

The Hon. Jefferson Sessions III
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

September 21, 2018

Dear Mr. Attorney General:

We write to express our concern over your plans to convene a meeting of state attorneys general later this month “to discuss a growing concern that [operators of popular social media services and search engines] may be hurting competition and intentionally stifling the free exchange of ideas on their platforms.”¹ The First Amendment bars the government from attempting to “correct” the first alleged problem, political bias, *including through the antitrust laws*, and sharply limits how the antitrust laws can be used against anticompetitive behavior *beyond* editorial bias. Essentially, antitrust law can prescribe anticompetitive *economic* conduct but “cannot be used to require a speaker to include certain material in its speech product.”²

Given these limitations, it is unclear what lawful action could result from your planned meeting. Indeed, we fear that the effect of your inquiry will be to accomplish through intimidation what the First Amendment bars: interference with editorial judgment.

Allegation #1: Editorial Bias: The President and congressional Republicans have offered a series of anecdotes of conservatives suffering because of (mainly algorithmic, automated) content moderation practices — but no evidence of systemic political bias. Academic research has found no political bias in news recommendation engines — the principal focus of the President’s complaint.³ Regardless, *even if evidence of such editorial bias existed, the First Amendment protects the exercise of editorial discretion, however “biased.”*

Suppose that, after years of President Elizabeth Warren tweeting angrily about “failing Faux News” and the “War Street Journal,” her Department of Justice (DOJ) announced their own inquiry (invoking your inquiry as precedent) about the political bias of conservative media against Democrats and progressives. The constitutional problem would be obvious — and the very same conservative

¹ Zack Whittaker, *Justice Dept. says social media giants may be intentionally stifling free speech*, Techcrunch, (Sept. 5, 2018), <https://techcrunch.com/2018/09/05/justice-dept-says-social-media-giants-may-be-intentionally-stifling-free-speech/>.

² See Eugene Volokh and Donald Falk, *First Amendment Protection for Search Engine Search Results*, at 21 (April 20, 2012). UCLA School of Law Research Paper No. 12-22, <https://ssrn.com/abstract=2055364>.

³ See, e.g., Seth C. Lewis & Efrat Nechushtai, *What kind of news gatekeepers do we want machines to be? Filter bubbles, fragmentation, and the normative dimensions of algorithmic recommendations*, *Computers in Hum. Behav.* (2018).

groups clamoring now for government intervention against social media companies would say so loudly: the First Amendment bars the government from second-guessing the editorial decisions made by cable networks and newspapers.

Internet media companies are no different. As Justice Scalia made clear in a 2011 decision striking down California’s attempt to regulate video games: “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”⁴ Thus, even when the government’s interest is strongest — protecting children from predation — the Court has consistently struck down regulation of social media content and the use of social media services.⁵

In doing so, the Court has hailed the “vast democratic forums of the Internet,”⁶ calling social networking sites “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”⁷ But this lofty language does *not* mean the Court will permit regulation of social networking sites to ensure that certain speakers have rights of access to them, as with town squares, because, these services are simply not state actors: they do not replicate *all* (or even most of) the functions of local government, as corporate-owned towns do, and they are readily distinguishable from shopping malls, the other category of public fora recognized by the Supreme Court.⁸

Earlier this year, a federal district court held that President Trump’s Twitter profile was a “public forum,” but this does *not* mean Twitter overall is such a forum; and far from limiting Twitter’s editorial discretion, the decision limited *President Trump’s* ability to block other Twitter users from interacting with his profile.⁹ In short, it is well settled that the First Amendment constrains the

⁴ *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) (emphasis added).

⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Brown*, 564 U.S. at 790 (2011); *United States v. Stevens*, 559 U.S. 460 (2010) (striking down federal law governing animal cruelty videos); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); see also *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down federal law governing online child protection).

⁶ *Reno*, 521 U.S. at 868.

⁷ *Packingham*, 137 S. Ct. at 1737.

⁸ Among other distinguishing factors, shopping malls are not in the speech business; their use for speech is purely incidental to their core purpose: commerce. See *Filtering Practices of Social Media Platforms*, Hearing Before the H. Comm. on the Judiciary, 115th Cong. 2-3 (2018) (testimony of Berin Szóka, President, TechFreedom), <https://judiciary.house.gov/wp-content/uploads/2018/04/Szoka-Testimony.pdf> [hereinafter *Szóka Testimony*]; see e.g., *Johnson v. Twitter, Inc.*, No. 18CECG00078 (Cal. Superior Ct. June 6, 2018), at 4, available at <https://www.documentcloud.org/documents/4495616-06-06-18.html> (“[Twitter] is a private sector company. Although it does invite the public to use its service, [Twitter] also limits this invitation by requiring users to agree to and abide by its User Rules, in an exercise of Defendant’s First Amendment Right. The rules clearly state that users may not post threatening tweets, and also that Defendant may unilaterally, for any reason, terminate a user’s account. The rules reflect Defendant’s exercise of free speech”).

⁹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

editorial decisions made only by state actors; it *protects* the editorial discretion of media companies, “new” media as well as “old” media.

Allegation #2: Anticompetitive Behavior: While no clear antitrust harms have been alleged yet in this area, it is true that media companies are not immune from antitrust suit.¹⁰ However, “the First Amendment does not allow antitrust claims to be predicated solely on protected speech.”¹¹ Thus, antitrust suits against web platforms — even against “virtual monopolies” — must be grounded in economic harms to competition, not the exercise of editorial discretion.¹² For example:

[I]t is constitutionally permissible to stop a newspaper from “forcing advertisers to boycott a competing” media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951). But the newspaper in *Lorain Journal Co.* was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. ***The Lorain Journal Co. rule thus does not authorize restrictions on a speaker’s editorial judgment about what content is more valuable to its readers.***¹³

The degree of a media company’s market power does not change its protection by the First Amendment:

[T]he Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a “substantial monopoly” could not be ordered to run a movie advertisement that it wanted to exclude, because “[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.” *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that, “[n]ewspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication.” *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).¹⁴

Given these limitations imposed by the First Amendment, it is difficult to see how concerns about political bias could *ever* be remedied through an antitrust suit.

Regulation by Intimidation. The mere fact of “investigating” social media may be coercive. Strong-arming social media companies to change their practices in ways that the First Amendment would not permit the government to formally *require* them to do can have markedly non-neutral effect.

¹⁰ *Volokh* at 20-22.

¹¹ *Jefferson County Sch. Dist. No. R-1 v. Moody’s Investor Servs.*, 175 F.3d 848, 860 (10th Cir. 1999).

¹² See Eugene Volokh and Donald Falk, First Amendment Protection for Search Engine Search Results (April 20, 2012). UCLA School of Law Research Paper No. 12-22, <https://ssrn.com/abstract=2055364>.

¹³ *Volokh* at 22 (emphasis added).

¹⁴ *Id.* at 23.

A recent example illustrates the point: in May 2016, after the first round of allegations that Facebook was biased against conservatives, Sen. John Thune (R-SD), Chairman of the Senate Commerce Committee, sent Facebook a letter interrogating the company about how it decided to feature content in the “Trending” section at the top corner of its homepage.¹⁵ Facebook responded to concerns about the left-wing slant of the employees who screened content suggested as “Trending” by algorithms on a rolling basis by simply ending human involvement in the process.¹⁶ This significant change in how Facebook operated its site was troubling enough as a roadmap for how to circumvent the First Amendment; it also had disastrous consequences, making it far easier for Russian and other foreign actors to manipulate Facebook’s algorithms to get their misinformation content featured prominently on Facebook — thus favoring those candidates and causes foreign interference was intended to aid.

This example illustrates, principally, that any investigation treading upon the First Amendment here must be conducted confidentially — not as a political spectacle.

A Fairness Doctrine for the Internet Would Be Unconstitutional. The President and top congressional Republicans have talked about the need to ensure the “fairness” of social media platforms and search engines. Consciously or otherwise, this invokes not antitrust law but the “Fairness Doctrine” imposed on radio and television broadcasters by the Federal Communications Commission from 1949 until 1987. In theory, the Fairness Doctrine required broadcasters to represent a wide spectrum of opinion on controversial issues of public importance. The Supreme Court upheld this Doctrine in *Red Lion* (1969) — but only because it declined to extend the full protection of the First Amendment to broadcasters on the grounds that they received government licenses to use a scarce public resource: the airwaves.¹⁷ Five years later, the Court categorically rejected mandating that newspapers offer a right of reply.¹⁸

Anything like the Fairness Doctrine would undoubtedly be struck down as unconstitutional if applied to *any other media* — whether to Fox News (the cable network) or Internet media.¹⁹ Indeed, it is highly likely that the Fairness Doctrine could not even be re-imposed on broadcasters, as many commentators have suggested that *Red Lion* will be overruled by the Supreme Court.²⁰

Ironically, it was conservatives who led the fight to repeal the Fairness Doctrine over four decades — because it hurt conservatives most: The threat of losing an FCC license discouraged broadcasters

¹⁵ Letter from Sen. John Thune, Chairman, S. Comm. on Commerce, Sci., and Transp., to Mark Zuckerberg, Facebook, Chairman (May 10, 2016), <https://www.commerce.senate.gov/public/cache/files/fe5b7b75-8d53-44c3-8a20-6b2c12b0970d/C5CF587E2778E073A80A79E2A6F73705.fb-letter.pdf>.

¹⁶ Colin Stretch, *Response to Chairman John Thune’s letter on Trending Topics*, Facebook (May 23, 2016), <https://newsroom.fb.com/news/2016/05/response-to-chairman-john-thunes-letter-on-trending-topics/>.

¹⁷ *Red Lion Broad. v. FCC*, 395 U.S. 367, 388 (1969).

¹⁸ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

¹⁹ *Szóka Testimony* at 17-23.

²⁰ See, e.g., Brief for Cato Institute as Amicus Curiae, *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192 (9th Cir. 2013); Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 Nw. J. Tech. & Intell. Prop. 1 (2010). (“The logic of *Red Lion* ... has been widely acknowledged as fatally flawed for a generation”).

from including non-mainstream voices in their coverage and made impossible alternative media offerings with an unabashed conservative “bias.” Indeed, it was President Reagan’s FCC that repealed the Fairness Doctrine in 1987. When congressional Democrats tried to restore the Fairness Doctrine by legislation, President Reagan vetoed the measure, declaring that:

[W]e must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.²¹

Republicans included a specific statement of opposition to the Fairness Doctrine in their 2008 platform; in 2012 (even *after* the Obama-era FCC had finally taken the Fairness Doctrine off the books), the Republican Platform maintained this statement unchanged, adding “We insist that there should be no regulation of political speech on the Internet;” and in 2016, the Platform repeated its opposition to the Fairness Doctrine, adding “support [for] free-market approaches to free speech unregulated by government.”²² Sadly today’s conservatives seem to have forgotten all of this as well as the wisdom of President Reagan, and the First Amendment jurisprudence of Justice Scalia.

Even if a Fairness Doctrine for the Internet were somehow constitutional, it would undoubtedly backfire against conservatives: What the Reagan FCC said about the original Fairness Doctrine would inevitably be true for an Internet Fairness Doctrine: “controversial viewpoint[s] [would be] screened out in favor of the dreary blandness of a more acceptable opinion.”²³ Moreover, the Fairness Doctrine “in operation inextricably involves the [government] in the dangerous task of evaluating the merits of particular viewpoints,”²⁴ and making such determinations after the fact inevitably gives vast leverage over media to whoever controls the government.

The last thing conservatives should want is a Democratic administration with such arbitrary power (or a Republican administration, for that matter). A Warren administration, say, could use such powers to coerce existing social media sites and search engines to disadvantage conservatives (in the name of neutrality and fairness, and stopping “fake news,” of course) and also to prohibit the “Facebook for conservatives” network recently called for by Donald Trump, Jr.²⁵

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²¹ Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), *available at* <http://www.presidency.ucsb.edu/ws/?pid=34456>.

²² *Szóka Testimony*, note 7.

²³ Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 188-190, ¶¶ 69-71 (1985).

²⁴ *Id.*

²⁵ Megan Keller, *Trump Jr. says he'd back a new conservative version of Facebook*, The Hill (Aug. 30, 2018) <http://thehill.com/policy/technology/404326-trump-jr-says-hed-back-a-new-conservative-version-of-facebook>

For all these reasons, we are skeptical that there are any grounds for legal action that could arise out of your inquiry. But if there is, even that action must be handled in a manner that is neutral among viewpoints, content and speakers — as the First Amendment requires for legal actions targeted at media companies. We do not believe that the Department of Justice, as an arm of an Administration that has so consistently attacked social media companies (as well as traditional media companies), has the independence to act in the neutral, apolitical fashion required by the First Amendment. Thus, we urge you to refer this matter to the Federal Trade Commission (FTC), an independent agency with co-equal authority to enforce the antitrust laws, and broader authority over consumer protection concerns. The FTC has already handled multiple investigations into social media companies, and thus already has the relevant expertise in this area.

Of course, despite the FTC's independence, when the agency merely conducted a *study* about "Reinventing Journalism" early in the Obama Administration, Republicans denounced the very possibility of government meddling with the media as offensive to the First Amendment.²⁶ If only they remembered such skepticism today.

Sincerely,

TechFreedom

Lincoln Network

The Copia Institute

Iain Murray, VP for Strategy and Senior Fellow, Competitive Enterprise Institute (CEI)

Engine Advocacy

Information Technology and Innovation Foundation (ITIF)

Jason Pye, Vice President of Legislative Affairs, FreedomWorks

Lisa B. Nelson, the CEO of the American Legislative Exchange Council

Prof. Eric Goldman, Santa Clara University School of Law (affiliation listed for identification only)

²⁶ See FTC Staff Discussion Draft, *How Will Journalism Survive the Digital Age?*, Presented at the FTC's Internet Media Workshop on June 15, 2019, https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf; Christopher Whalen, *How America's Hugo Chavez Fan Club Plans to 'Reform' Our Media Marketplace*, Breitbart (July 13, 2010), <https://www.breitbart.com/big-government/2010/07/13/how-america-s-hugo-chavez-fan-club-plans-to-reform-our-media-marketplace/>.