



Office of Commissioner  
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UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**Concurring and Dissenting Statement of Commissioner Melissa Holyoak**

*Social Media and Video Streaming Services Staff Report*; Matter No. P205402

September 19, 2024

I. INTRODUCTION

How social media companies view and treat users increasingly shapes civic discourse and determines the extent of Americans’ freedoms to participate in the modern public square.<sup>1</sup> Social media’s control over the pursuit of truth is an extraordinary power. What these companies deem “harmful,” “bias[ed],” or “erro[neous],” and their approach to such content, have significant consequences.<sup>2</sup> When companies suppress dissenting views on controversial topics to avoid harm or otherwise protect users online, they effectively prevent the clash of competing information and diverse views. But grappling with such diverse views is vital for self-government in a democracy.<sup>3</sup> As history has shown, limiting debate about contested topics to prevent harm and promote safety can backfire, reducing our freedom and undermining our agency as citizens.<sup>4</sup>

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<sup>1</sup> See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2422 (2024) (Alito, J., concurring); Remarks of Commissioner Melissa Holyoak at the Competitive Enterprise Institute’s Annual Summit, *Rediscovering Adam Smith: An Inquiry in the Rule of Law, Competition, and the Future of the Federal Trade Commission*, at 13 (May 31, 2024) (“The effect of denying access to financial services or deplatforming can have the effect of reducing . . . consumers to second class citizens. I believe it is critical to do more to understand the role that platforms play in controlling access to the digital commons. In a time when cancel culture is rampant—including in corporate America—such concerns are real.”), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-cei.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-cei.pdf). As explained below, today’s report follows the issuance of 6(b) Orders to nine companies that offer social media and video streaming services (SMVSSs). The Orders defined SMVSS as “any product or service that allows users to create and share content with other users (whether a private or group interaction) through an application or website on any device (e.g., personal computer, iOS device, Android device, etc.), or stream video, including, but not limited to, any social networking service, messaging service, video streaming service, or photo, video, or other content sharing application, whether offered for a fee or for free.” Fed. Trade Comm’n, 6(b) Study Sample Order (2020), Definition II, [https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-social-media-service-providers/6bs\\_order\\_os\\_final.pdf](https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-social-media-service-providers/6bs_order_os_final.pdf). In general, this statement uses “social media” or “social media companies” to refer to the firms offering SMVSSs. Where this statement capitalizes certain terms, it follows the convention of the Report (which, in turn, capitalized terms the 6(b) Orders defined).

<sup>2</sup> See FTC Staff Report, *A Look Behind the Screens: Examining the Data Practices of Social Media and Video Streaming Services*, at 83 (Sept. 2024) (“Report”) (asserting that “[l]egislation and regulation are badly needed”); *cf. id.* at 63-65 (describing potential harms, especially for young people, that stem from “showing content that gets the most User Engagement (view times, likes, comments, or content that is trending or popular).”).

<sup>3</sup> See, e.g., Richard V. Reeves & Jonathan Haidt, INTRODUCTION, ALL MINUS ONE: JOHN STUART MILL’S IDEAS ON FREE SPEECH, HETERODOX ACADEMY, at 1-2 (2021) (exploring why “free speech [is] important in a modern liberal democracy,” and the importance of “diversity of viewpoints”).

<sup>4</sup> Suppressing free speech and diverse perspectives can have other downsides, as well. See generally Federico Barrera-Lemarchand, et al., *Promoting Erroneous Divergent Opinions Increases the Wisdom of Crowds*, *Psychological Science*, 35(8), 872-886 (2024), <https://journals.sagepub.com/doi/abs/10.1177/09567976241252138>.

Notably—especially given recent evidence of the federal government’s repeated pressuring of social media companies to censor certain views<sup>5</sup>—today’s Report says it does “not address or endorse *any* attempt to censor or moderate content based on political views.”<sup>6</sup> But it also does not assess how its analysis and recommendations may otherwise directly or *indirectly* affect free speech online. For example, the Report says—among other things—that social media companies should implement “more stringent testing and monitoring standards” when it comes to automated systems.<sup>7</sup> The Report’s recommendation for algorithmic testing and monitoring comes in the context of addressing “bias, reliability, and accuracy,”<sup>8</sup> and is followed by a reference to “harmful use of AI,”<sup>9</sup> but with no attempt to explicitly define such terms. Without more, it is unclear how the Report’s analysis and recommendations could affect free speech. For example, if a social media company redesigns its algorithms or policies using disparate impact models for classes the FTC deems protected, such changes could affect that company’s “content recommendation[s]” or “content moderation” in ways that undermine free speech.<sup>10</sup> And given how large technology companies, including social media companies, have tended to expansively apply concepts like avoiding “harmful content”<sup>11</sup>—which in some quarters is a proxy for suppressing ideas considered too controversial and often inherently political—efforts to remove ideas or content that are harmful may undermine the pursuit of truth and ultimately reduce freedom. Unfortunately, the Report fails to robustly explore the full consequences of its conclusions and recommendations.

Notwithstanding some significant concerns about this Report and how social media companies may interpret it, I concur in the decision to publish it because I also believe it contains valuable information. And I commend staff for their work.<sup>12</sup> The Report concludes an investigation that began during the Trump Administration and it reflects information received from some of the largest and most powerful social media companies.<sup>13</sup> These include Facebook; YouTube; TikTok;

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<sup>5</sup> See, e.g., *Murthy v. Missouri*, 144 S. Ct. 1972, 1998-99 (2024) (Alito, J., dissenting); House Judiciary GOP, (@JudiciaryGOP), X.com (Aug. 26, 2024) (posting letter from Mark Zuckerberg, CEO, Meta Platforms, Inc., to Jim Jordan, Chairman, Committee on the Judiciary), <https://x.com/JudiciaryGOP/status/1828201780544504064>; Greg Wehner, *Meta CEO Admits Biden-Harris Admin Pressured Company to Censor Americans*, Fox Business (Aug. 26, 2024), <https://www.foxbusiness.com/politics/meta-ceo-admits-biden-harris-admin-pressured-company-censor-americans>.

<sup>6</sup> Report at 83 n.304 (emphasis added); *id.* at vii n.10.

<sup>7</sup> See *id.* at vii, 83.

<sup>8</sup> See *id.* at 65; *cf. id.* at 59 n.236 (setting forth an AI Risk Management Framework from the National Institute of Standards and Technology (“NIST”) that addresses “fairness in AI,” and suggesting a need for disparate impact analysis); *id.* at 83 (“self-regulation is failing” “when it comes to ensuring . . . firms’ AI systems do not result in unlawful discrimination, *error*, addiction, and *other harms*”) (emphases added).

<sup>9</sup> See *id.* at 83.

<sup>10</sup> See, e.g., *id.* at 50 (describing some Companies’ uses of Algorithms, Data Analytics, or AI relative to user data, including for “content recommendation, personalization, and search functionality, and to boost and measure User Engagement,” and “for content moderation purposes or in connection with safety and security efforts”); see *id.* at 68 (describing human review of system outputs related to content moderation and content recommendation).

<sup>11</sup> *Cf. id.* at vi, 49, 63 (referring to “harmful content,” with the example of dangerous online changes).

<sup>12</sup> The Commission’s Division of Privacy and Identity Protection is world-class, and we are particularly indebted to its staff for their contributions today.

<sup>13</sup> Press Release, Fed. Trade Comm’n, *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information* (Dec. 14, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use>.

WhatsApp; Snap; Discord; Reddit; Twitter; and Amazon.<sup>14</sup> I suspect Congress and the American people will read this Report with great interest, just as I have.

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Social media and video streaming services have a profound effect on the human experience. That is because Americans today pour countless hours into online activity, including social media. Adults in the U.S. “spend on average more than six hours daily on digital media (i.e., apps and websites accessed through mobile phones, tablets, computers, and other connected devices such as game consoles).”<sup>15</sup> Indeed, because of social media’s far-reaching effect on our lives, childhood today looks very different than it did a few decades ago. The Report describes a recent survey that found that “88% of teens between thirteen and eighteen have their own smartphone, and 57% of children between eight and twelve have their own tablet.”<sup>16</sup> As a corollary data point, 8th and 10th graders’ average time “on social media is 3.5 hours per day, 1-in-4 spend 5+ hours per day and 1-in-7 spend 7+ hours per day on social media.”<sup>17</sup>

All this has major ramifications. Here are just two. First, as the Report suggests, social media products are an important source of “news and information.”<sup>18</sup> And as other types of media decline, the importance of social media companies seems likely to grow.<sup>19</sup> A second ramification: these companies’ products have a profound impact on children and teens. And the impact is not always positive. To the contrary, as Professor Jonathan Haidt has argued, “social media—as distinct from the internet at large—is severely harming young people.”<sup>20</sup> Indeed, social media’s impact on all of our lives makes this Report’s contributions timely and make it more important than ever to grapple with how social media companies operate.

On a personal note, this Report addresses topics I care deeply about, including due to work as a law enforcer and my role as a parent. In Utah, I helped bring or support significant cases against large technology companies. And as a Commissioner, I urge that we need even more understanding of how large technology companies, including social media companies, operate—especially how social media companies enforce their terms and conditions of service.<sup>21</sup> As a mother of four, I believe the Report makes significant contributions concerning how social media companies treat children, teens, and their data—topics that policymakers may find especially important. Given social media’s prominence and ubiquity, enforcers and policymakers should have

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<sup>14</sup> *Id.*

<sup>15</sup> Report at 1.

<sup>16</sup> *Id.* at 45.

<sup>17</sup> *Id.* at 64 (internal quotation marks omitted).

<sup>18</sup> *Id.* at 8.

<sup>19</sup> See, e.g., *Murthy*, 144 S. Ct. at 1999 (Alito, J., dissenting).

<sup>20</sup> Maura Kelly, *How To Calm The Anxious Generation: Jonathan Haidt’s Case For Getting Kids More Interested In Real Life And Less Interested In Their Phones*, Harvard Public Health (Mar. 20, 2024), <https://harvardpublichealth.org/mental-health/jonathan-haidt-on-counteracting-negative-effects-of-social-media/>; cf., e.g., Katherine Blunt & Jeff Horwitz, *Children on Instagram and Facebook Were Frequent Targets of Sexual Harassment, State Says*, Wall St. J. (Jan. 17, 2024), <https://www.wsj.com/tech/children-on-instagram-and-facebook-were-frequent-targets-of-sexual-harassment-state-says-68401b07>; see also Report at 45 (“The harms to Children and Teens from SMVSSs and the ads on SMVSSs have been widely reported and range from the promotion of products detrimental to Children and Teens to effects on mental health.”).

<sup>21</sup> Remarks of Commissioner Melissa Holyoak, *supra* note 1, at 12-13.

a clear-eyed understanding of social media companies’ practices, the markets they operate within, and the economic realities that inform tradeoffs Congress requires us to assess and that policymakers need to understand to make sound decisions. With respect to understanding social media companies’ practices, this Report finalizes what the Trump FTC began and represents a major step forward.

But FTC staff reports never exist in a vacuum. For one thing, the watching world knows that our staff investigate and build cases that can lead to enforcement.<sup>22</sup> What staff says and writes can be a window into future cases or theories of liability. Moreover, the Commission has told the public it is considering regulations that would affect data-related practices and other topics that overlap with this Report.<sup>23</sup> Those outside the Commission will study this Report for clues of what’s coming. That’s all to be expected.

There’s another wrinkle, though. Private parties subject to the Commission’s jurisdiction have recently seen the political leadership at the Commission leverage and extend the FTC’s limited statutory authorities to pursue their favored policy goals—regardless of the limits to what Congress has authorized.<sup>24</sup> Thus, an additional factor in how private companies digest today’s Report—and especially all the directives in its “recommendations”<sup>25</sup>—is their awareness that there may be consequences for failing to act as directed or suggested. That’s especially true for this Report, which includes a strongly-worded preface from a Bureau Director who can decide which cases to bring and which ones to close.<sup>26</sup>

All this to say: companies pay close attention to what the Commission votes to put forward. That leads me to three concerns. First, the Report may affect free speech online. Where the Report’s analysis relates to protecting children and teens online or to clearly harmful content (e.g., promoting self-harm), I am deeply sympathetic. And as noted earlier, the Report says it does not “endorse any attempt to censor or moderate content based on political views.”<sup>27</sup> But because some of the Report relates to how social media companies design or modify their algorithms and AI in

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<sup>22</sup> Prepared Statement of Melissa Holyoak, Commissioner, Federal Trade Commission, Before the Subcommittee on Innovation, Data, and Commerce of the Energy and Commerce Committee, United States House of Representatives, Concerning “The Fiscal Year 2025 Federal Trade Commission Budget,” at 2 (July 9, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/commissioner-holyoak-testimony-7-5-24.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-testimony-7-5-24.pdf).

<sup>23</sup> See Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51273 (Aug. 22, 2022) (“[T]he Commission invites comment on whether it should implement new trade regulation rules or other regulatory alternatives concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.”), <https://www.govinfo.gov/content/pkg/FR-2022-08-22/pdf/2022-17752.pdf>.

<sup>24</sup> See, e.g., Joint Dissenting Statement of Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson, *In the Matter of ExxonMobil Corporation*, Commission File No. 241-0004 (May 2, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2410004exxonpioneerh-aftmt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneerh-aftmt.pdf); Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew Ferguson, *Health Breach Notification Rule*, File No. P205405 (Apr. 26, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p205405\\_hbmr\\_hhstmt\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p205405_hbmr_hhstmt_0.pdf).

<sup>25</sup> See Report at vii, 80-84.

<sup>26</sup> Of note: a staff report with a preface from the Director of the Bureau of Consumer Protection is a significant departure from traditional Commission practice for *staff* reports. It is hard to argue that there is no intent for the recommendations to directly reshape private sector conduct. Cf. *Murthy*, 144 S. Ct. at 1999 (Alito, J., dissenting) (describing how “internet platforms have a powerful incentive to please important federal officials”).

<sup>27</sup> See Report at vii n.10, 83 n.304.

ways that may affect their content recommendations or moderation, I have grave concerns.<sup>28</sup> It is likewise troubling that, rather than grapple with these concerns—which stem directly from what the Report says—the Chair seeks to mischaracterize them.<sup>29</sup> Second, the Report’s so-called “recommendations” effectively seek to regulate private conduct through a sub-regulatory guidance document<sup>30</sup> and, at times, incorporate mischaracterizations of what current law requires.<sup>31</sup> We should not dictate or otherwise seek to reshape private-sector conduct in a guidance document.<sup>32</sup> Third, I note that—notwithstanding many *descriptive* contributions this Report makes—there are pivotal factual and policy questions that must still be explored. Before we can conclude the

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<sup>28</sup> That the Report contains such suggestions or recommendations is also troubling because its readers will no doubt include social media companies currently subject to FTC enforcement actions, investigations, or ongoing monitoring under existing orders. *See, e.g., In the Matter of Facebook, Inc.*, FTC Matter No. 092 3184, <https://www.ftc.gov/legal-library/browse/cases-proceedings/092-3184-182-3109-c-4365-facebook-inc-matter> (last updated Aug. 29, 2024); *U.S. v. Twitter, Inc.*, Matter No. 2023062, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023062-twitter-inc-us-v> (last updated May 26, 2022). Given the current Commission’s willingness to use its authorities flexibly, and how some social media companies are already subject to Commission scrutiny in other contexts, they may be tempted to implement this Report’s recommendations—even when no law currently requires them to do so, and despite how this Report, in a footnote, suggests that current law may not “necessarily” require they take action. *Cf.* Report at 80 n.298.

<sup>29</sup> Statement of Chair Lina M. Khan, *Regarding the Social Media Service Providers Privacy Report*, Commission File No. P205402, at 2-3 (Sept. 19, 2024).

<sup>30</sup> *See* Dissenting Statement of Commissioner Melissa Holyoak, *Policy Statement of the Federal Trade Commission on Franchisors’ Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses*, FTC Matter No. P244402 (July 12, 2024) (“Where a policy statement correctly describes extant law and gives helpful guidance to businesses, I will support it. Where, however, a policy statement attempts to effect a change in the law or, as here, overstates the law and confuses or burdens businesses, I will not support it.”), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-statement-franchise-policy-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement-franchise-policy-statement.pdf); *cf.* Exec. Order No. 13,891, 84 Fed. Reg. 55235, 55235 (Oct. 9, 2019) (“Promoting the Rule of Law Through Improved Agency Guidance Documents”) (“Agencies may clarify existing obligations through non-binding guidance documents . . . . Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply.”), <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

<sup>31</sup> *Compare, e.g.,* Report at 59 & n.236 (referring to “unlawful discrimination” broadly, and citing a NIST framework for “fairness in AI”), *and id.* at 83 (alleging “the FTC has made clear how Section 5 applies to harmful use of AI,” but with no citations), *and id.* at 83 n.305 (referring to Report at 49 n.224, which cites a joint law enforcement statement—Joint Statement on Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems (Apr. 4, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/commissioner-holyoak-statement-re-coulter-8-15-24.pdf](https://www.justice.gov/crt/media/1346821/dl?inline—that, with respect to the FTC’s authority under Section 5, cites a case that included a disparate impact claim for so-called “unfair discrimination” under Section 5 of the FTC Act), with Dissenting and Concurring Statement of Commissioner Melissa Holyoak, <i>In re Coulter Motor Company, LLC</i>, FTC No. 2223033 (Aug. 15, 2024) (using Section 5 to pursue “unfair discrimination” claims based on disparate impact theory is inconsistent with the Commission’s limited statutory authority and may have unintended and pernicious consequences), <a href=), *and Chamber of Commerce v. CFPB*, 691 F. Supp. 3d 730 (E.D. Tex. 2023), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023) (striking down the CFPB’s attempt to use its unfairness authority to widely police discrimination in financial services, and pointing out that the CFPB’s and FTC’s unfairness authorities overlap in relevant part).

<sup>32</sup> Let me be clear: I have complete faith in the good intentions of the staff that helped prepare this Report, including its final recommendations. But that the Commission’s political leadership authorized these recommendations in their current and generally unqualified form without reframing these recommendations exclusively as guidance that *lawmakers* could consider requiring through duly-enacted legislation is wrong. Regulated parties—especially those subject to existing orders, enforcement, or investigation—will have strong practical incentive to comply with what they are told they “should” do here.

Report’s unqualified recommendations would ultimately lead to good outcomes for consumers or competition, more analysis is essential. Indeed, it is particularly troubling that these recommendations overlap with the Commission’s contemplated rulemaking and appear created in part to provide support for such rulemaking, circumventing and potentially subverting the public-comment process.<sup>33</sup>

## II. KEY FINDINGS

I begin by underscoring some of staff’s excellent descriptive work in this Report, including some key findings or observations. As an initial matter, part of this Report’s value stems from how information it reflects came directly from social media and video streaming companies themselves. The descriptions look different, and mean more than, for example, a scatterplot based solely on data from the Commission’s various enforcement efforts over a number of years, or from relying on one-off investigative journalism.

### A. Companies’ deletion practices varied and may not reflect what consumers expect.

“Most Companies reported enabling U.S. users to delete their data” that the Companies collected.<sup>34</sup> And the Report explains that a “user would likely assume that deletion means that a Company would permanently erase their data.”<sup>35</sup> But, instead of “permanently deleting data, some Companies instead reported de-identifying such data. These Companies claim[ed] that de-identification anonymized the data and removed any personally identifiable information.”<sup>36</sup> However, as the Report suggests, such practices may not ultimately protect users due to potential for re-identification,<sup>37</sup> and these practices may not be consistent with what consumers may expect.<sup>38</sup> As a law enforcer, this gives me pause. If companies fail to do what they represent to consumers, that warrants additional scrutiny.

### B. When shared, kids’ and teens’ data generally was not differentiated from adults’.

Children and teens are among social media’s most vulnerable users. It is particularly significant that, in relation to data sharing, the Report explains how most of the companies investigated “did not report implementing any additional safeguards around sharing information collected from Children or Teens.”<sup>39</sup> Relatedly, no companies “reported having sharing practices

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<sup>33</sup> I may be inclined to agree with some of the Report’s recommendations—not least of which the ones that relate to children and teens. But the Commission has more work to do before we could conclude its recommendations are ultimately beneficial for consumers or competition—or as a legal matter, that potentially unfair or deceptive acts or practices are prevalent. *See generally* 15 U.S.C. § 57a(b)(3) (addressing prevalence); *see also* 15 U.S.C. § 45(n) (setting forth standard for unfairness, and requiring assessment of the likelihood of “substantial injury,” and also the “countervailing benefits to consumers or to competition”).

<sup>34</sup> Report at 35.

<sup>35</sup> *Id.* at 33.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 37-38.

<sup>38</sup> *Cf. id.* at 31 (suggesting that some Companies “did not, in practice, have actual written data retention and deletion policies”).

<sup>39</sup> *Id.* at 26; *see id.* at 26 n.137 (“Only a few Companies reported engaging in different sharing practices with respect to Personal Information collected from users under thirteen years of age. Generally speaking, such sharing was more limited in nature than the sharing of adult user data.”).

that treat the information collected from a user known to be aged thirteen to seventeen differently from adult’s information,” suggesting that “privacy protections that were present for Children on a given [social media or video streaming service] disappeared the moment that Child turned thirteen.”<sup>40</sup> These findings<sup>41</sup> are significant as Congress continues considering what measures to enact to protect children and teens online.<sup>42</sup>

### C. Companies may have the technical capacity to detect users under age 13.

Some companies “stated that their Algorithms, Data Analytics, or AI could detect if a user was between 13 and 14 years of age, but if a user was under thirteen then the Companies stated they had to rely on other means (e.g., self-reporting) to determine that a user was a Child.”<sup>43</sup> Given the sophistication of modern technology that—apparently—permits distinguishing between a 13- and 14-year-old and perhaps younger ages,<sup>44</sup> it is worth further exploring whether companies have the technical ability to use their tools more effectively to identify children younger than 13. It is also worth exploring how much that ability may have improved even since the end date for information the Commission received as part of this study. These are hard questions. But if lawmakers consider requiring additional steps for age verification along with other potential privacy protections for children, it is important to understand social media’s capabilities.

### D. Companies often treated teens as adults.

The Report states that “[a]most all the SMVSSs permitted Teens to create accounts without any restrictions,” and “[o]f the Companies that allowed Teens to create accounts on their SMVSSs, they all collected Personal Information from Teens in the same manner as they collected Personal Information from adult users.”<sup>45</sup> Again, of interest, “[m]ost Companies reported that they either would not fulfill a parent or legal guardian’s request to delete a Teen user’s data or required all such requests to come through the Teen user’s account (and thus presumably through the Teen).”<sup>46</sup> As Congress considers how to protect teens—and also how to protect and strengthen parental rights relative to young people—these are important findings.

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<sup>40</sup> *Id.* at 26.

<sup>41</sup> Other findings in the Report are relevant, too. *See, e.g., id.* at 32 (“Collecting Personal Information from Children did not necessarily spur the Companies to adopt stricter data retention and deletion practices, despite their COPPA Rule obligations.”); *id.* at 43 (describing how most of the Companies “represented they had restrictions in place regarding ads targeted at Children and Teens”); *id.* at 45 (“With respect to Teens, almost all of the Companies permitted Teens to create accounts. However, when it came to advertising, some Companies reported distinct advertising practices with respect to Teens, such as limiting the types of ads that can be seen by Teens.”).

<sup>42</sup> A policy consideration that the Report does not explore robustly is when different protections may be needed depending on how old any given teen is. For example, should policymakers consider a sliding scale that tailors protections depending on the age of the teen? The typical seventeen-year-old is different than the typical thirteen-year-old, and different approaches may be appropriate.

<sup>43</sup> Report at 73; *see also id.* at 22 (“Many Companies reported inferring user information through the use of Algorithms, Data Analytics, or AI. Such Companies most often reported inferring a user’s age or age range using such technology. A few companies reported using systems on some SMVSSs to automatically identify Children and several more reported using such systems to identify Teens.”) (cleaned up).

<sup>44</sup> *See id.* at 54 (“Some Child-directed SMVSSs also used Algorithms or Data Analytics, or AI to infer Demographic Information about their users. For instance, at least one Child-directed SMVSS said it inferred user gender, age, country, and region.”) (emphasis added).

<sup>45</sup> *Id.* at 75.

<sup>46</sup> *Id.* at 77.

E. Some companies had difficulty describing the extent of their data collection.

According to the Report, “Companies collected vast amounts of data about” consumers, but “some of the Companies appeared incapable of comprehensively relaying what consumer information they collected or used.”<sup>47</sup> Again, as an enforcer, this concerns me to the extent it suggests companies’ practices may conflict with their representations to consumers, including representations that may relate to sensitive information.

F. Some companies shared data with foreign entities.

The Report suggests how some consumer data may be shared outside the United States,<sup>48</sup> an area that is rightly of ongoing interest and concern to policymakers. Congress has recently given guidance about ways that companies should handle data relative to foreign adversaries.<sup>49</sup> As the Report explains, sharing with entities in foreign countries “raises concerns about the Companies sharing U.S. consumers’ Personal Information in a way that may expose that data to potential collection by foreign governments.”<sup>50</sup> I believe this is an area that deserves additional focus as lawmakers continue assessing how to protect the American people from bad actors overseas.

G. Companies pervasively used automated systems.

According to the Report, “automated systems have dictated much of the user’s experiences . . . [and] have determined what user-generated content and advertisements to display and remove.”<sup>51</sup> Also, “[m]ost Companies said they relied on Algorithms, Data Analytics, or AI for content personalization—to determine, based on users’ information and activities, which content . . . users were presented with, to recommend and present content in response to search queries, or to surface topics, content, and trends.”<sup>52</sup> While many of us may have understood this to be the case for particular social media companies, official confirmation through the study of a larger set of such companies has real descriptive value. In particular: the pervasive use of automated systems, or increasingly AI, elevates the table stakes for policy discussions and decisions about how social media companies operate their systems to recommend or moderate content. We should recognize

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<sup>47</sup> *Id.* at 17 (cleaned up), 37.

<sup>48</sup> *Id.* at 27 (explaining how “[o]f the Companies that did identify the third parties with whom they shared Personal Information, many of these third parties were located outside of the United States. For example, some third parties who received users’ Personal Information were located in China, Hong Kong, Singapore, India, the Philippines and Cyprus. Such sharing raises concerns about the Companies sharing U.S. consumers’ Personal Information in a way that may expose that data to potential collection by foreign governments.”); *cf. id.* at 28 (detailing “Companies [that had] corporate entities incorporated in foreign jurisdictions like China, the United Arab Emirates, and Ukraine”).

<sup>49</sup> *See generally* H.R. 815, Pub. L. No. 118-50, Division I, Protecting Americans’ Data from Foreign Adversaries Act of 2024, § 2 (“It shall be unlawful for a data broker to sell, license, rent, trade, transfer, release, disclose, provide access to, or otherwise make available personally identifiable sensitive data of a United States individual to—(1) any foreign adversary country; or (2) any entity that is controlled by a foreign adversary.”).

<sup>50</sup> Report at 27.

<sup>51</sup> *Id.* at 69; *see generally id.* (“These systems also inferred or predicted personal details about users and their lives, such as their interests, habits, demographic categories, familial status and relationships, employment and income details, and likely other details and information not provided by the Companies.”).

<sup>52</sup> *Id.* at 51.



that any regulatory changes—properly promulgated or not.<sup>53</sup>—may have effects well beyond those intended. This is particularly so for suggestions relating to testing, auditing, or monitoring for bias, reliability, and accuracy, or to avoid error and harmful use of AI.<sup>54</sup> I am concerned that such suggestions and recommendations may further limit free speech online, even where the intent is not directly to suppress free speech.

This particular finding about pervasive use of automated systems raises broader questions, as well. For example: would content recommendation algorithms that de-emphasize user engagement, to the extent that approach goes beyond simply protecting children and young teens from harmful content,<sup>55</sup> be consistent with consumers’ expectations regarding terms and conditions? Will any new regulatory burdens degrade the user experience—for example, if social media content is displayed chronologically, rather than based on known or anticipated user interest derived from user data?<sup>56</sup> And how would the proposed changes alter any network effects that drive the utility of social media products? These policy questions are important and deserve continued exploration.

#### H. Social media companies’ revenues relied heavily on advertising.

Reliance on advertising for revenues is an observation that is well-known in many quarters, but has descriptive value given the Report’s reliance on information collected from or confirmed by some of the largest social media companies. The Report found that “most of the Companies’ revenue from [social media and video streaming services] was derived by serving or displaying advertisements . . . , and that all these [advertising services] provided ad-targeting capabilities.”<sup>57</sup> The Report also explained that “[m]ost of the Companies with advertising services reported that the majority of their revenues came from advertising.”<sup>58</sup> Given how much these companies make based on their advertising, it seems clear consumers are paying for zero-price services with their data and information.<sup>59</sup> This reality of the current social media business model supporting the free internet helps inform the significance and potential tradeoffs that stem from calling for an overhaul of that model as this Report envisions.<sup>60</sup>

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<sup>53</sup> This would include imperatives to the private sector in the context of a formal guidance document, a staff blog post, or other sub-regulatory efforts to direct or attempt to shape private sector conduct independent of existing and particular legal obligations.

<sup>54</sup> The Report suggests or concludes there is need for change and additional regulation in these areas. *See generally*, e.g., Report at vi-vii, 59 & n.236, 63-70, and 83.

<sup>55</sup> *See generally id.* at vi, 63-65.

<sup>56</sup> *See generally id.* at 65.

<sup>57</sup> *Id.* at 13 (citation omitted).

<sup>58</sup> *Id.* at 13 n.91; *see also id.* at 50-51 (“The majority of Companies acknowledged that they derived revenue from [Algorithms, Data Analytics, or AI] indirectly by using them to power or improve their products and services that generate revenue, such as their advertising services (i.e., to serve ads) . . .”).

<sup>59</sup> *Id.* at 14.

<sup>60</sup> As explained below, this in particular is an area where the Report makes unqualified recommendations, rather than tapping into staff’s understanding to explore these tradeoffs in a robust way. That the Commission’s political leadership decided the Report should not address these tradeoffs limits its utility for any attempts at future regulation on related topics.

### III. CONCERNS

The observations noted above are just a handful of the Report’s important descriptions and findings. They reflect staff’s hard work and commendable efforts. If the Report ended with those findings, so would my statement. Unfortunately, the Report sets forth a number of unqualified recommendations that raise concern. First, some of the Report’s analysis and recommendations may lead to more censorship or inadvertent suppression of certain content. Other federal officials have shown no qualms about directly pressuring social media companies to suppress content online.<sup>61</sup> We should steer clear of unqualified recommendations that could lead to similar outcomes—even if that is not their intent.<sup>62</sup> Second and relatedly, the Report’s recommendations often set forth what companies “should” do. But almost all of those suggestions or imperatives are presented separate from existing legal obligations,<sup>63</sup> and some also effectively incorporate contested legal theories.<sup>64</sup> Even when they have the authority to regulate, federal agencies should not seek to do so through staff statements and guidance like this Report’s recommendations.<sup>65</sup> Third and finally—and notwithstanding Commission staff’s tremendous expertise in grappling with the relevant policy issues and questions—political leadership at the Commission authorized publishing the final Report without addressing vital factual and policy questions that remain about how its unqualified recommendations would ultimately affect consumers and competition. That shortcoming does not negate the Report’s *descriptive* value where it simply sets forth information learned. But because it does not address these issues, the Report fails to adequately support its unqualified policy recommendations. Lawmakers should not blindly enact them, nor can the Commission rely or act on them, without recognizing and fully accounting for the Report’s limitations.

#### A. The Report may lead to suppression of free speech online.

The Commission publishes this Report with analysis that seems likely to at least indirectly affect how social media companies curate and recommend content on their platforms. But the Report does not explore how its analysis or recommendations may affect free speech writ large.

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<sup>61</sup> See, e.g., *The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Big Tech to Censor Americans, True Information, and Critics of the Biden Administration*, Interim Staff Report, Committee on the Judiciary & the Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Representatives, at 2 (May 1, 2024) (explaining how “[i]n the weeks and months following the start of the White House pressure campaign, Facebook, YouTube, and Amazon all changed their content moderation policies”), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Biden-WH-Censorship-Report-final.pdf>; House Judiciary GOP, (@JudiciaryGOP), *supra* note 5 (posting letter from Mark Zuckerberg, CEO, Meta Platforms, Inc. to Jim Jordan, Chairman, Committee on the Judiciary); Greg Wehner, *Meta CEO Admits Biden-Harris Admin Pressured Company to Censor Americans*, *supra* note 5.

<sup>62</sup> See Report at vii n.10, 83 n.304.

<sup>63</sup> Again, a number of the Report’s recommendations come concurrent with the Commission’s contemplated rulemaking on overlapping topics. See Advance Notice of Proposed Rulemaking, *supra* note 23. Issuing definitive and unqualified recommendations that relate to rulemakings the Commission has suggested are in the pipeline—with a preface from a Bureau Director who will also oversee that rulemaking—raises a possibility of, and at the very least invites, challenges alleging prejudice for any overlapping requirements in subsequent Commission rulemaking. Cf., e.g., *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

<sup>64</sup> See note 31, *supra* (describing Report’s incorporation of contested legal theories concerning disparate impact and so-called “unfair discrimination”).

<sup>65</sup> Even where I might agree with some of this Report’s substantive recommendations, I would *not* agree that “*regulation*” is badly needed, as opposed to *legislation*. See Report at 83 (emphasis added).

Today’s digital commons are increasingly where citizens speak and hear what others say. It is deeply concerning that political leadership at the Commission chooses to issue relevant analysis or recommendations without evaluating how the Report may affect this vital function, less than two months before an election.

For example, the Report says that social media companies should implement “more stringent testing and monitoring standards” when it comes to automated systems.<sup>66</sup> The Report’s recommendation for algorithmic testing and monitoring comes in the context of addressing “bias, reliability, and accuracy,”<sup>67</sup> and is followed by a recommendation referencing “harmful use of AI.”<sup>68</sup> But the Report never directly defines such terms. Likewise—while providing troubling context of harmful content young people may see—the Report does not describe or explicitly limit what other types of “harmful content” its analysis may ultimately envision or encompass.<sup>69</sup>

Without more—and given the ambiguities in or implications of the Report—it is unclear exactly how its analysis or recommendations will affect free speech. For example, if a social media firm redesigns its algorithms based on disparate impact models for classes it deems protected, such changes may affect its “content recommendation[s]” or “content moderation.”<sup>70</sup> Nor is it clear how such changes would affect free speech or a user’s day-to-day experience with, for example, the presentation of a “news feed.”<sup>71</sup> Would such a change affect the news feed’s presentation of trending or popular content around controversial social, religious, or related topics in the weeks leading up to November 5? Or will a social media company read the Report to require or encourage deprioritization of that content based on more “responsible use” of its algorithms? And what effect might such decisions—even about a single article—have on civic discourse in our country?<sup>72</sup> It is well known that what federal officials say can change how social media companies treat speech online, and that these companies react to guidance from federal officials.<sup>73</sup> That is particularly likely here, given the Commission’s ongoing legal interactions with many of the largest social media companies.<sup>74</sup> As drafted, the Report may increase the likelihood that trust and safety professionals at social media firms will pick up on what the Report signals in ways that go far

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<sup>66</sup> See Report at vii, 83.

<sup>67</sup> See *id.* at 65; *id.* at 83 (“self-regulation is failing” “when it comes to ensuring . . . firms’ AI systems do not result in unlawful discrimination, error, addiction, and other harms”); *cf. id.* at 59 n.236 (setting forth an AI Risk Management Framework from NIST that addresses “fairness in AI”).

<sup>68</sup> See *id.* at 83.

<sup>69</sup> See *id.* at vi, 49, 63.

<sup>70</sup> See, e.g., *id.* at 50 (describing some Companies’ uses of Algorithms, Data Analytics, or AI relative to user data, including for “content recommendation, personalization, and search functionality, and to boost and measure User Engagement,” and “for content moderation purposes or in connection with safety and security efforts”); see *id.* at 68 (describing human review of system outputs related to content moderation and content recommendation).

<sup>71</sup> *Cf.* Report at 65.

<sup>72</sup> See generally, e.g., Jordan Boyd, *Four Years After Biden ‘Laptop From Hell’ Falsely Labeled ‘Misinformation,’ DOJ Admits It’s Real*, *The Federalist* (Jan. 17, 2024), <https://thefederalist.com/2024/01/17/four-years-after-biden-laptop-from-hell-falsely-labeled-misinformation-doj-admits-its-real/>.

<sup>73</sup> See generally *The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Big Tech to Censor Americans, True Information, and Critics of the Biden Administration*, *supra* note 61; Murthy, 144 S. Ct. at 1998-99 (Alito, J., dissenting). The Biden Administration has repeatedly exerted pressure on social media companies. See, e.g., *id.*; see also Ben Geman, *Top Biden Aide Prods Big Tech to Crack Down on Climate Change Misinformation*, *Axios* (June 9, 2022), <https://www.axios.com/2022/06/09/climate-gina-mccarthy-misinformation>.

<sup>74</sup> See, e.g., note 28, *supra*.

beyond protecting children or teens online. Without more analysis, along with proper legal guardrails, we do not know whether Americans’ ability to freely converse is limited by this Report.

In her statement, the Chair gives lip-service to the predicate for some of my concerns,<sup>75</sup> where she reflects on the “dominance of several” social media companies and how their decisions have an “outsized impact on Americans.”<sup>76</sup> She also admits that such platforms are “susceptible to coordination with—or cooptation—by the government,” and that dominant social media companies “allow[] a small number of executives to determine whose views are amplified or silenced.”<sup>77</sup> That is exactly right. Which is why it is so concerning that this Report—which *contains analysis and recommendations that seem likely to directly or indirectly affect content recommendation and moderation*—fails to account for potential effects on free speech. Indeed, Chair Khan tells the world that all is well because the Report has a footnote disclaiming any connection between the Report and political censorship. But—as we recognize in other settings—a disclaimer cannot fundamentally alter or otherwise change the underlying message.<sup>78</sup>

#### B. The Report wrongly seeks to regulate through Commission-blessed staff guidance.

This Report is not simply issuing policy analysis for Congress to consider. Nor is it a legislative rule built on notice-and-comment procedures<sup>79</sup> or required hearings.<sup>80</sup> Instead, it is a guidance document that tells companies what they “should” do. Here are some examples of these directives to private parties:

- “Companies should implement more stringent testing and monitoring standards.”<sup>81</sup> Relatedly, the Report also mentions “some Companies having fewer or lacking sufficient policies or practices to monitor and test for things such as unlawful discrimination,” and says they should “do more to ensure their testing and monitoring of automated systems is rigorous, comprehensive, and consistent.”<sup>82</sup>
- “SMVSSs should limit data collection,” and “should limit the data collected from both users and third parties to what is necessary for providing the service.”<sup>83</sup>

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<sup>75</sup> Section I (Introduction), *supra*; see also Remarks of Commissioner Melissa Holyoak, *supra* note 1, at 12-13.

<sup>76</sup> See Statement of Chair Lina M. Khan, *supra* note 29, at 3.

<sup>77</sup> See *id.*

<sup>78</sup> Cf. *FTC Policy Statement on Deception*, at 4 (Oct. 14, 1983) (“Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices”), available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>79</sup> 15 U.S.C. § 57a(a)(1)(B).

<sup>80</sup> *Id.* § 57a(c).

<sup>81</sup> Report at 83.

<sup>82</sup> *Id.* As an aside, I question whether the suggestion of standardization in “testing” AI or algorithms will be a good thing or have pro-competitive effects. Such an approach of uniform standards in other contexts has led to practices that harm consumers and may run afoul of antitrust law. See generally *Garm’s Harm: How the World’s Biggest Brands Seek to Control Online Speech*, Interim Staff Report of the Committee on the Judiciary, U.S. House of Representatives (July 10, 2024), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-07-10%20GARMs%20Harm%20-%20How%20the%20Worlds%20Biggest%20Brands%20Seek%20to%20Control%20Online%20Speech.pdf>.

<sup>83</sup> Report at 80.

- “SMVSSs should limit data sharing with affiliates or company-branded entities. SMVSSs should limit such data sharing, using it only for purposes that are necessary for providing the service a consumer is seeking.”<sup>84</sup>
- “SMVSSs should limit data sharing with third parties.”<sup>85</sup>
- “SMVSSs should implement more concrete and enforceable data minimization and retention policies.”<sup>86</sup>
- “Companies should address the lack of access, choice, control, transparency, explainability, and interpretability relating to their use of automated systems.”<sup>87</sup>
- “SMVSSs should not collect users’ sensitive information via privacy-invasive ad tracking technologies,”<sup>88</sup> and “Companies should implement more safeguards when it comes to advertising . . . .”<sup>89</sup>

The Report contains a number of other directives, too.<sup>90</sup>

While the Report claims it is intended to inform “decisions made by policymakers and companies,”<sup>91</sup> it is unambiguously directing the private sector to comply with its recommendations. At nearly every turn of the Report, it repeatedly sets forth or suggests what private companies “should” or should not do. Yet, in nearly every instance where the Report sets forth a recommendation, it fails to provide evidence the recommendation is grounded in existing law. This Report feignedly acknowledges its apparent lack of legal authority to issue what amount to changes in existing legal obligations through a staff report.<sup>92</sup> It has become a pastime of sorts for administrative agencies to make an end-run around the Administrative Procedure Act to circumscribe private conduct. And here, in effect, the Report even suggests readers should make no mistake about how a “failure to follow” the Report’s recommendations will be viewed by enforcement staff.<sup>93</sup> Taken together with the Bureau Director’s preface, this Report’s recommendations are a new low for the administrative state’s abuse of a guidance document.

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<sup>84</sup> *Id.* at 81.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Relatedly the Report directs: “SMVSSs should implement and maintain concrete written data minimization policies that impose limits keyed to what is reasonably necessary to provide the consumer’s requested product or service, rather than allowing them to undertake any collection, use, or disclosure to monetize data.” *Id.* And: “SMVSSs should, in coordination with applying the recommended data minimization policies, develop, document and adopt concrete data retention policies that include clear-cut and definite retention periods for each type of user data collected that are tied to the purposes for which the SMVSS collected the data.” *Id.*

<sup>87</sup> *Id.* at 82.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at vii.

<sup>90</sup> *See generally id.* at 80-84.

<sup>91</sup> *Id.* at 80.

<sup>92</sup> *See id.* at 80 n.298 (“These recommendations are not intended to imply that a company’s failure to follow them is necessarily an unfair or deceptive trade practice. Rather, the recommendations reflect staff’s observations based on the documents received from the Companies as part of this study, along with staff’s expertise and experience in these areas.”).

<sup>93</sup> *See id.*

I raise this concern notwithstanding agreement I and others may share if Congress decides to authorize some of these requirements.<sup>94</sup> But the Commission cannot authorize them through sub-regulatory guidance,<sup>95</sup> including where they rest—even if indirectly or by implication—on misguided interpretations of our statutory authority.<sup>96</sup> And especially given that the Commission is currently considering updating or promulgating a variety of rules, it is poor governance to issue overlapping requirements and suggestions for the private sector.<sup>97</sup> Doing so circumvents rulemaking requirements and process that Congress has imposed.<sup>98</sup> While this Report may be intended to help support and validate *future* rulemaking efforts, its unqualified recommendations provide an infirm basis for future decision-making because they do not stem from the type of robust cost-benefit and policy analysis Congress requires that the Commission undertake.<sup>99</sup>

Contrary to the Chair’s mischaracterization of my statement, my concern has nothing to do with whether staff have relevant expertise, nor whether they should share their perspective on policy.<sup>100</sup> Instead, it is that the Report wrongly seeks to regulate through Commission-blessed staff guidance. Neither the Commission nor staff are elected lawmakers. We should avoid acting as such by directing private-sector conduct in guidance untethered to what existing laws require.

### C. Further analysis of the Report’s unqualified recommendations is essential.

Historically, the Federal Trade Commission has used its 6(b) authority<sup>101</sup> to gather information to study industries or related matters, and then issue reports that are in the public interest.<sup>102</sup> These reports seek to give Congress and the public objective, economically sound, evidence-based information—which can reshape public discourse on issues that affect consumers or competition. The standard of these reports has traditionally been nothing short of excellence. Given that general track record, when a 6(b) report makes unqualified recommendations, it is important that they rest on accurate assessment of the relevant tradeoffs. The Commission should, for example and where relevant, consider not just the likelihood of “substantial injury,” but also

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<sup>94</sup> I am particularly interested in continuing to explore recommendations relating to children and teens. *See id.* at 83-84. These individuals are among the most vulnerable members of our society. 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](https://www.ftc.gov/system/files/ftc_gov/pdf/2024.7.8-holyoak-statement-re-ngl.pdf). For these vulnerable members of our society, a number of the Report’s recommendations may be the best policy. But the Commission is not Congress, and this Report’s recommendations are not from duly-elected lawmakers.

<sup>95</sup> *See* note 30, *supra*.

<sup>96</sup> *See* note 31, *supra*.

<sup>97</sup> *Cf.* Dissenting Statement of Commissioner Christine S. Wilson, *Enforcement Policy Statement Regarding Negative Option Marketing*, Matter No. P064202, at 1 (Oct. 28, 2021) (“Prior to the arrival of new agency leadership, the FTC had issued policy guidance during the pendency of a related rulemaking on only one occasion, and in that instance noted its intention to refrain from enforcement actions in the area. . . . Publishing guidance during the pendency of a related rulemaking short-circuits the receipt of public input and conveys disdain for our stakeholders. I believe this practice does not constitute good government, so I dissent.”) (citation omitted), [https://www.ftc.gov/system/files/documents/public\\_statements/1598067/negative\\_option\\_policy\\_statement\\_csw\\_disent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598067/negative_option_policy_statement_csw_disent.pdf).

<sup>98</sup> *See* 15 U.S.C. § 57a.

<sup>99</sup> *See id.* §§ 45(n), 57b-3.

<sup>100</sup> Statement of Chair Lina M. Khan, *supra* note 29, at 3 n.7.

<sup>101</sup> 15 U.S.C. § 46(b).

<sup>102</sup> *Id.* § 46(f).

the “countervailing benefits to consumers or to competition” from any given practice or act.<sup>103</sup> More generally, evaluating the pros and cons of any approach helps reach well-reasoned, economically sound policy decisions that benefit the American people.<sup>104</sup> Here however, given the expansive nature of this Report’s recommendations—and due to misguided decisions of political leadership overseeing the final contents of the Report—much work remains before concluding its recommendations are warranted or we can conclusively determine how some of them will affect consumers or competition.<sup>105</sup>

For example: an important conclusion from the Report is the need to change existing business models that rely heavily on collecting and using data, including for targeted advertising.<sup>106</sup> But the Report fails to fully explore what such change could mean, in practice, for consumers or competition. As the companies with advertising services acknowledged, the majority of their revenues come from advertising.<sup>107</sup> The Report describes how “targeted advertising powers the business model of many of the Companies and accounts for most of their revenue.”<sup>108</sup> The Report also highlights the “inherent tension between business models that rely on collection of user data and the protection of user privacy.”<sup>109</sup> It is clear from the Report that changing these models may drastically affect revenues. Yet this conclusion does not prevent the Report from suggesting social media business models need significant alteration.<sup>110</sup>

A reader might reasonably conclude that the Report has thoroughly wrestled with, among other questions: (a) the harms of the status quo; (b) the proper definition of privacy and its relation to various types of data (ranging in their degrees of sensitivity); (c) the benefits of increasing various types of privacy; (d) any other relevant tradeoffs related to changing the dominant business

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<sup>103</sup> *Id.* § 45(n) (providing requirements for “unfairness”).

<sup>104</sup> *Cf.* Remarks of Commissioner Melissa Holyoak, *supra* note 1, at 8-9.

<sup>105</sup> One hint of how additional work remains is how some of the Report’s terminology connotes policy conclusions have already been reached. Using terms like “commercial surveillance,” Report at i-iv, or “data abuses,” *id.* at vi, 79, may ultimately have descriptive value. But those labels should apply only after robust engagement with the facts and related economic analysis. In my view, until that analysis occurs, it would be preferable to use neutral terminology that does not suggest any prejudgment of difficult issues. *See* Concurring Statement of Commissioner Melissa Holyoak, *Surveillance Pricing Intermediaries*, FTC Matter No. #P246202 (July 23, 2024) (“[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. [W]e should be careful to use neutral terminology that does not suggest any prejudgment of difficult issues.”), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-concurring-statement-re-surveillance-pricing.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-concurring-statement-re-surveillance-pricing.pdf).

<sup>106</sup> The Report’s extensive recommendations would generally change this model if the private sector implements them, as the Report directs. *See* Report at 80-84. The Report explains that “[m]any of the practices discussed in this report stem from this business model [gathering data for targeted advertising], which create incentives to increase engagement that, in turn, facilitates the vast collection upon which targeted advertising relies.” *Id.* at 38. Also, the Report’s preface says: “To Fix the System, Fix the Incentives: Staff’s report includes detailed findings around a host of issues ranging from indiscriminate data collection to hyper-granular targeting, each of which should concern policymakers. But these findings should not be viewed in isolation. They stem from a business model that varies little across these nine firms – harvesting data for targeted advertising, algorithm design, and sales to third parties.” *Id.* at ii.

<sup>107</sup> *Id.* at 13, n.91.

<sup>108</sup> *Id.* at 38.

<sup>109</sup> *Id.* at 36.

<sup>110</sup> *Cf., e.g., id.* at 82 n.301 (explaining “that incremental efforts to limit invasive targeting practices are unlikely to suffice when business models are built on such practices”).

model for social media companies, including how fewer revenues may affect any free offerings independent of social media or video streaming; and (e) how the Report’s analysis may map onto or mesh with state regulations that have multiplied since the end of the time period the Report covers. A reader might conclude the Report then determined the weight of the evidence unequivocally warrants the radical changes its unqualified recommendations will bring. But the Report never thoroughly wrestles with these issues. That major unanswered questions remain becomes clear from considering the potential effects of the Report’s conclusions and recommendations on consumers and on competition.

For example, if the Report’s recommendations to companies—like data minimization,<sup>111</sup> as well as others related to procuring or sharing data less broadly (including with affiliates)<sup>112</sup>—significantly alter the business model or practices that “account[] for most of the[se companies’] revenue,”<sup>113</sup> how will that change what companies with social media services can offer (in terms of price, quality, or innovation)?<sup>114</sup> As another example: if companies feel compelled by this Report’s analysis or what the Report suggests to focus less on maximizing user engagement due to certain harms of prioritizing content based on engagement,<sup>115</sup> will that mean consumers generally see less content they would prefer on those platforms? If so, given the current lack of uniform legal requirements and potential for varied market implementation of this Report’s recommendations, will users leave platforms, or start spending more time on other platforms? If revenues decline, where does that leave consumers?

Also, have we fully considered what downstream effects implementing these recommendations would have? Not in this Report. Companies with social media offerings are part of a complex ecosystem. Changing their current business model could have far-reaching effects on their other offerings, as well as their business partners and individual users.

For example: are targeted ads more effective than other kinds of ads? If so, will reducing or eliminating targeted ads hurt sales and revenues for small businesses in the United States? Are there even ways to deliver ads that are as effective as targeted ads without as much data collection and tracking of users? Concerns about ad efficacy may matter less for the largest companies—the household names and dominant firms that already have significant market share. Presumably they can afford to advertise broadly, notwithstanding a lower response rate to ads they pay for. But what about the upstart companies with limited advertising budgets, that seek to get the most for their spend and are trying to increase revenues to sustain growth and challenge today’s largest companies across a variety of industries? Put simply: have we considered whether reducing the

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<sup>111</sup> The Report mentions some form of the phrase “data minimization” over 25 times.

<sup>112</sup> *See id.* at 81.

<sup>113</sup> *Id.* at 38; *see id.* at 13, n.91.

<sup>114</sup> It may not, ultimately. Perhaps these companies will supplement their revenues in other ways, such as solely by contextual advertising. *See generally* Report at 13 n.93 (explaining “the goal of targeted advertising [as] direct[ing] advertisements to users or groups that will find the advertisement more relevant,” whereas contextual advertising “involves non-personalized advertising”). But the Report fails to meaningfully explore this and other questions before issuing its unqualified recommendations.

<sup>115</sup> *See* Report at 63-65 (describing how Companies “relied on Algorithms, Data Analytics, or AI to determine what content to serve users,” and “generally prioritized showing content that gets the most User Engagement (view time, likes, comments, or content that is trending or popular,” but that “Algorithms that rank User Engagement over other factors can lead to the promotion and proliferation of [harmful content],” which can harm young people).



availability of targeted advertising will make it harder for small companies to compete and disrupt today’s dominant incumbents?

Have we considered what effects these recommendations will have on third parties—think of artists, influencers, educators, etc.—that may rely in part on a platform’s advertising revenues or offerings for their income? How will the Report’s recommendations affect the economics for the content creators that make at least some money by developing and posting content? Will a plumber whose “do it yourself” content earns money (directly or indirectly through advertising) still have incentive to invest as much time and effort developing and posting content if they earn less?

And if incentives change for content creators, are there other downstream effects? If so, will those effects be regressive on lower-income American families? A family with income in the bottom quintile may be unable to readily hire a plumber, interior designer, car mechanic, or personal shopper. But they may be willing to trade some of their privacy or their data for free content that helps them teach themselves in ways that fit their budget and improve their quality of life.<sup>116</sup> Before conclusively announcing sweeping policy recommendations and saying private companies should follow them, we should consider whether any given recommendation may have an inflationary effect. Of course, the right answer might still be that social media companies’ business models need reinvention through legislation. But we should grapple with these and other difficult policy questions before definitively stating what should be done.<sup>117</sup>

There are other ways these recommendations need probing. For example: is there any tension between the Report’s concerns about companies using data to infer additional, more sensitive, data on individuals,<sup>118</sup> and the Report’s focus on testing and evaluating for bias or unlawful discrimination?<sup>119</sup> On this note, the Report expresses concern about the practice of inferring sensitive information about consumers and observes that “targeted advertising based on categories that are not sensitive on their own but can be combined to produce proxies for sensitive categories can also result in consumer harm.”<sup>120</sup> Elsewhere, the Report talks about how “[v]ery

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<sup>116</sup> Examples abound. What about the single mother who is using free tutorial videos to teach herself about software or some other skill to advance in her job? Or perhaps that same mother cannot afford cable TV, a paid streaming service, or a babysitter—but uses advertising-supported educational video content to entertain her children each night while she studies.

<sup>117</sup> Another point worth considering relates to the potential for consumer harm and the need for more analysis that differentiates between various types of data. Some types of information can be more sensitive than others—such as precise geolocation data. *See, e.g.*, Concurring Statement of Commissioner Melissa Holyoak, *Kochava Inc.*, FTC Matter No. X230009 (July 15, 2024) (highlighting “the significance of the Commission’s action to protect the privacy of consumers’ precise geolocation information”), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2024-7-15-Commissioner-Holyoak-Statement-re-Kochava-final.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2024-7-15-Commissioner-Holyoak-Statement-re-Kochava-final.pdf). While distinguishing between certain types of data in some contexts, this Report generally does not account for such distinctions in a number of its recommendations.

<sup>118</sup> *See, e.g.*, Report at 20 (“While such user interests may, at first glance, seem innocuous, the particularity of user interest categories often would have allowed the Company to infer more (and sometimes much more) information about a consumer.”).

<sup>119</sup> *See, e.g., id.* at 83 & n.304 (explaining “Companies should implement more stringent testing and monitoring standards,” describing “some Companies . . . [as] lacking sufficient policies or practices to monitor and test for things such as unlawful discrimination,” and referencing an inter-agency policy statement that incorporates a legally tenuous theory of “unfair discrimination” through disparate impact analysis under Section 5).

<sup>120</sup> *See id.* at 44 n.194.

few SMVSSs reported collecting or inferring information regarding a user’s race or ethnicity.”<sup>121</sup> But the Report leaves unanswered whether companies in the future that engage in data minimization and avoid collecting sensitive categories of information will be forced to follow the Report’s prescription of testing for bias. Based on where the Report lands, companies may have little choice but to infer sensitive types of data (such as race) and conduct new and expansive types of disparate impact analysis. That is an approach the Commission is effectively promoting in other contexts.<sup>122</sup> Under the Report’s analysis, legally mandating requirements that lead firms to infer highly sensitive information about individual users can create pernicious consequences. And more generally, broad standards of liability under disparate impact theories can backfire, creating risks of unlawful race-based practices.<sup>123</sup> “The solution to our Nation’s racial problems [] cannot come from policies grounded in affirmative action or some other conception of equity. Racism simply cannot be undone by different or more racism.”<sup>124</sup> The Report fails to explore, let alone resolve, the internal tensions in its analysis.

Returning to the importance of competition, a final point. The Report gives short shrift to what effects its data- and privacy-related recommendations may have on *reducing* competition in the markets for social media and video streaming. That is misguided and contrary to our mission. Endorsing new requirements could create significant barriers to entry. While the largest companies have significant resources to comply with new regulatory requirements, small firms or entrepreneurs contemplating a new technology product typically face disproportionate costs under burdensome regulatory requirements. Indeed, large companies often *want* burdensome regulatory requirements precisely because they hinder rival upstarts. The Commission does not wrestle thoroughly with these questions. Here, instead of setting forth factual and evidence-based findings about how its recommendations will affect competition, the Report provides conclusory and generalized statements.<sup>125</sup> And it fails to robustly engage with how this Report’s recommendations could ultimately affect smaller competitors to today’s online giants.

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The core of this agency’s mission is to protect consumers. Unfortunately, recent years have seen some Commissioners take a narrow view of that mission and where harms emanate from. Putting ideological blinders on does not remove the real-world trade-offs that exist in data privacy. We should not simply protect consumers from external harms—fraudsters, scammers, and the like. That is of course vital. But we should also protect the American people from harms that follow

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<sup>121</sup> Report at 17 n.108.

<sup>122</sup> Cf. Statement of Commissioner Melissa Holyoak, *In re Asbury Automotive Group – McDavid Group*; Matter No. 2223135 (Aug. 16, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/commissioner-holyoak-statement-re-asbury8-16-24.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-asbury8-16-24.pdf).

<sup>123</sup> See Dissenting and Concurring Statement of Commissioner Melissa Holyoak, *In re Coulter Motor Company*, *supra* note 31; cf. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (“Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and would almost inexorably lead governmental or private entities to use numerical quotas, and serious constitutional questions then could arise.”) (cleaned up); *id.* at 543 (“Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”).

<sup>124</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 277 (2023) (Thomas, J., concurring).

<sup>125</sup> See Report at 78-79.

when we fail to robustly and comprehensively scrutinize our own policy efforts and advocacy, including for economic effects, and to anticipate potential unintended consequences. More work remains before we can know whether this Report's recommendations can pass that test. Unfortunately, there was not enough political will at the Commission to ensure staff could explore these questions here.

#### IV. CONCLUSION

This is an important Report that ends an investigation the Trump FTC began. Staff are to be commended for their efforts, and their hard work shows: this Report has much to offer as we continue to develop our understanding of social media companies. With that said, I voice strong concern about significant features of the Report. Those concerns should lead to additional discussion and scrutiny as we and the watching world consider what comes next.