

**Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580**

In the Matter of)	
)	
Commercial Surveillance)	FTC-2022-0053
Advance Notice of Proposed Rulemaking)	R111004
)	
)	
)	

COMMENTS OF FREE PRESS

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Executive Summary and Introduction

The landmark Advance Notice of Proposed Rulemaking (“ANPR”)¹ issued in August by the Federal Trade Commission (“Commission”) seeks comment on the prevalence of harmful practices involving “collection, retention, aggregation, analysis, and onward disclosure” of people’s data.² Copious examples compiled in the ANPR itself,³ with that record bolstered by comments already submitted and still to come,⁴ show that such harmful practices are indeed prevalent enough to justify trade rules regulating and preventing them. Taken together, the record will show that a wide range of online actors subject to the Commission’s jurisdiction engage in data collection and uses that are not merely deceptive but that cause substantial injuries unavoidable by individual users and nowhere near worth the benefits alleged for these practices.

The over-collection, targeted use, and sale of people’s personal data leads to discriminatory outcomes and harms disproportionately borne by members of classes protected by the nation’s civil right laws. While the Commission does not have plenary authority to regulate all industries in which such civil rights violations arise, it does enforce antidiscrimination provisions in some sector-specific laws. Moreover, despite the empty protests of lobbyists representing industries that most benefit from the market for data, the Commission is certainly empowered to define patently discriminatory intentions and outcomes as unfair acts and practices affecting commerce when those behaviors curtail opportunities available to consumers.

¹ Federal Trade Commission, *Trade Regulation Rule on Commercial Surveillance and Data Security*, Docket No. FTC-2022-0053, Advance Notice of Proposed Rulemaking, R111004, 87 Fed. Reg. 51273 (Aug. 22, 2022) (“ANPR”).

² *Id.* at 51273-74.

³ *See, e.g., id.* at 51273-76, nn. 1-45.

⁴ *See, e.g.,* Comments of the Disinfo Defense League, Commercial Surveillance ANPR, R111004, at 5-7 (filed Nov. 21, 2022) (“DDL Comments”) (collecting examples of discriminatory algorithmic processes for healthcare decisionmaking, employment ads, and housing ads, and of disinformation on public health, voting rights, and other topics targeted by using commercially available data at communities of color and other protected groups).

Lobbyists' and trade associations' meritless challenges are likewise unavailing when they take aim at the Commission's more general authority for this ANPR and eventual rulemaking. The word games these commenters play, employing seemingly intentional (but, by any standard, clumsy) misreadings of the relevant statutes, are little more than an attempt to short-circuit this proceeding before it has even begun. They alternate between charges that the Commission cannot pre-judge the matter and yet, somehow, cannot proceed with the inquiry at hand unless it first has all of the answers it seeks from the comments it will receive. But the Catch-22 that these industry representatives attempt to author comes unraveled upon a proper reading of the statutory framework, and upon recognition of the Commission's careful adherence to it thus far.

Free Press and its allies have advocated for years now that the Commission (and Congress too) must conceive of privacy protections as not just guarding an abstract right to be left alone, but guaranteeing the same commercial opportunities and protections from abuse no matter an individual's race, ethnicity, national origin, religion, sexual orientation, gender identity, age, or other protected characteristics. As the majority commissioners make clear in their separate statements on the ANPR, they understand the urgency for the Commission to act using the ample authorities it currently possesses, even if and as Congress deliberates over new laws to re-affirm these privacy protections and the Commission's duties to enforce the same.

We call on the Commission to craft data minimization requirements under what the ANPR classifies as data security regulations, and to define blatantly discriminatory data practices as unfair and therefore unlawful acts. We also agree that the Commission should impose civil penalties for first-time violations of such rules. The record the ANPR has already begun to build and will yield in the end is replete with reasons to take bold steps towards protecting people from the harms all too often imposed on them today as the price for taking part in their daily lives.

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I. The Commission Has Clear Authority to Adopt Rules Preventing Unfair or Deceptive Acts or Practices, and an Obligation to Effectuate the FTC Act.

The ANPR seeks comment broadly, in Question 30, on the necessity for rules regarding “commercial surveillance and data security.”⁵ The ANPR itself sets forth the crystal clear basis of the Commission’s authority to adopt such rules.⁶ Section 5 of the Federal Trade Commission Act (“Act”) is mandatory, not hortatory. That section declares unlawful any “unfair or deceptive acts or practices in or affecting commerce.”⁷ It then permits the Commission to declare an act or practice unfair – and thus unlawful – so long as that act or practice “causes or is likely to cause substantial injury to consumers” and that injury “is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁸

Section 18 of the Act permits the Commission to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of [Section 5] . . .).”⁹ The Commission can proceed to a notice of proposed rulemaking “where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent,” based on the Commission’s issuance of cease and desist orders regarding such practices or if “any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.”¹⁰ But before doing so it must issue an ANPR, as it has dutifully done here.¹¹

⁵ ANPR, 87 Fed. Reg. at 51282, ¶ 30.

⁶ *See id.* at 51277.

⁷ 15 U.S.C. § 45(a)(1).

⁸ *Id.* § 45(n); *see also* ANPR, 87 Fed. Reg. at 51278.

⁹ 15 U.S.C. § 57a(a)(1)(B).

¹⁰ *Id.* § 57a(b)(3)(A)-(B).

¹¹ *Id.* § 57a(b)(2)(A).

The ANPR requests comment on the prevalence of such unfair or deceptive acts or practices in general. It asks a searching and comprehensive list of questions about specific risks from lax data security and from data uses that may be unfair, under the statutory parameters set out above. Yet even as it asks all of the right questions to elicit further information, the ANPR marshalls an alarming array of harmful practices using both bases available to the Commission under Section 18(b)(3): its past cease and desist orders and other enforcement actions, as well as voluminous amounts of “other information” documented by academics, widely reported in the press, and supplied by advocates, analysts, and individuals.¹²

A. The ANPR Follows the Authority Granted in Sections 5 and 18.

The ANPR precisely recites the statutory obligations in Sections 5 and 18, and methodically adheres to them, yet industry representatives have grumbled (wrongly) for some time now that the proceeding exceeds the Commission’s authority. In particular, the Interactive Advertising Bureau (“IAB”) took aim – in comments submitted a week before the deadline¹³ – at several of the Commission’s approaches and procedures. The ANPR does not expressly seek comment on Commission authority under Sections 5 and 18, yet IAB saw fit to challenge it. Unsurprisingly, this trade association that represents companies opposed to more meaningful regulation of their lucrative business practices strenuously attempts to distort the plain meaning of the statute and question the Commission’s fidelity to it. But these attacks are easily parried, to the extent they even require a response, and should not deter progress here.

IAB first claims that the ANPR tries to declare all “commercial surveillance” unfair or deceptive, when at least some data collection and use may be (at least partially or occasionally)

¹² See ANPR, 87 Fed. Reg. at 51278-81.

¹³ See Comments of Interactive Advertising Bureau, Commercial Surveillance ANPR, R111004 (filed Nov. 14, 2022) (“IAB Comments”).

beneficial or benign. That, according to IAB, is a conclusion reached not merely by the trade association itself but by a prior Commission too.¹⁴ We may set aside the fact that the ANPR provides an extensive list of harmful practices, whatever countervailing benefits may be claimed for these acts and others like them; and also the fact that an agency certainly may change its views over time, so long as it adequately explains the reasoned basis for those views,¹⁵ as it has done here. The chief problem with the sleight-of-hand IAB attempts is its gross mischaracterization of the Commission’s views, and the preliminary nature of the ANPR that IAB portrays as a final rule rather than the advance notice and start of the process that it is.

Undoubtedly, the ANPR takes a dimmer (or, as many people might agree, more realistic) view on the whole of what it names “commercial surveillance.” That is an admittedly less rosy term than IAB’s preferred euphemism, which describes data-driven targeting as a way of simply “optimizing” ads.¹⁶ Yet IAB fails to realize that what’s in the name the Commission assigns to these practices does not determine how rosy each may be. Nowhere does the ANPR declare that all “collection, aggregation, analysis, retention, transfer, or monetization of consumer data” is unfair or deceptive. In fact, the ANPR asks an exhaustive list of questions to gather comment on precisely whether and how any such practices injure consumers in ways they cannot reasonably avoid. The ANPR also asks, as it must under Section 5(n), about the potential benefits that such practices may provide to individuals and the economy as a whole. It does so in prominent places in its introductory sections as well as Questions 24 through 26, 40, and 48 through 50.¹⁷

¹⁴ *Id.* at 2, n.9 (citing Federal Trade Commission, *FTC Staff Comment to the NTIA: Developing the Administration’s Approach to Consumer Privacy*, at 11, 15-18 (filed Nov. 9, 2018)).

¹⁵ *See, e.g.*, *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

¹⁶ IAB Comments at 1.

¹⁷ *See, e.g.*, ANPR, 87 Fed. Reg. at 51278; *see also id.* at 51281 (“[T]he Commission invites public comment on . . . the balance of costs and countervailing benefits of such practices for consumers and competition.”); *id.* at 51282, ¶¶ 24-26; *id.* at 51283, ¶¶ 40, 48-50.

Conveniently ignoring the reality that the tone of the ANPR “suggests”¹⁸ precious little about the ultimate answers to the intensive inquiry the Commission has undertaken, IAB constructs a syllogism so bad that it rivals “all men are Socrates” for sheer falsity and credulity. IAB first reasons that “the Commission may not issue rules that address acts or practices that neither meet the standards of ‘unfair’ nor ‘deceptive’ acts or practices under Section 5 of the FTC Act.”¹⁹ True enough, and little more than a less eloquent restatement of the operative language in Section 5 itself, which the ANPR expertly recites. IAB then reiterates its view that “data-driven advertising significantly benefits consumers and competitions [sic],” positing that at least some specific data practices may be beneficial hence not unfair.²⁰

The conclusion IAB reaches from these two premises simply does not follow though, as the trade association asserts that the entire rulemaking therefore “exceeds” the Commission’s authority under Section 18.²¹ In other words: (1) the Commission may not treat as unlawful what it may not treat as unlawful; (2) some practices in which commercial entities engage may be lawful; therefore (3) the Commission cannot undertake any rulemaking in this area. Or in even shorter form: if the Commission cannot prohibit all “commercial surveillance,” it may prohibit none of it. IAB’s exaggerated argument does not withstand scrutiny. It essentially tries to cut-off the whole proceeding by demanding that the Commission do nothing unless it can satisfy a standard that IAB has conjured on its own, and suggesting that if there is any counter-example to the harmful practices that the ANPR and commenters have begun to catalog then the whole proceeding is *ultra vires*. This is simply not the case.

¹⁸ IAB Comments at 2.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 8.

²¹ *Id.* at 5.

B. The ANPR Properly Seeks to Gauge the Prevalence of Injurious Practices.

IAB's argument regarding "prevalence" suffers from the same flaw of putting the cart before the horse outside of the Federal Trade Commission Building. The ANPR quite properly seeks to understand how prevalent harmful data practices may be, just as the Commission must under Section 18(b)(3) before issuing a notice of proposed rulemaking that may follow the advance notice here. Yet as IAB would have it, it is in fact "impossible to prepare a record for what 'prevalent commercial surveillance practices' exist given that the definition of ANPR's definition of commercial surveillance is so broad"²²

A careful reader (or at least one that is not on any industry lobbying payroll) will have little trouble spotting the glaring omission in IAB's formulation of this test. The trade association again supposes the Commission has already found (or going forward, must find) that all data uses are harmful in order to find any of them harmful, once more misreading the ANPR to make it seem an impossible task. What the ANPR's text does instead, if read without the strategic deletions IAB employs, is seek comment on "the nature and prevalence of harmful commercial surveillance and lax data security practices" as well as "proposals for protecting consumers from harmful and prevalent commercial surveillance and lax data security practices." Far from attempting (much less needing) to complete IAB's supposedly impossible task, the ANPR seeks information on which specific practices are harmful, if any. That clearly leaves room for a potential conclusion that some data practices may not be harmful, just as IAB protests.²³

²² *Id.*

²³ ANPR, 87 Fed. Reg. at 51281 (emphases added); *see also id.* at 51277 ("Through this ANPR, the Commission aims to generate a public record about prevalent commercial surveillance practices or lax data security practices that are unfair or deceptive, as well as about efficient, effective, and adaptive regulatory responses.") (emphasis added). The only fair reading of the ANPR text making these distinctions and using these qualifiers is that the Commission knows full well that only some specific practices may be harmful, unfair, or deceptive, and that any rule it ultimately adopts may prevent only those practices that fit this description.

C. The ANPR Properly Seeks Comment on Alternative Approaches, Satisfying Any Duty It Has to Discuss Alternatives The Commission Actually Considers.

We will discuss in Part II below IAB's objections to the ANPR's focus on the civil rights implications of discriminatory data practices and disparate outcomes. But one last flawed objection to the Commission's general adherence to the Act bears mention first. IAB concocts several more instances in which it claims, wrongly, that the ANPR exceeds the Commission's authority or violates the requirements in Sections 5 and 18. One of these is a supposed failure in the ANPR "to include 'possible regulatory alternatives under consideration by the Commission[.]'"²⁴ But this language in Section 18 is not a positive command that an ANPR must propose alternatives to the approach the Commission is considering; it is instead a requirement that the ANPR contain such alternatives if and only if the Commission is indeed considering any. Section 18 requires an advance notice to contain alternatives that are in fact "under consideration by the Commission," but does not mandate that the Commission develop and consider any.

In any case, the ANPR does again seek the very information IAB falsely claims is missing before the proceeding even got off the ground. Question 30 asks about the sufficiency of "existing legal authorities and extralegal measures, including self-regulation" to prevent unfair or deceptive acts and practices. And in each category into which the ANPR sorts its 95 total questions, there is significant discussion of alternative approaches, trade-offs from regulation and failing to regulate, and the relative costs and benefits of different paths the Commission may pursue. As above, IAB's objections are a hollow complaint that the Commission should have completed its careful work before it even began, coupled with a decidedly self-contradictory and vague note of "gotcha" for the Commission's supposed pre-judgment.

²⁴ IAB Comments at 3 (citing, in part, 15 U.S.C. § 57a(b)(2)(A)(i)).

II. The Commission Has Clear Authority to Adopt Rules Treating Discriminatory Data Practices and Outcomes as Unfair Under Section 5.

A. *The Record the ANPR Is Building and Based On Contains Clear Evidence of Widespread Discriminatory Acts and Practices Affecting Commerce.*

The ANPR seeks comment, in Question 71 specifically, on the extent to which the Commission may “rely on its unfairness authority under Section 5 to promulgate antidiscrimination rules.”²⁵ This specific question follows several others about the nature and prevalence of discriminatory data practices, algorithms, and data processing outcomes.²⁶

More than three years ago, in partnership with the Lawyers’ Committee for Civil Rights Under Law, Free Press suggested that privacy protections must be re-calibrated and conceived of as safeguards against discriminatory practices and outcomes for people in protected categories. So it will come as no surprise that Free Press enthusiastically supports treating privacy rights as civil rights in precisely this way.²⁷ The ANPR cites legal analysis and grassroots advocacy conducted and coordinated by Free Press and its allies on just this point.²⁸ This year, we joined with Access Now and Ultraviolet to submit thousands of petition signatures calling on the Commission to initiate this action and prevent “companies’ exploitation of [] personal data, which has resulted in discriminatory practices against people of color, women, members of the

²⁵ ANPR, 87 Fed. Reg. at 51284, ¶ 71.

²⁶ See, e.g., *id.*, ¶ 68; see also *id.* at 51275-76 (“[C]ompanies’ growing reliance on automated systems is creating new forms and mechanisms for discrimination based on statutorily protected categories, including in critical areas such as housing, employment, and healthcare. . . . Critically, these kinds of disparate outcomes may arise even when automated systems consider only unprotected consumer traits.”) (emphasis in original).

²⁷ See Gaurav Laroia, David Brody, “Privacy Rights Are Civil Rights. We Need to Protect Them.”, Free Press Blog (Mar. 14, 2019), <https://www.freepress.net/blog/privacy-rights-are-civil-rights-we-need-protect-them> (“[T]he way tech companies collect, use and secure our personal information . . . has become a national priority. These companies have used our data to enable and sometimes even participate in discrimination against people of color, women, members of the LGBTQ community, religious minorities, people with disabilities, immigrants and other marginalized communities.”).

²⁸ See ANPR, 87 Fed. Reg. at 51276, n.47.

LGBTQIA+ community, religious minorities, people with disabilities, people living on low incomes, immigrants and other impacted groups.”²⁹

That popular outcry followed on a 2021 letter from 45 organizations working on civil rights, media democracy and consumer advocacy groups likewise urging the Commission to act against data abuses and discrimination.³⁰ The letter itself detailed a range of prevalent discriminatory and abusive data practices, illustrating a “widespread pattern of unfair or deceptive practices across all major spheres of . . . commerce including employment, finance, healthcare, credit, insurance, housing, and education.”³¹ And that letter in turn built on an even earlier letter sent to Chair Khan by the Senate Commerce Committee’s Subcommittee on Consumer Protection, Product Safety, and Data Security Chairman Blumenthal and eight other Senators.³² The Senate letters called on the Commission “to undertake a rulemaking process with the goal of protecting consumer data” and to “consider strong protections for the data of members of marginalized communities,” further explaining that “communities of color have faced setbacks in the fight to protect their civil rights as new forms of discrimination have proliferated on social media platforms.”³³

²⁹ See *id.* (citing Open Letter from Free Press, Access Now, and UltraViolet Members to Chair Lina M. Khan, Federal Trade Commission (May 12, 2022), https://act.freepress.net/sign/protect_privacy_civil_rights; see also Free Press, “Thousands Call on Federal Trade Commission to Make Privacy and Civil-Rights Rule on Data Protection,” Press Release (May 13, 2022), <https://www.freepress.net/news/press-releases/thousands-call-federal-trade-commission-make-privacy-and-civil-rights-rule-data>).

³⁰ Free Press, “45 Civil-Rights, Media-Democracy and Consumer-Advocacy Groups Urge FTC to Act Against Data Abuses and Discrimination,” Press Release (Oct. 27, 2021), <https://www.freepress.net/news/press-releases/45-civil-rights-media-democracy-and-consumer-advocacy-groups-urge-ftc-act>.

³¹ Letter from 45 Groups to Chair Lina M. Khan, Federal Trade Commission (Oct. 27, 2021) (citations omitted), <https://www.freepress.net/sites/default/files/2021-10/Letter-to-FTC-on-Privacy-Rulemaking-10-27-2021.pdf>.

³² Letter from Sens. Blumenthal, Schatz, Wyden, Warren, Coons, Luján, Klobuchar, Booker, and Markey, to Chair Lina M. Khan, Federal Trade Commission (Sept. 20, 2021), <https://www.blumenthal.senate.gov/imo/media/doc/2021.09.20%20-%20FTC%20-%20Privacy%20Rulemaking.pdf>.

³³ *Id.*

Instead of merely sitting back and hearing this call from lawmakers, advocates, and members of the public, the majority commissioners have already begun to heed it, and even lead it. They have begun to gather examples (from these letters and the many sources of “other information” available to the Commission) on widespread discriminatory practices and outcomes affecting commerce. And they rightly and persuasively call in their statements on this ANPR to consider protections against such acts and practices. Chair Khan explains that “[t]he data practices of today’s surveillance economy can create and exacerbate deep asymmetries of information – exacerbating, in turn, imbalances of power.” When that data is used to provide everything “from health care and housing to employment and education . . . what’s at stake with unlawful collection, use, retention, or disclosure is not just one’s subjective preference for privacy, but one’s access to opportunities in our economy and society, as well as core civil liberties and civil rights.”³⁴

Before Chair Khan joined the Commission, Commissioner Slaughter had already begun to lay the groundwork for this shift in understanding privacy rights as civil rights. As her ANPR statement notes, she began then to articulate her belief “that case-by-case enforcement in the space of data abuses was not effective,” and that unless and until Congress passes a new federal privacy law, “the Commission should use its authority under Section 18 to initiate a rulemaking process.”³⁵ She suggests, forcefully and correctly, that “[d]ata abuses are a civil rights issue, and commercial surveillance can be especially harmful from a civil rights and equity perspective.”³⁶

Commissioner Bedoya is the most recent majority Commissioner to be confirmed, but likewise has a longstanding commitment to protecting members of marginalized and targeted

³⁴ ANPR, 87 Fed. Reg. at 51287 (Statement of Chair Lina M. Khan).

³⁵ *Id.* at 51288 (Statement of Commissioner Rebecca Kelly Slaughter).

³⁶ *Id.* at 51291.

communities from “[e]merging discrimination” in our data-driven economy. He agrees “with Commissioner Slaughter and Chair Khan that our unfairness authority is a powerful tool for combatting discrimination.” As Commissioner Bedoya explains, “[g]iven significant gaps in federal antidiscrimination laws, especially related to internet platforms and technology companies, I believe the Commission must act to protect people’s civil rights.”³⁷

As indicated above in these comments, and discussed in somewhat more detail in Part III below: the record built in this proceeding, and already reflected in the enforcement actions and the other sources the ANPR cites, will show a widespread pattern of discriminatory and thus unfair acts or practices in or affecting commerce. Yet IAB saw fit to challenge the Commission’s authority once more, and once more failed in that challenge.

B. The Commission Should Define Discriminatory Practices In or Affecting Commerce as Unfair Under Section 5, Even When the Commission Is Not the Sole Regulator of the Product, Service, or Industry Sector in Question.

In its early-filed comments in response to the ANPR, IAB contends that Congress has “not delegated the FTC authority related to these topics” such as civil rights and antidiscrimination law, and that Congress in fact “has expressly delegated such authority to other agencies.”³⁸ As with IAB’s previous attempts to scuttle this proceeding, the trade association’s arguments here misstate the facts and the law in some relatively minor respects, but always on the way to utterly missing the major point.

On the minor misstatement, as the ANPR itself notes, Congress did grant the Commission express authority in the Equal Credit Opportunity Act to protect individuals from

³⁷ *Id.* at 51293 (Statement of Commissioner Alvaro M. Bedoya) (citations omitted).

³⁸ IAB Comments at 8.

“discrimination on the basis of race, color, religion, national origin, sex, marital status, receipt of public assistance, or good faith exercise of rights under the Consumer Credit Protection Act.”³⁹

Far more important than this IAB omission, however, is the fact that Section 5 makes unlawful any and all unfair acts or practices in or affecting commerce, so long as they meet the standards in Section 5(n). The Act then permits the Commission to define specific acts and practices as unfair by rule, so long as they meet the rulemaking and advance notice requirements in Section 18. The Act does so – subject also to industry-specific exceptions in Section 5(a)(2) and elsewhere, on which IAB does not and cannot rely – without regard for whether Congress has delegated regulatory authority over such industries or such practices to another agency.

This is then by design a one-way ratchet, intended to protect consumers (as broadly defined in the ANPR⁴⁰) from unfair acts or practices in or affecting commerce under the Commission’s jurisdiction. While the Commission does not have plenary civil rights authority to prevent discrimination in all fields of endeavor or industries that may (or may not) be regulated by other federal agencies, it does have jurisdiction over any unfair act or practice in or affecting commerce. Thus, if a commercial practice “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves” and if it is “not outweighed by countervailing benefits to consumers or to competition,”⁴¹ it does not somehow fall out of the Commission’s jurisdiction simply because the practice implicates civil rights, discriminates unlawfully, or causes such substantial injury to members of protected classes.

³⁹ ANPR, 87 Fed. Reg. at 51278.

⁴⁰ *See id.* at 51277 (defining consumer for purposes of the ANPR to include “businesses and workers, not just individuals who buy or exchange data for retail goods and services,” consistent with “the Commission’s longstanding practice of bringing enforcement actions against firms that harm companies as well as workers of all kinds.”).

⁴¹ 15 U.S.C. § 45(n).

Nor should it. As the majority commissioners deftly explain in their separate statements accompanying the ANPR, any such discriminatory act or practice can be readily understood as unfair under Section 5. For example, Commissioner Bedoya neatly sums up why discriminatory harms are unfair under the Act. “When a business substantially injures a person because of who they are, and that injury is not reasonably avoidable or outweighed by a countervailing benefit, that business has acted unlawfully.”⁴² Building on his analysis of the gaps in federal antidiscrimination laws for the internet era rather than the blanket coverage IAB portrays, he explains that “Title VII of the Civil Rights Act of 1964 covers employers and employment agencies, but does not directly address hiring technology vendors, digital sourcing platforms, and other companies that intermediate people’s access to employment opportunity.”⁴³

Commissioner Slaughter likewise punctures IAB’s argument that unfair practices and civil rights concerns are somehow non-overlapping. “The FTC’s mission to protect consumers from unfair or deceptive practices in commerce must include examining how commercial practices affect the marginalized and vulnerable,”⁴⁴ she writes, illustrating that commercial data collection or use remains within the Commission’s jurisdiction and mandate to assess for fairness even if – perhaps especially if – it impacts people with characteristics protected by civil rights laws. Thus, as she summarizes it: “Discrimination based on protected-class status is obviously unfair in the colloquial sense and may sometimes be unfair in Section 5 terms as well.”⁴⁵

⁴² ANPR, 87 Fed. Reg. at 51293 n.11 (Statement of Commissioner Alvaro M. Bedoya) (emphasis in original).

⁴³ *Id.* n.12.

⁴⁴ *Id.* at 51291 (Statement of Commissioner Rebecca Kelly Slaughter).

⁴⁵ *Id.* Commissioner Slaughter’s delineation, depicting the difference between discriminatory practices that are unfair colloquially versus those that are unfair and unlawful, also defeats IAB’s preposterous argument that this Commission has in advance attempted to declare all commercial surveillance practices unfair merely by issuing the ANPR. *See supra* Part I.A.

Chair Khan acknowledges the importance of understanding the discriminatory outcomes that modern data processing and algorithms may produce: “Automated systems used by firms sometimes discriminate based on protected categories – such as race, color, religion, national origin, or sex – including in contexts where this discrimination is unlawful.”⁴⁶ She reiterates the questions the ANPR asks about whether the Commission should consider new rules in this area, but there is no dispute that it can. As she suggests, “[t]he fact that current data practices can have such consequential effects heightens both the importance of wielding the full set of tools Congress has given us, as well as the responsibility we have to do so. . . . Section 18 of the FTC Act grants us clear authority to issue rules that identify specific business practices that are unlawful by virtue of being ‘unfair’ or ‘deceptive.’”⁴⁷ That responsibility cannot, and must not, disappear when the unfairness in question is based on discriminatory acts and outcomes.

IAB’s assertions to the contrary are patently false. They would lead to impractical and immoral results. The Act does not expressly list civil rights violations as examples of unfair and injurious acts affecting commerce within Section 5’s scope. IAB’s atextual attempt to read such discrimination out of Section 5, however, is based on the dubious suggestion that other agencies have those bases covered, even in a rapidly evolving and largely unregulated data economy. Just because there are laws against discrimination in housing, lending, employment, education, and healthcare, the Commission should not sit idly by if automated decisionmaking processes, online advertising, or other digital practices within its special expertise and longstanding jurisdiction are blatantly unfair under Section 5. That is not what the Act commands nor what the Commission should do, even if and as Congress engages in serious but still unfinished deliberations over new laws more explicitly preventing data abuses against people in protected categories.

⁴⁶ *Id.* at 51288 (Statement of Chair Lina M. Khan).

⁴⁷ *Id.* at 51287.

III. The Commission Should Propose Rules, Upon Review of the ANPR Record, to Require Data Minimization, Prevent Discriminatory Data Processing Practices and Outcomes, and Establish Penalties for First-Time Violations of These Trade Rules.

The precise rules that the Commission may formally propose, upon review of the record compiled in response to the ANPR, must await that full and fair review. Yet the ANPR itself, along with submissions, correspondence, and press reports that prompted the Commission to issue it in the first place, already point the way to the need for trade rules regulating and preventing certain widespread and perniciously unfair practices.

The ANPR catalogs a wide range of Commission enforcement actions initiated on a case-by-case basis concerning the same kinds of data privacy and security issues.⁴⁸ These include enforcement actions against improper collection, tracking, use, sale, and public disclosure of private health and financial information. And whether the personal information in jeopardy is strictly or even remotely commercial in the eyes of the individuals from whom it is obtained, various companies, data brokers, and bad actors certainly have no difficulty monetizing this data – through outright fraud and extortion, or more typically by targeting ads and information at the individuals they seek to influence and persuade.⁴⁹

This type of record evidence and observation, garnered from the Commission’s own cease-and-desist orders and other enforcement actions, is exactly the type of information that Section 18 contemplates as one basis for the Commission to proceed. It can determine that harmful practices are prevalent enough to justify issuance of a notice of proposed rulemaking

⁴⁸ See ANPR, 87 Fed. Reg. at 51278-80.

⁴⁹ See DDL Comments at 3, n.3 (citing Shoshana Zuboff, *The age of surveillance capitalism: The fight for a human future at the new frontier of power* (First edition, 2019); Dipayan Ghosh, “What is Microtargeting and What is it Doing in our Politics?” Mozilla (Oct. 4, 2018), <https://blog.mozilla.org/en/products/firefox/microtargeting-dipayan-ghosh/>; Tech Transparency Project, Amazon’s Data Dragnet (Jan, 22, 2021), <https://www.techtransparencyproject.org/articles/amazons-data-dragnet>; Ashley Capoot, “Apple Reportedly Plans to Put Ads in More Apps on Your iPhone,” CNBC (Aug. 15, 2022), <https://www.cnbc.com/2022/08/15/apple-reportedly-plans-to-put-ads-in-more-apps-on-your-iphone.html>.

that could (and should) follow this ANPR.⁵⁰ In the remainder of these comments, Free Press will answer some of the ANPR’s questions on what to do about these harms, and in light of mounting evidence of such harms submitted in response to this advance step in the rulemaking process.

A. Enforceable Data Minimization Requirements Preventing Collection of Extraneous Information Would Not Only Reduce the Risk from Breaches, But Reduce the Risk of Discriminatory Decisionmaking and Harmful Data Sharing.

The ANPR defines the term “data security” to mean not only breach risk mitigation, other data management and retention practices, and breach notifications, but also data minimization.⁵¹ Free Press agrees with the glaring need for companies to minimize the types and sheer amounts of data they collect to reduce the risk of breaches, hacking, and fraud before they happen, plus lessen the devastating outcomes of data security breaches after they happen.⁵² Yet we also believe the Commission can and should propose trade rules going forward to require data minimization, and expressly to prevent collection and use of data that companies do not need in order to provide the product or service that they ostensibly offer to their users.

In answer to the ANPR’s specific Questions 43, 48, and 50 on this subject, the Commission should indeed require companies to collect, retain, use, or transfer consumer data only to the extent necessary to deliver the specific service that a given individual consumer explicitly seeks, or services from the same entity that are compatible with that specifically sought offering.⁵³ In our preliminary view, the Commission need not set data use limits “beyond a certain predefined point” other than this type of necessary-use limitation. But it should be skeptical of claims from advertisers, app makers, data processors, and data brokers underlying

⁵⁰ 15 U.S.C. § 57a(b)(3).

⁵¹ ANPR, 87 Fed. Reg. at 51277.

⁵² See, e.g., *id.* at 51275, nn. 29-30; *id.* at 51283, ¶ 47.

⁵³ See *id.* at 51283, ¶ 43.

this ecosystem that online services offered at no fee to users – other than the implicit but hidden price people pay when surrendering their data in exchange for superficially “free” or low-priced products and services – cannot survive sensible minimization requirements and use limits.⁵⁴

The Commission’s ultimate rule proposals on this topic might countenance benefits that consumers obtain from ad personalization and lawful price differentiation. They might even consider benefits that individuals and the economy as a whole derive from services subsidized by or wholly supported by advertising dollars, at least when that advertising and marketing is communicated directly by the “first party” commercial entity offering the service to its customers. But the Commission should not stop at rules preventing only the deceptive over-collection and misuse of data, undisclosed (as it so often is, at least in any effective way) to the individuals surveilled by commercial entities.

There are specific practices that are unfair. They cause substantial, unavoidable injury to consumers, not offset by any purported benefits to those consumers or competition more broadly, even when that data collection, use, or disclosure is in theory known and consented to by impacted individuals. That is especially the case when over-collected data is used and misused to generate revenue from services that consumers did not request; when those misuses deprive people of equal commercial opportunities by allowing them to be excluded from certain offerings; and when that over-collection generates a bigger honeypot for hackers and criminals.

The Commission thus should not limit itself, as Question 46 suggests, to “data minimization or purpose limitations” only applicable to “certain designated practices or services” that may be deemed especially sensitive, like healthcare or finance.⁵⁵ As Free Press has long held, while those types of information are undoubtedly personal and sensitive for the vast

⁵⁴ See *id.*, ¶¶ 48, 50.

⁵⁵ See *id.*, ¶ 46.

majority of people, the government should not be in the business of deciding that other types of data are somehow not potentially private and sensitive to someone, and so deserving of stringent protections too.

B. The Commission Should Prevent the Use of Data Processing Practices That Produce Discriminatory Outcomes Against Recognized Protected Classes and Other Marginalized Groups Across All Commercial Sectors Within Its Jurisdiction.

The ANPR asks important questions about unfair practices stemming from discrimination based on protected categories.⁵⁶ We have already touched on the Commission’s authority and obligation to address such practices in Parts I and II above, but the need for rules bears repeating, and the answers to specific questions posed in this item are important if still developing.

The scope and scale of the information about such discriminatory harms that the ANPR has already marshaled is extensive and appalling when it comes to the real-world impacts of such commercial practices.⁵⁷ For example, the ANPR reports, alongside many other examples of injurious and unfair practices, that “some employers’ automated systems have reportedly learned to prefer men over women”; that “lenders’ use of educational attainment in credit underwriting might disadvantage students who attended historically Black colleges and universities”; and that “the Department of Justice recently settled its first case challenging algorithmic discrimination under the Fair Housing Act for a social media advertising delivery system that unlawfully discriminated based on protected categories.”⁵⁸

Correspondence sent to the Commission on this topic in advance of the ANPR’s release, along with comments already submitted and still to come prior to today’s deadline, further

⁵⁶ See *id.* at 51284, ¶¶ 65-72.

⁵⁷ See, e.g., *id.* at 51275-76 (“Companies’ collection and use of data have significant consequences for consumers’ wallets, safety, and mental health.”).

⁵⁸ *Id.* at 51276.

illustrate the problems at hand. For instance, comments submitted today by 21 of members of the Disinfo Defense League⁵⁹ call on the Commission to “prevent digital discrimination against protected classes and impose penalties on companies failing to adhere to existing civil rights frameworks.”⁶⁰ In support of that call, we and our partners in DDL provide a list of discriminatory practices including some of the seminal cases the ANPR mentions and other notable data abuses too.⁶¹

In response to what is already a flood of damning information about specific, unfair, discriminatory data practices and prevalent patterns, the ANPR asks in Question 67 whether it should “consider new trade regulation rules that bar or somehow limit the deployment of any system that produces discrimination, irrespective of the data or processes on which those outcomes are based.”⁶² Free Press submits that instead of barring deployment of any technology, algorithm, or other decision-making system, the Commission should require auditing of these systems for the impact these processes have, and then hold companies accountable for any discriminatory intent animating and disparate impacts arising from such practices.

Question 68 asks whether the Commission should “focus on harms based on protected classes” and “consider harms to other underserved groups that current law does not recognize as protected from discrimination (*e.g.*, unhoused people or residents of rural communities).” The

⁵⁹ Free Press is a member of the DDL, which is a distributed national network of over 230 grassroots, community-based organizations that are building a collective defense against disinformation campaigns that deliberately target Black, Latinx, Asian American, and other communities of color.

⁶⁰ DDL Comments at 4.

⁶¹ *See id.* at 5-7 (“Researchers from the University of California found that an algorithm widely used in U.S. hospitals to allocate healthcare to patients systematically discriminated against Black people, who were less likely than equally sick white counterparts to be referred to hospitals. . . . Meta has allowed alleged discriminatory employment ad targeting on the basis of gender and age. . . . Google’s algorithms drive discriminatory search results, pushing users to image search results that under-represent women and women of color.”).

⁶² ANPR, 87 Fed. Reg. at 51284, ¶ 67.

answers here are yes and yes.⁶³ Existing civil rights laws can and should guide the Commission in its examination of unfair acts and practices affecting commerce. Yet the Commission may craft additional protections too for vulnerable and disempowered groups, especially and at least when they are based on unprotected traits that may be proxies for protected characteristics.⁶⁴

Lastly, Question 69 asks if the Commission should “consider new rules on algorithmic discrimination in areas where Congress has already explicitly legislated, such as housing, employment, labor, and consumer finance” or instead “consider such rules addressing all sectors.”⁶⁵ Free Press submits that the latter course is best, proposing rules that address discrimination in all commerce under the Commission’s jurisdiction, because discrimination certainly can occur and be “unfair” under Section 5 even where Congress has not expressly addressed the precise civil rights issue in question. Yet as Part II above explains, Commission rules defining discriminatory acts and practices as unfair need not and must not leave uncovered any such violations arising in industries already putatively governed by other civil rights laws.

C. Civil Penalties Imposed Under Section 5 for First-Time Violations of Trade Rules Established Under Section 18 Would Provide a Clearer Guide and Better Incentives for Compliance With the Statute’s Prohibition of Unfair Practices.

The ANPR’s Item III.b, on the Commission’s approaches to case-by-case enforcement and rulemaking, lays out the improved enforcement, and effectiveness from establishing trade rules under Section 18.⁶⁶ As the Commission (and majority commissioners’ separate statements)

⁶³ *Id.*, ¶ 68.

⁶⁴ *See id.* at 51276, n.45.

⁶⁵ *Id.* at 51284, ¶ 69.

⁶⁶ *See id.* at 51280.

explain, the Act limits the remedies available and civil penalties that the Commission may impose in enforcement actions on companies for first-time violations of Section 5.⁶⁷

As the ANPR notes, the “fact that the Commission does not have authority to seek penalties for first-time violators may insufficiently deter future law violations” and “may put firms that are careful to follow the law, including those that implement reasonable privacy-protective measures, at a competitive disadvantage.”⁶⁸ Yet with new trade rules adopted and in place at the conclusion of this extended rulemaking proceeding, the Commission could not only “set clear legal requirements or benchmarks by which to evaluate covered companies”; it would also be able to “impose civil penalties for first-time violations of duly promulgated trade regulation rules.”⁶⁹ Free Press supports the ultimate adoption of good rules that the Commission may propose at the conclusion of this proceeding, both for the benefit of providing greater clarity and certainty for the people and communities protected by those rules, and for the sake of encouraging better compliance with the Act through more effective deterrents.

⁶⁷ 15 U.S.C. § 45(l).

⁶⁸ ANPR, 87 Fed. Reg. at 51280.

⁶⁹ *Id.* (citing 15 U.S.C. § 45(m)).

Conclusion

The Commission has the authority to conduct the rulemaking it commenced with the ANPR, and to define specific harmful data practices as unfair by rule and thus unlawful under Section 5. That includes the authority to assess and then prevent harms especially and disproportionately inflicted on people of color and members of other categories protected by civil rights laws, as such discriminatory acts and commercial practices remain well within the Commission's purview. The Commission should, upon concluding this initial ANPR process, propose rules based on the mounting and already substantial evidence of such harms. The ANPR is the first, and long-awaited yet still timely step on the road to protecting internet users and all participants in our modern economy from rampant data misuse and abuse.

Respectfully Submitted,

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