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

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

September 17, 2020

REPLY COMMENTS OF LINCOLN NETWORK

The Commission has been asked to respond to the National Telecommunications and Information Administration petition to initiate a rulemaking on Section 230 of the Communications Act of 1934, as amended. As forcefully argued by other commenters, the Commission does not currently have the authority to reinterpret or clarify the statute.[1] Lincoln Network (hereafter "Lincoln") believes that the case for rejection of the NTIA petition has already amply been made; our Reply Comments here are meant to underscore that there is at least one better alternative to address concerns about Section 230 than to petition the Commission to re-legislate the statute or to "clarify" it by re-interpreting it. The ultimate responsibility for updating and reforming Section 230 must fall on Congress, including granting any new regulatory authority to the Commission. Lincoln believes the best path forward to achieve informed consensus on Section 230 reform is for Congress to undertake the creation of a nonpartisan Congressional Commission—providing a forum to weigh the policy objectives sought by NTIA and the White House, as well as a broad range of other stakeholders.

[1] See, e.g., Comments of TechFreedom, RM-11862 (filed Sept. 2, 2020); Comments of New America's Open Technology Institute, RM-11862 (filed Sept. 2, 2020); Comments of Public Knowledge, RM-11862 (filed Sept. 2, 2020).

I. Contextualizing the Section 230 Debate

Lincoln believes that any revision to Section 230 must be rooted in an understanding of its history, including but not limited to its legislative history. We do not seek to reproduce that history here, in light of the other commenters' testimony that recounts or interprets it. Even so, we do wish to draw attention to the recent (July 28) Senate testimony by former Representative Chris Cox, who was one of the two original drafters and sponsors of Section 230 (along with then-Representative Ron Wyden).[2] [3] As Rep. Cox stressed in his testimony, the original text of Section 230 was meant to shield internet service providers from legal liability for content that the service provider did not originate—that is, content that the service provider did not create "in whole or in part." As Cox explained it in his written submission:

> *Section 230 was written, therefore, with a clear fact-based test:*
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> - *Did the person create the content? If so, that person is liable for any illegality.*
> - *Did someone else create the content? Then that someone else is liable.*
> - *Did the person do anything to develop the content created by another, even if only in part? If so, the person is liable along with the content creator.*

In doing so, Cox explains, he and Wyden were trying to balance the very concerns are reflected in today's debate about Section 230—the complaints from various individuals and political groups that internet services such as Facebook and Twitter "censor" (that is, remove) too much political content, or not enough "hate speech," or that, when they do remove content, they remove the wrong kind of content. In effect, the complaints are driven by the impulse to second-guess the services' various choices to remove or not to remove.

The problem, as Cox points out in his written testimony, is that no traditional model of legal liability for mass distribution of content—no model

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[2] "The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World." July 28, 2020. https://www.commerce.senate.gov/2020/7/the-pact-act-and-section-230-the-impact-of-the-law-that-helped-create-the-internet-and-an-examination-of-proposed-reforms-for-today-s-online-world.

[3] "Testimony of Former U.S. Rep. Chris Cox, Aughot and Co-Sponsor with Sen. Ron Wydon, Section 230." https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71.

deriving from the traditional press, or from broadcasting, for example—could deal with the volume of disintermediated user-generated content hosted by the largest platforms of the 1990s (e.g., America Online and CompuServe). And if that was true a quarter-century ago, it is even more true today, with platforms such as Twitter and Facebook hosting orders of magnitude more users and orders of magnitude larger quantities of user-generated content. Even so, Cox and Wyden crafted Section 230 with immense foresight, anticipating that a simple grant of flat immunity would invite abuse; they knew it was important not to give platforms that deliberately originated or developed illegal or tortious content a free pass. The question was how to strike the balances so that these then-new forums for freedom of expression, hosted by innovative, economy-boosting companies, wouldn't be unwittingly held responsible for unlawful content they didn't originate while ensuring that they could be held responsible for deliberately cultivating (through creation or development) of such content. As Cox put it in his Senate testimony last July:

> *Rep. Wyden and I knew that, in light of the volume of content that even in 1995 was crossing most internet platforms, it would be unreasonable for the law to presume that the platform will screen all material. We also well understood the corollary of this principle: if in a specific case a platform actually did review material and edit it, then there would be no basis for assuming otherwise. As a result, the plain language of Section 230 deprives such a platform of immunity.*

In short, Section 230 was designed to strike a balance between freedom of expression and responsibility. The statute shielded platforms from default legal liability even for mistaken judgments about what to remove or what not to remove. This was necessary, the drafters believed, because it was important that platform operators not be so fearful of making a mistake in curating content that they'd be afraid to remove content that they believed was either illegal or inappropriate for their audiences. (In effect, Section 230 was designed to strengthen the platforms' First Amendment protections as editors.) But mischievous or irresponsible platforms that, for example, deliberately sought to promote falsehoods about a private individual or public figure could be held liable if it failed Cox and Wyden's three-part fact-based test, quoted *supra*.

The NTIA has asked the Commission to "clarify" whether Congress struck the right balance in enacting a statute that essentially did what its drafters intended. Although we acknowledge that there may be valid reasons to consider amending Section 230 in light of more than two decades of experience with the

law,[4] we necessarily have to conclude that neither the NTIA nor the Commission is the right forum for any "clarification" of Section 230 that alters the established understanding of what the law means and how it has been intended to apply. Such a "clarification" is, in effect, a kind of legislative amendment, and therefore must be understood to belong to Congress under its Article I authorities rather than to the Commission (or the NTIA) under its Article II authorities.

II. Congress, not the Commission, Must Lead on Section 230 Reform

Lincoln believes that the ultimate responsibility falls on Congress to consider and implement any potential reforms to Section 230, including whether the Commission should have authority over it. Given the highly-politicized debate over Section 230 reform[5] and its high economic stakes,[6] Congress must first take steps to enhance its understanding of the issue, providing for the consideration of rational reforms that may better calibrate the law's balances. This is a reasonable undertaking, as much has changed in the quarter-century after the statute was enacted, including how the online platform ecosystem has evolved (aided in no small part by Section 230), as well as how the courts have interpreted the law.[7]

Lincoln believes that the best path forward, in order to return this debate to sober consideration of the serious issues raised by both sides, is the formation of a nonpartisan Congressional Commission.[8] This is an idea that was first proposed by U.S. Naval Academy professor Jeff Kosseff, who framed the role of such a body as bringing together a broad group of multi-disciplinary experts to investigate online

[4] We stress here that, although we are skeptical as to whether Section 230 is itself a source of problematic content on the internet, we recognize that many critics are offering good-faith arguments regarding the need for some reform. Even former Representative Cox, who co-sponsored Section 230, as well as Professor Jeff Kosseff (whose book *The Twenty-Six Words That Created the Internet* remains a touchstone for students of Section 230), have argued for some legislative refinements. Our Reply Comments here are aimed at underscoring the right channel for such potential refinements to be developed and assessed.

[5] This includes calls to revoke or reform the statute by both President Trump and Joe Biden, multiple Members of Congress, as well as a wide range of companies—some of whom are in competition with Google and Facebook—including Oracle, IBM, NewsCorp, AT&T, et al.

[6] See, e.g., Comments of Jerry Ellig, RM-11862 (filed Sept. 2, 2020).

[7] See, e.g., Jeff Kosseff, "The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution Over Two Decades," Columbia Science and Technology Law Review, Vol. 18, No. 1, 2017. https://ssrn.com/abstract=3225774.

[8] Other such commissions—including the Cyberspace Solarium Commission, the 9-11 Commission, the National Security Commission on Artificial Intelligence, the Financial Crisis Inquiry Commission, et al.—have helped inform critical policy debates on matters of national importance.

platforms and moderation practices and inform Congress about questions such as:[9]

> *How do platforms develop their moderation policies? Who reviews decisions to block particular users? How effective is artificial intelligence-based moderation? What could platforms do to improve their moderation? How does moderation differ across companies?*

Membership in the Congressional Commission should include representatives from: large, medium, and small tech firms that deal in user-generated content; venture capital; legal experts; economists; ethicists; think tanks and other civil society groups on the political left and right; victims rights groups; law enforcement groups; and other relevant stakeholders. It could also include federal government representatives, such as from NTIA and DOJ.

To depoliticize the selection process, nongovernmental members could be nominated by a nonpartisan body such as the congressionally-chartered National Academy of Sciences, in consultation with the chair and ranking member of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce (the committees with primary jurisdiction over this issue) as well as congressional leadership. Other relevant committees, such as the House and Senate committees on the judiciary, could also be consulted. Once selected, members of the Congressional Commission would be tasked with undertaking an 18-24 month investigation of the issue, including meetings with stakeholder groups, culminating in the production of a final report supported by the majority of its members, as well as a minority report allowing for dissenting views to be heard.

III. The Chief Problem a Section 230 Commission Should Consider

As anyone who has followed the public debate regarding Section 230 can attest, the substance of criticisms has tended to come from two different directions. On the one hand, there are critics of internet platforms who have argued that the platforms should remove ***more*** objectionable content (although

[9] Jeff Kosseff, "Understand the Internet's Most Important Law Before Changing It," The Regulatory Review, October 10, 2019. https://www.theregreview.org/2019/10/10/kosseff-understand-internets-most-important-law-before-changing-it/.

there is only rarely a true consensus as to what counts as "objectionable," outside of known illegal-content categories such as Child Sexual Abuse Material, a.k.a. CSAM). Other critics have argued that the platforms remove too much, or remove the wrong kinds of content, charging that the internet companies are acting unfairly, or favoring one kind of political content over other kinds. Quite often, both kinds of criticisms come from the same critics (albeit with different emphases depending on the context). How do we explain this odd bifurcation of criticisms?

The answer, we submit, is simple—the two most well-explored paradigms for traditional distributors of content in our legal system take two fundamentally different approaches, and although both approaches are valid in public-policy terms, neither fully captures what makes internet platforms different.

Before the passage of Section 230, the American legal system tended to focus on two paradigms for understanding communications media in the modern world: traditional one-to-many media (including traditional newspapers and journals, and, eventually, broadcasting) and common carriage (the many-to-many communications systems that include services like telephony and the mail). The traditional press (the kind of "press" the Framers were thinking of when they wrote the Bill of Rights) was squarely protected by the First Amendment but also carried a potential risk from claims like defamation because traditionally the publishers and editors of a publication had a duty to get their facts right.[10] Also fitting this first model was broadcasting. Like the traditional press, broadcasting has a lot of First Amendment protections, but broadcasters are limited by a government-based regulatory framework via the Federal Communications Commission. When it came to issues like defamation, broadcasters could be held responsible for what other people said on their services, too.[11]

The second model was common carriage—basically, a service provider (like Verizon or AT&T) isn't legally liable for defamation or other problematic content so long as the service in question (e.g., mobile telephone service) doesn't discriminate by content. Those services have to adhere to a kind of "neutrality" as to users' telephone content.[12] The common carriage model is useful, and in its

[10] Arguably the most important First Amendment case is *New York Times v. Sullivan* (1964), in which the Supreme Court determined that the First Amendment has to be understood as allowing publications to get their facts wrong about government officials sometimes, provided they weren't doing so intentionally or recklessly.

[11] *See generally*, Powe, Lucas A. *American Broadcasting and the First Amendment*, University of California Press, 1987.

[12] Not to be confused with "network neutrality," which is neutrality with regard to uses of internet bandwidth.

appropriate context is something that commentators have argued plays an important role in freedom of expression—for example, the Bell System's public telephone network operating on common carriage principles was once labeled as one of the key "technologies of freedom" by media scholar and political scientist Ithiel de Sola Pool.

Perhaps with notions of common carriage in mind, critics of Section 230 who aren't specialists in internet law have argued that Section 230's protections should be conditioned on whether platforms are neutral in content or, alternatively, on whether they're applied consistently. They seem to believe that Section 230 is meant to protect a kind of common carrier model for internet services. Other critics have argued that internet companies should act more like publishers, and certainly do more to filter and/or remove terrible content.

But the choice between "traditional press" and "common carrier" models is a false one because Section 230 was actually crafted to restore a third model of First Amendment protection for distributors of content. Rooted in *Smith v. California* (1959) and applied to computer networks in *Cubby v. CompuServe* (1991), this model might best be characterized as the bookstore/newsstand model. In 1959, the U.S. Supreme Court recognized that bookstores and newsstands—and, by implication—other distributors of information such as libraries—are in themselves important First Amendment-protected institutions. Our legal system does not insist that bookstore, newspaper stand owners, or library workers bear legal responsibility for everything they carry, but we also don't insist that they carry everything. They're *neither* publishers nor common carriers. Yet a state court judge misapplied the reasoning of the *Cubby v. CompuServe* decision in a 1995 case where the defendant was the then-popular online service Prodigy. In that case, this bookstore/newsstand/library model of First Amendment protection seemed to be slipping away from online services. It was this case about Prodigy that eventually led to the passage of what eventually became Section 230, a part of the Communications Decency Act of 1996. Subsection (c)(1) of that section is, precisely, Professor Kosseff's "Twenty-Six Words that Created the Internet:" "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."

This language is what made Twitter and Facebook as well as other services like Instagram and YouTube possible. It also made it possible for these services to distinguish themselves from one another—to compete in the marketplace—by

enabling them to make curation choices about some user-generated content without acquiring legal liability for all other user-generated content.

Lincoln takes the position in these Reply Comments that one chief source of complaints about the currently dominant social-media platforms in the United States (as well as, by extension, complaints about some aspects of other services built on the internet that also rely on content they do not originate, such as Amazon and Google's search product) is that internet technology companies have been reluctant to exert the curation authority they have under Section 230.

In fairness to the technology companies, their reluctance (at least until very recently) was understandable—frequent interventions in content questions were seen as likely encouraging the public expectation that the services will intervene more frequently or more consistently. That was seen for a long time as a recipe for disaster because consistent comprehensive content moderation is excruciatingly difficult at the scale of Facebook or Twitter's operations. (Lincoln is prepared to bet that doing so consistently is practically impossible.) So some services have opted for trying to give the impression of "neutrality" by limiting interventions to the barest legal minimum. They have believed, not unreasonably, that seeming to be "neutral" about the content their users generate keeps public expectations low enough to be managed, In addition, for many years it has much easier to exercise a low level of content curation and appear to be making consistent decisions (although Lincoln maintains, inconsistency with regard to curation is inevitable).

More recently, in the face of revelations about how different actors, foreign and domestic, have attempted to game online services for propaganda or other ill-intentioned purposes, the call for more curation has increased in volume. At the same time, an increasing degree of content curation leads to complaints that the wrong content is being removed. This is precisely the dilemma that faces internet companies today—they're damned if they intervene, and damned if they don't.

As a matter of both legal requirements and ordinary industry practice, however, the companies necessarily have to intervene at times. Sometimes the interventions will be responses to obvious breaches of their terms-of-service provisions. Other times, operators may need to conduct post-hoc editorial removals of content that appears to be CSAM or terroristic threats, to name two areas in which there is consensus about the need for intervention. Obviously, these content interventions have always been inconsistent on their face with the platforms' claiming, somehow, that they never applied judgment about content.

This was compounded by the fact, even in the early days of the statute, some of the company lawyers themselves didn't fully understand that Section 230 was meant to allow content curation without incurring liability. As the platforms expanded internationally, the protections of Section 230—which is limited of course to areas and activities in which the United States has jurisdiction—were frequently inapplicable. In an increasingly international marketplace, American tech companies have found it easier to say "we're just the platform," with pretensions of being simply neutral as to the content, or as simply acting as protectors of freedom of expression. It's no wonder that the companies' conflicting messages about their roles in curating content, and even about Section 230 protections, have failed to result in a consensus about what needs to be fixed.

Our view in these Reply Comments, however, is that a Congressional Commission to study Section 230 and Intermediary Liability Protections is the right path forward. As we have stated, *supra*, and as other commenters have clearly established, the legal and constitutional authorities on the Federal Communications Commission's powers under the Communications Act do not stretch so far as to include "clarifying" the meaning of Section 230 to mean just the opposite of what its drafters and Congress as a whole intended. What would-be reformers should seek, if they believe Section 230 is no longer fit for purpose, is not "clarification" by an agency in the executive branch but instead by a commission appropriately empowered by Congress to explore and develop legislative solutions.

Respectfully submitted,

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