TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement

FTC-2022-0073

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INTRODUCTION

TechFreedom files these comments, as requested by the Commission,[1] on the Petition for Rulemaking filed by Center for Digital Democracy, Fairplay, and 19 other organizations on November 17, 2022.[2] The Petition requests that the FTC commence a rulemaking proceeding to establish rules to declare certain online practices, as applied to minors, to violate Section 5 of the FTC Act.[3] In these comments, TechFreedom highlights the procedural, factual, and legal reasons why the FTC should tread carefully before diving into a rulemaking proceeding that will sap the agency's resources, which could be better used in targeted enforcement of the Children's Online Privacy and Protection Act of 1998. COPPA has served the agency, and more importantly, parents, well. Embarking on a rulemaking designed to establish vague, overbroad, and highly constitutionally questionable rules will neither solve the perceived problem nor be an effective use of taxpayer resources.

A. About TechFreedom

Founded in 2010, TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

We have weighed in on significant issues at the FTC over the past decade:

- We've recounted how past attempts to ban advertising to children have backfired badly on the Commission, and how current attempts to resurrect such bans would repeat these failures; as a 2004 FTC staff report put it, the FTC "has traveled down this road before" and this "is not a journey that anyone at the Commission cares to repeat."[4]

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[1] *See* Receipt of Petition; Request for Comment on Petition for Rulemaking of the Center for Digital Democracy, Fairplay, et al., FTC-2022-0073-0001 (December 1, 2022), https://www.regulations.gov/document/FTC-2022-0073-0001. The FTC's request for comment was published in the Federal Register on December 2, 2022, 87 Fed. Reg. 74056 (December 2, 2022). The Comment date was originally set for January 3, 2022 but was extended by the FTC until January 18, 2022. *See* https://www.ftc.gov/system/files/ftc_gov/pdf/r307000digitaldemocracyextensionfrn.pdf. These Comments are timely filed.

[2] Center for Digital Democracy et al., Petition for Rulemaking, filed November 17, 2022 (hereinafter "Petition"), https://fairplayforkids.org/wp-content/uploads/2022/11/EngagementPetition.pdf.

[3] *Id.* at 4.

[4] Comments of TechFreedom in the Matter of Protecting Kids from Stealth Advertising in Digital Media, Docket No. FTC-2022-0054 (Nov. 18, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-on-Stealth-Advertising-11-18-22.pdf, *quoting* FTC STAFF

- We've championed a reasoned approach to COPPA enforcement that doesn't destroy the creative community or tech industry;[5]
- We've warned about the pitfalls inherent in conducting Mag-Moss rulemakings in our comments on the FTC's recent "commercial surveillance" ANPR;[6]
- We've warned of the harm a general prohibition on non-compete agreements would have on the tech sector, especially companies reliant on intellectual property to deliver innovative solutions to the world's problems.[7]
- We've urged caution in rescinding prior FTC Policy Statements without thorough examination and something to fill the void;[8]
- We've analyzed the pros and cons of the FTC and DOJ's 2020 Vertical Merger Guidelines;[9]
- We've challenged the notion that the FTC Act requires plaintiffs to utilize the FTC's in-house adjudicatory process when bringing constitutional claims against the agency;[10]

REPORT, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT 23 (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf ("2004 FTC Staff Report").

[5] We hosted an event in the U.S. Capitol on January 13, 2020, bringing together the YouTube creator community with staffers to discuss the impact of the FCC's settlement with YouTube. *See Will Kids' Privacy Crackdown Break the Internet?*, TECHFREEDOM (Jan. 13, 2020), https://techfreedom.org/save-the-date-will-kids-privacy-crackdown-break-the-internet/. We also hosted a Capitol Hill panel discussion on COPPA in 2011, *see* https://techfreedom.org/reminder-techfreedomfosi-coppa-event-in-dc/, and appeared at the FTC's workshop on COPPA. *See* Press Release, Federal Trade Commission, The Future of the COPPA Rule: An FTC Workshop (Oct. 07, 2019) (General Counsel James E. Dunstan appeared on Panel 2: Scope of the COPPA Rule), https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop. *See also* Comments of TechFreedom in COPPA Rule Review, Docket No. FTC-2019-0054 (Dec. 11, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf.

[6] Comments of TechFreedom in the Matter of Trade Regulation Rule on Commercial Surveillance and Data Security, Docket No. FTC-2022-0053-0001, 10-11 (Nov. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-Trade-Regulation-Rule-on-Commercial-Surveillance-and-Data-Security.pdf.

[7] Comments of TechFreedom in the Matter of Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket No. FTC-2021-0036 (Sep. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Non-Compete-UMC-Rulemaking-10.2021.pdf.

[8] *See* TechFreedom, Letter to Chair Lina Kahn regarding Comments for July 1 Open Commission Meeting in re Unfair Methods of Competition Policy Statement (June 30, 2021), https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-FTC-Open-Meeting-Comments-6.30.21-UMC-Policy-Statement-1.pdf.

[9] *TechFreedom Praises, Critiques New Vertical Merger Guidelines*, TECHFREEDOM (June 30, 2020), https://techfreedom.org/techfreedom-praises-critiques-new-vertical-merger-guidelines/.

[10] *Axon: Can Defendants Raise Constitutional Defenses in Court Before the FTC Forces them to Settle?*, TECHFREEDOM (May 12, 2020), https://techfreedom.org/axon-can-defendants-raise-constitutional-defenses-in-court-before-the-ftc-forces-them-to-settle/.

- We've cautioned against attempting to conduct general rulemakings over unfair methods of competition under Section 6(g) of the FTC Act;[11] and,
- We've encouraged the Supreme Court to limit the FTC's remedy powers to those that are explicitly granted by the FTC Act.[12]

B. About the Petition

The Petition is headlined by the Center for Digital Democracy and Fairplay,[13] along with 19 other organizations. It posits a mental health emergency for minors, lays the blame for the emergency on Internet use, and argues that the FTC should use its Section 5 powers under the FTC Act to declare a broad swath of activities and design decisions (termed "engagement") to be "unfair and deceptive."[14] The Petition argues that the existing COPPA rules are insufficient because they only apply to children 12 and under,[15] and that case-by-case enforcement is insufficient to stop such wide-ranging activities.[16] Finally, the Petition argues that parents are unable—or simply can't be trusted—to assist their children in navigating the evils of the Internet.[17] While the Petition is couched in terms of trying to ban "engagement,"[18] at its core, it is yet another attempt to severely limit or ban advertising to minors. The terms "advertising" and "advertisement" appear 66 times in the Petition, almost always in a pejorative context.[19]

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[11] *See generally* Berin Szóka & Corbin Barthold, *The Constitutional Revolution that Wasn't: Why the FTC Isn't a Second National Legislature* (June 2022), https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMC-Rulemaking-Authority-TF-Version.pdf.

[12] *SCOTUS Should Apply Congressional Limits Placed On FTC's Remedy Power*, TECHFREEDOM (Oct. 2, 2020), https://techfreedom.org/scotus-should-apply-congressional-limits-placed-on-ftcs-remedy-power/.

[13] Until recently, Fairplay went by the name of the Campaign for a Commercial-Free Childhood. *Welcome to Fairplay*, FAIRPLAY, https://fairplayforkids.org/welcome-to-fairplay/.

[14] *See* Petition at 15 ("The FTC can promulgate rules defining acts or practices that are unfair or deceptive where it has 'reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.'").

[15] *Id.* at 64. Interestingly, the Petition only mentions COPPA, the backbone of child protection on the Internet, four times. *See id.* at n. 57.

[16] *Id.* at 65.

[17] *Id.* at 62 ("Not only are minors unable to reasonably avoid the harms caused by optimization for engagement, but parents and guardians are not able to protect their children from these harms, either. There are several reasons for this. The first and most important reason is that it is not logistically feasible for parents to directly supervise every moment of their children's internet use.")

[18] *See infra* at 16.

[19] *See, e.g.*, Petition at 1-2 ("The vast majority of apps, games, and services that are popular among minors generate revenue primarily via advertising, and many employ sophisticated techniques to cultivate lucrative long-term relationships between minors and their brands. As a result, developers have an interest in getting and keeping users on their products as much as possible. This conflicts with users' interest in an online

The Petition calls on the FTC to ban "low-friction variable awards," [20] "navigation manipulation,"[21] or "social manipulation"[22]—terms that the proposed rule leaves so broad and vague as to have little, if any, objective meaning.

SUMMARY

The Petition unites two bad ideas. First, the proposed rule would force many Internet service providers to verify the age of all users, which requires collecting personal information from them. This would violate the First Amendment rights of adults to communicate anonymously or pseudonymously online for the same reasons that caused the Supreme Court and other lower courts to strike down two of three major attempts by Congress to protect children online.[23]

Second, the Petition invites the FTC down a path reminiscent of the 1970s "KidVid Proceeding," in which activists sought to ban advertising to children.[24] The Petition makes many of the same dire warnings: evil advertisers are manipulating our children in unhealthy ways that will lead to the destruction of modern society. The FTC took the bait back then and launched the KidVid rulemaking. The result was disastrous: Congress briefly shuttered the agency and ultimately stripped it of authority to promulgate any rules related to advertising to children on television.[25] In 2004, in reviewing efforts to regulate fatty food advertising,

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experience that contributes to, rather than detracts from, their overall wellbeing."); 14 ("Further, when minors spend more time online, they are exposed to more advertisements for unhealthy products, which are heavily targeted toward minors."); 28 (listing "strategically timed advertisements" as an unfair method of "navigation manipulation"); 29 ("Interactive advertisements go even further, compelling a user to click or "play" in an ad in order to continue gameplay. These are all forms of navigation manipulation because they force a player to watch a video or "play a game" while still being an ad."); 31 (advertisements disrupt gameplay, which is "why they are categorically unfair when used on minors."); 51 ("The main benefit of these design tactics is that they help apps and services generate more revenue, including by increasing in-app transactions, advertising revenue, and monetization of user data. The longer users stay on a platform and the more they engage, the more data platforms and services, third party data collectors, and advertisers can collect about them."); 55-56 ("Due to immature executive functioning, minors have a diminished ability to resist advertising, diminished ability to control their attention when they are distracted by advertising, and diminished ability to critically judge advertising relative to adults."). We would note, as to the last argument, that the Petition itself admits that children generally are able to identify persuasive intent by the age of eight, and bias by the age of twelve. *Id.* at 60.

[20] Petition at 20.

[21] *Id.* at 28.

[22] *Id.* at 31.

[23] *See* Reno v. ACLU, 521 U.S. 844 (1997); Ashcroft v. ACLU, 535 U.S. 564 (2002).

[24] *See* FTC, Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

[25] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96- 252, §§ 11(a)(1), (3), 94 Stat. 374, 378–79 (1980) (codified in part at 15 U.S.C. § 57a(i)). While Section 11(a)(1) was passed in response to the KidVid proceeding, there is an argument that the "any substantially similar proceeding" would be applied to

FTC staff, in addition to concluding that such regulations probably would not pass First Amendment muster under the *Central Hudson* test,[26] also lamented how trying to regulate speech so heavily damaged the FTC:

> The children's advertising proceeding was toxic to the Commission as an institution. Congress allowed the agency's funding to lapse, and the agency was literally shut down for a brief time. The FTC's other important law enforcement functions were left in tatters. Newspapers ran stories showing FTC attorneys packing their active investigational files in boxes for storage, and entire industries sought restriction of, or even outright exemptions from, the agency's authority. Congress passed a law prohibiting the FTC from adopting any rule in the children's advertising rulemaking proceeding, or in any substantially similar proceeding, based on an unfairness theory. It was more than a decade after the FTC terminated the rulemaking before Congress was willing to reauthorize the agency. A congressional response of this magnitude was not simply the result of skilled lobbying by politically well connected industries, although they certainly did make their views known. Rather, it was the reaction to what was widely perceived as a grossly overreaching proposal. Even *The Washington Post*, normally a reliable friend of an activist FTC, editorialized that the proposal was "a preposterous intervention that would turn the FTC into a great national nanny." *The Washington Post* continued: [T]he 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.[27]

The instant Petition proposes KidVid on steroids—a national nanny for the Internet far more intrusive than what was contemplated for television in the 1970s. Given TechFreedom's

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any proceeding in which the FTC attempted to pass rules limiting advertising to children outside the statutory limitations imposed by COPPA, and not limited to rules related to television advertising. *See generally* 4 J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 JOURNAL OF PUB. POL'Y & MARKETING 192 (2003).

[26] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[27] FTC STAFF REPORT, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (2004), at 7-8 (footnotes omitted), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf ("2004 FTC Staff Report").

involvement in these issues since its founding, we are well-equipped to provide these comments.[28]

I. The Proposed Rule Would Require Age-Verification of Large Numbers of Adults, Raising Much the Same First Amendment Problems as the CDA and COPA

We begin with the proposed trade regulation itself (buried on page 67 of the Petition). Whatever the merits of the policy arguments made by the Petition, the rule it proposes would violate the First Amendment for essentially the same reason that the courts have struck down two of the three major statutes enacted by Congress to protect children online: it would force websites to verify the ages of large numbers of adults, which means collecting personal information that identifies them, thus denying them their constitutional right to communicate anonymously or pseudonymously online.[29] To anyone familiar with the extensive litigation over these two failed statutes, the unconstitutionality of the proposed rule should be obvious in its first ten words:

> *In delivering an online website or service to a minor*, it is an unfair or deceptive practice to employ certain features designed for the purpose of maximizing users':
>
> (a) time spent on the website or service…, or
>
> (b) activities performed on the website or service…[30]

This is a strict liability standard: a provider serving *any* minor violates the FTC Act regardless of whether it knows, or even *should* know, that that user is a minor. As such, the rule would require either (a) assuming that all users are minors, and applying the bill's draconian restrictions to everyone, or (b) age-verifying all users so those restrictions can be applied only to minors. Both outcomes would violate the First Amendment, though in different ways.

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[28] *See generally* Comments of TechFreedom in the Matter of Proposed Modifications to the Children's Online Privacy Protection Act (COPPA), Project No. P104503 (Sep. 24, 2012), https://techfreedom.org/techfreedom-urges-ftc-not-to-expand-coppa-by/; Comments of TechFreedom in the Matter of Protecting Kids from Stealth Advertising in Digital Media, Docket No. FTC-2022-0054 (Nov. 18, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-on-Stealth-Advertising-11-18-22.pdf; Comments of TechFreedom in the Matter of Trade Regulation Rule on Commercial Surveillance and Data Security, Docket No. FTC-2022-0053-0001 (Nov. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-Trade-Regulation-Rule-on-Commercial-Surveillance-and-Data-Security.pdf; TECHFREEDOM, *Extending COPPA to Teens is Unworkable* (Dec. 19, 2022), https://techfreedom.org/extending-coppa-to-teens-is-unworkable/.

[29] *See* cases cited *infra* notes 34-36 and accompanying text.

[30] Petition at 65 (emphasis added).

The former presumably is not what Petitioners intend, given the Petition's extensive focus on the unique vulnerability of minors. Practically, applying the proposed rule to all users would prove impossible: no website could *ever* "employ certain features designed for the purpose of maximizing users' [engagement]"—features of user interface design that are not only commonplace across the Internet but also that have long been essential aspects of the design of video games and the crafting of pre-digital media.[31] The rule would force a complete reengineering of much of the Internet. Such a regulation could not survive even intermediate scrutiny: there can be no legitimate government interest in presuming that adults cannot be trusted to regulate how much time they spend communicating—*i.e.*, speaking—online.

Presumably, the Petition means what it says: its rules should, somehow, be applied only to minors. Only by requiring *all* users to establish their age could a provider even begin to limit its liability—and even then, only partially, because existing tools for online age verification are inherently unreliable.[32] Some minors would inevitably be served, and the trigger for liability would be "delivering an online website or service to a minor,"" rather than, say, taking merely reasonable measures to avoid serving minors. Still, websites would have a powerful incentive to verify the age of all their users: such good faith efforts at compliance would at least reduce penalties imposed for violations. If violations were assessed per user, such penalties could be truly astronomical: at $50,120 per user, the penalties facing large social media services could involve "more money than there is on the planet."[33]

It is already well established that laws which have the effect of forcing websites to age-verify adults violate the First Amendment, even if they do not explicitly require age verification. The issue first arose in *Reno v. ACLU* (1997), which struck down nearly all of the Communications Decency Act (CDA) of 1996.[34] Congress subsequently enacted the Child

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[31] *See* discussion *infra* at 18.

[32] *See* Gordon v. Holder, 721 F.3d 638, 642, 657 (D.C. Cir. 2013) (recognizing that "[r]emote purchasing also makes it easier for parties to evade age restrictions … age verification requirements are only partially effective"); American Booksellers Found. For Free Expression v. Sullivan, 799 F. Supp. 2d 1078, 1082 (D. Alaska 2011) ("There are no reasonable technological means that enable a speaker on the Internet to ascertain the actual age of persons who access their communications.").

[33] Craig Timberg & Tony Romm, *How Big Could Facebook's Fine Theoretically Get? Here's A Hint: There Are Four Commas, And Counting*, THE WASHINGTON POST (Apr. 9, 2018, 3:07 PM), https://www.washingtonpost.com/news/the-switch/wp/2018/04/09/how-big-could-facebooks-fine-theoretically-get-heres-a-hint-there-are-four-commas-and-counting/ ("William Kovacic, a former FTC chairman, may have come closest when he joked that the potential fine as totaling 'more money than there is on the planet.'"); *FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023*, FEDERAL TRADE COMMISSION (Jan. 6, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023 ("The maximum civil penalty amount has increased from $46,517 to $50,120 for violations of Sections 5(l), 5(m)(1)(A), and 5(m)(1)(B) of the FTC Act").

[34] *See* Reno v. ACLU, 521 U.S. 844, 867-68 (1997) (striking down the CDA except for Section 230).

Online Protection Act (COPA) of 1998.[35] Defending the constitutionality of the doomed law, the government argued that COPA allowed a website to avoid liability for providing information deemed "harmful to minors" if it required each user to input credit card information, thereby verifying that they were not a minor. The Third Circuit rejected this proposition: because credit card information does not actually verify a user's identity (*e.g.*, a minor enters the information for their parent or some other adult), COPA's age verification affirmative defense was "effectively unavailable."[36] Thus, COPA was no more constitutional than the CDA. The technological infeasibility of reliable age verification has not fundamentally changed. More modern identity verification solutions involve providing government-issued documents and/or "selfies" or live video. But there is good reason to doubt that these methods are significantly more reliable: the Internet is replete with instructions on how to fool such verification measures with free, easy-to-use software.[37]

Only by sidestepping this issue entirely has COPPA avoided First Amendment challenges. COPPA requires "verifiable parental consent" for the "collection, use, or disclosure of personal information from children," not whenever a child is served (like the rule proposed here), but only (a) by services and sites "directed to" children under 13 or (b) when sites have "actual knowledge" that users are under 13.[38] This carefully crafted language protects adults' online communications from regulation under COPPA. Adults must identify themselves only before accessing sites aimed at the youngest children—sites that are so childish (literally) and that offer such limited interactivity that they do not facilitate any meaningful communication or access to information, and few, if any, adults would ever use them except perhaps alongside a young child.

The key to COPPA's constitutionality has been its limited ambition. Children can access mixed-audience services and sites simply by lying about their age (often with their parents' consent and/or participation). The COPPA Rule accepts the provision of a credit card by

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[35] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231).

[36] American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 196 (3d Cir. 2008) ("We conclude that the District Court correctly found that the affirmative defenses are 'effectively unavailable' because they do not actually verify age.").

[37] The links found on the first page of Google search results for "trick selfie verification" make clear how easy it is to find information on bypassing these verification schemes. *See, e.g.*, *Deepfakes Expose Cracks in Virtual ID Verification*, GEMINI ADVISORY (Jan. 27, 2021), https://geminiadvisory.io/deepfakes-id-verification/; Avi Gopani, *How To Fool Facial Recognition Systems*, ANALYTICS INDIA MAGAZINE (Aug. 4, 2021), https://analyticsindiamag.com/how-to-fool-facial-recognition-systems/; John Kowalski, *Ever wondered how people are passing selfie & ID verification?*, BLACK HAT WORLD (May 3, 2021), https://www.blackhatworld.com/seo/ever-wondered-how-people-are-passing-selfie-id-verification.1324282/.

[38] 15 U.S.C. § 6502.

someone as a "reasonable" way to "obtain verifiable parental consent,"[39] even though this mechanism in no way verifies the parent-child relationship and merely makes it more likely that an adult is involved—yet far from certain: U.S. credit card issuers generally do not issue credit cards to anyone under 18, but most will allow primary account holders to add minors of any age to their cards as authorized users.[40] In short, only by *not* attempting to address every possible instance of "delivering an online website or service to a minor" does COPPA avoid running afoul of the First Amendment.

The Petition's proposed rule resembles COPA far more than COPPA. Indeed, the rule's strict liability standard is far more draconian than COPA, which at least purported to offer an affirmative defense to any site that, "in good faith, has restricted access by minors to material that is harmful to minors."[41]

The only sure way to avoid requiring age verification—and thus burdening the rights of adults to communicate anonymously—would be to require actual knowledge that a specific user is a minor. A constructive knowledge standard could still be tantamount to an age verification mandate unless it were very narrowly circumscribed. If knowledge could be inferred from audience composition—such as under COPPA's "directed to" standard—many mixed-audience services would be covered by the rule and would have to either age-verify all their users or assume that all their users could be minors. Notably, while COPPA includes audience composition as an element of this standard, the FTC has never articulated a threshold for making such assessments. This is likely because the FTC understands that setting such a threshold would mean, for the first time, that sites enjoyed by significant numbers of adults must age-verify all users. Pending legislation would tie certain regulations intended to protect children to constructive knowledge based on inferences drawn by the service provider itself about a specific user.[42]

It might well be possible to craft such a rule, but it is not what Petitioners propose, and attempting to strike such a balance is exactly the kind of essentially major question that Congress, not the FTC, must decide, as we explain below.[43] Because the other constitutional

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[39] 16 C.F.R. § 312.5(b)(2)(ii).

[40] Alexandria White, *What's the minimum age to be an authorized user on a credit card?*, CNBC (Apr. 15, 2022), https://www.cnbc.com/select/whats-the-minimum-age-to-be-an-authorized-user-on-a-credit-card/. The distinction between primary and secondary card users is not apparent to operators when they verify the credit card information provided will work.

[41] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231(c)(1)).

[42] *See, e.g.*, Kids Internet Design and Safety Act, S.2918, 117th Cong. § 3(a)(3) (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2918.

[43] *See* discussion *infra* at 27-31.

problems raised by the proposed rule will become apparent only after considering the rule's implications, we address those next.

II. The Petition Has Not Justified the Proposed Rule

While the Magnuson-Moss Act of 1975 gives the FTC the power to issue trade regulation rules, Section 5(n) sets a high bar for unfairness rulemakings:

> The Commission shall have no authority … to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[44]

The Petition pays lip service to this test, of course, but it fails to prove either (a) that the engagement-maximizing design practices it would prohibit actually cause the harms it complains about nor (b) that parents cannot reasonably avoid such harms. Fundamentally, Section 5(n) requires the FTC to weigh the costs and benefits of regulation. By failing to take seriously the countervailing benefits of common design practices, the Petition makes it seem as if the Commission need do no weighing at all. In fact, the design practices it would prohibit are essential to many aspects of today's Internet, and they have long been essential to various forms of media and games even before the Internet.

A. Kids! What's the Matter with Kids Today?

The CDD Petition portrays a bleak landscape for children today. They are obese[45] and/or have eating disorders;[46] they are depressed,[47] don't get enough sleep,[48] don't exercise enough,[49] and suffer from other mental health issues. *Of course* children are struggling right now: After two years of pandemic lockdowns, their mental health has clearly suffered.[50] They've been indoors, not outside exercising, or in many instances not able to participate in

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[44] 15 U.S.C. § 45(n).

[45] Petition at 13, 14.

[46] *Id.* at 2, 7, 8, 9.

[47] *Id.* at 2, 6, 7, 13, 14.

[48] *Id.* at 7, 12, 13.

[49] *Id.* at 3, 14.

[50] *See* Monique Theberath et al., *Effects of COVID-19 pandemic on mental health of children and adolescents*, SAGE OPEN MED. (Mar. 20, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8972920/ ("Mental health problems among children and adolescents are increasingly observed during the outbreak of COVID-19, leading to significant healthcare concerns.").

athletics, a detriment to their physical wellbeing.[51] Group activities such as music and drama have been curtailed, eliminating much-needed social interaction and outlets of expression.[52] Their academic performance has also lagged during the past few years,[53] which also is impacting their mental wellbeing.[54] The pandemic has been especially hard on America's children, and adults bear a responsibility for what we've done to them. The Petitioners, however, want to lay all the blame on social media, computer games, and the Internet—to the exclusion of the mistakes made during the COVID pandemic, or any other factors. The Petition is myopic in its approach to children's mental health. More importantly, it is far beyond the expertise of the FTC to assess such questions, which should be left to Congress.[55]

B. While the Petition Shows Some Correlation between Internet Use and Child Mental Health Issues, It Does Not Prove Causation

The Petition cites a few formal studies—and many popular and anecdotal media posts from armchair psychiatrists. These cast social media and computer games as the villains, the principal threats to children's mental health. By their own admission, however, the best Petitioners can do scientifically is to point to some correlation between Internet use and mental health issues.[56] The causation required by Section 5(n) is established only by the assertions of the petitioners themselves, almost always without direct citation to any

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[51] *See* Sara Raimondi et al., *The Impact of Sport Activity Shut down during the COVID-19 Pandemic on Children, Adolescents, and Young Adults: Was It Worthwhile?*, INT. J. ENVIRON. RES. PUBLIC HEALTH (June 28, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9265880/ ("[S]port closure and limitations had an important negative impact on the overall health of young athletes, being also not effective in reducing the spread of COVID-19.").

[52] *See* Sitki Akarsu, *Investigating Secondary School Music Teachers' Views about Online Music Lessons During the COVID-19 Pandemic*, EDUCATIONAL POLICY ANALYSIS AND STRATEGIC RESEARCH (2021), https://files.eric.ed.gov/fulltext/EJ1301886.pdf ("The study found that the majority of secondary school music teachers thought that distance education was not suitable for music lessons. It was also determined that most of the participants had no prior experience with distance education, had difficulty using instruments in online lessons, and had synchronization problems in all music activities. Furthermore, internet connection problems, low motivation on the student side, the inefficiency of online lessons, digital fatigue, and the risk of children being exposed to harmful content on the internet emerged as other problems encountered by the participants.").

[53] The Associated Press, *Test scores dropped to lowest levels in decades during pandemic, according to nationwide exam*, NBC NEWS (Oct. 24, 2022, 6:41 AM), https://www.nbcnews.com/news/us-news/test-scores-dropped-lowest-levels-decades-pandemic-according-nationwid-rcna53659.

[54] Megan Kuhfeld et al., *The pandemic has had devastating impacts on learning. What will it take to help students catch up?*, BROOKINGS (Mar. 3, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/03/03/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/ ("students and educators continue to struggle with mental health challenges, higher rates of violence and misbehavior, and concerns about lost instructional time.").

[55] *See* discussion *infra* at 27-31.

[56] *See, e.g.*, Petition at 7-8 ("In another study, researchers found a positive correlation between higher Instagram use and orthorexia nervosa diagnoses.").

scientific studies.[57] This falls far short of what is required by Section 5(n) or the "substantial evidence" required by the Magnuson-Moss Act.[58]

Within the scientific community, there is significant study and discussion of children's mental health issues, but virtually no social scientist is willing to say that Internet overuse is *the* cause of the current situation. For example, one recent study suggests that social media use may be changing the brain patterns of children.[59] However, the authors hypothesize that such changes may be *beneficial*:

> While for some individuals with habitual checking behaviors, an initial hyposensitivity to potential social rewards and punishments followed by hypersensitivity may contribute to checking behaviors on social media becoming compulsive and problematic, for others, this change in sensitivity may reflect an adaptive behavior that allows them to better navigate their increasingly digital environment.[60]

At most, the authors suggest more research be done; they do not conclude that public policy should address social media in any way in response to their findings.[61] One author went on to say that the study may be showing positive adaptive responses to our digital world:

> We don't know if this is good or bad—if the brain is adapting in a way that allows teens to navigate and respond to the world they live in, it could be a very good thing. If it is becoming compulsive and addictive and taking away from their ability to engage in their social world, it could potentially be maladaptive.[62]

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[57] *See, e.g.*, Petition at 2 ("At their most extreme, these design features can be so appealing that they cause minors to form difficult-to-break habits that may lead to severe familial conflict, depression and anxiety, or even suicide." This assertion is followed by anecdotal stories); 3 ("This makes minors both particularly susceptible to, and particularly ill-equipped to avoid, the substantial harms caused by these practices. Nor can parents and guardians reasonably protect against these harms." No citation follows this conclusion).

[58] 15 U.S.C. § 57a(e)(3)(A).

[59] *See* Maria T. Maza et al., *Association of Habitual Checking Behaviors on Social Media With Longitudinal Functional Brain Development*, JAMA PEDIATRICS (Jan. 3, 2023), https://jamanetwork.com/journals/jamapediatrics/article-abstract/2799812.

[60] *Id.* at 7.

[61] "Further research examining long-term prospective associations between social media use, adolescent neural development, and psychological adjustment is needed to understand the effects of a ubiquitous influence on development for today's adolescents." *Id.* at 1.

[62] Cara Murez, *Frequent Social Media Checks May Affect Young Brains*, MEDICAL EXPRESS (Jan. 3, 2023), https://medicalxpress.com/news/2023-01-frequent-social-media-affect-young.html (quoting Eva H. Telzer).

While the CDD Petition chastises social media, the examples it uses in its Appendix to document alleged unfair practices are almost all free gaming apps.[63] Another study from 2019, also appearing in *JAMA Pediatrics*, found little association between games and adverse effects on mental health.[64] And as one report on this study put it:

> While the way this study categorized different forms of screen use is undeniably a strength, it still suffers from the correlation/causation problem that hounds the majority of screen time research. Is the association seen in the data simply due to a depressed individual being more likely to use social media or watch television?
>
> Gemma Lewis, a psychiatric researcher from University College London who did not work on this new study, agrees this new study does not allow for any causal conclusion to be made. In fact, Lewis questions how the subjects in the study were selected, suggesting these results may not be generally representative of all adolescents.[65]

Finally, a study published in *Nature Human Behaviour* in 2019, using data from over 350,000 subjects, found that digital technology use accounts for less than half a percent of a young person's negative mental health.[66] As one report states, "The research suggests everything from wearing glasses to not getting enough sleep have bigger negative effects on adolescent well-being than digital screen use."[67] If other commenters provide subsequent studies reaching different conclusions, the obvious question would be whether such differences could be explained by the COVID pandemic itself, and/or the public policy responses to it.

In short, much more study would be required to inform any FTC action on these issues. A national discussion about children and time spent online may well be overdue. But it hardly

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[63] *See generally* Petition, appendix.

[64] *See generally* Elroy Boers et al., *Association of Screen Time and Depression in Adolescence*, JAMA PEDIATRICS (July 15, 2019), https://jamanetwork.com/journals/jamapediatrics/article-abstract/2737909?resultClick=1.

[65] Rich Haridy, *Teen Depression Linked to Social Media Screen Time, But Video Games Are Fine*, NEW ATLAS (July 16, 2019), https://newatlas.com/social-media-screen-time-teenage-depression/60604/?itm_source=newatlas&itm_medium=article-body.

[66] *See* Amy Orben & Andrew K. Przybylski, *The Association Between Adolescent Well-Being and Digital Technology Use*, 3 NATURE HUMAN BEHAVIOUR 173 (Jan. 14, 2019), https://www.nature.com/articles/s41562-018-0506-1.

[67] Rich Haridy, *Oxford Study Finds Digital Screen time Has Little Effect on Teen Mental Health*, NEW ATLAS (Jan. 14, 2019), https://newatlas.com/screen-time-digital-technology-adolescent-mental-health/58019/?itm_source=newatlas&itm_medium=article-body.

follows that the FTC, rather than the democratically elected representatives of the American people, should decide so major a question. Increasingly, the courts require otherwise.[68]

C. Finding a Media Scapegoat Is Nothing New

Ascribing the ills of our children to media exposure and use is an age-old practice. Elvis Presley's music was banned from some radio stations after his appearance on NBC's *Milton Berle Show* in 1956 created a fervor over his hip-grinding rendition of "Hound Dog," leading to him being filmed only from the waist up on a subsequent *Ed Sullivan Show* appearance.[69] The impact of rock and roll on children was parodied in the 1960 Broadway musical *Bye Bye Birdie*, which included the iconic song, "Kids! What's the Matter with Kids Today,"[70] which we reuse in the heading above.

On May 9, 1961, then–FCC Chair Newton Minow excoriated the National Association of Broadcasters on the state of television programming:

> But when television is bad, nothing is worse. I invite each of you to sit down in front of your television set when your station goes on the air and stay there, for a day, without a book, without a magazine, without a newspaper, without a profit and loss sheet or a rating book to distract you. Keep your eyes glued to that set until the station signs off. I can assure you that what you will observe is a vast wasteland.
>
> You will see a procession of game shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence,

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[68] *See infra* at 27-31.

[69] Katie Cameron, *A (Brief) History of Music Censorship in America*, PASTE MAGAZINE (Dec. 17, 2018, 10:30 AM), https://www.pastemagazine.com/music/censorship/a-brief-history-of-censorship-of-music-in-america/; Trina Young, *Why Elvis Presley Was Censored on the Ed Sullivan Show*, ELVIS BIOGRAPHY (Sep. 9, 2020), https://elvisbiography.net/2020/09/09/why-elvis-presley-was-censored-on-the-ed-sullivan-show/.

[70] The lyrics of that song include:

> Kids! I don't know what's wrong with these kids today!
> Kids! Who can understand anything they say?
> Kids! They are disobedient, disrespectful oafs!
> Noisy, crazy, sloppy, lazy, loafers!
> While we're on the subject:
> Kids! You can talk and talk till your face is blue!
> Kids! But they still just do what they want to do!
> Why can't they be like we were
> Perfect in every way?
> What's the matter with kids today?

ORIGINAL BROADWAY CAST, *Kids, on* BYE BYE BIRDIE (Columbia Masterworks 1960).

> and cartoons. And endlessly, commercials—many screaming, cajoling, and offending. And most of all, boredom. True, you'll see a few things you will enjoy. But they will be very, very few. And if you think I exaggerate, I only ask you to try it.[71]

Was Minow's lament really all that different from Petitioners' claims?

We've seen this show before. In the 1980s, it was heavy metal music that was rotting the brains of children, and Al and Tipper Gore attempted to protect them. The result was a Senate hearing in which Twisted Sister lead singer Dee Snider embarrassed both the Gores and other Senators who wanted to blame music for the ills that plagued children at the time.[72]

Also in the 1980s, parents turned their sights on the roleplaying game Dungeons & Dragons ("D&D"), in which players (often children or young adults) take on the roles of fantasy characters, roll dice (with highly random results), encounter monsters, find treasures, and perhaps meet death.[73] When a few isolated teens—who happened to play D&D—committed suicide, parent groups quickly inferred causation, and CBS's *Sixty Minutes* even did an exposé of the issue.[74] As it turned out, each of the deceased players had had significant underlying mental health issues unrelated to the game.[75] As a 2014 BBC report put it, "Looking back now, it's possible to see the tendrils of a classic moral panic, and some elements of the slightly esoteric world of roleplaying did stir the imaginations of panicked outsiders."[76] Petitioners would do well to recall these technopanics. Again, we do not dispute that children today are struggling, but media consumption—here, social media and computer games—is an easy bogeyman, a kind we've seen before.

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[71] Lily Rothman, *The Scathing Speech That Made Television History*, TIME (May 9, 2016), https://time.com/4315217/newton-minow-vast-wasteland-1961-speech/.

[72] *See Dee Snider vs Tipper Gore 1984*, YOUTUBE (June 14, 2009), https://www.youtube.com/watch?v=veoYcsH7Wrs (Senate hearing excerpts).

[73] Peter Ray Allison, *The Great 1980s Dungeons & Dragons Panic*, BBC NEWS (Apr. 11, 2014), https://www.bbc.com/news/magazine-26328105.

[74] *See 60 Minutes on Dungeons & Dragons* (CBS television broadcast Sep. 15, 1985), https://archive.org/details/60_minutes_on_dungeons_and_dragons.

[75] *See* Allison, *supra* note 73 ("In truth, Egbert suffered from, among other things, depression and drug addiction," and "Again, it was clear that more complex psychological factors were at play. Victoria Rockecharlie, a classmate of Irving Pulling, commented that 'he had a lot of problems anyway that weren't associated with the game.'").

[76] *Id.*

III. The Petition's Wildly Overbroad Remedies Would Wreak Havoc on the Internet

The Petition focuses on Internet "engagement"; it uses that term or its derivatives 87 times. The Petition never defines what "engagement" means, but its treatment of the issue is best exemplified in this passage:

> [We] call upon the Federal Trade Commission (FTC) to promulgate a rule prohibiting the use of certain types of engagement-optimizing design practices on individuals under the age of 18 ("minors"). *When minors go online, they are bombarded by widespread design features that have been carefully crafted and refined for the purpose of maximizing the time users spend online and activities users engage in*.[77]

"Engagement," it seems, really means time spent.[78] According to the Petition, social media and computer games are harmful because they are designed to hold the attention of users and make them spend more time with the product. But isn't that exactly what every successful storyteller has attempted to do—from the *Epic of Gilgamesh*, the *Iliad*, the *Odyssey*, and the *Aeneid*, to *The Lord of the Rings*, the *Harry Potter* series, and *Game of Thrones*? Such contemporary series, whether in book or film form, are obviously "designed for the purpose of maximizing users' [engagement]," to paraphrase the rule. By changing just a few words in the quote above, the Petition's dangerous paternalism comes into full focus:

> [We] call upon the Federal Trade Commission (FTC) to promulgate a rule prohibiting the use of certain types of engagement-optimizing design practices on individuals under the age of 18 ("minors"). When minors go ~~online~~ to a library, they are bombarded by widespread design features that have been carefully crafted and refined for the purpose of maximizing the time users spend ~~online~~ reading and activities users engage in.

The Petition is unapologetic in declaring that these new unfairness rules *must* be as broad and far-reaching as possible.[79] The Petition even seems to argue that any design decision which makes a website, social media site, game, or app *look* better would be a prohibited

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[77] Petition at 1 (emphasis in original).

[78] *See also id.* at 5 ("As millions of exasperated parents are well aware, when minors are manipulated into spending more time and engaging in more activities online, this leads to a variety of concrete and serious psychological, emotional, and physical harms.").

[79] Petition at 4 ("A broadly applicable policy must be established to rein in these widespread unfair design practices that saturate the minor's online experience.").

"engagement" technique.[80] A closer look at the three categories of "designs" the Petition seeks to outlaw reveals the devasting impact such rules would have across the Internet.

A. The Petition Ignores the User Benefits of Designs that Promote Engagement

"The main benefit of these design tactics," the Petition blithely declares, "is that they help apps and services generate more revenue, including by increasing in-app transactions, advertising revenue, and monetization of user data."[81] It is doubtless true that the companies offering online services benefit financially from increased user engagement. But the design techniques petitioners decry are also what make games and other online experiences *fun* and worth playing, or using, in the first place.

People *want* to play games—or watch movies, or read books, or chat with friends—precisely because those experiences are engaging. A fun game is one the player wants to *keep playing*. Game designers know this: "[I]t can be said that while not all engaging experiences are fun, all fun experiences are engaging."[82] "Your goal," says the *Dungeon Master's Guide*, is "to keep your players coming back for more!"[83] It is not inherently malicious to seek to engage users. It's a mark of good game design.

B. The Proposed Rules Likely Can't Solve the Petitioners' Underlying Problem with the Internet

Even if the FTC adopted the proposed rules *in toto*, they likely wouldn't solve what seems to be petitioners' chief complaint—that children spend too much time on their devices:

> Heavy users of digital media are more likely to be unhappy, to be depressed, or to have attempted suicide. . . The researchers reported that suicide-related outcomes became elevated after two hours or more a day of electronic device

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[80] *See* Petition at 53-54 ("'For example, in one famous example, Google A/B tested forty-one different shades of blue in its toolbar to see which version—with which particular shade of blue—drew the most clicks from real-world users. Designers also can track how individual users behave and tweak user experience to get each user to engage more. This kind of A/B testing can be run at scale and endlessly, meaning the experience is constantly being changed in order to maintain the business's desired action (optimizing engagement).'" (footnotes omitted)). How in the world could surveying users to determine the most attractive color in a user interface (UI) lead to depression, obesity and/or suicide?

[81] Petition at 51.

[82] MICHAEL SELLERS, ADVANCED GAME DESIGN: A SYSTEMS APPROACH, 334-335 (2017).

[83] WIZARDS OF THE COAST, DUNGEON MASTER'S GUIDE 4 (2014). The "Dungeon Master" in Dungeons & Dragons designs and runs the game (campaign) for other player-characters.

> use. Among teens who used electronic devices five or more hours a day, a staggering 48% exhibited at least one suicide risk factor.[84]

Do petitioners really believe that implementing this rule will suddenly cut online activity to under two hours a day? Or even five hours a day? If children escape the "manipulation" of one site, why wouldn't they simply turn to another? One can only speculate about such questions, which suggests that petitioners lack solid evidence that the design features they complain about really cause the harms they allege—the most fundamental requirement of Section 5(n).

If the proposed rule merely spreads the time children spend online across more sites and more applications, what substantial harm has been avoided? Without some empirical evidence that these measures would significantly reduce time online (the alleged problem, according to petitioners), the next few years of regulatory effort will bring a pyrrhic victory at best.

C. The Three Practices Petitioners Would Ban Are Integral to Today's Internet

The overbreadth of the proposed rule becomes clear in examining each of the "prohibited practices" the Petition provides as examples of what would be "included" in the general rule, whose application could be even broader.

1. Proscribing "Low-Friction Variable Awards" Would Ban Virtually Every Game Ever Created

The first category of "design element" the Petition would ban would be "low-friction variable awards," which is just another name for random outcomes in games.[85] To petitioners,

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[84] Petition at 6 (footnotes omitted).

[85] The Petition defines such rewards as including those for "mere scrolling, tapping, and/or opening or logging into a website or service." Petition at 20. The inclusion of "tapping" would appear to sweep in all games that require a tap; many games cannot be played in any other way, especially on mobile phones and tablets. Many of the offending examples in the Appendix are screenshots for games in which random rewards are awarded as part of actual gameplay (which involves tapping), not just logging in. See Petition, appendix at 4 ("In the popular game "SpongeBob: Krusty Cook-Off" from Tilting Point LLC, the player is periodically given rewards chests containing a variety of in-game items."); 5 ("There is also a "Lucky Lair" variable reward game that allows the user to potentially earn rare prizes and treasure chests, leading to further low-friction variable rewards"); 7 ("In "Harry Potter: Hogwarts Mystery" from Jam City, Inc., the player is awarded chocolate frog cards that vary in rarity at random intervals throughout the game."); *id.* ("In the popular game, "Hello Kitty Nail Salon" from Budge Studios, the player is periodically presented with gift boxes that, when clicked upon, award new surprise items."); 14 ("'Star Wars: Galaxy of Heroes' from Electronic Arts features bronzium data cards that offer the player variable rewards."); 16 ("In "Talking Tom: Gold Run" from Outfit7Limited, the player frequently encounters vaults in game-play which offer variable rewards."); 17 ("In 'Squishy Magic' from Dramaton, playing through levels far enough will unlock variable rewards. Earning stars

playing a game where the outcome of an action is not known to the player is *per se* unfair: "At a chemical level, this is because the brain generates more dopamine in response to an uncertain reward than in response to an expected and reliable one."[86] But virtually all games ever created have some element of randomness that leads to a reward or penalty. Dice games date back more than five thousand years.[87] Randomized outcomes and variable awards were incorporated into the earliest computer games,[88] and one would be hard pressed to find any computer game without some form of randomness in gameplay or rewards designed to release dopamine. The Petition itself acknowledges that such gameplay design long predates the Internet.[89]

The third criterion for a "low-friction variable award" is that rewards "[g]enerally increase as a minor spends more time on the website or service, or visits it more frequently."[90] This clearly covers "random drops," which have been a fundamental aspect of computer game play for decades—defined as follows:

> A gameplay mechanic used principally to give a sense of reward to the players by assigning enemies a list of items you might gain if you defeat them. These items are called "drops" because the foe drops them when they die, and there's a probability table assigned to each item the enemy can drop — "Okay, 30% of the time you get a Potion, 5% you get a Red Shield, and 3% you get Cod Liver Oil" — which is where the "random" comes in.[91]

As anyone who has ever played a video game knows, the rewards associated with random drops tend to increase over time: as the player reaches higher levels of the game, their

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from doing orders increases the percentage of the random gift; hitting 100% unlocks it."). This last example, especially, brings into question the issue of whether any game where players can "level up" to unlock additional rewards (including new levels) based on extended gameplay would be prohibited under the proposed rules.

[86] *Id.* at 21.

[87] *Dice*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dice#History ("Dice have been used since before recorded history, and it is uncertain where they originated. It is theorized that dice developed from the practice of fortune-telling with the talus of hoofed animals, colloquially known as knucklebones.").

[88] *See, e.g.*, STEVE BRESS, COMMODORE 64 ASSEMBLY LANGUAGE PROGRAMMING (1982) (Book and 64K Disk), (explaining how to create computer games with a "self-adjusting difficulty method" to allow less proficient game players the ability to play at a slower pace while challenging more advanced players with more difficult scenarios using random number generators).

[89] Petition at 20-21 ("The psychological technique that renders these features effective is based on research that predates the internet by many years."). If these techniques predate the current crisis conferred on our children by the petitioners, then how can these techniques suddenly be the sole cause of these problems?

[90] *Id.* at 65.

[91] *Random Drop*, TV TROPES, https://tvtropes.org/pmwiki/pmwiki.php/Main/RandomDrop.

enemies become harder to defeat, but so, too, does the value of the items they "drop" when defeated.[92] This is effectively how *all* games work today.

Read broadly, banning "low-friction variable rewards" prohibits games that provide more content as you play them. Spending time "tapping" or "scrolling" in a game is precisely how a player progresses. As users increase their play time—unless the player is quite bad—they usually move through the game. Rewards that increase as a player *plays more* are rewards that "generally increase as a minor spends more time on the website or service"—that is, as they progress in the game. Petitioners' proposed rule could prohibit levels that increase with gameplay, enemies that only spawn in certain locations, and items that only unlock once a player obtains enough experience. Almost all games give rewards that "[g]enerally increase as a minor spends more time on the website or Service"; that is how they incentivize gameplay.

The ban on "low-friction variable rewards" could have an even broader meaning. Even when games do not necessarily offer "generally increasing" rewards with each level, users get better at the game the more time they spend playing it. Consider the venerable "Oregon Trail" computer game played by generations of schoolchildren, in which rewards and penalties are meted out on a somewhat random basis as users tap and scroll their way through the game.[93] Even if the game offered opportunities to hunt for game with equal frequency and if each hunt offered the same potential rewards throughout the game—that is, even if there were not the kind of levels that have become standard in modern gaming—it is clearly the case that users will *earn* more rewards (pounds of virtual "food") as they become better at playing the game with repeat plays. Measured by total rewards earned, such rewards would indeed "[g]enerally increase as a minor spends more time on the website or service, or visits it more frequently." Perhaps this is not what the Petitioners intend. Perhaps they intend to focus only on level drops, which increase in what is *offered*, not merely what is *earned*, but that is not what the proposed rule requires. Critically, the phrase "offered by a website or service" applies only to the nature of the rewards covered; the phrase "[g]enerally increase as a minor

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[92] *See, e.g.*, *Leveled Items*, THE ELDER SCROLLS WIKI, https://elderscrolls.fandom.com/wiki/Leveled_Items_(Skyrim); *Random Loot*, THE ELDER SCROLLS WIKI, https://elderscrolls.fandom.com/wiki/Random_Loot_(Skyrim) ("Random loot denotes the spoils of specific encounters in The Elder Scrolls V: Skyrim. Items such as weapons, armor, and gold coins appear in various locations based on player level."); WIZARDS OF THE COAST, DUNGEON MASTER'S GUIDE 82, 137-140 (2014); Maria-Virginia Aponte et al., *Scaling the Level of Difficulty in Single Player Video Games*, 5709 ICEC 24 (2009), https://www.researchgate.net/publication/266379614_Scaling_the_Level_of_Difficulty_in_Single_Player_Video_Games ("Difficulty scaling is a fundamental part of game design.").

[93] This is not in the least hyperbolic. The examples of "low-friction variable rewards" in the Petition encompass just about every type of random gameplay used since the dawn of time. *See* Petition, appendix at 4; *The Oregon Trail (1985 video game)*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Oregon_Trail_(1985_video_game).

spends more time on the website or service, or visits it more frequently" appears to stand independently, and therefore seems to apply to rewards earned, not merely rewards offered.

Variable awards might well be unfair in certain circumstances. As we noted in our "loot box" comments, random rewards that have all the characteristics of a lottery (payment, chance, and valuable prize), may be an unfair practice, especially if combined with gameplay mechanisms that hide the fact that a purchase for the random reward is being made.[94] But characterizing *all* random, gradually increasing rewards as unfair would effectively ban all computer games that could be accessed by a minor—and destroy a $200 billion industry.[95]

2. Designing a Service, Game, or App that Doesn't Involve "Navigation Manipulation" Would Be Nearly Impossible

The Petition defines "navigation manipulation" as design features that "(1) Make it difficult for a minor to navigate out of a content stream or exit an online website or service; or (2) Encourage seamless and continuous use of a website or service without any stopping cue(s)."[96] Under this definition, virtually all current Internet sites and apps are guilty of "navigation manipulation," since they are designed to allow all users, including children, to navigate freely throughout the site or app in a manner that is "seamless and continuous … without any stopping cues." *Of course* such design encourages continued use. Yet "endless scroll" navigation is an increasingly common aspect of the design of webpages and apps,

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[94] *See* Comments of TechFreedom on Video Game Loot Boxes, Docket No. FTC-2019-0021, 4 (Oct. 11, 2019), http://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-FTC-Loot-Box-Comments-10-11-19.pdf.

[95] *See* GRAND VIEW RESEARCH, VIDEO GAME MARKET SIZE, SHARE & TRENDS ANALYSIS REPORT (2022), https://www.grandviewresearch.com/industry-analysis/video-game-market.

[96] Petition at 28.

including *The New York Times* and *AP News*.[97] Will all websites now have to put up stop signs to interrupt browsing?

Designing a website, game, or social media site to interest people to continue using it, and seeing what's next, is a technique equivalent to one used by every competent storyteller since the dawn of sentience. Good books commonly have "cliffhangers" at the end of chapters to encourage the reader to continue to the next chapter (a form of "autoplay" the Petition now declares unfair). Charles Dickens famously published his novels in serial format optimized for "engagement."[98] As early as the 1910s, filmmakers created serials, designed to entice viewers to return to the theater the next week for the next chapter.[99] Theatergoers in the 1930s, 40s, and 50s were treated to serials before the feature film, such as "Flash Gordon," "The Shadow," and many others, again designed to engage viewers to return the following week.

Cliffhangers and serial (chapter) story arcs made their way into early television as well, with many popular shows leaving the narrative unfinished, or teasing the next week's episode, in order to maximize continued viewership of the series. Was this "engagement" tactic somehow unfair?

The other specific design elements cited by the Petition as examples of "navigation manipulation" are advertisements, either interspersed in the content thread, or required to

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[97] *See, e.g.*, *World News*, NEW YORK TIMES, https://www.nytimes.com/section/world; *Opinion*, NEW YORK TIMES, https://www.nytimes.com/section/opinion. Mobile and desktop browsers use infinite scroll on many New York Times section pages. *See also Politics*, AP NEWS, https://apnews.com/hub/politics.

[98] *Charles Dickens bibliography*, WIKIPEDIA, https://en.wikipedia.org/wiki/Charles_Dickens_bibliography.

[99] *See What Happened to Mary*, IMBD, https://www.imdb.com/title/tt0002574/ (a twelve part serial created in 1912).

be viewed in order to continue with the video or game.[100] As discussed more fully below, if the content is provided for free and is advertiser-supported (as it appears virtually all of the offending games, apps, and services in the Petition are), inserting advertising in the content is no less unfair than commercials in television programming that break up the content. But without these advertisements, much of the free content on the Internet would almost immediately cease to exist.

3. Banning "Social Manipulation" Would Break the Connectiveness that Makes Social Media Social and Leave Many Children in Peril

The Petition defines "social manipulation" as "[d]esign features that leverage a minor's desire for social relationships to encourage greater time spent and/or activities performed on the website or service."[101] The Petition's examples don't do much to clarify what is *not* covered by this sweeping and subjective definition.[102] Social networking is all about the relationships we make or maintain online. Some quantification will necessarily have to take place. Such connections, and "likes," also serve important purposes. How are children to know whether they might like a piece of content if they aren't allowed to see how many other users like the content, how many people dislike the content, or more importantly, whether their circle of connections (friends) have viewed or liked that content? Removing all such metrics would result in children walking blind through the Internet. Children would be more

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[100] Petition at 28-29 ("Some common examples of navigation manipulation practices commonly used on minors include autoplay and strategically timed advertisements. These techniques make it hard for a minor to navigate the online website or service because they either keep the minor on one content stream, increasing time on a device (autoplay) so as to exclude other content, or they block the minor from moving forward (pop-up advertisements).").

[101] Petition at 32.

[102] *Id.* These examples include:

> (1) Quantified Popularity of a Minor's Account or Content. Displaying a quantified tally of the number of connections or interactions for a minor's account or piece of content, such as followers, views, likes, dislikes, or comments.
>
> (2) Named Popularity. Displaying the names, usernames, or other known identifiers of specific other users who have interacted with a particular piece of content, such as by viewing, liking or disliking, or commenting on it.
>
> (3) Interaction Streaks. Features that quantify interactions between users, creating pressure for interactions to continue so that the streak value continues to increase.
>
> (4) Parasocial Relationship Pressure. The use of an artificial or animated character or a popular influencer on a website or service to pressure or shame a minor into taking a certain action, such as when a game character uses insulting language or pressure to manipulate the minor into continuing to play a game, coming back at another time, making a purchase, or sharing personal information.

likely to engage with harmful content than they would if the user community is able to curate or otherwise "grade" content.[103]

Similarly, banning all "named popularity" features—effectively, anonymizing all Internet content—would leave children with no peer guidance as to what content to engage with.[104] There is far more real danger of physical harm if we ban personalized, quantified, community connections. Predators and those intending to inflict real harm on children will thrive on an Internet that lacks the connectiveness this rule would outlaw.[105]

In all three categories of prohibited design, the definitions proposed by the Petition are so broad that they could easily be weaponized by anyone with a grudge against a site, an app, or a game. The Petition presumes that *any* design decisions that increase or "maximize" the time users engage with a site, app, or game causes substantial injury sufficient to justify prohibition under Section 5.[106] Under this standard, almost any design aspect of every website, social media site, app, or game could be second-guessed. The categories also appear to be non-exclusive and non-exhaustive.[107] Finally, and discussed elsewhere, the rules would apply not just to child-directed sites and apps, but to every corner of the Internet, apps, and computer games that could ever be played by anyone under 18.[108] These rules would govern all of the Internet, not just the traditional walled gardens we think of under COPPA.

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[103] *See* Petition at 2 (the described design features "expose[] minors to potential predators and online bullies, as well as to age-inappropriate content."). We would argue the exact opposite. Strip the Internet of community and peer curation, and we're placing our children in far greater danger.

[104] Indeed, under the petitioners' rules, game designers could be charged with a violation if they encouraged children in any way to invite their friends to play, or even recommend the game. Petition at 49 (""Finally, games and services also frequently incentivize, encourage, and remind minors to invite their friends to join the platform."). Yet the Petition points to no correlation, let alone causation, between children recommending a game or social media platform to their friends, and the myriad of mental health issues discussed in the Petition. We must conclude, therefore, that this is just another attempt to limit advertising, even word-of-mouth advertising, on the Internet.

[105] *See, e.g.*, Caroline Meek-Prieto*, Just Age Playing Around - How Second Life Aids and Abets Child Pornography*, 9 N.C.J.L & TECH 88 (2007), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1134&context=ncjolt.

[106] Petition at 5-6 ("By maximizing time and activities online, the design features at issue in this Petition harm minors' mental health, foster problematic internet use by minors, damage minors' physical health, exacerbate minors' privacy harms, increase minors' risk of contact with dangerous or harmful people, and increase minors' exposure to age-inappropriate and otherwise harmful content.").

[107] *Id.* at 16 n. 60 ("These types of harmful design features, though distinct, are not mutually exclusive, and some common design features fall into multiple categories.").

[108] *Id.* at 16 ("Of note, this Petition does not focus solely on sites and services that are obviously designed for and directed to minors. In an effort to establish prevalence, Petitioners includes examples taken from digital platforms that are used by both minors and adults. This is because regardless of whether or not a site or service is obviously child-directed, minors suffer harm as a result of these design features, and many of these features are widespread across sites and services that are used by adults and also heavily used by minors.").

Don't like your score on a popular video game? Just claim a violation of any of the three new design prohibitions, and bring the hammer of government down on the game designer. Hate Big Tech and want to blame them for all the evils of society? Claim a violation of the rules, and maybe even sue them to collect alleged damages.[109] The mischief to which these rules could (and probably would) be put boggles the mind.

D. The Rules Proposed in the Petition Would Destroy Free Content on the Internet, Disproportionately Impacting the Most Disadvantaged Kids

A wide variety of games and social media services exist free of charge on the Internet only because they are supported by advertising. The rules proposed in the Petition would devastate such free content. Take the economic engine of advertising away from content producers—a clear subtext of the Petition, like KidVid before it—and content may retreat behind paywalls, either through monthly subscriptions or pay-to-play mechanisms[110]—although many of these would also be outlawed by the new rules.[111] Limit the ability of advertisers to target ads, and we also risk turning our existing "walled gardens" into "content fortresses" where only the biggest platforms can hope to survive.[112]

Also harmed will be smaller, newer, and less well-funded content producers, as walled gardens are expensive to build and operate. We will be handing our children over to large media conglomerates, who can build those gardens, or whose name recognition is so high that they can afford to produce free content without advertising on the Internet because of

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[109] *See* Jyoti Narayan et al., *Seattle Public Schools Blame Tech Giants for Social Media Harm in Lawsuit*, REUTERS (Jan. 9, 2023), https://www.reuters.com/technology/seattle-public-schools-blame-tech-giants-social-media-harm-lawsuit-2023-01-08/?mkt_tok=ODUwLVRBQS01MTEAAAGJNdpHNsExzZvZ_3MGDquwqy-z_7D6Z96_ondb7Enk5UoJsVIt_Ku4a4K-0sKttz9w5Wh2O00zxVR4euHXi9icIazjbYK7uXFzsXb1k65-i9CG.

[110] *See* Adam Thierer, *Kids, Privacy, Free Speech & The Internet: Finding the Right Balance*, MERCATUS CTR. GEORGE MASON UNIV. 13 (Aug. 2012), https://www.mercatus.org/system/files/Kids_Privacy_Free_Speech_and_the_Internet_Thierer_WP32.pdf ("New Privacy rules could result in online pay walls, subscriptions, micropayment schemes, or tiered services. Web developers might have no choice but to raise prices to cover costs or cut back service. Regulation could also destroy opportunities for new or smaller website operators to break into the market and offer competing services and innovations, thus contributing to consolidation of online content and services by erecting barriers to entry."); *See also* Lartease M. Tiffith, Executive Vice President, Public Policy, Interactive Advertising Bureau, Remarks at Panel 3: Looking Forward and Considering Solutions, Protecting Kids from Stealth Advertising in Digital Media (Oct. 19, 2022) (transcript at 63), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf.

[111] Petition at 19 ("Google offers YouTube creators and marketers a variety of metrics tied to the delivery of financially related transactions, such as the purchasing of products, generating subscriptions and forms of payment. This drive for engagement from both the gaming and social media platform industries has meant the rapid expansion of harmful manipulative design practices.").

[112] Eric Seufert, *The Profound, Unintended Consequence of ATT: Content Fortresses*, MOBILE DEV MEMO (Feb.15, 2021), https://mobiledevmemo.com/the-profound-unintended-consequence-of-att-content-fortresses/.

their reach in other advertising markets.[113] As two economists, both veterans of the FTC, recently concluded:

> Data-driven advertising is particularly important to small publishers—the "long tail" of niche websites that make browsing the internet such an interesting activity. Large publishers have a great deal of information about users based on what they do on the publisher's own site and may have their own sales force. Small publishers cannot afford a sales force, have less data of their own, and are far more dependent on information from third parties. Indeed, the data advantages of large platforms and publishers are an important barrier to entry into advertising markets. Context is also likely to be a poor substitute for user data for niche sites, both because their audiences change over time and because the visitor to a site specializing in, say, quilting, has other interests that may be far more varied—and valuable—to advertisers other than sellers of quilting supplies.[114]

As a result of the YouTube settlement agreement, and the restrictions on advertising implemented thereafter, we've seen a marked decrease in new children's content on YouTube and an exodus of many smaller creators from that market.[115] The FTC has connected these dots in the past and concluded that a reduction in advertising "would include the loss of advertising-funded online content."[116] The same thing would happen under the rules proposed in the Petition. Advertisers simply won't support unengaging

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[113] *Id. See also* Avi Goldfarb and Catherine E. Tucker, *Privacy Regulation and Online Advertising*, 57 MGMT. SCI. 1, 6 (Aug. 5, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600259 (following the 2002 EU Privacy Directive which restricted the ability to deliver targeted advertising, advertising effectiveness decreased on average by around 65 percent in Europe relative to the rest of the world).

[114] J. HOWARD BEALES AND ANDREW STIVER, AN INFORMATION ECONOMY WITHOUT DATA, 1, 3 (Nov. 2022), https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf.

[115] James C. Cooper, Professor of Law and Director of the Program on Economics & Privacy at George Mason University, Remarks at Panel 3: Looking Forward and Considering Solutions, Protecting Kids from Stealth Advertising in Digital Media (Oct. 19, 2022) (transcript at 46), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf ("Things go behind paywalls. I actually have some work in progress with some other co-authors on the impact of the FTC's suit against YouTube, the COPPA suit, which turned off behavioral advertising for all kids channels. And you see a large exit empirically, this is not anecdotal; a lot of exits, reduction of videos, reduction of channels, channels moving to a more mixed or moving to a grownup, a plus 13 audience... And there's other evidence that when you turn off the spigot of advertising that you reduce content."

[116] FTC Staff Comment to the NTIA: Developing the Administration's Approach to Consumer Privacy, Docket No. 18021780-8780-01 (Nov. 9, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developingadministrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

content. Strip out the ability to interrupt content with advertisements (the classic "and now for a commercial announcement" approach used for nearly 100 years in radio and television), and economic support for content development would evaporate, or more precisely, it would move to less restricted forms of entertainment. And the biggest losers? Those children whose parents cannot afford subscriptions or micropayments. Also newer and more diverse content producers, struggling to compete with the megalith media companies, historically and predominantly owned by white males.[117] And smaller businesses, many of them owned by women and minorities, with more limited advertising budgets that must be spent more strategically to reach their audiences. The proposed rules would heavily favor the biggest tech companies and biggest media companies, which are most able to withstand, and even thrive on, the market inefficiencies introduced by such wide-ranging and overbroad definitions of what is "unfair."

IV. By Legislating on Questions Properly Left to Congress, the Proposed Rule May Violate the Constitution's Separation of Powers

The Magnuson-Moss Act gives the FTC the power to make rules governing unfair and deceptive practices—and the scope of Section 5 is broad indeed. Even under the limiting test imposed by Section 5(n), unfairness remains, as former FTC Commissioner J. Thomas Rosch put it, "an elastic and elusive concept. What is 'unfair' is in the eye of the beholder…."[118] Rosch's warning still rings true: the requirements of Section 5(n) are all too easily ignored.

This warning has taken on new life in recent years as the Supreme Court has increasingly signaled that it will no longer defer to agency interpretations of ambiguous statutory language as the basis for broad claims of authority. First, as a matter of statutory interpretation, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[119] Second, however clearly it speaks,

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[117] *See, e.g.*, Kim Makuch, *Television Station Ownership Diversity*, FCC OFFICE OF ECONOMICS AND ANALYTICS, ii (Jan. 2023), https://docs.fcc.gov/public/attachments/DOC-390667A1.pdf ("as of 2019, most TV households did not have access to stations identified as majority-owned by women or people of color. Less than 20% of TV households resided in a market with a female-owned station, just over 5% of TV households resided in a market with a Black/African-American-owned station, about 7% of TV households resided in a market with an Asian-owned station, and about 25% of TV households resided in a market with a Hispanic/Latino-owned station.").

[118] Dissenting Statement of Commissioner J. Thomas Rosch, Protecting Consumer Privacy In An Era Of Rapid Change Report, C-3 (2012), https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

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

"Congress … may not transfer to another branch 'powers which are strictly and exclusively legislative.'"[120] The rule proposed by the Petition could violate both doctrines.

A. No Clear Statement Gives the FTC Authority Over Such Major Questions

The Supreme Court recently provided its most robust articulation yet of 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 for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[121]

In other words, courts "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[122] The Supreme Court has struck down multiple agency rules for lack of clear statutory authorization under the major questions doctrine.[123]

As we explained in our recent comments on the FTC's "commercial surveillance" ANPR, unfairness rulemakings *always* have the potential to embroil the FTC in major questions.[124]

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

[121] *West Virginia v. EPA*, slip op. at 19 (quoting Utilility 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)).

[122] *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)).

[123] *See West Virginia v. EPA*, slip op. at 4, 28 (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 (citing Utility 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)).

[124] Comments of TechFreedom in the Matter of Trade Regulation Rule on Commercial Surveillance and Data Security, Docket No. FTC-2022-0053-0001, 10-11 (Nov. 21, 2022), https://techfreedom.org/wp-

Section 5's broad language provides no clear statement empowering the FTC to decide such major questions as whether all adults should have to identify themselves online, how "engaging" digital media should be, how much time minors should be spending online, and whether advertising should continue to be the business model that sustains most digital media, or whether a $200 billion entertainment industry will survive.[125] It is unlikely that Congress intended to delegate authority to resolve such questions to the FTC through the general language of Section 5. That is particularly so given the essential similarity between this petition and the KidVid proceeding of the 1970s—the overreach that, more than any other, prompted Congress to curtail the FTC's Mag-Moss rulemaking powers in 1980 and that still loomed large over the FTC's activities when Congress enacted Section 5(n) to constrain the FTC's unfairness powers in 1994.

One question in particular is likely a "major" one that Congress is unlikely to have left to the FTC to resolve: which age distinctions should exist between adults and children online? The Petition proposes a rule equally applicable to all minors.[126] The Internet that a 17-year-old would encounter would have to be the same that a 12-year-old would see. The scientific basis for applying these rules, according to the Petition, is the inability of certain minors to recognize that they are being manipulated. Yet those findings are based on the development cycles of "young children" (those under the age of 13). The Petition uses the term "young children" ten times, and most often in the section in which petitioners assert the targeted design features targeted by the Petition cause the mental health problems described by the Petition.[127] Yet Petitioners acknowledge a significant developmental difference between

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content/uploads/2022/11/TechFreedom-Comments-Trade-Regulation-Rule-on-Commercial-Surveillance-and-Data-Security.pdf.

[125] *See supra* note 95.

[126] Remarkably, even as the Petitioners argue that the brains of 17-year-olds are so undeveloped that they cannot protect themselves against alleged manipulative practices online, many jurisdictions are moving to allowing 16-year-olds to vote, arguing that 16-year-olds are mature enough to exercise the franchise. *See, e.g.*, *4 Reasons to Lower the U.S. Voting Age to 16*, VOTE16USA, https://vote16usa.org/reasons-for-lowing-voting-age-16/ ("sixteen- and 17-year olds are ready to vote. Research shows that 16- and 17-year-olds have the necessary civic knowledge, skills, and cognitive ability to vote responsibly. . . Lowering the voting age would force local politicians to listen to sixteen- and 17-year-olds and address their concerns."); *Why Should We Lower the Voting Age to 16?*, FAIRVOTE, https://fairvote.org/archives/why_should_we_lower_the_voting_age_to_16/ ("At first glance, many assume that 16-year-olds are unable to make mature and informed decisions about voting, that they will not turn out to vote, or that they will just vote the way their parents tell them to. However, research indicates that all three of those assumptions are untrue and are not a reason to keep local governments from extending voting rights to 16-year-old."). These two claims cannot be both true. Those below 18 can't have all the capabilities to cast a vote, but yet still must be shunted into walled gardens on the Internet because they lack the mental capabilities to defend themselves against manipulative design practices.

[127] *See* Petition at 42 ("Evidence shows that young children are more likely to follow the instructions of media characters they have formed a relationship with, compared to unknown but similarly entertaining

young children and teens: "Traditionally, researchers have found that minors cannot identify persuasive intent until the age of eight and bias until the age of twelve."[128] Nonetheless, they propose the same rules for everyone up to the age of 18 (and indeed, unless a site implements age verification, for *all* users[129]). The fact that the petition relies so heavily on research focused on young children to establish causation of harms for all minors exposes the difficulties inherent in writing a single rule applicable to all minors. This is a quintessentially legislative question.

Moreover, Congress has already spoken to this very issue: the only comparable federal statute, COPPA, enshrines a distinction between teenagers and children under the age of thirteen. This distinction reflected lawmakers' assessment of the developmental differences between those two age groups, [130] a distinction the Petition claims to agree with. Courts are unlikely to allow the FTC to, in effect, rewrite COPPA to limit the provision of service to all minors.

B. The Nondelegation Doctrine Likely Requires Congress, Not the FTC, to Write the Kind of Rule Petitioners Propose

If Section 5 empowered the FTC so broadly as to write legislative rules on the questions raised by the Petition, it might well constitute an impermissible delegation of lawmaking power. Section I.G of our ANPR comments, attached hereto as Appendix A, summarizes what the Supreme Court has said recently about the nondelegation doctrine.[131] To summarize briefly, Justice Gorsuch's dissent in *Gundy* provides an outline of a likely majority opinion in the next nondelegation case the Court decides.[132] For a Section 5 rulemaking to pass muster

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characters," and "Games and services manipulate users through parasocial relationships by, for example, shaming them into taking certain actions. These design features are widespread even in services used by really young children."); 54 ("young children in particular lack the ability to understand persuasive intent or bias behind design features deployed for the purpose of influencing their behavior."); 61 ("Young children are more trusting than adults, which leaves them vulnerable to social manipulation techniques applied by design features that maximize for online engagement"); 63 ("studies show that young children are not likely to greet trusted characters with skepticism even if they are being used to sell products or push more content.").

[128] Petition at 60.

[129] *See supra* at 6.

[130] Martha K. Landesberg et al., Federal Trade Commission, Privacy Online: A Report to Congress 42-43 (1998), https://www.ftc.gov/reports/privacy-online-report-congress ("In a commercial context, Congress and industry self-regulatory bodies traditionally have distinguished between children aged 12 and under, who are particularly vulnerable to overreaching by marketers, and children over the age of 12, for whom strong, but more flexible protections may be appropriate.").

[131] Comments of TechFreedom in the Matter of Trade Regulation Rule on Commercial Surveillance and Data Security, Docket No. FTC-2022-0053-0001, 14-19 (Nov. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-Trade-Regulation-Rule-on-Commercial-Surveillance-and-Data-Security.pdf.

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

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), leaving the FTC only to "fill up the details"[133] through the procedural safeguards for rulemakings contained in the Magnuson-Moss Act.[134]

But exactly what "policy decisions" has Congress made here? It is one thing to say that the FTC may proscribe practices as "unfair" because those practices (a) "cause" (b) "substantial injury" that (c) "outweighs countervailing benefit" when each of these elements is relatively objective. But it is quite another to claim that the FTC may ban practices (e.g., how engaging media is) whose (a) causal connection is highly tenuous to (b) forms of injury that are non-economic, not readily quantifiable, and far beyond the expertise of a consumer protection agency accustomed to dealing with fraud, deceptive marketing, and other objective harms, and that (c) would be enacted without regard for their staggering costs, both economic and in terms of user experience. When the FTC proscribes failure to notify consumers of a design defect that can cause tractors to explode, potentially causing fatal injuries [135] —the quintessential unfairness case—the Commission may well be working within the framework of "policy decisions" made by Congress. Such an application of Section 5 may well pass muster under Justice Gorsuch's proposed nondelegation test. But if the FTC writes rules declaring that media are just "too engaging" for kids these days, the Commission itself—not Congress—is making "policy decisions" that are essentially legislative in character.

To issue the kind of rule Petitioners seek would be to invite the Court to severely curtail the FTC's unfairness powers—not only in this particular case, but more broadly. Such a decision might well affect not only Mag-Moss rulemakings but also the FTC's powers in case-by-case enforcement. This is not a door the Commission should open—much as it should not repeat the debacle of the KidVid proceeding.

V. What the Commission Should Do After Dismissing This Petition

What former Commissioner Noah Phillips recently said about the Commission's Advance Notice of Proposed Rulemaking regarding Commercial Surveillance and Data Security is equally true of the Petition at hand: both "contemplate 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."[136] Even if the Commission believed that some of the practices the Petitioners complained about were unfair or deceptive, the best

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[133] *Gundy*, 139 S.Ct. 2136.

[134] 15 U.S.C. §§ 57a, 57b-3.

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

[136] *Id*. at 2.

way to proceed would be to bring enforcement actions regarding such practices. This would allow the Commission to focus on the narrow facts of specific cases—a far better way to give full effect to the balancing test required by Section 5(n) than undertaking a rulemaking with such potentially enormous effects on the entire Internet.

Even without treading new ground in unfairness, the FTC has other enforcement tools it can use. The Petition identifies several apps and games that might well deceive children and minors, either by pressuring them into making unwitting purchases[137] or by engaging in a form of gambling when "loot boxes" meet that definition.[138] Both issues have already been the subject of enforcement actions, however, either under COPPA[139] or other unfair and

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[137] *See* Petition at 45; Appendix at 22, 31, 48, 49.

[138] Comments of TechFreedom on Video Game Loot Boxes, Docket No. FTC-2019-0021, 5 (Oct. 11, 2019), http://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-FTC-Loot-Box-Comments-10-11-19.pdf

[139] *See*, *e.g.*, HyperBeard, Inc., Case No. 3:20-cv-03683 (June 4, 2020), https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3109-hyperbeard-inc (enforcing against developers of apps directed at children for allowing persistent identifiers to be used by advertisers to track child's in-app activity); Google LLC and YouTube, LLC, Case No. 1:19-cv-02642 (Sept. 4, 2019), https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3083-google-llc-youtube-llc (alleging YouTube's video sharing service violated COPPA by collecting information from children under 13 without opportunity to acquire parent's consent); VTech Elec. Ltd., Case No. 1:18-cv-00114 (Jan. 8, 2018), https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3032-vtech-electronics-limited (enjoining VTech from failing to make its privacy policy and notice of data collection reasonably available to parents on its web page); Yelp Inc., Case No. 3:14-cv-04163 (Sept. 17, 2014), https://www.ftc.gov/legal-library/browse/cases-proceedings/132-3066-yelp-inc (enforcing implementation of a functional age-screening process or mechanism to prevent children under 13 from registering for defendant's service); Path, Inc., Case No. 3:13-cv-00448 (Feb. 1, 2013), https://www.ftc.gov/legal-library/browse/cases-proceedings/122-3158-path-inc (enjoining Path, Inc. from utilizing data collected while Path allowed users under 13 years old to publicly share information—including geo-location data—on its social networking service); Playdom, Inc., Case No. SACV11-00724 (May 12, 2011), https://www.ftc.gov/legal-library/browse/cases-proceedings/1023036-playdom-inc (enforcing against Playdom, Inc. for impermissibly transferring account data from children under 13 to a French company for the purpose of continuing operation of its virtual interface); UMG Recordings, Inc., Case No. CV-04-1050 (Feb. 18, 2004), https://www.ftc.gov/legal-library/browse/cases-proceedings/umg-recordings-inc-corporation-us (finding UMG Recordings, Inc.'s remedy was inadequate where the company informed parents only after collecting data from children under 13, when proper notice must occur prior to data collection); Hershey Foods Corp., Case No. 4CV-03-350 (Feb. 27, 2003), https://www.ftc.gov/legal-library/browse/cases-proceedings/hershey-foods-corporation-us-ftc (finding method of asking children to have their parents fill out a consent form was an inadequate assurance that parents had notice of consent opportunity); Lisa Frank Inc., Case No. 01-1516-A (Oct. 2, 2001), https://www.ftc.gov/legal-library/browse/cases-proceedings/012-3050-frank-lisa-inc (requiring injunction because the defendant website operator conditioned online participation on a child providing more information than is reasonably necessary); Looksmart, Ltd., Case No. 01-606-A (April 19, 2001), https://www.ftc.gov/legal-library/browse/cases-proceedings/002-3379-looksmart-ltd (finding Looksmart had impermissibly collected full name, email address, gender, year of birth, and country on its message boards without parent's notice or consent).

deceptive practices.[140]

Initiating the rulemaking proposed by Petitioners would come at a significant opportunity cost for the agency. Reworking the proposed rules into something that would not be wildly overbroad and that would survive the inevitable constitutional challenge would sap vital resources from the Commission's enforcement of existing norms and policies. Without a clear need for new rules, and given its limited time and resources, the Commission should continue case-by-case enforcement.

The Commission might play a valuable role in working with industry to develop best practices for (a) design techniques that "engage," but don't trap, children and (b) parental control tools that make it easier for parents to manage their children's use of digital media. For example, Snapchat's parental tools require the parent to set up their own account, "friend" their teen, and get the teen's permission to allow parental control over their accounts—a process fraught with pitfalls for parents who will tend to be less savvy about social media then their children.[141] Navigating the various approaches taken by each

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[140] 15 USC § 45. *See*, *e.g.*, F.T.C. v. Amazon.com, Inc., 71 F. Supp. 3d 1158 (W.D. Wash. 2014) (denying Amazon's motion to dismiss because FTC had authority to allege that charging parents' accounts for a child's purchases without parental consent was an unfair practice under 15 U.S.C. § 45(a)); F.T.C. v. CyberSpy Software, LLC, 2008 WL 5157718 (M.D. Fla. Nov. 25, 2008) (obtaining preliminary injunctive order against keylogger spyware company that instructed its customers on how to make its spyware product innocuous and untraceable); MoviePass, Inc., F.T.C. File No. 192 3000 (Oct. 5, 2021) https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3000-moviepass-inc-matter (enjoining defendant from continuing to deceptively advertise as a "one movie per day" service while taking steps to prevent subscribers from accessing films as advertised); LendEDU, F.T.C. File No. 182 3180 (May 28, 2020) https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3180-lendedu-et-al-matter (preventing LendEDU from falsely disclosing itself as an unbiased financial product review source while posting fake reviews of financial products and accepting payment for top financial product rankings); UrthBox, Inc., F.T.C. File No. 172 3028 (Dec. 9, 2019) https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3028-urthbox-inc-matter (obtaining relief for consumers that were misrepresented by UrthBox's undisclosed compensation to reviewers for positive reviews); Apple Inc., F.T.C. File No. 112 3108 (March 27, 2014), https://www.ftc.gov/legal-library/browse/cases-proceedings/112-3108-apple-inc (enjoining Apple from charging children's in-app purchases without parental consent through the App Store); Sears Holdings Mgmt. Corp., F.T.C. File No. 082 3099 (Sept. 9, 2009), https://www.ftc.gov/legal-library/browse/cases-proceedings/082-3099-c-4264-sears-holdings-management-corporation-corporation-matter (seeking to enjoin tracking software which monitored user's online bank statements and shopping carts in third-party apps, beyond what online consumers consented to); Seismic Ent. Prod., Inc., F.T.C. File No. 042 3142 (Nov. 21, 2006), https://www.ftc.gov/legal-library/browse/cases-proceedings/042-3142-x05-0013-seismic-entertainment-productions-inc-et-alD (barring defendants from misrepresenting their product and coercing undetected downloads of spyware); Squared Sol., LLC, F.T.C. File No. 032-3223 (Aug. 9, 2004), https://www.ftc.gov/legal-library/browse/cases-proceedings/032-3223-d-squared-solutions-llc-california-limited-liability-company-anish-dhigra-individually-officer-d (enforcing against excessive pop-up ads that led to data loss, app failure, and computer crashes).

[141] Several platforms such as Snapchat and TikTok provide parental tools, but require the parent to set up an account, "friend" their teen, and get the teen's permission to allow parental control over their accounts. *Parent's Guide: Snapchat's Family Center*, SNAPCHAT (2022), https://values.snap.com/safety/family-center; J.

platform (and the manner in which a parent's account can be linked to a child's) can be a time-consuming and difficult process. Encouraging social media platforms to coalesce around more standardized approaches to parental controls (with each free to market their own particular implementation) could go a long way toward empowering parents with the tools they need to help prevent harm to their children. Empowerment is the focus of COPPA and should remain the focus of the FTC's work in this area. Having participated in prior FTC workshops on COPPA and other Internet issues,[142] we believe that productive outcomes can come from industry collaboration, and more importantly, from industry buy-in.

CONCLUSION

The current FTC would do well to remember what the FTC staff concluded in its 2004 review of the debacle that was the KidVid Proceeding of the 1970s:

> Although the idea of banning certain kinds of advertisements may offer a superficial appeal in this context, it is neither a workable nor an efficacious solution to the health problem of childhood obesity. The Federal Trade Commission has traveled down this road before. It is not a journey that anyone at the Commission cares to repeat.[143]

Substitute "advertisements" with "design practices," and exactly the same could be said of this Petition. For all the reasons above, the Petition should be dismissed.

D. Biersdorker, *How to Use TikTok's Parental Controls*, N.Y. TIMES (Oct. 26, 2022), https://www.nytimes.com/interactive/2022/10/26/technology/personaltech/tiktok-parental-controls.html.

[142] *See supra* note 5.

[143] FTC STAFF REPORT, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (2004), 23. https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf ("2004 FTC Staff Report").

Respectfully submitted,

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