Before the
Federal Trade Commission
Washington, D.C.

In the Matter of	)
Trade Regulation Rule on Commercial Surveillance and Data Security	)
Commercial Surveillance ANPR, R111004	)

COMMENT OF THE INSTITUTE FOR FREE SPEECH

November 18, 2022

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INTRODUCTION AND EXECUTIVE SUMMARY

The Institute for Free Speech[1] submits these comments in response to the Federal Trade Commission's advance notice of proposed rulemaking ("ANPR") addressing "commercial surveillance."[2] According to the Commission, "commercial surveillance" refers to practices that some businesses use "to target services—namely, to set prices, curate news feeds, serve advertisements, and conduct research on people's behavior, among other things."[3] Through the ANPR, the Commission "is beginning to consider the potential need for rules and requirements regarding commercial surveillance."[4] Among other things, the Commission seeks comment on the potential First Amendment implications of the ANPR.[5]

The Institute for Free Speech welcomes the opportunity to provide comments. As the Commission considers whether to regulate "commercial surveillance," the Institute urges the Commission to ensure that any regulations it adopts do not chill fundamental freedoms guaranteed by the First Amendment.

At this preliminary stage, the Commission has not proposed a regulatory text. Nevertheless, the ANPR suggests that potential Commission action would implicate the First Amendment. That is because several of the practices the ANPR identifies as "commercial surveillance" have been recognized by federal courts as protected speech. Specifically, the Supreme Court has held unconstitutional under the First Amendment laws that restrict persons

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[1] The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

[2] Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022) (hereinafter "ANPR").

[3] ANPR, 87 Fed. Reg. at 51274.

[4] ANPR, 87 Fed. Reg. at 51277.

[5] ANPR, 87 Fed. Reg. at 51284.

from analyzing consumer information, compiling that information in useful ways, and then selling it to third parties for use in targeting communications.[6] Similarly, federal courts of appeals have held unconstitutional under the First Amendment laws that restrict online content curation and regulate advertising.[7]

The Institute is particularly concerned about the impact of potential Commission regulations on speakers who use consumer information to make their political speech more effective. Political speech occupies a distinctive place in First Amendment law.[8] Presently, however, the ANPR does not acknowledge the potential impacts of "commercial surveillance" regulations on political speech. This is a significant oversight because, similar to other speakers, targeting speech through the use of consumer data is a common practice among speakers disseminating political messages. This means that Commission regulation of companies that engage in "commercial surveillance" will affect political speakers who rely on their services to efficiently deliver a message. The Institute also discusses several other First Amendment infirmities suggested by the ANPR, including the potential for content-based regulations, speaker-based regulations, and compelled speech requirements.[9]

If the Commission chooses to restrict speech through "commercial surveillance" regulation, the First Amendment requires the Commission to justify the constitutionality of its actions. The ANPR, however, struggles to identify a permissible governmental interest that would support speech regulation under any potentially applicable First Amendment standard and does not discuss tailoring requirements.[10] These problems are particularly acute with respect to the

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[6] Section I.A., *infra*.
[7] *Ibid.*
[8] Section I.B., *infra*.
[9] Section I.C., *infra*.
[10] Section II., *infra*.

ANPR's suggestion that the Commission might regulate speech to combat "hate speech," "misinformation," and "deception."[11] The Institute urges the Commission to correct these problems or to abandon these objectives, thereby ensuring that any proposed rules emerging from this proceeding do not offend the First Amendment.

DISCUSSION

I. The Commission Should Not Burden First Amendment Rights.

A. The ANPR Contemplates Regulations That Implicate Protected Speech.

Through the ANPR, "the Commission is beginning to consider the potential need for rules and requirements regarding commercial surveillance."[12] According to the Commission, "commercial surveillance" means "the collection, aggregation, analysis, retention, transfer, or monetization of consumer data and the direct derivatives of that information," and is a practice used by some companies "to target services—namely, to set prices, curate news feeds, serve advertisements, and conduct research on people's behavior, among other things."[13]

There is little doubt that these practices encompass protected speech. In *Sorrell v. IMS Health, Inc.*,[14] the Supreme Court recognized that "data miners"—that is, "firms that analyze [consumer]-identifying information and produce reports on [consumer] behavior" that were sold to third parties who "use[d] the reports to refine their marketing tactics and increase sales"—were engaged in First Amendment activity.[15] The Court explained that "the creation and dissemination of information" based on commercial data was "speech within the meaning of the First

[11] *See* sections I.A., I.C.1., and II.B., *infra*.
[12] ANPR, 87 Fed. Reg. at 51277
[13] ANPR, 87 Fed. Reg. at 51274, 51277.
[14] 564 U.S. 552 (2011).
[15] *Id.* at 558.

Amendment" and, further, that restricting its intended downstream use would be akin to "prohibiting trade magazines from purchasing or using ink."[16]

The ANPR implicates both aspects of this holding. With respect to the assemblage of consumer data, the practices the Commission defines as "commercial surveillance" appear similar to those at issue in *Sorrell*. According to the ANPR, "firms" engage in "commercial surveillance" practices to "collect consumer data" and "sell or otherwise monetize such information or compilations of it in their dealings with advertisers, data brokers, and other third parties."[17] Although the ANPR does not provide much detail about the firms the Commission has in mind, its description of their practices sounds remarkably similar to *Sorrell*'s "data miners" who analyze consumer information, compile the information in useful ways, and then sell it to third parties for use to target communications.[18]

Use cases discussed in the ANPR confirm the Commission's focus on protected speech. The ANPR asserts that businesses "use [commercial surveillance] information to . . . curate [online] newsfeeds" and "serve advertisements."[19] With respect to the former, courts have held that curation of online content is protected First Amendment activity that involves inherently expressive choices. As the Eleventh Circuit recently explained, "[s]ocial-media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights, and when they (like other entities) disclose, publish, or disseminate information, they engage in speech within the meaning of the First Amendment."[20]

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[16] *Id.* at 570–71.

[17] ANPR, 87 Fed. Reg. at 51274.

[18] *See Sorrell*, 564 U.S. at 558.

[19] ANPR, 87 Fed. Reg. at 51274.

[20] *NetChoice, LLC v. Atty. Gen., Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022) (citations omitted) (alterations accepted); *see also NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022) (vacating Fifth Circuit's stay of preliminary injunction, thus reinstating district court order that found Texas

The same is true for advertising, online or otherwise. For nearly half a century, the Supreme Court has recognized that even advertising "which does no more than propose a commercial transaction" is protected by the First Amendment.[21] Furthermore, because the ANPR does not appear limited to the context of "commercial speech," it appears that a proposed rule could sweep far beyond regulation of commercial advertising to burden individual and collective speech made "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[22]

B. The ANPR Contemplates Regulation of Core Political Speech.

The Institute is particularly concerned about the impact of potential Commission regulations on "core political speech."[23] "Because our democracy relies on free debate as the vehicle of dispute and the engine of electoral change," the judicial branch has long recognized that "political speech occupies a distinctive place in First Amendment law."[24] In its current form, however, the ANPR does not appear to recognize its potential impacts on core political speech.

This is an unfortunate and disturbing oversight. Just like other types of speakers, political speakers—including candidates campaigning for public office, and citizens engaged in individual or collective speech about candidates or issues—often rely upon data-driven advocacy to make their speech effective. This means that Commission regulation of companies that engage in "commercial surveillance" practices will affect political speakers who rely on these companies'

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statute regulating social media companies likely violated the First Amendment); *cf. NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

[21] *See Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[22] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

[23] *FEC v. Cruz*, 142 S. Ct. 1638, 1656 (2022).

[24] *Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019); *see also, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (citation omitted)).

services to identify audiences and deliver a message. The broad-based regulations contemplated by the ANPR, however, appear to take no account of the burdens they would impose on core political speech.

The Institute has previously documented the many benefits that accrue when political speakers can target their messages, explaining how the availability of online targeting tools has yielded tremendous benefits for political speech and association. The ability to concentrate communication efforts on those most likely to be receptive to a speaker's message enables candidates and concerned citizens to reach a receptive audience and not waste resources connecting with those unlikely to be interested in their message.[25] This promotes political advertising that is more personal and is more likely to encourage substantive issue-oriented appeals rather than emotional messages.[26] It also increases viewpoint diversity by creating more opportunities for new and underprivileged speakers, who may not have the resources to reach broad swaths of the American public but can launch effective targeted campaigns.[27] The Institute urges the Commission to carefully consider the potential impacts of any proposed regulations on political speech across a variety of speakers.

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[25] A. Baiocco, Institute for Free Speech, *Benefits of "Microtargeting": Why Online Ad Targeting Tools Are Good for Free Speech and Democracy* 1 (May 2021), *available at* https://www.ifs.org/research/benefits-of-microtargeting-good-for-free-speech-and-democracy/.

[26] *Ibid.*

[27] *Id.* at 1–2; *see also* A. Baiocco, Institute for Free Speech, *The Truth About "Microtargeting" and Political Speech: Why a Ban Is a Bad Idea* (May 2021), *available at* https://www.ifs.org/wp-content/uploads/2021/05/2021-05-25_Issue-Brief_Baiocco_The-Truth-About-Microtargeting-And-Political-Speech.pdf; L. Wachob, Institute for Free Speech, *Regulating the Internet: A Dangerous Trend for Free Speech* (Aug. 2018), *available at* https://www.ifs.org/wp-content/uploads/2018/08/2018-08-09_IFS-One-Pager_Regulating-the-Internet-A-Dangerous-Trend-for-Free-Speech.pdf.

C. The ANPR Suggests Other Potential First Amendment Infirmities.

In addition to contemplating rules that would broadly regulate speech, the ANPR suggests several other potential First Amendment infirmities. Specifically, the ANPR indicates that the Commission may be interested in regulating speech based on its communicative content and, further, that the Commission may be considering speaker-based regulations and compelled speech requirements.

1. The ANPR Suggests Commission Interest in Content-Based Speech Regulations.

"Above 'all else, the First Amendment means that government' generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[28] Accordingly, the Supreme Court has clearly and repeatedly held that content-based speech regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[29]

Content-based regulations target speech "based on its communicative content."[30] Accordingly, a regulation is content based "if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'"[31] Content-based regulations include those that draw both "obvious" and "subtle" "distinctions based on the message a speaker conveys," regulations "that cannot be 'justified without reference to the content of the regulated speech,'" and regulations

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[28] *Barr v. Am. Assn. of Political Consultants, Inc.*, 140 S.Ct. 2335, 2346 (2020) (plurality) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

[29] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *see, e.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

[30] *City of Austin, Texas v. Reagan Natl. Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed*, 576 U.S. at 163).

[31] *Ibid.*

"that were adopted by the government 'because of disagreement with the message the speech conveys.'"[32]

The ANPR suggests the Commission may be interested in regulating speech based on its communicative content. According to the Commission, "commercial surveillance" practices may require regulation because "reports" indicate that such practices "have facilitated consumer harms that can be difficult if not impossible for any one person to avoid."[33] In support of this claim, the Commission cites news and commentary about "hate speech" and "misinformation" that spread online.[34] The Commission also cites a rulemaking petition urging it to restrict social media companies "from profiting off hate" through practices that "boost[ ] outrageous content" and "amplify toxic misinformation."[35]

Such reasoning is plainly content based. "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful."[36] But the First Amendment does not allow the Commission to restrict speech based solely on the offensive nature of such content. The "proudest boast" of our democracy, the Supreme Court has explained, is that the First Amendment "protect[s] the freedom to express 'the thought that we hate.'"[37]

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[32] *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[33] ANPR, 87 Fed. Reg. at 51274.

[34] *See, e.g.*, Matthew Hindman et al., *Facebook Has a Superuser-Supremacy Problem*, The Atlantic (Feb. 10, 2022), https://www.theatlantic.com/technology/archive/2022/02/facebook-hate-speechmisinformation-superusers/621617/ (cited at ANPR, 87 Fed. Reg. at 51274 n.11).

[35] Petition for Rulemaking by Accountable Tech 33–34 (Dec. 3, 2021), *available at* https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/r207005_-_petition_for_rule_to_prohibit_surveillance_advertising_0.pdf; *see* Petition for Rulemaking by Accountable Tech, 86 Fed. Reg. 73206 (Dec. 27, 2021) (requesting comment); ANPR, 87 Fed. Reg. at 51276 n.47 (discussing petition).

[36] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality).

[37] *Ibid.* (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)); *see Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred.").

Accordingly, the Court has long held that "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."[38]

Nor does the Constitution allow the Commission to restrict access to information merely because it may be misleading. Free speech contributes to the "search for truth."[39] "[T]he best test of truth," the Supreme Court has said, "is the power of the thought to get itself accepted in the competition of the market."[40] This means that even demonstrably false utterances generally "contribute to the free interchange of ideas and the ascertainment of truth."[41]

For this reason, the Supreme Court has held that governments may not "compile a list of subjects about which false statements are punishable" merely because they are false.[42] In *Susan B. Anthony List v. Driehaus*,[43] for example, the Supreme Court held plaintiffs had standing to challenge an Ohio law that criminalized false statements about candidates during political campaigns.[44] On remand, the Sixth Circuit found the law unconstitutional because it imposed "content-based restrictions targeting core political speech" that were not justified by the state's

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[38] *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975)); *see also, e.g.*, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 798 (2011); *Cohen v. California*, 403 U.S. 15, 25 (1971).

[39] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

[40] *Natl. Inst. of Fam. and Life Advocates v. Becerra*,, 138 S. Ct. 2361, 2375 (2018) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[41] *Garrison*, 379 U.S. at 73; *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) ("Under our Constitution 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'").

[42] *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality); *see id.* at 730 (Breyer and Kagan, JJ., concurring in the judgment).

[43] 573 U.S. 149 (2014).

[44] *See id.* at 168.

interest in conducting fair elections.[45] As discussed in more detail below,[46] these and other cases suggest the Commission would likely face an insurmountable hurdle if it attempts to regulate speech based upon disagreement with its content.

2. The ANPR Suggests Commission Interest in Speaker-Based Speech Regulations.

In addition to content-based regulations, the ANPR appears to contemplate speaker-based regulations. The First Amendment is "deeply skeptical" of regulations "that 'distinguish among different speakers, allowing speech by some but not others.'"[47] Regulations based on the identity of the speaker "run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'"[48]

The ANPR suggests the Commission may be considering speaker-based regulations. Specifically, it asks "[t]o 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[.]"[49] This question implies that the Commission may be open to rules that prohibit only certain types of companies—that is, only certain types of speakers—from engaging in "commercial surveillance" practices that implicate speech.

Such regulations would be reminiscent of the regime the Supreme Court struck down in *Sorrell.* There, Vermont restricted pharmaceutical manufacturers from using reports from data miners to help them "shape their messages by 'tailoring' their 'presentations to individual

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[45] 814 F.3d 466, 476 (6th Cir. 2016).

[46] Section II., *infra*.

[47] *Natl. Inst. of Fam. and Life Advocates*, 138 S. Ct. at 2378 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)).

[48] *Ibid.* (quoting *Sorrell*, 564 U.S. at 580).

[49] ANPR, 87 Fed. Reg. at 51283.

prescriber styles, preferences, and attitudes.'"[50] The Supreme Court held that this was an unconstitutional "content- and speaker-based burden" on protected speech.[51] Here, the ANPR argues "commercial surveillance" is harmful because it permits speakers to deliver "hyper-personalized content to each user" that may be more effective than traditional mass communications.[52] But the Supreme Court described Vermont's similar restriction on speech it deemed "too persuasive" as "incompatible with the First Amendment."[53]

3. The ANPR Suggests Commission Interest in Compelled Speech Requirements.

The ANPR also contemplates compelling speech through disclosure requirements. Compulsory disclosures—even in the purely commercial setting—burden the First Amendment because the "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[54]

The ANPR seeks comment on more than a dozen issues relating to potential disclosure requirements.[55] Based on this broad range of questions, it is not clear whether the Commission envisions disclosure requirements that are "limited to 'purely factual and uncontroversial information about the terms under which services will be available.'"[56] Disclosures fitting this narrow description are sometimes subject to somewhat less rigorous First Amendment scrutiny but, even under this more relaxed standard, the Commission must prove the disclosures are

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[50] 564 U.S. at 557–61.

[51] *Id.* at 569–70.

[52] Petition for Rulemaking by Accountable Tech 38.

[53] *Sorrell*, 564 U.S. at 577–78; *see also Citizens United*, 558 U.S. at 356 (invalidating speaker-based restriction).

[54] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

[55] ANPR, 87 Fed. Reg. at 51284–85.

[56] *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)) (alteration accepted).

"neither unjustified nor unduly burdensome" and will not "chill" protected speech.[57] Furthermore, the ANPR appears to contemplate broader regulations that would touch, among other things, on core political speech and thus would be held to the strictest First Amendment scrutiny.[58] The Commission must consider the First Amendment implications of any compelled disclosure requirements it chooses to adopt.

II. The Commission Must Consider Its First Amendment Obligations.

A. The ANPR Struggles to Identify a Permissible Interest That Would Support Speech Regulation.

The Commission bears a heavy burden when it chooses to restrict speech. "When the Government restricts speech," the Supreme Court has explained, "the Government bears the burden of proving the constitutionality of its actions."[59] Under any potentially applicable First Amendment standard, therefore, "the Government must prove at the outset that it is in fact pursuing a legitimate objective."[60]

The Commission struggles with this task. Far from identifying a permissible governmental interest for regulating speech, the ANPR "allude[s]" to a congeries of "potential consumer harms."[61] The Commission then asks the public to fill in the gaps, suggesting that concerns about anything from "physical security," "economic injury," "psychological harm," "reputational injury," or "unwanted intrusion" "may" supply enough reason.[62] In all, approximately one-third of the ANPR's ninety-five numbered questions appear to be searching for the necessary

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[57] *Id.* at 2377.

[58] Section I.B., *supra*.

[59] *Cruz*, 142 S. Ct. at 1652 (citation omitted).

[60] *Ibid.*; *see Brown*, 564 U.S. at 799 ("The State must specifically identify an 'actual problem' in need of solving"). The necessary strength of the required interest (*e.g.*, "compelling," "important," "substantial") will of course vary according to the restriction imposed.

[61] ANPR, 87 Fed. Reg. at 51281.

[62] ANPR, 87 Fed. Reg. at 51280, 51281.

justification to regulate speech (for example, "Which practices do companies use to surveil consumers?"; "How, if at all, do these commercial surveillance practices harm consumers or increase the risk of harm to consumers?"; "Which areas or kinds of harm, if any, has the Commission failed to address through its enforcement actions?"). Indeed, the Commission follows these questions by asking "which legal theories would support limits . . . given potential constitutional or other legal challenges" rooted in "the First Amendment."[63]

The Commission's approach is suspect. The Supreme Court teaches that "[g]overnment 'justifications' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented'" to support desired outcomes.[64] When the government chooses to regulate speech and then searches for an adequate justification afterward, it raises concerns that, whatever motive the government eventually chooses, its true intent may be to restrict expression out of hostility towards its message, its ideas, its subject matter, or its content.[65]

In a few places, the ANPR suggests that regulations might be warranted to protect consumers from "deception."[66] As explained above, however, the Commission may not restrict speech simply because it is false.[67] "Our constitutional tradition," the Supreme Court has explained, "stands against the idea that we need Oceania's Ministry of Truth."[68]

That does not mean that all deception is immune from regulation. "Where false claims are made to effect a fraud or secure moneys or other valuable considerations," governments "may

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[63] ANPR, 87 Fed. Reg. at 51284.

[64] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432 (2022) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)) (alteration accepted).

[65] *Reed*, 576 U.S. at 163–64.

[66] ANPR, 87 Fed. Reg. at 51284; *see also id.* at 51275 (discussing "misleading representations").

[67] Section I.C.1, *supra*.

[68] *Alvarez*, 567 U.S. at 723 (citing G. Orwell, 1984 (1949)).

restrict speech without affronting the First Amendment."[69] Accordingly, it may be possible for the Commission to show that speech regulation is necessary to prevent speech related to illegal activity. But nothing in the ANPR, as drafted, suggests that this is the Commission's only objective. To the contrary, the ANPR expressly argues that a rule may be necessary to restrict offensive "hate speech" and to control editorial discretion.[70] And the ANPR makes no effort to avoid restricting even core political speech.

In addition to identifying a permissible governmental interest, the Commission must prove that the interest it identifies is actually in play. In other words, "[t]o survive constitutional review, the [Commission] must build its case on specific evidence" demonstrating "that the harms it recites are real," not "speculation or conjecture."[71]

This is a significant hurdle. Last term, the Supreme Court held that another federal administrative agency, the Federal Election Commission, failed "to carry [its] First Amendment burden" where that agency attempted to prove its asserted anticorruption interest through "a scholarly article, a poll, and statements by Members of Congress."[72] The D.C. Circuit, likewise, set aside the U.S. Department of Health and Human Service's "sweeping disclosure requirement" regarding prescription drug pricing, finding that the Department's attempt "to regulate the public

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[69] *Ibid.*; *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) (governments may restrict "commercial speech related to illegal activity").

[70] Sections I.A., I.C.1., *supra*.

[71] *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 143–44 (1994) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)); *see, e.g.*, *Cruz*, 142 S. Ct. at 1653 ("We have 'never accepted mere conjecture as adequate to carry a First Amendment burden.'"); *Zauderer*, 471 U.S. at 648–49 (holding Florida's "unsupported assertions" insufficient to justify prohibition on attorney advertising; "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force").

[72] *Cruz*, 142 S. Ct. at 1653–54.

speech of companies" was inadequately supported.[73] And the Ninth Circuit, earlier this year, held that a California administrative agency could not justify a disclosure requirement based upon the Environmental Protection Agency's ruling that "acrylamide as 'likely to be carcinogenic to humans'" given "robust disagreement by [other] reputable scientific sources."[74] These cases illustrate the Commission's heavy burden to prove a permissible interest in regulating speech.

B. The ANPR Does Not Appear to Consider Tailoring Requirements.

After proving that it is pursuing a permissible objective that is commensurate with the burden imposed, the Commission must show that the curtailment of free speech is necessary for the solution. "The First Amendment does not permit a remedy broader than that which is necessary to prevent" an asserted harm.[75]

The ANPR displays little awareness of this requirement. Indeed, as one member of the Commission observed, the ANPR "attempts to establish the prevalence necessary to justify broad commercial surveillance rulemaking by citing an amalgam of cases concerning very different

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[73] *Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 962 F.3d 531, 533, 541 (D.C. Cir. 2020). Because this "substantial constitutional question" was enough to render the agency's statutory interpretation "unreasonable[,]" *id.* at 540–41, the court avoided a direct ruling on the First Amendment question.

[74] *California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022). In a handful of cases, the D.C. Circuit has upheld restrictions on "deceptive and misleading" "commercial speech" where "findings of deception" regarding specific commercial advertisements were "supported by substantial evidence in the record." *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499–500 (D.C. Cir. 2015). Those cases provide no support for deferential review of FTC action in a rulemaking context that sweeps far beyond regulations of "commercial speech." Furthermore, these cases appear out of step with the Supreme Court's teaching that, where First Amendment issues are in play, courts have "an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.*, 466 U.S. at 499 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see id.* at 511 ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.").

[75] *Nat'l Comm'n On Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977).

business models and conduct."[76] This severe mismatch between means and ends would be a problem for the Commission even under the deferential arbitrary and capricious standard, where an agency need only show "a 'rational connection between the facts found and the choice made.'"[77] The First Amendment, *a fortiori*, requires a closer means-ends fit.

The ANPR's difficulties with tailoring are perhaps best illustrated by its suggestion that the Commission may broadly restrict targeting of all communications based upon "protected categories" or "unprotected consumer traits" to address problems in specific areas such as employment or housing.[78] The obvious problem is that this type of solution—the regulatory equivalent, to borrow a phrase, of using "a thermonuclear weapon" to "swat[ ] a fly"[79]—is often overbroad. If the Commission identifies a sufficiently important problem, the First Amendment requires that any regulatory solution be adequately tailored to address that problem.

Consider, for example, the types of valuable communications that could potentially be lost if a regulation is not properly tailored. In *NAACP v. Alabama*,[80] the Supreme Court held that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[81] Many group associations are formed around membership in a protected class, including religious or minority affiliations. For these organizations, the ability to target awareness campaigns, issue advocacy campaigns, voter

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[76] ANPR, 87 Fed. Reg. at 51295 (statement of Commissioner Alvaro M. Bedoya).

[77] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see Merck & Co.*, 962 F.3d at 533 ("The Department acted unreasonably in construing its regulatory authority to include the imposition of a sweeping disclosure requirement that is largely untethered to the actual administration of the Medicare or Medicaid programs.")

[78] ANPR, 87 Fed. Reg. at 51276 (emphasis removed).

[79] *Philipp v. Fed. Republic of Germany*, 925 F.3d 1349, 1352 (D.C. Cir. 2019) (Katsas, J., dissenting from the denial of rehearing en banc).

[80] 357 U.S. 449 (1958).

[81] *Id.* at 460; *see Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

registration or voter turnout efforts, fundraising appeals, and membership drives toward members of the protected class is vitally important. Yet, in the ANPR, the Commission does not acknowledge that its regulations of "commercial surveillance" practices could potentially inhibit these and other activities.

CONCLUSION

For all these reasons, the Commission must ensure that any proposed regulations emerging from this proceeding do not offend the First Amendment.

Respectfully submitted,

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