



Comments of David Inserra and Jennifer Huddleston in Response to Federal Trade Commission Request for Public Comment Regarding Technology Platform Censorship

We appreciate the opportunity to provide information related to the Federal Trade Commission (FTC)’s “Request for Public Comment Regarding Technology Platform Censorship.” This comment does not represent the views of any particular party or special interest group but is intended to assist regulators in understanding the way technology platforms host and moderate speech based on our prior research and relevant expertise. We seek to provide our insights into the important questions raised by the RFI around content moderation, the rationale for such moderation, and the relevance and impact of competition in this market.

We seek to emphasize three key points in this response.

- The FTC’s request frames technology platforms’ moderation as “censorship” but fails to grasp the platforms’ constitutional right to host and moderate speech as they see fit.
- To support its claim of private “censorship” the FTC asks for information about platforms’ inconsistency, unfairness, and lack of transparency in their moderation, even though such moderation does not remove the fundamental speech rights of platforms.
- The FTC’s request also asks if biased, unfair, and unclear content moderation is a result of anti-competitive practices by technology companies, an argument that if pursued could abuse antitrust authority and shift away from objective standards while potentially resulting in fewer content moderation options as well.

Content Moderation and Curation as Expression

Before turning to the first questions in the RFI dealing with how platforms moderated speech, perhaps the most important question to answer is question 5: “What factors motivated platforms’ decisions to adopt their policies or to take the adverse actions?” The request goes on to ask if platforms made their moderation and policy decisions due to pressure from private interests, foreign and U.S. governments, collusion with outside parties, or individual employees’ interests. These questions, however, entirely miss the primary reason why technology platforms have made content moderation decisions: platforms curate and host content according to their own

expressive and business interests. Many platforms choose to exclude massive amounts of spam, for example, to ensure their product is enjoyable to use. But they also regularly remove or limit the spread of content that they believe to be harmful, hateful, harassing, obscene, or otherwise objectionable based on any given company's preferences for and against certain types of speech.

This moderation and curation function is similar to bookstores that choose what speech they want to host. Like bookstores, online platforms generally host and distribute speech that is not their own. But the choice regarding which books to host is an essentially expressive act that reflects the values and views of the bookstore owner. Christian bookstores can't be required to sell smut. A Muslim bookstore does not need to sell a Hebrew Torah, a Catholic prayer book, or a history of Hinduism. Children-focused bookstores don't need to carry adult-themed books. Bookstores owned by progressives don't need to sell conservative books, nor do conservative-owned stores need to provide progressive books. Booksellers can choose to sell books they have or have not read based on the advice of others or bestseller lists.

In the same way, online platforms may choose which types of speech they want to allow, disallow, promote, or demote. Christian dating sites need not host porn or LGBTQ content. LGBTQ focused platforms need not platform conservative religious views that they consider harmful or bigoted. Platforms of all sizes possess the right to say that they won't host neo-Nazi speech or Hamas sympathizers.

But the rights to engage in curation decisions do not stop with mere selection of what to carry or not carry in offline examples nor should such a standard apply online. Bookstores can organize their shelves as they see fit, deciding which speech to promote and which to put on the back shelves, which to advertise and which they might restrict access to. And just as a bookstore's rights extend beyond just which books to carry, platforms also have the right to curate the content they host, deciding what gets recommended and what gets demoted. Given that millions of pieces of content are being posted every day, these companies make use of various technologies and algorithms to help them automate their moderation and curation. Some platforms like Reddit give significant authority to communities or groups to set some of their own rules. Other more decentralized platforms chose to give users substantial or near total

control over content moderation and curation.¹ But this, too, is an editorial decision by these decentralized platforms that are willing to host and distribute a broad range of speech and build a community around the choices of empowered individuals.

With this primary rationale established, we can see that some of specific rationales the RFI asks about are merely part of that the primary rationale. For example, if advertisers or civil society groups are pressuring an online platform to moderate speech differently, then the platform is free to respond to these pressures as it sees fit, holding its existing policies or changing them to reflect new research, new user and advertiser preferences, or simply a change in the values and interests of the platform. Similarly, individual employees and executives may try to influence moderations decisions. Employees and executives engage in ongoing debate over what a platform's values and policies should be and how to apply them. Indeed, one of the authors of this comment formerly worked on the content policy at Meta and was constantly engaged in debates over what speech should allowed or removed from Meta's platforms.

Asking about foreign and U.S. government influence, however, is a distinct question from the other potential sources of influence. Questions of government jawboning or censorship by proxy are worthy of consideration because of the ways they impact these platforms' own speech rights to make content moderation decisions, thus distinguishing them from the private or business choices a platform might otherwise make. The FTC is certainly aware of the *Murthy v. Missouri* decision from the Supreme Court and the details surrounding that case. The court decided the case on standing grounds, finding that there was not a clear causal connection between the pressure from the Biden Administration to the specific content moderation decisions of the platforms. While in many cases it is true that the companies did push back and hold their ground, in some cases these companies felt they had little choice but to comply with the demands of the Biden administration or otherwise risk the administration punishing them on other businesses issues.²

Democratic governments around the world are also increasingly regulating and censoring speech online, but these nations do not have the same legal standard for such intervention as the First

¹ David Inserra, "[A Guide to Content Moderation for Policymakers](#)," Cato Institute Policy Analysis no. 974, May 21, 2024.

² David Inserra, "[New Revelations of More Government Pressure on Tech Companies to Silence Constitutionally Protected Speech](#)," *Cato at Liberty (blog)*, May 6, 2024.

Amendment. The EU’s many intrusive regulations have given rise to conversations about the “Brussels effect” in technology, i.e. the degree to which technology platforms change their policies worldwide to comply with regulations coming from a large market such as the EU. These regulations may push companies to change their policies through the threat or imposition of major fines. Such regulations have also been used for more immediate effect, though, as seen when former EU Commissioner Thierry Breton directly invoked the Digital Services Act to demand that Elon Musk and X “mitigate” harms that might emerge from a livestream conversation between Musk and then candidate Donald Trump before the 2024 U.S. election or else risk significant penalties.³ While this attempted interference in a U.S. election appears to have resulted in his subsequent dismissal from the EU Commission, there is nothing preventing the EU from continuing to use its regulations to attempt to shape the content moderation of largely U.S. companies.

But U.S. regulators should remember that not only do such actions have a chilling effect on free expression and debate, but also the foreign jurisdictions proposing these interventions do not have the same restrictions on government censorship as the U.S. First Amendment. Regardless, these acts of coercion and censorship are wrong and unlawful because they deny the platforms the free exercise of their expressive rights. Rather than reject this coercive standard, however, in the next section we will see how the RFI attempts to justify government censorship against expression it dislikes.

Biased, Unclear, and Inconsistent Moderation and Curation Does Not Deprive Platforms of Their Expressive Rights

Returning to questions 1 through 4, the RFI asks for information regarding

- how platforms have “denied or degraded” user’s ability to use platforms,
- how users were notified or informed about content moderation and policies,
- if users felt the platforms had consistently adhered to their own policies,
- if users had a “meaningful opportunity to challenge or appeal” the moderation of their content, and
- how content moderation impacted the financial and speech interests of its users.

³ Thierry Breton (@ThierryBreton), “[With great audience comes greater responsibility #DSA](#),” X post, August 12, 2024, 12:25pm.

These questions might be best summarized as “how did online platforms treat you poorly?” They, however, fail to grasp that even if platforms lacked transparency, acted with bias, were inconsistent, unfair, or seemingly out of accord with their own public policies and statements—even if these accusations were entirely true, platforms maintain their expressive rights to moderate. The RFI proposes that poor moderation might be regulated as an “unfair and deceptive trade practice” but that ignores the constitutionally protected expressive nature of content moderation.

To think about this in an offline analogy again, a bookstore may not clearly post its criteria for why it includes or excludes a book. That lack of transparency does not deprive the bookstore of its right to curate its selection as it sees fit. Customers and authors alike may be frustrated and confused by the unclear rules the bookstore operates under and might even use their own expression rights to complain about such in an effort to encourage change. But while that is a potentially bad experience, the store is not required to disclose its criteria to retain its First Amendment protected rights. The exact same dynamic is at work with online platforms. They may not always be fully transparent with their moderation and curation decisions and that may make users unhappy, but as with the bookstore, platforms are free to be as clear as they want with their policies and users are free to provide feedback to the company about their policies or use a different service that better meets their needs.

Similarly, the First Amendment does not require that those carrying speech whether online or offline do so in consistent ways to remain free from government intervention. An owner may have a policy against books with certain content (such as sexual, violent, or blasphemy) but decide to stock a prominent example because they believe the literary or ideological value outweighs their concerns. The converse is also true, either online or offline, a store or platform might stock a book or allow a post one day, take it down next after reading it more closely or due to a particular concern that only suddenly arises. Such flexibility is even more critical online where content and context can rapidly change, resulting in what may appear to be inconsistent or erratic content moderation and curation. Again, this might result in a poor user experience if many people feel like the rules are being applied erratically or are constantly changing, but that doesn’t strip platforms or bookstores of their expressive choices.

Finally, online and offline those carrying others content are allowed to have biased policies. Religious bookstores do not need to host materials from other religions or that goes against the

owner's moral values. A Republican bookstore owner can exclude left-wing books just as Democratic booksellers can exclude right-wing books. LGBTQ bookstore owners do not need to carry books promoting conversion therapy. Vegetarian bookstore owners can refuse to sell cookbooks with meat recipes. All of these represent deeply held philosophical or political beliefs that government required neutrality would require they compromise on. To be clear, platforms create and enforce policies that often take positions regarding political and social issues.

One of the authors of this comment was responsible for developing these policies at Meta and was frequently concerned that the policies being developed failed to sufficiently value important social and political expression. Other platforms, on the other hand, frequently take completely different positions and favor other viewpoints. And this preference for certain views and bias against other views does not weaken the expressive rights of the technology platforms to moderate and curate the content on their platform. Rather, it is quite the opposite, as curating content based on one's own viewpoint free from government dictates is itself expressive that every person and organization is promised under our Constitution and culture of free expression.

Antitrust and Competition

Considering content moderation as an antitrust issue could be problematic for both content moderation and antitrust policy. If anything, the current policy approach to content moderation established by the First Amendment and Section 230 support various content moderation strategies that allow competition to flourish. Weaponizing antitrust to attempt to regulate content moderation strategies risks not only failing to achieve such policy goals but would also allow the abuse of this powerful tool well beyond its intended assurance of the benefits to consumers of a competitive marketplace.

Similarities in content moderation policies may actually reflect competition rather than be a sign of stifling it. In many cases, similar policies may reflect attempts to attract similar users or similar advertisers to the platform or be a response to general audience concerns. For example, Meta decided to implement a community notes model similar to that tried by X (formerly known as Twitter). It is highly unlikely that this shift is a result of "collusion" between the two companies, but rather a reflection of the response of platforms to similar market and political pressure. As a result, similar content moderation policies or actions when a violation occurs should not be considered sufficient evidence of collusion or otherwise violative of antitrust laws.

Even similar policies can still yield different interpretations. For example, when faced with the same altered video of Rep. Nancy Pelosi, Facebook left the content up and YouTube removed the content, despite similar policies.⁴

Content moderation policies are just one of many facets of competition in social media. When content moderation policies change consumers or advertisers that are dissatisfied with the changes may choose a different platform illustrating that competition remains both generally among platforms as well as for content moderation policies more specifically. For example, after X (formerly known as Twitter) changed its content moderation approach, some dissatisfied users moved to Bluesky. Similarly, conservatives who felt platforms were not serving their needs may have considered adding or moving content to platforms like Truth Social (owned by President Trump) or Rumble.

Using content moderation as the agency's justification for antitrust intervention would change the traditional consumer welfare focused approach to antitrust and also raise significant First Amendment concerns. As last year's *NetChoice* cases illustrated, government regulation that would require or forbid platforms from carrying certain content or otherwise engaging in content moderation are likely to fail First Amendment scrutiny.⁵ This would likely include if the agency attempted to engage in such regulation via antitrust enforcement. But beyond this particular concern, expanding antitrust enforcement to include such subjective policy concerns risks allowing its abuse for a variety of policy goals that would undermine its objective nature and allow significant government intervention into otherwise functioning and competitive markets. Such an approach would undermine the benefits of competition and innovation for consumers and could be weaponized not only against tech companies but any industry that might find itself politically disfavored.

The commission should also recognize that such an approach will likely fail to achieve desired goals. Breaking up or otherwise creating structural restrictions on tech platforms through antitrust would only result in smaller companies that still face similar pressures around controversial or problematic content but now have fewer resources to invest in tools to improve

⁴ Subramaniam Vincent, "[Why Facebook Left up the 'Drunk Pelosi' Video but YouTube Took It Down](#)," *Markkula Center for Applied Ethics*, June 24, 2019.

⁵ *Moody v. NetChoice*, [603 U.S.](#) (2024).

the process.⁶ These platforms would also likely face increased pressure from advertisers or certain users that might result in a resistance to allow more controversial or adversarial discussions of topics like politics, religion, or sexuality thus further silencing voices rather than providing more opportunities.

Current government policy approaches to content moderation support robust competition. In fact, the often wrongly maligned Section 230's liability protection keeps barriers low for new platforms carrying user-generated content and novel content moderation strategies encouraging further competition in the marketplace.⁷ Rather than looking at content moderation decisions as a failure, the Commission should recognize how this approach has created a robust market to provide platforms that can serve a diversity of voices and needs.

Conclusion

In exploring “big tech censorship”, the FTC should recognize that what may initially be decried as “censorship” are the result of the difficult decisions platforms carrying user content must make frequently. In some cases, users may dislike these decisions just as they dislike the decisions their local bookstore makes about what books to carry and who to feature in their newsletter, or their local coffee shop makes about what group's events to host; however, like their offline counterparts, the decisions of these private actors to make decisions about the content they choose to host or not host and how they prioritize it should be free from government intervention. Given the robust and ever-changing nature of platforms, there remains robust competition both for content moderation strategies and for users at multiple levels of the internet ecosystem. Concerningly, if the FTC were to pursue action in this regard, it could result in government censorship that would further limit the viewpoints available online and diminish competition in the market.

⁶ Adam Thierer and Jennifer Huddleston, “[Facebook and Antitrust, Part 3: Will Structural Remedies Solve Alleged Problems?](#),” *Mercatus Center*, June 18, 2019.

⁷ Jennifer Huddleston, “[Competition and Content Moderation](#),” Cato Institute Policy Analysis no. 922, January 31, 2022.