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October 14, 2022

Submitted via regulations.gov
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Trade Regulation Rule on Commercial Surveillance and Data Security ANPR, R111004

Chair Khan and Commissioners:

Washington Legal Foundation submits this comment in response to the Federal Trade Commission's Advanced Notice of Proposed Rulemaking (ANPR) entitled "Trade Regulation Rule on Commercial Surveillance and Data Security" (R111004).

I. WLF's Interest

WLF is a nonprofit, public-interest law firm and policy center that promotes free enterprise, limited government, and the rule of law. WLF often submits comments on proposed FTC actions.[1] WLF also appears before federal courts urging, successfully, that the Commission not be allowed to exceed its statutory authority.[2] And WLF's publishing arm, its Legal Studies Division, produces and distributes papers by outside experts on the FTC's proper statutory and regulatory reach.[3]

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[1] *See, e.g.,* WLF Comment, *In re Rescission Of 2015 FTC Statement On Unfair Methods Of Competition* (June 28, 2021); WLF Comment, *In re FTC Study Of Digital Technology Market Merger Review* (Nov. 19, 2018).

[2] *See, e.g., AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

[3] *See, e.g.*, Steven Cernak, *U.S. Merger Review Process Changing Before Our Eyes*, WLF LEGAL BACKGROUNDER (Nov. 12, 2021) <https://bit.ly/3EgnMTe>; Edward B. Schwartz & Gregory Vose, *"Don't Know Where We're Going, But We're on Our Way": FTC's Antitrust Remodeling Creates Chilling Uncertainty for Deal Making*, WLF LEGAL OPINION LETTER (Oct. 28, 2021) <https://bit.ly/3Mc9kOc>.

II. The FTC must not exceed its narrow rulemaking authority.

As "creatures of statute," administrative agencies like the FTC "possess only the authority Congress has provided."[4] The Commission's ANPR invokes Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), which empowers the Commission to police "unfair or deceptive acts or practices in or affecting commerce." But that authority is not unbridled. "The Commission is hardly free to write its own law of consumer protection."[5] In 1975, in response to widespread concerns that the FTC had abused its authority by issuing a series of rampant, unwieldy, and controversial rules, Congress limited the Commission's Section 5 rulemaking authority under Section 18's Magnuson-Moss amendments, 15 U.S.C. § 57a(a).

Section 18's new procedures were intended to make FTC rule-making more onerous and to ensure fairness and impartiality. They worked. No surprise, then, that in the 47 years since enactment of the Magnuson-Moss amendments, the Commission has issued only seven rules and nine amendments.[6] Each of those rules "took the agency 5.57 years, on average" to issue under Magnuson-Moss's stringent procedures.[7] Any attempt here by the Commission to take procedural shortcuts would thus come at the cost of important safeguards Congress adopted to increase the agency's accountability. It would also invite litigation.

Among other things, Section 18 limits the FTC to addressing only those practices the agency "has reason to believe" are both "unfair or deceptive" and "prevalent," 15 U.S.C. § 57a(b)(3). This means that the Commission must be able to point to prior cease-and-desist orders it has issued policing such practices under § 57a(b)(3). Otherwise, the Commission must prove "a widespread pattern" of such practices. Section 18 also requires the FTC to state with "particularity" the reasons justifying any proposed rule, 15 U.S.C. § 57a(b)(1). The ANPR is short on particularity. And rather than citing

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[4] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational & Safety Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam).

[5] *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973).

[6] *See* Jeffrey Lubbers, *It's Time to Remove the "Mossified' Procedures for FTC Rulemaking*, 83 Geo. Wash. L. Rev. 1789, 1997 (2015).

[7] *Id.* at 1997–98.

federal court decisions or prior administrative orders (as the Commission has done in previous rulemakings), the ANPR stands on complaints, settlements, and innuendo from a dizzying array of "news" reports. But most of these alleged harms are speculative and far from prevalent. Indeed, many practices are no longer widespread due to the Commission's own prior enforcement actions. To be sure, any final rule will have to explain, with particularity, why each proscribed practice is both prevalent and violates Section 5.

A practice is unfair under Section 5 only if it is "likely to cause substantial injury to consumers," 15 U.S.C. § 45(n). The ANPR sidesteps the substantial injury requirement. Yet the FTC's own Policy Statement on Unfairness, which Congress impliedly adopted with § 45(n), makes clear that trivial or merely speculative harms are beyond the Commission's regulatory reach because they do not qualify as a "substantial injury" to consumers. In fact, the Commission assured Congress that "in most cases," a substantial injury "involves monetary harm."[8] In contrast, "[e]motional impact and other more subjective types of harm" are not enough.[9] So apart from egregious practices involving actual deception, monetary loss, or some other statutory hook, the Commission will be hard pressed to prove that many of the ANPR's alleged privacy harms qualify as substantial injuries.

What's more, the Commission may declare a practice unfair or deceptive only if the alleged injury "is not reasonably avoidable by consumers themselves," 15 U.S.C. § 45(n). Some practices the ANPR identifies may well clear this hurdle. (For example, an advertisement that omits material terms and is likely to mislead consumers is clearly deceptive under Section 5.) But many do not. And by taking aim at the FTC's longstanding "notice and consent" regulatory scheme for privacy (ANPR, 10-11), the Commission appears poised not only to render consumer choice a dead letter, but also to ignore whether any alleged harms are reasonably avoidable, as § 45(n) demands.

Even if an injury is both substantial and unavoidable, it does not qualify as unfair or deceptive under § 5 unless it is "not outweighed by countervailing benefits to consumers or to competition," 15 U.S.C. § 45(n). Among other things, this cost-benefit analysis requires the Commission to consider the efficiencies of existing data-protection policies that a final rule

[8] FTC, Policy Statement on Unfairness (Dec. 17, 1980) <https://bit.ly/3xLunAW>.

[9] *Id.*

would displace. This would include a detailed accounting of any added costs passed on to consumers, as well as an accounting of any consumer and competitive benefits that the rule will sacrifice.

"Regardless of how serious the problem an administrative agency seeks to address," it cannot "exercise its authority in a manner that is inconsistent with the [statute] that Congress enacted into law."[10] If the Commission's final rule is to pass muster in federal court, it will need to carefully adhere to the statutory limits Congress has imposed on the agency's rulemaking. The sweeping, economy-wide scope of the ANPR lands far wide of the mark.

III. Major policy questions belong to Congress, not the FTC.

The major-questions doctrine "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[11] This is especially true when an agency claims regulatory authority "beyond what Congress could reasonably be understood to have granted."[12] Such "grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[13] The FTC Act is no exception, and the nebulous phrase "unfair or deceptive acts or practices" cannot bear the enormous weight the Commission seeks to heap upon it in the ANPR. Simply put, federal courts no longer can tolerate agency attempts to promulgate expansive rules that exceed their statutory reach. The unprecedented breadth and depth of the Commission's ANPR suggest that the major questions doctrine will likely pose a formidable obstacle to any final rule.

Agencies rarely have "the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country.'"[14] Indeed, it is "telling when Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action"—a sign that the agency is "attempting to work around the legislative process to

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[10] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

[11] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting U.*S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2019) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[12] *Id.* at 2609.

[13] *Id.* (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)).

[14] *Id.* at 2621 (Gorsuch, J., concurring) (cleaned up).

resolve for itself a question of great political significance."[15] The FTC appears to be undertaking just such a "work around." While Congress has considered many bills addressing the same issues addressed by the ANPR, so far it has failed to arrive at a legislative consensus. In fact, some Commissioners have cited Congress's failure to act as an invitation for the FTC to do so.

At the same time, the ANPR arrives amid a flurry of congressional activity on federal privacy legislation. It was issued just three weeks after the House Committee on Energy & Commerce passed the American Data Privacy and Protection Act and only two weeks after the Senate counterpart approved two bills on regulating privacy for children and teens. These bills would address many issues raised in the ANPR. Yet in her statement accompanying the ANPR, Chair Khan describes the FTC as "the country's de facto law enforcer in this domain"—tacitly conceding that the agency is not the de jure enforcer. Even so, Commissioner Slaughter has roundly rejected the view that congressional action is preferable to agency rulemaking, and has dismissed as "hollow" any suggestion that sweeping privacy regulation "necessarily involves value judgments that are better left to Congress."

Application of the major questions doctrine also turns on the economic significance of the proposed regulation. The Commission "must point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy.'"[16] While it is not yet possible to estimate the cost of any final privacy rule, compliance with the European General Data Protection Regulation is estimated to have cost in excess of $7.5 billion.[17] And Commissioner Slaughter has conceded that the practices targeted by the ANPR "affect nearly every aspect of our lives."

Such a sweeping, economy-wide regulation of America's digital economy is, by any definition, a "major question." "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[18]

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[15] *Id.*

[16] *Id.*

[17] *See* Bloomberg News, *It'll Cost Billions for Companies to Comply with Europe's New Data Law* (Mar. 22, 2018) <https://bloom.bg/3e4uml1>.

[18] *West Virginia*, 142 S. Ct at 2616.

IV. Classifying targeted advertising as an unfair or deceptive practice would harm both consumers and competition.

Although the ANPR disparages targeted advertising as "commercial surveillance," targeted ads provide clear benefits to both consumers and competition. Targeted ads benefit consumers by providing more relevant ads and, in many cases, supporting access to free services that consumers may otherwise have to pay for. And targeted ads benefit competition by making it more cost efficient for small businesses to engage in advertising and to maximize their smaller marketing budgets. Outside proving outright deception, then, the Commission would have a hard time showing that suppression of non-sensitive, nondiscriminatory ads is "not outweighed by countervailing benefits to consumers or to competition," 15 U.S.C. § 45(n). Nor are such ads likely to cause "substantial harm."

"The consistency of an agency's position is a factor in assessing the weight that position is due."[19] The Commission's latest criticism of targeted advertising contradicts its earlier view. The Commission has long maintained, for instance, that targeted advertising is a net benefit to both competition and consumers. And only two years ago, the Commission extolled the benefits of targeted advertising, explaining that the targeting of ads "benefits the consumer because it effectively reduces their search costs."[20] Indeed, by reducing search costs and improving match quality, targeted ads help "increase price competition," which "increases the total value consumers derive from acquiring the products they match with."[21] Targeting can also "mean fewer ads overall; consumers benefit directly from not having to view ads, but also indirectly from cost-savings passed on by firms."[22] The ANPR does not even attempt to justify such a stark change in the Commission's position.

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[19] *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

[20] FTC, Yan Lau, *A Brief Primer on the Economics of Targeted Advertising* (Jan. 2020) <https://bit.ly/3SySDic>.

[21] *Id.*

[22] *Id.*

Businesses "crave certainty as much as almost anything: certainty allows them to make long-term plans and long-term investments."[23] Issue a reliable, stable rule and—even if it is not the rule a company would have wanted—the company will adjust. But cavalierly change the rule back and forth, and you whipsaw the company between either abandoning its successful business model or facing potentially ruinous enforcement actions and penalties. Not even *Chevron* deference gives the Commission the ability to rotate its legal position 180 degrees anytime there is a change in administration. Indeed, the Commission can be sure that, if challenged in court, any rule that presumes that Section 5 of the FTC Act outlaws most targeted advertising would receive little to no deference.

Regulating commercial speech also raises serious constitutional concerns. Under the First Amendment, the regulation of truthful, non-misleading advertising must pass intermediate scrutiny. This requires a careful analysis of the agency's legitimate justification, if any, for its commercial-speech restrictions and an exacting review of the fit between the proposed restrictions and that goal. The FTC's own policy statement promises that "the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers."[24] The ANPR appears to be in tension with that assurance. The Commission should be mindful that the trend of the Supreme Court's commercial-speech jurisprudence has been one of "increasing constitutional sensitivity regarding the value of commercial speech to sellers and consumers in a free-market economy."[25]

Respectfully submitted,

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[23] Alan Greenspan & Adrian Wooldridge, Capitalism in America: A History 258 (2018).

[24] FTC Policy Statement on Unfairness (Dec. 17, 1980) < https://bit.ly/3xLunAW>.

[25] Bert W. Rein & Megan L. Brown, *Precautions for Commercial-Speech Regulators*, WLF Legal Opinion Letter (Jun. 16, 2017) <https://bit.ly/3ybTQ6T>.