

Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Re: Commercial Surveillance ANPR, R111004

**COMMENTS OF**  
**THE FREE STATE FOUNDATION**

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## I. Introduction and Summary

In an Advance Notice of Proposed Rulemaking ("ANPR") released on August 11, 2022, the Federal Trade Commission ("FTC" or "Commission") "invites comment on whether it should implement new trade regulation rules or other regulatory alternatives concerning the ways in which companies (1) collect, aggregate, protect, use, analyze, and retain consumer data, as well as (2) transfer, share, sell, or otherwise monetize that data *in ways that are unfair or deceptive*."<sup>1</sup> The Free State Foundation welcomes the opportunity to share its concerns regarding the ANPR's ill-timed and legally suspect broadside attack on the pro-consumer, ad-supported online ecosystem.

The Free State Foundation supports tailored improvements to the notice-and-consent privacy protection framework – a proven model that then-Commissioner Noah Phillips rightly described as "one of the traditional bedrocks of privacy policy"<sup>2</sup> – by which consumers willingly provide companies with personal information in exchange for goods and services they value at a reduced or zero price. The Internet is a modern tool assembled from rapidly evolving technology, and at times it can be challenging for consumers to stay abreast of the steady stream of innovations that emerge. In other words, "information asymmetries" can arise that complicate individuals' decisions regarding consent. Given the central role that online commerce plays in our nation's economy, however, the responsibility to craft novel, radically different rules of the road

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<sup>1</sup> *Trade Regulation Rule on Commercial Surveillance and Data Security*, Federal Trade Commission, Advance Notice of Proposed Rulemaking; Request for Public Comment; Public Forum (August 22, 2022), at 1 (emphasis added), available at [https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security\(ANPR\)](https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security(ANPR)).

<sup>2</sup> Dissenting Statement of Commissioner Noah Phillips, Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking (August 11, 2022), at 6, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf) (*Phillips Dissenting Statement*).

that address such market imperfections rests primarily in the hands of our elected representatives in Congress.

Motivated, it would seem, by both the proliferation of state-specific comprehensive data privacy statutes and the absence, to date, of a federal law, the Commission has chosen to take the initial step in a rulemaking pursuant to Section 18 of the FTC Act. Unfortunately, issuance of the ANPR is by no means a reasonable gambit. Beginning with the use of the highly charged, untethered term "digital surveillance" in its title and continuing through nearly 100 everything-but-the-kitchen-sink questions, the ANPR embodies a highly biased and distorted perspective (in the words of then-Commissioner Phillips, "a rather dystopic view of modern commerce"<sup>3</sup>). It is a view that (a) threatens to upend congressional momentum on data privacy legislation, (b) wholly ignores recent, highly relevant Supreme Court precedent, (c) far exceeds the FTC's rulemaking authority, and (d) dismisses the benefits that consumers reap from ad-supported ("free") services in order to justify radical limits on data-based transactions.

Without question, a need exists for a comprehensive federal data privacy regime. For one, as noted above, relentless progress in Internet technologies at times can lead to "information asymmetries," whereby consumers' appreciation of the innovative ways that companies use their personal information – and, consequently, their ability to make fully informed choices about sharing their personal information with others – falls short. For another, the state-by-state approach that has emerged over the last several years simply is not viable: because the Internet transcends geographic borders, inconsistent state laws unavoidably create confusion for consumers and compliance nightmares for companies.

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<sup>3</sup> *Id.* at 11.

But whereas many of the bills introduced in Congress over the past several years, most notably the bipartisan and bicameral American Data Privacy and Protection Act ("ADPPA"), which cleared the House Commerce Committee on a near-majority basis and at the moment awaits a floor vote, along with the six statutes to date passed in five different states, by and large attempt to address those "information asymmetries" through the establishment of bright-line consumer rights and corporate responsibilities, the sprawling ANPR instead seeks to vilify the entire ad-supported foundation of the online experience. Perhaps the idea, or hope, is that the extreme draconian measures it proposes – such as constraining or banning outright the use of artificial intelligence, without regard to our nation's ability to compete on the global stage, or placing excessive and unwarranted limits on targeted advertising – will be overlooked.<sup>4</sup>

But as these comments emphasize, this would be a mistake. The ANPR raises very serious issues that call into question its release.

*First*, as a matter of sound policymaking, it is irresponsible for the FTC not to acknowledge that the release of the ANPR – the first statutorily required step in an intentionally drawn-out rulemaking process defined in Section 18 of the FTC Act – could interfere with active congressional negotiations regarding the substance of the ADPPA. Leaving to the side, just for the moment, constitutional separation of powers concerns, there is a meaningful difference between a regulatory agency testing the limits of its authority in the face of legislative indifference – and one competing in real time with

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<sup>4</sup> *See id.* at 8 ("The Commission wonders if it should put the kibosh on the development of artificial intelligence. Stopping American innovation in its tracks seems to me neither to reflect the law nor to be sound public policy.").

Congress. On its own, the potential threat that the ANPR poses to the passage of a comprehensive federal data privacy statutes requires that the FTC press "pause."

*Second*, given the economic significance of consumer data and the absence of clear statutory language authorizing the extraordinary steps contemplated by the ANPR, the Supreme Court's recent holding in *West Virginia v. EPA* formally invoking the "major questions doctrine" directly calls into question the FTC's authority to proceed.

Unconscionably, however, the ANPR fails to even mention that case – perhaps because the Commission majority understands the seemingly fatal blow that decision delivers to their ambitions.

*Third*, the ANPR ignores the limits established by Congress for a Section 18 of the FTC Act ("Mag-Moss") rulemaking. As Commissioner Christine Wilson astutely pointed out, while Section 18 provides the agency with limited power to adopt "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce," the ANPR "wanders far afield of areas for which we have clear evidence of a widespread pattern of unfair or deceptive practices."<sup>5</sup> Such areas include targeted advertising and the use of algorithms, broadly defined.

*Fourth*, questions of authority aside, the ANPR on the merits represents a clear desire to reject the prevailing notice-and-consent privacy protection mechanism, which respects the sovereignty of the individual and generates undeniable consumer benefits, and replace it with a radically different view of how things *ought* to be. Rather than proposing to address in a responsibly targeted fashion any "information asymmetries"

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<sup>5</sup> Dissenting Statement of Commissioner Christine S. Wilson, Trade Regulation Rule on Commercial Surveillance and Data Security (August 11, 2022), at 2, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Commissioner%20Wilson%20Dissent%20ANPRM%20FINAL%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Wilson%20Dissent%20ANPRM%20FINAL%2008112022.pdf) (*Wilson Dissenting Statement*).

that may exist, the ANPR calls into question the very ability of adult consumers to make educated decisions in their best interest – as well as the ability of parents to make those same choices for their children. It dismisses the value that consumers derive from ad-supported ("free") services as naïve, a duplicitous trojan horse for the "digital surveillance" from which they need government protection. But as then-Commissioner Phillips pointed out, "[r]educing the ability of companies to use data about consumers, which today facilitates the provision of free services, likely will result in higher prices – an effect that policymakers would be remiss not to consider in our current inflationary environment."<sup>6</sup>

In short, the ANPR is fraught with legal and policy problems. It represents a clear attempt to usurp the role of Congress, it reaches far beyond the FTC's limited authority to make rules, and it embodies an inexcusably dismissive view of the valuable role that targeted advertising – and the "free" services provided in exchange – plays in our economy. Rather than proceed to a notice of proposed rulemaking, at least for now, the Commission should defer to the active legislative effort unfolding in Congress. And if it becomes appropriate to move forward in the future, the Commission should issue a new ANPR that is properly focused in such a way as to be consistent with the FTC's authority and with sound policy.

## **II. As a Matter of Sound Policy, the FTC Should Defer to Ongoing Congressional Efforts to Pass a Comprehensive Federal Data Privacy Law**

Without question, it is the appropriate responsibility of our elected representatives in Congress to determine the contours of a nationwide comprehensive data privacy regime. And this session lawmakers have made unprecedented progress toward that goal.

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<sup>6</sup> *Phillips Dissenting Statement* at 1.

The release of the ANPR threatens to upend that momentum – and, on that basis alone, should be shelved.

The need for Congress – not the states,<sup>7</sup> not the FTC, but Congress – to establish policies on data privacy is a principle with near universal support. On October 4, 2022, the New Democrat Coalition, representing 99 Democratic House members, endorsed the ADPPA.<sup>8</sup> On September 13, 2022, the U.S. Government Accountability Office released a "Snapshot" report "recommend[ing] that Congress consider comprehensive legislation on internet privacy that would enhance consumer protections *and include the oversight authorities agencies should have.*"<sup>9</sup> Even Commissioner Rebecca Kelly Slaughter, in her prepared statement regarding the Commercial Surveillance and Data Security Public

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<sup>7</sup> See, e.g., Andrew Long, "A Tale of Three Data Privacy Bills: Federal Legislative Stalemate Enables Bad State Laws," *Perspectives from FSF Scholars*, Vol. 17, No. 2 (January 6, 2022), at 4, available at <https://freestatefoundation.org/wp-content/uploads/2022/01/A-Tale-of-Three-Data-Privacy-Bills-Federal-Legislative-Stalemate-Enables-Bad-State-Laws-010622.pdf> ("Absent a preemptive federal law, the dreaded 'patchwork' of inconsistent state laws will be upon us in less than a year's time.") (citation omitted). The California Consumer Privacy Act, which became law at the beginning of 2020, at present is the only enforceable state data privacy statute. Both the California Privacy Rights Act of 2020 and the Virginia Consumer Data Protection Act will go into effect on January 1, 2023, the Colorado Privacy Act and the Connecticut Data Privacy Act six months later, and the Utah Consumer Privacy Act at the end of 2023. See generally Andrew Long, "Inconsistent State Data Privacy Laws Increase Confusion and Costs," *Perspectives from FSF Scholars*, Vol. 16, No. 14 (March 16, 2021), available at <https://freestatefoundation.org/wp-content/uploads/2021/03/Inconsistent-State-Data-Privacy-Laws-Increase-Confusion-and-Costs-031621.pdf> ("Absent a federal data privacy regime ... businesses may find no viable option but to abide a Frankenstein's monster composed of the most unfavorable provisions from the universe of state laws – and consumers will be left in the dark as to the rules of the road that apply."), Andrew Long, "Utah Becomes Fourth State to Pass a Privacy Law," *FSF Blog* (March 25, 2022), available at <https://freestatefoundation.blogspot.com/2022/03/utah-becomes-fourth-state-to-pass.html>, Andrew Long, "#FSFConf14 Speakers on Need for Federal Privacy Law," *FSF Blog* (May 26, 2022), available at <https://freestatefoundation.blogspot.com/2022/05/fsfconf14-speakers-on-need-for-federal.html> (noting that, on May 10, 2022, Connecticut became the fifth state to adopt a unique comprehensive data privacy law).

<sup>8</sup> See New Democrat Coalition Press Release, "New Democrat Coalition Endorses Strong National Data Privacy Standard in the American Data Privacy and Protection Act" (October 4, 2022), available at <https://newdemocratcoalition.house.gov/media-center/press-releases/new-democrat-coalition-endorses-strong-national-data-privacy-standard-in-the-american-data-privacy-and-protection-act>.

<sup>9</sup> U.S. Government Accountability Office Snapshot, GAO-22-106096, "Consumer Data: Increasing Use Poses Risks to Privacy" (September 13, 2022), available at <https://www.gao.gov/assets/gao-22-106096.pdf> (emphasis added).

Forum on September 8, 2022, wrote that she "support[s] strong federal privacy legislation."<sup>10</sup>

And in fact, a comprehensive data privacy bill – the ADPPA – is pending in the House. On July 20, 2022, a near majority of the House Committee on Energy and Commerce voted for an amended version of the ADPPA,<sup>11</sup> which was introduced in June by members of the House and the Senate representing both sides of the political aisle.<sup>12</sup> That was a historic event: the first time that privacy legislation cleared committee. And as recently as September 29, 2022, House Energy and Commerce Committee Chair Frank Pallone (D-NJ), one of the ADPPA's authors, expressed confidence that it could pass this year.<sup>13</sup>

Though not without its flaws,<sup>14</sup> and by no means certain to make it to the finish line this session,<sup>15</sup> the ADPPA reflects irrefutable congressional interest in, and progress

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<sup>10</sup> "Statement of Commissioner Rebecca Kelly Slaughter at the Commercial Surveillance and Data Security Public Forum" (September 8, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/CommissionerSlaughterANPRPublicForumStatement9.8.2022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/CommissionerSlaughterANPRPublicForumStatement9.8.2022.pdf).

<sup>11</sup> See generally Andrew Long, "House Commerce Committee Passes Amended Privacy Bill, Concerns Remain," *Perspectives from FSF Scholars*, Vol. 17, No. 39 (August 4, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/08/House-Commerce-Committee-Passes-Amended-Privacy-Bill-Concerns-Remain-080422.pdf>.

<sup>12</sup> See generally Andrew Long, "Bipartisan Privacy Discussion Draft: Significant, If Incomplete, Progress," *Perspectives from FSF Scholars*, Vol. 17, No. 32 (June 16, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/06/Bipartisan-Privacy-Discussion-Draft-Significant-If-Incomplete-Progress-061622.pdf>.

<sup>13</sup> See "Transcript: Across the Aisle with Reps. Frank Pallone Jr. & Cathy McMorris Rodgers," *Washington Post* (September 29, 2022), available at <https://www.washingtonpost.com/washington-post-live/2022/09/29/transcript-across-aisle-with-reps-frank-pallone-jr-cathy-mcmorris-rodgers/> ("[W]e're still in session for another three months and we're working hard to try to get there to have this pass the House as well as the Senate and send it to the president, and I think we can do it in this time period.").

<sup>14</sup> See Andrew Long, "House Commerce Committee Passes Amended Privacy Bill, Concerns Remain," *Perspectives from FSF Scholars*, Vol. 17, No. 39 (August 4, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/08/House-Commerce-Committee-Passes-Amended-Privacy-Bill-Concerns-Remain-080422.pdf> (describing the amended bill's shortcomings with respect to, among other things, preemption of state laws and the availability of a private right of action).

<sup>15</sup> See generally Andrew Long, "Expanding Cracks Threaten the Privacy Preemption Legislative Compromise," *Perspectives from FSF Scholars*, Vol. 17, No. 48 (September 23, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/09/Expanding-Cracks-Threaten-the-Privacy-Preemption-Legislative-Compromise-092322.pdf>.



toward adoption of, a comprehensive federal data privacy law. One that, similar to the six state-level statutes to date passed in five states (California twice, Virginia, Colorado, Utah, and Connecticut), attempts to address any "information asymmetries" that may exist by delineating clearly both consumer rights (such as the rights to know, correct, delete, and request collected information, opt-out of its use, and so on), and corporate responsibilities (including the duty to provide adequate disclosures, an obligation to minimize data collected, and a requirement to not discriminate against consumers who assert their privacy rights). And one that includes (admittedly imperfect) language preempting similar state laws<sup>16</sup> – an essential goal for a federal privacy regime that is beyond the reach of any rules the FTC might adopt.<sup>17</sup>

The release itself of the ANPR, along with its radically partisan approach, both pose a serious threat to those legislative efforts. As Commissioner Wilson explained in her Dissenting Statement, "[t]he momentum of ADPPA plays a significant role in my 'no' vote on the Advance Notice of Proposed Rulemaking (ANPRM) announced today. *I am gravely concerned that opponents of the bill will use the ANPRM as an excuse to derail the ADPPA.*"<sup>18</sup> Similarly, in his Dissenting Statement then-Commissioner Phillips wrote that:

National consumer privacy laws pose consequential questions, which is why I have said, repeatedly, that Congress – not the Federal Trade Commission ... – is where national privacy law should be enacted. I am

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<sup>16</sup> *But see id.* at 2 (criticizing the version of the ADPPA that cleared the House Commerce Committee for "exceptions to that general rule, in the form of carve-outs for specific state statutes").

<sup>17</sup> *See, e.g.*, U.S. Chamber of Commerce Press Release, "U.S. Chamber on FTC Privacy Rulemaking: 'Congress Must First Give the FTC the Authority Before It Can Act'" (August 11, 2022), available at <https://www.uschamber.com/technology/data-privacy/u-s-chamber-on-ftc-privacy-rulemaking-congress-must-first-give-the-ftc-the-authority-before-it-can-act> ("Coherent privacy policy that includes true preemption can only be achieved through Congressional action. The FTC's privacy rulemaking only adds yet another layer to the confusing patchwork of emerging privacy laws.").

<sup>18</sup> *Wilson Dissenting Statement* at 2 (emphasis added).

heartened to see Congress considering just such a law today, *and hope this Commission process does nothing to upset that consideration.*<sup>19</sup>

To be sure, and as discussed below, the ANPR is rife with legal and substantive flaws. Specific flaws aside, however, the mere possibility that its poorly timed release might thwart legislative action is more than adequate justification for a prompt course reversal.

### **III. The ANPR Inexcusably Ignores the Supreme Court's Embrace of the "Major Questions Doctrine" in *West Virginia v. EPA***

On June 30, 2022, the Supreme Court issued its opinion in *West Virginia v. EPA*.<sup>20</sup> That decision, which formally and explicitly invoked the "major questions doctrine," has significant implications for administrative agency rulemakings generally – and especially the ANPR. Therefore, it truly is remarkable that the ANPR – unveiled, as it was, well over a month later – makes no reference whatsoever to *West Virginia v. EPA* with regard to assessing the Commission's authority to adopt radically new privacy rules.<sup>21</sup> The only explanation, perhaps, is that the Commission concluded that it would be more expedient to ignore it altogether than attempt to justify the release of the ANPR in its wake.

Writing for a six-justice majority, Chief Justice Roberts concluded that the Environmental Protection Agency lacked sufficient authority under the Clean Air Act to require a shift in electricity generation from higher carbon-emitting sources (that is, coal)

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<sup>19</sup> *Phillips Dissenting Statement* at 1 (citations omitted).

<sup>20</sup> *West Virginia v. EPA*, 597 U.S. \_\_\_ (2022).

<sup>21</sup> See Lawrence J. Spiwak, "Biting Off More Than It Can Chew? Some Thoughts on the FTC's Advance Notice of Proposed Rulemaking on 'Commercial Surveillance and Data Security,'" Phoenix Center Policy Bulletin No. 59 (September 2022), available at <https://www.phoenix-center.org/PolicyBulletin/PCPB59Final.pdf> ("[T]he 'major questions' doctrine looms large over the FTC's efforts. Yet, what is so striking is that the *ANPR* makes absolutely no mention about the impact of the 'major questions' doctrine anywhere in the document.") (emphasis in original).

to lower carbon-emitting sources (such as natural gas and renewables). Citing 2014's *Utility Air Regulatory Group v. EPA*,<sup>22</sup> the Chief Justice wrote that:

[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.<sup>23</sup>

Again referencing *Utility Air*, Roberts makes plain that such "extraordinary cases" include "assertions of 'extravagant statutory power over the national economy.'"<sup>24</sup>

As Free State Foundation President Randolph May, co-author of these comments, wrote in response to the Court's ruling:

Given that [Article I of] the Constitution assigns *all* of the legislative power to Congress, it is proper for the Court to preserve the separation of powers by requiring a clear statement from Congress before executive branch officials exercise rulemaking powers – which constitute lawmaking – in extraordinary cases of major economic or political significance.<sup>25</sup>

Lest there be any doubt as to the critical importance of data-dependent online activity to our nation's economy – and, by direct extension, the relevance of the Court's application of the "major questions doctrine" in *West Virginia v. EPA* to the ANPR – we submit the following select data points:

- According to the Interactive Advertising Bureau, the Internet economy in 2020 "contributed \$2.45 trillion to the United States' \$21.18 trillion [gross domestic product]," representing 12 percent of that total;<sup>26</sup>

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<sup>22</sup> *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

<sup>23</sup> *West Virginia v. EPA*, 597 U.S. \_\_\_, slip op. at 19 (citations omitted).

<sup>24</sup> *Id.*

<sup>25</sup> Randolph J. May, "A Major Ruling on Major Questions," *Perspectives from FSF Scholars*, Vol. 17, No. 36 (July 15, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/07/A-Major-Ruling-on-Major-Questions-071522.pdf> (emphasis in original).

<sup>26</sup> Interactive Advertising Bureau Press Release, "Study Finds Internet Economy Grew Seven Times Faster Than Total U.S. Economy, Created Over 7 Million Jobs in the Last Four Years" (October 18, 2021), available at <https://www.iab.com/news/study-finds-internet-economy-grew-seven-times-faster/>.

- Amazon.com alone reported net sales of over \$121 billion in the second quarter of 2022, a 7 percent annual increase;<sup>27</sup>
- Alphabet Inc.'s second quarter 2022 total revenues were 11 percent higher than twelve months earlier: \$70 billion;<sup>28</sup>
- For the second quarter of 2022, Shopify reported that it "facilitated through the Shopify platform" nearly \$47 billion in sales, an 11 percent jump from the year prior;<sup>29</sup> and
- Streaming video providers in the U.S. generated over \$29 billion in revenues in 2021, an amount that is predicted to surpass \$40 billion in 2026.<sup>30</sup>

As then-Commissioner Phillips pointed out in his Dissenting Statement, "[a]ny law our nation adopts will have vast economic significance. It will impact many thousands of companies, millions of citizens, and billions upon billions of dollars in commerce"<sup>31</sup> – whereas the FTC majority's attempt to adopt *rules* with an equally expansive (or even greater) impact based solely on its Section 18 rulemaking authority with respect to "unfair or deceptive acts and practices" would, in his words, amount to "[r]eading the FTC Act to provide the Commission with ... 'sweeping and consequential authority' to mandate changes across huge swaths of the economy" in a manner that "will test the limits of our congressional delegation."<sup>32</sup> Likewise, Commissioner Wilson warned in her Dissenting Statement that "[r]ecent Supreme Court decisions indicate FTC rulemaking overreach likely will not fare well when subjected to judicial review."<sup>33</sup>

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<sup>27</sup> Amazon.com Press Release, "Amazon.com Announces Second Quarter Results" July 28, 2022, available at <https://ir.aboutamazon.com/news-release/news-release-details/2022/Amazon.com-Announces-Second-Quarter-Results-fe1df2b70/default.aspx>.

<sup>28</sup> "Alphabet Announces Second Quarter 2022 Results" (July 26, 2022), available at [https://abc.xyz/investor/static/pdf/2022Q2\\_alphabet\\_earnings\\_release.pdf?cache=ed395cc](https://abc.xyz/investor/static/pdf/2022Q2_alphabet_earnings_release.pdf?cache=ed395cc).

<sup>29</sup> "Shopify Reports Second-Quarter 2022 Financial Results" (July 27, 2022), available at [https://s27.q4cdn.com/572064924/files/doc\\_financials/2022/q2/Press-Release-Q2-2022.pdf](https://s27.q4cdn.com/572064924/files/doc_financials/2022/q2/Press-Release-Q2-2022.pdf).

<sup>30</sup> Caitlin Huston, "Don't Expect Streaming Revenue to Keep Up Its Rapid Growth Rate," *The Hollywood Reporter* (June 21, 2022), available at <https://www.hollywoodreporter.com/business/digital/streaming-revenue-to-keep-up-its-rapid-growth-rate-1235169023/>.

<sup>31</sup> *Phillips Dissenting Statement* at 1 (emphasis added).

<sup>32</sup> *Id.* at 4 (citing *West Virginia v. EPA*, slip op. at 17).

<sup>33</sup> *Wilson Dissenting Statement* at 2.

Consequently, the choice to initiate a lengthy, largely unbounded "Mag-Moss" rulemaking process without consideration of this highly relevant judicial precedent represents a fiscally irresponsible administrative folly, the commitment of significant agency and public resources to a regulatory undertaking seemingly doomed from the start.

#### **IV. The ANPR Disregards the FTC's Limited Rulemaking Authority**

Congress provided the FTC with limited rulemaking powers via 1975's Magnuson-Moss Warranty – Federal Trade Commission Improvement Act.<sup>34</sup> A so-called "Mag-Moss" rulemaking differs in substantial ways from one conducted pursuant to the Administrative Procedure Act.<sup>35</sup> For instance, prior to issuing a notice of proposed rulemaking, the Commission first must publish an advance notice of proposed rulemaking, such as the ANPR that is the subject of these comments, that (1) "contain[s] a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission," and (2) solicits input thereupon from interested members of the public.<sup>36</sup> It is highly unlikely that the 95 boundless questions included in the ANPR define with adequate specificity either the areas of inquiry or objectives sought in a way

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<sup>34</sup> See generally Pub. L. No. 93-637, 88 Stat. 2183 (1975). In a footnote, the ANPR (1) references a September 2021 petition, upon which the FTC sought comment, that "calls on [the FTC] to promulgate rules pursuant to its authority to protect against unfair methods of competition in the market for consumer data," and (2) asserts that the rules it contemplates "could arise from the Commission's authority to protect unfair methods of competition, so they may be proposed directly without first being subject of an advance notice of proposed rulemaking." See ANPR at 10, n.47. For a discussion of the dubious legality of "unfair methods of competition" rulemakings, see Randolph J. May and Andrew Magloughlin, "FTC Competition Rulemaking Is Unlawful," *Perspectives from FSF Scholars*, Vol. 17, No. 33 (June 17, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/06/FTC-Competition-Rulemaking-Is-Unlawful-061722.pdf>.

<sup>35</sup> See generally 15 U.S.C. § 57a.

<sup>36</sup> 15 U.S.C. § 57a(b)(2)(A)(i) and (ii).

that comports with the law, as then-Commissioner Phillips made plain in his Dissenting Statement:

This ANPR flunks even that basic test. The areas of inquiry are vast and amorphous, and the objectives and regulatory alternatives are just not there. It is impossible to discern from this sprawling document – which meanders in and out of the jurisdiction of the FTC and goes far afield from traditional data privacy and security – the number and scope of rules the Commission envisions.<sup>37</sup>

Arguably the most significant limitation imposed on a "Mag-Moss" rulemaking, however, is that it must target "with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of [Section 5 of the FTC Act])."<sup>38</sup> Section 5 governs the case-by-case enforcement efforts that serve as the basis of the Commission's oversight of privacy.

The ANPR, in a section dedicated to agency authority, states the following:

Generally, a practice is unfair under Section 5 if (1) it causes or is likely to cause substantial injury, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by benefits to consumers or competition. A representation, omission, or practice is deceptive under Section 5 if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, it would likely affect the consumer's conduct or decision with regard to a product or service. *Under the statute, this broad language is applied to specific commercial practices through Commission enforcement actions and the promulgation of trade regulation rules.*<sup>39</sup>

But as Commissioner Wilson explained in her Dissenting Statement, the relevant statutory language makes clear that the FTC may proceed to the second stage in a "Mag-Moss" rulemaking – that is, a notice of proposed rulemaking – only "when it 'has reason

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<sup>37</sup> See Phillips Dissenting Statement at 2 (footnote omitted).

<sup>38</sup> 15 U.S.C. § 57a(a)(1)(b).

<sup>39</sup> ANPR at 14-15 (citations omitted) (emphasis added).

to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."<sup>40</sup> And yet:

Many practices discussed in this [ANPR] are presented as clearly deceptive or unfair despite the fact that they stretch far beyond practices with which we are familiar, given our extensive law enforcement experience. Indeed, the [ANPR] wanders far afield of areas for which we have clear evidence of a widespread pattern of unfair or deceptive practices.<sup>41</sup>

Then-Commissioner Phillips expressed similar misgivings, writing that "[o]ur Section 18 authority to regulate "unfair or deceptive acts or practices" goes only so far; and the ANPR contemplates reaching well beyond, including to common business practices we have never before even asserted are illegal."<sup>42</sup> In other words, the ANPR proposes to reach practices where there is no evidentiary basis for the agency to assume they are prevalent.

One example thereof involves the use of algorithms, referred to in the ANPR as "automated decision-making systems." Questions 53 through 56 raise doubts as to the infallibility of algorithms, Question 57 then broadly asks "[t]o what extent do such practices violate Section 5 of the FTC Act," and Questions 59 through 61 proceed to contemplate various restrictions on their use. And rather than citing Section 5 enforcement actions establishing the use of algorithms to be "unfair or deceptive," Question 62 instead asks "[w]hich, if any, legal theories would support limits on the use of automated systems in targeted advertising given potential constitutional or other legal

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<sup>40</sup> *Wilson Dissenting Statement* at 2 (citing 15 U.S.C. 57a(b)(3)).

<sup>41</sup> *Id.* See also *Phillips Dissenting Statement* at 5 ("The ANPR aims for regulation without even any experience, to say nothing of court decisions ratifying the application of Section 5 to the business conduct in question.").

<sup>42</sup> *Phillips Dissenting Statement* at 4.

challenges," potentially including those brought under the First Amendment (Question 63) or Section 230 of the Communications Act (Question 64).<sup>43</sup>

Another example can be found in Question 39, which contemplates banning broad categories of businesses from engaging in targeted advertising – by no means a practice heretofore found to be "unfair or deceptive" – altogether:

To what extent, if at all, should the Commission limit companies that provide any specifically enumerated services (e.g., finance, healthcare, search, or social media) from owning or operating a business that engages in any specific commercial surveillance practices like personalized or targeted advertising? If so, how? What would the relative costs and benefits of such a rule be, given that consumers generally pay zero dollars for services that are financed through advertising?<sup>44</sup>

This misguided effort should not proceed to a notice of proposed rulemaking. The Commission would have a significant amount of work to do before the statutory requirements of Section 18 of the FTC Act possibly could be satisfied.

#### **V. The ANPR Would Decimate the Pro-Consumer, Ad-Supported Online Ecosystem – Empowering Government to Make Decisions for Individuals**

After reading through the ANPR's 95 waterfront-encompassing questions, one might conclude that Americans simply are incapable of making informed, self-interested decisions for themselves. Unlike the ADPPA and similar state statutes, which – to varying degrees of success – attempt to address the "information asymmetries" that impact voluntary transactions involving personal data through the establishment of bright-line rights and responsibilities, the ANPR embraces a paternalistic view of the entire ad-supported online experience and the notice-and-comment foundation upon which it stands.

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<sup>43</sup> ANPR at 34-35.

<sup>44</sup> *Id.* at 31.



Indeed, at the heart of the ANPR rests a deeply skeptical assessment of adult Americans' ability to provide meaningful consent under *any* circumstances – one the ANPR relies upon to justify the broad-reaching proposals discussed in the previous section.

In a keynote address at the Free State Foundation's Twelfth Annual Telecom Policy Conference in March 2020, Commissioner Wilson discussed "information asymmetries" as they relate to data privacy:

[M]arkets function inefficiently when consumers face significant information asymmetries, including incomplete information about product features and quality. In the face of documented market failures, government intervention may help protect consumers. This is the situation we face in privacy today. Consumers' data is collected, maintained, shared, and monetized in ways that consumers cannot see and cannot avoid. As demonstrated by the FTC's robust enforcement program, some of these practices cause harm. *A privacy law can provide needed transparency so that consumers can begin to make informed choices.*<sup>45</sup>

Rather than empower consumers "to make informed choices" about what personal information they hand over, however, the ANPR leverages the existence of such "information asymmetries" to justify a regulatory landgrab that threatens consumers' continued ability to enjoy ad-supported ("free") services altogether.

Consequently, while Commissioner Wilson did reiterate her concerns regarding "information asymmetries" in her Dissenting Statement regarding the ANPR, as a general matter she objected to its release, advocating instead for "[f]ederal privacy legislation [that] would provide transparency to consumers regarding the full scope of data collection, and how collected data are used, shared, sold, and otherwise monetized" – in

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<sup>45</sup> Christine S. Wilson, "Free Markets, Regulation, and Legislation: A Place for Everything, and Everything in Its Place," Remarks at the Free State Foundation Twelfth Annual Telecom Policy Conference (March 10, 2020), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1568831/wilson\\_-\\_free\\_state\\_foundation\\_keynote\\_3-10-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1568831/wilson_-_free_state_foundation_keynote_3-10-20.pdf), at 15 (emphasis added) (citation omitted).

other words, a federal statute that addresses "information asymmetries" rather than an ANPR that "wanders far afield of areas for which we have clear evidence of a widespread pattern of unfair or deceptive practices."<sup>46</sup>

In his Dissenting Statement, then-Commissioner Phillips makes similar points, arguing that "the only thing clear in the ANPR is a rather dystopic view of modern commerce" and highlighting the fact that "[r]educing the ability of companies to use data about consumers, which today facilitates the provision of free services, may result in higher prices."<sup>47</sup>

Lest we forget, the number of American consumers who choose to exchange personal information for zero-cost online services is massive. Just a few examples: Facebook last year reportedly had 200 million users,<sup>48</sup> Google's Gmail has more than 130 million active users,<sup>49</sup> and Twitter has nearly 77 million users.<sup>50</sup> Clearly, a substantial number of consumers perceive a benefit from these bargains.

In stark contrast, the ANPR reluctantly concedes only that, "*in theory*, these personalization practices have the potential to benefit consumers."<sup>51</sup> And not until Question 39 does it even acknowledge "that consumers generally pay zero dollars for services that are financed through advertising."<sup>52</sup>

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<sup>46</sup> *Wilson Dissenting Statement* at 2.

<sup>47</sup> *Phillips Dissenting Statement* at 11, 1.

<sup>48</sup> Chaitra Anand, "The 10 countries with the most Facebook users: Is Australia among them?" *Yahoo! Finance* (November 9, 2021), available at <https://au.finance.yahoo.com/news/the-10-countries-with-the-most-facebook-users-201519997.html>.

<sup>49</sup> Christo Petrov, "52 Gmail Statistics To Show How Big It Is In 2022," *Techjury* (August 19, 2022), available at <https://techjury.net/blog/gmail-statistics/#gref>.

<sup>50</sup> Jason Wise, "How Many Twitter Users in the US Are There in 2022?" *EarthWeb* (July 23, 2022), available at <https://earthweb.com/how-many-twitter-users-in-the-us/>.

<sup>51</sup> *ANPR* at 3.

<sup>52</sup> *Id.* at 31. *See also id.* at 33, Question 50 ("What would be the effect of data minimization or purpose limitations on consumers' ability to access services or content for which they are not currently charged out of pocket? Conversely, which costs, if any, would consumers bear if the Commission does not impose any such restrictions?").

With a blind eye toward the consumer benefits that ad-supported services generate, the ANPR jumps to the incorrect conclusion that individuals therefore have no conceivable legitimate basis to agree to make available their personal information – and, consequently, that government ought to constrain their sovereign ability to make decisions for themselves, lest they choose incorrectly. This paternal perspective permeates the entire ANPR. In the overview, consent is dismissed as "ostensible,"<sup>53</sup> "not always ... meaningful or informed,"<sup>54</sup> and "irrelevant,"<sup>55</sup> while "privacy notices ... are reportedly not readable to the average consumer,"<sup>56</sup> who "do[es] not have the time to review lengthy privacy notices."<sup>57</sup>

The questions that follow hammer home that biased theme:

- Question 19 asks if "parental consent [is] an efficacious way of ensuring child online privacy,"<sup>58</sup> suggesting that adult guardians are not capable of making informed decisions regarding the best interests of their wards;
- Question 73: "Given the reported scale, opacity, and pervasiveness of existing commercial surveillance today, to what extent is consumer consent an effective way of evaluating whether a practice is unfair or deceptive?";<sup>59</sup>
- Question 74 is a broadside against the very notion that individuals are capable of providing consent, asking "[i]n which circumstances, *if any*, is consumer consent likely to be effective," while Question 76 contemplates "new trade regulation rules [that] prohibit certain specific commercial surveillance practices, irrespective of whether consumers consent to them," and Question 77 seeks input on "[h]ow demonstrable or substantial must consumer consent be if it is to remain a useful way of evaluating whether a commercial surveillance practice is unfair or deceptive" and "[h]ow should the Commission evaluate whether consumer consent is meaningful enough";<sup>60</sup>

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<sup>53</sup> ANPR at 4.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.* at 5-6.

<sup>58</sup> *Id.* at 28.

<sup>59</sup> *Id.* at 37.

<sup>60</sup> *Id.* at 37-38. *See also id.* at 38, Question 80 ("Have opt-out choices proved effective in protecting against commercial surveillance? If so, how and in what contexts?").

- Question 79 contemplates a wholly unworkable regime in which "different consent standards" might somehow apply to "different consumer groups (e.g., parents of teenagers (as opposed to parents of pre-teens), elderly individuals, individuals in crisis or otherwise especially vulnerable to deception)";<sup>61</sup>
- Question 84 suggests a lack of confidence in "transparency or disclosure requirements" generally;<sup>62</sup>
- Question 90 expresses the concern that required "[d]isclosures .. might not be comprehensible to many audiences," asks whether "new rules, if promulgated, [should] require plain-spoken explanations," and then wonders "[h]ow effective could such explanations be, no matter how plain";<sup>63</sup> and
- Question 93 indicates doubt that "companies have the capacity to provide any of the above information."

In summary, the overall perspective reflected in the ANPR of the ability of Americans to make self-interested, informed choices is inconsistent with reality and should not serve as the basis for extreme limits on the use of personal data.

## **VI. Conclusion**

Americans today spend a vast amount of time online. Virtually every facet of daily life has a digital component – and leaves a digital footprint. Clear and consistent rules of the road regarding acceptable use of personal data therefore are essential. And in light of the economic, social, and political significance of the online space, it is Congress that should bear the responsibility to make sure they come to pass.

The Commission therefore should reconsider the wisdom of its ANPR and, rather

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<sup>61</sup> *Id.* at 38.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 40.

than proceed to a notice of proposed rulemaking, should defer instead to the ongoing legislative efforts in Congress to address the highly significant role that personal data plays in our economy.

Respectfully submitted,

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