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speech, but would underscore just how unconstitutional the Executive Order,³ the NTIA petition is born from, is. Accordingly, the Federal Communications Commission (“FCC” or “Commission”) should refuse to open a rulemaking.

First, the NTIA lacks the authority to seek a rulemaking, and this petition exceeds their jurisdiction. NTIA has historically acted as an advisor to the President and executive branch on matters and policies regarding spectrum allocation, scientific research programs, and technological innovation and development. In its first foray into content moderation, the NTIA has exceeded their authority and is asking the Commission to participate in a retaliatory campaign to regulate online speech.

Secondly, the petition submitted by NTIA seeks to chill free speech at the behest of the highest government official. This petition clearly seeks to punish private entities for engaging in political speech. It is clear that this administration is seeking to compel these private entities into promoting opinions that it agrees with and silencing those it does not. The Commission should not excuse unconstitutional attempts to suppress speech by considering this request.

Thirdly, per its *Restoring Internet Freedom Order*,⁴ the Commission relinquished any authority to regulate online platforms, and cannot promulgate new rules to regulate the content hosted on social media platforms.

Finally, the Commission should remain focused on one of its most important goals to promote programs and promulgate rules aimed at bringing broadband within reach for the millions of Americans that still do not have affordable and reliable high-speed connections. The Coronavirus (COVID-19) pandemic has shown that connectivity is more important than ever,

³ See Exec. Order No. 13925, 85 FR 34079 (June 02, 2020) (hereinafter “ Executive Order No. 13925”), available at <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

⁴ See generally, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, 33 FCC Rcd 311 (“RIF Order”).

and the Commission should not divert any time or resources away from its indispensable work to close the digital divide.

II. The NTIA Lacks Authority to Seek a Rulemaking

The NTIA was envisioned to serve as the President's principal advisor on telecommunications policies pertaining to economic and technological advancement in the telecommunications industry.⁵ Section 230 of the Communications Decency Act (“Section 230”) does not purport to regulate “Telecommunications” defined by the Communications Act as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁶ Section 230 does not purport to regulate telecommunications, but is explicit about its intent to regulate “interactive computer services.”⁷ Section 230 regulates user generated content online whereas “telecommunications” applies to the infrastructure through which user-generated content flows.

It follows that the NTIA does not have authority to seek this rulemaking under its codified policy mandates under the Communications Act. As stated in statute the NTIA must seek to advance policies that promote the benefits of technological development,⁸ facilitate and contribute to the full development of competition, efficiency, and the free flow of commerce in

⁵ Exec. Order No. 12046, 43 FR 13349 (Mar. 29, 1978), *reprinted as amended in* 47 U.S.C. §§ 901-04 (1992).

⁶ 47 U.S.C. § 153 (50) (2018).

⁷ 47 U.S.C § 230 (f)(2) (2018) (Interactive Computer Service is defined as “any information services, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.”).

⁸ 47 U.S.C. § 901 (c)(1) (2018).

telecommunications markets,⁹ foster full and efficient use of telecommunications resources,¹⁰ and further scientific knowledge about telecommunications and information.¹¹ However, critically, the petition does nothing to advance any of these institutional policy priorities. Instead, the NTIA petition threatens to interfere with the efficient and free flow of commerce in online markets by inserting a government content moderator into the business of private companies. This further disrupts the full and efficient use of telecommunications resources by forcing telecommunications regulators to assign time, resources, and personnel to determine which political speech is acceptable, and which is not.

This is the first time that the NTIA has ever expressed that Section 230 is under its authority. Notably, however, the petition under consideration by the Commission actively works against policies and protocol previously set by the NTIA.

III. Promulgating Rules To Modify Section 230 Will Chill Free Speech

The NTIA petition was born from Executive Order 13925.¹² This Executive Order tasked the NTIA with seeking to garner a rulemaking from the FCC that would compel online platforms to promote certain speech, while living in fear that at any time a regulatory action could be brought against them at the whim of political actors. As Justice Robert H. Jackson asserted, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹³ However, this is exactly what the

⁹ 47 U.S.C. § 901 (c)(3) (2018).

¹⁰ 47 U.S.C. § 901 (c)(4) (2018).

¹¹ 47 U.S.C. § 901 (c)(5) (2018).

¹² See Executive Order No. 13925.

¹³ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

petition before the Commission seeks to do. The rules the NTIA are urging the Commission to adopt would limit what types of information private actors can host on their platforms and punish them with potential regulatory action if they were to publish, or fail to publish, something the administration disagreed or agreed with respectively.

The NTIA petition correctly points out that many American's use social media to follow news, connect with friends and family, share their views on current events, and act as the present day public square.¹⁴ The NTIA argues that social media firms are engaging in selective censorship with regards to the incredible dearth of content that is hosted on their sites every day. However, even if this were true, the NTIA is asking the Commission to force these private actors to take a more active role in censorship to the point that they would lose their protections under Section 230 even if it were in alignment with the political winds.

The internet was created with the intent of it being a place where people can freely share information. Changing the calculus so that it is unclear which information will stay and which information will go while forcing private actors to bend to political wills was never envisioned by the internet's founders. Simply, it's wrong. The commission should refuse to participate in this exercise aimed at stifling free speech.

IV. The Federal Communications Commission Lacks Authority to Promulgate Rules Regulating Section 230

If the Commission were to undertake a rulemaking at the request of the NTIA petition, it would be acting outside the scope of its rulemaking authority. The Commission does not have subject matter jurisdiction to promulgate any proposed rules. In fact, it voluntarily shed its

¹⁴ NTIA 230 Petition at 6-7 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017)).

authority to regulate broadband and any implied authority to regulate the online content it supports. In its 2018 *Restoring Internet Freedom Order* (“RIF Order”), the Commission reclassified broadband providers from telecommunications services to information services. As a consequence, these providers are relegated to a category of entities “left largely unregulated by default.”¹⁵ The Commission would have to do an about-face and impose regulatory obligations to accommodate this request.

Moreover, the Commission lacks the proper jurisdiction to promulgate the requested rules. As courts have decided in the past the Commission’s jurisdiction encompasses the transmission of covered material. This means the Commission’s jurisdiction does not extend to what happens before that transmission is sent, nor does it cover what occurs after the transmission is received by the intended recipient.¹⁶

The language of Section 230 protects “providers” and “users” of interactive computer services from liability in the editorial decision making they decide to undertake with regards to online content.¹⁷ As the NTIA petition points out “social media offers primarily third-party content. Rather than charge fees, social media platforms profile users in order to categorize them and connect them to advertisers and other parties interested in user information.”¹⁸

Clearly, NTIA understands that the social media companies must wait until a user has hosted content on their website in order to take action. At no point are social media companies taking actions while the data from users is in transit. Nevertheless, NTIA’s proposal seeks to regulate providers and users before they transmit content, and after it has been received. As

¹⁵ RIF Order at ¶ 203 (emphasis added) (quotation marks and citations omitted).

¹⁶ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

¹⁷ 47 U.S.C. § 230 (c)(1) (2018) (“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”).

¹⁸ NTIA 230 Petition at 12-13.

Vimeo noted, the analog equivalent is telling individuals what they must consider before they decide to answer a ringing phone.¹⁹

In the past, the Commission has cited Section 230 as a justification for its deregulation of broadband providers.²⁰ The Commission has been clear that it intended to take a hands-off approach to internet regulation. The Commission claimed, in the RIF Order, that it sought to end utility-style regulation of the internet in favor of market based policies that would preserve the future of internet freedom.²¹ Currently, The NTIA is urging the Commission to make a decision that would have not only far reaching implications for social media, but for all internet platforms that host third party content. If the Commission were to undertake this rulemaking, it would be in stark contrast to agency precedent and undermine its current stated objectives. To the contrary, even if the Commission finds justification for this rulemaking, it is missing a critical jurisdictional piece required to promulgate a rule – direction from Congress.

Generally there are two instances where an agency may regulate. The first is when there is a direct ask from Congress to do something or to take some action. The second is when Congress uses ambiguous language in a statute. If there is ambiguous language, under the Chevron Doctrine, Congress delegates its authority to an agency to “fill in the gaps” and resolve the ambiguity.²² However, Section 230 provides no explicit commands to the FCC to do anything, nor are there any ambiguities that the Commission would be able to act upon without reconciling with the RIF Order.

¹⁹ Petition of Vimeo, Inc. to Dismiss the National Telecommunications and Information Administration’s Petition for Rulemaking, RM-11962, at 4 (filed Aug. 4, 2020), [https://ecfsapi.fcc.gov/file/1080410753378/\(as%20filed\)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf](https://ecfsapi.fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf).

²⁰ RIF Order, 33 FCC Rcd 311 ¶ 1, 2 (2018).

²¹ *Id.* at ¶ 2.

²² *See Generally, Chevron, U.S.A. v. Natural Resources Defence Council, Inc.*, 467 U.S. 837 (1984).

The Commission clearly took the stance in 2018 that it wished to wash its hands of internet regulation. In order to take up a new rulemaking now would cause the FCC to need to reconcile its prior decisions in order to avoid having a new rule be challenged as arbitrary and capricious. It is important to note that, in April 2020, the Commission denied a request by the organization Free Press to investigate the spread of COVID-19 misinformation during White House broadcasts,²³ citing that it does not wish to be an arbiter of free speech and to take up rulemaking now would force it to reconcile with recent, persuasive precedent to the contrary.

Beyond lacking the jurisdiction to promulgate the rules sought by the NTIA, the Commission has documented its opposition, and does not have cause, to regulate speech online.

VI. Reforming Section 230 Will Hinder the Commission in its Main Goal of Granting Universal Internet Access Across the Nation

The purpose of the Federal Communications Commission is to “make available, so far as possible, to all the people of the United States, without discriminaton. . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service. . .”²⁴ The Coronavirus (COVID-19) pandemic has shown that, now more than ever, access to reliable high-speed connectivity is essential. As students begin the new school year from home, parents continue to telework, and we rely on video and voice conferencing to stay connected with friends and family, the Commission must remain focused on expanding high-speed connectivity for every community, helping unserved and underserved populations gain access to affordable and reliable

²³ Letter from Michelle M. Carey, Chief, Federal Communications Commission Media Bureau and Thomas M. Johnson, General Counsel, Federal Communications Commission, to Jessica J. González, Co-CEO, Free Press and Gaurav Laroia, Senior Policy Counsel, Free Press (Apr. 6, 2020), *available at* <https://www.fcc.gov/document/fcc-defends-1st-amendment-and-denies-petition-filed-free-press>.

²⁴ 47 U.S.C. § 151 (2018).

broadband. However, the petition currently before the Commission is a distraction. It supports diverting critical time, resources, and manpower from furthering the Commission's core goal of universal connectivity.

It's mission is essential. The work is urgent. The Commission must continue to work diligently to bring connectivity to all corners of the country as there is no "one size fits all" technological solution to achieve universal connectivity. Some communities may respond better to the deployment of wireless solutions. Others may require more robust fiber optic connections to meet the demands placed on their networks. Either way, millions of Americans are waiting and are counting on the Commission.

Local and state government leaders are working feverishly to fill in the connectivity gaps. Working from home, shutting down schools, closing down businesses, etc. has forced every member of government and the general public to confront the reality that, in a digital society, high-speed connectivity is essential. We have an obligation to support broadband networks and the community partnerships that increase adoption. In the midst of one of the largest connectivity crises of the modern age, this is not time for the Commission to switch gears and manufacture opportunities to police speech.

VII. Conclusion

More than 30 years ago the Commission struck down the "Fairness Doctrine." Expressing its discomfort with its role in the editorial decisions being made by broadcasters, the Commission argued that government involvement in such decisions ran contrary to the First Amendment. The Doctrine was implemented to serve the public interest, however, as the

Commission stated, it ended up stifling speech and inhibited free and open debate on the public airwaves.²⁵

Granting NTIA's petition requires the Commission to abandon those concerns today. It is an unconstitutional request that should be denied as it flies in the face of shared goals to ensure that every American can enjoy the benefits of digital citizenship. Instead, the Commission should concentrate its time and resources on the millions who are still waiting for affordable and reliable opportunities to get online.

²⁵ See Amendment of the Rules Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Order, 50 FR 35418 (Aug. 30, 1985).