



Comments of

TechFreedom

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At the

FTC Open Commission Meeting

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INTRODUCTION

On November 14, 2024, two 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

Good morning, I’m Berin Szóka, President of TechFreedom.

In its 1935 *Humphrey’s Executor* decision, the Supreme Court said the Federal Trade Commission was intended to “be non-partisan” and to “act with entire impartiality” in administering duties that are “neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”¹

Declaring that all of the agency’s decisions are political, Chair Khan has made the FTC more partisan than ever.² Yet things could get much worse. Here are a few ways the Commission could avoid accelerating a downward spiral.

The Chair should honor three long-established norms. All work should cease on any matter without bipartisan support. All staff should assist fully in the coming transition. And Chair Khan should submit her resignation forthwith, effective at noon on Inauguration Day.

Staying longer would accomplish nothing except to give President Trump what he wants: the opportunity to fire her and begin the legal challenge to *Humphrey’s Executor* proposed by Project 2025.³ Few, if any, administrative law scholars expect the Court to uphold limits on the President’s power to fire FTC Commissioners.

Trump might well fire the other two Democratic Commissioners anyway, but this would be much harder to justify, especially if he fills those seats with his allies. The FTC Act would allow him to do that, provided those candidates weren’t Republicans, but he might want to challenge that limit on his appointment power, too—and he might well win.

No sane person should want this breakdown in the FTC’s bipartisan structure. The back-and-forth among Commissioners improves FTC decision-making; it also makes the Commission more likely to prevail when its actions are challenged. Making the FTC directly subordinate

1 *Humphrey’s Executor v. U.S.*, 295 U.S. 602 (1935).

2 See Nancy Scola, *Lina Khan Isn’t Worried About Going Too Far*, INTELLIGENCER (Oct. 27, 2021), <https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html>; Fox Business, *Break up Amazon as a monopoly?*, YouTube (June 23, 2017), https://www.youtube.com/watch?v=VI_DEYqWxqs (“I think all decisions are political in so far as government agencies are bringing them.”).

3 Adam Candeub, *Federal Trade Commission* at 873, Project 2025, https://static.project2025.org/2025_MandateForLeadership_CHAPTER-30.pdf#page=5 (last visited Nov. 11, 2024).

to the President would likely bring down the Trans-Atlantic Data Privacy Framework, the agreement that allows US/EU data transfers, since European fundamental rights law requires regulatory supervision by an independent American authority. Jeopardizing data flows would, in turn, undermine American tech leadership worldwide.

All five sitting Commissioners should join together in a statement that reiterates the value of continuing to have two minority Commissioners chosen by the opposition's Senate leader, and of continuing to include minority Commissioners fully in all aspects of the Commission's work.

II. Comments of Andy Jung

Good morning. I'm Andy Jung, Associate Counsel at TechFreedom.

This year, the Commission has brought numerous enforcement actions against companies using unfair and deceptive business practices involving artificial intelligence. In *Rite-Aid*, the Commission prohibited the chain from deploying unfair, biased AI-based facial recognition technology in stores.⁴ And the Commission has cracked down on deceptive "fake AI" scams through enforcement actions like *Automators* and Operation AI Comply.⁵

These enforcement actions, alongside a handful of blog posts and statements, encompass the corpus of FTC regulation on unfair and deceptive AI business practices. Currently, the guidance is scattered, un-centralized, and often informal.

To understand the big picture, consumers and businesses must read through two-hundred-plus results on the Commission's website tagged as related to "artificial intelligence."⁶ The guidance is sometimes ambiguous and inconsistent: the *Rite-Aid* press release, for example, speaks of "AI Facial Recognition,"⁷ but the complaint does not mention artificial intelligence and focuses instead on algorithmic fairness.⁸

4 Press Release, FTC, Rite Aid Banned from Using AI Facial Recognition After FTC Says Retailer Deployed Technology without Reasonable Safeguards (Dec. 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without>.

5 Fed. Trade Comm'n v. Automators LLC, No. 23-cv-1444-DMS-BGS (S.D. Cal. 2024), <https://www.ftc.gov/legal-library/browse/cases-proceedings/automators>; Press Release, FTC, FTC Announces Crackdown on Deceptive AI Claims and Schemes (Sept. 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes>.

6 FTC, *Tag: Artificial Intelligence*, <https://www.ftc.gov/industry/technology/artificial-intelligence> (last visited Nov. 14, 2024).

7 Press Release, *supra* note 4.

8 See Statement of Commissioner Alvaro M. Bedoya On *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation* at 3 (Dec. 19, 2023),

The Commission should create and share for public comment a policy statement on Unfair and Deceptive AI Business Practices. Start with bedrock principles: an AI business practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable...and not outweighed by countervailing benefits to consumers or to competition.”⁹ And “deceptive” AI practices involve a material representation, omission, or practice that is likely to mislead a consumer acting reasonably.¹⁰

The policy statement should provide concrete examples of unfair and deceptive AI practices, with explanations citing to enforcement actions. A document summarizing and formalizing the Commission’s work on AI is especially important given the upcoming change in administration. And public comment would be invaluable and essential, allowing the Commission to hear concerns from consumers and field questions from the AI business community.

Respectfully submitted,

_____/s/_____

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https://www.ftc.gov/system/files/ftc_gov/pdf/2023190_commissioner_bedoya_riteaid_statement.pdf#page=3.

9 15 U.S.C. Sec. 45(n).

10 Fed. Trade Comm’n, Policy Statement on Deception (appended to Cliffdale Associates, 103 F.T.C. 110, 174 (1984)),

https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.