

July 31, 2026

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

Re: AI Policy Statement; Matter No. P264200

Dear Chair Ferguson:



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Advocacy Department**
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The American Civil Liberties Union (ACLU) writes in response to the Federal Trade Commission's (FTC or Commission) request for public comment on its proposed Policy Statement Concerning the Suppression of Accuracy in Artificial Intelligence Systems.¹ The Draft Policy Statement seeks to use the Commission's unfair and deceptive acts or practices (UDAP) authority to hold AI companies liable for "undisclosed ideological objectives" or attempts to comply with state nondiscrimination laws. In addition to raising significant concerns under the First Amendment, the Draft Policy Statement is a thinly veiled attempt to preempt state law regulation of AI through an unprecedented and legally unsupported application of the Commission's UDAP authority.² We trust that the FTC will not undertake such action, especially as Chair Ferguson noted that the Commission "will leave the legislating to the people's representatives in Congress and in the States."³

AI models serve a variety of purposes including production of constitutionally protected "expressive activity" in some circumstances as well as constitutionally regulatable conduct in other circumstances.

By their very nature, AI models lend themselves to a multitude of purposes, including some that constitute speech or editorial activity protected by the First Amendment and others that do not. End users may leverage AI to create

¹ Policy Statement Concerning the Suppression of Accuracy in Artificial Intelligence Systems, 91 Fed. Reg. 41,638 (July 7, 2026) [hereinafter Draft Policy Statement].

² Draft Policy Statement, *supra* note 1, at 41,642, n.51.

³ Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding *Ryan, LLC v. FTC*, Fed. Trade Comm'n (Sept. 5, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-holyoak-statement-re-noncompete-acceding-vacatur.pdf.



art, video, or text on any number of topics, including creation of comments, satire, or parody on matters of public interest.⁴

In addition, developing AI models sometimes involves its own expressive editorial decisions about the type of speech the model should generate. For example, OpenAI's "model spec" describes the myriad directions provided to the ChatGPT model, including to not respond "with erotica or gore," not "contribute to extremist agendas that promote violence," and to answer "factual questions" with "evidence-based information from reliable sources."⁵ Other models include similar choices about what content they should produce, the tone they should use, and the sources they may rely on.

These choices parallel editorial decisions that have been long recognized as protected "expressive activity."⁶ For example, social media platforms' content moderation guidelines limit content about "violence and incitement, coordinating harm and publicizing crime, fraud and deception," or "hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines)."⁷ "Like them or loathe them," social media content moderation standards entail "a wealth of user-agnostic judgments about what kinds of speech, including what viewpoints, are not worthy of promotion."⁸ AI models' specifications do, too.

This is not to say, however, that all aspects of AI use and development are protected by the First Amendment. Like traditional executable computer code, AI models may also be used for non-expressive conduct, potentially being used in cyberattacks, directing autonomous vehicles, or making critical decisions in employment, education, housing, and more.⁹

⁴ *Babylon Bee, LLC v. Lopez*, 818 F. Supp. 3d 1181, 1199 (D. Haw. 2026) (AI-generated political speech is protected); *Kohls v. Bonta*, 797 F. Supp. 3d 1177, 1183 (E.D. Cal. 2025) (same).

⁵ *OpenAI Model Spec*, OpenAI (Dec. 18, 2025), <https://model-spec.openai.com/2025-12-18.html> [<https://perma.cc/9WZQ-BADU>].

⁶ *Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024)

⁷ *Id.* at 735.

⁸ *Id.* at 736 n.5. The Court used the term "user-agnostic" to refer to content moderation tools that promote, limit, label, or remove content *not* based "solely [on] how users act online." Feeds based on users' online behavior often seek to give users "the content they appear to want, without any regard to independent content standards." *Id.* That is, "user-agnostic" feeds reflect editorial decisions regarding content, *not* users' personal information

⁹ Olga Akselrod & Cody Venzke, *How Artificial Intelligence Might Prevent You From Getting Hired*, American Civil Liberties Union (Aug. 23, 2023), <https://www.aclu.org/news/racial-justice/how-artificial-intelligence-might-prevent-you-from-getting-hired> [<https://perma.cc/NM58-5G7R>].



That last set of uses in making critical decisions is particularly relevant to the Draft Policy Statement, which cites state laws aimed at addressing potential “algorithmic discrimination” in fields where federal and state laws have long protected against analogous discrimination by human decision-makers.¹⁰ Various AI models used to sort who receives a job offer, is admitted to schools, is shown a targeted ad for an economic opportunity, or is given favorable credit terms have been demonstrated to discriminate against protected classes.¹¹ Discrimination in such decisions, however, is not even “arguably protected speech,” it is “commercial activity” and at that, it is “illegal commercial activity.”¹²

The Commission’s insistence that civil rights laws may “force AI models to produce false results in order to avoid a ‘differential treatment or impact’ on protected groups”¹³ ignores this long-established recognition that discrimination is regulatable conduct and not speech at all. Because discrimination is not speech, but conduct, the Commission’s insistence that nondiscrimination laws “restrict[] truthful speech” is misplaced.¹⁴ Just as laws regulating other forms of conduct – for example, “physical [medical] interventions,” the “sale of contraband,” or “outdoor fires”¹⁵ – cannot be recast as compelling “false results,” the same is true of nondiscrimination

¹⁰ Draft Policy Statement, *supra* note 1, at 41,638, 41,639 n.11.

¹¹ Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back From Tough Times*, Consumer Rep. (Mar. 11, 2021), <https://www.consumerreports.org/electronics/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/> [<https://perma.cc/SS6M-SEWE>]; Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, The Markup (Aug. 25, 2021), <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms> [<https://perma.cc/A5A7-2FM4>]; Galen Sherwin & Esha Bhandari, *Holding Facebook Accountable for Digital Redlining*, ACLU (Mar. 19, 2019), <https://www.aclu.org/news/privacy-technology/holding-facebook-accountable-for-digital-redlining>; Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, Reuters (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G/> [<https://perma.cc/2F98-ZRF>].

¹² *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 388, 390 (1973).

¹³ Draft Policy Statement, *supra* note 1, at 41,639, n.12.

¹⁴ *Cf.* Misrepresentation, Black’s Law Dictionary (12th ed. 2024) (“A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words.”); Fed. Trade Comm’n, Policy Statement on Deception (Oct. 14, 1987), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf, archived at <https://perma.cc/WK8H-VZHG> (“Most deception involves written or oral misrepresentations, or omissions of material information.”).

¹⁵ *Chiles v. Salazar*, 146 S. Ct. 1010, 1023, 1026 (2026).



laws. Moreover, the Draft Policy Statement creates a false dichotomy by painting compliance with nondiscrimination laws as forcing “AI models to produce false results,”¹⁶ especially when unregulated AI systems are prone to flawed outputs.¹⁷ Model development introduces issues for several reasons, including bias and underrepresentation in training data and overrepresentation of communities of color in undesirable data, such as criminal records.¹⁸ Models trained on such data are likely to produce inaccurate outputs. For instance, a LinkedIn recommendation algorithm promoted male candidates over female candidates, not based on qualifications, but because male candidates were more aggressive in their job-hunting efforts.¹⁹ Civil rights laws play an important role in ensuring that AI outputs are more accurate by requiring AI companies to consider fairness in the non-editorial decisions they make around the development and use of their products.

Application of UDAP authority to protected “expressive activity” raises significant constitutional concerns.

As described above, decisions made by AI developers about what speech outputs to permit, prohibit, promote, or restrict constitute protected “expressive activity.” The Supreme Court has repeatedly affirmed that editorial decisions about what to publish, what not to publish, and how to present it are protected by the First Amendment. This basic principle has been reaffirmed regardless of medium, including for newspapers,²⁰ broadcasters,²¹ cable networks,²² and online platforms.²³ When any of these entities, including AI developers, “exercises editorial discretion in the

¹⁶ Draft Policy Statement, *supra* note 1, at 41,639, n.12.

¹⁷ Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, The Markup (May 28, 2020), <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>.

¹⁸ Written Testimony of ReNika Moore, Director, Racial Justice Program, ACLU, *Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier*, U.S. Equal Emp. Opportunity Comm’n (Jan. 31, 2023), <https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new/moore>.

¹⁹ See Sheridan Wall & Hilke Schellmann, *LinkedIn’s Job-Matching AI was Biased. The Company’s Solution? More AI.*, MIT Tech. Rev. (June 23, 2021), <https://www.technologyreview.com/2021/06/23/1026825/linkedin-ai-bias-ziprecruiter-monster-artificial-intelligence/>.

²⁰ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

²¹ *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

²² *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994).

²³ *Moody v. NetChoice, LLC*, 603 U.S. 707, 710–11 (2024).



selection and presentation of its programming, it engages in speech activity” protected by the First Amendment.²⁴

The First Amendment applies in full force even 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.”²⁵ The goal of “balanc[ing] the marketplace of ideas” through regulating private speech is one that the government simply “may not pursue . . . consistent with the First Amendment.”²⁶ 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.”²⁷

Consequently, the Commission’s goal to enforce its UDAP authority against AI developers’ choices about speech outputs raises significant constitutional concerns. The Draft Policy Statement’s stated purpose is to address perceived “undisclosed ideological objectives” and “hidden agenda” among AI developers. Using UDAP authority to balance ideological views or to attack perceived ideological unfairness or agenda is exactly what the Supreme Court forbade in *Moody v. NetChoice, LLC*.²⁸ Even construing the Draft Policy Statement as requiring model developers to disclose embedded editorial decisions would still raise significant concerns. The Draft Policy Statement warns developers that disclosures could not be “hidden away” and “would have to be adequate to shift consumer expectations that would be based otherwise both on companies’ explicit representations and on the inherent value proposition of AI systems as tools to solve human problems.”²⁹ This open-ended standard would leave significant discretion with the Commission to police editorial decisions and would likely raise its own constitutional

²⁴ *Arkansas Educ. Television*, 523 U.S.C at 674.

²⁵ *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)).

²⁶ *Id.* at 741 (cleaned up).

²⁷ *Id.* (cleaned up).

²⁸ 603 U.S. 707 (2024).

²⁹ Draft Policy Statement, *supra* note 1, at 41,641.

issues: compelling platforms to “convey the company's policy views on intensely debated and politically fraught topics” has repeatedly failed constitutional muster.³⁰

In instances where AI is used for conduct, such as analysis in hiring or housing, the models may be legitimately regulated, including through state and local efforts.

To be clear, where AI models are deployed for conduct, they can properly be regulated. This includes tools used for decision-making in hiring, access to credit, housing, healthcare, and other critical areas of life.



Courts are already beginning to recognize that automated decision-making is not immune from generally applicable anti-discrimination protections. For example, in *Mobley v. Workday*, the Northern District of California ruled plaintiff's disparate impact claims could proceed against Workday after he was rejected from over one hundred jobs that used Workday's applicant screening tools.³¹

In addition, several cities and states have also enacted laws directly regulating automated decision-making. For example, some state privacy laws, such as the Alabama Personal Data Protection Act and Florida Digital Bill of Rights, provide consumers the right to opt out of automated processing of their personal data.³² Similarly, laws like NYC Local Law 144³³ have created transparency and auditing requirements, in that case focused on automated

³⁰ *X Corp. v. Bonta*, 116 F.4th 888, 902 (9th Cir. 2024); *NerChoice, LLC v. Bonta*, 113 F.4th 1101, 1120 (9th Cir. 2024) (requiring “businesses to go beyond opining about their products or services to opine on highly controversial issues of public concern”); *cf. Volokh v. James*, 148 F.4th 71, 97–98 (2d Cir.), certified question accepted, 44 N.Y.3d 963, 267 N.E.3d 1245 (2025), and certified question answered, No. 58, 2026 WL 1790976 (N.Y. June 23, 2026) (“[I]f social media networks are required to provide dedicated reporting mechanisms for “hateful conduct,” as defined by the State, or if the statute requires the networks to respond to reports, then the Report Mechanism Requirement would force Plaintiffs to promote the State's view as to categories of speech that should be discouraged, reported, and responded to. . . . Thus understood, the Report Mechanism Requirement would compel speech, and would be subject to intermediate or strict scrutiny.”)

³¹ 740 F.Supp.3d 796, 810-811 (N.D. Cal. 2024).

³² H.B. 351, 2026 Leg., Reg. Sess. (Ala. 2026) (engrossed bill), <https://alison.legislature.state.al.us/files/pdf/SearchableInstruments/2026RS/HB351-eng.pdf>; Act of June 6, 2023, ch. 2023-201, 2023 Fla. Laws 1 (codified at Fla. Stat. §§ 112.23, 501.1735).

³³ NYC Admin. Code § 20-870 et seq.



tools used for employment decisions, that do not implicate First Amendment concerns.

The FTC is well aware of the applicability of laws to automated decision-making tools as demonstrated by its own enforcement activity. For example, the Commission enforced the Fair Credit Reporting Act (FCRA) against RealPage for its automated tenant screening tool that provided inaccurate information that in some cases wrongly tied potential tenants to criminal records.³⁴ Earlier this month, the Commission announced a similar settlement with RentGrow for its tenant screening tool that provided inaccurate outputs in violation of the FCRA.³⁵ Courts have repeatedly upheld the FCRA as a constitutional regulation of commercial speech.³⁶

The Draft Policy Statement misconstrues consumer expectations and the preemptive effect of UDAP authority.

The Draft Policy Statement suffers an additional serious defect: the notion that compliance with legitimate nondiscrimination laws constitutes deception is unprecedented and incorrect. The FTC can hold companies liable for a material “representation, omission, or practice” “that is likely to mislead” “a consumer acting reasonably in the circumstances.”³⁷ The Draft Policy Statement claims that laws like Colorado’s recently updated Automated Decision-Making Technology Act³⁸ may cause AI companies to “steer the outputs of their AI systems toward unexpected objectives, and away from the objectives set by or reasonably expected by users.”³⁹ This is a bold assertion that the Draft Policy Statement fails to support with any evidence that reasonable consumers do not expect AI outputs to comply with nondiscrimination laws. In fact, many people believe AI systems should be

³⁴ *RealPage, Inc.*, FTC File No. 152 3059, <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3059-realpage-inc>.

³⁵ *United States v. RentGrow, Inc.*, FTC File No. 222 3002, <https://www.ftc.gov/legal-library/browse/cases-proceedings/222-3002-rentgrow-inc-us-v>.

³⁶ See *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d 303, 306 (E.D. Pa. 2012); *Trans Union Corp. v. FTC.*, 245 F.3d 809, 818 (D.C. Cir. 2001)

³⁷ FTC Policy Statement on Deception (“Deception Policy Statement”), 103 F.T.C. 174, 183 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

³⁸ S.B. 26-189, 75th Gen. Assem., Reg. Sess. (Colo. 2026), https://leg.colorado.gov/bill_files/116489/download.

³⁹ Draft Policy Statement, *supra* note 1, at 41,641.



“developed and used in ways that treat people fairly.”⁴⁰ And consumers, including both users of AI tools and people who are subject to the use of AI tools,⁴¹ may reasonably expect that any use of an AI tool would comply with all applicable federal, state, and local laws, including nondiscrimination laws. Moreover, the FTC acknowledges in the Draft Policy Statement that “reasonable consumers would not expect, of course, that an AI system would output content that is clearly and unequivocally not protected by the First Amendment.”⁴² As outlined above, conduct such as discrimination in automated decision-making in protected sectors is not typically protected by the First Amendment. Therefore, by the FTC’s own logic, there is no reason to believe consumers would expect unlawful discriminatory outputs.

Nor is there precedent for using the FTC’s UDAP authority to make broad declarations of preemption. Conflict preemption is a “fact-intensive” inquiry that “mandates deferral of review until an actual preemption of a specific state regulation occurs.”⁴³ It requires that either it is impossible to comply with both federal and state law⁴⁴ or that a state law poses an obstacle to the “full purposes and objectives” of Congress.⁴⁵ Even when applied to a specific state or local law, “[i]mpossibility pre-emption is a demanding defense”⁴⁶ and courts conduct their own analysis of the relevant federal and state laws rather than rely on “an agency’s mere assertion that state law is an obstacle to achieving its statutory objectives.”⁴⁷ Given these rigorous standards and the fact-intensive nature of assessing conflict preemption, a policy statement is not the appropriate vehicle to assert conflict preemption. Finally, there is no

⁴⁰ N. Polo & R. Modhvia, *Great Expectations: Policy Briefing*, Ada Lovelace Inst. (2025) (finding 91% of UK adults surveyed believe AI systems should be developed and used in ways that treat people fairly), <https://www.adalovelaceinstitute.org/policy-briefing/great-expectations/>.

⁴¹ The FTC has consistently interpreted “consumers” broadly to cover those subject to an unfair or deceptive act or practice, including businesses and workers, beyond the individuals engaged in a transaction for goods or services. For example, a worker who is subject to an AI evaluation tool is considered a consumer under the FTC’s UDAP authority. See *Trade Regulation Rule on Commercial Surveillance and Data Security*, 87 Fed. Reg. 51,273, 51,277 n.68 (advance notice of proposed rulemaking Aug. 22, 2022) (citing cases in which FTC used its enforcement authority to protect workers), <https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security#footnote-68-p51277>.

⁴² Draft Policy Statement, *supra* note 1, at 41,640, n.40.

⁴³ *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984).

⁴⁴ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

⁴⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁴⁶ *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

⁴⁷ *Id.* At 576.



support for the claim that Colorado’s law or any other state law “requires an AI firm to deceive its consumers.”⁴⁸

UDAP enforcement still applies to AI developers as it does generally.

Outside of developers’ editorial decisions around the speech outputs of models, the FTC can, and should, properly use its UDAP authority to regulate AI services just as it does in other contexts. The FTC has regularly used its deception authority to address false advertising,⁴⁹ misleading endorsements and reviews,⁵⁰ dark patterns,⁵¹ and privacy and security misrepresentations.⁵² As the Draft Policy Statement notes, the FTC already enforces against deceptive marketing of AI models, focusing on “material misrepresentations about the performance, efficacy, and characteristics of AI products.”⁵³ We welcome such action and previously asked the Commission to investigate Aon Consulting for deceptive marketing claims about its employment assessment tools.⁵⁴

The Draft Policy Statement raises serious First Amendment concerns, attempts to replace legislative intent with agency action, and takes unprecedented and unsupported positions on UDAP authority, including as to its preemptive effect. Such action is wholly unnecessary when the FTC has demonstrated that it already has the tools to lawfully regulate AI products. Therefore, we urge the Commission not to adopt the Draft Policy Statement.

⁴⁸ Draft Policy Statement at 41,641.

⁴⁹ *Handy Technologies, Inc.*, FTC Case Proceeding, <https://www.ftc.gov/legal-library/browse/cases-proceedings/handy-technologies>; *Match Group, Inc.*, FTC File No. 172 3013, <https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3013-match-group-inc>.

⁵⁰ *Fashion Nova, LLC*, FTC File No. 192 3138, <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3138-fashion-nova-llc-matter>; *Southern Health Solutions, Inc.* (NextMed), FTC Proceeding, <https://www.ftc.gov/legal-library/browse/cases-proceedings/nextmed>.

⁵¹ *Credit Karma, LLC*, FTC File No. 202 3138, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023138-credit-karma-llc>.

⁵² *1Health.io Inc.*, FTC File No. 192 3170, <https://www.ftc.gov/legal-library/browse/cases-proceedings/1923170-1healthiovitagene-matter>; *Illuminate Education, Inc.*, FTC File No. 222 3105, <https://www.ftc.gov/legal-library/browse/cases-proceedings/222-3105-illuminate-education-inc-matter>.

⁵³ Draft Policy Statement, *supra* note 1, at 41,640.

⁵⁴ Complaint of Am. C.L. Union, *In re Aon Consulting, Inc.* (FTC Oct. 21, 2020), <https://www.aclu.org/documents/aclu-complaint-to-the-ftc-regarding-aon-consulting-inc>.

Thank you for your consideration, and please do not hesitate to contact jjohn@aclu.org and cvenzke@aclu.org with any questions.

Sincerely,



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