

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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

**Reply Comment of the  
International Justice Clinic and UCI  
Intellectual Property, Arts, and Technology Clinic at the  
University of California, Irvine School of Law\***

<b>I.</b>	<b>Introduction</b>	<b>2</b>
<b>II.</b>	<b>U.S. obligations under international human rights law</b>	<b>3</b>
<b>III.</b>	<b>How changes to § 230 of the CDA may affect U.S. obligations under Article 19 of the ICCPR</b>	<b>5</b>
	A. Legality	6
	B. Necessity and Proportionality	7
	C. Legitimacy	9
	D. The Obligation of Non-Discrimination	11
<b>IV.</b>	<b>The role of the United Nations Guiding Principles on Business and Human Rights</b>	<b>13</b>
<b>V.</b>	<b>How transparency regulations could advance freedom of expression</b>	<b>14</b>
<b>VI.</b>	<b>Conclusion</b>	<b>15</b>

\* This document does not reflect the official position of the University of California, Irvine.

# I. Introduction

The comments submitted in the current Rulemaking Petition generally address the ways in which U.S. law, Constitutional and statutory, enabled the growth of the digital technology sector and framed the debates concerning commercial content moderation. They often, on that basis, express grave concerns about the implications of the proposed Rulemaking. For instance, as the comment from the Center for Democracy & Technology (“CDT”) explains, the subject petition is problematic because the Federal Communications Commission (“FCC”) not only lacks the authority to implement what the National Telecommunications and Information Administration (“NTIA”) is requesting, but to act on its petition would be “contrary to the Constitution of the United States and especially to the principles of free speech which it enshrines.”<sup>1</sup> We agree. However, this submission, submitted by two law clinics of the University of California, Irvine, School of Law, seeks to highlight a set of largely unaddressed perspectives, in particular the ways in which U.S. international obligations should be taken into account and the likelihood that changes in domestic regulation would have significant impact on individuals and communities outside the United States. Indeed, as the home of many of the largest social media platforms globally, changes to the United States’ regulation of internet companies and social media platforms may affect billions of people worldwide, beyond the jurisdiction of the United States. The changes proposed to Section 230 of the Communications Decency Act (“Section 230”) by the NTIA would undoubtedly affect the right to freedom of opinion and expression guaranteed under international human rights law binding on the United States. Given this context, we urge the FCC to consider the U.S. obligations under international laws and to deny the NTIA’s Petition for Rulemaking.

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<sup>1</sup> Center for Democracy & Technology, Comment Letter Opposing the National Telecommunications and Information Administration’s Petition for Rulemaking (Aug. 31, 2020), [hereinafter CDT Comment] <https://ecfsapi.fcc.gov/file/10831957605823/CDT%20Opposition%20to%20NTIA%20Petition%20on%20Section%20230.pdf>, at 1. See also, e.g., Automattic Inc., Vimeo, Inc. & Reddit, Inc., Comment Letter in Opposition to the Petition of the National Telecommunications and Information Administration (Sept. 2, 2020) [hereinafter Automattic, Vimeo & Reddit Comment Letter], [https://ecfsapi.fcc.gov/file/109022869418620/\(as%20filed\)%20Section%20230%20FCC%20Comments%209-2-20.pdf](https://ecfsapi.fcc.gov/file/109022869418620/(as%20filed)%20Section%20230%20FCC%20Comments%209-2-20.pdf); Internet Association, Comment Letter Opposing the National Telecommunications and Information Administration’s Petition for Rulemaking (Sept. 2, 2020), [https://ecfsapi.fcc.gov/file/10902184309650/IA%20Comments%20to%20FCC%20on%20NTIA%20Petition%20re%20Section%20230\\_v2.pdf](https://ecfsapi.fcc.gov/file/10902184309650/IA%20Comments%20to%20FCC%20on%20NTIA%20Petition%20re%20Section%20230_v2.pdf).

## II. U.S. obligations under international human rights law

The United States actively participated in the drafting and negotiation of the provisions of international human rights law of relevance in this proceeding. Under the chairmanship of Eleanor Roosevelt, in 1948 the United Nations adopted the Universal Declaration of Human Rights (“Universal Declaration”), Article 19 of which provides for the protection of the freedom of expression, that is, the right to seek, receive and impart information and ideas of all kinds.<sup>2</sup> While the Universal Declaration itself is non-binding, the United States ratified, in 1992, the International Covenant on Civil and Political Rights (“ICCPR”).<sup>3</sup> At the time, President George H.W. Bush strongly advocated ratification, noting in his transmittal of the treaty to the Senate that the ICCPR “codifies the essential freedoms people must enjoy in a democratic society,” consistent with the U.S. Constitution.<sup>4</sup> As a treaty of the United States, the ICCPR constitutes part of the “supreme law of the land” under Article VI of the Constitution, binding on the United States, and thus deserves particular attention in the course of these proceedings.<sup>5</sup> Moreover, as of today, 171 States have ratified the ICCPR, giving it special power as the global standard for protecting the rights of individuals worldwide.<sup>6</sup>

Article 19 of the ICCPR provides the following:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - a. *For respect of the rights or reputations of others;*
  - b. *For the protection of national security or of public order (ordre public), or of public health or morals.*<sup>7</sup>

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<sup>2</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>3</sup> International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>4</sup> *See* S. EXEC. COMM. REP., 102D CONG., S. COMM. ON FOREIGN RELATIONS REP. ON INT’L LAW, APP. A, TRANSMITTAL LETTER FROM PRESIDENT GEORGE BUSH (Aug. 8, 1991) (1992), (reprinted in 31 I.L.M. 645, 660).

<sup>5</sup> U.S. CONST. art. VI.

<sup>6</sup> ICCPR, *supra* note 3.

<sup>7</sup> *Id.* art. 19.

The language of human rights law’s guarantee of free speech thus echoes, in fundamental respects, the First Amendment of the U.S. Constitution. There are variations. For instance, whereas the First Amendment is directed toward government (“Congress shall make no law...”),<sup>8</sup> Article 19 requires a focus on the individual who enjoys the right to freedom of opinion and expression. It protects the individual’s rights as consumer or audience (*seek and receive*) and as speaker in the conventional sense (*impart*).<sup>9</sup> Moreover, unlike other provisions of human rights law, it expressly applies “regardless of frontiers,”<sup>10</sup> promoting and guaranteeing the sharing of information and ideas across national borders. Finally, Article 19 was drafted with the possibility of evolving technology in mind, as it protects the freedom of expression *through any media*.<sup>11</sup> The Human Rights Committee, the expert monitoring body of the ICCPR given great weight in interpretations of the treaty, has emphasized that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person.”<sup>12</sup> Due to the importance of Article 19, “[t]he obligation to respect freedoms of opinion and expression is binding on every State party as a whole.”<sup>13</sup> This obligation extends to all branches of the State, and also compels States to “ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression.”<sup>14</sup> Thus, “[t]he duty to ensure freedom of expression obligates States to promote, *inter alia*, media diversity and independence and access to information.”<sup>15</sup>

Article 19 of the ICCPR provides a powerful statement of the freedom of expression. Unlike the First Amendment, it also identifies the circumstances under which governments may impose restrictions on the exercise of the right to freedom of expression. Article 19(3) provides what is widely understood to be a three-part test, according to which any government restricting expression under Article 19(2) must demonstrate that such restriction is (1) provided by law and (2) necessary to (3) achieve a legitimate objective.<sup>16</sup> These three parts, also known as the legality, necessity and legitimacy tests, are understood to be strict and narrow and, in brief, to mean the following:

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<sup>8</sup> U.S. CONST. amend. I.

<sup>9</sup> ICCPR, *supra* note 3, art. 19(2).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Human Rights Comm., *General Comment No. 34: Article 19 (Freedoms of Opinion and Expression)*, U.N. Doc. CCPR/C/GC/34, para. 2 (Sept. 12, 2011) [hereinafter *General Comment 34*].

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> David Kaye (Special Rapporteur on the Freedom of Opinion and Expression), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/38/35, at 4 (Apr. 6, 2018) [hereinafter *2018 Report*].

<sup>16</sup> ICCPR, *supra* note 3, art. 19(3).

(a) Provided by law (the **legality** principle). Any restriction must be undertaken in accordance with law that is precise, public and transparent; that law must avoid providing authorities with unbounded discretion, and appropriate notice must be given to those whose speech is being regulated. Laws should be subject to public comment and regular legislative processes.<sup>17</sup> Procedural safeguards, especially those guaranteed by independent courts or tribunals, should protect rights.<sup>18</sup>

(b) **Necessity and proportionality**. The restriction must be demonstrated by the State as necessary to protect a legitimate interest and to be the least restrictive means to achieve the purported aim. The Human Rights Committee has referred to these conditions as “strict tests”, according to which restrictions “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.<sup>19</sup>

(c) **Legitimacy**. The restriction should be justified to protect one or more of the interests specified in Article 19 (3) of the Covenant, that is, to respect the rights or reputations of others or to protect national security, public order, or public health or morals.<sup>20</sup>

In addition to contemplating the constitutionality of the NTIA’s petition, we recommend that the FCC take into account the limits that Article 19 of the ICCPR place on the government’s ability to restrict freedom of expression, under the legality, necessity and legitimacy tests, as they are analyzed in Section III.

### III. How changes to § 230 of the CDA may affect U.S. obligations under Article 19 of the ICCPR

We agree with those commentators who argue that the NTIA’s proposal would “gut Section 230 by (1) repealing its core immunity for publishing user content; and (2) imposing heavy-handed regulations on platforms by telling them what content they can remove and how they can remove it.”<sup>21</sup>

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<sup>17</sup> Inter-American Commission on Human Rights, *The Inter-American legal framework regarding the right to freedom of expression*, OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, para. 69 (Dec. 30, 2009); Inter-American Court of Human Rights, Advisory Opinion OC-6/86 of May 9, 1986: The word “Laws” in Article 30 of the American Convention on Human Rights.

<sup>18</sup> David Kaye (Special Rapporteur on the Freedom of Opinion and Expression), *Research Report on Artistic Freedom of Expression*, U.N. Doc. A/HRC/44/49/Add.2, at 7 (July 24, 2020) [hereinafter A/HRC/44/49/Add.2].

<sup>19</sup> General Comment 34, *supra* note 12, para. 22.

<sup>20</sup> *Id.* paras. 28-29.

<sup>21</sup> Automattic, Vimeo & Reddit Comment Letter, *supra* note 1 at 2.

Any such implications would have a deleterious impact not only on the platforms' abilities to develop their own content rules, as protected by the First Amendment, but they would interfere with the right to freedom of expression enjoyed by the users of the platforms. As such, the NTIA proposal should be seen as a "restriction" under Article 19(3) of the ICCPR, and its lawfulness under international law should be evaluated in the context of such U.S. obligations. This section will thus examine the risks that the proposed changes to Section 230 pose to freedom of expression under the legality, necessity and proportionality, and legitimacy tests.

## A. Legality

Under Article 19(3) of the ICCPR, the formal enactment into law of a restriction on expression does not automatically qualify it as meeting the standard of "provided by law".<sup>22</sup> The ICCPR requires more than such a superficial showing. Rather, human rights law requires scrutiny of the restriction. As noted above, the law "must be formulated with sufficient precision to enable an individual to regulate his or her conduct and it must be made accessible to the public."<sup>23</sup> It may not confer excessive discretion on those charged with its execution.<sup>24</sup>

The NTIA has petitioned the FCC to clarify the interaction between subparagraphs (c)(1) and (c)(2) of Section 230, and to identify the conditions under which actions that restrict access to or availability of material are not "taken in good faith." The petition urges the FCC to redefine "otherwise objectionable" in section 230(c)(2) in a way that would be at odds with the plain meaning of the statute and would strictly limit the content that platforms may moderate without risking litigation.<sup>25</sup> Specifically, the NTIA urges that the definition of "otherwise objectionable" content in Section 230 be limited to "obscene, lewd, lascivious, filthy, excessively violent, or harassing materials."<sup>26</sup> Additionally, the NTIA has requested that the FCC propose regulations that the NTIA concludes may be appropriate to advance the policy of fostering clear ground rules promoting free and open debate on the internet.<sup>27</sup>

To begin with, as noted by one submission, "whether Section 230 needs updating as a result of twenty-five years of enforcement by the courts is not up to the FCC."<sup>28</sup> While this issue may appear to be a

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<sup>22</sup> 2018 Report, *supra* note 15, at 4.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> A/HRC/44/49/Add.2, *supra* note 18 at 10.

<sup>25</sup> Petition for Rulemaking of the National Telecommunications and Information Administration, *Section 230 of the Communications Act of 1934*, RM-11862 (July 27, 2020) at 5 [hereinafter Petition for Rulemaking].

<sup>26</sup> *Id.* at 54.

<sup>27</sup> Executive Order on Preventing Online Censorship (May 28, 2020) at 3 [hereinafter Executive Order], <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/> (last accessed Sep. 6, 2020).

strictly domestic one, Article 19's provided-by-law standard speaks to the question of the process by which a restriction may be adopted.<sup>29</sup> The FCC is manifestly the wrong forum to decide whether and how to amend Section 230. That debate belongs in Congress.<sup>30</sup> Congress has not delegated authority to the Commission to promulgate regulations on Section 230.<sup>31</sup> The NTIA assumes that Congress must explicitly state when it has not delegated authority to the Commission, and concludes that, because "Congress did not do so ...[it] opens an ambiguity in section 230 that the Commission may fill pursuant to its section 201(b) rulemaking authority."<sup>32</sup> But Congressional silence on the FCC's authority is a reflection of the nature of Section 230. Section 230 is self-executing, a grant of immunity from civil liability that is enforced through private litigation.<sup>33</sup> The FCC does not implement, oversee, or enforce Section 230. Additionally, as the New America's Open Technology Institute (OTI) and Ranking Digital Rights (RDR) have highlighted, the FCC has never interpreted Section 230 as a grant of rulemaking authority.<sup>34</sup> By requesting the FCC's clarification, the government could be abusing its executive power to influence the content monitoring policy of the internet intermediaries. Given the restriction of the good faith provision, read with the proposed standard of "otherwise objectionable content," the FCC would have an excessive amount of discretion in determining what type of speech is to be moderated. Thus, if the FCC were to adopt the NTIA's proposed rulemaking regarding Section 230, it would be at odds with the legality test as the law must avoid providing authorities with unbounded discretion.

## B. Necessity and Proportionality

Any restriction on the right to freedom of expression must be "necessary" to achieve a legitimate purpose. That is, it must be established that the legitimate objective cannot reasonably be accomplished by any other means less restrictive to human rights. It is understood that, as part of the necessity evaluation, States must also ensure that the limitation is proportionate to the interest to be protected.<sup>35</sup> It

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<sup>28</sup> Eric Null; Isedua Oribhabor; Jenniffer Brody, Comments of Access Now in the matter of Section 230 of the Communication Act of 1934 (Sept. 2, 2020) at 6 para. 3 [hereinafter Comments of Access Now], <https://ecfsapi.fcc.gov/file/10902143605049/Access%20Now%20Comments%20FCC%20Section%20230%20NTIA%20Petition%209.2.2020.pdf>.

<sup>29</sup> A/HRC/44/49/Add.2, *supra* note 18 para. 14(a)-(c).

<sup>30</sup> Comments of Access Now, *supra* note 28 at 1.

<sup>31</sup> CDT Comment, *supra* note 1, at 4.

<sup>32</sup> Petition for Rulemaking, *supra* note 25, at 18.

<sup>33</sup> Koustubh "K.J." Bagchi; Christine Bannan; Spandana Singh; Nathalie Maréchal, Comments By New America's Open Technology Institute And Ranking Digital Rights Urging Denial of the National Telecommunications and Information Administration's Petition For Rulemaking (Sept. 2, 2020) at 5 [hereinafter OTI and RDR Comment], [https://ecfsapi.fcc.gov/file/109031681807340/OTI%20%26%20RDR\\_FCC%20comments%20re%20NTIA%20Sec%20230%20petition\\_Certificate.pdf](https://ecfsapi.fcc.gov/file/109031681807340/OTI%20%26%20RDR_FCC%20comments%20re%20NTIA%20Sec%20230%20petition_Certificate.pdf).

<sup>34</sup> *Id.* at 3 para. 1.

must also be emphasized that Article 19(3) places the burden on the government to demonstrate the necessity and proportionality of its restriction.

Here, the asserted intent of the Executive Branch is to address the concern that Section 230 has “allow[ed] a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike.”<sup>36</sup> However, notwithstanding the fact that it is the government that must demonstrate the necessity of its proposal, the NTIA did not supply any evidence to show that Internet platforms are discriminating against certain political views. Because Section 230 protects “users” and “providers” without clear boundaries on these terms, the NTIA’s rules would not just regulate the world’s largest Internet platforms but would affect nearly all Internet participants.<sup>37</sup> Furthermore, invalidating the settled understanding of how Section 230 operates will have significant negative effects on a wide variety of web platforms, and in particular, small businesses.<sup>38</sup> Consequently, the proposed changes fall short of meeting the requirements of necessity and proportionality, as the approach taken would impose an undue burden on small companies, and cause a chilling effect on the freedom of expression enjoyed by companies, which would almost certainly avoid taking action against problematic content in order to avoid liability.

Amending Section 230 in accordance with the NTIA’s proposal would bring a chilling effect to a wide range of intermediaries and ultimately internet users all over the world. The NTIA proposes that the FCC effectively rewrite Section 230 to deny its liability shield to any intermediary that is “. . . commenting upon, or editorializing about content provided by another information content provider.”<sup>39</sup> This proposal would drastically affect intermediaries because they would be exposed to potential liability by any fact-checking, labeling or independent commentary, practices that have become increasingly important as they endeavor to protect users against threats to public health, disinformation, incitement to violence and other content that they may, in good faith, determine to be “objectionable content.” An amendment of Section 230 as proposed by the NTIA, when dealing with inaccurate information, would

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<sup>35</sup> Human Rights Comm., *General Comment No. 27: Article 12 (Freedom of Movement)*, U.N. Doc. Citation CCPR/C/21/Rev.1/Add.9, para. 14 (Nov. 2, 1999). The Inter-American Commission has also explained that to examine the proportionality of the restrictive measure, it must be determined whether the sacrifice of freedom of expression inherent in the restriction is exaggerated in relation to the advantages obtained from the adoption of such limitations. *See*, Inter-American Commission on Human Rights, *The Inter-American legal framework regarding the right to freedom of expression*, OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, para. 88 (Dec. 30, 2009).

<sup>36</sup> Executive Order, *supra* note 27, at 4.

<sup>37</sup> Automattic, Vimeo & Reddit Comment Letter, *supra* note 1, at 22.

<sup>38</sup> NetChoice, Comment on NTIA Petition for Rulemaking (Sept. 2, 2020), Docket No. RM-11862 at 26, <https://ecfsapi.fcc.gov/file/10902240429171/NetChoice%20FCC%20Comment%20-%20Docket%20No.%20RM-11862.pdf>.

<sup>39</sup> Petition for Rulemaking, *supra* note 25, at 42.



force the intermediaries to choose between silence, and thus avoiding liability, or identifying objectionable content with accurate information or warnings while exposing themselves to potentially costly or nuisance lawsuits.<sup>40</sup>

Due to these legal risks, internet platforms will be unable to promote diversity and freedom of expression on their platforms because the NTIA will threaten liability on them when they endeavor to moderate content—the very activity Congress meant to encourage when it passed Section 230. The NTIA’s petition could therefore lead to less diversity of expression by exposing platforms to liability for removing disinformation related, for example, to voting, or racist, Islamophobic, anti-Semitic and other similar objectionable content. The NTIA proposal limits immunity for content removal decisions to the enumerated grounds in Section 230(c)(2), which the proposal construed narrowly. But hate speech that constitute incitement to violence or discrimination, and many other categories that interfere with the possibility of the platforms providing expressive space for members of marginalized or historically under-represented communities, are not among the enumerated grounds. Additionally, the Petition, if adopted, would almost certainly encourage Internet content and platform providers to supply the public with only highly-curated content to reduce legal risk. Ultimately, the internet platforms’ restrictions would give representation to significantly fewer voices across a narrower spectrum of communities in the United states and worldwide.<sup>41</sup> In this context, the result of amending Section 230 would unnecessarily and disproportionately bring harm to freedom of expression. In the end, the NTIA’s proposal could decrease the value of the internet community and discourage people from participating in it.<sup>42</sup>

## C. Legitimacy

If a restriction is to be imposed, it must be aimed to protect one of the legitimate interests recognized under Article 19(3).

It has long been understood that Article 19(3) does not permit restrictions that would interfere with discussion of government policies and political debate; reporting on government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities; and expression of opinion and dissent, religious opinion or belief, including by persons belonging to

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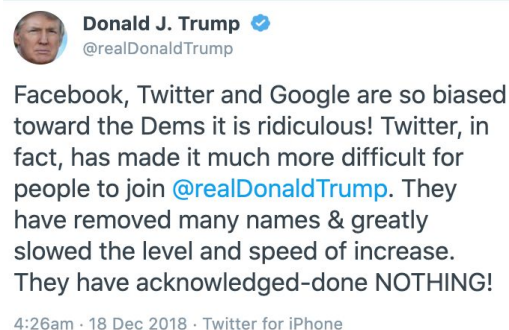
<sup>40</sup> CDT Comment *supra* note 1, at 3.

<sup>41</sup> Comments of Internet Association Opposing The National Telecommunications and Information Administration’s Petition For Rulemaking at 6 [hereinafter Internet Association Comment Letter] [https://internetassociation.org/files/ia\\_comments-to-fcc-on-ntia-petition-re-section-230\\_rm-11862\\_09-02-2020\\_intermediary-liability/](https://internetassociation.org/files/ia_comments-to-fcc-on-ntia-petition-re-section-230_rm-11862_09-02-2020_intermediary-liability/).

<sup>42</sup> Automattic, Vimeo & Reddit Comment Letter, *supra* note 1, at 26.

minorities or vulnerable groups.<sup>43</sup> Because the NTIA’s standards for moderation can be interpreted to moderate government policies and political debate, if the NTIA’s changes to Section 230 are to be implemented, the “specter of tort liability in an area of such prolific speech would have an obvious chilling effect . . . Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”<sup>44</sup> If online content is severely restricted by intermediaries due to their fear of tort liability, much of the censored content would likely fall in the protected categories of discussion laid out in Article 19(3).

The NTIA seeks to clarify the conditions under which an action restricting access to or availability of material is not “taken in good faith” and what content counts as “otherwise objectionable” within the meaning of subparagraph (c)(2)(A) of Section 230. In other words, the government, through the NTIA petition, is attempting to provide the Executive Branch with the grounds to censor content that is contrary to its political agenda or views, under the guise of expanding the categories of legitimate restrictions.<sup>45</sup> The intent to censor content contrary to the Trump administration has been made clear from the “Executive Order on Preventing Online Censorship” which was released in May, as well as President Trump’s own statements when he was signing the Executive Order, that, regarding Twitter, “if it were able to be legally shut down, I would do it.”<sup>46</sup> As far back as 2018, President Trump expressed his view, without evidence, that the major social media platforms are biased against him.<sup>47</sup>



<sup>43</sup> Frank La Rue (Special Rapporteur on the Freedom of Opinion and Expression), *Promotion and protection of the right to freedom of opinion and expression*, U.N. Doc. A/66/290, at 14 (August 10, 2011) [hereinafter A/66/290].

<sup>44</sup> Automattic, Vimeo & Reddit Comment Letter, *supra* note 1, at 22-23.

<sup>45</sup> Comments of Access Now, *supra* note 28, at 2-5.

<sup>46</sup> *Id.*; Remarks by President Trump Announcing an Executive Order on Preventing Online Censorship, (May 28, 2020)

<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-executive-order-preventing-online-censorship/>.

<sup>47</sup> See Donald Trump (@realdonaldtrump), TWITTER (Dec. 18, 2018, 4:26 AM), <https://twitter.com/realdonaldtrump/status/1075004324567285761>.

The NTIA’s regulatory proposals would introduce contingencies to, and ultimately reduce, the scope of immunities that Section 230 grants to internet services. Thus, if the NTIA’s petition is adopted, it could compel intermediaries to impose generic bans and excessive content moderation of many of the types of expression that should not be subject to restrictions, as noted by the Special Rapporteurs from the United Nations (UN), the Organization of American States (OAS), the Organization for Security and Co-operation in Europe (OSCE) and the African Commission on Human and Peoples’ Rights (ACHPR).<sup>48</sup> Ultimately, the NTIA’s proposal could result in restrictions on the freedom of expression of users of online content providers, and for no legitimate reason identified in Article 19—neither national security, public order, nor public health or morals is at issue here.

## D. The Obligation of Non-Discrimination

Article 19, in conjunction with Article 26, of the ICCPR entails the right to freedom from discrimination in the holding and forming of opinions, the expression of and access to ideas and information, and the exercise of privacy and the protection of data. The Special Rapporteurs from the UN, OAS, OSCE and ACHPR, those mechanisms monitoring freedom of expression globally and in key regions around the world, have also voiced their concerns for the challenges to freedom of expression.

The NTIA proposal would limit the scope of immunity that intermediaries enjoy when removing content because it would remove protections for content moderation decisions and would require notice and detailed reasoning every time a platform removes content.<sup>49</sup> Particularly, the NTIA wants the meaning of “otherwise objectionable” to be limited to “obscene, lewd, lascivious, filthy, excessively violent, or harassing materials.” This proposed definition would disincentive platforms from removing harmful content such as hate speech, because it does not technically fall under the NTIA’s proposed definition of “otherwise objectionable” content.<sup>50</sup> By doing so, the proposal would exacerbate a dynamic in which online speech that threatens, or intimidates members of a disadvantaged group drives the disadvantaged group away from social media and chills its online speech and activities.<sup>51</sup>

On the other hand, instead of under-moderating under the NTIA’s proposal, intermediaries would be more likely to over-exclude off-topic content to avoid “inappropriate content” from appearing in the

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<sup>48</sup> Special Rapporteurship for Freedom of Expression, Ten Key Challenges to Freedom of Expression in the Next Decade (Feb. 2, 2010), <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&IID=1> (last accessed Sept. 16, 2020) [hereinafter Ten Key Challenges].

<sup>49</sup> Automattic, Vimeo & Reddit Comment Letter, *supra* note 1, at 25.

<sup>50</sup> OTI and RDR comment, *supra* note 33, at 6.

<sup>51</sup> OTI and RDR comment, *supra* note 33, at 6.

first place. The Special Rapporteurs from the UN, OAS, OSCE and ACHPR have expressed their concern that misuse of hate speech laws to prevent historically disadvantaged groups from engaging in debate about their concerns is one of the challenges to freedom of expression.<sup>52</sup> The NTIA proposal amplifies this challenge because it would further discriminate against disadvantaged groups' right to freedom of expression. By setting up overly rigorous content rules, internet platforms may be prone to over-censor, resulting in discrimination that impedes the right to freedom of expression. Ultimately, though the NTIA petition purports to prevent over-moderation by social media platforms, the reality is that it would have the effect of disproportionately chilling the speech of disadvantaged groups.<sup>53</sup>

Additionally, excessive content moderation could negatively impact minority groups' right to freedom of expression because over-censorship limits intermediaries' ability to assess context and take into account the wide variety of language cues and linguistic and cultural particularities. One of the reasons is that to achieve content moderation, manual review is unlikely to be successful unless it is combined with automated tools, and automated tools often neglect the context of the content algorithms deemed "inappropriate." Even when algorithmic content moderation is complemented by human review, a tendency to defer to machine-made decisions impedes interrogation of content moderation outcomes. As a result, minority groups are the most likely to be disadvantaged because the context of their expressed content is often neglected.<sup>54</sup> And as the Human Rights Council has found, automated content moderation tools may also be "grounded in datasets that incorporate discriminatory assumptions" about race, gender and other protected characteristics, creating a high risk that such tools will remove content "in accordance with biased or discriminatory concepts."<sup>55</sup> As a result, overreliance on automated tools may both overlook content susceptible to lawful restriction under Article 19(3) and increase censorship of legitimate expression. Ultimately, the NTIA's proposal of imposing intermediate liability can discriminate the disadvantaged to exercise their right to freedom of opinion and expression.

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<sup>52</sup> Ten Key Challenges *supra* note 45, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&IID=1> (last accessed Sept. 16, 2020).

<sup>53</sup> OTI and RDR comment, *supra* note 33, at 7.

<sup>54</sup> CDT comment, *supra* note 1, at 4.

<sup>55</sup> David Kaye (Special Rapporteur on the Freedom of Opinion and Expression), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc. A/73/348, at 9 (Aug. 29, 2018) [hereinafter A/73/348].

## IV. The role of the United Nations Guiding Principles on Business and Human Rights

The focus of the changes to Section 230 is to address fears of needless censorship in today's online spaces. However, the imposition of intermediary liability on companies does not satisfactorily address this issue without raising major human rights concerns, and the FCC should instead explore other avenues for keeping companies accountable. Other avenues to adequately moderate content without running afoul of Article 19 could be to ensure public disclosure of policies for moderation, disclosure of requests from government and private entities, outreach with users and the impact reports on the effects of moderation, and providing mechanisms for processing grievances, among other strategies for greater transparency.<sup>56</sup> This can be accomplished by taking into consideration and implementing the duties on States as enumerated in the United Nation Guiding Principles on Business and Human Rights (UNGP), which was endorsed by the Human Rights Council in 2011. The UNGP “emphasize[s] State duties to ensure environments that enable business respect for human rights.”<sup>57</sup> The UNGP are relevant because human rights law obligates States to ensure that private entities do not interfere with the freedoms of opinion and expression.<sup>58</sup> One way the FCC can fulfill its duties as laid out by the UNGP in its regulation of social media platforms and internet companies is by providing guidance to businesses on how to respect human rights in their operations, and “encourage . . . business enterprises to communicate how they address their human rights impacts” by adopting disclosure requirements.<sup>59</sup>

It would be beneficial for the FCC to adopt disclosure requirements for internet companies because it would address the issue of whether companies are making a good faith effort in their content moderation policies, and increase transparency as to how companies are working to do so with respect to international human rights law. Disclosure rules would require companies to explain how their content moderation policies are consistent with the UNGP and more generally with the human rights of their users.<sup>60</sup> For example, the FCC could adopt formal public reporting requirements for internet and social media companies, which would have companies communicate how they address their human rights impacts and thus fulfill the disclosure requirement.<sup>61</sup> Any reporting requirements that are adopted would need to take into account the risks a communication could pose to the security and safety of individuals;

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<sup>56</sup> *Submission to UN Special Rapporteur for Freedom of Expression and Opinion David Kaye: Content Regulation in the Digital Age*, Ranking Digital Rights (2017) [hereinafter RDR] at 20.

<sup>57</sup> A/HRC/44/49/Add.2, *supra* note 18, para. 13.

<sup>58</sup> General Comment 34, *supra* note 12, para. 7.

<sup>59</sup> United Nations Human Rights Office of the High Comm’r, *Guiding Principles Business and Human Rights*, HR/PUB/11/4 (2011) at 4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 6.

“legitimate requirements of commercial confidentiality; and variations in companies’ size and structures.”<sup>62</sup> Therefore, we recommend that if the FCC were to consider any rulemaking to Section 230, that they will instead adopt reporting requirements in compliance with the UNGP.

## V. How transparency regulations could advance freedom of expression

In recognizing that the amount of content that is produced today requires moderation, companies have created algorithms for moderating content. As a result, the reliance on algorithms to filter content causes the injection of bias into the types of speech that is allowed and the types of speech that will be suppressed.<sup>63</sup> If the NTIA’s proposals are to be passed, there will be a further reliance on these algorithms over which the public has little oversight, and will frustrate the freedom of expression enshrined in ICCPR Articles 19(1) and 19(2). Furthermore, because the current policies for these companies are to keep the underlying code for the algorithms under lock and key, the lack of transparency in seeing what factors enable the biased moderation of speech poses issues in allowing people to freely express their ideas. The imposition of intermediary liability on companies such as Google, Twitter and Facebook means that not only do opaque algorithms further increase the types of speech that are moderated, the increased responsibilities imposed on companies can affect the innovation and competitiveness of smaller companies. As Access Now states, “transparency is the first step toward accountability.”<sup>64</sup>

We agree with AT&T’s comment that the public deserves more transparency from tech platforms in how content is moderated.<sup>65</sup> Not only does it promote trust between consumers and businesses, transparency in algorithms and how they moderate content would bring them in line to the standards of other industries. Furthermore, the implementation of measures to increase transparency would better uphold the United State’s commitment to upholding human rights principles of providing properly tailored limitations to speech.<sup>66</sup> In practice, this would mean publishing reports on both third-party and government requests for content and user removal, data on a regular basis the volume and type of content

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<sup>62</sup> *Id.*

<sup>63</sup> *Submission to UN Special Rapporteur for Freedom of Expression and Opinion David Kaye: Content Regulation in the Digital Age*, Global Partners Digital (2017) at 16.

<sup>64</sup> *Primer: Respecting human rights in content regulation in the digital age*, Access Now (2018) at 15 (submission of Access now for David Kaye, Special Rapporteur on the promotion and protection for the right to freedom of opinion and expression).

<sup>65</sup> AT&T Services, Inc., Comments of AT&T Services, Inc. (Sept. 2, 2020), at 3 [hereinafter AT&T Comment]. <https://ecfsapi.fcc.gov/file/1090291808483/9.2.2020%20AT%26T%20Section%20230%20Comments.pdf>

<sup>66</sup> PAUL M. BARRET, NYU CTR. FOR BUS. AND HUMAN RIGHTS, REGULATING SOCIAL MEDIA: THE FIGHT OVER SECTION 230—AND BEYOND (2020) at 3.

removal requests, as well as how the company moderates the content removal. Furthermore, effective grievance measures should be implemented that can be used to address genuine concerns of freedom of expression and privacy.<sup>67</sup> As an alternative to the changes proposed, the adoption of increased transparency through the public disclosure of requests to remove content, the public transparency of algorithms used by companies, as well as the option for users to appeal content removal decisions in accordance to the Manila Principles of Intermediary Liability.<sup>68</sup>

## VI. Conclusion

At the time of writing the laws for intermediary liability for companies, legislators likely did not fully anticipate the growing role of companies such as Facebook and Google in influencing public discourse. No longer are they simply “search engines” or social media platforms, but in fact regulated spaces where data is collected from users to target ads and content back to users, while also serving as public platforms and, for many people, as “newspapers, TV stations, the postal service, and even money.”<sup>69</sup> Although the initial view of the internet was as a “new frontier, largely free from the powers and limits of the old world,”<sup>70</sup> the vision of a vigorous and democratic discourse on these online spaces is currently frustrated by the increasing trend of tying free expression to data capture, as well as businesses practices not explicitly bound to human rights standards. Despite the intent to hold companies accountable, imposing greater intermediary liability through NTIA’s proposed changes to Section 230 would not achieve its intended purpose, and would further frustrate the United States’ efforts to meet its human rights obligations.

Rulemaking with respect to Section 230 must be very carefully considered. Again, given the international reach of internet companies and social media platforms, adoption of the proposals put forth in the NTIA’s petition for rulemaking would not only affect U.S. citizens, but endanger a great proportion of the international community’s rights to freedom of opinion and expression. The importance of human rights law and the protections it affords to the global community must not be understated. The U.S. carries

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<sup>67</sup> RDR, *supra* note 56, at 20.

<sup>68</sup> *Submission to UN Special Rapporteur for Freedom of Expression and Opinion David Kaye: Content Regulation in the Digital Age*, Observacom (Feb. 21, 2018) at 10  
<https://www.ohchr.org/Documents/Issues/Opinion/ContentRegulation/APC.pdf>.

<sup>69</sup> *Submission to UN Special Rapporteur for Freedom of Expression and Opinion David Kaye: Content Regulation in the Digital Age*, Association for Progressive Communications (APC) at 6; Daphne Keller, *Facebook Restricts Speech by Popular Demand*, THE ATLANTIC (Sept. 22, 2019)  
[https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/?utm\\_source=share&utm\\_campaign=share](https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/?utm_source=share&utm_campaign=share).

<sup>70</sup> Rikke Frank Jørgensen (2018) *Framing Human Rights: Exploring Storytelling Within Internet Companies*, Information, Communications, & Society,  
[https://www.ohchr.org/Documents/Issues/Opinion/ContentRegulation/DanishHumanRightsInstitute\\_1.pdf](https://www.ohchr.org/Documents/Issues/Opinion/ContentRegulation/DanishHumanRightsInstitute_1.pdf) at 341

obligations to the international community because it is a party to the ICCPR, and it is our recommendation that at this time the FCC reject the NTIA's Petition for Rulemaking and carefully weigh the protected rights of freedom of opinion and expression for any future rulemaking.

Respectfully submitted,

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