Before the
Federal Communications Commission
Washington, DC 20554

In the matter of the National Telecommunications & Information Administration's Petition to Clarify Provisions of Section 230 of the Communications Act of 1934, as Amended	)))))	RM No. 11862

Comment of
Engine

SEPTEMBER 2, 2020

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Introduction and Executive Summary

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues.

Given Engine's focus on startups, entrepreneurship, innovation, and competition, we are particularly troubled by the anti-competitive impacts of NTIA's proposed changes to Section 230. While hundreds of pages could—and likely will—be written on the factual inaccuracies contained in the petition regarding Section 230's legislative history and subsequent legal interpretation, our comments will focus on the ways in which NTIA's petition for rulemaking is predicated on wholly unsupported allegations about how Section 230 shapes the Internet ecosystem and how its proposed changes to Section 230 would harm smaller and newer platforms and their ability to compete in the market.

The petition fundamentally misunderstands several things about both Section 230 and today's Internet ecosystem. The petition claims that Section 230 has become unnecessary in a world with a mature Internet industry and that the law's legal framework has anticompetitive effects. Both of those claims are untrue. The Internet ecosystem has not changed so dramatically since the law's passage, and it is still made up of the new, innovative, and competition companies that Congress sought to protect in 1996. At the same time, the dramatic rise in the increase of usage of Internet platforms means that perfect content moderation has

become—despite the petition's completely unsupported claims to the contrary—more impossible every day, increasingly making the legal liability limitations under Section 230 a necessity for a platform of any size that hosts user-generated content. Section 230 is what allows new and small platforms to launch and compete in the market, and making the changes envisioned by the petition would make it harder to launch and compete—a burden that will fall disproportionately on startups.

The rewriting of Section 230 envisioned by the petition is especially egregious because the NTIA has failed to identify any justification for that rewriting. The petition acknowledges that there is no empirical evidence to support its repeatedly disproven claims that major social media platforms are exhibiting "anti-conservtative bias," and it doesn't even attempt to justify the absurd claim that limiting platforms' legal liability somehow reduces competition, including by deterring new companies from entering the market. Without managing to accurately identify a competitive or consumer harm currently being suffered, the petition envisions significant policy changes to a fundamental law that will ultimately hurt competition and consumers.

The petition is predicated on unsupported and inaccurate claims about Section 230 and the Internet ecosystem

Simply put, NTIA's petition asks the FCC to usurp the roles of Congress and the judiciary to rewrite settled law. Such sweeping changes to a foundational legal regime that has allowed private companies to build the most powerful medium for human expression and economic growth in history are beyond the scope of the FCC's proper authority. If, as the

petition claims, courts have applied Section 230 in a manner contrary to Congress's intent for decades, the responsibility for updating the regime lies with Congress, not the FCC.

Putting aside the obvious deficiencies with NTIA's theory of FCC authority, the petition fails to provide a single plausible policy justification for its attempt to rewrite Section 230. Rather than citing empirical evidence, the petition relies on ahistorical reinterpretations of Congress's intent in passing 230, debunked conspiracies about alleged political bias amongst social media companies, and economically illiterate theories of startup competition to paper over its true motivation: to punish platforms over political grievances. The President's May 28, 2020 executive order and resulting NTIA petition came after a social media company correctly flagged a post from the President as inaccurate, and they are little more than an attempt to "work the refs" by threatening private Internet companies with a flood of meritless litigation if they do not allow politically advantageous falsehoods to proliferate on their platforms. If policy changes to Section 230's critical framework are deemed necessary, Congress should take a comprehensive view of the current Internet ecosystem and the impacts any policy changes would have on that ecosystem, rather than take at face value the many misrepresentations presented in the petition.

The Internet ecosystem is made up of thousands of smaller, newer online platforms that continue to rely on Section 230's commonsense liability framework

The petition, like many critics of Section 230, incorrectly asserts that the Internet industry has grown so large and mature that its companies no longer need Section 230's legal framework as they did when the law was written in 1996:

> "Times have changed, and the liability rules appropriate in 1996 may no longer further Congress's purpose that section 230 further a 'true diversity of political discourse'" when "[a] handful of large if large social media platforms delivering varied types of content over high-speed Internet have replaced the sprawling world of dial-up Internet Service Providers (ISPs) and countless bulletin boards hosting static postings."[1]

This could not be further from the truth; the Internet ecosystem is not a monolith, and anyone with a connection to the open Internet can find—and even contribute to—a sprawling world of diverse platforms hosting user-generated content.

Despite policymakers' and the media's attention on a few, large companies, the Internet is made up of thousands of small, young companies. Section 230 helped create the legal framework that supports the Twitters and Facebooks of the world—where a platform can host an untold amount of user-generated content without being held liable for each individual piece of content it did not create—but it also supports any website or online service that hosts user-generated content. From file sharing services, to e-commerce websites with third-party sellers, to comment sections across the Internet, Section 230 enables all kinds of platforms to host all kinds of user communities creating all kinds of content.

Take, for instance, Newsbreak.com, a news aggregation website cited in the petition for its reposting of an article from Breitbart.com.[2] Newsbreak.com posts previews of news stories

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[1] Petition of the National Telecommunications and Information Administration, Docket RM-11862, (July 27, 2020), at 4. Available at https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf ("Petition").

[2] Petition at 26.

from around the Internet and allows users to comment on those stories. A quick scan of the website's front page shows stories with thousands of comments on each of them. Section 230 protects Newsbreak.com from being held liable for anything posted in those comments. At the same time, Newsbreak.com also has a "Commenting Policy" prohibiting comments containing hate speech, harassment, and misrepresentations.[3] The applicability of Section 230 to Newsbreak.com's comments does not—and should not—change based on the steps they take to keep their platform free from hate speech, harassment, and misrepresentations, but that's the kind of detrimental policy change the petition envisions.

Additionally, the argument that the Internet has matured past the stage of being a "nascent industry"—and therefore can survive such a dramatic shift in the legal landscape as the fundamental rethinking of Section 230 as envisioned by the petition—fails to take into account that as Internet usage grows, so does the amount of content on the Internet that would need to be individually moderated were it not for Section 230. Twitter is a perfect example of that kind of typical explosion in content. The year after Twitter's launch, "[f]olks were tweeting 5,000 times a day in 2007. By 2008, that number was 300,000, and by 2009 it had grown to 2.5 million per day."[4] By 2010, the site was seeing 50 million tweets per day.[5] By 2013, Twitter was averaging more than 500 million tweets per day.[6] What was impractical within a year of the company's launch—monitoring and moderating, if necessary, every one of the 5,000 tweets per day—was

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[3] News Break, "News Break Commenting Policy" (June 2020), available at https://help.newsbreak.com/hc/en-us/articles/360045028691-News-Break-Commenting-Policy
[4] Twitter, "Measuring Tweets" (Feb. 22, 2010), available at https://blog.twitter.com/official/en_us/a/2010/measuring-tweets.html
[5] Id.
[6] Twitter, "New Tweets per second record, and how!" (Aug. 16, 2013), available at https://blog.twitter.com/engineering/en_us/a/2013/new-tweets-per-second-record-and-how.html

impossible within a year and would be inconceivable now. Section 230 creates the legal certainty a platform needs to host user-generated content whether or not it has the ability to monitor and moderate a small number of posts at launch of hundreds of millions of posts after a few years of growth.

At the same time the petition misunderstands the nature and scope of online content moderation in the modern era, it also overstates the ability of technological tools to handle content moderation at scale and the availability of those tools. The petition repeatedly makes claims like, "[m]odern firms…with machine learning and other artificial techniques [sic], have and exercise much greater power to control and monitor content and users,"[7] and overestimates the efficacy of technological content moderation tools. "[W]ith artificial intelligence and automated methods of textual analysis to flag harmful content now available...platforms no longer need to manually review each individual post but can review, at much lower cost, millions of posts,"[8] the petition states, citing only—and rather ironically—a 2019 Freedom House report that warns about the dangers of the use of social media analytics tools by government officials for mass surveillance. The report notes that technologies exist to "map users' relationships through link analysis; assign a meaning or attitude to their social media posts using natural-language processing and sentiment analysis; and infer their past, present, or future locations" in ways that risk civil liberties of social media users. However, nothing in the report suggests that Internet platforms have within reach well-functioning tools to automatically, consistently, and perfectly identify problematic speech as nuanced as defamation, hate speech, harassment, or the many other types of dangerous speech that platforms prohibit to protect their

[7] Petition at 9.
[8] Petition at 5.

users. In fact, the report's policy recommendations include "[p]reserving broad protections against intermediary liability" and warn that "[p]olicies designed to enforce political neutrality would negatively impact 'Good Samaritan' rules that enable companies to moderate harmful content without fear of unfair legal consequences and, conversely, would open the door for government interference."

In reality, perfect content moderation tools do not exist, and the tools that do exist cannot be used alone, especially without chilling user speech. Human moderation will always be a necessary step to understand the context of speech, and, as exemplified by Twitter's growth pattern described above, human moderation of each piece of user-generated content quickly becomes impossible and carries its own steep costs. Even where platforms have supplemented their human moderation efforts with automated content moderation tools, they have been extremely expensive, and they work imperfectly, often removing legal content and other speech that does not violate a platform's acceptable use policies.

Take, for instance, YouTube's work on ContentID, a tool to help rightsholders identify copyrighted material uploaded to the video sharing site. According to the company, YouTube's parent company Google had invested more than $100 million in ContentID as of 2018. The problems with ContentID incorrectly flagging non-infringing content are well documented,[9] despite that substantial investment from one of the world's largest technology companies. The petition even recognizes the overwhelming costs of building content moderation tools, acknowledging that the largest companies have "invested immense resources into both

[9] Washington Journal of Law, Technology & Arts, "YouTube (Still) Has a Copyright Problem" (Feb. 28, 2019), available at https://wjlta.com/2019/02/28/youtube-still-has-a-copyright-problem/

professional manual moderation and automated content screening for promotion, demotion, monetization, and removal."[10] Content moderation tools, and the "immense resources" needed to build them, are far out of the reach of startups, which launch with, on average, $78,000 in funding.[11] If automated content filtering tools are not the silver bullet—as the petition implies—for the biggest and best positioned technology companies in the world, they will certainly fail to solve all content moderation problems for small and new Internet platforms.

The petition's claims about alleged online platform bias are unsupported and cannot support its proposed rewrite of Section 230

In laying out the case for its sweeping reimagining of Section 230, the petition cherry picks one of the statute's findings, claiming that "Congress's purpose [in enacting] section 230 [was to] further a 'true diversity of political discourse,'" but that "times have changed, and the liability rules appropriate in 1996 may no longer further" this purpose.[12] Putting aside the fact that the petition conveniently omits that one of the statute's other stated policy goals "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"[13] militates against its proposed rulemaking, the petition fails to provide any evidence that Section 230 no longer promotes a diversity of political discourse.

[10] Petition at 13.
[11] Fundable, "A Look Back at Startup Funding in 2014," (2014), available at https://www.fundable.com/learn/resources/infographics/look-back-startup-funding-2014
[12] Petition at 4.
[13] 47 U.S.C. § 230(b)(2).

The petition is full of unsupported claims that "large online platforms appear to engage in selective censorship that is harming our national discourse"[14] and that "tens of thousands of Americans have reported, among other troubling behaviors, online platforms 'flagging' content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse,"[15] but it does not present any evidence supporting these claims. Transparently, it attempts to buttress its assertions about "tens of thousands" of reports of Internet platform censorship by citing to the EO, which, not surprisingly, itself fails to provide any evidence beyond conclusory allegations that any such censorship (or even the purported complaints themselves) actually happened.[16] The best evidentiary support the petition can muster for these claims of political bias amongst online platforms is an unsupported assertion from FCC Commissioner Brendan Carr that "there's no question that [large social media platforms] are engaging in editorial conduct, that these are not neutral platforms," and a reference to a pending lawsuit against a single online platform alleging bias.[17] Factually baseless claims—even from an FCC Commissioner—cannot support such a drastic reversal of settled law.

NTIA reveals its hand by openly admitting that it has no factual basis for its assertions of political bias, admitting that "few academic empirical studies exist of the phenomenon of social

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[14] Petition at 7.
[15] Id. at 25.
[16] Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020), available at https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship; Petition at 7.
[17] Id. at 7-8.

media bias."[18] Curiously, it does not actually cite any of these studies, likely because they undermine the petition's thesis. In fact, as two studies from Media Matters for America regarding the reach of partisan content on Facebook demonstrated, "right-leaning and left-leaning pages had virtually the same engagement numbers based on weekly interactions (reactions, comments, and shares) and interaction rates (a metric calculated by dividing the total number of interactions per post on an individual page by the number of likes the page has)."[19] Far from proving that Internet companies engage in widespread censorship of political speech they disapprove of, these studies make clear what is evident to anyone who spends any amount of time on the Internet: opinions from across the political spectrum are widely available online to anyone at any time. The only reason that this diversity of political opinion has flourished online is because Section 230 prevents websites from being sued out of existence for user speech—particularly political speech—that it cannot fully control. Removing 230's protections to promote "a diversity of political discourse" online is like fasting to prevent hunger. Contrary to the petition's claims, Section 230 is more necessary than ever for fostering a diverse range of speech online.

The petition's claims that Section 230 inhibits competition are absurd

To support its claim that Section 230 is outdated, the petition argues "that the liability protections appropriate to internet firms in 1996 are different because modern firms have much

[18] Id.
[19] Natalie Martinez, "Study: Analysis of top Facebook pages covering American political news," Media Matters (July 16, 2018), available at https://www.mediamatters.org/facebook/study-analysis-top-facebook-pages-covering-american-political-news; Natalie Martinez, "Study: Facebook is still not censoring conservatives," Media Matters (April 9, 2019), available at https://www.mediamatters.org/facebook/study-facebook-still-not-censoring-conservatives.

greater economic power, play a bigger, if not dominant, role in American political and social discourse,"[20] and that in light of these market developments, "liability shields [like Section 230] can deter market entrance."[21] The notion that protections from virtually unlimited legal liability could somehow be bad for early-stage startups is so perplexing that NTIA predictably makes no effort to justify this claim with anything beyond mere supposition. It is, of course, simple common sense that as the cost of launching and operating a company increases, the rate of new firm formation will decrease. One study of investors found that 78 percent of venture capitalists said they would be deterred from investing in online platforms if new regulations increased secondary legal liability for hosting user content.[22] Given the high cost of litigation, even a slight increase in legal exposure will have a significant negative impact on startup success. Both Congress and the judiciary recognized the problems of unlimited legal exposure for early-stage companies when they passed and interpreted Section 230, respectively.[23] NTIA has failed to identify any changed circumstances in the intervening years to suggest that subjecting early-stage companies to such unlimited legal exposure would now enhance startup formation and competition.

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[20] Petition at 9.
[21] Id. at 14.
[22] Evan Engstrom, Matthew Le Merle, and Tallulah Le Merle, "The Impact of Internet Regulation on Early Stage Investment," Fifth Era and Engine Advocacy, (November 2014), at 5. Available at https://bit.ly/2YKwmnz. Because this study specifically focused on potential increased secondary liability for copyright infringement, it is likely that increasing secondary liability for a much larger range of non-IP claims as NTIA recommends would have an even larger negative impact on investment in new entrants.
[23] Jeff Kosseff, "What's in a Name? Quite a Bit, If You're Talking About Section 230," Lawfare, (Dec. 19, 2019), available at https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230

Equally implausibly, the petition argues that Section 230 hinders competition because it blocks lawsuits to enforce "interactive computer services' contractual representations about their own services," such that "interactive computer services cannot distinguish themselves."[24] According to NTIA's petition, because "[c]onsumers will not believe, nor should they believe, representations about online services," websites cannot "credibly claim to offer different services, further strengthening entry barriers and exacerbating competition concerns."[25] As with its other arguments, the petition's claims are not supported by evidence or logic.

NTIA's argument is based on the notion that websites are routinely failing to comply with their own terms of service and representations regarding their content moderation practices—an allegation that the petition does not support with any evidence. Moreover, even if the petition were able to cite examples of platforms not complying with their "contractual representations about their own services," it has failed to present any evidence that consumers make decisions about which platforms to use because of their stated content moderation practices rather than, say, the quality of their services. The petition also fails to explain the supposed causal connection between some platforms allegedly failing to comply with their terms of service and a decrease in platform competition. If consumers do not believe that incumbents are fairly moderating user content in accordance with their stated policies, new entrants will be able to compete by deploying better content moderation policies. This is, of course, how the free market works. NTIA's petition seems to believe that users would be more willing to bring costly lawsuits with specious damages claims against platforms that fail to comply with their stated moderation practices than simply switch to a different platform that abides by its moderation

[24] Petition at 26.
[25] Id.

commitments. Not only does the petition fail to present any evidence at all supporting such a bizarre theory of consumer behavior, but it makes the absurd claim that the FCC would bolster competition by drastically changing the legal framework created by Section 230.

Changing Section 230, especially as envisioned by the petition, will do harm to innovation and competition in the online platform space

Section 230 remains one of the most pro-competition laws supporting the U.S. Internet ecosystem. Changing the legal framework that allows Internet platforms to host user-generated content, especially as envisioned by petition, will harm the ability of small and new companies to launch and compete without providing any meaningful benefits to consumers or competition. To quote Chairman Pai, NTIA's petition for rulemaking isn't merely "a solution in search of a problem—it's a government solution that creates a real-world problem."[26]

Modifying Section 230 in the way envisioned by the petition will cement large platforms' market power by making it too costly for smaller companies to host user-generated content. Even with the current legal framework created by Section 230, it costs platforms tens of thousands of dollars per lawsuit to fend off meritless litigation when such a lawsuit can be dismissed at the earliest stages.[27] If platforms lose the ability to quickly dismiss those lawsuits, the costs quickly run into the hundreds of thousands of dollars per lawsuit.[28] At the same time, the petition envisions creating regulatory burdens in the form of transparency requirements around

[26] Oral Dissenting Statement of Commissioner Ajit Pai Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, at 5. Available at https://bit.ly/3lHMujI
[27] Evan Engstrom, "Primer: Value of Section 230," Engine (Jan. 31, 2019), available at https://www.engine.is/news/primer/section230costs
[28] Id.

"content-management mechanisms" and "any other content moderation...practices" that will fall disproportionately on smaller companies. Only the largest, most established platforms with the deepest pockets will be able to compete in a world with a modified Section 230. That will mean there are dramatically fewer places on the Internet where users can go to express themselves, making it harder for diverse viewpoints to find a home online.

Not only would the changes envisioned by the petition make it harder for small and new platforms to launch and grow, changes to the application of the term "otherwise objectionable" would create a legal framework that disincentivizes differentiation in content moderation practices as a way to appeal to unique communities of users online. Take, for instance, the Reddit community "Cats Standing Up." This subreddit features user-submitted images of cats standing up. Their community rules prohibit content that is "[a]nything that isn't a housecat standing."[29] If Section 230's framework were changed such that Reddit would be held liable for user-generated content if they remove content not specifically defined by a narrowed reading of Section 230 (c)(2)(A), they would open themselves up to risk by allowing communities to have rules such as those enabling communities to cater to users who only want to see images of cats standing up. Platforms that launch with the goal of catering to specific communities by hosting specific kinds of content would have to risk legal liability for all user-generated content—which, as established above, is impossible to police in real-time—if they want to engage in content moderation to do anything besides prevent against content that is illegal, obscene, lews, lascivious, filthy, excessively violent, or harassing. This would have the effect of hindering

[29] Reddit, "Cats Standing Up" (March 14, 2012), available at https://www.reddit.com/r/CatsStandingUp/

competition by making it prohibitively expensive to host only specific kinds of user-generated content, or by forcing platforms to forfeit their ability to host niche communities online.

Conclusion

Leaving aside the worthy criticisms of the petition for its inaccuracies surrounding the FCC's authority and the congressional intent of Section 230, the petition fails to identify a justification for such dramatic changes to the law, especially changes that would so disproportionately harm small and new companies and hamper competition in the Internet ecosystem. If the goal of the petition is to "promot[e] Internet diversity and a free flow of ideas" and address a "particularly troubling" alleged lack of competition, the federal government should be strengthening Section 230's legal framework, not taking politically-motivated shots at the law that underpins the creation and sharing of user-generated speech online.

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing comments was served via First Class mail upon:

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Performing the Delegated Duties of the Assistant Secretary for
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/s/ 

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