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HOW THE BIDEN-HARRIS ADMINISTRATION CAN (BEGIN TO) SAVE THE INTERNET

STANFORD UNIVERSITY

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To fix our information ecosystem the Biden Administration must simultaneously work to bridge the digital divide, address algorithmic discrimination, be honest about Section 230 and the First Amendment, and build non-commercial media to combat misinformation.

The **cynical machinations** surrounding Congress's last COVID relief bill showcase the dismal state of tech policy at the end of the Trump era. Activists and advocates worked for nine months to get funding for broadband affordability in the law, winning a $3.2 billion allocation to support internet access for people affected by the pandemic and economic crisis. That's both a landmark achievement and an insufficient endpoint, as it is roughly enough to keep just five million households connected for a year in the absence of additional steps.

Meanwhile, a Republican-led Section 230 repeal made a surprise last-minute appearance as the wrench used to sink $2,000 stimulus payments in that December relief bill. That law was the subject of Trump's incoherent wrath long before Twitter started **labeling his tweets** last spring, and will only continue to anger misguided GOP politicians now that so many platforms have **banned Trump** for stoking violence and insurrection.

The relative invisibility of broadband adoption and affordability as a policy issue, especially when compared to the near-endless, high-profile wrangling over the future of Section 230 and its purported role in alleged online "anti-conservative bias" shows just how badly the Trump administration and its fellow travelers lost the plot on tech policy.

The centrality of the internet to our lives was already a cliché before the pandemic. But the crisis has underlined the importance of getting these policies right. Turning the page on the Trump administration and preparing for the crises to come means moving past the tech utopianism that

Successful reimagination of the status quo is possible and within reach. The internet and our information and media ecosystem must work in the public interest. Charting a better path forward stands on these four pillars: connecting people that aren't connected; centering civil rights and privacy in the data economy; having a clear-headed and honest conversation about Section 230, content moderation and intermediary liability; and encouraging and publicly supporting noncommercial sources of information.

characterized much of the early internet but also putting aside the cynicism and defeatism that has emerged in recent years. "Just turn it off" can't be the solution to any of tech policy's major issues, especially when even mass user defections and advertiser boycotts have not and could not curb all the excesses and abuses of social media, the data economy, and disinformation.

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Congress should be a willing and eager partner on these issues. But the close partisan divide in both chambers may mean an uphill climb on many of the nation's most pressing issues. This document emphasizes executive action where possible, so the Biden administration can act immediately.

BROADBAND: TITLE II, ACCESS, AND AFFORDABILITY

It has been more than three years now since Trump's Federal Communications Commission Chairman Ajit Pai abdicated the agency's regulatory oversight of broadband providers in the egregiously misnamed *Restoring Internet Freedom Order.* While commonly conceived of as the order that reversed the Obama FCC's 2015 Net Neutrality order, it also uprooted the same order's proper classification of broadband as a "telecommunications service" under Title II of the Communications Act, and that classification has always been about much more than Net Neutrality nondiscrimination rules alone.

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access for everyone in the United States. It provides the FCC with the best and in some cases only authority the agency has to make broadband more ubiquitously available, reliable, reasonably priced and competitive. It would let the FCC prohibit broadband disconnections during the pandemic. It would allow the agency to protect public-safety communications from unreasonable internet service provider (ISP) practices, and to require the rapid restoration and improvement of communications infrastructure wiped out by increasingly severe disasters like the **hurricanes that devastated**

Puerto Rico and the wildfires in so many western states. And Title II supplies the only good authority the FCC has to support discounted broadband on a permanent basis with its Lifeline program.

Some ISP lobbyists, and the pundits and politicians that listen to them, are eager for the "reclassification wars" to end; but Title II just makes sense. It is only contentious in D.C. because a few powerful lobbies and lawmakers keep fighting against what people across the political spectrum overwhelmingly and obviously want and need.

As Free Press has written, Title II is the proper framework for broadband from both a legal and engineering standpoint. It comes with none of the harms to broadband investment and deployment that Pai and others so often and so falsely claimed. Its repeal did not result in the broadband investment, speeds, and coverage increase that Pai claims, and in fact investment did nothing but decline on his watch. Sustained attacks by the industry to avoid proper oversight and scrutiny should not deter the Biden administration from doing the right thing.

The end of the Trump presidency leaves us with this sobering legacy, even as the outgoing administration and FCC leadership falsely claim to have made real progress in closing the digital divide: Nearly 80 million people, or almost a quarter of the U.S. population, lack an adequate home-broadband connection. Economic and racial gaps in broadband adoption persist. Only 48 percent of low-income households have a fixed broadband connection. Some 13 million Black people, 18 million Latinx people, and 13 million Indigenous people lack this type of adequate home connectivity.

The FCC's failure here would be wrong under any circumstance. But the pandemic has made that failure even more visible, poignant and tangible. Universal, affordable and open internet connectivity is necessary for jobs, education, civic engagement, and staying connected to one another — especially during a time of social distancing.

To protect the internet and ensure a resilient, affordable, and accessible telecommunications infrastructure, the FCC must put broadband back under Title II of the Communications Act.

The Biden administration should:

1. Appoint FCC commissioners who support returning to a proper interpretation of Title II of the Communications Act, which provides the legal foundation for a wide range of FCC initiatives to increase broadband deployment, affordability, reliability, resiliency and competition, as well as the foundation for strong Net Neutrality protections.

2. Support legislative efforts to clarify, reaffirm or restate this proper legal classification for broadband, and the FCC jurisdiction and mandates that come with it. The Save the Internet Act has already passed the House of Representatives once in 2019, and was modeled on the Congressional Review Act vote in the Senate in 2018 to overturn the Pai repeal. That kind of legislation would fully restore Net Neutrality rules along with the necessary Title II legal foundation, but Congress could also take up this task in more straightforward ways not tied back to reversing the Pai repeal.

3. Oppose any legislation that would restore only a few of the "bright-line rules" in the Net Neutrality context without restoring other necessary protections against unreasonable ISP discrimination or reinstating the necessary authority for the FCC to achieve all of these other broadband equity and affordability goals.

When it comes to affordability, the incoming administration should do everything it can to improve adoption, especially by people of color, on tribal lands, and in low-income communities more generally. This means it must:

1. Nominate or elevate an FCC chair and/or new commissioner (joining Democrats Jessica Rosenworcel and Geoffrey Starks) who wholeheartedly supports the Lifeline program, which subsidizes critical communication services for low-income households. The new FCC leadership must stop the attacks on that program launched by the outgoing chairman and his Republican colleagues, and also must protect broadband affordability by ensuring that businesses contribute their fair share to the Universal Service Fund that pays for Lifeline and other initiatives.

2. Support legislation mandating FCC collection of data on the actual prices people pay for broadband, to provide a comprehensive picture of cost-based barriers to adoption and formulate policies to address them.

3. Explore more progressive ways to fund broadband support mechanisms, not only for people already eligible for Lifeline but those above the poverty line too, with a mix of direct congressional appropriations and tax-credits to reduce the prices that working families and others pay for broadband today. The ink is barely dry on the December stimulus package, and the FCC has just begun work to administer the $3.2 billion emergency broadband benefit described at the outset of this article. But more economic recovery and pandemic relief spending is necessary, and both the new administration and new Congress should look to build upon the broadband affordability support in the December bill.

4. Encourage the FCC ‘s use of its authority under Title II to investigate and stop unjust and reasonable practices and penalties, and at least oversee the prices charged and fees imposed by internet service providers. This is the crux of the argument over Title II: While it is possible to debate the need and capacity of the FCC to actually set rates for broadband, the FCC must have oversight of the prices and fees imposed on internet users by monopoly and duopoly providers of this essential service.

5. Support FCC action, and new legislation if necessary, to allow for broadband wholesaling and then resale competition from providers that do not own their own networks. That kind of competition is present in the wireless market to some degree but has almost disappeared in the wired broadband market after two decades of bad FCC decisions.

6. Support legislation that removes barriers to municipal broadband projects, and other cooperative and competitive initiatives, while using federal broadband-deployment subsidies to support local decision-making on construction and maintenance of these kinds of networks.

CIVIL RIGHTS AND PRIVACY

There is an urgent need to address the failings, damaging business models, and privacy and civil rights abuses of the data economy. The large tech companies, already wildly wealthy and integrated into our lives before the pandemic, have seen **their profits soar** in recent months as the online world supplanted so much of the brick-and-mortar world for jobs, **commerce**, education and social interaction. The obvious vehicle for addressing these issues is comprehensive federal privacy legislation — which is perennially at a standstill in Congress, as the political parties and other stakeholders continue trying to hammer out a compromise. The Biden administration should support that legislative effort. But federal action on data collection and security, and on algorithmic discrimination, cannot wait forever for Congress to break that logjam.

How data is collected, shared and processed affects all economic opportunities and implicates the pandemic recovery. The way that data collection supports targeted propaganda has imperiled the right to vote, the peaceful transition of power, and perhaps the foundations of democracy. These companies have used data to enable and sometimes even participate in discrimination against people of color, women, members of the LGBTQIA+ community, religious minorities, people with disabilities, and other marginalized groups. Importantly, even when they are not expressly designed to do so, algorithms that profile users and target content to them can also facilitate age, racial, and sex discrimination in **employment**, **housing**, lending, commerce, and **voting**.

These violations are well documented. And they can force the poor and most vulnerable into increasing levels and cycles of precarity, which like everything else have been exacerbated during the pandemic. People that have experienced acute economic hardship because of the pandemic, like losing a job or facing an eviction, are having those hardships logged into credit-reporting databases that will make it harder for them to avail themselves of economic growth when it returns.

Free Press and the Lawyers' Committee for Civil Rights Under Law **have written draft privacy legislation** with these problems in mind. Our model bill has strong civil rights provisions that fill in the gaps where existing civil rights laws sometimes do not reach, and that address the disparate impacts of this new kind of data and algorithmic based decision-making.

Members of Congress have taken up this same civil rights and privacy fight. At least half a dozen Democratic privacy bills have addressed civil rights issues, and leaders of key committees have committed to addressing privacy in a way that **strengthens consumer and civil rights** alike. These efforts should be supported by the Biden administration, and any privacy bill that comes across his desk ought to advance the cause of civil rights.

But the Biden administration should not wait for Congress to act. Civil rights laws already on the books remain woefully under-enforced with regards to algorithmic decision-making and data use. For instance, the Equal Employment Opportunity Commission (EEOC) has **yet to issue guidance** on how it intends to apply its authorities to regulate hiring algorithms and facial-recognition software (though it has made moves in that **direction this month**). The Department of Housing and Urban Development (HUD) promulgated a rule making it **nearly impossible to substantiate** a disparate-impact claim with regards to housing discrimination, in effect allowing landlords to hide behind algorithmic models that perpetuate segregation. Machine-learning bias in credit denial can have lasting impacts on a family's wealth that lasts generations, and the Equal Credit Opportunity Act (ECOA) is meant to **guard against that kind of discrimination.** And so on. Some existing authorities, though limited, wielded artfully could still have material impacts on combating this kind of discrimination.

Dedicated and systematic attention from the new administration is a must. Executive-branch agencies need strong direction and leaders ready to tackle these problems, and they should not just be left to their own devices. Leadership across the Biden administration and government must be consistent and coherent, not just attempt to address these issues that fall under different agencies' jurisdictions in a scattershot way.

The Biden administration should show its commitment to these civil rights issues, and should:

1. Commit to tasking all of its agencies with any civil rights authorities and responsibilities to regulate data collection and algorithmic decision-making within their scope of authority and competence. This must be done in a coordinated fashion across the government.

2. Appoint a "czar" to coordinate agency action on privacy and algorithmic decision-making, or at minimum direct the Department of Justice to spearhead the effort.

3. Reorganize agencies to place civil rights at the top of their agendas. Every agency/commission that does not have an Office of Civil Rights reporting directly to its political leadership should create one. If the agency/commission already has an OCR but it does not report directly to the Secretary/Commissioners, it should reorganize to raise the profile of the OCR.

4. Direct or suggest that every agency or commission hire senior officials dedicated to technology policy within their Office of Civil Rights. These various Offices of Civil Rights should hire additional technology policy professionals and attorneys as appropriate given the scope of the agency or commission's activities. A single official cannot be expected to handle the civil rights portfolio of an entire large agency or commission.

Nominate or elevate an Federal Trade Commission Chair who will breathe new life into the Commission's "unfairness" authority to address algorithmic discrimination and injustice. Using this authority is an idea that current Democratic FTC Commissioners **Rebecca Kelly Slaughter** and **Rohit Chopra** have already endorsed. The Commission should use this authority to address civil rights and privacy harms and increase the scope of its oversight of practices beyond just policing companies' adherence to their own (often poorly crafted and poorly enforced) privacy policies.

One drawback of a full-throated commitment by the administration to tackle privacy and data abuses through existing authorities is the potential to take the wind out of the sails of federal privacy legislation, which is already mired in wrangling over issues like preemption of state laws and enforcement. But this needn't be the case. The executive branch effort should complement, not conflict with the legislative effort, bootstrapping attempts to address all of these problems without waiting indefinitely for Congress.

A commitment by the Biden administration to seriously investigate and regulate the data economy, with the goal of ensuring that real-world biases and disparate impacts from superficially "neutral" inputs don't unfairly disadvantage vulnerable populations, would begin to rework the data economy. It would set the stage for a less exploitative system and flex regulatory muscles that will be needed once legislation is finally passed. Not only worrying about but also working against discriminatory outcomes in data collection and algorithmic decisions will necessarily begin to tame some of the most exploitative aspects of the internet economy. It will teach valuable lessons both to Congress, as it continues to craft privacy legislation, and to the federal government too in building the expertise and institutional power necessary to manage and counter the adverse effects of the data ecosystem.

INTERMEDIARY LIABILITY AND SECTION 230

Newly notorious and widely misunderstood, **Section 230** has been thrust into the public's consciousness due to repeated attempts by the Trump administration (and its congressional allies) to twist the law, suggesting that its repeal is deserved to punish social media companies for fact-checking the president and for other sins both real and imagined. Repeated grandstanding and mischaracterizations of this law **by Senators Ted Cruz, Josh Hawley,** and other less seditious lawmakers, in congressional hearings with tech CEOs and other settings, has made the debate over Section 230 eclipse almost every other issue in tech policy. President-elect Biden also took a rather **un-nuanced view** of Section 230 a year ago on the campaign trail, but must take the opportunity to recenter the debate on the facts, the law, and the Constitution.

We **have written about** President Trump's persistent, but incoherent, **cynical** and **unconstitutional attempts** to use Section 230 to subvert the First Amendment in pursuit of remedying the nonexistent "anti-conservative bias" of social media companies. Trump and Senator Mitch McConnell's final actions on Section 230 at the close of 2020 tied its proposed repeal to passage of increased covid stimulus payments for people in need. Whether that was a confused but earnest attempt by Trump to accomplish both goals, or a poison pill in McConnell's mind to further dampen prospects for $2,000 checks, the move characterized the lack of rigor and seriousness they took toward the legitimate policy questions surrounding intermediary liability.

As long as prominent members of the House and Senate continue to create or at least to take advantage of the confusion over Section 230, and continue to mischaracterize the law themselves, technology policymaking in Congress will remain distracted and confused. And as long as the debate is confused, it will not move forward.

Free Press is unconvinced that any of the changes thus far proposed to Section 230 are both necessary and good — and many of them are **just outright harmful** — but we're certainly listening and engaging in the conversation on good-faith proposals seeking a positive impact.

Any changes to Section 230 must retain a balance: keeping low barriers to people posting their own content, ideas, and expression on platforms, websites, apps and other online fora they don't own; but also preserving the principle that interactive computer services are legally liable for their own bad acts, not for everything their users say and share in real time and at scale. It's worth emphasizing that the **balance the law currently strikes**, immunizing platforms for third-party speech but also immunizing platforms for their content-moderation decisions, is what has facilitated the swift and wide-ranging **deplatforming of insurrectionists** — and most recently **the President** who incited them — and all manner of **their enablers** on services across the internet, both before and especially in the wake of the deadly attack on Congress on January 6th.

Yet even if interactive computer services were suddenly (in theory) liable for everything their users posted, many of those posts containing clearly awful racism, bigotry, homophobia, sexism and other ills, such as COVID disinformation and conspiracy theories, can't readily be addressed by changes to Section 230.

Remember also that repealing Section 230 would lead to far more preemptive takedowns and refusals to host any user-generated content at all, if social media, online exchanges, and comments sections could even withstand such a drastic change. Yet even if interactive computer services were suddenly (in theory) liable for everything their users posted, many of those posts containing clearly awful racism, bigotry, homophobia, sexism and other ills, such as COVID disinformation and conspiracy theories, can't readily be addressed by changes to Section 230. The First Amendment generally protects that speech, and tort law doesn't readily provide for civil suits against it either. Repealing or otherwise gutting the statute wouldn't suddenly make speech unlawful or tortious for a platform to host if it weren't already unlawful or tortious for the original speaker in the first place.

The Biden administration has a responsibility to speak honestly about where it understands the scope and the limits of the First Amendment to be, and how within that context it sees the roles of websites and other intermediaries in hosting any such lawful but disfavored speech.

The Biden administration should:

1. Rescind and disavow the **Trump Section 230 executive order,** and make it clear that the government cannot enforce a principle of "political neutrality" on private websites, not only because it's a bad and unworkable policy but also because of the limitations the First Amendment rightly places on the government in this context.

2. Rescind and revisit the **Department of Justice's Section 230 recommendations.** Provide an accounting of actual instances where the Department of Justice, the FTC, or other agencies have felt they couldn't bring enforcement actions against internet platforms because of the provision. Include a civil rights review of the section and make it clear that the government believes Section 230 does not provide a shield for civil rights violations committed by or facilitated by the platforms themselves.

3. Don't be skittish about bringing cases against the actual creators of unlawful content or against platforms that actively support illegal activity. Much of the ire Section 230 has drawn is misdirected anger at government inaction in the face of clear wrongdoing. Section 230's co-author, former Rep. Chris Cox, **recently wrote that** the provision is premised on the idea "of imposing liability on criminals and tort-feasors for their own wrongful conduct." This is still true. The underenforcement of civil and criminal law is not reason to reject the shield.

3. Encourage more transparency, as campaigns like **Change the Terms** (where Free Press is a founding member) and others have called for, in terms of how content moderation actually happens on large social media platforms. The Europeans are moving to compel this kind of transparency. The new administration here can encourage the FTC to use its 6(b) authority or other routes to get a full accounting of social media content-moderation practices.

We need to turn the page on the prevailing but unhelpful discussion of Section 230 in too many public and congressional debates, where its reform or repeal are posited wrongly as simple and obviously beneficial steps. This single statute is crucial, but contrary to popular misperception it is not an all-encompassing liability shield for all harmful content online. It's also not a special benefit to large social media and Silicon Valley giants, but is instead a protection for every online service that allows any user interaction. And its

removal would not allow lawmakers, regulators or enforcers to skirt the First Amendment or hold platforms liable for speech to which no legal liability attaches now.

The Biden administration should make it clear that platforms are indeed already liable for their own conduct, products, or speech. They should expand on and clarify precedents set in the 9th Circuit (***Malwarebytes*** and ***Roommates***) and the 3rd Circuit (***Oberdorf***), ruling that the shield is in fact limited. The government should not be afraid to bring more enforcement actions like the HUD Facebook settlement.

There are persistent harms caused by things like harassment, revenge porn, child sexual abuse material, and increasingly visible insurrectionist and white-supremacist violence organized online. The administration should be clear that **enhancing existing laws and enforcement capabilities** against such heinous conduct — rather than wholesale rejection of Section 230 — can best provide relief.

There have been **suggestions** too that the Biden administration should support Senator Brian Schatz and Senator John Thune's **PACT Act** that seeks to codify the principles of "distributor liability" rather than publisher liability for platforms. Free Press agrees that kind of approach would properly keep the focus on the original content creators' harmful and criminal conduct, yet could clarify interactive computer services' obligations to take down content already adjudged to violate the law rather than purporting to make services pre-screen everything users post. Of course, the notice and enforcement provisions for any such distributor liability scheme matter greatly, even if the idea is sound in principle.

But the invocation of Section 230 as a boon to big tech alone, and one that must be taken away to somehow punish the largest platforms, is not helpful and will not lead to good results. The Biden administration having an honest accounting of Section 230, the First Amendment, and where it believes it can push on aggressive litigation to punish platforms' own bad conduct, would help immensely.

SAVING JOURNALISM

The misinformation crisis, along with the low trust Americans have in institutions, each other, and politics in general, can't be untangled from the crisis in journalism. Producing high-quality information has to be part of the tech-policy conversation. Yet no amount of new privacy laws, antitrust actions, or other suits against the largest platforms will be enough to bring America back together if we keep swimming in a pit of lies. These falsehoods take root not only on the largest and most popular platforms, but on all manner of websites and various broadcast and **cable channels** too. The inability to access high quality local information doesn't just affect low-information voters. The collapse of local news is having a material affect on our democracy. Commercial media sources, both online and traditional, have failed to provide local communities with the news they need. We don't believe government should ever influence news content and coverage, but it must do more to fund public-interest journalism.

In 2019, Free Press published **"Beyond Fixing Facebook,"** which included a legislative plan to fund local news media through a tax on targeted internet advertising. In 2020, we followed up with **comprehensive plans** to put **journalism funding into pandemic relief bills.** That should be a priority because truly local news outlets were among the businesses hurt by the massive economic disruptions; but also because the only way to build back better from the pandemic is to **acknowledge and repair** the media's historical and present role in propping up systemic racism, economic injustices, and the toxic mixture of purposeful disinformation and negligence in newsrooms that worsened the disproportionate impacts of the pandemic on Black and brown people.

The Biden administration can take concrete actions to save journalism and protect our media system from further consolidation:

1. Support legislation to tax the targeted advertising revenue of large online platforms and redirect those funds to public, independent and noncommercial journalism.

2. Provide money for journalists' jobs and for news outlets already struggling before the pandemic hit. Such funding was proposed but not passed in the initial COVID relief bills last spring. In the more recent December stimulus bill, broadcasters got expanded eligibility for paycheck protection plans, but we fear this aid could flow to local affiliates of **giant media conglomerates** too easily. Free Press has called for billions to be put more directly into truly local commercial newsrooms and noncommercial outlets alike.

3. Reverse years of runaway broadcast media consolidation by appointing FCC commissioners who will focus on increasing ownership diversity, abandoning the Trump FCC's efforts to eliminate ownership limits and ignore diversity altogether (as argued in the Supreme Court just in January by Free Press and allies).
   Support legislation that carves out a designated path for journalism outlets to apply for 501(c)3 nonprofit status.

4. Endorse state-level initiatives to fund local-news media, especially in so-called "news deserts" where there are no traditional local-news outlets; and efforts like Free Press's **News Voices** initiative to promote accountability and dialogue between journalists and the people they cover — centering racial justice, and elevating the voices of communities the media have misrepresented or maligned.

5. Defend the Corporation for Public Broadcasting against congressional efforts to "zero out" its funding, while expanding the concept of public and noncommercial media worthy of support to more than just existing public TV and radio stations, with a new emphasis on supporting local journalism and newsgathering.

CONCLUSION

As the ongoing efforts to overturn the results of the November election show, the end of the Trump administration is a welcome and essential change but not a full reprieve from the underlying social, technological and economic forces that brought Trump to power in the first place. If we do not work aggressively to mend the inequities and failings of the technology and media system we will continue to imperil the ability of Americans to discern truth from lies, information from propaganda, and community from divisiveness.

We hope the Biden administration takes a clear-eyed view of the possibilities in Congress, and pushes for new laws there, but also commits to aggressive executive action where possible. The future of our country and our communities depend on it.

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