

## UNITED STATES OF AMERICA **Federal Trade Commission**

WASHINGTON, D.C. 20580

## Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson

Regarding the Social Media and Video Streaming Services Report Commission File No. P205402

September 19, 2024

Today, the Commission votes to release a report about various companies offering social media and video streaming services, the culmination of a nearly four-year effort that began in December 2020 under the Trump Administration. The companies that the Commission studied are household names—Amazon, Facebook, YouTube, Twitter, Snapchat, TikTok, Discord, Reddit, and WhatsApp—and most Americans use more than one of these companies' products in their daily lives. Most Americans do not understand, however, how much of their private data these companies are collecting, nor what they are doing with that information after collecting the data.

I vote to approve the publication of this Report because it sheds light on the online privacy crisis. Although much of what the Report reveals was already widely known, I nevertheless hope that the Commission's release of this information will make Americans more aware of the extent of the online commercial surveillance to which they have been subjected. I also concur in much of the Report's discussion of children and teens, although I believe the Report should have focused more on proposing legislative improvements to the online rights of parents and children rather than accusing companies of violating existing law under novel, dubious theories.

I dissent in part, however, from the sections of the Report that deal with targeted advertising and artificial intelligence (AI). The Report's claim that consumers can be "profoundly threat[ened]" and suffer "extreme harm[]" by being shown a targeted advertisement is unjustified, a gratuitous attack on the online economy made with the goal of justifying heavy-handed regulation.<sup>3</sup> The same is true of the Report's claims about AI. The Report criticizes the companies for using AI to show users content that "favors engagement." That is, the Report wishes that rather than accurately predicting what consumers want to see and showing it to them, companies would instead show consumers content that Washington bureaucrats would agree is higher "quality."<sup>5</sup>

<sup>&</sup>lt;sup>1</sup> FTC, A Look Behind the Screens: Examining the Data Practices of Social Media and Video Streaming Services (2024) ("Report").

<sup>&</sup>lt;sup>2</sup> To be clear, the Report claims that these "profound threats to users" arise from the very display of a targeted advertisement, completely independently and in addition to any harm from the data practices that the companies use to enable targeted advertising.

<sup>&</sup>lt;sup>3</sup> Report at 44.

<sup>&</sup>lt;sup>4</sup> *Id.* at 63.

The Report also calls for the expansion of AI safety departments within these companies, and for the bureaucrats who staff them to have binding authority over the engineers and business leaders who actually innovate and create new products. It conveniently fails to mention the stunningly bad decisions made by such AI safety bureaucracies where they already exert their harmful influence.

Just as disappointing is what the Report omits. The Section 6(b) orders asked about the companies' content moderation policies, but the Report says nothing about the pervasive political censorship and election interference carried out by the studied companies under the guise of "content moderation." The Report says nothing about the banning of politicians (including Donald Trump while he was serving as President of the United States), about the removal and demonetization of users who challenge the Silicon Valley political consensus, nor about one of the most brazen acts of election interference in recent history: the coordinated suppression by social media companies of the Hunter Biden laptop story in the leadup to the 2020 presidential election.

I

The Report does its best work by illuminating social-media and video streaming services' (SMVSS) collection, aggregation, sharing, and indefinite storage of our data. It is alarming how much private, revealing information SMVSSs have been collecting, aggregating, disclosing, and indefinitely storing. Many of these companies offer their services to consumers purportedly for "free"—that is, without demanding money in exchange for service. Instead of money, customers pay with their data, which fuel the online advertising that pays for these services. SMVSSs therefore have every incentive to build dossiers of our personal information—from the most mundane facts to the most private and intimate details—and use them to sell and display targeted advertisements. Sometimes this information remains internal to the company that collected it. But often, they share the information with affiliates or other third parties, including entities in foreign countries like China, over which the collecting company exercises no control. This information is often retained indefinitely, and American users generally have no legal right to demand that their personal information be deleted. Companies often aggregate and anonymize collected data, but the information can often be reassembled to identify the user with trivial effort. 10

This massive collection, repackaging, sharing, and retention of our private and intimate details puts Americans at great risk. Bad actors can buy or steal the data and use them to target Americans for all sorts of crimes and scams. Others, including foreign governments who routinely purchase Americans' information, can use it to damage the reputations of Americans by releasing, or threatening to release, their most private details, like their browsing histories, sexual interests, private political views, and so forth.

<sup>&</sup>lt;sup>6</sup> *Id.* at 66–69.

<sup>&</sup>lt;sup>7</sup> FTC, 6(b) SMVSS Study Sample Order at 16 (Dec. 2020).

<sup>&</sup>lt;sup>8</sup> Report at 27.

<sup>&</sup>lt;sup>9</sup> *Id.* at 31–33.

<sup>&</sup>lt;sup>10</sup> *Id.* at 37–38 & n.183.

The Report reveals this mass data collection has been very difficult to avoid. Many of these products are necessities of modern life. They are critical access points to markets, social engagement, and civil society. For many adult Americans, wholesale abstention from SMVSSs is not a realistic option. And even if it were, these firms would likely get much of your data anyway as their platforms are often integrated into other websites.<sup>11</sup>

To be sure, most firms technically disclose their data practices to consumers through privacy policies. But every American knows that these policies are long, vague, and unhelpful—probably intentionally so. <sup>12</sup> The policies also seem to change like the seasons. We all have email inboxes full of notices that one of the firms whose products we use has once again changed its privacy policy. And the policies are largely similar across platforms because there is not enough competition between these companies on privacy protection. <sup>13</sup> Consumers therefore have few options if they care about participating on social media while also protecting their privacy.

Much of what the Report contains is not novel. Knowledge of the data practices the Report discusses has led to extensive regulatory action in Europe.<sup>14</sup> and the States,.<sup>15</sup> and has been the subject of bipartisan legislative action in Congress. Indeed, the House Energy and Commerce Committee in 2022 reported a comprehensive federal privacy bill to the House floor on a bipartisan 53-2 vote..<sup>16</sup> But the Report adds some additional color in its discussion of the internal data policies of the studied firms. This fact alone I think merits publication of the Report.

II

The main commercial use for all the data that the companies collect is the display of targeted advertisements. The Report takes a dim view of targeted advertising. The thesis of the targeted advertising discussion is that the very act of being shown a targeted advertisement (as opposed to the data practices that make that act possible) can be "extremely harmful" and "cause a wide range of injuries," posing "profound threats to users." <sup>17</sup> Indeed, the timbre of the Report's discussion of targeted advertising leaves one wondering whether the Commission thinks the industry should exist at all. <sup>18</sup>

I do not share the Report's apparent view that the display of targeted advertising to adults is, on balance, harmful. (Targeted advertising to children and teenagers is another matter entirely.)

<sup>13</sup> OECD, *The intersection between competition and data privacy – Background Note* 14 (2024) (noting that the opacity of privacy practices makes it difficult for rivals to compete on privacy).

<sup>&</sup>lt;sup>11</sup> There's no escape from Facebook, even if you don't use it, Wash. Post, Aug. 29, 2021, https://www.washingtonpost.com/technology/2021/08/29/facebook-privacy-monopoly/.

<sup>&</sup>lt;sup>12</sup> Report at 38.

<sup>&</sup>lt;sup>14</sup> General Data Protection Regulation (GDPR), Council Regulation 2016/679.

<sup>&</sup>lt;sup>15</sup> International Association of Privacy Professionals, *US State Privacy Legislation Tracker*, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ (last visited Sept. 17. 2024) (listing nineteen US states as having enacted comprehensive privacy legislation).

<sup>&</sup>lt;sup>16</sup> H.R. Rep. No. 117-669 (2022) (reporting the American Data Privacy and Protection Act, H.R. 8152, out of committee).

<sup>&</sup>lt;sup>17</sup> Report at 44.

<sup>&</sup>lt;sup>18</sup> Additionally, the Report's recommendation that companies should limit data collection to "what is necessary for providing the service" is essentially a call for the elimination of targeted advertising. Report at 80.

Targeted advertising can offer significant benefits to website operators, advertisers, and consumers. For one thing, targeted advertising makes much of the internet possible. The reason so much of our online activity does not require the constant exchange of money is because of targeted advertising. If regulators and lawmakers attempt to ban or seriously curtail targeted advertising, they will be undoing the balance of the online economy.

Moreover, targeted advertising can be beneficial for consumers and producers. Traditional advertising often reaches a broad audience, including many viewers who have no interest in the product being advertised. For example, advertisements for newborn clothing are relevant only to expectant or recent parents, and the friends and family of those parents. But advertisements for newborn clothing on television or the radio, for example, would be seen and heard by many others who have no need for them. This mode of advertising wastes advertising dollars. And because marketing is a substantial cost of selling goods and services, marketing inefficiencies can contribute to higher prices. Targeted advertisements, by contrast, are directed to the groups of consumers most likely to be interested in the advertised product in the first place. Targeting therefore increases the value of advertising space for online service operators and can lower costs for advertisers by reducing wasted impressions. Those lower costs in turn can contribute to lower prices. And the increased value of online advertising space means that operators are better rewarded for creating, and therefore more incentivized to create, online services that people want to use.

Targeted advertising may also help promote competition. Upstart challengers to dominant market incumbents may lack the mass-marketing resources to get consumers' attention. But with targeted advertising, they can present their products and services to consumers without having to match the incumbents' marketing resources. The same is true in politics. Targeted advertising permits outsiders to challenge powerful, well-heeled incumbents by reaching voters more efficiently and at lower cost than traditional mass marketing.

The Report focuses on "targeting based on sensitive categories" which it argues can be "extremely harmful" and "cause a wide range of injuries" including "unlawful discrimination, emotional distress, stigma, reputation harm, embarrassment, and invasion of privacy." <sup>19</sup> It lists two examples—a person being shown ads targeted to their sexual orientation despite not having publicly revealed their sexual orientation, and a pregnant woman being shown ads for baby products before she has told her family she is pregnant—but does not explain why these examples are supposed to represent "extremely harmful" "profound threats to users." <sup>20</sup>

I am not obtuse to the fact that a targeted advertisement can remind someone of something tragic, embarrassing, or traumatic in their life. But I am skeptical that this is the kind of injury the law should try to address. First, the Report does not give us examples of "sensitive categories," propose a methodology to determine them, or explain the connection between such categories and the likelihood of emotional harm. I doubt it could. Any such line would tend toward arbitrariness and is not a stable system on which to decide whether advertisements are illegal. Consider two

<sup>&</sup>lt;sup>19</sup> Report at 44.

<sup>&</sup>lt;sup>20</sup> *Ibid*.

examples offered by one of the Report's sources: a person with an eating disorder being shown ads about diets after searching for diet advice, reminding them of their eating disorder; and a woman trying to find hand sanitizer and toilet paper during the Covid-19 pandemic being shown ads for those products, exacerbating her anxiety. Presumably my colleagues do not believe that the law should prohibit displaying advertisements about diets to people who searched for diet advice, or hand sanitizer ads to a person who searched for hand sanitizers. These emotional sensitivities therefore would not qualify for "sensitive category" treatment. But I see no good reason why advertisements generating these understandable and legitimate emotional reactions should be permitted, while others prohibited. This line-drawing exercise would therefore be either arbitrary or highly politicized. In my view, lawmakers and regulators should avoid creating categories of permitted and prohibited emotional responses.

Second, this treatment of online emotional harms would be totally out of step with how the law ordinarily handles emotional injuries. Tort law generally does not treat psychological injuries as cognizable unless they are objectively extreme and the result of conduct intended to cause the injury, or expected to cause extreme injury in a typical person. When a mother who lost her child is reminded of her loss by seeing a neighbor's children play on the street, the law gives her no remedy against the neighbor. Nor does a person with an eating disorder have a viable claim against someone who puts up a billboard advertising a diet plan. Indeed, the list of things that can trigger each unique individual's trauma is endless and would cover every imaginable activity. It is hard to see how our society could function if the law tried to address such injuries. It therefore limits liability for emotional harm to the most extreme cases and the most outrageous conduct. The Report's elevation of generalized psychological embarrassment, stigma, and discomfort to a legally cognizable "harm" is inconsistent with longstanding principles of Anglo-American law. And as with "sensitive categories," idiosyncratic emotional response is a hopelessly unstable foundation on which to construct a regulatory regime.

Finally, the Report expresses concern that targeted advertisements may sometimes qualify as a form of "unlawful discrimination," "reputation harm," and "invasion of privacy." The Report does not explain how this may happen nor does it give any examples. The absence of any examples suggests these unlawful acts are not widely occurring. But even assuming that the Report is correct, the law already prohibits *unlawful* discrimination, reputation harms, and invasions of privacy. <sup>23</sup> I

<sup>&</sup>lt;sup>21</sup> Rae Nudson, *When targeted ads feel a little too targeted*, Vox (Apr. 9, 2020), https://www.vox.com/thegoods/2020/4/9/21204425/targeted-ads-fertility-eating-disorder-coronavirus (cited in Report at 44 n.194).

<sup>22</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 46 (2012) (liability for intentional infliction of emotional

<sup>&</sup>lt;sup>22</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 46 (2012) (liability for intentional infliction of emotional distress requires "extreme and outrageous conduct" causing "severe emotional harm," "so severe that no reasonable [person] could be expected to endure it"); *Id.* § 47 (similarly, liability for negligent infliction of emotional distress requires that the conduct cause, and would have caused a reasonable person, "serious emotional harm"; this is often treated as something less than "severe emotional harm," sometimes as synonymous, but an exacting standard nonetheless.).

<sup>&</sup>lt;sup>23</sup> The U.S. Department of Justice believes that the Fair Housing Act, for example, prohibits discriminatory targeting of advertisements. Department of Justice, *Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook*, to Resolve Allegations of Discriminatory Advertising (2022), https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-

do not think that the risk—unquantified and unelaborated by the Report—that these firms may be violating antidiscrimination and tort laws is a reason to suppress or prohibit targeted advertising. Existing antidiscrimination laws and tort laws already prohibit such conduct and can and should be used to resist it.

In my view, the pressing policy question is not targeted advertising itself. Targeted advertising can have many procompetitive justifications and should not itself be the object of regulatory ire. The correct regulatory focus is one step earlier in the supply chain—the largely unregulated collection, aggregation, sale, and retention of consumers' data that makes the targeted advertising possible. Policymakers should focus on protecting consumer data privacy on the front end rather than on implementing the sort of amorphous, backend advertising regulations that the Report recommends.

III

The Report focuses on children and teenagers in its final section. This discussion is a particular application of the more general privacy problems identified in the Report's earlier sections. But the Report is wise to treat it separately. The dangers that data collection, aggregation, disclosure, and retention pose for adult consumers are more severe for children. That is why Congress has been especially solicitous of children's privacy online. Congress's most substantial foray into online privacy remains the quarter-century-old Children's Online Privacy Protection Act of 1998 (COPPA). And the Commission has done some of its most valuable work in adopting the Children's Online Privacy Protection Rule. and enforcing it.

COPPA forbids website operators—including the SMVSSs—from collecting, using, or disclosing the personal data of any user under the age of thirteen without the "verifiable parental consent" of the user's parent. But the prohibition applies only if the operator has "actual knowledge" that the user is under the age of thirteen, or if the online service is "directed at children." Website operators ordinarily determine a user's age by asking the user to provide his or her date of birth—which is what the Commission has advised the industry to do. But this method of self-verification is not difficult to circumvent.

formerly-known. And various torts protect against the disclosure of false or private information: Restatement (Second) of Torts § 652B (1977) (intrusion upon seclusion); *id.* § 652D (public disclosure of private facts); *id.* § 652E (1977) (false light); *id.* § 558 (defamation).

<sup>&</sup>lt;sup>24</sup> 15 U.S.C. § 6501 et seq.

<sup>&</sup>lt;sup>25</sup> 16 C.F.R. pt. 312.

<sup>&</sup>lt;sup>26</sup> 15 U.S.C. § 6502(b)(1)(A)(ii).

<sup>&</sup>lt;sup>27</sup> *Id.* § 6502(b)(1)(A).

<sup>&</sup>lt;sup>28</sup> FTC, Complying with COPPA: Frequently Asked Questions, Will the COPPA Rule prevent children from lying about their age to register for general audience sites or online services whose terms of service prohibit their participation?, https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions ("However, an operator of a general audience site or service that chooses to screen its users for age in a neutral fashion may rely on the age information its users enter, even if that age information is not accurate. In some circumstances, this may mean that children are able to register on a site or service in violation of the operator's Terms of Service. If, however, the operator later determines that a particular user is a child under age 13, COPPA's notice and parental consent requirements will be triggered.").

The Report concludes that SMVSSs have been treating this verification process as a charade, and that they in fact knew that some of their users are under the age of thirteen. The Report reasons that the data collected on some of the users give rise to the inference that these users are under the age of thirteen, and that this data-driven inference is sufficient to satisfy COPPA's "actual knowledge" requirement. These SMVSSs, the Report suggests, were therefore violating COPPA..<sup>29</sup>

I am not so sure as textual matter that possessing data giving rise to a probabilistic inference that a user is thirteen satisfies COPPA's actual-knowledge requirement. A data-driven probabilistic inference of a user's age does not seem to be "actual knowledge" as ordinary people would use that term—especially when the user was asked how old he or she was, and the user replied that he or she was older than thirteen. Insofar as the Report is suggesting that COPPA requires companies to disregard a self-reported user age and to rely on imperfect data-driven inferences about age, I do not concur in that suggestion.

Instead of concocting new, dubious theories with which to accuse companies of breaking the law, the Report should have focused more on the legislative changes needed to better protect the rights of children and parents online. The Report called for some changes, but I would have gone farther. In particular, Congress should empower parents to assert direct control over their children's online activities and the personal data those activities generate. Every family is different and so is every child. Some parents take a lax approach to supervising their children, and others are stricter. Some teenagers can be trusted to make safe decisions with little supervision, but others cannot. And every teenager matures at his or her own rate. There is no one-size-fits-all approach to parenting, and it would be folly for government to try to impose one. Instead, Congress should take steps to ensure that smartphone and computer operating systems, as well as online services, give parents the tools they need to carry out their chosen approach to supervising and protecting their children online.

Children's online privacy should rest on more than an unverified birthdate. Congress should require SMVSSs to permit parents to decide whether their children can have accounts online. Parents should have the right to see what their children are sending and receiving on a service, as well as to prohibit their children from using it altogether. They should be able to set time limits, both for individual online services and for groups of services. Parents and children should be able to erase any trace left by children on these platforms, at all levels of granularity, from individual messages to entire accounts. Parents have long taught their children that the phrase "don't tell your parents about this" is a red flag for danger. Yet the law currently allows strangers to contact teenagers online and gives parents no rights to see those messages or prevent such contact. Congress should empower parents to impose whatever level of supervision and control over internet messaging they feel is right for their family and their children.

<sup>29</sup> Report at 73 (accusing the companies of willful blindness); *id.* at 83 ("SMVSSs should not ignore the reality that there are Child users. Willfully ignoring a Child user on their SMVSSs will not help companies avoid liability under COPPA.").

Report at 73 (accusing the com

How best to implement these parental rights is a difficult technical and political question. Online platforms would have to implement some of these capabilities, while the makers of smartphone and computer operating systems would have to implement others. Furthermore, online platforms and operating systems must implement age- and identity-verification systems in a way that preserves minors' privacy and right to anonymity. <sup>30</sup> And parents who choose to allow their teenagers to use the internet unsupervised should have that right too.

These are difficult issues, but they are not insurmountable. The future of this country may depend on empowering parents to make meaningful choices about their children's activities online. I urge Congress to take up the challenge.

IV

Α

The Report contains important revelations and useful legislative recommendations regarding data privacy. The AI section—Part VI—is another matter. Part of the AI section is, like the children-and-teens discussion, a particular application of the broader data-privacy problem. The same personal user data that drive the targeted-advertising system also train AI models, and they are the grist for the algorithmic mills that determine which content SMVSSs recommend to their users.

The thrust of the AI section, however, is not data privacy. It is about justifying more content moderation and more government regulation of AI. The Report faults the companies for using "algorithms, data analytics, or AI" that "prioritize[] showing content that gets the most User Engagement (view time, likes, comments, or content that is trending or is popular)." The Report quotes at length from a Surgeon General's report for the proposition that giving users what they want may endanger adolescent mental health. 32

This criticism is odd. Competition and innovation are about getting consumers what they want. In a competitive market, a company that offers consumers a product they do not want will not long survive. The Report's attack is a bit like faulting a florist for selling roses on Valentine's Day, or a department store for selling Christmas decorations after Thanksgiving.

Rather than give consumers what they want, the Report suggests that SMVSSs should give consumers "quality" content.<sup>33</sup> The Report does not say what quality content is, nor was it able to determine what SMVSSs think counts as quality content.

But we have seen what happens when social media companies prioritize their views—or the government's view—of "quality" over the preferences of their users. Over the past decade,

<sup>&</sup>lt;sup>30</sup> Concurring Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, In the Matter of NGL Labs, LLC, et al. (July 9, 2024); Concurring Statement of Commissioner Melissa Holyoak, NGL Labs, LLC (July 9, 2024).

<sup>&</sup>lt;sup>31</sup> Report at 63.

<sup>&</sup>lt;sup>32</sup> *Id.* at 64.

<sup>&</sup>lt;sup>33</sup> *Id.* at 64–65.

these companies have enforced a restrictive censorship regime on Americans' online speech. They have adopted Orwellian policies banning nebulous categories of content like "misinformation," "disinformation," and "hate speech"—categories that in practice mean only any content that challenges the Silicon Valley elite consensus on immigration, crime, climate change, foreign policy, sex and marriage, or any other issue where free thought is inconvenient to those in charge.

During the Covid-19 pandemic, when government lockdowns made social media platforms one of the few venues available for political discourse, this suppression of speech went into overdrive. Social media companies aggressively suppressed dissident views about the pandemic—about the origins of the virus and the efficacy of masks, lockdowns, and vaccines—many of which proved to be true. And the government got in on the action. Litigation and congressional investigations have revealed that at least some companies' censorship was carried out to satisfy menacing federal bureaucrats, <sup>34</sup> who had their own views about what counted as "quality" content during the pandemic. <sup>35</sup>

And in the lead-up to 2020 election, online platforms undertook one of the most shocking acts of election interference in recent memory: the coordinated suppression of reporting about, and commentary on, the content of Hunter Biden's laptop, invoking the specter of "Russian disinformation" as the grounds for suppression. The invocation was balderdash; the laptop's contents were later the basis for Mr. Biden's convictions for violating federal firearms laws. <sup>36</sup> But the platforms' views of what counted as "quality" content in a presidential election led to a coordinated campaign of information suppression that would have made Ingsoc's Big Brother

<sup>34</sup> A House report earlier this year documented this shocking pressure campaign in depth. A few examples suffice to illustrate the contempt that some federal officials had for American's freedom of expression:

Interim Staff Report of the House Judiciary Committee, The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Big Tech To Censor Americans, True Information, and Critics of the Biden Administration (May 1, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Biden-WH-Censorship-Report-final.pdf.

<sup>-</sup> Meta's President of Global Affairs, Nick Clegg, wrote in an internal email: "Just got off [an] hour long call with [Senior Advisor to President Biden] Andy Slavitt. . . . [H]e was outraged – not too strong of a word to describe his reaction – that we did not remove this post. . . . I countered that removing content like that would represent a significant incursion into traditional boundaries of free expression in the US but he replied that the post was directly comparing Covid vaccines to asbestos poisoning in a way which demonstrably inhibits confidence in Covid vaccines amongst those the Biden Administration is trying to reach." p. 1.

<sup>-</sup> Another internal Facebook email noted that "The Surgeon General wants us to remove true information about [vaccine] side effects." p. 3.

<sup>-</sup> A White House official demanded that a tweet by Robert F. Kennedy, Jr. be "removed ASAP" and that Twitter "keep an eye out for tweets that fall in this same genre." p. 1.

<sup>-</sup> In response to complaints from the Biden administration that searches for "vaccines" returned too many antivaccine books, an internal Amazon presentation asked "Is the [Biden] Admin asking us to remove books, or are they more concerned about search results/order (or both)?" p. 7.

<sup>&</sup>lt;sup>35</sup> Murthy v. Missouri, 144 S. Ct. 1972, 1982–83 (2024) (detailing the federal government's pressure campaign to convince social media companies to remove content disliked by government officials); *Id.* at 1997–2005 (Alito, J., dissenting) (likewise, in more detail); 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>&</sup>lt;sup>36</sup> Hunter Biden's Laptop, Revealed by New York Post, Comes Back to Haunt Him, N.Y. Times, June 11, 2024, https://www.nytimes.com/2024/06/11/business/media/hunter-biden-laptop-new-york-post.html.

blush. The companies banned users from sharing information about the laptop, and some even kicked the *New York Post*—the oldest continuously published newspaper in the country—off their platforms for daring to break the story.<sup>37</sup>

Any report on social media practices that delves into content-moderation policies and fails to address the most glaring and consequential examples of "quality" content curation in American history is woefully incomplete. There is no doubt that heavy engagement with social media has negatively affected the mental and physical health of huge swaths of American teenagers. But it does not follow that government bureaucrats should pressure social media companies to replace the content that users want with what Silicon Valley or Washington elites think is higher "quality." We have seen what happens when they do. The better approach to protecting children online would be to empower parents rather than empower Silicon Valley.

В

The Report then sets its sights on AI directly. It warns that AI-driven algorithms pose risks to consumers' civil rights because they can produce erroneous and discriminatory decisions while at the same time being difficult to understand, even to the engineers who develop them. And it laments the absence of "dedicated AI-specific teams" of "human reviewers" to police AI outcomes for "bias." The Report concludes that "comprehensive federal legislation" on AI is "badly needed" to address these issues. I firmly disagree.

1

American consumers have an arsenal of legal rights at their disposal, from general contract, tort, and civil rights laws to industry-specific laws like the Fair Credit Reporting Act.<sup>41</sup> and the Equal Credit Opportunity Act,<sup>42</sup> to protect them from unfairness and discrimination. That the

Twitter, Facebook censor Post over Hunter Biden exposé, N.Y. Post, Oct. 14, 2020, https://nypost.com/2020/10/14/facebook-twitter-block-the-post-from-posting/; Hunter Biden story is Russian disinfo, dozens of former intel officials say, Politico, Oct. 19, 2020, https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276; Jack Dorsey says the New York Post Twitter account will remain locked until it deletes the original tweet featuring its Hunter Biden story, Business Insider, Oct. 28, 2020, https://www.businessinsider.com/jack-dorsey-ny-post-remains-locked-out-twitter-hunter-biden-2020-10; Zuckerberg tells Rogan FBI warning prompted Biden laptop story censorship, BBC, Aug. 26, 2022, https://www.bbc.com/news/world-us-canada-62688532.

<sup>&</sup>lt;sup>38</sup> In her statement, Chair Khan argues that "the power to censor derives from centralized control" and that "market dominance" allows "a small number of executives to determine whose views are amplified or silenced." She also notes that "a consolidated market is also more susceptible to coordination with—or cooptation by—the government." Statement of Chair Lina M. Khan at 3. I agree with the Chair that insufficient competition contributes to online censorship (and other consumer harm), and that this risk merits aggressive enforcement of the antitrust laws in these sectors. I add only that aggressive antitrust enforcement alone is likely insufficient to combat online censorship. If the number of corporate executives making these decisions were to double or triple, but they remained subject to the same incentives—Silicon Valley groupthink, political and legal pressure from the government, and social pressure from NGOs and journalists accusing them of destroying democracy by allowing conservative speech—I am not confident that much would change. But the Chair is correct that vigorous antitrust enforcement will help.

<sup>&</sup>lt;sup>39</sup> See generally Greg Lukianoff & Jonathan Haidt, The Coddling of the American Mind (2018)

<sup>&</sup>lt;sup>40</sup> See supra Part III.

<sup>&</sup>lt;sup>41</sup> 15 U.S.C. § 1681 et seq.

<sup>&</sup>lt;sup>42</sup> 15 U.S.C. § 1691 et seq.

offending decisions are made by software running in datacenters instead of humans with laptops should usually make no difference to the ability of consumers to seek redress under the law. The law forbids intentional discrimination on the basis of protected characteristics either way.

If those laws were inadequate to protect consumers from automated decision making, Congress and state legislatures could pass new laws. But the Report does not identify any inadequacies. It nevertheless calls for "comprehensive federal legislation" regulating AI. <sup>43</sup> Clearly, the point of this section of the Report is not to identify specific problems and propose solutions, but to place the Commission firmly on the pro-regulation side of the AI debate raging across academia, industry, and government. That side is the wrong one.

Generative AI technology is remarkable. ChatGPT and similar products represent a major leap in the ability of computers to do the sort of creative work traditionally thought to separate man from machine. The jury is still out on whether these developments are signs that researchers are close to developing "artificial general intelligence"—machine intelligence matching or exceeding both the power and generality of human reasoning and intuition, the holy grail of AI research. <sup>44</sup> But a great many believe that they are. If so, it is critical to our national future that this technology be developed within the United States. And even if artificial general intelligence is still decades or centuries away, we are only just discovering the economic and social utility of these generative AI systems. In particular, AI may pose a much-needed competitive and innovative challenge to incumbent Big Tech firms. A knee-jerk regulatory response will only squelch innovation, further entrench Big Tech incumbents, and ensure that AI innovators move to jurisdictions friendlier to them—but perhaps hostile to the United States.

A time may come when comprehensive federal AI legislation would be appropriate. But as it stands, neither AI's creators nor its would-be regulators really understand it. Imposing comprehensive regulations at the incipiency of a potential technological revolution would be foolish. For now, we should limit ourselves to enforcing existing laws against illegal conduct when it involves AI no differently than when it does not.

2

43 Report at 83

<sup>44</sup> The term "artificial general intelligence" was popularized in 2007, see Ben Goertzel & Cassio Pennachin, *Preface to* Artificial General Intelligence, at v–vii (2007), but the idea of creating a machine capable of human-level cognition dates back at least to mathematician Alan Turing's 1950 paper *Computing Machinery and Intelligence*. 49 Mind 433–60 (1950). AI emerged as its own field of study shortly thereafter at the Dartmouth Summer Research Project on Artificial Intelligence held in 1956. Grace Solomonoff, *The Meeting of the Minds That Launched AI* (May 6, 2023), <a href="https://spectrum.ieee.org/dartmouth-ai-workshop">https://spectrum.ieee.org/dartmouth-ai-workshop</a>. The project was born of a proposal for a "2-month, 10-man study of artificial intelligence ... to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it" and to "attempt ... to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves." *A Proposal For The Dartmouth Summer Research Project On Artificial Intelligence Debate*, John McCarthy et al. (August 31, 1955). Debate about whether such machines are possible, how they will work, when they will be created, and whether they will improve or worsen the human condition, has been raging since.

The Report also notes that many social media and video streaming companies have "inhouse experts, such as ethicists, social and political scientists, [and] policy experts" who are responsible for addressing "ethics, bias, inclusion, and fairness" in AI technology. <sup>45</sup> The Report suggests that this is a good thing and that the companies need more of them, preferably with binding authority over the rest of the company. <sup>46</sup> But the truth is that these AI safety groups, as they are often called, have proven to be little more than rebranded versions of the DEI bureaucracies that have infected America's businesses and colleges. True to that mold, these bureaucrats have agitated for AI companies to implement explicit racial and political biases in their products.

Take, for example, the rollout of Google's Gemini generative AI product. When a user asked Gemini to generate images of the Pope, "instead of yielding a photo of one of the 266 pontiffs throughout history—all of them white men—Gemini provided pictures of a Southeast Asian woman and a black man wearing holy vestments." It similarly responded to requests to produce images of Nazi soldiers by showing images of people of color in Wehrmacht garb, clearly in compliance with its programming to prioritize diversity in its output over historical accuracy. And requests for images of "the Founding Fathers in 1789" produced "images of black and Native American individuals signing what appeared to be a version of the US Constitution." Some reported difficulty getting Google Gemini to produce any images of white people at all. Gemini explained these bizarre results by saying that it "aimed to provide a more accurate and inclusive representation of the historical context."

These absurdities were the handiwork of the AI safety teams lauded by the Report as necessary to combat "bias." <sup>51</sup> But, of course, these teams did not combat bias, they demanded it. They chose to project their political preferences onto history. Google responded to the humiliating episode by apologizing, suspending some of Gemini's functions, and laying off members of its AI

<sup>&</sup>lt;sup>45</sup> *Id.* at 66.

<sup>&</sup>lt;sup>46</sup> *Ibid.* ("But even where Companies reported dedicating robust internal resources to Algorithms, Data Analytics, or AI, the authority of these internal organizations was not always clear, and their role appeared limited to consulting and offering guidance to the teams that developed the models. It also was not clear whether any of their recommendations were binding.")

<sup>&</sup>lt;sup>47</sup> 'Absurdly woke': Google's AI chatbot spits out 'diverse' images of Founding Fathers, popes, Vikings, N.Y. Post, Feb. 21, 2024 ("N.Y. Post Gemini Story"), https://nypost.com/2024/02/21/business/googles-ai-chatbot-geminimakes-diverse-images-of-founding-fathers-popes-and-vikings-so-woke-its-unusable/; see also Google halts AI tool's ability to produce images of people after backlash, CNN, Feb. 22, 2024, https://www.cnn.com/2024/02/22/tech/google-gemini-ai-image-generator/index.html.

<sup>&</sup>lt;sup>48</sup> N.Y. Post Gemini Story.

<sup>&</sup>lt;sup>49</sup> *Id*.

<sup>&</sup>lt;sup>50</sup> *Id*.

<sup>&</sup>lt;sup>51</sup> Google Chatbot's A.I. Images Put People of Color in Nazi-Era Uniforms, N.Y. Times, Feb. 22, 2024, https://www.nytimes.com/2024/02/22/technology/google-gemini-german-uniforms.html. (Google "spent years assembling teams that tried to reduce any outputs from its technology that users might find offensive. Google also worked to improve representation, including showing more diverse pictures of professionals like doctors and businesspeople in Google Image search results.").

"trust and safety team." <sup>52</sup> Similar problems also plague OpenAI and its ChatGPT product, which is well-established as having a strong left-wing bias. <sup>53</sup> OpenAI CEO Sam Altman has even conceded that these biases stem, in large part, from the biases of the employees of these companies, who live in a San Francisco "groupthink' bubble." <sup>54</sup>

The Report whistles right past this graveyard. The Report is right that there is reason to worry about bias at AI firms. We have witnessed it in real time. But the evidence demonstrates that AI safety bureaucrats are largely responsible for that bias. Creating more of these bureaucrats and giving them more power will not protect us against bias. It will make elite Silicon Valley political bias the gate through which AI must pass.

V

Finally, I dissent in part from the pages of "Staff Recommendations" with which the Report closes. Proposing to Congress and state lawmakers changes to existing law is an important part of the Commission's Section 6(b) authority. Congress has more than once adopted our recommendations in statute.<sup>55</sup> This Report, for example, calls repeatedly for comprehensive federal privacy legislation to protect consumers' data and provide greater clarity to those who collect and sell data. This I support (although as is always the case, the devil will be in the details of any such legislation).

But the Report does much more than recommend changes to existing law. It proposes a litany of things that firms "should" and "should not" do. <sup>56</sup> It provides a laundry list of policies that the firms "should" implement to "protect consumers' privacy." <sup>57</sup> It tells firms they should not use ad-tracking technologies, that they should be more transparent about whether they use consumers' data to train AI, that they "should implement more stringent testing and monitoring standards" for

<sup>&</sup>lt;sup>52</sup> Google apologizes after new Gemini AI refuses to show pictures, achievements of White people, Fox Business, Feb. 21, 2024, https://www.foxbusiness.com/media/google-apologizes-new-gemini-ai-refuses-show-pictures-achievements-white-people; Google lays off people from Trust & Safety team responsible for AI, others working overtime to fix Gemini, Firstpost, Mar. 4, 2024, https://www.firstpost.com/tech/google-lays-off-people-trust-safety-team-responsible-ai-others-working-overtime-fix-gemini-13744836.html.

<sup>&</sup>lt;sup>53</sup> Jeremy Baum & John Villasenor, *The politics of AI: ChatGPT and political bias*, Brookings, https://www.brookings.edu/articles/the-politics-of-ai-chatgpt-and-political-bias/; *ChatGPT has a 'significant' liberal bias, researchers say*, N.Y. Post, August 17, 2023, https://nypost.com/2023/08/17/chatgpt-has-a-significant-liberal-bias-researchers-say/.

<sup>&</sup>lt;sup>54</sup> *Ibid*.

<sup>&</sup>lt;sup>55</sup> Office of Policy Planning, FTC, History of Section 6 Report-Writing at the Federal Trade Commission at 7, 8, 24–27, 63–64 (April 1981), https://www.ftc.gov/sites/default/files/documents/reports/history-section-6-report-writing-federal-trade-commission/231984.pdf (noting that the Commission's Report on the Grain Trade affected the Grain Futures Act, the Chain Stores Report ultimately led to the Robinson-Patman Act of 1936, and the 1977 Prescription Drug Study aided comment on draft legislation and support for an investigation into and successful challenges to state drug substitution laws).

<sup>&</sup>lt;sup>56</sup> It also calls for undefined and indeterminate "comprehensive federal legislation" governing AI. I have already explained my objections to this recommendation. See supra Part IV.B.1.

<sup>57</sup> Report 80–81.

AI, and that they should make a series of changes in how they engage with children and teenagers online. <sup>58</sup>

I dissent from these recommendations, even though I agree with some of them, because I think "recommending" that firms act or refrain from acting exceeds our authority and our expertise. We are not moral philosophers, business ethicists, or social commentators. We are a law-enforcement agency. We enforce specific statutory mandates and prohibitions. Congress has instructed us to develop expertise regarding the enforcement of those laws. <sup>59</sup> When we tell a private person or firm what to do, that instruction must be for compliance with the laws we enforce. When our instructions have no connection to the laws, we are beyond our bailiwick and just like anyone else with an opinion on matters of public importance. Indeed, as Beltway bureaucrats, our opinion on these matters is probably worth less than the average American's.

The Commission does not actually mean for these "recommendations" to be purely recommendatory. Many of the recommendations amount to thinly-veiled threats against firms—do what we say, or else. I do not know how else a reasonable firm would interpret statements in the Report that firms "should" or "should not" do certain things, followed by warnings that certain courses of action "will not help companies avoid liability." These "recommendations," then, are merely the latest entry in a long catalog of examples of federal agencies using "sub-regulatory guidance" to control private behavior without having to go through the rigmarole of rulemaking and judicial review. Although sub-regulatory guidance is not "law" in the sense that one ordinarily uses that word, it has all the coercive power of law because it is backed by the threat of costly investigations and enforcement proceedings without any of the procedural protections that attend lawmaking in Congress and rulemaking in the agencies.

The Report tries to talk its way out of this obvious implication by saying in a footnote that it does not "intend[] to imply" that "failure to follow" the recommendations is a violation of Section 5. The recommendations, the Report insists, "reflect staff's observations based on the documents received ... along with staff's expertise and experience in these areas." <sup>62</sup> But we are not a think tank or collection of concerned citizens. We are the government with the power to obtain injunctions and civil penalties against lawbreakers. When the government "recommends" that the firms it regulates do something, the "recommendation" is not a friendly suggestion. Intended or not, the Report's coercive implication is clear.

<sup>&</sup>lt;sup>58</sup> *Id.* at 82–84.

<sup>&</sup>lt;sup>59</sup> Dissenting Statement of Commissioner Andrew N. Ferguson, joined by Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule ("Ferguson Noncompete Dissent") at 24 & n.203 (June 28, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-matter-non

<sup>&</sup>lt;sup>60</sup> Dissenting Statement of Commissioner Andrew N. Ferguson, Regarding the Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses (July 2024) (discussing the illegitimacy of sub-regulatory guidance).

<sup>&</sup>lt;sup>61</sup> *Id.* at 2 n.7 & 3 (explaining that Congress imposed procedural safeguards on our rulemaking powers to protect against arbitrary Commission decisions); Ferguson Noncompete Dissent at 8 ("the difficulty of legislating in Congress a feature of the Constitution's design, not a fault").

<sup>&</sup>lt;sup>62</sup> Report at 80 n.298.

If we believe that the law requires firms to act or refrain from acting, we can undertake a rulemaking or enforcement action and defend it in court. I understand why the majority does not want to do that; our rules have not fared well before the judiciary. <sup>63</sup> But tacking on threats to the end of a report and calling them "recommendations" is not good government; it is bureaucratic bullying.

<sup>&</sup>lt;sup>63</sup> E.g. *Ryan, LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (granting summary judgment to plaintiffs and setting aside our rule banning employee noncompete agreements for exceeding our statutory authority and being arbitrary and capricious).