September 3, 2025

Rep. Jim Jordan
Chairman, Committee on the Judiciary
United States House of Representatives

cc: Rep. Jamie Raskin
Ranking Member, Committee on the Judiciary
United States House of Representatives

Re: the FTC's Legal Theories Regarding Hearing on "Europe's Threat to American Speech and Innovation"

Dear Chairman Jordan:

Andrew Ferguson, Chairman of the Federal Trade Commission (FTC), recently sent letters to major tech companies warning them that "censoring Americans in response to the laws, demands, or expected demands of foreign powers" might be an unfair or deceptive trade practice in violation of Section 5 of the FTC Act.[1] His message was clear—as *Wired* put it: "The FTC Warns Big Tech Companies Not to Apply the Digital Services Act."[2] Ferguson's letter provides no legal analysis and cites no cases, offering just two short, vague sentences.

In essence, Chair Ferguson is trying to sidestep a serious legal question about when foreign laws in general, and the European Union's Digital Services Act (DSA) in particular, have extraterritorial effect within the United States. As the European Commission has just assured your Committee, the DSA itself "has no extraterritorial jurisdiction in the U.S."[3] While the laws of EU Member States *may* have extraterritorial effect, the European Commission has clarified that "[w]here a content is illegal only in a given Member State, as a general rule it should only be removed in the territory where it is illegal."[4] With respect to *lawful* content, the DSA does impose certain obligations on tech companies regarding fundamental rights compliance (Article 14(4)) and the assessment and mitigation of certain "systemic risks" (Articles 34 and 35), but only within the EU.[5] The law leaves it to companies

[1] Letter from Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, to Tech Companies (Aug. 21, 2025) (Ferguson Letter), https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-unfair-security-letter-ferguson.pdf.
[2] Mila Fiordalisi, *The FTC Warns Big Tech Companies Not to Apply the Digital Services Act*, Wired (Aug. 31, 2025, 6:00 AM), https://www.wired.com/story/big-tech-companies-in-the-us-have-been-told-not-to-apply-the-digital-services-act/.
[3] Henna Virkkunen (@HennaVirkkunen), X (Sept. 1, 2025, 12:15 PM), https://x.com/HennaVirkkunen/status/1962549865835028757.
[4] Press Release, Eur. Comm'n, Questions and answers on the Digital Services Act (Feb. 23, 2024), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348.
[5] See supra note 3; see also Letter from Martin Husovec et al to Rep. Jim Jordan, Chairman, Committee on the Judiciary, United States House of Representatives, (Sept 3, 2025), https://husovec.eu/wp-content/uploads/2025/09/Academic-Letters-DSA-Censorship.pdf.

to decide whether to implement compliance in a globally consistent manner, or by country or region.[6]

Chair Ferguson claims it is both unfair and deceptive for American companies to moderate content in ways that foreign governments require or want. He says almost nothing about why this, even if it were true, would violate the FTC Act. In effect, he appears to be using the power of his office to punish content moderation decisions he doesn't like—to reshape online discourse to force American consumers to see content he favors. In *Moody v. NetChoice*, the Court said that "it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased, rather than to leave such judgments to speakers and their audiences."[7] The *Moody* Court recognized that "the government can take varied measures, like enforcing competition laws, to protect that access."[8] Presumably, the same goes for consumer protection laws, including the FTC Act. But for any of those laws, the same fundamental caveat applies: the First Amendment "bar[s] the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm."[9] Ferguson appears to be trying to influence how companies exercise their right to decide which content they will carry and promote—a right that the First Amendment protects as much for websites as for newspapers.[10]

Chair Ferguson has engaged in an extensive effort to do just that: to reshape how tech companies moderate content to suit his conception of "free speech"—that is, what he thinks online content *should* look like. He attempts to do so under the guise of protecting Americans from undue foreign influence. But whatever the theory, the government may not "interfere with private actors' speech to advance its own vision of ideological balance."[11] Moreover, Ferguson's claims depart from the agency's longstanding conception of its powers under the FTC Act—the limits that have thus far allowed the Commission to avoid running afoul of the First Amendment in how it wields its authority to protect consumers from unfair or deceptive acts or practices.[12]

To start, the FTC would struggle to prove that tech companies are actually doing what Ferguson accuses them of: acting "to appease a foreign power."[13] In *Murthy v. Missouri* (2024), a mix of states and social media users sued federal agencies, alleging that the Biden Administration had coerced social media platforms into censoring conservative-leaning speech regarding the 2020 election, COVID-19, and other topics.[14] As Ferguson has conceded, the "Court ultimately concluded that the States had failed to demonstrate that their speech was removed because of government coercion, as

[6] Daphne Keller, *A Primer on Cross-Border Speech Regulation and the EU's Digital Services Act*, CIS (Sept. 2, 2025),
https://cyberlaw.stanford.edu/a-primer-on-cross-border-speech-regulation-and-the-eus-digital-services-act/
[7] Moody v. NetChoice, LLC, 603 U.S. 707, ___, slip. op. at 4 (2024).
[8] Id. at 19.
[9] Id.
[10] Id. at 17-18.
[11] Id. at 27.
[12] 15 U.S.C. § 45(a).
[13] Ferguson Letter at 3.
[14] Murthy v. Missouri, 23-411 (June 26, 2024).

opposed to decisions made by the platforms of their own volition."[15] The same problem would plague the theories Ferguson raises. Your committee's report illustrates the problem: after an exhaustive investigation using the Committee's extensive subpoena powers, you have failed to identify any evidence to substantiate your claims that American tech companies are, in fact, "censoring" Americans' speech because of the DSA.[16]

Unfairness Claim

Ferguson asserts that "it might be an unfair practice" for US tech companies "to subject American consumers to censorship by a foreign power by applying foreign legal requirements, demands, or expected demands to consumers outside of that foreign jurisdiction." This theory fails under the First Amendment, the FTC Act, and long-standing FTC doctrine.

An act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[17] Under the Commission's bedrock 1980 Unfairness Policy Statement, in "most cases a substantial injury involves monetary harm," and "health and safety risks may also support a finding of unfairness," but "[e]motional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair."[18] Thus, the FTC "will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers."[19] Now Ferguson claims the FTC can wield unfairness to combat what it calls "pervasive online censorship," which he claims "has outraged the American people."[20]

As Republican Commissioners have done for decades, Chair Ferguson once took a hard line against expanding the FTC's unfairness doctrine. Last year, the FTC settled an unfairness claim against Gravy Analytics, alleging the company had "categorized consumers into audience segments based on sensitive characteristics, such as medical conditions, political activities, and religious beliefs, derived from location data" and then "sold these audience segments to third parties."[21] Ferguson decried the FTC's overreach: "'[T]he list of things that can trigger each unique individual's trauma is

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[15] Concurring Statement of Commissioner Andrew N. Ferguson, FTC v. 1661, Inc., Matter No. 222-3016, 3 (Dec. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-goat-concurrence.pdf

[16] H. Comm. on the Judiciary, The Foreign Censorship Threat: How the European Union's Digital Services Act Compels Global Censorship and Infringes on American Free Speech, 188th Cong. (2025) (HJC Report) available at, https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2025-07/DSA_Report%26Appendix%2807.25.25%29.pdf.

[17] 15 U.S.C. § 45(n).

[18] Letter from the FTC to the House Consumer Subcommittee, *appended to* In re International Harvester Co., 104 F.T.C. 949, 1073 (1984), www.ftc.gov/ftc-policy-statement-on-unfairness (*Unfairness Statement*).

[19] *Id.*

[20] *Id.*

[21] In re Gravy Analytics, Inc., F.T.C. Matter No. 212-3035, ¶¶ 79–81 (Dec. 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/2123035gravyanalyticscomplaint.pdf; In re Mobilewalla, Inc., F.T.C. Matter No. 202-3196 (Dec. 3, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2023196mobilewallacomplaint.pdf.

endless and would cover every imaginable' advertisement based on every possible categorization, so whatever lines we end up drawing will be 'either arbitrary or highly politicized.'"[22] Now, it's Ferguson who's drawing lines that are not only "arbitrary [*and*] highly politicized" but also hopelessly vague. He is, in effect, returning to the expansive conception of unfairness that led the FTC to be decried as the "National Nanny" in the 1970s,[23] led Congress to pressure the FTC into constraining its conception of unfairness with its 1980 Unfairness Policy Statement, and led Congress to further constrain unfairness when it added Section 5(n) to the FTC Act.[24]

In unfairness cases, "the Commission may consider established public policies as evidence to be considered with all other evidence," but "[s]uch public policy considerations may not serve as a primary basis for such determination."[25] Thus, the FTC cannot simply point to executive orders about "censorship" or even claim to be defending the free speech rights of Americans; it must point to some substantial injury, which must be specific and concrete, not abstract. The purpose of both the Unfairness Statement and Section 5(n) was to prevent the FTC from making the kind of tradeoffs among competing values that belong, properly, to Congress—whose power to legislate is itself constrained by the First Amendment.

In some cases, content moderation (which Ferguson calls "censorship") might indeed result in a "substantial injury" cognizable under the Unfairness Statement and Section 5(n). For example, blocking the account of an influencer or a media outlet could deprive them of revenue—a readily quantified harm. But even in such narrowly focused cases, an unfairness claim would fail because Section 5(n) requires the FTC to show that any injury is "not outweighed by countervailing benefits," and the First Amendment bars the FTC from weighing some speech against other speech and against other societal values. But that is precisely what content moderation inevitably involves.

For example, Meta bars "dehumanizing speech, allegations of serious immorality or criminality, and slurs" as well as "harmful stereotypes, which … have historically been used to attack, intimidate, or exclude specific groups, and that are often linked with offline violence" and "serious insults, expressions of contempt or disgust, cursing, and calls for exclusion or segregation when targeting people based on protected characteristics."[26] Meta has decided that the value of such speech is outweighed by the harms to the users it might be directed at, including the value of the speech of those groups which might be chilled by such attacks.

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[22] Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, In re Gravy Analytics, Inc. & In re Mobilewalla, Inc., F.T.C. Matter No. 212-3035 & 202-3196, at 4 (Dec. 3, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/gravy_-mobilewalla-ferguson-concurrence.pdf (quoting Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, A Look Behind the Screens: Examining the Data Practices of Social Media and Video Streaming Services, at 5 (Sept. 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-statement-social-media-6b.pdf).
[23] Justin Hurwitz, Chevron and the Limits of Administrative Antitrust, 76 U. Pitt. L. Rev. 209, 235-36 (2014).
[24] 15 U.S.C. § 45(n).
[25] Id.
[26] *Hateful Conduct*, Meta, https://transparency.meta.com/policies/community-standards/hateful-conduct/ (last visited Sept. 2, 2025),

Private companies can engage in such balancing tests, but the government may not do so, even if it claims to be assuring a "neutral" balance in how private companies weigh speech.[27] In *U.S. v. Stevens*, the Court rejected any attempt to define the depiction of animal cruelty as a category of speech with "minimal redeeming value" based on a "categorical balancing of the value of the speech against its societal costs —language remarkably similar to Section 5(n)'s "countervailing benefits" test.[28] The Court called this test "startling and dangerous" and rejected any "ad hoc balancing of relative social costs and benefit."[29]

The FTC has *never* attempted to correct how private companies balance speech. Neither the Unfairness Statement nor Section 5(n) contemplates weighing *speech*, at least not the kind of non-commercial speech at issue here; both involve weighing economic and other quantifiable injuries, such as to health and safety, against "benefits":

> Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects. The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.[30]

The Unfairness Statement recognizes that some practices might be unfair because they "unjustifiably hinder … free market decisions" insofar as they "undermine[] an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market."[31] But here again, the examples cited make clear that the FTC was talking about ordinary consumer protection problems:

> Some [potentially unfair practices] may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons. Some may engage in overt coercion, as by dismantling a home appliance for "inspection" and refusing to reassemble it until a service contract is signed. And some may exercise undue influence over highly susceptible classes of purchasers, as by promoting fraudulent "cures" to seriously ill cancer patients.[32]

Constitutionally, this is a world apart from Ferguson's theories. When the Unfairness Statement says the FTC might bring certain unfairness claims "to halt some form of seller behavior that

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[27] "However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others." Moody at 19..
[28] United States v. Stevens, 559 U.S. 460, 469–70 (2010).
[29] *Id.*
[30] *Unfairness Statement*.
[31] *Id.*
[32] *Id.*

unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking," it means something specific: "certain types of sales techniques may prevent consumers from effectively making their own decisions." Ferguson has invoked similar language in calling for antitrust action against "censorship."[33] But here, again the FTC has understood this concept to refer to the literal marketplace of economic decisions—"sales," not speech.

Congress codified this concept in Section 5(n), which requires the FTC to show that a practice "is not reasonably avoidable by consumers themselves…."[34] In general, that test has two dimensions: can consumers perceive that they are being injured, and can they find some alternative? "Normally we expect the marketplace to be self-correcting," says the Unfairness Statement, "and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market."[35] The FTC presumes "that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." In this case, even if the rationale behind content moderation (i.e., the role of foreign law) is opaque, users *do* see how their speech is being moderated. If they don't like how major tech companies are moderating their content, they have alternatives — notably X and Truth Social, but also sites like Gab and Rumble. These sites do very little to moderate content, and consumers can easily switch to them if they dislike how their speech is being moderated on YouTube, Instagram or Facebook.

Thus even in the narrow terms of satisfying the statutory requirements of Section 5(n), as framed by the Unfairness Statement, it is difficult to see how the FTC could convince a court to accept any unfairness claim regarding content moderation. That task becomes more difficult, still, when considering the First Amendment. In practical terms, the FTC's real focus is likely to be on deception, which is why Ferguson leads with those theories.

Deception Claims

The vast majority of the FTC's consumer protection cases turn on deception. Deception is generally easier to establish because it turns on establishing consumer expectations rather than directly proving injury. Most deception claims involve a misrepresentation, "an express or implied statement contrary to fact,"[36] but an omission or practice can also be deceptive; the essential element, under the FTC's 1983 Deception Policy Statement and decades of case law, is that the representation, omission or practice is "likely to mislead the consumer."[37] They must be "material," *i.e.*, "likely to affect a consumer's choice of or conduct regarding a product."[38] Under the Deception Statement,

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[33] Ferguson GOAT Statement at 1 ("[W]e must vigorously enforce the antitrust laws against any platforms found to be unlawfully limiting Americans' ability to exchange ideas freely and openly.").
[34] 15 U.S.C. § 45(n).
[35] *Unfairness Statement*.
[36] Letter from the FTC to the Committee on Energy & Commerce, appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (*Deception Statement*).
[37] *Id.*
[38] *Id.*

"injury and materiality are different names for the same concept": "injury exists if consumers would have chosen differently but for the deception."[39]

Ferguson suggests two potential deception theories. First, he says, "American consumers do not reasonably expect to be censored to appease a foreign power and may be deceived" when a tech platform "[c]ensor[s] Americans to comply with a foreign power's laws, demands, or expected demands." Second, he argues that "consumers might be further deceived if companies do not prominently disclose that censorious policies were adopted due to the actions of a foreign government, as consumers might not want to use a service that exposes them to censorship by foreign powers." Both theories are extremely tenuous.

If tech companies made express claims about how they set and enforce content moderation rules related to foreign governments, but failed to do what they promised users, the FTC might well be able to enforce those promises under its deception authority. But even then, the Commission could not point to an express claim in isolation; it would have to "examine 'the entire mosaic, rather than each tile separately,'" that is, "evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond."[40] The Commission would not have to prove materiality: in general, the agency "presumes that express claims are material" because "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."[41]

Ferguson doesn't argue that any express promise has been broken. Instead, he asserts: "Companies *might* be censoring Americans in response to the laws, demands, or expected demands of foreign powers."[42] But both Google and Meta are careful in what they say about foreign legal requirements: *generally*, they treat these as *not* having extra-territorial effect, but note that they sometimes *might*:

- **Meta**: "Where we do act against user content on the basis of local law rather than our Community Standards, we *endeavor* to restrict access to the content only in the jurisdiction where it is alleged to be unlawful and do not impose any other penalties or feature restrictions. We also notify the affected user."[43]
- **Google**: "When content is found to violate Google's content or product policies or Terms of Service, we typically remove, demonetize or restrict access globally" but: "When content is found to violate a specific local law, we *typically* remove or restrict access to the content only in the country/region where it appears to be illegal."[44]

Such caveats are sufficient to prevent the FTC from convincing a court that either company has misled consumers if they do what they say: *sometimes* moderate content in the U.S. because of

[39] *Id.*
[40] *Id.*
[41] *Deception Statement*.
[42] Ferguson Letter at 1 (emphasis added)
[43] Locally Illegal Content, Products, or Services, Meta Transparency Center (Oct. 2, 2024) (emphasis added), https://transparency.meta.com/policies/community-standards/locally-illegal-products-services.
[44] Overview of Legal Content Removals at Google, Legal Help (emphasis added), https://support.google.com/legal-help-center/answer/13948866?hl=en&utm_source=chatgpt.com.

foreign laws. Neither company makes any other express claims regarding Ferguson's other allegation: that "censorious policies were adopted due to the actions of a foreign government." This, Ferguson's second theory, turns on a material omission while his first theory appears to involve either an implied claim, an omission, or perhaps that the practice itself is deceptive. Consider these three flavors of deception:

- **Implied Claims**. Under the Deception Statement, "when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality." This might be true where a company attempts to distinguish one product from another.[45] By extension, if a company marketed its products as being free of the influence of a foreign government, unlike other products on the market, it might well be said to imply a claim not to moderate at the direction of a foreign government, even if it made no such claim expressly.
- **Material Omissions**. The Commission does not presume that omissions are material unless they involve "health, safety, or other areas with which the reasonable consumer would be concerned," which might include, "[d]epending on the facts, information pertaining to the central characteristics of the product or service," such as "the purpose, … efficacy, or cost, of the product or service."[46] If tech companies compromised the security of their product to allow foreign governments back door access to sensitive personal information, this could easily jeopardize the physical security of users. The same cannot be said for Ferguson's allegation that tech platforms are moderating content posted by Americans "to appease a foreign power."
- **Deceptive Practices**. Sometimes, a practice may be deceptive even without a misrepresentation, express or implied, or an omission, including "[m]arketing and point-of-sales practices that are likely to mislead consumers,"[47] "where a sales representative misrepresented the purpose of the initial contact with customers,"[48] and formatting advertising messages in certain ways.[49]

Perhaps the most relevant analogy the Commission might invoke involves search results. Since 2002, the FTC has warned companies that "failing to clearly and prominently disclose the paid nature of [advertisements shown within search results] is deceptive" because "consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party. Knowing when search results are included or ranked higher based on payment and not on impartial criteria likely would

[45] *Deception Statement* note 51.
[46] *Id.* at 5.
[47] *Id.* at 2.
[48] *Id.*
[49] F.T.C., Enforcement Policy Statement on Deceptively Formatted Advertisements 1-2 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf ("Over the years, the Commission has challenged as deceptive a wide variety of advertising and other commercial message formats, including "advertorials" that appeared as news stories or feature articles, direct-mail ads disguised as book reviews, infomercials presented as regular television or radio programming, in-person sales practices that misled consumers as to their true nature and purpose, mortgage relief ads designed to look like solicitations from a government agency, emails with deceptive headers that appeared to originate from a consumer's bank or mortgage company, and paid endorsements offered as the independent opinions of impartial consumers or experts.").

influence consumers' decisions with regard to a search engine and the results it delivers."[50] The Commission had reliable survey evidence to substantiate its point: "nearly half of searchers did not recognize top ads as distinct from natural search results and said the background shading used to distinguish the ads was white."[51]

Ferguson makes much the same argument about content moderation: that Americans ordinarily expect companies not to moderate content because of some foreign law. Or perhaps the FTC might claim that consumers expect content to be moderated only if it is unlawful in the US. In theory, the analogy to paid search results may seem simple, but in practice, consumers have varied, inconsistent preferences. Consumers have complicated and ultimately incoherent preferences about content moderation. In a poll conducted by Boston University in June 2024, 68% agreed: "For social media platforms, I think an important value they should uphold is freedom of speech." Yet nearly as many (59%) agreed that "If social media posts spread unverified information about a political candidate or election process, I think it is acceptable for social media platforms to remove content."

Are such sentiments inconsistent? What do users actually want? Such questions are radically different from the question of whether users want or expect to see paid results intermingled among "organic" search results. Such questions are not essentially different from the question facing any editor of any medium: what do readers want and how should the publication meet the needs or desire of their audience? How to reconcile seemingly inconsistent values is what the Supreme Court described in *Moody* as the "exercise of editorial control and judgment."[52] The First Amendment protects that discretion and bars the government from interfering with it, whether in the name of consumer protection, policing competition or any other value. When the FTC presumed that users expect payment for search results to be disclosed, the Commission did not intrude in editorial judgment. The analogy cannot hold.

Subjectivity. The First Amendment's limits upon the FTC's authority are mirrored by the way the Deception Statement conceives of subjectivity. Deception, unlike unfairness, *can* be used to enforce subjective preferences of consumers—provided that they are violated by objectively verifiable claims (*i.e.*, promises) made to users. Thus, on the one hand, "the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion." Yet, on the other hand, if consumers have a subjective preference for American-made products, and a company markets or labels its products as "Made in America," that claim is no less enforceable than any other objective claim simply because it speaks to a subjective value. Of course, the Commission would face the kind of proof problems inherent in any marketing claim—*e.g.*, what counts as "made," "finished" or "assembled" (depending on the claim) and what minimum percentage suffices in each case and by what measure. But it may fairly presume the materiality of Americanness because companies expressly promise it. The same goes for "kosher" food claims.

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[50] *Id*. at 6.
[51] F.T.C., Sample Letter to General Purpose Search Engines, at 2 (June 24, 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf.
[52] Moody at 14.

But these simply are not comparable to Ferguson's theory. He cannot prove what consumers really want. Instead, he asserts that consumers care strongly about some aspect of product quality that may or may not be being degraded. That aspect is not merely an externally verifiable aspect of the product (how content is being moderated) but *why* companies might be, in his telling, reducing that aspect of quality (*why* they are moderating content in certain ways). He cannot prove what is really happening. Instead, he asserts, without evidence, that tech "[c]ompanies *might* be censoring Americans in response to the laws, demands, or expected demands of foreign powers." Finally, he cannot point to any express claim to the contrary. Instead, he implies that there might be some other basis for a deception claim, without specifying exactly what that might be.

Not being able to rely on the presumption of materiality is not necessarily the end of the road. "Where the Commission cannot find materiality based on the above analysis [i.e., presumptions, the Commission may require evidence that the claim or omission is likely to be considered important by consumers," says the Deception Statement.[53] "This evidence can be the fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony."[54] But, again, it would be extremely difficult, if not impossible, for the FTC to find any clear user preference in consumer surveys as to what they want their speech environment to look like.

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Chair Ferguson asserts powers to police content moderation that the FTC simply does not possess. If the First Amendment permit the US government to do something about how US companies moderate content in response to foreign laws or even extralegal forms of pressure, that is a question for Congress to address, consistent with the First Amendment right of tech platforms to decide what speech they want to carry. It simply is not a question for the FTC to decide. You should ask Chair Ferguson to cease and desist from misrepresenting his agency's legal authority.

Sincerely,

Berin Szóka
President, TechFreedom
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[53] *Deception Statement* at 5.
[54] *Id.*