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A NEW SEASON AT THE FTC

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Introduction

Thank you for having me. I'll start with a disclaimer: the views I express today are my own. They do not necessarily reflect the views of the Commission or any other Commissioner.

For the past four years, the Biden FTC oscillated between two different approaches to antitrust:[1] one that is consistent with long-standing principles that undergird the antitrust laws,[2] and another that undermines those principles.[3] The latter approach—made clear through a remarkable show of how *not* to run an agency[4]—has failed. The Biden FTC was misguided on consumer protection, too. Under Chairman Ferguson's leadership, I am confident we will usher in a new season at the FTC—something that has already begun.

To promote an innovative and competitive marketplace, we should focus on the following three goals, which I'll unpack today. *First*, the merger review process should be improved and made more predictable. The Biden FTC seemingly introduced friction into merger review solely for the purpose of slowing down M&A. Throwing dynamite in the pond is one way to fish—and it certainly makes a big splash—but the benefits the fisherman reaps are outweighed by the collateral damage it causes. Instead, we should simply fish where the fish are.[5] And our enforcement approach should be clear enough for everyone to easily understand it. *Second*, we must avoid slowing innovation in artificial intelligence through misguided enforcement actions. While the technology is still nascent, it is critically important to America's economic and national security. The Commission needs to be circumspect when policing AI. Our focus should be on stopping fraudulent conduct and developing further our understanding of this industry, not seeking to stretch our statutory authorities. *Third and finally*, we must fight against Big Tech censorship. Dominant social media companies have suppressed certain speech, viewpoints, and speakers. We

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[1] *See* Daniel Francis, *After Neo-Brandeis*, ProMarket (Nov. 25, 2024), https://www.promarket.org/2024/11/25/after-neo-brandeis/.

[2] *See, e.g.*, Compl., *In re Tapestry, Inc., & Capri Holdings Ltd.*, FTC Matter No. 9429 (Apr. 22, 2024). But note that even in *Tapestry*—a complaint based upon traditional theories of harm that received unanimous Commission support and ended in a litigation victory—the former Chair and her Democrat colleagues attempted to spin the result as some sort of assault on the use of economics evidence to define markets and a way to justify the 2023 Merger Guidelines. *See* Statement of Chair Lina M. Khan, Joined by Comm'r Rebecca K. Slaughter & Comm'r Alvaro M. Bedoya, *In re Tapestry, Inc. and Capri Holdings Limited*, FTC Matter No. D09429 (Dec. 5, 2024). The judge's opinion, however, speaks for itself. It demonstrates and reflects traditional antitrust principles rather than an aggressive embrace of a radical attack against economics. *See* Opinion & Order, *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109 (S.D.N.Y. Nov. 1, 2024).

[3] *See, e.g.*, Compl., *In re Chevron Corp.*, FTC Matter No. 241-0008 (Sept. 30, 2024); Compl., *In re Exxon Mobil Corp.*, FTC Matter No. 241-0004 (May 1, 2024); Compl., *In re Meta Platforms, Inc.*, FTC Matter No. 221-0040 (Aug. 11, 2022); Press Release, Fed. Trade Comm'n, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes; Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Fed. Trade Comm'n Act, FTC Matter No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[4] *See generally* Cat Zakrzewski, *Sinking FTC Workplace Rankings Threaten Chair Lina Khan's Agenda*, Wash. Post (Jul. 13, 2022), https://www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings/.

[5] *See* Remarks of Comm'r Melissa Holyoak at the Competitive Enterprise Institute's Annual Summit, *Rediscovering Adam Smith: An Inquiry in the Rule of Law, Competition, and the Future of the Federal Trade Commission*, at 9-10 (May 31, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-cei.pdf.

should use our existing statutory tools to address this problem and ongoing harm. I'll explain each of these goals in more detail.

II. Promoting Innovation by Improving Merger Review

The Commission must strive to promote innovation. Mergers have the potential to promote innovation in meaningful ways. As a few examples: the prospect of being acquired by a larger firm provides start-ups and small firms with powerful incentives to disrupt and innovate, including with the goal of developing a product that has the potential to become an attractive acquisition target. Further, vertical mergers often involve combining complements, which can justify greater investment in R&D as the combined entities work together to make production more efficient and realize profits from their investments.[6] In fact, recent empirical research identifies a statistically significant relationship between mergers and R&D expenditures.[7]

The Biden Administration's approach to antitrust erected procedural and substantive roadblocks that have undermined the ability for American firms to innovate. Procedurally speaking, the Biden FTC abandoned the practice of early termination, sent unprecedented close-at-your-own-risk letters, and stymied traditional engagement with investigation targets, including unjustified hostility to divestitures. From a substantive standpoint, the Biden FTC brought enforcement actions without any regard for the law, economic theory, or the evidence necessary to substantiate its allegations. Certainly, some mergers are unlawful, and I have voted to challenge unlawful mergers. But the procedural abuses and substantive nonsense the Biden FTC employed disincentivized lawful and innovative behavior. I'll discuss both problems in turn.

A. Procedural Roadblocks

Early termination is a statutory right enjoyed by merging parties under the Hart-Scott-Rodino (HSR) Act.[8] Parties may, with their HSR filings, request early termination, and the FTC and DOJ Antitrust Division may, if they do not intend to take action, terminate the waiting periods.[9] On February 4, 2021, two weeks after then-President Biden's inauguration, the FTC and DOJ imposed a "temporary suspension" of early termination that was supposed to be "brief."[10] But with Chair Khan at the helm of the Biden FTC, the so-called "temporary suspension" continued well into her term.

What did this mean? Entirely benign transactions that were not even being reviewed by the Commission during the statutory waiting period could not be closed, even though many of them would have been during any other administration. For context, during the final year of the Obama

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[6] Robert Kulick & Andrew Card, *Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications*, NERA Economic Consulting (Feb. 2023), https://www.nera.com/content/dam/nera/publications/2023/NERA_Mergers_and_Innovation_FINAL_Feb_2023.pdf.

[7] *Id.*

[8] *See* 15 U.S.C. § 18a(b)(2).

[9] *See id.*

[10] Press Release, Fed. Trade Comm'n, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

Administration, the DOJ and FTC granted early termination for 1,102 transactions.[11] Assuming similar numbers today, that's roughly 1,000 transactions per year, or 4,000 transactions during the Biden Administration that were likely delayed unjustifiably. Unfortunately, many of those transactions were likely procompetitive and promoted innovation.

Chair Khan continued to inject unjustifiable uncertainty into merger review through needless saber-rattling. Starting in August 2021, the Biden FTC began sending letters to merging parties when it could not "fully investigate" a transaction in the statutory timelines, warning the merging parties that they were closing "at their own risk" and that it may continue its investigation and challenge them later.[12] Sending threatening letters was unprecedented; it caused considerable angst among merging parties and sent shockwaves throughout the antitrust world.

As the second Trump Administration gets underway, I hope to see a return to normalcy where the Commission, once again and where appropriate, grants early termination as allowed by statute, and avoids anything remotely like these warning letters.

The Commission should focus on making the merger review process more predictable for merging parties. The Biden Administration occasionally failed to engage meaningfully with merging parties during investigations. While there are many examples of this lack of engagement, one that comes to mind is divestitures. From August 2023 until the end of Biden's term, the FTC did not enter a single divestiture consent decree to remedy a merger. And that last remedy came shortly before a letter from Senator Warren "urg[ing]" the Biden FTC "to reject the use of remedies—both behavioral and structural—in merger review."[13] As for the DOJ, Jonathan Kanter, the Assistant Attorney General for the Antitrust Division, said that divestitures are the "exception, not the rule" [14] and under his watch, the DOJ only resolved one merger investigation by a consent decree containing a divestiture.

What has this skepticism toward divestitures meant for the agencies' merger enforcement patterns? You'd think that if they were not accepting divestitures, then they must have sued to block more mergers. But that's simply not the case. The rate of enforcement actions in each of 2021, 2022, 2023, and 2024 have all been lower than any prior year since 2007.[15]

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[11] FED. TRADE COMM'N & U.S. DEPT. OF JUST., HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2023, Appendix A (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf.

[12] Holly Vedova, Fed. Trade Comm'n, *Adjusting Merger Review to Deal with the Surge in Merger Filings* (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings; Sample Letter from Holly Vedova, Acting Director, Bureau of Competition, Fed. Trade Comm'n (Aug. 3, 2021), https://www.ftc.gov/system/files/attachments/blog_posts/Adjusting%20merger%20review%20to%20deal%20with%20the%20surge%20in%20merger%20filings/sample_pre-consummation_warning_letter.pdf.

[13] Elizabeth Warren, Press Release, *Warren to FTC after Big Pharma Merger: Preserve Competition, Reject Behavioral and Structural Remedies* (Nov. 9, 2023), https://www.warren.senate.gov/newsroom/press-releases/warren-to-ftc-after-big-pharma-merger-preserve-competition-reject-behavioral-and-structural-remedies.

[14] Remarks of Assistant Attorney General Jonathan Kanter, U.S. Dept. of Justice, at the New York State Bar Association Antitrust Section (Jan 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

[15] Ryan Quillian & Pegah Nabili, *Three Years Running: Merger Enforcement Activity Continues at Historically Low Levels According to the Agencies' Most Recent HSR Report*, Westlaw Today, at 3 (Oct. 23, 2024),

So, the agencies haven't been accepting divestures by consent and haven't been suing to enjoin mergers more frequently. What has happened? Perhaps the DOJ was proceeding via secret divestures outside of the eye of the public, and outside of the Tunney Act? But this enforcement approach never works. I know this first-hand from experience. As a mother of four hungry children, I am called upon to regulate cookie consumption—a problem that other parents know all too well. If I prohibit cookies entirely, my children will still whine and bother me to have them and may even get them secretly from my husband. Or sometimes, I just need an Oreo and the prohibition is over. I wonder if this cookie parable describes what happened at DOJ during the Biden Administration.

Perhaps another explanation for the lack of divestitures and merger enforcement is that deals were just "dying in the boardroom." But this cannot be universally true. When you see mergers like Kroger/Albertsons, it's fairly plain that strategic transactions have not become a thing of the past.

Again, I hope the Commission will return to normal operations with regard to divestitures. Where a divesture can successfully preserve lost competition from the underlying merger, the agencies should consider it, and should focus on the potential benefits to innovation from the remainder of the merger.[16] Where proposed divestitures are inadequate, we will file suit to block the merger. Our litigators at the Commission are incredibly skilled, and as they have proven time and again, they are ready to win against the largest and most well-resourced entities in the world.

B. Substantive Roadblocks.

Process was not the only area where the Biden FTC failed to execute a lawful and coherent antitrust agenda. The Biden FTC pursued some unprecedented theories in its merger complaints. As I have explained in various dissenting statements, the complaints challenging Exxon's acquisition of Pioneer and Chevron's acquisition of Hess were inconsistent with both antitrust law and the economics of coordinated effects, and unfortunately were especially egregious because the direct effects of the "remedies" were borne by non-party individuals. The Biden FTC's challenge of Amgen's acquisition of Horizon Therapeutics and Meta's acquisition of Within were over-aggressive and contained unsupported theories of harm, with one resulting in a loss in federal court and the other resulting in a settlement that allowed the Commission to avoid a very tough road in federal court. Such inconsistent and unpredictable enforcement decisions have had a serious impact on merger risks, and ultimately innovation.

In the last year, the Biden FTC has also filed traditional merger enforcement actions based upon theories of harm supported by the law, the facts, and the economics. In particular, I'm referring to the challenge to Tapestry's acquisition of Capri and the buy-side challenge to Kroger's acquisition of Albertsons. These cases were based upon sound documents, testimony, and economics, and the Commission came out victorious. This does not mean that these cases lacked

https://www.cov.com/en/news-and-insights/insights/2024/10/three-years-running-merger-enforcement-activity-continues-at-historically-low-levels-according-to-the-agencies-most-recent-hsr-report.

[16] *See* Kulick & Card, *supra* note 6.

any litigation risk—because there certainly was risk. But where consumers are being harmed, I strongly support aggressive enforcement of Section 7 of the Clayton Act.

We also should avoid shooting ourselves in the foot in merger litigation by adding weak or factually unsupported theories of harm. This is what happened in the Kroger/Albertsons case when the Biden FTC added superfluous allegations of harm in the union grocery labor market, which the court did not reach "because plaintiffs [met] their burden regarding consumer protection."[17] The Biden FTC was lucky that the weaknesses in that market did not undermine its traditional sell-side case. And even though the outcome ultimately favored the Commission, the Commission's pursuit of the labor claims squandered enormous additional resources required to bring both theories of harm.

The Biden FTC's sporadic and undisciplined approach to antitrust enforcement has dramatically impeded predictability in the market, thereby dissuading transactions that may have promoted innovation, improved efficiency, and generated savings for American consumers. As part of the return to normalcy, I will continue following a simple principle: if the documents, testimony, and economics demonstrate a violation of the law, then we will enforce the law. These three components, sometimes called the three-legged-stool of antitrust litigation, will continue to be central to my decision-making calculus. On the other hand, half-baked or callow economic theory will not be the basis of enforcement actions. Nor will theory without evidentiary support. I do not naively suggest that these principles will provide clarity for all business conduct, but they will at least eliminate the ill-conceived and unpredictable enforcement decisions that have damaged the Commission's reputation and created unprecedented uncertainty that has undermined innovation.

III. The Commission's Approach to Artificial Intelligence

I want to now turn to the topic of artificial intelligence. No policy-related speech in 2025 is complete without a discussion of AI, its rapid development, and how it relates to the topic at issue. And for good reason: AI has the potential to disrupt existing industries, unleash innovation, and expand efficiency across virtually every sector of the economy, increasing product quality, decreasing prices, and leading to entirely new product categories that we in this room have not yet imagined. But AI can also be concentrated in the hands of a small number of firms, forestalling or dampening benefits to consumers. It is no surprise that the stakes with AI are high. In addition to ensuring and promoting consumer welfare, the United States has a strong national security and economic interest in being first in AI technology.

Market events from the past week crisply illustrate the current stakes for AI. Just a few days ago, a Chinese company launched a new generative AI reasoning model called "Deepseek," which apparently produces generative AI output of comparable quality to ChatGPT at a fraction of the cost. Large technology companies lost nearly $1 trillion in market capitalization, with Nvidia losing over $593 billion, the single largest one-day loss *ever*. Google and Microsoft suffered multi-billion-dollar losses as well. The launch of this single app has unmoored consumers' and investors' expectations about what firms are on top in the AI space. And it's raised several questions about how policymakers should be regulating the development of AI technology, including what

[17] *Fed. Trade Comm'n v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *32 (D. Or. Dec. 10, 2024).

"barriers to entry" may exist and how other regulations, such as privacy laws, may affect the number of dominant players.

As this audience understands, FTC enforcement actions can directly affect the structure and efficiency of markets, which ultimately affects consumers. This is particularly true for the AI industry. We have a vested interest in keeping America first when it comes to AI technology. With that in mind, the Commission should be looking for ways to promote dynamic competition and innovation in AI, not hamper it by pursuing unclear regulations or misguided enforcement actions. During the past four years, the Biden Administration imposed regulations that limited the development of AI.[18] And the Biden FTC took actions that further dampened firms' incentives to innovate in AI by, for example, imposing liability on the developers of neutral AI tools.

The Biden FTC's settlement with Rytr is emblematic of this misguided approach.[19] Rytr offers its users a generative AI tool to draft different written material for more than forty different use cases. But one of Rytr's offerings happened to generate product reviews based on user prompts. Focusing on this use case only, the Biden FTC argued that Rytr's service gave consumers the "means and instrumentalities" to generate false and deceptive product reviews.[20] I dissented from the Biden FTC's approach for several reasons.[21] But I'll mention just one reason here. The Biden FTC effectively punished a company for providing a neutral AI tool—one that is not inherently deceptive.[22] Tools can always be misused. But that doesn't mean the tools' creators are, or should be treated as, liable. For any entrepreneurs watching, the takeaway here was clear: do not invest in innovation. Instead, the message was to tread very carefully. Even neutral applications of AI—applications that consumers demonstrably value—may be unlawful.

Fortunately, President Trump has signaled that his administration prioritizes innovation in AI. The President has rescinded the Biden Administration's executive order regarding AI.[23] The President also announced that he secured over $500 billion in private investment from OpenAI, Oracle, and SoftBank to build new AI infrastructure in the United States.[24] Over the next four

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[18] *See* Exec. Order No. 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (Oct. 30, 2023), 88 Fed. Reg. 75191 (2023).

[19] Press Release, Fed. Trade Comm'n, *FTC Announces Crackdown on Deceptive AI Claims and Schemes* (Sept. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes.

[20] Compl., *In re Rytr, LLC*, FTC Matter No. 2323052, ¶¶ 15-16 (Sept. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2323052rytrcomplaint.pdf.

[21] Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In re Rytr, LLC*, FTC Matter No. 2323052 (Sept. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-rytr-statement.pdf.

[22] *Id.* at 4-5 ("Treating Rytr's neutral drafting tool as inherently unfair or deceptive will have deleterious consequences for AI products generally. Today's complaint suggests to all cutting-edge technology developers that an otherwise neutral product used inappropriately can lead to liability—even where, like here, the developer neither deceived nor caused injury to a consumer.").

[23] *See* Exec. Order No. 14148, *Initial Rescissions of Harmful Executive Orders and Actions* (Jan. 20, 2025), 90 Fed. Reg. 8237 (2025); David Shepardson, *Trump revokes Biden executive order on addressing AI risks*, Reuters (Jan. 21, 2025), https://www.reuters.com/technology/artificial-intelligence/trump-revokes-biden-executive-order-addressing-ai-risks-2025-01-21/.

[24] Bernard Mar, *What Does Trump's $500 Billion Stargate Mean For The World Of AI?*, Forbes (Jan. 23, 2025), https://www.forbes.com/sites/bernardmarr/2025/01/23/what-does-trumps-500-billion-stargate-mean-for-the-world-of-ai/.

years, the Stargate Project promises to cement American leadership in AI, create more than one hundred thousand American jobs, and promote economic prosperity and security for our nation.[25]

It is important that the Commission facilitate—not stymie—this upcoming growth of AI and innovation in the AI industry generally. Under Chairman Ferguson's leadership, I fully expect the Commission will do just that. The Commission plays an important role in ensuring that AI development is done in a manner that promotes competition, avoids entrenching dominant large technology companies, and mitigates fraudulent practices in the AI ecosystem.

I'll share two brief examples. *First*, the Commission must continue to police AI-powered fraud and scams. And it must do so without overextending its statutory authority. Last year, the Commission announced an "AI Comply" sweep—a suite of enforcement actions in which the Commission put a stop to AI-related law violations, such as deceiving consumers about what an AI lawyer service was capable of doing and what earnings AI-powered e-commerce stores could offer.[26] I voted for several of these enforcement actions. The Commission also initiated a Voice Cloning Challenge,[27] which facilitated industry and scholarly research on ways to address and detect voice cloning fraud. This led to innovative solutions—including using AI technologies itself—to address the emerging threats that voice cloning poses to consumers and honest business.[28]

Second, the Commission should continue to study the issues surrounding the development of AI and this evolving market. Earlier this month, the Commission released its much anticipated 6(b) report regarding AI partnerships and investments involving Google, Amazon, Microsoft, OpenAI, and Anthropic.[29] While I have previously criticized the Biden FTC's misguided 6(b) reports and their incomplete findings,[30] I concurred, in part, with the issuance of this report on AI partnerships and investments.[31] The topics covered by the report are important. While I may not agree with everything in the report, the underlying analysis "advances our knowledge of some of the commercial dynamics shaping AI's evolution" and sheds light on "how key technology companies have operated in this important and dynamic area of our economy[.]"[32] This information is valuable to policymakers, the Commission, and the American public. But the

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[25] *Id.*

[26] *See* FTC Press Release, *supra* note 19.

[27] Press Release, Fed. Trade Comm'n, *FTC Announces Exploratory Challenge to Prevent the Harms of AI-enabled Voice Cloning* (Nov. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-announces-exploratory-challenge-prevent-harms-ai-enabled-voice-cloning.

[28] Press Release, Fed. Trade Comm'n, *FTC Announces Winners of Voice Cloning Challenge* (Apr. 8, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-winners-voice-cloning-challenge.

[29] Fed. Trade Comm'n, Office of Technology, *Partnerships Between Cloud Service Providers and AI Developers: FTC Staff Report on AI Partnerships & Investments 6(b) Study*, Jan. 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/p246201_aipartnerships6breport_redacted_0.pdf.

[30] *See, e.g.*, Dissenting Statement of Comm'r Melissa Holyoak, *In re Pharmacy Benefit Managers Report*, FTC Matter No. P221200 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-Statement-Pharmacy-BenefitManagers-Report.pdf; Concurring and Dissenting Statement of Comm'r Melissa Holyoak, *In re Social Media and Video Streaming Services Staff Report*, FTC Matter No. P205402 (Sept. 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-social-media-6b.pdf.

[31] Concurring and Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *AI Partnerships and Investments 6(b) Study*, FTC Matter No. P246201 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement-ai-6b.pdf.

[32] *Id.* at 1.

Commission can always do more to understand this evolving and expanding market. For example, the Commission may want to better understand the potential regulatory barriers to entry, especially those that could impact new entrants. And, how regulatory burdens will be magnified by other regulations, such as in the privacy space, that place restrictions on access to, and use of, data to train and fine tune foundational models. The Commission may also want to explore the role that emerging data portability and interoperability measures for platforms and online services can play in promoting greater competition across existing AI firms.

IV. Protecting Americans from Big Tech Censorship

Finally, I'd like to discuss how the Commission can protect Americans from wrongful censorship by large technology companies. Here, I will briefly describe concerns about censorship and then touch on potential solutions that enforcers and policymakers can explore. But first I'll respond to an objection. There is content online that no one condones. No one approves of child pornography. No one welcomes user-created self-harm videos, or dangerous online challenges that target kids. Filtering such filth and repulsive content is not my focus today. Instead, my concerns flow from how lopsided censorship of certain speech—typically from vantage points and speakers that offend the sensibilities of progressive gatekeepers—lessens liberty and degrades civic discourse.

At this point in American history, it is common knowledge that a number of large technology platforms have engaged in lopsided censorship. Social media firms have, sometimes in very prominent circumstances, reduced certain user-generated speech that reflects disfavored views. Sometimes such censorship has also been in response to political pressure,[33] which appears far less likely thanks to steps President Trump has already begun to take.[34]

When large technology companies use opaque terms and conditions to employ subjective evaluations of certain consumer conduct that are inconsistent with consumers' reasonable expectations, that can cause significant harm.[35] Among other things, suppressing certain content or access to social media can reduce affected consumers and speakers to second-class citizens—even when those citizens are prominent and powerful. Nor are such censorship's harms limited to individuals. They have societal and civic effects. Reducing or cutting off access to social media—today's equivalent of the town square—limits freedom of speech in ways that degrade civic discourse by shortchanging the clash of competing information and diverse views that is so vital for self-government.[36] These are not hypothetical concerns. Our awareness of large technology

[33] *See, e.g.*, Interim Staff Report, *The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Big Tech to Censor Americans, True Information, and Critics of the Bident Administration*, Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Representatives, at 1 (May 1, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Biden-WH-Censorship-Report-final.pdf.

[34] *See, e.g.*, Exec. Order No. 14149, *Restoring Freedom of Speech and Ending Federal Censorship* (Jan. 20, 2025), 90 Fed. Reg. 8243 (2025).

[35] *See* Holyoak CEI Remarks, *supra* note 5, at 12-13 & n.67; *see also* Concurring Statement of Comm'r Melissa Holyoak, *In re 1661, Inc. d/b/a GOAT*, FTC Matter No. 2223016, at 2 (Dec. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-concurring-statement-re-goat.pdf.

[36] *See generally* Holyoak Social Media 6(b) Statement, *supra* note 30, at 1.

companies' censorship has only grown during the last four years.[37] Notwithstanding some positive developments in recent weeks,[38] any lessening of censorship may be ephemeral if left solely to the whim of large technology companies. Accordingly, I expect the Trump Administration and Congress will continue robustly exploring and implementing solutions to censorship.

Fortunately, Congress has already equipped the FTC and other enforcers with a set of relevant tools in both consumer protection and antitrust law.[39] For one thing, we should study whether and how companies apply terms and conditions in ways inconsistent with consumers' reasonable expectations.[40] This is an idea consistent with what President Trump has supported before.[41] I believe other steps, including enforcement under consumer protection authorities, may be appropriate, depending on the facts and circumstances.[42] Part of the Commission's investigations could also include investigating ways that trust and safety professionals may be collaboratively seeking to affect how AI is developed to moderate content. It will be of great interest whether business-to-business agreements between such companies may implement terms and conditions, including but not limited to design requirements, intended to reshape consumer-facing products in ways that restrict free speech.[43]

Finally, I believe that there may be situations in which censorship is an indicator of a digital platform's market power. Again, I'll address an objection. Antitrust in general may seem disconnected from free speech, and the typical antitrust cases may not lead to behavioral remedies that are directly responsive to free speech concerns.[44] But censorship may be a degradation in quality or obstacle to innovation, which may be the manifestation of anticompetitive effects.[45] And where the elements required for a violation of the antitrust laws have been satisfied, I will continue

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[37] *See, e.g.*, *Murthy v. Missouri*, 603 U.S. 43, 76-79 (2024) (Alito, J., dissenting); House Judiciary GOP, (@JudiciaryGOP), X.com (Aug. 26, 2024) (posting letter from Mark Zuckerberg, CEO, Meta Platforms, Inc., to Jim Jordan, Chairman, Committee on the Judiciary), https://x.com/JudiciaryGOP/status/1828201780544504064; Greg Wehner, *Meta CEO Admits Biden-Harris Admin Pressured Company to Censor Americans*, Fox Business (Aug. 26, 2024), https://www.foxbusiness.com/politics/meta-ceo-admits-biden-harris-admin-pressured-company-censor-americans.

[38] *See, e.g.*, Josh Christenson, *Powerful Judiciary Chair Jim Jordan Praises Mark Zuckerberg for Ending Censorship Efforts, Says Google Should Be Next*, N.Y. Post (Jan. 7, 2025), https://nypost.com/2025/01/07/us-news/powerful-judiciary-chair-jim-jordan-praises-mark-zuckerberg-for-ending-censorship-efforts-says-google-should-be-next/.

[39] Consistent with the vision Chairman Ferguson articulated last month, I believe there are several paths forward. *See generally* Concurring Statement of Comm'r Andrew N. Ferguson, *FTC v. 1661, Inc. d/b/a GOAT*, Matter No. 2223016 (Dec. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-goat-concurrence.pdf.

[40] *See* Holyoak CEI Remarks, *supra* note 5, at 12-13; *see also* Statement of Comm'r Melissa Holyoak, Subcommittee on Innovation, Data, and Commerce, Energy and Commerce Committee, U.S. House of Representatives, "The Fiscal Year 2025 Federal Trade Commission Budget," at 6 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-testimony-7-5-24.pdf.

[41] *See, e.g.*, Exec. Order No. 13925, *Preventing Online Censorship* (May 28, 2020), 85 Fed. Reg. 34079, 34081-82 (2020).

[42] *See, e.g.*, Holyoak GOAT Statement, *supra* note 35, at 2 ("And the settlement with GOAT underscores the existing legal authority the Commission has to prosecute how platforms enforce their terms of service.").

[43] *See* Holyoak AI Partnerships 6(b) Statement, *supra* note 31, at 2.

[44] *See* Holyoak GOAT Statement, *supra* note 35, at 2 n.14.

[45] *See, e.g.*, Letter from Senator Mike Lee to Sundar Pichai (Alphabet) et al., at 2 (July 30, 2020) ("I view your heavy-handed censorship as a sign of exactly the sort of degraded quality one expects from a monopolist. In any other business, you would never dream of treating your customers the way you treat those with views you don't like. That is, unless you know your customers have no other serious options."), https://www.lee.senate.gov/services/files/89d2dcc8-3d2c-4fee-a6c5-d309ffcebfb4.

to strongly support antitrust enforcement against large technology companies—just as I did as Utah's Solicitor General.[46]

Furthermore, as Chairman Ferguson has recently identified, there are other ways that antitrust may relate directly to censorship. I will briefly mention two examples worth exploring. First, we should consider investigating potential violations of the antitrust laws against collusion.[47] For example, if online platforms are unlawfully colluding over how they moderate content, we will not look the other way. Content moderation is one dimension of product quality, and collusion to impede product quality may be unlawful.[48] Second, and relatedly, antitrust laws may prohibit the efforts by advertisers to coordinate boycotts of certain media outlets because of the content they produce.[49] As the House Judiciary Committee concluded in an interim report last year:

> If collusion among powerful corporations capable of collectively demonetizing, and in effect eliminating, certain views and voices is allowed to continue, the ability of countless American consumers to choose what to read and listen to, or even have their speech or writing reach other Americans, will be destroyed. Federal antitrust laws do not diminish because GARM or its members claim to have good intentions.[50]

Both unlawful collusion and boycotts that lessen speech are wrong, and I believe antitrust enforcers should explore how our authorities may be brought to bear on these types of problems.

* * *

As I have described today, the Biden FTC has been off the rails. If we are to restore and promote an innovative and competitive marketplace, I believe it is advisable to explore the steps I have outlined today. I am confident that, under Chairman Ferguson's leadership, we are already well on our way to renewing the Commission's legitimacy and reputation in ways that will benefit and empower the free choices of the American people.

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[46] *Cf.* Holyoak CEI Remarks, *supra* note 5, at 12.

[47] *See, e.g.*, Ferguson GOAT Statement, *supra* note 39, at 1.

[48] PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (CCH) 1901 ("[R]elevant output can be estimated or inferred by several means. The most obvious is the number of units sold. Perhaps the second most obvious is the quality of the units. If macaroni manufacturers agree with one another to substitute 50 percent inferior farina wheat when making their product, rather than using 100 percent durum semolina wheat, this agreement may have little impact on the number of pounds of macaroni that they sell. But in this case the agreement to make a product of inferior quality would count as the output reduction. In all events, the relevant output consists of not merely the naked product itself, but also all information, amenities, and other features that a firm produces. For example, automobile dealers compete with one another not only by pricing cars but also by having longer showroom hours, more effective advertising, better service departments, and the like." (citations omitted)); *see also Continental Airlines, Inc. v. United Air Lines, Inc.*, 126 F. Supp. 2d 962, 975 (E.D. Va. 2001), *vacated on other grounds*, 277 F.3d 499 (4th Cir. 2002) (agreeing on size of carry-on bags as output reduction).

[49] *See* Ferguson GOAT Statement, *supra* note 39, at 3; *see also* Interim Staff Report, *GARM's Harm: How the World's Biggest Brands Seek to Control Online Speech*, Committee on the Judiciary, U.S. House of Representatives, at 1 (July 10, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-07-10%20GARMs%20Harm%20-%20How%20the%20Worlds%20Biggest%20Brands%20Seek%20to%20Control%20Online%20Speech.pdf.

[50] *See GARM's Harm*, *supra* note 49, at 38.