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Comments of

TechFreedom

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In the Matter of

Request for Public Comment Regarding "Gender-Affirming Care" for Minors

FTC-2025-0264

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INTRODUCTION

This "Request for Public Comment [(RFC)] Regarding 'Gender-Affirming Care' for Minors" (GAC) "seeks to evaluate whether consumers (in particular, minors) have been harmed by GAC and whether medical professionals or others may have violated Sections 5 and 12 of the Federal Trade Commission (FTC) Act by failing to disclose material risks associated with GAC or making false or unsubstantiated claims about the benefits or effectiveness of GAC."[1]

I. The Commission Should Leave GAC to Medical Professionals

The Commission's "broad mandate …. to prevent 'unfair or deceptive acts or practices' …. includes making sure the information marketers provide about the benefits and safety of … health-related products is accurate so consumers can make informed decisions."[2] The key word here is *marketers*. The Commission polices marketing, advertising and, in some other limited circumstances, other commercial "acts and practices" provided to consumers; it "does not regulate the practice of medicine" and "cannot make policy decisions limiting sex transition treatments for minors," as Commissioner Melissa Holyoak noted at the FTC's July workshop on this topic.[3]

Why, then, does Question 1 of this RFC invite comment on personal experiences with "medical professionals"? Commissioner Holyoak, despite her recognition of the limit of the FTC's authority, asserts that "the question medical providers have posed to parents did not present a truthful representation of the consequences of gender-affirming treatment."[4] If medical professionals are, indeed, misleading patients about GAC, that is a matter for state medical boards to address, not the FTC.[5]

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[1] Fed. Trade Comm'n, *Request for Public Comment Regarding "Gender-Affirming Care" for Minors* (July 28, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/GAC-RFI-FINAL.pdf.

[2] Fed. Trade Comm'n, Health Products Compliance Guidance, (2022) https://www.ftc.gov/system/files/ftc_gov/pdf/Health-Products-Compliance-Guidance.pdf?.

[3] Melissa Holyoak, Commissioner, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors at 46 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf.

[4] *Id.* at 47.

[5] "States have a compelling interest in the practice of processions within their boundaries, and … as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standard for licensing practitioners and regulating the practice of professions." Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975). *See also* Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, VIRTUAL MENTOR, Ethics Journal of the American Medical Association (April 2005), https://journalofethics.ama-assn.org/sites/joedb/files/2018-06/pfor1-0504.pdf ("State medical boards are the agencies that license medical doctors, investigate complaints, discipline physicians who violate the medical practices act, and refer physicians for evaluation and rehabilitation when appropriate. The overriding mission of medical boards is to serve the public by protecting it from incompetent, unprofessional and improperly trained physicians.").

One reason this is so is that Section 5 of the FTC Act applies to "unfair or deceptive acts or practices in or affecting *commerce*,"[6] while Section 12 likewise applies to "false advertisements" "in or having an effect upon *commerce*."[7] The word "commerce" means *interstate* commerce.[8] The FTC simply cannot police intrastate activity, such as what doctors tell their patients.

Moreover, the Commission sorely lacks the expertise necessary to weigh the scientific evidence about GAC. The agency is unlikely to develop any such experience; certainly, the workshop evinced no interest in doing so.

The other questions posed by the RFC at least pertain to the kinds of things the FTC *might* be able to police: promotions, advertisements, or other public statements about GAC. Yet even here, the FTC must tread carefully. To date, the Commission has applied its authority only in narrow circumstances where such representations, or omissions, are clearly deceptive, such as making unsupported claims about the health benefits of nutritional supplements,[9] or obvious scams such as those involving supposed stem cell therapy.[10]

Those cases focused on clear, indisputable medical harms. Here, the FTC is considering jumping headlong into hotly contested questions about medicine and gender identity. GAC is widely supported by medical professionals.[11] The Commission will have a difficult time, in general, showing that medically supported public statements about GAC are deceptive or false. To be sure, some people *do* regret their gender transitions or have other negative experiences with GAC. Inviting individuals to comment on their personal experiences may highlight examples of specific individuals whose experience with GAC did not match their expectations, and, potentially, those who overstate the benefits of GAC or understate its risks in a marketing context, but such an inquiry will only tell a small part of a complex story and

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[6] 15 U.S.C. § 45(a) (emphasis added).
[7] 15 U.S.C. § 52 (emphasis added).
[8] 15 U.S.C. § 44.
[9] Fed. Trade Comm'n, FTC Warns Almost 700 Marketing Companies They Could Face Civil Penalties If They Can't Back Up Their Claims (Apr. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-warns-almost-700-marketing-companies-they-could-face-civil-penalties-if-they-cant-back-their.
[10] *See, e.g.*, Regenerative Medical Group, Inc., Fed. Trade Comm'n (Apr. 30, 2019), https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3062-regenerative-medical-group-inc.
[11] *See generally* American Academy of Pediatrics, Brief Of Amici Curiae American Academy Of Pediatrics and Additional National and State Medical and Mental Health Organizations In Support Of Petitioner and Respondents In Support Of Petitioner, United States v. Jonathan Skrmetti, No 23-477 (U.S. Sept. 3, 2024) (amicus brief), https://www.supremecourt.gov/DocketPDF/23/23-477/323964/20240903155151548_23-477%20tsac%20Brief%20of%20Amici%20Curiae%20AAP%20et%20al..pdf.

a complex factual inquiry. Notably, the Commission does *not* ask about the other side of the coin: either detransition or the impacts of not receiving GAC.

At the July workshop, Chair Andrew Ferguson highlighted a select handful of experiences. "After years of intense mental health struggles," he said, "these girls and their parents were looking for any path that might lead them to genuine healing, and they encountered physicians, therapists and surgeons, who purported to provide them with one."[12] This—the practice of medicine—simply is not a problem the FTC has the authority to address, however harmful it might be; collecting similar stories will not help the FTC build any valid UDAP case.

What this inquiry may well do, even if the Commission never brings an enforcement action, is chill speech about politically controversial medical practices. The efficacy of GAC is among the most contentious political issues in America today. Indeed, it is almost impossible to separate the question of GAC's efficacy from that of its *morality*. Assessing whether GAC "works" is deeply tied up in questions of gender identity—questions that are a matter of intense public debate. The Commission has *never* attempted to police such politically or morally contentious content. Notably, the Commission never attempted to insert itself on either side of the abortion debate. The Commission should leave this area to medical professionals.

II. If the Commission Is Determined to Do Something, It Should Start by Holding a Workshop on the Scope of Its Authority, Including the First Amendment

If the agency is determined to wade into this area, it must tread very, very carefully. It must first and foremost consider the views of medical experts, but it must also carefully consider how the FTC Act and First Amendment limit its authority before saying anything about GAC—and especially before proceeding with any enforcement action.

During the first Trump administration, the Commission held roughly two dozen public workshops to explore the future of consumer protection and competition law.[13] These offer an excellent model for how the Commission might proceed in this area with appropriate caution. Such a hearing should, of course, include medical professionals to develop a more complete factual record than this RFC can. But such a hearing should explore legal limits on the Commission's powers with diverse array of experts in both FTC case law and the First

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[12] Andrew Ferguson, Chairman, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors, at 3 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf/.

[13] Events, Fed. Trade Comm'n, https://www.ftc.gov/news-events/events?items_per_page=20&search=Workshop&start_date=2017-01-20&end_date=2021-01-20 (last visited Sept. 26, 2025).

Amendment. Notably, the Commission's July workshop included no discussion of the First Amendment or "free speech" whatsoever.

Even after such a workshop, the Commission should be very cautious in how it wields its enforcement powers. As the Supreme Court recognized long ago, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" can be "informal censorship."[14] At least two members of the Commission, and top staff, have not been subtle about making such threats about GAC.[15]

III. Politicized Investigations Can Impose Chilling Effects

Investigations, when used to harass or intimidate, can impose unconstitutional chilling effects: "the costs of responding to [agency] inquiries …, as well as the uncertainties involved, independently exert a chilling effect on [a speaker's] willingness to court official displeasure."[16] A court's "ultimate concern is not so much with what government officials will actually do, but with how reasonable [entities] will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation."[17]

Publicizing the Commission's inquiries serves no legitimate law enforcement purpose, but it does greatly amplify the *in terrorem* effects of the Commission's inquiry over those targeted by the agency. Here, that especially includes parties the Commission would be least justified in trying to regulate: the "specialists" (*i.e.*, medical professionals) decried by Ferguson.[18]

IV. Civil Penalties Amplify Chilling Effects

The Commission has certainly not been "speak[ing] softly" but and certainly does "carry a big stick"[19]: The threat of civil penalties, which could be up to $53,088 per violation,[20] and

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[14] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963) (holding unconstitutional a state commission's practice of informally pressuring book distributors not to carry "objectionable" publications).
[15] *See infra* Section VI.
[16] *Community-Service Broadcasting of Mid-America*, 593 F.2d 1102, 1116 n. 33 (D.C. Cir. 1978).
[17] *Id.* at 1116.
[18] Andrew Ferguson, Chairman, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors, at 3 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf/.
("At a loss for how to help their child helpless parents seek the advice of medical specialists who believe they will provide objective evidence-based guidance. After a brief meeting with the child, the specialist may proclaim that his or her problems can be solved by undergoing a medical transition.").
[19] Theodore Roosevelt, Speech at the Minnesota State Fair (Sept. 2, 1901).
[20] Fed. Trade Comm'n, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2025, (Feb. 11, 2025) https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2025.

which might be multiplied by the number of individuals affected. Such potentially enormous penalties greatly amplify the chilling effects of threats against GAC content.

To avoid imposing chilling effects on speech protected by the First Amendment, the Commission should clarify how it might use the three tools by which it could potentially seek civil penalties.

A. Penalty Offense Notices (§ 5(m)(1)(B))

At the July workshop, Josh Payne, a trial lawyer who has served as "lead counsel on behalf of Detransitioners in medical malpractice litigation" in three states,[21] encouraged the Commission[22] to seek civil penalties under Section 5(m)(1)(B). This provision applies after the Commission has issued a final cease and desist order in an adjudicatory proceeding regarding an act or practice, provided notice to companies of the order, and then found those companies to have engaged in that same act or practice despite having "actual knowledge that [it] … is unfair or deceptive."[23] This is an extraordinary power, seldom wielded by the Commission and only recently revived.[24] It applies only when a rule is "clear."[25]

In April 2023, the Commission issued a "Notice of Penalty Offenses Concerning Substantiation of Product Claims" to 670 companies in the health-related product sector, including this:

> It is an unfair or deceptive act or practice for an advertiser to represent expressly or by implication that a product is effective in the cure, mitigation, or treatment of any serious disease … without possessing and relying upon at least one human clinical trial of the product that (1) is randomized, (2) is well controlled, (3) is double-blinded (unless the marketer can demonstrate that

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[21] Mark Meador, Commissioner, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors, at 74 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf/.

[22] Josh Payne, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors, at 80-81 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf/.

[23] 15 U.S.C. § 45(m)(1)(B).

[24] Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. 71 (2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9763&context=penn_law_review.

[25] Fed. Trade Comm'n, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on Commerce, Science, and Transportation, at 2 (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589176/formatted_prepared_statement_0420_senate_hearing_42021_final.pdf ("where a company is subject to an order; or we have adopted a rule; or Congress has passed a statute; or we send a notice under 5(m)(1)(B) – in all these circumstances, where rules are clear, penalties apply.").

> blinding cannot be effectively implemented given the nature of the intervention), (4) is conducted by persons qualified by training and experience to conduct such studies, (5) measures disease end points or validated surrogate markers, and (6) yields statistically significant results.[26]

These requirements impose enormous costs upon anyone attempting to make health claims for a product. Such costs could easily be large enough to significantly suppress GAC-related speech. The cases cited by this Notice of Penalty Offense involved the health benefits of commodity products that were mass-marketed to consumers: pomegranate juice (*Pom Wonderful*) and a topical analgesic (*Thompson Medical*).[27] Neither case involved the provision of medical services or contentious political issues of social policy. Thus, neither raised the kind of First Amendment questions that would be implicated by bringing an enforcement action over GAC, let alone imposing civil penalties for GAC based on the 2023 Notice of Penalty Offenses. It would be wildly inappropriate to impose civil penalties under this Notice.

Moreover, that 2013 Notice omits the key proviso to the rule requiring randomized critical trial. The Commission had noted, said the D.C. Circuit, that this rule might not apply "if an ad were to incorporate an effective disclaimer, such as a statement that the 'evidence in support of this claim is inconclusive.'"[28] Only because "POM's ads contained no such qualifier" did the "Commission [hold] petitioners to the general substantiation standard for non-specific establishment claims—*i.e.*, the requirement that petitioners possess evidence sufficient to satisfy the relevant scientific community of the truth of their claims."[29] The general rule remains that established in *Pearson v. Shalala* (D.C. Cir. 1999), and cited by in *Pom Wonderful*—which is, as TechFreedom argued in an amicus brief filed in the latter case, "the First Amendment require[s] allowance of qualified claims based on the totality of the scientific evidence as a less speech-restrictive alternative to outright suppression."[30]

In other words, it *could*, if done properly, be appropriate for the Commission to advise those engaged in making marketing claims for GAC products and services—as distinguished from

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[26] Fed. Trade Comm'n, Notice of Penalty Offenses Concerning Substantiation of Product Claims, (2023) https://www.ftc.gov/system/files/ftc_gov/pdf/Substantiaton-NPO.pdf.
[27] *Id.* (citing POM Wonderful, LLC, 155 F.T.C. 1 (2013), aff'd in part, 777 F.3d 478 (D.C. Cir. 2015); Thompson Med. Co., 104 F.T.C. 648 (1984), 791 F.2d 189 (D.C. Cir. 1986)).
[28] 777 F.3d at 489 (quoting POM Wonderful LLC, No. 9344, Final Order at 44 (U.S. Fed. Trade Comm'n Jan. 10, 2013) (quoting Pearson v. Shalala, 164 F.3d 650, 659 (D.C. Cir. 1999))).
[29] *Id.*
[30] TechFreedom, Brief of Amici Curiae Alliance for Natural Health-USA And TechFreedom Supporting Petitioners' Opening Brief, 3, Pom Wonderful LLC v. Fed. Trade Comm'n, No 13-1060m, (D.C. Cir. 2013) (amicus brief) https://techfreedom.org/wp-content/uploads/2023/02/Docket-13-1060-POM-v-FTC.pdf.

medical professionals providing advice in specific cases—to include provisos in their marketing claims making clear that their claims are not conclusive.

But in general, when it comes to GAC, where commercial and non-commercial speech may be closely intertwined, the need to avoid suppressing valuable speech is much greater than in the case of a purely commercial speech claim. If the Commission were to use the 2013 Notice of Penalty Offenses (derived from those cases) as a basis for imposing civil penalties under Section 5(m)(1)(B) on those speaking about GAC, it could impose significant burdens on non-commercial speech about GAC or about transgender identity more generally—and possibly run afoul of the First Amendment.

It might sometimes be possible to disentangle such non-commercial speech from purely commercial speech involved in marketing GAC products or services. If so, the imposition of civil penalties under Section 5(m)(1)(B) might be appropriate. But to do so, the Commission must first bring an enforcement action regarding such marketing and successfully litigate it all the way to an order; importantly, this cannot include a settlement.[31] Only then could the Commission conceivably issue some new, narrowly tailored Notice of Penalty Offenses.

To avoid chilling constitutionally protected speech, the Commission should otherwise abjure the use of Section 5(m)(1)(B) in this area.

B. Advertising Violations (§§ 12 & 14)

Where the Commission proceeds under Section 12 against "false advertisements" "in or having an effect upon commerce,"[32] it may impose civil penalties under Section 14 "if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead…"[33] The RFC's questions about injury could be interpreted to suggest that the Commission is contemplating use of this mechanism; after all, deception claims under Section 5 do not require proof of injury. (Or the Commission may be contemplating bring unfairness actions against GAC.)

The Commission would have a difficult time establishing that specific GAC practices are, on net, "injurious to health" and an even harder time establishing an "intent to defraud or mislead." So it is unlikely that the Commission would be able to impose civil penalties

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[31] 15 U.S.C. § 45(m)(1)(B) ("If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States…).

[32] 15 U.S.C. § 52.

[33] 15 U.S.C. § 54(a).

through this mechanism. But implying that it *might* do so could nonetheless give the Commission additional leverage against GAC speech it wants to squelch *unconstitutionally*.

C. Rule Violations (§ 5(m)(1)(A))

At the July hearing, Payne mentioned a third option:[34] If the Commission issued a rule governing GAC, it could impose civil penalties for violations of that rule. The issuance of such a rule would be subject to significant procedural safeguards under the Magnuson-Moss Act.[35] While we do not support this approach, any such rule must be carefully tailored based on public input and subject to judicial review, as discussed below.

V. How *Not* to Proceed

If the Commission is determined to expend enforcement and policy resources in this area, the Commission's next step should be to hold a public workshop exploring the legal limits on its authority, how to avoid chilling speech protected by the First Amendment, especially non-commercial speech, and under what circumstances, if any, the Commission might appropriately seek to impose civil penalties regarding GAC.

A. Case-by-Case Enforcement Would Likely, and Dangerously, Produce a "Common Law of Settlements"

After holding such a workshop (or if the Commission declines to do so), the Commission *should not* proceed through case-by-case rulemaking. In theory, this might allow the agency to apply its authority to specific cases, focusing only on those acts of practices that are truly harmful to consumers. But in practice, the history of the Commission's use of its authority in UDAP cases tells a very different story: in UDAP cases, nearly all companies settle rather than litigate. While this allows them to avoid the expense, hassle, and reputational costs of litigation, it also means that it will not be courts that decide the boundaries of the law but the Commission itself. The Commission has, improperly, used this leverage to build what it has called a "common law" of settlements on privacy, data security and other areas of significant importance.[36] As we warned a decade ago, this approach "lacks the key virtue of the common

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[34] Remarks of Josh Payne, *supra* note 22, at 81.

[35] 15 U.S.C. § 57a.

[36] Commissioner Julie Brill, Privacy, Consumer Protection, and Competition, speech given at 12th Annual Loyola Antitrust Colloquium (Apr. 27, 2012), http://www.ftc.gov/sites/default/files/documents/public_statements/privacy-consumer-protection-and-competition/120427loyolasymposium.pdf ("Yet our privacy cases are also more generally informative about data collection and use practices that are acceptable, and those that cross the line, under Section 5 of the Federal Trade Commission Act creating what some have referred to as a common law of privacy in this country.").

law: a neutral tribunal carefully weighing limiting principles."[37] Moreover, this approach has "allowed the FTC to effectively circumvent not only the process reforms of [the Magnuson-Moss Act] but also the substantive constraints volunteered by the FTC later [in 1980] in the Unfairness Policy Statement and, three years later, in the Deception Policy Statement."[38]

If the Commission were to use its leverage to create such a body of quasi-precedents governing GAC, it could circumvent judicial review and thus impose significant burdens on free speech by limiting or precluding the opportunity for anyone to raise First Amendment concerns. This is precisely what just happened in the Commission's settlement of its enforcement action against Aylo, the parent company of Pornhub.[39] That settlement raises profound First Amendment concerns that were neither considered by the Commission nor put before the federal judge who rubberstamped the stipulated order negotiated by the Commission and the company.[40] This settlement is an unfortunate model for how the Commission abuses its power to coerce companies into settling entirely novel claims despite their grave First Amendment implications; it may also signal the beginning of the FTC's crackdown on politically disfavored content far beyond child sexual abuse material (CSAM), which of course has no First Amendment protection (nor does it have any defenders, least of all us).

Indeed, Commissioner Meador has suggested that the settlement was just a "first step that we could take under the powers that we have," adding: "There's a much bigger problem with even the quote-unquote 'consensual' pornography that's out there," which, he said, "poses a grave threat to children…"[41] There is significant reason to fear that such a campaign would aim to suppress speech about GAC, and about transgender identity more generally, as discussed below.

To avoid the short-circuiting of any discussion of the First Amendment, if the Commission decides to bring enforcement actions related to GAC, and the companies involved choose to

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[37] Berin Szoka, *To Protect Consumers Congress Must Limit The FTC's Discretion*, THE HILL (Aug. 27, 2015), https://thehill.com/blogs/congress-blog/251934-to-protect-consumers-congress-must-limit-the-ftcs-discretion/.

[38] Berin Szóka & Geoffrey A. Manne, The Federal Trade Commission: Restoring Congressional Oversight of The Second National Legislature 4-5 (2016), https://laweconcenter.org/wp-content/uploads/2017/09/ftc-restoring-congressional-oversight.pdf.

[39] Fed. Trade Comm'n, Pornhub/Mindgeek/Aylo, (Sept. 3, 2025), https://www.ftc.gov/legal-library/browse/cases-proceedings/pornhubmindgeekaylo.

[40] Mike Masnick, *Techdirt Podcast Episode 431: The Many Problems with the FTC's Pornhub Settlement*, TECHDIRT (Sept. 23, 2025), https://www.techdirt.com/2025/09/23/techdirt-podcast-episode-431-the-many-problems-with-the-ftcs-pornhub-settlement/.

[41] Zack Halaschak, *FTC commissioner Meador emphasizes protecting children online after porn settlement*, THE WASH. EXAMINER (Sept. 9, 2025), https://www.washingtonexaminer.com/policy/finance-and-economy/3797941/mark-meador-emphasizes-protecting-children-ftc-porn-settlement/.

settle after the filing of a complaint in federal court, the Commission should commit now to do what it is required to do by rule in matters settled before the Commission's complaint counsel file a complaint in federal court:[42] offer the public the opportunity to comment on the settlement before it is submitted to a federal court for approval—as federal courts routinely rubberstamp stipulated orders submitted to them by the FTC.

B. The Better Approach: Making Recommendations

Alternatively, if, after examining the record created in response to this RFC, the Commission finds reliable evidence (not merely anecdotes) that misrepresentation of the health benefits or risks of GAC are prevalent, it should refer its findings to state medical boards or the American Medical Association. It might also issue a report recommending legislation to Congress.

C. A Last Resort: Rulemaking

If, in the end, the Commission is determined to apply Section 5 to GAC, the least harmful approach may be to use the process Congress created to ensure the input of experts and all affected stakeholders: a Magnuson-Moss rulemaking.[43] We do not endorse such a rulemaking, but at least, it might be better than the Commission making de facto rules without the opportunity for public comment.

No such rulemaking should be undertaken before the Commission restores the procedural safeguards in the Magnuson-Moss rulemaking process that were bypassed by the previous Commission. At the time, both Republican Commissioners dissented from the decision to "modernize" this rulemaking process.[44] This Commission should rectify that mistake, as Republican Commissioners Noah Phillips and Christine Wilson argued at the time. In particular, the Commission should commit to appointing an independent presiding officer to run such hearings. An independent, expert officer would serve as a neutral judge of procedural matters and avoid any appearance of prejudgment or political motivations.[45]

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[42] 16 C.F.R. § 2.34(c),

[43] 15 U.S.C. § 57a.

[44] Fed. Trade Comm'n, Joint Statement of Commissioners Wilson and Phillips on the Commission's Rules of Practice (Mar. 16, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf; Commissioner Christine S. Wilson, Dissenting Statement at the Commission Meeting on the Commission's Rules of Practice (Mar. 16, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.

[45] *See generally* TechFreedom, Comments on Trade Regulation Rule on Commercial Surveillance and Data Security, FTC-2022-0053-0001, at 38-39, (Nov. 21, 2022), https://techfreedom.org/wp-

VI. Commissioners and Staff Must Avoid Prejudgment

However the Commission decides to proceed, Commissioners and FTC staff must be careful not to comment about the potential unlawfulness of statements about GAC, least they further jeopardize the impartiality of the Commission in any future enforcement actions. An agency's "reputation for objectivity" is in question if "a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[46]

Chair Ferguson has already been outspoken in condemning GAC. As a Commissioner, Ferguson lobbied the then-incoming administration to be made Chair. He promised to "Fight Wokeness" and "Fight back against the trans agenda."[47] More specifically, he promised to: "Investigate the doctors, therapists, hospitals, and others who deceptively pushed gender confusion, puberty blockers, hormone replacement, and sex-change surgeries on children and adults while failing to disclose strong evidence that such interventions are not helpful and carry enormous risks."[48] That he made this promise is hardly surprising, given that opposition to all things transgender has been a top priority of this Administration. Consider, as but one indicium of that opposition and what it really entails, Project 2025, the Heritage Foundation's manifesto for this administration, which opens thus on pages 3 and 4 of 920:

> PROMISE #1: RESTORE THE FAMILY AS THE CENTERPIECE OF AMERICAN LIFE AND PROTECT OUR CHILDREN. …
>
> ***Pornography, manifested today in the omnipresent propagation of transgender ideology*** and sexualization of children, for instance, is not a political Gordian knot inextricably binding up disparate claims about free speech, property rights, sexual liberation, and child welfare. It has no claim to First Amendment protection. Its purveyors are child predators and misogynistic exploiters of women. Their product is as addictive as any illicit drug and as psychologically destructive as any crime. ***Pornography should be outlawed.*** The people who produce and distribute it should be imprisoned. Educators and public librarians who purvey it should be classed as registered

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content/uploads/2022/11/TechFreedom-Comments-Trade-Regulation-Rule-on-Commercial-Surveillance-and-Data-Security.pdf.

[46] Gilligan, Will Co. v. SEC, 267 F.2d 461, 468-69 (2nd Cir. 1959).

[47] Mike Masnick, *Incoming FTC Chair: I Will Stop All These Investigations That I Falsely Claim Are Politically Motivated In Order To Launch My Own Openly Politically Motivated Investigations*, TECHDIRT (Dec. 11, 2024), https://www.techdirt.com/2024/12/11/incoming-ftc-chair-i-will-stop-all-these-investigations-that-i-falsely-claim-are-politically-motivated-in-order-to-launch-my-own-openly-politically-motivated-investigations/.

[48] *Id.*

> sex offenders. And telecommunications and ***technology firms that facilitate its spread should be shuttered***.[49]

This is a call for the entire federal government to crack down on "pornography," defined so broadly as to include content that "propagates" "transgender ideology."

It is in this politically charged context that courts will doubtless be called upon to assess whether the Chair Ferguson and his colleagues have prejudged whatever enforcement actions they may decide to take regarding GAC. Even in run-of-the-mill matters that do not involve political pre-commitments to take certain actions, FTC Commissioners' public comments evincing prejudgment have disqualified them from judging cases and "[w]herever there may be reasonable suspicion of unfairness," courts say, "it is best to disqualify."[50]

Yet, unfortunately, if a Commissioner refuses to recuse, and the Commission rejects a motion to disqualify a Commissioner (inevitable in this context), courts have said that denial of a motion to recuse a Commissioner is not an appealable final order.[51] Thus, a defendant might have to litigate an administrative adjudication to the end before it could get a federal court to consider the question of prejudgment. This gives the Commission significant leverage in coercing private parties to settle cases, even when a Commissioner's prejudgment is clear. Yet the stakes for the Commission are high *if* a defendant is willing to litigate.

After the Commission has issued an order in an administrative action, courts have entirely voided the order because of a Commissioner's prior public accusations that specific companies had violated the law.[52] Such statements may "entrench[ ] a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion."[53] Chair Ferguson's openness to change his views may already be viewed skeptically by a court. He should consider recusing himself from future GAC matters.

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[49] *Project 2025: Mandate for Leadership—The Conservative Promise* 5 (Heritage Found. 2023).

[50] American Cyanamid Co. v. Fed. Trade Comm'n, 363 F.2d 757, 767 (6th Cir. 1966).

[51] SEC v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963); *see also* Strausbaugh v. MSPB, 401 Fed. Appx. 524, 526 (Fed. Cir. 2010) ("the rule is well settled that the denial of a motion to disqualify the trial judge is not final").

[52] Because regulatory agencies carefully avoided prejudgment for decades, there is scant litigation on the question. The most relevant cases involve the Federal Trade Commission in the 1960s. For example, FTC Chair Rand Paul Dixon once told an audience that "your problems are ours because they arise from practices prohibited by two of the most important statutes administered by the Commission… You know the practices — price fixing, price discrimination, and overriding commissions on TBA. You know the companies — Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone." Texaco, Inc. v. Fed. Trade Comm'n, 336 F.2d 754, 759-60 (D.C. Cir. 1964). The court voided a subsequent FTC order. *Id.*

[53] Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n, 425 F.2d 583, 591 (D.C. Cir. 1970).

In considering whether Chair Ferguson *must* recuse himself, or to avoid Commission orders because he has not done so, courts may also consider the comments made by his senior staff about GAC. Just to cite one example, Ferguson's Senior Policy Advisor, Jon Schweppe, has publicly asserted that gender-affirming care is *always* harmful, telling one transgender person: "kids cannot be trans. They are kids. Please stop promoting the mutilation of kids just so you can feel better about your own life choices."[54] If "kids cannot be trans," then GAC is inherently unfair and deceptive. This is essentially the same point made by Brandon Showalter, one of the witnesses at the FTC's July Workshop: "when we talk about unfairness and deceptive trade practices, because it is based on an irretrievably flawed premise that it's actually possible to be born in the wrong body, any medical treatment toward that end is going to do damage, guaranteed full stop, because it starts with a lie."[55] Both argue—Showalter, explicitly, and Schweppe, implicitly—that GAC is *per se* a violation of Section 5. This argument prejudges the essential questions raised by this inquiry.

Commissioner Mark Meador has been less explicit in condemning GAC but also less than careful about avoiding the appearance of prejudgment. At the July workshop, he asked "what the FTC can do as an agency about the unfair and deceptive practices that exist in the field of youth gender medicine."[56] Clearly, he was not merely referring to about unlawful practices that *might* exist, but condemning those that *do*, in his view, exist. In other words, like Schweppe and Showalter, he already knows that the law is being violated. To make his preconceptions unmistakable, he added: "for too long those in power have only given a voice to one side in this debate. Sadly, it was the side that is perpetrating the very fraud that needs to be uncovered and stopped."[57] All that remains is for Meador to identify the guilty parties by name. And such specificity is not required for a court to void an FTC action because of prejudgment by Commissioners; the implication of guilt may be sufficiently clear for a court to conclude that a Commissioner has prejudged a question.[58]

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[54] Jon Schweppe (@JonSchweppe), X (Sept. 9, 2023, 8:01 AM), https://x.com/JonSchweppe/status/1700479585886851565.

[55]Brandon Showalter, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors, at 77 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf/.

[56]Mark Meador, Commissioner, Fed. Trade Comm'n, The Dangers of "Gender-Affirming Care" For Minors, at 74 (July 9, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Dangers-of-Gender-Affirming-Care-for-Minors-Transcript.pdf/.

[57] *Id.* at 84.

[58] The D.C. Circuit voided another FTC order because it was sufficiently clear that Dixon's public remarks applied to one company's guilt even though he did not specifically name that company. Cinderella Career Finishing Sch. v. Fed. Trade Comm'n, 425 F.2d 583, 590 (D.C. Cir. 1970).

CONCLUSION

The Commission should leave medicine and medical advice to medical professionals. It can, at most, police commercial marketing, but never non-commercial speech. If it must act in this area, its next step should be to more clearly define the line between the two. If the Commission fails to do so, it will open a door that those advocating FTC action on GAC could soon regret. Policing GAC today could open the door to the Commission policing, say, gay conversion therapy under a Democratic administration. The FTC should not become another instrument of the culture war that has consumed so much of American society. It should stick to the task Congress assigned to it, and in which its staff has expertise: consumer protection. Everything else is distraction from this important mission.

Respectfully submitted,

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