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Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking

August 11, 2022

Three years ago, I gave a speech outlining: why I believed that case-by-case enforcement in the space of data abuses was not effective; how I hoped to see Congress pass a long-overdue federal privacy law; and that, until such a law is signed, the Commission should use its authority under Section 18 to initiate a rulemaking process.¹ I am delighted that Congress appears to be making substantial and unprecedented progress toward a meaningful privacy law, which I am eager to see pass.² Nonetheless, given the uncertainty of the legislative process and the time a Section 18 rulemaking necessarily takes, the Commission should not wait any longer than it already has to develop a public record that could support enforceable rules. So I am equally delighted that we are now beginning the Section 18 process by issuing this Advance Notice of Proposed Rulemaking (“ANPR”) on commercial surveillance and data security.³

It is indisputable that the Federal Trade Commission has expertise in regulating this sector; it is widely recognized as the nation’s premier “privacy enforcer.”⁴ I commend agency staff for their dogged application of our nearly 100-year-old consumer-protection statute (and handful of sector-specific privacy laws) to build that reputation.

Historically, much of that work operated through the straightforward application of those basic consumer-protection principles to privacy. The FTC ensured that companies told users what they were doing with the users’ data, insisted that they secure users’ consent, and policed companies’ promises. But case-by-case enforcement has not systemically deterred unlawful behavior in this market. As our own reports make clear, the prevailing notice-and-choice regime

¹ See Rebecca Kelly Slaughter, *The Near Future of U.S. Privacy Law*, Silicon Flatirons-University of Colorado Law School (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf.

² See Rebecca Klar, *House Panel Advances landmark Federal Data Privacy Bill*, The Hill (July 20, 2022), <https://thehill.com/policy/technology/3567822-house-panel-advances-landmark-federal-data-privacy-bill/>.

³ Fed. Trade Comm’n, Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. ----h (forthcoming 2022) [hereinafter “ANPR”].

⁴ When Congress passed the Children’s Online Privacy Protection Act (“COPPA”) in 1998 it assigned sector-specific privacy enforcement and rulemaking powers to the FTC on top of our UDAP authority. Bills being debated in both House and Senate Commerce Committees build on our “comparative expertise” in this field and seek to streamline and enhance our privacy enforcement and rulemaking processes. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022) (“ ‘When an agency has no comparative expertise’ in making certain policy judgments, we have said, ‘Congress presumably would not’ task it with doing so.” (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019))).

has failed to protect users,⁵ and the modes by which sensitive information can be discovered, derived, and disclosed have only grown in number and complexity.⁶

Data abuses such as surreptitious biometric or location tracking,⁷ unaccountable and discriminatory algorithmic decision-making,⁸ or lax data security practices⁹ have been either caused by, exacerbated by, or are in service of nearly unfettered commercial data collection, retention, use, and sharing. It is up to the Commission to use the tools Congress explicitly gave us, however rusty we are at wielding them, to prevent these unlawful practices. That is why I have consistently, for years, called for the Commission to begin the process to consider clear, bright-line rules against unfair or deceptive data practices pursuant to our Section 18 authority.¹⁰

⁵ An FTC staff 6(b) study on ISP privacy uncovered that companies routinely bury important disclosures in endless terms-of-service and that choice, even when purportedly offered, is “illusory.” Fed. Trade Comm’n, *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers* 27 (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-youexamining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

⁶ See Kristin Cohen, *Location, Health, and Other Sensitive Information: FTC Committed to Fully Enforcing the Law Against Illegal Use and Sharing of Highly Sensitive Data*, Fed. Trade Comm’n (July 11, 2022), <https://www.ftc.gov/business-guidance/blog/2022/07/location-health-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal-use> (“Smartphones, connected cars, wearable fitness trackers, “smart home” products, and even the browser you’re reading this on are capable of directly observing or deriving sensitive information about users.”).

⁷ See, e.g., *Mobile Advertising Network InMobi Settles FTC Charges It Tracked Hundreds of Millions of Consumers’ Locations Without Permission*, FTC (June 22, 2016), <https://www.ftc.gov/newsevents/press-releases/2016/06/mobile-advertising-network-inmobi-settles-ftc-charges-it-tracked>.

⁸ See, e.g., Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company’s Use of AI* (Apr. 19, 2021), <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>.

⁹ See, e.g., Press Release, *FTC Finalizes Action Against CafePress for Covering Up Data Breach, Lax Security* (June 24, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-finalizes-action-against-cafe-press-covering-data-breach-lax-security-0>.

¹⁰ See, e.g., Rebecca Kelly Slaughter, *The Near Future of U.S. Privacy Law*, Silicon Flatirons-University of Colorado Law School, (Sept. 6, 2019)

https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf; *Remarks of Commissioner Rebecca Kelly Slaughter on Algorithms and Economic Justice*, UCLA School of Law (Jan. 24, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf; *Opening Statement of Commissioner Rebecca Kelly Slaughter*, United States Senate Committee on Commerce, Science, and Transportation Hearing on Oversight of the Federal Trade Commission (Aug. 5, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1578979/opening_statement_of_commissioner_rebecca_kelly_slaughter_senate_commerce_oversight_hearing.pdf; *FTC Data Privacy Enforcement: A Time of Change*, N.Y.U. School of Law (Oct. 16, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf; *Protecting Consumer Privacy in a Time of Crisis*, Future of Privacy Forum, (Feb. 10, 2021)

https://www.ftc.gov/system/files/documents/public_statements/1587283/fpf_opening_remarks_210_.pdf; *Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter*, Consumer Federation of America’s Virtual Consumer Assembly (May 4, 2021),

https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughter-cfa-virtual-consumer-assembly.pdf; Rebecca Kelly Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, Yale J. L. & Tech. (Aug. 2021),

Section 18 rulemaking’s virtue lies in being open, iterative, and public. By the same token it is, by congressional design, laborious and time-consuming. But we intend to follow the record where it leads and, if appropriate, issue Trade Regulation Rules to proscribe unlawful conduct. The Commission has proactively taken steps to use this authority as Congress directed. During my time as Acting Chair, we created a Rulemaking Group within the Office of General Counsel, which has already been indispensable in building the agency’s capacity during this process.¹¹ Working with that Group, the Commission updated our Rules of Practice to enhance transparency and shed self-imposed roadblocks to avoid unnecessary and costly delay in these proceedings.¹²

As happy as I am to see us finally take this first step of opening this record, it is not something I take lightly. An initiative like this entails some risk, though I believe further inaction does as well. I have heard arguments, including from my fellow Commissioners, that conducting a rulemaking in the data space is inappropriate, either because Congress is currently debating privacy legislation or even because the topic is simply too consequential or the issues too vast for the Commission to appropriately address. In this statement, I challenge some of these assumptions and then raise some of the issues in which I am especially interested.

On Timing

The best time to initiate this lengthy process was years ago, but the second-best time is now. Effective nationwide rules governing the collection and use of data are long overdue. As the nation’s principal consumer-protection agency, we have a responsibility to act.

Restoring Effective Deterrence

The question of effective enforcement is central to this proceeding. Case-by-case enforcement, while once considered a prudent expression of our statutory authority, has not proved effective at deterring illegal conduct in the data space. Trade Regulation Rules can help remedy this problem by providing clear and specific guidance about what conduct the law

https://yjolt.org/sites/default/files/23_yale_j.l._tech._special_issue_1.pdf; *Statement of Rebecca Kelly Slaughter Regarding the Report to Congress on Privacy and Security* (Oct. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597012/rks_statement_on_privacy_report_final.pdf; *Disputing the Dogmas of Surveillance Advertising*, National Advertising Division (Oct. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597050/commissioner_slaughter_national_advertising_division_10-1-2021_keynote_address.pdf; *Wait But Why? Rethinking Assumptions About Surveillance Advertising*, IAPP Privacy Security Risk Keynote (Oct. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597998/iapp_psr_2021_102221_final2.pdf; *NTIA Listening Session on Privacy, Equity, and Civil Rights Keynote Address of Commissioner Rebecca Kelly Slaughter*, NTIA, (Dec. 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1599831/slaughter-ntia-keynote.pdf.

¹¹ Press Release, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (Mar. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

¹² Statement of Commissioner Rebecca Kelly Slaughter joined by Chair Lina Khan and Commissioner Rohit Chopra Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf.

proscribes and attaching financial consequences to violations of the law.

Providing a financial penalty for first-time lawbreaking is now, in the wake of the loss of our Section 13(b) authority, a particular necessity. Last year, the Supreme Court ruled that we can no longer seek monetary relief in federal court for violations of the FTC Act under our 13(b) authority.¹³ I have testified in Congress that the loss of this authority is devastating for consumers who now face a significantly steeper uphill battle to be made whole after suffering a financial injury stemming from illegal conduct.¹⁴ But the loss of 13(b) also hampers our ability to deter unlawful conduct in the first place. In its absence, and without a statutory fix, first-time violators of the FTC Act are unlikely to face monetary consequences for their unlawful practices.¹⁵ Trade Regulation Rules enforced under Section 19 can enable such consequences.¹⁶

Rulemaking in the Time of ADPPA

For years, Congress has nibbled around the edges of comprehensive federal privacy legislation; it is now engaged in the advanced stages of consideration of such legislation. All members of the Commission have repeatedly called on Congress to act in this space. I have advocated for legislation that sets clear rules regarding data minimization, use restrictions, and secondary uses; that gives us the ability to seek civil penalties for law violations; that gives us flexible APA rulemaking authority so we can act swiftly to address new conduct; and most importantly gives the agency the resources to meaningfully enforce the law.

The House may be the closest it has been in years to seeing legislation like this reach the finish line.¹⁷ I not only welcome it—I prefer Congressional action to strengthen our authority. But I know from personal experience that the road for a bill to become a law is not a straight or easy one.¹⁸ In the absence of that legislation, and while Congress deliberates, we cannot sit idly by or press pause indefinitely on doing our jobs to the best of our ability. As I mentioned above, I believe that we have a duty to use the authorities Congress has already given us to prevent and address these unfair or deceptive practices how we best see fit.

¹³ *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347 (2021).

¹⁴ Rebecca Kelly Slaughter, *Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter [on] The Urgent Need to Fix Section 13(b) of the FTC Act*, United States House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (Apr. 27, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589456/opening_statement_april_27_house_13b_hearing_427.pdf.

¹⁵ See ANPR at 23 (“For instance, after a hacker steals personal consumer data from an inadequately secured database, an injunction stopping the conduct and requiring the business to take affirmative steps to improve its security going forward can help prevent future breaches but does not remediate the harm that has already occurred or is likely to occur.”).

¹⁶ In the course of removing our 13(b) equitable monetary relief authority, the Supreme Court admonished the Commission to stop complaining about the “cumbersome” Section 19 process and either use our authority in earnest, ask Congress for a fix, or both. *AMG Cap. Mgmt.*, 141 S. Ct. at 1352 (“Nothing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers. If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.”).

¹⁷ Gilad Eldman, *Don’t Look Now, but Congress Might Pass an Actually Good Privacy Bill*, Wired (July 21, 2022), <https://www.wired.com/story/american-data-privacy-protection-act-adppa/>.

¹⁸ See Margaret Harding McGill, *Online Privacy Bill Faces Daunting Roadblocks*, Axios (Aug. 4, 2022), <https://www.axios.com/2022/08/04/online-privacy-bill-roadblocks-congress>.

I am certain that action by the Federal Trade Commission will not clip the wings of Congressional ambition. Our work here is complementary to Congress' efforts.¹⁹ The bills supported by the leaders of both Commerce Committees empower the FTC to be a more effective privacy regulator,²⁰ as will the record we develop pursuant to this ANPR. Section 18 rulemaking, even more so than more common APA rulemaking, gives members of the public the opportunity to be active participants in the policy process. The open record will allow us to hear from ordinary people about the data economy harms they have experienced. We can begin to flex our regulatory muscle by evaluating which of those harms meet the statutory prohibitions on unfair or deceptive conduct and which of those are prevalent in the market. The study, public commentary, and dialogue this proceeding will launch can meaningfully inform any superseding rulemaking Congress eventually directs us to take as well as the Congressional debate should the current legislative progress stall.

Our Authority and the Scope of this Proceeding

Some have balked at this ANPR as overly ambitious for an agency that has not previously issued rules in this area, or as coloring outside the lines of our statute in the topics it addresses, especially in light of the Supreme Court decision in *West Virginia v. EPA*. But our authority is as unambiguous as it is limited, and so our regulatory ambit is rightfully constrained—the questions we ask in the ANPR and the rules we are empowered to issue may be consequential, but they do not implicate the “major questions doctrine.”²¹

Section 18 Rulemaking

In its grant of Section 18 rulemaking authority to the Commission in 1975 under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Congress explicitly empowered the FTC to “define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce”²² Those terms, and therefore our delegated authority, are not defined by “modest words,” “vague terms,” “subtle devices,” or “oblique or elliptical language.”²³ Determining what acts “in commerce” are unfair or deceptive is central to our statutory mission and their meaning is prescribed by our statutes and nearly 100 years of judicial interpretation.

¹⁹ A group of nine Senators wrote that these are “parallel” efforts and encouraged the Commission to “take advantage of every tool in its toolkit to protect consumers’ privacy.” Notably, a majority of these members have either introduced or cosponsored FTC-empowering privacy legislation. Senators Booker, Blumenthal, Coons, Luján, Markey, Klobuchar, Schatz, Warren, and Wyden, *2021.09.20 FTC Privacy Rulemaking* (Sept. 20, 2021), <https://www.blumenthal.senate.gov/imo/media/doc/2021.09.20%20-%20FTC%20-%20Privacy%20Rulemaking.pdf>.

²⁰ See, e.g., American Data Privacy and Protection Act, H.R.8152, 117th Congress (2022); See Consumer Online Privacy Rights Act, S.3195, 117th Congress (2021).

²¹ *West Virginia*, 142 S. Ct. at 2614 (2022) (“Given these circumstances [of a novel claim of a authority by an agency] . . . the Government must—under the major questions doctrine—point to ‘clear congressional authorization’ to regulate in that manner.”). The FTC is exercising here, however, its central authority: to define unfair or deceptive acts or practices, as it has done in enforcement matters for nearly 100 years under Section 5 and in rulemaking under Section 18 for nearly 50.

²² 15 U.S.C. § 57a(a)(1)(B).

²³ *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted).

It is worth reiterating these standards, both as a matter of legal principle and as a note for those participating in this process. A “deceptive” act is one that (1) makes a “representation, omission, or practice that is likely to mislead the consumer” (2) who is “acting reasonably in the circumstances” and (3) is “material,” meaning it would “affect the consumer’s conduct or decision with regard to a product or service.”²⁴

Congress updated the FTC Act in 1994, adopting into statute the Commission’s policy statement on “unfairness.” An act may be “unfair” and in violation of the FTC Act if that act (1) “causes or is likely to cause substantial injury to consumers,” (2) “is not reasonably avoidable by consumers themselves,” and (3) is not “not outweighed by countervailing benefits to consumers or to competition.”²⁵

Even after finding that a practice is unfair or deceptive we face an additional hurdle to issuing a Notice of Proposed Rulemaking leading to a possible Trade Regulation Rule. We may issue proposed rules to prevent unfair or deceptive practices only if we find that such practices are “prevalent.” We can find a practice prevalent if the FTC has “issued cease and desist orders regarding such acts or practices,” or we can determine prevalence through “any other information available to the Commission” that “indicates a widespread pattern of unfair or deceptive acts or practices.”²⁶

We cannot invent the law here. I want to underscore this. In this rulemaking we can address only unfair or deceptive practices that we could have otherwise found unlawful in the ordinary enforcement of our Section 5 authority on a case-by-case basis. But the purpose of Section 18 rulemaking is not merely to memorialize unlawful activity that we have already fully adjudicated.²⁷ The ANPR allows us to look at harms systematically and address the root of that unlawful activity. The limiting principle for the scope of conduct we may regulate is the contours of the law itself: acts that are both deceptive or unfair *and* prevalent.

Scope of the ANPR

The scope of the ANPR is reflective of the broad set of issues that arise from unfettered commercial data collection and use. That a public inquiry into this market asks a wide range of questions—inquiring about issues like collection and consent, algorithms, ad-delivery, demographic data, engagement, and the ecosystem’s effects on kids and teens—should not be surprising. This is broadly the same scope of issues the Commission is currently examining in our social media and video streaming study initiated under Chair Simons in 2020.²⁸

I believe it is appropriate ask those questions, and more, in this ANPR. I expect that the

²⁴ FTC Policy Statement on Deception (Oct. 14, 1983), *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

²⁵ 15 U.S.C. § 45(n).

²⁶ 15 U.S.C. § 57a(b)(3).

²⁷ In fact, we have a different statute for that process: our penalty offense authority. *See* Fed. Trade Comm’n, *Notices of Penalty Offenses*, <https://www.ftc.gov/enforcement/penalty-offenses>.

²⁸ *See* Lesley Fair, *FTC issues 6(b) orders to social media and video streaming services* (Dec. 14, 2020), <https://www.ftc.gov/business-guidance/blog/2020/12/ftc-issues-6b-orders-social-media-and-video-streaming-services>.

record will alert us, and Congress, to widespread harms that may otherwise have not reached our attention. Some of those harms may be better addressed under our other sector-specific privacy authorities or under our competition authority. A holistic look at the data economy allows us to better understand the interplay between our consumer protection and competition missions and, should we get to that stage, propose better and more effective rules.

Are Data Abuse Rules Different?

Some have argued that this exercise of our rulemaking authority is permissible to address some unfair or deceptive practices in some other sector of the market but not this one.²⁹ The rules the agency has historically issued already touch hundreds of millions of Americans' lives. FTC rules cover business conduct in funerals,³⁰ the marketing of new opportunities to consumers,³¹ the eyeglasses market,³² and unfair credit practices.³³ These rules cover sectors with hundreds of billions in economic output. The Franchise Rule,³⁴ for example, helps govern the business conduct of a sector that employs over 8 million people and contributes over 3% to the country's GDP.³⁵ This is all to say that the "bigness" of an industry, or the potential significance of rulemaking in that industry, should have little bearing on the legal question about the scope of our authority.³⁶ As a policy matter, "bigness," if anything, should compel extra scrutiny of business practices on our part, not a free pass, kid gloves, or a punt to Congress. Though their products and services touch all our lives, technology companies are not exempt from generally applicable laws. If we have the authority to police their business practices by case-by-case enforcement to protect the public from potentially unfair or deceptive practices, and we do, then we have the authority to examine how *ex ante* rules may also govern those practices.

Issues of Particular Interest

I want to encourage public participation in this comment period, especially from the voices we hear from less at the Commission. Having information in the record from a diverse set of communities and commenters will strengthen the record and help lay a firm foundation for potential agency action. I encourage the public to engage with all the issues we have teed up in the ANPR and to think about how commercial surveillance and abusive data practices affect them not only as consumers of products and services but also as workers, small business owners,

²⁹ See Jordan Crenshaw, *Congress Should Write Privacy Rules, Not the FTC*, U.S. Chamber of Commerce (Sept. 17, 2021), <https://www.uschamber.com/technology/data-privacy/congress-should-write-privacy-rules-not-the-ftc>.

³⁰ 16 C.F.R. pt. 453.

³¹ 16 C.F.R. pt. 437.

³² 16 C.F.R. pt. 456.

³³ 16 C.F.R. pt. 444.

³⁴ 16 C.F.R. pt. 436.

³⁵ See Int'l Franchise Ass'n, *2022 Franchising Economic Outlook* (Feb. 15, 2022)

<https://www.franchise.org/franchise-information/franchise-business-outlook/2022franchising-economic-outlook>.

³⁶ *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting) ("A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise.").

and potential competitors to dominant firms.³⁷ I'm eager to see and evaluate the record in its entirety, but there are some issues I have had a particular interest in during my time at the Commission. I've highlighted some of them below.

Minimization and Purpose and Use Specifications

I have spoken at length about my interest in ideas around data minimization.³⁸ The ANPR asks several questions related to the concept, and I am eager to see comments about potentially unlawful practices in this area, the state of data collection in the industry, and how that relates to user expectations of the products or services on offer.³⁹

Civil Rights, Vulnerable Populations, and Discriminatory Algorithms

Data abuses are a civil rights issue, and commercial surveillance can be especially harmful from a civil rights and equity perspective. The FTC's own reports have explored these issues for years.⁴⁰ The FTC's mission to protect consumers from unfair or deceptive practices in commerce must include examining how commercial practices affect the marginalized and vulnerable. Discrimination based on protected-class status is obviously unfair in the colloquial sense and may sometimes be unfair in Section 5 terms as well.⁴¹ As I have written, failure to closely scrutinize the impact of data-driven decision-making tools can create discriminatory outcomes.⁴² The ANPR asks several questions about the prevalence of such practices, the extent of our authority in this area, and how the FTC, working with other enforcement agencies, may ameliorate those potential harms.⁴³

³⁷ People are far more than simply consumers of products and services. Effective consumer protection has to think about people as workers and potential entrepreneurs too. See Statement of Commissioner Rebecca Kelly Slaughter Regarding Advance Notice of Proposed Rulemaking on the Use of Earnings Claims (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/RKS%20Earnings%20Claim%20Statement.pdf.

³⁸ See Rebecca Kelly Slaughter, *Keynote Closing Remarks of Commissioner Rebecca Slaughter at IAPP 2021*, IAPP (Oct. 22, 2021),

https://www.ftc.gov/system/files/documents/public_statements/1597998/iapp_psr_2021_102221_final2.pdf.

³⁹ See ANPR at 31.

⁴⁰ See Fed. Trade Comm'n, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, (Jan. 2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>. See also Fed. Trade Comm'n, *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers* (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

⁴¹ Commercial practices that discriminate against people based on their immutable characteristics neatly fit into Section 5's prohibitions. They may cause or be likely to cause substantial injury to consumers, may not be reasonably avoidable by those consumers, and may not be outweighed by benefits to consumers or competition. See Joint Statement of Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, *In the Matter of Napleton Automotive Group* (Mar. 31, 2022), <https://www.ftc.gov/news-events/news/speeches/joint-statement-chair-lina-m-khan-commissioner-rebecca-kelly-slaughter-matter-napleton-automotive>.

⁴² See Rebecca Kelly Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, Yale J. L. & Tech. (Aug. 2021), https://yjolt.org/sites/default/files/23_yale_j.l._tech._special_issue_1.pdf.

⁴³ See ANPR at 36.

Kids and Teens

As I remarked at COPPA’s 20th anniversary, our experience enforcing the Children’s Online Privacy Protection Act (“COPPA”) surely has lessons for any potential rulemaking.⁴⁴ What can the statutory scheme in COPPA tell us about how to structure potential rules? As a parent, I also have concerns for children as they pass outside the COPPA safety zone of under-13 years old. Are there harms we should examine that affect young teenagers in particular?⁴⁵

Conclusion

The path the Commission is heading down by opening this rulemaking process is not an easy one. But it is a necessary one. The worst outcome, as I said three years ago, is not that we get started and then Congress passes a law; it is that we never get started and Congress never passes a law. People have made it clear that they find this status quo unacceptable.⁴⁶ Consumers and businesses alike deserve to know, with real clarity, how our Section 5 authority applies in the data economy. Using the tools we have available benefits the whole of the Commission’s mission; well-supported rules could facilitate competition, improve respect for and compliance with the law, and relieve our enforcement burdens.

I have an open mind about this process and no certainty about where our inquiry will lead or what rules the record will support, as I believe is my obligation. But I do know that it is past time for us to begin asking these questions and to follow the facts and evidence where they lead us. I expect that the Commission will take this opportunity to think deeply about people’s experiences in this market and about how to ensure that the benefits of progress are not built on an exploitative foundation. Clear rules have the potential for making the data economy more fair and more equitable for consumers, workers, businesses, and potential competitors alike.

I am grateful to the Commission staff for their extensive work leading up to the issuance

⁴⁴ See Rebecca Kelly Slaughter, *COPPA at 20: Protecting Children’s Privacy in the New Digital Era*, Georgetown Univ. Law Ctr., (Oct. 24, 2018), https://www.ftc.gov/system/files/documents/public_statements/1417811/opening_remarks_of_commissioner_slaughter_georgetown_law_coppa_at_20_event.pdf.

⁴⁵ See ANPR at 27.

⁴⁶ See Lee Raine, *Americans’ Complicated Feelings About Social Media in an Era of Privacy Concerns*, Pew Research Center (Mar. 27, 2018), <https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns> (“Some 80% of social media users said they were concerned about advertisers and businesses accessing the data they share on social media platforms, and 64% said the government should do more to regulate advertisers.”); Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, Pew Research Center (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information> (“Some 81% of the public say that the potential risks they face because of data collection by companies outweigh the benefits...”). These are not just theoretical concerns: The lack of effective data protection is harming the vitality of the tech sector. See Andrew Perrin, *Half of Americans have decided not to use a product or service because of privacy concerns*, Pew Research Center (Apr. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/04/14/half-of-americans-have-decided-not-to-use-a-product-or-service-because-of-privacy-concerns/>.

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