

Comments of

TechFreedom

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In the Matter of

Request for Information: Regulatory Reform on Artificial Intelligence

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INTRODUCTION

In the Request for Information (RFI), the Office of Science and Technology Policy (OSTP) “requests input ... in identifying existing Federal statutes, regulations, agency rules, guidance, forms, and administrative processes that unnecessarily hinder the development, deployment, and adoption of artificial intelligence (AI) technologies within the United States.”¹ More generally, the RFI aims to identify “priorities for such regulatory reform or other agency action necessary to promote AI innovation and adoption” and “regulatory and procedural barriers that unnecessarily slow safe, beneficial AI deployment.”²

These comments respond to two specific questions in the RFI:

Where barriers arise from a lack of clarity or interpretive guidance on how existing rules cover AI activities, what forms of clarification (e.g., standards, guidance documents, interpretive rules) would be most effective?³

We aim to clarify how Federal Communication Commission (FCC) authority covers AI activities—and how it does not. Additionally, we call for interpretative guidance from the Federal Trade Commission (FTC) on unfair or deceptive AI acts or practices.

Where existing policy frameworks are not appropriate for AI applications, what administrative tools (e.g., waivers, exemptions, experimental authorities) are available, but underutilized? Please identify the administrative tools with specificity, citing the CFR or U.S.C. where applicable.⁴

To that end, we endorse regulatory sandboxes as administrative tools that are available to the federal government but underutilized for AI.

I. The FCC Lacks the Statutory Authority to Preempt State AI Laws

The RFI touts the potential revolutionary impact of artificial intelligence:

AI has applications across nearly every sector of the economy and public life, including healthcare, finance, transportation, manufacturing, education, agriculture, and national security. AI adoption is expected to yield significant

¹ Notice of Request for Information; Regulatory Reform on Artificial Intelligence, 90 Fed. Reg. 46422 (Sept. 26, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-09-26/pdf/2025-18737.pdf> [hereinafter *RFI*].

² *Id.* at 46422, 46423.

³ *Id.* at 46424.

⁴ *Id.*

benefits, including greater efficiency, improved safety and reliability, expanded access to services, and enhanced economic competitiveness.⁵

Note, however, that the words “communications,” “telecommunications,” “data,” or “networks” nowhere appear in this laundry list of these economic sectors. In the AI Action Plan, the only mention of our communications (data) networks is the stated goal to:

Maintain security guardrails to prohibit adversaries from inserting sensitive inputs to this infrastructure. Ensure that the domestic AI computing stack is built on American products and that the infrastructure that supports AI development such as energy and telecommunications are free from foreign adversary information and communications technology and services (ICTS)—including software and relevant hardware.⁶

Yet the AI Action Plan envisions an important (indeed, outsized) role for the FCC in the future regulatory regime for AI, asking the Commission to “evaluate whether state AI regulations interfere with the agency’s ability to carry out its obligations and authorities under the Communications Act of 1934.”⁷

This section explains the limits to the FCC’S statutory authority, and why efforts to preempt state AI laws that do not directly impact communications networks will not be sustained by courts. We agree that preemption of intrusive and potentially destructive state AI laws is necessary,⁸ but such preemption must come from Congress, not the FCC.

⁵ *Id.* at 46423.

⁶ THE WHITE HOUSE, *AMERICA’S AI ACTION PLAN* 15 (July 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf#page=18>.

⁷ *Id.* at 3.

⁸ *See, e.g.*, Kevin Fraizer & Adam Thierer, *AI Moratorium Questions*, R STREET (June 3, 2025), <https://www.rstreet.org/ai-moratorium-questions/> (“Rooted in the Constitution’s Supremacy Clause, federal preemption allows federal law to supersede state law when they conflict or when Congress intends to occupy a regulatory field exclusively. Because its language explicitly prohibits states from enforcing certain laws, the AI moratorium—if enacted—would be an act of express preemption.”); Kristen Stout, *Federal Preemption and AI Regulation: A Law & Economics Case for Strategic Forbearance*, WLF LEGAL PULSE (May 30, 2025), <https://www.wlf.org/2025/05/30/wlf-legal-pulse/federal-preemption-and-ai-regulation-a-law-and-economics-case-for-strategic-forbearance/> (“From a law and economics perspective, the current trajectory toward fragmented state-level AI regulation threatens to impose substantial costs while failing to achieve the consumer protection goals that motivate such regulation. The proposed moratorium offers a strategic pause—what we might call “regulatory forbearance”—that can prevent these inefficiencies while allowing for the development of a more coherent, evidence-based national framework.”).

A. The FCC's Overall Regulatory Authority Is Limited to Matters Related to Communications

In general, “a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.”⁹ Defining the metes and bounds of FCC preemption authority requires examining what services Congress has authorized the FCC to regulate.

1. The FCC May Only Regulate Communications Services

The FCC's plenary power stems from Section 1 of the Communications Act of 1934:

For the purpose of regulating interstate and foreign *commerce in communication* by wire and radio so as to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nationwide, and world-wide wire and radio *communication service* with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property *through the use of wire and radio communication*, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the “Federal Communications Commission”¹⁰

The AI Action Plan is concerned that our telecommunications infrastructure be free from “foreign adversary information,” but there is scant statutory authority for FCC intervention beyond what it is already doing to protect infrastructure from foreign intervention.¹¹ The terms “security” and “national defense” appear in only a few places in the Communications Act. For example, the FCC has authority to regulate devices that could interfere with radio reception under Section 302, based partially on national defense.¹² Similarly, the Communications Assistance for Law Enforcement Act (CALEA) gave the FCC special

⁹ La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

¹⁰ 47 U.S.C. § 151 (emphasis added).

¹¹ See, e.g., HKT Limited, Order to Show Cause, DA 25-928 (2025), <https://docs.fcc.gov/public/attachments/DA-25-928A1.pdf> (Commission proposes to revoke the Section 214 authority of HKT Limited based on national security concerns); FCC National Security Advisory (Oct. 14, 2025), <https://docs.fcc.gov/public/attachments/DA-25-927A1.pdf> (warning of the continued dangers of using equipment manufactured by China and other foreign adversaries identified on the Covered List); Promoting the Integrity and Security of Telecommunications Certification Bodies, Report and Order, FCC 25-27 (May 27, 2025) (adopting rules banning Chinese-owned labs from being certified as telecommunications certification bodies (TCPs) able to participate in the FCC's equipment authorization program).

¹² 47 U.S.C. § 302.

regulatory authority over communications carriers to require them to cooperate with law enforcement under certain national security and public safety circumstances.¹³ Finally, in times of war and emergencies, Congress gave the President certain limited powers to protect the “national defense and security” of the country to provide “preference or priority” for certain communications.¹⁴

Thus, unless a communications system is directly involved, the FCC has no statutory authority to regulate—or, by the same token, preempt state laws.

2. By Definition, AI Is Not a Communications Service

There are many definitions of “artificial intelligence.” This has caused much confusion in the current debates as to whether, and how, to regulate AI.¹⁵ The AI Action Plan fails to define AI. The most widely used definition of AI comes from the National Artificial Intelligence Initiative Act of 2020:

a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action.¹⁶

Absent is any mention of AI requiring the use of a communications network. While the “system” contemplated here might utilize a data network to transport the “recommendations” or “decisions” created, it is by no means a requirement. And even when a “system” does utilize data networks, the FCC has no more statutory authority to regulate the AI “system” than the Department of Transportation can regulate farming merely because produce is transported on the nation’s highways.

¹³ 47 U.S.C. § 229.

¹⁴ 47 U.S.C. § 706.

¹⁵ See, e.g., Bernard Marr, *The Key Definitions Of Artificial Intelligence (AI) That Explain Its Importance*, FORBES (Dec. 10, 2021), <https://www.forbes.com/sites/bernardmarr/2018/02/14/the-key-definitions-of-artificial-intelligence-ai-that-explain-its-importance/> (noting at least six different definitions of AI); *Defining Artificial Intelligence: Why it’s hard and what you can do about it*, AIEDU, <https://www.aiedu.org/aiedu-blog/defining-artificial-intelligence> (last visited Oct. 27, 2025) (“As is often the case with fields of study that are broad and currently evolving, the definitions are also broad and evolving. An acceptable but not very helpful answer would be it depends on who you ask.”).

¹⁶ 15 U.S.C. § 9401.

Thus, unless the FCC can determine that certain AI systems could directly damage our communications infrastructure,¹⁷ there is no statutory hook by which the FCC can regulate AI, and by implication, preempt state laws.

B. The FCC’s “Ancillary Authority” Must Be Rooted in Its Statutory Authority

The FCC sometimes claims “ancillary authority” beyond the hardware of communications infrastructure. But courts have concluded, especially more recently, that there must be a clear statutory peg on which the FCC can hang this ancillary authority.

1. Ancillary Authority Cannot Be “Ancillary to Nothing”

When the FCC attempted to impose “broadcast flag” regulations to protect copyright owners from having their material aired without their permission or without compensation, the U.S. Court of Appeals for the D.C. Circuit blocked the rule:

Great caution is warranted here, because *the disputed [] regulations rest on no apparent statutory foundation and thus appear to be ancillary to nothing*. Just as the Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer “unbounded” jurisdiction on the Commission, we will not construe the first prong in a manner that imposes no meaningful limits on the scope of the FCC’s general jurisdictional grant.¹⁸

This is the fundamental limit on the FCC’s authority: Before regulating an entity, the agency must establish its authority over that entity. Courts have addressed this fundamental principle repeatedly in the last 50 years and have several times made clear where the FCC’s “ancillary authority” ends.¹⁹ Judge David Tatel of the D.C. Circuit put it best in 2010:

[T]he Commission maintains that congressional policy by itself creates “statutorily mandated responsibilities” sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether.²⁰

¹⁷ See *supra* note 11.

¹⁸ *American Library Ass’n v. Fed. Comm’n Comm’n*, 406 F.3d 689, 692 (D.C. Cir. 2005) (quoting *United States v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (*Midwest Video II*)) (emphasis added).

¹⁹ See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*).

²⁰ *Comcast Corp. v. Fed. Comm’n Comm’n*, 600 F.3d 642, 655 (D.C. Cir. 2010).

This is precisely what the FCC would do by regulating AI without explicit statutory authority.

2. In Terms of Regulatory Authority, AI Is No Different from Netflix

Similarly, merely positing that AI systems might burden data networks because of the amount of data transmitted is insufficient to trigger ancillary authority. The FCC has long held that it has no authority over “edge providers” or content creators merely because they transport their data over the U.S. communications infrastructure.

Asserting regulatory authority over AI systems would overturn decades of Commission decisions. For example, streaming services are a subset of what the FCC and others have described as “edge providers”: Internet content providers who are basically beyond the reach of the FCC’s jurisdiction. Such providers have never been regulated by the FCC. The 2010 Open Internet Order made clear that its net neutrality rules, including its “transparency” rule, “apply only to the provision of broadband Internet access service and not to edge provider activities, such as the provision of content or applications over the Internet.”²¹ The Commission drew this bright line for good reasons:

First, the Communications Act particularly directs us to prevent harms related to the *utilization of networks and spectrum to provide communication by wire and radio*. Second, these rules are an outgrowth of the Commission’s *Internet Policy Statement*. The Statement was issued in 2005 when the Commission removed key regulatory protections from DSL service, and was intended to protect against the harms to the open Internet that might result from *broadband providers’* subsequent conduct. *The Commission has always understood those principles to apply to broadband Internet access service only*, as have most private-sector stakeholders. Thus, insofar as these rules translate existing Commission principles into codified rules, *it is appropriate to limit the application of the rules to broadband Internet access service*.²²

The Commission took pains to distinguish broadband providers from content providers that engage in editorial discretion. Only by doing so could the 2010 Order dispense with the First Amendment arguments raised by some ISPs.²³

²¹ Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972-80, ¶ 50 (2010 Order).

²² *Id.* (emphasis added).

²³ The Commission explained:

In arguing that broadband service is protected by the First Amendment, AT&T compares its provision of broadband service to the operation of a cable television system, and points out

Clearly, had the FCC attempted to extend any of its Open Internet rules to edge providers, those rules would have been subject to First Amendment scrutiny, which they could never have survived. In 2017, a three-judge panel of the D.C. Circuit upheld the FCC’s 2015 reclassification of broadband providers as common carriers.²⁴ When broadband providers sought rehearing by the full D.C. Circuit, then-Judge Brett Kavanaugh argued that imposing common carrier status on ISPs violated the First Amendment. Not so, explained the two judges who wrote the panel decision below, because the rules applied only insofar as broadband providers represented to their subscribers that their service would connect to “substantially all Internet endpoints”—and thus merely “require[d] ISPs to act in accordance with their customers’ legitimate expectations.”²⁵ As the 2010 Order noted, “Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.”²⁶

The Congressional Research Service aptly summarized the FCC’s “hands off” approach to edge providers: “Edge provider activities, conducted on the ‘edge’ of the internet—hence the name—are not regulated by the Federal Communications Commission (FCC).”²⁷ The FCC has

that the Supreme Court has determined that cable programmers and cable operators engage in speech protected by the First Amendment. . . Unlike cable television operators, broadband providers typically are best described not as “speakers,” but rather as conduits for speech. The broadband Internet access service at issue here does not involve an exercise of editorial discretion that is comparable to cable companies’ choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefiting from an editorial presence. To the contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.

Id. ¶¶ 140-41. Edge providers certainly are “speakers” and have full First Amendment rights. *Moody v. NetChoice, LLC*, 603 U.S. 707, 717 (2024) (“And while much about social media is new, the essence of that project is something this Court has seen before. Traditional publishers and editors also select and shape other parties’ expression into their own curated speech products. And we have repeatedly held that laws curtailing their editorial choices must meet the First Amendment’s requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world.”).

²⁴ *U.S. Telecom Ass’n v. Fed. Comm’n Comm’n*, 855 F.3d 381 (D.C. Cir. 2017).

²⁵ *Id.* Conversely, the judges wrote, ISPs could easily avoid the burdens of common carriage status by exercising their First Amendment rights: “[T]he rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP’s exercise of ‘editorial intervention.’” *Id.* at 389 (Srinivasan, J., concurring) (citing *In the Matter of Protecting & Promoting the Open Internet*, 30 FCC Rcd 5601 (2015)).

²⁶ 2010 Order ¶ 141.

²⁷ *See, e.g.*, CLARE Y. CHO, CONG. RESEARCH SERV., R46207, COMPETITION ON THE EDGE OF THE INTERNET (Jan. 30, 2020),

https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf.

rejected attempts in the past to regulate social media and other edge providers, even at the height of Title II Internet regulation: “The Commission has been unequivocal in declaring that it has no intent to regulate edge providers.”²⁸ We have similarly demonstrated that the FCC lacks authority over edge providers in the FCC’s Wireless Emergency Alert System proceeding.²⁹

AI is no different. It is, indeed, a very special use case of an edge service. While the inputs and outputs of AI systems might ride on the backbone of communications infrastructure, in terms of its direct impact on that infrastructure, it is no different than a huge consumer of data services such as Netflix.³⁰

3. Section 253 of the Communications Act Does Not Support Ancillary Authority over AI

FCC Chair Brendan Carr has suggested that the FCC’s ancillary authority might rest in the broad language of Section 253 of the Communications Act,³¹ which states:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.³²

This argument fails for many reasons. Courts have made clear that the burden is on those seeking to invoke Section 253 to demonstrate that the state or local requirement has a direct

²⁸ See Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor ‘Do Not Track’ Requests, DA 15-1266, Order (2015), <https://docs.fcc.gov/public/attachments/DA-15-1266A1.pdf>. That order goes on to state that even after finding that the provision of BIAS was a telecommunications service, at the same time, the Commission specified that in reclassifying BIAS, it was not “regulating the Internet, per se, or any Internet applications or content.” Rather, as the Commission explained, its “reclassification of broadband Internet access service involves only the transmission component of Internet access service.” (quoting Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶ 5575 (2015)).

²⁹ See TechFreedom, Comments on Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System & Wireless Emergency Alerts, PS Docket No. 15-94 & 15-91 (May 14, 2021), <https://techfreedom.org/wp-content/uploads/2021/05/TF-Draft-Comments-WEA-NOI-5-14-21.pdf>.

³⁰ See, e.g., Bojan Jovanovic, *Binge-Watching by the Numbers: How Much Data Does Netflix Use?*, DATAPROT.NET (June 8, 2023), <https://dataprot.net/blog/how-much-data-does-netflix-use/> (as much as 15% worldwide internet traffic is consumed by Netflix).

³¹ See John Hendel, *FCC to explore possible preemption of state AI rules*, POLITICOPRO (July 24, 2025), <https://subscriber.politicopro.com/article/2025/07/fcc-to-explore-possible-preemption-of-state-ai-rules-00475004>.

³² 47 U.S.C. § 253.

effect on the provision of service, and is not just a minor inconvenience.³³ Furthermore, courts have recognized that states have the right to regulate many aspects of the provision of services over which they have regulated in the past. These areas include local business licensing and informational filings;³⁴ the regulation of late fees;³⁵ advertising practices;³⁶ misleading advertising of rate increases;³⁷ deceptive billing;³⁸ complaints of consumer fraud;³⁹ and issues related to zoning and tower placement.⁴⁰

Third, and most important, Chair Carr assumes that AI is a telecommunications service. Not so. “Telecommunications” is defined in the Communications Act as “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴¹ In other words, there must be a transmission involved. As discussed earlier, while AI *might* involve a transmission of data, this is not a requirement: an AI system could operate completely within a set of computers (*e.g.*, a data center), without interconnecting with the overall communications infrastructure. Thus, Section 253 has no bearing on whether the FCC can preempt state AI laws.⁴²

³³ See Public Utility Comm’n of Texas, 13 FCC Rcd. 3460 (1997) (local requirements must “materially inhibit or limit the ability of an entity to compete to invoke Section 253”); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (“[N]ot every increase in costs creates a prohibition within the meaning [of] § 253.”).

³⁴ See Petition of the People of the State of California, Report and Order, 10 FCC Rcd 7486 (1995).

³⁵ See *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421, 423 (D. MD 2000) (“Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves”).

³⁶ See *Moriconi v. AT&T Wireless PCS, LLC*, 280 F. Supp. 2d 867 (E.D. Ark. 2003).

³⁷ See *State ex rel. v. Nextel West Corp.*, 248 F.Supp.2d 885 (E.D. Mo. 2003) (rejected claim of Section 332 preemption of claim that carrier falsely advised subscribers that rate increases were due to new government regulations).

³⁸ *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2nd Cir. 1998); *Gattegno v. Sprint Corporation*, 297 F.Supp.2d 372 (D. MA 2003).

³⁹ See *Smith v. GTE Corp.*, 236 F.3d 1292, 1312 (11th Cir. 2001).

⁴⁰ See *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *compare N.Y. SMSA Ltd. Partnership v. Town Of Clarkstown*, 603 F.Supp.2d 715 (S.D. NY 2009) (Zoning ordinance partly upheld and partly struck down; portions that dealt with traditional zoning issues such as aesthetics, setbacks, process and fees upheld, provisions that gave preferences for lower power transmissions and required RF interference certifications struck down as preempted. But the entire ordinance struck down when court concluded that it couldn’t sever the preempted portions without doing damage to the ordinance as a whole).

⁴¹ 47 U.S.C § 153(48).

⁴² Public Knowledge (PK) argues that whether the FCC has authority to preempt state AI statutes is dependent on whether AI is a “telecommunications service” or an “information service.” Harold Feld, *Can the FCC Preempt State Laws on AI? No – Especially Not With Broadband As Title I*, PUBLIC KNOWLEDGE (Sept. 19, 2025), <https://publicknowledge.org/can-the-fcc-preempt-state-laws-on-ai-no/>. This is the argument raised in the historic “net neutrality” fights over whether the FCC has the authority to regulate broadband

In sum, the FCC has very little say in the future of AI, AI regulation, or the AI Action Plan. Its role, given its limited statutory authority, would be to move to protect the communications infrastructure from threats posed by AI which could interfere with, or totally disrupt, the transmission of voice and data across that infrastructure. Congress alone can preempt burdensome state AI laws and regulations; it should do so as quickly as possible.

II. The FTC Should Provide Better Guidance on Unfair or Deceptive AI Acts or Practices

The FTC has long protected consumers from unfair or deceptive trade practices across the economy, applying these broad and flexible standards to new technologies by looking to precedents developed in previous cases. The FTC should, of course, continue to do this with respect to AI, just as it has with previous technologies. To address standard consumer protection problems, we do not need an entirely new law of AI any more than we once needed a law of the horse.⁴³

But the manner in which the FTC applies its authority may well “unnecessarily hinder development, deployment, and adoption of” AI technologies.⁴⁴ In the absence of congressional action to enact sector-specific regulation, as in the European Union, the FTC has become the default regulator of major substantive issues raised by the Digital Revolution, especially data security and privacy. This may be for the best: or, at least, superior to enacting new legislation.

The FTC frequently refers to its body of settlements regarding new technologies as its ‘common law,’ but there is an essential difference between this approach and real common law: the involvement of courts in working through questions of doctrine. Because the FTC has settled nearly every case it has brought, it is difficult to know with any certainty how legal concepts that once applied to horses and buggies and motor cars now apply to technologies like AI.

interactive access service (BIAS). In PK’s view, the recent ruling by the Sixth Circuit striking down the FCC’s authority to classify BIAS as a telecommunications service, *see* *Ohio Telecom Ass’n v. FCC*, No. 24-3449 (6th Cir. 2025), strips the FCC of authority to regulate AI. Presumably, PK would argue that if the FCC were able to declare BIAS a telecommunication service, it also would have preemptive authority over state AI laws, because AI would then become a telecommunications service. But as demonstrated above, AI is different from BIAS and could never be a telecommunications service because it lacks the fundamental requirement of there being a transmission between two points.

⁴³ *See generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. L. F. 207 (1996), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2147&context=journl_articles.

⁴⁴ *See* RFI at 46422.

TechFreedom has long urged the FTC to do more to better develop its doctrine.⁴⁵ We have previously proposed ways to encourage companies to be more willing to litigate enforcement actions on the merits, so courts can play their critical role in deciding questions of doctrine. But these reforms can only go so far. The real question is how a commission can substitute for a lack of judicial analysis by better explaining its own understanding of its powers.

One way for the FTC to do this, in general, would be to revive its long-dormant practice of issuing closing letters to explain why it has decided not to bring enforcement actions in certain cases. Closing letters help regulated parties to understand the line between lawful and unlawful conduct. In the same vein, the FTC could issue formal guidance not merely as to which practices are unlawful, but why. The need for such guidance with respect to how consumer protection law applies to AI is especially important and urgent, given the pace at which these technologies are developing and the degree to which they are transforming our economy and way of life.

Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce....”⁴⁶ FTC leadership has made clear that this consumer protection authority applies to AI.⁴⁷ To date, however, the FTC has not released any guidance on what, exactly, constitutes an “unfair” or “deceptive” AI act or practice—thus failing to notify AI developers and users of use cases they should avoid or safeguard against.

Over the past three years, the FTC has brought numerous enforcement actions against companies undertaking unfair or deceptive business practices involving AI technologies.⁴⁸

⁴⁵ See, e.g., *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission*, TECHFREEDOM (Dec. 2013), http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf; Berin Szóka & Geoffrey A. Manne, *The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature* at 46, TECHFREEDOM (May 2016), <https://techfreedom.org/wp-content/uploads/2021/09/ftc-restoring-congressional-oversight.pdf>.

⁴⁶ 15 U.S.C. § 45(a)(1).

⁴⁷ *FTC Announces Crackdown on Deceptive AI Claims and Schemes*, FTC (Sept. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes> (quoting former FTC Chair Lina Khan: “The FTC’s enforcement actions make clear that there is no AI exemption from the laws on the books. By cracking down on unfair or deceptive practices in these markets, FTC is ensuring that honest businesses and innovators can get a fair shot and consumers are being protected.”); ROHIT CHOPRA, U.S. CONSUMER FIN. PROT. BUREAU, KRISTEN CLARKE, U.S. DEP’T OF JUST., CHARLOTTE A. BURROWS, U.S. EQUAL EMP. OPPORTUNITY COMM’N., & LINA KAHN, U. S. FED. TRADE COMM’N., JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

⁴⁸ *Legal Library: Cases and Proceedings*, FTC, https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&items_per_page=20&search=&field_competition_topics=All&field_consumer

These complaints and settlements, alongside a handful of blog posts and statements, encompass the existing corpus of FTC AI regulation. Whatever guidance they provide is scattered, un-centralized, and often informal: to understand the big picture, consumers and businesses must read through two-hundred-plus results on the FTC’s website tagged as related to “artificial intelligence.”⁴⁹ Worse yet, the guidance is sometimes ambiguous and inconsistent.⁵⁰

The AI Action Plan directs the FTC to:

Review all ... investigations commenced under the previous administration to ensure that they do not advance theories of liability that unduly burden AI innovation. Furthermore, review all FTC final orders, consent decrees, and injunctions, and, where appropriate, seek to modify or set-aside any that unduly burden AI innovation.⁵¹

The FTC, however, has yet to put the Plan in motion. Consequently, FTC regulatory guidance on AI is not only informal but liable to change. Just this year, the Trump administration has deleted several Biden-era FTC blog posts about AI without warning or explanation.⁵²

When the FTC submitted the Unfairness Policy Statement to Congress, the cover letter noted:

In response to your inquiry we have therefore undertaken a review of the decided cases and rules and have synthesized from them the most important principles of general applicability. Rather than merely reciting the law, we have attempted to provide the Committee with a concrete indication of the manner in which the Commission has enforced, and will continue to enforce, its unfairness mandate. In so doing we intend to address the concerns that

_protection_topics=All&field_federal_court=All&field_industry=2389&field_case_status=All&field_enforcement_type=All&search_matter_number=&search_civil_action_number=&start_date=&end_date= (last visited Oct. 27, 2025) (filtered by “Artificial Intelligence”).

⁴⁹ Tag: *Artificial Intelligence*, FTC, <https://www.ftc.gov/industry/technology/artificial-intelligence> (last visited Oct. 27, 2025).

⁵⁰ For example, the FTC’s press release about the enforcement action against Rite-Aid speaks of “AI Facial Recognition” and “artificial intelligence-based facial recognition technology....” 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>. The Decision and Order, however, does not mention artificial intelligence at all. Rite Aid Corporation, 2:23-cv-5023 (2024).

⁵¹ THE WHITE HOUSE, AMERICA’S AI ACTION PLAN 3-4 (July 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf#page=6>.

⁵² Lauren Goode & Makena Kelly, *The FTC Is Disappearing Blog Posts About AI Published During Lina Khan’s Tenure*, WIRED (Oct. 20, 2025), <https://www.wired.com/story/ftc-removes-blog-posts-about-ai-authored-by-by-lina-khan/>.

have been raised about the meaning of consumer unfairness, and thereby attempt to provide a greater sense of certainty about what the Commission would regard as an unfair act or practice under Section 5.⁵³

The FTC should apply the same approach to regulating unfair or deceptive AI acts or practices: review and synthesize relevant cases, rules, statements, and blog posts “to provide a concrete indication ... [and] a greater sense of certainty about” AI conduct prohibited under Section 5 of the FTC Act.

Unfortunately, in each of the FTC’s consumer protection cases involving AI, the parties settled the charges without judicial review of the underlying doctrines. Consequently, the body of law is underdeveloped and untested.

To provide the AI industry with clear consumer protection standards, the FTC should hold public workshops assessing how to translate the few relevant AI enforcement actions into formal policy. The FTC should hold separate workshops on unfair AI and deceptive AI, soliciting feedback from legal experts, technologists, the AI industry, and the public.

Taking what it learned from the workshops, the FTC should then draft and share for public comment a policy statement on Unfair or Deceptive AI Acts or Practices. This statement should provide concrete examples of unfair or deceptive AI practices, with explanations citing to enforcement actions. Although the policy statement would not be binding upon the FTC, it would “require the Commission to better explain the rationale for what it has done in the past” and “allow the FTC to build doctrine in an analytically rigorous way as a second-best alternative to judicial decision-making....”⁵⁴ This approach is, at least, superior to the FTC’s current strategy of creating a “common law of consent decrees” regulating AI.⁵⁵ The policy statement should also implement the AI Action Plan by specifying AI-related agency actions that unduly burden innovation and explaining whether and how the FTC has modified them or set them aside.

A. Unfair AI Acts or Practices

An act or practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by

⁵³ Fed. Trade Comm’n, Policy Statement on Unfairness (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>.

⁵⁴ Berin Szóka & Geoffrey A. Manne, *The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature* at 46, TECHFREEDOM (May 2016), <https://techfreedom.org/wp-content/uploads/2021/09/ftc-restoring-congressional-oversight.pdf>.

⁵⁵ Christopher Wolf, *Targeted Enforcement and Shared Lawmaking Authority As Catalysts for Data Protection in the United States* (2010), <https://news.bloomberglaw.com/tech-and-telecom-law/targeted-enforcement-and-shared-lawmaking-authority-as-catalysts-for-data-protection-in-the-united-states>.

countervailing benefits to consumers or to competition.”⁵⁶ “‘Unfair’ is a particularly imprecise and flexible term ... [which] can never be defined with precision, but some patterns can be discerned.”⁵⁷ The FTC has long asserted that “[t]he flexibility and adaptability of unfairness make it suitable to combat the new permutations of fraudulent behavior that the Internet is likely to spawn.”⁵⁸

More recently, the FTC has applied its unfairness authority to AI.⁵⁹ In a deleted blog post, the FTC explained: “Design or use of a product can also violate the FTC Act if it is unfair – something that we’ve shown in several cases and discussed in terms of AI tools with biased or discriminatory results.”⁶⁰

Formal FTC guidance on unfair AI acts or practices, however, is woefully underdeveloped. Most enforcement actions targeting unfair AI have focused on business opportunity schemes which falsely guaranteed consumers earnings via AI-powered tools and software.⁶¹ In those cases, the alleged unfair conduct stemmed from fraudulent promises of profit—“nothing new under the sun”—not the AI technology itself.

The FTC cites the *Rite Aid* enforcement action as an “important case[] that highlight[s] the FTC’s work to rein in abuses and misuses of AI.”⁶² The case, however, fails to provide meaningful guidance on unfair AI acts or practices. The FTC charged Rite Aid with “us[ing] facial recognition technology in their retail stores without taking reasonable steps to address the risks that their deployment of such technology was likely to result in harm to consumers as a result of false-positive facial recognition match alerts.”⁶³ In a press release, the FTC

⁵⁶ 15 U.S.C. § 45(n).

⁵⁷ Thomas B. Leary, *Unfairness and the Internet* (Apr. 13, 2000), <https://www.ftc.gov/news-events/news/speeches/unfairness-internet>.

⁵⁸ *Id.*

⁵⁹ See *FTC Announces Crackdown on Deceptive AI Claims and Schemes*, FTC (Sept. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes>.

⁶⁰ Michael Atleson, *The Luring Test: AI and the engineering of consumer trust*, FTC (May 1, 2023), <https://archive.is/42RSh>.

⁶¹ See, e.g., *FBA Machine/Passive Scaling*, 2:24-cv-06635-JXN-LDW (2025); *Ascend Ecom*, 2:24-cv-07660 (2025).

⁶² *Artificial Intelligence: Examining Trends in Innovation and Competition Before the Subcomm. on the Admin. State, Regul. Reform & Antitrust of the H. Comm. on the Judiciary*, 119th Cong. 4 (2025), <https://www.congress.gov/119/meeting/house/118081/witnesses/HHRG-119-JU05-Wstate-BedoyaA-20250402-U11.pdf#page=4>; see also *FTC Announces Crackdown on Deceptive AI Claims and Schemes*, FTC (Sept. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes> (“The Operation AI Comply cases being announced today build on a number of recent FTC cases involving claims about artificial intelligence, including ... Rite Aid, which allegedly used AI facial recognition technology in its stores without reasonable safeguards”).

⁶³ *Rite Aid Corporation*, Complaint at 35, 2:23-cv-5023 (2024).

claimed “Rite Aid deployed *artificial intelligence-based* facial recognition technology....”⁶⁴ The Decision and Order, however, does not mention AI at all: instead, the FTC focused on “Facial Recognition or Analysis Systems[,]” “Biometric Information[,]” “Automated Biometric Security[,]”⁶⁵ and “algorithmic fairness”⁶⁶—without explaining the connection to AI, let alone unfair use of the technology.

The only unfairness enforcement action directly on point is *Rytr*.⁶⁷ The company offers “an artificial intelligence-enabled ‘writing assistant’ service ... [that] generates written content for its users under 43 distinct ‘Use Cases[.]’ ... includ[ing] ‘Email,’ ‘Product Description,’ ‘Blogs,’ ‘Articles,’ ‘Story Plot,’ ‘Google Search Ads,’ and ‘Testimonial & Review,’ among others.”⁶⁸ The FTC’s enforcement action focused on the “Testimonial & Review” Use Case, which

enables users to generate written content for reviews. Users may then choose to manually select and copy the content to post reviews elsewhere online. To generate results ..., the user selects the output language and the desired tone (e.g., “formal,” “cautionary,” “critical,” “convincing” “worried,” “urgent,” “funny”) and then adds inputs such as keywords, phrases, and titles. The user can also choose the level of creativity for the content (e.g., “optimal,” “none,” “low,” “medium,” “high,” “max”), and whether they want one, two, or three different results.⁶⁹

The FTC alleged the “Testimonial & Review” Use Case was unfair because it

causes or is likely to cause substantial harm to consumers. It has no or de minimis reasonable, legitimate use. As the service can quickly generate an unlimited number of detailed and genuine-sounding reviews with minimal input, its likely only use is to facilitate subscribers posting fake reviews with which to deceive consumers. In some cases, Respondent’s subscribers

⁶⁴ 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> (emphasis added).

⁶⁵ Rite Aid Corporation, Stipulated Order at 6-7, 2:23-cv-5023 (2024).

⁶⁶ See Statement of Commissioner Alvaro M. Bedoya On *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation* at 3 (Dec. 19, 2023),

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

⁶⁷ *Rytr LLC, In the Matter*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/232-3052-rytr-llc-matter> (last visited Oct. 27, 2025).

⁶⁸ *Rytr LLC*, Complaint at 1, 232-3052 (2024).

⁶⁹ *Id.* at 2.

generated tens of thousands of reviews in a short time. This is likely to pollute the marketplace with a glut of fake reviews. Consumers rely on reviews for fair and accurate information about products and services, and fake reviews can give consumers a false impression of a product or service's quality. As a result, consumers can make purchase choices they otherwise would not have made and waste money on products or services that do not meet their expectations. Honest competitors who do not post fake reviews can lose sales to businesses that do, which can result in reduced consumer choice and lower quality products and services. Consumers cannot reasonably avoid these injuries because the reviews Respondent's service generates appear authentic enough to make it difficult or impossible for consumers to distinguish a real review from a fake one. The harm caused by Respondent's service is not outweighed by countervailing benefits to consumers or to competition; indeed, there are no legitimate benefits to the public from a service that generates an unlimited number of false reviews.⁷⁰

Thus, the FTC charged Rytr with "Unfair Practices" related to "offer[ing] a service intended to quickly generate unlimited content for consumer reviews and creat[ing] false and deceptive written content for consumer reviews."⁷¹

Rytr suggests some factors the FTC might weigh when assessing AI unfairness claims: whether the AI feature has de minimis legitimate use, the rate and quantity of content generated, and whether the content appears authentic. This guidance, however, is wholly insufficient. Many AI tools and services can generate seemingly authentic content, which users may use to write fake consumer reviews. The *Rytr* case fails to identify a clear line between illegal, unfair conduct and legitimate generative AI services. One case cannot provide meaningful guidance on the contours of unfairness as applied to AI, especially given the fact that *Rytr* settled without litigating the allegations in court.

Moreover, Commissioner Holyoak and then-Commissioner Ferguson (now FTC Chairman) dissented, undermining any unified theory undergirding the case. Commissioner Holyoak explained: "Treating Rytr's neutral drafting tool as inherently unfair ... will have deleterious consequences for AI products generally ... [by] suggest[ing] to all cutting-edge technology developers that an otherwise neutral product used inappropriately can lead to liability"⁷²

⁷⁰ *Id.* at 3-4.

⁷¹ *Id.* at 4.

⁷² Dissenting Statement of Commissioner Melissa Holyoak in re *Rytr, LLC* at 5 (Sept. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-rytr-statement.pdf#page=5.

To develop a clearer understanding of unfair AI practices, the FTC should hold a workshop and solicit feedback from experts and the public. In the workshop, the FTC should analyze and respond to the majority and dissenting arguments in *Rytr* to build a consensus on the case. Following the workshop, the FTC should create and share for public a policy statement covering unfair AI to put developers and consumers on notice about fair versus unfair uses of the technology.

B. Deceptive AI Acts or Practices

The FTC's 1983 Policy Statement on Deception defines deception as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."⁷³ Two now-deleted blog posts explained how this might apply to AI: The FTC examines "AI-related *deception*[]" both in terms of exaggerated and unsubstantiated claims for AI products and the use of generative AI for fraud."⁷⁴ The FTC warned "that some products with AI claims might not even work as advertised in the first place[.]" and companies should not "overpromise what your algorithm or AI-based tool can deliver."⁷⁵

The FTC has brought several enforcement actions against companies for deceptive use of AI. In *Evolv Technologies*, the FTC charged the company with making "false claims about its AI-powered security screening system[.]"⁷⁶ These "False and Unsubstantiated Efficacy Claims" included "represent[ing], directly or indirectly, expressly or by implication, that ... Evolv Express will detect all weapons while ignoring harmless personal items ... [and] detects weapons more accurately than metal detectors..."⁷⁷ In *IntelliVision Technologies*, the FTC charged the company with making "false claims about its AI-powered facial recognition software ... [including] false, misleading, or unsubstantiated claims that its AI-powered facial recognition software was free of gender or racial bias."⁷⁸ In *DoNotPay*, the company "claimed to offer an AI service that was 'the world's first robot lawyer,' but the product failed to live

⁷³ Fed. Trade Comm'n, Policy Statement on Deception at 2 (appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf#page=2.

⁷⁴ Michael Atleson, *The Luring Test: AI and the engineering of consumer trust*, FTC (May 1, 2023), <https://archive.is/42RSh>.

⁷⁵ Michael Atleson, *Keep your AI claims in check*, FTC (Feb. 27, 2023), <https://archive.is/F7mCC>.

⁷⁶ *Evolv Technologies*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/evolv-technologies> (last visited Oct. 27, 2025).

⁷⁷ *Evolv Technologies Holdings Inc.*, Complaint at 15, 1:24-cv-12940 (2024).

⁷⁸ *Intellivision, In the Matter of*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/232-3023-intellivision-matter> (last visited Oct. 27, 2025).

up to its lofty claims that the service could substitute for the expertise of a human lawyer.”⁷⁹ The FTC charged DoNotPay with making “False or Unsubstantiated Performance Claims” that its “artificial intelligence and other technology operates like a human lawyer, including by applying the relevant laws to subscribers’ particular legal and factual situations....”⁸⁰

Taken together, these enforcement actions provide some guidance on how deception authority applies to AI—more guidance, at least, than the FTC has provided on unfairness. The cases lay out some clear examples of deceptive AI use cases.

Once again, however, *Rytr* complicates the consumer protection analysis. In addition to the unfairness claim discussed above, the FTC charged Rytr with “furnish[ing] its users and subscribers with the means to generate written content for consumer reviews that is false and deceptive ... [thereby] provid[ing] the means and instrumentalities for the commission of deceptive acts and practices.”⁸¹ This theory of harm is known as means-and-instrumentalities liability.

In his dissent, then-Commissioner Ferguson explained that “[m]eans-and-instrumentalities liability arises from a century-old case involving not ‘unfair or deceptive acts or practices,’ but ‘unfair methods of competition’”:⁸²

Means-and-instrumentalities liability has traditionally been confined to two types of cases. The first involves a defendant who supplies someone other than a consumer—ordinarily a retailer—with a product or service that is unlawful because it is inherently deceptive, or because it has no purpose apart from facilitating a Section 5 violation. The recipient of that product or service then passes it on to consumers in violation of Section 5.

...

The second type of means-and-instrumentalities case involves suppliers of misleading marketing materials that someone down the supply chain uses to deceive consumers. In these cases, the defendant makes false or misleading

⁷⁹ *DoNotPay*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/donotpay> (last visited Oct. 27, 2025).

⁸⁰ *DoNotPay, Inc.*, Complaint at 16, 232-3042 (2024) (Confusingly, the complaint describes DoNotPay’s conduct as “unfair or deceptive acts or practices” without clarifying what counts as unfair versus deceptive. *Id.* at 17.).

⁸¹ *Rytr LLC*, Complaint at 4, 232-3052 (2024).

⁸² Dissenting Statement of Commissioner Andrew N. Ferguson in the Matter of Rytr LLC at 3 (Sept. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-rytr-statement.pdf#page=3.

statements to someone further down the supply chain, who then repeats the misstatements to deceive consumers.⁸³

Ferguson concluded that “Rytr falls into neither category” and that the “complaint is a dramatic extension of means-and-instrumentalities liability.”⁸⁴ Clearly, the FTC is divided on how exactly means-and-instrumentalities liability applies to AI. Just as it did with unfairness, *Rytr* fails to articulate reliable guidance on deceptive AI practices and corresponding liability. This example illustrates the problems with relying on settlements rather than judicial decisions, as in real common law.

Again, there is only so much the FTC can do to remedy these inherent defects of a common law of settlements; but it should strive to do better. A public workshop could explore how to apply longstanding doctrines to specific deceptive AI use cases and address when developers may be liable for bad actors using their services to deceive consumers. In particular, the workshop should discuss how to avoid unduly penalizing open-source AI, which is more vulnerable to manipulation than closed systems.⁸⁵ Following the workshop, the FTC should create and share for public comment a policy statement formalizing guidance on deceptive AI.

C. Policy Statement on Unfair or Deceptive AI Acts or Practices

Left undefined, the FTC’s unfairness and deception authority hangs over the AI industry like the sword of Damocles.⁸⁶ Thus far, the FTC has formally identified only a handful of specific AI uses cases as unfair (AI-power writing assistants for generating fake reviews) or deceptive (false claims about the efficacy of AI-powered security screening systems, facial recognition systems, and lawyer chatbots). Undoubtedly there are more. For now, however, developers and users engage with AI at their own risk, with little warning as to when or where the FTC may drop the sword next.

The FTC has repeatedly emphasized that “there is no AI exemption from the laws on the books.”⁸⁷ But the FTC has failed to identify which laws and how exactly they apply to the new

⁸³ *Id.* at 3-4.

⁸⁴ *Id.* at 5.

⁸⁵ The AI Action Plan directs “the Federal government ... [to] create a supportive environment for open models.” THE WHITE HOUSE, AMERICA’S AI ACTION PLAN 4 (July 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf#page=7> (“Encourage Open-Source and Open-Weight AI”).

⁸⁶ Evan Andrews, *What Was the Sword of Damocles?*, HISTORY (May 27, 2025), <https://www.history.com/articles/what-was-the-sword-of-damocles>.

⁸⁷ See, e.g., *FTC Announces Crackdown on Deceptive AI Claims and Schemes*, FTC (Sept. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes>.

and rapidly developing technology. The FTC’s consumer protection authority over unfair or deceptive acts or practices clearly applies to AI, but the Commission must formally explain to what extent. 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.”⁸⁸ And “deceptive” AI practices involve a material representation, omission, or practice that is likely to mislead a consumer acting reasonably.⁸⁹

A policy statement on Unfair or Deceptive AI Acts or Practices should provide concrete examples of prohibited conduct tied to specific enforcement actions or, at least, related theories of harm. A document summarizing and formalizing the FTC’s work on AI is especially important to ensure consistent regulation and enforcement across administrations. Public comment would be invaluable and essential, allowing the FTC to hear concerns from consumers and field questions from the AI business community.

III. The Federal Government Should Create a Regulatory Sandbox for AI

The AI Action Plan calls on the federal government to “[e]stablish regulatory sandboxes ... around the country where researchers, startups, and established enterprises can rapidly deploy and test AI tools while committing to open sharing of data and results.”⁹⁰

Regulatory sandboxes are regulatory frameworks which allow qualifying companies to offer products and services without complying with all the red tape that otherwise governs that industry. Sandbox companies are not exempt from all regulations: regulatory sandboxes may explicitly provide, for example, that consumer protection law still applies. Regulatory sandboxes may expire after a set period, and companies automatically exit their sandbox once they outgrow the applicable criteria.

Legislatures create regulatory sandboxes to reduce legal pressure on growing industries and to encourage experimentation and innovation.⁹¹ Regulators then collaborate with sandbox companies to collect data on the industry, and, in turn, the sandbox data inform legislative changes that better serve the industry and consumers.

⁸⁸ 15 U.S.C. § 45(n).

⁸⁹ Fed. Trade Comm’n, Policy Statement on Deception at 2 (appended to *Cliffdale Associates*, 103 F.T.C. 110, 174 (1984)), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf#page=2.

⁹⁰ AMERICA’S AI ACTION PLAN 5 (July 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf#page=8>.

⁹¹ Andy Jung, *Shifting Sands in the Tech Sector*, TECHDIRT (Apr. 7, 2022, 3:31 PM), <https://www.techdirt.com/2022/04/07/shifting-sands-in-the-tech-sector/>.

Fourteen states have established regulatory sandboxes for various industries.⁹² Earlier this year, Utah created a regulatory sandbox for AI, known as the Artificial Intelligence Learning Laboratory Program.⁹³

At the federal level, Senator Ted Cruz (R-TX) introduced the Strengthening Artificial intelligence Normalization and Diffusion By Oversight and eXperimentation Act (SANDBOX Act) in September.⁹⁴ The Act provides a workable model for AI regulatory sandboxes as envisioned by the AI Action Plan.

The Act would create a federal regulatory sandbox for AI, “allow[ing] any AI user or developer to apply for waivers or modifications of federal rules or regulations to test, experiment with, or temporarily offer AI products or services without being subject to overly prescriptive enforcement of those rules.”⁹⁵ Consistent with the AI Action Plan and this RFI, the Act aims “to incentivize—(1) the development of current or new artificial intelligence products and services and artificial intelligence development methods; (2) the expansion of economic opportunities from artificial intelligence development; (3) the creation of jobs from artificial intelligence development; and (4) the creation of opportunities for artificial intelligence innovation in the United States.”⁹⁶

Federal agencies would work with OSTP to oversee the sandbox and review applications. Participants would submit regular disclosures and reports including “the number of consumers participating in or receiving the artificial intelligence product or service” and “an assessment of the likely risks and the manner by which the person is mitigating those risks....”⁹⁷ In turn, OSTP would submit an annual report to Congress describing: “(A) the number of applications [] received and the number of applications approved; (B) the name and a description of each applicant that was granted a waiver or modification under the Program; (C) a description of the benefits to the public from the Program; (D) a description of any harm to the public from the Program; (E) the covered provisions that have been

⁹² INST. FOR REFORMING GOV'T, REMOVING BARRIERS TO INNOVATION: HOW REGULATORY SANDBOXES CAN SOLVE KITCHEN TABLE ISSUES 8 (2024), https://reforminggovernment.org/wp-content/uploads/2024/05/IRG_SandboxReport.pdf.

⁹³ UTAH CODE ANN. § 13-70-301, <https://le.utah.gov/~2024/bills/static/SB0149.html>.

⁹⁴ S. 2750, 119th Cong. (2025), <https://www.commerce.senate.gov/services/files/032DEA9D-0C56-41B4-A155-53FFC3987350>.

⁹⁵ *The SANDBOX Act* (Sept. 10, 2025), <https://www.commerce.senate.gov/services/files/4DCC55D7-FEA6-4BCF-9B5F-0B1667F3D860>.

⁹⁶ S. 2750, 119th Cong. § 702(b)(1)-(4) (2025).

⁹⁷ *Id.* § 702(n)(1)(A)(i)-(ii).

waived or modified and the number of times such provisions have been waived or modified; [and] (F) the total number of consumers affected by such waivers or modifications”⁹⁸

Notably, applicants would have to provide “an explanation of how potential benefits of the product or service or development method outweigh the risks, taking into account any mitigation measures, ... including any ... risk of *unfair or deceptive trade practices*”⁹⁹—defined as “an unfair or deceptive act or practice that is declared unlawful pursuant to section 5 of the Federal Trade Commission Act....”¹⁰⁰ The reference to the FTC’s consumer protection authority underscores the necessity of formalizing guidance on unfair or deceptive AI acts or practices. Developers should not have to guess as to whether their AI tools pose such a risk to consumers or speculate about the types of mitigation measures they need to build into their systems to avoid liability under Section 5.

CONCLUSION

The AI Action Plan envisions a role for the FCC and FTC in regulating AI.¹⁰¹ The FCC, however, lacks clear authority. On the other hand, the FTC’s authority over unfair or deceptive acts or practices applies to AI, but the agency has failed to issue guidance on the exact contours of its power over the technology.

The RFI acknowledges that

The realization of the benefits from AI applications cannot be done through complete de-regulation, but require policy frameworks, both regulatory and non-regulatory. Suitable policy frameworks enable innovation while safeguarding the public interest. This is critical to foster public trust in AI technologies, leading to broader deployment and faster adoption. Such policy frameworks may include statutory and regulatory requirements, technical standards, guidance documents, voluntary frameworks, and other instruments.¹⁰²

We agree. Rather than advocate for complete de-regulation, these comments seek to clarify the FCC and FTC’s roles in regulating AI. While consumer protection law may qualify as a “[s]uitable policy framework[] [to] enable innovation while safeguarding the public interest[,]” the FTC must issue guidance, like a Policy Statement on Unfair or Deceptive AI

⁹⁸ *Id.* § 702(n)(2)(A)-(F).

⁹⁹ *Id.* § 702(c)(1)(D)(iii)(I)(cc) (emphasis added).

¹⁰⁰ *Id.* § 701(11)(A).

¹⁰¹ THE WHITE HOUSE, AMERICA’S AI ACTION PLAN 3-4 (July 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf#page=6>.

¹⁰² RFI at 46423.

Acts or Practices, to “foster public trust” while promoting “broader deployment and faster adoption.” In the meantime, instruments like regulatory sandboxes allow AI developers and users leeway to experiment with the technology while retaining safeguards to protect the public.

Respectfully submitted,

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