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FOR FREEDOM OF THE PRESS

PO Box 34176
Washington, DC 20043
(202) 795-9300 • www.rcfp.org

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Submitted via Regulations.gov May 20, 2025

The Honorable Andrew N. Ferguson
Chairman, Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C. 20580

Re: Docket (FTC-2025-0023)

Dear Chairman Ferguson:

The Reporters Committee for Freedom of the Press submits this comment to highlight the significant danger to the press and public were the Federal Trade Commission to deploy its Section 5 authorities to investigate perceived bias in content moderation by technology platforms.

Founded in 1970, the Reporters Committee is a nonprofit organization that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has long been an advocate for strong legal protections to shield the press and other private speakers from government interference in their editorial choices. We have been especially focused in recent years on efforts by federal and state authorities around the country to misuse consumer protection laws to "thumb the scale of political discourse to their advantage." Brief for Reps. Comm. for Freedom of the Press et al. as Amici Curiae Supporting Respondents in No. 22-277 & Petitioners in No. 22-55 at 9, *Moody v. NetChoice*, 603 U.S. 707 (2024), https://bit.ly/4jczK0X.[1]

[1] *See also, e.g.*, Gabe Rottman, *Another Texas Consumer-Protection Inquiry Threatens First Amendment Rights*, Reps. Comm. for Freedom of the Press (July 22, 2024), https://bit.ly/3S4vHJ7; Brief for Reps. Comm. for Freedom of the Press as Amicus Curiae Supporting Plaintiff-Appellant, *Yelp, Inc. v. Paxton*, No. 24-581 (9th Cir. Mar. 19, 2024); Brief for Reps. Comm. for Freedom of the Press & Media L. Res. Ctr. as Amici Curiae Supporting Plaintiff-Appellee's Petition for Rehearing En Banc, *Twitter, Inc. v. Paxton*, 26 F.4th 1119 (9th Cir. 2022) (No. 21-15869); Brief for Reps. Comm. for Freedom of the Press & Media L. Res. Ctr., Inc. as Amici Curiae Supporting Plaintiff-Appellant, *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (9th Cir. 2022) (No. 21-15869); Brief for Reps. Comm. for Freedom of the Press & 14 Media Orgs. as Amici Curiae Supporting Plaintiff-Appellee, *NetChoice v. Bonta*, No. 23-2969 (9th Cir. Feb. 14, 2024); Proposed Brief for Media Orgs. as Amici Curiae Supporting Plaintiff's Mot. for Prelim. Inj. & Opposing Defendant's Mot. to Dismiss & to Strike, *U.S. News & World Rep., L.P. v. Chiu*, No. 24-cv-00395-WHO (N.D. Cal. May 7, 2024); Brief for Reps. Comm. for Freedom of the Press as Amicus Curiae Supporting

The Reporters Committee is concerned that the Commission's request for comment on "technology platform censorship" seeks to similarly repurpose the Commission's Section 5 authorities to impose the government's view of fairness or viewpoint neutrality on technology platforms and to force them to host or promote content that their "reason tells them should not be published" or promoted. *Miami Herald v. Tornillo*, 418 U.S. 241, 256 (1974); *see also 303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023) (condemning "principle [that] would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty").

Government non-interference in these private editorial choices is a lodestar of First Amendment jurisprudence and a key protection for an informed electorate. As then-Judge Brett Kavanaugh put it, "except in rare circumstances, the First Amendment does not allow the Government to regulate the content choices of private editors just so that the Government may enhance certain voices and alter the content available to the citizenry." *See U.S. Telecomm. Ass'n. v. FCC*, 855 F.3d 381, 432 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

To be sure, no government agency is suited to this role. But the power to "improve or better balance the speech market," *NetChoice*, 603 U.S. at 741, would be particularly dangerous if claimed by the FTC with its elastic authorities and the deference afforded its judgments by the courts. *See Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("[P]roscriptions in s 5 are flexible, to be defined with particularity by the myriad of cases from the field of business." (internal citation omitted)). As the Supreme Court emphasized just last term in confirming that content moderation receives the same First Amendment protection as other editorial choices by private speakers, "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." *NetChoice*, 603 U.S. at 741–42. That danger is acute given the FTC's expansive investigative and enforcement powers.

Further, while this request for comment is focused on content moderation by technology platforms, it has echoes of the petition two decades ago urging the Commission to investigate Fox News Channel under the theory that its then-slogan "Fair and Balanced" constituted deceptive advertising because of a perceived ideological slant in Fox's news coverage. The Commission summarily rejected that complaint expressly because of the danger proceeding with such an inquiry posed to a free press. *See Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org*, Fed. Trade Comm'n (July 19, 2004), http://bit.ly/4dnqoyb. As Chairman Muris put it, "There is no way to evaluate this petition without evaluating the content of the news at issue." *Id.* The Commission should likewise resolve this request for comment by reaffirming First Amendment constraints on its authority and disclaiming any power to police perceived "censorship" by private speakers.

Appellees, *Media Matters for Am. v. Paxton*, No. 24-7059 (D.C. Cir. Mar. 27, 2025).

Consistent with Chairman Muris's observation in the Fox News matter, there is no way to evaluate whether a technology platform has applied its moderation policies "consistently" or "fairly" without the FTC evaluating the content of the speech being moderated. And were the FTC to expand Section 5 in that direction, there would be no limiting principle preventing the extension of such authority to traditional news organizations, including, for instance, whether individual editorial determinations are consistent with stated editorial standards. *Cf. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 144–45 (1973) (Stewart, J., concurring) (highlighting the danger posed by arguments for "greater Government control of press freedom" in new media and how they "would require no great ingenuity" to extend to newspapers).

Consumer protection laws are important and constitutional, but it is essential that they stay properly within the lane of commercial speech. Extending the FTC's deceptive practices authorities to editorial choices like whether social media posts violate platforms' community standards necessarily involves *non*-commercial speech. The U.S. Supreme Court has made clear that commercial speech is a narrow category, confined to expression that "does no more than propose a commercial transaction," *Harris v. Quinn*, 573 U.S. 616, 648 (2014) (citation omitted), or that "relate[s] solely to the economic interests of the speaker and its audience," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). With respect to both traditional news organizations' editorial standards and community policies for social media platforms, courts have easily and routinely found both to be far too aspirational or subjective to be enforceable under the rubric of false advertising. *See, e.g.*, *Prager Univ. v. Google LLC*, 951 F.3d 991, 999–1000 (9th Cir. 2020). For the same reason, such policies should be beyond the reach of the FTC's Section 5 unfair or deceptive practices authorities.

Additionally, even if editorial judgments like these could be classified as commercial speech, Section 5 regulation of them under a deceptive practices theory would still violate the First Amendment. That is, a commercial speech regulation, including unfair and deceptive practices enforcement at the FTC, must still serve a legitimate government interest. *Cent. Hudson*, 447 U.S. at 566; *POM Wonderful, LLC v. Fed. Trade Comm'n*, 777 F.3d 478, 501 (D.C. Cir. 2015) (applying *Central Hudson* test to deceptive advertising claim). In *NetChoice*, however, Justice Kagan, joined by Chief Justice Roberts and Justices Kavanaugh, Barrett, and Sotomayor, explicitly confirmed that there is simply *no* valid interest in correcting "the mix of speech that the major social-media platforms present." 603 U.S. at 740.

Finally, with respect to the Commission's request for comment on whether platforms' content moderation practices implicate Section 5 unfair competition authorities, we offer two observations that counsel caution.

First, while expressive industries are not immune from generally applicable antitrust laws, the Supreme Court has also emphasized that antitrust enforcement would raise First Amendment concerns were it to suppress speech. Famously, for instance, the Supreme Court upheld an injunction against the Associated Press's bylaws that both restricted the sale of news to non-members and, crucially, gave members the power to block competitors from membership. *Associated Press v. United States*, 326 U.S. 1, 4

(1945). The Court, however, emphasized that the injunction did not "compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *Id.* at 20 n.18; *see also Tornillo*, 418 U.S. at 254 (citing *Associated Press* and noting that the injunction in that case passed constitutional muster because there was no state compulsion to publish).

Second, antitrust laws have historically been vulnerable to politicization under administrations of both parties in efforts to "thumb the scale" of public discourse. In early 1964, for instance, President Lyndon B. Johnson demanded and received a letter of fealty from the Houston Chronicle in exchange for Johnson approving the merger of the Texas National Bank and the Houston National Bank of Commerce – of which the editor was also the president. Robert A. Caro, *The Passage of Power: The Years of Lyndon Johnson* 523–27 (2012). Under the Nixon administration, the White House wielded the threat of an antitrust case against the "Big Three" networks as a "sword of Damocles" to coerce better coverage. Walter Pincus & George Lardner, Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, Wash. Post, Dec. 1, 1997, https://perma.cc/C42R-HKN8.

In sum, the use of the FTC's unfair competition authorities to investigate or regulate perceived bias in content moderation would likely violate the First Amendment under the principle articulated in *Associated Press* and *Tornillo*. And, in any event, the FTC should exercise significant caution when enforcing its competition authorities in expressive industries, like the news media or social media.

* * *

For the reasons detailed above, the Reporters Committee urges the Commission to disclaim authority under Section 5 to regulate constitutionally protected editorial choices by technology platforms. Please contact Gabe Rottman, the Reporters Committee's Vice President of Policy, with any questions.

Sincerely,

The Reporters Committee
for Freedom of the Press