[2] is unjustified, a gratuitous attack on the online economy made with the goal of justifying heavy-handed regulation.[3] The same is true of the Report's claims about AI. The Report criticizes the companies for using AI to show users content that "favors engagement."[4] That is, the Report wishes that rather than accurately predicting what consumers want to see and showing it to them, companies would instead show consumers content that Washington bureaucrats would agree is higher "quality."[5]

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[1] FTC, *A Look Behind the Screens: Examining the Data Practices of Social Media and Video Streaming Services* (2024) ("Report").

[2] To be clear, the Report claims that these "profound threats to users" arise from the very *practice* of a targeted advertisement, completely independently and in addition to any harm from the data practices that the companies use to *enable* targeted advertising.

[3] Report at 44.

[4] *Id.* at 63.

[5] *Id.* at 64–65.

The Report reveals this mass data collection has been very difficult to avoid. Many of these products are necessities of modern life. They are critical access points to markets, social engagement, and civil society. For many adult Americans, wholesale abstention from SMVSSs is not a realistic option. And even if it were, these firms would likely get much of your data anyway as their platforms are often integrated into other websites.[11]

To be sure, most firms technically disclose their data practices to consumers throug(g)1 ((g)1 ((g)1

Targeted advertising can offer significant benefits to website operators, advertisers, and consumers. For one thing, targeted advertising makes much of the internet possible. The reason so much of our online activity does not require the constant exchange of money is because of targeted advertising. If regulators and lawmakers attempt to ban or seriously curtail targeted advertising, they will be undoing the balance of the online economy.

Moreover, targeted advertising can be beneficial for consumers and producers. Traditional advertising often reaches a broad audience, including many viewers who have no interest in the product being advertised. For example, advertisements for newborn clothing are relevant only to expectant or recent parents, and the friends and family of those parents. But advertisements for newborn clothing on television or the radio, for example, would be seen and heard by many others who have no need for them. This mode of advertising wastes advertising dollars. And because marketing is a substantial cost of selling goods and services, marketing inefficiencies can contribute to higher prices. Targeted advertisements, by contrast, are directed to the groups of consumers most likely to be interested in the advertised product in the first place. Targeting therefore increases the value of advertising space for online service operators and can lower costs for advertisers by reducing wasted impressions. Those lower costs in turn can contribute to lower prices. And the increased value of online advertising space means that operators are better rewarded for creating, and therefore more incentivized to create, online services that people want to use.

Targeted advertising may also help promote competition. Upstart challengers to dominant market incumbents may lack the mass-marketing resources to get consumers' attention. But with targeted advertising, they can present their products and services to consumers without having to match the incumbents' marketing resources. The same is true in politics. Targeted advertising permits outsiders to challenge powerful, well-heeled incumbents by reaching voters more efficiently and at lower cost than traditional mass marketing.

The Report focuses on "targeting based on sensitive categories" which it argues can be "extremely harmful" and "cause a wide range of injuries" including "unlawful discrimination, emotional distress, stigma, reputation harm, embarrassment, and invasion of privac

examples offered by one of the Report's sources: a person with an eating disorder being shown ads about diets after searching for diet advice, reminding them of their eating disorder; and a woman trying to find hand sanitizer and toilet paper during the Covid-19 pandemic being shown ads for those products, exacerbating her anxiety.[21] Presumably my colleagues do not believe that the law should prohibit displaying advertisements about diets to people who searched for diet advice, or hand sanitizer ads to a person who searched for hand sanitizers. These emotional sensitivities therefore would not qualify for "sensitive category" treatment. But I see no good reason why advertisements generating these understandable and legitimate emotional reactions should be permitted, while others prohibited. This line-drawing exercise would therefore be either arbitrary or highly politicized. In my view, lawmakers and regulators should avoid creating categories of permitted and prohibited emotional responses.

Second, this treatment of online emotional harms would be totally out of step with how the law ordinarily handles emotional injuries. Tort law generally does not treat psychological injuries [(a6 (i)4 (za)-u3)-oai-1 (e)5m(a).9e aga6 (aco)1 (n)9 Tsp wrbi.72 - 1 665

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do not think that the risk—unquantified and unelaborated by the Report—that these firms may be violating antidiscrimination and tort laws is a reason to suppress or prohibit targeted advertising. Existing antidiscrimination laws and tort laws already prohibit such conduct and can and should be used to resist it.

In my view, the pressing policy question is not targeted advertising itself. Targeted advertising can have many procompetitive justifications and should not itself be the object of regulatory ire. The correct regulatory focus is one step earlier in the supply chain—the largely unregulated collection, aggregation, sale, and retention of consumers' data that makes the targeted advertising possible. Policymakers should focus on protecting consumer data privacy on the front end rather than on implementing the sort of amorphous, backend advertising regulations that the Report recommends.

III

The Report focuses on children and teenagers in its final section. This discussion is a particular application of the more general privacy problems identified in the Report's earlier sections. But the Report is wise to treat it separately. The dangers that data collection, aggregation, disclosure, and retention pose for adult consumers are more severe for children. That is why Congress has been especially solicitous of children's privacy online. Congress's most substantial foray into online privacy remains the quarter-century-old Children's Online Privacy Protection Act of 1998 (COPPA).[24] And the Commission has done some of its most valuable work in adopting the Children's Online Privacy Protection Rule[25] and enforcing it.

COPPA forbids website operators—including the SMVSSs—from collecting, using, or

The Report concludes that SMVSSs have been treating this verification process as a charade, and that they in fact knew that some of their users are under the age of thirteen. The Report reasons that the data collected on some of the users give rise to the inference that these users are under the age of thirteen, and that this data-driven inference is sufficient to satisfy COPPA's "actual knowledge" requirement. These SMVSSs, the Report suggests, were therefore violating COPPA.[29]

How best to implement these parental rights is a difficult technical and political question. Online platforms would have to implement some of these capabilities, while the makers of smartphone and computer operating systems would have to implement others. Furthermore, online platforms and operating systems must implement age- and identity-verification systems in a way that preserves minors' privacy and right to anonymity.[30] And parents who choose to allow their teenagers to use the internet unsupervised should have that right too.

These are difficult issues, but they are not insurmountable. The future of this country may depend on empowering parents to make meaningful choices about their children's activities online. I urge Congress to take up the challenge.

IV

A

The Report contains important revelations and useful legislative recommendations regarding data privacy. The AI section—Part VI—is another matter. Part of the AI section is, like the children-and-teens discussion, a particular application of the broader data-privacy problem. The same personal user data that drive the targeted-advertising system also train AI models, and they are the grist for the algorithmic mills that determine which content SMVSSs recommend to their users.

The thrust of the AI section, however, is not data privacy. It is about justifying more content moderation and more government regulation of AI. The Report faults the companies for using "algorithms, data analytics, or AI" that "prioritize[] showing content that gets the most User Engagement (view time, likes, comments, or content that is trending or is popular)."[31] The Report quotes at length from a Surgeon General's report for the proposition that giving users what they want may endanger adolescent mental health.[32]

This criticism is odd. Competition and innovation are about getting consumers what they want. In a competitive market, a company that offers consumers a product they do not want will not long survive. The Report's attack is a bit like faulting a florist for selling roses on Valentine's Day, or a department store for selling Christmas decorations after Thanksgiving.

Rather than give consumers what they want, the Report suggests that SMVSSs should give consumers "quality" content.[33] The Report does not say what quality content is, nor was it able to determine what SMVSSs think counts as quality content.

But we have seen what happens when social media companies prioritize their views—or the government's view—of "quality" over the preferences of their users. Over the past decade,

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[30] Concurring Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, In the Matter of NGL Labs, LLC, et al. (July 9, 2024); Concurring Statement of Commissioner Melissa Holyoak, NGL Labs, LLC (July 9, 2024).
[31] Report at 63.
[32] *Id* at 64.
[33] *Id* at 64–65.

these companies have enforced a restrictive censorship regime on Americans' online speech. They have adopted Orwellian policies banning nebulous categories of content like "misinformation," "disinformation," and "hate speech"—categories that in practice mean only any content that challenges the Silicon Valley elite consensus on immigration, crime, climate change, foreign policy, sex and marriage, or any other issue where free thought is inconvenient to those in charge.

During the Covid-19 pandemic, when government lockdowns made social media platforms one of the few venues available for political discourse, this suppression of speech went into overdrive. Social media companies aggressively suppressed dissident views about the pandemic—about the origins of the virus and the efficacy of masks, lockdowns, and vaccines—many of which proved to be true. And the government got in on the action. Litigation and congressional investigations have revealed that at least some companies' censorship was carried out to satisfy menacing federal bureaucrats,[34] who had their own views about what counted as "quality" content during the pandemic.[35]

And in the lead-up to 2020 election, online platforms undertook one of the most shocking acts of election interference in recent memory: the coordinated suppression of reporting about, and commentary on, the content of Hunter Biden's laptop, invoking the specter of "Russian disinformation" as the grounds for suppression. The invocation was balderdash; the laptop's contents were later the basis for Mr. Biden's convictions for violating federal firearms laws.[36] But the platforms' views of what counted as "quality" content in a presidential election led to a coordinated campaign of information suppression that would have made Ingsoc's Big Brother

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[34] A House report earlier this year documented this shocking pressure campaign in depth. A few examples suffice to

blush. The companies banned users from sharing information about the laptop, and some even kicked the [redacted] —the oldest continuously published newspaper in the country—off their platforms for daring to break the story.[37]

offending decisions are made by software running in datacenters instead of humans with laptops should usually make no difference to the ability of consumers to seek redress under the law. The law forbids intentional discrimination on the basis of protected characteristics either way.

If those laws were inadequate to protect consumers from automated decision making, Congress and state legislatures could pass new laws. But the Report does not identify any inadequacies. It nevertheless calls for "comprehensive federal legislation" regulating AI.[43] Clearly, the point of this section of the Report is not to identify specific problems and propose solutions, but to place the Commission firmly on the pro-regulation side of the AI debate raging across academia, industry, and government

The Report also notes that many social media and video streaming companies have "in-house experts, such as ethicists, social and political scientists, [and] policy experts" who are responsible for addressing "ethics, bias, inclusion, and fairness" in AI technology.[45] The Report suggests that this is a good thing and that the companies need more of them, preferably with binding authority over the rest of the company.[46] But the truth is that these AI safety groups, as they are often called, have proven to be little more than rebranded versions of the DEI bureaucracies that have infected America's businesses and colleges. True to that mold, these bureaucrats have agitated for AI companies to implement explicit racial and political biases in their products.

Take, for example, the rollout of Google's Gemini generative AI product. When a user asked Gemini to generate images of the Pope, "instead of yielding a photo of one of the 266 pontiffs throughout history—all of them white men—Gemini provided pictures of a Southeast Asian woman and a black man wearing holy vestments."[47] It similarly responded to requests to produce images of Nazi soldiers by showing images of people of color in Wehrmacht garb, clearly in compliance with its programming to prioritize diversity in its output over historical accuracy. And requests for images of "the Founding Fathers in 1789" produced "images of black and Native American individuals signing what appeared to be a version of the US Constitution."[48] Some reported difficulty getting Google Gemini to produce any images of white people at all.[49] Gemini explained these bizarre results by saying that it "aimed to provide a more accurate and inclusive representation of the historical context."[50]

These absurdities were the handiwork of the AI safety teams lauded by the Report as necessary to combat "bias."[51] But, of course, these teams did not combat bias, they demanded it. They chose to project their political preferences onto history. Google responded to the humiliating episode by apologizing, suspending some of Gemini's functions, and laying off members of its AI

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[45] *Id.* at 66.

[46] *Id.* ("But even where Companies reported dedicating robust internal resources to Algorithms, Data Analytics, or

"trust and safety team."[52] Similar problems also plague OpenAI and its ChatGPT product, which is well-established as having a strong left-wing bias.[53] OpenAI CEO Sam Altman has even conceded that these biases stem, in large part, from the biases of the employees of these companies, who live in a San Francisco "'groupthink' bubble."[54]

The Report whistles right past this graveyard. The Report is right that there is reason to worry about bias at AI firms. We have witnessed it in real time. But the evidence demonstrates that AI safety bureaucrats are largely responsible for that bias. Creating more of these bureaucrats and giving them more power will not protect us against bias. It will make elite Silicon Valley political bias the gate through which AI must pass.

V

Finally, I dissent in part from the pages of "Staff Recommendations" with which the Report closes. Proposing to Congress and state lawmakers changes to existing law is an important part of the Commission's Section 6(b) authority. Congress has more than once adopted our recommendations in statute.[55] This Report, for example, calls repeatedly for comprehensive federal privacy legislation to protect consumers' data and provide greater clarity to those who collect and sell data. This I support (although as is always the case, the devil will be in the details of any such legislation).

But the Report does much more than recommend changes to existing law. It proposes a

AI, and that they should make a series of changes in how they engage with children and teenagers online.[58]

I dissent from these recommendations, even though I agree with some of them, because I think "recommending" that firms act or refrain from acting exceeds our authority and our expertise. We are not moral philosophers, business ethicists, or social commentators. We are a law-enforcement agency. We enforce specific statutory mandates and prohibitions. Congress has instructed us to develop expertise regarding the enforcement of those laws.[59] When we tell a private person or firm what to do, that instruction must be for compliance with the laws we enforce. When our instructions have no connection to the laws, we are beyond our bailiwick and just like anyone else with an opinion on matters of public importance. Indeed, as Beltway bureaucrats, our opinion on these matters is probably worth less than the average American's.

The Commission does not actually mean for these "recommendations" to be purely recommendatory. Many of the recommendations amount to thinly-veiled threats against firms—do what we say, or else. I do not know how else a reasonable firm would interpret statements in the Report that firms "should" or "should not" do certain things, followed by warnings that certain courses of action "will not help companies avoid liability." These "recommendations," then, are merely the latest entry in a long catalog of examples of federal agencies using "sub-regulatory guidance" to control private behavior without having to go through the rigmarole of rulemaking and judicial review.[60] Although sub-regulatory guidance is not "law" in the sense that one ordinarily uses that word, it has all the coercive power of law because it is backed by the threat of costly investigations and enforcement proceedings without any of the procedural protections that attend lawmaking in Congress and rulemaking in the agencies.[61]

The Report tries to talk its way out of this obvious implication by saying in a footnote that it does not "intend[] to imply" that "failure to follow" the recommendations is a violation of Section 5. The recommendations, the Report insists, "reflect staff's observations based on the documents received … along with staff's expertise and experience in these areas."[62] But we are not a think tank or collection of concerned citizens. We are the government with the power to obtain injunctions and civil penalties against lawbreakers. When the government "recommends" that the firms it regulates do something, the "recommendation" is not a friendly not 0 -1.60e232 (e)1 (