

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

In the Matter of: )

National Telecommunications and )  
Information Administration )

RM-11862

Petition for Rulemaking to Clarify Provisions of )  
Section 230 of the Communications Act of 1934 )

**REPLY COMMENTS OF THE  
JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES  
IN OPPOSITION TO NTIA'S PETITION FOR RULEMAKING**

Spencer Overton  
Professor of Law, George Washington University  
President, Joint Center for Political and Economic Studies  
633 Pennsylvania Ave, NW  
Washington, DC 20004  
202-789-3500  
soverton@law.gwu.edu

September 17, 2020

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## I. Introduction and Summary of Argument

The Joint Center for Political and Economic Studies respectfully submits these comments in opposition to the National Telecommunications and Information Administration’s petition for rulemaking.\*

The Joint Center is America’s Black think tank. Spencer Overton serves as the President of the Joint Center and is a tenured Professor of Law at George Washington University. He has published academic research and testified before Congress on Section 230 and content moderation to prevent disinformation.<sup>1</sup>

The Joint Center opposes the National Telecommunications & Information Administration’s Petition requesting that the Federal Communications Commission effectively rewrite Section 230 to narrow the scope of immunity from liability. NTIA’s proposal would effectively overrule Congress and rewrite Section 230 to prevent platforms from content moderation that removes objectionable material, such as material that suppresses voting in communities of color or

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\* The author thanks K.J. Bagchi, LaShonda Brenson, Maurita Coley, Yosef Getachew, Russell Frisby, David Honig, Victoria Johnson, Aleya Jones, and Clint Odom for providing helpful comments in preparation of this submission.

<sup>1</sup> Spencer Overton, [\*State Power to Regulate Social Media Companies to Prevent Voter Suppression\*](#), 53 U.C. DAVIS L. REV. 1793, 1830 (2020) (proposing that Congress explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting); Hearing on A Country in Crisis: How Disinformation Online Is Dividing the Nation: Hearing Before the Subcomm. on Communications and Technology and the Subcomm. on Consumer Protection and Commerce of the H. Comm. on Energy and Commerce, 116th Cong. (June 24, 2020) ([testimony](#) and [questions for the record](#) of Spencer Overton).

facilitates housing or employment discrimination. Congress—rather than the NTIA—should drive clarifications of Section 230 by explicitly stating what is already the law; that Section 230 does not provide a defense to federal and state civil rights claims when social media companies make a “material contribution” to underlying discrimination ad targeting and delivery when they target online advertisements that facilitate voter suppression toward communities of color, or when they target online ads that promote housing, employment, or financial services opportunities away from communities of color.

## **II. Section 230 Clearly Allows Social Media Companies to Remove Disinformation**

Federal law explicitly empowers private social media companies to remove disinformation—even if such content would be constitutionally-protected speech if removed by a state actor. Section 230 of the Communications Act of 1934 (also known as Section 230 of the Communications Decency Act) proclaims that platforms will not “be held liable on account of . . . 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...”<sup>2</sup> Section 230 also protects social media platforms from being liable as publishers or speakers due to the content of information of third parties by stating: “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>3</sup>

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<sup>2</sup> 47 U.S.C. § 230(c)(2) (2019).

<sup>3</sup>*Id.* § 230(c)(1). An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . .” *Id.* § 230(f)(2).

These provisions reflect Congress’s intent to empower platforms to engage in content moderation without fear of liability. Section 230’s drafters sought to repudiate a legal case that they, and ultimately Congress, believed was wrong. In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, the trial court found that the internet service provider Prodigy was liable as a publisher for defamatory comments that a third-party user posted on Prodigy’s financial bulletin board. Although Prodigy argued that it could not edit the thousands of messages posted to its bulletin board, the trial court reasoned that Prodigy used software to identify and delete “notes from its computer bulletin board on the basis of offensiveness or ‘bad taste.’”<sup>4</sup> According to the trial court, by engaging in some content moderation Prodigy had opened itself to liability for all content, unlike a different case which held CompuServe was not liable for defamation for third-party content on its website because CompuServe did not attempt to filter any third-party content.<sup>5</sup>

Members of Congress were disturbed by the holding, fearing that liability stemming from Prodigy’s attempted but imperfect screening would not lead to improved content moderation, but no screening at all.<sup>6</sup> In the words of then Congressman Bob Goodlatte (R-VA):

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<sup>4</sup> See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*4 (finding that Prodigy was liable as a publisher because it exercised editorial control by “actively utilizing technology and manpower to delete notes from its computer bulletin board on the basis of offensiveness or ‘bad taste.’”).

<sup>5</sup> See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding that CompuServ, a computerized database on which defamatory statements were made, is a distributor not a publisher because it has no more editorial control the content of statements on its platform than does a public library).

<sup>6</sup> Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 405 (2017) (“The court’s somewhat perverse reliance on Prodigy’s filtering efforts to establish its liability for defamation (of which it had no idea) sufficiently disturbed Congress to move legislators to act to immunize such activity. The concern was that holding online service providers liable for inexact screening would not result in improved

[T]here is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a \$200 million libel suit simply because it did exercise some control over profanity and indecent material.<sup>7</sup>

As a result, Congress passed Section 230 to immunize “interactive computer services” such as Facebook, Twitter, and YouTube from liability for claims based on content created entirely by third-party users that they fail to take down. Section 230 ensures social media platforms can freely remove unsavory content by users without fear of becoming “publishers” who are suddenly liable for all third-party content.<sup>8</sup> As a U.S. Court of Appeals decision later explained, in enacting Section 230 “Congress sought to encourage websites to make efforts to screen content without fear of liability.”<sup>9</sup> Section 230 also allows for the development of movements like #MeToo, the Tea Party, and Black Lives Matter whose members make controversial allegations, because social media platforms can display this content without fear of being sued.<sup>10</sup>

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screening but rather in no screening at all. This is because providers could avoid publisher liability if they acted as purely passive conduits.”)

<sup>7</sup> 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

<sup>8</sup>The “good Samaritan” provision of Section 230 proclaims platforms will not “be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene . . . excessively violent, harassing, or otherwise objectionable . . .” *Id.* § 230(c)(2)(A); *see also* Doe v. Backpage.com, 817 F.3d 12, 18-19 (1st Cir. 2016) (explaining that “Congress sought to encourage websites to make efforts to screen content without fear of liability”).

<sup>9</sup> Doe v. Backpage.com, 817 F.3d 12, 18-19 (1st Cir. 2016) (explaining that “Congress sought to encourage websites to make efforts to screen content without fear of liability”).

<sup>10</sup>*See, e.g.,* Ron Wyden, [Corporations Are Working with the Trump Administration to Control Online Speech](#), WASH. POST (Feb. 17, 2020, 6:30 AM) (arguing that “[w]ithout 230, social media couldn’t exist . . . . Movements such as Black Lives Matter or #MeToo, whose advocates post controversial accusations against powerful figures on social media, would have remained whispers, not megaphones for oppressed communities,” and asserting that repealing Section 230 would harm start-up companies more than big tech companies that can afford extensive legal representation).

As they are empowered to do by Section 230, Facebook, Twitter, YouTube, and other social media companies have developed specific content moderation guidelines to reduce the spread of false or misleading information about voting in elections, other false or misleading information, hate speech, threats of violence, and other objectionable content.<sup>11</sup>

### **III. NTIA's Petition for Rulemaking Stems from Executive Branch Retaliation for Legitimate Content Moderation**

Unfortunately, President Trump issued a retaliatory executive order attempting to narrowly construe the protections of Section 230 two days after Twitter enforced its content moderation guidelines against the President. The executive order directed NTIA to petition the FCC for a rulemaking to narrowly construe Section 230. This executive order during an election season discourages social media companies from content moderation, which undermines democracy by effectively promoting disinformation, polarization, and suppression.

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<sup>11</sup> [Community Standards](#), FACEBOOK (last visited June 22, 2020) (indicating that content may be removed and accounts may be disabled when users threaten violence, attack people based on protected characteristics such as race or religion, impersonate others by creating fake accounts, and engage in coordinated inauthentic behavior, and that false news will not be removed but significantly reduced in distribution); [The Twitter Rules](#), TWITTER (last visited June 22, 2020) (prohibiting violence, hateful threats or harassment based on a protected characteristic such as race or religion, suppression of civic participation, misleading information about civic participation); [Community Guidelines](#), YOUTUBE (last visited June 22, 2020) (prohibiting accounts established to impersonate others, prohibiting threats of violence, and prohibiting content that incites hatred on the basis of protected categories such as race and religion).

In response to concerns about the transmission of COVID-19 during in-person voting, many states expanded vote-by-mail options,<sup>12</sup> and on May 26, 2020 at 5:17 am, President Trump tweeted the following in two tweets:

There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed . . . The Governor of California is sending Ballots to millions of people, anyone . . . living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!<sup>13</sup>

Later that day, Twitter attached a “[g]et the facts about mail in-ballots” notice to the President’s tweets, which Twitter hyperlinked to a notice indicating the President’s claim was “unsubstantiated” according to news outlets, and that experts indicate “mail-in ballots are very rarely linked to voter fraud.”<sup>14</sup> Twitter did not remove the President’s tweets.

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<sup>12</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, [COVID-19: HOW’S IT CHANGING ELECTIONS?](#) (June 2020).

<sup>13</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 5:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392>; Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 5:17 AM), <https://twitter.com/realDonaldTrump/status/1265255845358645254>

<sup>14</sup> <https://twitter.com/i/events/1265330601034256384>.

In response, President Trump tweeted “Twitter is completely stifling FREE SPEECH, and I, as President, will not allow it to happen!”<sup>15</sup> The following day he tweeted:

Republicans feel that Social Media Platforms totally silence conservatives [sic] voices. We will strongly regulate, or close them down, before we can ever allow this to happen. We saw what they attempted to do, and failed, in 2016. We can’t let a more sophisticated version of that . . . happen again.<sup>16</sup>

Two days after his original tweet, President Trump issued an “Executive Order on Preventing Online Censorship.”<sup>17</sup> Although Section 230 clearly gives social media providers the power to in good faith “restrict access to or availability of material that the provider or users considers” to be “objectionable, whether or not such material is constitutionally protected,” the executive order directed several federal agencies to restrict significantly Section 230’s protections to reflect the Administration’s interpretation of the “narrow purpose of the section.”<sup>18</sup> Among those directives, the executive order instructed the Secretary of Commerce, acting through the NTIA, to petition the FCC to propose regulations to “clarify” Section 230.<sup>19</sup>

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<sup>15</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 4:40 PM), <https://twitter.com/realDonaldTrump/status/1265427539008380928>.

<sup>16</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 27, 2020, 4:11 AM), <https://twitter.com/realDonaldTrump/status/1265601611310739456>.

<sup>17</sup> Executive Order (May 28, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

<sup>18</sup> Executive Order (May 28, 2020), Sec. 2(b) <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

<sup>19</sup> Executive Order (May 28, 2020), Sec. 2(b) <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

#### IV. NTIA’s Proposed Rules to Effectively Rewrite Section 230 Would Hinder Content Moderation, Promote Discrimination and Disinformation, and Undermine Civil Rights and Democracy

Prompted by the President’s retaliatory executive order, NTIA’s petition alleges that “large online platforms appear to engage in selective censorship.”<sup>20</sup> As a result, NTIA asks that the FCC effectively rewrite Section 230(c)(1) so as not to immunize a platform’s “decisions to restrict access to content or its bar user from a platform,”<sup>21</sup> and NTIA asks that the FCC effectively rewrite the federal statute to significantly narrow the scope of Section 230(c)(2).

The clear text of Section 230(c)(2)(A) gives social media platforms and other interactive computer services the power to engage in content moderation. Section 230(c)(2)(A) explains that interactive computer services shall not be held liable for “any action voluntarily taken in **good faith** to restrict access to or availability of material that the provider or users considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or **otherwise objectionable**, whether or not such material is constitutionally protected. (emphasis added)”

NTIA calls on the FCC to limit the meaning of “good faith” and “otherwise objectionable” in an attempt to curtail platforms from engaging in content moderation. NTIA argues that “good faith” should be limited to a narrow list of items<sup>22</sup> and that “otherwise objectionable” should be limited

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<sup>20</sup> NTIA Rulemaking Petition at 7.

<sup>21</sup> NTIA Rulemaking Petition at 30.

<sup>22</sup> NTIA Rulemaking Petition at 39-40. NTIA would limit the meaning of “good faith” to situations in which a platform:

- i. restricts access to or availability of material or bars or refuses service to any person consistent with publicly available terms of service or use that state plainly and with particularity the criteria the interactive computer service employs in its content-

to “any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials.”<sup>23</sup>

Section 230 clearly gives social media providers the power to in good faith “restrict access to or availability of material that the provider or users considers” to be “**objectionable, whether or not such material is constitutionally protected.**”

NTIA’s proposed narrowing of “objectionable” to material that is similar to material that is “obscene, lewd, lascivious, filthy, excessively violent, or harassing” would discourage social media companies from content moderation, which would worsen online experiences for many Americans by effectively promoting disinformation, polarization, and suppression. It would undermine democracy, damage lives, and undermine engagement if social media companies could not freely remove threats, altered video, or misinformation<sup>24</sup> unless this material was undisputedly

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- moderation practices, including by any partially or fully automated processes, and that are in effect on the date such content is first posted;
  - ii. has an objectively reasonable belief that the material falls within one of the listed categories set forth in 47 U.S.C. § 230(c)(2)(A);
  - iii. does not restrict access to or availability of material on deceptive or pretextual grounds, and does not apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the interactive computer service intentionally declines to restrict; and
  - iv. supplies the interactive computer service of the material with timely notice describing with particularity the interactive computer service’s reasonable factual basis for the restriction of access and a meaningful opportunity to respond, unless the interactive computer service has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.

<sup>23</sup> NTIA Rulemaking Petition at 38.

<sup>24</sup> Danielle Citron, [Digital Platforms’ Power Over Speech Should Not Go Unchecked](#), KNIGHT FOUNDATION (June 16, 2020) (“Legally mandated platform neutrality would jeopardize — not reinforce — free speech values. Social media companies could not ban spam, doxing, threats,

“obscene, lewd, lascivious, filthy, excessively violent, [or] harassing.” Social media companies would not be able to prevent much of the harmful targeting of people from marginalized groups and the abuse and torment of marginalized groups engaging online—or block many invasions of intimate privacy.

As non-state actors, social media companies currently have the freedom and crucially the power to prevent these harms under an “**otherwise objectionable**” standard—but NTIA’s proposal to effectively narrow the statutory language would hinder such content moderation. The restrictive nature of NTIA’s proposal increases the likelihood that social media companies will disengage from pro-social content moderation. It would result in the failure to take down disinformation by fake accounts that provide false information about voting and discourage voting by communities of color. Platforms also would be chilled from removing racially-discriminatory advertisements for housing, employment, or financial services because although this material is “objectionable” it may not be “similar to” material that is “lewd, lascivious, filthy, excessively violent, [or] harassing.” It would increase the likelihood that social media companies would ignore posts that promote hate speech and facilitate racial polarization. NTIA’s proposal only promotes the likelihood of disinformation, discrimination, and suppression—particularly during an election season—and effectively undermines free and fair elections and democracy.

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harassment, nonconsensual pornography or deep fakes. They could not combat cyber mob attacks that chase people offline. They could not mitigate the damage wrought by sexual-privacy invasions by filtering or blocking them. . . Empirical evidence shows that cyber harassment has chilled the intimate, artistic and professional expression of women and people from marginalized communities.”).

While the President claims content moderation by private social media companies stifles free speech, the First Amendment was supposed to be a check against government—not against private entities.<sup>25</sup> To give government the power to control information through ad hoc content moderation during an election season is more dangerous to our democracy and our constitutional values than private entities engaging in content moderation.<sup>26</sup> While statutory clarification of Section 230 by Congress is warranted (see Part V below), the President’s retaliatory executive order and NTIA’s petition chill social media companies from moderating disinformation and preventing voter suppression. In this instance, Twitter was targeted and penalized—not for removing the President’s content, but for disclosing facts that countered his narrative against a well-established form of voting that would make voting easier and safer for millions of Americans during a pandemic.

Americans have strong feelings against political disinformation. According to surveys by Gallup and the John S. and James L. Knight Foundation conducted in December 2019 and March 2020, the vast majority of U.S. adults—81 percent—believe that social media companies should never

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<sup>25</sup> In asserting that Twitter and Facebook provide “an important forum to the public for others to engage in free expression and debate,” the President’s Executive Order compares the platforms to shopping malls in citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980); Executive Order, Sec. 4 (May 28, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>. In *PruneYard*, however, the U.S. Supreme Court did not find that the First Amendment of the U.S. Constitution gave leafleters the right to leaflet in shopping malls, but instead that a state right of access for leafleters to leaflet did not amount to a taking of a mall’s private property under the 5<sup>th</sup> and 15<sup>th</sup> Amendments of the U.S. Constitution. Indeed, another U.S. Supreme Court case has explicitly held that a mall owner may bar leafleters from distributing handbills at a mall without violating the First Amendment of the U.S. Constitution because the mall is not a state actor. *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

<sup>26</sup> *Thomas v. Collins*, 324 U.S. 516, 545 (1945) (“every person must be his watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”);

allow intentionally misleading information on elections and political issues.<sup>27</sup> Of various types of content surveyed, the only other content that larger groups of respondents believed should never be allowed on social media were child pornography and intentionally misleading health and medical information.

#### **V. Congress Should Clarify that Section 230 Does Not Immunize Racially Discriminatory Ad Targeting by Platforms**

Congress—rather than the NTIA and a retaliatory executive order—should drive clarifications of Section 230. Congress should explicitly state what is already the law—that Section 230 does not provide a defense to federal and state civil rights claims when social media companies make a “material contribution” to the underlying discrimination through their ad targeting and delivery. Social media companies make a material contribution to discrimination when they target (and/or deliver) employment or housing ads away from communities of color and other protected groups, and when they target (and/or deliver) voter suppression ads toward Black users and other protected groups.

For example, on Election Day 2016 the operators of the Williams & Calvin Facebook page — ostensibly two Black men from Atlanta who ran a popular Facebook page focused on Black media and culture — paid for and posted a Facebook ad. The ad proclaimed: “We don’t have any other choice this time but to boycott the election. This time we choose between two racists. No one

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<sup>27</sup> FREE EXPRESSION, [HARMFUL SPEECH AND CENSORSHIP IN A DIGITAL WORLD](#), KNIGHT FOUNDATION AND GALLUP, INC., 6 (June 16, 2020). The survey, which was commissioned by the Knight Foundation, was of just over 1600 U.S. adults in December 2019 and just over 1400 U.S. adults in March 2020.

represents Black people. Don't go to vote.”<sup>28</sup> The creators of the Election Day ad discouraging Black voting selected as audiences the Facebook microtargeting advertising categories of users interested in “Martin Luther King, Jr.”; “African American Civil Rights Movement (1954-68)”;  
and “African American history or Malcolm X.”<sup>29</sup>

After the November 2016 election, an investigation revealed that the Williams & Kalvin Facebook account was a fake account set up and operated by the Russian Internet Research Agency (the “Russian Agency”). While African Americans make up just 12.7% of the U.S. population, 37.04% of the unique Facebook pages believed to be created by the Russian Agency were focused on Black audiences,<sup>30</sup> and these pages attracted 35.72% of the followers of the pages created by the Russian Agency.<sup>31</sup> Of the twenty U.S.-focused audience segments that the Russian Agency targeted on

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<sup>28</sup>YOUNG MIE KIM, PROJECT DATA, [UNCOVER: STRATEGIES AND TACTICS OF RUSSIAN INTERFERENCE IN US ELECTIONS: RUSSIAN GROUPS INTERFERED IN ELECTIONS WITH SOPHISTICATED DIGITAL CAMPAIGN STRATEGIES](#) 9 (2018).

<sup>29</sup>*Id.*

<sup>30</sup>*See id.* at 21 (calculating a total percentage of Black pages at 37.037%, based on numbers indicating that the “Facebook data provided posts from 81 unique pages” (the denominator) and that “[o]verall, 30 targeted Black audiences” (the numerator)); *ACS 2013-2017 Five Year Estimates*, U.S. CENSUS BUREAU (2017), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_16\\_5YR\\_DP05&src=pt](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_DP05&src=pt) [<https://perma.cc/YZW7-ETB6>] (indicating a Black population in the United States of 12.7%); *see also* PHILIP N. HOWARD ET AL., COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018, at 6 (2018), <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/12/IRA-Report.pdf> [<https://perma.cc/7XR5-VG8Y>] (indicating that Facebook provided data on 3,393 individual ads published from 2015-2017 that it believed originated from the Russian Agency to the U.S. Senate Select Committee on Intelligence, and the U.S. House Permanent Select Committee on Intelligence released details on 3,517 of such ads).

<sup>31</sup>*See* RENEE DIRESTA ET AL., THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY 21 (2019), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1003&context=senatedocs> [<https://perma.cc/PN9Y-8B3C>] (“The Facebook data provided included posts from 81 unique Pages . . . Overall, 30 targeted Black audiences and amassed 1,187,810 followers; 25 targeted the Right and amassed 1,446,588 followers, and 7 targeted the Left and amassed 689,045 followers.

Facebook, just two segments — “African American Politics and Culture” and “Black Identity and Nationalism” — accounted for over 38% of the ads purchased, 46.96% of the user impressions, and 49.84% of the user clicks.<sup>32</sup>

In these situations—when social media companies are accepting money and deploying their algorithms to target and/or deliver ads away from or toward communities of color for discriminatory purposes—Congress should make clear that courts should not accept overly expansive legal claims that civil rights laws do not apply to social media companies—as Facebook attempted to do in 2017.<sup>33</sup> Section 230 does not bar racial discrimination claims against platforms when those platforms make material contributions to the underlying discrimination.<sup>34</sup> Third-party

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The remaining 19 were a sporadic collection of pages with almost no posts and approximately 2000 followers across them.”).

<sup>32</sup>See PHILIP N. HOWARD ET AL., COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018, at 23 tbl.4 (2018), <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/12/IRA-Report.pdf> [https://perma.cc/7XR5-VG8Y] (providing raw numbers of the twenty audience segments on Facebook targeted by the Russian Agency, including the two audience segments of “African American Politics and Culture” and “Black Identity and Nationalism”).

<sup>33</sup> See Notice of Motion & Motion to Dismiss First Amended Complaint for Defendant at 2, *Onuoha v. Facebook, Inc.*, No. 16-cv-06440-EJD (N.D. Cal. Apr. 3, 2017) (“Advertisers, not Facebook, are responsible for both the content of their ads and what targeting criteria to use, if any. Facebook’s provision of these neutral tools to advertisers falls squarely within the scope of CDA immunity.”). In 2019, Facebook settled several legal actions and agreed to make significant changes to prevent advertisers for housing, employment, or credit from discriminating based on race, national origin, ethnicity, age, sex, sexual orientation, disability, or family status. *Summary of Settlements Between Civil Rights Advocates and Facebook, Housing, Employment and Credit Advertising Reforms*, ACLU (Mar. 19, 2019), <https://www.aclu.org/other/summary-settlements-between-civil-rights-advocates-and-facebook>.

<sup>34</sup> See *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (“we interpret the term “development” as referring not merely to augmenting the content generally, but to *materially contributing* to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it *contributes materially* to the alleged illegality of the conduct.”); Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. DAVIS L. REV. 1793, 1812-28 (2020) (reviewing the law and explaining how social media platforms that target voter

advertisers generally exercise minimal control in the targeting of suppressive ads and no control over which users actually see ads — social media companies often exercise the bulk of the control in the selective targeting and all of the control over which users actually see ads. Selective targeting and delivery by social media companies of voter suppression ads toward protected classes and housing and employment ads away from protected classes contribute materially to discrimination, and thus social media companies do not enjoy Section 230 immunity for this activity.

Congress should explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting. While this is already the law, Congress should explicitly articulate this carve-out as applied to all types of civil rights claims arising from online ad targeting (e.g., discriminatory dissemination of ads in voting, employment, lending, housing, education, and transportation). Section 230 carve-outs already exist for violations in various areas of the law (e.g., federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986 and similar State laws, federal sex trafficking law).<sup>35</sup> A clear

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suppression ads toward communities of color and housing and employment ads away from communities of color make material contributions to the underlying discrimination and do not enjoy Section 230 immunity); United States’ Statement of Interest at 7, *Onuoha v. Facebook, Inc.*, No. C 16-06440-EJD (N.D. Cal. Nov. 16, 2018) (“[T]he CDA does not immunize Facebook for materially contributing to the alleged illegality, namely excluding users from seeing ads based on protected characteristics. . . . Facebook allegedly mines its users’ information and activity for data about their race, and national origin, and other protected characteristics, which is the touchstone in making discriminatory targeting possible. . . Facebook is not entitled to the protection of the CDA because it is Facebook that ultimately decides for each ad which users will see it and which users will not. If Facebook engaged in this conduct, it was not simply providing its advertisers with a neutral tool or a blank slate to express their own content; it was materially contributing to an alleged violation of the FHA (Fair Housing Act)”; *see also* Statement of Interest of the United States of America, *Nat’l Fair Hous. All. v. Facebook, Inc.*, No. 18-cv-02689-JGK (S.D.N.Y. Aug. 17, 2018) (asserting that Facebook is not entitled to immunity for violations of the federal Fair Housing Act because it uses its algorithms to deliver discriminatorily targeted ads).

<sup>35</sup> *See, e.g.*, 47 U.S.C. § 230(e)(1)-(5) (2019).

congressional carve out would prevent companies from asserting that the Civil Rights Act of 1964, the Fair Housing Act, and other landmark civil rights laws are inapplicable simply because a platform discriminates online rather than at a brick-and-mortar storefront.

Respectfully submitted,



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Spencer Overton  
Professor of Law, George Washington University  
President, Joint Center for Political and Economic Studies  
633 Pennsylvania Ave, NW  
Washington, DC 20004

## Certificate of Service

I, Spencer Overton, hereby certify that on the 17<sup>th</sup> day of September, 2020, I caused a true and correct copy of the foregoing Reply Comment to be sent via First Class mail to the following:

Douglas Kinkoph  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230



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Spencer Overton  
Professor of Law, George Washington University  
President, Joint Center for Political and Economic Studies  
633 Pennsylvania Ave, NW  
Washington, DC 20004