TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

Berin Szóka[i]

In the Matter of

Omnicom/IPG

File No. 251 0049

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INTRODUCTION

The Commission has agreed to allow a major merger of advertising agencies on the condition that the companies refrain from certain practices related to political or ideological bias.[1] The Commission is thus about to cross a true constitutional Rubicon—that between commercial and non-commercial speech.

In protecting consumers from unfair and deceptive advertising, the agency has long policed commercial speech—that which "[does] no more than propose a commercial transaction."[2] But the FTC has also long recognized that unless an "advertisement can be classified as commercial speech, it is not subject to the Commission's jurisdiction."[3] Likewise, the Commission's 2023 Endorsement Guidelines recognized that the agency's "jurisdiction is limited to commercial speech," and thus could not "reach the use of fake followers for vanity or other non-commercial purposes."[4] When the Commission banned certain impersonations last year, the rule excluded "false impersonations or misrepresentations that are not material to a commercial transaction," such as those made "in connection with political or other non-commercial speech" in order to be "coterminous with the scope of the FTC's authority,"[5] which applies only to acts "in or affecting commerce."[6] By steering well clear of this statutory limitation, the Commission has also avoided running afoul of the First Amendment.

The Commission has been *asked* to police political speech for bias, but it has consistently resisted such calls—and it has been Republican FTC Chairs who have done so. In 2020, Chair Joe Simons noted that the agency's "authority focuses on commercial speech, not political content curation,"[7] when Republican lawmakers demanded that the agency take action

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[1] Fed. Trade Comm'n, In the Matter of Omnicom Group/The Interpublic Group of Co., File No. 251-0049 (June 23, 2025), https://www.ftc.gov/legal-library/browse/cases-proceedings/251-0049-omnicom-groupthe-interpublic-group-co.

[2] Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376, 385 (1973) (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)). *See also* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1976).

[3] In the Matter of R.J. Reynolds Tobacco Company, 1988 WL 490114, *2 (1988) ("unless the Reynolds advertisement can be classified as commercial speech, it is not subject to the Commission's jurisdiction").

[4] FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2023), https://www.federalregister.gov/documents/2023/07/26/2023-14795/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising.

[5] Rules of Practice Amendments, 64 Fed. Reg. 46267 (Aug. 25, 1999) (to be codified at 16 C.F.R. pts, 2-4.).

[6] 15 U.S.C. § 45(a).

[7] Leah Nylen, *Trump Aides Interviewing Replacement for Embattled FTC Chair*, POLITICO (Aug. 28, 2020, 02:28 PM), https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479.

against "censorship" by tech platforms.[8] Demands for the FTC to police bias used to come from the political left, not the right. In 2004, left-wing media reform groups asked the FTC to declare Fox News's use of the slogan "Fair and Balanced" to be a deceptive trade practice.[9] Chair Tim Muris dismissed this complaint in a few sentences: "I am not aware of any instance in which the [FTC] has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency."[10]

Chairmen Muris and Simons were prudent to stick to policing commercial speech. So clear to them were the perils of crossing the Rubicon to interfere with non-commercial speech that it hardly seemed necessary to explain their reasoning in detail. The Supreme Court had clearly barred the way. As the Court noted last year in *Moody v. NetChoice*, it had "many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased…."[11]

Because the First Amendment bars the government from policing political bias, there was no need for the FTC to belabor its refusal to cross that Rubicon. Yet there *was* more to say, and still is, about the shape of that river. This comment outlines how the Commission should proceed before explaining why the proposed consent order does, indeed, cross a constitutional Rubicon.

I. How the Commission Should Proceed

Media companies have, of course, never been immune from either competition law or consumer protection law. Publishers, "are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want," as the Supreme Court long ago recognized. [12] "The fact that the publisher handles news while others handle food does not … afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."[13] This is what the *Moody* Court meant when it noted that "the government can take varied measures, like enforcing competition laws, to protect … a well-functioning sphere of expression, in which

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[8] Leah Nylen, *Trump Pressures Head of Consumer Agency to Bend Social Media Crackdown*, POLITICO (Aug. 21, 2020, 06:40 PM), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.
[9] Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act, MoveOn.org and Common Cause (July 19, 2004), https://web.archive.org/web/%2020040724155405/http:/cdn.moveon.org/content/pdfs/ftc_filing.pdf
[10] Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris.
[11] Moody v. NetChoice, LLC, 603 U.S. 707, 727 (2024).
[12] Associated Press v. United States, 326 U.S. 1, 7 (1945).
[13] *Id.*

citizens have access to information from many sources."[14] In the very next sentence, the Court reiterated what it had said earlier, as quoted above: "in 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."[15]

Associated Press (1945) and *Moody* (2024) are flipsides of the same coin: The first says "business practices" may be subject to regulation. The latter reiterates the point, citing competition law as an example of such regulation, but says very clearly—*twice*—that "bias" is not something the government may correct by any means. Courts have had little need to parse this distinction. That is largely because both the FTC and Department of Justice have, prudently, steered well clear of bringing cases that might run afoul of the First Amendment.[16]

The Commission now wants to test where the limits—both constitutional and statutory—of its authority are. Given its limited experience dealing with non-commercial speech, or with the line between commercial and non-commercial speech, the agency should seek the advice of experts. There is a prudent way to do that—the same way the Commission has attempted to understand complex legal issues in the past: organize a public workshop, just as it has held many such workshops on the future of policing of competition and consumer protection law.[17] This would enable experts in First Amendment and competition law to advise the FTC on using its authority in a way that respects constitutional limits. The Commission could use this workshop to draft a policy statement laying out how it intends to approach issues involving the First Amendment and concerns about bias. It has issued many policy statements in the past on key elements of its authority.[18] The agency could also solicit comments on a draft policy statement. "Such input would," as one Republican Commissioner put it when urging the Commission to seek public comment on the 2015 Policy Statement on Unfair Methods of Competition (UMC), "have helped ensure that the Commission is offering durable and practical guidance around the fundamental question of whether and when this

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[14] Moody v. NetChoice, LLC, 603 U.S. 707, 732 (2024).
[15] *Id.*
[16] *See, e.g.*, 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 ("[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.").
[17] *See* FTC Events, https://www.ftc.gov/news-events/events?items_per_page=20&search=workshop&start_date=&end_date=.
[18] *See, e.g.*, FTC, Policy Statement on Unfairness (December 17,1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness; FTC, Policy Statement on Deception (October 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf; FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

agency will reach beyond well-settled principles of antitrust law to impose new varieties of UMC liability."[19]

In another world, such a workshop might already have occurred, the Commission might already have taken public comment, and the drafting of such a policy statement might already now be under way. But this is not how the Commission has chosen to proceed. While the Commission has asked for public comment for evidence of political bias against this Administration and its supporters,[20] it has *not* asked about its legal authority, or limits to that authority. Instead, the Commission has taken the least enlightening and most troubling approach: regulation by consent decree.

A. A Missed Opportunity to Provide Clarity

The Commission's approach sheds little light on how it intends to stay within First Amendment limits. Chair Andrew Ferguson asserts that the consent order "does not limit either advertisers' or marketing companies' constitutionally protected right to free speech," because Omnicom "may choose with whom it does business and follow any lawful instruction from its customers as to where and how to advertise" and no advertiser "will be forced to have their brand or their ads appear in venues and among content they do not wish."[21] His statement announcing the order includes just four sentences discussing "free speech;" it never mentions the First Amendment, and it cites not a single court decision. The other Commissioner voting for the consent order said nothing at all, while the third Republican recused himself (having brought a remarkably similar suit against advertisers just before joining the Commission). The FTC issued a short "Aide to Public Comment" that says little more than the Chair's statement does.[22]

B. The Dangers of Regulating Speech through Soft Law

This consent decree could mark the start of a soft law framework on so-called censorship, akin to the 'common law' the FTC previously developed in the realm of privacy and data

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[19] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act (Sept. 21, 2015), https://www.federalregister.gov/documents/2015/09/21/2015-23498/statement-of-enforcement-principles-regarding-unfair-methods-of-competition-under-section-5-of-the

[20] Fed. Trade Comm'n, Request for Public Comment Regarding Technology Platform Censorship, Docket No. FTC-2025-0023-0001 (Feb. 20, 2025).

[21] Statement of Chairman Andrew N. Ferguson In the Matter of Omnicom Group, Matter No. 251-0049, at 6 (June 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/omnicom-ipg-ferguson-statement_0.pdf (hereinafter Ferguson Statement).

[22] Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, Docket No. FTC-2025-0066-0001 (June 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/Omnicom-Analysis.pdf (hereinafter Omnicom Aide to Public Comment).

security.[23] It took more than twelve years for any company to insist on litigating an FTC enforcement on data security, and even the *Wyndham* decision offered little clear guidance.[24] I have long objected to this process as a way to "circumvent judicial review"[25] and warned: "Ultimately, the FTC's process is the punishment… Wyndham Hotels spent over $5 million over three years responding to the FTC's subpoenas" before the company decided to litigate the FTC's data security concerns.[26] "If the FTC's investigation itself doesn't force a company to settle," I warned in 2020, "having to litigate before an ALJ and then invariably losing before the Commission almost always will."[27]

This "soft law" approach was dangerous and rightly criticized by those concerned about FTC.[28] No matter how many cases the Commission brings, if the Commission settles them all, such a common law "is really just a series of unadjudicated assertions," as Geoffrey Manne and I warned back in 2013.[29] However troubling this practice was when it concerned the regulation of business practices, it is truly alarming when it implicates the First Amendment's core protections for political speech.

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[23] "Together, these enforcement efforts have established what some scholars call 'the common law of privacy' in the United States." Julie Brill, Commissioner, Fed. Trade Comm'n, Remarks to the Mentor Group Forum for EU-US Legal-Economic Affairs Brussels, 3 (Apr. 16, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-mentor-group-forum-eu-uslegal-economic-affairs-brussels-belgium/130416mentorgroup.pdf (citing Christopher Wolf, Targeted Enforcement and Shared Lawmaking Authority As Catalysts for Data Protection in the United States (2010), http://www.justice.gov.il/NR/rdonlyres/8D438C53-82C8- 4F25-99F8-E3039D40E4E4/26451/Consumer_WOLFDataProtectionandPrivacyCommissioners.pdf (FTC Consent Orders have "created a 'common law of Consent Orders,' producing a set of data protection rules for businesses to follow.")).

[24] Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015).

[25] Berin Szóka & Geoffrey A. Manne, *The Federal Trade Commission: Restoring Congressional Oversight of The Second National Legislature* (2016), https://techfreedom.org/wp-content/uploads/2021/09/ftc-restoring-congressional-oversight.pdf.

[26] TechFreedom, *Axon: Can Defendants Raise Constitutional Defenses in Court Before the FTC Forces Them to Settle?* (May 12, 2020), https://techfreedom.org/axon-can-defendants-raise-constitutional-defenses-in-court-before-the-ftc-forces-them-to-settle/.

[27] *Id*.

[28] *See, e.g.*, Berin Szóka and Geoffrey A. Manne, *Restoring Congressional Oversight of the Second National Legislature* (May 2016), https://techfreedom.org/wp-content/uploads/2021/09/ftc-restoring-congressional-oversight.pdf; Geoffrey A. Manne, *FTC Commissioner Joshua Wright gets his competition enforcement guidelines*, INT'L CTR. FOR LAW & ECON., (Aug. 13, 2015), https://laweconcenter.org/resources/ftc-commissioner-joshua-wright-gets-his-competiton-enforcement-guidelines/; Jennifer Huddleston, *A Primer on Data Privacy Enforcement Options*, AMERICAN ACTION FORUM (May 4, 2020), https://www.americanactionforum.org/insight/a-primer-on-data-privacy-enforcement-options/.

[29] Berin Szóka and Geoffrey A. Manne, *The Second Century of The Federal Trade Commission*, TECHDIRT (Sept. 26, 2013), https://www.techdirt.com/articles/20130926/16542624670/second-century-federal-trade-commission.shtml.

C. What the Commission Can Do

When Caesar crossed the literal Rubicon, everyone in Rome understood that something momentous had occurred. No one downplayed the event's significance. Today, the FTC has crossed a Rubicon of vast importance. If that seems unremarkable, if few file in this docket, it may be because the issues appear arcane—or because the Commission is using a merger of advertising companies, seemingly the unlikeliest of opportunities, to make a profound point about its ability to police speech in America. If there is little hue and cry, it will be principally because those who should have sounded the alarm, the minority Commissioners whose job it was to monitor such matters carefully, have been fired by the President. America had already crossed several much more consequential Rubicons regarding the power of the President.

The Commission could have tried to compensate for this lack of independent oversight. To be sure, the Commission has at least sought public comment on these conditions.[30] But this is the *least* the Commission is required to do by its longstanding rule,[31] which reflects a consistent practice dating back to 1939.[32] But given the stakes here, the Commission should do much more than the bare minimum. It could have, for instance, allowed more time for public comment—or waited to raise such issues until after it had held a public workshop and issued a policy statement based on public comment. But that ship has, it seems, sailed.

Given that the Commission appears determined to proceed, it should at least issue a detailed analysis of the First Amendment issues raised by this settlement and responding to comments like this one. Such an analysis could be modeled on the competitive impact statement required by Tunney Act when the Department of Justice seeks judicial approval of an antitrust settlement.[33] But such a statement would address First Amendment issues rather than merely economic analysis.

II. The Constitutional Rubicon

The Commission is about to break with more than a century of its practice. The Chair has downplayed the significance of this consent order. This section examines what little the Chair and the staff have said about the consent order, then explains the First Amendment concerns

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[30] Omnicom Aide to Public Comment, *supra* note 22.

[31] 16 C.F.R. § 2.34(c).

[32] Rules of Practice Amendments, 64 Fed. Reg. 46267,46268 (Aug. 25, 1999) (to be codified at 16 C.F.R. pts, 2-4.) ("Although public comment periods on consent agreements are not required, the Commission has sent followed this practice for many years. The Commission's procedure for considering administrative consent orders has existed in one form or another since at least 1939.")

[33] This statement requires greater detail than the "aid to assist public comment" otherwise published by the FTC. 15 U.S.C. § 16(b).

raised by the consent order's conditions involving exclusion lists and collusion, and how they will be enforced.

A. The Commission's Defense: Much Ado About Nothing?

"In recent years," laments Chair Ferguson, "the advertising industry has been plagued by deliberate, coordinated efforts to steer ad revenue away from certain news organizations, media outlets, and social media networks."[34] Declaring that "investigating and policing censorship practices that run afoul of the antitrust laws is a top priority of the Trump-Vance FTC,"[35] he has publicly contemplated bringing competition and consumer protection claims against not only social media companies but also advertisers and ad agencies.

Now, for the first time, the Commission has acted on such theories. Omnicom and Interpublic Group (IPG), own various "media buying agencies,"[36] which advise advertisers on where to place ads. A proposed consent order permits the two companies to merge subject to two key conditions. First, they must cease using standardized "exclusion lists" of publishers considered toxic to brand safety "on the basis of political or ideological viewpoints." Second, such agencies must refrain from joining with others in the industry to set brand safety standards on the same basis. Both practices have enraged conservatives as forms of "censorship."

Some ad industry analysts agree, calling the merger conditions a "moot point" and "more sideshow than centre stage."[37] Other observers are less sanguine. One analyst warns that the consent order points "to a much more highly politicized environment for agencies than we have ever seen before, at least in the United States."[38] The proposed consent order has no precedent. It also marks a break from the FTC's longstanding reluctance to intervene in questions of media fairness. In 2004, left-wing media reform groups asked the FTC to declare Fox News's use of the slogan "Fair and Balanced" to be a deceptive trade practice.[39] The Republican FTC Chair, Tim Muris, dismissed the complaint in a few sentences: "I am not

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[34] Ferguson Statement at 3.
[35] Ferguson Statement at 6.
[36] "Advertising agencies' two primary services are creative advertising (*e.g.*, slogans, branding, visual designs, commercial) and media buying (*e.g.*, negotiating with television networks to place advertisements at primetime or buying search ads on Google)." Omnicom Aide to Public Comment, *supra* note 22.
[37] Matthew Keegan, *Omnicom-Interpublic deal approved by FTC with restrictions on ad boycotts*, HAYMARKET MARKETING COMMUNICATIONS (June 24, 2025), https://www.mmm-online.com/news/omnicom-interpublic-deal-approved-by-ftc-with-restrictions-on-ad-boycotts/.
[38] Lauren Hirsch et al, *F.T.C. May Put Unusual Condition on Ad Mega-Merger: No Boycotting*, N.Y. TIMES (June 12, 2025), https://www.nytimes.com/2025/06/12/business/ftc-omnicom-interpublic-merger.html.
[39] Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act, MoveOn.org and Common Cause (July 19, 2004), https://web.archive.org/web/%2020040724155405/http:/cdn.moveon.org/content/pdfs/ftc_filing.pdf.

aware of any instance in which the [FTC] has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency."[40]

The Trump Administration has no such hesitations. The FTC has recently sought public comment on potential grounds for suing tech companies for "censoring" user speech, including the role of advertising boycotts.[41] At a "Big-Tech Censorship Forum" recently held by the U.S. Department of Justice's Antitrust Division, Assistant Attorney General Gail Slater captured the new ethos best: "In the words of the great Steve Bannon, it's time for 'action, action, action.'"[42] Her excited introduction of Bannon and other MAGA influencers preceded their complaints, such as losing ad revenues because of their political views.

Another advertising industry analyst warns that, despite its provisos about advertiser choice, the proposed consent order conditions "create further nervousness when dealing with a media platform owner who is clearly litigious."[43] Indeed, Elon Musk, the owner of X, has already sued the world's largest advertisers over boycotting his platform.[44] Ad agencies, advertisers and others advertising intermediaries might be even more concerned about just how far the FTC will go—both in suing companies and in pressuring companies to change their practices to benefit Bannon, X, Rumble, and other MAGA-aligned media.

In the sanguine view, Ferguson may be engaging in regrettable but politically necessary kabuki. Perhaps he is merely trying to placate a president enraged over getting fact-

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[40] Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris.

[41] Federal Trade Commission, *Request for Information Regarding the Role of Artificial Intelligence in Content Moderation* (June 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.

[42] Nancy Scola, *Antitrust Enforcer Gail Slater on American Innovation: 'We Can Win the AI Race Against the Chinese Without Becoming Like China'*, POLITICO (May 9, 2025), https://www.politico.com/news/magazine/2025/05/09/gail-slater-donald-trump-antitrust-00277348.

[43] Matthew Keegan, *Omnicom-Interpublic deal approved by FTC with restrictions on ad boycotts*, HAYMARKET MARKETING COMMUNICATIONS (June 24, 2025), https://www.mmm-online.com/news/omnicom-interpublic-deal-approved-by-ftc-with-restrictions-on-ad-boycotts/.

[44] Second Amended Complaint, X Corp. v. World Federation of Advertisers, 7:24-cv-00114-B (N.D. Tex. 2025), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393003/gov.uscourts.txnd.393003.77.0_3.pdf (hereinafter X Complaint).

checked,[45] boycotted,[46] and banned.[47] The Omnicom-IPG consent order might demonstrate "action" without substantially changing industry practice. After all, Ferguson says the parties themselves proposed the merger conditions accepted by the Commission.[48] *Plus ça change, plus c'est la même chose?*

But the CEO of a leading advertising analytics firm fears the proposed consent order gives the FTC "a vehicle through which [the agency] can decide at an industrial scale, [that] the largest U.S. media agency will fund or not fund media [publishers] on behalf of [its] clients."[49] If the merger conditions really allowed FTC to second guess how IPG advises clients on protecting their brands, why might Omnicom and IPG have proposed (or at least agreed to) such conditions?

Because, in the cynical view, they think that risk of the conditions is outweighed by the cost of delaying their merger for years, the costs of litigation, and the political costs of further enraging the White House. Indeed, it has become increasingly common for media companies to settle claims brought by Trump personally that appear to have little, if any, legal merit—such as accusing the *Des Moines Register* of deceiving consumers by reporting on a poll that predicted Trump would lose Iowa in 2024,[50] accusing *60 Minutes* of engaging in "news distortion" by selectively editing an interview with Kamala Harris,[51] or accusing Meta of violating consumer protection law, unfair competition law, and (somehow) the First Amendment itself by banning Trump and other users after January 6.[52]

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[45] Julie Carrie Wong & Sam Levine, *Twitter labels Trump's false claims with warning for first time*, THE GUARDIAN (May 26, 2020), https://www.theguardian.com/us-news/2020/may/26/trump-twitter-fact-check-warning-label (false claims of impending fraud in the 2020 election).

[46] Melina Delkic, *Trump's banishment from Facebook and Twitter: A timeline*, N.Y. TIMES (May 2, 2010), https://www.nytimes.com/2022/05/10/technology/trump-social-media-ban-timeline.html (banned from social media services for his role in inciting the January 6 insurrection).

[47] Karlene Lukovitz, *Advertisers Shun Truth Social, Won't Curb Facebook Due To Trump Return*, DIGITAL NEWS DAILY (Jan. 30, 2023), https://www.mediapost.com/publications/article/382027/advertisers-shun-truth-social-wont-curb-facebook.html?edition= (advertisers boycott his own social media service, Truth Social).

[48] Ferguson Statement at 5 ("to resolve the Commission's concerns, the parties have proposed a remedy in the form of conduct restrictions that will mitigate this merger's anticompetitive effects.").

[49] Sam Bradley, *Here Are Some of the Big Questions Left Unanswered by the FTC's Omnicom IPG Neutrality Decree*, DIGIDAY (June 25, 2025), https://digiday.com/media-buying/here-are-some-of-the-big-questions-left-unanswered-by-the-ftcs-omnicom-ipg-neutrality-decree/.

[50] *See* Bart Jansen, *President-elect Trump sues Des Moines Register, Gannett over Iowa election poll*, DES MOINES REGISTER (Dec. 17, 2024), https://www.desmoinesregister.com/story/news/politics/2024/12/17/donald-trump-lawsuit-gannett-des-moines-register-iowa-election-poll/77051510007/.

[51] *See Paramount, President Trump reach $16 million settlement over "60 Minutes" lawsuit*, CBS NEWS (July 2, 2025), https://www.cbsnews.com/news/paramount-trump-60-minutes-lawsuit-settlement/.

[52] Amended Class Action Complaint, Trump v. Facebook, Inc., Civil Action No. 1:21-cv-22440-KMW-CMM, (S.D. Fla. May 1, 2023),

In this view, parties eager to merge are particularly vulnerable to coercion; they are just as dependent on currying the favor of the regulator as are broadcasters, who must take increasingly seriously Trump's longstanding threats to cancel their licenses.[53] When Ferguson concludes, blandly, "I hope the conditions imposed on this merger will encourage all advertising firms to adopt similar practices,"[54] many companies may understandably interpret this as more than mere encouragement. By using formal means to coerce concessions from Omnicom, the FTC has acquired a weapon for jawboning others—using "informal pressure by a government actor on a private entity … that operates at the limit of, or outside, that actor's authority."[55]

Black letter law alone cannot assess which view is correct. Predicting what will happen requires understanding competition law in the context of an increasingly bitter battle over online speech—a battle that has become central to American politics.

B. The Battle over "Exclusion Lists"

The first merger condition focuses on "exclusion lists" based on the political or ideological viewpoints of media.[56] Advertisers rely on media buying agencies to develop such lists because the proliferation of digital media has made the advertising market increasingly complicated. "Web ads are often bought through third-party brokers, such as Google and Facebook… [which] distribute them to a network of websites according to algorithms that seek a specific target audience (say, young men) or a set number of impressions."[57] Thus explained *The Washington Post* in a 2017 story, one of four cited by Ferguson in his statement about the consent order as evidence of the nature of the antitrust problem posed by Omnicom's acquisition of IPG. "As a result of such 'programmatic' buying, advertisers often are in the dark about where their ads end up," the story explained."[58]

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https://storage.courtlistener.com/recap/gov.uscourts.cand.388335/gov.uscourts.cand.388335.16.0.pdf; Josh Gerstein, *Meta Settles Trump Lawsuit Over Facebook Ban for $25 Million*, POLITICO (Jan. 29, 2025), https://www.politico.com/news/2025/01/29/meta-settles-trump-facebook-ban-lawsuit-007810.

[53] Brian Stelter, *Trump Demands Broadcast Licenses for Networks That Displease Him*, CNN (Oct. 22, 2024), https://edition.cnn.com/2024/10/22/media/trump-strip-tv-station-licenses-punish-media.

[54] Ferguson Statement at 6.

[55] Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015), https://scholarship.law.umn.edu/mlr/182/.

[56] Fed. Trade Comm'n, In the Matter of Omnicom Group/The Interpublic Group of Co., File No. 251-0049, Decision & Order, at 3-4 (June 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2510049omnicomdecisionorder.pdf (hereinafter Consent Order).

[57] Paul Farhi, *The Mysterious Group That's Picking Breitbart Apart, One Tweet at a Time*, WASHINGTON POST (Sept. 22, 2017), https://www.washingtonpost.com/lifestyle/style/the-mysterious-group-thats-picking-breitbart-apart-one-tweet-at-a-time/2017/09/22/df1ee0c0-9d5c-11e7-9083-fbfddf6804c2_story.html.

[58] *Id.*

Not coincidentally, the story was about a boycott of Breitbart—the site directed by Steve Bannon—organized by Sleeping Giants, a grassroots campaign launched after Trump's 2016 election win. The group quickly developed a Twitter following by asking major advertisers' Twitter accounts a simple question: "Are you aware that you're advertising on Breitbart, the alt-right's biggest champion, today?" In fact, most advertisers had no idea their ads were appearing next to section of articles curated by Breitbart on "Black Crime" or articles with titles like "Birth control makes women—and men—less attractive" and "Gabby Gifford: the Gun Control Movement's Human Shield," four years after the Arizona Congresswoman survived an attempted assassination.[59]

"Advertisers can opt out of certain sites," noted *The Washington Post*, "but only if they affirmatively place them on a blacklist of sites."[60] But as Ferguson himself concedes, advertisers "understandably do not necessarily possess the in-house expertise to determine where their advertisements should be placed."[61] So advertisers turned to media buying agencies to "prepare a media buying plan to determine where the advertiser will seek to place advertisements,"[62] including "exclusion lists" of publishers likely to publish toxic content. Ferguson, Bannon and others blame such lists for choking funding to MAGA-aligned media.

1. Omnicom's Commitment Regarding Exclusion Lists

Omnicom agrees not to use or develop exclusion lists "on the basis of political or ideological viewpoints to determine or direct Advertisers' advertising placements"—except that lists "developed *at the express direction of a particular client* are … expressly permitted."[63] Presumably, Omnicom and IPG believe this exception will allow them sufficient flexibility to meet their clients' brand safety needs. They might, for instance, offer clients an automated questionnaire specifying the kinds of content they don't want their brands associated with.

Omnicom further commits not to "offer any client's exclusion list to another client or third party" and not to "knowingly encourage or solicit third parties to do so."[64] The FTC will expect Omnicom's continual assurances that this is not happening. This could involve comparing the lists developed for each client. Suppose the sanguine view proves right: most advertisers continue using the same exclusion lists as before the settlement, and thus largely the same lists as each other. If so, the cynical view would expect the FTC to allege that

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[59] *Id.*
[60] *Id.*
[61] Ferguson Statement at 1.
[62] Omnicom Aide to Public Comment, *supra* note 22.
[63] Consent Order, *supra* note 56, at 3-4.
[64] Consent Order, *supra* note 56, at 4.

Omnicom had continued to provide one "client's exclusion list to another client" in violation of the decision and order. If the FTC believed that Omnicom had violated this, or any other, requirement, it should have no difficulty persuading the Department of Justice to bring suit in federal court, as required,[65] given the agencies' political alignment around "censorship."

But would a court accept such a claim? In general, the text of a consent decree controls.[66] But what does it really mean for a list to be "developed at the express direction of a particular client"? How much "direction" must the client give, how "express" must it be, and what counts as "developing" a list? If, in a simple model, an advertiser checks boxes on a questionnaire saying it doesn't want its content associated with "hate speech" or "disinformation," is that "express" enough? Are these categories actually based on political or ideological viewpoints—such that Omnicom, rather than advertisers, is doing the "directing"? How precisely must an advertiser enumerate what kinds of content it doesn't want its brand associated with? Is Omnicom "developing" a new list for that client if it combines pre-existing lists that correspond to specific boxes being checked on a questionnaire?

Actually developing, and maintaining, exclusion lists will likely be both more complex and dynamic than this simple model. Omnicom may, naturally, use ongoing feedback from advertisers about their brand safety needs to continually refine whatever questions it asks them and to update the lists it offers in response. After all, what constitutes problematic hate speech, disinformation, violent content, and similar is necessarily a moving target, and what really matters to media buying agencies is what advertisers themselves find problematic, even if they struggle to articulate that or keep track with changes in media, coded communications, and consumer sensitivities. Omnicom will doubtless rely on artificial intelligence tools to curate its exclusion lists. What must the company do to prove that it is not reusing a list from one client to another?

If Omnicom cannot prove that the exception for client-directed lists applies, it will find itself embroiled in disputes over whether it is excluding media publishers on the "basis of political or ideological viewpoints." "It will be difficult for the F.T.C. to tell whether an Omnicom recommendation is based on politics or simply a media platform's business performance," warns David Schwartz, a former Lead Investigative Attorney at the FTC on antitrust matters now in private practice.[67] This *should* make enforcement harder: in any action to impose penalties for violating a decision and order, the FTC bears the burden of proof by a

[65] 15 U.S.C. § 45(l).
[66] United States v. Armour & Co., 402 U.S. 673, 682 (1971) ("the scope of a proposed consent order must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.").
[67] *See supra* note 38.

preponderance of the evidence, as in any enforcement action.[68] But in practice, this problem of proof may be more of a problem for Omnicom than the FTC.

At a minimum, Omnicom has invited endless scrutiny into its internal operations. Every communication inside the company, between the company and its clients, and between the company and any third party involved in the development of exclusion lists can be demanded by the FTC.[69] Even a few internal such documents could allow the FTC to claim that it had found a "smoking gun" proving a violation of the order.

In the end, the FTC doesn't have to persuade a court that Omnicom has violated the consent decree to succeed in leveraging the consent decree to significantly redirect advertising spending to media favored by the Administration. Omnicom might not litigate such claims at all. Today, the stakes are high: litigating could cost the two companies significantly in delaying the merger. Yet future litigation over whether the company has violated the proposed consent order could prove even more expensive, resulting in penalties of up to $53,088 per violation.[70] What constitutes the unit of "violation" remains unclear, but it could include the number of publishers times the number of advertisers involved. In other words, there is no practical limit; the FTC could seek tens of billions in remedies. Even being threatened with such an enforcement action might prove costly politically.

2. No Clear Connection to an Antitrust Violation

What is most remarkable about this condition is that the FTC has not established any clear link between it and a theory of antitrust harm—unlike the second condition discussed below, which suggests that collusion among ad agencies and advertisers on brand safety standards are an "an agreement not to compete on quality."[71] At most Ferguson implies that the use of such exclusion lists has been connected to collusion in the past, and that, because the merger increases the potential for collusion by reducing the number of players in the market, limiting the use of exclusion lists is an appropriate merger condition.

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[68] When a proposed decision and order is entered as a judgment by federal court, the FTC may seek more severe sanctions for contempt of court and a correspondingly higher burden applies. FTC v. Kuykendall, 371 F.3d 745, 756 (10th Cir. 2004) ("[I]n the civil contempt context, a plaintiff must prove liability by clear and convincing evidence."). But the Omnicom-IPG merger complaint was filed in the FTC's administrative process, as is the proposed settlement, so the normal burden of proof applies.

[69] Section 5 of the complaint grants the FTC broad access rights to "all books, ledgers, accounts, correspondence, memoranda, and all other records and documents." Consent Order, *supra* note 56, at 5.

[70] Adjustments to Civil Penalty Amounts, 90 Fed. Reg. 3094 (Jan. 17, 2025), https://www.federalregister.gov/documents/2025/01/17/2025-01361/adjustments-to-civil-penalty-amounts.

[71] Ferguson Statement at 5.

This might not be persuasive to a court, but by persuading Omnicom to settle, the Commission has sidestepped such legal questions. In general, proposed decision and orders "should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce."[72] Thus, Omnicom has invited FTC oversight of oversee practices that might have been difficult, if not impossible, for the FTC to scrutinize through the antitrust suits. The agency may, in turn, further leverage its shaky legal theory by "encourage[ing] all advertising firms to adopt similar practices."[73]

C. The Battle over "Collusion"

The complaint focuses on alleged collusion among advertisers and ad agencies to set common brand safety standards, which Omnicom commits to cease doing. As evidence of collusion "to steer ad revenue away from certain news organizations, media outlets, and social media networks,"[74] Chair Ferguson points to the Global Alliance for Responsible Media (GARM), the entity created by leading ad agencies, advertisers, and ad networks to set common standards for brand safety. In 2024, X and Rumble sued GARM and participating large advertisers.[75] While GARM dissolved rapidly after the suit was filed, the suit continues against those advertisers. Advertisers filed their motion to dismiss X's lawsuit in May.[76]

X argues that "collective action among competing advertisers to dictate brand safety standards to be applied by social media platforms shortcuts the competitive process and allows the collective views of a group of advertisers with market power to override the interests of consumers."[77] Rumble makes similar claims.[78] Yet both suits may be dismissed for failing to identify harm to consumers, rather than to X or Rumble as marketplace participants.[79]

The FTC's complaint at least alleges a broader theory of harm: "Coordinated interaction harms consumers because it enables competitors collectively to compete less aggressively, reduce product quality, slow the rate of innovation, or, in the case of advertising, reduce ad

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[72] United States v. ITT Continental Baking Co., 420 U.S. 223, 237 (1975).
[73] Ferguson Statement at 6.
[74] *Id.* at 3.
[75] X Complaint, *supra* note 44. *See also* First Amended Complaint, Rumble Inc. v. World Federation of Advertisers, 7:24-cv-00115-O (N.D. Tex. 2024), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393019/gov.uscourts.txnd.393019.13.0.pdf (Rumble Complaint).
[76] Defendants' Motion to Dismiss for Failure to State a Claim, X Corp. v. World Federation of Advertisers, 7:24-cv-00114-B (N.D. Tex. 2025), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393003/gov.uscourts.txnd.393003.160.0.pdf.
[77] X Complaint, *supra* note 44, at 3.
[78] Rumble Complaint, *supra* note 75, at 6.
[79] Defendants' Motion to Dismiss for Failure to State a Claim, *supra* note 76.

revenues for particular media publishers, forcing those publishers to reduce the quality and quantity of products they can feasibly offer to their own downstream consumers."[80] Ferguson argues that "coordinated action by advertising agencies against politically disfavored publishers is tantamount to an agreement not to compete on quality," and that Omnicom and IPG would increase the potential for such collusion by merging the third and fourth largest families of ad agencies to create a new number one in a market with six large players.[81] Neither X nor Rumble's complaints make these arguments.

The *Omnicom* complaint and consent order raise two related First Amendment questions. The first speaks directly to the politicization of the FTC: Do consumers actually suffer a reduction in the quality of media? Is political and ideological diversity in media quality a dimension of competition that the FTC, or any government agency, can properly assess? The second set of questions is squarely before the district court in the X and Rumble suits: when does the First Amendment protect group boycotts based on ideological and political grounds?

1. Quality Reductions & the Marketplace of Ideas

Chair Ferguson points to "a troubling history of collusion to the detriment of consumers and the free conduct of American political discourse and elections," citing four news reports in a footnote without further comment. According to one report, in 2018, Fox News anchor Tucker Carlson saw dozens of major advertisers boycott his show after he decried immigration as making America "poorer and dirtier and more divided."[82]

The Chairman avoids such specifics. Instead, he frames the issue in abstract terms: Consumers, he claims, are "deprived of a diverse range of viewpoints when certain publishers are forced to scale back their products due to lack of revenue."[83] In a recent major address, Ferguson invoked the "marketplace of ideas" eighteen times: "If part of the attractiveness of a social media platform is that it facilitates a genuine marketplace of ideas, a highly concentrated, less competitive market will make it easier for social media companies to degrade the quality of their product through censorship without facing any competitive consequences."[84]

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[80] Omnicom Complaint at 3.
[81] Ferguson Statement at 2, 6.
[82] A.J. Katz, *20+ Brands Have Stopped Advertising on Tucker Carlson Tonight After Immigration Comments*, ADWEEK (July 14, 2023), https://www.adweek.com/convergent-tv/20-plus-brands-have-stopped-advertising-on-tucker-carlson-tonight-after-immigration-comments/.
[83] Omnicom Complaint at 4.
[84] Stigler Center, *FTC Chairman Andrew Ferguson with Eric Posner - 2025 Antitrust and Competition Conference Keynote*, YOUTUBE, at 11:15 (Apr. 15, 2025), https://www.youtube.com/watch?v=f06YGAPDwAw&list=PLW8F2fexkgF5EEJUC0eZztgE-OrjcayCD

Ferguson asserts that "diversity" of views is not merely a Platonic ideal but what consumers want. But researchers have concluded that "most users do not want unregulated spaces. They view moderation as essential to sustaining democratic discourse."[85] Moreover, users have diverse and inconsistent preferences. Doubtless there are some who want a marketplace of ideas in which immigrants or other groups may be denigrated, but many of those may draw the line differently depending on context. Many other consumers may recoil from participating in such a marketplace, especially if they are the ones being dehumanized. Is it enough that they can avoid Carlson, or being associated with him, simply by not watching Fox News? What about social networks, where users interact with each other according to common ground rules?

Since Elon Musk bought Twitter, renamed it X, and slashed the site's content moderation practices, the site has hemorrhaged users. In the two months after the 2024 U.S. election alone, the site lost an estimated 2.7 million active users while Bluesky, its upstart rival, gained an estimated 2.5 million users.[86] Meanwhile, various alternative social networks—from Parler to Gab, from Rumble to Truth Social—have offered users something like Ferguson's unmoderated marketplace of ideas, yet have never attracted more than a few million regular users.[87] If this were simply a matter of network effects—users preferring to use established networks their friends are already on—how did Bluesky emerge so quickly?

The First Amendment does not permit the FTC to decide the kinds of media users really want—as Chairman Muris recognized.[88] Only last summer, the Supreme Court reiterated that it "has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased…."[89]

In that case, *Moody v. NetChoice* (2024), Justice Clarence Thomas dissented. He asserted that social media could be required to carry some speech because "social-media platforms have become the 'modern public square," citing the Supreme Court's decision in *Packingham* v. *North Carolina* (2017).[90] But that case involved a state law restricting Internet use, not

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[85] Yannis Theocharis et al., *What People Want from Platforms Isn't What Musk and Zuckerberg Are Selling*, TECH POLICY PRESS (May 6, 2025), https://www.techpolicy.press/what-people-want-from-platforms-isnt-what-musk-and-zuckerberg-are-selling/.

[86] Raphael Boyd**,** *From X to Bluesky: Why Are People Fleeing Elon Musk's 'Digital Town Square'?*, THE GUARDIAN (Dec. 11, 2024), https://www.theguardian.com/media/2024/dec/11/from-x-to-bluesky-why-are-people-abandoning-twitter-digital-town-square.

[87] *See, e.g.*, Oskar Mortensen, *How Many Users Does Truth Social Have? Statistics & Facts (2025)*, SEO.AI (Jan. 28, 2025), https://seo.ai/blog/how-many-users-does-truth-social-have ("Truth Social has 6,300,000 users as of January 2025.").

[88] *See supra* at note 40 and associated text.

[89] Moody v. NetChoice, LLC, 603 U.S. 707, 727 (2024).

[90] Packingham v. North Carolina, 582 U. S. 98, 107 (2017).

private companies "censoring" (moderating) online content, and such clear state action triggered the First Amendment. Justice Samuel Alito, who would later join Justice Thomas's *Moody* dissent, chided the court for its "its undisciplined dicta"—its inability "to resist musings that seem to equate the entirety of the internet with public streets and parks."[91] Yet that is exactly what Ferguson (a former Thomas clerk) is doing now as he regularly invokes the idea of a "truly public forum"—*i.e.*, one without moderation he does not like.[92]

2. Claiborne Hardware or Superior Court Trial Lawyers?

Does the First Amendment protect advertisers and media buying agencies when they coordinate boycotts of content they find objectionable? The answer depends on which line of Supreme Court cases applies—a question squarely presented by advertisers' motion to dismiss the X lawsuit.[93] In *NAACP v. Claiborne Hardware Co.* (1982), the Court blocked antitrust claims against those who boycotted local white businesses over civil rights issues because the antitrust laws "could not justify a complete prohibition against a nonviolent, politically motivated boycott" that was not intended "to destroy legitimate competition."[94] Conversely, in *FTC v. Superior Court Trial Lawyers Ass'n* (1990), the Court upheld the application of the longstanding *per se* prohibition on group boycotts to a "group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in District of Columbia criminal cases [and who] agreed … to stop providing such representation until the District increased group members' compensation."[95] The key was the motive: "Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves," but rather were trying to "change a social order" they considered unjust, whereas "the undenied objective of [the trial lawyers'] boycott was an economic advantage for those who agreed to participate."[96]

The *Omnicom* complaint alleges that "a *concerted* (or otherwise coordinated) refusal to deal among Media Buying Services firms provides a direct economic benefit to the firms by ensuring that they are not competitively disadvantaged relative to their rivals, which are likewise foregoing the opportunity to reach potential audiences on the boycotted publishers' platforms."[97] If this were the standard, businesses could *never* engage in political boycotts: If

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[91] 582 U.S. at 107 (Alito, J., concurring in judgment).
[92] Ferguson told his Stigler audience: "we are also thinking about a *truly public forum* through which each citizen—not just society's elites—have equal capacity to express their own opinions, to have them heard and responded to by others, and for the consensus emerging from that exchange to have a genuine effect on the public policy of the society in which the exchanges take place." *See supra* note 84 (emphasis original).
[93] Defendants' Motion to Dismiss for Failure to State a Claim, *supra* note 76.
[94] 458 U.S. 886, 912.
[95] 493 U.S. 411, 414.
[96] *Id.* at 426.
[97] Omnicom Complaint at 4.

businesses in a small town in the Jim Crow South boycotted the local newspaper to protest its racist speech by refusing to run ads in the newspaper, every participating business might in some sense benefit from collusion by ensuring that their rivals did not defect from the boycott by running ads in the paper. But the relevant question is not whether the boycott makes it easier for businesses to unite in political protest (an *instrumental* economic purpose towards the *ultimate* political purpose), but whether the boycott aimed "to destroy legitimate competition" (an *ultimate* economic purpose).

The Omnicom complaint does not explain how media buying agencies are benefitted—in the way the trial lawyers sought to raise their own compensation—by refusing to subsidize speech they, or their advertiser clients, find objectionable. X alleges that "GARM's advertiser and advertising agency members have an economic incentive to see digital media and social media platforms adopt and adhere to the GARM Brand Safety Standards"[98] for two related reasons. First, "some advertisers do not want their advertisements appearing in connection with or adjacent to some types of content."[99] X's complaint does not dwell on this point, lest it draw attention to the First Amendment right of advertisers not to subsidize speech they abhor.[100] Instead, X focuses on cost-shifting as an instrumental economic purpose:

> Before the Brand Safety Standards, each advertiser negotiated individually with social media platforms to customize the reach of its ads and to avoid unwanted content. Some GARM-member advertisers found these individualized negotiations to be unsatisfying and costly and wished to reduce their costs of advertising on social media platforms by forcing the social media platforms to incur those costs instead. Through the Brand Safety Standards, GARM-member advertisers collectively shift to social media platforms a portion of the costs previously borne by advertisers by forcing the social media platforms (i) to proactively remove certain content (that falling below the Safety Floor) and (ii) to adopt tools to allow advertisers to more easily avoid certain other content subject to the Suitability Framework.[101]

This is exactly like saying, in the above hypothetical, that local advertisers participating in the boycott would benefit by "coercing" the newspaper to bear the cost of screening content that advertisers abhor. Perhaps, but this merely makes it cheaper for advertisers to achieve ends that are ultimately political, not economic. As two commenters on the case have noted, "the fact that the defendants in the X case might believe they are better off in business terms

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[98] X Complaint, *supra* note 44, at 15.
[99] *Id.*
[100] United States v. United Foods, Inc., 533 U.S. 405 (2001).
[101] X Complaint, *supra* note 44, at 15.

if they don't associate with X doesn't in any way diminish the fact that their primary motive is to vindicate their expressive freedom not to associate."[102] Furthermore, they note, because neither advertisers nor media buying agencies compete with media publishers, they cannot benefit directly from changing how media publishers operate. Indeed, in key respects, "the case for First Amendment protection of the X defendants is in some respects *even stronger* than that of the Claiborne County boycotters" because they "are focusing their efforts on the very entity whose expression they find unattractive, rather than targeting a third party to indirectly exert pressure on others to change," whereas the "secondary boycott" in *Claiborne Hardware* aimed "not simply to get the targeted businesses to alter their practices, but to put pressure on government officials (who presumably would be worried about bad publicity and a possible reduction in tax revenues) to change public policies" regarding employment.[103] The same goes for media buying agencies.

In short, the district court *should* dismiss the X and Rumble lawsuits against the advertisers, and the same logic should have made it impossible for the FTC to win any claim against Omnicom. The merging companies *should* have seen no reason to settle because the FTC's arguments are essentially unconstitutional.

And yet Omnicom *did* settle the case, just as GARM quickly dissolved operations. Why? The cost and delay (to completing the merger) of litigating such questions might alone explain Omnicom's submission. The legal realist might safely predict that, whatever the right legal answer is hardly matters because the case law is sufficiently murky that political factors will determine the outcome.

3. The Confused State of Supreme Court Doctrine

"The Supreme Court's approach to resolving the question of the legality of concerted commercial activity undertaken for political ends has been essentially inconsistent," lamented a 1992 law review article critiquing the *Superior Court Trial Lawyers* decision.[104] Since 1961, "the Court has revisited the question of the validity of such conduct four times. In each decision, it resolved the issue via a different route. In each case, it avoided a thorough analysis of the combined political and commercial speech inherent in the conduct."[105] Absent a clear standard, lower "courts have attempted to distinguish between boycotts that are

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[102] Vikram David Amar & Ashutosh Bhagwat, *Why Elon Musk's (and X's) Lawsuit Against Companies Who Have Stopped Advertising on the X Platform Is Legally Weak*, VERDICT (Aug. 26, 2024), https://verdict.justia.com/2024/08/26/why-elon-musks-and-xs-lawsuit-against-companies-who-have-stopped-advertising-on-the-x-platform-is-legally-weak/.

[103] *Id.*

[104] Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992), https://scholars.law.unlv.edu/facpub/53.

[105] *Id.* at 738.

primarily commercial but have 'ancillary' political purposes and boycotts that are essentially political but have 'ancillary' economic purposes. This methodology tends to be highly fact-specific, and is often heavily influenced by 'the presence or absence of economic gain flowing to the boycotters.'"[106] Yet it is not entirely clear from the case law, as it should be, that what matters is ultimate economic benefit (destroying legitimate competition) rather than the instrumental economic benefit of making it more or less costly for boycotters to achieve their political end. Nor is it entirely clear that protecting brands from association with objectionable content is an ultimate economic benefit. The Supreme Court has not provided further clarity on these questions since *Superior Court Trial Lawyers*.

The Court declined an opportunity to do so in 2023, when it denied cert in *Arkansas Times LP v. Waldrip*.[107] Arkansas law requires government contractors to certify they are not boycotting Israel or "Israeli-controlled territories."[108] Accordingly, before renewing its annual advertising contract, a state university demanded that the *Arkansas Times* sign such a certification; the paper refused on principle. A panel of the Eighth Circuit Court of Appeals struck down the law on First Amendment grounds.[109] *En banc*, the Eighth Circuit (the most Republican-dominated court of appeals) reversed, upholding the law.[110] The appeals court ruled that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)* (2006)[111] controls, rather than *Claiborne Hardware*.

FAIR involved law schools' boycott of military recruiters to protest a ban on openly gay soldiers. While the *FAIR* Court did not discuss *Claiborne Hardware* or boycotts explicitly, the Court said that the First Amendment protects only "conduct that is inherently expressive," and that "a law school's decision to allow recruiters on campus is not inherently expressive."[112] According to the Eighth Circuit's en banc decision, the *FAIR* Court "made clear that the question wasn't whether someone *intended* to express an idea, but whether a neutral observer would *understand* that they're expressing an idea."[113] The court upheld Arkansas's law because it prohibits "purely commercial, non-expressive conduct, … does not ban *Arkansas Times* from publicly criticizing Israel, or even protesting the statute itself," and "only prohibits economic decisions that discriminate against Israel. Because those

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[106] *Id.* at 712.
[107] *See* Arkansas Times v. Waldrip, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, No. 22-379 (2023).
[108] Ark. Code Ann. § 25-1-503 (2017).
[109] Arkansas Times v. Waldrip, 988 F.3d 453 (8th Cir. 2021).
[110] Arkansas Times v. Waldrip, 37 F.4th 1386 (8th Cir. 2022).
[111] 547 U.S. 47.
[112] 547 U.S. at 175, 157.
[113] *See Arkansas Times*, 37 F.4th at 1391.

commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment."[114]

X and Rumble are likely to make similar arguments. The Fifth Circuit might well accept them. The FTC might had made such arguments had it litigated the *Omnicom* case. Yet *Arkansas Times* can be distinguished on multiple grounds. "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from … certain individuals to pay subsidies for speech to which they object."[115] Even mushroom producers could not be compelled to support a Congressionally created Mushroom Council's generic advertising to promote mushrooms to consumers.[116]

Advertisers worry about "brand safety" precisely because their ads are far from "invisible to observers unless explained;" they reasonably fear that a "neutral observer" will associate their brand with the content in the media it appears in. [117] The Eighth Circuit was willing to uphold the Arkansas law only insofar as it "prohibit[s] solely commercial activity that lacks *any* expressive or political value," but not if it "prohibit[ed] those elements of a boycott, such as speech and association, that we know enjoy First Amendment protection…"[118] When media buying agencies make decisions about which publishers to recommend to their clients "on the basis of political or ideological viewpoints," they are helping advertisers make expressive decisions.

Furthermore, the Arkansas "legislature's motive for passing Act 710 was primarily economic."[119] The same could surely be said for the Sherman, Clayton, and FTC Acts. But X, Rumble, and the FTC are clearly invoking the antitrust laws because they resent how advertisers and media buying agencies make decisions about which content they will not associate with. The Supreme Court has long recognized that the First Amendment can be violated when the discretion inherent in content-neutral laws is exercised based on "dislike for or disagreement with" certain views,[120] and that a pattern of public statements can

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[114] 37 F.4th at 1394.
[115] United States v. United Foods, Inc., 533 U.S. 405, 410 (2001).
[116] *Id.* at 405.
[117] *See Arkansas Times*, 37 F.4th at 1392.
[118] *Arkansas Times*, 988 F.3d 453 at *10-11 (8th Cir. 2021).
[119] *Arkansas Times*, 37 F.4th at 1393.
[120] Niemotko v. Maryland, 340 U.S. 268, 272 (1951).

disclose animosity to viewpoints or speakers.[121] Interpretations of statutes that confer excessive discretion may violate the First Amendment.[122]

4. The Realist Fear: Results-Oriented Decisionmaking

Courts of appeals have varied considerably in how they have applied the First Amendment to measures intended to remedy online "censorship." In 2022, the Fifth Circuit panel upheld a Texas law[123] that compelled social media services not to moderate content favored by Trump and his allies[124] while an Eleventh Circuit panel struck down[125] most of a similar Florida law.[126] The Supreme Court remanded both cases because plaintiffs should have brought as-applied, rather than facial challenges.[127] The Court could have stopped there, but six justices agreed that the Fifth Circuit had so poorly understood "what kind of government actions the First Amendment prohibits" that it was necessary to "set out the relevant constitutional principles" in detail.[128]

For the legal realist, what is important is not—at least in the near-term—why those principles likely bar the theories relied on by X, Rumble, and the FTC, but rather that Elon Musk, simply by shifting X's corporate headquarters to Texas, was able to ensure that it would be the Fifth Circuit that would apply its creative misconceptions about the First Amendment to the litigation brought by X. Whatever the district court judge handling the X and Rumble suits decides, the Fifth Circuit panel hearing the appeal of that decision is likely to rule that *Superior Trial Court Lawyers* and *FAIR* control, not *Claiborne Hardware*. It could take several years before the Supreme Court has the opportunity to set the Fifth Circuit straight again. In the meantime, the FTC will claim that advertiser boycotts are prohibited per se by the antitrust laws—and will leverage that *apparent* state of the law to do what Ferguson suggests: "encourage all advertising firms to adopt similar practices" to those "volunteered" by Omnicom.[129]

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[121] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).
[122] *See, e.g.*, ACORN v. City of Tulsa, 835 F.2d 735, 740-41 (10th Cir. 1987) (ban on erecting "structures" in parks was not unconstitutionally vague, but the discretion of officials to issue permits allowing structures was unconstitutionally broad).
[123] Texas House Bill 20, 'Relating to censorship of or certain other interference with digital expression' (2021) 87th Legislature, 2nd Special Session, https://capitol.texas.gov/BillLookup/Text.aspx?Bill=HB20&LegSess=872.
[124] NetChoice v. Paxton, 49 F.4th 439, 459 (5th Cir. 2022).
[125] NetChoice v. Moody, 34 F.4th 1196, 1210 (11th Cir. 2022).
[126] Florida Senate Bill 7072, 'Social Media Platforms' (2021), https://www.flsenate.gov/Session/Bill/2021/7072.
[127] Moody v. NetChoice, LLC, 603 U.S. 707, 717 (2024).
[128] 603 U.S. at 730.
[129] Ferguson Statement at 6.

D. Policing Compliance

Chair Ferguson declares: "Compliance reporting provisions will give the Commission insight into the merged firm's activities."[130] Omnicom must file an annual Compliance Report and any additional reports requested by the Commission. These must include "a list setting forth the number of times a publisher appears on 'exclusion lists' developed or applied by Omnicom Media Group at the express direction of a particular client based on political ideology."[131]

The FTC Act generally bars the Commission from making public such trade secrets or confidential information, [132] but does not "prevent disclosure to either House of the Congress or to any committee or subcommittee of the Congress," provided that the Commission notifies the Omnicom of such a request.[133] Lawmakers could, in turn, make such information public.

Several Congressional committees would have a keen interest in publicizing such information. Rep. Jim Jordan has wielded his subpoena powers broadly to obtain, and then publish, internal communications purporting to prove a conspiracy to censor conservative speech.[134] Most publicly, a relentless campaign of subpoenas and attendant publicity caused Stanford University to shut down its Internet Observatory's Election Integrity Project, whose analysis of disinformation about the 2020 election enraged Republicans convinced the election had somehow been stolen from Trump.[135] Similarly, Jordan bombarded GARM and leading advertisers with subpoenas about their boycotts of X and MAGA-aligned media.[136] Jordan published this information as a committee report, which served as the basis for antitrust suits filed by X and Rumble,[137] giving them access to information that private

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[130] *Id.*

[131] Consent Order, *supra* note 56, at 4.

[132] The FTC may disclose such information to state, federal, or foreign law enforcement agencies solely "upon the prior certification … that such information will be maintained in confidence and will be used only for official law enforcement purposes." 15 U.S.C. § 46(f).

[133] 15 U.S.C. § 57b-2(b)(3)(C).

[134] In the last Congress, Jordan did this primarily as chair of the Select Subcommittee on the Weaponization of the Federal Government. That special subcommittee was not reconstituted in this Congress, but Jordan remains chair of the House Oversight Committee.

[135] Shannon Bond, *A Major Disinformation Research Team's Future Is Uncertain After Political Attacks*, NPR (June 14, 2024), https://www.npr.org/2024/06/14/g-s1-4570/a-major-disinformation-research-teams-future-is-uncertain-after-political-attacks.

[136] Press Release, House Judiciary Comm., Chairman Jordan Seeks Records from Major Corporations Regarding Potential Violations of Antitrust Laws (Mar. 26, 2024), https://judiciary.house.gov/media/press-releases/chairman-jordan-seeks-records-major-corporations-regarding-potential.

[137] X Complaint, *supra* note 44, at 3-4; Rumble Complaint, *supra* note 75, at 5-6.

plaintiffs normally could have attempted to obtain only through discovery and after resolution of a motion to dismiss.

In the sanguine view, this risk already existed: Congress could use its broad subpoena powers to obtain such information from Omnicom regardless of any consent order. Thus, the settlement has not exacerbated pre-existing political dynamics. In the cynical view, the consent order paints a target squarely on Omnicom, making clear precisely what Jordan and other committee or subcommittee chairs should demand, and helping to create a narrative framework they can use about specific MAGA-aligned publishers being "under attack" by advertisers for their political views.

Rep. Jordan has tried to pressure specific advertisers to desist from boycotting MAGA-aligned publishers. Most useful for that purpose would be lists of which advertisers are boycotting which publishers. Nothing in the proposed consent order requires Omnicom to document the preferences of advertisers, but neither does it bar the FTC from demanding such information. Instead, the FTC has broad discretion to demand more: "Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Omnicom is in compliance with this Order. Conclusory statements that Respondent Omnicom has complied with its obligations under this Order are insufficient." And whatever is included in the compliance reports, the Order appears to require Omnicom to retain records of its interaction with advertisers for five years ("all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent Omnicom's obligations") and requires Omnicom to "provide copies of these documents to Commission staff upon request."[138] Such records could be obtained by Congressional subpoenas directly from Omnicom, whereas Omnicom might otherwise destroy them in in its regular course of business.

One way to guard against abuse would be to amend the agreement to require that any documents provided to the FTC be anonymized, so that they do not identify a particular advertiser.

E. The Settlement's Impact on Speech

The consent decree raises grave First Amendment problems. Whatever level of scrutiny courts might apply, there is simply no legitimate government interest in trying to "balance" speech, as discussed above.[139] The government cannot, as the *Moody* Court said, "interfere with private actors' speech to advance its own vision of ideological balance."[140]

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[138] Proposed Consent Order at 4-5.
[139] Moody v. NetChoice, LLC, 603 U.S. 707, 741 (2024). *See also* II.C.1.
[140] *Moody*, 607 U.S. at 741.

Moreover, under longstanding First Amendment doctrine, government restrictions that target speech because of its content are highly disfavored.[141] The Supreme Court has repeatedly held that when a law or policy singles out speech based on "the message a speaker conveys"—whether by subject matter, function, or viewpoint—it is presumptively unconstitutional and subject to strict scrutiny.[142] That test requires the government to prove both that the regulation serves a compelling interest and that it is narrowly tailored to achieve that goal.[143] Critically, the burden is on the government to show that no less-restrictive alternative would suffice.[144] Even in commercial contexts, where intermediate scrutiny is more common, the Court has applied strict scrutiny where regulations target particular messages or disfavored speakers.[145]

The FTC's settlement with Omnicom and IPG raises precisely these concerns. The behavioral restriction prohibits the companies from "steer[ing] advertising dollars away from publishers based on their political or ideological viewpoints"—a rule that turns entirely on the content of the publisher's speech. That's a textbook content-based restriction. While the FTC justifies this condition in antitrust terms, *Reed v. Town of Gilbert* (2015) makes clear that even facially neutral justifications cannot save a law that draws content-based distinctions on its face.[146] Even if this restriction is never challenged, the Commission is nevertheless leveraging its regulatory power to compel companies to support or avoid certain kinds of speech. The Commission may believe it is targeting anticompetitive collusion, but it risks chilling legitimate, and protected, editorial judgments by private actors. If there is any ambiguity about the line between permissible antitrust enforcement and unconstitutional speech regulation, the Commission should err on the side of caution.

CONCLUSION

The FTC would do well to remember the wisdom of President Ronald Reagan, who ended meddling in the "fairness" of broadcast media—and thus achieved a longstanding

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[141] 576 U.S. 155, 163–64; *see also* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (to guard against content-based prohibitions as a "repressive force in the lives and thoughts of a free people," the Constitution "demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality" (internal citations omitted)).

[142] *Reed*, 576 U.S. at 163.

[143] United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000). *See also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances.").

[144] *Playboy Ent. Grp.*, 529 U.S. at 813.

[145] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501–04 (1996) (plurality opinion); Cincinnati v. Discovery Network, 507 U.S. 410, 429 (1993).

[146] *See Reed*, 576 U.S. 155 (2015).

conservative goal. Until 1987, the Federal Communications Commission's Fairness Doctrine required broadcasters to represent all sides of controversial issues and to provide opportunity for response to personal attacks in the media.[147] This rule survived only because broadcasters were denied the full protection of the First Amendment—unlike new media.[148] President Reagan's FCC Chairs ended this doctrine, and Congress passed legislation to restore it, which President Reagan vetoed. "[T]he obvious intent of the First Amendment," he explained, was "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."[149] So, too, here. "Bias" is simply not something the FTC, or any other government agency, may regulate—through competition law or any other means.

Respectfully submitted,

_____/s/_____

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[147] 47 U.S.C. § 315.

[148] *See, e.g.*, Brown v. Entertainment Merchants Assn., 564 U.S. 786, 790 (2011) ("whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."); Moody v. NetChoice, LLC, 603 U.S. 707, 717 (2024) ("And we have repeatedly held that laws curtailing their editorial choices must meet the First Amendment's requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world.").

[149] President Ronald Reagan, Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill, Ronald Reagan Presidential Library & Museum (June 19, 1987), https://www.reaganlibrary.gov/archives/speech/message-senate-returning-without-approval-fairness-broadcasting-bill.