Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF
THE FREE STATE FOUNDATION*

These reply comments are submitted in response to the Commission's request for public comments regarding the Petition filed by NTIA asking the Commission to initiate a proceeding to clarify the provisions of Section 230 of the Communications Act of 1934. In our initial comments we stated that, a quarter century after its enactment at the dawn of the Internet Age, now in an Internet ecosystem that hardly would have been imaginable in 1996, it is appropriate for Section 230 to be subjected to careful review, either by Congress or the FCC. Given their respective roles, we have no hesitancy in saying that Congress is the more appropriate venue for such a review. Indeed, several committees are undertaking that task, and several bills have been introduced to revise Section 230 in various ways.

Nevertheless, despite objections to the contrary expressed by many in their initial comments, we remain of the view that the FCC likely possesses authority to interpret and clarify the meaning of Section 230's terms – as opposed to issuing rules mandating that "interactive computer services" publish or not publish, or censor or not censor, any

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* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Director of Policy Studies and Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

particular speech. In our initial comments, we were careful to limit our observations to the FCC's "authority, within proper bounds, to issue clarifying interpretations of ambiguous Communications Act provisions like Section 230."[1]

Relatedly, many of the opponents of NTIA's petition wrongly equate **any** action that may narrow in **any** way the scope of the immunity afforded to interactive computer services by Section 230 with government compulsion or censorship of speech violative of the First Amendment. For the purposes of argument and illustration, let's assume here that such narrowing construction is accomplished either by congressional amendment or by Commission action. As a matter of law, and putting aside whether or not any such congressional or FCC action represents sound policy, altering the scope of immunity from liability does not necessarily **compel** the websites which presently enjoy such immunity to say anything they do not wish to say or to censor anything that they do not wish to censor. It may just mean they have additional incentives to be more transparent and accountable to the public for their actions and/or that they must defend themselves in court for claims that they have acted unlawfully.

Many of the opponents of any revisions to Section 230 point to the likelihood of increased litigation and the associated burdens and costs of such litigation and, *ipso facto*, leap, quite reflexively, to a First Amendment violation. We don't deny the existence of such burdens and costs. But if interpretations of law that narrow immunity provisions were *per se* or "facial" violations of the First Amendment on this basis, as opposed, potentially, to constituting "as applied" violations considered in a specific context

[1] Comments of the Free State Foundation, RM-11862, September 2, at 2.

involving an evidentiary record, then First Amendment casebooks would be filled with many more cases.

Below we will respond briefly to claims in the comments relating to the FCC's authority and the First Amendment.

A. The FCC's Authority

To repeat, we think Congress is the more appropriate venue for a Section 230 review and possible revision. Nevertheless, to the extent that the Commission limits its role to issuing an interpretation of provisions in the Communications Act, it is not as easy as opponents claim to dismiss the agency's authority to do so.[2]

After all, to a significant extent, that is primarily what the landmark *Brand X* case is all about.[3] There the case turned on the Commission's interpretation of the definitions of "telecommunications service" and "information service." The Supreme Court, applying a heavy dose of *Chevron* deference, affirmed the FCC's determination that Internet access services are non-common carrier information services. In doing so, the Court declared: "Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act, §151, and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act, §201(b)."[4]

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[2] *See, e.g.*, Comment of Americans for Prosperity, September 2, 2020, at 3-6; Comments of Free Press, September 2, 2020, at 3; Comments of New America's Open Technology Institute, September 2, 2020, at 3; Reply Comments of Professors Christopher Terry and Daniel Lyons, September 10, 2020, at 8.

[3] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

[4] *Id*. at 980. The FCC had relied on Section 151 as a source for its interpretative authority regarding "telecommunications services" and "information services" in its *Cable Modem Order*, along with Section 4(i) of the Communications Act, which provides that "the Commission may perform any and all acts…and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, March 15, 2002, at para. 75.

In its 2018 *Restoring Internet Freedom Order*, the Commission relied on the above-quoted portion of *Brand X* in finding that it possessed authority to return to its previous classification of broadband Internet access services as "information services" under Title I. In the *RIF Order*, the Commission declared:

> The Supreme Court made clear when affirming the Commission's original information service classification of cable modem service that Congress 'delegated to the Commission authority to execute and enforce the Communications Act, as well as prescribe the rules and regulations necessary in the public interest to carry out the provisions.' This delegation includes the legal authority to interpret the definitional provisions of the Communications Act. Nothing in the record meaningfully contests this fundamental point.[5]

We recognize that *Brand X* and the *RIF Order* involved the agency clarifying statutory "definitions" rather than statutory "terms" that are not denominated "definitions." But we are not convinced that, for purposes of determining the Commission's authority to declare its understanding of the meaning of statutory provisions in the Communications Act, that this constitutes any material difference.

We also recognize that many of the NTIA petition opponents assert that none of the terms in Section 230 are ambiguous[6] (while other opponents take the contrary view and assert that Congress deliberately intended to leave some terms, like "otherwise objectionable," ambiguous to accord content providers free rein). We admit that ambiguity, up to a point, is in the eye of the beholder. After all, in *Brand X*, the Justices

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[5] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, Order, January 4, 2018, at para. 155. In view of the statutory text, *Brand X*, and the *RIF Order*, we are not persuaded by comments claiming that Section 201(b) does not provide the Commission with any authority to interpret the meaning or application of Section 230. *See, e.g.*, Comments of Free Press, at 15-16 (because common carrier services are not involved); New America's OTI, at 5 (citing the FCC's failed attempt to regulate based on ancillary authority alone in *Am. Library Ass'n. v. F.C.C.*, 406 F.3d 689, 703 (D.C. Cir. 2005) as well as the Commission's failed attempt to rely primarily on report authority to impose program content regulation in *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002); Comments of Professors Terry and Lyons, at 7 (because Section 230 includes no express directive to the Commission).

[6] *See, e.g.*, Comments of Americans for Prosperity, at 3, 7-8, 11; Comments of Free Press, at 3, 13.

split 5-4 regarding whether the definitions of "telecommunications" and "information services" were ambiguous or not. That's why we have courts of law.

And regarding the claim that nothing in Section 230 indicates an intent by Congress to confer any interpretive authority on the FCC,[7] the Supreme Court's decision in *City of Arlington v. FCC* is pertinent.[8] Preliminarily, it is worth noting that the Court relied on the grant of authority in Section 201(b) as empowering the Commission to issue a declaratory ruling clarifying the meaning of certain wireless siting provisions in Section 332 of the Communications Act.[9] In other words, a grant of authority residing in Title II was used as authority for clarifying provisions in Title III. Moreover, and perhaps more to the point, writing for the *City of Arlingto*n majority, Justice Antonin Scalia rejected the contention that, for purposes of applying *Chevron* deference, there is a distinction, akin to that asserted by some in this proceeding, between "jurisdictional" and "nonjurisdictional" interpretations, or to the same effect, that an agency's interpretation of the bounds of its authority is due no deference. Rejecting that claim, Justice Scalia responded: "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always simply, *whether the agency has stayed within the bounds of its statutory authority*."[10]

Finally, to the extent that the question is confined to the Commission's authority to issue declaratory orders interpreting provisions of the Communications Act, as

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[7] *See, e.g*., Comments of Americans for Prosperity, at 3-6; Comments of Free Press, at 3; Comments of New America's OTI, at 3; Reply Comments of Professors Terry and Daniel Lyons, at 8-9.

[8] See *City of Arlington v. FCC*, 569 U.S. 290 (2013).

[9] *Id*. at 293-295. Note that the Court relied on Section 201(b) as authority for the Commission clarifying statutory provisions in Title III, not Title II.

[10] *Id*. at 297. By discussing the Court's holding in *City of Arlington* and other cases, we do not want to be misunderstood as necessarily endorsing an expansive view of *Chevron* deference. Indeed, on separation of powers grounds, we have expressed reservations regarding the way in which holdings, such as in *City of Arlington* and other cases, confer overly expansive authority on administrative agencies.

opposed to issuing mandatory orders, Section 554(e) of the Administrative Procedure Act[11] is relevant. Although not addressed by the NTIA petition's opponents, Section 554(e) provides that an agency "in its sound discretion, may issue a declaratory order to …remove uncertainty." The Commission has relied on this APA provision in issuing declaratory orders.[12]

B. The First Amendment

To repeat again, we think Congress is the more appropriate venue for a Section 230 review and possible revision. But we don't think that means that any Commission declaratory orders interpreting Section 230's terms, say, for example, "otherwise objectionable," necessarily violate the First Amendment. This is because, despite the efforts of commenters to completely conflate the two, there is a difference between an agency interpreting a statutory provision and purporting to affirmatively exercise statutory authority to compel or mandate speech or censorship. Americans for Prosperity, for example, claims NTIA's petition "would violate the First Amendment by **compelling** individuals to engage in or host speech that they otherwise find objectionable."[13] And AFP refers to a case "[**c]ompelling** individuals to mouth support for views they find objectionable."[14] Professors Christopher Terry and Daniel Lyons refer to a case involving a mandatory right-of-reply for a newspaper as "**compelled** speech created through a mandated access provision."[15] New America's Open Technology Institute says

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[11] 5 U.S.C. §554(e).

[12] *See, e.g.*, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, Declaratory Ruling, released March 23, 2007, para 2, note 3; United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, Memorandum Opinion and Order, WC Docket No. 06-10, released November 7, 2006, para 2, note 2.

[13] Comment Americans for Prosperity, September 2, 2020, at 2.

[14] *Id.*, at 16.

[15] Reply Comments of Professors Christopher Terry and Daniel Lyons, September 10, 2020, at 4.

NTIA's attempt to **"dictate"** when liability attaches "amounts to content-based restrictions that run afoul of the First Amendment."[16]

In defending the First Amendment rights of speakers, we have, over many years, cited many of the cases relied on by NTIA petition opponents in instances of government-compelled or dictated speech, and we'll continue to do so. Indeed, we have forthrightly defended the First Amendment rights of the social media and other content providers, like Google, Facebook, and Twitter, when others have claimed a violation of their First Amendment rights, and even when we have disagreed with their actions.[17] As we stated in our initial comments: "[W]hen private sector online services remove or disable access to users' content from their websites, they do not violate the First Amendment free speech rights of the sites' users. The First Amendment prevents the government from censoring speech, not private actors."[18] But any narrowing of immunity from liability does not necessarily equate to government compulsion that compels what a content provider must say or not say or censor or not censor. And it does no service to the First Amendment to conflate the two.

We do understand, of course, that any action which has the effect, whether taken by Congress or the FCC, of *actually*[19] narrowing the immunity from liability currently accorded to interactive computer services like Google, Facebook, Twitter, and thousands of others may be burdensome and costly. Thus, Professors Terry and Lyons express

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16 Comments by New America's Open Technology Institute, September 2, 2020, at 6.
17 *See, e.g*. Randolph J. May, "FSF President Randolph May's Statement on Trump Executive Order," The Free State Foundation Blog, May 29, 2020, at: https://freestatefoundation.blogspot.com/2020/05/fsf-president-randolph-mays-statement.html.
18 Comments of the Free State Foundation, September 2, 2020, at 3.
19 We say "actually" because, for the sake of argument, we are assuming here that the courts ultimately accept, by the application of *Chevron* deference or otherwise, a Commission interpretation of Section 230's terms that narrows immunity from liability. The courts will have the final word, and they may not do so.

concern that the effect of any revisions to Section 230 is "likely to be fewer cases dismissed and more cases going to trial, which strips Section 230 of one of its biggest advantages: avoiding the litigation costs of discovery." [20] TechFreedom says that Section 230 revisions would place "a heavy burden on websites to defend their exercise of editorial discretion each time they are sued for content moderation decisions."[21] Americans for Prosperity worries that any narrowing of immunity may cause social media sites to "err on the side of caution, removing any content that could potentially trigger a lawsuit." Or they may have to pay for more moderators, which would impact their "legal budget to deal with litigation, even if meritless." [22]

These effects, in many instances, are real and may be significant. Certainly, as a matter of policy, the increased burdens and costs imposed on content providers by any narrowing of the existing immunity they enjoy should be taken into account in considering the lawfulness of any revisions. And, as a matter of First Amendment law, consideration of these impacts, which are claimed to constitute "chilling effects," is not irrelevant either, especially in a case based on the compilation of an evidentiary record that challenges any Section 230 revisions "as applied" to the social media websites.[23] But it is also relevant, as a matter of law and policy, in considering whether any Section 230 revisions would increase the transparency and accountability of the social media websites

[20] Reply Comments of Professors Christopher Terry and Daniel Lyons, at 16.
[21] Comments of TechFreedom, September 2, 2020, at iii.
[22] Comment of Americans for Prosperity, at 38.
[23] We note that most often, under the Supreme Court's jurisprudence, the "chilling effects" doctrine has been applied to laws and regulations that are found to be "overbroad" and highly discretionary in application. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

to consider that many publishers and speakers do not enjoy such immunity and the First Amendment does not compel such a grant.[24]

Finally, we don't believe that any narrowing of Section 230 immunity from liability constitutes an "unconstitutional condition," and we are not aware of any cases so holding. In any event, the leading cases on "unconstitutional conditions," for example those cited by TechFreedom,[25] generally involve instances of claimed withdrawals of federal financial assistance as well as tax exemptions and deductions. They generally arise in the context of the Supreme Court's Spending Clause jurisprudence,[26] a context different than the present instance involving the conferral of immunity.

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[24] Of course, the courts, properly, can erect a high hurdle for imposing liability on publishers for allegedly defamatory statements, as the Supreme Court did in *New York Times v. Sullivan*, 376 U.S. 254 (1964), with regard to public figures, to safeguard freedom of speech. On the other hand, when teenager Nicholas Sandmann, not a public figure, sued the Washington Post and other media outlets for defamation regarding the way they characterized his encounter on the Washington Mall with a Native-American activist, the Washington Post and CNN settled the lawsuits, while others are continuing to litigate. See Paul Farhi, *Washington Post Settles Lawsuit with a Kentucky Teenager*, July 24, 2020, at: https://www.washingtonpost.com/lifestyle/style/washington-post-settles-lawsuit-with-family-of-kentucky-teenager/2020/07/24/ae42144c-cdbd-11ea-b0e3-d55bda07d66a_story.html. While litigation is a burden to be sure, no one seriously claims that the media outlets enjoy immunity under the First Amendment from suit.

[25] Comments of TechFreedom, at 36-40.

[26] *See*, *e.g., Regan* v. *Taxation with Representation of Wash.* 461 U.S. 540, 549 (1983).

In conclusion, the Commission should consider NTIA's petition regarding Section 230 with the views expressed herein and in our initial comments in mind.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Senior Fellow and Director of Policy Studies

The Free State Foundation
P.O. Box 60680
Potomac, MD 20859
301-984-8253

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