TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Request for Public Comments Regarding Technology Platform Censorship

FTC-2025-0023

May 21, 2025

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INTRODUCTION

The Federal Trade Commission's Request for Comment asks how social media content moderation might be unfair, deceptive, or anticompetitive—and thus, by implication, how the Commission might use its authority to change how platforms moderate content. The Commission's stated goal is to "better understand how technology platforms deny or degrade users' access to services based on the content of the users' speech or their affiliations, including activities that take place outside the platform."[1]

When the Commission suggests that it is harmful for technology platforms to limit the ideas users can share, and that the Commission may use its authority to change content moderation, it signals to private actors that they "cannot decide for themselves what views to convey."[2] Just last year, the Supreme Court recognized that "[t]he reason" governments attempt to "regulat[e] the content-moderation policies that the major platforms use for their feeds *is to change the speech that will be displayed there*."[3]

Content moderation decisions are platforms' protected speech.[4] The Commission has no role in determining what those decisions should be: "under the First Amendment, that is a preference [the state] may not impose."[5] The Commission can regulate business practices, but if those regulations implicate platforms' editorial judgments—their protected speech—the regulations will be subject to First Amendment scrutiny.[6]

To explore the questions raised by the Commission's RFC, TechFreedom and the Competitive Enterprise Institute recently held a policy forum on the constitutional limits of agency action on media and speech.[7] These issues are complicated: ultimately, most, if not all, inquiries into

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[1] Request for Public Comment Regarding Technology Platform Censorship (Feb. 20, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf ("RFC").

[2] Moody v. NetChoice, LLC, 603 U.S. 707, 743 (2024).

[3] *See id.* (emphasis added).

[4] *See, e.g.*, *id.* at 718 ("The [Texas law] then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities."). *See also infra* II.A.

[5] *Id.* at 743. In this case, the *Commission*, rather than Texas, is the government actor that wants platforms to "create a different expressive product, communicating different values and priorities." *Id.* The Commission, like Texas, remains bound by the First Amendment.

[6] *Compare* Associated Press v. United States, 326 U.S. 1, 7 (1945) ("The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."), *with Moody*, 603 U.S. at 744 ("[T]he editorial judgments influencing the content of [social media] feeds are … protected expressive activity.").

[7] POLICY SUMMIT: CONSTITUTIONAL LIMITS OF FTC, FCC & DOJ INTERFERENCE IN MEDIA AND SPEECH, https://techfreedom.org/upcoming-event-what-can-the-ftc-doj-and-fcc-do-about-censorship-and-bias/.

the content moderation practices of online platforms will require the Commission to evaluate the content of speech, straying far from its core competency of policing business practices. We submit herewith the video of our policy forum with these comments.[8]

Many of the questions the Commission asks in its RFC cannot be answered without reference to the platforms' speech choices. Publishers are not immune from the antitrust laws,[9] but the Commission cannot regulate *speech* by merely labeling it anticompetitive. The same is true for consumer protection law.

We write to suggest the following. First, the Commission should hold a public workshop on the intersection between private content moderation and competition authority, modeled on those workshops held in the previous Trump administration, and include experts on both the First Amendment and Commission authority. Second, before the Commission takes any action regarding content moderation, the agency should issue a policy statement explaining its legal authority to bring such claims in light of the First Amendment.

I. Content Moderation is Difficult and Inherently Subjective

"Content moderation at scale is impossible to do well."[10] This is just the nature of content moderation: some people will have their content removed and be upset, some will see content they wish they hadn't seen and be upset, and some will be upset by the inherently subjective nature of moderation decisions.[11] No content moderation regime will please everyone, and platforms set rules that reflect their own preferences for what content to host. "By definition, content moderation is always going to rely on judgment calls, and many of the judgment calls will end up in gray areas where lots of people's opinions may differ greatly."[12] Platforms are not obligated to host all content that is legal under the First Amendment—they might *choose* to do so, but they do not have to. The collection of content a platform hosts is its expressive product.[13]

Consider the Commission's own "comment policy" for its blog. The agency refuses to host:

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[8] Competitive Enterprise Institute, *LIVE: Constitutional Limits of FTC, FCC and DOJ | Day 1*, YOUTUBE (May 15, 2025), https://www.youtube.com/watch?v=6e1rpU0mTpE ("TechFreedom and CEI Policy Forum").
[9] *See* Associated Press v. United States, 326 U.S. 1, 7 (1945).
[10] Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/2019/11/20/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well/.
[11] *Id.*
[12] *Id.*
[13] Moody v. NetChoice, LLC, 603 U.S. 707, 743 (2024).

> spam or off-topic comments; comments that contain vulgar language, personal attacks, or offensive terms that target specific groups; […] comments that contain clearly misleading or false information[14]

The Commission has refused to include in this very docket a range of comments for a variety of reasons, including that it finds them "inappropriate."[15] These are content moderation decisions that the Commission uses to curate its blog.

There is "no uniform standard for content moderation," and "[o]perators balance the goal of prioritizing content that increases user engagement and moderating content that violates their policies, such as content that may be illegal, harmful, or objectionable."[16] Not all ideas will flourish on all platforms, and some ideas may be so widely reviled that no popular platform is willing to host them. The imperfect nature of content moderation, however, does not justify government intervention.

II. The First Amendment Protects Online Platforms' Speech

The Commission's core authority covers unfair methods of competition and unfair or deceptive acts or practices.[17] Regardless of which legal claim the Commission brings, the same general First Amendment principles apply—the government may not interfere in the marketplace of ideas. As the Supreme Court said last year in *Moody v. NetChoice*:

> [T]he government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas.... [I]n case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm.... However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others.[18]

How private parties choose to shape speech on their own platforms, no matter how biased or objectionable their choices may be, is not the type of "censorship" the First Amendment is designed to prevent. The First Amendment constrains the *government*, not private

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[14] *Comment Policy*, https://www.ftc.gov/news-events/blogs/comment-policy (last visited May 20, 2025).
[15] *See, e.g.*, Comment from Love, Jo Anna, https://www.regulations.gov/comment/FTC-2025-0023-1986 ("Reason Restricted: Inappropriate") (last visited May 21, 2025); Corbin K. Barthold(@corbinkharthold), X (Apr. 25, 2025, 12:43 PM), https://x.com/corbinkbarthold/status/1915808873749090637.
[16] CLARE Y. CHO & LING ZHU, CONG. RESEARCH SERV., R46662, SOCIAL MEDIA: CONTENT DISSEMINATION AND MODERATION PRACTICES i (Mar. 20, 2025), https://www.everycrsreport.com/reports/R46662.html.
[17] 15 U.S.C. § 45(a) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").
[18] Moody v. NetChoice, LLC, 603 U.S. 707, 732-33 (2024).

actors.[19] President Ronald Reagan put it best nearly forty years ago, when he vetoed a legislative effort to reinstate the Fairness Doctrine for broadcasters after the Federal Communications Commission ended it:

> [W]e must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.[20]

Social media platforms are fora for speech, but they are not public fora whose speech is limited by the First Amendment;[21] they are speakers whose speech is *protected* by the First Amendment. The Commission may wish that platforms spoke *differently*, or that some platforms were more popular than others, but wishful thinking does not a violation of competition or consumer protection law make. As a Commissioner, Chair Ferguson put the point aptly last year: the Commission "must be mindful not to stretch the scope of consumer-protection laws beyond their rightful purpose. [It] must stay in [its] lane. Everyone is a consumer. But not every issue is a consumer-protection issue."[22] That caution is laudable in general, but even more essential here, where the Commission risks not merely exceeding its competence but also violating the First Amendment.

A. Content Moderation Is Protected Editorial Discretion

The First Amendment protects editorial discretion, including where a platform makes decisions about what speech to host and how to host it: "[T]he editorial function itself is an aspect of speech."[23] In *Moody*, the Supreme Court explained:

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[19] *See id.* at 743.

[20] President's Remarks on Vetoing the Fairness in Broadcasting Act of 1987 (June 29, 1987), https://www.senate.gov/legislative/vetoes/messages/ReaganR/S742-Sdoc-100-10.pdf (emphasis added).

[21] Manhattan Community Access Corp. v. Halleck, 587 U.S. ___, slip op. at 1, 9 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. … [W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.").

[22] *Staying in Our Lane: Resisting the Temptation of Using Consumer Protection Law to Solve Other Problems*, Prepared Remarks of Commissioner Andrew N. Ferguson at 1 (Sept. 27, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/9.27.2024-Ferguson-ICPEN-Remarks.pdf.

[23] Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U. S. 727, 737 (1996) (plurality opinion). *See also Moody*, 603 U.S. at 731 ("First, the First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude.").

> Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is an expressive activity of its own. And that activity results in a distinctive expressive product. When the government interferes with such editorial choices … it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing—in overriding a private party's expressive choices—the government confronts the First Amendment.[24]

Moody is instructive. The Court took the time to give clear, extensive guidance to lower courts and to the government on what counts as protected speech. The Court made clear that these principles apply to the Internet and to social media platforms.[25] And the Court made expressly clear that a platform's content moderation choices are protected by the First Amendment:

> When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.[26]

In general, to restrict protected speech, the government must advance an interest that can justify its laws or regulations.[27] In *Moody*, the Court held there is no valid government interest in "changing the content of the platforms' feeds,"[28] even under the least stringent form of First Amendment scrutiny. The government cannot, the Court says, "interfere with private actors' speech to advance its own vision of ideological balance."[29]

B. Some Government Efforts to Protect Access to Information or Provide Transparency, Rather Than Altering or Balancing Expressive Conduct, May Survive First Amendment Scrutiny

The *Moody* Court observed, in a footnote, that, when "the Government's interest was 'not the alteration of speech.' … the prospects of permissible regulation are entirely different."[30] In *Turner*, the Court noted, "the interest there advanced was not to balance expressive content"

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[24] *Moody*, 607 U.S. at 731-32.
[25] *Id.* at 733-34.
[26] *Id.* at 740.
[27] *Id.* at 740.
[28] *Id.* at 727.
[29] *Id.* at 741.
[30] *Id.* at 742-43, n.10 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 577 (1995)).

but "to save the local-broadcast industry, so that it could continue to serve households without cable."[31] Thus, must-carry mandates for cable were constitutionally permissible because they rested on an interest "'unrelated to the content of expression' disseminated by either cable or broadcast speakers."[32]

While "the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas," the Court noted that it is "critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources," and that "the government can take varied measures, like enforcing competition laws, to protect that access."[33] But *which* measures?

Some social media regulations may affect content moderation without infringing on editorial discretion,[34] and we will soon see court rulings on these applications.[35] These rulings may shed significant light on how the First Amendment limits the application of consumer protection and competition law to social media. The Commission would be well served to consider these cases and the questions they raise in a workshop and in crafting a policy statement before taking any enforcement action.

The Commission's ability to apply its consumer protection authority to content moderation depends in significant part on how courts understand the nature of content or choices at issue. If the Commission's actions do *not* implicate expressive products, and if it does not aim to change platforms' speech, it will have more room to act. It is certainly possible to imagine *some* aspects of content moderation that might fall into this category. A carefully crafted policy statement would be the ideal place to draw the line.

Absent such clarity, the Commission risks "intru[ding] on protected editorial discretion,"[36] that is, coercing platforms into changing their feeds. This might or might not be intentional. But in the end, questioning the legality of platforms' speech curation decisions means questioning the legality of their speech. The Commission's skepticism is misplaced and

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[31] Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 647 (1994).
[32] *Id.*
[33] *Moody* at 732.
[34] *Id.* at 725 ("For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion.").
[35] In *Moody*, for instance, Texas argued that "holding that businesses are not required to comply with their own acceptable-use policies would upend consumer-protection laws across the country. Brief for Respondent at 3, NetChoice, LLC v. Paxton, 603 U.S. 707 (2004) (No. 22-555), https://www.supremecourt.gov/DocketPDF/22/22-555/295811/20240116145554309_22-555%20Brief%20for%20Respondent.pdf. The Court remanded these laws to the appeals courts for further proceedings. *Moody* at 716.
[36] *Moody* at 725.

inappropriate: Content moderation decisions are protected speech, and the Commission cannot second-guess them without violating the First Amendment.

III. The Balance of Speech Is Not a Competition or Consumer Protection Issue

The RFC suggests that platforms' content moderation decisions may have harmed consumers: "FTC staff," the RFC says, "is interested in understanding how consumers have been harmed—including by potentially unfair or deceptive acts or practices, or potentially unfair methods of competition—by technology platforms that limit users' ability to share their ideas or affiliations freely and openly."[37]

Calling speech a competition or consumer protection issue does not make it so. A platform's decision about what speech to host—that is, how it "limit[s] users' ability to share their ideas"—is protected editorial discretion.[38] The Supreme Court has consistently said that the government:

> cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[39]

The Court has been saying the same thing for decades:

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[40]

Defending this principle has been a central tenant of the conservative legal movement for decades. We now fear that the Commission, unhappy with the limits the Constitution places on government power, seeks to regulate free speech by reframing speech choices as antitrust injury. "Drying up access to ideas," Chair Ferguson says, "is an injury to consumers that the

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[37] RFC at 1.
[38] *See supra* II.A.
[39] *Moody*, 603 U.S. at 741-42 (quoting Buckley v. Valeo, 424 U. S. 1, 48–49 (1976) (*per curiam*)).
[40] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964); Roth v. United States, 354 U.S. 476, 484 (1957)).

antitrust laws care about."[41] Even if this were true, there is no remedy the Commission could enforce that would not run afoul of the First Amendment.

When Chair Ferguson refers to "drying up access to ideas," he is referring to decisions made by platforms and advertisers to downrank, remove, demonetize, or otherwise moderate content. Those decisions are, for platforms and advertisers, decisions about how to speak. Social media platforms, like newspapers or bookstores, are free to set limits on the types of ideas they want to be associated with; they are free to refuse to host certain ideas entirely. The Commission cannot—and *should not*—force platforms to carry speech favored by the government. As Chair Ferguson said last year, "Competition laws should address competition problems… Competition Law is Not a Panacea for Social and Corporate Ills."[42] Instead, "[c]onsumer protection should focus on safeguarding individuals in their capacity as consumers—not in every aspect of their lives…[the Commission's] concern should be limited to deception and unfairness in the commercial context only."[43]

Commissioners have long acknowledged that the Commission lacks the authority to police how media companies curate speech. In 1999, former Chair Robert Pitofsky refused to "judge the content of" movies, music, and video games because "[the Commission] understand[s] that this is an area that impacts on freedom of expression and that there are appropriate limits on government action imposed by the First Amendment."[44] The Commission, he cautioned, "will not be the modern embodiment of thought police."[45]

In 2004, former Chair Timothy Muris declined to act on a petition to investigate whether Fox New's slogan of "Fair and Balanced" was deceptive: "I am not aware of any instance in which the Federal Trade Commission has investigated the slogan of a news organization."[46] He explained: "There is no way to evaluate this petition without evaluating the content of the news at issue."[47]

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[41] The Justice Department, *The Antitrust Division Hosts a Big-Tech Censorship Forum*, YOUTUBE, at 19:00 (Apr. 4, 2025), https://www.youtube.com/watch?v=RPPgJ-xkjWo.
[42] *Confining Competition, Consumer-Protection and Privacy Law to Their Domains*, Prepared Remarks of Commissioner Andrew N. Ferguson at 2 (June 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.06.26-Ferguson-TFTC-Remarks.pdf#page=2.
[43] Ferguson, *supra* note 22.
[44] Chair Robert Pitofsky, *The Influence of Violent Entertainment Material on Kids: What is to be Done?* (June 25, 1999), https://www.ftc.gov/news-events/news/speeches/influence-violent-entertainment-material-kids-what-be-done.
[45] *Id.*
[46] Statement of Chairman Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/news/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris-complaint-filed-today-moveonorg.
[47] *Id.*

And in 2020, former Chair Joe Simons stated his position to the Senate Commerce Committee during an oversight hearing: "Our authority focuses on commercial speech, not political content curation."[48] Chair Simons explained that the Commission could not act on President Trump's executive order directing the agency to take action if websites moderated content inconsistently with public representations because political speech is outside the Commission's jurisdiction.[49]

A. Denying Service Based on User Conduct Is Generally Protected Speech

Question One in the RFC asks: "Under what circumstances have platforms denied or degraded ('shadow banned,' 'demonetized,' etc.) users' access to services based on the content of the users' speech or affiliations?"[50]

The RFC frames denial of service as a consumer protection issue. But "when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site."[51] Denying or degrading service to curate a feed is a content moderation decision and is protected speech, as we discuss above.[52] The First Amendment prohibits interference aimed at changing platforms' editorial judgments on whether to remove or deprioritize content.

1. Weighing "Countervailing Benefits to Consumers" Would Involve Judging Speech

"Unjustified consumer injury is the primary focus of the FTC Act."[53] Question One in the RFC seems to recognize[54] that, if the Commission were to bring an unfairness claim related to denial of service, it would have to show that the injury in question—shadow banning a user, for example—is "not outweighed by countervailing benefits to consumers or to competition."[55]

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[48] Leah Nylen et al., *Trump pressures head of consumer agency to bend on social media crackdown*, POLITICO (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.
[49] *Id*.
[50] RFC at 1.
[51] NetChoice v. Moody, 34 F. 4th 1196, 1210 (11th Cir. 2022), *rev'd for reconsideration of facial challenge*, 603 U.S. 707 (2024).
[52] *See supra* II.A.
[53] Unfairness Policy Statement.
[54] RFC at 1 ("Did countervailing benefits to consumers or competition justify the platform's decisions to deny or degrade its users' access to services?").
[55] 15 U.S.C. § 45(n).

The RFC uses the term "adverse actions" to refer to content moderation decisions such as refusing to host a user's posts based on the ideas expressed, or to deprioritize the content in its own feeds. Such editorial judgments are protected speech; collectively, they shape a platform's expressive product. If the Commission alleged that particular adverse actions were unfair, it would have to make value judgments about whether consumers are better off with the expressive speech product that includes the removed content, or the expressive speech product that does not. Those products constitute different statements by the platform; similarly, a newspaper opinion page with a particular article is a different speech product than a page lacking that article. The First Amendment will not allow the Commission to force platforms to adopt its preferred speech.

Historically, the Commission has avoided making these sorts of judgments regarding editorial decisions precisely because doing so requires evaluating speech in violation of the First Amendment. [56] Whether a social media platform's feed is better or worse (whatever that might mean) without certain speech is none of the Commission's business. Even if the feed is "worse," it remains protected: "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[57]

B. Evaluating Enforcement of a Platforms' Stated Content Moderation Policies Is Constitutionally Fraught

The RFC, and Chair Ferguson, suggest that the way platforms enforce their terms of service may be a competition issue or an unfair or deceptive act or practice.[58] "Did the platform adhere," the RFC asks, "to its policies or other public-facing representations?"[59] This theory also implicates the First Amendment: any investigation by the government into whether a removed post actually violated a platform's terms of service would require evaluating the content of the speech posted, which the Commission has historically refused to do.[60]

If, for example, a platform says that it removed a post for violating its policy against hate speech, the Commission would necessarily have to investigate and decide whether the post was *actually* hate speech under the policy, *i.e.*, whether it was hateful based on its content. Consider X. The company bans what it calls "hateful conduct": "You may not directly attack other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender,

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[56] *See* Pitofsky, *supra* note 44 and associated text.
[57] United States v. Stevens, 559 U.S. 460, 470 (2010).
[58] RFC at 2, questions 2-3; The Justice Department, *The Antitrust Division Hosts a Big-Tech Censorship Forum*, YOUTUBE, at 15:53 (Apr. 4, 2025), https://www.youtube.com/watch?v=RPPgJ-xkjWo.
[59] RFC at 2.
[60] *See supra* note 44 and associated text.

gender identity, religious affiliation, age, disability, or serious disease."[61] Is this policy sufficiently clear? What qualifies as an "attack"? The First Amendment forbids the government from categorizing such speech or telling private actors how to evaluate it.

Overall, evaluating removed posts to determine if content moderation aligned with stated policies necessitates content-based assessments that implicate the First Amendment by forcing the government to judge speech. Debates over the accuracy of speech and political discussion are, as former FTC Chair Bill Kovacic put it at our workshop, "quicksand…into which agencies go to die."[62]

1. Assessing "Consistency" in Content Moderation Requires Evaluating and Categorizing Speech

The RFC asks about platforms acting "in a consistent manner in response to analogous conduct by different users,"[63] and whether the platforms "applied a consistent challenge or appeals process in response to analogous conduct by different users?"[64] Even deciding whether content policies are enforced "consistently" or "analogously" would be troublesome: the Commission should not be in a position to, for instance, decide a given word is a slur, or whether it is a slur in all contexts, or whether a given use was hateful or educational. It's worth reiterating what former FTC Chair Muris once said: evaluating content "is a task the First Amendment leaves to the American people, not a government agency."[65]

C. Demonetization and Degradation of Service Are Editorial Decisions Protected by the First Amendment

The Commission is also concerned with users' ability to earn money on platforms, and whether users were "able to reach similar audiences and achieve similar goals (such as monetization and reach) on competing platforms."[66] But it is not the government's business to make sure someone can make a living posting on someone else's website. Demonetization or degradation of service that occurs because a platform does not like a user's speech is, as we have discussed—as the Supreme Court has said—protected speech.[67]

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[61] *Hateful Conduct*, https://help.x.com/en/rules-and-policies/hateful-conduct-policy.
[62] TechFreedom and CEI Policy Forum, *supra* note 8, at 4:39:00.
[63] RFC at 2, question 2.d.
[64] RFC at 2, question 3.c.
[65] Statement of Chairman Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/news/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris-complaint-filed-today-moveonorg.
[66] RFC at 2-3; The Justice Department, *The Antitrust Division Hosts a Big-Tech Censorship Forum*, YOUTUBE, at 17:00 (Apr. 4, 2025), https://www.youtube.com/watch?v=RPPgJ-xkjWo.
[67] *See supra* II.A.

To stop platforms from demonetizing or deprioritizing users for their speech, the Commission would need to force those platforms to create new, and different, expressive speech products.[68] Even if the Commission finds a way to allege that deplatforming decisions are unfair, deceptive, or otherwise anticompetitive, what would be the remedy? The First Amendment bars the Commission from forcing platforms to host speech against their will in order to create the balance of speech that it prefers.[69]

Even if demonetization results in less of some types of speech—or, as Chair Ferguson says, dries up access to ideas—that is simply the marketplace of ideas at work. Some ideas lose. Some ideas are widely considered distasteful, such that platforms do not want to host or monetize them, or that advertisers do not want their products associated with the ideas or with platforms that host them. People who want to discuss these ideas will have to go elsewhere. The First Amendment does not guarantee attention, or virality, or that you will be paid for your speech. It guarantees that the *government* will not infringe on private speech rights. There is no right to be an influencer.

IV. The Commission Must Avoid Jawboning Via Threat of Agency Action

As the Supreme Court has recently made clear, in *NRA v. Vullo*, the government may not use the threat of legal sanctions to control private parties' speech.[70] And as the Supreme Court also recently made clear, in *Moody v. NetChoice*, this principle plainly governs not only threats aimed at speech suppression, but also threats aimed at changing the "present[ation]" of "a curated compilation of speech originally created by others."[71] Under the First Amendment, the government may not force a private social media platform "to accommodate messages it would prefer to exclude."[72]

While *Vullo* confirms that explicit threats may not be used for "ham-handed censorship," several justices have also, while dissenting in *Murthy v. Missouri*, expressed their concern about government jawboning that is "more subtle" but "no less coercive."[73] When the government uses its power to "harr[y]" and "implicitly threaten[]" private actors, these justices have explained, that, too, is a First Amendment problem.[74] These justices have gone so far as to claim that jawboning of social media platforms creates special problems, because

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[68] *See supra* II.A.

[69] *See* Moody v. NetChoice, LLC, 603 U.S. 707, 733 (2024) (*"*[I]n case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm.").

[70] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 189 (2024).

[71] *Moody*, 603 U.S. at 728.

[72] *Id.* at 731.

[73] Murthy v. Missouri, 603 U.S. ___, slip op. 4 (2024) (Alito, J., dissenting).

[74] *Id.* (Alito, J., dissenting).

those platforms are, in these justices' telling, extraordinarily "vulnerable to Government pressure."[75]

The conduct that worried the three *Murthy* dissenters was an informal pressure campaign. In their words, "top federal officials continuously and persistently hectored Facebook to crack down on what the officials saw as unhelpful social media posts."[76] But if informal messages from government officials to a platform can qualify as unlawful jawboning, all the more so—a fortiori, as it were—can an *official government investigation* of a platform do so. "[I]t is as utterly unrealistic to think" that a platform would not "be intimidated" by the "prospect" of being zealously investigated by the government for "an indeterminate period of time."[77] Simply put, then: An investigation of a platform, the aim of which is to *change the platform's content moderation decisions*, violates the First Amendment.

First Amendment scholar Bob Corn-Revere aptly summarized the constitutional problem in a 2009 article for the Cato Institute on "Fairness 2.0 Media Content Regulation in the 21st Century." He noted:

> the costs involved in responding to FCC inquiries or participating in license renewal hearings, as well as the uncertainties involved, independently exert a chilling effect on the licensee's willingness to court official displeasure. A chilling effect can exist even when a regulatory requirement "neither creates any new content restrictions . . . nor establishes any new mechanism for enforcement of existing standards" to the extent the measure was adopted for the purpose of exerting greater control over content. In analyzing such matters, the court's "ultimate concern is not so much what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation."[78]

Here, the message from the administration is unmistakable: do not moderate content in ways we do not like. This message will lead to more censorship, not less.

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[75] *Id.* at 5 (Alito, J., dissenting).
[76] *Id.* at 14 (Alito, J., dissenting).
[77] Morrison v. Olson, 487 U.S. 654, 712-13 (1988) (Scalia, J., dissenting).
[78] Robert Corn-Revere, *Fairness 2.0 Media Content Regulation in the 21st Century*, 12 (2009), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa651.pdf (quoting Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1110, 1116 (1978)).

V. Conclusion

The Commission is poised to embark on a long, fraught journey to regulate the content moderation practices of Internet platforms. The First Amendment, however, stands in its way: it protects the editorial discretion of platforms to curate content as they see fit.

Content moderation is protected speech, and the Commission cannot regulate moderation practices to change the balance of speech on platform' feeds without violating the First Amendment. Instead of leaping blindly into such a constitutional morass with enforcement actions or even compulsory processes, the Commission should solicit input from experts on its legal authority to bring claims related to content moderation in light of the First Amendment. Given the complexity and importance of these issues, the Commission should issue a policy statement on content moderation and solicit feedback from the public.

Respectfully submitted,

_____/s/_____

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May 21, 2025