Before the

FEDERAL TRADE COMMISSION

Washington, DC 20580

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Re: Request for Public Comment Regarding Technology Platform Censorship

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Comments of

The Program on Economics & Privacy
George Mason University Antonin Scalia Law School

May 21, 2025

## INTRODUCTION AND EXECUTIVE SUMMARY

On February 19, 2025, the U.S. Federal Trade Commission ("FTC") invited comments from the public "to better understand how technology platforms deny or degrade (such as by 'demonetizing' and 'shadow banning') users' access to services based on the content of the users' speech or their affiliations, including activities that take place outside the platform."[1] While FTC's specific inquiries appear to be aimed at identifying specific instances of platform censorship, the Commission "encourage[d] members of the public . . . to comment on any issues or concerns that are relevant to the FTC's consideration of this topic."[2]

The Program on Economics & Privacy at the George Mason University Antonin Scalia Law School is pleased to offer these comments to provide a potential framework for analyzing platform censorship—which we broadly define to include as denial or degradation of users' ability to post content on a platform—under both antitrust and consumer protection laws that the FTC enforces. Part I highlights constitutional limitations on the Commission's ability to impose liability based on technology platforms' content moderation decisions. Part II addresses theories the Commission might pursue under its authority to police unfair methods of competition ("UMC"). Part III considers theories the Commission might pursue under its authority to police unfair or deceptive acts or practices ("UDAP").

In summary, we conclude:

***First Amendment:***

- The U.S. Constitution constrains the Commission's ability to police technology platforms' content moderation under the FTC Act. As the U.S. Supreme Court recently observed:
    - Platforms' moderation decisions comprise expression that is protected under the First Amendment; and
    - The First Amendment does not permit the government to interfere with private actors' protected expression to advance its own vision of ideological balance.

[1] FED. TR. COMM'N, REQUEST FOR PUBLIC COMMENT REGARDING TECHNOLOGY PLATFORM CENSORSHIP (Feb. 19, 2025).
[2] *Id*.

***Unfair Methods of Competition:***

- There are several serious legal hurdles to establishing that technology platforms' content moderation decisions comprise an "unfair method of competition."
    - A violation of Section 1 or 2 of the Sherman Act constitutes an unfair method of competition. There are also some business practices that amount to "standalone" unfair methods of competition, even though they do not violate the Sherman Act.
    - If the Commission attempts to establish an unfair method of competition based on a violation of Section 1 of the Sherman Act, which forbids *agreements* that *unreasonably restrain trade* and *do not constitute protected expression*, it will likely focus on three sorts of agreements: agreements among platforms to suppress certain content, agreements among advertisers to withhold advertising revenue from certain content providers, or agreements between platforms and government officials about what content should be carried or promoted.
        - To establish a content-suppression agreement among platforms, the Commission will likely have to produce evidence of an actual agreement; the mere fact that multiple platforms suppressed the same content probably will not suffice, as each platform could point to a unilateral incentive to suppress the content at issue.
        - For an advertiser agreement, the Commission would again have to show an actual agreement rather than consciously parallel behavior, *and* it would have to show that the advertiser boycott was not a First Amendment-protected expression, which could be difficult.
        - An agreement between a platform and government officials should not give rise to antitrust liability. The government is typically immune from antitrust liability, and private actors can hardly be blamed for giving in to the demands of officials who have the power to punish them. While governmental jawboning of private speech platforms can run afoul of the First Amendment, only the government is liable; pressured platforms are among its victims.
    - If the Commission attempts to establish an unfair method of competition based on a violation of Section 2 of the Sherman Act, it will face two significant difficulties:
        - First, given that the purportedly monopolized market would consist of avenues for public digital expression, of which there are many, the Commission will likely struggle to prove that any particular

platform possesses the monopoly or market power required for liability.

- In addition, the Commission likely will have a hard time proving that content moderation satisfies the second element of a Section 2 claim: unreasonably exclusionary conduct that enhances or maintains market power. One platform's aggressive content moderation typically makes it easier—not harder—for rivals to compete. The one exception would be when a platform suppresses *a rival's* content, but in that case, the platform can usually demonstrate that it is doing so to enhance its attractiveness to other users and is thus competing on the merits.

- An attempt to prove that a technology platform's content moderation constitutes a "standalone" unfair method of competition could likely succeed only if (1) the suppressed content was from an actual or potential rival of the platform (suppressing non-rivals' content would hurt no rival but would instead benefit rival platforms by making it easier for them to attract disfavored users' business); and (2) the content suppression did not enhance the attractiveness of the platform to other consumers or advertisers (such content suppression would constitute competition on the merits and could hardly be deemed "unfair").

***Unfair or Deceptive Acts or Practices:***

- The Commission has authority to prohibit "unfair or deceptive acts or practices" in commerce.
- A representation is deceptive if it is material and likely to mislead a significant minority of reasonable consumers.
    - Platform censorship could be a deceptive act or practice if it is directly contrary to specific representations concerning content moderation policies.
    - Other than this narrow circumstance, it is unlikely that other platform censorship scenarios would rise to the level of deceptive practices. This is due to the broad discretion over content moderation found in most platforms' terms of service, in conjunction with the subjective nature of representations surrounding content moderation.
    - Failure to provide certain details of content moderation policies can constitute a deceptive practice only under the following limited circumstances: (1) the platform has otherwise created an impression about its content moderation policies that would be misleading absent an

appropriate disclosure; or (2) the non-disclosed content moderation details would be considered "core aspects of the transaction that virtually all consumers would consider essential to make an informed decision."

- An act or practice is unfair if it (1) causes, or is likely to cause, substantial consumer injury; (2) that is not outweighed by countervailing benefits to consumers or competition; and (3) cannot be reasonably avoided.
    - Platform censorship is likely to harm those whose content is removed or degraded (both in terms of direct utility and potential monetization), as well as other platform users who would have benefited from the content. Given the relatively small level of harm accompanying any instance of censorship, to rise to the level of "substantial" injury needed for an unfairness claim, such censorship would likely need to implicate many platform users, not merely a few isolated instances.
    - At the same time, platform censorship inexorably generates benefits for users who would have suffered disutility from exposure to the censored content.
    - Further, platforms benefit financially from content moderation by attracting both users and advertisers that do not want their products appearing next to content that is inconsistent with their brand. In this manner, content moderation is an important competitive tool for platforms to maximize their value.
    - Absent evidence that a platform actively obfuscated or inadequately disclosed its content moderation policies, platform censorship would be unavoidable only if users were unable to mitigate their harm by finding alternative means for posting or viewing content. This element likely would be difficult to satisfy given the large number of content-hosting platforms with differing content moderation policies, and the fact that consumers tend to use multiple platforms to view and post content.

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## I. First Amendment Constraints on the FTC's Ability to Impose Liability Based on Technology Platforms' Content Moderation Decisions

In *Moody v. NetChoice*,[3] the U.S. Supreme Court instructed that the First Amendment to the U.S. Constitution constrains the government's ability to penalize technology platforms' content moderation decisions. While the Court unanimously

[3] 603 U.S. 707 (2024).

rejected and remanded facial challenges to Florida and Texas laws purporting to restrict technology platforms' suppression of particular viewpoints, it did so on a narrow ground: The challengers had not carried the heavy burden required for a successful facial (as opposed to as-applied) challenge.[4] In instructing the lower courts on how to assess the constitutionality of the challenged statutes on remand, however, the majority made two points that are relevant to FTC's efforts here.

First, the majority clarified that technology platforms' content moderation decisions are protected by the First Amendment.[5] Correcting the Fifth Circuit, which had held that the First Amendment was not triggered by the Texas law at issue,[6] the Court observed that "[w]hen the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection."[7]

The Court then observed that the government cannot survive a First Amendment challenge to restrictions on content moderation by arguing that the restrictions better balance the mix of speech on a platform. Recognizing that the challenged Texas law's "objective [was] to correct the mix of speech that the major social-media platforms present"[8]—specifically, to prevent the suppression of conservative viewpoints, which also appears to be FTC's objective with this inquiry—the Court instructed that "a [government actor] may not interfere with private actors' speech to advance its own vision of ideological balance."[9] Although the Court acknowledged that ensuring "an expressive realm in which the public has access to a wide range of views" is "a fundamental aim of the First Amendment,"[10] it emphasized that the First Amendment secures that goal "by preventing *the government* from 'tilt[ing] public debate in a preferred direction.'"[11] It added that the government may not "stop *private actors* from speaking as they wish and preferring some views over others … even when those actors possess 'enviable vehicle[s]' for expression."[12]

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[4] *Id*. at 717 ("Today, we vacate both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge.").
[5] *Id*. at 740.
[6] *Id*. at 726-27 (observing that Fifth Circuit had "held that the content choices the major platforms make for their main feeds are 'not speech' at all, so States may regulate them free of the First Amendment's restraints").
[7] *Id*. at 740.
[8] *Id*.
[9] *Id*. at 741.
[10] *Id*.
[11] *Id*. (emphasis in original; citing Sorell v. IMS Health Inc., 564 U.S. 552, 578-79 (2011)).
[12] *Id*. (citing Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 577 (1995)).

Public comments by FTC Chairman Andrew Ferguson suggest that the Commission's efforts to use the FTC Act to combat alleged censorship of conservative viewpoints may risk violating the First Amendment. At an April 3, 2025 "Big-Tech Censorship Forum" hosted by the Antitrust Division of the U.S. Department of Justice (DOJ),[13] Chairman Ferguson expressed uncertainty about whether "we need to care as much about the free speech rights of gargantuan corporations as individuals,"[14] and he referred to "truly terrifying Silicon Valley elites"[15] who, he said, have "truly horrifying and terrifying views."[16] Those comments suggest that the Commission's ultimate aim may be to alter the ideological mix of content on technology platforms away from the "truly horrifying and terrifying views" of the companies that own them. *NetChoice* precludes governmental efforts to do so. We urge the Commission to pay close attention to the teaching of *NetChoice* lest it waste precious agency resources on a doomed enforcement effort.

## II. Theories of Liability Based on the Use of Unfair Methods of Competition

Section 5 of the Federal Trade Commission Act empowers the FTC to bring enforcement actions to prevent the use of "unfair methods of competition."[17] Courts have long held that a violation of the Sherman Act constitutes an unfair method of competition.[18] They have also recognized that there are some behaviors, such as invitations to collude, that do not violate the Sherman Act but nevertheless constitute unfair methods of competition.[19] This Section therefore discusses how technology platforms' moderation of user-generated content could offend Section 5 of the FTC Act as a violation of Sections 1 or 2 the Sherman Act, or as a "standalone" unfair method of competition.

### A. Potential Liability Based on a Violation of the Sherman Act, Section 1

Section 1 of the Sherman Act addresses concerted conduct, proclaiming that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce … is declared to be illegal."[20] The Supreme Court early on realized

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[13] U.S. DEP'T OF JUSTICE, *THE ANTITRUST DIVISION HOSTS A BIG-TECH CENSORSHIP FORUM* (12:00 PM ET, April 3, 2025) (video available at https://www.youtube.com/watch?v=RPPgJ-xkjWo).

[14] *Id.* at 14:30.

[15] *Id*. at 14:28.

[16] *Id*. at 13:30. *See also* Concurring Statement of Commissioner Andrew N. Ferguson, *FTC v. 1661, Inc. d/b/a GOAT*, at 2 (Dec. 2, 2024) ("'Misinformation,' of course, being Newspeak for ideas and speech inconsistent with progressive orthodoxy.").

[17] 15 U.S.C. § 45(a), (b).

[18] *See* FTC v. Cement Institute, 333 U.S. 683, 694 (1948) (observing that "all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act").

[19] *See*, *e.g.*, In re Delta/Airtran Baggage Fee Antitrust Litigation, 245 F.Supp.3d 1343, 1372 (N.D. Ga. 2017).

[20] 15 U.S.C. § 1.

that a literal interpretation of Section 1 would outlaw all commercial contracts, as the essence of such agreements is to "restrain trade" by committing the parties to a particular course of action.[21] Accordingly, the Court has long held that Section 1 forbids only those agreements that *unreasonably* restrain trade by reducing market output (e.g., through higher prices, reduced quantity or quality, or dampened innovation).[22] The Court has also held that the U.S. Constitution's First Amendment precludes imposing liability for protected expression, even when it involves a trade-restraining agreement.[23] The Court has distinguished concerted refusals to deal, that are aimed at expressing participants' views in order to achieve political or social change (those get First Amendment protection)[24] from concerted refusals that are aimed at securing an economic advantage for participants by reducing market competition (those do not).[25] To successfully establish an unfair method of competition based on a Section 1 violation, therefore, the Commission must prove (1) an actual agreement between distinct economic entities (a "contract, combination …, or conspiracy") that (2) unreasonably restrains trade by reducing overall market output and (3) is not aimed primarily at expressing participants' views in order to achieve a political or societal objective.

Public comments by federal antitrust enforcers suggest that the Commission is considering three categories of agreements as potential Section 1 violations and thus unfair methods of competition. The first consists of agreements among competing technology platforms to suppress particular content, such as the *New York Post* article on Hunter Biden's laptop, the subject of much discussion during DOJ's Big-Tech Censorship Forum.[26] The second, emphasized by Chairman Ferguson, includes agreements among advertisers to boycott particular content or platforms.[27] The third, also referenced during the recent DOJ Forum, consists of agreements between technology platforms and

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[21] Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918) (observing that "[e]very agreement concerning trade … restrains. To bind, to restrain, is of their very essence.").

[22] See Arizona v. Maricopa County Med. Soc'y, 457U.S. 332, 343 (1982) (observing that "since Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 … (1911), we have analyzed most restraints under the so-called 'rule of reason'", which "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition"); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2-5 (2005) (describing courts' market output-focused understanding of competition).

[23] National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 913-14 (1982).

[24] *Id*.

[25] Fed. Tr. Comm'n v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 427 (1990) ("[O]ur reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'").

[26] *See, e.g.*, Big-Tech Censorship Forum Video, *supra* note 13, at 33:45 – 41:30.

[27] *See id*. at 16:53 – 19:15.

government officials.[28] The understandings revealed, in the so-called "Twitter Files" and at issue in *Murthy v. Missouri,* fall within this category.[29]

Of these three types of agreements, those within the first category seem most likely to violate the Sherman Act, Section 1. An agreement among competing technology platforms to suppress particular content would seem to reduce market output and thereby injure consumers, and even if suppressing the content at issue makes a platform's offering more attractive to users, an *agreement* to suppress such content—as opposed to a unilateral decision to do so—is unnecessary to achieve that output-enhancing end. Moreover, the primary objective of such an agreement is less likely to be expressive—e.g., a deliberate effort to amplify disapproval of certain content via concerted refusal to carry or promote it—and is more likely aimed at protecting participants from losing business to competitors who, but for their agreement, would carry or promote the content at issue.

The primary hurdle to establishing an unfair method of competition, based on platforms' collective refusal to carry or promote content, is Section 1's agreement element: The platforms must have made a "conscious commitment to a common scheme" of treating the content at issue in a uniform manner,[30] and the mere fact that they individually decided to handle the content the same way will not suffice.[31] It is thus not enough to show that all the major technology platforms suppressed certain content; the Commission must prove facts suggesting that their parallel behavior is more likely the product of an agreement than of independent action.[32] Given that each platform could argue that it suppressed content in order to maximize the attractiveness of its offering to consumers and/or advertisers, the Commission will likely need evidence of a "smoking gun" agreement to treat disfavored content in a uniform manner.

Any theory of liability based on advertisers' collective refusal to deal with particular content providers or platforms must also surmount the agreement hurdle, as each advertiser could claim that it had a unilateral incentive to eschew certain content or advertising venues. But even if the Commission could prove that advertisers agreed to withhold business from particular content providers or platforms, the Commission would face another difficulty: The advertisers would have a strong argument that their

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[28] *See id*. at 36:43 – 41:30.

[29] *See* AMICUS CURIAE BRIEF OF THE "TWITTER FILES" JOURNALISTS: MATT TAIBBI, MICHAEL SHELLENBERGER, LEE FANG, DAVID ZWEIG, LEIGHTON WOODHOUSE, ALEX GUTENTAG IN SUPPORT OF RESPONDENTS, *Murthy v. Missouri*, No. 23-411 (Feb. 8, 2024) (available at https://www.supremecourt.gov/DocketPDF/23/23-411/300197/20240208220913623_44722%20pdf%20Candeub.pdf).

[30] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

[31] Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954) (observing that "this Court has never held that proof of parallel business behavior conclusively establishes agreement").

[32] *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

trade-restraining agreement was primarily expressive and thus entitled to First Amendment protection.

Compared to a boycott among platforms, an advertiser boycott involves a greater expressive element. Due to network effects and economies of scale, digital platforms that host user-generated content tend to be quite large. Any platform that wished to convey its views by limiting the content it carried or promoted could do so unilaterally; amplification of its message via concerted conduct would not be necessary to attract users' attention. By contrast, it would be difficult for any individual advertiser that wanted to "send a message" as a means of effecting social change to do so on its own. Amplification of the message via concerted conduct—i.e., "*we all* believe the position reflected in this content to be wrong"—adds significant expressive value.[33] An advertiser boycott is therefore less like the one condemned in *Superior Court Trial Lawyers*, where the Supreme Court observed that the boycotters' "immediate objective was to increase the price that they would be paid for their services,"[34] and more like the one acquitted in *Claiborne Hardware*, where the Court concluded that the boycott was primarily expressive and thus protected by the First Amendment.[35]

With respect to the third category of concerted conduct—agreements between digital platforms and the government—antitrust is not the appropriate tool for addressing any resulting harms. Most government action is immune from antitrust scrutiny even when it occasions anticompetitive harm.[36] And one could hardly blame the government's counterparties for agreeing to comply with the demands and encouragements of officials who have the power to punish them. The real problem with the "agreements" falling into this third category is that they entail governmental speech coercion, which itself poses serious First Amendment issues.[37] But it is the government alone that is liable for such coercion. While FTC efforts to discover First Amendment violations by the government

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[33] They may reason that *sending that message* generates goodwill that will enhance their profits, but their profit-enhancement would result from conveying the message, not from reducing market competition.

[34] *Superior Court Trial Lawyers*, 493 U.S. at 427.

[35] *Claiborne Hardware*, 458 U.S. at 907-15.

[36] *See* Sea Air Shuttle Corp. v. Virgin Islands Port Authority, 782 F. Supp. 1070 (D. V.I. 1991) (observing that "virtually all levels of government have been granted some degree of immunity from the operation of antitrust law generally and the Sherman Act specifically"), citing Sea Land Service v. Alaska Railroad, 659 F.2d 243 (D.C.Cir.1981) (holding that a railroad owned and operated by the federal government was immune from antitrust action under the governmental immunity doctrine which protects the federal government, its agencies, and instrumentalities from the reaches of antitrust law); Parker v. Brown, 317 U.S. 341 (1942) (holding that a State of California agriculture program to market certain crops was immune from antitrust challenge under state immunity doctrine); and Local Government Antitrust Act of 1984, 15 U.S.C. § 34 et seq. (where Congress granted limited antitrust immunity to local governments).

[37] *See* Nat'l Rifle Ass'n of America v. Vullo, 602 U.S. 175, 180 (2024) ("Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.").

should be lauded, the coerced technology platforms are victims, not the perpetrators, of such violations.

### B. Potential Liability Based on a Violation of the Sherman Act, Section 2

The Commission would face even higher hurdles should it attempt to establish an unfair method of competition arising from a violation of Section 2 of the Sherman Act. Unlike Section 1, which addresses only concerted conduct and requires an agreement between distinct economic entities, Section 2 reaches unilateral conduct by dominant firms.[38] The two types of unilateral conduct forbidden by the provision—monopolization and attempted monopolization—both require that the defendant possess a measure of market power: Monopolization liability requires the possession of monopoly power (the ability to control market prices);[39] attempted monopolization requires a "dangerous probability" of achieving monopoly power,[40] which typically requires that the defendant possess at least market power (the ability to enhance one's profits by raising price significantly above one's incremental cost).[41] Both monopolization and attempted monopolization also require that the defendant engage in some sort of exclusionary conduct that enhances or maintains that power.[42] Establishing each of these elements will likely prove difficult.

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[38] 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize … any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony….").

[39] *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."). "Monopoly power is the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

[40] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 ("Consistent with our cases, it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.").

[41] *Id*. ("In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market."); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 6.5b2 at 309 (4th ed. 2011) (observing that courts generally require "that the plaintiff in an attempt case … show that the defendant has a certain minimum market share."); *id*. at § 3.1, p. 88 ("Market power is a firm's ability to increase profits by reducing output and charging more than a competitive price for its product.").

[42] *Grinnell*, 384 U.S. at 570-71 (observing that monopolization requires "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); *Spectrum Sports*, 506 U.S. at 456 (observing that attempted monopolization requires "that the defendant has engaged in predatory or anticompetitive conduct").

Monopoly or market power may be proven either indirectly or directly.[43] Indirect proof, the more common route, requires a showing that the defendant accounts for a large proportion of transactions within a relevant antitrust market: typically 50 percent or more for market power[44] and greater than 70 percent for monopoly power.[45] Direct proof requires showing that the defendant's conduct has actually caused a reduction in overall output within that market (i.e., higher prices, lower quantity or quality, or dampened innovation *across the market as a whole*, not just on the defendant's own platform).[46]

Because the Commission's primary concern in this inquiry is that digital platforms are suppressing the public expression of certain viewpoints,[47] the relevant market would appear to be avenues for public digital expression. Such avenues would include social media platforms like Facebook, X (formerly Twitter), Instagram, Snap, MeWe, Reddit, Bluesky, Truth Social, and LinkedIn; video-sharing platforms like YouTube and TikTok; and blogging platforms like WordPress, Medium, and Substack. If the Commission elects to establish market power indirectly, it will likely struggle to establish that any individual platform controls a sufficient share of the avenues for digital expression. If the Commission instead attempts to prove market power directly, it will have difficulty showing a reduction in output *across the market*. Given that X (formerly Twitter) is one of the most prominent and influential platforms for digital expression and appears not to disfavor user-generated content on the basis of its perspective, it would likely be hard for

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[43] *See*, *e.g.*, In re Actos Antitrust Litig., 2025 WL 1001259, *11 (S.D.N.Y. March 31, 2025) ("Plaintiffs may prove monopoly power in two ways: directly through evidence that the defendant exercised control over prices or excluded competition, or indirectly by showing that the defendant had a 'large percentage share of the relevant market.'") (quoting Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 500 (2d Cir. 2004)).

[44] *See* M&M Medical Supplies and Service v. Pleasant Valley Hosp., 981 F.2d 160, 168 (4th Cir. 1992) (en banc) (in assessing dangerous probability of success element of attempted monopolization claim, "(1) claims of less than 30% market shares should be presumptively rejected; (2) claims involving between 30% and 50% should usually be rejected, except where conduct is very likely to achieve monopoly or when conduct is invidious, but not so much as to make the defendant per se liable; (3) claims involving greater than 50% share should be treated as attempts at monopolization when the other elements of attempted monopolization are satisfied").

[45] *See* Hovenkamp, *supra* note 41, at § 6.2a, p. 293 (in monopolization cases, "[s]everal courts have found a market share of 75% to be sufficient, but if the share is lower than 70% courts become much more reluctant to find monopoly power").

[46] *See*, *e.g.*, Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 307 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."); United States v. Microsoft, 253 F.3d 34, 51 (D.C. Cir. 2001) ("Where evidence indicates that a firm has in fact profitably [raised prices substantially above the competitive level], the existence of monopoly power is clear.").

[47] *See*, *e.g.*, Big-Tech Censorship Panel Video, *supra* note 13, at 18:34 (Chairman Ferguson remarking "I think the most dangerous exercise of market power that we confront in America today is market power that dries up either ideas or access to those ideas").

the Commission to show a *marketwide* reduction in opportunities for digital expression. Nor could the Commission successfully argue that platforms that moderate content more aggressively "must" have market power because they can harm consumers without losing significant business.[48] The problem with this reasoning is the very content moderation that harms some users (those whose content is disfavored) benefits others (consumers and advertisers who value the platform's offerings more without the disfavored content), so it would be extraordinarily difficult to prove that a platform imposed a net harm on its users without losing significant business. In the end, then, the Commission will likely struggle to establish the market power required for a Section 2 violation.

Even if it succeeded on such a showing, however, the Commission would face difficulty proving the second element of a Section 2 claim. At the outset, it is worth noting that there may some confusion over how this second element would be met in the context of platform censorship. At DOJ's Big-Tech Censorship Forum, for example, Principal Deputy Assistant Attorney General Roger Alford described the second element as "the abuse of … monopoly power that has anticompetitive effects" such as higher prices, "quality harms" and "innovation harms."[49] Panelists then proceeded to speculate as to how some consumers may be harmed by content moderation, suggesting that such harms, standing alone, could satisfy the second element of a Section 2 claim.

But this description of Section 2's second element is inaccurate. If monopoly abuse that causes consumer harm could satisfy the second element of a Section 2 claim, then a monopolist's mere charging of monopoly prices would violate Section 2. The Supreme Court, however, has repeatedly held that simple monopoly pricing by a firm that has achieved monopoly power legitimately is not an antitrust violation.[50] The second element of Section 2 must therefore consist of more than monopoly abuse that causes consumer harm.[51]

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[48] *Cf.* 42nd Parallel North v. E Street Denim Co., 286 F.3d 401, 405 (7th Cir.2002) (defining "market power" as the ability to "raise prices above a competitive level without losing ... business.") (citing Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F.2d 656, 666–68 (7th Cir.1987)).

[49] Big Tech Censorship Panel Video at 1:23:59 – 1:24:45.

[50] *See*, *e.g.*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system…."); Pacific Bell Tel. Co. v. linkLine Commun'cns., Inc., 555 U.S. 438, 447-48 (2009) ("Simply possessing monopoly power and charging monopoly prices does not violate § 2….").

[51] *See generally* Thomas A. Lambert, *The Essence of an Antitrust Violation*, 76 UC L. J. ___ (forthcoming 2025) (draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5011802) (demonstrating that consumer harm from antitrust-relevant behavior is not a sufficient condition for imposing antitrust liability).

The Supreme Court has defined Section 2's second element as "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[52] A firm that engages in "acquisition or maintenance" of monopoly power *enhances* its market power from the level that would prevail but for its efforts. And if its enhancement of market power is both "willful" and not "a consequence of a superior product, business acumen, or historic accident," then it involves excluding rivals on some basis other than competition on the merits, which is a reasonable means of exclusion. The upshot of all this is that the second element of Section 2 does not consist merely of monopoly abuse, that causes consumer harm but instead requires that the defendant *enhance its market power* by engaging in *unreasonably exclusionary conduct*.[53]

Content moderation by digital platforms, even if biased against particular viewpoints, would rarely suffice under a correct understanding of Section 2's second element. When a digital platform suppresses certain user-generated content, it creates an opportunity for competing platforms to win the business of disfavored users. Rather than excluding rivals, content suppression boosts them. Moreover, to the extent a platform suppresses some users' content in an effort to attract or maintain other users (either consumers or advertisers), it is engaged in competition on the merits. Thus, digital platforms' content moderation—even instances the Commission deems to be ideologically "biased"—will rarely involve what the second element of Section 2 requires: an enhancement of the defendant's market power via unreasonably exclusionary conduct.

A possible exception to this would involve a platform's disfavoring of *its rivals'* content. Suppressing content generated by an actual or potential competitor could make that competitor's offering less desirable to users and advertisers and thereby enhance the defendant platform's market power. And, if the content-suppression was not aimed at enhancing the quality of the defendant's own offering, it would involve unreasonable exclusion rather than competition on the merits. A digital platform's suppression of the content of actual or potential rivals, then, could involve an enhancement of market power via unreasonably exclusionary conduct, satisfying the second element of a Section 2 claim.

But any action based on a digital platform's refusal to carry or promote a rival's content would have to overcome the significant limitations on liability for unilateral

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[52] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[53] United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) ("A firm violates § 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'") (quoting *Grinnell*, 384 U.S. at 571).

refusal to deal with a rival. In its 2004 *Trinko* decision, the U.S. Supreme Court observed that its earlier *Aspen Skiing* decision, which had imposed such liability, represented the "outer boundary" of Section 2's condemnation of unilateral refusals to deal.[54] In highlighting features that were present in *Aspen Skiing*, the Court appeared to cabin liability for unilateral refusal to deal to cases involving those features. The apparently necessary features include (1) a prior, voluntary course of dealing between the defendant and its excluded rival;[55] (2) evidence that the defendant voluntarily engaged with others on the terms the excluded rival preferred;[56] and (3) evidence that the refusal to deal involved an immediate sacrifice of profits and thus made no economic sense apart from an effort to squelch competition and earn future supracompetitive profits.[57] To establish Section 2 liability based on a digital platform's suppression of content generated by a rival, then, the Commission would have to prove that the platform carried or promoted the same or similar content from the rival in the past, that it continued to carry or promote similar content from other users, and that its decision to suppress the rival's content did not make its offering more attractive to advertisers or other users.

### C. Potential Liability for a "Standalone" Unfair Method of Competition

Given the difficulty of establishing a predicate Sherman Act violation, the Commission may attempt to show that a technology platform's content moderation constitutes a "standalone" unfair method of competition. Exactly what a standalone unfair method of competition consists of is somewhat unclear. Shortly after President Biden elevated Lina Khan to Chair of the FTC, the Commission majority (which included none of the Commission's current members) rescinded a prior policy statement committing the Commission to follow certain Sherman Act principles—chiefly, a focus on consumer welfare and "rule of reason" adjudication—in identifying unfair methods

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[54] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (limiting antitrust duty to deal recognized in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).

[55] *Trinko*, 540 U.S. at 409 (noting that *Aspen Skiing* Court "found significance in the defendant's decision to cease participation in a cooperative venture" and observing that complaint under consideration "d[id] not allege that [the defendant] voluntarily engaged in a course of dealing with its rivals").

[56] *Id*. at 410 ("In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail…. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.").

[57] *Id*. at 409 (observing that in *Aspen Skiing*, "[t]he unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end" and noting that *Aspen Skiing* defendant "turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher").

of competition.[58] The Khan FTC's replacement UMC statement,[59] which none of the current commissioners approved, has yet to be tested in the courts.

In any event, it is unlikely that the Commission could convince a court that a digital platform's moderation of user-generated content comprises a standalone unfair method of competition. As noted, a platform's suppression of content generated by anyone other than a rival platform would make it *easier* for rivals to compete: They would become more attractive to the users whose content was being suppressed. A standalone UMC action would thus need to be based on suppression of content generated by an actual or potential rival of the defendant. Even then, though, the content-suppression would comprise competition on the merits—and thus would not be an *unfair* method of competition—if it had the effect of enhancing the defendant platform's attractiveness to other users or advertisers. To succeed, then, the FTC would have to identify suppression of *a platform rival's* content, where *the content suppression did not make the defendant platform's offering more attractive to users or advertisers*.

## III. Theories of Liability Based on Unfair or Deceptive Acts or Practices

Section 5 of the FTC Act provides the Commission authority to enjoin "unfair or deceptive acts or practices" (UDAP).[60] Below, we discuss the potential application of UDAP authority to platform censorship.

### A. Deception

A representation is deceptive under the FTC Act if it is material and likely to mislead a significant minority of reasonable consumers.[61] A representation is material if it impacts a consumer's purchasing decision.[62] The Commission presumes all express claims and intended implied claims are material, as are representations about price,

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[58] *See* FED. TR. COMM'N, FTC RESCINDS 2015 POLICY THAT LIMITED ITS ENFORCEMENT ABILITY UNDER SECTION 5 OF THE FTC ACT (July 1, 2021) (press release available at https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act). The rescinded 2015 policy is available at 80 Fed. Reg. 57056 (Sept. 21, 2015) (https://www.ftc.gov/system/files/documents/federal_register_notices/2015/09/150921commissionpolicyfrn.pdf).

[59] FED. TR. COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, Commission File No. P221202 (Nov. 10, 2022) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

[60] 15 U.S.C. § 45(a)(1).

[61] FTC Policy Statement on Deception ("Deception Statement") at 2 ("The commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumers detriment.").

[62] Deception Statement at 5 ("A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product.").

health and safety, and other core aspects of a product.[63] A representation is also deceptive if a firm lacks a reasonable basis for a claim at the time it was made.[64]

Episodes of platform censorship could constitute deceptive acts or practices if they were taken in a manner directly contrary to representations the platform made in terms of service (TOS), marketing, or other public statements. Assuming representations surrounding content moderation are material, examples of such clear-cut deception might include removal of content after unambiguously representing "never" to remove content under any circumstances, or refusing to provide a promised appeals procedure for removed or degraded content.[65]

It is likely to be difficult to make out a deception claim for platform censorship, however, beyond these narrow circumstances of actions taken in direct conflict with unambiguous express claims. For example, to the extent that TOS provide platforms broad discretion to remove, degrade, or demonetize content on their platform, it would likely be difficult to prove a platform took actions contrary to those policies.[66] A deception claim predicated on a platform's action to categorize certain content as "hate speech" or "misinformation," would require the Commission to make highly subjective determinations about the veracity of content or its impact on other platform users to determine liability. Further, broad statements about a platform's moderation policy are inherently subjective, and thus likely to be treated as "puffery," or claims not subject to objective verification.[67]

Although the omission of material information can constitute deception, the conditions under which the failure to provide information about content moderation practices would rise to this level are limited. Typically, material omissions fall into the category of "half-truths," where a representation has created a misleading impression

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[63] *See* Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000).

[64] *See* FTC Policy Statement Regarding Advertising Substantiation (Nov. 23, 1984); Commission Opinion, In the Matter of POM Wonderful LLC, at 6 (Jan. 10, 2013).

[65] *See*, *e.g.*, Complaint, In the Matter of Gateway Learning Corp., Dkt No. C-4120, at ¶¶11-12 (Jul. 7, 2004) (alleging that Gateway provided data to third parties after express representations that it would not).

[66] *See*, *e.g.*, Reddit User Agreement ( "Although we have no obligation to screen, edit, or monitor Your Content, we may, in our sole discretion, delete, deem your content ineligible for monetization, or remove Your Content, at any time and for any reason . . ."), at https://redditinc.com/policies/user-agreement; YouTube's "Community Guidelines" ("If a YouTube creator's on- and/or off-platform behavior harms our users, community, employees or ecosystem, we may respond based on a number of factors including, but not limited to, the egregiousness of their actions and whether a pattern of harmful behavior exists. Our response will range from suspending a creator's privileges to account termination."), *at* https://support.google.com/youtube/answer/9288567.

[67] *See*, *e.g.*, Prager University v. Google LLC, 951 F.3d 991, 1000 (9th Cir. 2020) ("Lofty but vague statements like 'everyone deserves to have a voice, and 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").

that would require a disclosure to render it non-deceptive.[68] Complete silence about a feature rises to the level of deception under the FTC Act only in highly limited circumstances that involve contradictions with core consumer expectation about the product.[69] Thus, a deceptive omission theory is likely to be viable only in the narrow circumstances where (1) the platform had created an impression about its content moderation policies that is deceptive absent appropriate disclosures; or (2) the non-disclosed details of a platform's content moderation process would rise to the level of "core aspects of a transaction that virtually all consumers would consider essential to an informed decision."[70]

### B. Unfairness

An act or practice is unfair if it (1) causes or is likely to cause substantial consumer injury, (2) that is not outweighed by countervailing benefits to consumers or competition; and (3) is not reasonably avoidable.[71] Unfairness is broader than deception—although many unfairness cases involve some element of fraud, a practice can be unfair without being deceptive.[72]

In potentially the most relevant application of unfairness to platform censorship, the Commission has found that a unilateral breach of contract can rise to the level of unfairness under certain very limited circumstances. In *FTC v. Orkin*, Orkin unilaterally

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[68] In re International Harvester, 104 FTC 949, 1057 (1984) ("it can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression.").

[69] For example, failure to disclose that a car will not reach highway speeds would likely constitute deceptive omission, as consumers would reasonably expect a car to be capable of reaching such speeds. *See* Statement of Acting Chairman Maureen K. Ohlhausen, In the Matter of Lenovo, Inc., at 2 (Sept. 5, 2017) ("an omission is misleading under the FTC Act if the consumers' ordinary fundamental expectations about the product were violated."). This limitation is grounded in sound policy: because myriad factors that could be disclosed about any product might be material to some consumers, requiring disclosures of all potentially material information would lead to an avalanche of costly and extraneous (to most consumers) information accompanying every product. *See* International Harvester, 104 FTC at 1059.

[70] *Int'l Harvester*, 104 FTC at 1062.

[71] 15 U.S.C. § 45(n); FTC Policy Statement on Unfairness (Dec. 17, 1980), at https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[72] Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1367 (11th Cir. 1988). For example, in *International Harvester*—the first case to employ this three-prong unfairness test—the Commission held that a failure adequately to warn consumers about possible fuel geysering constituted an unfair practice, because the potential consumer harm from this defect was sufficiently large to outweigh the costs of warning, and consumers could not avoid the harm because they lacked adequate knowledge of its existence and severity. In re International Harvester, 104 FTC 949 (1984). Indeed, deception can be thought of as a special case of unfairness, where harm is presumed for material misrepresentations. *See* J. Howard Beales, III, *The FTC's Use of Unfairness Authority: It's Rise, Fall, and Resurrection*, Marketing and Public Policy Conference (May 30, 2003), at https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection.

breached a substantial number of consumer contracts for pest control services by raising their contract renewal rate despite contractual promises that this price would increase only if there were structural modifications to the covered home.[73] The Eleventh Circuit upheld a Commission finding that this breach was an unfair practice because it imposed an unavoidable price increase on a large number of consumers, which was not offset by any countervailing benefits. [74] The Commission has pled similar unfairness theories in other settled cases.[75] Below, we discuss application of each element of unfairness to platform censorship through the lens of a unilateral breach of content moderation policies.

***Substantial Injury***

First, censorship clearly harms those who are censored, both in terms of lost utility from having their content available to the public and potentially due to lost monetization from advertising, subscriptions, or other off-platform revenue streams supported by platform content. Further, those who might derive benefits from the censored content are also likely harmed. Given the relatively small level of harm accompanying any instance of censorship, a single or a few instances of censorship likely would not satisfy the substantiality requirement[76] For example, *Orkin* involved a breach affecting over 200,000 consumers who were charged a total of $7 million in additional fees.[77] Thus, the Commission would have to show that a substantial number of content providers were censored due to a widespread pattern of breaches of TOS. Importantly, there must be a causal link between *breaches of TOS* related to content moderation (either through failure to honor existing policies or a unilateral change in policies) and substantial consumer injury, not merely evidence that a platform removed or otherwise degraded a substantial amount of content in a manner consistent with its policies.

***Countervailing Benefits***

The same actions that harm censored content providers are likely to provide benefits to other platform users who might suffer harm from the censored content; one person's truth can be another person's hate speech or disinformation. Further, there are

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[73] *Orkin*, 849 F.2d 1354.

[74] *Id*.

[75] *See*, *e.g.*, In the Matter of Negotiated Data Solutions, LLC, Dkt. No. C-4234 (Sept. 23, 2008); In re Gateway Learning Corp., Dkt No. C-4120 (Jul. 7, 2004).

[76] Substantial injury can be shown by "small harm to a large number of people." Unfairness Statement at n.12. We also note that the Commission has stated that "emotional impact and other more subjective types of harm . . . ordinarily will not make a practice unfair." Unfairness Statement. Thus, to the extent that censorship does not accompany loss in monetization, the lost utility to content providers and consumers could be considered too subjective for the purpose of unfairness.

[77] *Orkin*, 849 F.2d at 1356, 1365.

potential positive externalities to society from stopping misinformation or content promoting violence.[78] Content moderation also directly benefits the platform. First, a platform may feel a sense of "corporate responsibility" to strike what it sees as the correct balance between hosting different points of view and providing a forum for violent or false content.[79] Content moderation choices are also an important dimension of quality that platforms calibrate to maximize their value—content moderation policies simultaneously attract more users to a platform and create an appealing environment for advertisers that do not want to see their brands next to controversial content.[80] To interfere with a platform's private decision to censor certain types of content would go against a modern Commission's use of its unfairness authority to promote consumer sovereignty rather than substituting its judgment for that of the marketplace.[81] What is more, a platform's freedom to determine its optimal content moderation policy is intimately related to its First Amendment rights discussed in Part I.[82]

***Reasonably Avoidable***

A practice is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it, or if consumers are aware of, and are reasonably capable of pursing potential avenues toward mitigating the injury after the fact."[83] The Commission typically satisfies this element of an unfairness claim by showing that consumers had no advanced knowledge of the practice due to active concealment[84]

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[78] For example, content that promotes false information related to communicable diseases or promoting violence against a certain groups can cause harm to consumers who are not using the platform.

[79] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625-27 (2018).

[80] *See Id.* at 1627 ("the primary reason companies take down obscene and violent material is the threat that allowing such material poses to potential profits based in advertising revenue"). *See also* Kevin Roose, *Reddit's IPO Is a Content Moderation Success Story*, NEW YORK TIMES (March 21, 2024) ("content moderation is not an empty buzzword or a partisan plot. It's a business necessity, a prerequisite for growth and something every social media company has to embrace eventually, if it wants to succeed")

[81] *Cf*. Beales, *supra* note 72 ("the Commission's role is to promote consumer choice, not second-guess those choices"); Unfairness Policy Statement, *supra* note 71 ("Unfairness actions "are brought, not to second-guess the wisdom of particular consumer decision, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.").

[82] *See NetChoice*, 603 U.S. at 734 ("The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey.").

[83] FTC v. Amazon.com, 2016 WL 10654030, at *9 (W.D. Wa. 2016). *See also* FTC v. Fleetcor Tech., Inc., 2022 WL 3273286, at *32 (N.D. Ga. Aug. 9, 2022) ( Where 'anticipatory avoidance' and 'subsequent mitigation' are not reasonably possible, the injury is not reasonably avoidable").

[84] E.g., Fleetcor, 2022 WL 3273286, at *34 (defendant did not inform prospective customers about fees, hid fees, automatically enrolled consumers in programs with fees, and obscured fee information on bills).

or a failure adequately to disclose relevant information.[85] Further, inability to reasonably avoid a harmful practice can also be shown by high costs to mitigate harm *after* gaining knowledge of the practice, such as procedures that impede the ability to obtain refunds or to avoid charges,[86] or the inability to switch suppliers.[87]

Satisfying this element of unfairness in the context of platform censorship, therefore, would require showing that (1) the TOS were either actively obfuscated or not adequately disclosed at the time the censored consumer signed up for the service, and (2) it was too difficult for consumers to find alternative platforms to post or view content once they became aware of the offending policy. The circumstances under which either of these conditions are likely to obtain appear to be quite limited. First, as noted, TOS typically are not difficult to find or actively obfuscated.[88] Second, there are myriad platforms on which one can post content, with heterogenous content moderation policies.[89] Further, most content providers multihome.[90] Thus, there appears to be few

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[85] *See*, *e.g.*, *Amazon.com*, 2016 WL 10654030, at **9-10 (disclosure of in-app purchasing window was inadequate to put consumers on notice).

[86] *See, e.g.*, FTC v. 1661, Inc., dba GOAT, Complaint, Case No. 2:24-c-10329 (C.D. Cal. Dec. 2, 2024) (alleging lack of adequate procedures to provide consumers with promised refunds for defective products); FTC v. Avant, LLC, Complaint, Case No. 19-cv-2517 (N.D. Il. April 15, 2019) (alleging lack of procedure to rectify and obtain refunds for inaccurate charges).

[87] For example, in N-Data, the Commission alleged that businesses that had developed products around the standard containing N-Data's patent could not switch to another standard. Complaint, In the Matter of Negotiated Data Solutions LLC, Dkt No. C-4234 at ¶32 (Sept. 23, 2008).

[88] *Cf. NetChoice*, 603 U.S. at 738 ("The Community Standards and Community Guidelines set out in copious detail the varied kinds of speech [Facebook and YouTube] want no truck with").

[89] There is evidence that entry and repositing in the content moderation speech may be an important form of competition. *See*, *e.g.*, Klonick, *supra* note 79, at 1629 (discussing how Twitter had modified its policies to rein in certain types of hate speech and harassment in response to consumer exit when its moderation policies did not mesh with users' norms). More recently, platforms such as Gab have entered the market and are known for having relatively relaxed content moderation policies compared to other platforms . *See* Christopher St. Aubin & Galen Stocking, Center, *Key Facts About Gab*, PEW RESEARCH CENTER (Jan 24, 2023) ("Gab identifies itself as an alternative to Big Tech and has limited content moderation."), at https://www.pewresearch.org/short-reads/2023/01/24/key-facts-about-gab/ . Further, X and Meta recently have relaxed their content moderation policies. *See*, *e.g.*, Kate Conger, *Elon Musk Wants People on X to Police Election Posts. It's not Working Well*, NEW YORK TIMES (Jul. 25, 2024), at https://www.nytimes.com/2024/07/25/technology/elon-musk-x-community-notes-election.html; Mike Isaac & Theodore Schleifer, *Meta Says it Will End It's Fact-Checking Program on Social Media*, NEW YORK TIMES (Jan. 7, 2025), at https://www.nytimes.com/live/2025/01/07/business/meta-fact-checking; 7, 2025), at https://www.nytimes.com/live/2025/01/07/business/meta-fact-checking.

[90] According to a recent Pew survey, 66 percent of news influencers—defined as those who post about current events and have at least 100,000 followers on Facebook, Instagram, YouTube, X, or TikTok— post content on more than one site, and 27 percent are on five or more sites. https://www.pewresearch.org/wp-content/uploads/sites/20/2024/11/PJ_2024.11.18_news-influencers_report.pdf. Further, 34 percent of these influences also have a podcast. *Id*.

circumstances under which users could not avoid, or otherwise mitigate, harm from platform censorship at a reasonable cost.

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In sum, although the FTC enjoys broad UDAP authority, absent a substantial departure from existing law, there appears to be only a highly limited set of facts that would support its application to platform content moderation policies that result in censorship. As Chairman Ferguson has explained recently, the FTC "must be mindful not to stretch the scope of consumer-protection laws beyond their rightful purpose. . . . Everyone is a consumer. But not every issue is a consumer protection issue."[91]

## CONCLUSION

As an ever-increasing portion of the US population rely on platforms for vital information, content moderation decisions can have sweeping impacts. Nonetheless, except in very limited circumstances, the powers Congress granted the FTC to prohibit "unfair methods of competition" and "unfair or deceptive acts or practices" do not appear to be the proper tools to address these issues.

[91] Commissioner Andrew Ferguson, Federal Trade Commission, Staying in Our Lane: Resisting the Temptation of Using Consumer Protection Law to Solve Other Problems, at 1 (Sept. 27, 2024), at https://www.ftc.gov/system/files/ftc_gov/pdf/9.27.2024-Ferguson-ICPEN-Remarks.pdf.