Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Section 230 of the Communications Act of 1934	File No. RM-11862

To: The Commission

COMMENTS OF ACCESS NOW

Eric Null
Isedua Oribhabor
Jennifer Brody
Access Now
1440 G St NW, Suite 800
Washington, DC 20005

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Access Now files these comments in response to the Federal Communications Commission's (FCC) public notice regarding the "Petition for Rulemaking of the National Telecommunications and Information Administration" (Petition),[1] filed pursuant to the president's Executive Order on Preventing Online Censorship (EO),[2] seeking several rule changes from the FCC under Section 230 of the Communications Decency Act.

Access Now opposes the Petition for a variety of reasons and urges the FCC to dismiss it outright to ensure there is no confusion over whether the FCC will take action.[3] The FCC is the wrong forum to decide whether and how to amend Section 230. That debate belongs in Congress, where it is currently playing out.

This filing will not focus on the substance of the meritless rule changes requested by the Petition, the record will be replete with comments doing that. Instead, these comments will argue that the FCC should reject the Petition because (1) the request is an unconstitutional ploy to silence the president's critics that the FCC should ignore; and (2) Section 230 does not provide the FCC with the authority it would need to pass the requested rules.

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[1] Petition for Rulemaking of the National Telecommunications and Information Administration, Section 230 of the Communications Act of 1996 (July 27, 2020), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter "Petition").

[2] Executive Order on Preventing Online Censorship (May 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship (hereinafter "EO"). The EO has an ironic title, given it will lead to much more *government* censorship.

[3] In fact, the petition is so plainly not worthy of consideration the FCC should have dismissed it prior to seeking comments under 47 CFR §1.401(e).

I. The president is trying to unconstitutionally silence his critics and the FCC should play no part

The circumstances surrounding the EO and the Petition show that the president is trying to exact retribution on companies he simply does not like, and the FCC should not aid this attack.

Many politicians, including the president, have accused social media companies of supposed discrimination against conservative viewpoints[4] and have apparently identified Section 230 as part of the problem.[5] A key component of the president's arsenal against these companies has been the threat of removing or amending Section 230 liability protections, particularly through executive order. Rumors of such an executive order, which purportedly would have given the Federal Trade Commission (FTC) and FCC more power to police social media platforms, began in August 2019.[6] Although the president and other political officials continued to privately discuss reining in Silicon Valley,[7] there was no further public indication that they would move forward with the executive order.

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[4] Cristiano Lima, *Facebook Wades Deeper into Censorship Debate as it Bans 'Dangerous' Accounts*, Politico (May 2, 2019), https://www.politico.com/story/2019/05/02/facebook-bans-far-right-alex-jones-1299247. There has not been any proof that such discrimination exists. In fact, Facebook has appeared much more pro-conservative in general. See, Aaron Homes, *Conservative Outlets Regularly Have the Top-Performing Posts on Facebook — but Facebook Says the Full Picture is More Complicated*, Business Insider (July 22, 2020), https://www.businessinsider.com/facebook-crowdtangle-data-top-posts-conservative-outlets-2020-7.

[5] Russell Brandom, *Senate Republicans Want to Make it Easier to Sue Tech Companies for Bias*, The Verge (June 17, 2020), https://www.theverge.com/2020/6/17/21294032/section-230-hawley-rubio-conservative-bias-lawsuit-good-faith.

[6] Brian Fung, *White House Proposal Would have FCC and FTC Police Alleged Social Media Censorship*, CNN Business (Aug. 10, 2020), https://www.cnn.com/2019/08/09/tech/white-house-social-media-executive-order-fcc-ftc/index.html.

[7] Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, Wired (Aug. 13, 2019), https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/ ("[Representative] Gaetz says he has semi-frequent cell calls with the president, and says he's discussed this issue with senior Trump officials, including 'what we can do in the absence of legislation.'").

Nine months later, that all changed. On May 26, 2020, Twitter fact-checked the president's tweet for the first time, adding a warning label to his tweet that falsely claimed that mail-in ballots would lead to a rigged election.[8] At that point, the EO draft leaked.[9] For the next two days, the president's administration worked diligently to update the EO, which the president then signed.[10] The new EO, called the "Executive Order on Preventing Online Censorship," will actually *increase* online censorship by narrowing Section 230 protections with the ultimate goal of punishing companies that try to take action against the president's harmful messages. As if to verify the retribution narrative, the president stated that same day that he would shut down Twitter if he could.[11]

The EO is constitutionally suspect and rests on very weak footing. Multiple parties have filed lawsuits against it. One claims it "violates the First Amendment [because] it is plainly retaliatory: it attacks a private company, Twitter, for exercising its First Amendment right to comment on the President's statements[; and] the Order seeks to curtail and chill the constitutionally protected speech of all online platforms and individuals."[12] Another claims it "violates [First Amendment] right[s] by

[8] Donald Trump (@realDonaldTrump), Twitter (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392.
[9] Draft of Executive Order on Preventing Online Censorship, https://kateklonick.com/wp-content/uploads/2020/05/DRAFT-EO-Preventing-Online-Censorship.pdf.
[10] EO, *supra* note 2.
[11] Sonam Sheth, *Trump Said He Wanted to Shut Down Twitter Moments After Signing an Executive Order Emphasizing his 'commitment to free and open debate on the internet'*, Business Insider (May 28, 2020), https://www.businessinsider.com/trump-says-shut-down-twitter-while-attacking-it-censorship-2020-5.
[12] Ctr. Democracy & Tech. v. Donald J. Trump, No. 20-1456 (D.D.C. filed June 2, 2020), https://cdt.org/wp-content/uploads/2020/06/1-2020-cv-01456-0001-COMPLAINT-against-DONALD-J-TRUMP-filed-by-CENTER-FO-et-seq.pdf, at ¶1.

undermining online platforms' ability to moderate and speak."[13] Thus, it may be that the EO requesting this Petition is actually invalid.

To add fuel to the fire, the president has apparently taken retributive action against commissioners *of independent agencies* who do not agree with the EO. First, FCC Commissioner Mike O'Rielly made a public statement on July 29, 2020, that he was a principled supporter of the First Amendment and implied that the EO, which is an effort to undermine that amendment, was inappropriate.[14] Five days later, the president pulled Commissioner O'Rielly's re-nomination.[15] Further, at an FTC oversight hearing on August 5, 2020, FTC Chairman Joe Simons stated he was not prioritizing the EO and did not plan to take action. Shortly thereafter, the president summoned Simons[16] and is now reportedly looking for a new FTC chair.[17]

This series of events shows the president's true goals: to silence his critics. He is even willing to compromise the independence of the FCC and the FTC to get there. Yet, the Petition is broader and more dangerous than it may seem, as it threatens to unconstitutionally abridge the freedom of speech and freedom of expression that platforms and platform users have online. To achieve that goal, it seeks a vast and

[13] Rock the Vote v. Donald J. Trump, No. 3:20-cv-06021 (N.D. Cal. filed Aug. 27, 2020), https://www.freepress.net/sites/default/files/2020-08/lawsuit_against_trump_executive_order_0.pdf, at ¶7.
[14] Remarks of FCC Commissioner Michael O'Rielly (July 29, 2020) https://docs.fcc.gov/public/attachments/DOC-365814A1.pdf, at pg. 5.
[15] David Shepardson, *Trump Withdraws Nomination of Republica FCC Commissioner to Serve New Term*, Reuters (Aug. 3, 2020), https://www.reuters.com/article/us-usa-fcc-trump/trump-withdraws-nomination-of-republican-fcc-commissioner-to-serve-new-term-idUSKCN24Z2NI.
[16] Leah Nylen, John Hendel, & Betsy Woodruff Swan, *Trump Pressures Head of Consumer Agency to Bend on Social Media Crackdown*, Politico (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.
[17] Leah Nylen, John Hendel, & Betsy Woodruff Swan, *Trump Aides Interviewing Replacement for Embattled FTC Chair*, Politico (Aug. 28, 2020), https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479.

unprecedented expansion of the FCC's authority to online content providers, over which the agency lacks authority. The FCC should stay out of this issue.

II. The FCC lacks authority to act under Section 230

The FCC lacks authority to promulgate rules under Section 230. Interpreting Section 230 to grant the FCC rulemaking authority would fail both Step One and Step Two of *Chevron* deference.

A. Section 230 and its history

Congress passed Section 230 of the Communications Decency Act, sometimes known as the "26 words that created the internet,"[18] in 1996 and wrapped it into the Telecommunications Act rewrite. Its purpose was to protect platforms that hosted third party content. When the law was written, it primarily protected message boards, but today the statute more commonly protects social media platforms (like Facebook, YouTube, and others) against being held liable for the speech of their users and for content moderation decisions.

In the early 1990s, two lawsuits created a "moderator's dilemma" for platforms relying on user-generated content.[19] In *Cubby, Inc. v. CompuServe Inc.*, the court held that CompuServe was not liable for the content of its users' posts because it did not moderate its platform and therefore was merely a "distributor" of content.[20] In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court found that Prodigy, because it moderated its platform to ensure a family-friendly service, was a "publisher" with

[18] Jeff Kosseff, The 26 Words that Created the Internet (2019).
[19] Jess Miers, *A Primer on Section 230 and Trump's Executive Order*, Brookings (June 8, 2020), https://www.brookings.edu/blog/techtank/2020/06/08/a-primer-on-section-230-and-trumps-executive-order.
[20] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

respect to the content on its platform.[21] These cases created the unfortunate incentive ("moderator's dilemma") for platforms either not to moderate their service at all, thereby avoiding publisher liability, or to over-moderate to ensure no content could create liability for the platform. Both options were bad for platforms and for people who wanted to speak and communicate online. To correct this dilemma, Congress passed Section 230 to change those incentives and to allow platforms to moderate without being subject to endless, likely business-destroying, lawsuits.

In passing Section 230, Congress created a few broad exemptions where platforms could be held liable: federal criminal law,[22] intellectual property law,[23] and claims under the Electronic Communications Privacy Act.[24] More recently, Congress adding an exemption for sex trafficking law by passing "Allow States and Victims to Fight Online Sex Trafficking Act" (FOSTA) and "Stop Enabling Sex Traffickers Act" (SESTA) into law, over the objections of much of the tech community including Access Now.[25] These provisions incent platforms to help prevent use of platforms to violate these laws.

Whether Section 230 needs updating as a result of twenty-five years of enforcement by the courts is not up to the FCC, it is up to Congress.

B. Interpreting Section 230 to grant the FCC rulemaking authority would fail under *Chevron* Step One

Section 230 provides no direct authority to the FCC. The Supreme Court held in *City of Arlington v. FCC* (*Arlington*) that when a federal agency interprets a statute that

[21] Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).
[22] 47 U.S.C. §230 (1996), at (e)(1).
[23] *Id.* at (e)(2).
[24] *Id.* at (e)(4).
[25] *Id.* at (e)(5). See Stop Sesta & Fosta, https://stopsesta.org.

concerns the scope of its regulatory authority, it is entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*).[26] The first step of that analysis is "[i]f the intent of Congress is clear, that is the end of the matter."[27] As *Arlington* made clear, "*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' *administered by an agency*, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' "[28] To make that determination, we look to the language of the relevant portion of the statute:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
> (1) Treatment of publisher or speaker
> 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.
> (2) Civil liability
> No provider or user of an interactive computer service shall be held liable on account of—
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph ([A]).[29]

The plain language of the statute is straightforward: subsection (c)(1) states interactive computer services (for the petition's purposes, social media companies) shall

[26] City of Arlington v. FCC, 569 U.S. 290 (2013) (hereinafter "*Arlington*") (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 837 (1984)).
[27] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (hereinafter "*Chevron*").
[28] *Arlington* at II.B. (citing Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735 –741 (1996)) (emphasis added).
[29] 47 U.S.C. §230(c) (fixing a typo in subsection (c)(2)(B)).

not be held liable as a speaker or publisher of information that was provided by another information content provider, unless that interactive computer service played a role in creating the content.[30] This subsection covers such services when they engage in a variety of editorial conduct, even decisions to remove content once it has been published.[31] Subsection (c)(2)(A) precludes civil liability when interactive computer services make moderation decisions to remove or restrict access to certain material they (subjectively[32]) deem to be inappropriate. However, this immunity is slightly different from the immunity under subsection (c)(1), because (c)(2)(A) protects even services that helped create the content.[33] Providing technical means to make those moderation decisions is also protected under subsection (c)(2)(B).

The FCC plays no role in administering or enforcing Section 230 and therefore does not meet the requirement in *Arlington* that a statute must be "administered by an agency." Nowhere in the statute does it mention the FCC. It provides no direct authority for the FCC, and the language of the statute contemplates no role for the FCC in its interpretation or enforcement. Section 230 is entirely self-executing as a directive to

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[30] *See* 47 U.S.C. §230(f)(3) ("The term "information content provider" means any person or entity that is responsible, in whole *or in part*, for the creation or development of information provided through the Internet or any other interactive computer service.") (emphasis added).

[31] *See* Batzel v. Smith, 333 F.3d 1018, 1032 (9th Cir. 2003) (rejecting claim that Section 230(c)(1) applies only to content that is left up; stating that "The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance . . . . A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either.").

[32] Matt Schruers, *What Is Section 230's "Otherwise Objectionable" Provision?*, DisCo (July 29, 2020), https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/.

[33] *See* Barnes v. Yahoo!, Inc., 565 F.3d 560, 569-70 (9th Cir. 2009) ("the persons who can take advantage of [(c)(2)] liability are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. . . . Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue . . . can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.") (citations omitted).

courts for purposes of private litigation regarding user-generated content. The statute's self-executing nature is made plain by the fact that the statute has existed and has been enforced—by courts—for nearly twenty-five years without FCC involvement.

Acknowledging the lack of direction from Congress, NTIA argues that Congress' "silence" on FCC authority "further underscores the presumption that the Commission has power to issue regulations under Section 230."[34] These arguments are not persuasive.

NTIA argues that the mere fact that Section 230 is included in Title II ends the authority inquiry, but that is not the case. The statute NTIA primarily relies upon is section 201(b), which states "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[35] NTIA claims that that statute grants the FCC authority to promulgate rules under Section 230. However, statutes "are not read as a collection of isolated phrases,"[36] instead, they must be read in context.[37] Placing the quoted portion section 201(b) in context, it covers FCC authority over "common carriers engaged in interstate or foreign communication by wire or radio."[38] The social media companies the Petition is seeking FCC regulations over have never been understood as common carriers (or "telecommunications services"). The NTIA does not seek a reclassification of such companies, nor is that likely.

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[34] Petition at 17.
[35] Petition at 15 *et seq* (quoting 47 U.S.C. §201(b)).
[36] Abuelhawa v. United States, 556 U.S. 816, 819-20 (2009) (quoting Dolan v. Postal Service, 546 U.S. 481, 486 (2006)).
[37] Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).
[38] 47 U.S.C. §201(a).

The Petition further relies on *AT&T Corp. v. Iowa Utilities Board* for these arguments, but that case is inapplicable. As an initial matter, that case was in large part about FCC "jurisdiction."[39] Yet, in *Arlington*, the Court did away with the "jurisdiction" inquiry and said that all agency statutory interpretation, even on questions of the agency's authority, is dictated by the *Chevron* analysis and whether the agency is acting consistently with the statute (here, it is not).[40] Second, *Iowa Utilities Board* was specifically about whether the language in section 201(a) specifying "interstate" commerce was sufficient to limit the directive at the end of section 201(b) and therefore prevent the FCC from directing states in enforcing local competition rules. While inclusion of "interstate" may not have swayed the Court in those circumstances, NTIA is seeking an interpretation of section 201 that requires reading out of the statute "common carriers," which the FCC simply cannot do. Section 201 should not be read so broadly to apply to online content companies, which are not common carriers. Claiming section 201(b) allows for expansive rulemaking authority over online content companies in Section 230 would require the FCC to completely ignore the plain language and the intent of Section 230 and section 201(b).

NTIA claims Congress was "silen[t]" regarding FCC authority and that there is not "any speck of legislative history" that "suggests congressional intent to preclude the [FCC's] implementation."[41] That is also not true. First, Congress included "findings" and "purposes" under Section 230. In particular, Congress stated that online content companies have grown and should continue growing with a "minimum of government regulation" and they wanted to encourage growth of services "unfettered by Federal or

[39] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999), at 379 *et seq*.
[40] *See Arlington*.
[41] Petition at 17.

State regulation."[42] Whether these principles ring true today—a questionable proposition—it is not for the FCC to decide. It would require an intellectual contortionist to square those congressional statements with the idea of extensive FCC authority over content moderation practices of social media companies.

Second, the congressional record shows Congress had indeed contemplated explicitly removing any potential of it being interpreted to grant FCC authority. Earlier versions of Section 230, called the "Internet Freedom and Family Empowerment Act," included a section that said

> FCC Regulation of the Internet and Other Interactive Computer Services Prohibited.—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services.[43]

Former Representative, and the law's co-author, Chris Cox recently reminded Congress of this fact.[44] While the section did not make it into the final law, Congress likely felt it did not need to include it because Section 230 so clearly does not grant the FCC authority. Further, the drafters of Section 230 did "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[45] The reference to a "Federal Computer Commission" appears meant to invoke "FCC," showing a clear intent not to give the FCC a role in content moderation decisions.

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[42] 47 U.S.C. §230(a)(4), (b)(2).
[43] Internet Freedom and Family Empowerment Act, H.R. 1978 (1995), https://www.congress.gov/bill/104th-congress/house-bill/1978/text, at (2)(d).
[44] *Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 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 (testimony of Christopher Cox), 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.
[45] *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (cited by Restoring Internet Freedom Order, n.235, more discussion below).

Third, the silence-as-authority presumption is even more inappropriate where the delegation of authority has strong implications for the First Amendment. "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating" the First Amendment.[46] Congress knows when it is giving the FCC authority that implicates the First Amendment, and when it does, it is much more careful to clarify and circumscribe the authority.[47]

Another reason not to interpret silence as expansive authority is that Congress does not hide elephants in mouseholes. The Supreme Court has stated "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[48] The law has stood on its own for nearly a quarter century without any agency involvement or even any question over whether the FCC had authority. Now, the NTIA claims the FCC suddenly has authority to pass rules under Section 230. That cannot be the case. Thus, it is unlikely that Congress hid constitutionally-suspect FCC authority over content moderation of social media platforms in Section 230(c).

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[46] Motion Picture Association of America, Inc. v. FCC, 309 F.3d 796, 806 (D.C. Cir. 2002), at (2)(B)(2) (hereinafter "*MPAA*").

[47] For examples of explicit authority that implicates the First Amendment, see 18 U.S.C. §1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); 47 U.S.C. §315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. §399 ("No noncommercial educational broadcasting station may support or oppose any candidate for political office."). For authority that is circumscribed, see 47 U.S.C. §544(f) (providing that "[a]ny Federal agency may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter"); 47 U.S.C. §326 (providing that the FCC does not possess the power of censorship, and "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"). See also *MPAA*.

[48] *See MCI Telecommunications Corp.* v. *American Telephone* & *Telegraph Co.,* 512 U.S. 218, 231 (1994).

C. Interpreting Section 230 to grant the FCC rulemaking authority would similarly fail under *Chevron* Step Two

Even if a reviewing court were to decide that Congress did not directly speak to this issue, the FCC would be on shaky ground under *Chevron* Step Two. *Chevron* states that if Congress "has not directly addressed the precise question" at hand, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of the statute is entitled to deference so long as it is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute."[49] Were the FCC to conclude that Section 230 grants it authority, it would be arbitrary and capricious because it would be contrary to this commission's decision in the *Restoring Internet Freedom Order* (RIFO).[50]

Fewer than three years ago, the FCC found that Section 230 is deregulatory and hortatory in its rush to abdicate its authority over broadband internet access service (BIAS) providers. The RIFO, which reclassified BIAS providers as information services and therefore almost entirely beyond the FCC's authority, opened with a quote from "bipartisan" Section 230(b) expounding how important it is that the internet remain "unfettered by Federal or State regulation."[51] The RIFO cites that provision no fewer than twelve times to drive the point home. It spends five paragraphs discussing the deregulatory nature of Section 230 and how it evidenced Congress' view that all online players (including BIAS providers, a point with which Access Now disagrees) should be unregulated.[52] It also later states that Section 230(b) "is hortatory" and even assuming

[49] *Chevron* at 843-44.
[50] *Restoring Internet Freedom Order*, 33 FCC Rcd 311 (Jan. 4, 2018), https://docs.fcc.gov/public/attachments/FCC-17-166A1_Rcd.pdf (hereinafter "RIFO").
[51] RIFO at ¶1.
[52] RIFO at ¶58 *et seq*.

"*arguendo*" that Section 230 "could be viewed as a grant of Commission authority, [the FCC is] not persuaded it could be invoked to impose regulatory obligations on" BIAS providers, again citing the "unfettered" language.[53] Interpreting Section 230 to grant rulemaking authority over online content companies so contrarily and so quickly after the RIFO would very likely be held arbitrary and capricious by a reviewing court.

Not only would switching gears on online content rulemaking authority be arbitrary, but it would go against the vast majority of FCC history, which shows that the FCC does not regulate online content. In the broadband privacy proceeding, the FCC refused to extend its privacy regime to non-telecom services, leaving out platforms like Facebook, Twitter, and others. Undergirding that decision was an understanding that the FCC does not regulate online content. The broadband privacy order stated online content companies "operat[e] under the FTC's general jurisdiction."[54] Then-Commissioner Pai wrote in his dissent that, to preserve parity between the privacy requirements of BIAS providers and online content providers, "[t]he FTC could return us to a level playing field by changing its sensitivity-based approach to privacy to mirror the FCC's."[55] There was unanimous commission agreement that it would not regulate the privacy practices of online content companies. Were the FCC to now take similar action with regard not to privacy *practices* of *BIAS providers* but to *content moderation* decisions of *online content companies*, it would be taking an unprecedented, and likely uncorrectable, move in a direction it has never taken and should not take.

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[53] RIFO at ¶284.
[54] RIFO at ¶246.
[55] Dissenting Statement of Commissioner Ajit Pai, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Dkt. 16-106, at 2-3, https://docs.fcc.gov/public/attachments/FCC-16-148A5.pdf.

III. Conclusion

For the foregoing reasons, the FCC should dismiss the Petition.