UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Andrew N. Ferguson

Concurring Statement of Commissioner Andrew N. Ferguson
FTC v. 1661, Inc. d/b/a GOAT
Matter Number 2223016

December 2, 2024

I concur fully in the filing of this complaint and stipulated order and write separately only to address an issue raised in Commissioner Holyoak's thoughtful concurrence. My colleague urges the Commission to investigate online platforms for unfair acts or practices relating to their opaque, unpredictable processes for banning users and censoring content. She is right. President Trump himself asked the Commission in 2020 to investigate such practices.[1] When Americans' ability to engage in robust public debate on issues of national importance is at stake, no stone should be left unturned. The Commission should undertake these investigations.

Using Section 5 to enforce the penumbra of contract law is only one of many tools at our disposal. We should use all the tools we have. We should address not just censorious conduct specifically, but also investigate the structural issues that may have given these platforms their power over Americans' lives and speech in the first place. In particular, we must vigorously enforce the antitrust laws against any platforms found to be unlawfully limiting Americans' ability to exchange ideas freely and openly. We must prosecute any unlawful collusion between online platforms, and confront advertiser boycotts which threaten competition among those platforms.

Addressing potential structural problems is necessary even if the Commission successfully enforces the platforms' terms of service. Suppose that, in response to Commission action, the platforms honestly disclose their content policies and comply with them. Consumers could then choose to use platforms that provided free-speech-respecting products rather than those that do not. This would be an improvement over the status quo. But the choice would be real only if there are suitable free-speech-respecting substitutes to the censorious platforms. X right now is such a platform. But that is a recent phenomenon; X was once as censorious as the rest. Its current turn toward free expression is due only to its new owner's unusually firm commitment to free and open debate. Other online platforms remain far more censorious. Moreover, the major social media platforms may not necessarily be suitable substitutes for each other based on their characteristics and uses. They appear to occupy several unique niches, and a creator banned from one platform cannot count on earning a living by posting the same content on another platform.

Even if the various platforms are in some measure substitutes for each other, there is another problem. For years, the major speech platforms seemed to censor in lockstep. They banned dissent on the origins of COVID-19, mask mandates, the efficacy and safety of COVID-19 vaccines, transgenderism, and the integrity of the 2020 election. Every major speech platform—Snapchat, Facebook, Twitter, Instagram, and YouTube—banned President Trump roughly

[1] Exec. Order No. 13925, 85 Fed. Reg. 34079 (May 28, 2020).

contemporaneously in early 2021.[2] And this phenomenon was never more obvious than in 2020, when major Big Tech platforms simultaneously banned reporting on, and discussion of, the Hunter Biden laptop story.[3]

The antitrust laws generally do not forbid competitors from engaging in unilateral, parallel conduct—that is, identical or substantially similar conduct that occurs at about the same time but coincidentally.[4] They do, however, prohibit agreements among competitors not to compete.[5] If the platforms colluded amongst each other to set shared censorship policies, such an agreement would be tantamount to an agreement not to compete on contract terms or product quality.[6] "[A]s far as the Sherman Act … is concerned, concerted agreements on contract terms are as unlawful as boycotts."[7]

The prospect of Big Tech censorship collusion is not merely hypothetical. Litigation has revealed the proclivity of some Big Tech firms to conspire on censorship policies. In *Missouri v. Murthy*,[8] several States sued the United States and alleged that officials of the federal government coerced Big Tech firms to suppress "misinformation" on the platforms in violation of the First Amendment. "Misinformation," of course, being Newspeak for ideas and speech inconsistent with progressive orthodoxy. The censored content "touched on a host of divisive topics like the COVID-19 lab-leak theory, pandemic lockdowns, vaccine side-effects, election fraud, and the Hunter

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[2] *Which social media platforms have banned Trump and why? An overview*, FoxNews.com, Aug. 5, 2024, https://www.foxnews.com/politics/trump-remains-permanently-blocked-from-snapchat-after-sequence-blockings-from-top-platforms-2021.

[3] Concurring and Dissenting Statement of Comm'r Andrew N. Ferguson, Regarding the Social Media and Video Streaming Services Report, Matter No. P205402, 9–10 (Sept. 19, 2024).

[4] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("[C]onscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."); *Theatre Enters, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. …'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (dismissing Sherman Act Section 1 claim for failure to plead more than parallel conduct explaining "prior rulings and considered views of leading commentators," are clear that "lawful parallel conduct fails to bespeak unlawful agreement."). There are, of course, some prohibitions on unilateral conduct carried out by monopolists. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767–68 (1984) ("In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.").

[5] See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58 (1911) (Section 1 prohibits agreements that are "unreasonably restrictive of competitive conditions").

[6] Cf. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (agreement between dentists to refuse to submit x-rays to dental insurers for use in benefits determinations limiting consumer choice violated antitrust law because the argument "that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices … amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'" (quoting *Nat'l Soc'y of Pro. Eng'rs.*, 435 U.S. 679, 695 (1978)); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 36–41 (1930) (agreement between film producers to distribute films only subject to the terms of a standard contract including arbitration provision violated antitrust law).

[7] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 803 (1993).

[8] 603 U.S. 43 (2024).

Biden laptop story."[9] The Supreme Court ultimately concluded that the States had failed to demonstrate that their speech was removed because of government coercion, as opposed to decisions made by the platforms of their own volition.[10] But discovery in that case revealed the shocking extent of the collaboration between various organs of the federal government—including the White House, CDC, FBI, CISA, and State Department—and Big Tech firms to suppress dissident speech.[11] The record thus demonstrates that Big Tech firms were happy to work with others to determine their censorship policies—a point driven home by the Supreme Court's conclusion that government coercion did not principally drive Big Tech censorship. If they were coordinating those policies with each other, they may have violated the antitrust laws.

There is another danger to free speech on Big Tech platforms that may fall within our antitrust bailiwick: advertiser boycotts. Shortly after Twitter (now X) was purchased by a free-speech champion, major advertisers raced for the door and refused to advertise on X. Concerted refusals to deal—also known as group boycotts—are illegal under the Sherman Act.[12] According to X, this mass advertiser exodus was concerted, and was facilitated by the World Federation of Advertisers' Global Alliance for Responsible Media (GARM) initiative.[13] GARM described itself as a coalition of "marketers, media agencies, media platforms, industry associations, and advertising technology solutions providers to safeguard the potential of digital media by reducing the availability and monetization of harmful content online."[14] According to the House Judiciary Committee, GARM may have been a conspiracy of major advertisers that facilitated boycotts of conservative and libertarian websites, podcasts, platforms, and political candidates in order to protect "brand safety" from "misinformation."[15] GARM ceased its operations in the face of litigation by X.

GARM's dissolution, however, has not abated the risk of advertiser boycotts that raise Sherman Act problems. NewsGuard, for example, "is a domestic for-profit business that rates the credibility of news and information outlets and tells readers and advertisers which outlets they can trust."[16] Like GARM, NewsGuard claims to promote "brand safety" for advertisers. "NewsGuard leverages 'human intelligence' (journalists on staff) to dictate an outlet's trustworthiness. Those deemed 'untrustworthy' are then compiled into 'exclusion lists,' with 'trustworthy' sites on

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[9] *Missouri v. Biden*, 83 F.4th 350, 259 (5th Cir. 2023) (per curiam), *rev'd*, 603 U.S. 43 (2024).
[10] *Murthy*, 603 U.S. at 59–60.
[11] See *Missouri v. Biden*, 680 F. Supp. 3d 630, 645–89 (W.D. La. 2023).
[12] See, e.g., *Associated Press v. United States*, 326 U.S. 1, 9, 15–19 (1945) (bylaws of publishing agency violated antitrust law where they prohibited dealings with nonmembers and authorized members to block their competitors from obtaining membership); *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 424 (1990) (group boycott violated antitrust law regardless of "[t]he social justifications proffered for [the challenged] restraint of trade").
[13] See Compl., *X Corp. v. World Fed'n of Advertisers*, 7:24-cv-00114 (N.D. Tex. Aug. 6, 2024). Rumble similarly filed suit, alleging such an unlawful conspiracy. Compl., *Rumble Inc. v. World Fed'n of Advertisers*, 7:24-cv-00115 (N.D. Tex. Aug. 6, 2024).
[14] Interim Staff Report of the Comm. on the Judiciary U.S. House of Representatives, GARM's Harm: How the World's Biggest Brands Seek to Control Online Speech, at 1 (July 10, 2024) (quotation marks omitted), 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.
[15] *Id*. at 2–4.
[16] H. Comm. on Small Business, Small Business: Instruments and Casualties of the Censorship-Industrial Complex, Interim Staff Report 2024 at 42, https://smallbusiness.house.gov/uploadedfiles/house_committee_on_small_business_-_cic_report_september_2024.pdf.

'inclusion lists,' which are licensed to advertisers to instruct their ad agencies and ad-tech partners to keep their programmatic ads off/on these sites."[17] If a website gets a poor rating on NewsGuard's "nutrition label," it can choke off the advertising dollars that are the lifeblood for many websites—including platforms on which millions of Americans every day speak their minds.[18] NewsGuard "goes to great lengths to create the appearance of nonpartisanship and objectivity," but it seems to give a free pass to deceptive and biased news coverage by major left-leaning outlets.[19] NewsGuard is, of course, free to rate websites by whatever metric it wants. But the antitrust laws do not permit third parties to facilitate group boycotts among competitors.[20]

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All of this is to say that Commissioner Holyoak is right to propose reviving President Trump's Executive Order 13925. Doing so could promote transparency and honesty in how Big Tech treats its consumers. But I would not stop there. Censorship, even if carried out transparently and honestly, is inimical to American democracy. The Commission must use the full extent of its authority to protect the free speech of all Americans. That authority includes the power to investigate collusion that may suppress competition and, in doing so, suppress free speech online. We ought to conduct such an investigation. And if our investigation reveals anti-competitive cartels that facilitate or promote censorship, we ought to bust them up.

[17] *Id.* at 43.
[18] *Id.* at 43–44.
[19] *Id.* at 43, 44–48.
[20] *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934–35 (7th Cir. 2000); *United States v. Apple, Inc.*, 791 F.3d 290, 319–20 (2d Cir. 2015) ("[I]t is well established that vertical agreements, lawful in the abstract can in context 'be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel." (quoting *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 893 (2007)).