

Federal Trade Commission Request for Information
Regarding Technology Platform “Censorship”

Response from NetChoice

Zachary Lilly

Deputy Director of State & Federal Affairs

NetChoice

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NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that internet-based business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression. We also work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

On February 20th, the Federal Trade Commission (Commission) released a Request for Information (RFI) “Regarding Technology Platform Censorship.” The goal, as stated in the RFI, is to “better understand how technology platforms deny or degrade users’ access to services based on the content of the users’ speech or their affiliations, including activities that take place outside the platform.” But there is no way for the FTC to investigate platform decisions about user access based on user speech without evaluating the editorial decisions and speech rights of platforms. In the words of former FTC Chairman Muris, “that is a task the First Amendment leaves to the American people, not a government agency.”¹ We fear that, beyond mere information gathering, the Commission seeks to use these comments as justification to insert itself into the content moderation process of private entities. As is hopefully understood by the experts at the Commission, overwhelming and recent Supreme Court precedent weighs heavily against the Commission’s desired foray into regulating editorial discretion. In our submission, we seek to illuminate the constitutional barriers to the Commission transforming itself into the speech police under the guise of enforcing consumer protection and antitrust laws.

The First Amendment Trumps the FTC Act

NetChoice sued the states of Florida and Texas in 2021 over two laws that violated the First Amendment rights of our members.² The states sought to override private platforms’ editorial discretion and force them to carry certain content favored by the individuals currently in power in those states because it was aligned with their political views. That litigation remains ongoing, but on an interlocutory appeal, the Supreme Court issued an opinion reaffirming its existing jurisprudence: The First Amendment prohibits the government from dictating the content moderation policies of private parties.³ “[T]he First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others’ speech, is directed to accommodate messages it

¹ Fed. Trade Commission, Statement 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>

² [22-277 Moody v. NetChoice, LLC \(07/01/2024\)](#)

³ Ibid

would prefer to exclude,” and “the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas.”⁴

Given the nature of the RFI, it seems clear that the Commission well understands that a naked attempt to pressure platforms to shift content moderation policies towards its preferred outcomes would run afoul of the Supreme Court’s *NetChoice* decision. It would appear that the “innovation” that the Commission has arrived at is circumventing the First Amendment by means of the FTC Act. The Commission seeks to perform legal alchemy, transforming a clear and litigated speech issue into a consumer protection and competition one.

Unfortunately, the Commission seems deeply confused about what censorship is, if that is the case, it becomes impossible to effectively fight against it. The Commission’s RFI is framed as a request for information about “Technology Platform Censorship,” by which it means “technology platforms that limit users’ ability to share their ideas or affiliations freely and openly.” But censorship relates to *government efforts* to stifle or direct private speech, not expressive choices that private actors make. The First Amendment acts as an absolute bulwark against *government interference* in speech. A disturbing trend reimagines the First Amendment, not as a restraint on government, but as a means to coerce private actors to adhere to the government’s preferences.⁵ This is a dangerous shift, and federal courts have consistently rejected the argument that private organizations like NetChoice’s members should be treated as if they are state actors under the First Amendment.⁶ Such arguments have it exactly

⁴ *Id.*, 603 U.S. 707 at 731-32.

⁵ And internet social media platforms may be particularly susceptible to such coercion. See *Murthy v. Missouri*, 603 U.S. 43, 80, 144 S. Ct. 1972, 1999, 219 L. Ed. 2d 604 (2024) (Alito, J. dissenting) (“[I]nternet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources[, because they] are critically dependent on the protection provided by § 230 of the Communications Decency Act.”).

⁶ See, e.g., *Rutenburg v. Twitter, Inc.*, No. 21-16074, 2022 WL 1568360, at *1 (9th Cir. May 18, 2022) (“The First Amendment’s Free Speech Clause prohibits the government—not a private party—from abridging speech.”) (cleaned up); *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020) (“[C]ourts have uniformly concluded that digital internet platforms that open their property to user-generated content do not become state actors”); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (“Facebook and Twitter ... are private businesses that do not become ‘state actors’ based solely on the provision of their social media networks to the public.”); *Green v. YouTube, LLC*, 2019 WL 1428890, at *4 (D.N.H. Mar. 13, 2019) (there is no “state action giving rise to the alleged violations of [the plaintiff’s] First Amendment rights” by YouTube and other platforms that are “all private companies”); *Nyabwa v. Facebook*, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) (“Because the First Amendment governs only governmental restrictions on speech, [the plaintiff] has not stated a cause of action against Facebook.”); *Shulman v. Facebook.com*, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (Facebook is not a state actor); *Forbes v. Facebook, Inc.*, 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) (“Facebook is a private corporation” whose actions may not “be fairly attributable to the state”); *Doe v. Cuomo*, 2013 WL 1213174, at *9 (N.D.N.Y. Feb. 25, 2013) (Facebook is not a state actor under the joint action test).

backwards: Again, social media platforms’ content moderation decisions themselves constitute expressive activity that the First Amendment protects from governmental intrusion.⁷

Under this bedrock constitutional jurisprudence, therefore, the only “Technology Platform Censorship” of concern when it comes to the RFI is potential censorship of the technology platforms by the government, acting through the FTC. The RFI’s questions make clear that the Commission is contemplating enforcement actions for which the only possible remedies would require courts to permit the FTC to second-guess and dictate platforms’ content moderation decisions.⁸ The Commission appears to believe that its competition and consumer protection authorities permit it to censor private platforms and infringe upon their First Amendment-protected editorial discretion. If that is the case, then either the FTC’s interpretation of the FTC Act is incorrect, or the FTC Act violates the First Amendment.

Moreover, in the First Amendment context, platforms’ rights could be at issue even if the FTC never brings an enforcement action. The mere threat of enforcement can have chilling effects that raise constitutional concerns, if the threat is intended to suppress citizens’ exercise of their First Amendment rights. The Supreme Court has held that a plaintiff can plausibly allege a First Amendment violation on the basis of a government actor’s meetings with regulated entities, informal guidance letters, and press releases, prior to any formal enforcement action being brought, and even where the affected expressive activity is not that of the regulated entities themselves: “[T]he First Amendment prohibits government officials from relying on the threat of invoking legal sanctions and other means of coercion to achieve the suppression of disfavored speech.”⁹

In President Trump’s March address to a Joint Session of Congress, he explicitly referenced his executive order “Restoring Free Speech and Ending Federal Censorship.”¹⁰ It is clearly a point of pride for President Trump that we are turning the page on the Biden administration’s efforts to jawbone and censor—as it should be. Those efforts may have reached their apex in the administration’s approach to platforms’ moderation of content related to COVID-19, which states and private plaintiffs challenged in *Murthy v. Missouri*, alleging that the federal government had coerced the platforms to undertake

⁷ See, e.g., *Moody*, 603 U.S. 707 at 731-33.

⁸ See Request for Public Comment Regarding Technology Platform Censorship, https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf (“Did the platform adhere to its policies . . .?”; “Has the platform acted in a consistent manner in response to analogous conduct by different users?”; “Has the platform applied a consistent challenge or appeals process . . .?”; “Did platforms adopt similar policies to and take similar adverse actions as other platforms?”).

⁹ *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 189 (2024).

¹⁰ [Restoring Freedom Of Speech And Ending Federal Censorship – The White House](#)

specific content moderation actions in violation of the First Amendment.¹¹ Although a majority of the Supreme Court found against plaintiffs on procedural grounds, concluding they had failed to establish standing to bring their claims, Justice Alito (joined by Justices Thomas and Gorsuch) reached the merits in a dissent, reiterating the principle that “[g]overnment efforts to dictate the subjects about which persons may speak” are “presumptively unconstitutional.”¹²

That the Commission would be unresponsive to these clear and powerful directives from the President and the Supreme Court is especially baffling. Chairman Ferguson acknowledged in an interview, “I do generally think the government should not threaten private people with punishment because of things they are saying unless they are criminal.”¹³ Then surely it follows that the government should not be using threats of investigations pursuant to tenuous liability theories to pressure platforms to change their content moderation policies. As far as the Commission takes steps to limit *government* interference in the content moderation practices of private entities, it has our full support. Unfortunately, the Commission appears poised to do the opposite.

Market Power and Moderation

The RFI asks if users whose content was moderated were “able to find adequate substitutes in other platforms,” and “to reach similar audiences” on competing platforms. While substitutability is a relevant consideration for a competition enforcer, basing it on a “similar audience” misunderstands the nature of competition in non-homogeneous products. As scholars have noted, “real competition is often sustainable given the presence of product and service differentiation, ad-supported platform services, multihoming, and the fact that users can connect to new and existing rivals.”¹⁴

Communications platforms have differentiated themselves in their choice of what content to moderate and how to do so: some such as 4chan engage in almost no moderation, while others such as BlueSky default to warning labels on posts from accounts deemed “intolerant” by the platform’s standards, and hiding posts deemed “rude” or to constitute threats. Such differentiation is a sign of robust competition, not of each platform being a monopoly in a specific market consisting only of itself.

¹¹ 603 U.S. 43 (2024).

¹² *Id.* at 98-99 (cleaned up).

¹³ Transcript: FTC Chairman Andrew Ferguson, Stigler Center 2025 Antitrust and Competition Conference.

¹⁴ Written Testimony of Daniel Francis, Assistant Professor of Law, New York University School of Law, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust and Consumers Rights, for a Hearing Entitled “Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets,” March 7, 2023, at n. 52, *available at* <https://www.judiciary.senate.gov/imo/media/doc/2023-03-07%20-%20Testimony%20-%20Francis.pdf>.

Moreover, content moderation has always played an important role in any medium’s ability to attract advertising support. Just as major brands in the 20th century refused to run commercials alongside broadcast television shows airing episodes on controversial subjects such as abortion,¹⁵ today, they may refuse to advertise on a platform that does not moderate user content with which brands fear to associate themselves. The thesis that the existence of private content moderation necessarily denotes market power completely misunderstands online platforms and their users.

The FTC and Loper Bright

In June of 2024, the Supreme Court overruled the *Chevron* doctrine in its landmark *Loper Bright Enterprises v. Raimondo* decision.¹⁶ In essence, the decision gave the judiciary greater power to interpret ambiguous statutes, tying the hands of federal regulators and bureaucrats from interpreting their own authority when not explicitly enumerated in statute by Congress.

There is obviously no clear reading of FTC statute that would lead one to believe the Commission has the authority to examine and demand justification for the constitutionally-protected editorial discretion of private companies. In that case, this effort runs directly into the big, beautiful wall of *Loper Bright*. As stated previously, even if Congress did seek to expressly empower the FTC to violate free speech, such an endeavor is constitutionally prohibited.

Conclusion

Censorship is a pernicious enemy of free peoples. A core expression of human dignity in every civilization across history is fighting against the government’s control over how we express ourselves. The First Amendment right to freedom of speech protects individuals and organizations from the government, and the muscular exercise of that right cannot constitute consumer harm or anticompetitive conduct. Such a reinterpretation of the First Amendment is an extraordinary gift to would-be government censors across the federal and state governments and would risk inaugurating a shockingly broad censorship regime. NetChoice strongly urges the Commission against going down this dark, unconstitutional path. Return is far from certain.

¹⁵ Norman Lear's Most Controversial Episode: 'Maude' on ...

The New York Times

<https://www.nytimes.com> › Arts › Television

Dec 7, 2023 — “Pepsi, General Mills, the J.B. Williams Company and others had pulled their ads, and the episode ran without sponsorship.”

¹⁶ [22-451 Loper Bright Enterprises v. Raimondo \(06/28/2024\)](#)