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FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Noah Joshua Phillips

Regarding the Combatting Online Harms Through Innovation Report to Congress

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In December 2020, as part of the 2021 Appropriations Act, Congress tasked the Federal Trade Commission with conducting a study and reporting on whether and how artificial intelligence (“AI”) could be used to identify, remove, or take other appropriate action to address a variety of online harms.¹ Congress also required the FTC to recommend reasonable policies and procedures for using AI to combat these online harms, and any legislation to “advance the adoption and use of [AI]” for these purposes.² I do not believe we conducted the requisite study, and I do not think the report on AI issued by the Commission (“AI Report” or “Report”) takes sufficient care to answer the questions Congress asked. The Report gives short shrift to how and why AI is being used to combat the online harms identified by Congress. Instead, the Report reads as a general indictment of the technology itself. I respectfully dissent.

The FTC was given 12 months to conduct this study, and another six to prepare the Report and submit it to Congress. Rather than use this time to solicit input from all relevant stakeholders, the Commission chose to conduct a kind of literature review. I have tremendous respect for the career staff who worked hard to put this report together, but tasking one staff member to read and summarize select academic articles and news reports on AI does not constitute an adequate study. While academics and reporters have useful perspectives that should be considered, they should not be the only views represented. The Report has no information gleaned directly from individuals and companies actually using AI to try to identify and remove harmful online content, precisely what Congress asked us to evaluate. To address this, the Commission could have asked for such information. It could have put out a request for information giving all stakeholders the opportunity to provide information and views.³ The

¹ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), <https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf>.

² *Id.*

³ We do this routinely even where Congress has not asked us to prepare a report. Recently, the Commission sought to educate itself on subjects by issuing requests for information on topics such as factors that could have contributed to the infant formula shortage and contract terms that could harm consumers. *See* Solicitation for Public Comments on Factors that May Have Contributed to the Infant Formula Shortage and Its Impact on Families and Retailers (May 24, 2022), <https://www.regulations.gov/document/FTC-2022-0031-0001>; Solicitation for Public Comments on

Commission's approach here departs from typical practice. In the past, the Commission has prepared congressional reports by issuing compulsory process, interviewing market participants, or conducting surveys.⁴ I do not understand why we did not follow this approach for this AI Report.⁵

Take, for example, the Report's discussion of how AI can be used to combat fake reviews, a target of recent FTC enforcement.⁶ Congress specifically directed us to study whether and how AI can be used to identify and remove fake reviews. The Report acknowledges that many large platforms use machine learning tools, often in conjunction with human review, to spot and remove fake reviews. Presumably, they do so for a reason. It would have been useful to ask the platforms how they view the efficacy of these tools.⁷ We did not do that. The closest the Report comes is to cite the results of a survey done by Fakespot, a company that developed a machine learning tool to help identify potentially fake reviews, which found that approximately 31 percent of product reviews on Amazon, Walmart, eBay, Best Buy, Shopify, and Sephora

Contract Terms that May Harm Consumers (Aug. 5, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0022>.

⁴ See, e.g., Fed. Trade Comm'n, *2021 Report on Ethanol Market Concentration* (Dec. 2021), www.ftc.gov/system/files/documents/reports/2021-report-ethanol-market-concentration/p063000_-_2021_report_on_ethanol_market_concentration.pdf (relying on publicly available information and interviewed market participants); Fed. Trade Comm'n, *Cigarette Report for 2020* (Oct. 2021), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2020-smokeless-tobacco-report-2020/p114508fy20cigarettereport.pdf> (issuing compulsory process in order to put together the report every year since 1967); Fed. Trade Comm'n, *Virtual Worlds and Kids: Mapping the Risks* (Dec. 2009), www.ftc.gov/sites/default/files/documents/reports/virtual-worlds-and-kids-mapping-risks-federal-trade-commission-report-congress/oecd-vwrpt.pdf (surveying 27 online virtual worlds and obtained information directly from six specific virtual worlds); Fed. Trade Comm'n, *Marketing Food to Children and Adolescents* (July 2008), <https://www.ftc.gov/sites/default/files/documents/reports/marketing-food-children-and-adolescents-review-industry-expenditures-activities-and-self-regulation/p064504foodmktngreport.pdf> (issuing compulsory process); Fed. Trade Comm'n, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Games Industries* (Sept. 2000), <https://www.ftc.gov/system/files/documents/reports/marketing-violent-entertainment-children-review-self-regulation-industry-practices-motion-picture/vioreport.pdf> (conducting surveys over a three month period).

⁵ I have supported reports to Congress that did not include stakeholder input, but these reports were much narrower in scope and did not include recommendations for legislation. See, e.g., Fed. Trade Comm'n, *Social Media Bots and Deceptive Advertising* (Jul. 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/07/ftc-sends-report-congress-social-media-bots-deceptive-advertising>; Fed. Trade Comm'n, *Shipping to Non-Foreign Areas* (Apr. 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-sends-report-congress-retailers-shipping-policies>.

⁶ See, e.g., *In the matter of Sunday Riley Modern Skincare, LLC*, FTC File No. 1923008 (2019), <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3008-sunday-riley-modern-skincare-llc-matter>.

⁷ It would likewise have been useful to ask smaller platforms about their experience using AI to deal with fake reviews. For example, we could have asked review platform Trustpilot about its experiences using a combination of AI and human review to identify and remove fake reviews. Trustpilot, *Fighting fake reviews and misuse*, <https://www.trustpilot.com/trust/combating-fake-reviews>. As is so often the case, the conversation the Report attempts to have only about "Big Tech" ought to be had as conversation about the technologies and business practices in question.

websites were unreliable.⁸ (This is, of course, an example of using AI to combat fake reviews.) The Report notes that automated detection efforts are worthwhile, but seemingly based on the fact that there are still fake reviews on the internet, concludes that the AI detection of fake reviews is not good enough. But there is no discussion of whether human review is any better at finding fake reviews – perhaps *the* question to ask in answering our congressional query. And there is zero attempt at a cost-benefit analysis. Does the time and money saved by using AI tools to detect and remove fake reviews outweigh the costs of the AI tools missing some percentage of fake reviews? Who knows? Congress deserves a better attempt at answering their question.⁹

While many of the academics and reporters cited in the Report have important perspectives that we properly considered, the document does include some curious citations. (The public should not fail to read the footnotes.) Citing the AI Decolonial Manifesto¹⁰ and the Twitter feeds of individuals, for example, is not the level of rigor that I expect to underpin an FTC report to Congress. The Report also frequently cites to the work and opinions of individuals currently employed by the FTC. While I am glad that the FTC has staff with interest and expertise in this area, I am concerned that the quantity of self-reference here calls the objectivity of the document into question. A report that includes recommendations, especially recommendations for legislation, will necessarily reflect the personal opinions of a majority of the Commission. Still, we should at least endeavor to produce a report that reflects the full diversity of experiences and viewpoints on these important issues concerning AI.

⁸ Fakespot, *US Online Shopping Ratings & Reviews Analysis Report* (2021), <https://www.fakespot.com/2021holidayreport>. Fakespot’s survey and the AI Report both note that there was disparity among these websites. For example, the Best Buy website had a fake review percentage of 8.1 percent, while Walmart had a fake review percentage of 37.6 percent. If the Commission had reached out to Walmart and Best Buy we might have been able to determine some of the reasons for the discrepancies, which would have been useful information when considering policy recommendations.

⁹ The Report’s discussion of whether AI can be used to identify counterfeit products will also leave a careful reader wanting. It lists four companies (eBay, Etsy, Facebook, and Alibaba) that have indicated that they use automated tools and declares that the efficacy of these tools cannot be determined. We should at least have asked. In May 2021, Amazon released a Brand Protection Report describing its efforts to protect its consumers, brands, sellers, partners, and store from counterfeits and fraud. It issued a second report in June 2022. Amazon Brand Protection Report (June 2022), <https://www.aboutamazon.com/news/small-business/amazons-brand-protection-report>. A report to Congress asking whether and how AI can be used to identify counterfeit products should at least acknowledge companies’ public statements on the efficacy of their automated tools. We need not be credulous of those claims, of course; but if we have reason to doubt company claims, we should say so, and why.

¹⁰ AI Decolonial Manifesto, <https://manyfesto.ai/index.html?s=03>. The document states: “Notions of decolonial governances will emerge from community and situated contexts, questioning what currently constitutes hegemonic narratives. Decoloniality is not merely diversity and inclusion; removing the echoes of coloniality in AI will require reparations for present and past material and epistemic injustice and dispossession. These reinventions of AI governance will acknowledge the expertise that comes from lived experience, and will create new pathways to make it possible for those who have been historically marginalized to have the opportunity to decide and build their own dignified socio-technical futures. Decolonial governance will recognize, in a way that Western-centric governance structures historically have not, how our destinies are intertwined. We owe each other our mutual futures.” I am not sure what that means.

I do not believe the Reports spends enough time grappling seriously with the benefits and costs of using AI to combat online harms, and it spends too much time on detours out of the topics Congress identified for the Commission to study. One example is the plight of the information technology workforce. We were not asked to opine on employer-employee relations, an area where the FTC lacks jurisdiction and expertise and on which we are ill-suited to provide Congress with advice. The Report also preoccupies itself with advocating for researchers and journalists to have broader access to companies' AI tools. On the flip side, it also criticizes technology companies that fund AI research, mostly based on the opinions of a few cited individuals. The history of American consumers benefitting from private sector research is long and rich, and it is far from clear why AI should be treated differently. But leaving that aside, the point is that all these issues are beyond our remit.

The Report also states: “the only effective ways to deal with online harm are laws that change the business models or incentives allowing harmful content to proliferate.” Nothing in this Report actually supports this broad statement, and in fact it describes a variety of different business models, each of which it associates with the online harms in question.¹¹ To be sure, our new(ish) technological capability for anyone to share anything they want with the world carries with it substantial problems, but that is not tied to a particular business model. If the Report has a view of which business models need to change and how, it should say so.

Finally, I cannot shake discomfort with the Report's discussion of using “inoculation theory” to “prebunk” the public against harmful content. Congress did not ask for an evaluation of the notion that alleged “misinformation” is a clearly identifiable harm against which people can and should be “inoculated,” and a government agency should tread carefully before crediting such strategies. How to moderate content at scale and what role the government should play has proven one of the most vexing public policy questions of our time. People have very different views.¹²

On policy, I generally agree with the topline conclusion that government and companies should “exercise great caution in either mandating the use of, or over-relying on, [AI] tools even for the important purpose of reducing harms.”¹³ And the Report also provides a sufficient basis to conclude that humans should continue to be involved in combatting the online harms Congress identified. There are many questions around the current reliability and effectiveness of AI tools,

¹¹ For example, the Report discusses AI being used by Microsoft to find phishing and spam in Outlook, which is licensed to customers, and Facebook using AI to look for scams in Facebook Marketplace, which generates revenue, at least in part, from advertisements. Those are different business models; as is Bumble, a dating service that sells subscriptions and uses AI tools to blur automatically nude images shared within a chat. Bumble, *With Bumble's Private Detector, You Have Control Over Unsolicited Nudes*, <https://bumble.com/en-us/the-buzz/privatedetector>.

¹² In its discussion of content moderation, the Report treats Twitter as a model. It describes the company as the “most outspoken platform” on content moderation issues, quotes its policy extensively, and implicitly praises Twitter's “open internet principles” which, according to the Report, “prioritiz[e] ‘human choice and control’ over algorithms” and “promot[e] healthy conversations.” Fed. Trade Comm'n, *Combatting Online Harms Through Innovation Report to Congress*, 64, 70 (June 2022). Not everyone believes that Twitter's content moderation policies should be the subject of imitation.

¹³ Fed. Trade Comm'n, *Combatting Online Harms Through Innovation Report to Congress*, 5 (June 2022).

so it seems prudent to hold off on requiring their use as a matter of law and excluding from that use human intervention. The Commission should, however, take care that its enforcement actions do not have the effect of disincentivizing companies from employing human review. Last year, the Commission brought a case against ad exchange OpenX for violations of the Children’s Online Privacy Protection Act (“COPPA”) and Section 5 of the FTC Act.¹⁴ OpenX claimed to take a unique human and technological approach to traffic quality and employed human review to assure compliance with its policies and to classify websites. OpenX’s human review failed. But it was only the human review that provided the “actual knowledge” needed for the Commission to obtain civil penalties under COPPA. If OpenX had relied entirely on automated systems, it might have avoided monetary liability. I voted for the case, but warned in my concurring statement that we should “weigh the instinct to penalize against the desire to foster a commercial environment where care is taken.”¹⁵ The Report reaffirms my view that we should exercise caution not to disincentivize human review.

Had the Commission sought input from stakeholders and engaged in more than a cursory analysis of the effectiveness of AI tools in combatting the harms identified by Congress, I could have signed on to the Report. It did not. It did go beyond the questions posed into a discussion of a variety of topics, which raised standalone concerns. For these reasons, I cannot vote in favor of this Report.

¹⁴ *U.S. v. OpenX Technologies, Inc.*, Civil Action No. 2:21-cv-09693 (C.D. Cal. 2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/1923019-openx-technologies-inc>.

¹⁵ Concurring Statement of Commissioner Noah Joshua Phillips Regarding *United States v. OpenX Technologies, Inc.* (Dec. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598947/commissioner_phillips_concurring_statement_open_x_final.pdf.