



Comments of

TechFreedom

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In the Matter of

*Policy Statement Concerning the Suppression
of Accuracy in Artificial Intelligence Systems*

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TABLE OF CONTENTS

Introduction	1
I. AI Services' Express Claims About Accuracy and Fairness Cannot Be Grounds for a Deception Action.....	4
A. The Commission Has Limited Deception Claims Based on the Content of Media to Those that Are Objectively Disprovable and Involve Health.....	6
B. The Commission Does Not Police Puffery: Claims That Are Not Objectively Verifiable.....	9
C. Even Express Claims Are Not Always Presumptively Material	10
II. Implied Claims and Consumer Expectations.....	11
III. Material Omissions and Practices	12
IV. The Disclosures Necessary to Avoid Liability in the FTC's View Are a Form of Compelled Speech Barred by the First Amendment.....	14
Conclusion.....	15

INTRODUCTION

The Administration has directed the Commission “to issue a policy statement on the application of the Federal Trade Commission Act’s prohibition on unfair and deceptive acts or practices to AI models.”¹ In March, TechFreedom called on the Commission to seek public comment before issuing the statement.² We commend the Commission for allowing the public to weigh in on its “proposed policy statement addressing concerns that AI companies may be manipulating the behavior of their AI systems contrary to reasonable consumer expectations for objectivity and accuracy.”³ But the draft statement fails to explain how the First Amendment could allow the agency to use its deception authority against such practices—even assuming it could prove that they exist.

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.”⁴ Such speech is accorded “lesser protection” than non-commercial speech.⁵ The FTC’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.”⁶ When the Commission banned certain impersonations in 2024, the rule’s scope excluded “false impersonations or misrepresentations that are not material to a commercial transaction,” such as those made “in connection with political or other non-

¹ Ensuring a National Policy Framework for Artificial Intelligence, Exec. Order No. 14,365, 90 Fed. Reg. 58499, 58500 (Dec. 11, 2025), <https://www.federalregister.gov/documents/2025/12/16/2025-23092/ensuring-a-national-policy-framework-for-artificial-intelligence>.

² Letter from TechFreedom to Chair Ferguson and Commissioner Meador (Mar. 10, 2026), <https://techfreedom.org/wp-content/uploads/2026/03/Letter-re-Deceptive-AI-Policy-Statement-Public-Comments.pdf>.

³ Press Release, Fed. Trade Comm’n, FTC Seeks Public Comment on Policy Statement Addressing AI Accuracy (July 1, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/07/ftc-seeks-public-comment-policy-statement-addressing-ai-accuracy> (*AI Accuracy Press Release*). See also Fed. Trade Comm’n, *Proposed Policy Statement Concerning the Suppression of Accuracy in Artificial Intelligence Systems* 7 (July 1, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/ai-policy-statement_0.pdf (“truth and accuracy are in many cases implicit objectives in requests to AI systems”; “an ability to make accurate predictions, correctly solve problems, or make good decisions hinges on AI systems operating without undisclosed ideological biases that contradict explicit and implicit claims of accuracy and neutrality.”) (*Draft Statement*).

⁴ *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).

⁵ *Central Hudson Gas & Elec. v. Public Svc. Comm’n*, 447 U.S. 557, 561-63 (1980).

⁶ Fed. Trade Comm’n, *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>.

commercial speech” in order to be “coterminous with the scope of the FTC’s authority,”⁷ which applies only to acts “in or affecting commerce.”⁸ By steering well clear of this statutory limitation, the Commission has also generally avoided running afoul of the First Amendment.

When AI systems answer questions, they speak—or rather, the developers of those systems speak.⁹ Sometimes, this may be commercial speech. Where the user asks for advice on products or services and AI provides an answer based on a hidden financial interest, such surreptitious advertising may, of course, be deceptive—just as the Commission has long recognized for search engines absent a clear disclosure that the result is sponsored rather than organic.¹⁰ But in general, AI services are engaging in *non*-commercial speech.

The Commission has never policed non-commercial speech for its objectivity or accuracy—for encyclopedias or any other medium. The FTC’s “authority focuses on commercial speech, not political content curation,” as Republican Chair Joe Simons noted in 2020,¹¹ when Republican lawmakers demanded that the agency take action against “censorship” by tech platforms.¹² For essentially the same reasons, in 2004, former Chair Timothy Muris declined to act on a petition to investigate whether Fox News’ slogan of “Fair and Balanced” was deceptive: “I am not aware of any instance in which the Federal Trade Commission has investigated the slogan of a news organization.”¹³ There was, he explained, “no way to evaluate this petition without evaluating the content of the news at issue.”¹⁴ In other words, it did not matter that Fox’s slogan was a marketing claim intended to advertise a for-profit

⁷ Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15017 (Mar. 1, 2024) (to be codified at 16 C.F.R. pt. 461).

⁸ 15 U.S.C. § 45(a).

⁹ See generally Corbin K. Barthold, *AI + 1A*, TECHFREEDOM (Mar. 2026), <https://techfreedom.org/wp-content/uploads/2026/03/Paper-Why-the-First-Amendment-Protects-AI.pdf#page=12> (§ I.C. The Right to Editorial Control).

¹⁰ Fed. Trade Comm’n, Sample Letter to General Purpose Search Engines (June 24, 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>.

¹¹ Leah Nylen, *Trump Aides Interviewing Replacement for Embattled FTC Chair*, POLITICO (Aug. 28, 2020, 02:28PM), <https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479>.

¹² 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>.

¹³ Statement of Chairman Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), <https://www.ftc.gov/news-events/news/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris-complaint-filed-today-moveonorg>.

¹⁴ *Id.*

service—potentially, commercial speech. “Fair and balanced” was a subjective claim about the nature of Fox’s journalism—its non-commercial speech.¹⁵

The Commission cannot police bias in non-commercial speech under principles long established in its deception case law and grounded in the agency’s bedrock 1983 Deception Policy Statement.¹⁶ These principles have, for decades, helped the Commission steer clear of violating the First Amendment. The draft statement does not grapple with these principles. It scarcely mentions the First Amendment or the Deception Policy Statement—and fails to incorporate the Supreme Court decisions that have shaped the FTC’s enforcement of Section 5. Notably, the statement declares that “a company’s motives for deceiving consumers are irrelevant Whether motivated by profit, shaping public opinion, or anything else, Section 5 prohibits deceiving consumers.”¹⁷ In fact, having an “economic motivation” is a necessary, but not even sufficient, element in making speech commercial, as the Supreme Court has ruled.¹⁸ Without proof of such a motive, the FTC has no jurisdiction over speech.

The draft statement buries its key, and most unconstitutional, assertion in a footnote:

an ability to make accurate predictions, correctly solve problems, or make good decisions hinges on AI systems operating without undisclosed ideological biases that contradict explicit and implicit claims of accuracy and neutrality. Though the exact line of what constitutes bias may be difficult to draw, forcing an AI system to prioritize a singular ideological objective over all else is on the wrong side.¹⁹

¹⁵ In 2017, Fox replaced “Fair and Balanced” with a new slogan—“Most watched. Most trusted.”—thus blending an objectively verifiable claim with another purely subjective one. See Guardian staff, *Fox News drops ‘fair and balanced’ slogan*, THE GUARDIAN (June 15, 2017), <https://www.theguardian.com/media/2017/jun/15/fox-news-drops-fair-and-balanced-slogan>.

¹⁶ Fed. Trade Comm’n, Policy Statement on Deception, 103 F.T.C. 174, 183 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception> (“*Deception Policy Statement*”).

¹⁷ *Draft Statement* at 8.

¹⁸ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983) (Neither the “fact that these pamphlets are conceded to be advertisements” nor “the reference to a specific product ... render the pamphlets commercial speech” and “the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient, by itself, to turn the materials into commercial speech, but the “combination of all these characteristics, however” suggests “that the informational pamphlets are properly characterized as commercial speech”).

¹⁹ *Draft Statement* at 6 n.37.

The line the Commission calls “difficult” to draw is actually rather clear.²⁰ In *NetChoice v. Moody* (2024), Texas asserted that it could “correct the mix of speech that the major social-media platforms present” or “balance the mix of speech” on such platforms “because [it] thought those feeds skewed against politically conservative voices.”²¹ The Supreme Court rejected this interest as plainly illegitimate: “it is no job for government to decide what counts as the right balance of private expression—to ‘un-bias’ what it thinks biased”²² That the FTC purports to be enforcing AI services’ promises to consumers, or fulfilling consumers’ expectations, does not change the analysis: The FTC cannot police claims of accuracy or objectivity without policing accuracy and objectivity. The Commission should adhere to its longstanding deception doctrine principles; by doing so, it can avoid violating the First Amendment.

I. AI Services’ Express Claims About Accuracy and Fairness Cannot Be Grounds for a Deception Action

“AI companies,” says the draft statement, “aggressively market themselves as building products and services that distill all of human knowledge.”²³ Similarly, *Encyclopaedia Britannica* (1910) promised its readers the “sum of human knowledge—all that mankind has thought, done or achieved ... all is included that is relevant and everything explained that is explainable.”²⁴ *Encyclopedia Americana* (1922) was literally subtitled *A Library of Universal Knowledge*.²⁵

“In marketing their products as problem-solving tools,” the draft asserts, “AI companies have represented explicitly and implicitly that their AI systems aim to produce the best output possible given technological and resource constraints.”²⁶ Yes, they tell consumers that this is their “aim.” OpenAI is “working hard to make AI systems *more* useful and reliable.”²⁷ This is

²⁰ See generally Berin Szóka, *The First Amendment’s Red Line*, CONCURRENCES (Nov. 2025), <https://techfreedom.org/wp-content/uploads/2025/11/Berin-Szoka-Part-VIII-The-First-Amendments-red-line-between-the-expressive-and-commercial-realms.pdf>.

²¹ *NetChoice v. Moody*, 603 U.S. 707, 718-19, 740 (2024).

²² *Id.* at 719.

²³ *Draft Statement* at 6.

²⁴ G. Kim Blank, *Civilizing, Selling, and T. S. Eliot Curled Up Behind the Encyclopædia Britannica*, THE FORTNIGHTLY REVIEW (Jan 19, 2024), <https://fortnightlyreview.co.uk/2024/01/civilizing-selling-t-s-eliot-curled-encyclopaedia-britannica/>.

²⁵ 1 THE ENCYCLOPEDIA AMERICANA: A LIBRARY OF UNIVERSAL KNOWLEDGE (George Edwin Rines ed., 1922), <https://archive.org/details/encyclopediaamer01unse/page/n9/mode/2up>.

²⁶ *Draft Statement* at 6.

²⁷ *Id.* n. 35 (quoting OpenAI, *Why Language Models Hallucinate* (Sept. 5, 2025) (emphasis added)).

an aspirational promise, not a description of perfect objectivity. It is certainly much less explicit than what encyclopedias have long promised. The *Encyclopedia Americana* promised “scholarly impartiality,” “accuracy,” and “fairness” without “political, governmental, religious, or social ... prejudice or bias of any kind.”²⁸ Likewise, in 2003, Microsoft promised that “*Encarta* provides consumers” content that is both “trustworthy” and “accurate.”²⁹

Could the FTC have enforced such explicit representations to protect what the draft calls “reasonable consumer expectations for objectivity and accuracy”?³⁰ No—but not because encyclopedia publishers, AI services or any other media company are categorically immune from consumer protection law. As the Supreme Court has long recognized:

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. ... 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.³¹

The crucial limit to the FTC’s powers lies in those last two words: *business practices*. The FTC’s authority over “unfair or deceptive acts or practices in or affecting commerce”³² allows it to regulate only deception in business practices. The First Amendment permits no more. 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 citizens have access to information from many sources.”³³ In the very next sentence, the Court reiterated what it had said about “de-biasing”: “in case after case,

²⁸ THE ENCYCLOPEDIA AMERICANA, *supra* note 25, at 17. It also promised to “present in the most intelligent, authoritative, impersonal and impartial manner the actual facts of knowledge so far as it is humanly possible to do so.” *Id.* Currently, *Encyclopaedia Britannica* promises that it “strives to make ... accurate, objective, and fair.” *Learn about Encyclopaedia Britannica’s editorial process*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/video/Encyclopaedia-Britannica-editorial-department-process/-247368> (last visited July 31, 2026).

²⁹ *Microsoft Encarta Takes Learning to a New Level of Discovery* (June 26, 2003), <https://news.microsoft.com/source/2003/06/26/microsoft-encarta-takes-learning-to-a-new-level-of-discovery/>.

³⁰ *AI Accuracy Press Release*, *supra* note 3.

³¹ *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

³² 15 U.S.C. § 45(a)(1).

³³ *Moody*, 603 U.S. at 732.

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.”³⁴

A. The Commission Has Limited Deception Claims Based on the Content of Media to Those that Are Objectively Disprovable and Involve Health

The Commission has regularly brought consumer protection claims against encyclopedia publishers for their sales practices.³⁵ In exceptional cases, the Commission has brought deception claims regarding marketing claims based on the content of media, but only where those claims were easy to verify objectively and where the government had an interest in protecting public health, which—unlike policing bias and ideological balance—is a legitimate government interest unrelated to the content of speech. Such cases are a far cry from what the draft statement contemplates.

The Commission’s decision in *Rodale Press* (1967) involved the publisher of various books, including *Health Finder*, which Rodale presented as “an encyclopedia of health Information from the preventive point of view” whose “readers will find therein the answer to any health problem”³⁶ The Commission was “not challenging the truth or falsity of any statements made in ... the advertised publications,” but rather “specific representations contained in respondents’ advertising”; thus, the agency was “constitutionally entitled to determine the truth or falsity of the respondents’ advertising of their publications”³⁷ The Commission found that “the basic message being conveyed in respondents’ advertising is that respondents’ book is essentially a sort of ‘how-to-prevent-illness’ book and that readers of the book will in fact be able to prevent most of the diseases and disorders which affect the good health of human beings.”³⁸ If an AI service made similar claims today, the FTC might have a viable deception claim—but that’s not what the policy statement is talking about.

³⁴ *Id.*

³⁵ See, e.g., *P.F. Collier & Son Corp.*, 70 F.T.C. 977 (1966); *Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421 (1976); *Grolier Inc.*, 91 F.T.C. 315 (1978).

³⁶ *Rodale Press, Inc.*, 71 F.T.C. 1184, 1186, 1192 (1967).

³⁷ *Id.* at 113.

³⁸ *Id.* at 1238; *id.* 1235-36 (“The complaint charges that respondents falsely advertised that readers of The Health Finder would add years to their lives , gain more energy, effectuate savings on medical and dental expenditures, feel better than ever, gain and maintain health, find the answers to all health problems, prevent the common cold , ulcers, fatigue, goiter and high blood pressure, prevent and cure all types of constipation, and prevent, treat, and relieve cancer, tuberculosis, infantile paralysis , all types of heart disease, arthritis and mental illness and that readers of How To Eat For A Healthy Heart and This Pace Is Not Killing Us would be able to prevent treat and relieve all types of heart disease.”).

In the subsequent decades, the Commission brought many cases involving deceptive health claims made by those selling products³⁹—but not against those who merely publish media that makes deceptive claims. In *FTC v. Agora Financial, LLC* (2021), the Commission sued a company that did not “sell a product that they claim will yield particular benefits,” but instead published a book that “provides, in their view, recommendations on how individuals might reduce the risks and symptoms associated with Type 2 diabetes.”⁴⁰ The Commission cited only cases in which “the respective defendants marketed products that would be sold for the buyer to consume, and purportedly reap the alleged benefits”⁴¹—indicating just how extraordinary it is for the Commission to bring a deception action against a media publisher that sold no such products.

On appeal, the district court parsed the Supreme Court’s distinction between commercial and non-commercial speech, and concluded that “fraudulent commercial claims can be extricated out of advertisements for products featuring noncommercial speech.”⁴² It concluded that, “[i]f Defendants were selling a medical product or service,” it would “have to determine whether their representations about the efficacy of their product or service were accurate” but “[b]ecause Defendants are selling a book, this Court need not apply the standard for health-related efficacy claims.”⁴³

Yet because the defendants “did not sell or have a commercial interest” in anything they made claims about, the *Agora* court declined to assess, as the FTC proposed, “whether the medical claims within *The Doctors’ Guide* are supported by [competent and reliable scientific evidence].”⁴⁴ Because the FTC had “not demonstrated that Defendants’ claims, with regard to the effectiveness of their protocol, are ‘patently false,’” such “untested theories are best assessed by qualified medical professionals exchanging opinions in the marketplace of ideas.”⁴⁵ The court recognized only “two actionable misrepresentations in the advertising for *The Doctors’ Guide*.”⁴⁶ First, *Agora*’s advertising “repeatedly represents that its protocol ‘has nothing to do with changing your diet,’” when, in fact, part of the protocol “exclusively

³⁹ See, e.g., *Pom Wonderful LLC v. Purely Juice, Inc.*, No. CV-07-02633 CAS (JWJx), 2008 U.S. Dist. LEXIS 96083 (C.D. Cal. July 17, 2008); *Welch Foods Inc. v. Nat’l Union Fire Ins. Co.*, 659 F.3d 191 (1st Cir. 2011).

⁴⁰ *Fed. Trade Comm’n v. Agora Fin., LLC*, 447 F. Supp. 3d 350, 361 (D. Md. 2020).

⁴¹ *Id.*

⁴² *Id.* at 363.

⁴³ *Id.* at 364.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 366.

discusses dietary changes.”⁴⁷ Second, Agora’s “advertising misrepresents that the protocol described in *The Doctor’s Guide* has been ‘scientifically proven’ to ‘reverse your diabetes in just 28 days,’” without any evidence of any such testing.⁴⁸ Both of these representations were easily disproven by objective evidence.

These claims are utterly unlike the claims (or expectations) of “objectivity and accuracy” that the draft statement asserts the FTC may police. In *Agora*, assessing the content at issue was simple and required no subjective assessment of truth. But to assess whether Fox was “fair and balanced” would have required the Commission to build a record of historically accurate, objective facts, including any number of hotly contested sociopolitical issues. The Commission would face exactly the same problems in policing Anthropic’s promises that Claude is “safe, accurate, and secure—the trusted assistant for you to do your best work.”⁴⁹ In both cases, the Commission would have to determine which theories are correct and which sources are reputable—to become a Ministry (or Commission, as it were) of Truth.⁵⁰

Government has no such power. The Commission cannot judge if a company has “abuse[d] consumer trust by training a model surreptitiously to produce ideologically motivated distortions ... such as to correct what the [publisher] believes are ‘historical injustices’ in the facts.”⁵¹ The agency cannot determine what is “ideological”—as compared to what? A state-sanctioned version of the objective truth? Never mind whether the government itself lies; it can’t mandate adherence to its version of the truth in the first place; it *cannot* “forc[e] a private speaker to present views it wished to spurn in order to rejigger the expressive realm.”⁵² This is true *even if* AI services are prioritizing some views over others.⁵³ As the Court so recently said, “‘The choice of material,’ the ‘decisions made [as to] content,’ the ‘treatment of public issues’—‘whether fair or unfair’—all these ‘constitute the exercise of editorial control and judgement.’”⁵⁴

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Draft Statement* at 6, n.36 (citing CLAUDE, <https://claude.com>).

⁵⁰ GEORGE ORWELL, 1984 4 (Penguin Books 1960) (1949).

⁵¹ *Draft Statement* at 7.

⁵² *Moody v. NetChoice*, 603 U.S. 707, 733 (2024).

⁵³ *Id.* at 733 (“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.”).

⁵⁴ *Id.* at 738.

B. The Commission Does Not Police Puffery: Claims That Are Not Objectively Verifiable

The Commission has steered well clear of violating the First Amendment largely because, as the 1983 Deception Policy Statement declares, it “generally will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously”⁵⁵ as a literal description of what the service offers. Courts have recognized that puffery “is not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.”⁵⁶ Thus, puffery does not involve a “false or misleading representation of fact” that is “likely to cause confusion” or deceive the general public about the product, as required by both the Lanham Act⁵⁷ and the Deception Policy Statement.⁵⁸

Vague statements of opinion and aspirational goals in marketing are traditionally not actionable.⁵⁹ This is necessarily the case for the kind of claims invoked by the draft statement, which contemplates exactly the kind of claim brought by PragerU in 2022 against YouTube for moderating its videos in violation, allegedly, of YouTube’s representations. The Ninth Circuit dismissed this out of hand:

YouTube’s braggadocio about its commitment to free speech constitutes *opinions* that are not subject to the Lanham Act. Lofty but vague statements like “everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories” or that YouTube believes that “people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities” are classic, non-actionable opinions or puffery. Similarly, YouTube’s statements that the platform will “help [one] grow,” “discover what works best,” and “giv[e] [one] tools, insights and best practices” for using YouTube’s products are *impervious to being “quantifiable,” and thus are non-actionable “puffery.”*⁶⁰

⁵⁵ *Deception Policy Statement*, 103 F.T.C. at 185.

⁵⁶ *Coastal Abstract Service v. First Amer. Title*, 173 F.3d 725, 731 (9th Cir. 1998).

⁵⁷ 15 U.S.C. § 1125 (a)(1)(A).

⁵⁸ *Deception Policy Statement*, 103 F.T.C. at 170 (“there must be a representation, omission or practice that is likely to mislead the consumer.”).

⁵⁹ *See supra* notes 55–57 and associated text.

⁶⁰ *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) (internal citations omitted; emphases added).

Likewise, AI companies, says the draft statement, promise to “solve problems, large and small, in furtherance of users’ given objectives.”⁶¹ The draft statement cites statements AI companies have made about their systems:

- “At OpenAI, we’re working hard to make AI systems more useful and reliable.”⁶²
- “Helpfulness is one of Claude’s most important traits. Speaking with Claude should be akin to a conversation with a brilliant friend, one who will speak frankly to a person about their situation, providing information grounded in evidence.”⁶³
- “Grok is your truth-seeking AI companion for unfiltered answers with advanced capabilities in reasoning, coding, and visual processing.”⁶⁴

None of these representations are quantifiable, falsifiable, or reasonably interpreted as objective fact.⁶⁵ OpenAI’s aspiration to make “AI systems more useful and reliable” is puffery. Anthropic’s claim that Claude is helpful, “brilliant,” and “grounded in evidence” is subjective, based on pure opinion. X.ai’s claim that Grok is “truth-seeking” cannot be meaningfully measured.

C. Even Express Claims Are Not Always Presumptively Material

In general, the agency “presumes that express claims are material” because “[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.”⁶⁶ Thus, the Commission could not base a deception claim on statements made by a company under political pressure—such as at Congressional hearings—or under other forms of compulsion by the government. That would include the statements AI services would be required to make committing to offer a “neutral, nonpartisan tool that does not

⁶¹ *Draft Statement* at 6.

⁶² *Id.* at 6 n. 35 (quoting OpenAI, *Why Language Models Hallucinate* (Sept. 5, 2025) (“At OpenAI, we’re working hard to make AI systems more useful and reliable. Even as language models become more capable, one challenge remains stubbornly hard to fully solve: hallucinations.”)).

⁶³ *Id.* (quoting *How People Ask Claude for Personal Guidance*, ANTHROPIC, <https://www.anthropic.com/research/claude-personal-guidance> (Apr. 30, 2026)).

⁶⁴ *Id.* (quoting *Chat With Grok*, <https://x.ai/grok> (last accessed May 20, 2026)).

⁶⁵ See *supra* note 56 and associated text.

⁶⁶ *Deception Policy Statement*, 103 F.T.C. at 189.

manipulate responses in favor of ideological dogmas” to be eligible for federal contracts under a pending proposed federal acquisition regulation.⁶⁷

II. Implied Claims and Consumer Expectations

The draft statement asserts that AI services make both “explicit and implicit claims of accuracy and neutrality.”⁶⁸ Under the Deception Policy Statement, the Commission evaluates implied claims about products and services in two ways. Sometimes, the Commission will “determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.”⁶⁹ For both express and implied claims, the Commission examines “the entire mosaic, rather than each tile separately,” evaluating “the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond.”⁷⁰ This analysis is especially crucial for implied claims. Alternatively, the Commission may use “extrinsic evidence that reasonable consumers reach the implied claims.”⁷¹ Crucially, “[i]n all instances, the Commission will carefully consider any extrinsic evidence that is introduced”⁷²—including “expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.”⁷³

The draft statement employs neither approach properly. Instead, it cherry-picks statements AI companies have made about their systems in blog posts and product overviews without context, failing to examine the entire documents or the nature of the claims—which are, as

⁶⁷ Acquisition of Information and Communication Technology, 91 Fed. Reg. 36559 (proposed June 17, 2026), <https://www.federalregister.gov/d/2026-12205/p-203>.

The Contractor must ensure the LLM is developed and monitored in accordance with the following unbiased AI principles:

(i) The LLM must be truthful in responding to user prompts seeking factual information or analysis. The LLM must prioritize historical accuracy, scientific inquiry, and objectivity and must acknowledge uncertainty where reliable information is incomplete or contradictory.

(ii) The LLM must be a neutral, nonpartisan tool that does not manipulate responses in favor of ideological dogmas. The Contractor must not intentionally introduce or embed partisan or ideological judgments into the LLM’s Data Outputs.

⁶⁸ *Draft Statement* at 6 n.37.

⁶⁹ *Deception Policy Statement*, 103 F.T.C. at 108.

⁷⁰ *Id.* at 177.

⁷¹ *Id.* at 173.

⁷² *Id.* at 107. *See also id.* at 175, n. 7 (“In each of these cases, other factors, including in some instances surveys, were in evidence on the meaning of the ad.”).

⁷³ *Id.* at 107.

we explain above, unquantifiable and non-actionable puffery. Rather than unpacking or explaining the representations the Commission alleges these claims imply, it buries them in footnotes.⁷⁴

Worse yet, the only extrinsic evidence the draft statement cites regarding consumer expectations is a Forbes article paraphrasing a report by Anthropic, which found that 8.7% of users “[c]heck facts and claims that matter” in their conversations with Claude.⁷⁵ The draft statement reframes this to assert that “consumers accept AI system outputs without conducting any further fact checking over 90% of the time, even though these systems purport to only strive for, rather than guarantee, complete accuracy.”⁷⁶ But the statistic does not prove or even suggest that AI users “overwhelmingly trust that the system is designed to provide an answer tailored specifically to their objectives[,]” as the proposed statement concludes.⁷⁷ It merely shows that users do not bother to double-check facts and claims raised by Claude—perhaps because they are busy, or lazy, or not overly invested. To establish this purportedly “widely held consumer expectation,”⁷⁸ the Commission would have to cite reliable evidence, such as consumer testimony and surveys, directly addressing whether users consider AI systems accurate or neutral.

III. Material Omissions and Practices

The draft statement posits that AI services may “abuse consumer trust by training a model surreptitiously to produce ideologically motivated distortions ... such as to correct what the [publishers] believes are ‘historical injustices’ in the facts.”⁷⁹

In theory, an omission or practice can also be deceptive; the essential element, under the FTC’s 1983 Deception Policy Statement and decades of case law, is that the representation, omission or practice is “likely to mislead the consumer.”⁸⁰ Either must be “material,” *i.e.*, “likely to affect a consumer’s choice of or conduct regarding a product.”⁸¹ Under the

⁷⁴ *Id.*

⁷⁵ *Draft Statement* at 7 n. 39 (quoting Ted Ladd, *Anthropic: 91% of Users Do Not Fact-Check AI. Let’s Fix That*, FORBES (Mar. 5, 2026), <https://www.forbes.com/sites/tedladd/2026/03/05/anthropic-91-of-users-do-not-fact-check-ai-lets-fix-that/>).

⁷⁶ *Draft Statement* at 7.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Deception Policy Statement*, 103 F.T.C. at 175.

⁸¹ *Id.*

Deception Statement, “injury and materiality are different names for the same concept”: “injury exists if consumers would have chosen differently but for the deception.”⁸²

The key question is proof. “In some circumstances, the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission,”⁸³ such as when “they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned.”⁸⁴ The draft statement mentions “health” only in passing.⁸⁵ Public health can, indeed, be a compelling government interest; indeed, it underpinned the Commission’s case in *Rodale, Agora*, and other such matters. But the draft statement is concerned with something entirely different:

It is predictable that an AI company might suppress accuracy and interpose other objectives, such as *so-called “equity,”* to avoid liability under this law, but fail to disclose these ulterior objectives in order to hide the loss of accuracy they necessitate. AI companies may also be subject to public pressure to surreptitiously avoid politically inflammatory outputs, as well as the temptation to clandestinely modify their AI systems to further their own or their employees’ *political agendas*.⁸⁶

Outside such narrow circumstances, the DPS requires the Commission to provide “evidence on consumers’ expectations” to establish that an omission was material.⁸⁷ In normal cases involving the sale of products or services, this may not require “elaborate proof of consumer beliefs,” such as whether the “sale of unmarked products in Alaska led consumers to believe erroneously that they were handmade in Alaska by natives.”⁸⁸ But this is not such a normal case; here, the Commission is attempting to regulate the fairness of speech.

It is not enough to assert, as the draft statement does, “that AI companies that steer the outputs of their AI systems toward unexpected objectives, and away from the objectives set by or reasonably expected by users, are likely to deceive consumers in violation of Section 5

⁸² *Id.* at 135.

⁸³ *Id.* at 175.

⁸⁴ *Id.* at 190.

⁸⁵ *Draft Statement* at 6–7 (“Consumers share this understanding of the purpose of AI systems and have learned to trust these systems across a broad swath of applications, from education to health, finance, relationships or a myriad of other uses.”).

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* (emphasis added).

⁸⁸ *Deception Policy Statement*, 103 F.T.C. at 176 n. 13 (citing Leonard Porter, 88 F.T.C. 546, 626, n.5 (1976)).

of the FTC Act.”⁸⁹ Attempting to divine consumers’ “true objectives” will necessarily embroil the Commission in assessing the fairness and accuracy of media—exactly what the First Amendment forbids.

IV. The Disclosures Necessary to Avoid Liability in the FTC’s View Are a Form of Compelled Speech Barred by the First Amendment

In *In Agora*, the FTC declared that it sought “only to regulate Defendants’ advertising of *The Doctor’s Guide*, not the content of the publication itself.”⁹⁰

The draft statement closes by suggesting that an AI company can simply avoid liability for deception should it “clearly and conspicuously disclose that its systems are designed to produce outputs that prioritize certain objectives over what users request and otherwise expect” and thus “dispel the notion that the system is designed to give the best answer possible.”⁹¹ This in no way solves the First Amendment problem discussed above; instead, it is merely a different kind of First Amendment problem.

The First Amendment broadly bars the government from compelling speech, including requiring speakers to label themselves as “partisans.” In *West Virginia Board of Education v. Barnette* (1943), the Court established that the government cannot force citizens to affirm or profess a belief or political status.⁹² Justice Robert Jackson famously wrote: “If there is any fixed star in our constitutional constellation, it is that no official ... can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”⁹³ And whether editorial choices by AI companies make their models’ outputs not “the best answer possible”⁹⁴ is unquestionably a matter of opinion—the reason for those choices are indeed because they are believed to lead to better answers.

The Supreme Court has permitted the mandating of “purely factual and uncontroversial disclosures about commercial products,” but has refused to allow compelling speech about controversial topics such as abortion.⁹⁵ Political bias in AI services has quickly become a deeply “controversial” topic—a fact reinforced by the White House’s intense interest in proceeding. Any requirement that AI companies declare their “biases” or disparage their

⁸⁹ *Draft Statement* at 7.

⁹⁰ *Agora*, 447 F. Supp. at 361.

⁹¹ *Draft Statement* at 9.

⁹² 319 U.S. 624.

⁹³ *Id.* at 642.

⁹⁴ *Draft Statement* at 9.

⁹⁵ *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018).

own offerings by telling users that they are “not designed to give the best answer possible” because the FTC has decided that it is the arbiter (and it certainly is not) of how AI should work and what outputs are desirable would be a clear First Amendment violation.

CONCLUSION

The truest sentence of the draft statement is this: “companies know that their success depends on their products’ utility.”⁹⁶ The Commission repeatedly implies that “consumers’ objectives” can all too easily be “subverted” by an “AI developer’s hidden agenda.”⁹⁷ But consumers aren’t locked into any particular AI service. They can easily compare the answers they receive across services and judge for themselves whether their objectives are being met. Indeed, they can use competing AI services to compare how AI services answer the same question to compare the tilt of each service in whatever dimensions are important to them.

“Normally,” as the Commission noted in its bedrock 1980 Unfairness Policy Statement, “we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.”⁹⁸ There is no reason not to expect the market to work here. Consumers have the information they need to make their own judgments about the “bias” of each AI service. Those judgments will be opinions. That is simply the marketplace of ideas at work.

Conservatives have long understood that government of media in the name of “fairness” is dangerous. In 1987, the Federal Communications Commission repealed the Fairness Doctrine.⁹⁹ Congressional Democrats enacted legislation to restore it, which President Ronald Reagan vetoed. He said this:

[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

⁹⁶ *Draft Statement* at 6.

⁹⁷ *Id.* at 8.

⁹⁸ Fed. Trade Comm’n, Policy Statement on Unfairness (Dec. 17, 1980), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>.

⁹⁹ *Syracuse Peace Council v. WTVH*, Memorandum Opinion and Order, 2 FCC Rcd. 5043 (Aug. 6, 1987). Fairness Held Unfair, BROADCASTING, 27 (Aug. 10, 1987), <https://www.americanradiohistory.com/Archive-BC/BC-1987/BC-1987-08-10.pdf> (emphasis added). (“[T]he First Amendment does not guarantee a fair press, only a free press”).

biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.¹⁰⁰

What was true for broadcasters then remains true for all media—including artificial intelligence services.

Respectfully submitted,

_____/s/____

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