

# TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

**Comments of**

**TechFreedom**

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**At the**

Open Commission Meeting

**July 20, 2023**

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## INTRODUCTION

On July 20, 2023, three of TechFreedom’s legal scholars delivered remarks at the FTC’s Open Commission Meeting. Their oral remarks are presented here, lightly edited for clarity.

### I. Comments of Berin Szóka

I’m Berin Szóka, President of TechFreedom and a longtime observer of the FTC.

Last year, the FTC’s Ethics Officer asked Chair Khan to recuse herself from an enforcement action against Meta. She refused—something no Commissioner had ever done before.<sup>1</sup> The Ethics Officer noted that her participation was “not a *per se* federal ethics violation.” But that’s not really the issue.

At last week’s oversight hearing, Khan promised not to “allow any personal financial interests or [her] previous work on antitrust issues to influence [her] decisions.” This, too, misses the point.

The real issue is the Constitution’s guarantee of due process. In America, *every* defendant has a right to an impartial tribunal.<sup>2</sup> *If*, as the Second Circuit held in 1959, a “disinterested observer may conclude that [an agency] has in . . . some measure adjudged . . . a particular case in advance of hearing it,” then its “reputation for objectivity and impartiality is opened to challenge.”<sup>3</sup>

Such prejudgments led courts to disqualify FTC Chair Paul Rand Dixon *three* times in the following decade, voiding lawsuits he brought. As the Sixth Circuit noted, Chair Dixon had, “as counsel for a Senate Subcommittee, . . . investigated and developed many of [the] same facts” that would underpin administrative suits he brought as Chair.<sup>4</sup> Likewise, Chair Khan has proudly claimed that she “led the congressional investigation into digital markets and

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<sup>1</sup> MEMORANDUM ON FEDERAL ETHICS RESPONSE TO META PETITION FOR CHAIR KHAN’S RECUSAL 8, FED. TRADE COMM’N (2022), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rfE9nltMFEH8/v0> (“To the best of my knowledge, no FTC employee has participated in a specific party matter when the agency designee has recommended recusal on appearance or other federal ethics grounds.”).

<sup>2</sup> *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”); Amos Treat Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962) (administrative hearings “must be attended, not only with every element of fairness but with the very appearance of complete fairness.”).

<sup>3</sup> Gilligan, Will Co. v. SEC, 267 F.2d 461, 468-69 (2nd Cir. 1959).

<sup>4</sup> American Cyanamid Co. v. FTC, 363 F.2d 757, 767 (6th Cir. 1966).

the publication of its final report.”<sup>5</sup> That report prejudged many key aspects of potential suits against tech companies.

Both Chairs repeated their prejudgments publicly. Such statements, as the D.C. Circuit warned, “may . . . entrench[] a Commissioner in a position . . . , making it difficult, if not impossible, for [them] to reach a different conclusion . . . after consideration of the record.”<sup>6</sup>

Thus, concluded the Sixth Circuit, “[w]herever there may be reasonable suspicion of unfairness, it is best to disqualify”<sup>7</sup> a Commissioner from participating as an adjudicator.

Such a Commissioner may yet be able to vote to bring suit directly in federal court. When a Commissioner acts only as prosecutor, their potential prejudgment doesn’t raise the same constitutional problems as when they sit as judge and jury.<sup>8</sup> If Chair Khan insists on using the administrative trial process where “there may be reasonable suspicion of unfairness,”<sup>9</sup> she may find that she has expended years of staff time and effort only to have a court void the entire lawsuit.

*That* is the real issue here.

## **II. Comments of Bilal Sayyed**

Earlier this week, former president and current presidential candidate Donald Trump announced his intention to bring independent agencies under presidential authority if he returns to the White House. According to Mr. Trump, “the independent regulatory agencies, such as . . . the FTC . . . do not get to become a fourth branch of government, issuing rules and edicts all by themselves.”<sup>10</sup>

Attacks on the Commission’s independence from the executive branch would have previously met with strong resistance from the business and academic community, the judicial branch, and the Congress. I no longer believe this is likely. Support for significant

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<sup>5</sup> *LINA KHAN*, <http://web.archive.org/web/20210701205313/http://www.linamkhan.com/bio-1> (last visited July 20, 2023).

<sup>6</sup> *Cinderella Career Finishing Sch. v. F.T.C.*, 425 F.2d 583, 590 (D.C. Cir. 1970).

<sup>7</sup> *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966).

<sup>8</sup> *Fed. Trade Comm’n v. Facebook, Inc.*, No. 20-3590 (JEB) at 41-48 (D.D.C. Jan. 11, 2022), <https://s3.documentcloud.org/documents/21177063/memorandum-opinion.pdf>.

<sup>9</sup> *American Cyanamid*, 363 F.2d at 768.

<sup>10</sup> Presidential Campaign of Donald Trump, *Agenda47: Liberating America from Biden’s Regulatory Onslaught* (Apr. 16, 2023), <https://www.donaldjtrump.com/agenda47/agenda47-liberating-america-from-bidens-regulatory-onslaught>.

curbs on the so-called administrative state has reached deep into these communities, and within a significant percentage of the public.

The substantive reasons for dissatisfaction with the Commission are not easily summarized in a few hundred words and are deeper than the current Commission's enforcement and regulatory agenda. And I recognize, and believe it is laudable, that this Commission especially but not uniquely has attempted to expand its base of those with an interest and voice in its mission.

However, it is no secret that this Commission's actions have alienated many who agree with and accept the Commission's mission and have in the past worked productively with it to advance the dynamism of our economy and to protect consumers, and who have traditionally defended the Commission's independence.

The Commission should be aggressive in protecting consumers and competition. But it should not be reckless or casual in challenging the constraints it operates under, as I believe it has been recently. Smaller steps toward the development of the law and regulatory policy in support of its mission should be chosen over leaps. And the Commission, while expanding its stakeholder base, should repair its relationships with those with a longstanding interest in the Commission's success as a protector of competition and consumers.

### **III. Comments of Andy Jung**

I'm Andy Jung, a Legal Fellow at TechFreedom.

Last year, the Commission released a report on so-called "dark patterns," defined as design practices used to "trick or manipulate consumers into buying products or services or giving up their privacy."<sup>11</sup> This broad definition includes conduct like native advertising and hidden junk fees.

Former Commissioner Phillips responded: "I just don't think the term dark pattern is very helpful . . . it fails in helping businesses and consumers identify those practices that are illegal."<sup>12</sup> His warning was prescient.

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<sup>11</sup> *FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers*, FTC (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers>; FED. TRADE COMM'N, BRINGING DARK PATTERNS TO LIGHT (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf).

<sup>12</sup> Comments of Commissioner Noah Phillips, *FTC Open Commission Meeting, September 15, 2022* at 20, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftc\\_open\\_commission\\_meeting\\_september\\_15\\_2022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftc_open_commission_meeting_september_15_2022.pdf).

The term blurs the distinction between gray-area business practices and hardcore fraud at the core of the FTC Act. In a recent complaint, the Commission accuses Amazon of using “dark patterns” by streamlining the enrollment process and complicating the cancellation process for Prime subscriptions.<sup>13</sup> The FTC *might* show that Amazon’s practices are unfair. Or Amazon might show that they’re not. Section 5(n) requires a weighing of costs and benefits for practices that fall into this gray zone of normal business activity.

But hardcore fraud is different. Under Section 19, where a practice is “one which a reasonable man would have known under the circumstances was dishonest or fraudulent,” the FTC may obtain monetary relief.<sup>14</sup>

For example, the FTC released a complaint against Fluent, which operates robocall lead generation websites.<sup>15</sup> The complaint alleges that Fluent uses “dark patterns . . . to manipulate consumers into divulging their contact information,” purportedly to enable Fluent to send consumers a reward or to help consumers apply for a job.<sup>16</sup> The promised

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To start, I just don’t think the term dark pattern is very helpful, at least with respect to giving clarity about the law. It reduces rather than adds clarity for consumers, for businesses, and even for us, law enforcers. We all might agree on some practices that qualify, but there’s very little agreement on the full scope of what is in and what is out of the category of dark pattern. So the term succeeds in painting an ominous picture of the practices it is used to describe, but it fails in helping businesses and consumers identify those practices that are illegal, and to me, that’s what really matters.

The term also does not line up with the definitions of unfairness and deception, which is what we have the authority to police and regulate. Some of the practices described in the report are not unfair or deceptive. We may not like it when declining to provide an online retailer with our email address requires us to click a message saying, no, I don’t want to save 25%, but it’s just not a violation of section five.

The report also suggests that collecting information for advertising purposes could be itself a dark pattern. I know there are some who dislike targeted advertising, but personalized ads do not violate section five. I’m concerned at the commission’s recent tendency to use pejoratives to refer to a wide array of practices, only some of which are illegal, so calling conduct a dark pattern or commercial surveillance is not a replacement for the legal and factual analysis required in order for us to show that a practice is deceptive or unfair, and it does little to add clarity for enforcers, or the public, or again, for the businesses who are trying to follow the law and get things right.

<sup>13</sup> Complaint ¶¶ 2, 8, 217, Fed. Trade Comm’n v. Amazon.com, Inc., No. 2:23-cv-0932 (W.D. Wash. June 21, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/amazon-rosca-public-redacted-complaint-to\\_be\\_filed.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/amazon-rosca-public-redacted-complaint-to_be_filed.pdf). For example, the Commission accuses Amazon of “Confirmshaming”—the use of “emotive wording around the disfavored option to guilt users into selecting the favored option.” *Id.* ¶ 217.

<sup>14</sup> 15 U.S.C. § 57b(a)(2).

<sup>15</sup> Complaint, United States v. Fluent, LLC et al., No. 9:23-cv-81045 (S.D. Fla. July 17, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/1923230fluentcomplaintandattachment.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/1923230fluentcomplaintandattachment.pdf).

<sup>16</sup> *Id.* ¶¶ 36-38.

rewards and jobs, however, usually do not exist.<sup>17</sup> Fluent then sells this fraudulently collected data to call centers, which inundate consumers with robocalls and spam.<sup>18</sup>

The FTC accuses both Amazon and Fluent of using “dark patterns,” but these are very different cases. A complicated cancellation workflow is categorically different from deceiving consumers into sharing personal information and sending them harmful spam. The Commission shouldn’t lump together potentially legitimate business activity with hardcore fraud. As former Commissioner Phillips explained, “calling conduct a dark pattern . . . is not a replacement for the legal and factual analysis required . . . to show that a practice is deceptive or unfair.”<sup>19</sup>

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_

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<sup>17</sup> *Id.* ¶¶ 37, 38.

<sup>18</sup> *Id.* ¶¶ 31, 36.

<sup>19</sup> Comments of Commissioner Noah Phillips, *FTC Open Commission Meeting, September 15, 2022* at 20, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftc\\_open\\_commission\\_meeting\\_september\\_15\\_2022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftc_open_commission_meeting_september_15_2022.pdf).