Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act of 1934	)	RM-11862
	)	

Reply of DigitalFrontiers Advocacy

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Sept. 17, 2020

Table of Contents

Summary

The internet is a wonderous resource for communication, commerce, and creativity. No one would likely argue, however, that there isn't room to improve in light of the accelerating growth of unlawful conduct and other harmful behavior online. Section 230 reform can help address these problems—without "breaking the internet." Instead, it can make the internet an even stronger engine for economic growth, innovation, and healthy discourse.

Part of the problem is that the policy pendulum has swung too far in favor of shielding platforms from liability, at the expense of accountability and consumer welfare. Section 230, as construed by the courts, limits platforms' liability for almost *any cause of action* based on their subscribers' use of the platforms' services for unlawful conduct—regardless of the harm caused; regardless whether the platforms knew or should have known about the unlawful conduct; regardless whether they collected advertising fees, subscription revenue, or valuable data around the unlawful use of their services; and regardless whether they engaged in adequate (or any) content moderation. This has the effect of eliminating for platforms the duty of care that ordinarily requires businesses to take reasonable steps to curb use of their services to harm others.

Thus, despite conventional wisdom and Congress' best intentions, content moderation by platforms is not more likely—but less likely—because of section 230. In this way, section 230 increases the risk that the public will be harmed online, the opposite of Congress' goal. Which is why it is worth exploring whether section 230 reform can better accomplish Congress' objective of promoting content moderation and making the online experience safer, while still continuing to promote the internet as an economic engine and remaining true to the First Amendment.

The best way forward remains for Congress to amend section 230 to require that platforms take reasonable steps to curb unlawful conduct as a condition of receiving section 230's liability limitations. Short of that, however, the FCC can help address the harm from the overbroad court

interpretations by clarifying that section 230 does not bar holding platforms liable when they: 1) negligently, recklessly, or knowingly fail to curb unlawful conduct; or 2) act in violation of their own policies, under pretext, or inconsistently when deciding whether to take down or leave up lawful content.

Most participants in this proceeding expressed views about what the FCC *can't do*, rather than what it *can*. In light of the comments submitted so far, the following points bear emphasizing:

- Section 230(c)(2), *by itself*, accomplishes Congress' goal of overturning *Stratton Oakmont* and preventing the act of content moderation from subjecting platforms to liability.
- Despite ambiguity in the language of section 230(c)(1), courts have construed it as limiting platform liability even when platforms don't moderate but instead negligently, recklessly, or knowingly fail to curb use of their services to harm other.
- The FCC can construe section 230 under the authority of section 201(b) of the Communications Act.
- Because section 230(c)(1) is ambiguous, the FCC is not constrained by prior court interpretations when construing it, but courts would be required under Supreme Court precedent to give deference to the FCC's construction going forward, so long as that construction is reasonable.
- The FCC can reasonably conclude that—although subsection (c)(1) *does* prohibit treating platforms as the speakers or publishers of their users' content in defamation cases—it *does not* prohibit treating them as distributors of that content in such cases. Nor does it prohibit holding them liable for negligently, recklessly, or knowingly failing to curb other unlawful conduct.
- Such a construction would better accomplish Congress' goal of promoting content moderation and protecting the public.
- Such a construction does not amount to regulation.
- Holding platforms accountable for negligently, recklessly, or knowingly failing to curb unlawful conduct by their users would not hinder innovation, hurt smaller platforms and startups, or harm the ability of platforms to serve as avenues of free expression.
- When it comes to issues involving lawful expression—such as concerns over hate speech, bias, and "fake news"—transparency requirements and enforcement of platforms' terms of service may provide a constitutional way forward.

I. Section 230(c)(1), as Construed by the Courts, Increases the Risk of Harm to the Public by Removing the Duty of Care That Would Otherwise Require Platforms to Take Reasonable Steps to Curb Unlawful Conduct

Despite conventional wisdom, section 230 does not encourage platforms to moderate content.[1] Section 230(c)(2), it is true, provides that:

> [n]o provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.[2]

That language, *by itself*, does accomplish Congress' goal of preventing the act of content moderation from subjecting platforms to liability, and so removes the disincentive created by the *Stratton Oakmont* case.[3] Although removing that disincentive benefits the public, *removing a disincentive* is not the same as *creating an incentive*. Nothing in section 230(c)(2) makes platforms better off for moderating. It just eliminates a potential negative consequence *if they choose to moderate*.

And unfortunately, what public benefit subsection (c)(2) does create, subsection (c)(1) takes away, at least the way courts have interpreted it.[4]

Subsection (c)(1) provides that "[n]o 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."[5] Courts have ruled that this language "creates a federal immunity to *any cause*

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[1] *Accord* Comments of Common Sense Media, at 2 (stating that "[w]hile the original intention of the statute was to encourage platforms to moderate content and establish safe online environments, the statute has done nothing to mandate this."); Comments of Consumer Reports, at 9 (stating that "Section 230's 'Good Samaritan' provision *allows* for good faith moderation, but it does *not* encourage it.").

[2] 47 U.S.C. § 230(c)(2), (c)(2)(A).

[3] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 2-4.

[4] *See id.*, at 5-7.

[5] 47 U.S.C. § 230(c)(1).

of action that would make service providers liable for information originating with a third-party user of the service,"[6] including in cases involving housing discrimination, harassment, sexual disparagement, revenge porn, marketing of child sexual abuse materials, and terrorism.[7]

Absent this court construction of subsection (c)(1), platforms would be subject to the affirmative duty of care that ordinarily requires businesses to take reasonable steps to curb unlawful conduct over their services.[8] By taking that duty away, section 230(c)(1) as construed by the courts makes platforms less likely to moderate content—not more—because there is no longer a potential negative legal consequence for failing to do so.[9]

As a result, section 230(c) as applied creates a *misincentive* because platforms can save resources by avoiding the ordinary and appropriate costs companies usually incur to curtail harm, without fear of liability.[10] Consequently, despite Congress' best intentions, section 230 as currently applied increases the risk that the public will be harmed online, the opposite of the stated goal.[11]

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[6]*See* Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997) (emphasis added). Platforms do not receive the liability limitations of section 230, however, if their own, affirmative actions facilitating the illicit, third-party conduct are themselves unlawful. *See* Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

[7]*Accord* Comments of Carrie Goldberg, at 2 (stating that "Big Tech monopolies have abused Section 230 as a license to allow revenge porn, cyberstalking, sex trafficking, dissemination of child sexual abuse material, and criminal harassment on their platforms—the exact type of content that Section 230 was meant to stop.").

[8]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 6-7 & n.28.

[9]*Accord* Comments of Carrie Goldberg, at 1 (stating that "[c]ompanies take no initiative to stop active abuses because there are zero consequences if they don't. They have zero incentive to identify or prevent harm. And in one of my cases, the court even pointed to Section 230 as a logical reason for a tech company to not take action to help a crime victim actively stalked and impersonated, because the immunity from liability meant no action was legally necessary.").

[10]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 7.

[11]*Accord* Comments of Common Sense Media, at 1 (stating that "reforms to Section 230 are key to creating a safe and supportive online environment for our children and families. … Section 230's broad liability shield protects bad actors and makes interactive computer services unaccountable when online harms emerge.") (citing Danielle Citron, *The Internet's Safe Harbor Is Not Safe for Kids*, COMMON SENSE MEDIA (Sept. 6, 2019)).

For that reason, section 230 does not operate today as a "Good Samaritan" provision,[12] notwithstanding Congress' labeling it as such in section 230(c).[13]

Good Samaritan statutes are usually designed to limit liability for individuals *who have no duty of care*, in order to increase the likelihood they will lend aid.[14] The quintessential example is a stranger who comes upon someone in distress. Because the stranger has no relationship to the person in peril, the stranger is under no obligation to help. Moreover, if the stranger takes action despite having no obligation and harms the person in the process, the stranger could ordinarily be held liable, potentially discouraging the stranger from providing assistance. A properly functioning Good Samaritan statute removes the disincentive to act for someone under no duty of care, thereby creating a net increase in the likelihood of action.

Here, by contrast, the platforms have an ongoing relationship with their users. As a result, they have an affirmative duty to take reasonable steps to prevent users from either suffering from, or causing, harm over the platforms' services. Section 230 as applied today is acting to *remove this existing duty of care*, reducing the likelihood platforms will moderate. By eliminating for platforms the duty of care that would ordinarily apply, section 230 as currently construed is acting as a Bad Samaritan statute, limiting platforms' liability even when they negligently, recklessly, or knowingly fail to curb harmful conduct.[15] By fixing this harmful construction, section 230 reform would make people safer, not less safe, as some critics claim.[16]

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[12] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 7.

[13] *See* 47 U.S.C. § 230(c).

[14] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 9-10.

[15] *Accord* Comments of Common Sense Media, at 3 (stating that "Section 230 creates a powerful liability shield for good *and bad* actors online.").

[16] *See, e.g.*, Comments of the American Library Association, at 5-6; Comments of Michelle Banayan, at 13-15; Comments of the Computer & Communications Industry Association, at 6-7; Comments of Consumer Reports, at 9; Comments of Free Press, at 9, 12-13; Comments of New America, at 6.

II. Ideally, Congress Will Condition Section 230's Shield on Taking Reasonable Steps to Curb Unlawful Conduct But, Short of That, the FCC Has Authority Under Section 201(b) to Clarify That Section 230 Does Not Preclude Holding Platforms Liable for Negligently, Recklessly, or Knowingly Failing to Curb Unlawful Conduct

The best course of action would be for Congress to amend section 230 to make clear that platforms only receive its liability limitations when they take reasonable steps to curb use of their services for unlawful conduct.[17] Doing so would preserve the benefits of the subsection (c)(2) content moderation safe harbor, while better accomplishing Congress' goal of actually encouraging such content moderation and protecting the public. Short of that, however, the FCC can help address the overbroad and harmful consequences of the current court interpretations by invoking its authority under section 201(b) of the Communications Act to clarify that section 230(c)(1) does not preclude holding platforms liable for negligently, recklessly, or knowingly failing to curb unlawful conduct over their services.[18]

A. The FCC Can Rely on its Grant of Authority in Section 201(b) to Construe the Scope of the Immunity in Section 230(c)(1)

Some commenters argue that the Communications Act provides the FCC no express authority to construe section 230.[19] Section 201(b), however, provides in relevant part that "[t]he

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[17] *Accord* Comments of Carrie Goldberg, at 1 (advocating legislation); Comments of Common Sense Media, at 1, 3 (suggesting Congress should reform section 230) (citing DANIELLE KEATS CITRON & BENJAMIN WITTES, THE INTERNET WILL NOT BREAK: DENYING BAD SAMARITANS § 230 IMMUNITY, 86 FORDHAM L. REV. 401, 419 (2017)); Comments of Consumer Reports, at 9 (stating that "Congress can and should strengthen the incentives for platforms to carefully moderate harmful or false content on their sites and networks. Lawmakers should also hold platforms responsible, commensurate with their powers and resources, for protecting consumers from content that causes demonstrable harm."); Comments of the Information Technology & Innovation Foundation, at 1 (advocating Congress clarify or update section 230); Comments of Public Knowledge, at 1 (stating that "[t]here are of course legitimate debates to be had about the interpretation of Section 230 in some cases, and even ways it could be amended.").

[18] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 13.

[19] *See, e.g.*, Comments of the American Library Association, at 6; Comments of Common Sense Media, at 2; Comments of the Computer & Communications Industry Association, at 3;

Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [chapter 5 of the Communications Act]."[20] The Supreme Court ruled in *AT&T v. Iowa Utilities Board* that section 201(b) authorizes the FCC to implement the provisions of the Communications Act, including provisions Congress subsequently adds.[21] Because Congress chose to place certain local phone competition provisions in sections 251 and 252 of the Communications Act, the Court concluded that the FCC had authority under section 201(b) to construe them—even though local phone service is ordinarily the province of state regulators, and even though sections 251 and 252 did not explicitly direct the FCC to adopt rules implementing the provisions.[22]

As with sections 251 and 252, Congress chose to place section 230 in chapter 5 of the Communications Act, where section 201 resides.[23] Consequently, the FCC has authority under section 201 to construe section 230, even though section 230 does not explicitly call for FCC implementation.[24]

Some commenters argue that section 230 falls outside the reach of section 201(b) because there is nothing to "carry out."[25] But that's not quite accurate. Proper understanding of the scope of the immunity in section 230 is necessary for courts to apply it. And since section 230 resides in

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Comments of Consumer Reports, at 6; Comments of the Internet Association, at i, 9-10; Comments of NetChoice, at 7; Comments of New America, at 4-5; Reply Comments of Profs. Terry and Lyons, at 9; Comments of Public Knowledge, at 3; Comments of TechFreedom, at i, 4.

[20] 47 U.S.C. § 201(b).

[21] *See* 525 U.S. 366, 377-80 & n.5 (1999).

[22] *See id.*, at 371-75, 377-85.

[23] *See* 47 U.S.C. ch. 5 (including both section 201 and 230 in subchapter II), https://www.govinfo.gov/content/pkg/USCODE-2011-title47/pdf/USCODE-2011-title47-chap5.pdf.

[24] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 14.

[25] *See* Reply Comments of Profs. Terry and Lyons, at 7; Comments of Public Knowledge, at 4-5.

chapter 5 of the Communications Act, it falls within the FCC's jurisdiction to construe it.[26] That the FCC would be construing a provision of law for application by another body—courts—is not inapposite. Just as the Supreme Court concluded in *Iowa Utilities* that the FCC had authority to construe the local phone competition language of section 251 for purposes of guiding application by state commissions,[27] the FCC can construe section 230 for purposes of guiding application by courts. Indeed, courts frequently apply agency constructions of statutes when rendering decisions. And because the FCC would merely be interpreting the statute, claims that implementing section 230 will inexorably pull the FCC into content regulation[28] are simply wrong.[29]

That the FCC has not provided such guidance before is of no matter, despite claims of some commenters.[30] While the misincentives in section 230 as interpreted by the courts might not have caused as many problems in the past, we are experiencing mounting crises around internet accountability. Changing circumstances can, and typically do, prompt initiation of agency activity.

[26] *Accord* Comments of the Free State Foundation, at 2, 4 (stating that "the FCC almost certainly has authority, within proper bounds, to issue clarifying interpretations of ambiguous Communications Act provisions like Section 230 and that it is not inherently improper for the Commission to consider exercising this authority.").

[27] *See* 525 U.S. 366, 378 n.6, 384-85 (1999). *Accord* Comments of the Internet Association, at 10-11 (stating that "*Iowa Utilities Board* involved FCC regulations that would guide state and local decisionmaking.").

[28] *See, e.g.*, Comments of NetChoice at 24-25.

[29] *Accord* Comments of the Free State Foundation, at 5 (stating that "[i]t is difficult to understand how Commission action engaging in such clarification and interpretation—as opposed to its issuing orders or regulations actually restricting, or purporting to restrict, any content providers' speech—violates any entities' First Amendment rights, as some claim.").

[30] *See, e.g.,* Comments of NetChoice, at 9; Comments of Public Knowledge, at 5.

B. Section 230 Does Not Include Language Precluding its Interpretation by the FCC

A number of commenters argue that, notwithstanding section 201(b), the language of section 230 prohibits the FCC from implementing the section's provisions.[31] That is an incorrect reading of section 230.

Section 230 does contain precatory language within its findings and policy provisions expressing Congress' preference to avoid regulation of the internet,[32] as some commenters observe.[33] Such congressional statements, however, are hortatory and do not have the force of law, as even some of these same commenters acknowledge.[34] Moreover, this language at most expresses a *preference* for non-regulatory approaches, not a prohibition of regulation.

Some commenters also point to statements by former Member of Congress Chris Cox, one of the drafters of the language that became section 230, that section 230 was intended not just to *favor* voluntary content moderation, but to *preclude* FCC regulation of the internet.[35] But no language in section 230 explicitly precludes the FCC from regulating the internet. In fact, although an earlier version of what would become section 230 *did* include language that might have

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[31] *See, e.g.,* Comments of the Internet Association, at i-ii, 11-12; Reply Comments of Profs. Terry and Lyons, at 7.

[32] *See* 47 U.S.C. § 230(a)(4) (finding that platforms "have flourished, to the benefit of all Americans, with a minimum of government regulation"); *id.*, § 230(b)(2) (making it U.S. policy 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.").

[33] *See, e.g.*, Comments of Michelle Banayan, at 12-13; Comments of the Center for Democracy & Technology, at 5; Comments of Common Sense Media, at 2; Comments of the Computer & Communications Industry Association, at 4; Comments of the Consumer Technology Association, at 13; Comments of the Internet Association, at i, 11; Comments of NetChoice, at 6; Comments of TechFreedom, at 6.

[34] *See, e.g.,* Comments of the Consumer Technology Association, at 32; Comments of the Internet Association, at 11; Comments of New America, at 4; Reply Comments of Profs. Terry and Lyons, at 8; Comments of TechFreedom, at 9-10, 12.

[35] *See, e.g.*, Comments of the Computer & Communications Industry Association, at 4; Comments of the Internet Association, at 13-14, 16; Comments of the Internet Society, at 3; Comments of NetChoice, at 2-3; Reply Comments of Profs. Terry and Lyons, at 8; Comments of TechFreedom, at i, 6.

precluded FCC regulation of the internet absent an explicit grant of authority somewhere in the statute, that language did not make the final version.[36] If anything, the removal of that language could suggest a congressional intent *not* to affirmatively preclude FCC regulation of the internet.

Regardless, FCC construction of the scope of section 230's liability limitation does not constitute regulation.[37] Regulation typically involves advance restrictions on the permissible business models of multiple, similarly situated entities. Here, however, platforms would still have discretion over their business models on the front end. The FCC would just be clarifying the extent to which individual platforms could be held accountable in court on the back end for the way they exercise that discretion. The FCC construing section 230 to determine the extent to which platforms can be held liable for failing to curb unlawful conduct occurring over their services is no more an act of regulation than a court determining the extent to which a building manager can be held liable for failing to curb unlawful conduct in the operation of its office building. In both cases, the business is not being told *how* to operate its service, but only that it can be held accountable for the way it chooses to do so.

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[36] *See* Jeff Kosseff, *Correcting the Record on Section 230's Legislative History (Guest Blog Post)*, TECH. AND MARKETING LAW BLOG (Aug. 1, 2019) (stating that "[t]he initial version of the Cox-Wyden bill stated that communications laws shall not 'be construed to grant any jurisdiction or authority to the [FCC] with respect to economic or content regulation of the Internet or other interactive computer services.' (This was not in the final bill that Clinton signed, likely in an effort to deconflict it from the Senate's decency provisions, though the final version of the Senate provisions stated that '[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.')", https://blog.ericgoldman.org/archives/2019/08/correcting-the-record-on-section-230s-legislative-history-guest-blog-post.htm.

[37] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 11.

For similar reasons, an FCC conclusion that it can construe section 230 is not inconsistent with its *Restoring Internet Freedom* decision, despite claims to the contrary.[38] The FCC simply observed in that proceeding that section 230 is not a source of FCC authority to regulate the internet.[39] That conclusion has no bearing on whether the FCC has authority to construe the scope of the liability limitation in section 230, as doing so is not an act of regulating the internet.

Indeed, the question here is neither whether section 230 includes language that *grants* the FCC authority to *regulate the internet*, nor whether it includes language that *precludes* the FCC from *regulating the internet*. The question is whether anything in section 230 *precludes* the FCC *from construing section 230* under the general grant of authority in section 201(b). There is no such language in section 230.

C. Because Section 230(c)(1) is Ambiguous Regarding Platforms' Liability for Failing to Curb Unlawful Conduct, the FCC Can Provide its Own Construction and Is Not Bound by Prior Court Interpretations in Doing So

The Supreme Court has held that agencies are free to interpret ambiguous statutory provisions within their jurisdiction; that in developing such interpretations, agencies need not follow previous court constructions of the language; and that courts must defer to such agency interpretations if the interpretations are reasonable, regardless whether the courts believe better interpretations exist.[40] In *NCTA v. Brand X*, for example, the Supreme Court concluded that the

[38] *See, e.g.*, Comments of the Center for Democracy & Technology, at 5, 7-8; Comments of the Computer & Communications Industry Association, at 4; Comments of Common Sense Media, at 2-3; Comments of Consumer Reports, at 6-7; Comments of the Consumer Technology Association, at 14; Comments of Free Press, at 5-6, 17-18; Comments of Incompas, at 10-11; Comments of the Internet Association, at 11-12; Comments of NetChoice, at 9; Comments of New America, at 4; Reply Comments of Profs. Terry and Lyons, at 9; Comments of TechFreedom, at 11-12.

[39] *See In re* Restoring Internet Freedom, WC Docket No. 17-108, *Declaratory Ruling, Report and Order, and Order*, FCC 17-166, at ¶¶ 267, 284 (2018).

[40] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 15.

FCC could rule that cable broadband service is an information service, even though a federal court had previously ruled that it was a telecommunications service, because the statutory language was ambiguous and the FCC's alternative interpretation was reasonable.[41]

Section 230(c) is also ambiguous, at least with regard to platform liability *for failing to moderate*, as opposed to liability *for moderating*.[42] Although subsection (c)(2) is clear that "[n]o provider or user of an interactive computer service *shall be held liable* [for] *action voluntarily taken to restrict access*,"[43] it says nothing about action *not* taken. And although subsection (c)(1) says "[n]o 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,"[44] it does not mention the word "liability." A prohibition on treating platforms as speaker or publishers is not necessarily the same thing as a general prohibition on assessing liability.

Consequently, the FCC is free to adopt its own construction of section 230(c)(1), it is not bound by prior court interpretations in doing so, and courts in the future would be obligated to follow the FCC's construction so long as that construction was reasonable. There is nothing unusual about the fact that the FCC would be binding courts. Under our system, Congress routinely delegates certain authority to agencies by statute and, under the *Chevron* doctrine, courts must defer to agency construction of those statutes so long as those constructions are reasonable. Indeed, that was a main crux of the Supreme Court's ruling in *Brand X.*

[41]NCTA v. Brand X, 545 U.S. 967, 980-83 (2005) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[42]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 15.

[43]47 U.S.C. § 230(c)(2), (c)(2)(A) (emphasis added).

[44]*Id*., § 230(c)(1).

D. The FCC Can Reasonably Conclude That Section 230(c)(1) Does Preclude Treating Platforms in Defamation Cases as Speakers or Publishers, But Does Not Preclude Treating Them as Distributors in Such Cases, Nor Precludes Holding Them Liable for Failing to Curb Other Unlawful Conduct

Nothing in section 230(c)(1) *requires* courts' current interpretation that it precludes holding platforms liable in virtually any cause of action based on its subscribers' use of the platforms' services, since there are other reasonable constructions of the language.[45] For example, another reasonable interpretation would be that section 230(c)(1) *does* preclude treating platforms in defamation cases as speakers or publishers of their users' content, but *does not* preclude treating platforms in defamation cases as distributors of their users' content.

Congress' decision to adopt section 230 was prompted by its consternation with the court decision in *Stratton Oakmont v. Prodigy*, a defamation case.[46] That makes it reasonable to construe the language of section 230 in the context of defamation law. Defamation law has developed specific ways for treating the original author—or "speaker"—of defamatory material, the "publisher" of the material, and the "distributor" of the material.[47] The fact that section 230(c)(1) mentions the first two but not the third could reasonably be construed to mean that subsection (c)(1) precludes treating a platform in a defamation case as either a speaker or publisher, *but does not preclude treating it as a distributor* in a defamation case, notwithstanding that courts today have concluded that it precludes treating platforms as any of the three.

Under this interpretation, platforms *could* be held culpable for the defamatory statements of their users *if they knew or should have known about the defamatory statements*—the standard

[45] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 16.
[46] *See id.*, at 2-4.
[47] *See id*., at 2-3.

that applies to distributors.[48] This interpretation would make sense in light of the fact that there was no allegation in the *Stratton* case that Prodigy knew or should have known about the defamatory statement, which means there is no reason to assume Congress wanted to preclude holding platforms culpable for defamation in such cases.

Congress clearly disagreed with the *Stratton* court's decision to treat Prodigy *as a publisher*—which can be held culpable *even if it is not aware of a defamatory statement* in content it publishes—merely because Prodigy had engaged in content moderation. Precluding the *Stratton* decision's treatment of platforms in defamation cases as publishers of specific content *they did not moderate* merely because of other content *they did moderate*, would remove a significant deterrent to content moderation. It would therefore reasonably meet Congress' objective even without precluding distributor liability for defamatory content that platforms know or have reason to know about, such as when they have been alerted to its existence. Congress could very well have been less sympathetic to shielding platforms in cases where they have such knowledge.[49]

Subsection (c)(2) under this interpretation would still preclude assessing liability on platforms *for their actual moderating of content*, which is also consistent with Congress' goal of wanting to remove disincentives to content moderation. Neither subsection (c)(1) nor (c)(2) would preclude assessing liability on platforms *in non-defamation* cases where they did not moderate the specific content at issue. And without that shield, platforms could still be held culpable if they did not meet the ordinary duty of care by negligently, recklessly, or knowingly failing to curb unlawful conduct over their services. Another way to think of this is that platforms would be held liable

[48] *Accord* Comments of Carrie Goldberg, at 5-6 (stating that "Section 230 immunity should not apply when there's constructive notice of the specific harm and damages," the standard that applies to distributors).

[49] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 8-9.

neither for defamation as a speaker or publisher of their users' content, nor for moderating content, but for *not* moderating content and breaching the duty of care that ordinarily requires businesses to take reasonable steps to curb use of their services to harm others.

Not only would this be a reasonable construction of section 230—and thus permissible under the *Brand X* analysis and subject to deference by courts—it is arguably a better construction than the prevailing one applied by the courts. Congress' goal with section 230 was to protect the public from harmful conduct and encourage content moderation by creating a liability shield for platforms that *do* take proactive measures. It seems odd to construe section 230 as granting a shield to platforms even when they *do not* take such measures, thereby removing the duty of care that ordinarily requires businesses to take reasonable steps to curb use of their services to cause harm. Doing so increases the likelihood people will be harmed online, rather than decreases it.

Congress presumably would have spoken more explicitly if it intended to broadly eliminate for platforms the general duty of care, shielding them even when they do not moderate content and negligently, recklessly, or knowingly fail to curb unlawful conduct over their services. That Congress may not have intended to grant such sweeping immunity when platforms do not act is buttressed by the fact that Congress did not use the word "liability" in subsection (c)(1), which applies in the absence of content moderation, but did in subsection (c)(2), which applies in the presence of content moderation. As one commenter observed: "'[W]here Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[50]

[50]Comments of Michelle Banayan, at 11 (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)).

III. Holding Platforms Liable for Negligently, Recklessly, or Knowingly Failing to Curb Unlawful Conduct Would Not Hinder Innovation, Hurt Smaller Platforms and Startups, or Harm the Ability of Platforms to Serve as Avenues of Free Expression

A number of commenters claim that deviation from the courts' current construction of section 230 would hinder innovation[51] or hurt smaller platforms and startups.[52] Holding platforms accountable for negligently, recklessly, or knowingly failing to curb unlawful conduct would do neither.[53] In fact, it might foster *more* entry, competition, and innovation by ameliorating some of the toxic environment online and the distrust of platforms, both of which can discourage digital participation by individuals and businesses. Startups and smaller platforms might also have an easier time incorporating more sophisticated and proactive content moderation practices earlier in their business evolution than larger, more established platforms will have in retrofitting such measures. If that is the case, newer platforms might actually have an efficiency edge, as well as a competitive edge in being able to market safer and more hospitable services.

As discussed above, assessing liability after the fact for the way a company exercises its unfettered business discretion also does not amount to regulation, and so does not have the innovation chilling affect often ascribed to regulation. Moreover, any court assessment of whether a platform has acted negligently, recklessly, or knowingly will take into account the resources available to the platform.[54] When a platform has fewer resources, less will be expected of it, and when it has fewer users and uses, there will be less for it to do. As the platform grows, so must its

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[51] *See, e.g.*, Comments of the American Library Association, at 2, 3-4; Comments of Incompas, at 2, 7; Comments of the Internet Association, at iv; Comments of the Internet Society, at 2-3.

[52] *See, e.g.*, Comments of the American Library Association, at 5; Comments of Michelle Banayan, at 13-14; Comments of Engine, at 14; Comments of Incompas, at 2, 6-7; Comments of the Internet Association, at iv; Comments of the Internet Society, at 3.

[53] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 11.

[54] *Accord* Comments of Common Sense Media, at 3 (citing HANY FARID, REIGNING IN ONLINE ABUSES, 19 TECHNOLOGY AND INNOVATION 593-599 (2018)).

moderation efforts, but it will have more resources at its disposal. In addition, back-end accountability may encourage platforms to innovate to create their services in ways that curb harm.

Some commenters argue that section 230 reform would harm expression.[55] They also argue that platforms will curtail their moderation efforts for fear of liability and refuse to carry any user-generated content,[56] curtail their moderation efforts and allow even more harmful content on their services,[57] or over moderate.[58]

Holding platforms accountable for negligently, recklessly, or knowingly failing to curb unlawful conduct would not have any of these effects.[59] It would focus on unlawful conduct, not protected speech. It does not create a government entity that could restrict platforms' editorial discretion, avoiding censorship concerns. And the subsection (c)(2) safe harbor for content moderation would remain, allowing platforms to continue carrying and moderating user-generated content free from liability, so long as they take reasonable steps to curb unlawful conduct, the same standard that applies to most businesses.

A number of commenters were particularly worried about being subject to defamation liability.[60] But, as discussed above, platforms in defamation cases would be subject to the distributor standard, which would require action only once the platforms knew or should have

[55] *See, e.g.*, Comments of the American Library Association, at 2; Comments of Incompas, at 7; Comments of the Internet Association, at iv-v; Comments of New America, at 6; Comments of OpenMedia, at 1.

[56] *See, e.g.*, Comments of the American Library Association, at 5; Comments of Michelle Banayan, at 13-14; Comments of the Center for Democracy & Technology, at 2.

[57] *See, e.g.*, Comments of the American Library Association, at 5-6; Comments of Michelle Banayan, at 13-15; Comments of the Computer & Communications Industry Association, at 6-7; Comments of Consumer Reports, at 9; Comments of Free Press, at 9, 12-13; Comments of New America, at 6.

[58] *See, e.g.*, Comments of the American Library Association, at 6-7.

[59] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 12.

[60] *See, e.g.,* Comments of the American Library Association, at 3.

known about the defamatory content. That is a standard that traditional libraries, bookstores, and newsvendors have been living with for decades.

And even if a platform failed to meet the duty of care, it would not automatically be subject to liability. It simply could no longer hide behind section 230. Any lawsuit would still need to prove some cause of action and a court would still be bound to consider the free speech implications before rendering judgement. Section 230 is not the First Amendment of the internet—the First Amendment is. Even if the section 230 shield does not apply, the First Amendment still does. Moreover, narrowing the scope of the liability shield and better encouraging moderation might foster more robust discourse by, as discussed above, ameliorating some of the toxicity online and the distrust of platforms that can discourage individuals' and businesses' digital participation.

IV. Transparency Requirements and Enforcement of Platforms' Terms of Service May Provide a Constitutional Path Forward on Hate Speech, Bias, and Fake News

Commenters are correct that platforms are private actors, which means their editorial discretion is protected by the First Amendment and they are not subject to the restrictions that the First Amendment places on government.[61] Thus, rather than put limitations on platforms, the First Amendment limits the ability of the government to address issues involving lawful expression—such as concerns over hate speech, bias and fake news—as opposed to unlawful conduct.

This is not to say that hate speech and fake news cannot rise to actionable violations of law, such as perhaps harassment or fraud. But we would not be dealing with lawful speech then, in which case platforms might be held culpable for failing to curb such unlawful conduct, as outlined

[61] *See, e.g.,* Comments of Michelle Banayan, at 5; Comments of the Center for Democracy & Technology, at 2; Comments of the Computer & Communications Industry Association, at 6; Comments of the Consumer Technology Association, at 25; Comments of Free Press, at 13-14; Comments of the Free State Foundation, at 3; Comments of Incompas, at 6; Comments of the Internet Association, at iii, 46-48; Comments of TechFreedom, at ii, 26-31.

above. Where there is no unlawful conduct, however, transparency requirements and enforcement of platforms' terms of service may provide a constitutional way forward.[62]

Take for example a user concerned that a platform failed to take down particular expression, such as hate speech, despite applicable language in the platform's terms of service saying it would. The user could seek to bring a breach of contract claim in court or an unfair or deceptive acts or practices complaint before the FTC, arguing that holding a platform culpable for deviating from its terms of service is not the same as treating the platform as the speaker or publisher of third-party content, making section 230(c)(1) inapplicable.[63] Although there is precedent for such an argument,[64] it might be wise for the FCC to clarify that section 230(c)(1) is not a bar to contract or FTC claims for such deviations. To do so, the FCC would again invoke its authority under section 201(b), as discussed above.

A user concerned that a platform *did* take down content, but in a way that did not comply with the policies and procedures in the platform's terms of service, might similarly bring a contract or FTC claim. In this situation, the user would argue that the platform lost its subsection (c)(2) defense because it had failed to act in good faith.

For example, if there was evidence that a platform was motivated by something other than protecting users or the public (such as bias), the user could argue that the platform was acting under

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[62] *Accord* Comments of AT&T, at 3-4; Comments of Common Sense Media, at 4-5.

[63] *Accord* Comments of the Free State Foundation, at 3 (stating that "[t]he Federal Trade Commission, pursuant to its consumer protection authority, may consider complaints that such terms of service have been violated—including complaints that may implicate Section 230 immunity—and may consider whether to impose sanctions for such violations.").

[64] *See, e.g.,* Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009) (reasoning that section 230 might not bar a claim for breach of contract on the grounds that a platform has failed to honor a commitment to remove content, or that such a commitment might constitute a waiver of the section 230 defense). *Accord* Comments of Carrie Goldberg, at 4 (stating that "Section 230 is not meant to immunize online platforms for their own statements and contracts."); Comments of Profs. Barnhizer and Macsary, at 1-3.

pretext, and thus not in good faith. Other evidence of a lack of good faith might include a platforms' failure to act consistently, or its failure to comply with its own policies and procedures regarding the flagging of content, appeals of content violation claims, removal of content, and termination of a user. A platform's lack of due diligence regarding claims that someone has posted inappropriate content might also indicate the absence of good faith. A court could look for any of these factors today under the good faith language of subsection (c)(2) but, again, it may make sense for the FCC to invoke section 201(b) to adopt rules clarifying this interpretation.

Keep in mind that, as discussed above in connection with the discussion of unlawful conduct, the inability of platforms to continue hiding behind section 230 when they act inappropriately in regard to lawful expression would not mean that they would automatically be held liable, or that expression on the internet would suffer. Someone would still need to prove a cause of action, and courts would still be required to apply the First Amendment when addressing any claim against platforms.

If platforms' terms of service are silent or vague on particular issues, provide that the platforms reserve the right to take unilateral action, or say that the platforms reserve the right to follow certain procedures and take certain actions but do not commit to always do so, it may be difficult to demonstrate a violation of the terms of service or bad faith. If necessary, the FCC could adopt transparency requirements or require terms of service to include particular procedural provisions. But again, because platforms are private actors, the FCC would need to ensure that any transparency requirements pass First Amendment muster.

To adopt such transparency requirements, the FCC could rely on section 257 of the Communications Act[65] regarding elimination of market barriers,[66] as it did in creating transparency requirements in its *Restoring Internet Freedom* proceeding.[67] Information about platforms' content moderation practices is relevant to a consumer's decision about what platforms to use, as well as whether to switch providers. In a similar vein, new entrants and existing providers might use such information to compete based on content moderation practices.

At least one commenter argues that the FCC cannot rely on section 257 to adopt transparency rules for platforms because the FCC made clear that its transparency rules in the *Restoring Internet Freedom* order were limited to broadband internet access service providers.[68] But the fact that the FCC chose to limit to such service providers those particular transparency rules it adopted under section 257, does not mean it cannot subsequently adopt similar or different transparency rules under section 257 that apply to different service providers. The FCC might also rely on section 4(i),[69] on the grounds that requiring information about platforms' content moderation policies and practices is reasonably ancillary to its ability to implement the section 230 good faith language under its section 201(b) authority.[70]

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[65] *Accord* Comments of the Free State Foundation, at 6.

[66] 47 U.S.C. § 257.

[67] *See In re* Restoring Internet Freedom, WC Docket No. 17-108, *Declaratory Ruling,* FCC 17-166, at ¶ 232 (rel. Jan. 4, 2018). *See also* Mozilla Corp. v. FCC, No. 18-1051, slip. op. at 69-71 (D.C. Cir. Oct. 1, 2019) (upholding the FCC's authority under section 257 to adopt transparency rules for internet service providers).

[68] *See* Comments of TechFreedom, at 18-20.

[69] *See* 47 U.S.C. § 154(i) (providing that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[70] *Accord* Comments of the Free State Foundation, at 6 (stating that "[w]ithin proper bounds, such transparency rules are a means to increase accountability to the public as well as to assist the courts (and the FTC as well) in determining whether online content providers meet the eligibility requirements for immunity from civil liability under Section 230.").

In any event, transparency requirements alone would not be enough. Fostering competition among platforms over content moderation may help, but won't do enough to curb the growth of unlawful conduct. That will require a better construction of section 230(c)(1), as discussed above.

Conclusion

There is a lot to love about the internet, but it is by no means perfect. To say that the status quo online is acceptable—with its increasing amount of unlawful and harmful conduct—and that neither the internet nor a 25-year-old law can be improved upon, is dishearteningly cynical for an industry that built itself on notions of limitless innovation and making the world better. An online environment that is both permissionless and unaccountable is not anywhere anyone should want to be. As more of communication, commerce, and creativity moves from the accountable brick-and-mortar world to the unaccountable online world, a failure to reform section 230 would be an abdication of responsibility—ironically much like the abdication we are accusing platforms of.

Congress can remedy this situation by amending section 230 to require that platforms take reasonable steps to curb unlawful conduct as a condition of receiving section 230's liability limitations. Short of that, however, the FCC can rely on its authority under section 201(b) to adopt a narrower construction of section 230(c)(1) that allows platforms to be held accountable when they negligently, recklessly, or knowingly fail to curb use of their services for unlawful conduct.

Doing so would restore the duty of care that would ordinarily apply and would better accomplish Congress' goal of protecting the public by promoting content moderation. It would do so without regulating. Without hurting innovation or hindering smaller platforms. And without harming the section 230(c)(2) content moderation safe harbor or hindering the ability of platforms to serve as avenues of free expression.

Because platforms are private entities, their editorial discretion is protected by the First Amendment, and they are not subject to the limitations it places on government. This makes it difficult for the government to address issues online involving lawful speech—such as concerns over hate speech, bias and fake news. Transparency requirements and enforcement of platforms' terms of service may provide a constitutional way forward, however.

Respectfully submitted,

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Sept. 17, 2020