speech and innovation with Section 230 was a good one. Furthermore, the language it chose to implement this policy was well-suited to meet it then, and it remains well-suited to meet it now. Allowing the Executive Branch to overwrite this chosen language with the alternate language it proposes would turn the statute into an entirely different law advancing entirely different policy goals than Congress intended when it passed Section 230 in order to ensure that the Internet could continue to grow to be vibrant and competitive. And it would do it at their expense.

The NTIA petition must therefore be **rejected**.

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[9] *See* Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020).

B. The NTIA's recommendation for language changes to Section 230 are misguided and counter-productive.

The NTIA's petition is full of mistakes and misunderstandings about Section 230, its operation, its intended policy goals, and how courts have interpreted it over the past two decades. But none are as profoundly misguided as the statement that "liability shields can deter [market] entrance." In reality, the exact opposite is true.

Liability shields are critical to enabling new market entrants. Without them the barriers to entry for new Internet platforms and services can be insurmountable. If Internet platforms and services could be held liable for their users' activity, as soon as they took on users, they would also take on potentially crippling liability. Even if ultimately there is nothing legally wrong with their users' activity, or even if they would not ultimately be found liable for it, the damage will have already been done just by having to take on the defense costs.

What is critically important for policymakers to understand is that liability shields are about more than ultimate liability. Litigation in the United States is cripplingly expensive. Even simply having a lawyer respond to a demand letter can cost four figures, answering complaints five figures, and full-blown litigation can easily cost well into the six or even seven figures.[10] And those numbers presume a successful defense. Multiply this financial risk by the number of users, and scale it to the volume of user-generated content they create, and the amount of financial risk a new platform would face is staggering. Few could ever afford to enter the market, assuming they could even get capitalized in the first place. Needed investment would be deterred, because instead of underwriting platforms' future success, investors' cash would be more likely spent underwriting legal costs.

We know this market-obliviating risk is not hypothetical because we can see what happens in the fortunately still-few areas where Section 230 is not available for Internet

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[10] *See* Engine, Section 230 Cost Report (last accessed Sept. 2, 2020), http://www.engine.is/s/Section-230-cost-study.pdf.

platforms and services. For instance, if the thing allegedly wrong with user-supplied content is that it infringes an intellectual property right, Section 230 is not available to protect the platform.[11] In the case of potential copyright infringement, the Digital Millennium Copyright Act provides some protection,[12] but that protection is much more limited and conditional. Lawsuits naming the platforms as defendants can rapidly deplete the them and drive them to bankruptcy, even when they might ultimately not be held liable.

A salient example of this ruinous reality arose in *UMG v. Shelter Capital*.[13] In this case UMG sued Veoh Networks, a video-hosting platform similar to YouTube, for copyright infringement. Eventually Veoh Networks was found not to be liable, but not before the company had been bankrupted and the public lost a market competitor to YouTube.[14] Indeed, as that case also demonstrates, sometimes driving out a competitor may itself be the goal of the litigation.[15] Litigation is so costly that lawsuits are often battles of attrition rather than merit. The point of Section 230 is to protect platforms from being obliterated by litigiousness. It is likely a policy failure that Section 230 does not cover allegations of intellectual property infringement because it has led to this sort of market harm. But in its recommendations the NTIA does not suggest plugging this hole in its coverage. Instead it demands that the FCC make more.

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[11] 47 U.S.C. § 230(e)(2).
[12] *See* 17 U.S.C. § 512.
[13] *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006 (9th Cir. 2013).
[14] Peter Kafka, Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/ (describing how the startup platform in UMG v. Shelter Capital, supra, could not get funding and thus went out of business while it was litigating the lawsuit it later won).
[15] *See, e.g.*, Dmitry Shapiro, UNCENSORED – A personal experience with DMCA, The World Wide Water Cooler (Jan. 18, 2012), available at https://web.archive.org/web/20120119032819/http://minglewing.com/w/sopapipa/4f15f882e2c68903d2000004/uncensored-a-personal-experience-with-dmca-umg ("UMG scoffed at their responsibilities to notify us of infringement and refused to send us a single DMCA take down notice. They believed that the DMCA didn't apply. They were not interested in making sure their content was taken down, but rather that Veoh was taken down! As you can imagine the lawsuit dramatically impacted our ability to operate the company. The financial drain of millions of dollars going to litigation took away our power to compete, countless hours of executive's time was spent in dealing with various responsibilities of litigation, and employee morale was deeply impacted with a constant threat of shutdown.").

If we are unhappy that today there are not enough alternatives to YouTube we only have ourselves to blame by having not adequately protected its potential competitors so that there today could now be more of them. Limiting Section 230's protection is certainly not something we should be doing more of if we actually wish to foster these choices. The more Section 230 becomes limited or conditional in its coverage, the more these choices are reduced as fewer platforms are available to enable user activity.

This point was driven home recently when Congress amended Section 230 with FOSTA.[16] By making Section 230's critical statutory protection more limited and conditional, it made it unsafe for many platforms that hoped to continue to exist to remain available to facilitate even lawful user expression.[17]

We cannot and should not invite more of these sorts of harms that reduce the ability for Americans to engage online. Therefore we cannot and should not further limit Section 230. But this limitation is exactly what the NTIA calls for in its petition with each of its proposed language changes. And thus this depletion of online resources is exactly what will result if any of this proposed language is given effect. The NTIA is correct that there should be plenty of forums available for online activity. But the only way to achieve that end is to **reject** every one of the textual changes it proposes for Section 230.

C. The NTIA's recommendation for language changes to Section 230 are misguided and counter-productive.

In its petition the NTIA alleges that changes are needed to Section 230 to vindicate First Amendment values. In reality, the exact opposite is true. Not only would the changes proposed by the NTIA limit the number of platforms available to facilitate user expression,[18] and their ability to facilitate lawful speech,[19] but its animus toward existing

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[16] Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA").
[17] Craigslist notably turned off its online personals section in response to FOSTA. See https://www.craigslist.org/about/FOSTA. It also prohibited the advertisements of lawful services. *Woodhull Freedom Foundation v. U.S.*, 948 F. 3d 363, 374 (D.C. Cir. 2020) (finding that a masseuse who could no longer advertise on Craigslist had standing to challenge FOSTA).
[18] See discussion *supra* Section III.B.
[19] *Id.*

platforms' moderation practices ignores their First Amendment rights to exercise that editorial discretion. The changes the NTIA proposes, purposefully designed to limit that editorial discretion, would thus unconstitutionally offend these rights if put into effect.

An initial failing here is a lack of understanding of what Section 230 protects. It is not just the large, commercial platforms the NTIA takes issue with; Section 230 protects everyone, including ordinary Internet users.[20] Because it is not just large commercial platforms that intermediate third-party content; individual people can too, and Section 230 is just as much about insulating them as it does the larger platforms.[21]

For example, individuals with Facebook posts may allow comments on their posts. If one of those comments happens to be wrongful in some way, the Facebook user with the parent post is not liable for that wrongfulness. Section 230 makes clear that whoever imbued the content with its wrongful quality is responsible for it, but not whoever provided the forum for that content.[22] It isn't just Facebook that offered the forum for the content; so did the Facebook user who provided the parent post, and both are equally protected.

It's easy to see, however, that a Facebook user who allows comments on their post should not be obligated to keep a comment that they find distasteful, or be forced to delete a comment they enjoy. The First Amendment protects those decisions.

It also protects those decisions even if, instead of Facebook, it was the person's blog where others could comment, or an online message board they host. The First Amendment would protect those decisions even if the message board host monetized this user activity, such as with ads. And it would protect those decisions if the message board host ran it with their friend, perhaps even as an corporation. That editorial discretion would remain.[23]

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[20] *See, e.g.*, *Barrett v. Rosenthal*, 146 P. 3d 510 (Cal. 2006).

[21] Section 230 also protects online publications, including newspapers, that accept user comments. Were the FCC to take upon itself the authority to change Section 230, it would inherently change it for media that has never been part of its regulatory purview, including traditional press.

[22] *See, e.g.*, *Force v. Facebook, Inc.*, 934 F. 3d 53 (2d. Cir. 2019).

[23] Requiring "transparency" into these editorial decisions also itself attacks this discretion. The NTIA's proposal to require "transparency" into these editorial decisions also itself attacks this discretion. True discretion includes the ability to be arbitrary, but having to document these decisions both chills them and raises issues of compelled speech, which is itself constitutionally dubious.

The changes the NTIA proposes are predicated on the unconstitutional notion that there is some size a platform or company could reach that warrants it to be stripped of its discretion. There is not, and NTIA suggests no Constitutional basis for why companies of a certain size should be allowed to have their First Amendment rights taken from them. Even if there were some basis in competition law that could justify different treatment of some platforms, simply being large, successful, and popular does not make a business anti-competitive. Yet the NTIA offers no other principled rationale for targeting them, while also proposing changes to the functioning language of Section 230 that will hit far more platforms than just the large ones that are the targets of the NTIA's ire.

Indeed, as long as new platforms can continue to be launched to facilitate user expression, stripping any of their editorial discretion is insupportable. The "irony" is that these attempts to strip these platforms of their Section 230 protection and editorial discretion are what jeopardizes the ability to get new platforms and risks entrenching the large incumbents further. The NTIA is correct to want to encourage greater platform competition. But the only way to do that is to ensure that platforms retain the rights and protections they have enjoyed to date. It is when we meddle with them that we doom ourselves to the exact situation we are trying to avoid.

IV. Conclusion

For the forgoing reasons, the NTIA petition must be **rejected**.

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Respectfully submitted,

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