New Civil Liberties Alliance

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Federal Communications Commission
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Submitted via FCC E-filing

Re: *National Telecommunications and Information Administration's Petition for Rulemaking, Docket RM-11862*

The New Civil Liberties Alliance (NCLA) submits the following letter urging the Federal Communications Commission (FCC) to reject the National Telecommunications and Information Administration's (NTIA) Petition for Rulemaking concerning Section 230 of the Communications Decency Act (CDA), Docket RM-11862. NTIA's petition invites the Commission to run roughshod over the constitutional limits on its authority and substantively rewrite a federal statute to mean the opposite of what Congress enacted. Regardless of whatever merit the petition's policy objectives might have (or not), FCC cannot adopt NTIA's proposed regulations without violating its constitutional role as an entity subservient to both Congress and the judiciary.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be governed only by laws passed by Congress. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because lawmakers, federal administrative agencies and department

heads, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people on a daily basis. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[1] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention. To this end, NCLA has filed lawsuits against federal agencies that have attempted to usurp Congress' core legislative function.

Even where NCLA has not yet brought a suit to challenge the unconstitutional exercise of regulatory or executive power, it encourages government officials themselves to curb unlawful administrative power by establishing meaningful limitations on their exercise of authority. NCLA believes that administrative agencies—including the Commissioners of the FCC—should ensure that they are not disregarding their constitutional obligations.

II. BACKGROUND

On May 28, 2020, President Trump issued Executive Order 13925, *Preventing Online Censorship*, 85 Fed. Reg. 34079 (June 2, 2020). Among other things, the Order directed the Secretary of Commerce, in consultation with the Attorney General, and acting through NTIA, to file a petition for rulemaking with FCC concerning Section 230 of the Communications Decency Act. *Id.* at 34081.

Consistent with the Order, NTIA filed a petition for rulemaking on July 27, 2020. The petition asked the Commission to substantively rewrite Section 230 (47 U.S.C. § 230) by providing extensive regulatory revisions to the statutory text. NTIA Pet. at Appx. A. Specifically, NTIA proposed that FCC amend Section 230 to provide that immunity for liability under Section 230(c)(1) not be available to an internet-service provider that "restrict[ed] access to or availability of material provided by another information content provider." NTIA Pet. at Appx. A, Proposed 47 C.F.R. § 130.01(a). NTIA also proposed that Section 230(c)(1)'s immunity be restricted as to any service provider that does any of the following—"substantively contributing to, modifying, altering, presenting with a reasonably discernible viewpoint, commenting upon, or editorializing about content provided by another information content provider." NTIA Pet. at Appx. A, Proposed 47

[1] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

C.F.R. §130.03. Finally, NTIA proposed that FCC rewrite Section 230(c)(2)'s more limited immunity provision by narrowing the circumstances in which a provider will be considered to have acted in "good faith" and by limiting the types of material a provider may restrict. NTIA Pet. at Appx. A, Proposed 47 C.F.R. §§ 130.02(d), (e).

Chairman Pai opened NTIA's petition for public comment on August 3, 2020.

III. FCC LACKS THE AUTHORITY TO ACCEPT NTIA'S INVITATION TO SUBSTANTIVELY REWRITE FEDERAL LAW

NCLA takes no position on the policy goals of either President Trump's Executive Order or NTIA's Petition. Reasonable minds can and do differ about the need to reform Section 230. But FCC may not settle that debate through rulemaking, absent further legislation from Congress. NCLA urges the Commission to recognize the core limits of its authority and decline NTIA's Petition, which asks FCC to exceed the bounds of proper administrative functions.

Indeed, NTIA argues, in defiance of longstanding court interpretation, that FCC has the power to rewrite Section 230 entirely. But the Commission has no such authority. Section 230's language is clear, and there is no legal "gap" for FCC, or any agency, to fill. More fundamentally, FCC has no power to *revise* the statutory language to reach legal outcomes that are specifically precluded by existing law. NTIA would have the Commission act as a super-legislature—issuing new laws in defiance of both Congress and the judiciary. The Constitution does not and cannot tolerate NTIA's proposed course of action.

A. FCC'S CONSTITUTIONAL AUTHORITY

Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress. Article I, § 7, Clauses 2 and 3 of the Constitution require that "Every Bill" shall be passed by both the House of Representatives and the Senate and signed by the President "before it [may] become a Law." Article II, § 3 of the Constitution directs that the President "shall take Care that the Laws be faithfully executed[.]"

This constitutional structure divides the branches of government. "Even before the birth of this country, separation of powers was known to be a defense against tyranny," and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 756-57 (1996).

No agency has any inherent power to make law. Thus, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355,

374 (1986).

And an agency may only "fill [] statutory gap[s]" left by "ambiguities in statutes within an agency's jurisdiction to administer" to the extent Congress "delegated" such responsibility to the agency. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (there must exist "a gap for the agency to fill" to authorize lawful agency action). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). A statute that is unambiguous "means that there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (quoting *Brand X Internet Servs.*, 545 U.S. at 982-83).

In "review[ing] an agency's construction of [a] statute which it administers," the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Under this analysis, the court "must reject administrative constructions which are contrary to clear congressional intent," because the "judiciary is the final authority on issues of statutory construction." *Id.* at n.9; *see also Webster v. Luther*, 163 U.S. 331, 342 (1896) ("[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.").

B. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

"Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014). It "marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others." *Id.* (citing *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003)).

CDA's protection comes in two distinct sections. Section 230(c)(1) states, "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." 47 U.S.C. § 230(c)(1). Courts of appeals have consistently and uniformly "recognized the provision to protect internet service providers for the display of content created by someone else." *Jones*, 755 F.3d at 406 (collecting cases).

The protections of Section 230(c)(1) do not consider the good faith, or lack thereof, on the

part of the service provider or user. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19, 23 (1st Cir. 2016) ("assertions about [the defendant's] behavior" were irrelevant for § 230(c)(1)).

Instead, the only question relevant to Section 230(c)(1) is whether a defendant is in a "publisher's role." The statute bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Zeran v. America Online, Inc. (AOL)*, 129 F.3d 327, 330 (4th Cir. 1997); *see also, e.g.*, *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."). When a defendant acts in a publisher's role, Section 230(c)(1) provides the defendant with immunity from liability in connection with a wide variety of causes of action, including housing discrimination, see *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008), negligence, *see Doe*, 528 F.3d at 418; *Green*, 318 F.3d at 470-71, and even securities fraud and cyberstalking, *see Universal Comm's Systems Inc. v. Lycos, Inc.*, 478 F.3d 413, 421-22 (1st Cir. 2007).

By contrast, Section 230(c)(2) "provides an additional shield from liability, but only for 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene ... or otherwise objectionable.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (quoting 47 U.S.C. § 230(c)(2)(A)). "Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service." *Id.* "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." *Id.* (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc)); *see also Doe*, 817 F.3d at 22-23 ("Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites.") (collecting cases).

The interplay between the two subsections of 230(c) in the CDA is not subject to confusion or even debate in the courts of appeals. The statutory language is quite clear. "It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language." *Barnes*, 570 F.3d at 1105.

C. FCC CANNOT REWRITE SECTION 230

Undeterred by the statutory text and consistent court interpretation thereof, NTIA has advanced three purported ambiguities in Section 230 it says allow the Commission to act. First, it says there is "uncertainty about the interplay between section 230(c)(1) and (c)(2)." NTIA Pet. at 27. Second, NTIA says that "what it means to be an 'information content provider' or to be 'treated as a publisher or speaker' is not clear in light of today's new technology and business practices." NTIA Pet. at 28. Third, NTIA claims that Section 230's terms "otherwise objectionable" and "good faith" "are ambiguous on their face." NTIA Pet. at 28. Based on these contrived ambiguities, NTIA then proposes a radical rewrite of each statutory section to fundamentally alter what each provision does. *See* NTIA Pet. at Appx. A.

NTIA does not appear to appreciate the difference between true ambiguity that would allow for rulemaking versus its own simple disagreement with the law's plain text as consistently interpreted by the courts. Indeed, NTIA says, "Section 230 contains a number of ambiguities that courts have interpreted broadly in ways that are harmful to American consumers, free speech, and the original objective of the statute." NTIA Pet. at 27. Pointing to consistent interpretation by the judiciary of plain statutory terms does not provide the Commission with *any* power to take the law into its own hands through NTIA's requested rulemaking. NTIA's argument boils down to a simple disagreement with court interpretation of the plain language of the statute. The Commission should not accept NTIA's invitation to vastly exceed its authority.

i. FCC Cannot Rewrite Section 230(c)(1) to Remove Immunity for Restricting Access to Material

First, NTIA's request to have FCC "determine whether the two subsections' scope is additive or not" flies in the face of both clear statutory language and consistent court interpretations. *See* NTIA Pet. at 29. NTIA briefly, and without any analysis, asserts that the "relationship between subparagraphs (c)(1) and (c)(2)" is "ambiguous" because "courts [have] read[] section 230(c)(1) in an expansive way that risks rendering (c)(2) a nullity." NTIA Pet. at 28. This contention is both false and a distraction from the ambiguity analysis. Expansive is different than ambiguous. Courts have just disagreed with NTIA's view of what the statute *should* be. That provides no basis for the Commission to act.

A court has a duty to "exhaust all the traditional tools of construction" before "wav[ing] the ambiguity flag." *Kisor*, 139 S. Ct. at 2415 (internal citations and quotation marks omitted). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a

judge conclude that it is more one of policy than of law." *Id.* (internal citations and quotation marks omitted). And these same rules of statutory interpretation "bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring).

NTIA never really identifies what is ambiguous about the statute—because any principled application of the test for ambiguity comes up short. NTIA has hardly "exhaust[ed] all the traditional tools of construction." *See Kisor*, 139 S. Ct. at 2415. Instead, courts have explained that the plain language of the statute sets up two distinct liability shields. Section 230(c)(1) applies to publishers who are not information content providers, whereas (c)(2) applies to "*any* provider of an interactive computer service," whether or not it also provides information. *Barnes*, 570 F.3d at 1105. There is nothing odd, much less *ambiguous*, about Congress' choice to have different protections for different parties.

NTIA even recognizes that courts have uniformly interpreted the plain text of Section 230 to explain the interplay between these sections. *See* NTIA Pet. at 29 (citing *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019)). It just disagrees with those court decisions. Disagreement with an outcome is hardly identification of ambiguity. Instead, it illuminates what NTIA really wants the Commission to do—*change the law*.

If there were any doubt about NTIA's goals, it would be answered by the text of NTIA's proposed regulation. Proceeding from an unidentified ambiguity, NTIA proposes a regulation that explicitly contradicts the statute and prevailing case law, artificially narrowing Section 230(c)(1) so that it provides *no* protection for service providers that "restrict access to or availability of material provided by another information content provider." *See* NTIA Pet at 30-31. But as the Ninth Circuit explained in *Barnes*, Section 230(c)(1) "by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." 570 F.3d at 1105. Restricting *access* to third-party content is at the heart of what Section 230(c)(1) protects. The Commission cannot limit that protection through rulemaking.

ii. FCC Cannot Rewrite Section 230 to Penalize Providers Who Make Editorial Decisions About Content

NTIA's next request, to have the Commission redefine the term "information content provider" must also be rejected as antithetical to the agency's proper role. *See* NTIA Pet. at 42.

Whereas Section 230(c)(1) provides immunity when a service provider is not acting as a "publisher or speaker" of certain information, it does not protect any "information content

providers" who are "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).[2] Thus, as a secondary line of argument, litigants have often tried to argue that an internet service provider is really an *information content provider* because they have made certain editorial decisions about what content to display or prioritize or merely have encouraged creation of certain content. *See, e.g.*, *Jones*, 755 F.3d at 413-14 (collecting cases).

But the unanimous view of the courts is that the statutory language plainly applies to "creation or development" of material, not the exclusion or prioritization of content. *See, e.g.*, *Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."). As the Sixth Circuit said in joining every other court of appeals on this question, "an encouragement test would inflate the meaning of 'development' to the point of eclipsing the immunity from publisher-liability that Congress established." *Jones*, 755 F.3d at 414.

NTIA asks FCC to sweep that law aside and adopt a new definition of an information content provider, treating a service provider as the publisher or speaker of content when it merely "recommends, or promotes" content, even if it does so with an algorithm or other automated means. NTIA Pet. at 46-47. In short, NTIA wants to eliminate protection when a service provider does something far less concrete than the "creation or development" of content.

As a threshold matter, NTIA's petition yet again pretends that there is some ambiguity in the statutory text, as it asks FCC to overrule these courts and rewrite the scope of the law. Rather than engage meaningfully with the statutory text, NTIA just says that "[c]ourts have proposed numerous interpretations" of what it means to be an information content provider. NTIA Pet. at 40.

But there is no ambiguity in the text of the statute. Indeed, Section 230(f)(2) provides a detailed statutory definition of what it means to be an information content provider. NTIA does not really argue otherwise, it just suggests that there could always be an additional level of definitions. *See* NTIA Pet. at 40.

Of course, in construing statutes, courts "give undefined terms their ordinary meanings," and not every undefined term is ambiguous. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018); *see also United States v. Day*, 700 F.3d 713, 725 (4th Cir. 2012) ("It is beyond cavil that a criminal statute need not define explicitly every last term within its text[.]"). If agencies can rewrite statutes by defining

[2] As discussed, this definition does not apply to Section 230(c)(2). That subsection provides liability even for information content providers, which is part of what differentiates the provisions. *See Barnes*, 570 F.3d at 1105.

every undefined term, Congress cannot control the law. No matter how clear the statute or its *definitions*, some term will always be left undefined—or else the definitions themselves will have undefined terms in them. But "silence does not always constitute a gap an agency may fill"; often it "simply marks the point where Congress decided to stop authorization to regulate." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc on behalf of 10 judges). Indeed, reading Congress' silence as an implicit grant of authority is both "a caricature of *Chevron*" and a "notion [] entirely alien to our system of laws." *Id.* at 359-60.

NTIA invites the Commission to make the rudimentary mistake of believing that it has unlimited authority to define *every* open-ended term on the premise of ambiguity. But if that were so, where would it end? Surely not every term in a definition is itself defined. Indeed, NTIA wants a new definition of the terms within the statute's definitions. Congress did not bestow on the Commission unlimited power over Section 230, and NTIA's passing suggestion otherwise should be rejected.

In any event, and contrary to NTIA's suggestion, the courts have adopted clear limits based on the text of the statute. Indeed, whereas NTIA cites to *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016), and *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199-1200 (10th Cir. 2009), as evidence of disagreement in the courts, *see* NTIA Pet. at 40-41, both cases adopted and applied the "material contribution test." And *Huon* even dealt with a provider that "authored" allegedly defamatory content. 841 F.3d at 743. Thus, *Huon* and *Accusearch, Inc.* demonstrate nothing more than the consensus view that information content providers must do something much more than simply promote or prioritize material in order to become liable. NTIA's suggestion about the state of the law is, at best, disingenuous.

More importantly, the courts have based their rulings on the clear statutory text. *See Jones*, 755 F.3d at 414. NTIA's suggestion that FCC can somehow overrule those courts is an affront to the proper role of an agency. *See Brand X Internet Servs.*, 545 U.S. at 982-83. Thus, the Commission cannot lawfully adopt NTIA's proposed rewrite to Section 230(f)(2).

iii. FCC Cannot Drastically Revise Section 230(c)(2) to Make Providers Liable for Good Faith Efforts to Restrict Objectionable Content

Finally, the Commission should reject NTIA's request to redefine the statutory terms "otherwise objectionable" and "good faith" in ways that run counter to their plain meaning. *See* NTIA Pet. at 31, 38.

Section 230(c)(2) grants a limited protection. It immunizes all service and content providers who "in good faith" "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." 47 U.S.C. § 230(c)(2)(A).

NTIA objects to this broad statutory standard, yet again under the pretense of asking the Commission to fill in ambiguities. First, NTIA says that the term "otherwise objectionable" is "ambiguous" because courts routinely consider it to be separate and apart from the other enumerated types of material—*e.g.*, obscene or violent material. *See* NTIA Pet. at 31. NTIA wishes instead that courts would limit this phrase to mean only what the enumerated terms already encompass—"any material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." *See* NTIA Pet. at 31-32, 38.

Needless to say, disagreement over court decisions is not the same thing as identifying an ambiguity. And courts have often been called upon to construe the broad term "objectionable." *See, e.g.*, *Zimmerman v. Bd. of Trustees of Ball State Univ.*, 940 F. Supp. 2d 875, 890 (S.D. Ind. 2013). There is "nothing ambiguous" about that term. *Id.*

What NTIA seeks to do is have the Commission write the term "objectionable" out of the statute. Indeed, courts have recognized that Congress intended to give the term "otherwise objectionable" *some* meaning, and not just reiterate the list of other forms of content. *See Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019). Rejecting the argument advanced by NTIA, the Ninth Circuit said, "We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s. But even if *ejusdem generis* did apply, it would not support [a] narrow interpretation of 'otherwise objectionable.' Congress wanted to give internet users tools to avoid not only violent or sexually explicit materials, but also harassing materials." *Id.* FCC may not alter statutory language just because NTIA wishes Congress would have written a different law.

NTIA also says, yet again without analysis, that the "phrase 'good faith' in section 230(c) is also ambiguous." NTIA Pet. at 38. But instead of explaining why that phrase is purportedly incapable of being readily understood, NTIA does what it does best—it argues against courts that have interpreted the phrase in its ordinary sense. *See* NTIA Pet. at 38-39.

NTIA's attempt to create ambiguity around the meaning of "good faith" is particularly misplaced because the phrase "good faith" is "a legal term that has a well understood meaning." *See Wilder v. World of Boxing LLC*, 220 F. Supp. 3d 473, 480 (S.D.N.Y. 2016). And courts have applied

this understanding to Section 230 consistently—looking for bad motives on the part of the provider. *See, e.g.*, *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 603 n.9 (S.D.N.Y. 2020).

Consistent with its pattern of framing disagreement with settled law as ambiguity, NTIA acknowledges that the law runs counter to its proffered regulation. It just argues that, as a policy matter, good faith should be read unnaturally to "require[] transparency about content moderation dispute processes." *See* NTIA Pet. at 39. And its proposed regulation takes that idea and runs with it—defining good faith with a four-part definitional test that forbids a finding of good faith in a host of circumstances, including where automated content moderation fails to perfectly align with a provider's terms of service. *See* NTIA Pet. at 39. This definition is not the plain meaning of good faith—it is not even arguably so. NTIA apparently wants to completely scrap the statutory language in favor of something very different.

IV. CONCLUSION

NCLA urges FCC to reject NTIA's Petition. Even if the Commission shared NTIA's view about what Section 230 *should* look like, it has a constitutional obligation to leave such complex policy decisions in the hands of Congress and the President. FCC simply cannot revise an act of Congress, under the pretense of rulemaking, so that it means the opposite of what Congress set out in law. To allow such *sub rosa* lawmaking would be an affront to constitutional order.

Sincerely,

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