

March 10, 2026

Andrew Ferguson  
Chair, Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Mark Meador  
Commissioner, Federal Trade  
Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: Deceptive AI Policy Statement**

Dear Chair Ferguson and Commissioner Meador:

We write regarding the “policy statement” that President Donald Trump ordered the Commission to issue regarding artificial intelligence (AI). We remind you of President Trump’s 2019 Executive Order, which required “that agencies treat guidance documents as non-binding both in law and in practice” and “take public input into account when appropriate in formulating guidance documents.”<sup>1</sup> Given that AI is transforming our entire economy, AI regulation easily qualifies as economically “significant,” triggering this requirement for public input.<sup>2</sup>

President Trump has directed the agency to “issue a policy statement on the application of the Federal Trade Commission Act’s prohibition on unfair and deceptive acts or practices under 15 U.S.C. § 45 [Section 5] to AI models.”<sup>3</sup> The Commission’s website lists just thirteen

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<sup>1</sup> Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019), <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

<sup>2</sup> *Id.* at 55237. *See also* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>. Both define “significant” guidance as guidance that “may reasonably be anticipated to lead to” an annual effect on the economy of \$100 million or more.

<sup>3</sup> Ensuring a National Policy Framework for Artificial Intelligence, Exec. Order No. 14,365, 90 Fed. Reg. 58499, 58500 (Dec. 11, 2025), <https://www.federalregister.gov/documents/2025/12/16/2025-23092/ensuring-a-national-policy-framework-for-artificial-intelligence>. The Order directs the Commission to issue the statement within 90 days, *i.e.*, March 11. *Id.*

consumer protection cases involving AI.<sup>4</sup> None of these appears to have resulted in a decision on the merits by a court, the Commission, or even its administrative law judge. Thus, the Commission cannot do what past policy statements—on unfairness (1980),<sup>5</sup> deception (1983)<sup>6</sup> and deceptively formatted advertisements (2015)<sup>7</sup>—have done: distill hard law. At most, the Commission could issue guidance explaining how it believes well-established principles of unfairness and deception *may* apply to AI.

In particular, the Executive Order provides that the “policy statement must explain the circumstances under which State laws that require alterations to the truthful outputs of AI models are preempted by the Federal Trade Commission Act’s prohibition on engaging in deceptive acts or practices affecting commerce.”<sup>8</sup> In effect, this would be an interpretive rule.

The previous Trump administration was clear that “guidance may not be used as a substitute for rulemaking.”<sup>9</sup> The Department of Justice (DOJ) explicitly committed to “no longer engage in th[e] practice [of] ... issuing guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (*including state, local and tribal governments*).”<sup>10</sup> Nor would such documents “be used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of”—*i.e.*, on the face of—“the applicable statute or regulation.”<sup>11</sup>

Section 5, by its terms, preempts no state law; to the contrary, it has long been understood that “state laws providing for regulation of unfair or deceptive practices in commerce are valid unless they conflict with the federal law to the extent that both cannot stand in the same

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<sup>4</sup> *Tag: Artificial Intelligence*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/industry/technology/artificial-intelligence?type=case&mission=29> (last visited Mar. 6, 2026).

<sup>5</sup> Fed. Trade Comm’n, Policy Statement on Unfairness (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)).

<sup>6</sup> Fed. Trade Comm’n, Policy Statement on Deception (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984)).

<sup>7</sup> Fed. Trade Comm’n, Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596 (Apr. 18, 2016).

<sup>8</sup> Ensuring a National Policy Framework for Artificial Intelligence, Exec. Order No. 14,365, 90 Fed. Reg. 58499, 58500 (Dec. 11, 2025).

<sup>9</sup> Off. Att’y Gen., Memorandum on Prohibition of Improper Guidance Documents at 1 (Nov. 16, 2017), <https://www.justice.gov/archives/opa/press-release/file/1012271/dl?inline=>.

<sup>10</sup> *Id.* at 1-2 (emphasis added).

<sup>11</sup> *Id.* at 2.

area.”<sup>12</sup> Whether some state laws might conflict with federal law is a complex question, implicating issues of federalism, the First Amendment, and FTC doctrine.

**Good Governance.** Taking public comment on important matters should be uncontroversial; Justice Antonin Scalia recognized that notice-and-comment was “probably the most significant innovation” of the Administrative Procedure Act of 1949.<sup>13</sup> In 2017, the DOJ recognized that taking public comment about a proposed rule “has the benefit of availing agencies of more complete information about a proposed rule’s effects than the agency could ascertain on its own, and therefore results in better decision making by regulators.”<sup>14</sup> The same goes for policy statements. The Administrative Conference of the United States (ACUS), an “independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure,”<sup>15</sup> recommends that: “When an agency is contemplating adopting or modifying a policy statement, it should consider whether to solicit public participation, and, if so, what kind, before adopting the statement.”<sup>16</sup> There is simply no downside to taking public comment here.

Like the DOJ, ACUS aimed to avoid the abuse of guidance documents, recognizing “that regulated persons sometimes feel that they have no choice other than to comply with a policy statement’s position, even if they disagree with it.”<sup>17</sup> This is exactly what the Executive Order expects: that states will simply accept a “policy statement” declaring that Section 5 preempts certain state laws, and thus desist either from enforcing existing laws or enacting new ones. As Chair Ferguson has explained, agencies “go[] too far” when they “attempt to announce *de facto* rules through an ostensibly nonbinding Policy Statement, bypassing the procedural safeguards that govern our rulemakings and denying regulated parties the benefit of *ex ante*

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<sup>12</sup> *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991) (citing *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F. Supp. 515, 518 (N.D. Tex. 1965)) (“In fact, the FTC Act has long enjoyed a cooperative relationship with state laws. The FTC itself has encouraged state deceptive practices laws because problems in the marketplace go beyond the enforcement capabilities of the federal government.”).

<sup>13</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989). *See also* 5 U.S.C. § 553.

<sup>14</sup> Off. Att’y Gen., *supra* note 9.

<sup>15</sup> *Federal Administrative Procedure Sourcebook*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (May 27, 2025), [https://sourcebook.acus.gov/wiki/Federal\\_Administrative\\_Procedure\\_Sourcebook](https://sourcebook.acus.gov/wiki/Federal_Administrative_Procedure_Sourcebook).

<sup>16</sup> Admin. Conf. of the U.S., *Recommendation 2017-5, Agency Guidance Through Policy Statements* at 10 (Dec. 14, 2017), [https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29\\_2.pdf#page=10](https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf#page=10).

<sup>17</sup> *Id.* at 12.

judicial review.”<sup>18</sup> ACUS “seeks to mitigate that problem by suggesting ways in which an agency can give those persons [effectively governed by a policy statement] a fair opportunity to ask the agency to reconsider and perhaps change its position.”<sup>19</sup>

Consultation is especially vital when it is states that are effectively bound by guidance documents. Since 1999, Executive Order 13132 has required agencies “to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications”<sup>20</sup>—including “policy statements....”<sup>21</sup> That Order prohibits agencies from “promulgat[ing] any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation ... consulted with State and local officials early in the process....”<sup>22</sup> Before issuing such policy statements, agencies must provide:

a federalism summary impact statement, which consists of a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met....<sup>23</sup>

Agencies must also “make available ... any written communications submitted to the agency by State and local officials.”<sup>24</sup> Public comments are an ideal vehicle for receiving input from states in accordance with the Order and developing a record of agency policymaking.

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<sup>18</sup> Andrew N. Ferguson, Comm’r, Fed. Trade Comm’n, Dissenting Statement Regarding the Policy Statement of the Federal Trade Commission on Franchisors’ Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses at 1 (July 12, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-statement-on-franchise-policy-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-statement-on-franchise-policy-statement.pdf).

<sup>19</sup> Admin. Conf. of the U.S., *supra* note 16, at 12.

<sup>20</sup> Federalism, Exec. Order No. 13,132, 64 Fed. Reg. 43255, 43257 (§ 6(a)).

<sup>21</sup> *Id.* at 43255 (§ 1(a)) (“Policies that have federalism implications’ refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”).

<sup>22</sup> *Id.* at 43258 (§ 6(c)(1)).

<sup>23</sup> *Id.* (§ 6(c)(2)).

<sup>24</sup> *Id.* (§ 6(c)(3)).

Although the APA does not require public comments for “general statements of policy[,]”<sup>25</sup> the Commission frequently solicits input nonetheless.<sup>26</sup> For the last thirty years, the FTC and DOJ have increasingly sought public comments when issuing new Merger Guidelines.<sup>27</sup> The Assistant Attorney General under President Reagan committed that, “absent extraordinary circumstances, we will release law enforcement guidelines to the public in draft form and solicit comment from all interested persons before promulgating a final version” because “whatever delay and resource expenditure are caused by this procedure will be justified by broader participation in the policy process and a better final product.”<sup>28</sup>

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<sup>25</sup> 5 U.S.C § 553(b)(A).

<sup>26</sup> Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 842 (2006), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1172&context=wmlr#page=73> (“In the past, the [FTC and DOJ] sometimes have shown some willingness to engage in APA-like procedures such as notice and comment when promulgating their guidelines....”). See, e.g., *FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims*, FEDERAL TRADE COMMISSION (Dec. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims>; *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FEDERAL TRADE COMMISSION (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements> (“In May 2022, the FTC announced it was seeking public comments on proposed updates to the Guides to reflect the ways advertisers now reach consumers to promote products and services, including through social media and reviews.”); *Draft Merger Guidelines for Public Comment*, REGULATIONS.GOV (July 19, 2023), <https://www.regulations.gov/document/FTC-2023-0043-0001>.

<sup>27</sup> Mahshad Badii, *Antitrust’s North Star*, 77 STAN. L. REV. 1189, 1207-1214 (2025), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2025/05/Badii-77-Stan.-L.-Rev.-1189.pdf#page=19> (§ II(B)-(C)). The antitrust agencies sought public comments on the 2010, 2020, and 2023 Merger Guidelines. *Id.* at 1208-1211. Public input sharpened and improved the final guidelines: for example, in response to public comments that the draft 2023 Guidelines relied on outdated legal precedent, see, e.g., Herbert Hovenkamp, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Sept. 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0043-1280> (“The current draft relies heavily on Supreme Court case law from the 1960s and 1970s at the expense of more recent cases in the Circuit Courts of Appeal....”), the agencies added citations to several recent lower court decisions to bolster their arguments. Compare DOJ & FTC, DRAFT FTC-DOJ MERGER GUIDELINES FOR PUBLIC COMMENT (2023), [https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines\\_0.pdf](https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf), with 2023 GUIDELINES, §§ 1 n.5, 2.1 n.9, 3.3 n.68, 4.3 n.78 (citing *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160 (3d Cir. 2022); *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017); and *FTC v. Advoc. Health Care Network*, 841 F.3d 460 (7th Cir. 2016)). See also 2023 GUIDELINES §§ 2.5 nn.28-29, 4.3 n.91 (citing *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023)).

<sup>28</sup> Douglas H. Ginsburg, Assistant Att’y Gen., Antitrust Div., DOJ, Antitrust Enforcement in the Second Term: Remarks Before the 19th New England Antitrust Conference (Nov. 8, 1985), <https://www.justice.gov/archives/atr/speech/file/1235696/dl?inline> (announcing that the DOJ would begin soliciting public comments on guidance statements from 1985 onward).

Agencies rely on public comments to formulate better public policy.<sup>29</sup> Notably, in her dissenting statement opposing the 2015 Section 5 Policy Statement, former Acting FTC Chairman Maureen Ohlhausen criticized “the lack of ... consultation surrounding this policy statement,”<sup>30</sup> and declared:

seek[ing] public comment ... would have allowed the Commission to *receive input from key stakeholders*, including Congress, the Department of Justice (DOJ) Antitrust Division, the business community, and the antitrust bar on this particular policy formulation. Such input would have helped ensure that the Commission is offering *durable and practical guidance* around the fundamental question of whether and when this agency will reach beyond well-settled principles of antitrust law to impose new varieties of UMC liability. It would also have allowed *more careful consideration* of how this expansive policy may be viewed by other antitrust regimes around the world.<sup>31</sup>

Yale law professor Nicholas R. Parrillo explained that public participation on agency guidance leads to “improved technical and political information and heightened legitimacy...”<sup>32</sup> A former senior Federal Reserve official stated “it was wrong to issue guidance without prior public comment because ‘nobody is that smart’ .... Public comment, she said, really helps make ‘better policy.’”<sup>33</sup> A General Counsel of the Department of Transportation concurred that “taking public comment on guidance made the agency’s approaches ‘smarter’ and ‘better informed.’”<sup>34</sup>

Public comments also increase the likelihood that courts will take seriously and defer to policy statements: “one subtle effect of an increased procedural requirement, such as notice and comment, is that it might lead courts to *increase* their deference towards the guidelines.”<sup>35</sup> Under *Skidmore* deference, courts asks whether an agency’s action reflects “thoroughness evident in its consideration.”<sup>36</sup> In 2010, the Seventh Circuit gave the FTC’s

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<sup>29</sup> See Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN L. REV. 57, 86-99 (2019), [https://administrativelawreview.org/wp-content/uploads/sites/2/2019/07/71.1\\_Parrillo\\_FINAL.pdf](https://administrativelawreview.org/wp-content/uploads/sites/2/2019/07/71.1_Parrillo_FINAL.pdf) (§ III(A)-(C)).

<sup>30</sup> Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, Dissenting Statement Regarding FTC Act Section 5 Policy Statement at 5 (Aug. 13, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/735371/150813ohlhausendissentfinal.pdf](https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf)

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> Parrillo, *supra* note 29, at 70.

<sup>33</sup> *Id.* at 86.

<sup>34</sup> *Id.* at 87.

<sup>35</sup> Greene, *supra* note 26, at 843.

<sup>36</sup> *Skidmore v. Swift & Co.*, 323 US 134, 140.

statutory interpretations “a reasonably high degree of deference” in part because “[t]he FTC promulgated the interpretations using notice-and-comment procedures even though it was not required to do so.”<sup>37</sup> In contrast, in 2012, the Supreme Court concluded that the Department of Labor’s interpretation of its regulations “plainly lack[ed] the hallmarks of thorough consideration” in part because “there was no opportunity for public comment....”<sup>38</sup> Similarly, the First Circuit found “no thoroughness evident in the consideration” of interpretive guidance issued by the Equal Employment Opportunity Commission in part because it was “not the product of notice-and-comment rulemaking....”<sup>39</sup> Soliciting and responding to public comments evinces “thoroughness” in the “consideration” of policy statements.<sup>40</sup>

Finally, public comments are especially indispensable now that the Commission is operating with just two Commissioners, both from the same party. Congress intended the FTC to “be composed of five Commissioners” and not entirely of members of the President’s party.<sup>41</sup> The advantage of “multi-member independent agencies,” wrote then-Judge Brett Kavanaugh, is that they “benefit from diverse perspectives and different points of view among the commissioners and board members. The multiple voices and perspectives make it more likely that the costs and downsides of proposed decisions will be more fully ventilated.”<sup>42</sup> Scholars have long recognized that “the presence of dissenters provides new information and forces the proponent to articulate a coherent rationale, thus acting as a constraining force.”<sup>43</sup> In doing so, dissents “provide additional information, challenge invalid assumptions, and reduce the propensity for ‘groupthink.’”<sup>44</sup>

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<sup>37</sup> Miller v. Herman, 600 F.3d 726, 734 (7th Cir. 2010).

<sup>38</sup> Christopher v. Smithkline Beecham Corp., 567 U.S. 142, 159 (2012).

<sup>39</sup> Navarro v. Pfizer Corp., 261 F.3d 90, 100 (1st Cir. 2001).

<sup>40</sup> See Skidmore, 323 U.S. at 140.

<sup>41</sup> 45 U.S.C. § 41 (“Not more than three of the Commissioners shall be members of the same political party.”).

<sup>42</sup> PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1, 26-27 (D.C. Cir. 2016) (internal citations omitted) (declaring the Consumer Financial Protection Bureau’s single-director structure unconstitutional).

<sup>43</sup> Recent Legislation, *Dodd-Frank Act*, 124 HARV. L. REV. 2123, 2128 (2011), [https://harvardlawreview.org/wp-content/uploads/2011/06/vol12408\\_recentlegislation.pdf#page=6](https://harvardlawreview.org/wp-content/uploads/2011/06/vol12408_recentlegislation.pdf#page=6) (citing Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 101 (1986); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretation*, 120 HARV. L. REV. 528, 536 (2006); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 336 (2004)).

<sup>44</sup> Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 587 n. 223 (2017), <https://scholar.law.colorado.edu/articles/833> (citing Robert S. Dooley & Gerald E. Fryxell, *Attaining Decision Quality and Commitment from Dissent: The Moderating Effects of Loyalty and Competence in Strategic Decision-Making Teams*, 42 ACAD. MGMT. J. 389, 398-99 (1999)).

When Commissioner Christine Wilson announced her resignation in 2016 out of frustration that she was being ignored, the Republican former chairman of the Federal Energy Regulatory Commission urged her to reconsider: “the prospect of a dissent curbed any desire I might have had to push beyond my legal authority.”<sup>45</sup> Why? In part because “an effective dissent provides a road map to the court on how an agency abused its authority, ignored or cherry-picked the record or violated due process required by administrative law.”<sup>46</sup> Further, “the presence of appointees from different administrations reduces the variance of policy and improves accuracy through aggregation.”<sup>47</sup> Taking public comments cannot fully compensate for the lack of dissenting opinions on the Commission, but it would at least help to “foster more deliberative decision making.”<sup>48</sup>

Public comments are essential to unpack the complex issues of deceptive AI and federal preemption. Here, taking comments would allow the Commission to benefit from feedback from the public and experts on both the factual question—what, if any, state laws “require alterations to the truthful outputs of AI models”—and the legal question—“the circumstances under which” the FTC Act may preempt such laws.<sup>49</sup>

Sincerely,

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<sup>45</sup> Joe Kelliher, *To Resign or Continue Dissenting at the FTC?*, THE WALL STREET JOURNAL (Feb. 20, 2023), <https://www.wsj.com/articles/ftc-wilson-resign-khan-power-dissent-7ac3491e>.

<sup>46</sup> *Id.*

<sup>47</sup> Recent Legislation, *supra* note 43 (citing Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 101 (1986); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 536 (2006) (noting the “complex internal decisionmaking dynamics” in administrative agencies and multimember courts); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 336 (observing a “dampening of differences” when ideological opponents sit on the same panel).

<sup>48</sup> See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (failure of an agency to address comments refuting evidence in the record was arbitrary and capricious).

<sup>49</sup> See *Ensuring a National Policy Framework for Artificial Intelligence*, Exec. Order No. 14,365, 90 Fed. Reg. 58499, 58500 (Dec. 11, 2025).