

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

In the Matter of)	
)	
National Telecommunications and Information Administration)	RM - 11862
)	
Petition for Rulemaking to Clarify provisions of Section 230 Of the Communications Act of 1934)	

REPLY COMMENTS OF TECHFREEDOM



110 Maryland Ave NE
Suite #205
Washington, DC 20002

Dated: September 17, 2020

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COMMENTS OF TECHFREEDOM: EXECUTIVE SUMMARY

The initial comments filed in this docket underscore the fundamental flaws in NTIA’s Petition. To start, the FCC has no authority to implement the Petition. No commenter supporting the Petition did anything to substantiate NTIA’s claims of authority beyond merely repeating them. In particular, none explained how the FCC can apply Section 201(b) to make rules governing *non-common carrier* services such as social media when the text of 201(b) clearly applies only to common carriers. Indeed, the debate that has raged since 2010 over reclassifying Broadband Internet Access Service as a common carrier service is most fundamentally about whether BIAS should be reclassified so that the FCC could invoke Section 201(b). It would appear either that no one at NTIA were aware of this debate, or of consistent Republican opposition at the FCC and in Congress to the FCC’s broad claims of power to regulate Internet services — or that no one cared about the astounding inconsistency of going from “Restoring Internet Freedom” to “Regulating the Internet.”

Multiple commenters support NTIA’s petition on the theory that it will allow state attorneys general, the FTC, or private parties to sue social media providers for breach of

contract or deception under consumer protection law by promising neutrality and failing to deliver. None of these commenters explain how such suits could proceed under contract law or consumer protection law, given that both require specificity in claims far beyond what any social media service promises today, as well as some means of *objectively* verifying the falsity of claims compared to a company’s practices — requirements ultimately grounded in the First Amendment, as we explained in detail in our comments.

Moreover, no commenter has explained the NTIA’s flagrant misrepresentation of what the Supreme Court said in *Packingham*: social media are not public fora, and “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.” Nor did any commenter explain how the NTIA Petition would not violate the unconstitutional conditions doctrine. Only one other commenter even discussed the doctrine in their comments — and they agreed with us: the government may not condition the receipt of a benefit, including legal immunity, on the surrender of First Amendment rights, including the right to decide what third-party content to host.

While some commenters did argue that the FCC should impose disclosure mandates on social media providers modeled on the FCC’s mandates for BIAS, these comparisons are clearly apples and oranges. BIAS providers, by definition, do not exercise editorial discretion over the content received by users — while the entire point of this debate is that social media providers do.

NTIA’s Petition, if granted, would not only violate the First Amendment; it would transform the Internet into something that looks a lot like Gab, the “alternative” “free speech” platform — where racism, antisemitism, and the most vicious kinds of “lawful but awful”

content abounds. FoxNews.com bans “hateful; or discriminatory” comments; *The Daily Caller* bans “racially, ethnically, or otherwise offensive language.” Even *Infowars* bans comments that are “hateful, racially or ethnically objectionable.” *Gateway Pundit* bars users from posting content that is “hateful, racist, or otherwise objectionable.” Evidently, “otherwise objectionable” is an appropriate reservation of editorial discretion for *Gateway Pundit* — why would it be inappropriate for any other website? *Breitbart* claims equivalently vast discretion to remove content, or block users who post it, merely because that content is “inappropriate.”

NTIA would punish all these sites for attempting to disassociate themselves from content they find repugnant. Even Parler, which has rapidly eclipsed Gab, and attracted the participation of leading Republicans and conservative influencers, claims vastly more discretion to remove objectionable content than NTIA would allow — yet, in practice, seems to have removed only just enough of the most extremely “lawful but awful” content to make the site palatable to the major influencers.

Anyone who wants to understand what the Internet would look like if NTIA’s Petition were granted should spend some time using Gab — and then ask themselves whether they really want that to be the *only* option available for themselves and their children. Even a careful look at Parler should make them think twice about whether they want to use Section 230 to prevent websites — *all* websites, not just “Big Tech” — from removing the kind of noxious content that even leading conservative media sites ban in their comment sections.

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TechFreedom, pursuant to Sections 1.4 and 1.405 of the Commission’s rules (47 C.F.R. §§ 1.4 & 1.405), hereby files these Comments in response to the Petition for Rulemaking filed by the National Telecommunications and Information Agency (“NTIA”) on July 27, 2020 (the “NTIA Petition”).¹ In support of these Comments, TechFreedom submits:

I. About TechFreedom

Founded in 2010, TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and

¹ By Public Notice, Report No. 3157, released Aug. 3, 2020, the FCC opened NTIA’s Petition for comment, with comments due by Sept. 2, 2020. These Comments are timely filed. These comments were drafted by Berin Szóka, TechFreedom Senior Fellow, and James Dunstan, TechFreedom General Counsel, with contributions and vital assistance from Ashkhen Kazaryan, TechFreedom’s Director of Civil Liberties and Legal Research Fellow; Andy Jung, Law Clerk, TechFreedom; and, Sara Uhlenbecker, Law Clerk, TechFreedom.

thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.²

II. The FCC Lacks Authority to Implement the NTIA Petition.

While many commenters talk about a perceived need to reign in the immunity granted under Section 230,³ few, if any, provide a cogent basis to conclude that the FCC has the power to implement the NTIA Petition.⁴ While we as a nation can debate the metes and bounds of Section 230, any changes to the statute must be that: changes to the statute *made by Congress*, not an attempt to end-run the legislative function of Congress by miraculously discovering, 25 years after passage, that Congress, apparently in invisible ink, delegated authority to the FCC to “fill in the gaps” of a statute that contains no such gaps.⁵

A. The FCC Cannot Invent Delegated Authority Where It Doesn't Exist.

“In our federal system, the National Government possesses only limited powers[.]”⁶ And within that limited government, federal agencies are even more limited, because they can exercise only those powers that Congress has chosen to further delegate to them. Thus

² More about our past participation in this debate can be found in our comments. TechFreedom, Comments on National Telecommunications and Information Administration Petition for Rulemaking to Clarify provisions of Section 230 Of the Communications Act of 1934 (Sept. 2, 2020), <https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-9.2.2020.pdf>.

³ See, e.g., Comments of DigitalFrontiers Advocacy; Comments of Internet Accountability Project; Comments of Free State Foundation; Comments of Republican State Attorneys General.

⁴ See Petition for Rulemaking of the National Telecommunications and Information Administration, *in re Section 230 of the Communications Act of 1934*, RM-11862 (July 27, 2020) [hereinafter *Petition*], https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

⁵ As we stated in our comments, if Section 230 was so ambiguous, surely one of the thousand-plus judges that have had to rule on cases involving Section 230 would have suggested that the FCC should weigh in on issues surrounding Section 230. See TechFreedom Comments at 8-15.

⁶ *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014).

the FCC, like any other agency, has “literally . . . no power to act . . . unless and until Congress confers power upon it.”⁷ Thus, while courts do preserve agencies’ discretion for the “formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,”⁸ the courts are also obligated to preserve Congress’s constitutional power and duty to define the scope of agency discretion, by “taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority.”⁹

The Supreme Court’s analysis in *Brown & Williamson* warns against an agency suddenly discovering immense, dormant powers in longstanding statutes.¹⁰ The Court began by observing, in reviewing an agency’s attempt to expand dramatically its powers under a 1938 statute, that “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude.”¹¹ The Court analyzed the relevant statutory language not in isolation, but in light of the “overall statutory scheme,”¹² and in light of Congress’s longstanding legislative approach to the matter at hand (namely, tobacco).¹³ Furthermore, the policy matter at hand demanded judicial skepticism when an agency began “assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy,”¹⁴ and one with a “unique place in American history and society,”¹⁵ but without anchoring its regulatory

⁷ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

⁸ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

⁹ *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

¹⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120 (2000).

¹¹ *Id.* at 133.

¹² *Id.*

¹³ *Id.* at 143.

¹⁴ *Id.* at 159.

¹⁵ *Id.*

program in clear congressional authorization to regulate that industry. “[W]e are confident,” the Supreme Court concluded, “that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁶

As our comments explain, however, there are no mouseholes here. Congress did not secretly hide delegated authority in some time vault, to open automatically 25 years later when it became politically expedient.¹⁷ Congress was adamant that it did not wish to turn the Federal Communications Commission into the Federal **Computer** Commission.¹⁸ Section 230 was always intended as a stand-alone provision, to be applied and interpreted by courts in private litigation, as has been the case since 1996.

¹⁶ *Id.* at 160; *see also MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”). Other courts have applied similar scrutiny to agency assertions of broad new powers. In *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the Court rebuffed the FTC’s “attempted turf expansion” over the legal industry, which the agency had attempted to justify by reference to a broad statute empowering the agency to regulate institutions that “engag[ed] in financial activities.” *Id.* at 467. Even if the statute were ambiguous, the Court explained, “[w]hen we examine a scheme of the length, detail, and intricacy of the one before us, we find it difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by ‘federal functional regulators’— and never mentioned in the statute.” *Id.* at 469. Similarly, when the D.C. Circuit rejected the IRS’s assertion of authority over tax-preparers, the Court characterized it as a decision “of major economic or political significance,” because the agency “would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion-dollar tax preparation industry.” *Loving v. United States*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). The Court’s skepticism was reinforced by the agency’s belated assertion of regulatory power under its longstanding statute: “we find it rather telling,” the Court observed, “that the IRS had never before maintained that it possessed this authority.” *Id.*; *see also UARG*, 134 S. Ct. at 2444 (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” (citation omitted)).

¹⁷ *See* TechFreedom Comments at 4-8.

¹⁸ *Id.* at 6 *citing* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

B. Section 201(b) Does Not Contain Delegated Authority for the FCC To Interpret Section 230.

A number of commenters supportive of NTIA's petition allude to Section 201(b) providing authority to the FCC, with little more than a citation to the NTIA Petition itself¹⁹ — which, in turn, does little more than cite to *City of Arlington v. FCC*.²⁰ As we demonstrated in our comments, however, Section 201(b) does not provide the FCC with a blank check to regulate all aspects of any activity that even peripherally touches the communications networks of this country.²¹ By its own terms, Section 201(b) provides delegated authority to the FCC only to regulate “common carriers” and to ensure that their “charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable.”²²

Thus, when the Supreme Court declared, in *City of Arlington*, that “Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication,”²³ it was referring to the FCC's power *over common carriers*, which were the (only) subject of the FCC order at issue in that case.²⁴ It is not an

¹⁹ See, e.g., Comments of DigitalFrontiers Advocacy at 14; Comments of Internet Accountability Project at 2; Comments of Free State Foundation at 2. See *Petition*, *supra* note 4.

²⁰ *Petition*, *supra* note 4, at 16-17.

²¹ TechFreedom Comments at 15-18.

²² 47 U.S.C. § 201(b).

²³ *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

²⁴ The FCC order at issue in *City of Arlington* applied to “personal wireless services,” defined as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services” by 47 U.S.C. § 332(c)(7)(C)(i); see also FCC, Declaratory Ruling In the Matter of Clarifying Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance (Nov. 18, 2009) at 35, <https://ecfsapi.fcc.gov/file/7020912340.pdf>. First, “commercial mobile services” are defined as common carriers, 47 U.S.C. § 332(c)(1)(A) (“A person engaged in the provision of a service that is a commercial mobile

accident that the majority in that case used, as an example of a “validly-enacted statute,” the hypothetical “Common Carrier Act.”²⁵ NTIA has not proposed that the FCC make rules specific to common carriers; instead, it has proposed that the FCC make rules over services that the FCC has said are *non*-common carriers. This defect alone, clearly visible on the face of the Petition, should have sufficed for the FCC to ignore this waste of the scarce resources of the FCC, and everyone else who has filed in this legally baseless proceeding.

Finally, we note what Commissioner O’Rielly said in his dissent from the issuance of the 2015 Open Order:

the Commission has enforced statutory provisions even where it has not “give[n] fair notice of conduct that is forbidden or required.” This happened in the *Terracom Notice of Apparent Liability for Forfeiture* where the Commission determined, for the first time—during an enforcement action—that sections 201 and 222 cover data protection. As I explained at length in my dissent, the Commission had never adopted any rules to that effect. To the contrary, prior orders had made clear that the Commission viewed section 222 as being limited to CPNI. Moreover, if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice “in connection with” a communications service. There is no limiting principle.²⁶

So, too, here: there is no limiting principle to the NTIA’s interpretation of Section 201(b). If we allow the FCC to make rules with respect to non-common carrier services, where would the FCC’s power over those services end?

service shall, insofar as such person is so engaged, be treated as a common carrier”). Second, “the term ‘unlicensed wireless service’ means the offering of telecommunications services,” 47 U.S.C. § 332(c)(7)(C)(iii), a term of art that refers to common carrier service under the Act, 47 U.S.C. § 153(51) & (53). The third category is defined as a common carrier service.

²⁵ *City of Arlington* at 298-301.

²⁶ FCC, Dissenting Statement of Commissioner Michael O’Rielly in the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28 (May 15, 2014), <https://docs.fcc.gov/public/attachments/FCC-15-24A6.pdf>.

By reclassifying BIAS as an “information service,” not a “telecommunications service,” under Title II, the 2018 Order specifically rejected the argument that Section 201(b) provides the FCC with broad authority over non-common carrier “information services,” including social media providers:

The Open Internet Order never squares [its] legal theories [on Section 201(b) and Section 251(a)(1) authority] with *the statutory prohibition on treating telecommunications carriers as common carriers when they are not engaged in the provision of telecommunications service or with the similar restriction on common carrier treatment of private mobile services*. That Order also is ambiguous whether it is relying on these provisions for direct or ancillary authority. If claiming direct authority, the Open Internet Order fails to reconcile its theories with relevant precedent and to address key factual questions. Even in the more likely case that these represented theories of ancillary authority, the Open Internet Order’s failure to forthrightly engage with the theories on those terms leaves it unclear how conduct rules are sufficiently “necessary” to the implementation of section 201 and/or section 251(a)(1) to satisfy the standard for ancillary authority under Comcast.²⁷

The same can be said here: neither NTIA nor any commenter have explained how Section 201(b) can be used to regulate social media operators as non-common carriers.

C. The Debate over Title II Was Primarily a Debate over Whether BIAS Should Be Subjected to 201(b), Illustrating That This Provision Does Not Apply to Non-Common Carriers.

In 2010, the FCC first floated the idea of “Title II Lite,” in which the FCC would “treat only the transmission component of broadband access service as a telecommunications service while preserving the longstanding consensus that the FCC should not regulate the Internet, including web-based services and applications, e-commerce sites, and online

²⁷ Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 286 (2018) (emphasis added).

content.”²⁸ This “Third Way” would “[a]pply only a handful of provisions of Title II (Sections 201, 202, 208, 222, 254, and 255)” while forbearing from “many sections of the Communications Act that are unnecessary and inappropriate for broadband access service.”²⁹ This is, in effect, what the FCC ultimately adopted in the 2015 Order. Commissioner Mike O’Rielly objected: “the majority seems to be comfortable with suggesting that they can forbear from parts of Title II because section 201 does it all anyway.”³⁰ In other words, what Republicans objected to at the time was that reclassification of BIAS providers would, for the first time, subject them to the FCC’s broad discretion under 201(b).

It was a mistake for the FCC to open this door with the 2015 Order, and the current leadership of the Commission was right to close that door with the 2018 Order. Inviting the FCC to use Section 201(b) to make rules to govern Internet services would be an even greater mistake. It should be clear to all by now that essentially any regulatory mandate for digital services could be reframed as a condition of Section 230 immunity. If, as NTIA claims, Section 201(b) truly empowered the Commission to regulate “edge” services like social networks, what limiting principle would there be to the FCC’s powers to regulate the Internet?

Fortunately, this is not the case, as we explained in our comments.³¹ The entire point of the debate over reclassification in 2010 and 2014-15 was that Section 201(b) *did not apply to BIAS because it was not classified as a common carrier service*; it was only with reclassification of BIAS that the “vague, broad” powers inherent in Section 201(b) would

²⁸ FCC Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework* at 5 (May 6, 2010), <https://docs.fcc.gov/public/attachments/DOC-297944A1.pdf>.

²⁹ *Id.*

³⁰ Dissenting Statement of Commissioner Michael O’Rielly, *supra* note 26, at 12.

³¹ TechFreedom Comments at 15-18.

apply to BIAS. If, as NTIA and its supporters argue now, Section 201(b) was never limited to common carriers, what was that debate about? Why would BIAS providers have fought Title II reclassification so hard if they were already subject to Section 201(b), despite being non-common carrier providers of information services?

III. Notable Misinterpretations of Section 230 & Other Legal Principles Among Commenters.

Those supporting the NTIA Petition misunderstand both Section 230 and the First Amendment, just as NTIA does. None can explain the NTIA's flagrant misrepresentation of the holding of the *Packingham* decision: the Supreme Court did *not* hold that social media are public fora,³² and has instead made clear that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."³³

A. Republican State AGs Claim Power to Do What the First Amendment Prohibits: Bring Fraud Claims Based on Subjective Questions of How Websites Exercise Editorial Discretion in Content Moderation.

Four Republican state attorneys general filed comments in support of the Petition, arguing, in particular, that it "takes a modest, and appropriate, textualist approach to interpreting section 230(c)(2)'s scope of immunity, limiting it to moderation of 'obscene, violent, or other disturbing matters.'"³⁴ As we explained in our comments, there is nothing "textualist" about the NTIA's proposal, as it simply reads the words "otherwise

³² TechFreedom comments at 27-32.

³³ *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019).

³⁴ Comments of Attorneys General for the States of Texas, Indiana, Louisiana, and Missouri at 2.

objectionable” out of the statute.³⁵ The meaning of those words is plain: they protect the exercise of editorial discretion just as the First Amendment itself does. As the Ninth Circuit has explained:

removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove. ... In other words, the duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because such conduct is publishing conduct that we have insisted that section 230 protects from liability "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online."³⁶

No commenter provides any reason to conclude that Congress intended otherwise when it crafted Subsection 230(c)(1).

The AGs continue to make an argument that vaguely appeals to principles of federalism: “By clearly delineating the separate functions of section 230(c)(1) and 230(c)(2) and cabining the immunity conferred thereunder, the Petition leaves room for states to enforce consumer protection laws when fraudulent conduct occurs.”³⁷ The specific thing the AGs want “room” to do — bring deception claims under their Baby FTC Act and other consumer protection laws — is forbidden to them not by Section 230, but by the First Amendment, as we explained in detail in our comments.³⁸

³⁵ TechFreedom Comments at 92-98..

³⁶ *Barnes v. Yahoo!, Inc.*, 565 F.3d 560 (9th Cir. 2009) (citing *Fair v. Roommates*, 521 F.3d 1157, 1170-71 (9th Cir. 2008)).

³⁷ Comments of Attorneys General for the States of Texas, Indiana, Louisiana, and Missouri at 2.

³⁸ TechFreedom Comments at 25-81.

Leaving such “room” might or might not be a good idea, but it is not what Congress enshrined into law when it wrote Section 230. Paragraph 230(e)(3) make unambiguous Congress’ intention to broadly preempt state law: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”³⁹ This is reinforced by the policy statement found in Paragraph 230(b)(2), that Congress intended “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁴⁰

Strikingly, the State AGs do not mention criminal law at all. Section 230 has never protected ICS providers or users from prosecution under federal criminal law.⁴¹ This exclusion was carefully crafted to ensure that a single body of consistent federal criminal law governs all Internet services, regardless of who applies it. As the Internet remains an inherently interstate medium, the need for consistency remains as great as ever. There is simply no need to authorize new state laws: the U.S. Attorney General already has the power to deputize state, local and tribal prosecutors to enforce Sections 2252 and 2252A,⁴² but has simply chosen not to exercise this power. As far as we know, no state AG has asked the U.S. Attorney General to exercise this power. If the AGs want Congress to authorize states to act without waiting for such deputization, they should lobby lawmakers to directly authorize states to enforce federal criminal law.

³⁹ 47 U.S.C. § 230(e)(3).

⁴⁰ 47 U.S.C. § 230(b)(2).

⁴¹ 47 U.S.C. § 230(e)(1).

⁴² 28 U.S.C. § 543(a) (“The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires”).

B. Enforcement of Contract & Consumer Protection Law.

Profs. Daniel Barnhizer — a former colleague of Adam Candeub, who taught at Michigan State Law School before joining NTIA, where he now serves as Acting Administrator, and who has pushed the ideas behind the NTIA petition for years — and George Mocsary argue: “By making clear that [230(c)(1)] does not apply to a platform’s own promises, statements, and representations that form the basis of a contract or fraud suit, the Federal Communications Commission would protect the rights of internet users worldwide and affirm section 230’s text and congressional purpose.”⁴³

To start, they misunderstand the function of the statute, claiming that “Section 230(c)(1)... was intended to preserve the rule in *Cubby v. CompuServe*: platforms that simply post users’ content, without moderating or editing such content, have no liability for the content.”⁴⁴ This is a common misconception about the origins of Section: in fact, the clear purpose of Section 230 was to overrule *both Cubby, Inc. v. CompuServe Inc.* (1991)⁴⁵ and *Stratton Oakmont, Inc. v. Prodigy Servs. Co* (1995).⁴⁶ Both decisions created a version of the “Moderator’s Dilemma”: *Stratton Oakmont*, more famously, held websites more liable by virtue of attempting to moderate content. *Cubby*, as we noted in our comments, “found no liability, but made clear that this finding depended on the fact that CompuServe had not been provided adequate notice of the defamatory content, implying that such notice *would* trigger a takedown obligation under a theory of distributor liability.”⁴⁷ Barnhizer and Mocsary (and

⁴³ Comments of “Contract Law Professors” at 3.

⁴⁴ *Id.* at 2.

⁴⁵ 776 F.Supp. 135 (S.D.N.Y. 1991).

⁴⁶ 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

⁴⁷ TechFreedom Comments note 263.

many other commentators about Section 230) make this elementary error because they speak in broad strokes about the “purpose” of the statute, rather than beginning with the text itself. Subsection (c)(1) is clear: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁸ As we explained in our comments, the meaning of this provision is plain: it protects the same exercise of editorial discretion that is protected by the First Amendment. Any narrower reading raises the First Amendment problems we explained in our comments, notably the unconstitutional conditions doctrine. Barnhizer and Mocsary offer no reason for thinking otherwise or substantiation for their claim that (c)(1) “was intended to preserve the rule in *Cubby*.”⁴⁹

Our comments explain in detail why, in addition to the Section 230(c)(1), the First Amendment protects websites from being sued under either consumer protection law or contract law for alleged discrepancies between what content they remove and what content they say they will remove, except perhaps in circumstances so narrow as to have little to do with NTIA’s petition.⁵⁰ Nothing Profs. Barnhizer and Mocsary say changes that analysis.

C. No One Has Explained Why NTIA’s Petition Would Not Violate the Unconstitutional Conditions Doctrine.

None of the commenters supporting the NTIA Petition explain why tying eligibility for Section 230’s liability shields on the surrender of First Amendment rights would not, as

⁴⁸ 47 U.S.C. § 230(c)(1).

⁴⁹ Comments of “Contract Law Professors” at 2.

⁵⁰ TechFreedom Comments at 59-81.

we explained in our comments, violate the unconstitutional conditions doctrine.⁵¹ The Free State Foundation (“FSF”) boldly declares (without addressing this issue): “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.”⁵² FSF may want to re-read their own previous publications for a refresher on why tying receipt of a benefit to the surrender of First Amendment rights is unconstitutional. In 2015, FSF published an excellent article by Prof. Enrique Armijo, member of the Free State Foundation’s Board of Academic Advisors, and Assistant Professor at the Elon University School of Law, explaining why it was unconstitutional for local governments to offer broadband service to their citizens on the condition that they agree not to transmit a wide swathe of lawful but “offensive” or “inappropriate” content:

Government’s conditioning the receipt of a benefit such as broadband access on accepting a prior restraint on speech offends the unconstitutional conditions doctrine. In its simplest form, the doctrine states that government may not coerce people into relinquishing constitutional rights through its regulation, spending, and licensing power. In the case of these municipal broadband terms of use, the government’s demanded relinquishment is of the First Amendment-derived right to nondiscriminatory treatment of speech, and the coercion is the prerequisite of waiver of the right to sue in exchange for access to the network over which that speech will take place. Moreover, governments conditioning Internet connectivity on their users’ waiver of their First Amendment rights cannot be heard to argue that prospective speakers can simply exercise those rights using the networks of private ISPs. The unconstitutional conditions doctrine is unconcerned with

⁵¹ TechFreedom Comments at 36-39.

⁵² Comments of The Free State Foundation at 3.

“alternative settings” for the speech of the parties the government seeks to coerce. In other words, the existence and availability of an alternative for carriage of the speech in question in the form of a privately owned network can’t cure the constitutional harm caused by the government’s demand that a user waive a right in return for the benefit of public network access. A “you can say it over Comcast’s network” defense by Chattanooga or Wilson would thus be unavailing, in much the same way as the Postal Service can’t refuse to deliver a letter because of its content on the ground the letter’s sender could have used FedEx instead.⁵³

Exactly the same analysis applies here: the government cannot coerce social networks and other ICS providers into limiting the kind of content moderation (*i.e.*, editorial discretion) they engage in as a condition for “earning” the protection of Section 230’s liability shield. Does NTIA imagine that it is possible for each social network provider to split its services into two versions — one with content moderation unprotected by Section 230 and the other with content moderation limited to what NTIA would allow? Such a thing seems impossible to imagine, given that the central purpose of social networks is to serve as unified platforms for users to interact with each other on a single network. But even if this were possible, the possibility of splitting services in two “can’t cure the constitutional harm caused by the government’s demand that a user waive a right in return for the benefit,” as Prof. Armijo elegantly puts it. Our comments explain why the Supreme Court has not allowed such heavy burdens to be imposed as conditions of immunity.⁵⁴

NTIA is essentially doing precisely what FSF warned against in 2014: “A federal court will not readily allow an administrative agency to shrink the scope of constitutionally

⁵³ Enrique Armijo, *Municipal Broadband Networks Present Serious First Amendment Problems* at 2, The Free State Foundation (Feb. 23, 2015), <https://freestatefoundation.org/wp-content/uploads/2019/06/Municipal-Broadband-Networks-Present-Serious-First-Amendment-Problems-022015.pdf>.

⁵⁴ TechFreedom Comments at 36-55.

protected activity in order to regulate it.”⁵⁵ Here, the scope of constitutionally protected activity is quite clear: the First Amendment protects the right of both providers and users of ICS services to decide what content to carry or not to carry. Any attempt to shrink the scope of that protection by narrowing Section 230 protections will be struck down as unconstitutional.

IV. The FCC Should Ignore Efforts to Expand the Scope of this Inquiry.

Many of the comments supporting the NTIA Petition, and some opposing it, attempt to expand the scope of this inquiry beyond what NTIA has asked for. While NTIA seeks to limit content moderation, these commentators seek to coerce greater content moderation. The FCC has no power to make Section 230 conditional on removing illicit content, misinformation, hate speech, or any other form of content.

DigitalFrontiers Advocacy (DFA) proposes that the FCC “clarifying that section 230 does not preclude holding platforms accountable when they fail to take reasonable steps to curb illicit activity by their users.”⁵⁶ The NTIA petition proposes no such thing, and therefore this comment is outside the scope of this proceeding. It is also clearly outside the scope of

⁵⁵ The Free State Foundation, Reply Comments in the Matter of Protecting and Promoting the Open Internet Framework for Broadband Internet Service at 6, 19 (Sept. 15, 2014), <https://ecfsapi.fcc.gov/file/7522505668.pdf>.

⁵⁶ DigitalFrontiers Advocacy, Statement in Support of the Petition for Rulemaking at 13 (Sept. 2, 2020), <https://ecfsapi.fcc.gov/file/10902180305939/200902%20DigitalFrontiers%20Advocacy%20support%20for%20sec%20230%20rulemaking%20final.pdf>.

the FCC's authority. DFA seems to acknowledge that what it really wants is for *Congress* to rewrite the statute, but asserts that the FCC should take on the task anyway.⁵⁷

Multiple self-described “progressive” groups demand that the FCC force social networks to do *more* content moderation — to block the spread of disinformation and hate speech. The Media Alliance and Global Exchange (together “Protest Facebook Coalition”) propose:

- “algorithmic limitations for the most political of this content i.e. direct political ads”
- “ad buy ceilings beyond which liability protections no longer apply” — lest Section 230 “protect viral spread at scale that is paid for and sponsored”
- And that “the Commission to construct standards for content moderation policies by establishing a basement for what such policies must contain and the operational capacity that must accompany them.”⁵⁸

Some of the latter standards overlap with what NTIA proposes. But to those, the Coalition adds another demand: “[a]n outright prohibition on incitements to violence or content that objectively seeks to create hatred towards groups of individuals due to protected characteristics.”⁵⁹ While NTIA would make moderation of such content ineligible for Section 230's protections, the coalition would make it *mandatory*. Such a mandate would be just as obviously unconstitutional as the NTIA's attempt to coerce social media providers into ceasing certain kinds of content moderation. Being pulled in opposite directions depending

⁵⁷ *Id.* (“Ideally, Congress will amend section 230 to explicitly require platforms to take reasonable steps to curb illicit activity as a condition of receiving the section's protections. Unless and until it does so, however, section 230(c)(1) as currently applied will continue to aggravate the spread of illicit activity online by shielding platforms when they negligently, recklessly, or knowingly fail to prevent such activity by their users. The FCC can and should ameliorate this problem by clarifying that section 230 does not preclude holding platforms accountable when they fail to take reasonable steps to curb illicit activity by their users.”).

⁵⁸ Protest Facebook Coalition, Comments of Media Alliance and Global Exchange on Section 230 of the Communications Act of 1934 at 6 (Sept. 2020), <https://ecfsapi.fcc.gov/file/1090235365516/Media%20Alliance%20and%20Global%20Exchange%20Comments%20on%20Section%20230.pdf>.

⁵⁹ *Id.* at 7.

on changing political tides is exactly the kind of political tug-of-war that Congress sought to avoid in enacting Section 230: ICS providers have a First Amendment right to decide where on this spectrum they want to operate, and Section 230 ensures they will not have to defend their constitutionally protected editorial discretion in lawsuit after lawsuit.

Comments filed by the Protest Facebook Coalition and multiple groups demanding that social networks be compelled to do *more* to moderate content they find objectionable should make clear to Republicans that the NTIA Petition is truly a Pandora's Box, as we noted in our comments:

if the FTC or a state AG may sue a social media site because it believes that site did not live up to its community standards, what would prevent elected attorneys general from either party from alleging that social media sites had broken their promises to stop harassment on their services by continuing to allow any president to use their service?⁶⁰

V. The Disclosure Mandates NTIA Seeks Are Fundamentally Different from the FCC's Disclosure Mandates for BIAS Providers.

Commissioner Carr has called for extending something like the FCC's disclosure mandates for BIAS providers to ICS providers⁶¹ as a condition of their eligibility for the protections of Section 230. AT&T seems to endorse this proposal:

the largest online platforms owe the public greater transparency about the algorithmic choices that so profoundly shape the American economic and political landscape...

Just as AT&T and other ISPs disclose the basics of their network management practices to the public, leading tech platforms should now be required to make disclosures about how they collect and use data, how they rank search results,

⁶⁰ TechFreedom Comments at 102.

⁶¹ Brendan Carr, *A Conservative Path Forward on Big Tech*, NEWSWEEK (July 27, 2020, 7:30 AM), available at <https://www.newsweek.com/conservative-path-forward-big-tech-opinion-1520375>.

how they interconnect and interoperate with others, and more generally how their algorithms preference some content, products and services over others. Such disclosures would help consumers and other companies make better educated choices among online services and help policymakers determine whether more substantive oversight is needed.⁶²

This conflates apples and oranges. The “network management practices” of broadband networks are, for the most part, categorically different from the issue in this proceeding, which is: how “tech platforms” exercise their editorial discretion to moderate content they find objectionable. As we explained in our comments, any broadband provider that actually exercised similar discretion by “blocking,” “throttling” or “prioritizing” content simply would not qualify as a BIAS provider, and would therefore not be subject to the FCC’s disclosure rule.⁶³ The other dimensions of disclosure mentioned above (essentially, business practices beyond content moderation and data practices) are policy questions that must be decided by Congress.

VI. NTIA’s Petition Would Reshape the Internet for the Worse — and in Violation of the First Amendment.

Our comments explained in detail why the NTIA Petition is unconstitutional. Here, we offer concrete examples of how it would transform the Internet into something a lot more like Gab than the comments sections on *Fox News*, *Breitbart*, *The Daily Caller* or any major conservative publication.

⁶² AT&T Comments at 3-4.

⁶³ TechFreedom Comments at 66-68.

A. NTIA’s Petition Would Prevent Leading Conservative Website Operators from Engaging in Content Moderation They Currently Claim the Right to Do.

NTIA’s petition would fundamentally change how the Internet works — not only for “Big Tech” companies but also leading conservative media. NTIA’s petition, if granted, would expose leading conservative websites to lawsuits merely for enforcing their existing terms of service, which claim broad discretion to engage in content moderation of user comments that would not fall within the narrow criteria permitted by NTIA.

FoxNews.com bars users from posting, in comments, content that is “false or misleading; ... or hateful; or discriminatory,” and from “[i]mpersonat[ing] or attempt to impersonat[ing] any person or entity.”⁶⁴ *The Daily Caller* bans “racially, ethnically, or otherwise offensive language.”⁶⁵ Even *Infowars* bans comments that are “hateful, racially or ethnically objectionable.”⁶⁶ *Gateway Pundit* bars users from posting content that is “hateful, racist, or otherwise objectionable.”⁶⁷ If “otherwise objectionable” is an appropriate reservation of editorial discretion to remove content for any reason for *Gateway Pundit*, why isn’t it for any other site? *Breitbart* claims equivalently vast discretion to remove content, or block users who post it, merely because that content is “inappropriate.”⁶⁸

All of these criteria would be excluded by NTIA’s petition from the scope of content moderation protected by Section 230. Moreover, the Petition would require *all* these sites to

⁶⁴ *Fox News Network, LLC Terms of Use Agreement*, FOX NEWS (May 19, 2020), <https://www.foxnews.com/terms-of-use>.

⁶⁵ *Terms Of Use*, DAILY CALLER (Oct. 21, 2009), <https://dailycaller.com/footer/terms-of-use>.

⁶⁶ *FREE SPEECH SYSTEMS LLC, TERMS OF USE & PRIVACY POLICY*, INFOWARS (2020), <https://www.infowars.com/terms-of-service/>.

⁶⁷ *Terms*, GATEWAY PUNDIT (2020), <https://www.thegatewaypundit.com/terms/>.

⁶⁸ *TERMS OF USE*, BREITBART (June 3, 2015), <https://www.breitbart.com/terms-of-use/>.

rewrite their terms of service to “state plainly and with particularity the criteria the interactive computer service employs in its content-moderation practices.”⁶⁹ What would that actually mean in practice? Neither the NTIA nor any commenters supporting it seem to have considered this question; instead, they all seem to assume that only “Big Tech” sites would have to solve this problem.

B. What the Fake Controversy Over *The Federalist* Shows about the Inherent Challenges of Content Moderation.

Multiple commenters supportive of NTIA’s petition cite, as evidence of the need for regulation, Google’s supposed “censorship” of *The Federalist*.⁷⁰ The Internet Accountability Project’s comments claim that:

In June, Google flexed its muscle against *The Federalist*, a conservative news site, for violating Google’s advertising policies in the site’s comment section. Troublingly, it brought the complaint against *The Federalist* at the behest of NBC News – demonstrating the power Google has to knock out entire news sites while working in tandem with a partisan media competitor.”⁷¹

Writing in *The Wall Street Journal*, Ben Domenech and Sean Davis, co-founders of *The Federalist*, claim that “NBC News attempted this week to use the power of Google to cancel our publication.”⁷²

What *The Federalist* experienced is exactly the same thing other sites have experienced. Far from proving political bias, the example illustrates the difficulties inherent in content moderation — difficulties that cannot, constitutionally, be solved by the NTIA

⁶⁹ *Petition*, *supra* note 4, at 55.

⁷⁰ *See, e.g.*, Comments of “Contract Law Professors” at 3.

⁷¹ IAP Comments at 6.

⁷² Ben Domenech and Sean Davis, *NBC Tries to Cancel a Conservative Website*, THE WALL STREET JOURNAL (June 17, 2020), <https://www.wsj.com/articles/nbc-tries-to-cancel-a-conservative-website-11592410893>.

Petition or any other government action. *TechDirt* (a leading site about technology that no one would ever accuse of being “right wing”) quickly explained that it had experienced exactly the same thing the previous year.⁷³ Writing a month later, *TechDirt*'s editor Mike Masnick explained their situation:

there are currently no third-party ads on Techdirt. We pulled them down late last week, after it became impossible to keep them on the site, thanks to some content moderation choices by Google. In some ways, this is yet another example of the impossibility of content moderation at scale...

The truth is that Google's AdSense (its third-party ad platform) content moderation just sucks. In those earlier posts about The Federalist's situation, we mentioned that tons of websites deal with those "policy violation" notices from Google all the time. Two weeks ago, it went into overdrive for us: we started receiving policy violation notices at least once a day, and frequently multiple times per day. Every time, the message was the same, telling us we had violated their policies (they don't say which ones) and we had to log in to our "AdSense Policy Center" to find out what the problem was. Every day for the ensuing week and a half (until we pulled the ads down), we would get more of these notices, and every time we'd log in to the Policy Center, we'd get an ever rotating list of "violations." But there was never much info to explain what the violation was. Sometimes it was "URL not found" (which seems to say more about AdSense's shit crawler than us). Sometimes it was "dangerous and derogatory content." Sometimes it was "shocking content."⁷⁴

Other large publications have experienced similar problems including Slate (generally considered notably left-of-center). Their experience illustrates the limits of algorithmic content moderation as a way of handling the scale problem of online content:

⁷³ Mike Masnick, *No, Google Didn't Demonetize The Federalist & It's Not An Example Of Anti-Conservative Bias*, TECHDIRT (June 16, 2020), <https://www.techdirt.com/articles/20200616/14390744730/no-google-didnt-demonetize-federalist-not-example-anti-conservative-bias.shtml>.

⁷⁴ Mike Masnick, *Why Are There Currently No Ads On Techdirt? Apparently Google Thinks We're Dangerous*, TECHDIRT (Aug. 12, 2020), <https://www.techdirt.com/articles/20200810/11335745081/why-are-there-currently-no-ads-techdirt-apparently-google-thinks-were-dangerous.shtml>.

Last Thursday, Google informed Slate’s advertising operations team that 10 articles on the site had been demonetized for containing “dangerous or derogatory content.” The articles in question covered subjects like white supremacy, slavery, and hate groups, and most of them quoted racial slurs. They included pieces on the racist origins of the name kaffir lime, the 2017 police brutality movie *Detroit*, Joe Biden’s 1972 Senate run, and a Twitter campaign aimed at defaming Black feminists, which all had quotes containing the N-word. Another, about the use of offensive words in tournament Scrabble, referenced a book that had the N-word in the title, and a demonetized Dear Prudence column reproduced a reader letter asking for advice about a racist nephew who had lobbed an ethnic slur for Middle Eastern people. Articles about the end of slavery in Massachusetts, the legacy of “assimilation,” and Twitter debates, as well as a podcast transcript from the *Slow Burn* season on white supremacist David Duke, either quoted or described racist views.

Needless to say, the articles were not promoting the discriminatory ideologies affiliated with these slurs but rather reporting on and analyzing the context in which they were used.

Once flagged by the algorithm, the pages were not eligible to earn revenue through Ad Exchange. Slate appealed the moderation decisions through Google’s ad platform last Thursday morning, as it normally would when a demonetization it feels is unjustified occurs. Not long after, as part of the reporting of this story, I contacted Google’s communications department, whose personnel said they would contact the engineering team to look into it. The pages were subsequently remonetized by Friday morning.⁷⁵

So, yes, the tool Google uses to decide whether it wants to run its ads next to potentially objectionable content is *highly* imperfect. Yes, everyone can agree that it would be better if this tool could distinguish between discussions of racism and racism itself — and exactly the same thing can be said of Facebook and (to a lesser degree) Twitter in the algorithms they apply to moderate user content on their sites. But these simply are not problems for the

⁷⁵ Aaron Mak, *Google’s Advertising Platform Is Blocking Articles About Racism*, SLATE (Aug. 13, 2020), <https://slate.com/technology/2020/08/googles-ad-exchange-blocking-articles-about-racism.html>.

government to solve. The First Amendment requires us to accept that the exercise of editorial discretion regarding what will or will not be published will always be messy. This is even more true of digital media than it is of traditional media, as Masnick's Impossibility Theorem recognizes:

Content moderation at scale is impossible to do well. More specifically, it will always end up frustrating very large segments of the population and will always fail to accurately represent the "proper" level of moderation of anyone....

First, the most obvious one: any moderation is likely to end up pissing off those who are moderated. ...

Second, moderation is, inherently, a subjective practice. Despite some people's desire to have content moderation be more scientific and objective, that's impossible. ***By definition, content moderation is always going to rely on judgment calls, and many of the judgment calls will end up in gray areas where lots of people's opinions may differ greatly.*** ... [T]o make good decisions you often need a tremendous amount of context, and there's simply no way to adequately provide that at scale in a manner that actually works. That is, when doing content moderation at scale, you need to set rules, but rules leave little to no room for understanding context and applying it appropriately. And thus, you get lots of crazy edge cases that end up looking bad. ...

Third, ***people truly underestimate the impact that "scale" has on this equation.*** Getting 99.9% of content moderation decisions at an "acceptable" level probably works fine for situations when you're dealing with 1,000 moderation decisions per day, but large platforms are dealing with way more than that. If you assume that there are 1 million decisions made every day, even with 99.9% "accuracy" (and, remember, there's no such thing, given the points above), you're still going to "miss" 1,000 calls. But 1 million is nothing. On Facebook alone a recent report noted that there are 350 million photos uploaded every single day. And that's just photos. If there's a 99.9% accuracy rate, it's still going to make "mistakes" on 350,000 images. Every. Single. Day.

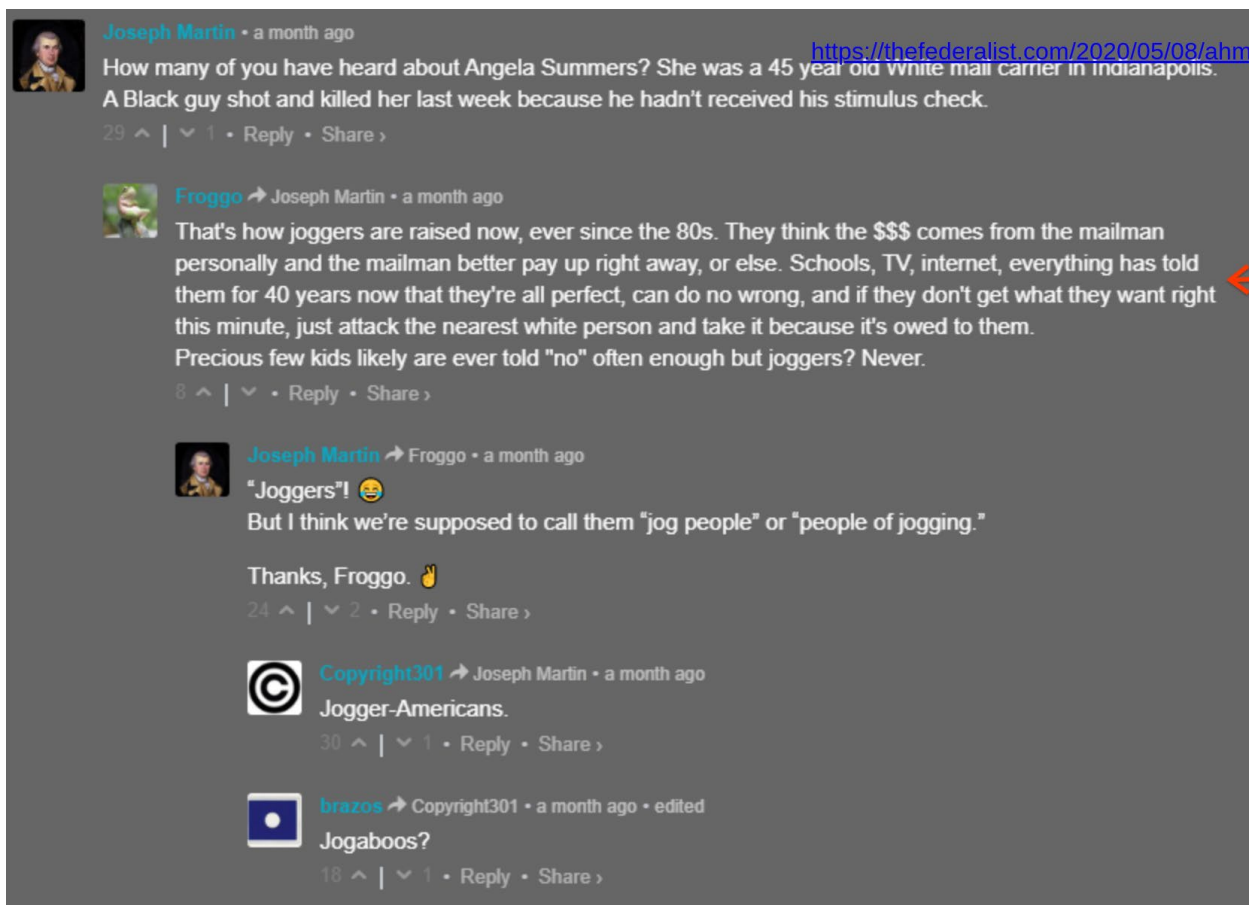
So, add another 350,000 mistakes the next day. And the next. And the next.
And so on.⁷⁶

There is nothing unique about *The Federalist's* experience, except that the site succeeded in making political hay out of something other sites across the political spectrum have experienced.

C. What the Fake Controversy Over *The Federalist* Says about the Site and the Nature of the Larger “Anti-Conservative Bias” Debate.

That is not the only difference between how *The Federalist* handled the situation and how *TechDirt* did: *The Federalist* took down its comment section completely while *TechDirt* took down its Google Ads. Either site could have solved their AdSense problems (and restored advertising displayed next to their own content) simply by separating their comments page from each article's page, as *Boing Boing*, another tech industry site does. Google has a clear First Amendment right not to run its ads next to content it finds objectionable. If websites want to run Google ads next to their comments section, they have a contractual obligation to remove content that violates Google's terms of service for their advertising platform. Simply relying on users to downrank objectionable content, rather than removing it altogether — as *The Federalist* apparently did and as *TechDirt* apparently does — will not suffice if the objectionable content remains visible on page where Google Ads appear. It is worth noting that, while *TechDirt* might reasonably expect its readers to downrank obviously racist content, the exact opposite has happened on *The Federalist*:

⁷⁶ Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019) (emphasis added), <https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml>.



The racist nature of this exchange should be clear even without understanding that, months before these comments were posted, the term “jogger” had become code for the n-word as white supremacists celebrated the racially motivated murder of “Ahmaud Arbery, the young black man who was shot dead in February while he was running in a suburban neighborhood in Georgia.”⁷⁷

Given the inherent challenges involved in content moderation at scale discussed above, it would be unfair to label *The Federalist* as racist simply because they failed to identify such content and take it down. Indeed, given that only a small percentage of readers

⁷⁷ Tess Owen, *White Supremacists Have a Disgusting New Code for the N-Word After Ahmaud Arbery's Death*, VICE NEWS (May 14, 2020), https://www.vice.com/en_us/article/bv88a5/white-supremacists-have-a-disgusting-new-code-for-the-n-word-after-ahmaud-arberys-death.

on any site actually post, read, or vote to uprank/downrank comments, it would be unfair to generalize about the overall readership of *The Federalist* based on such examples, even if there were evidence to suggest that this example were typical of comment threads on the site. Nonetheless, Google has every right — guaranteed by the First Amendment — to insist that its ads not appear next to a single such exchange, to prevent its ads from appearing on pages with such content, and to decide, if such content is sufficiently pervasive in a site’s comment section, not to allow its ads to appear on *any* comments section on the website.

This example, isolated though it is, does suggest that Google may well have been justified in concluding that such content was indeed pervasive among comment threads on the site. The fact that this particular comment received eight upvotes and zero downvotes, and that it generated a very popular reply thread (which received 24, 30 and 18 upvotes and only a total of 3 downvotes) suggests that, within the subset of users who comment and engage in comments, *The Federalist* had a serious problem with racism among the most engaged commenters on its site—that, rather than downvoting such bigotry as repugnant, they tolerate it, upvote it, and make light of it. In that light, perhaps *The Federalist* chose to take down its comment section completely — rather than taking down ads, as *TechDirt* did — not merely out of financial self-interest. Perhaps the site’s editors realized that it was only a matter of time before some enterprising reporter took the time to document examples like this one across the site’s comments section? Perhaps the site’s editors recognized that a uncomfortably large percentage of the site’s readers said openly racist things that the editors found repugnant — yet were unwilling to implement inherently imperfect automated content moderation technologies to block such content, unable to incur the expense of large-scale human content moderation, and concerned that any attempt to moderate content

would incur a backlash from many of their readers? Perhaps, after several years of regularly decrying content moderation by social media services, the site’s editors decided, probably rightly, that their own readership would denounce any attempt to institute meaningful content moderation on the site? Perhaps they simply found a way to have their “cake and eat it, too”: avoid the thorny problem of moderating user comments while blaming Google for “forcing” them to do it?

Ultimately, these are not questions for the FCC or any government agency to decide. The First Amendment protects *The Federalist’s* right to decide how to handle user comments — to take them down or not to take them down, as they see fit — just as it protects Google’s right to decide what content it considers appropriate for the ads Google sells to appear next to it. Even more importantly, the First Amendment protects Google’s right to make those decisions as a way of protecting the First Amendment rights of *advertisers* not to be associated with content they find repugnant — a right they exercise when they contract with Google to purchase ads based on the promise that Google will screen the content next to which their ads might appear. (Critically, the AdSense “display” ad network serves ads on websites without, in most cases, advertisers selecting or even being aware where their ads appear.)

D. Gab: the Totally “Uncensored” Social Network — and Essentially a Model for the Internet that Would Exist If NTIA’s Petition Were Granted.

Profs. Mocsary and Barnhizer claim Google has “banned competing social networks from the Google Play store,” citing the example of Gab.⁷⁸ Likewise, The Claremont Institute complains:

The market dominance of these companies makes the argument often offered by their proponents that others should start your own social network or search engine absurd.... If you start your own app to compete, against Twitter of [sic] YouTube, Google and Apple [sic], who control 99.9% of the smartphone operating market. The “free speech” social network Gab was banned from both app stores for not following the same [sic].⁷⁹

Have those who cite Gab as an example of Google’s “censorship” ever actually *used* the site? A search of the site for “kikes” produces 17 hashtags using different variants of the term, while there are 78 hashtags including the word “niggers.” In both cases the basic hashtag reveals an endless stream of recent posts. If anything, quick glances at the site dramatically understate the prevalence of “awful but lawful” content. Notably, Gab does not offer full-text search of all its content, as Twitter, Facebook and other sites to; instead, it allows searches only of usernames and hashtags. Thus, keyword searches on both sites dramatically understate the scale of noxious content on the site. Moreover, the “Alt-Right” has developed an extensive argot of euphemisms for various racial, ethnic, religious, and sexual minorities,⁸⁰ which allows them to code their discussion to make it less obvious to “normies” (people outside the Alt-Right). Such content is “lawful but awful.” Gab has every

⁷⁸ Comments of “Contract Law Professors” at 3.

⁷⁹ Claremont Institute Comments at 3.

⁸⁰ *Alt-right glossary*, RATIONALWIKI (Sept. 14, 2020), https://rationalwiki.org/wiki/Alt-right_glossary.

right to publish it, its users have every right to post it, and Google has every right to refuse to be associated with it. The First Amendment protects equally each party's right to speak, or not to speak, and whether to publish or not publish.

It is not difficult to understand why Google chose not to allow the Gab app to appear in the official Play Store — though it is worth emphasizing that Google, unlike Apple, *does* allow users to install apps from outside their app store. In fact, Gab offers its users precisely that option, and as of this date, their app has been downloaded 114,639 times.⁸¹ Such “sideloading” means the apps are not verified by Google or any other app store and thus involves privacy and security risks, but it *is* an option. In addition, to offering apps available directly for download on their websites, “conservatives” or Alt-Right activists could start their own app store for Android devices — just as Amazon offers its own Android store — as an alternative to the official Play Store. Google will not stop Android users from installing apps from that app store.

E. Despite Claiming to Deliver “Viewpoint Neutrality” Parler Claims Broad Discretion Just Like Other Websites.

Gab was, until recently the social “free speech” network of choice for those aggrieved by “censorship” on Facebook and Twitter. But the site never attracted the participation of major political figures, publications and influencers. Gab has rapidly been eclipsed by Parler, which *has* succeeded in attracting leading Republican elected officials and conservative influencers. (Notably, while Parler does not run ads at all, its app *has* been accepted in the

⁸¹ *Available apps*, GAB (2020), <https://apps.gab.com/>.

Google Play store.⁸²) Parler illustrates several points important to this discussion. First, the site clearly exercises exactly the kind of discretion in content moderation that would, under NTIA’s proposal, not be protected by Section 230.

Both Gab and Parley profess their commitment to First Amendment values in similar terms. Gab’s terms of service promises:

We strive to ensure that the First Amendment remains the Website’s standard for content moderation. We will make best efforts to ensure that all content moderation decisions and enforcement of these terms of service does not punish users for exercising their God-given right to speak freely.⁸³

Likewise, Parler’s community guidelines say:

We prefer that removing users or content be kept to the absolute minimum. We prefer to leave decisions about what is seen and who is heard to each user. In no case will Parler decide what content will be removed or filtered, or whose account will be removed, on the basis of the opinion expressed within the content at issue. Parler is, to use a well-known concept in First Amendment law, viewpoint-neutral in its policies.⁸⁴

Parler’s CEO, John Matze, grandly declares: “If you can say it on the street of New York, you can say it on Parler.”⁸⁵

But that isn’t actually true of Parler — which illustrates that the premise of the NTIA Petition — that websites can deliver “viewpoint neutrality” in content moderation the way courts demand of the government — is an illusion. It is simply impossible to run a social network without the ongoing exercise of editorial discretion based on inherently subjective

⁸² *Parler*, GOOGLE PLAY (2020), https://play.google.com/store/apps/details?id=com.parler.parler&hl=en_US.

⁸³ *Website Terms of Service*, GAB (Apr. 10, 2020), <https://gab.com/about/tos>.

⁸⁴ *Community Guidelines*, PARLOR (Aug. 21, 2020), <https://legal.parler.com/documents/guidelines.pdf>.

⁸⁵ Ari Levy, *Trump fans are flocking to the social media app Parler — its CEO is begging liberals to join them*, CNBC (June 28 2020), <https://www.cnbc.com/2020/06/27/parler-ceo-wants-liberal-to-join-the-pro-trump-crowd-on-the-app.html>.

line-drawing that would never pass muster if the government were doing it. Indeed, Parler has clearly made an effort to clean up its site to make it at least slightly more acceptable than Gab — to clean up content based on criteria that would, as with other conservative media, *not* be permissible grounds for content moderation under NTIA’s proposal.

“With Devin Nunes came a whole pack of haters,” Matze told CNBC. “He said that parody accounts are fine and even welcome, but Parler draws a line when it comes to spammers. ‘You can’t spam people’s comment sections with unrelated content,’ he said.”⁸⁶ It is impossible to discern how or where Parler draws that line from how it describes its content moderation practices. Its two-page “community guidelines” include just two principles. The first is that “Parler will not knowingly allow itself to be used as a tool for crime, civil torts, or other unlawful acts” (followed by three short paragraphs). The second principle is:

Posting spam and using bots are not conducive to productive and polite discourse. The use of our mute and block features, by individual users, is often adequate to address problems with spam. But whenever it is not, and in the case of bots, Parler will remove users who engage in this behavior.⁸⁷

The “detailed discussion of the types of actions encompassed by these two principles” offers little clarity:

Spam is repetitive content that does not contribute relevant, solicited substance to the conversation, but instead prevents others from getting their message out. It is most disruptive of discussions in comments on others’ parleys. But a user’s own parleys can also qualify as spam, especially when they make frequent, irrelevant use of hashtags, or other users’ handles. Such deceptive uses of hashtags and user handles result in the flooding of a tag feed, or of a user’s notifications feed, with repetitive or irrelevant content. While

⁸⁶ Levy, *supra* note 85.

⁸⁷ *Community Guidelines*, *supra* note 84, at 2.

serial spamming is a violation of these Guidelines, we encourage Parleyers to first use our mute or block features before reporting spammers.⁸⁸

Would this meet the requirements of the NTIA’s proposed definition of “harassing” content — primarily, that which “is that sent by an information content provider that has the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value?” While it might seem so, NTIA’s standard is clearly more restrictive, requiring proof of *subjective* intent. Parler, by contrast, reserves full discretion to decide what constitutes “spam,” without respect to subjective intent. Given the inherent ambiguity in Parler’s content moderation policy, it should not be surprising that multiple progressives have complained that Parler has “censored” — apparently, for violating the “spam” policy. For example:⁸⁹



Presumably, these were among the “haters” Matze was referring to. Were they *really* banned for spamming other users — or for their political views? We will never know — because, of course, Parler has nothing like the appeals process contemplated by NTIA for aggrieved

⁸⁸ Elaboration on Guidelines at 4, PARLER, <https://legal.parler.com/documents/Elaboration-on-Guidelines.pdf>.

⁸⁹ Respectable Lawyer (@RespectableLaw), Twitter (June 26, 2020, 2:58 PM), <https://twitter.com/RespectableLaw/status/1276590556374880258>.

users to challenge its decisions, nor does it report the reasons for terminating users or removing content, as NTIA demands of all social networks. Indeed, Parler’s decision not to allow keyword searches for the contents of posts (only hashtags and usernames) makes it especially difficult to understand the nature of content on the site. More importantly, whether content “does not contribute relevant, solicited substance to the conversation, but instead prevents others from getting their message out” is inherently subjective. Indeed, while some Parler users may read its “community guidelines” as a paean to free speech, any competent lawyer will understand that the document is so full of qualifications as to promise nothing at all to users. What does it really mean to be “disruptive of discussions in comments on others’ parleys?” What constitutes “repetitive or irrelevant content?” The emptiness of Parler’s rhetoric should be obvious to anyone who bothers to read the site’s “User Agreement,” which boils down to this:

Parler may remove any content and terminate your access to the Services at any time and for any reason to the extent Parler reasonably believes (a) you have violated these Terms or Parler’s Community Guidelines, (b) you create risk or possible legal exposure for Parler.⁹⁰

In the end, Parler retains full discretion to moderate both content and users either because it concludes, in its sole discretion (not subject to appeal) that they have violated the inherently ambiguous language of the Community Guidelines — or simply because it believes they create “risk... for Parler.” Mind you, that “risk” need *not* be “possible legal exposure,” but simply whatever Parler decides constitutes “risk” — of bad press, political impact, or whatever else. In short, Parler while claims that its “mission is to create a social

⁹⁰ *User Agreement* at 4, PARLER (Aug. 15, 2020), <https://legal.parler.com/documents/useragreement.pdf>.

platform in the spirit of the First Amendment,” it is no different from any other social network in reserving to itself discretion to decide what it finds “otherwise objectionable.”

F. Parler Claims Broad Discretion to Engage in Content Moderation, but Exercises It Only Selectively.

Parler *is* different from other social networks in *how* it chooses to exercise the broad discretion it reserves for its content moderation. The site is markedly less “restrictive” (or more permissive of “lawful but awful” content) than Facebook or Twitter, but somewhat more restrictive (less permissive) than Gab. While Gab shows 79 results for hashtags involving variants of “niggers,” Parler shows *zero* results. Clearly, Parler is making *some* effort to moderate the most obviously problematic content on its site — despite its promise that “If you can say it on the street of New York, you can say it on Parler.”⁹¹

Even so, it is not difficult to find on Parler the same kind of explicitly racist, antisemitic, and often openly neo-Nazi content that one could find, perhaps somewhat more easily, Gab. It just requires a little more creativity in knowing what to search for and following the right users. To pick just one particularly nauseating example, this account (found by clicking through to the first hashtag) is not remotely subtle:⁹²

⁹¹ See *supra* note 85.

⁹² Chimney Smoke (@CSm0ke), PARLER (Aug. 27, 2020), <https://share.par.pw/post/2a30084f707c4bed88ae9494d3cc0c10>.



ChimneySm0ke

@CSm0ke

August 27, 2020

#itsthejews #jewsarenotwhite #jewscontroltheworld



Honknelius Rye

@CorneliusRye

our country makes more sense when you realize everyone in power is either a jew, a pedophile, a jewish pedophile, or being blackmailed by jews, pedophiles, or jewish pedophiles

and SOMETIMES it's even jewish pedophiles being blackmailed by other jewish pedophiles

At a minimum, Parler's content moderation practices are markedly inconsistent. The site clearly moderate some content for reasons that are most definitely *not* "state[d] plainly and with particularity" in its community standards (as NTIA demands) — but that it considers "otherwise objectionable." Yet, at the same time, Parler allows content that is not merely Holocaust-denying but explicitly *pro*-Holocaust ("ChimneySm0ke"). As its guidelines note, "[s]o-called "fighting words" are not a violation of our Guidelines."⁹³ Instead, the site says it will ban only:

⁹³ Elaboration on Guidelines, *supra* note 88, at 4.

an explicit or implicit encouragement to use violence, or to commit a lawless action, such that: (a) the Parleyer intends his or her speech to result in the use of violence or lawless action, and (b) the imminent use of violence or lawless action is the likely result of the parley, comment, or message.⁹⁴

That’s good news for “ChimneySm0ke,” but bad news for anyone who doesn’t want to be — *or want their children to be* — on a site where slightly more generalized calls for repeated genocide are tolerated.

Should Parler be subject to suit for failing to deliver on its absolutist promises, or for inconsistencies in its content moderation? No, of course not. Again, the First Amendment protects Parler’s right to leave up pro-Holocaust content that falls short of incitement to imminent violence — just as it protects the site’s right to take down or block such content, which falls clearly within the scope of what *Fox News*, *The Daily Caller*, *Breitbart*, *Gateway Pundit*, and *Infowars* all claim to ban.⁹⁵ But if the FCC implemented the rule NTIA proposes, on what grounds could Parler, these sites, any other site ban such comments or the users who post them? How could they ban use of hashtags involving the n-word, as Parler does?

NTIA’s Petition, if implemented, would transform the entire Internet into something a lot more like Gab than Parler — minus content that is “obscene,” “lewd,” lascivious,” “filthy,” excessively violent,” or “harassing.” NTIA seems to think that the Internet should be “cleaned up” to address traditional conservative objections to children (or anyone else) seeing content related to sex and “excessive” violence, but *not* to address concerns about the most egregious kinds of racism, bigotry, the celebration of genocide, and so on — *even though leading conservative publications themselves condemn such content and disclaim any intention*

⁹⁴ *Id.*

⁹⁵ *See supra* at 19-20.

to host it if their readers post it on their sites. The First Amendment bars any such meddling by government in the content that is, or is not, permitted on the many private websites that make up the World Wide Web.

VII. Conclusion

NTIA's Petition violates the First Amendment. It is offensive to the most fundamental conservative principles about constitutionally limited government. It is inconsistent with the appropriately narrow reading of the FCC's authority taken by this Commission. It would transform the Internet into something few Americans, including conservatives, want: a place dominated by the worst aspects of human nature. For all these reasons, it should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Berin Szóka, hereby certify that on this 17th day of September, 2020, a copy of the foregoing "Reply Comments of TechFreedom" have been served by FedEx, postage prepaid, upon the following:

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