

May 21, 2025

Andrew N. Ferguson
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Ferguson:

The Supreme Court has repeatedly affirmed that a private speaker's decisions about what to publish, what not to publish, and in what order are protected by the First Amendment. This basic principle has been reaffirmed regardless of medium, including for newspapers,¹ broadcasters,² cable networks,³ and online platforms.⁴ When any of these entities “exercise[] editorial discretion in the selection and presentation of its programming, it engages in speech activity.”⁵ These protected activities are the focus of the Federal Trade Commission's February 20 Request for Information (RFI), seeking feedback on the application of the Commission's unfair and deceptive acts or practices (UDAP) authority to online platforms' content moderation decisions.⁶ As described below, the RFI raises serious concerns about its constitutionality as applied to platforms' core content moderation functions.⁸



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¹ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

² *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

³ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994).

⁴ *Moody v. NetChoice, LLC*, 603 U.S. 707, 710–11 (2024).

⁵ *Arkansas Educ. Television*, 523 U.S.C at 674.

⁶ FEDERAL TRADE COMM'N, REQUEST FOR PUBLIC COMMENT REGARDING TECHNOLOGY PLATFORM CENSORSHIP 1 (2025),

https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.

⁷ The Commission notes that the RFI's scope includes “social media, video sharing, photo sharing, ride sharing, event planning, internal or external communications, or other internet services.” *Id.* at 1 n.1. These comments address platforms that predominantly serve as intermediaries for third-party speech, such as social media, video sharing, and photo sharing platforms. Other types of platforms such as ride sharing or home rentals may implicate the principles discussed in these comments, but merit a separate analysis, including on the application of public accommodations and civil rights laws.

⁸ These comments use “core content moderation” to refer to platforms' “control” of “the content that will appear to users, exercising authority to remove, label or demote messages they disfavor” or to promote those they favor, reflecting judgments based on the platforms' community standards or other guidelines. *Moody*, 603 U.S. at 734–36. Functions regarding core content moderation are the focus of the comments, and other functions may merit a separate analysis.



The First Amendment Protects Content Moderation Decisions

While actors across the political spectrum have accused platforms of unfairly “censoring” some protected speech, including along politically motivated lines, it is key to remember that the First Amendment protects platforms’ ability to do this. The First Amendment protects “presenting a curated compilation of speech originally created by others,” and it prevents the government from requiring a private speaker to “carry and promote . . . speech they would rather discard or downplay.”⁹

This remains the case when the government is seeking to ensure that everyone’s voice is heard. “[I]n case after case, the [Supreme] Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm.”¹⁰ The goal of “balanc[ing] the marketplace of ideas” is one that the government simply “may not pursue . . . consistent with the First Amendment.”¹¹ Once the federal government is allowed to interfere in curation and editorial discretion, it will inevitably do so to promote its own ideologies and suppress alternatives. That is why “the way the First Amendment achieves th[e] goal [of an expressive realm in which the public has access to a wide range of views] is by preventing the government from tilting public debate in a preferred direction,” and “not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others.”¹²

In *Miami Herald Publishing Co. v. Tornillo*,¹³ the Supreme Court unanimously affirmed that the government cannot interfere with a newspaper’s choice of material and its treatment of the issues. According to the Court, these actions — “whether fair or unfair — constitute the exercise of editorial control and judgement,” which the government cannot regulate.¹⁴ Later holdings note that an entity’s own First Amendment rights are implicated when it compiles third-party speech into a single product.¹⁵

And the First Amendment continues to protect curation and compilation when the medium at issue is social media. Most recently, the Supreme Court drew on this wealth of existing precedent to decide in *Moody v. NetChoice* that the government cannot control what online platforms publish. It noted

⁹ *Moody*, LLC, 603 U.S. at 728.

¹⁰ *Id.* (citing *Tornillo*, 418 U.S. at 249; *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1 (1986); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 577 (1995)).

¹¹ *Id.* at 741 (cleaned up).

¹² *Id.* (cleaned up),

¹³ 418 U.S. 241, 257 (1974).

¹⁴ 418 U.S. at 258.

¹⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (1994); *Moody*, LLC, 603 U.S. at 710 (“[T]he First Amendment offers protection when an entity engage[s] in compiling and curating others’ speech into an expressive product of its own . . .”).



that “it is no job for government to decide what counts as the right balance of private expression—to ‘un-bias’ what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.”¹⁶

The *Moody* Court recognized that modern content moderation falls within the same protections as more traditional editorial decisions: “Like the editors, cable operators, and parade organizers this Court has previously considered, the major social-media platforms curate their feeds by combining ‘multifarious voices’ Their choices about which messages are appropriate give the feed a particular expressive quality and ‘constitute the exercise’ of protected ‘editorial control.’”¹⁷

Given the Supreme Court’s clear holding, the Commission cannot use its UDAP authority as a workaround to regulate platforms’ editorial activity. Even if platforms apply their content moderation policies in ways that the government deems to be uneven, ineffective, or unfair, the government cannot compel the editorial decisions it would prefer.¹⁸

The First Amendment Protects Against Compelled Explanations for Editorial Decisions

Those protections also preclude mandating explanations of editorial decisions. The Florida and Texas laws in *Moody* included “individualized-explanation provisions, requiring a platform to give reasons to a user if it removes or alters her posts.”¹⁹ The Court explained that the First Amendment’s principles “bear[] on how the lower courts should address the individualized-explanation provisions” and noted that — at minimum — “requirements of that kind violate the First Amendment if they unduly burden expressive activity.”²⁰

This outcome is not new: courts have long-shielded speakers from requirements that they explain their editorial decisions. And they have consistently applied that rule to compelled explanations of online platforms’ content moderation decisions. For example, one federal Court of Appeals recently reversed a district court’s denial of a preliminary injunction against

¹⁶ *Moody v. NetChoice, LLC*, 603 U.S. 707, 719 (2024).

¹⁷ *Moody*, 603 U.S. at 710–11.

¹⁸ *Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 672–73 (1998); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105 (1973) (“That editors — newspaper or broadcast — can and do abuse this power is beyond doubt [b]ut calculated risks of abuse are taken in order to preserve higher values.”).

¹⁹ *Id.* at 707.

²⁰ *Id.* at 727 n.3. Although the Court cites *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), it did so based on concessions made in the lower courts. *Id.* at 751 (Thomas, J., concurring in the judgment).



a state law mandating that social media platforms detail their “content-moderation practices including, if at all, how the terms of service define and address (a) hate speech or racism; (b) extremism or radicalization; (c) disinformation or misinformation; (d) harassment; and (e) foreign political interference.”²¹

The Court of Appeals noted that requiring platforms to detail their content moderation decisions would require explaining their “policy views on intensely debated and politically fraught topics, including hate speech, racism, misinformation, and radicalization” and “convey how the company has applied its policies” to those issues.²² Ultimately, explanations for content moderation decisions are “sensitive, constitutionally protected speech that the State [cannot] compel a social media company to disclose without satisfying strict scrutiny.”²³

Enforcement of UDAP authority against core content moderation decisions will raise the same First Amendment issues. In determining whether a platform has engaged in unfair or deceptive acts or practices, the Commission would necessarily require the platform to “convey how [it] has applied its policies” to politically charged topics such as hate speech and misinformation. The platform would be forced to “explain why or on what grounds” it chose to remove, promote, or otherwise address content, subject to the Commission’s second-guessing and interpretation of the platform’s policies — a proposition that would be “untenable.”²⁴

Other Aspects of Platform’s Practices May Be Subject to UDAP Authority

Other aspects of platforms’ activities outside of content moderation decisions may potentially be subject to the Commission’s UDAP authority.

For example, the Commission has long addressed privacy violations as deceptive conduct, and properly so: subjecting privacy policies to scrutiny for deception does not raise the same First Amendment concerns as core content moderation decisions. A platform’s privacy practices are not an exercise of First Amendment-protected editorial discretion and curation. Equally, explaining privacy practices will not force platforms to “opine” on politically charged issues or explain how it applies its policies to those issues.

²¹ *X Corp. v. Bonta*, 116 F.4th 888, 894 (9th Cir. 2024).

²² *Id.* at 902.

²³ *Id.*; *accord* *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1120 (9th Cir. 2024) (“[T]he DPIA report . . . require[s] businesses to go beyond opining about their products or services to opine on highly controversial issues of public concern and then take steps to censor material that the company has deemed sufficiently harmful . . .”).

²⁴ *X Corp.*, 116 F.4th at 902–03.



Further, representations regarding data collection, use, and sharing are generally more concrete and evaluable than the general terms used in content moderation policies. A platform's representation that it does not sell your data or permit law enforcement surveillance is significantly more amenable to a deception analysis than a nebulous statement that it is the "free speech wing of the free speech party."²⁵ Consequently, platform's data practices are more appropriately subject to the Commission's UDAP authority.

Certain procedural aspects of content moderation decisions could also be appropriately subject to UDAP authority. For example, if a platform promised users the opportunity to appeal content moderation decisions and then entirely failed to provide any such option, those practices may be subject to UDAP or related authority.

The Commission, however, has not limited its RFI to those actionable circumstances. Instead, it focuses squarely on core content moderation decisions, an emphasis that runs afoul of the First Amendment.

Please do not hesitate to contact us at jleventoff@aclu.org and cvenzke@aclu.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Anders".

Christopher Anders
Director, Democracy & Technology

A handwritten signature in black ink, appearing to read "Jenna Leventoff".

Jenna Leventoff
Senior Policy Counsel

A handwritten signature in black ink, appearing to read "Cody Venzke".

Cody Venzke
Senior Policy Counsel

²⁵ See *Prager University v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) ("Lofty but vague statements" in content moderation policies about "commitment to free speech" constitute mere opinions and "are classic, non-actionable opinions or puffery."); *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360, 382 (2021) (same); *cf.* *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 122 (1st Cir. 2000) (investigative journalist's promise of "positive" coverage "akin to 'puffing' or 'trade talk'"); *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1354 (7th Cir. 1995) (journalist's "promise to wear kid gloves" was not reasonably relied upon).