TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

Berin Szóka[i] and Santana Boulton[ii]

In the Matter of

Prohibition on Restricting Choice of Content Moderator

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[i] Berin Szóka is President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at bszoka@techfreedom.org.
[ii] Santana Boulton is a legal fellow at TechFreedom. She can be reached at sboulton@techfreedom.org.

TABLE OF CONTENTS

INTRODUCTION

Missouri suggests that its proposed rule will "protect the 'project of the First Amendment' in the context of social media," quoting *NetChoice v. Moody* (2024).[1] Missouri omits the crucial part of that decision, which comes from the very same paragraph: "[T]he government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas."[2] In its rush to regulate social media, Missouri ignores the clear command of the Court: The government can enforce competition laws, but "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."[3] Thus, Missouri may not, in enforcing its competition laws, attempt to supplant the expressive choices of social media platforms.

Forcing social media platforms to offer competing content-moderation services (so-called "middleware") means forcing them to change how they speak, because decisions platforms make about the content they host *are* their protected speech.[4] What the *Moody* Court said about Texas is no less true of Missouri: "The reason Texas is regulating the content-moderation policies that the major platforms use for their feeds *is to change the speech that will be displayed there*."[5] In both cases, "under the First Amendment, that is a preference [the state] may not impose."[6]

Publishers are not immune from the antitrust laws, as the Court made clear long ago in *Associated Press v. United States* (1945).[7] Missouri, however, cannot regulate *speech* by merely labeling it anticompetitive. Regulations that implicate platforms' editorial judgments—their protected speech—will be subject to First Amendment scrutiny.[8] Indeed, the Court will apply strict scrutiny, which this law cannot possibly satisfy.

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[1] 15 C.S.R. 60-19.020, Prohibition on Restricting Choice of Content Moderator, 50 Mo. Reg. 853 (June 16, 2025), https://www.sos.mo.gov/CMSImages/AdRules/moreg/2025/v50n12June16/v50n12.pdf#page=89 ("Proposed Rule").

[2] Moody v. NetChoice, LLC, 603 U.S. 707, 732 (2024).

[3] *Id.* at 732.

[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.

[5] *See Moody* at 743 (emphasis added).

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

[7] 326 U.S. 1, 7 (1945).

[8] *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

I. Content Moderation is Difficult and Inherently Subjective

"Content moderation at scale is impossible to do well."[9] 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.[10] No content moderation regime will please everyone., 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."[11] Platforms are not obligated to host all content that is legal under the First Amendment, although they might *choose* to do so. Thus, the collection of content a platform hosts is its expressive product.[12]

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."[13] 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. Competition Laws Cannot Override the First Amendment

Missouri's core authority under the Missouri Merchandising Practices Act (MMPA) covers unfair methods of competition and unfair or deceptive acts or practices.[14] The state's authority, however, cannot override the First Amendment: the government may not interfere in the marketplace of ideas. As the Supreme Court said last year in *Moody v. NetChoice*:

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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.").

[9] 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/.

[10] *Id.*

[11] *Id.*

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

[13] 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.

[14] Missouri Merchandising Practice Act, Section 407.020, RSMo (2016).

> 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.[15]

The First Amendment constrains the *government*, not private actors.[16] 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. 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.[17]

Social media platforms are fora for speech, but they are not public fora whose speech is limited by the First Amendment:[18] they are speakers whose speech is *protected* by the First Amendment. Missouri may wish that platforms spoke *differently*—in other words, that they moderated content differently—but wishful thinking does not a violation of competition or consumer protection law make. Missouri cannot *make* the platforms speak differently by calling platform control over its own content moderation a "monopoly."[19]

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."[20] In *Moody*, the Supreme Court explained:

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[15] Moody v. NetChoice, LLC, 603 U.S. 707, 732-33 (2024).
[16] *See id.* at 743.
[17] 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).
[18] 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.").
[19] Proposed Rule at 853.
[20] 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

> 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.[21]

Moody is instructive. Because the Fifth Circuit had upheld the Texas law based on "a serious misunderstanding of First Amendment precedent and principle," the Supreme Court found it necessary to give clear, extensive guidance to lower courts and to the government on what counts as protected speech.[22] The Court made clear that these principles apply to the Internet and to social media platforms.[23] 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.[24]

A. Missouri's Interest Is Neither Neutral nor Valid

The *Moody* court did not just rule that the Texas law failed strict scrutiny—it emphasized that the law failed even the lowest level of First Amendment scrutiny. The Court explained: "Even assuming that the less stringent form of First Amendment review applies, Texas's law does not pass," said the Court, because "the interest Texas has asserted … is very much related to the suppression of free expression, and it is not valid, let alone substantial."[25] Simply put, the government has no valid interest in "changing the content of the platforms' feeds,"[26] even under the least stringent form of First Amendment scrutiny. This reflects a core First Amendment principle: the government cannot "interfere with private actors' speech to advance its own vision of ideological balance."[27]

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expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude.").

[21] *Moody*, 607 U.S. at 731-32.

[22] *Id.* at 727.

[23] *Id.* at 733-34.

[24] *Id.* at 740.

[25] *Id.* at 740.

[26] *Id.* at 727.

[27] *Id.* at 741.

This rule applies equally whether the government tries to force a platform to host a specific user or to let a third party moderate content. In either case, the platform is being compelled to *substitute a third party's speech for its own*. Under Missouri's proposed rule, platforms would be required to cede control over how they present content—even when it means displaying material the platform would have removed or restricted.

Just as the government cannot order private parade organizers to include participants,[28] it could not order private parade organizers to put on several different parades, all organized by independent parties. Either way, the government would be changing the expressive decisions, *i.e.*, speech, of the parade organizers—something the First Amendment forbids.

The same goes for newspapers. In *Miami Herald v. Tornillo* (1974), the Court struck down a Florida law that compelled newspapers to host speech from political candidates they did not want to host.[29] The *Tornillo* Court acknowledged that, in many media markets, newspapers held a "monopoly of the means of communication," which "allows for little or no critical analysis of the media except in professional journals of very limited readership."[30] Such monopoly power, however, did not affect the decision.

Suppose that, just as Missouri is now responding to *Moody*, lawmakers had responded to *Miami Herald* by changing tack: instead of mandating that newspapers carry particular speakers' speech, a new law required that newspapers give their subscribers the option of receiving, inside their Sunday paper, an alternative selection of content of their choosing—say, news stories from press pools (*e.g.*, United Press International or Reuters instead of the Associated Press, the clear market leader) or opinion columns from a third-party syndicate (*e.g.*, United Feature Syndicate, Creators Syndicate, King Features Syndicate, or Washington Post Writers Group). The subscriber might even have to pay an additional fee to cover the cost. The newspaper need only print the supplement, include it with other sections of its own Sunday edition, and deliver it to the subscriber who requested it. Would such a law have

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[28] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

[29] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[30] *Id.* at 249-50 ("The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public. The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.")

been treated any differently from the law at issue in *Tornillo*? No. This would still compel newspapers to print speech they'd otherwise exclude. The Court made clear that any such compulsion is unconstitutional:

> [A]ny such a compulsion to publish that which "*reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and, like many other virtues, it cannot be legislated.*[31]

The same applies here: social media platforms "publish" when they disseminate their feeds, and altering those feeds means altering their speech, regardless of whether the interference involves requiring non-discrimination or carrying particular speakers' speech (as in *Moody*) or requiring platforms to outsource their decisions over what speech they publish (as in the hypothetical above).[32]

In *Moody*, Texas relied heavily on *Turner Broadcasting. v. FCC* (1994), which recognized that Congress had a legitimate interest in trying to "save the local-broadcast industry, so that it could continue to serve households without cable."[33] This interest, the *Moody* Court stressed, "was not to balance expressive content," did not involve the "'the alteration of speech,'" and was "'unrelated to the content of expression' disseminated by either cable or broadcast speakers."[34] Thus "the prospects of permissible regulation [were] entirely different" from the circumstances of *Moody*.[35]

Conceivably, some application of competition law or other regulation might somehow relate to content moderation *without* infringing on editorial discretion[36]—in other words, regulations of *business practices*, as contemplated by the *Associated Press* Court.[37] Indeed, the *Moody* decision requires the lower courts to which the Texas and Florida laws were

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[31] *Tornillo*, 418 U.S. at 256 (emphasis original).

[32] Someone will perhaps argue that Section 230(c)(1) changes this analysis. It reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). But of course, an act of Congress cannot change how the First Amendment, or any other part of the Constitution, is applied. This provision, properly understood, can only limit liability under *statutes*.

[33] Turner Broadcasting Systems, Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 647 (1994).

[34] *Id*.

[35] Moody, 603 U.S. at 743 note 10 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 577 (1995)).

[36] *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.").

[37] *See supra* note 8.

remanded to draw such lines.[38] These rulings may shed significant light on how the First Amendment limits the application of consumer protection and competition law to social media. But one thing is clear: regulating to reduce a platform's control over its own speech—*i.e.*, "presenting a curated compilation of speech originally created by others"[39]—cannot be a legitimate government interest. Yet this is plainly what Missouri's proposed rule does.

B. How Competition Law Might Apply

The *Moody* Court said that "the government can take varied measures, like enforcing competition laws, to protect [speech] access."[40] But how can it do that without—as the very next sentence said—"forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm?"[41] Each case cited by *Moody* provides an example of courts permitting the regulation of media companies regarding only their "*business practices*,"[42] not their editorial judgments.

Media companies may not conspire to block competition. In *Associated Press* (1945), the Court permitted antitrust suit against the press pool for allowing member newspapers to veto potential competitors from joining the press pool.[43] Similarly, in *Lorain Journal Co. v. United States* (1951), an antitrust suit could proceed against a newspaper for coercing local businesses to join an advertising boycott of a new radio station as a potential competitor to the newspaper in the advertising market.[44]

Mergers of media companies may reduce competition. *United States v. Greater Buffalo Press* (1971) involved the merger of the two publishers of the comic pages supplement included by newspapers in their editions.[45] Likewise, agreements not to compete may also violate the antitrust laws. In *Citizen Publishing Co. v. United States* (1969), a joint operating agreement between the only two newspapers in a market violated the antitrust laws.[46] It was clear that the agreement affected only business practices and not editorial judgments because it

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[38] 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,* 603 U.S. at 716.

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

[40] *Id.* at 731-32.

[41] *Id.* at 732.

[42] *See supra* note 8.

[43] 326 U.S. 1, 7.

[44] *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[45] United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971).

[46] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

"provided that each paper should retain its own news and editorial department, as well as its corporate identity."[47]

III. Why Strict Scrutiny Will Apply

Because "interfer[ing] with private actors' speech to advance [the government's] own vision of ideological balance"[48] is not a legitimate interest, Missouri's rule will fail regardless of the level of scrutiny the Court applies. But it is also clear that the Court will ultimately apply strict scrutiny to this regulation—a standard the rule cannot possibly survive.

A. Compelled Speech

In *Turner*, the Court rejected the idea that "must-carry" rules for cable triggered strict scrutiny simply because they compelled cable operators to transmit others' speech. Instead, the Court applied intermediate scrutiny:

> The provisions do not intrude on the editorial control of cable operators. They are content neutral in application, and they do not force cable operators to alter their own messages to respond to the broadcast programming they must carry. In addition, the physical connection between the television set and the cable network gives cable operators bottleneck, or gatekeeper, control over most programming delivered into subscribers' homes.[49]

The Missouri rule is distinguishable on each point. Cable operators never objected to the nature of the content they were being compelled to carry.[50] Whereas cable operators had a "long history of serving as a conduit for broadcast signals,"[51] the opposite is true for social media platforms: they actively curate content and exercise editorial judgment. What cable operators objected to was losing control over their channel capacity, and thus the opportunity to maximize their profits. While this involved the editorial control of cable operators, it was closer to what the *Associated Press* Court referred as a "business practice."[52]

Given this, said the *Turner* Court, "appellants do not suggest, nor do we think it the case, that must-carry will force cable operators to alter their own messages to respond to the broadcast programming they are required to carry."[53] This was essential: "Government

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[47] *Id.* at 133.
[48] *Moody*, 603 U.S. at 741.
[49] *Turner*, 512 U.S. at 656.
[50] *Id.* at 629 ("'For the most part, cable personnel do not review any of the material provided by cable networks .... [C]able systems have no conscious control over program services provided by others.'" (quoting Dan Brenner, *Cable Television and the Freedom of Expression*, 37 DUKE L. J. 329, 339 (1988))).
[51] *Id.* at 655.
[52] *See supra* note 8.
[53] 512 U.S. at 655.

action that stifles speech on account of its message, or that ***requires the utterance of a particular message favored by the Government***, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion, rather than persuasion."[54] That risk is present here. Missouri's rule would compel platforms to host and disseminate content they disapprove of, simply because users opt into an alternative content moderation provider. Platforms would, quite naturally, seek to disassociate themselves from that speech—especially if it includes harmful or offensive content they currently remove.

Missouri might argue that no disclaimer is needed, since users would have chosen the content filter themselves. Such an argument would miss the essential point: if platforms abhor certain content today enough to moderate it, the platforms would not want *anyone* to think that they endorse that content—and that is exactly what would happen if users could create their own customized version of, say, Facebook. It is already common practice for lawmakers to show screen shots of content on a social media platform at Congressional hearings and interrogate that company's executive about why they host such content. The same happens on both social media and traditional media: companies are blamed for content that appears on their sites. The same would happen under Missouri's rule. Thus, platforms would feel compelled to try to disclaim association from that speech. It does not matter how great the risk of being associated with appalling speech is: "this Court has never hinged a compiler's First Amendment protection on the risk of misattribution."[55]

The must-carry mandate for cable operators was "content neutral in application."[56] The Missouri law might appear so, but in fact it requires outsourcing of moderation only of certain content. This proviso is critical: "Nothing shall prohibit a social media platform from moderating, restricting, or prohibiting, to the exclusion of other content moderators, content that in the social media company's good-faith judgment" falls into several categories.[57] One of these is for content that is "sexually explicit."[58] Thus, the law favors content that is not sexually explicit over content that is—yet is lawful. We know that this exception applies to lawful content because a further exception applies to content that "is unlawful expression under laws or regulations consistent with the United States Constitution."[59]

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[54] 512 U.S. at 641.
[55] *Id.* at 739.
[56] *Id.* at 655.
[57] Proposed Rule at 854.
[58] *Id.*
[59] *Id.*

Yet another exception to the outsourcing mandate covers content that "the social media platform is specifically authorized to restrict or moderate by federal law."[60] This language is copied directly from Texas's law.[61] If a court engaged in a full assessment of how the Missouri law would work in practice, it would have to conclude that requiring platforms to cede editorial control over some content but not others is a form of content-based discrimination. It would be as if Congress had mandated that cable operators carry broadcasters' channels *depending on the nature of content there*. There is no doubt what the Supreme Court would do: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[62]

Finally, the *Turner* Court emphasized the "unique physical characteristics of cable transmission,"[63] which distinguished the medium from newspapers and thus justified a different result from *Tornillo*: "when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale."[64] This went far beyond the "monopoly of the means of communication" that newspapers enjoyed in *Miami Herald*;[65] it was a degree of control that was fundamentally different in kind:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the *essential pathway* for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[66]

This "gatekeeper" control arose not from market forces but from government itself: "The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property.

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[60] Proposed Rule at 854.
[61] Act of September 2, 2021, 87th Leg., 2d C.S., ch. 3 ("HB20") ("the social media platform is specifically authorized to censor by federal law.").
[62] Reed v. Town of Gilbert, 576 U.S. 155, ___ (2015).
[63] 512 U.S. 622, 639.
[64] *Id.* at 656.
[65] 418 U.S. 241, 250 (1974).
[66] 512 U.S. at 656.

As a result, the cable medium may depend for its very existence upon express permission from local governing authorities."[67]

None of this applies here. The *Moody* Court was clear: Social media platforms are no different from the newspapers at issue in *Tornillo*.[68] Both enjoy the full protection of the First Amendment.

B. Speaker-Based Discrimination

The *Turner* Court also rejected arguments that it should "apply strict scrutiny because the must-carry provisions favor one set of speakers (broadcast programmers) over another (cable programmers)."[69] Similarly, the Missouri rule discriminates among speakers: it imposes special duties on large platforms that do not apply to smaller platforms or other media,[70] and it favors some speakers' speech (those who feel their content is being unfairly moderated) over other speakers' speech (the platforms). Because the law applies only to platforms with more than "50 million distinct, active users in the United States in a calendar month," it applies to Instagram, Facebook, YouTube, and TikTok, but not Truth Social, Rumble, or Gab.[71]

The *Turner* Court was clear: "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."[72] That is plainly the case here: Missouri, like Texas and Florida, resents what it calls "censorship" and has crafted a law to prefer some speakers' editorial judgments over others. This is true in a very practical sense: the law literally requires covered platforms to turn their editorial judgments over to third-parties. The outcome would be entirely predictable: to massively reduce content moderation of speech that Missouri favors for political reasons.

IV. The Regulation Would Fail Both Strict and Intermediate Scrutiny

Missouri's regulation cannot survive strict scrutiny, because it is neither narrowly tailored nor supported by a compelling government interest. The state may claim an interest in promoting user choice or ideological diversity, but the Supreme Court has consistently held

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[67] *Id.* at 628.
[68] *Moody*, 603 U.S. at 731.
[69] *Turner*, 512 U.S. at 657.
[70] Proposed Rule at 854.
[71] While the Supreme Court has never required absolute precision in targeting only disfavored speakers as a reason to apply strict scrutiny, it is worth noting that Missouri's targeting is almost perfect: the only platform that the law does cover that has generally been on Missouri's side of the political conflict over content moderation is X.
[72] *Id.* at 658.

that the government may not force private speakers to carry speech they reject in order to "balance" the marketplace of ideas. That is not a compelling interest—it is the very kind of state interference the First Amendment forbids. Even if the interest were valid, the regulation is not narrowly tailored: it directly compels platforms to cede editorial control and disseminate content they would otherwise suppress, while applying only to certain platforms and privileging certain kinds of lawful content. A less restrictive alternative—such as encouraging third-party platforms or promoting media literacy—would advance the same goals without coercing speech. Instead, Missouri's rule operates as a content- and speaker-based mandate that forces disfavored platforms to host disfavored speech, while excluding others from its reach. Under the First Amendment, such a regime is presumptively unconstitutional. Missouri has offered no evidence or justification that could overcome that presumption.

Even if a court declined to apply strict scrutiny, Missouri's rule would not satisfy even intermediate scrutiny. The state's interest simply is not legitimate, as explained above. But even if the court somehow thought otherwise, the regulation would still fail intermediate scrutiny for other reasons. The *Turner* Court explained: "a regulation need not be the least speech-restrictive means of advancing the Government's interests," as under strict scrutiny," but the government must show that the "'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' … in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[73] Critically, the government bears this burden. The proposed rule does nothing to show that there is no less burdensome way to address concerns about users' speech.

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

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.[74] 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

[73] 512 U.S. at 662 (quoting Ward v. Rock Against Racism, 491 U. S. 781, 799 (1989)).
[74] *See supra* II.

> contexts that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[75]

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.'"[76]

Defending this principle has long been a central tenant of the conservative legal movement. Yet Missouri, frustrated with the limits the Constitution places on government power, seeks to regulate free speech by reframing protected editorial judgments as antitrust injury.

Missouri frames denial of service as a consumer protection issue, calling it "censorship."[77] Even if this were true, there is no remedy Missouri could enforce that would not run afoul of the First Amendment: "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."[78]

Those decisions are 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. Missouri cannot—and *should not*—force platforms to carry speech favored by the government.

VI. The Threat of Agency Action Is Itself a First Amendment Problem

Clearly, the proposed rule simply cannot survive First Amendment review. It is also clear that this rule is part of an ongoing campaign to intimidate social media services into changing their content moderation practices. The rule states at the outset that it "does not contain an exhaustive list of practices that violate [Missouri's Merchandising Practices] Act." Missouri's Attorney General is apparently just warming up.

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[75] *Moody*, 603 U.S. at 741-42 (quoting Buckley v. Valeo, 424 U. S. 1, 48–49 (1976) (*per curiam*)).
[76] 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)).
[77] Proposed Rule at 853.
[78] NetChoice v. Moody, 34 F. 4th 1196, 1210 (11th Cir. 2022), *rev'd for reconsideration of facial challenge*, 603 U.S. 707 (2024).

Indeed, since this rule was announced, he has sent a series of letters to major AI operators, threatening them with legal action under Missouri's consumer protection statute because of alleged political bias in the results generated by AI tools.[79] This allegation is nothing short of frivolous. AI developers enjoy the protection of the First Amendment for the results speech tools generate based on algorithms they design. The *Moody* Court reiterated this basic principle: "[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of the First Amendment do not vary."[80] What's true for newspapers and parades is true for social media platforms and AI developers.

What is really happening here is shameless jawboning: the use of "informal pressure by a government actor on a private entity … that operates at the limit of, or outside, that actor's authority."[81] 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.[82] 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."[83] Under the First Amendment, the government may not force a private social media platform "to accommodate messages it would prefer to exclude."[84]

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 concern about government jawboning that is "more subtle" but "no less coercive."[85] 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.[86] These justices have gone so far as to claim that jawboning of social media platforms creates special problems, because those platforms are, in these justices' telling, extraordinarily "vulnerable to Government pressure."[87]

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[79] Letter from James Lawson, Acting Chief of Staff for Andrew Bailey, Attorney General of Missouri, to Sundar Pichai, CEO of Google (July 9, 2025), https://ago.mo.gov/wp-content/uploads/2025.07.09-Google-LLC-Sndar-Pichai-Letter.pdf.

[80] *Moody*, 603 U.S. at 733 (quoting Brown v. Entertainment Merchants Assn., 564 U. S. 786, 790 (2011) (cleaned up)).

[81] Derek E Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 57 (2015), https://scholarship.law.umn.edu/mlr/182/.

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

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

[84] *Id.* at 731.

[85] Murthy v. Missouri, 603 U.S. ___, slip op. 4 (2024) (Alito, J., dissenting), https://www.supremecourt.gov/opinions/23pdf/23-411_3dq3.pdf.

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

[87] *Id.* at 5 (Alito, J., dissenting).

Jawboning may be used to circumvent constitutional limits on governmental interference: "the First Amendment institutionalizes a strong preference, if not a command, for government actors to channel regulatory demands via formal mechanisms rather than informal ones."[88] Moreover, "Internet platforms face structural incentives to knuckle under government jawboning over content," which makes them "unusually vulnerable to government pressures, both formal and informal."[89] As a leading scholar of jawboning explains:

> Firms that host disfavored content reap little benefit, since any single user or source generates but tiny revenue for the platform. However, they face the full force of any legal liability or public disapprobation that attends that material. The cost-benefit calculus is clear: it makes sense to censor anything questionable.[90]

This contemplated jawboning aimed to coerce platforms to take down user-generated content, but the same goes for content created by AI tools, or for content moderation decisions. In each case, platforms are vulnerable to jawboning.

The Supreme Court has recently had to address growing concerns about jawboning—especially among Republicans who believed the Biden Administration abused its powers to pressure platforms to moderate more content. 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."[91] But if *informal* messages from government officials to a platform can qualify as unlawful jawboning, all the more so can an *official government investigation* of a platform do so—and it does not matter whether jawboning aims to pressure platforms to take content down or to keep it up. "[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."[92] Simply put, then: An ongoing investigation of a platform, the aim of which is to *change the platform's content moderation decisions*, violates the First Amendment.

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[88] Bambauer, *supra* note 81, at 60.
[89] *Id.* at 84.
[90] *Id.* at 60.
[91] *Murthy* at 14 (Alito, J., dissenting).
[92] Morrison v. Olson, 487 U.S. 654, 712-13 (1988) (Scalia, J., dissenting).

Here, the message from Missouri is unmistakable: do not moderate content in ways we do not like. This message will lead to more censorship, not less: the state will be interfering in the exercise of platforms' First Amendment rights.

VII. Conclusion

Missouri has embarked on a long, fraught journey to regulate the content moderation practices of Internet platforms, as well as any other editorial judgments the state dislikes. The First Amendment, however, stands in Missouri's way: the Constitution protects the editorial discretion of platforms to curate content as they see fit. Missouri cannot regulate moderation practices to change the balance of speech on platform' feeds without violating the First Amendment. Missouri should stick to doing what the First Amendment allows: policing the *business practices*[93] of new media companies, like any other company, and accept that these companies' editorial judgments are simply beyond the reach of Missouri law.

Respectfully submitted,

_____/s/_____

Berin Szóka
President
bszoka@techfreedom.org

Santana Boulton
Legal Fellow
sboulton@techfreedom.org

TechFreedom
1500 K St NW
Floor 2
Washington, DC 20005

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[93] *See supra* note 8.