

TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Trade Regulation Rule on Commercial Surveillance and Data Security

FTC-2022-0053-0001

November 21, 2022

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INTRODUCTION

As Chairwoman Lina Khan recently noted at the recent Privacy + Security Forum, the notice-and-choice model of privacy has proven inadequate to protect consumers from a variety of harms. On this basic fact, there has long been broad consensus among privacy scholars.¹ What comes next is, Khan said, a “major question” for policymakers to decide. Indeed, it is. Courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”² Yet Section 5’s broad language provides no clear statement empowering the FTC to decide such major questions as whether America should fundamentally change its approach to data governance by moving to something more like the European Union’s General Data Protection Regulation. And if it did, Section 5 might constitute an impermissible delegation of lawmaking power. The Commission should leave the “major questions” about how data may be collected, used, and processed to the democratically elected representatives of the American people, who are closer to enacting comprehensive baseline privacy legislation than ever before. The last FTC Chairman, Joe Simons, put it best when he said this to lawmakers in 2020:

I believe we need more authority, which is why I urge you to continue your hard work to enact privacy and data security legislation that would be enforced by the FTC. As policymakers, it is appropriate for you to make the difficult value-based decisions underlying new privacy protections.³

Making such decisions simply is not an appropriate role for the FTC—or any other agency. If there is a role for Magnuson-Moss⁴ rulemaking, it lies in data security, where the Commission has long brought enforcement actions resting on deception to ensure that consumers get the data security they are promised. If the Commission chooses to make rules based on its unfairness authority, those rules should focus on clear and demonstrable monetary, physical, safety, or health injuries within the FTC’s expertise. When in doubt, the

¹ Fred H. Cate, *The Failure of Fair Information Practice Principles*, in CONSUMER PROTECTION IN THE AGE OF THE INFORMATION ECONOMY 343 (2006), <https://ssrn.com/abstract=1156972>; Paul M. Schwartz & Daniel Solove, *Notice and Choice: Implications for Digital Marketing to Youth*, BERKELEY MEDIA STUD. GRP. 2–3 (2009), https://www.changelabsolutions.org/sites/default/files/documents/Notice_and_choice.pdf; Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793 (2021).

² *West Virginia v. EPA*, No. 20-1530, slip op. at 11 (U.S. June 30, 2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

³ Prepared Remarks of Chairman Joseph J. Simons, Oversight of the Federal Trade Comm’n, Senate Comm. On Commerce, Science, and Transportation at 2 (Aug. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578975/simons_-_oral_remarks_hearing_on_oversight_of_ftc_8-5-20.pdf

⁴ Magnuson-Moss Warranty-Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections of 26 U.S.C.).

Commission should leave it to Congress to write rules. Avoiding rulemaking proposals targeting more subjective harms will help the Commission stick to what is constitutionally permissible: fact-finding, rather than making policy judgments, and only about “minor” questions well within its consumer protection expertise. More subjective theories of harm should be addressed through case-by-case enforcement. An enforcement policy statement might, if subject to public comment, be a fruitful way to develop such concepts. But the Commission should proceed cautiously even in issuing such informal guidance, given that the agency has very rarely actually litigated such theories.

After the FTC’s last rulemaking spree in the 1970s, Congress added procedural safeguards to avoid future abuse of Mag-Moss. Taking those safeguards seriously will help the Commission avoid constitutional challenges to whatever rules it might issue. Section 18 requires the FTC to focus its rulemaking inquiries at the earliest possible stage of the process so that those potentially impacted by the rules can meaningfully inform the process *before* the Commission proposes any draft rules and starts winnowing down the range of “disputed issues of material fact.”⁵ This Advance Notice of Proposed Rulemaking (ANPR) offers no such focus. It might pass muster as a Notice of Inquiry issued by other agencies, but not as an ANPR required by the Magnuson-Moss Act. The Commission should remedy this by reissuing ANPRs focused on discrete issues, *e.g.*, data security, before issuing draft rules. If the Commission proceeds with rulemakings, it will need to assure the public—and the courts—that it is acting within the authority Congress gave it: to develop and weigh facts, not make policy judgments. The best ways to do that would be to appoint hearing officers who are truly independent of the Chair, such as the ALJs who have presided over all past Mag-Moss hearings, and to give the Bureau of Economics an active and public role in the process.

I. Any Proposed Rules Must Respect the Constitution’s Separation of Powers

In drafting any proposed rules, the Commission must begin by considering two constitutional limitations upon its rulemaking power. First is the major questions doctrine:

in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis

⁵ 16 C.F.R. § 1.11(b).

for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims.⁶

In other words, courts “presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”⁷ The Supreme Court has struck down multiple agency rules for lack of clear statutory authorization under the major questions doctrine.⁸ Section 5 is anything but “clear” about what it authorizes the Commission to regulate.

If this Commission’s answer is—as it often seems to think—*everything*, the agency may find itself running straight into the nondelegation doctrine, which “bars Congress from transferring its legislative power to another branch of Government”⁹—regardless of whether there is a clear statement of Congress’s intent to do so. A majority of the Supreme Court has recently signaled that it may revive this test in ways that could cause the court to curtail the FTC’s powers over unfairness—or perhaps even strike down Section 5 altogether as an unconstitutional delegation of legislative power. The FTC’s best defense against such a catastrophe will be to take a cautious approach to the meaning of unfairness and to follow the procedural requirements of Magnuson-Moss scrupulously.

A. The FTC May Not Regulate “Major Questions”

In our increasingly data-driven world, much depends on how data may be collected, processed, and transferred. Commissioner Rebecca Slaughter “prefer[s] the term ‘data abuses’ to the narrower language of ‘privacy’” because “rampant data collection, sharing, and

⁶ *West Virginia v. EPA*, slip op. at 19 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324). In general, clear statement “rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds;” these rules thus help courts “act as faithful agents of the Constitution.” *Id.* at 2 (Gorsuch, J., concurring) (quoting A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 169 (2010)).

⁷ *Id.* at 19 (quoting *United States Telecom. Ass’n v. FCC*, 855 F.3d 381, 419 (2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

⁸ See *West Virginia v. EPA*, *supra* note 2 (The EPA does not have the authority to regulate greenhouse gas emissions in virtually any industry under the “major questions” doctrine without clear Congressional authorization (quoting *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302 (2014) (The EPA does not have the authority to deem greenhouse gas emissions from small stationary sources as an “air pollutant”); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (The Attorney General could not rescind the license of a physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.* 529 U.S. 120 (2000) (The Food and Drug Administration’s authority over “drugs” and “devices” does not extend to the power to regulate, and even ban, tobacco products); *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (The Centers for Disease Control and Prevention do not have the authority to institute a nationwide eviction moratorium in response to the COVID-19 pandemic.); *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994) (The Federal Communications Commission cannot authorize a permissive detariffing policy for communications common carriers)).

⁹ *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality opinion of Kagan, J.).

exploitation harms consumers and competition in ways that affect nearly every aspect of our lives.”¹⁰ The economic significance of these questions is clear. The direct costs of compliance by European companies alone with Europe’s new General Data Protection Regulation have been estimated at above \$7.5 billion.¹¹ Replicating the GDPR in the United States could have far more significant indirect effects in terms of the lost consumer efficiencies (estimated at \$1.8 billion annually), reduced access to data and thus reduced innovation (\$71 billion), and reduced effectiveness of advertising (estimated at \$32.9 billion).¹² Whatever the precise numbers, the scale of the costs is clear.¹³ If regulating potential “data abuses” does not entail “decisions of vast economic and political significance,” what question possibly could?

The Court has applied the major questions doctrine simply because it has found that an agency exceeded its expertise in handling major questions. In *King v. Burwell* (2015), the Court ultimately upheld a key provision of the Affordable Care Act but refused to defer to interpretation of that provision by the Internal Revenue Service:

The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to

¹⁰ Statement of Commissioner Rebecca Slaughter before the Subcommittee on Consumer Protection and Commerce at 1 (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592977/final_slaughter_opening_statement_ec_72821.pdf.

¹¹ Comments of Washington Legal Foundation at 5 (citing Jeremy Kahn, *It'll Cost Billions for Companies to Comply with Europe's New Data Law*, BLOOMBERG NEWS (Mar. 22, 2018), <https://www.bloomberg.com/news/articles/2018-03-22/it-ll-cost-billions-for-companies-to-comply-with-europe-s-new-data-law>).

¹² Ashley Johnson & Daniel Castro, *Maintaining a Light-Touch Approach to Data Protection in the United States*, INFO. TECH. & INNOVATION FOUND. (Aug. 8, 2022), <https://itif.org/publications/2022/08/08/maintaining-a-light-touch-approach-to-data-protection-in-the-united-states/>.

¹³ PONEMON INSTITUTE LLC, *THE RACE TO GDPR: A STUDY OF COMPANIES IN THE UNITED STATES & EUROPE* at 22 (2018), <https://s3-us-east-2.amazonaws.com/mwe.media/wp-content/uploads/2019/04/15202019/Race-to-GDPR.pdf> (The average annual budget for organizations complying with GDPR is \$13 million); J. Howard Beales & Andrew Stiver, *An Information Economy Without Data* (Nov. 2022), <https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf> (finding that firms with exposure to GDPR restrictions experienced an 8 percent reduction in profits in 2018 and a 2 percent drop in sales (citing Chinchih Chen, Carl Benedikt Frey & Giorgio Presidente, *Privacy Regulation and Firm Performance: Estimating the GDPR Effect Globally* (Oxford Martin Sch., Univ. of Oxford, Working Paper No. 2022-1, 2022), <https://www.oxfordmartin.ox.ac.uk/downloads/Privacy-Regulation-and-Firm-Performance-Giorgio-WP-Upload-2022-1.pdf>). See also William Rinehart, *What is the cost of privacy legislation?: A collection of estimates.*, CTR. FOR GROWTH AND OPPORTUNITY (Nov. 17, 2022), <https://www.thecgo.org/benchmark/what-is-the-cost-of-privacy-legislation/>.

this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.¹⁴

Congress has long *considered* assigning general responsibility for data security or privacy to the FTC—but never done so. The Commission may think of itself as America’s consumer cop on the digital beat, but Congress has assigned it responsibility only in discrete areas. Indeed, Congress recently already blocked another agency from writing broad privacy rules based on ambiguous statutory language.¹⁵

Commissioner Slaughter acknowledges that “the questions we ask in the ANPR and the rules we are empowered to issue may be consequential,” but she insists “they do not implicate the ‘major questions doctrine.’”¹⁶ The Supreme Court’s recent decision in *West Virginia v. EPA* is different, she says, because it involved a “novel claim of authority” while “[t]he FTC is exercising here, however, its central authority: to define unfair or deceptive acts or practices, as it has done in enforcement matters for nearly 100 years under Section 5 and in rulemaking under Section 18 for nearly 50.”¹⁷ That’s rather like saying that the EPA has always been in the business of “protecting the environment.” If that were enough, the EPA would have prevailed in the *West Virginia* case. It did not.

Not all questions raised by the Advance Notice of Proposed Rulemaking are necessarily “major.” Many questions about “data abuse” turn on applying longstanding principles of consumer protection law. Consumers *should* get what they have been promised.¹⁸ What is meant by claims of “reasonable” data security or “secure encryption” might well be amenable to rulemaking based on Section 5’s prohibition of deception.¹⁹

¹⁴ King v. Burwell, 576 U.S. 473, 485 (2015).

¹⁵ Act of Apr. 3, 2017, Pub. L. No. 115–22, 131 Stat. 88 (disapproving and nullifying the FCC’s online privacy rule under the Congressional Review Act).

¹⁶ Statement of Commissioner Slaughter Regarding the Commercial Surveillance Data Security Advance Notice of Proposed Rulemaking at 5 (Aug. 11, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-slaughter-regarding-commercial-surveillance-data-security-advance-notice>.

¹⁷ *Id.* at 5 n.21.

¹⁸ See *In re GeoCities*, No. C-3850 (F.T.C. Feb. 5, 1999) (“[Geocities] has represented, expressly or by implication, that the personal identifying information collected through its New Member Application form is used only for the purpose of providing to members the specific e-mail advertising offers and other products or services they request in truth and in fact...Respondent has also sold, rented, or otherwise marketed or disclosed this information, including information collected from children, to third parties who have used this information for purposes other than those for which members have given permission... Therefore, the [representation] was, and is, false or misleading).

¹⁹ See *infra* § II.E.

What is potentially “novel” here is not the notion that the FTC has the power to police unfair or deceptive acts or practices (UDAP) case by case or to write rules governing them. Plainly, the Commission has both powers. Rather, what is potentially novel is *how* the Commission might wield its, in particular, its unfairness power. Most obviously, the Commission proposes to reinterpret Section 5’s unfairness language as an anti-discrimination statute, a theory no court has ever considered and that the Commission itself proposed for the first time in an enforcement action only *after* issuing this ANPR.²⁰

The potential for novel claims of authority here is great because sussing out unfairness has always been dangerously close to what lawmakers do in legislating—making policy—and because, despite efforts by Congress to constrain unfairness, the potential remains for the Commission to apply unfairness in ways that are dangerously elastic. Four decades after the FTC issued its 1980 Unfairness Policy Statement (UPS)²¹ and nearly a quarter century after Congress enshrined the core of that document into Section 5(n), courts have told us little about the basic elements of unfairness.²² The Commission has increasingly invoked the power to regulate privacy and data security, but such enforcement actions have been resolved almost entirely through settlements and consent decrees, where the respondent agrees to abide by an ad-hoc regulatory mechanism provided by the FTC, in exchange for not having to admit fault or liability.²³ These documents reflect nothing more than the Commission’s assertions about the meaning of Section 5. As the old joke goes: “It’s turtles all the way down.” While other ANPRs cite court decisions establishing the unlawfulness of the practices the FTC is considering regulating, this ANPR cannot do so because there *are* no such decisions.²⁴ Insofar as the ANPR points to news reports and the like, as (former) Commissioner Phillips notes, it “contemplates banning or regulating conduct the Commission has never once identified as unfair or deceptive. That is a dramatic departure even from recent Commission rulemaking practice.”²⁵

²⁰ See *infra* § I.D.

²¹ Letter from Michael Pertschuk, Chairman, Fed. Trade Comm’n, and Paul Rand Dixon, Comm’r, Fed. Trade Comm’n, to Wendell H. Ford, Chairman, House Commerce Subcomm. on Commerce, Sci. & Transp. (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> [hereinafter UPS].

²² See *infra* at 19-20.

²³ See *infra* note 104 and associated text; *infra* § II at 19-21.

²⁴ Dissenting Statement of Comm’r Noah Phillips, Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking at 5 (Aug. 11, 2022) (hereinafter “Comm’r Phillips ANPR Dissent”), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

²⁵ *Id.* at 2.

Because of its breadth, the concept of unfairness has historically embroiled the Commission in the most “major” policy questions in American life. After the Supreme Court’s 1972 decision in *FTC v. Sperry & Hutchinson* seemed to bless the FTC’s open-ended conception of unfairness as divination of “public values,”²⁶ this “beckoning invitation ... for the FTC to become the second most powerful legislature in Washington proved irresistible.”²⁷ The FTC proposed rules that “would have specified warranty terms and regulated warranty performance in the mobile home industry; required over-the-counter drug advertising to use precisely the same terms approved for labels; required detailed disclosures of the possible side effects of over-the-counter antacids; and, eventually, banned all advertising directed to children.”²⁸ Over the last year, the Commission has launched a spate of rulemakings²⁹ of which this is only the most expansive and—because of its proposed reliance of unfairness and on novel forms of injury—the one most likely to exceed the scope of decisions Congress can reasonably have been intended to have assigned to the FTC.³⁰

B. Why the “KidVid” Rulemaking Implicated Major Questions

How might the FTC distinguish between major and minor questions? The FTC’s most calamitous overreach provides a clear lesson as to what kind of questions *not* to tackle through rulemaking—and also how *not* to provoke a Congressional backlash that imperils the agency. In 1978, the FTC proposed banning all televised advertising for (1) “any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising,” and (2) “sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks.”³¹ If the FTC attempted such a rulemaking today,

²⁶ “[T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.” 405 U.S. 233, 245 n.5 (1972).

²⁷ J. Howard Beales III, *What Does It All Mean? “Abusive” Acts or Practices and the CFPB* (2019), https://files.consumerfinance.gov/f/documents/cfpb_beales-written-statement_symposium-abusive.pdf

²⁸ *Id.*

²⁹ ‘An Avalanche of Rulemakings’—*The FTC Gears Up for an Active 2022*, WILEY (Jan. 2022), <https://www.wiley.law/newsletter-Jan-2022-PIF-An-Avalanche-of-Rulemakings-The-FTC-Gears-Up-for-an-Active-2022>.

³⁰ *Cf.* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (“Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”).

³¹ 43 Fed. Reg. 17967, 17969 (Apr. 27, 1978).

courts would recognize that this rulemaking raised major questions and block it—if Congress didn’t do so first.³²

The novelty of the KidVid proposal was plain: never before had the federal government proposed such a crackdown on advertising. The economic stakes of the FTC’s proposals were enormous. Banning advertising altogether would eliminate the for-profit business model of media for young children. Banning advertising of sugared products would eliminate 20-25% of all advertising shown to audiences of which children were a significant part.³³ Sen. Howard Cannon (D-NV) said:

I cannot help but wonder (aside from my concerns about the regulation of free speech) what will happen to children’s programming if a ban is imposed. Is children’s television to be virtually eliminated as the FTC uses the unfairness doctrine as a broad charter to sweep away children’s advertising solely because it is contrary to the Commission’s concept of fairness?³⁴

In effect, the question was whether the FTC should force Congress and other policymakers to make up the shortfall in advertising revenues with public funding. At the time, lawmakers insisted that this was a question for them to decide, not the FTC. Today, courts would recognize this as a major question with vast implications for the nature of that content—and thus the influence of government over children. For instance, today, the advertising industry spends \$12 billion per year on ads targeted to children.³⁵

KidVid also raised concern because of its proposed unfairness rationale. The 1978 Staff Report on which the NPRM relied suggested multiple bases for these rules, including seven forms of “public policy of protecting children,” another of “public policy of protecting

³² It is unlikely that any rulemaking in this docket could be completed before the third quarter of 2024. If one is completed between roughly mid-August 2024 and the end of this Congress, and Republicans win the White House and control of both chambers of Congress, any rules issued in this docket will likely be subject to resolutions of disapproval under the Congressional Review Act—as happened in early 2017, when the Congress effectively vetoed a slew of regulations issued in late 2016, including the Federal Communications Commission’s broadband privacy rules. *See supra* at 15. Such a resolution would not only void the regulation but also bar the FTC from issuing the rule in “substantially the same form” or issue a “new rule that is substantially the same” as the disapproved rule “unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.” 5 U.S.C. § 801(b)(2).

³³ J. HOWARD BEALES, FEDERAL TRADE COMMISSION, AN ANALYSIS OF EXPOSURE TO NON-NETWORK TELEVISION ADVERTISING 12 (1978), <https://www.ftc.gov/sites/default/files/documents/reports/childrens-exposure-television-advertising-1977-and-2004-information-obesity-debate-bureau-economics/fyi07235anyl.pdf>.

³⁴ 126 Cong. Rec. 2353, 2353 (statement of Sen. Cannon).

³⁵ Melissa Dittmann, *Protecting Children from Advertising*, AMERICAN PSYCHOLOGICAL ASSOCIATION (June 2004), <https://www.apa.org/monitor/jun04/protecting>.

parental authority.”³⁶ Advertising sugared products was, according to the report, “immoral, unethical, oppressive and unscrupulous.”³⁷ Meanwhile, “television advertising for any product directed to children who are too young to appreciate the selling purpose of, or otherwise comprehend or evaluate, the advertising is inherently unfair and deceptive.”³⁸ Lawmakers reasonably worried: If the FTC could ban advertising to children in the name of unfairness, what *couldn't* it do? Two years later, the Unfairness Policy Statement (UPS) rejected such appeals to public policy and in 1994, Section 5(n) clearly banned the use of public policy considerations as the “primary basis for ... determination[s of unfairness].”³⁹ Moreover, when the UPS said that “[e]motional impact and other more subjective types of harm will not ordinarily make a practice unfair,”⁴⁰ it was rejecting the kind of theories of injury contained in the Staff Report, such as that “children crying and whining” was a “major nagging problem,”⁴¹ or that parents suffered a “substantial injury” by having to defend their dietary choices and parental authority more generally.⁴²

The FTC deserved the nickname *The Washington Post* gave it: the “National Nanny.” As *The Post* explained, “the proposal, in reality, is designed to protect children from the weaknesses of their parents—and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess—if you can afford one. It is not a proper role of government.”⁴³ By proposing to ground unfairness in essentially subjective theories of

³⁶ FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN, FEDERAL TRADE COMMISSION 206, 217 (1978) [hereinafter 1978 Staff Report].

³⁷ *Id.* at 33.

³⁸ *Id.* at 47.

³⁹ *See* UPS; 15 U.S.C. § 45(n).

⁴⁰ *See* UPS.

⁴¹ 1978 Staff Report at 195. “Whenever a parent accepts the responsibility of guiding a child’s dietary habits, the extent to which the child will be permitted to indulge a taste for foods the parent disfavors will be resolved by some sort of negotiation between the parent and child, which is often a continuing source of tension in the parent-child relationship.” *Id.*

⁴² *Id.* at 197 (“The injury here is that while a child may be incapable of balancing the short-term attractions of sugar consumption against the possible long-term harms, a parent not only is capable of striking such a balance on the child’s behalf, but also may well feel obligated to strike it, as an element of responsible parenthood. A parent, on reviewing the evidence on the dental and non-dental health consequences, might very well conclude that sugar should be consumed in a significantly lesser amount than the child might prefer. The advertising at issue, however, taken cumulatively, will force such a parent to defend that conclusion against the teaching of the television set that all sugared foods are desirable, and that their unfettered consumption is the normal, healthy way to satisfy hunger. The advertising undermines the authority of the parent in his or her own home on a matter which is intimately related to health, and thus central to legitimate parental concern.”).

⁴³ Editorial, *The Washington Post* (Mar. 1, 1978), reprinted in Michael Pertschuk, *Revolt Against Regulation*, at 69-70 (1982). “Former FTC Chairman Pertschuk characterizes the *Post* editorial as a turning point in the Federal Trade Commission’s fortunes.” Howard Beales, *Advertising to Kids and the FTC: A Regulatory*

harm, the FTC had claimed sweeping power—in effect, the power to legislate. Sen. Carl Levin (D-MI) aptly explained why Congress had to rein in the FTC:

Mr. President, we cannot allow catchall and vague words like “unfair” to remain undefined in the statute that the FTC is applying to advertising practices. Such an untrammled and undefined hunting license in the area of opinion and speech, is dangerous because it is so subjective. ... To give the FTC the authority to move against advertising which, although not deceptive, is thought by some to be unfair is simply to give too much legislative power in a critical area of speech and opinion to an unaccountable, unelected agency.⁴⁴

The 1980 FTC Improvements Act directly barred the FTC from “promulgat[ing] any rule in the children’s advertising proceeding ... or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice....”⁴⁵ Had Congress not written such a clear statement into the FTC Act that the Commission should *not* decide such a question, courts today would bar the agency from writing such a rule for lack of a clear statement that it *could* decide such a question.

C. Unfairness, Broadly Construed, Always Has the Potential to Embroil the FTC in Major Questions

The nature of unfairness always has the potential to tempt the Commission into deciding what Sen. Levin rightly recognized as essentially legislative questions. That risk remains even under today’s narrower form of unfairness, which bars the Commission from proscribing practices as unfair unless they (1) cause “substantial injury to consumers” that (2) “is not reasonably avoidable by consumers themselves” and (3) is “not outweighed by countervailing benefits to consumers or to competition.”⁴⁶ But how far can the FTC go in defining substantial injury?

“Emotional impact and other more subjective types of harm,” declared the UPS, “will not ordinarily make a practice unfair.”⁴⁷ The Senate Commerce Committee was even more definitive in 1993—these harms “alone are not intended to make an injury unfair”—when it

Retrospective That Advises the Present at 8 (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf.

⁴⁴ 126 Cong. Rec. 2353, 2366 (1980) (statement of Sen. Levin) (emphasis added).

⁴⁵ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11(a)(1), 94 Stat. 374, 378 (1980) (codified in part at 15 U.S.C. § 57a(h)).

⁴⁶ 15 U.S.C. § 45(n).

⁴⁷ See UPS.

approved the bill that became Section 5(n).⁴⁸ “In most cases,” explained the UPS, a substantial injury involves monetary harm... but “[u]nwarranted health and safety risks may also support a finding of unfairness.”⁴⁹ Beneath the grand talk of parental authority and other public policy considerations, the 1978 Staff Report’s primary rationale for banning ads for sugared foods was, in fact, health effects.⁵⁰ So might a narrower rule focused solely on the advertising of sugared foods have been viable after 1980, had Congress not banned the FTC from issuing any “substantially similar” rule? The fact that Congress did not distinguish between the ban on advertising sugared foods and the categorical ban on all advertising to young kids suggests that Congress recognized the entire proceeding as raising major questions it had never intended the FTC to regulate in the first place—and that it wanted to make clear the FTC did not attempt to regulate again. The lesson here is that, while avoiding “subjective” theories of harm will help to keep the FTC out of major questions, sometimes targeting even objective forms of injury (like children’s health) may raise major questions that the FTC cannot regulate absent a clear statement from Congress.⁵¹

D. Expanding Non-Discrimination Law Is a Major Question

Question 71 asks: “To what extent, if at all, may the Commission rely on its unfairness authority under Section 5 to promulgate antidiscrimination rules? Should it? How, if at all, should antidiscrimination doctrine in other sectors or federal statutes relate to new rules?” Former Commissioner Noah Phillips answered this question best in his dissent in the recent *Passport Automotive Group* case. The Commission settled a complaint alleging that an auto dealer’s policy of giving employees discretion in reducing the markup on interest rates charged to consumers had resulted in “unfair racially disparate impact.”⁵² Phillips responded:

Section 5 does not mention discrimination. It does not identify protected classes, the bases on which discrimination is impermissible. Section 5 does not identify any context where Congress has determined discrimination exists and must be rooted out. And it gives enforcers and courts no guidance whether liability may be predicated on the disparate impact (on, again, any basis) of a business practice alone. One obvious takeaway from all of this is that Section

⁴⁸ S. REP. NO. 103-130, at 13 (1993).

⁴⁹ See UPS.

⁵⁰ 1978 Staff Report at 193 (“There are two elements of injury in all this. The first is the immediate injury done to the child’s health, dental and otherwise, by consuming the advertised sugared products. The second is that done to the child’s ability to safeguard his or her long-term health by learning and cultivating sound nutritional habits.”).

⁵¹ See *infra* note 128 and associated text.

⁵² See *FTC v. Passport Automotive Group, Inc.*, Case No. TDC-22-2670 (2022).

5 is not an antidiscrimination statute. No beak, no feathers, no walk, no quack—Section 5 is a terrific consumer protection tool, but it is no duck.⁵³

The FTC’s theory of disparate impact as substantial injury would, he warned “give the Commission authority to go far beyond the antidiscrimination laws on the books ... to condemn conduct covered by antidiscrimination laws but permitted by them.”⁵⁴ Chair Khan’s statement hints that the FTC might limit its conception of disparate impact by referencing “protected categories—such as race, color, religion, national origin, or sex” established in other areas of federal law.⁵⁵ But she cites a portion of the UPS⁵⁶ that was clearly overruled by Section 5(n), which bars the FTC from standing its definition of unfairness on “[s]uch” generalized “public policy considerations.”⁵⁷ In other words, when it passes some other law on some other topic, Congress is not inviting the FTC to riff on that law, using Section 5 to pass de facto laws of its own.

Whether to introduce specific prohibitions on disparate impact into the general language of Section 5 is a quintessentially major question. Indeed, whether to enact a new civil rights law, and what contexts it should cover, was *the* most contentious political question in

⁵³ Comm’r Phillips ANPR Dissent at 4.

⁵⁴ *Id.* at 4-5. “To establish liability under the Fair Housing Act using a disparate impact theory, for example, a plaintiff must show that a facially neutral policy has resulted in a disparate impact, at which point the burden shifts to the defendant to provide a legitimate need for the policy. The burden then shifts back to the plaintiff to show that a less discriminatory alternative was available and serves the defendant’s legitimate need. A defendant will not be liable for a disparate impact if there was a valid justification and no less discriminatory alternative. That is not how Section 5 works. Unfairness requires that the costs of a business practice outweigh its benefits. That leaves open the possibility that the Commission could determine that a business practice that was legitimate and for which there was no less restrictive alternative was nonetheless illegal discrimination under Section 5 because, in our view, the benefits of the conduct didn’t justify the discrimination.”

⁵⁵ Statement of Chair Lina M. Khan Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking at 4 (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

⁵⁶ ANPR at 51289 & note 19 (citing UPS (“This occurs when the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for separate analysis by the Commission. In these cases the legislature or court, in announcing the policy, has already determined that such injury does exist and thus it need not be expressly proved in each instance. ... To the extent that the Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well-established. In other words, the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values.”).

⁵⁷ *See* UPS.

America for the century following the Civil War.⁵⁸ Whether to extend non-discrimination law now is clearly a decision for Congress, not the FTC, to make.

E. Regulating Children’s Privacy Is a Major Question Congress Has Already Decided

Questions 13–23 involve potential harms to children, including teenagers. Chair Khan may well be right about the limits of the notice and choice model of privacy,⁵⁹ but, as Commissioner Phillips notes in his dissent, we already have a federal law, the Children’s Online Privacy Protection Act (COPPA), that governs many of the issues—and constitutes Congress’s considered policy view—surrounding children’s data privacy online.⁶⁰ It is not for the FTC, Phillips correctly observes, to rewrite COPPA. Children’s privacy is clearly a matter of “vast ‘economic and political significance.’”⁶¹ “The Commission also has had ongoing for years a review of the COPPA Rule” and, as Phillips notes, the “Commission received over 170,000 comments upon it, the most of any request for input issued in the history of the agency.”⁶² Likewise, regulating teens’ privacy as if they were still 12 years or younger would pose a major question, given that Congress, for right or wrong, limited COPPA to children younger than 13.⁶³ Congress considered crafting separate rules for teen privacy but dropped them from the COPPA legislation after concerns were raised about the implications for free speech online.⁶⁴ It is not for the FTC to re-open that legislative question.

⁵⁸ Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary, The Review Essay and Comments: Reconstructing Reconstruction*, 98 YALE L. J. 565, 567 (1988), https://ir.lawnet.fordham.edu/faculty_scholarship/223/ (“The controversial issue that confronted Congress in its efforts to secure civil rights in 1866 was not whether national civil rights enforcement should extend to private individuals or be limited to eliminating discriminatory state laws, but whether Congress had any authority to secure civil rights in any manner at all. Since the states had been the traditional guardians of fundamental rights, Republicans had to find an explicit or an implied constitutional delegation of authority to secure such rights before Congress could legislate to protect and enforce the civil rights of Americans.”).

⁵⁹ See *supra* note 1 and associated text.

⁶⁰ Comm’r Phillips ANPR Dissent at 7 (highlighting that Congress had already determined children’s online privacy concerns through COPPA, such as explicitly providing parents with the ability to control their children’s data).

⁶¹ *West Virginia v. EPA*, No. 20-1530, at *37 (June 30, 2022).

⁶² Comm’r Phillips ANPR Dissent at 7.

⁶³ See James E. Dunstan, Comments of TechFreedom, *Protecting Kids from Stealth Advertising in Digital Media* (Nov. 14, 2022), <https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-on-Stealth-Advertising-11-18-22.pdf>; Berin Szóka, Comments of TechFreedom, *Proposed Modifications to the Children’s Online Privacy Protection Act (COPPA)* (Sep. 24, 2012), <https://techfreedom.org/techfreedom-urges-ftc-not-to-expand-coppa-by/>

⁶⁴ See Testimony of Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology, before the Senate Committee on Commerce, Science and Transportation Subcommittee on Communications (Sept. 23, 1998), available at <https://cdt.org/wp-content/uploads/testimony/980923mulligan.shtml>

F. Regulating Child Sexual Abuse Material Is a Major Question

Question 23 asks: “How would potential rules that block or otherwise help to stem the spread of child sexual abuse material, including content-matching techniques, otherwise affect consumer privacy?” CSAM is obscenity unprotected by the First Amendment.⁶⁵ TechFreedom fully supports the use of content-matching to identify known images of children being sexually abused and measures to stop the spread of such material. But we also recognize that how such content is identified may implicate difficult First Amendment questions.⁶⁶ How accurate a match is enough to ensure that lawful content is not swept up in the dragnet? Imposing an affirmative legal duty on companies to search for CSAM also has profound Fourth Amendment implications: it may result in private actors conducting those searches being designated as state actors subject to the Fourth Amendment’s warrant requirement.⁶⁷ Avoiding such an outcome is precisely why 18 U.S.C. § 2258A(f) explicitly declares that companies have no duty to monitor users, monitor content, or “affirmatively search, screen, or scan” for CSAM or Child Sexual Exploitation content.

Using Section 5 to regulate CSAM would clearly be “novel”; it would obviously have vast significance for speech online, and indeed for law enforcement’s ability to continue to get reports of CSAM from private companies that do not get warrants for their searches. The FTC should leave such matters to Congress. The Commission clearly has no expertise in this area.

G. The FTC’s Best Defense Against Nondelegation Challenges Is Self-Restraint

Under the “major questions” doctrine, “administrative agencies must be able to point to ‘clear congressional authorization’ when they claim the power to make decisions of vast ‘economic and political significance.’”⁶⁸ The nondelegation doctrine is different: however clearly it speaks, “Congress ... may not transfer to another branch ‘powers which are strictly

⁶⁵ *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁶⁶ See *The EARN IT Act: Holding the Tech Industry Accountable in the Fight Against Online Child Sexual Exploitation*: Hearing on S. 3538 Before the S. Comm. on the Judiciary, 116th Cong. 7 (2022) (written testimony of Elizabeth Banker, Deputy General Counsel, Internet Association) (“If a company engaged in an aggressive effort to remove CSAM that also [swept] out other non-CSAM content protected by the First Amendment ... such actions could subject both the government and companies to arguments that they have imposed unconstitutionally overbroad speech regulation.”); Commonwealth of Pa. Commission on Crime and Delinquency, *Report of the Task Force on Child Pornography*, at 2 (Sept. 28, 2022), available at [http://jslg.legis.state.pa.us/resources/documents/ftp/publications/2022-09-30%20Task%20Force%20on%20Child%20Pornography%20FINAL%20Report%20\(9.29.22\)%20340pm.pdf](http://jslg.legis.state.pa.us/resources/documents/ftp/publications/2022-09-30%20Task%20Force%20on%20Child%20Pornography%20FINAL%20Report%20(9.29.22)%20340pm.pdf) (“A child pornography ban is perfectly legal However, innocent speech is protected and any prior and general [governmental restraints require due process of law] the over-blocking inherent in technology has led to the blockage of constitutionally protected communications, which offends the First Amendment.”).

⁶⁷ See, e.g., *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016).

⁶⁸ *West Virginia v. EPA*, No. 20-1530 at *36 (June 30, 2022) (Gorsuch, J., concurring).

and exclusively legislative.”⁶⁹ *Gundy v. United States* (2019) is the Supreme Court’s most recent statement on this doctrine. It upholds an “intelligible principle” test, under which Congress’s power to delegate authority is broad indeed.⁷⁰ Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his “support” for “reconsider[ing] th[at] approach,” if and when a majority of the Court wishes to do so.⁷¹ Justice Kavanaugh, who did not participate in *Gundy*, has expressed just such a willingness.⁷² And Justice Ginsburg, one of the four justices to stand by the “intelligible principle” standard in *Gundy*, has been replaced by Justice Barrett, who has described the intelligible principle test as “notoriously lax.”⁷³

Justice Gorsuch’s dissent in *Gundy*—which Chief Justice Roberts and Justice Thomas joined, and which Justices Alito, Kavanaugh, and Barrett are likely to find attractive in a future case—thus warrants far more attention than an average dissent. If the executive branch may make “laws,” Justice Gorsuch notes, they will “not be few in number,” nor “the product of widespread social consensus,” nor “likely to protect minority interests,” nor “apt to provide stability and fair notice.”⁷⁴ Executive lawmaking also enables both the legislature and the executive to evade accountability, each branch blaming the other for the consequences of open-ended legislation implemented through detailed agency rules.⁷⁵ Gorsuch could well have been describing the public and Congressional backlash against the FTC’s rulemakings in the 1970s. For these and other reasons, Justice Gorsuch urges the Court to end its “intelligible principle misadventure” and insists that “Congress, and not the Executive Branch, make the policy judgments” that are implemented through agency action.⁷⁶

After *Gundy*, even when the FTC applies Section 5’s “unfairness” standard only case by case, under a rubric of congressionally set procedural rules and close judicial scrutiny, that

⁶⁹ *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

⁷⁰ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

⁷¹ 139 S. Ct. at 2131 (concurring opinion).

⁷² See *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari) (“Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”).

⁷³ Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4618&context=clr>.

⁷⁴ 139 S. Ct. at 2135.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2141.

standard is at high risk of being declared an unconstitutional over-delegation.⁷⁷ “The term ‘unfair,’” after all, “is an elusive concept, often dependent upon the eye of the beholder.”⁷⁸ Indeed, as Commissioner Phillips observed last year, the term “unfair methods of competition” in section 5 is “almost the exact [same] wording” as “codes of fair competition,” the term struck down under the nondelegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*.⁷⁹ The FTC’s power over “unfair acts and practices,” added to Section 5 in by the Wheeler-Lea Act of 1938, is merely a subset of the more general concept of unfairness.⁸⁰

So, there might be a nondelegation problem with Section 5 no matter what. Consider Justice Gorsuch’s dissent in *Gundy* as the outline of a likely majority opinion in the next nondelegation case the Court decides. For a Section 5 rulemaking to pass muster under the test he sketches out, the FTC will need to argue that “Congress [has made] the policy decisions” in crafting substantive limits on unfairness in Section 5(n) and leaving the FTC only to “fill up the details”⁸¹ through the procedural safeguards for rulemakings contained in Sections 18 and 22.⁸²

The distinction between policymaking and detail-filling—a distinction important to both nondelegation and major questions—derives from *Wayman v. Southard* (1825), in which Chief Justice Marshall distinguished between those “important subjects, which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act ... to fill up the details.”⁸³ As early as *Cargo of Brig Aurora v. United States* (1813), the Supreme Court upheld a statute that allowed the President to take a certain action (impose a trade embargo against either Great Britain or France) upon the finding of certain facts (that the other—not-to-be-embargoed—of those two nations had become more open to American trade).⁸⁴ And in 1928, the Court ruled that “a statute ‘lay[ing] down by legislative act an intelligible principle to which the

⁷⁷ See Corbin K. Barthold, *Pride Before the Fall at the FTC?*, LAW & LIBERTY (Nov. 2, 2021), <https://bit.ly/3rt3U85>.

⁷⁸ *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 137–38 (2d Cir. 1984).

⁷⁹ 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). See Commissioner Noah Joshua Phillips Prepared Remarks, Fed. Trade Comm’n, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), <https://bit.ly/2U7jGrv>.

⁸⁰ The FTC has long recognized that “unfairness is the set of general principles of which deception is a particularly well-established and streamlined subset.” *International Harvester*, 104 F.T.C. 949, 1060 (1984). Likewise, unfair methods of competition and unfair acts and practices are subsets of the same “set of general principles.”

⁸¹ 139 S.Ct. 2136.

⁸² 15 U.S.C. §§ 57a, 57b-3.

⁸³ See 139 S. Ct. at 2136 (discussing 23 U.S. (10 Wheat.) 1, 42–43, 6 L.Ed. 253).

⁸⁴ *Id.* (discussing 11 U.S. (7 Cranch) 382, 388, 3 L.Ed. 378 (1813)).

[executive official] is directed to conform' satisfies the separation of powers."⁸⁵ The two sides in *Gundy* split over how to apply that test.

Of course, in modern policymaking, drawing the line between policymaking and detail-filling is far more complicated. Gorsuch cites a potential model. In *Touby v. United States* (1991), he explains, "the Court considered a provision of the Controlled Substances Act that allowed the Attorney General to add a substance to a list of prohibited drugs temporarily if he determined that doing so was 'necessary to avoid an imminent hazard to the public safety.'"⁸⁶ In some ways, that process resembled Mag-Moss rulemaking. "Congress required the Attorney General, before acting, to consider the drug's 'history and current pattern of abuse,' the 'scope, duration, and significance of [that] abuse,' and '[w]hat, if any, risk there is to the public health.'"⁸⁷ These concepts are roughly analogous to those of prevalence and substantial injury in an FTC rulemaking. Gorsuch continued:

In approving the statute, the Court stressed all these constraints on the Attorney General's discretion and, in doing so, seemed to indicate that the statute supplied an "intelligible principle" *because* it assigned an essentially fact-finding responsibility to the executive. Whether or not one agrees with its characterization of the statute, in proceeding as it did *Touby* may have at least begun to point us back in the direction of the right questions. To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.⁸⁸

Notably, this formulation does not turn on whether the an agency's use of its powers is "novel;" it asks whether the powers were lawfully delegated in the first place. How might the kind of rules contemplated by the ANPR fare under such a test? Section 5(n) establishes four criteria: (1) the practice must be one that "causes or is likely to cause" (2) "substantial injury to consumers" (3) "which is not reasonably avoidable by consumers themselves" and (4)

⁸⁵ *Id.* at 2138-39 (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

⁸⁶ 500 U.S. 160, 166.

⁸⁷ *Id.*

⁸⁸ 139 S. Ct. at 2141 (citing *Touby v. United States*, 500 U.S. 160 (1991)).

“not outweighed by countervailing benefits to consumers or to competition.”⁸⁹ Each is a commandment to the FTC to engage in fact-finding. Section 5(n) constrains the FTC’s ability to make policy by requiring “public policies” be “established” when “considered with all other evidence”—but that they “may not serve as a primary basis for ... determination” of unfairness.⁹⁰ Yet even this formulation still leaves ample room for policy judgments to creep into what purports to be mere-fact finding. What kinds of injury qualify as substantial enough to merit government intervention, what problems can be left to consumers and market forces, and how to weigh costs and benefits—these are the essence of *any* legislative judgment. If the FTC reads Section 5(n) broadly enough, its ostensible limits may not solve the nondelegation problem at all. Self-restraint may be the Commission’s best—indeed, only—defense. Below, Section II explains why it would be in institutional interests of the FTC to stick to the constrained view of unfairness laid out in the agency’s 1980 Unfairness Policy Statement, and followed since—at least, until recently.⁹¹

Ultimately, the Commission’s best defense may be to show that the process it follows in crafting rules really is one of careful and objective fact-finding, not policymaking. The *J.W. Hampton* Court upheld the 1922 tariff law because, according to Gorsuch, Congress “offered guidance on how to determine costs of production, listing several relevant factors and establishing *a process for interested parties to submit evidence*.”⁹² Writing for the Court in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), Chief Justice Taft made a similar point. When handing “the regulatory police power” to an agency, he said, Congress, to avoid making “a pure delegation of legislative power, must enjoin upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function.”⁹³ Much like Magnuson-Moss, the tariff act at issue in *J.W. Hampton* required the Tariff Commission “give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.”⁹⁴

Below, Section III explains what it would mean to take the procedural safeguards imposed by Congress seriously.⁹⁵ Here, recall that when the *Schechter* Court struck down the core of the National Industrial Recovery Act (NIRA) of 1933, it discussed the FTC Act at length as an

⁸⁹ 15 U.S.C. § 45(n).

⁹⁰ *Id.*

⁹¹ See *infra* § I at 19-33.

⁹² *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019).

⁹³ *Wichita R.R. v. Pub. Util. Comm.*, 260 U.S. 48, 65 (1922).

⁹⁴ *Hampton Co. v. United States*, 276 U.S. 394, 401 (1928).

⁹⁵ See *infra* § III at 33-39.

analogous statute.⁹⁶ NIRA gave the President broad discretion to approve codes of fair competition developed by “trade or industrial associations”⁹⁷ if he decided it would “tend to effectuate” the NIRA’s (many and conflicting) policy goals.⁹⁸ Why was Section 5 valid, while the provision at issue in *Schechter Poultry* was an invalid delegation? One reason is that:

under the FTC Act, “unfair methods” are “to be determined in particular instances, upon evidence, in light of particular competitive conditions.” This “special procedure,” which made “provision” for “formal complaint,” “notice and hearing,” “findings of fact,” and “judicial review,” ensured that the agency’s discretion in defining “unfair methods” would remain narrow. The NIRA, by contrast, “dispense[d]” with “administrative procedure.” It granted a power “to authorize new and controlling prohibitions” in “codes of laws”—i.e., binding rules.⁹⁹

The Supreme Court has, in essence, already blessed Section 5(b)’s “special procedure,” which provides “for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority.”¹⁰⁰ If the Commission sees a need to weigh more subjective theories of harm, which may appear to a court to involve policy judgments rather than factfinding, the safest way to do so would be to use Section 5(b)’s “administrative machinery for the application of established principles of law to particular instances of violation.”¹⁰¹

II. Substantive Safeguards in FTC Rulemaking

The ANPR cites thirty-one cases¹⁰² as a “sample of the Commission’s enforcement work in data privacy and security.”¹⁰³ The FTC and some scholars refer to this as a common law of privacy.¹⁰⁴ But virtually all these supposed precedents lack the essential element of the

⁹⁶ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁹⁷ 295 U.S. at 521.

⁹⁸ *Id.* at 519.

⁹⁹ Corbin K. Barthold, *Pride Before the Fall at the FTC?*, LAW & LIBERTY (Nov. 2, 2021), <https://bit.ly/3rt3U85>.

¹⁰⁰ 295 U.S. at 532.

¹⁰¹ *Id.* at 535.

¹⁰² ANPR notes 85–103.

¹⁰³ *Id.* note 104.

¹⁰⁴ “Together, these enforcement efforts have established what some scholars call ‘the common law of privacy’ in the United States.” Julie Brill, Commissioner, Fed. Trade Comm’n, Remarks to the Mentor Group Forum for EU-US Legal-Economic Affairs Brussels, April 16, 2013, 3 (Apr. 16, 2013),

common law: judges weighing arguments on both sides of the case and writing opinions to explain not merely who is right, but *why*.¹⁰⁵ Only a handful of courts have ruled on the merits of the FTC's legal theories.¹⁰⁶ Settlements and consent decrees might technically satisfy the relatively low bar for defining prevalence in a Notice of Proposed Rulemaking,¹⁰⁷ but they will not relieve the Commission of its ultimate burden of establishing, in the Statement of Basis and Purpose accompanying a final rule, that the practices it regulates are, in fact, unfair or deceptive.¹⁰⁸

Data practices that cause, or can be shown to be likely to cause, physical or financial injuries may, in principle, be amenable to rulemaking. The Commission has recently initiated just

<https://www.ftc.gov/news-events/news/speeches/remarks-mentor-group-forum-eu-us-legal-economic-affairs-brussels-belgium> (citing Christopher Wolf, Targeted Enforcement and Shared Lawmaking Authority As Catalysts for Data Protection in the United States (2010), <https://www.hoganlovells.com/en/publications/targeted-enforcement-and-shared-lawmaking-authority-as-catalysts-for-data-protection-in-the-united-states> (FTC consent decrees have “created a ‘common law of consent decrees,’ producing a set of data protection rules for businesses to follow.”). FTC Chairman Edith Ramirez said roughly the same thing, referring to FTC complaints as “precedents” in a 2014 speech:

I have expressed concern about recent proposals to formulate guidance to try to codify our unfair methods principles for the first time in the Commission’s 100 year history. While I don’t object to guidance in theory, I am less interested in prescribing our future enforcement actions than in describing our broad enforcement principles revealed in our recent precedent.

Quoted in Geoffrey Manne, *FTC Commissioner Joshua Wright gets his competition enforcement guidelines*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (Aug. 13, 2015), <https://laweconcenter.org/resources/ftc-commissioner-joshua-wright-gets-his-competiton-enforcement-guidelines/> (speech video available at <http://masonlec.org/media-center/299>).

¹⁰⁵ See *infra* note 113.

¹⁰⁶ See *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015) (affirming denial of motion to dismiss); *FTC v. D-Link Systems, Inc.* (N.D.Ca. 2017) (granting motion to dismiss for failure to identify any actual consumer injury); *LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018) (vacating cease and desist order issued by the FTC under Section 5(b) for failure to “instruct LabMD to stop committing a specific act or practice”). Even outside the context of privacy and data security, there have been precious few court decisions applying Section 5 to digital services. See, e.g., *FTC v. Amazon.Com, Inc.*, No. C14-1038-JCC (W.D. Wash. Apr. 26, 2016); *FTC v. Accusearch Inc., et al*, No. 08-8003 (10th Cir. 2009) (upholding summary judgment where defendant did not challenge the FTC’s unfairness claims except to argue that its conduct did not violate any other statute).

¹⁰⁷ “The Commission shall issue a notice of proposed rulemaking ... only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if ... it has issued cease and desist orders regarding such acts or practices.” 15 U.S.C. § 57a(b)(3)(A). Cf. 15 U.S.C. § 45(m)(1)(B) (“If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty...”). The comparison suggests that consent orders may suffice as the basis for the finding of prevalence adequate to justify the issuance of an NPRM.

¹⁰⁸ 15 U.S.C. § 57a(d)(1) (“The Commission’s statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) shall include ... a statement as to the manner and context in which such acts or practices are unfair or deceptive....”)

such a rulemaking focused on impersonation.¹⁰⁹ But otherwise, rulemaking grounded in unfairness would be premature. The Commission has struggled to define “informational injuries,” having issued only a slender 7-page staff report summarizing views expressed on the topic at an FTC workshop in 2018.¹¹⁰ Even less has the Commission developed a solid methodological framework for weighing injuries against benefits where neither is readily quantifiable, nor one for assessing what harms consumers can “reasonably avoid.” Instead of attempting to address these issues through rulemaking, the Commission would do better to hold workshops that develop these concepts further, issue a draft policy statement on enforcement of informational injuries, seek public comment on that statement, and then issue that statement as a guide to the Commission’s application of unfairness in this area.

A. “The Act or Practice Causes or Is Likely to Cause”

Any rules the FTC might issue should address consumer injury, not merely theoretical risks of injury. ¹¹¹In *FTC v. Wyndham Worldwide* (3d. Cir. 2015), the court sustained the FTC’s complaint that inadequate data security allowed an alleged data theft of personal information of hundreds of thousands of consumers that resulted in over \$10.6 million in fraudulent charges. But in *FTC v. D-Link Systems, Inc.* (N.D.Ca. 2017), the court dismissed unfairness claims in an FTC complaint alleging data security vulnerabilities in home video cameras that allowed remote attackers to peer inside users’ homes and other private settings because:

The FTC does not allege any actual consumer injury in the form of a monetary loss or an actual incident where sensitive personal data was accessed or exposed. Instead, the FTC relies solely on the likelihood that DLS put consumers at “risk” because “remote attackers could take simple steps, using widely available tools, to locate and exploit Defendants’ devices, which were widely known to be vulnerable.” ... That is effectively the sum total of the harm allegations, and they make out a mere possibility of injury at best.¹¹²

¹⁰⁹ NPRM for Trade Regulation Rule on Impersonation of Government and Businesses, 87 Fed. Reg. 62741 (Oct. 17, 2022), <https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

¹¹⁰ See *FTC Informational Injury Workshop, BE and BCP Staff Perspective* (Oct. 2018), <https://www.ftc.gov/reports/ftc-informational-injury-workshop-be-bcp-staff-perspective>.

¹¹¹ See *Frank v. Gaos*, 139 S. Ct. 1041, 1043–44 (2019) (remanding a class action lawsuit against Google alleging privacy harms under the Stored Communications Act, 18 U.S.C. § 2701, et. seq, and expressing doubts that the plaintiffs had Article III standing (quoting *Spokeo, Inc. v. Robins*, 578 U. S. 330, 341 (2016) (“Article III standing requires a concrete injury even in the context of a statutory violation”))).

¹¹² *FTC v. D-Link Systems*, No. 3:17-cv-00039-JD, 2017 U.S. Dist. LEXIS 152319 at *8 (N.D. Cal. Sep. 19, 2017), https://causeofaction.org/wp-content/uploads/2017/09/Opinion__12b6__19-Sept.-2017.pdf.

In an adjudication, the focus is on the presence or absence of an injury or likely injury in the case at hand. In a rulemaking, the Commission is relieved of that burden of establishing a specific injury in a discrete case; but it takes on the much higher burden of having to muster concrete examples of actual or likely injury in number sufficient to support a claim that a practice is both “prevalent” and “substantial” enough to merit a rule over adjudications, and for the costs of that rule to outweigh more systemic countervailing benefits.

B. “Substantial Injury”

Most of the 31 cases cited by the FTC as examples of its work in privacy and data security involve deception claims. Those complaints that involved unfairness mostly focused on the categories of injury that the Unfairness Policy Statement recognized should be the FTC’s focus. In some complaints, the Commission may have alleged other forms of harm, but because such cases did not produce judicial opinions or even administrative orders, one can speak only loosely of these cases as “precedents” for anything.¹¹³

“In most cases,” explained the Unfairness Policy Statement, “a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services...”¹¹⁴ For example, ads encouraging children to call 900 numbers are unfair because they result in charges that parents cannot avoid—without countervailing benefit.¹¹⁵ More recently, the Commission settled allegations that design of online platforms that make it too easy for children to make purchases unauthorized by parents may result in similar financial injuries¹¹⁶ (though how to weigh those injuries against the benefits of not requiring users to provide a password for every purchase remains less than clear¹¹⁷). “Unwarranted health and

¹¹³ See *supra* note 104 (discussing former chair Edith Ramirez’s use of the term “precedent” referring to settlements). As far as third parties are concerned, a ruling without a written opinion may as well have been decided by coin flip. Such decisions “add[] no insight or information to the stock of existing cases.” RICHARD A. POSNER, *OVERCOMING LAW*, 492 (1995). Under a common law system—which the FTC’s case-by-case “unfairness” adjudications (should) resemble—we ask a judge not only to issue a *ruling*, making a “call” like an umpire, but also to *elaborate* on the rules, using sound judgment. *Id.* A common law—or FTC “fairness”—regime built on unelaborated rulings, by contrast, would operate “under ever staler and more obsolete rules,” because the *information* in the regime would never consist of much more than the initial judgments made by those who set up the regime at the outset. *Id.* “Every year” that regime “would do a worse job.” *Id.* Yet it is exactly such a stale and empty regime—such a body of *information-less* “precedent”—on which the Commission now purports to make a substantive finding of prevalence.

¹¹⁴ See UPS.

¹¹⁵ Phone Programs, Inc., 115 F.T.C. 977 (1992) (consent order); Audio Communications Inc., 114 F.T.C. 414 (1991) (consent order); Teleline, Inc., 114 F.T.C. 399 (1991) (consent order).

¹¹⁶ FTC v. Amazon.Com, Inc., No. C14-1038-JCC, at *14 (W.D. Wash. Apr. 26, 2016).

¹¹⁷ See Dissenting Statement of Comm’r Joshua D. Wright In the Matter of Apple Inc. 13 (Jan. 15, 2014), https://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright/140115applestatementwright.pdf.

safety risks," the UPS continued, "may also support a finding of unfairness."¹¹⁸ In the landmark 1984 case that first applied the UPS, failure to disclose a manufacturing defect was unfair: although the defect resulted in just twelve injuries out of 1.3 million tractors sold, disclosure was easy and would have enabled users to avoid the risk.¹¹⁹ Equally serious physical harm could result from ads endangering children by encouraging them to cook without adult supervision or use electrical hairdryers next to sinks filled with water.¹²⁰

Before the adverse district court ruling mentioned above,¹²¹ the Commission settled allegations that flaws in a security camera made it possible for strangers to see into users' homes. This "increase[d] the likelihood," the Commission reasoned, that consumers could be targeted by criminals, recorded by strangers, or tracked by stalkers.¹²² Despite its court loss, the Commission probably could establish that real physical harms have indeed resulted from such data security vulnerabilities and are "likely to" do so again.

Likewise, the Commission settled allegations that companies committed unfair trade practices when they embedded "detective mode" software in rent-to-own computers, allowing them to secretly track the location of those computers, log keystrokes, capture screen shots and take photographs using a computer's webcam.¹²³ If the Commission can establish injury in such cases, it might bolster its analysis by drawing analogies to the Second Restatement of Torts' definition of intrusion on seclusion: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be *highly offensive* to a reasonable person."¹²⁴ But the key to this tort is *unauthorized* intrusion; it did not occur where plaintiffs assented to the collection of their facial scans as a

¹¹⁸ See UPS.

¹¹⁹ Int'l Harvester Co., 104 F.T.C. 949, 1063, 1066 (1984).

¹²⁰ Uncle Ben's, Inc., 89 F.T.C. 131 (1977) (consent order); Mego International, Inc., 92 F.T.C. 186 (1978) (consent order).

¹²¹ See *supra* note 112 and associated text.

¹²² FTC, Complaint, *In re* Trendnet, Inc., No. 122-3090 (Feb. 7, 2014), <https://www.ftc.gov/system/files/documents/cases/140207trendnetcmpt.pdf>.

¹²³ Press Release, Fed. Trade Comm'n, Spyware Seller Settles FTC Charges; Order Bars Marketing of Keylogger Software for Illegal Uses (June 2, 2010), <https://www.ftc.gov/news-events/news/press-releases/2010/06/spyware-seller-settles-ftc-charges-order-bars-marketing-keylogger-software-illegal-uses>; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges Against Software and Rent-to-Own Companies Accused of Computer Spying (Apr. 15, 2013), <http://www.ftc.gov/news-events/press-releases/2013/04/ftc-approves-final-order-settling-charges-against-software-and>; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges that Aaron's Inc. Allowed Franchisees to Spy on Consumers via Rental Computers (Mar. 11, 2014), <http://www.ftc.gov/news-events/press-releases/2014/03/ftc-approves-final-order-settling-charges-aarons-inc-allowed>.

¹²⁴ Restatement (Second) of Torts § 652B (1977).

condition of playing the game and did not allege the scans were used for any other purpose.¹²⁵ This concept of harm might be a useful tool for the FTC, but it will be of limited value in moving beyond “notice and choice.”

Where the Unfairness Policy Statement seemed to leave the FTC some room to maneuver—“Emotional impact and other more subjective types of harm, on the other hand, will not *ordinarily* make a practice unfair”¹²⁶—the Senate Commerce Committee was even more definitive—these harms “alone are not intended to make an injury unfair”—in 1993 when it approved the bill that became Section 5(n).¹²⁷

The FTC should focus any unfairness rules it issues on well-defined, objective forms of injury. But one important lesson of the KidVid debacle is that even focusing on objective harms, like health risks, may not be enough to avoid provoking backlash by Congress and a loss in court: Congress never assigned to the FTC general responsibility for protecting the health of Americans, nor does the agency have the expertise needed to do so.¹²⁸

C. “Reasonably Avoidable”

“Normally,” explained the Unfairness Policy Statement, “we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market.”¹²⁹ Section 5(n) codified the Statement’s requirement that cognizable injuries be those the consumer cannot reasonably avoid. Yet 42 years later, this concept has been scantily developed. Only a handful of judicial decisions discuss it. The FTC defined the concept thus in its 1984 *International Harvester* decision: “Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end.”¹³⁰

¹²⁵ “Regardless of whether the plaintiffs understood the ins-and-outs of the face scanning technology, or knew that their faces were ‘biometric identifiers’ under the BIPA, the plaintiffs plainly understood that the MyPlayer feature had to collect data based upon their unique faces to create the personalized basketball avatars.” *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 517 (S.D.N.Y. 2017).

¹²⁶ See UPS (emphasis added).

¹²⁷ Senate Report (Aug. 24, 1993) at 13.

¹²⁸ See *supra* note 51 and associated text.

¹²⁹ See UPS; see also *American Financial Services v. F.T.C.*, 767 F.2d 957, 976 (D.C. Cir. 1985) (“The requirement that the injury cannot be reasonably avoided by the consumers stems from the Commission’s general reliance on free and informed consumer choice as the best regulator of the market.”).

¹³⁰ *In re International Harvester, Co.*, 104 F.T.C. 949, 1064 n. 55 (1984); see also *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168-69 (9th Cir. 2012); *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1365 (11th Cir. 1988).

Most cases discussing this provision involve fraudulent, or near-fraudulent, conduct resulting in clear financial injuries. In *Orkin v. FTC*, the best known appellate decision, consumers could not reasonably expect an increase the fees charged on a “lifetime” pest control agreement.¹³¹ Other practices that courts have found not to be reasonably avoidable included the fraudulent creation of unverified checks,¹³² and disclosing debts to employers without the borrowers’ consent.¹³³ *American Financial Services v. FTC* (D.C. 1985) involved the garnishment of a debtor’s wages by a creditor without “first obtaining a court judgment” and an “HHG security interest,” a “non-purchase, non-possessory security interest in household goods” that “allows the creditor to seize and sell the debtor’s household goods upon default without a judgment or court order.”¹³⁴ The injuries associated with the use of these practices were “not reasonably avoidable by consumers for two interrelated reasons: (1) consumers are not, as a practical matter, able to shop and bargain over alternative remedial provisions; and (2) default is ordinarily the product of forces beyond a debtor’s control.”¹³⁵

Absent fraud or the highly coercive contexts of debtor-creditor relations, plaintiffs are expected to exercise more judgment. In *Davis v. HSBC Bank Nevada, N.A.* (9th Cir. 2012), the court dismissed a class action under a state law tied to the FTC Act against Best Buy alleging that the company had defrauded California customers by offering credit cards without adequately disclosing that cardholders would be subject to an annual fee.¹³⁶

Davis’s alleged injury was certainly avoidable before he completed the application for the [credit card]. The advertisement contained the disclaimer, “other restrictions may apply,” which would have motivated a reasonable consumer to consult the terms and conditions. If that were not enough, the online application used boldface and oversized font to alert Davis to the Important Terms & Disclosure Statement, instructing him to “read the notice below carefully.” The disclaimer and the terms and conditions were enough to give a reasonable consumer “reason to anticipate” the possibility of fees. Additionally, the fact that Davis was required to check the box indicating his assent before completing the application meant that he could have aborted his

¹³¹ *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1365 (11th Cir. 1988).

¹³² *FTC v. Neovi*, 604 F.3d 1150, 1158 (9th Cir. 2010).

¹³³ *FTC v. Loanpointe, LLC*, 525 F. App’x 696, 9 (10th Cir. 2013).

¹³⁴ 767 F.2d at 964.

¹³⁵ *Id.* at 976.

¹³⁶ 691 F.3d 1152

application upon reading the terms and conditions. This provided “the means to avoid” the alleged harm.¹³⁷

In only one case related to data security or privacy has a court discussed reasonable avoidability. In *FTC v. Wyndham*, the court accepted as “plausible” on a motion to dismiss the FTC’s claim that “consumers certainly would not have known that Wyndham had unreasonable data security practices” because “[Wyndham’s] privacy policy ... deceive[s] consumers by saying we do have reasonable security data practices. That is one way consumers couldn’t possibly have avoided providing a credit card to a company.”¹³⁸ This rationale applies only to cases where deception and unfairness intertwine because consumers have been promised something they did not get. *Wyndham* says nothing about pure unfairness cases not tied to a representation of reasonable data security.

The ANPR declares that the term “consumer” “includes businesses and workers, not just individuals who buy or exchange data for retail goods and services.”¹³⁹ If the Commission intends to ground rules in harm to businesses, it will bear a heightened burden in showing that businesses cannot avoid those injuries. While certain business “techniques may prevent consumers from effectively making their own decisions,” the Commission generally presumes that “consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.”¹⁴⁰ Businesses are better positioned than consumers to make their own choices, and the Commission’s analysis of reasonable avoidability must take that into account.

D. “Not Outweighed by Countervailing Benefits”

Section 5(n) requires the FTC to conduct a “cost-benefit analysis.”¹⁴¹ Question 24 ask how the FTC should weigh the benefits of data practices before regulating them.¹⁴² Question 26 asks specifically about costs to innovation.¹⁴³ Innovation should be central to the Section 5(n) balancing test regardless of whether the Commission views it through the lens of a benefit or a cost (specifically, *reduced* innovation as a cost). The FTC has previously defined

¹³⁷ *Id.* at 1169.

¹³⁸ *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015).

¹³⁹ ANPR at 51277.

¹⁴⁰ *See* UPS.

¹⁴¹ *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 255 (3d Cir. 2015); *see also* *Pennsylvania Funeral Directors Ass’n v. F.T.C.*, 41 F.3d 81 (3d Cir. 1994).

¹⁴² ANPR at 51282.

¹⁴³ *Id.*

innovation as “the development of new and improved goods, services, and processes.”¹⁴⁴ Various experts have offered similar, expanded definitions.¹⁴⁵

The FTC must consider at least three potential costs of regulating the use of data. First and most obviously, privacy and data security rules may force firms to start charging for online tools and services that are currently ad-supported. New privacy and data security rules would limit firms’ ability to monetize free online services, forcing them to switch to paid models which charge consumers upfront.

Second, new regulations can create higher compliance costs and raise barriers to entry for companies developing online tools and services. This may disincentivize firms, especially small ones and startups, from building or investing in online tools and services.¹⁴⁶ The Unfairness Policy Statement recognizes “reduced incentives to innovation” as a potential cost of regulation.¹⁴⁷

¹⁴⁴ TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, FEDERAL TRADE COMMISSION 1 (2003), <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf>; *see also* TRANSCRIPT OF FTC HEARING ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY, FEDERAL TRADE COMMISSION 4 (2018) https://www.ftc.gov/system/files/documents/public_events/1415062/ftc_hearings_session_4_transcript_da_y_1_10-23-18_0.pdf (“innovation benefits consumers through the development of new products, processes, and services that improve lives and address unmet needs.”).

¹⁴⁵ In 2009, academics in the United Kingdom conducted a literature review of various definitions of innovation used in the fields of economics, innovation and entrepreneurship, business and management, and technology. The paper defined innovation as: “the multi-stage process whereby organizations transform ideas into new/improved products, service [sic] or processes, in order to advance, compete and differentiate themselves successfully in their marketplace.” *See* Anahita Baregheh et al., *Towards a Multidisciplinary Definition of Innovation*, 47 *MANAGEMENT DECISION* 1323 (Sep. 4, 2009), <https://www.emerald.com/insight/content/doi/10.1108/00251740910984578/full/pdf?title=towards-a-multidisciplinary-definition-of-innovation>.

¹⁴⁶ *See* Anja Lambrecht, *E-Privacy Provisions And Venture Capital Investments In The EU* (2017), <https://www.ceps.eu/wp-content/uploads/2017/10/E-Privacy%20Provisions%20and%20Venture%20Capital%20Investments%20in%20the%20EU.PDF>; *see also* James Campbell, Avi Goldfarb & Catherine Tucker, *Privacy Regulation and Market Structure*, 24 *J. ECON. & MGMT. STRUCTURE* 47-73 (2015), <https://onlinelibrary.wiley.com/doi/abs/10.1111/jems.12079>.

¹⁴⁷ *See* UPS:

Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces. Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller’s failure to present complex technical data on his product may lessen a consumer’s ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects. The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, *reduced incentives to innovation* and capital formation, and similar matters.

Third, the UPS recognizes “increased regulatory burdens on the flow of information.”¹⁴⁸ Written long before the Digital Revolution, this prescient passage reflects the FTC’s understanding that the Commission had restricted the “flow of information” when it regulated marketing claims, and that this necessarily implicated the First Amendment. The UPS cited *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976).¹⁴⁹ That landmark Supreme Court decision extended First Amendment protection to commercial speech for the first time,¹⁵⁰ noting that the “First Amendment interests in the free flow of price information could be found to outweigh the countervailing interests of the State.”¹⁵¹ More recently, in a case involving patterns of data about which doctors prescribe which drugs and when, the Court has recognized that the First Amendment broadly protects data:

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment ... Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.¹⁵²

“Facts”—*i.e.*, data—are also the raw material for the innovation that is at stake in this proceeding. New privacy and data security regulations could make online tools and services less effective and less accessible.¹⁵³ For example, rules limiting how firms collect and use consumer data would restrict the ability of firms to offer targeted, personalized services based on behavioral and browsing data.

1. How to Weigh Innovation

Innovations benefit consumers and competition. “Data-driven innovation forms a key pillar in 21st century sources of growth.”¹⁵⁴ As the FTC itself recognized nearly two decades ago, “[a]n economy’s capacity for invention and innovation helps drive its economic growth and

¹⁴⁸ See UPS.

¹⁴⁹ See UPS n. 25.

¹⁵⁰ 425 U.S. 748 (overruling *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which held that there were no constitutional restraints on regulating purely commercial advertising).

¹⁵¹ 425 U.S. at 755.

¹⁵² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (citations omitted) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.”)).

¹⁵³ See Avi Goldfarb & Catherine Tucker, *Privacy and Innovation*, 12 INNOVATION POL’Y & ECON. 65-89 (2012), <https://www.journals.uchicago.edu/doi/full/10.1086/663156>.

¹⁵⁴ *Data-Driven Innovation for Growth and Well-Being*, OECD, <http://oe.cd/bigdata> (last visited Nov. 20, 2022).

the degree to which standards of living increase.”¹⁵⁵ Yet the case law examining the role of innovation in Section 5(n) cost-benefit analysis is woefully underdeveloped. The only court to rule on the question has said what should be obvious: firms cannot merely point to a “general interest in innovation” when arguing that a given commercial surveillance practice benefits consumers or competition.¹⁵⁶

When weighing innovation, the Commission should focus on a specific innovative product or service and consider evidence of whether, or to what extent, data collection, analysis, and monetization supported its development. Relevant evidence includes the types and quantity of data collected, the role data played in developing or improving upon a product or service, the role data plays in the core functionality of a product or service, the level of customization or targeting within a product or service, the cost of a product or service, and whether data usage impacts the cost.

If properly conducted, a rulemaking might better develop these questions than yet another enforcement action. In such a proceeding, the Commission could gather evidence from a wide range of affected parties, request comments and hold hearings on specific products or services, the data practices of those services, and how those services utilize consumer data. The current ANPR, however, is far too broad to account for the potential impact of rulemaking on innovation with any level of specificity. At best, the current ANPR speaks only to a “general interest in innovation.” At worst, the current ANPR treats innovation as an afterthought.

2. How to Weigh Usability Tradeoffs

Many of the tradeoffs at stake in this proceeding involve usability, “a quality attribute that assesses how easy user interfaces are to use.”¹⁵⁷ “When Amazon’s Appstore first implemented in-app purchases in November 2011, the default setting did not require account holder approval, by entry of a password or any other means, prior to completion of an in-app purchase.”¹⁵⁸ Amazon argued that “consumers prefer a seamless, efficient mobile experience.” The court responded:

¹⁵⁵ *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Federal Trade Commission (October 2003), <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf>.

¹⁵⁶ *FTC v. Amazon.Com, Inc.*, No. C14-1038-JCC at *21 (W.D. Wash. Apr. 26, 2016) (“Amazon’s ... argument about stifling innovation is too vague, and unsupported by any evidence, to create a genuine issue with respect to this cost-benefit analysis.”).

¹⁵⁷ Jakob Nielsen, *Usability 101: Introduction to Usability*, NIELSEN NORMAN GROUP (January 3, 2012), <https://www.nngroup.com/articles/usability-101-introduction-to-usability/>.

¹⁵⁸ *FTC v. Amazon.Com, Inc.*, No. C14-1038-JCC, at *3 (W.D. Wash. Apr. 26, 2016)

even accepting as true the notion that consumers prefer a seamless and efficient experience, the “benefit” of ensuring a streamlined experience is not incompatible with the practice of affirmatively seeking a customer’s authorized consent to a charge.¹⁵⁹

In that case, the usability tradeoff did not seem difficult to the court. A harder tradeoff was presented by the FTC’s settlement with Apple over claims that Apple’s practice of allowing purchases without further authorization for a fifteen-minute window after the user provides their password.¹⁶⁰ The FTC alleged that children were able to make unauthorized purchases in this window and that “Apple in many instances [did] not inform account holders that password entry will approve a charge or initiate a fifteen-minute window during which children using the app can incur charges without further action by the account holder.”¹⁶¹ After receiving complaints from parents—and long before the FTC took action—Apple changed the practice to require the entry of a password for each new purchase.¹⁶² That may have been the right choice for Apple, but should every company be required to follow the same rule in all circumstances?

If the Commission were to make a rule regarding in-app purchases—something we would not advise—it would have to consider the various possible permutations of its rule. Should consumers have to supply a password—or otherwise verify themselves—before making each purchase? How much do consumers benefit in usability from not having to do so? Do some consumers benefit more from such usability in some circumstances than others, such as making in-app purchases in the middle of game play? Will having to pause to re-enter a password to buy more armor or recharge your character’s health points detract from the seamless experience of game play more than having to authorize each purchase in an app store? Can users with different preferences be given different options? What should the default settings be? How much guidance should users be given and what should it look like? As Commissioner Josh Wright noted in his dissent from the Apple settlement, the Commission refused to engage in any such analysis, even on the relatively simple question of how to configure notifications to users about how long the window of time in which in-app payments could be made without having to enter another password would remain open:

¹⁵⁹ *Id.* at *21.

¹⁶⁰ Complaint, Apple, Inc., FTC File No. 1123108, at para. 28-30 (Jan. 15, 2014), <https://www.ftc.gov/sites/default/files/documents/cases/140115applecmpt.pdf>.

¹⁶¹ *Id.*

¹⁶² See Chris Foresman, *Apple Facing Class-Action Lawsuit Over Kids’ In-App Purchases*, ARSTECHNICA, Apr. 15, 2011, <http://arstechnica.com/apple/2011/04/apple-facing-class-action-lawsuit-over-kids-in-app-purchases/> (“After entering a password to purchase an app from the App Store, the password now has to be reentered in order to make any initial in-app purchases.”).

the Commission effectively rejects an analysis of tradeoffs between the benefits of additional guidance and potential harm to some consumers or to competition from mandating guidance by assuming that “the burden, if any, to users who have never had unauthorized charges for in-app purchases, or to Apple, from the provision of this additional information is de minimis” and that any mandated disclosure would not “detract in any material way from a streamlined and seamless user experience.”¹⁶³

Such assertions would not pass muster in a rulemaking. The Commission would have to carefully consider the usability tradeoffs involved in various permutations of a rule. Here, those tradeoffs are so complicated that making a rule is unlikely to be worth the effort it would take the Commission—and unnecessary, given that the problem had already been resolved by market forces even before the Commission brought its in-app purchase cases. But to date, this area is the only example of the Commission beginning to consider usability tradeoffs—and it failed to do so in any meaningful way.

E. Deception & the Need to Assess Materiality

Deception is generally a better-defined area of law and offers a sounder basis for rulemaking. This is especially so for data security. The *Wyndham* case turned on what was meant by representations such as this: “We safeguard our Customers’ personally identifiable information by using industry standard practices.”¹⁶⁴ The *Wyndham* court noted that an FTC guidebook “counsel[ed] against many of the specific practices alleged” by the FTC.¹⁶⁵ Any rule the FTC might issue would have to be accompanied by “a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.”¹⁶⁶

¹⁶³ Dissenting Statement of Comm’r Joshua D. Wright In the Matter of Apple Inc. at 13 (Jan. 15, 2014), https://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright/140115applestatementwright.pdf.

¹⁶⁴ *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 241 (3d Cir. 2015).

¹⁶⁵ *Id.* at 256 (“For instance, [the Guidebook] recommends that companies “consider encrypting sensitive information that is stored on [a] computer network ... [c]heck ... software vendors’ websites regularly for alerts about new vulnerabilities, and implement policies for installing vendor-approved patches.” It recommends using “a firewall to protect [a] computer from hacker attacks while it is connected to the Internet,” deciding “whether [to] install a ‘border’ firewall where [a] network connects to the Internet,” and setting access controls that “determine who gets through the firewall and what they will be allowed to see ... to allow only trusted employees with a legitimate business need to access the network.” It recommends “requiring that employees use ‘strong’ passwords” and cautions that “[h]ackers will first try words like ... the software’s default password[] and other easy-to-guess choices.” And it recommends implementing a “breach response plan,” which includes “[i]nvestigat[ing] security incidents immediately and tak[ing] steps to close off existing vulnerabilities or threats to personal information.”) (citing FTC, *Protecting Personal Information: A Guide for Business*, 10, 17, 22, 30–31 (2016), available at https://www.ftc.gov/system/files/documents/plain-language/pdf-0136_proteting-personal-information.pdf).

¹⁶⁶ 15 U.S.C. § 57a(d)(1)(C).

Notably, this is something the Commission never considered in its *LabMD* litigation, where the Commission's expert witness at trial could speak only to the best practices of Fortune 500 companies, not small businesses like LabMD.¹⁶⁷

Two areas of deception doctrine, however, merit caution, as they remain undeveloped nearly 40 years after issuance of the FTC's 1983 Deception Policy Statement (DPS).¹⁶⁸ First, that statement requires that "the representation, omission, or practice must be a 'material' one," which the DPS defines as "likely to affect the consumer's conduct or decision with regard to a product or service."¹⁶⁹ The concept of materiality remains woefully underdeveloped because the Commission has, in nearly every case it has brought, relied on the presumption of materiality.¹⁷⁰

It makes sense to presume that "express claims are material"¹⁷¹ in traditional advertisements. "[W]e may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."¹⁷² But that presumption doesn't always make sense—and it increasingly breaks down in the online context where companies make express statements that look nothing like traditional marketing claims. "The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality,"¹⁷³ declares the DPS, yet the Commission has never really explained how to weigh such evidence. Attached, for the Commission's consideration, is a 2015 white paper exploring this issue in detail.¹⁷⁴ The paper's advice remains applicable: the Commission would be well-served to hold a workshop on deception and consider issuing a policy statement on the topic after soliciting public input on a draft statement.

¹⁶⁷ Gus Hurwitz, *The FTC's Data Security Error: Treating Small Businesses Like the Fortune 1000*, FORBES (Feb. 20, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/02/20/the-ftcs-data-security-error-treating-small-businesses-like-the-fortune-1000/>.

¹⁶⁸ See Letter from James C. Miller III, Fed. Trade Comm'n Chairman, to John D. Dingell, Chairman, House Comm. on Energy and Commerce (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [hereinafter DPS]. The DPS is also appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

¹⁶⁹ DPS at 1.

¹⁷⁰ *Id.* at 1-2 ("In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.").

¹⁷¹ *Id.* at 5.

¹⁷² *Id.* n.49 (quoting *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980)).

¹⁷³ *Id.* at 5 n.47.

¹⁷⁴ Geoffrey A. Manne, R. Ben Sperry & Berin Szóka, *In the Matter of Nomi Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case*, International Center for Law & Economics, White Paper 2015-1 (2015), available at http://techfreedom.org/wp-content/uploads/2018/11/icle-nomi_white_paper.pdf.

Second, and relatedly, if the Commission interprets “consumer” to include businesses,¹⁷⁵ it will become especially critical that it establish the materiality of the representation between businesses that it alleges. Further, the Commission would have to “examine the [allegedly deceptive] practice from the perspective of a consumer acting reasonably in the circumstances.”¹⁷⁶ “The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience.”¹⁷⁷

III. The Procedural Safeguards of Mag-Moss Will Help the FTC Avoid Overreach

The Commission’s commercial surveillance and data security ANPR is deficient. It says both too much and not enough. It does not tell the public what rules the Commission is considering or what the limits on future rules might be. “[The ANPR] provides no notice whatsoever,” former Commissioner Phillips wrote in his dissent, “of the scope and parameters of what rule or rules might follow; thereby, undermining the public input and congressional notification processes.”¹⁷⁸ Procedurally, the ANPR is too broad to properly inform and solicit comments. If the Commission must consider rulemaking in this area, it should revise and narrow the ANPR. Ideally, it should break down the ANPR into smaller ANPRs, each focused on a specific area. At a minimum, it should hold a public workshop on each specific area and provide additional opportunity for comment before issuing any NPRM.¹⁷⁹

Former Commissioner Phillips suggested that the Commission is fishing for legal theories under which to prohibit disfavored advertising tactics without first determining that those tactics are actually unfair.¹⁸⁰ He further suggested that the Commission must first do its homework.¹⁸¹ Congress thought the same: “The provisions of the bill before us requires that the agency do more up-front work so that it will have a greater appreciation of the need for a proposal before it actually issues a proposed rule and goes through the rulemaking process.”¹⁸² And so too here. In its rush to do *something*, the Commission has failed to make its legal authority and regulatory goals clear and precise. This ANPR fails consumers.

¹⁷⁵ ANPR at 51277.

¹⁷⁶ DPS at 1.

¹⁷⁷ *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977); see also DPS n. 29

¹⁷⁸ Comm’r Phillips ANPR Dissent at 2.

¹⁷⁹ See 15 U.S.C. § 57a(b)(2)(B) (“The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking....”).

¹⁸⁰ See Comm’r Phillips ANPR Dissent at 6.

¹⁸¹ *Id.* at 7.

¹⁸² 125 Cong. Rec. 32,455 (1979) (statement of Rep. Broyhill).

A. This ANPR Is Hopelessly Unfocused

Commissioner Phillips provides a pithy summary of the problems with this ANPR: it “recast[s] the Commission as a legislature, with virtually limitless rulemaking authority where personal data are concerned.”¹⁸³ While doubtless intended to accelerate the rulemaking process, this breadth, ironically, recreates the very thing that caused Magnuson-Moss rulemakings to take so long in the 1970s—a major criticism of the Mag-Moss process.¹⁸⁴ Simply counting the time between start and completion misses the important point, as the Administrative Conference explained in its 1980 report recommending reform:

The massive, poorly organized records in most of the early Magnuson-Moss rulemakings are symptomatic of a basic problem observed in the FTC’s trade regulation rulemaking proceedings: that is, the failure of the FTC to recognize that effective implementation of the Magnuson-Moss Act requires even more emphasis on procedural and substantive structuring than agencies have traditionally used for informal rulemaking under 5 U.S.C. 553. Instead, the appropriate substantive structuring—the focusing and narrowing of the issues—often did not take place until late in the post-hearing stage of the proceedings, and, in many instances, not until the very end of the administrative process. The FTC commissioners’ general lack of involvement in the process until the very end, and the absence of any “feedback” from them to staff and interested persons during most of the process, further contributed to the problem of lack of structure. As a result, public input—by means of rebuttal, “post-record” comments and oral presentations—was not focused narrowly on issues or information of significance to the commissioners.¹⁸⁵

This was the worst of both worlds: “the combination of additional procedural requirements with informal notice-and-comment procedures caused delay and uncertainty in the rulemaking proceedings, and appears to have contributed to judicial reversal of final rulemaking actions.”¹⁸⁶ In its 1980 report, the Administrative Conference of the United States—the body created by Congress in 1964 to recommend improvements in

¹⁸³ Comm’r Phillips ANPR Dissent at 2.

¹⁸⁴ Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1988-89 (2015), https://digitalcommons.wcl.american.edu/facsch_lawrev/1082/ (“The average number of days it took to issue these pre-Magnuson-Moss Act rules is 1086 days, or 2.94 years.... These seven post-Magnuson-Moss Act rules (counting both the Vocational Schools rule and the Business Opportunity rule) averaged 2035 days or 5.57 years”).

¹⁸⁵ ADMIN. CONF. OF THE U.S., RECOMMENDATION 80-1: TRADE REGULATION RULEMAKING UNDER THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT 2 (1980) [hereinafter *1980 ACUS Report*].

¹⁸⁶ *Id.* at 3.

administrative processes¹⁸⁷—specifically recommended that Mag-Moss rulemakings be narrow and focused: the Conference’s top recommendation to lawmakers was that the FTC “structure the rulemaking proceedings to narrow and focus the issues early in the proceeding and prior to the holding of the hearing by section 18(c)....”¹⁸⁸ The American Bar Association’s Antitrust Section raised the same concern:

In many cases, neither the initial notice nor the associated memorandum [issued by the FTC staff to recommend a rulemaking] contained any thorough analysis of the factual or issues associated with the proposed rule. As a result, commenters found it difficult to assess what kinds of comment and legal analysis would be appropriate or necessary either to support or refute the rule. In addition, some initial notices, particularly in the early rulemaking proceedings, tended to be quite restricted in the remedies suggested. Narrow notice inhibits consideration of alternative remedies.¹⁸⁹

And lawmakers considering what became the FTC Improvements Act of 1980 agreed: “[T]he Commission,” said Representative Broyhill, “has also from time to time begun a rulemaking proceeding without doing the necessary background work to determine whether a trade regulation rule is necessary in the first place.”¹⁹⁰

This ANPR suffers from exactly the same problem: it is so hopelessly unfocused that “stakeholders cannot discern how to engage meaningfully and provide comment, and the lack of focus for their comments will give the Commission a corollary ability to proceed in any direction it chooses.”¹⁹¹ The commercial surveillance ANPR asks far more questions—*ninety-five* in total¹⁹²—than previous ANPRs. Other ANPRs ask far fewer: the Home Insulation ANPR asked five questions,¹⁹³ the Funeral Industry Practices ANPR asked forty-

¹⁸⁷ Administrative Conference Act of 1964, Pub. L. No. 88-499, 78 Stat. 615 (“To carry out the purpose of this Act the Conference is authorized to . . . arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure”).

¹⁸⁸ *1980 ACUS Report* at 4-5.

¹⁸⁹ *Report of the Section Concerning FTC Trade Regulation Rulemaking Procedures Pursuant to the Magnuson-Moss Act*, 49 ANTITRUST L.J. 347, 357 (1980) [hereinafter *1980 ABA Report*].

¹⁹⁰ 125 Cong. Rec. 32,455 (1979).

¹⁹¹ Comm’r Phillips ANPR Dissent at 3.

¹⁹² ANPR for Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51285 (Aug. 22, 2022), <https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security>.

¹⁹³ ANPR for Trade Regulation Rule on Labeling and Advertising of Home Insulation, 64 Fed. Reg. 48024, 48048 (Sep. 1, 1999).

four,¹⁹⁴ the Franchising Rule ANPR asked thirty-one,¹⁹⁵ and more recently, the Impersonation ANPR, Deceptive Earnings Claims ANPR, and Telemarketing Sales Rule ANPR asked thirteen,¹⁹⁶ twenty-eight,¹⁹⁷ and ten¹⁹⁸ questions, respectively. “[T]his ANPR,” Commissioner Phillips said, “addresses too many topics to be coherent.”¹⁹⁹ It is over twice the length of many other ANPRs. Even this comparison understates the breadth of this ANPR, as even some of its shortest questions contemplate matters that might themselves entail an entire rulemaking of the scale usually undertaken. As William Blake put it: “To see a world in a grain of sand.”²⁰⁰

The FTC’s last Operating Manual required that staff reports recommending action after an ANPR be limited to 300 pages.²⁰¹ Any staff report produced in response to this ANPR, with its ninety-five questions, could easily run much longer. Dividing this inquiry into multiple proceedings would allow the FTC to give each subject area the attention it deserves. But if the FTC does not issue an additional ANPR (or ANPRs) before moving to an NPRM, it will have, in effect, have skipped the first step of the Mag-Moss process—the very step that was supposed to focus the FTC’s attention.

B. Recommendations for Hearings

The 1989 Operating Manual provides that, when the Commission decides to issue an NPRM, “the matter is assigned to a Presiding Officer.”²⁰² Until the FTC recently revised its rules, it would have been up to the Chief Administrative Law Judge to select a presiding officer. Now,

¹⁹⁴ ANPR for Trade Regulation Rule on Funeral Industry Practices, 52 Fed. Reg. 46706 (Dec. 9, 1987).

¹⁹⁵ ANPR for Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 62 Fed. Reg. 9115 (Feb. 28, 1997).

¹⁹⁶ ANPR for Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72901 (Dec. 23, 2021), <https://www.federalregister.gov/documents/2021/12/23/2021-27731/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

¹⁹⁷ Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13951 (Mar. 11, 2022), <https://www.federalregister.gov/documents/2022/03/11/2022-04679/deceptive-or-unfair-earnings-claims>.

¹⁹⁸ Telemarketing Sales Rule, 87 Fed. Reg. 33662 (June 3, 2022), <https://www.federalregister.gov/documents/2022/06/03/2022-10922/telemarketing-sales-rule>.

¹⁹⁹ Comm’r Phillips ANPR Dissent at 3.

²⁰⁰ William Blake, *Auguries of Innocence*, in POETS OF THE ENGLISH LANGUAGE (1950).

²⁰¹ FED. TRADE COMM’N, FTC OPERATING MANUAL § 7.3.21 (1989).

²⁰² See FED. TRADE COMM’N, FTC OPERATING MANUAL § 7.3.2 (1989).

this is a decision for the Chair to make.²⁰³ Few decisions will have more importance in any rulemaking the FTC chooses to pursue.

Chair Khan should consider the 1980 Recommendation of the ABA Antitrust Section: “The FTC should use its staff of administrative law judges, rather than its staff lawyers, as presiding officers in rulemaking proceedings.”²⁰⁴ The reasoning for this recommendation remains no less compelling today:

It is unrealistic to permit a staff member to be a vigorous advocate on one hand and to expect him to be an impartial fact finder on the other. It would be even more unrealistic for industry representatives who are the subject of pointed cross-examination at hearings and counsel for the industry to view staff as anything but adversaries....

Also troublesome is the expectation that staff can prepare an impartial staff report, as contemplated by the [pre-1980] rules, since it is unlikely members who spend years getting a rule proposed and supporting it through hearings will be impartial.

It seems evident from a reading of almost any staff report in a rulemaking proceeding that the staff is writing in support of the rule, rather than preparing a report which analyzes pros and cons of a rule. It is even more unlikely that the industry will believe that the staff is impartial after it has clashed with it during weeks and even months of hearings.²⁰⁵

The Antitrust Section noted that “the presiding officer’s current role in a rulemaking proceeding is ambiguous and generally misunderstood.”²⁰⁶ While the “layout of the hearing room gives the unexperienced witness the impression that the presiding officer has a role similar to that of a judge in a formal adjudication,” in fact, their role was “basically a procedural umpire with a limited factfinding function.”²⁰⁷ Congress attempted to address

²⁰³ See Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures 2 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

²⁰⁴ 1980 ABA Report at 351.

²⁰⁵ *Id.* at 361-62.

²⁰⁶ *Id.* at 362.

²⁰⁷ *Id.* at 360.

this problem by vesting the power to make factual findings in the presiding officer.²⁰⁸ By making herself the Chief Presiding Officer of the hearing process, the Chair has made it easier to question whether the FTC is truly engaging in factfinding rather than policymaking. There is only so much the Chair can do to try to compensate for the fact that she will have ultimate control over the key questions in this proceeding. But at a minimum, she could pick a presiding officer—or officers, if the Commission breaks down this rulemaking into more than one proceeding—who is truly independent of her.

That person should be the FTC’s Administrative Law Judge. But if the Chair decides otherwise, it should at least not be any other current employee of the Commission, who will be dependent upon her. A veteran of the agency might be an appropriate candidate, especially if that person is at a stage of their career where their judgments cannot be attributed to currying favor with either the Commission or with industry—perhaps a former Commissioner or Bureau Chief. Expertise in the subject matter at hand would be helpful, which is a good reason for breaking this proceeding down into more focused workstreams. But the essential thing is that they have the kind of experience that an ALJ would have in administering hearings, considering evidence, and synthesizing large volumes of evidence into the recommended decision that must inform the Commission’s deliberations on issuing a final rule.²⁰⁹ The presiding officer should be a lawyer, not least because they must follow *ex parte* rules.²¹⁰ Perhaps the best way to think about the characteristics to be sought is to consider how judges choose special masters. Noting the value of subject matter expertise and comparing the role of a special master to that of a federal magistrate judge, one district judge said this:

The expert in this case must assist the court by coordinating and evaluating remedial proposals that defendants and others are in the process of preparing pursuant to court order. He must serve an investigatory and consultative function among the parties and advise this court in technical areas so it may approve an effective remedial order. In a sense, he must bridge the gap between the court as impartial arbiter of plans placed before it and advocates

²⁰⁸ 15 U.S.C. § 57a(c)(1)(B) (“The officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence.”).

²⁰⁹ 14 U.S.C. § 57a(c)(1)(B).

²¹⁰ 15 U.S.C. 57a(c)(1)(C) (“Except as required for the disposition of *ex parte* matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.”).

protecting their clients' positions that are often narrower than that of society at large.²¹¹

Much the same could be said for the role of a presiding officer in a Mag-Moss rulemaking.

C. Involve the Bureau of Economics

The FTC's Operating Manual long required not merely the participation of the Bureau of Economics throughout the rulemaking process, but the Bureau's concurrence, even to the issuance of an Advance Notice of Proposed Rulemaking.²¹² Indeed, according to the most recent version of the Manual: "If concurrence cannot be achieved, the Bureau of Economics should submit an accompanying memorandum outlining its objections to the rulemaking proposal and its recommendations for Commission action."²¹³

What role did the Bureau have in the drafting of this ANPR? Did it concur to the issuance of the report? If not, did it explain its objections and make recommendations in such a memorandum? The public would benefit from seeing that document. If the Commission has not yet formally solicited the views of the Bureau, it should. Specifically, before any rule is proposed, as the ABA Section recommended in 1980:

[T]he Bureau of Economics should be directed to prepare and to forward directly to the Commission an economic impact statement, including an analysis of competitive impact, less adverse alternative approaches, and costs and benefits, on each proposed rule. The Bureau would consider separately the provisions of the proposed rule suggested by the staff and would prepare a detailed analysis economic impact of each substantive provision.²¹⁴

Further, the Commission should commit now to giving the Bureau the same role at the conclusion of the hearing process, when the staff issues its final report,²¹⁵ that the Commission's last published Operating Manual provided for:

Ordinarily comments of the Directors of the Bureau of Consumer Protection and the Bureau of Economics on the final staff report will be made when the

²¹¹ *Hart v. Comty. Sch. Bd.*, Brooklyn, N.Y. Sch. D. #21, 383 F. Supp. 699, 764 (E.D.N.Y. 1974)

²¹² "Before the staff report can be forwarded to the Commission, the concurrence of the Bureau of Economics must be sought and obtained." *1980 ABA Report* at 355 (citing FED. TRADE COMM'N, FTC OPERATING MANUAL § 7.3.8.3 (1978)).

²¹³ FED. TRADE COMM'N, FTC OPERATING MANUAL § 7.3.8.3 (1989).

²¹⁴ *1980 ABA Report* at 356.

²¹⁵ FED. TRADE COMM'N, FTC OPERATING MANUAL § 7.3.21 (1989). The final staff report is issued near the end of the rulemaking process, after the conclusion of public hearings and the period for filing rebuttal submissions.

rulemaking record is submitted to the Commission at the end of the post report comment period. However, a memorandum setting forth the Director's views may be forwarded with the staff report to the Presiding Officer for placement on the rulemaking record if a Director desires those views be the subject of public comment during the post report comment period.²¹⁶

CONCLUSION

Why did Congress craft Section 5 the way it did? "The statute," explained the Unfairness Policy Statement, "was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion."²¹⁷ What Congress assigned to the FTC was not a blank check to make policy decisions but "[t]he task of identifying unfair trade practices ..., subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time."²¹⁸ Far less "development" has occurred than anyone could have expected when the Unfairness Policy Statement was written in 1980, or even when Congress wrote Section 5(n) in 1994. Because there has been little "judicial review," there has been little of the "the gradual process of judicial inclusion and exclusion" to give meaning to unfairness, "one of that class of phrases which do not admit of precise definition."²¹⁹

The Commission now proposes to short-circuit that "evolutionary process" by "drafting a ... list of unfair trade practices"²²⁰ to govern the most dynamic parts of the American economy. Some of those rules might well be justified, but the Commission should proceed cautiously. It should focus, as it has in past Mag-Moss rulemakings, on discrete issues where clear, objective harms cannot be addressed without regulation. Even when it proposes to address objective harms, it should remember the limits of its expertise. To continue this proceeding at the breadth of the ANPR invites backlash from both Congress and the courts. If the FTC treats Section 5 as a broad mandate to decide major questions and to make essentially legislative judgments, it should not be surprised if Congress rebukes it—or if the inevitable court battle leaves the agency with *less* authority than it has today. The more the Commission rushes the process along, skirting the procedural safeguards of the Magnuson-Moss Act, the

²¹⁶ FED. TRADE COMM'N, FTC OPERATING MANUAL § 7.3.21.3 (1989).

²¹⁷ *See* UPS.

²¹⁸ *Id.*

²¹⁹ *Id.* (quoting *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931)).

²²⁰ *Id.*

less the Commission’s role looks like fact-finding—“a practice that is ... long associated with the executive function”²²¹—and the more it looks like lawmaking.

Respectfully submitted,

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²²¹ Gundy v. United States, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting).