Before the

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

Re: Accountable Tech Petition for Rulemaking to Prohibit Tailored Advertising

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Comments of

The Program on Economics & Privacy
George Mason University, Antonin Scalia Law School

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This comment addresses Accountable Tech's Petition asking the Federal Trade Commission (FTC) to initiate a rulemaking to prohibit tailored advertising (TA) as an unfair method of competition (UMC).[1] We make five main points that cast serious doubt on the wisdom and viability of such a rulemaking.

- First, as a threshold matter, there are reasons to doubt that Congress has given the FTC the power to promulgate rules under its UMC authority. The only court to address the issue did so 50 years ago,[2] and it is far from clear that its rationale would survive today, especially when one looks at the provision purported to give the FTC such power (Section 6(g)) in the context of the entire structure of the FTC Act.[3]

- Second, the FTC can reach any use of TA that harms competition under its current authority. Section 5 of the FTC Act incorporates Sherman Act prohibitions against monopolization, which allows the FTC to bring suits against any dominant platform employing TA in an anticompetitive way to achieve or maintain its monopoly.[4] The rule that Petitioners ask for, however, would allow the FTC to circumvent this framework—which courts have constructed over years to ferret out those unilateral practices that are likely to harm consumers and competition —to condemn out of hand *any use* of TA. As such, the Petitioner asks the Commission to place TA into the narrow category of conduct that the antitrust laws condemn *per se* "because they always or almost always tend to restrict competition and decrease output."[5] Given the benefits inherent to TA and

[1] Specifically, the Petition defines "surveillance advertising" as consisting of (1) the collection of personal data; and (2) "targeting advertisements at users, based on that personal data, as they traverse the internet, including other digital platforms," and it asks the FTC to "issue a rule prohibiting online platforms from using personal data for the purpose of delivering advertisements." Accountable Tech, Docket No. FTC-2021-0070, *Petition for Rulemaking to Prohibit Surveillance* Advertising at 60 (Dec. 3, 2021). We use the term "tailored advertising" throughout this comment to refer to "surveillance advertising."
[2] National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973).
[3] *See generally* AMG Capital Management, LLC v. FTC, 141 S. Ct. 1341 (2021)
[4] *See, e.g.*, FTC v. Facebook, Inc., No. 20-3590 (JEB), 2021 WL 2643627 (D.D.C. 2021).
[5] Ohio v. American Express, 138 S.Ct. 2274, 2283-84 (2018) (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)).

the lack of empirical evidence linking TA to market power,[6] there simply is no reason to place TA into a category reserved for naked agreements among competitors to fix prices or divide markets.

- Third, given that a *per se* condemnation of TA would represent such a monumental departure from Sherman Act precedent, there are serious doubts that such an interpretation of the Commission's UMC power would withstand judicial scrutiny under *Chevron*.[7] Even assuming that Congress gave the FTC, and not the courts, the power to define what constitutes an unfair method of competition, under *Chevron*, the courts defer only to an agency's "reasonable" interpretation of an ambiguity in a statute it administers.[8] It seems doubtful that the FTC, having failed in the past to convince courts to adopt even incremental expansions of its UMC power beyond the Sherman Act, can now argue that a reasonable interpretation of "unfair methods of competition" includes a blanket ban on a unilateral practice utilized by a myriad of large and small online content providers.

- Fourth, TA provides consumer benefits in terms of access to free content and services that far exceed the costs in lost privacy. Empirical evidence consistently shows that consumers find privacy costs associated with TA to be minimal. This empirical evidence suggests that a ban on TA would not address a significant consumer concern and would be very harmful to the majority of publishers and service providers who rely on an advertising-based business model. These consequences suggest TA is not the type of conduct that competition law should prohibit outright.

[6] See James C. Cooper & John M. Yun, *Privacy and Antitrust: It's Complicated*, (Antonin Scalia Law School, L. & Econ. Rsch. Paper Series, Working Paper No. 21-14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871873.
[7] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).
[8] *Id*.

- Finally, any rule that would limit TA will have to pass First Amendment scrutiny. A wholesale ban, based on speculative evidence of consumer harm, will not pass that scrutiny.

In sum, given a dubious legal authority to issue a UMC rule, we urge the FTC to reject this petition. The reasons include a lack of any systematic relationship between TA and competition; widespread evidence that most consumers willingly accept the minimal privacy costs that TA poses in return for the tremendous benefits of free Internet; and clear conflicts with the First Amendment.

I. IT IS UNCLEAR THAT THE FTC HAS THE POWER TO ISSUE A UMC RULE

The FTC is unique in that its organic statute gives it power to proscribe a wide range of conduct that is harmful to consumers. Section 5 of the FTC Act is capacious. When originally conceived in 1914, the FTC Act covered only "unfair methods of competition," but in 1938, Congress added "unfair or deceptive acts and practices" to the FTC's remit.[9] Since that time, these missions have been administered separately for the most part. On the consumer protection side, after the addition of explicit consumer protection rulemaking procedures to the FTC Act, the FTC famously overreached in applying its unfairness authority, leading to the adoption and eventual codification of the unfairness statement.[10] The Commission's UMC authority, on the other hand, largely has evolved in tandem with the Sherman Act through enforcement actions, many of which have provided valuable clarification to the antitrust laws.[11]

The last and only word on whether the FTC enjoys the authority to engage in rulemaking under this provision was almost a half century ago in *National Petroleum Refiners Association v.*

[9] Wheeler-Lea Act, 15 U.S.C. §§ 41, 44, 45, 52-58.
[10] *See* William MacLeod, Elizabeth Brunins, & Anna Kertesz, *Three Rules and A Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943 (2005).
[11] *See*, *e.g.*, North Carolina State Board of Dental Examiners v. FTC, 574 U.S 494 (2015); FTC v. Phoebe Putney Health Systems, Inc., 568 US 216 (2013); FTC v. Actavis, Inc., 570 U.S . 136 (2013); California Dental Association v. FTC, 526 U.S. 756 (1999); FTC v. Superior Ct. Trial Lawyers Ass'n, 493 US 411 (1990); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1987). *See also* PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

FTC, which involved a challenge to the FTC's 1971 Octane Rule.[12] Although the Commission based the Rule on a finding that a failure to disclose octane ratings on pumps was both an "unfair method of competition" and an "unfair and deceptive act and practice," the Statement of Basis and Purpose discusses consumer harm arising from a lack of information about octane levels as the sole rationale, never once making a link between a failure to disclose octane levels and competition.[13] Importantly, the D.C. Circuit did not differentiate between those fonts of authority when holding that the FTC enjoyed the power under Section 6(g) to promulgate substantive rules.[14]

Section 5 lays out how the Commission is to engage in administrative litigation for both its consumer protection and competition missions, and to vindicate violations of cease-and-desist orders and consumer protection rules.[15] After *National Petroleum Refiners*, Congress passed the Magnuson-Moss Warranty and Federal Trade Commission Improvement Act adding Section 18, which governs consumer protection rulemaking.[16] Thus, any claim that Congress has given the FTC the authority to engage in rulemaking under its UMC authority must be staked in Section 6, which describes "additional powers of the Commission" and is primarily concerned with industry investigations, reports, and international cooperation. Tucked away in this part of the Act, Section 6(g) provides that the Commission may "[f]rom time to time classify corporations and [to] make rules and regulation for the purpose of carrying out the provisions of the [FTC Act]."[17]

It seems odd that Congress would have hidden enormous power to rewrite the antitrust laws in an obscure section of the FTC Act, away from the core enforcement and rulemaking

[12] 482 F.2d 672 (D.C. Cir. 1973).
[13] *See* 36 Fed. Reg. 23871 (Dec. 16, 1971). Specifically, the rule expressed concern that lacking information about octane levels, consumers would either (1) purchase gasoline that contained more octane than they needed for their specific engines, thus paying too much for gasoline, or (2) unknowingly purchase gasoline with too little octane, thus potentially harming their engines. *Id*.
[14] Nat'l Petroleum Refiners Ass'n, 482 F.2d at 678.
[15] 15 U.S.C. § 45.
[16] Magnuson-Moss Warranty and Federal Trade Commission Improvement Act, 15 U.S.C. § 2301.
[17] 15 USC § 46(g).

provisions of the Act.[18] A plain reading of this provision, in conjunction with the structure of the FTC Act, would tend to suggest that 6(g) provides the Commission the power to enact procedural rules necessary to carry out its core enforcement provisions, not the power to issue rules governing competition for the entire economy.[19] As the Supreme Court has explained in a different context, "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[20] Indeed, in *AMG Capital Management, LLC v. FTC*, the Supreme Court rejected a similar attempt by the FTC to read an implicit Congressional grant of broad authority into Section 5.[21]

II. THE FTC'S CURRENT ANTITRUST AUTHORITY IS SUFFICIENT TO ADDRESS ANY ANTICOMPETITIVE USE OF TAILORED ADVERTISING

The FTC's current antitrust enforcement authority is more than sufficient to address any anticompetitive use of TA. There is no dispute that, subject to important statutory exemptions, Section 5 covers all conduct that the Sherman and Clayton Acts cover.[22] Thus, the FTC could use its UMC authority to challenge an online platform's use of TA in federal court or in administrative litigation, with the burden to show that the defendant had monopoly power (or sufficient share for an attempted monopoly) in a relevant market, a causal link between the use of TA and the accretion and maintenance of monopoly power, and rebut any business justifications—of which there are likely to be many—offered by the defendant for the use of TA.[23] For a very narrow set of practices that experience and learning have shown "always or almost always tend to restrict competition and decrease output," the antitrust laws allow a

[18] Although, in Magnuson-Moss, Congress did reserve to the FTC "any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce." 15 U.S.C.§ 57a(a)(2). As the Court explained in *AMG*, however, the key question is whether the FTC received that power "in the first place." *AMG*, 141 S.Ct. at 1351 ("Here, however, the question is not one of preserving pre-existing remedies given by other statutory provisions. The question is whether those other provisions (namely, § 13(b)) gave that remedy in the first place.").

[19] *See* Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce, Aug. 12, 2021, https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.

[20] Whitman v. Am. Trucking Ass'n, 5331 U.S. 457, 468 (2001). *See also* AMG, 141 S. Ct. 1341.

[21] 141 S.Ct. at 1349.

[22] *See* Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980).

[23] Indeed, FTC recently survived a motion dismiss in a suit against Facebook under a Sherman Act, Section 2 claim. FTC v. Facebook, Inc., No. 20-3590 (JEB), 2022 U.S. Dist. LEXIS 5415 at *11 (D.D.C. Jan. 11, 2022) (citing United States v. Microsoft, Corp.253 F.3d 34, 58 (D.C. Cir. 2001)).

plaintiff to circumvent the fact-specific inquiry into market impacts and succeed by merely showing the defendant engaged in the proscribed conduct.[24] Over time, this category has dwindled, and now courts typically will condemn only naked agreements among horizontal competitors to fix prices, reduce output, or divide markets as *per se* illegal.[25] Significantly, there are *no* unilateral practices that fall into this *per se* category—indeed, it is well established that the "mere possession of monopoly power, and concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."[26]

The existence of a rule prohibiting conduct does not alleviate the FTC burden of enforcement, but like a *per se* rule in antitrust, it would "narrow the inquiry" from a full accounting of the competitive impact of a practice to merely determining whether the defendant has engaged in the suspect conduct.[27] As such, the effect of the rule Petitioners seek would be effectively to place TA into the category of *per se* illegal conduct. Yet there simply is no basis to conclude that TA "always or almost always tend[s] to restrict competition and decrease output."[28] To the contrary, TA plays a key role in facilitating consumers' free access to myriad online content. Further, TA provides advertisers with a tool to more efficiently reach consumers who are likely to be interested in what they are selling—such enhanced consumer information spurs competition in product markets to consumers' benefit.[29]

What's more, recent empirical work examining the relationship between data collection and market concentration for Android apps and websites questions the wisdom of the FTC adopting an irrebuttable presumption that the collection and use of consumer data to serve ads is

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[24] Ohio v. American Express, 138 S.Ct. 2274, 2283-84 (2018) (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)).
[25] *Id.*
[26] Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
[27] S*ee* Nat'l Petroleum Refiners Ass'n, 482 F.2d at 674-75.
[28] *See* Amex, 138 S.Ct. at 2283-84.
[29] *See*, *e.g.*, C. Robert Clark, *Advertising, Restrictions and Competition in the Children's Breakfast Cereal Industry*, 50 J.L. & ECON. 757 (2007); Pauline M. Ippolito & Alan Mathios, *Information, Advertising and Health Choices: A Study of the Cereal* Market, 21 RAND J. ECON. 459 (1990). Note that what the Petition characterizes as harm to publishers—the ability of advertisers to reach consumers interested in their products across the open web more cheaply rather than only on one publisher's site—is actually an example of increased efficiency in providing consumers with information that flows from breaking a publisher's monopoly over advertiser access to certain consumers. *See* Accountable Tech, Docket No. FTC-2021-0070, *Petition for Rulemaking to Prohibit Surveillance Advertising* at 37 (Dec. 3, 2021).

an unfair method of competition.[30] Using a variety of methodologies, the authors find no statistical relationship between objective measurements of app and website privacy practices and various concentration metrics.

These empirical results are consistent with firms' incentives regarding privacy. For example, the "privacy paradox" suggests that actual consumer demand for privacy falls below what their stated preferences would predict.[31] Although the cause of this "paradox" is unclear—it could result from rationale decision-making, asymmetric information, behavioral biases, or some combination of all three—the upshot is that if only a small proportion of consumers make marketplace decisions based on privacy, most firms are unlikely to see privacy as a particularly important dimension of competition.[32]

Further undermining the link between market power and the use of consumer data is the fact that although a consumer may experience a reduction in privacy analogous to an increase in price or reduction in quality by consumer, a reduction in privacy is not experienced in the same way by the firm: consumer data is an input that results in increased profits only after the firm takes some action that is likely to provide net benefits to at least some consumers in the form of more and better content at lower prices. The net result on welfare is complex as it depends on the distribution of preferences for privacy, the underlying product, and the correlation between

[30] *See* Cooper & Yun, *supra* note 6.

[31] *See, e.g.*, Alessandro Acquisti, Curtis Taylor, & Liad Wagman, *The Economics of Privacy*, 54 J. ECON. LITERATURE 442, 476 (2016) ("If anything, the adoption of privacy-enhancing technologies (for instance, Tor, an application for browsing the Internet anonymously) lags vastly behind the adoption of sharing technologies (for instance, online social networks such as Facebook"); Garrett A. Johnson, Scott K. Shriver, & Shaoyin Du, *Consumer Privacy Choice in Online Advertising: Who Opts Out and at What Cost to Industry?,* 39 MARKETING SCI. 33, 40 (2020) (finding that 0.23 percent of display advertising impressions are served to consumers who have opted out of online tracking through the AdChoices program); Susan Athey, Christian Catalini, & Catherine Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, NBER Working Paper No. 23488, June 2017, https://www.nber.org/system/files/working_papers/w23488/w23488.pdf (finding that students were willing to disclose personal contact information for a small incentive, that is, free pizza). Experiments have attempted to determine if privacy education will reduce the gap between revealed preference and stated preference and have found little impact. *See* Lior Strahilevitz & Matthew B. Kugler, *Is Privacy Policy Language Irrelevant to Consumers?,* 45 J. LEGAL STUD. S69 (2016); Omri Ben-Shahar & Adam S. Chilton, *Simplification of Privacy Disclosures: An Experimental Test*, 45 J. LEG. STUD. S41 (2016).

[32] Cooper & Yun, *supra* note 6, at 19; Alex Marthews & Catherine Tucker, *Privacy Policy and Competition*, ECON. STUD. BROOKINGS at 8 (Dec. 2019) ("There is little evidence that competition itself appears to enhance privacy.").

the two.[33] Finally, when consumers have full information about their data practices, even monopolies have incentives take only welfare-enhancing actions. This result flows from the fact that, with full information, any increased profit from data collection is exactly offset by reductions in demand that flow from privacy harms.[34]

Of course, this full information result may not hold in many circumstances, leading to suboptimal levels of privacy protection, but the important point is that the root of consumer harm is asymmetric information, not market power. Thus, while consumer protection actions that improve information about privacy practices (by holding firms to their privacy promises or requiring certain disclosures) may help foster competition over privacy (by making it easier for consumers to understand firms' data practices and thus easier for firms credibly to commit to a level of privacy), the converse is not true—antitrust actions that reduce market power are not likely to lead to higher levels of privacy.[35]

It is also notable that much of the underlying conduct that the Petition complains of involves alleged *deception about the use* of TA, not the use of TA itself.[36] Yet harmful deception is already addressable through both consumer protection and competition laws. For example, both Facebook and Google are under FTC orders for alleged deception surrounding their privacy practices, and both have agreed to pay substantial monetary penalties to settle

[33] If some consumers find reductions in privacy accompanied by concomitant product quality increases on net beneficial, changes in privacy lead to shifts and rotations in demand. The direction and size of the rotation (clockwise or counterclockwise), and hence the net impact on welfare, depends on the correlation of the distributions of preferences for privacy and quality improvements. *See* Daniel P. O'Brien & Douglas Smith, *Privacy in Online Markets: A Welfare Analysis of Demand Rotations*, (Fed. Trade Comm. Bureau of Economics Working Paper No. 323, 2014), https://www.ftc.gov/system/files/documents/reports/privacy-online-markets-welfare-analysis-demand-rotations/wp323.pdf.

[34] *See* Joseph Farrell, *Can Privacy Be Just Another Good?*, 10 J. TELECOM & HIGH TECH L. 251 (2012). Farrell illustrates this point in a simple model of a firm with market power choosing the profit maximizing level of privacy. He considers a setting in which the firm charges a positive price for its product, with privacy being one dimension of quality that impacts consumer value of the product. He models the revenue stream from increased access to consumer information as an equivalent reduction in marginal cost. The net impact on welfare depends on whether the increased data revenue streams cause marginal cost to fall more or less than the value that consumers place on the product falls (due to reduced privacy).

[35] Indeed, the point that asymmetric information can prevent an otherwise competitive market from functioning is the key insight from Akerlof's seminal paper. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

[36] *See, e.g.*, Petition at 21-30.

charges that they violated those orders.[37] Further, to the extent that deception has an anticompetitive effect, it is also actionable under the antitrust laws. For example, a district court recently denied Facebook's motion to dismiss a monopolization case that is based in large part on the same allegedly deceptive conduct that the Petition cites as a basis to adopt a rule to ban TA.[38] A rule banning TA because of a concern that large platforms have lied about how they use TA would be akin to banning the sale of fruit juice because firms have lied about the health benefits of drinking it.[39] If one is concerned about deception, the remedy should ban the lie, not the product.

Ultimately, Petitioners hope to empower the Commission to accomplish via rulemaking what it cannot accomplish in court—it asks the Commission to place the use of TA into the narrow category of conduct that the antitrust laws condemn *per se.* Indeed, if the FTC were to adopt Petitioners' rule, Section 5 would treat an arts-and-crafts site with 1,000 viewers the same as it would competing drug makers who conspired to raise the price of a cancer treatment. When cast in this light, the absurdity of what the Petition asks becomes evident. To the extent that TA raises privacy concerns that are not adequately addressed by the market, the root cause is asymmetric information, not the abuse of market power. As such, a proper remedy lies in the Commission's power to prohibit unfair acts and practices, not unfair methods of competition.

III. A RULE PROHIBITING TAILORED ADVERTISING IS NOT A "REASONABLE INTERPRETATION" OF THE FTC'S UMC POWER

That a *per se* condemnation of TA is so inconsistent with Sherman Act precedents also casts doubt on the likelihood that such an interpretation of the Commission's UMC power would withstand judicial scrutiny. As a threshold matter, it is unclear whether the vagueness of the

[37] In re Google Inc., F.T.C. File No. 102-3136 (Oct. 13, 2011) (administrative cease and desist order); In re Facebook, Inc., F.T.C. File No. 092-3184 (Jul. 27, 2012)) (administrative cease and desist order); United States v. Google, Inc., No. CV12-04177 SI, Order Approving Stipulated Order for Permanent Injunction and Civil Penalty Judgment (N.D. Cal. Nov. 16, 2012) ($22.5 million civil penalty); United States v. Facebook, Inc., Case No. 19-cv-2194, Complaint for Civil Penalties, Injunction, and Other Relief (July 24, 2019) ($5 billion civil penalty).
[38] FTC v. Facebook, Inc., No. 20-3590 (JEB), 2022 U.S. Dist. LEXIS 5415 (D.D.C. Jan. 11, 2022). Notably, the court adopted a strict test for allowing deception to form the basis of an antitrust claim, again suggesting that *per se* condemnation of TA would sweep far too broadly.
[39] *See* POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015).

term "unfair" should be viewed as an ambiguity—in the sense that the term is susceptible to multiple meanings—or evidence that Congress has delegated the function of creating a federal common law—to either the courts or the FTC.[40] The courts faced with this issue have appeared to answer this question by reserving to themselves the right to define unfair methods of competition. Thus, despite a rich legislative history suggesting that Congress intended an expert Commission to use Section 5 as a vehicle to establish new competition norms, courts may enjoy a veto right over any FTC definition of unfairness—not merely an unreasonable one.[41]

A trio of pre-*Chevron* cases appear to adopt this position. For example, in *Official Airline Guides*, for example, the court agreed to give a nod to the FTC's view of what was unfair, but clearly reserved to itself the power to make the ultimate decision, explaining, "The final word is left to the courts."[42] The Second and Ninth Circuits in *Ethyl* and *Boise Cascade* reached the same conclusion.[43] There have been no post-*Chevron* cases that directly address a proposed FTC interpretation of its UMC authority, and only one post-*Chevron* case —*FTC v. Indiana Federation of Dentists*[44]—even considers the extent to which courts owe the Commission deference in a UMC case.[45] In laying out the correct standard of review, the

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[40] *See* Daniel Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1190 (2008). The question of deference to FTC interpretation raises what Cass Sunstein has referred to as the "Chevron Step Zero" problem. That is, whether *Chevron* applies to an agency interpretation is ultimately a question of congressional delegation; the reviewing court must first determine whether Congress intended to delegate the duty to interpret the statute to the agency in the first place. The answer to this "step zero" question may hinge on whether the interpretation decides an important policy issue or merely concerns a minor ministerial function. *See* Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). Some have argued that *Chevron* does apply to the FTC's determination of its Section 5 UMC authority. *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020); Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209 (2015); Royce Zeisler, *Note: Chevron Deference and the FTC: How and Why the FTC Should Use Chevron To Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266 (2014).

[41] *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

[42] Official Airline Guides v. FTC, 630 F.2d 920, 927 (2d Cir. 1980) (internal quotations omitted).

[43] E.I. DuPont de Nemours & Co. v. FTC (Ethyl), 729 F.2d 128, 136 (2d Cir. 1984) (The FTC's interpretation of Section 5 "is entitled to great weight, and its power to declare trade practice unfair is broad, it is the function of the court ultimately to determine the scope of the statute upon which the Commission's jurisdiction depends."); FTC v. Boise Cascade, 637 F.2d 573, 581 (9th Cir. 1980) ("The policies calling for deference to the Commission are, of course, in tension with the acknowledged responsibility of the courts to interpret Section 5.").

[44] 476 U.S. 447 (1986).

[45] Since *Chevron*, the FTC has received deference in consumer protection rulemaking. *See* Mainstream Marketing Servs., Inc. v. FTC, 358 F.3d 1228, 1250 (10th Cir. 2004). FTC v. Abbott Labs, 853 F. Supp. 526 (D.D.C. 1994), is the only post-*Chevron* decision to consider the FTC's UMC authority. In this case, the Commission proceeded as a plaintiff under its Section 13(b) power to initiate Section 5 actions in federal district court. Because it was not an appeal from a Commission determination that Abbott's conduct was unfair (the Commission needs only "reason to

Supreme Court allowed that "courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair'" but explained that "the legal issues presented—that is, the identification of governing legal standards and their application to the fact found—are . . . for the courts to resolve."[46]

Even assuming that Congress intended the FTC, and not the courts, to have the power to define what constitutes an unfair method of competition, under *Chevron*, the courts defer only to an agency's "reasonable" interpretation of an ambiguity in a statute it administers.[47] Although some courts have paid lip service to the notion that Section 5's prohibition of "unfair methods of competition" is somehow broader than conduct the Sherman Act proscribes,[48] what practices actually comprise this set remains a mystery.[49] The FTC has not litigated a case alleging a UMC violation that was not also a Sherman Act violation since 1992, and the last three appellate courts to weigh in on the issue have rejected the FTC's attempts to stretch the reach of Section 5 beyond the Sherman Act, each of which involved the unilateral adoption of certain pricing and information sharing practices that were alleged to facilitate tacit collusion.[50] It seems doubtful that the FTC, having failed to convince courts to adopt even incremental expansions[51] of its

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believe" that a defendant violated the FTC Act to approve a complaint), the court had no occasion to even consider the issues of deference. Rather, it merely tested the evidence against the unfairness standard announced by the Second Circuit in *Ethyl*, and the court found it lacking.

[46] *Indiana Fed'n* Dentists, 476 U.S. at 455. The Commission had found that the practice in question was an unfair method of competition solely because it had violated Section 1 of the Sherman Act; however, the Supreme Court addressed only the Sherman Act question. Thus, it did not have the occasion to consider just how much deference it would accord a Commission decision to condemn a practice as an unfair method of competition.

[47] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[48] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

[49] *See* James C. Cooper, *Perils of Excessive Discretion: The Elusive Meaning of Unfairness Under the FTC Act*, 3 J. ANTITRUST ENF. 87 (2015).

[50] *See* FTC v. Boise Cascade, 637 F.2d 573, 581 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d. Cir. 1980); E.I. DuPont de Nemours & Co. v. FTC (Ethyl), 729 F.2d 128 (2d Cir. 1984). The FTC's last judicially decided Section 5 action was in 1992. FTC v. Abbott Labs, 853 F. Supp. 526 (D.D.C. 1992). *See also* In re McWane, Inc. and Star Pipe Prods., Inc., Dkt No. 9351 (Jan 4, 2012) (The ALJ ruled against the complaint counsel at the trial level on an invitation to collude count, and this count was not appealed to the full Commission. Since 1992, the FTC has continued to define Section 5's reach internally, through settlements primarily involve two classes of conduct: so-called "invitations to collude" and breaches of agreements to disclose or to license standard-essential patents (SEPs). In addition to these lines of cases, the FTC has used Section 5 in two additional matters: the "CD MAP" cases, involving the parallel adoption by major record companies of "minimum advertised price" restrictions; and the suit against Intel for engaging in exclusionary conduct, including deception and certain pricing practices. *See* Cooper, *supra* note 49, at 98-99.

[51] *See* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 663 (2018) ("When the Commission has brought standalone Section 5 actions in the intervening years, these cases have represented only marginal extensions of existing Sherman Act precedent.").

UMC power, can now argue that a reasonable interpretation of "unfair method of competition" includes a blanket ban on a unilateral practice utilized by nearly every online content provider.

IV. CONSUMERS AND PUBLISHERS BENEFIT FROM TAILORED ADVERTISING

On the merits, the remedy proposed in the Petition—a complete ban of targeted advertising—is likely to harm rather than help consumers. Even if specific acts of Facebook, Google, or Amazon are found to be anticompetitive or harmful, the general practice of collecting data about consumers in exchange for free content or services, and then using or selling the data for future TA, is not inherently harmful, and may actually mitigate rather than causing some of the problems that the Petition ascribes to it.

The Petition claims that targeted advertising "effectively increases prices" for end users while simultaneously reducing revenues for content creators and service providers. These claims, however, are not substantiated. To the contrary, content creators and service providers that rely on advertising revenues rather than subscription fees would be significantly harmed by a ban on targeted advertising. With the exception of one study, the empirical research shows that websites would lose between 38-66% of their advertising revenues if behavioral advertising is banned.[52] The vast majority of publishers would lose revenue.[53] In Europe, when privacy laws under the Data Protection Directive (the predecessor to the GDPR) were first implemented, the consequent restriction in behavioral advertising caused all advertising revenue to decrease.[54] The decrease in revenue was particularly large for general interest news websites since the

[52] Avi Goldfarb & Catherine E. Tucker, *Privacy Regulation and Online Advertising,* 57 MGMT. SCI. 57 (2011) (65% reduction in revenue); Howard Beales & Jeffrey A. Eisenach, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2421405 (66% reduction); Garrett A. Johnson et al., *Consumer Privacy Choice in Online Advertising: Who Opts Out and at What Cost to Industry?,* 39 MARKETING SCI. 33 (52% reduction); Deepak Ravichandran & Nitish Korula, *Effect of Disabling Third-Party Cookies on Publisher Revenue,* Google (2019) (64% reduction); *The Value of Personalized Ads to a Thriving App Ecosystem,* Facebook (2020) (50% reduction); *Programmatic Insights 2019,* Bidswitch (2020); *Apple's IDFA Opt-In,* PubMatic (2021); Koen Pauwels, *What's a Cookie Worth Anyway?,* Smarter Marketing Gets Better Results (2021), https://analyticdashboards.wordpress.com/2021/06/28/whats-a-cookie-worth-anyway/. The only study that found a lower figure was based on a single high value publisher and assumed that advertisers would still have access to a user's geolocation and device information. Veronica Marotta et al., *Online Tracking and Publishers' Revenues: An Empirical Analysis* (2019), https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf. S*ee also* Avi Goldfarb & Catherine Tucker, *Digital Economics,* NBER Working Paper No. 23684 at 30-32 (2017) for a review of the theoretical and empirical literature on targeted advertising models.

[53] *See* Pauwels, *supra* note 52.

[54] *See* Goldfarb & Tucker, *supra* note 52.

content did not allow for effective targeting based on the context of the content.[55] Thus, in contrast to the claims of the Petition, the Federal Trade Commission should have serious concerns that a ban on targeted advertising will have the effect of harming news and general interest content creators.

The costs of a ban on targeted advertising to publishers will harm consumers, too, as websites and web services will make up for lost revenues by either producing less or lower quality content or by charging a subscription fee.[56] Yet Americans prefer advertising-supported free business models to higher priced models.[57] Meanwhile, neither the Petition nor the large literature on the "privacy paradox" have demonstrated that Americans are harmed by the practices; although, the Petition claims that few consumers would allow data tracking if they had the choice, in fact many studies show that Americans generally *do* allow tracking when given a choice, even when they have the option to opt-out, and when that option is made salient.[58] By contrast, consumers respond, behaviorally, to advertising *formats* that are obnoxious such as ad banners that are too large by navigating away from the websites or ads.[59]

Thus, it is not at all clear that collecting data on consumers in exchange for content and services is any more "harmful," from the subjective preferences of the consumers, than charging

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[55] *Id*.
[56] Benjamin Shiller et al., *The Effect of Ad Blocking on Website Traffic and Quality,* 49 RAND J. ECON. 43 (2018) (showing that ad-blocking software, which decreases the effectiveness of advertising in ways that would have a similar revenue impact to a ban on targeted advertising, caused the quality of ad-supported websites to decrease); Garrett Johnson, *The Impact of Privacy Policy on the Auction Market for Online Display Advertising* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333193.
[57] *See e.g.*, Sarah Shevenock, *Bulk of U.S. Consumers Prefer to Sith Through Ads on Streamers—if It Saves Them Money,* Morning Consult (June 1, 2021), https://morningconsult.com/2021/06/01/ad-supported-streaming-services/.
[58] Lior J. Strahilevitz & Matthew B. Kugler, *Is Privacy Policy Language Irrelevant to Consumers?*, 45 J. LEG. STUD. 569 (2016); Susan Athey et al., *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, NBER Working Paper No. 23488 (2017); Ivano Bongiovanni et al., *The Privacy Paradox: We Claim We Care About Our Data, So Why Don't Our Actions Match?,* THE CONVERSATION (July 29, 2020), https://theconversation.com/the-privacy-paradox-we-claim-we-care-about-our-data-so-why-dont-our-actions-match-143354. Under GDPR, fewer than 10% of Europeans opt out of cookie tracking. *See Quantcast Choice Powers One Billion Consumer Consent Choices in Two Months Since GDPR,* Quantcast (July 30, 2018), https://www.quantcast.com/press-release/quantcast-choice-powers-one-billion-consumer-consent-choices/; CMA Report Appendix F (2020), https://assets.publishing.service.gov.uk/media/5efb1d48d3bf7f7695a34ade/Appendix_F_-_role_of_data_in_digital_advertising_v.4.pdf. *See also* Alessandro Acquisti, *Privacy and Human Behavior in the Age of Information*, 347 SCIENCE 509 (2015) (providing a summary of related scholarship).
[59] *See* Avi Goldfarb & Catherine Tucker, *Online Display Advertising: Targeting and Obtrusiveness,* 57 MGMT. SCI. 458 (2011).

a price. The Petition uses loaded terms like "surveillance" and "extraction" to evoke a sense of threat, but a dispassionate analysis of a typical consumer's experience online with and without tailored advertising could very well find that the consumer will pay more money and have access to less content if TA were banned. Although there may be some benefits to giving consumers more information and agency over the terms of the exchange of data for content or services,[60] a ban would reduce agency and reduce the quality or quantity of free or reduced-price offerings.

Finally, it is not clear how the FTC would be able to distinguish "surveillance advertising" from contextual display advertising, which the Petition argues should be left unimpeded. When Facebook is placing an advertisement in its newsfeed, can it permit advertisers to use the "context" of the newsfeed's content? If so, a ban on tailored advertising will strengthen, rather than weaken, Facebook's position in the market for display advertising. More generally, the lower cost of tracking customers across websites and transactions is one of the pillars of the digital economy that causes greater, rather than less, competition between media companies to keep consumers satisfied.[61]

V. FIRST AMENDMENT LIMITATIONS

The Petition makes no mention of how a complete ban on tailored advertising could survive First Amendment scrutiny even though all of the acts covered by the ban (collecting personal data, and then using it for tailored marketing) are forms of expression covered by free speech precedent. In *Sorrell v. IMS Health Inc.*,[62] the Supreme Court struck down a state law that prohibited the use of a doctor's prescribing data for targeted advertising purposes without the doctor's consent. That case applied strict scrutiny because the law at issue imposed speaker-based restrictions on the use of personal data to tailor the advertising of only one industry (drug manufacturers). A total ban on TA might trigger only intermediate scrutiny since the prohibition

[60] *See* Catherine Tucker, *The Economics of Advertising and Privacy,* 30 INT'L J. INDUSTRIAL ORG. 326 (2012); Laura Brandimarte et al., *Misplaced Confidences: Privacy and the Control Paradox,* 4 SOCIAL PSYCH. & PERSONALITY SCI. 340 (2012).
[61] *See, e.g.*, Susan Athey et al., *The Impact of the Internet on Advertising Markets for News Media,* NBER Paper No. 19419 (2013).
[62] 564 U.S. 552 (2011).

would apply to all platforms and advertisers, regardless of content.[63] But the ban would fail even the intermediate scrutiny test, which requires that the law further a substantial government interest and the restriction is well-tailored to the interest.[64] First, it would be hard to justify a ban given the paucity of evidence that the practice significantly harms consumers. Indeed, the ban would have such a negative impact on publishers that consumers are likely to be disserved by the prohibition. Moreover, the wide breadth of the ban (all targeted advertising across all platforms and venues) would very likely fail a tailoring analysis, since opt-out systems would permit an ad-supported business model to continue serving consumers who are price-sensitive and privacy-insensitive.

CONCLUSION

Accountable Tech's Petition is flawed on both legal and policy grounds. It is doubtful that the FTC has the authority to issue a rule under its UMC authority, and, in any event, a rule banning tailored advertising would harm, not help, consumers and violate their First Amendment protections. The Federal Trade Commission should not attempt to use its rulemaking authority to undermine one of the most successful and valuable business models of the Internet era.

[63] Turner Broadcasting System, Inc. V. FCC, 512 U.S. 622, 643, 662 (1994) (describing content-neutrality and defining the test).
[64] *Id*. at 662-68.