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A PATH FORWARD ON PRIVACY, ADVERTISING, AND AI

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REMARKS AT NATIONAL ADVERTISING DIVISION KEYNOTE 2024

* 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. Many thanks to my attorney-advisor Elisa Jillson for her assistance with these remarks.

Thank you, Laura, for the introduction and for inviting me today. I'm delighted to be in New York today, fresh from a trip to Paris, where I had the privilege to meet with the CNIL, the French Competition Authority, and many others interested in the consumer protection and competition issues.

After traveling, I like to reflect a bit on my experience and think about where I should be headed next. That kind of retrospective and prospective gaze also serves us well as enforcers and policymakers. Today, I'd like to reflect on my time at the Commission, to identify two paths best not taken and to identify the paths we *should* be taking on privacy and AI.

I. We Must Act Within the Authority Granted by Congress

The first path best *not* taken is acting according to our own policy preferences, regardless of whether our actions are authorized by Congress.

I have now been at the Commission for about six months. During that time, I've been privileged to work with talented staff and fellow Commissioners as we grapple with some of the most difficult consumer protection and competition questions of our day. I have great respect for the good intentions of my colleagues: we all want to fulfill the agency's critically important mission of protecting consumers and promoting competition. But, in a number of instances, I have been dismayed to see the Commission act outside the bounds authorized by Congress, both in the consumer protection and competition contexts.[1]

I'll give three examples in the consumer protection context. First, shortly after I joined the agency, the Commission issued a final Health Breach Notification Rule amending a prior version.[2] To accomplish a laudable goal—to protect the privacy of consumers' health information—the Commission adopted a rule that is irreconcilable with both the text and structure of the underlying statute. I dissented.[3] I highlighted in my dissenting statement that departing from the statute meant that the rule had no limiting principle: A rule that was supposed to apply only to the breach of identifiable health information in "personal health records" now, on its face, applied to gas stations, convenience stores, and retailers that sold "health supplies" such as Advil, Band-aids, vitamins, or maternity clothes.[4] In the eagerness to effectuate a particular policy goal, the Commission exceeded Congressional authorization, left itself open to legal challenge, and sent a signal to Congress that the FTC is not to be trusted to abide by the law as written.

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[1] *See, e.g.*, Dissenting Statement of Comm'r Melissa Holyoak Joined by Comm'r Andrew N. Ferguson, In re Non-Compete Clause Rule, FTC Matter No. P201200, at 1, 5-6 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf (hereinafter "Holyoak Non-Compete Statement"); Statement of Comm'r Holyoak, Joined by Comm'r Ferguson, Regarding the Health Breach Notification Rule, FTC Matter No. P205405, at 2 (Apr. 26, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-holyoak-joined-commissioner-ferguson-regarding-health-breach-notification (hereinafter "Holyoak Health Breach Statement").

[2] 16 C.F.R. § 318 (2024).

[3] Holyoak Health Breach Statement, *supra* note 1.

[4] *Id.*

Second, I am also concerned that the Commission has been approving civil penalty settlements based on alleged violations of Section 5(m)(1)(B) of the FTC Act,[5] even where the *sole basis* for alleging the "actual knowledge" required by this section is the receipt of a mass-mailed Notice of Penalty Offenses which describes conduct dissimilar from that of the recipient.[6] Indeed, some of the attendees of this conference may have received these stock notices related to substantiation, earnings claims, endorsements, or other topics, which provide cursory descriptions of adjudicated Commission actions, some dating from the 1940s. I am concerned that by predicating settlements merely on stock notices—no matter crucial distinctions between the recipient's business practices and the conduct described in the notice—the Commission has effectively engaged in a backdoor rulemaking.[7] To be clear, I fully support using the authorities Congress has given the FTC, including Section 5(m)(1)(B) when the Commission can in fact show the "actual knowledge" of unlawful conduct this section requires. But we must use any authority consistent with the grant from Congress.

Third, I am troubled not only by apparent backdoor rulemaking, but also by rulemaking itself under Section 18 of the FTC Act that does not comport with statutory requirements.[8] Under Section 18, the Commission may issue a notice of proposed rulemaking "*only* where it has reason to believe that the *unfair or deceptive* acts or practices which are the subject of the proposed rulemaking are *prevalent*."[9] It does not suffice to show that *an act or practice* is prevalent; rather, the Commission must show that *unfair or deceptive* acts or practices which are the subject of the proposed rulemaking are prevalent. This requirement that unfairness or deception be "prevalent"—not occasional or anecdotal—is a bulwark against premature regulation. And for good reason: We are most likely to get it wrong—to pervert incentives, set up or reinforce barriers to market entry, and create other unintended, deleterious consequences—when we prophylactically curtail market conduct before fully understanding (and analyzing, with rigorous evidence) the potential problems we are trying to solve.

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[5] 15 U.S.C. § 45(m)(1)(B). I have voted in support of these settlements only where the monetary relief obtained appropriately stemmed from a rule violation, rather than from the supposed violation of Section 5(m)(1)(B). *See, e.g.*, Concurring Statement of Comm'r Melissa Holyoak, *Arise Virtual Solutions, Inc*., FTC Matter No. 2223046 (July 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement-arise-7-1-2024.pdf (noting that monetary relief was appropriate under the Business Opportunity Rule rather than Section 5(m)(1)(B)).

[6] *Notices of Penalty Offenses*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/penalty-offenses (collecting Notices on Misuse of Information Collected in Confidential Contexts; Money-Making Opportunities, Substantiation, Endorsements, Education).

[7] *See, e.g.*, Fed. Trade Comm'n, Press Release, *FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties* (Oct. 26, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties (noting that the FTC sent the notice to more than 1,100 businesses); Fed. Trade Comm'n, Press Release, *FTC Warns Almost 700 Marketing Companies That They Could Face Civil Penalties if They Can't Back Up Their Product Claims* (Apr. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-warns-almost-700-marketing-companies-they-could-face-civil-penalties-if-they-cant-back-their; Fed. Trade Comm'n, Press Release, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Misleading Endorsements* (Oct. 13, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements (more than 700 companies).

[8] 15 U.S.C. § 57a.

[9] 15 U.S.C. § 57a(b)(3).

These and other departures from what Congress has authorized are troubling for several reasons. First, exceeding our authority undermines our commitment to the Constitution. The Constitution vests authority to make laws in the Congress, not in unelected bureaucrats.[10] The Supreme Court has made clear that courts will not countenance agencies' usurpation of Congress's prerogative to make the laws.[11] We act at our peril when we ignore that fact.

My second concern is more pragmatic: where we depart from the balance carefully struck by Congress, we are more likely to get it wrong. For example, my concern with the Health Breach Notification Rule was not just that the Commission was inappropriately legislating by rulemaking, but also that its lawless reading of the statute removed any limiting principle, resulting in harmful unintended consequences and increasing the likelihood of legal challenge.[12]

My final concern with unauthorized action is about the long view. I worry that unauthorized action to achieve particular policy goals loses sight of the forest for the trees. If Congress cannot trust the FTC with faithful execution of the law as written, Congress may decline to give the FTC additional authority, such as authority to obtain redress or disgorgement in federal court for first-time violations of Section 5.[13] And Congress may be unwilling to fund the Commission as requested where it believes the FTC is misusing those funds for lawless ends. Indeed, the FTC is facing cuts already—which some view as a direct reproach to current FTC leadership's willingness to play fast-and-loose with the law.[14] After all, the last time the FTC dramatically exceeded its authority, that was precisely Congress's response.[15]

II. We Must Avoid Straw Man Arguments and Grapple with Complexity

The second path we need to avoid is the tendency to construct straw man arguments and to focus on attacking those constructed arguments rather than face the real, challenging complexity of business practices and consumer behavior.

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[10] *West Virginia v. EPA*, 597 U.S. 697, 737-38 (2022); *Gundy v. United States*, 588 U.S. 128, 166 2141 (2019).
[11] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 109, 117 (2022) (per curiam) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").
[12] Holyoak Health Breach Statement, *supra* note 1 at 5-7.
[13] The Commission currently has certain limited authority to obtain monetary relief for violations of Section 5 under Section 19(a), 15 U.S.C. § 57b(a).
[14] *See* Claude Marx, *House Panel Recommends Budget Cut for FTC*, FTC WATCH (2024), https://www.mlexwatch.com/ftcwatch/articles/1847749/house-panel-recommends-budget-cut-for-ftc ("Subcommittee Chairman David Joyce of Ohio said the request 'raises concerns,' partly because the agency is 'exceeding its statutory authority' in some of its rulemaking and some of its rules have the potential to stifle economic growth.").
[15] *See* J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. OF PUB. POL'Y & MKTG. 192, 193 (Sept. 1, 2003) ("The breadth, overreaching, and lack of focus in the FTC's ambitious rulemaking agenda outraged many in business, Congress, and the media. Even the Washington Post editorialized that the FTC had become the 'National Nanny.' Most significantly, these concerns reverberated in Congress. At one point, Congress refused to provide the necessary funding, and simply shut down the FTC for several days. Entire industries sought exemption from FTC jurisdiction, fortunately without success. Eventually, Congress acted to restrict the FTC's authority, including legislation preventing the FTC from using unfairness in new rulemakings to restrict advertising. So great were the concerns that Congress did not reauthorize the FTC for fourteen years.").

As my family prepares our Wizard of Oz costumes for our neighborhood Halloween party, I am mindful of my 13-year-old son, who told me adamantly that he prefers the tin man to a straw scarecrow. In his view, it's better to have no heart than no brain. Neither tin nor straw will work here: we need both heart and mind to tackle these complex issues that have real impact on consumers' daily lives. Here are a few of the straw men we are facing.

A. "Surveillance Advertising"

Take the "surveillance" straw man. Over the past few years, the Commission has repeatedly referred to a range of data practices as "commercial surveillance."[16] Targeting advertising is "surveillance advertising."[17] Personalized pricing, the subject of the most recent FTC orders under Section 6(b) for market study,[18] is "surveillance pricing."[19] The term "surveillance" conjures nefarious action and actors—the inescapable watchful eye of Big Brother (or stealth network of Brothers) motivated by corporate greed.

Perhaps this re-branding is just silly—an attempt to boost press appeal, pander to the like-minded, score some political points—and basically harmless. But I fear that the silliness belies something more troubling: a glossing over—and perhaps even a degree of prejudgment—of difficult issues.[20] Let's take behaviorally targeted advertising, a subject no doubt of particular interest here. Does it deserve the nefarious moniker "surveillance advertising"?

On one hand, behaviorally targeted advertising is unquestionably more data-intensive than contextual advertising. It creates powerful incentives for collection, use, retention, and sometimes widespread dissemination of consumer data, even if those data practices may be inconsistent with consumers' reasonable expectations. Consumers likely have little to no understanding of the extent to which their data is collected, disclosed, used, retained, and monetized, and we may find this information asymmetry troubling.[21]

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[16] *See, e.g.*, Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022).

[17] *See, e.g.*, *Event Description for PrivacyCon 2024*, FED. TRADE COMM'N (2024), https://www.ftc.gov/news-events/events/2024/03/privacycon-2024.

[18] 15 U.S.C. § 46(b).

[19] Concurring Statement of Comm'r Melissa Holyoak, Surveillance Pricing Intermediaries, FTC Matter No. P246202 (July 23, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-concurring-statement-re-surveillance-pricing.pdf (hereinafter "Holyoak Surveillance Pricing Statement") ("[P]ublic statements that accompany the issuance of these orders describe their focus not on targeted or personalized pricing, but on 'surveillance pricing.' This term's negative connotations may suggest that personalized pricing is necessarily a nefarious practice. In my view, we should be careful to use neutral terminology that does not suggest any prejudgment of difficult issues.").

[20] *Id.*

[21] The extent to which information asymmetries are troubling varies by context. I suspect that consumers rarely understand all the legalese in their mortgage documents and car lease agreements. We attempt to ameliorate that information asymmetry by requiring that these documents contain clear notice of certain material terms. But we also implicitly countenance the asymmetric information between the bank and the consumer—so long as the bank is not harming the consumer, of course. My guess is that many of you, like me, have signed on the dotted line to get your house without fully appreciating what you are signing for. Whether or not that is a problematic outcome is context specific. Indeed, it would be an inefficient allocation of our time to become experts on every term in every contract. *See* Bryan Caplan, *Rational Ignorance versus Rational Irrationality* 54 KYKLOS 3, 8 (2003).

On the other hand, many consumers appear to enjoy the "free" Internet largely powered by targeted ads, and most studies comparing behaviorally targeted ads with contextual ads have suggested that behaviorally targeted ads increase sales significantly more than contextual advertising.[22] According to some research recently presented at the FTC's annual privacy and technology conference, PrivacyCon, when offered a choice between tracking (i.e., data collection) and receiving "free" content online, or paying for that content with money, most consumers choose tracking.[23] Other research suggests that if consumers must see ads, they would prefer more relevant ads to less relevant ads.[24] After all, a relevant ad lowers consumers' search costs, which is the entire economic justification for advertising in the first place.[25] Small businesses and new market entrants may benefit in particular from targeted advertising, because they are able to connect more readily with consumers interested in their products.[26] This increase in competition may benefit consumers and competition alike.

Dubbing behaviorally targeted advertising "surveillance advertising" makes it easier to conflate the lawful activity of targeting advertising with *unfair or deceptive* data collection and use practices, such as the disclosure of consumers' sensitive health information to third parties contrary to promises to consumers to keep that information private.[27] But the new moniker does

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[22] *See, e.g.*, J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, PRIVACY FOR AMERICA, Nov. 2022, at ii, https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf ("Context alone is only about one third as effective as using context with user's data to predict behavior."); Arslan Aziz & Rahul Telang, *What is a Cookie Worth?* (2016), http://dx.doi.org/10.2139/ssrn.2757325 (sales increase by 28.7%); J. Howard Beales & Jeffrey A Eisenach, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content*, DIGITAL ADVERTISING ALLIANCE, Jan. 2014, https://digitaladvertisingalliance.org/sites/aboutads/files/files/DAA_images/fullvalueinfostudy%20-%20Navigant.pdf (28 cents more); Ayman Farahat & Michael C Bailey, *How effective is targeted advertising?*, PROCEEDINGS OF THE 21ST INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 2012, at 111–20 (2013), http://dx.doi.org/10.2139/ssrn.2242311 (click-through rates 37% more but do not increase brand searches); Avi Goldfarb & Catherine E. Tucker, *Privacy Regulation and Online Advertising*, 57 MANAGEMENT SCIENCE 57, 57-71 (2011); Catherine Tucker, *Shifts in Privacy Concerns*, 102 AMERICAN ECONOMIC REVIEW 349, 349-53 (2012) (limiting behavioral targeting decreased the effect of ads on stated purchase intent by 65%); Omid Rafieian & Hema Yogana, *The Value of Information in Mobile Ad Targeting* (2017), https://www.ftc.gov/system/files/documents/public_events/966823/rafieianyoganarasimhan_thevalueofinformationinmobileadtargeting_final_0.pdf (increase click-through-rates 15.2%). Some research, however, suggests that targeted ads are only 4% for effective in generating revenue than contextual ads. *See* Veronica Marotta et al., *Online Tracking and Publishers' Revenues: An Empirical Analysis* (2019), https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf.

[23] *See* Timo Müller-Tribbensee, et al., *Paying for Privacy: Pay-or-Tracking Walls* (presented at FTC PrivacyCon 2024), Mar. 5, 2024, https://www.ftc.gov/system/files/ftc.gov/pdf/muller.tribbensee.pay.or.tracking.walls.pdf. Of course, this research did not present consumers with the option to see contextual rather than targeted ads.

[24] *See The Ad-Supported Free and Open Internet: Consumers, Content, and Assessing the Data Value Exchange*, INTERNET ADVERTISING BUREAU (Jan. 30, 2024), https://www.iab.com/insights/consumer-privacy-research/. After all, a relevant ad lowers consumers' search costs, which is the entire economic justification for advertising in the first place.

[25] *See generally* Lester G. Telser, *Advertising and Competition,* 72 J. OF POL. ECON. 537 (1964) (describing economic underpinnings for advertising).

[26] *Id.*

[27] Fed. Trade Comm'n, Press Release, *Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data* (Jan. 13, 2021),

nothing to tease out the complexity of the privacy debate concerning the costs and benefits of behaviorally targeted advertising. To the contrary, it wrongly suggests there is no complexity. Moreover, when that glib phrasing is used in connection with consequential Commission action, it may convey an appearance of prejudgment of these difficult issues that is troubling and threatens to undermine the Commission's stature.[28]

During my tenure at the Commission, I will not dodge complexity in this fashion. I will instead press for more empirical research to ground this difficult policy debate.

B. The Death of Notice and Choice?

Another straw man is the argument that "notice and choice" has failed entirely and that we must utterly abandon this failed model in favor of "substantive" privacy protections, such as data minimization, disclosure bans, retention limits, and use restrictions. I don't dispute that we have relied too heavily on the fiction of informed consent.[29] Like most consumers, I don't think I have ever read a privacy policy in full, much less the hundreds or thousands of policies I have nominally agreed to in my life.

But let's not throw the baby out with the bath water—or overstate the extent to which the Commission has in fact moved beyond notice and choice. Indeed, in its recent privacy cases, hailed as "banning" various data practices, the Commission has continued to allow for notice and choice. For example, in the *Better*Overall, the "bans" in FTC privacy orders are actually specific prohibitions with exceptions and consent requirements not enormously dissimilar to past Commission actions.

To be clear, as a general matter, I support a nuanced approach in FTC privacy orders in which prohibitions have appropriate, fact-specific exceptions. I am simply concerned that failing to call a spade a spade obfuscates the complexity of the issues in a manner that hampers the debate.

Rather than only nominally tossing out the "notice-and-choice" model, it may be better to frame the privacy debate in a different, more rigorous, manner: Why are we not seeing more firms

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https://www.ftc.gov/news-events/news/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc-allegations-it-misled-consumers-about.

[28] Holyoak Surveillance Pricing Statement, *supra* note 19.

[29] *See generally* James C. Cooper, *Does Privacy Want to Unravel*, 37 HARV. J. LAW & TECH. 1039, 1041 (2023), https://jolt.law.harvard.edu/assets/articlePDFs/v37/Symposium-3-Cooper-Does-Privacy-Want-to-Unravel.pdf ("[P]rivacy law scholars have long viewed the notion of consent in the notice-and-choice model as fiction given the complexity and uncertainty surrounding the use of consumer information").

[30] Fed. Trade Comm'n, Press Release, *FTC to Ban BetterHelp from Revealing Consumers' Data, Including Sensitive Mental Health Information, to Facebook and Others for Targeted Advertising* (Mar. 2, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-ban-betterhelp-revealing-consumers-data-including-sensitive-mental-health-information-facebook.

[31] Fed. Trade Comm'n, Press Release, *FTC Enforcement Action to Bar GoodRx from Sharing Consumers' Sensitive Health Info for Advertising* (Feb. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising.

[32] Fed. Trade Comm'n, Press Release, *Ovulation Tracking App Premom Will be Barred from Sharing Health Data for Advertising Under Proposed FTC Order* (Mar. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ovulation-tracking-app-premom-will-be-barred-sharing-health-data-advertising-under-proposed-ftc.

compete by offering or advertising more attractive privacy terms?[33] Do firms understand too little of their own practices, especially relative to their competitors, to make credible commitments on privacy?[34] Is there a mistaken perception that consumers do not demand privacy when in fact consumers do not believe that firms' privacy representations are credible?[35] As some scholars have noted, these issues are important to our foundational understanding of the market.[36]

After all, it may be that notice-and-choice is to privacy what democracy is to government—the worst option, except for all the other choices, because consumers have varied privacy preferences.[37] Rather than depriving consumers of choice, it may be a better approach to acknowledge the problems with the notice-and-choice model and attempt to ameliorate them, by promoting greater competition on privacy, encouraging better default settings (so that fewer notices are required),[38] and advocating for more thoughtful notices buttressed by a certain degree of substantive protections in appropriate places. The ultimate role (or roles) for notice-and-choice, "substantive" privacy protections, or any other privacy model is an open question for Congress to answer.

During my tenure at the Commission, I will do my utmost to brush aside the straw-man arguments and take a rigorous approach to these difficult, complex issues as we enforce current law and aid Congress in consideration of whether additional law is warranted.[39]

C. The Rises of Data Minimization?

Data minimization gets the obverse treatment from notice and choice. Data minimization has come into fashion as the panacea *du jour*—even though data minimization has been part of the the "FIPPs," the "fair information practice principles" guiding privacy policymaking, for

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[33] *See* Cooper, *supra* note 29 at 1051-52.
[34] *See id.* at 1053 ("If consumers are not likely to respond to privacy commitments even if perfectly comprehensible and enforceable, firms rationally will not provide this information, and no amount of forced disclosure will change privacy levels. Conversely, if the market for privacy suffers from adverse selection because firms cannot credibly commit to consumer-friendly data practices, or if firms lack knowledge about how their data practices fit in the distribution, fixing the informational environment could help privacy unravel.").
[35] *See id.* at 1043 (considering whether the FTC could provide "tools to transform what consumers might perceive as cheap talk into credible privacy commitments").
[36] *Id.* at 1042.
[37] *See* Alessandro Acquisti, et al., *What Is Privacy Worth?*, 42 J. LEGAL STUD. 2 (2013), https://www.journals.uchicago.edu/doi/10.1086/671754.
[38] *Cf.* Fed. Trade Comm'n, Press Release, *Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges* (Dec. 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations (describing default privacy settings for children and teens) (hereinafter Epic Games Press Release).
[39] *Cf.* Dissenting Statement of Comm'r Melissa Holyoak, In the Matter of the Pharmacy Benefit Managers Report (July 8, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-Statement-Pharmacy-Benefit-Managers-Report.pdf (arguing that a facile report that fails to engage with complex issues is a disservice to the important issue of PBM's effect on competition).

decades.[40] It's been a longstanding privacy principle for good reason: there can't be a breach or misuse of data that wasn't collected in the first place. Data minimization may be appropriate in certain contexts—but the devil is in the details.

And this particular devil wears Prada. Let's imagine a company that offers a free fashion blog. Now, let's further imagine that any company must minimize consumer data by only collecting what is reasonably necessary to provide the service. The fashion blog doesn't get to collect personal data because collecting personal data isn't reasonably necessary for fashion blogging. But what if the company re-frames its service as offering a fashion blog that is free because it serves behaviorally targeted ads? Can it then collect any personal data it uses for behavioral targeting? What if the company redefines its service again, this time as offering a fashion blog that is free because it serves behaviorally targeted ads *and* sells user data to data brokers? Can it then collect any data for both targeting and brokerage? Doesn't that take us back to the concern that companies can do pretty much whatever they want with our data, while explaining their data practices in long privacy policies that few consumers read? And if a data minimization requirement doesn't change much in practice, is it simply a wealth transfer to lawyers? If we drive up transaction costs in this fashion (pardon the pun), we will likely also drive up downstream consumer prices, an unwelcome proposition at any time, but especially in an inflationary economy.

I'm also mindful of the potential unintended consequences of undifferentiated data minimization requirements. Many of the innovative products and services we enjoy today are the product of analyzing massive quantities of data collected, perhaps, over long periods of time. If the cost of data minimization, both in collection and retention, is less innovation, are we willing to bear that cost?[41] Perhaps not. But my suspicion is that, here too, the devil is in the details—the specific costs and benefits associated with the data and the technology, which will vary by context. Calling for data minimization without taking a nuanced view of these difficult issues is not only naïve but also potentially counter-productive. Again, to make meaningful contributions to Congress's important deliberations on privacy issues, we must take a nuanced view of these difficult, complex issues.

III. A Path Forward on Privacy

It's easy to identify the wrong turns, but hard at times to find the path forward. So rather than just criticizing past actions, I would like to offer an alternative vision for the FTC's work on privacy and AI—one focused less on banning and branding and more on grappling with complexity to address harms.

With limited resources, the Commission must always triage where to dedicate enforcement efforts. As a first cut, we should be focused on tailored enforcement actions that protect sensitive personal data rather than on sweeping regulation of *all* personal data. As former Bureau of

[40] *See* Robert Gellman, *Fair Information Practices: A Basic History* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2415020.

[41] *See* Transcript of FTC Hearing on Competition and Consumer Protection in the 21st Century Omar Ben-Shahar, at Day 1, 44:11-25, (Nov. 6, 2018), https://www.ftc.gov/system/files/documents/public_events/1418633/ftc_hearings_session_6_transcript_day_1_11-6-18_0.pdf.

Competition Directors Susan Creighton and Bruce Hoffman put it, when fishing for law violations, "the best place to fish is where the fish are plentiful."[42] We are more likely to find harm to consumers from mishandling of children's personal data or precise geolocation data revealing consumers' political or religious activities than we are from data practices involving less sensitive information.

Indeed, these two types of sensitive data have been the subject of recent FTC actions, *NGL* and *Kochava*. In my concurring statements on these matters, I have explained the basis for my support for each.

Children and young teens are especially vulnerable online because, with their developing brains and shifting hormones, they do not always have the cognitive capacity for judicious decisionmaking.[43] As a mother of four, including tweens and young teens, I am reminded of this on a daily basis. It is crucial that we protect kids online both from bad actors and from bad judgments made easy by weak default privacy settings[44] or other problematic business practices.[45] We should protect kids online both through rigorous enforcement of the Children's Online Privacy Protection Act (COPPA)[46] and the COPPA Rule[47] and by enforcement of Section 5 of the FTC Act.[48]

The Commission's recent settlement in the *NGL* matter is a great example of this. The Commission used its authority under COPPA, Section 5, and the Restore Online Shoppers' Confidence Act (ROSCA)[49] to shut down an anonymous messaging app aimed at children and teens that was sending fake, provocative messages (such as "are you straight?, "I stalk u on ig [Instagram] all the time", "I know what you did") to prey on tween's insecurities to lure them into buying NGL's subscription product.[50] As I noted in my statement supporting this settlement, the

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[42] *See* Susan A. Creighton, et al., *Cheap Exclusion*, 72 ANTITRUST L. J. 975, 978 (2005) ("In the efficient allocation of always-scarce enforcement resources, exclusionary conduct that is likely to be common (relative to other forms of exclusion), and lacks any legitimate competitive benefit, makes an attractive target.").

[43] *See, e.g.*, Eric D. Reicin, *Teens Online: Responsible Data Considerations for Business Leaders*, BBB NATIONAL PROGRAMS (2022), https://bbbprograms.org/media-center/bd/insights/2022/08/25/teens-online ("Experts agree that teens are more risk-seeking than younger children but less competent than adults at managing online risks."); Manuel Gamez-Guadix, Erika Borrajo, & Carmen Almendros, *Risky Online Behaviors Among Adolescents: Longitudinal Relations Among Problematic Internet Use Cyberbullying Perpetration, and Meeting Strangers Online*, J. BEHAV. ADDICT. 5(1), 100-107 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5322986/.

[44] Epic Games Press Release, *supra* note 38.

[45] *See, e.g.*, NGL Press Release.

[46] 15 U.S.C. § 6501 et seq.

[47] 16 C.F.R. Part 312.

[48] *See, e.g.*, Fed. Trade Comm'n, Press Release, *FTC Says Ring Employees Illegally Surveilled Customers, Failed to Stop Hackers from Taking Control of Users' Cameras* (May 31, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-says-ring-employees-illegally-surveilled-customers-failed-stop-hackers-taking-control-users [hereinafter "Ring Press Release"] (alleging violations of Section 5 where allegedly unreasonable security practices enabled bad actors to compromise cameras in children's bedrooms and harass and threaten children).

[49] 15 U.S.C. § 8403 et seq.

[50] Concurring Statement of Commissioner Melissa Holyoak, *In re NGL Labs, LLC*, FTC Matter No. 2223144 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.7.8-holyoak-statement-re-ngl.pdf (hereinafter "Holyoak NGL Statement).

Commission is at its best when protecting the most vulnerable among us (children), because deception is most likely and the risk of substantial injury at its greatest where kids are involved.

I also voted in support of an amended complaint against location data broker Kochava, because the misuse of precise geolocation information revealing consumers' medical, political and religious activities presents grave dangers to the freedoms of Americans.[51] For consumers to realize the benefits of technology, they must be able to trust that technology—including tools that hold their sensitive personal data—will remain secure from wrongful government surveillance.[52] (And, here, by the way, I do in fact mean government *surveillance*, with all of its negative connotations.)

While our work must always remain within the bounds authorized by Congress, that does not mean we must necessarily take a crabbed view of harm. Undermining parental choice,[53] intruding into the sanctum of the home,[54] identity theft,[55] exposing a child to the risk of predation or injurious practices,[56] enabling circumvention by law enforcement of Constitutional freedoms,[57] the de-banking or de-platforming of consumers because of their political or religious beliefs[58]—these may all be or stem from unfair or deceptive acts or practices that we can and should address. Of course, as I noted in my concurring statement regarding *Kochava*, we must be responsive to judicial feedback and only take action where we have reason to believe there are legally cognizable harms.[59]

As we consider how to protect the privacy of consumers' sensitive personal information, we also need to be mindful of the effect of privacy issues and our regulatory choices on

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[51] Concurring Statement of Comm'r Melissa Holyoak, *Kochava Inc.*, FTC Matter No. X230009 (July 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-7-15-Commissioner-Holyoak-Statement-re-Kochava-final.pdf (hereinafter "Holyoak Kochava Statement").

[52] *See* Letter from Jason Miyares, Virginia Attorney General and joined by 19 State Attorneys General to Merrick Garland, Attorney General & Christopher Wray, FBI Director (Feb. 10, 2023) (expressing outrage at FBI internal memorandum that targeted Catholics as potential threats due to their religious beliefs), https://attorneygeneral.utah.gov/wp-content/uploads/2023/02/Letter-to-Attorney-General-Garland-Director-Wray2.10.2023-002-1.pdf.

[53] Fed. Trade Comm'n, Press Release, *FTC and DOJ Charge Amazon with Violating Children's Privacy Law by Keeping Kids' Alexa Recordings Forever and Undermining Parents' Deletion Requests* (May 31, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-doj-charge-amazon-violating-childrens-privacy-law-keeping-kids-alexa-voice-recordings-forever (describing FTC action to stop Amazon's alleged failure to implement parents' deletion requests for children's voice recordings).

[54] FTC Policy Statement on Unfairness at n. 16, Appended to *International Harvester Co*., 104 F.T.C. 949, 1070 (1984); Ring Press Release (describing FTC action to stop alleged privacy and security failings that enabled employees and hackers to spy on consumers in private spaces of their homes), *supra* note 48.

[55] Concurring Statement of Comm'r Melissa Holyoak, *Verkada, Inc*., FTC Matter No. 2123068 (Aug. 30, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/comm-holyoak-statement-re-verkada.pdf.

[56] Holyoak NGL Statement, *supra* note 50.

[57] Holyoak Kochava Statement, *supra* note 51.

[58] Comm'r Melissa Holyoak, Rediscovering Adam Smith: An Inquiry in the Rule of Law, Competition, and the Future of the Federal Trade Commission, Remarks at the Competitive Enterprise Institute's Annual Summit (May 31, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-cei.pdf (calling for the Commission to use its 6(b) authority to better understand how platforms enforce their terms of agreement or service and how their enforcement impacts consumers).

[59] Holyoak Kochava Statement, *supra* note 51.

competition.[60] For example, companies with better access to data by virtue of their gatekeeper role in the digital ecosystem can have a competitive advantage. What may be pro-privacy may also be anticompetitive. Are, for example, walled gardens good for privacy but less so for competition? In 2019, the Commission under Chair Joseph J. Simons held a series of hearings on competition and consumer protection issues in the 21st century which explored some of these important issues.[61] We should learn from this past work and promote further research and dialogue to aid Congress in its consideration of privacy issues.

Similarly, we need to be mindful of the competitive effects of regulation. Regulation can create barriers to entry that may entrench the large, sophisticated companies that can bear the cost of complying with those regulations. Companies may artificially stifle growth to avoid reaching the size at which they would become subject to regulatory requirements. The Commission should not be choosing winners and losers in the market. FTC action should be market-reinforcing, not market-compromising or -replacing.[62]

IV. A Path Forward on AI

The last path I would like to address is the path forward on AI. We are at an exciting time of technological development, as large language models and other forms of artificial intelligence are revolutionizing how we work, make decisions, conduct research, entertain ourselves, learn, and interact with each other. At the same time, there are very real concerns about AI, such as whether it will power greater fraud and deception, or how it will affect consumers at work and consumers who create.

I share the excitement at the promise of AI—and the concerns about these potential harms. As the nation's consumer protection and competition agency, the Commission is—and should be—at the forefront of addressing AI-related harms, whether they manifest as antitrust violations, deception, fraud, or some other form of substantial injury to consumers that the Commission has legal authority to address.[63]

Given the number and magnitude of the concerns, I understand the appeal of creating "guardrails" or "rules of the road" for AI development and use. At the same time, as I've mentioned, when we act without fully understanding the problems—and without rigorous evidence of them—we are likely to get it wrong, decreasing innovation and harming consumers and competition rather than protecting them. Of course, if Congress were to empower the FTC with

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[60] *See, e.g.*, Pinto, Sokol & Zhu, *The Antitrust and Privacy Interface: Lessons for Regulators from the Data* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4908422.
[61] Hearings on Competition & Consumer Protection in the 21st Century, Fed. Trade Comm'n (2018-19), https://www.ftc.gov/enforcement-policy/hearings-competition-consumer-protection.
[62] *Cf.* Todd J. Zywicki, *Market-Reinforcing Versus Market-Replacing Consumer Finance Regulation* (2017), *available at* https://www.law.gmu.edu/pubs/papers/17_07.
[63] *Cf.* Dissenting and Concurring Statement of Comm'r Melissa Holyoak, *Coulter Motor Co., LLC*, FTC Matter No. 2223033 (Aug. 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-coulter-8-15-24.pdf [hereinafter "Holyoak Coulter Statement] (arguing that an "unfair discrimination" complaint count exceeded the bounds of the Commission's Section 5 authority).

authority to implement defined "AI rules of the road," I would vigorously enforce that law. But the Commission is not Congress.

Rather than speculate about harms from AI or indulge a salience bias—where we assume that a few, highly visible problems are indicative of larger-scale problems—the Commission needs to learn more about AI, such as through a rigorous 6(b) study of market practices,[64] targeted enforcement, and by promoting research and stakeholder dialogue. And we should continue to use our enforcement authority according to what we learn.

In my view, the Commission should approach AI in four ways.

First, the Commission should continue its important work to stop AI-powered fraud—that is, fraud made more effective and widespread through the use of AI. As I mentioned during an Open Commission Meeting a few months ago, the Commission's recent Voice Cloning Challenge is a great example of its efforts to stop AI-powered fraud.[65] Voice cloning can be an important medical aid for consumers who have lost their voices from accidents or illness. But, as with any technology, voice cloning can be used for good or for ill. Bad actors can use voice cloning to target individuals or small businesses via impersonation frauds, in which consumers are duped into sending money because they believe they are talking to someone they know and trust.

Earlier this year, the Commission held a "Voice Cloning Challenge," which offered a prize for innovative solutions to the threats voice cloning can pose.[66] Some winners of the challenge used AI themselves, such as algorithms to differentiate between genuine and synthetic voice patterns.[67] With efforts like the Voice Cloning Challenge, the Commission does important work to ensure that AI is used for good rather than harm.

Second, the Commission should protect consumers from deception about AI—whether it's deception about AI's capabilities, what "AI-powered" product will deliver, or something else. This summer, I voted in support of an amended complaint against FBA Machine and related entities and individuals that made false claims that consumers would earn enormous sums by investing in AI-powered online stores when, in fact, FBA Machine's products made consumers lose money and incur debt.[68] It's critically important that the Commission take action of this sort to stop deception about AI so that consumers can trust and benefit from real AI and so that honest businesses can bring innovative solutions to the market.

Third, to identify and address cognizable harms that may flow from the development and use of AI, the Commission should examine, through rigorous 6(b) market studies, workshops, or

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[64] 5 U.S.C. § 46(b).
[65] *See* Transcript of FTC Open Comm'n Meeting at 16, (May 23, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-ftc-open-commission-meeting-5.23.24.pdf.
[66] *The FTC Voice Cloning Challenge*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/contests/ftc-voice-cloning-challenge.
[67] Fed. Trade Comm'n, Press Release, *FTC Announces Winners of Voice Cloning Challenge* (April 8, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-winners-voice-cloning-challenge.
[68] Amended Compl., *FTC v. FBA Machine/Passive Scaling*, FTC Matter No. X240032 (June 14, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/x240032-fba-machinepassive-scaling-ftc-v.

enforcement, the processes companies are using to develop and use the AI in compliance with the laws the FTC enforces.[69]

Finally, it is critical that we approach AI as the market-wide issue that it is, rather than siloing consumer protection and competition concerns. If dominant firms become even more dominant in relevant markets through the concentration of AI tools and data repositories needed to build those tools, we should examine those practices carefully.

Thank you, and I look forward to your questions.

[69] *Cf.* Holyoak Coulter Statement.