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National Telecommunications and Information Administration
Department of Commerce
Via electronic submission

Re: NTIA–2023–0009, Request for Comment: Dual Use Foundation Artificial Intelligence Models With Widely Available Model Weights

I write in response to the National Telecommunications and Information Administration's request for public input on Dual Use Foundation Artificial Intelligence Models with Widely Available Model Weights (the "RFC"). I currently teach at Cornell Law School in our First Amendment Clinic. Prior to my teaching career I worked at the Center for Democracy & Technology on privacy, speech, and surveillance issues in technology law and policy.

I believe that several open legal and constitutional questions necessitate care and deliberation from NTIA and other governmental actors contemplating regulatory intervention and oversight of AI and related technologies. In particular, *some* (not all) AI regulations may raise First Amendment questions or concerns. As such, though I do *not* argue that regulatory efforts *necessarily* violate the First Amendment, I encourage NTIA to consider the following doctrinal complexities in crafting and evaluating regulatory proposals.

Regulatory mandates that target the development or availability of software, including AI, raise possibilities of constitutional challenge. Drafters must thus consider multiple strands of First Amendment doctrine, some of which remain unsettled as applied to digital technologies. We identify a few topics below that warrant consideration and analysis by NTIA and other governmental entities.

Licensing Regimes: Any governmental effort that requires licensing or registration can raise prior restraint issues if it seeks to regulate speech. The Supreme Court has repeatedly warned against the imposition of licensing regimes or prior restraints, noting that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'"[1] While some regimes might satisfy constitutional scrutiny, designers of any licensing system must work carefully lest inevitable First Amendment challenges doom the regulatory structure.

Regulation of the Internet: The Supreme Court held in *Reno v. ACLU* that, unlike broadcast television or radio, regulations of the Internet as a communications medium are subject to strict

[1] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

scrutiny.[2] Regulation of the communicative function of artificial intelligence models may thus trigger strict scrutiny, the most exacting standard in constitutional law. While the government can satisfy strict scrutiny by demonstrating that a compelling interest exists and that the law or regulation at issue serves as the least restrictive means of achieving that interest and has been narrowly tailored, strict scrutiny challenges on First Amendment grounds often succeed. Thus, any regulation that targets artificial intelligence models that might either be content-based (thus triggering strict scrutiny) or treated as Internet regulations similar to *Reno* will likely face skepticism from the courts. Drafters must thus work carefully and proactively to ensure that regulations of AI can meet the application of strict scrutiny in a First Amendment challenge.

Content Moderation: Two pending cases at the U.S. Supreme Court raise questions regarding the ability of the state to regulate the alleged speech of private parties. *NetChoice v. Paxton* and *Moody v. NetChoice* concern laws from Texas and Florida respectively that levy requirements upon social media companies regarding the content and users they host. Two trade associations representing those companies challenged the laws on First Amendment grounds, arguing that they compel speech from the platforms in violation of multiple Supreme Court cases that protect the "editorial discretion" rights. A decision in the *NetChoice* cases is expected by Summer 2024. The Supreme Court's ruling will likely inform how federal and state legislatures and regulators can determine the choices that AI platforms make (though other legal doctrines such as copyright or defamation might inform the information structures of AI).

Transparency Requirements: Mandated transparency requirements are also at issue in the *NetChoice* cases and in various other cases currently being litigated in the lower federal courts. These requirements have been challenged on First Amendment grounds as violating the standard set forth by *Zauderer v. Office of Disciplinary Counsel* that upholds transparency requirements that are factual and non-controversial.[3] Regulated entities have challenged the applicability of *Zauderer* to various data privacy and Internet regulations, arguing that the *Zauderer* standard does not apply and the regulations violate First Amendment doctrine on compelled speech. The Supreme Court may reach those issues in the *NetChoice* cases, and might also grant certiorari on cases currently being litigated in the Second and Ninth Circuits. Some AI transparency obligations likely satisfy the First Amendment, but in the absence of clear guidance from the Supreme Court such obligations will almost certainly face First Amendment challenge.

Export Controls: In *Bernstein v. U.S.*, the U.S. Court of Appeals for the Ninth Circuit held that restrictions on the export of computer source code constituted a restriction on speech and violated the First Amendment.[4] The Ninth Circuit later withdrew that opinion, but other courts have relied upon the underlying reasoning.[5] Regulated AI companies may rely upon the reasoning of *Bernstein* to argue that export restrictions on model weights violate the First Amendment. As with the other topics discussed above, the specific constitutionality of a hypothetical export control regulation cannot be evaluated *ex ante*. I note, however, that any such export control regulations would also

[2] Reno v. ACLU, 521 U.S. 844, 870 (1997) ("Our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").
[3] 471 U.S. 626 (1985).
[4] 176 F.3d 1132 (9th Circ. 1999).
[5] *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d. 429 (2nd Circ. 2001).

almost certainly face First Amendment challenge. If other courts follow the reasoning of *Bernstein*, such challenges present a serious obstacle to export control regulations.

Thank you for your consideration of these issues. Please do not hesitate to contact me if any additional information would be useful.

Regards,

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