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# Returning the Communications Decency Act to Its Text and Purpose: The NTIA Section 230 Petition

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# Returning the Communications Decency Act to Its Text and Purpose: The NTIA Section 230 Petition

By Adam Candeub

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## Executive Summary:

Following common law, section 230(c)(1) exempts internet platforms from legal liability created by statements their users post. But, thanks to unwarranted statutory interpretation, courts have expanded section 230(c)(1) beyond its common law and textual moorings in two ways: (i) reading the provision to give the platforms absolute immunity—including from knowingly distributing unlawful content and (ii) ruling that section 230 protects against the platforms' own editorial decisions—as opposed to the editorial decision of their users. Courts have criticized this expansion as without basis in statutory text, legislative history, or congressional intent or purpose—let alone any conceivable policy justification. This judicial expansion of section 230 allows the platforms to turn a blind eye to sex trafficking, obscenity, terrorism, and other sorts of unlawful content. The judicial expansion also allows the platforms to remove users and their content in violation of civil rights, consumer fraud, and contract law. The Trump Executive Order 13925 (E.O. 13925) directed the National Telecommunications & Information Authority (NTIA) to petition the Federal Communications Commission (FCC) to implement regulations to correct judicial misinterpretations of section 230. Successful in demonstrating to the FCC that it had authority to issue these regulations, the NTIA Petition sets forth the roadmap for section 230 reform that can protect users and promote free speech online.

## Introduction: The Policy Challenges of Section 230, President Trump's Executive Order, and the National Telecommunications & Information Authority (NTIA) Petition

Section 230 of the Communications Decency Act played a prominent role in the Trump administration's policy deliberations—from the President's many tweets on the topic and his Executive Order 13925 (E.O. 13925),<sup>1</sup> to his efforts to repeal the statute during the final days of his administration. This focus was no accident. President Trump, perhaps the first world leader in history to recognize the full political potential of social media, communicated messages directly to supporters through his Twitter account. He assumed a power to define himself, his message, and his Presidency in a personal, even revolutionary way, circumventing the filters of traditional media outlets and giving him an unprecedented ability to connect with voters.

At the same time, the platforms themselves faced tremendous pressure from both within and outside Silicon Valley to limit the President's ability to communicate. They came to see their civic responsibility—a responsibility no doubt consistent with their ideological preferences—as extending to policing political discourse and cleansing it of what they came to call “disinformation” and other content they deemed harmful. After the events of January 6, due to the “risk of further incitement of violence,” Twitter suspended the President's account.<sup>2</sup>

Because section 230 grants unique liability protections to social media, never enjoyed by any other dominant communications network in our history, the provision naturally became a chip in this political struggle between the President and Big Tech. Without section 230, social media platforms would be liable for all damages resulting from their users' posts. Without certain judicial interpretations of section 230, they

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would lose the ability to moderate and manipulate their users’ content without legal consequence and knowingly transmit illegal content with impunity.

In short, without section 230, Facebook and Twitter no longer have a feasible business model. Trump no doubt recognized the pivotal role the statute plays in social media’s survival. Threatening its repeal became a stick to keep the platforms in line. When he lost that stick at the end of his Presidency, the major platforms felt emboldened to kick him off.

Yet, Congress never intended section 230 to become a locus of the struggle to control political speech in the United States. The NTIA Petition emerged from the recognition that overly expansive judicial decisions have led to the politicization of the provision. By giving the major platforms unprecedented legal immunity, these rulings empowered the platforms to play a greater role in controlling political and democratic deliberation than any group of private entities in American history. The NTIA petition sought, *inter alia*, to return section 230’s interpretation to its textual moorings and congressional purpose—and thereby de-politicize the statute.<sup>3</sup>

First, section 230(c)(1)’s text does not, despite the social media industry’s claims, provide immunity for *knowing* posting of unlawful content. The statute is silent—and such extraordinary liability is inconsistent with a straightforward textual interpretation of the statute’s common law terms. Such immunity allows the platforms to knowingly host unlawful content and even

ignore court orders to remove such content, as *Hassell v. Bird* ruled.<sup>4</sup>

Second, there is no textual basis to conclude section 230(c)(1) provides immunity for actions involving platforms’ *own actions* and *own words*, such as the exercise of their own editorial function in moderating or controlling content. For this reason, section 230 does not bar anti-trust violations when platforms refuse to connect with competitors, contract claims or fraud claims when they break their promises and representations to users or advertisers, or civil rights violations when they ban gay people or Jews from their platforms. Unfortunately, several cases, many of which are California state cases and/or pro se cases that quote *Zeran* out of context, say precisely that. The statute is silent on these two pivotal matters—and only judicial rulings, notably *Zeran v. AOL*,<sup>5</sup> which has become ever more difficult to defend—expand section 230(c)(1) in such ways.

These judicial statutory embroideries were perhaps first motivated in the 1990s from a desire to foster growth in a nascent industry, but they make no sense three decades later with the emergence of dominant internet platforms. Returning section 230 to its textual moorings, absent Supreme Court review, required action by the Federal Communications Commission (FCC) to promulgate regulation. And, that was what the NTIA petition aimed to do.

The NTIA petition faced great challenges. Above all, it had to present a re-thinking of conventional wisdom concerning section 230, a conventional wisdom loudly supported by Big Tech’s numerous friends within the ranks of

Washington lobbyists, think tanks, and academe. Many believed that the FCC had no rulemaking authority to implement regulation interpreting section 230—and it never had claimed authority to do so. The petition had to convincingly show that the FCC had jurisdiction to issue implementing regulations. In addition, the NTIA petition had to present how section 230 court cases had gone awry—and how the FCC could fix it. The following presents the reasoning of the NTIA Petition and its pathway toward section 230 reform.

### I. Section 230: What Congress in fact legislated and why

Congress passed section 230 as part of the Communications Decency Act, a 1996 effort to control pornography on the internet by, in part, overruling a New York state case, *Stratton Oakmont v. Prodigy*.<sup>6</sup> Early platforms, such as Prodigy and its bulletin boards, claimed they could not offer porn-free environments because of a New York State case, *Stratton Oakmont*. Applying the existing law of publication, that case ruled that Prodigy was a “publisher” for all statements on its bulletin board because it content moderated posts to render its forum “family friendly.”

*Stratton Oakmont*’s legal conclusion created the Hobson’s choice: either content moderate and face liability for all posts on your bulletin board, or don’t moderate at all and have posts filled with obscenity or indecent pictures. That legal rule was hardly an incentive to continue to content moderate obscenity and nudity.

Congress, eager to clean up the internet in 1996, came to the rescue with the Communications Decency Act. Representatives Christopher Cox and Ron Wyden floated one bill, with the title “Internet Freedom and Family Empowerment Act,”<sup>7</sup> that became section 230.<sup>8</sup> It was an alternative to Senator J. James Exon’s bill that criminalized the transmission of indecent material to minors.<sup>9</sup> Both became part of

the Communication Decency Act, but the Supreme Court struck down Exon’s portion, leaving section 230.<sup>10</sup>

In particular, section 230(c)(2) resolved the Hobson’s choice that *Stratton Oakmont* created. The provision states that Prodigy—and other platforms such as Facebook, “shall not be held liable” for editing to remove content that is “obscene, lewd, lascivious, filthy, excessively violent, or harassing.”<sup>11</sup> Congress therefore eliminated the Hobson’s choice: when platforms content moderate for these specific reasons, they would no longer be held liable for everything on their site.

The legislative history indicates that the congressmen and women understood section 230’s only task was to resolve the Hobson’s Choice. In its brief legislative history, every legislator speaking on section 230 thought its purpose was to cure the Hobson’s choice and allow free market mechanism to permit more content moderation, *for the specified reasons*, in section 230(c)(2). Congress thought freeing platforms from liability would encourage them to content moderate for porn, or at least create incentives for ISPs to create different types of online experiences.

And, it should be remembered that in the technological context of the time, a competitive market of ISPs, each with different types of content, was conceivable. The CDA was passed in 1996, and the world wide web was just being introduced. For the most part, internet access still involved “walled-garden” experiences provided by dial-up services—which provided email, weather, stock quotes, and bulletin boards. It was reasonable to expect that ISPs providing family-appropriate experience could emerge and compete with other services providing sexual or other content inappropriate for minors.

But, section 230’s text went beyond fixing *Prodigy*’s Hobson’s Choice. While the legislative history hardly discussed section 230(c)(1), which was perhaps an addition from a helpful

lobbyist, this provision proved to be far more important. Section 230(c)(1) eliminates internet platforms’ “publisher or speaker” liability for the third-party user content they post. It states, “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.”<sup>12</sup> This provision treats internet platforms as bookstores or libraries or telephones or telegraphs. They are not responsible for the unlawful content that third parties place on them. In short, it is a statutory enactment of *distributor* liability from the common law.

And, section 230(c)(1), though clearly *not* the stated purpose of section 230, makes good sense as written. Early platforms, such as AOL and Prodigy, would have been crushed with the legal liability of having to review all posts. Section 230(c)(1) said they were not so liable for third party content—and section 230(c)(2) says they would not become so even if they edited them for certain, enumerated reasons. Thus, section 230(c)(1) ratified *Cubby v. AOL*, an early internet opinion, which ruled that because AOL did not moderate or edit content, AOL had no liability for user posts.<sup>13</sup>

In a manner similar to the liability protection for telegraphs, telephones, and bookstores, section 230(c)(1) removes liability for causes of action that include, in their elements, treating the “interactive computer service,” *i.e.*, platform, as a publisher or speaker of another’s words. The classic example is defamation. If a Facebook user posts a defamatory statement and the defamed person sues Facebook as a publisher of the defamation, such action would include “the provider as a publisher or speaker” of such user’s words as an element. Section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be against the user. Section 230(c)(1) thereby allowed AOL and Prodigy to run bulletin boards without the crushing liability risk that thousands of user generated posts presents.

But neither section 230(c)(1) nor (2) extends to platforms’ protection for content moderation reasons *not* specified in section 230(c)(2). That would include “disinformation,” “hate speech,” “misgendering,” “religious hatred,” or for that matter the traffic prioritizations the platforms perform to give people content they want. Yet, some courts have blessed such an untextual expansion.<sup>14</sup>

Not only is the text silent about content moderation, but the legislative history is too. Indeed, the legislative history makes clear that section 230 had nothing to do with content moderation beyond the enumerated reasons in section 230(c)(2). The Communications Decency Act was concerned about limiting pornography and other family unfriendly content on the internet. The categories referenced in section 230(c)(2) all reflect that goal. Perhaps more important, Congress never intended section 230 as some sort of brilliant liability deal to “make the internet.”

In comments on the House floor, Representative Cox explained that section 230 would reverse *Stratton Oakmont* and advance the regulatory goal of allowing families greater power to control online content, protecting them from “offensive material, some things in the bookstore, if you will that our children ought not to see. . . I want to make sure that my children have access to this future and that I do not have to worry about what they might running into online. I would like to keep that out of my house and off of my computer. How should we do this?<sup>15</sup> We want to encourage [internet services to do] . . . everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.”<sup>16</sup> In fact, the comments in the Congressional record from *every* supporting member of Congress—and it received strong bi-partisan support—reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, was a non-regulatory approach to protect-

ing children from pornography and other types of material that the federal government *already* regulated.<sup>17</sup>

The litany of removable material listed in section 230(c)(2) further demonstrates the point that Congress designed the provision to keep material family friendly—by including types of communications already regulated lawfully. The first four adjectives in subsection (c)(2), “obscene, lewd, lascivious, filthy,” are found in the Comstock Act as amended in 1909.<sup>18</sup>

The next two terms in the list “excessively violent” and “harassing” also refer to typical concerns of communications regulation which were, in fact, stated concerns of the CDA itself. Congress and the FCC have long been concerned about the effect of violent television shows, particularly upon children; indeed, concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which the CDA is a part. Section 551 of the Act, entitled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known as the V-chip, which allowed content blocking based on ratings for broadcast television that consisted of violent programming.<sup>19</sup>

Last, section 223, Title 47, the provision which the CDA amended and into which the CDA was in part codified, is a statute that prohibits the

making of “obscene or harassing” telecommunications. These harassing calls include “mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number” or “mak[ing] repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.”<sup>20</sup>

Given that the terms in section 230(c)(2) all refer to matters Congress considered regulable on electronic media and it historically regulated—and, in fact, regulated in the Telecommunications Act, it is reasonable to assume the term “otherwise objectionable” refers to similar types of content, following the *eiusdem generis* interpretive canon: “Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>21</sup> Consistent with the congressional impetus for passing section 230 to combat pornography and other material harmful to children, section 230(c)(2) has only limited protection for specified types of content all relating to harmful content Congress traditionally regulated and so regulated in the 1996 Telecommunications Act.<sup>22</sup>

**Chart 1**

Statutory Section	Legal Protection
Section 230(c)(1)	Liability that attaches for speaking or publishing third-party posts/speech that the platform hosts or controls
Section 230(c)(2)	Liability that attaches for removing, curating, moderating obscene, lewd, lascivious, filthy, excessively violent, harassing content

**“...many courts rely on section 230(c)(1) to allow imposition of highly repressive censorship and deplatforming regimes in flagrant disregard of consumer protection, contract, and civil law. Thus, in this changed online environment, contrary to the early judicial claims, reading section 230(c)(1) broadly restricts free speech.”**

Taken together, both section 230’s text and legislative history point to the same interpretation: Section 230(c)(1) allows platforms to accept comments from their users without liability for such speech, i.e., the situation in *Cubby*. Section 230(c)(2), in turn, protects platforms that want to content moderate, giving them protection when removing, editing, or blocking third-party, user-generated content for certain, enumerated reasons.

Neither the text nor the legislative history reveals any notion of creating some grand liability regime for the internet to give platforms carte blanche to content moderate. It is true that certain legislators, decades after the fact, have made claims that they were making some vital deal for the internet.<sup>23</sup> But, courts do not rely upon comments by legislators made twenty years after the fact, as legislatures have a myriad of motives to characterize their past actions.<sup>24</sup> The Supreme Court rejects these statements as being probative of statutory meaning, stating “[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”<sup>25</sup>

## **II. How Silicon Valley and California courts succeeded in stretching Section 230’s protections beyond its original text and purpose**

Expanding section 230 protections may have been justified at the beginning of the internet to protect a nascent industry, but section 230 caselaw has transmogrified into a set of unprec-edented rules that render Big Tech a law unto

itself. For instance, judicially expanded section 230 lops off the social media giants’ publisher and distributor liability for the content of speech they control—without attaching the common carrier’s obligation to serve the public and refrain from discrimination.<sup>26</sup> The judicially expanded section 230 combines in social media the power of a newspaper editor to defame but with no fear of libel suit; a television broadcaster to use the public airways but with no obligation to carry political advertisements in a nonpartisan manner; a cable system to refuse service to Africans Americans or gay people but with no fear of civil rights laws, and an internal state police that can monitor and censor private conversations but with no common carrier obligation to carry messages confidentially.

And the judicially expanded section 230 further imbues in these firms the power to distribute child pornography, aid and abet terrorism, and assist in human trafficking with impunity. Never in our history have private communications firms enjoyed such legal privileges, giving them an incredible control over what Americans see and read. And, as the 2020 elections have shown, the social media giants are not bashful in wielding this power.

Section 230’s text and congressional purpose speak to narrow protections, targeted at one harm—pornographic and other material harmful to children. It is a baseless claim that section 230’s claims should be read “broadly” as some sort of seminal charter of online internet liability carefully considered by Congress. But, following *Zeran*, many courts have “generally

interpreted section 230 immunity broadly, so as to effectuate Congress’s ‘policy choice ... not to deter harmful online speech through the ... route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”<sup>27</sup>

When section 230 applies to on-line bulletin boards, such as Prodigy, a broad reading protects free speech—and perhaps that is what *Zeran* intended. In such context, a broad reading protects a platform to *add more speech*. Many of the old bulletin boards were not curated experiences. Limiting liability would create more incentive to host more speech—creating freer online environments.

But times have changed, and now a few social media platforms have become the dominant online experience—indeed, they are to use the Supreme Court’s phrase, “the modern public square.”<sup>28</sup> Reading the section broadly, many courts rely on section 230(c)(1) to allow imposition of highly repressive censorship and deplatforming regimes in flagrant disregard of consumer protection, contract, and civil rights law. Thus, in this changed online environment, contrary to the early judicial claims, reading section 230(c)(1) broadly restricts free speech.

#### A. Judicially Expanded Section 230’s first wrong claim: Section 230 (c) (1) protects content moderation decisions

Section 230 states, “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.” The text of section 230(c)(1) protects platforms against liability for claims that include, in their elements, treating the provider as a publisher or speaker of another’s words.

The classic example, again, is defamation. If a Facebook user posts a defamatory statement and the defamed person sues Facebook as a publisher of the defamation, such action would treat “The provider as a publisher or speaker”

of such user’s words. Thus, section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be against the user. But, that is *not* the test that some courts have adopted.

But rather than adopt an elemental analysis that section 230’s text, by using the phrase “treated as the publisher or speaker,” many adopt a test that holds section 230 “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”<sup>29</sup> And that language is quoted extensively.<sup>30</sup>

This language comes from the influential *Zeran* case. What many courts forget is the *immediately preceding* language. To quote the *Zeran* passage more fully, section 230

creates a federal immunity to any cause of action that would make service providers liable for **information originating with a third-party user of the service**. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.<sup>31</sup>

The “traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content” are examples, i.e., the *Zeran* court uses the word “[s]pecifically,” of the type of **third-party content** decisions that section 230 protects. *Zeran* is not saying that section 230 protects a platform from its own editorial decisions or judgments.

In other words, to use Twitter as an example, if a third-party user of Twitter posts criminal threats or omits important context that renders

Chart 2

Liability for Postings on Twitter	
Twitter's content moderation policies, statements and corporate tweets, i.e., its own editorial function	Users' tweets, i.e., users' editorial function
No section 230(c)(1)	section 230(c)(1) protection

his statements libelous, section 230 protects Twitter. Those threats and libelous statements are a product of “traditional editorial functions.” But, if Twitter, itself, imposes content moderation policies that violate its contracts with users or discriminates against certain protected groups, that is Twitter’s *own* editorial function, not that of third parties. Section 230 offers no immunity.

In fairness, when quoted out of context, the “its” in the *Zeran* opinion would seem to suggest that section 230 immunizes the platform’s publisher role. But, this is obviously an example of sloppy drafting as the sentence immediately indicates. Regrettably, much mischief has been caused by this misplaced pronoun and its ambiguous antecedent.

Nonetheless, the distinction is lost on a growing number of courts that misquote the controlling language in *Zeran* and interpret section 230 as immunizing platforms’ *own editorial decisions*. For instance, in *Levitt v. Yelp!*, the plaintiff alleged that Yelp! “manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance.”<sup>32</sup> The *Levitt* plaintiffs argued that Yelp!’s behavior constituted unfair or fraudulent business under Cal. Bus. & Prof. Code § 17200, but that the elements of unfair or fraudulent business practices have nothing to do with speaking or publishing third party content. Rather, they require Yelp! to engage in an “unlawful, unfair or fraudulent business act or practice” or an “unfair, deceptive, untrue or

misleading advertising and any act.” Speaking or publishing third party-speech has nothing to do with this cause of action.

Despite the distinction between Yelp!’s own editorial function and those of its users, the court ruled that section 230(c)(1) immunized Yelp!’s conduct. And, it supported its conclusion by quoting the “traditional editorial functions” language of *Zeran*.<sup>33</sup> But, notice the confusion of the *Levitt* court. Here, Yelp! allegedly made changes and conscious re-arrangements to reviews in violation of its representations to users and customers. This unfair business cause of action had no element that includes speaking or publishing third-party content. Plaintiffs sought to make Yelp! accountable for *its own* editorial decisions.

This reading of section 230(c)(1) would protect platforms from contract, consumer fraud or even civil rights claims, freeing them to discriminate against certain users and throw them off their platforms. Courts are relying upon section 230 to immunize platforms for their own speech and actions—from contract liability with their own users,<sup>34</sup> their own consumer fraud,<sup>35</sup> their own violation of users’ civil rights,<sup>36</sup> and aiding and abetting terrorism.<sup>37</sup>

The transformation of the “traditional publisher function” language in *Zeran* has resulted from a coordinated and consistent defense strategy, originally appearing in pro se cases, such as *Sikh for Justice and Lancaster*.<sup>38</sup> The out-of-context quotation was probably picked up by *per curiam* opinions written by court

staff clerks with little judicial oversight. These opinions were then used and included in more completely litigated cases, such as *Force v. Facebook*.

### **B. The Judicially Expanded Section 230’s liability rule no longer makes sense**

Beyond its misleading dicta that has confused so many courts, the *Zeran* holding, itself, no longer offers a strong or coherent justification. The word “publisher” is fundamentally ambiguous. On one hand, it refers to someone who “actually” publishes or speaks something; on the other hand, it also refers to someone who re-publishes or distributes, as the Restatement (Second) indicates.<sup>39</sup> Thus, like the term “congressman” which refers to both senators and representatives, but usually refers to representatives, “publisher” refers both to those who “actually publish” and those who re-publish or distribute. Both “publishers” and “distributors” fall under the generic term “publisher.” It is not clear whether Congress intended the generic or the specific meaning of publisher. These generic and specific meanings of “publisher” stem from common law concepts.

The common law recognized a “narrow exception to the rule that there must be an affirmative act of publishing a statement.”<sup>40</sup> A person “while not actually publishing—will be subjected to liability for the reputational injury that is attributable to the defendant’s failure to remove a defamatory statement published by another person.”<sup>41</sup> This type of liability describes that which platforms face when they distribute content of another person—a distinction between “actually” publishing and re-publishing or distributing.<sup>42</sup>

Ignoring text and statutory context, *Zeran* opted to interpret “publisher” as including “distributor” thereby removing all liability for content derived from third parties, i.e., “another content provider.”<sup>43</sup> As a textual matter, the statutory context precludes such a move.<sup>44</sup> Here, context makes clear that Congress used the term “publisher” in the more limited sense. As Justice Thomas recently observed in a statement respecting the denial of certiorari, Congress expressly imposed distributor liability in Communications Decency Act, of which section 230 is a part.<sup>45</sup> Section 502 of the Communications Decency Act makes it a crime to “knowingly...display” obscene material to children, even if a third party created that content.<sup>46</sup> It would be inconsistent to argue that Congress implicitly eliminated distributor liability in an Act that expressly imposed such liability.<sup>47</sup>

Further, had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in section 230(c)(1): “No provider shall be held liable for information provided by a third party.” Indeed, Congress used categorical language in the very next subsection, section 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, courts conclude that Congress did so for a reason.<sup>48</sup> Here, that reason is because Congress intended to leave distributor liability intact.

As a policy matter, the *Zeran* approach may have made sense in infancy of the internet, but its policy justifications are outdated. *Zeran* granted its extraordinary immunity, which no other media or distributor has enjoyed, because

“[i]f computer service providers were

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**“Courts are relying upon section 230 to immunize platforms for their own speech and actions--from contract liability with their own users, their own consumer fraud, their own violation of users’ civil rights, and aiding and abetting terrorism.”**

subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.”<sup>49</sup>

But times have changed, and *Zeran* no longer correctly describes online content-moderation. Platforms already use various techniques, many relying upon artificial intelligence, that do what *Zeran* thought impossible, namely examine every post their users made at reasonable cost. Bookstores, social media, and other distributors make decisions and implement policies about who and what access their platforms. Once material is accepted, the law of defamation holds these firms responsible for those decisions. Given the control that AI allows the platforms, they should be responsible for the messages they transmit.

Last, a word about *why* courts have been so expansive in their readings of section 230(c)(1). While such explanations are speculative, three reasons seem likely. First, reading statutory immunity broadly allows for quick disposal of cases, and that helps clear dockets easily and quickly, which is a primary motivation of judges, as Judge Posner has observed.<sup>50</sup> Second, the section 230 defense bar has been sophisticated and well-funded. As described above, it has been able to present consistent views

against plaintiffs who are often pro se or who are often not experts in the deceptively simple statute. Language from these ill-argued and ill-presented cases were then incorporated in other contexts. Third, the *Zeran* court, ruling in the context of AOL bulletin boards, believed that it was furthering free speech by allowing a “broad” immunity. And, it was correct in the 1990s. In the context of bulletin boards in which platforms faced liability was for third-party posts, a broad immunity allowed platforms to host more content.

The judicially expanded section 230 has not simply rendered section 230 a doctrinal mess, but it has rendered the dominant platforms into unbridled political actors and fomented much of the political rancor of recent times. Allowing section 230(c)(1) to protect the content decisions of dominant social media platforms to enforce their own partisan content policies will not result in free speech. Rather, the platforms have become a sort of Tocquevilian democratic nightmare, where majority political and social views, at least views endemic among powerful segments in our society and technology sectors, wage a war of social ostracism and de-platforming against dissenters. In contrast, dominant communications networks in the past have always had obligations to serve all in the interest of robust civil society. Telephones and telegraphs to this day, as common carriers, have an obligation to serve all.<sup>51</sup> Radios, from the first Radio Act of 1927, had an obligation to give equal time to political candidates.<sup>52</sup>

Older electronic media, such as telephones and telegraphs, had no publisher liability for carrying unlawful content, but this privilege was not extended to “knowing” carriage. For instance, it is centuries-old law that UPS or Western Union or other bearers of messages do not function as publishers when they convey messages through their services from one individual to another; they are privileged with

regard to unlawful content they distribute, provided they have no knowledge of the message's unlawfulness.<sup>53</sup> The law, however, did impose distributor liability if one of these services knowingly agreed to deliver unlawful content, for example, child pornography. Liability only attaches when a “telegraph company happened to know, or ‘should have reason to know’, that the message was spurious, or that the sender was acting . . . in bad faith, and for the purpose of defaming another.”<sup>54</sup> And, no liability regime ever removed liability for a platform's own discriminatory, editing, and content-moderation decisions.

### III. The NTIA Section 230 Petition: Challenging Conventional Wisdom

President Trump's May 2020 Executive Order tasked NTIA to write its petition to the FCC to implement regulations to reform section 230. The E.O. recognized that a “limited number of online platforms [can] hand pick the speech that Americans may access and convey on the internet,” and such control undermines “freedom to express and debate ideas is the foundation for all of our rights as a free people.”<sup>55</sup> (Para. 1). Indeed, the Executive Order recognizes this control as “dangerous” and “un-American and anti-democratic.”<sup>56</sup>

Specifically, the E.O. pointed out that how platforms undermine free speech. “Online platforms are engaging in selective censorship . . . . Tens of thousands of Americans have reported . . . 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.”<sup>57</sup>

The E.O. understood how this power to selectively censor emerged from overexpansive interpretations of section 230. It also saw that the provision's primary purpose was to “provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material.”<sup>58</sup> It therefore tasked NTIA to petition the FCC to clarify the provision's scope and correct prior, misguided decisions.

In particular, the EO instructed NTIA to seek clarification on (i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, and especially to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1) as well as the conditions under which an action restricting access to or availability of material is not “taken in good faith.”<sup>59</sup>

With this mission in mind, the NTIA drafted a petition that sought regulations that would interpret section 230 in a way consistent with statutory text and Congressional purpose. Its petition set forth many of the arguments set forth in this Policy Brief. Specifically, the NTIA petition asked the FCC to issue regulations

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**“The judicially expanded section 230 has not simply rendered section 230 a doctrinal mess, but it has rendered the dominant platforms into unbridled political actors and fomented much of the political rancor of recent times.”**

**“The expansive reading of section 230(c)(1) allows the Big Tech to set the rules. It seems that, in a democracy, the democratic process should do that.”**

clarifying that (i) section 230(c)(1) had a scope limited to liability resulting from users’ editorial functions, not the platform’s; (ii) exclude from section 230(c)(1)’s protection for *knowing* carriage of unlawful content; and (iii) adopt a *eiusdem generis* interpretation of section 230(c)(2).

The reaction to the Executive Order and the NTIA petition was cool within many policy circles. Many claimed, improbably, that clarifying the contours violated the First Amendment because it would render the FCC into the speech police.<sup>60</sup> Of course, the petition had nothing to do with restricting speech, but was intended to clarify section 230’s special liability gift to the internet industry. The platforms have always been free to say whatever they wish. Section 230 simply deals with the details of related liability for unlawful speech.

More fundamentally, there was considerable skepticism that the FCC had jurisdiction to write implementing regulation.<sup>61</sup> This confusion stems in part from legal amnesia. Conventional wisdom holds that section 230 is “internet law.” The FCC does telephones. But, lawyers forgot, nearly thirty years after its passage, that section 230 was enacted as part of the Telecommunications Act which in turn was codified into the Communications Act of 1934. Section 201(b) is quite clear that the FCC has plenary power to implement all sections of the m/Communications Act—a point the Supreme Court made twice. The

Supreme Court made clear that “the grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of [the 1934 Communications] Act.’<sup>62</sup>

Also motivating this skepticism was the claim that section 230 was somehow “self-executing.” There was no “room” for regulation, unlike other sections of the Communications Act that explicitly called for regulation or, because they were written at a high level of abstraction, could not be implemented without regulation. But, as the NTIA petition pointed out, and as numerous courts struggling to interpret its text affirm, the statute has numerous textual ambiguities.

Last, the seeming private scope of section 230 presents no bar to the FCC’s power to implement regulations. After all, the statute duplicates public interest because it blocks state criminal and civil enforcement. Further, regardless of their public purposes, agency statutory interpretations and implementation regulations receive full deference and have full effect even when governing actions involving private litigation or disputes in which the agency plays no role.<sup>63</sup> But, not surprisingly, in an exhaustive analysis, the FCC General Counsel rejected these claims and, affirming NTIA’s position, determined that the FCC had jurisdiction to implement the regulations and issued a notice of proposed rulemaking, seeking comment on NTIA’s petition. The arguments largely tracked those made in the NTIA petition,

based upon section 201(b)'s grant of plenary rulemaking authority to the FCC.<sup>64</sup>

#### IV. Moving Forward

Due to the election of 2020, the FCC no longer had a political majority willing to go forward with the NTIA petition. Yet, the election of 2020 underscored the importance of section 230 reform as it led to social media revealing its hand. After social media's stifling of the Hunter Biden scandal, its censorship of scientific research or debate that questioned government positions on the COVID pandemic, and even banning Trump campaign advertisements, few would deny that the dominant social media companies have emerged as powerful, partisan political actors. As such, section 230's special liability break for them makes even less sense. Those that wield such power should not be above the law or lawful democratic oversight.

But, even without the events of the 2020 election, some courts' embrace of content moderation raises broader questions about democratic deliberation. Content moderation is the rules of the game—the terms of the debate for democratic discourse in the 21st century. The expansive reading of section 230(c)(1) allows the Big Tech to set the rules. It seems that, in a democracy, the democratic process should do that.

What if content moderation decisions were taken outside of the purview of section 230? Some argue that the internet would become a trollfest of unpalatable content, destroying the value of many online platforms. That is absurd. Content moderation would simply become a matter of contract, part of the terms of service and legal relationship platforms have with users. As such, contract, consumer fraud, antitrust, and civil rights laws would apply to these policies. The online behemoths would simply face

the same democratic oversight that all other businesses and individuals face.

While unlikely to be successful at the FCC at least in the near term, the petition's influence changed the terms of the debate, along with Justice Thomas's concurrences in *Malewarebytes* and *Biden v. Knight First Amendment Institute*,<sup>65</sup> which adopted similar arguments. The petition's influence is also seen in numerous legislative proposals for reforming section 230. The petition did not achieve its policy goal of the FCC implementing its recommendations into rules, but the petition did carry the ball successfully in a game that defenders of robust democratic discourse must win.

#### Endnotes

1. Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020) (E.O. 13925).
2. [https://blog.twitter.com/en\\_us/topics/company/2020/suspension.html](https://blog.twitter.com/en_us/topics/company/2020/suspension.html).
3. NTIA Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act (July 27, 2020), available at <https://www.ntia.gov/fcc-filing/2020/ntia-petition-rulemaking-clarify-provisions-section-230-communications-act>.
4. *Hassell v. Bird*, 5 Cal. 5th 522, 532 (2018), cert. denied sub nom. *Hassell v. Yelp, Inc.*, 139 S. Ct. 940 (2019).
5. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).
6. 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).
7. H.R.1978 - Internet Freedom and Family Empowerment Act, 104th Congress (1995-1996).
8. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Informa-*

*tion Superhighway*, 49 Fed. Comm. L.J. 51, 69 (1996).

9. *Id.*; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 Notre Dame L. Rev. 293, 316 (2011); 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 564 (2002) (“[T]he Communications Decency Act reflected Congress’s response to the proliferation of pornographic, violent and indecent content on the web Congress’ first attempt to protect children from exposure to pornographic material on the Internet.”).

Telecommunications Act of 1996, Pub. L. No. 104-104, title V, Sec. 509 (1996).

10. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 859 n. 24 (1997) (“Some Members of the House of Representatives opposed the Exon Amendment because they thought it ‘possible for our parents now to child-proof the family computer with these products available in the private sector.’ They also thought the Senate’s approach would ‘involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected.’ These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled ‘Online Family Empowerment.’ See 110 Stat. 137, 47 U.S.C. § 230 (Supp. 1997); 141 Cong. Rec. H8458-H8472 (1995).”).

11. 47 U.S.C. § 230(c)(2).

12. 47 U.S.C. § 230(c)(1).

13. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

14. See, e.g., *Fed. Agency of News LLC, et al. v. Facebook, Inc.*, 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (dismissing discrimination claims under

Title II and 42 U.S.C. § 1983); *Sikhs for Justice “SFJ”, Inc.*, 144 F.Supp.3d at 1094–95 (N.D.Cal. 2015) (Section 230 bars claims for civil rights discrimination claims).

15. See 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

16. *Id.*;

17. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) (“We are all against smut and pornography . . . [rather than give our Government the power to keep offensive material out the hands of children . . . We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector”); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (“I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet”) (statement of Rep. Danner); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (“I have got small children at home.... I want to be sure can protect them from the wrong influences on the Internet. But I have to got to tell my colleagues”) (statement of Rep. White); *Id.* (statement of Rep. Lofgren) (“[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment”); *id.* (statement of Rep. Goodlatte) (“Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet”); *id.* (statement of Rep. Markey) (supporting the amendment because it “dealt with the content concerns which the gentlemen from Oregon and California have raised”); *Id.* (statement of Rep. Fields) (congratulating all the of legislatures for “this fine work”).

18. Section 3893 of the Revised Statutes in section 211 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129; *United States v. Limehouse*, 285 U.S. 424, 425 (1932) (stating that “Section 211 of the Criminal Code (18 USCA § 334) declares unmailable ‘every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character’”). The phrase is repeated in numerous state statutes.

19. 47 U.S.C. § 303(x). See *Technology Requirements to Enable Blocking of Video Programming Based on Program Ratings*, 63 Fed. Reg. 20, 131 (Apr. 23, 1998) (“[T]he Commission is amending the rules to require . . . technological features to allow parents to block the display of violent, sexual, or other programming they believe is harmful to their children. These features are commonly referred to as ‘v-chip’ technology.”). Finding that “[t]here is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children,” Congress sought to “provid[e] parents with timely information about the nature of upcoming video programming and with the technological tools” to block undesirable programming by passing the Telecommunications Act of 1996.

20. 47 U.S.C. § 223(a)(1)(D); see also 47 U.S.C. § 223(a)(1)(C), (E).

21. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (cleaned up); see also *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991).

22. Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. S 230(c)(2)*, 1 J. Free Speech L. 175, 176 (2021).

23. Ron Wyden, *I Wrote This Law to Protect Free Speech. Now Trump Wants to Revoke It*, CNN Business Perspectives (June 9, 2020), available at [https://www.cnn.com/2020/06/09/perspectives/ron-wyden-section-230/index.html?fbclid=I-wARImOHxR8yebkuhMTiHv\\_qbM96Z-boVarUI46poPVrlPrZqkLVwRJeK519Fg](https://www.cnn.com/2020/06/09/perspectives/ron-wyden-section-230/index.html?fbclid=I-wARImOHxR8yebkuhMTiHv_qbM96Z-boVarUI46poPVrlPrZqkLVwRJeK519Fg) (“Republican Congressman Chris Cox and I wrote section 230 in 1996 to give up-and-coming tech companies a sword and a shield, and to foster free speech and innovation online. Essentially, 230 says that users, not the website that hosts their content, are the ones responsible for what they post, whether on Facebook or in the comments section of a news article. That’s what I call the shield. But it also gave companies a sword so that they can take down offensive content, lies and slime — the stuff that may be protected by the First Amendment but that most people do not want to experience online”); JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) (Quoting a June 2017 interview with Ron Wyden, “We really were interested in protecting the platforms from being held liable for the content posted on their sites and being sued out of existence”).

24. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”); *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Mine Workers*, 330 U.S. 258 (1947). Judge Posner cautions: Judges who credit “subsequent expressions of intent not embodied in any statute may break rather than enforce the legislative contract.” RICHARD A. POSNER, *THE FEDERAL COURTS* 270 (1985) (“Judges also risk getting snookered. . . . Post-enactment legislative history

... is sometimes a sneaky device for trying to influence the interpretation of a statute, in derogation of the deal struck in the statute itself among the various interests represented in the legislature. Courts must be careful not to fall for such tricks and thereby upset a legislative compromise.”) (citations omitted).

25. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

26. Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 *YALE J.L. & TECH.* 391, 404-05 (2020).

27. *Universal Communication Sys.*, 478 F.3d 413, 418 (1st Cir. 2007), *quoting Zeran*, 129 F.3d at 330–331.

28. *Packingham v. North Carolina*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1730, 1736, 198 L.Ed.2d 273 (2017).

29. *Zeran*, 129 F.3d at 330 (emphasis added).

30. According to a Westlaw search, 98 cases quote the language directly from *Zeran*. That count probably underestimates the influence of the language because the quotation appears in other cases that are themselves quoted.

31. *Barrett v. Rosenthal*, 146 P.3d 510, 516 (Cal. 2006), *quoting Zeran*, 129 F.3d at 330.

32. *Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526, at \*6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).

33. *Id.*

34. *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017) (stressing that “the immunity bestowed on interactive computers service providers by section 230(c) prohibits all [including contract] of Plaintiff’s claims against Facebook”); *Lancaster v. Alphabet Inc.*, No. 15-CV-05299-HSG, 2016 WL 3648608, at \*5 (N.D. Cal. July 8, 2016) (finding where “plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract . . . CDA precludes any claim seeking to hold Defendants liable for removing videos

from Plaintiff’s YouTube channel”); *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting CDA “immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]”).

35. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836, 121 Cal. Rptr. 2d 703 (2002) (interpreting that “Appellants’ UCL cause of action is based upon . . . [the claim]: that eBay misrepresented the forged collectibles offered for sale in its auctions”).

36. *Sikhs for Justice “SFJ”, Inc.*, 144 F.Supp.3d at 1094–1095 (N.D.Cal. 2015).

37. *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019).

38. *Lancaster v. Alphabet Inc.*, No. 15-CV-05299-HSG, 2016 WL 3648608, at \*5 (N.D. Cal. July 8, 2016).

39. *Restatement (Second) Of Torts* § 558 (1977).

40. Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 *VAL. U. L. REV.* 1, 20 (2016).

41. *Id.* at 21, *citing* *Restatement (Second) of Torts* § 577(2) (Am. Law Inst. 1977)).

42. *Restatement (Second) of Torts* § 578 (1977) (“Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability. Thus one who reprints and sells a libel already published by another becomes himself a publisher and is subject to liability to the same extent as if he had originally published it . . . the same is true of one who merely circulates, distributes or hands on a libel already so published”).

43. *Zeran*, 129 F.3d at 330-31.

44. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *quoting Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) (“It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and

with a view to their place in the overall statutory scheme.”).

45. See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020).

46. 10 Stat. 133–134 (codified at 47 U. S. C. § 223(d)).

47. *Malwarebytes*, 141 S. Ct. at 15.

48. See *Russello v. United States*, 464 U. S. 16, 23 (1983); *Malwarebytes*, 141 S. Ct. at 15.

49. *Zeran*, 129 F.3d at 333.

50. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 1993 SUP. CT. ECON. REV. 1.

51. *Aventure Commc’ns Tech., LLC v. Sprint Commc’ns Co. L.P.*, 224 F. Supp. 3d 706, 712 (S.D. Iowa 2015) (“Telephone companies have been required ‘to provide service on request at just and reasonable rates, without unjust discrimination or undue preference,’ since 1910”); *Am. Tel. & Tel. Co. v. IMR Cap. Corp.*, 888 F. Supp. 221, 236–37 (D. Mass. 1995) (“Under Section 14 of Chapter 159, the DPU is empowered to investigate whether any of the rates of a common carrier are “unjust, unreasonable, unjustly discriminatory, [or] unduly preferential....”); *Essential Commc’ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1117 (3d Cir. 1979); *Home Tel. Co. v. People’s Tel. & Tel. Co.*, 125 Tenn. 270, 141 SW. 845, 848 (1911) (“Telephone and telegraph companies are common carriers of intelligence, and must give the same service on the same terms to all who apply therefor, without partiality or unreasonable discrimination.”), citing *Delaware & A. Telegraph & Telephone Co. v. Delaware*, 50 Fed. 677; *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co. (C. C.)* 177 Fed. 726; *Com. Union Tel. Co. v. New England Tel. Co.*, 61 Vt. 241; *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Central Union Telegraph Co. v. State*, 118 Ind. 194; *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431; *Danaher v. Southwestern Telegraph & Telephone Co.*, 94 Ark. 533.

52. “If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office ... and the Commission shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.” 48 STAT. 1088 (1934), 47 U. S. C. § 315 (1940); see also *Radio - Censorship - Section 315 of Federal Communications Act Relating to Political Candidates’ Speeches Construed As Not Precluding Private Censorship*, 61 Harv. L. Rev. 552 (1948).

53. See *Peterson v. W. Union Tel. Co.*, 65 Minn. 18, 23, (1896) (“Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant cannot be held to have maliciously published a libel”).

54. *Lesesne v. Willingham*, 83 F. Supp. 918, 924 (E.D.S.C. 1949); see also *O’Brien v. W. U. Tel. Co.*, 113 F.2d 539, 543 (1st Cir. 1940) (“the routine transmission of a defamatory message, . . . [but] could only be [liable] . . . where the transmitting agent of the telegraph company happened to know that the message was spurious or that the sender was acting, not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another.”).

55. Exec. Order No. 13925, *supra* note 2, §1.

56. *Id.* §1.

57. *Id.*

58. *Id.* §2.

59. *Id.*

60. Remarks Of Commissioner Jessica Rosenworcel Federal Communications Commission “Section 230, Online Speech, And The FCC,”

It is a transparent attempt to intimidate social media platforms into advancing Trump’s agenda.”).

61. McBeath, *supra* note 49 (“Andrew Jay Schwartzman, senior counselor, Benton Institute for Broadband & Society: “The FCC has no authority to interpret section 230” . . . .Free Press Senior Counsel Gaurav Laroia: “The Trump administration’s petition to the FCC for a rulemaking on section 230 is a confused and embarrassing document — . . . . [the Petition] cannot suddenly give the agency authority to regulate internet platforms — a power the FCC has never claimed.”).

62. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999); *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 293 (2013) (noting that section 201(b) of that Act empowers the Federal Communications Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions. Of course, that rulemaking authority extends to the subsequently added portions of the Act.”).

63. *Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 58 (2007); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 650–51 (7th Cir. 2015); *Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360, 372 (6th Cir. 2012); *Schafer v. Astrue*, 641 F.3d 49, 61 (4th Cir. 2011); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th Cir. 2009).

64. Thomas M. Johnson Jr., FCC General Counsel *The FCC’s Authority to Interpret Section 230 of the Communications Act* (Oct. 21, 2020), *available* at <https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act>.

65. *Biden v. Knight First Amendment Institute*, 593 U.S. \_\_\_ (2021) (Thomas, J., conc.).