

Content Moderation and Antitrust: Part VI - Is there an empty set at the intersection of antitrust and content moderation?

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Antitrust scrutiny of large technology platforms has continued apace in ways both more and less familiar under the second Trump administration and its antitrust agencies. Of some controversy is enforcers' interest in a novel area of inquiry; that is, whether—and under what conditions—content moderation might prove anticompetitive, in violation of the antitrust laws. That question raises another: if so, would enforcement of the antitrust laws against such content moderation run afoul of the speech clause of the First Amendment to the U.S. Constitution? We suggest a qualified “no” as an answer to the first question and a likely “yes” as an answer to the second. While one might, in the abstract, imagine an antitrust case against something like a tech platform’s content moderation practices, we suspect that finding facts and circumstances to make out a convincing antitrust case involving the actual tech platforms of interest would prove tough sledding. Moreover, recent Supreme Court precedent suggests limits to the reach of antitrust, at least as pertains to content moderation by privately operated tech platforms.

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"President Trump has put a swift end to the weaponization of the federal government against Americans and their freedoms (. . .)"

Andrew N. Ferguson¹

1. Antitrust scrutiny of large technology platforms has continued apace under the second Trump

1. Model Letter Sent to Tech Companies from Andrew N. Ferguson, Chairman, U.S. Fed. Trade Comm'n, Aug. 21, 2025, at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-unfair-security-letter-ferguson.pdf.

administration and the leadership appointed at the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) in 2025. Both the FTC and DOJ have maintained investigations, litigation, and, indeed, aggressive remedies proposals in the tech sector.² Beyond that, the agencies have opened a novel area of inquiry—one that raises a two-part question: first, whether—and under what conditions—content moderation might prove anticompetitive, in violation of the antitrust laws; and second, whether, in such cases—supposing there are some—enforcement of the antitrust laws runs afoul of the speech clause of the First Amendment to the U.S. Constitution. The case law seems to provide no precedent on private content moderation as an antitrust violation, and popular antitrust treatises, such as Areeda and Hovenkamp's fourteen-volume *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, do not appear to mention it at all.³

2. As we explain below, we suggest a qualified "no" as an answer to the first question and a likely "yes" as an answer to the second. Theoretically, one might imagine an antitrust case against something like a tech platform's content moderation policies or practices. We suspect, however, that finding facts and circumstances to make out a convincing case involving the actual tech platforms of interest would prove tough sledding. Moreover, recent Supreme Court precedent suggests limits to the reach of antitrust, at least as pertains to content moderation by privately operated tech platforms. This does not seem a fruitful use of limited agency resources, and it may

2. Enforcement matters brought by the Department of Justice and the Federal Trade Commission include lawsuits against Amazon, Apple, Google (two matters), Meta (two matters), and Microsoft. *See U.S. and Plaintiff States v. Apple*, case No. 2:24-cv-04055 (D.N.J. 2024) (Compl.); *FTC and Plaintiff States v. Amazon.com, Inc.*, case No. 2:23-cv-01495 (W.D. Wa. 2023) (Compl.); *FTC v. Microsoft Corp.*, case No. 3:23-cv-02880 (N.D. Cal. 2023) (Compl. for Temporary Restraining Order and Preliminary Injunction); *U.S. and Plaintiff States v. Google LLC*, case No. 1:23-cv-00108 (E.D. Va. 2023) (Compl.); *FTC v. Meta Platforms, Inc.*, case No. 5:22-cv-04325 (N.D. Cal. 2022) (Compl. for Temporary Restraining Order and Preliminary Injunction); *FTC v. Facebook, Inc.*, case No. 1:20-cv-03590 (D.D.C. 2021) (Compl. for Injunctive and Other Equitable Relief); *U.S. and Plaintiff States v. Google LLC*, case No. 1:20-cv-03010 (D. D.C. 2020) (Compl.).

3. *See, e.g.,* H. Hovenkamp, *Principles of Antitrust*, 3rd ed., West Academic Publishing, St. Paul, 2025; P. E. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 4th–5th ed., Wolters Kluwer, New York, 2022 (absence of the issue from these treatises confirmed by searching contents and indices, and by email with Herbert Hovenkamp, Sept. 21, 2025).

be something worse than that.

I. Content moderation and antitrust?

3. This new initiative seems to have begun with the FTC’s February 2025 announcement of a Request for Public Comment Regarding Technology Platform Censorship,⁴ which was pitched as “a public inquiry to better understand how technology platforms deny or degrade users’ access to services based on the content of their speech or affiliations, and how this conduct may have violated the law.”⁵

4. That sort of request—a request for information (RFI)—is not a law-enforcement investigation, and it does not require any party to submit anything in particular—no subpoena power or compulsory process is invoked. It is one sort of broad preliminary inquiry that may inform the Commission and, potentially (or not), lead to a more formal study, reporting, or investigation. It fits broadly under the FTC’s authority under Section 6(a) of the FTC Act: “To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce (. . .)”⁶ As such, it might have been business as usual. Keeping up with market developments by various means—from rigorous empirical studies to issue-spotting workshops and RFIs—is a basic part of the FTC’s statutory mission.

5. Yet, the issue of platforms’ content moderation and the framing of the request hardly seemed a neutral inquiry into an area of potential interest.⁷ It took little imagination to wonder whether an inquiry into “censorship” and how “technology platform”

conduct “may have violated the law” may have skewed submissions to the agency and, perhaps, biased the inquiry itself. Encouraging input from “[t]ech platform users who have been banned, shadow banned, demonetized, or otherwise censored” (but no others) did not seem a neutral solicitation of public comment on the potential costs and benefits of platform conduct. Indeed, some of the Commission’s commentary seemed ominous. The FTC’s press release stated that “[c]ensorship by technology platforms is not just un-American, it is potentially illegal.”⁸ Posting on the platform X, Chairman Ferguson (very) similarly opined that “Big Tech censorship is not just un-American, it is potentially illegal.”⁹ Those may have been his genuine suspicions, but they were not reminiscent of the FTC’s long lauded history as a research-based enforcement agency. To some, they may have seemed to flirt with prejudice.

6. A somewhat clearer statement of concerns can be found in a statement of interest (“Statement” or “SOI”) filed by the DOJ Antitrust Division in a private antitrust case brought against a number of major news publishers by, among others, the Children’s Health Defense Fund—an organization previously chaired by U.S. Health and Human Services Secretary Robert F. Kennedy Jr.¹⁰ Nominally, at least, a statement of interest can be distinguished from an amicus brief filed on behalf of or in support of a party.¹¹ Still, it was a statement supportive of the plaintiffs in the matter and a formal submission to a federal court. It may, in that regard, be distinguished from information gathering and *ex officio* remarks by agency officials that are not themselves legal instruments or even official agency guidance documents.¹²

7. The DOJ’s Statement “takes no position on the application of the law to the facts alleged in

4. Fed. Trade Comm’n, Request for Public Comment Regarding Technology Platform Censorship, Feb. 20, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.

5. Fed. Trade Comm’n, Press Release, Federal Trade Commission Launches Inquiry on Tech Censorship, Feb. 20, 2025, <https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship>.

6. 15 U.S.C. § 46(a).

7. See, e.g., D. J. Gilman, Antitrust at the Agencies: Private Anticompetitive Censorship Edition, *Truth on the Market*, Feb. 21, 2025, <https://truthonthemarket.com/2025/02/21/antitrust-at-the-agencies-private-anticompetitive-censorship-edition/>.

8. Press Release, *supra* note 5.

9. Post, Andrew Ferguson, Chairman, FTC, X, Feb. 20, 2025, <https://x.com/AFergusonFTC/status/1892619431991287893>.

10. Statement of Interest of the United States, *Children’s Health Defense v. WP Co.*, Civil Action No. 1:23-cv-2735 (D.D.C. filed Jul. 11, 2025), <https://www.justice.gov/atr/media/1407666/dl?inline>.

11. See 28 U.S.C. § 517 (authorizing the Department of Justice to “attend to the interests of the United States” in a pending suit).

12. See J. Casper, FTC’s Ferguson Says Tech Censorship Practices May Violate Antitrust Law, *Broadband Breakfast*, Mar. 25, 2025, <https://broadband-breakfast.com/ftcs-ferguson-says-tech-censorship-may-violate-antitrust-law/>.

Plaintiffs' complaint or on the resolution of Defendants' motion."¹³ That is consistent with an agency's legitimate interest in the courts' proper application of the laws that the agency is charged to enforce, an interest that extends to the legal principles themselves and not just their fit to specific facts alleged. Still, it is worth noting that the motion in question was a motion to dismiss for, among other things, failure to state a claim. Setting aside the facts, even as alleged, and the question of dismissal, leaves us with a question about how much clarification is on offer in the DOJ's Statement.

8. The Statement notes that nonprice dimensions of competition, including product quality, could be the gravamen of an antitrust complaint under either Section 1 or Section 2 of the Sherman Antitrust Act.¹⁴ That abstract point is uncontroversial. For example, in the 2010 Horizontal Merger Guidelines, the FTC and the DOJ stated: "*Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.*"¹⁵

9. Historically, the agencies have considered non-price effects in certain merger reviews under the Sherman and Clayton Acts,¹⁶ and federal courts have noted the importance of non-price dimensions of competition in antitrust cases.¹⁷ Hence, when

considering hospital mergers, certain qualitative aspects of care may be salient: *ceteris paribus*, higher rates of post-operative infection are uniformly considered lower-quality outcomes,¹⁸ and such non-price effects may be important, perhaps especially where exogenous constraints limit price competition.

10. But such antitrust cases are few and far between, and for good reason. For one thing, the conditions under which product quality (or quality-adjusted price) may be suppressed independent of (more easily assessed) price and output effects may be limited. Second, the material qualitative attributes of products may be numerous and diverse. At some level, such attributes may be indefinitely many and constitutive of the product itself. While the entire bundle of such attributes may have a market valuation, and while there may be market prices for certain variable product attributes (such as trim levels on an automobile), objective assessments—even ordinal assessments—of the value of individual qualitative attributes are far from the norm.

11. Both problems may have been skirted in the FTC's 1965 *Macaroni* case. There, the Court of Appeals for the Seventh Circuit agreed with the FTC that the "*highest quality macaroni products are made from 100% semolina and such products have the best consumer acceptance of all macaroni products.*"¹⁹ It was alleged that the defendant producers of dried pasta had agreed, through their association, to fix the amount of that "*highest quality*" input as a uniform cost-control measure. And so, the Seventh Circuit agreed with the FTC that "*where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court.*"²⁰ That is, the agreement was determined to be an agreement among horizontal competitors to fix quality-adjusted prices.

12. What would it mean to make out an analogous

13. Statement of Interest of the United States, *supra* note 10, at 2.

14. *See, e.g., National Macaroni Manufacturers Association, et al., Petitioners, v. Federal Trade Commission, Respondent*, 345 F.2d 421 (7th Cir. 1965); *see also*, Comments of the International Center for Law & Economics RE: FTC-2025-0023-0001, Request for Public Comments Regarding Technology Platform Censorship, May 21, 2025, <https://laweconcenter.org/wp-content/uploads/2025/05/FTC-RFI-Technology-Platform-Censorship-2025.pdf>.

15. U.S. Dep't Justice and U.S. Fed. Trade Comm'n, Horizontal Merger Guidelines, Aug. 19, 2010, at 2, [https://www.justice.gov/atr/file/810276/dl?inline= \(withdrawn Dec. 2023\)](https://www.justice.gov/atr/file/810276/dl?inline= (withdrawn Dec. 2023)).

16. *National Macaroni Manufacturers Ass'n*, *supra* note 14; *see also*, M. Jones, B. Kobayashi and J. O'Connor, Economics at the FTC: Non-Price Merger Effects and Deceptive Automobile Ads, FTC Working Paper, Dec. 2018, <https://www.ftc.gov/system/files/documents/reports/economics-ftc-non-price-merger-effects-deceptive-automobile-ads/1812-be-rio.pdf> (FTC Bureau of Economics analysis of the non-price effects of the proposed merger between DraftKings, Inc. and FanDuel Ltd.).

17. *National Macaroni Manufacturers Ass'n*, *supra* note 14; *United States v.*

Continental Can Co., 378 U.S. 441 (1964).

18. The U.S. Department of Health & Human Services has developed certain measures of hospital quality, including certain core outcomes and process measures. *See, e.g.,* Dep't Health & Human Servs., Agency for Health Care Research and Quality, Major Hospital Quality Measurement Sets, <https://www.ahrq.gov/talkingquality/measures/setting/hospitals/measurement-sets.html>.

19. *National Macaroni Manufacturers Ass'n*, 345 F.2d at 424.

20. *Ibid.* at 426.

case for a platform’s content moderation policies? Of course, with unilateral conduct, we might even assume, for the sake of argument, that a given platform has lowered the quality of its content moderation and fail to find a viable case. Even firms with market power are typically free to price and design products as they will, subject to market (not regulatory or antitrust) discipline. But what if we—or a plaintiff—were to challenge that assumption? Content moderation policies—as written and as implemented—may themselves bundle (or exemplify) complex attributes and they are, in any case, but some of the many non-price attributes of a social media or other tech platform. We—the authors—may prefer one or another content moderation policy. One or both of us might find all of them to be acceptable or unacceptable in meeting our preferences. But our preferences do not constitute an intersubjective utility function, much less a market-wide assessment or ordering of content moderation policies, much less such an assessment or ordering of various tradeoffs, across non-price dimensions of product quality across platforms. With such policies, one person’s meat may be another’s poison, and variation across policies may be fundamental to healthy differentiated interbrand competition among platforms. The problem of valuation seems fundamentally confounding, even before we consider that there is no straightforward way to link qualitative variation to price with such services.

13. Formal comments submitted to the FTC by the International Center for Law & Economics put the problem thus: “*The complexity inherent to the tradeoffs (. . .) are even more difficult to assess when different consumer groups have sharply contrasting views of what constitutes indicia of quality along each of these dimensions. With political media, most would prefer to have more of what they want to read available, and less of what they don’t want available, even if it comes at the expense of other consumers’ preferences. There is no easy way to quantify and weigh general consumer welfare where one group’s moderation preferences necessarily come at the expense of another’s. In this sense, a non-price-effects analysis of political bias would be even more complex than a complaint based on user privacy. (. . .) when it comes to the algorithm that determines what is seen and in what order, or what is fact checked, or even what is monetized, there is no clear preference that all consumers share.*”²¹

14. The DOJ’s Statement recognizes that, in the

abstract, a full rule of reason approach may be demanded if agreements among competitors regard the joint development of, e.g., voluntary product quality standards or information sharing about (input) product quality, whereas a truncated analysis may be appropriate when competitors agree “*on the pricing or features of the products they will and will not sell.*”²² In the abstract, well enough. But the *Macaroni* case is easily distinguished to the point where it is hard to see how platform content-moderation policies could be tantamount to price fixing. Without opining on the facts alleged and ways in which they might or might not fit the law, the DOJ’s Statement seems to elide all the hard questions about the ways in which platform content moderation might or might not run afoul of the antitrust laws. It is unclear whether there is anything left to their clarification beyond the tepid point that non-price dimensions of competition may be relevant to antitrust analysis.

15. Similarly, we might consider the DOJ’s numerous citations to the Supreme Court’s 1945 decision in *Associated Press*,²³ which was about exclusionary conduct and not content moderation or non-price competition. Nothing in the decision turns on the question of whether the AP had unduly restricted its own access to news and thus had diminished the quality of its own product, or access to any specific quantity or quality of news on the part of its members. As detailed more below, it is not clear that the case says anything about the First Amendment considerations that a content moderation antitrust case might pose. Leaving aside the question of how to read *Associated Press* through the lens of subsequent First Amendment jurisprudence, the DOJ’s Statement seems to establish little (if anything) more than the proposition that the business conduct of firms engaged in protected speech, among other activities, is not generally immune from antitrust scrutiny, even if some of their business conduct may be.

16. The DOJ’s Statement indulges in high-flying language about the importance of antitrust and “*viewpoint competition in the marketplace of ideas.*” Yet it avoids or even obscures everything that is hard about the underlying controversy—and indeed the

21. See Comments of the International Center for Law & Economics, *supra* note 14, at 20.

22. Statement of Interest of the United States, *supra* note 10, at 13.

23. *Associated Press v. United States*, 326 U.S. 1 (1945).

larger issue—on at least two fundamental points:

- What would it take for the plaintiffs to prevail on—or even establish antitrust standing to bring—their underlying antitrust complaint?
- How might antitrust liability or remedies be subject to First Amendment limitations?

17. The question of liability—and, indeed, the requirements of antitrust standing (above and beyond Article III standing)—goes to the basic question of what it would take for the plaintiffs in the case at issue to establish, or even adequately plead, harm to competition, and not just harm to the plaintiffs themselves. Stepping back from the facts alleged in the underlying private complaint, The DOJ’s Statement sheds little to no light on the questions whether and under what conditions the content moderation policies of tech platforms might run afoul of the antitrust laws, independent of First Amendment questions.

II. Antitrust, content moderation, and the First Amendment

18. The DOJ’s Statement does little to clarify the extent to which the First Amendment may cabin or even preclude antitrust liability for private content moderation decisions, whether cases are brought by private plaintiffs or a government enforcement agency. And the First Amendment questions are many. The Statement’s numerous citations to *Associated Press* ignore what may be key aspects of that decision, even as it seeks to clarify the relationship between antitrust and the First Amendment as the Court understood it in 1945. How to read it through the lens of subsequent First Amendment jurisprudence—notably, cases involving news organizations, such as *Miami Herald Pub. Co. v. Tornillo*²⁴ and online content moderation, such as *Moody v. NetChoice*²⁵—is hardly considered at all.

19. Moreover, much as with the FTC’s platform censorship inquiry, the DOJ’s Statement elides the First Amendment’s distinction between government

action and private action. The Statement cites, among other sources, Nobel laureate economist F. A. Hayek and Justice Oliver Wendell Holmes’ dissent in *Abrams v. United States*,²⁶ to bolster the idea that diverse sources of speech are good for the marketplace of ideas. But these citations argue against government restrictions on speech, not against private ordering.

20. The Supreme Court has repeatedly made clear that the First Amendment only restrains government actors,²⁷ and that it affords private actors wide latitude to police speech on their property.²⁸ Antitrust law, after all—certainly antitrust action by federal enforcers—is government action, itself subject to the First Amendment.²⁹ The DOJ cites Hayek to bolster the argument that antitrust law may be used to ensure diverse voices in the marketplace of ideas.³⁰ But DOJ’s citation is inapposite. Hayek’s article—“The Use of Knowledge in Society”—argues that market actors, rather than government bureaucrats, are best positioned to utilize dispersed information. The article cited by the DOJ argues against central control by government actors.

21. The DOJ’s Statement also ignores the limitations on remedies presented by the *Associated Press* decision itself. There, the Court noted: “*The decree does not compel AP or its members to permit publication of anything which their ‘reason’ tells them should not be published. It only provides that, after their ‘reason’ has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication.*”³¹ In other words, antitrust remedies may not compel social-media platforms to publish material they do not wish to publish, whether because it is purported misinformation or for any other

24. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

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

26. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

27. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

28. *Moody*, 603 U.S. at 731 (“[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 would prefer to exclude.”).

29. See, e.g., B. Sperry, First Amendment Conflict of Visions Redux: The Case of Facebook’s Oversight Board and the Threat of Antitrust Action, *Truth on the Market*, May 12, 2020, <https://truthonthemarket.com/2020/05/12/first-amendment-conflict-of-visions-redux-the-case-of-facebooks-oversight-board-and-the-threat-of-antitrust-action/>.

30. Statement of Interest of the United States, *supra* note 10, at 5 (citing F. A. Hayek, The Use of Knowledge in Society, *Amer. Econ. Rev.*, Vol. 35, No. 4, 1945, pp. 519–530).

31. *Associated Press*, 326 U.S. at 20, n.18.

reason.

22. And, of course, there is the Supreme Court's 2024 decision in *Moody v. NetChoice*. At issue there were Florida and Texas laws that purported to regulate "large social-media companies and other internet platforms."³² While recognizing that the state laws differed in various respects, the Court noted that both laws would "curtail the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied third-party messages, videos, and other content their users wish to post."³³ The decision seems very much on point, even if the content moderation at issue may not exhaust the issues of potential concern to the FTC. In *Moody*, the Court reasoned that "a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing the government from 'tilt[ing] public debate in a preferred direction.' Sorrell v. IMS Health Inc., 564 U. S. 552, 578–579 (2011). It is not by licensing the government to stop private actors from speaking as they wish and preferring some views over others. And that is so even when those actors possess 'enviable vehicle[s]' for expression. [Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 577 (1995).] In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.' Buckley v. Valeo, 424 U. S. 1, 48–49 (1976) (per curiam). That unadorned interest is not 'unrelated to the suppression of free expression,' and the government may not pursue it consistent with the First Amendment."³⁴

32. *Moody*, 603 U.S. at 707.

33. *Ibid.*

23. It is worth noting that courts have consistently rejected claims that would require tech platforms to carry speech. In *Jian Zhang v. Baidu.com*,³⁵ the U.S. District Court for the Southern District of New York found that the application of a New York public accommodations law to a Chinese search engine that "censored" pro-democracy speech is inconsistent with the right to editorial discretion, stating that "there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation."³⁶ Other courts have similarly found that tech platforms have a right to editorial discretion that limits antitrust claims.³⁷

24. An antitrust case against advertisers would likely fare no better. In *FTC v. Superior Ct. Trail Lawyers Ass'n*,³⁸ the Supreme Court considered the interaction of antitrust law and the First Amendment in a group-boycott case in which a lawyer's association joined together to refuse to represent indigent defendants until the District of Columbia government increased their fees.³⁹ The Court distinguished the case from *NAACP v. Claiborne Hardware Co.*,⁴⁰ arguing that in this case "the undenied objective of [the lawyer association's] boycott was an economic advantage for those who agreed to participate,"⁴¹ while the black citizens who boycotted white merchants in Claiborne County, Mississippi, "sought no special advantage for themselves."⁴² The government may regulate economic activity, but it may not infringe the First Amendment in doing so.

25. Here, the motivation for advertisers to withdraw from various platforms may be driven by various considerations beyond the mere economic, such that it would be challenging to attribute a motive of consolidating or exercising market power. That might be a relatively trivial point with unilateral conduct.

34. *Ibid.* at 741–742.

35. 10 F. Supp. 3d 433 (S.D. N.Y. Mar. 28, 2014).

36. *Ibid.* at 438.

37. See, e.g., *E-Ventures Worldwide LLC v. Google Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–630 (D. Del. 2007).

38. 493 U.S. 411 (1990).

39. See *ibid.* at 414.

40. 458 U.S. 886 (1982).

41. *Superior Ct. Trail Lawyers Ass'n*, 493 U.S. at 426.

42. *Ibid.*

But that attribution would be challenging with joint conduct as well. Even the DOJ’s Statement recognizes that joint conduct about minimum quality standards or the identification of unreliable or otherwise damaging sources might be a case of voluntary standard setting, which could be procompetitive.⁴³ Turning to First Amendment concerns, a reviewing court would likely see an advertiser’s decision not to be associated with content that it finds damaging to its brand to be a legitimate expression of its First Amendment rights. The decision to disassociate from particular content ecosystems could reflect an exercise of expressive choice, or a prudent measure to safeguard intangible reputational assets—activities that may themselves possess First Amendment dimensions. Decisions to adhere to, or participate in, standard-setting on these dimensions seem to raise the same constitutional questions.

26. While preserving brand equity is undeniably intertwined with a firm’s overall economic well-being, it is analytically distinct from a concerted effort to manipulate market conditions in ways traditionally scrutinized under antitrust doctrines. Indeed, decisions to curtail advertising, while potentially serving long-term reputational interests or expressive aims, might concurrently impose immediate opportunity costs or a reduction in revenue, to the extent that advertising correlates with product or service sales. Ascertaining the primary impetus behind such conduct—whether predominantly expressive, reputational, or anticompetitively economic in the *Trial Lawyers* sense—presents a nuanced evidentiary challenge.

27. In either case, antitrust agencies would confront a formidable challenge if they sought to design remedies in such a case that would comport with existing First Amendment jurisprudence. Governmental compulsion of speech by private entities is generally disfavored. Social-media companies’ creation of expressive products through curation and other moderation decisions, and businesses’ decisions on whether or not to advertise on a particular platform, are both First Amendment-protected activities. Consequently, any remedial measure that would compel a social-media entity to

host specific speech or mandate that businesses engage in specific advertising would likely raise substantial First Amendment questions.

28. There may be a path through the thicket. But the path is not obvious, and the prospect of its discovery seems unpromising.

III. Settlements, agency letters and soft law?

29. Several additional forays by the agencies—especially the FTC—merit consideration. One is a consent order in a merger matter involving Omnicom Group’s acquisition of the Interpublic Group of Companies.⁴⁴ Also of interest are a series of letters sent to various tech firms by Andrew Ferguson, in his capacity as chairman of the FTC.⁴⁵ In *Omnicom*, the FTC had filed a complaint alleging that there had been a history of coordination in the market for media-buying services and that a “*history of coordination in an industry creates the risk of future coordination, in particular post-merger, where there will be one less significant competitor.*”⁴⁶

43. See Statement of Interest of the United States, *supra* note 10, at 13 (“[V]oluntary product standards promulgated with ‘meaningful safeguards’ can sometimes have ‘significant procompetitive advantages.’ Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988).”).

44. Decision and Order, Fed. Trade Comm’n, *In the Matter of Omnicom Group Inc. and the Interpublic Group of Companies, Inc.*, docket No. C-4823, Sept. 26, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/OmnicomOrder.pdf.

45. See Fed. Trade Comm’n, Press Release, FTC Chairman Ferguson Warns Companies Against Censoring or Weakening the Data Security of Americans at the Behest of Foreign Powers, Aug. 21, 2025, <https://www.ftc.gov/news-events/news/press-releases/2025/08/ftc-chairman-ferguson-warns-companies-against-censoring-or-weakening-data-security-americans-behest> (regarding letters sent to “more than a dozen prominent technology companies”); Model Letter Sent to Tech Companies from Andrew N. Ferguson, *supra* note 1; Fed. Trade Comm’n, Press Release, Federal Trade Commission Chairman Andrew N. Ferguson Issues Letter on Gmail Using Partisan Filtering, Aug. 28, 2025, <https://www.ftc.gov/news-events/news/press-releases/2025/08/federal-trade-commission-chairman-andrew-n-ferguson-issues-letter-gmail-using-partisan-filtering>; Letter from Andrew N. Ferguson, FTC Chairman, to Sundar Pichai, Alphabet Corp., re Potential FTC Act Violations Related to Partisan Administration of Gmail, Aug. 28, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-letter-alphabet-ceo-re-potential-ftc-act-violations-related-to-partisan-administration-of-gmail.pdf.

46. Complaint, Fed. Trade Comm’n, *In the Matter of Omnicom Group Inc. and the Interpublic Group of Companies, Inc.*, docket No. C-4823, at 3 (Sept. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2410059C4823OmnicomComplaint.pdf. The complaint defined “Media Buying Services” as “media purchases of advertising inventory across any type of media and purchases on behalf of, or for later resale to, customers or potential customers (advertisers) but does not include other media services sold or billed separately by the company, such as media planning

30. Perhaps. A history of unlawful, anticompetitive coordination involving merging parties might well underscore concerns about post-merger conduct. At the same time, the complaint did not allege a history of price fixing or market allocation agreements among the parties to the transaction; it did not allege that the merger was likely to lead to price fixing involving the merged entity and others in the market; and it did not allege (or explain how) the merger was likely to lead to increased prices or reduced output in the relevant market. Rather, it focused on the potential for a reduction in non-price competition. As we saw above discussing the DOJ's SOI in *Children's Health Defense*, the *Omnicom* complaint noted the potential for firms to coordinate on, e.g., standards of harmful or sensitive content. Further, the FTC complaint stated, “[s]uch practices may have influenced the approaches of online platforms to censor speech about controversial topics and deny access or services to users. Such approaches are relatively transparent and easily observable by competitors.”⁴⁷

31. In the abstract, an enforcer might well be concerned about the prospect of coordinated action post-merger. Coordination, like the acquisition of market power, may raise concerns about increased prices, reduced output, or, indeed, increased quality-adjusted prices. But the complaint makes a weak case for such concerns, and it raises all the problems we saw above with the DOJ's Statement and the FTC's request for information. It raises such concerns, but it does nothing to resolve them. Moreover, given such concerns, and given a thoroughgoing lack of precedent (or economic basis) for such a case, one might well worry if merger complaints seem to be raised, and settled, conditional on a regulator's comfort with a deal's potential (whether likely or not) impact on the marketplace of ideas (or, as in this case, advertising ideas).

32. One interesting question is whether these types of enforcement actions could amount to unconstitutional coercion. In *NRA v. Vullo*,⁴⁸ the Supreme Court considered the efforts of the New York State Department of Financial Services (DFS) to strong-arm consent decrees with an insurer and an insurance broker designed to harm the advocacy

efforts of the National Rifle Association (NRA). The DFS had those entities “agree[] not to provide any NRA-endorsed insurance programs (even if lawful)”

⁴⁹ The Court ruled 9-0 that this was unconstitutional coercion, stating that “a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.”⁵⁰ Despite the DFS having authority over insurance regulation, it could not use that authority to suppress speech activities.

33. Here, the issue is slightly different, as the FTC is attempting to use a consent order to ensure Omnicom cannot coordinate with other advertisers nor act on its own to direct, refuse, or decline advertisements based on “political or ideological viewpoints expressed in content” of media publishers.⁵¹ In other words, the FTC is trying to compel advertisers not to consider what content ads may run beside on social media platforms or other forms of media. Businesses that do not wish for their advertising dollars to run alongside content they find distasteful because it could harm their brand (and thus bottom line) should have the ability to employ advertising agencies to help them in their goals. This is the reverse issue of that presented in *Vullo*, one that was considered in *Moody* with a twist: whether the government can indirectly compel speech by forbidding advertising agencies from considering viewpoints on those media platforms. Nonetheless, the same principle should apply: the government cannot do indirectly what it may not do directly.

34. The FTC could argue that it is merely attempting to fulfill its enforcement mandate. Settlements may efficiently resolve antitrust concerns, and the agency has wide latitude when entering into consent agreements with merging parties. But it is not clear that FTC orders can coerce advertising agencies to carry material against their better business judgment and their customers' wishes without violating the First Amendment. This is why the order is careful to state that it only applies to agreements between Omnicom and “any third party with respect to Media Buying Services” and not to “any agreement (. . .) between Omnicom and an Advertiser,” making clear that “exclusion lists (. . .) or Other means of

or campaign management.” Ibid.

47. Ibid. at 4.

48. 602 U.S. 175 (2024).

49. Ibid. at 185.

50. Ibid. at 190.

51. Decision and Order, *supra* note 44, at 3.

*differentiating between Media Publishers developed at the express direction of a particular client (. . .) are expressly permitted.*⁵² Nonetheless, the focus of the order as a whole is clearly on the issue of content, not the normal concerns of collusion to fix prices, reduce output, or allocate markets.

35. The letters to various tech companies offer another example of the FTC’s efforts to curtail what it sees as censorship. These letters were issued in August 2025. First, on August 21, the FTC announced a series of letters from Andrew Ferguson, in his capacity as chairman of the FTC, to “*more than a dozen*” tech firms, including Akamai, Alphabet, Amazon, Apple, Cloudflare, Discord, GoDaddy, Meta, Microsoft, Reddit, Signal, Snap, Slack and X, and posted a “model letter.”⁵³ The letters noted that “[b]ecause online platforms have become so critical to public discourse, pervasive online censorship in recent years has outraged the American people. Not only have Americans been censored and expelled from platforms for uttering opinions and beliefs that were not shared by a small Silicon Valley elite, the previous administration actively worked to encourage such censorship.”⁵⁴

36. The letters also suggest that such “*censorship*” might be a response to regulatory or other pressures imposed by foreign governments, and cautioned that compliance with such pressures might violate Section 5 of the FTC Act, including the consumer protection or unfair or deceptive acts or practices (UDAP) prong of Section 5 if, for example, firms promised a certain level or mechanism of security for consumers’ personal information but failed to deliver on that promise.

37. Rhetorical flourishes aside, we do not doubt that some Americans have been displeased and others outraged by the moderation practices of one or another tech platform, even as others may have felt differently. Moreover, the letter is correct in that substandard privacy and security practices by tech firms (among others) might be in violation of Section 5, whether or not imposed in response to foreign pressure. As informal guidance for industry—albeit not under the imprimatur of the

Commission itself—the letter is potentially useful. At the same time, it adds almost nothing to extant guidance from the agency, but for the strained bundling with the question of content moderation at the heart of this essay.

38. The August 28 letter to Sundar Pichai, CEO of Alphabet (Google’s parent company), is similar, but seems more pointed—perhaps even threatening. As above, the letter raises concerns about potential violations of Section 5 of the FTC Act, with a focus on the consumer protection prong. But the letter to Pichai stops just short of alleging that conduct by Google violates the FTC Act. Citing contestable allegations by third parties, and no legal or research findings,⁵⁵ Ferguson writes to Pichai, “*due to recent reporting that suggests Alphabet’s administration of Gmail is designed to have partisan effects, and accordingly to notify you that Alphabet may be engaging in unfair or deceptive acts or practices.*”⁵⁶

39. Again, there is no reason why an agency might not provide guidance to industry, and no reason why an FTC chairman, or any other sitting commissioner, might not raise general concerns about either competition or consumer protection matters under the agency’s jurisdiction. The question remains whether writing “[a]s the Chairman of the FTC, I write to inform you of your obligations under the FTC Act. Any act or practice inconsistent with these obligations could lead to an FTC investigation and potential enforcement action”⁵⁷ is just that, or something more. There may be many fine lines on a spectrum running from inquiry, to opining, to “*jawboning*,”⁵⁸ to pressure, to coercion. We are not sure where best, along that spectrum, to situate the missives from the chairman (but not the Commission). We are unsure, notwithstanding Chairman Ferguson’s welcome assurance, in his letter, that “*President Trump has put a swift end to the weaponization of the federal government against Americans and their freedoms (. . .)*”⁵⁹

52. *Ibid.* at 3–4.

53. Model Letter Sent to Tech Companies from Andrew N. Ferguson, *supra* note 1.

54. *Ibid.* at 1.

55. For a critique of the citations in the letter, see D. J. Gilman, Antitrust at the Agencies: Moderation in All Things Edition, *Truth on the Market*, Sept. 3, 2025, <https://truthonthemarket.com/2025/09/03/antitrust-at-the-agencies-moderation-in-all-things-edition/>.

56. Letter from Andrew N. Ferguson to Sundar Pichai, Alphabet Corp., *supra* note 45, at 1.

57. *Ibid.* at 2.

58. W. Duffield, *Jawboning against Speech*, Cato Institute, Sept. 12, 2022, <https://www.cato.org/policy-analysis/jawboning-against-speech>.

59. Model Letter Sent to Tech Companies from Andrew N. Ferguson, *supra*

IV. Conclusion

40. Our conclusion is brief and limited. The U.S. agencies are right that non-price dimensions of products and services might rightly figure in competition matters. That is an entirely uncontroversial position. They are right, too, that the firms operating such platforms are not generally immune from antitrust scrutiny, across all conduct and all lines of business, simply because they engage in protected speech. That, too, is entirely uncontroversial. At the same time, the conditions under which an enforcer might make out a good antitrust case about a platform's content moderation

note 1, at 1

policies seem limited and poorly fit to what is generally known about such policies. The same might be said of consumer protection actions under the FTC Act. Moreover, the Supreme Court has been clear that the First Amendment's prohibition of censorship regards government censorship, not private moderation, and that the speech clause protects content moderation decisions against government intervention that would otherwise fall within state or federal police powers. What is left for content moderation by tech platforms at the intersection of antitrust liability and the First Amendment may or may not be the empty set. But it is limited, to be sure. And the agencies' ongoing inquiries and interventions in the space seem an unpromising waste of limited resources, at best.

D. G. & B. S. ■