

Concurring Statement of Commissioner Christine S. Wilson
Epic Games, Inc.
Matter No. 2223087

December 19, 2022

Today, the FTC announced a settlement with Epic Games, the creator of the popular online video game Fortnite. I support and applaud this enforcement action, which takes important steps to protect the online privacy of children, including teens. And I am grateful to our talented staff for their excellent work on this case, which incorporates a noteworthy unfairness count and novel but fully warranted injunctive relief. This case clearly exemplifies the harms of insufficient privacy protections, particularly for children. Concerned parents may wish to review the FTC's helpful website with resources about protecting kids online.¹

I write separately to explain my support both for the unfairness count and the groundbreaking injunctive relief. Section 5 of the FTC Act provides the necessary flexibility to address emerging threats to consumers from new industries and evolving technologies.² But the Commission's unfairness authority is not unbounded. As I have previously noted, the FTC must observe the boundaries of its statutory authority and operate within the jurisdictional limits set by Congress.³ Here, however, the elements of the unfairness test are clearly satisfied — because Epic Games allegedly opted children into voice and text communications with players around the world, children were exposed to bullying, threats, and harassment, and were enticed or coerced into sharing sexually explicit images and meeting offline for sexual activity.⁴ And the novel

¹ *Protecting Kids Online*, FED. TRADE COMM'N, <https://consumer.ftc.gov/identity-theft-and-online-security/protecting-kids-online> (last visited Dec. 18, 2022).

² The Agency has used this flexible standard to address online harms like digital stalking (Compl., Retina-X Studios, LLC, No. 172-3118 (filed Oct. 22, 2019), https://www.ftc.gov/system/files/documents/cases/172_3118_retina-x_studios_complaint_0.pdf), revenge porn (Compl., Emp Media, Inc., No. 162 3052 (filed July 9, 2018), https://www.ftc.gov/system/files/documents/cases/1623052_myex_complaint_1-9-18.pdf), and invasions of people's homes through web cameras (Compl., TRENDnet, Inc., No. 122-3090 (filed Feb. 7, 2014), <https://www.ftc.gov/enforcement/casesproceedings/122-3090/trendnet-inc-matter>). *See also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014) (describing the FTC's role since the late 1990s in enforcing privacy statutes and companies' privacy practices).

³ Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf; Dissenting Statement of Commissioner Christine S. Wilson, Final Rule related to Made in U.S.A. Claims (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591494/2021-07-01_commissioner_wilson_statement_musa_final_rule.pdf; Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, Notice of Proposed Rulemaking related to Made in U.S.A. claims (June 22, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf.

⁴ *See* Compl., Epic Games, Inc., No. 222-3087 (filed Dec. 19, 2022).

injunctive mechanisms, which require Epic Games to implement heightened privacy default settings, directly address the privacy harms fostered by the company's alleged business practices.

I also write separately to underscore the dangers of insufficient privacy protections, particularly for children, including teens. As I write, close to three million gamers around the globe are playing Fortnite.⁵ In the Battle Royale mode, players are matched with up to 99 other gamers in a format that allows combatants to communicate with each other via voice and text. Despite knowing that adults and children play the video game concurrently, Epic Games allegedly failed to prioritize the safety of its young players when the company implemented default settings that allowed strangers to communicate with children and teens. The complaint details how Epic Games chose to opt children into conversations with unknown adults despite repeated warnings from game designers, users, parents, and others that this approach violated industry norms and carried significant risks.

The results? I offer three examples:

In 2018, a 13-year-old boy (called MV#1 in court pleadings) told his doctor he was stressed because an adult male named "Gavin" whom he met while playing Fortnite planned to travel from "Gavin's" home in Pennsylvania to MV#1's home in Georgia for a visit. MV#1 wrote down a list of things "Gavin" wanted him to do, including "blow job, making out, kissing, cuddling, and fingering." "Gavin," later identified as Gregory Mancini, flew to Georgia in November 2018 and proposed to meet MV#1 at a Waffle House, where Mancini was arrested. A subsequent search of Mancini's computer "uncovered ... child sexual abuse material depicting very young minors, including images involving adult males engaged in sexual abuse of boys appearing to be about two years of age."⁶

Also in 2018, Sergeant Christopher S. Gilbert met "Miss MN" online playing Fortnite. Using the voice chat feature in the game, "Miss MN" told Gilbert she was 13 years old, and Gilbert told her he was 22. The two traded Instagram account names and began exchanging private messages through the Instagram text messaging feature. A court subsequently concluded that Gilbert sexually abused "Miss MN" by sending her digital pictures and videos of his penis, engaged in inappropriate sexual conversations with her, and attempted to guilt her into sending nude images of herself. A subsequent search of Gilbert's phone revealed child pornography. Gilbert was convicted of sexual abuse of a child and possession of child pornography.⁷

And in 2019, Juan Carlos Sandoval-Guerrero, using Fortnite, coerced a young child (called Victim B in court pleadings) into sending images that portray Victim B

⁵ *Fortnite Live Player Count*, PLAYER COUNTER, <https://playercounter.com/fortnite/> (last visited Dec. 18, 2022).

⁶ Sentencing Mem. of the U.S., *United States v. Mancini*, No. 1:20-cr-00031-SPB (W.D. Pa. Apr. 25, 2022).

⁷ *United States v. Gilbert*, ARMY 20190766, 2020 WL 4458493 (Army Ct. Crim. App. July 31, 2020).

“displaying his penis, masturbating his penis with his hand and penetrating his anus with his finger. In some videos, Victim B can be seen wearing a wireless headset of the type ... typically associated with video game systems like Xbox. During one of the videos, Victim B can be heard talking about the points he got on a game while he is masturbating his penis.” In 2021, Sandoval-Guerrero pled guilty to the production and attempted production of child pornography in violation of 18 U.S.C. 2251(a), (e).⁸

These examples should concern any parent whose kids enjoy playing online video games. And they should serve as a wake-up call to skeptics who believe that invasions of privacy lead merely to targeted advertising.

Numerous news articles have reported that Fortnite and other online games foster a target-rich hunting ground for sexual predators.⁹ The National Center for Missing & Exploited Children, the nation’s centralized reporting system for suspected child sexual exploitation, received more than 29.3 million reports of suspected child sexual exploitation in 2021, including over 44,000 reported incidents of online enticement of children for sexual acts.¹⁰ And the organization noted that the reports of online enticement have been growing more numerous each year. During my tenure as a Commissioner, I have been an ardent advocate for federal privacy legislation,¹¹ in

⁸ Plea Agreement, *United States v. Sandoval-Guerrero*, No. 4:20-CR-06009-SMJ-1 (E.D. Wash. Apr. 1, 2021).

⁹ Paige Gross, *Predators are using Fortnite to Lure kids. Cops say parents need to worry*, NJ.com (Sept. 21, 2018 12:30 PM), https://www.nj.com/news/2018/09/fortnite_minecraft_join_other_platforms_where_pred.html (warning the public about popular apps being used by people to abuse and exploit teens and children); Nellie Bowles and Michael H. Keller, *Video Games and Online Chats Are ‘Hunting Grounds’ for Sexual Predators*, N.Y. Times, Dec. 7, 2019, <https://www.nytimes.com/interactive/2019/12/07/us/video-games-child-sex-abuse.html> (detailing the efforts of criminals to make virtual connections in order to exploit and abuse children, including teens, through gaming and social media platforms); Dustin Racioppi, *‘People don’t want to talk about it,’ but reports of kids being exploited online have spiked amid coronavirus pandemic*, USA Today, Oct. 22, 2020, <https://www.usatoday.com/story/news/nation/2020/10/22/coronavirus-child-abuse-nj-online-child-exploitation-reports-increase/6004205002/> (discussing the epidemic of online child exploitation during the coronavirus pandemic).

¹⁰ *CyberTipline 2021 Report*, NAT’L CTR. FOR MISSING AND EXPLOITED CHILD., <https://www.missingkids.org/gethelpnow/cybertipline/cybertiplinedata#overview>.

¹¹ Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf; Christine Wilson, Op-Ed, *Coronavirus Demands a Privacy Law*, WALL ST. J., May 13 2020, available at <https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686>; Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation (April 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf; Christine Wilson, *Privacy in the Time of Covid-19*, TRUTH ON THE MARKET (Apr. 15, 2020), <https://truthonthemarket.com/author/christinewilsonicle/>; Christine S. Wilson, *A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation*, Remarks at the Future of Privacy Forum, Feb. 6, 2020, <https://www.ftc.gov/system/files/documents/>

part because of the pernicious risks threatening children's safety online.¹²

I am not a Luddite. I recognize that children's lives can be enriched through social media, gaming, and other online resources. But online activity comes with risks, especially when internet products have flawed or non-existent safeguards. The FTC's Section 5 authority does not reach, and cannot prevent, every danger facing teens and children on the internet today. Here, however, I am comfortable with this use of our unfairness authority, and I am supportive of the groundbreaking injunctive relief requiring privacy-protective settings for children and teens, because I have reason to believe that Epic Games knew that its products and/or services presented a substantial risk of harm and did not take simple steps to address that risk.

[public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf](https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf); Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf; Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423979/commissioner_wilson_nov_2018_testimony.pdf.

¹² Christine S. Wilson, *The FTC's Role in Supporting Online Safety*, Remarks at the Family Online Safety Institute, Nov. 21, 2019, https://www.ftc.gov/system/files/documents/public_statements/1557684/commissioner_wilson_remarks_at_the_family_online_safety_institute_11-21-19.pdf.