Before the

FEDERAL TRADE COMMISSION

Washington, DC 20580

Re: Children's Online Privacy Protection Rule, Notice of Proposed Rulemaking

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Comments of

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

and

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This comment addresses elements of the Federal Trade Commission's (FTC) notice of proposed rulemaking (NPRM) with respect to the Children's Online Privacy Protection Act (COPPA) rule.[1]

In COPPA, Congress instructed the FTC to create a system aimed at protecting the privacy of children. It did not accord the FTC free rein to define privacy and then pursue that interest on behalf of American children through regulation.[2] Rather, it specified a system for giving parents notice and an opportunity to consent to collection of personal information from children. This is privacy in the "control" sense—control of personal information about oneself (here, one's kids), which is arguably the strongest sense of the word "privacy." Other senses of "privacy," including fairness, security, peace and quiet, and freedom from commodification,[3] are often protected through control, but Congress sought to allocate control to parents, who would make decisions based on the interests they prioritize for their families. To the extent the COPPA rule and the proposed amendment pursue privacy values beyond control, they run into trouble. The policy merits of the rule weaken, the statutory support for the rule grows frail, and the First Amendment concerns raised by the rule increase.

The process for this review and possible amendment of the COPPA rule began in 2019 with a workshop and an open comment period. In January 2024, the FTC published an NPRM to amend the COPPA rule.[4] While the NPRM proposes several sensible changes—including allowing verifiable parental consent (VPC) via text and modifications that would make it easier for schools to consent on students' behalf to use educational technology—this comment focuses on those parts of the proposal that are most likely to impact operators' incentives to provide online services for children.[5] In particular, this comment is addressed to the following proposed modifications of the COPPA rule:

- **Engagement Limitations**: Proposed rules that would prevent the collection and use of personal information, including persistent identifiers "to encourage or prompt use of a website or online service" or "to optimize user attention or maximize user engagement with the website or online service" without VPC.

- **Data Minimization:** Proposed language that would create a *de facto* data minimization requirement by modifying the definition of "activity" in Section 312.7 (to which data minimization requirements already apply) so that it encompasses "any activity offered by a website or online service, whether that activity is a subset or component of the website or online service or *is the entirety of the website or online service*." This proposal would create

[1] 89 Fed. Reg 2034 (January 11, 2024).
[2] *Cf*. Health Insurance Portability and Accountability Act. Pub. L. No. 104-191, § 264, 110 Stat. 1936. (instructing DHHS to provide privacy recommendations to Congress then implement them if Congress failed to act).
[3] *See* Jim Harper, WHAT DO PEOPLE MEAN BY "PRIVACY," AND HOW DO THEY PRIORITIZE AMONG PRIVACY VALUES?: PRELIMINARY RESULTS, American Enterprise Institute report (Mar. 18, 2022).
[4] 89 Fed. Reg 2034 (January 11, 2024).
[5] We include website operators and content providers, such as YouTube creators, in the definition of "operators," and include websites and other online platforms and apps that provide services (e.g., social media) and content (e.g.,YouTube) throughout this comment.

an "outright prohibition" on collecting more information than is "reasonably necessary" that cannot be modified or waived by verifiable parental VPC.[6]

- **Duplicative Consent Requirements:** Requiring separate notice and VPC each time information is shared with third parties, even after initial notice and VPC.[7]

Together, these proposed modifications to the COPPA rule are likely to reduce the quantity and quality of online services for children by directly chilling operators' incentives to improve their products and by reducing revenue streams needed to produce online services.

First, and most directly, modifications that prevent operators from using information collected from their users to "encourage" engagement or attention are likely to chill operators from improving, or even providing, children's online services. This restriction is vague, and the civil penalties accompanying a COPPA violation can be substantial—over $51,000 per violation. Rationally, an online operator will shy away from using information about or provided by its users to improve their online services if the Commission could view this action as "encouraging use" of such service. For example, under the proposed amendments, a math tutor app may not be able to collect information about a child's favorite animal that would be associated with their persistent identifier to create a customized character that would return when the child logs on and take the child through the lessons in an entertaining and familiar way. De facto data minimization standards and heightened consent requirements for sharing with third-party analytic partners will further reduce the ability of operators to employ information collected from their users to improve the quality of their online services.

Second, all of these provisions will work indirectly to reduce revenues online operators earn, which is likely to further reduce the quality and quantity of online services. First, the reduction in content quality from the prohibitions on the use of information to drive engagement will reduce user interaction (by design) and thus reduce revenue—whether through impressions served, subscription fees, or in-app purchases. Further, the proposed de facto data minimization requirements, in tandem with heightened VPC requirements on the use of persistent identifiers for analytics and advertising performed by third parties, will also likely reduce the ability of operators to generate revenue from their online services. There is a growing empirical literature showing a causal relationship between the reduced ability to monetize content and a reduction in the quality and quantity of online services, suggesting the proposed amendments to the COPPA rule are likely to reduce the quality and number of online services available to children.

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[6] 89 Fed. Reg. at 2059-60 (emphasis added). 16 CFR § 312.7 prohibits operators from "conditioning a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information that is reasonably necessary to participate in such activity." We note that the Commission has not included any proposed change to Section 312.7 or the definition of "activity" in Section 312.2 language in its proposed amendments to the COPPA rule, see 89 Fed. Reg. at 2071-76. Nonetheless, the Commission provided proposed language in the NPRM.

[7] 89 Fed. Reg. at 2051. 16 CFR § 312.5(a)(2) requires an operator to "give the parent the option to consent to the collection and use of the child's personal information without consent to the disclosure of his or her personal information to third parties." The proposal is unclear as to how such VPC would work in practice, and in particular, whether it would be required each time an operator shared information with a third party.

As a first-order concern, the reduction in the quantity or quality of any product or service lowers consumer surplus. Although the FTC may have concerns about the negative impact on children from overuse of online services, and there is a vibrant debate in the scientific community about the extent to which there is a causal relationship between screen time and reductions in children's well-being,[8] the FTC cannot merely assume that any reduction in screen time improves children's welfare. Rather, for a regulatory intervention of this scale, it must conduct a rigorous cost-benefit analysis that compares the reduction in consumer surplus from losses in online services against any benefits in mental and physical health to children. As it stands, the NPRM simply fails on this count. [9]

In addition to the FTC's failure to properly consider the welfare consequences of reduced quantity and quality of online children's services, these proposed modifications are legally infirm.

First, the FTC's direct restriction on the ability to employ user information to gain users' attention or engagement appears to be out of a concern that children are "overusing online services."[10] While there may be legitimate reasons to be concerned about children spending too much time on screens, Congress did not design COPPA to address this concern but left that in the hands of parents. Modifications to the COPPA rule adopted to address these concerns go beyond congressional authorization as found in the COPPA statute.

Second, restrictions that reduce children's ability to receive online content and to communicate online violate the First Amendment unless they are narrowly tailored to address an important government interest. These COPPA rule amendments would have to satisfy intermediate scrutiny, which applies to content-neutral regulations of speech. Absent validating research of the kind called for above, the FTC will have serious difficulty convincing a court that encouraging "engagement" (i.e., more speech) is categorically harmful, and the proposed rule modifications that would interfere with engagement will be struck down for failure to identify a government interest. All of the proposed rule changes will also fail the tailoring analysis under intermediate scrutiny.

I. REDUCTION IN THE QUANTITY AND QUALITY OF CHILDREN'S ONLINE SERVICES

Several parts of the NPRM are likely to reduce the quantity and quality of online services for children, both directly and indirectly.

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[8] *See*, *e.g.,* J. Haidt, Z.Rausch, & J. Twenge, *Social Media and Mental Health: A Collaborative Review* (ongoing), https://docs.google.com/document/d/1w-HOfseF2wF9YIpXwUUtP65-olnkPyWcgF5BiAtBEy0/edit.

[9] Other than obliquely mentioning "recent media reports indicating that children may be overusing online services due to engagement-enhancing techniques," the NPRM does not engage with the literature on the impact of screen time on children's well-being. Further, the NPRM has no mention of the extant economic literature examining the relationship between privacy regulations and the quality and quantity of online services. *See* notes 29-32, and accompanying text, *infra*.

[10] 89 Fed. Reg. at 2059, n.300.

A. Direct Impacts: Limits on the Ability to Use Information to Improve Online Services

Adoption of modifications in the NPRM would directly reduce incentives to improve online services in three ways.

1. Modifying the Definition of "Support for the Internal Operations"

First, the NPRM would modify paragraph (2) of Section 312.2's definition of "support for the internal operations" to prohibit operators from "using or disclosing persistent identifiers to optimize user attention or maximize user engagement with the website or online service, including by sending notifications to prompt the child to engage with the site or service, without verifiable parental consent."[11]

Currently, the COPPA rule provides an exception to the general rule that operators must obtain VPC before collecting or using personal data when the operator "collects a persistent identifier and no other personal information and such identifier is used for the sole purpose of providing support for internal operations."[12] The rule in turn provides various activities that constitute "support for the internal operations," but it prohibits any information collected for these permitted activities to be "used or disclosed to contact a specific individual, including through behavioral advertising, to amass a profile on a specific individual, or for any other purpose."[13]

The NPRM would add to this list of limitations using or disclosing information "in connection with processes that encourage or prompt use of a website or online service."[14] Thus, under the proposed modification, operators would now be required to obtain VPC even if the operator used only a persistent identifier (linked with no additional information) in a way that was designed to "encourage use," "optimize user attention," or "maximize user engagement." Operators in a competitive environment should be expected to analyze user information to improve an app or website—for example, by seeing how users respond to the app's design, observing which videos are watched after a search, curating personalized recommendation lists,

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[11] *Id*.
[12] 16 CFR § 312.5(c)(7).
[13] 16 CFR § 312.2.
[14] This new provision on would work together with a proposed revisions to Section 312.5(c)(4), which would prohibit "operators from using online contact information to optimize user attention or maximize user engagement with the website or online service, including by sending push notifications, without first obtaining verifiable parental consent."89 Fed. Reg. at 2059. Currently, 16 CFR § 312.5(c)(4) provides an exception for obtaining verifiable parental consent "where the purpose of collecting a child's and a parent's online contact information is to respond directly more than once to the child's specific request, and where such information is not used for any other purpose, disclosed, or combined with any other information collected from the child." The operator does have to provide notice under 16 CFR § 312.4(c)(3), but does not have to obtain VPC to use information in this way. The NPRM would also amend Section 312.4(d) to require operators to "specifically identify the practices for which the operator has collected a persistent identifier and the means the operator uses to comply the definition's use restriction."89 Fed. Reg. at 2045. 16 CFR § 312.4(d) regulates notice required on an operator's "website or online service," and currently requires the operator to supply: contact information (Section 312.4(d)(1)); a description of the information collection practices, including what information is collected, whether the service "enables a child to make personal information publicly available," "how the operator uses such information," and "the operator's disclosure practices."

or providing bespoke features that make the service more attractive. Using data for either of these purposes seems clearly designed to "encourage" use of the app or website by making it better. Indeed, as the Commission explained when issuing the 2013 amendments to the COPPA rule, "Persistent identifiers are also used for a host of functions that have little or nothing to do with contacting a specific individual, and . . . these uses are fundamental to the smooth functioning of the Internet, the quality of the site or service, and the individual user's experience."[15]

Yet under the potentially vast and highly subjective standard proposed by the Commission, taking actions to improve one's service risks being deemed by the Commission to have "encouraged" use or attention. When faced with uncertain liability standards and potentially crippling monetary penalties—each violation of the COPPA rule comes with a civil penalty as high as $51,744—operators rationally will err on the side of caution to minimize the expected cost of their conduct.[16] In this manner, the NPRM would cause operators to forgo beneficial uses of data, thus degrading the quality of their online services.

2. Data Minimization

Currently, Section 312.7 prohibits operators from "conditioning a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information that is reasonably necessary to participate in such activity." [17] The Commission proposes amending the definition of "activity" in Section 312.7 to provide that an "activity" is "any activity offered by a website or online service, whether that activity is a subset or component of the website or online service or is the entirety of the website or online service."[18] By bringing the entire website or online service into the definition of "activity," the Commission has created a de facto data minimization requirement that would prohibit an operator from collecting information that the Commission believes is not "necessary" to provide the operator's service.[19] This modification would work in tandem with proposed modifications to Section 312.10, which would clarify that "operators may retain personal information for only as long as is reasonably necessary for the specific business purpose for which it was collected."[20]

As drafted, the potential interaction of revised Section 312.7 (and Section 312.10) with other sections of the rule raises questions as to whether operators could use personal information for interest-based advertising (IBA) or to improve their online services in a way that might "encourage" engagement even if they obtain VPC. First, if the term "activity" is defined to

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[15] 78 Fed. Reg. 3972, 3980 (Jan. 17, 2013).

[16] *See* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards* 2 J.L. ECON. & ORG. 279 (1986); Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271, 276–77 (1984). *See also* James C. Cooper & Bruce H. Kobayashi, *Unreasonable: A Strict Liability Solution to the FTC's Data Security Problem*, 28 MICH. TECH. L. REV. 257 (2022). (showing how uncertain liability can cause firms to take socially excessive care in context of data security).

[17] 16 CFR § 312.7.

[18] 89 Fed. Reg. 2059-60.

[19] *See* 89 Fed. Reg. at 2062 (describing Section 312.7 as a "data minimization requirement").

[20] 89 Fed. Reg. at 2062. 16 CFR § 312.10 provides that an operator "shall retain personal information collected online from a child for only as long as is reasonably necessary to fulfill the purpose for which the information was collected."

include the entire online service, then the revised Section 312.7 would seem to impose a *per se* prohibition on collecting "more personal information" than the Commission deems "reasonably necessary" to provide the online service. As the NPRM explains, this prohibition cannot be removed through VPC:

> The Commission notes that [Section 312.7] serves as an *outright prohibition* on collecting more personal information that is reasonably necessary for a child to participate in a game, offer of a prize, or another activity. Therefore, operators may not collect more information that is reasonably necessary for such participation, *even if the operator obtains consent for the collection of information that goes beyond what is reasonably necessary*.[21]

This prohibition poses a potential conflict with other parts of the COPPA rule.

First, as discussed above, proposed revisions to Section 312.2's definition of "internal operations" would exclude "using or disclosing persistent identifiers to optimize user attention or maximize user engagement with the website or online service, including by sending notifications to prompt the child to engage with the site or service, *without verifiable parental consent*."[22] Thus, it appears that the proposed revision to Section 312.2 contemplates operators being able to obtain VPC for using data beyond internal operations, including to encourage user engagement. Similarly, the proposed revision to Section 312.5(a)(2) is designed to "clarify" that operators must "obtain separate verifiable parental consent for disclosures" to third parties and "may not condition access to the website or online service on such consent."[23] Thus, it clearly contemplates that operators may share data, including persistent identifiers, with third parties for the purpose of engaging in IBA, if they obtain VPC.

Yet Section 312.7 appears to vitiate the role of VPC in these provisions; it would limit data collection to what the FTC deems "reasonably necessary" to provide the service, a limitation that cannot be waived by VPC. Thus, even if a parent could consent to having personal information *used* to increase engagement with a service or *shared* with a third party to serve IBA or other marketing, the proposed amendment to Section 312.7 appears to bar *collection* of that information in the first instance.[24]

For example, even if a children's website had obtained VPC to share a device's persistent identifier with an ad exchange or an ad network for the purpose of IBA (as required under Sections 312.5(a)(2) and Section 312.2's definition of "internal operations"), Section 312.7 and Section 312.10 would appear to bar the third-party ad exchange from collecting this information at all unless the FTC found that serving IBA was "reasonably necessary" to the operation of the website, which it almost surely would not. Similarly, if an educational app obtained VPC to collect and use a child's contact information to send messages about their progress on a lesson

[21] 89 Fed. Reg. at 2060 (emphasis added).
[22] 89 Fed. Reg. at 2045.
[23]. 89 Fed. Reg. at 2051.
[24] Since Section 312.7 deals with collection, not use, a possible exception to this prohibition could be for information that has a dual purpose—one that FTC finds is "reasonably necessary" for the operation of the online service, which would permit collection—and one for IBA or to encourage engagement, which parents could consent to.

(as would be required under 312.4(c)(4)) or persistent identifiers to make recommendations or otherwise tailor the offering based on how quickly they are mastering a subject matter (as would be required under Section 312.4(c)(1)), Sections 312.7 and 312.10 would appear to bar the collection of this information outright unless the FTC found these activities to be "reasonably necessary" for the operation of the app.

In sum, the proposed modifications to Section 312.7, coupled with an interpretation that the data minimization provision cannot be waived with VPC, fundamentally rewrites COPPA by eliminating the role of VPC in allowing the collection and use of children's information. In this manner, the NPRM would substitute the FTC's judgment on what information an online operator should collect as "reasonably necessary" to operate their online service for that of parents. Further, this proposed modification—again, resting on what information the Commission finds to be "reasonably necessary" for a website to operate—is, like the proposed amendments to the definition of "internal operations," vague and likely to chill the collection of user information that would improve the quality of the online service.

3. Heightened Notice and Consent Requirements for Persistent Identifiers

Finally, the NPRM would increase the notice and VPC requirements related to the use of persistent identifiers. First, the NPRM would amend Section 312.5(a)(2) to "clarify" that operators must "obtain separate verifiable parental consent for disclosures" to third parties and "may not condition access to the website or online service on such consent."[25] As a threshold matter, it is unclear when and how often an operator must obtain this separate VPC before sharing covered information. For example, the proposed modification does not clarify whether an operator could obtain a blanket VPC for sharing covered information with third parties at the same time it obtained the original VPC under Section 315.5(c)(1), or whether it would have to get VPC each time before it shared covered information with a third party. Regardless, this heightened notice-and-consent requirement would further increase the cost of collecting or using persistent identifiers—especially if notice is required each time such information is shared—in a way that benefits users, thus also reducing the quality of children's online services.

B. INDIRECT IMPACTS: LIMITATIONS ON MONETIZATION

In addition to directly reducing incentives to use information to improve the quality of online services, the proposed amendments to the COPPA rule are likely to indirectly reduce the quantity and quality of online content directed at children by reducing the ability of operators to monetize their online services.

First, as detailed above in Part A, the proposed amendments to Section 312.7 would appear to prohibit the use of IBA, as IBA relies on the collection and use of persistent identifiers in a way that the FTC is not likely to find "reasonably necessary" to provide the online service. Further, even if Section 312.7 were not to ban IBA altogether, proposed amendments to Section

[25] 89 Fed. Reg. at 2051. 16 CFR § 312.5(a)(2) requires an operator to "give the parent the option to consent to the collection and use of the child's personal information without consent to the disclosure of his or her personal information to third parties."

312.5(a)(2) would make it more difficult for an operator to employ IBA by requiring *additional* VPC to share persistent identifiers with third parties, which is necessary to serve IBA.[26]

The consensus in the empirical literature is that advertisements based on cookies and other identifiers provide approximately two to three times more revenue on average than those based on context alone.[27] Consequently, any reduction in the ability to employ IBA—which is already greatly diminished by having to obtain VPC to collect and use covered information under Section 312.5(a)—will further reduce the amount of advertising-based revenue that an operator can generate.

Second, the reduction in content quality from the prohibitions on the collection and use of information to encourage use, along with the data minimization provisions discussed above in Part A, will reduce traffic. Fewer users and lower levels of engagement from existing users will result in fewer impressions served, fewer subscribers, and fewer in-app purchases, all necessarily leading to lower revenue.

A growing empirical literature finds a causal link between reduced revenue for online platforms due to privacy regulations that restrict information flows and lower levels of output and quality. For example, Johnson et al. and Kircher and Foerderer both study the impact of YouTube's 2019 consent decree with the FTC to resolve COPPA charges, in which YouTube agreed to bar all use of persistent identifiers for made-for-kids programming.[28] Both studies find a reduction in content production and quality.[29] In related work, Kircher and Foerderer study Google's decision to ban the collection of persistent identifiers and the use of IBA for children's apps in the Google Play store.[30] They find that the IBA ban made kids' gaming apps 17 percent less likely than non-impacted game apps to receive feature updates, increased the likelihood of a

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[26] 89 Fed. Reg. at 2051. As explained, when and how operators would obtain this additional VPC is unclear.

[27] *See*, *e.g.*, CMA Report on the Digital Economy, Appendix F, at F31-32, F36 (2020) (70% lower without identifier); Garrett A. Johnson et al., *Consumer Privacy Choice in Online Advertising: Who Opts Out and at what Cost to Industry?*, 36 MARKETING SCI. 33 (2020) (52% lower without identifier); Rene Laub et al., *The Economic Value of User Tracking for Publishers* (2022) (24% lower without identifier), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251233; Ravichandran & Korula, *The Effect of Disabling Third-party Cookies on Publisher Revenue*, Google Tech. Rep. (2019) (52% lower without identifier); Howard J. Beales & Jeffrey A. Eisenach, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content*, Navigant Economics (2014) (66% lower without an identifier); Avi Goldfarb & Catherine Tucker, *Privacy Regulation and Online Advertising*, 57 MGM'T SCI. 57 (2011) (65% lower without identifier). *But see* Veronica Marotta, Vibhanshu Abhishek, & Alessandro Acquisti, *Online Tracking and Publishers' Revenues: An Empirical Analysis* at 6-7, 14-16, 27 (2019) (finding a statistically insignificant 4% reduction in the value of an impression without an identifier), *at* https://weis2017.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf. This premium reflects higher conversion rates—that is, there is a higher probability that a voluntary value-enhancing exchange will occur in response to advertising served on consumer interests rather than on context alone.

[28] Tobias Kircher & Jens Foerderer, *Does Privacy Undermine Content Provision and Consumption? Evidence from Educational YouTube Channels* (Jan. 19, 2024), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4473538. .

[29] Johnson et al. and Kircher & Foerderer both find an 18 percent reduction in video uploads (although Kircher & Foerderer focus only on educational content). Johnson et al. also find that original content fell substantially, and that user ratings fall by 10 percent and views fall by 20 percent, consistent with reduced quality. Kircher & Foerderer find that the loss of niche programming meant that children substituted into lower quality non-niche programming.

[30] Tobias Kircher & Jens Foerderer, *Ban Targeted Advertising? An Empirical Investigation of the Consequences for App Development*, 70 MGM'T SCI. 1070 (2024).

kids' game exiting the Google Play store by 11 percent, and reduced developers' release of new kids' games by 36 percent.[31] Research from Janssen et al., for example, finds that the restrictions on data collection and use in the General Data Protection Regulation (GDRP) have increased exit and reduced entry of Android apps. They estimate that this loss in content has reduced consumer surplus by 32 percent.[32] In another relevant study, albeit one not related to privacy regulation, Shiller et al. find a causal relationship between the intensity of users employing ad-blocking technology and various metrics of website quality, suggesting that reduced ad revenue is the mechanism. [33]

In sum, by making it harder to employ user information to improve the quality of online services and to employ IBA, the NPRM is likely to reduce the revenue available to creators of online services for children. Given the negative relationship between revenue and the quantity and quality of online services, it is likely that the NPRM will lead to fewer and lower-quality online services for children.

C. Welfare Consequences of the Proposed Amendments

As demonstrated above in Parts A and B, the proposed amendments to the COPPA rule are likely to reduce the quantity and quality of online services for children. For normal goods, a reduction in the quantity or quality of any product reduces consumer surplus.[34] For example, Janssen et al. use the variation in the price of apps to estimate that consumer surplus fell by about one-third from the reduction in apps due to the GDPR.[35] Similarly, Brynjolffson, Collins, and Eggers utilize an online choice experiment to estimate the value of certain free online products and find that the median consumer would be willing to accept $1,818 to forgo online videos,

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[31] Id.

[32] Rebecca Janssen et al., *GDPR and the Lost Generation of Innovative Apps*, NBER Working Paper at 2, 14 (May 2022). Also suggesting a positive relationship between data use and content quality, recent research finds that users' ratings of Google Play Store apps are inversely related to their privacy grades. James C. Cooper & John M. Yun, *Privacy & Antitrust: It's Complicated*, 2022 Ill. J.L. Tech & Pol'y 382, 393 (2022). This finding could be due to developers that lack data (and thus have a higher privacy grade) being unable to improve or personalize the experience in the app or due to reduced revenues from an inability to personalize advertising, resulting in less investment in the quality of the app. Other works examining the effect of the GDPR on content have found more mixed results. For example, Lefrere et al. find a small decrease in page views for EU news and media publishers relative to their US counterparts after the GDPR, but they find no statistically measurable impact in other dimensions, such as social media engagement with content or page rank, and suggest that these null results might reflect firms' continuing access to consumer data through GDPR exceptions. V. Lefrere et al., *Does Privacy Regulation Harm Content Providers? A Longitudinal Analysis of the Impact of the GDPR,* at 7, 48 (2022), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4239013; *see also* Miguel Godinho de Matos & Idris Adjerid, *Consumer Consent and Firm Targeting After GDPR: The Case of a Large Telecom Provider*, 68 Mgm't Sci. 3330 (2022) (finding that opt-in for different data types increased after GDPR-compliant consent forms were re-solicited, resulting in increased sales to those who were treated with the GDPR-compliant consent).

[33] Benjamin Shiller et al., *The Effect of Ad Blocking on Website Traffic & Quality*, 49 RAND J. Econ. 43, 51-58 (2018);

[34] A reduction in output results in a movement up a demand curve, reducing surplus. A reduction in quality results in the demand curve shifting in, also reducing surplus. Typically measuring changes in surplus due to changes in (or movements along) demand curves requires price variation. For examples of estimation of demand and consumer surplus, *see*, *e.g.*, Jerry A. Hausman & Gregory K. Leonard, *The Competitive Effects of a New Product Introduction: A Case Study*, 50 J. Indus. Econ. 237 (2002); Aviv Nevo, *Measuring Market Power in the Ready-to-Eat Cereal Industry*, 69 Econometrica 307 (2001).

[35] *See* Janssen et al., *supra* note 32.

social media, messaging, and music for a year.[36] Thus, as a basic economic principle, any reduction in the quantity or quality of a child-directed online services is likely to reduce children's surplus.

At the same time, not all online services directed at children may be normal goods. There is a vibrant debate in the academic literature over the size and strength of causal links between time spent online (and on social media, in particular) and negative impacts on children's mental health.[37] To the extent that there are negative impacts from the use of online services, however, they are likely to vary by the type of service (e.g., an educational app versus social media versus a game) and traits of the specific child (e.g., boys may respond differently than girls do to social media).[38] What is more, there is little information about the substitution patterns of children; it is far from clear that in response to making online services less numerous or attractive, children would substitute activities that are more beneficial (e.g., sports, music, or studying) rather than moving to lower-quality online content or other media, such as television or video games.[39]

The upshot is that even if the FTC has the legal authority under COPPA to diminish child-directed online services in order to reduce their consumption (which is doubtful, as detailed below), it cannot merely assume that any reduction in screen time resulting from the amended COPPA rule improves children's welfare. If the FTC intends to amend the COPPA rule to discourage online engagement due to "concerns about harm" due to children "overusing online services," it must conduct a rigorous cost-benefit analysis that considers the reduction in consumer surplus from losses in online services as well as the nuance and uncertainties that characterize the current state of empirical literature examining the link between how much time children spend online and their well-being. Yet in the NPRM, the FTC fails to engage with any of the relevant empirical literature, let alone provide any analysis of its own. As such, the rule risks being set aside under the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), one of a number of legal infirmities detailed below.[40]

II. STATUTORY IMPEDIMENTS TO THE PROPOSED AMENDMENTS

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[36] Brynjolfsson et al., *Using Massive Online Choice Experiments to Measure Changes in Well-being*, 116 PROCEEDINGS OF THE NAT'L ACADEMY OF SCIENCES 7250 (2019).

[37] Compare Jean M. Twenge et al., *Specification Curve Analysis Shows that Social Media Use is Linked to Poor Mental Health, Especially Among Girls*, 224 ACTA PYSCHOLOGIA 103512 (Apr. 2022) and, Amy Orben & Andrew K. Przybylski, *The Association Between Adolescent Well-being and Digital Technology Use*, 3 NAT. HUMAN BEHAV. 173 (2019). For an ongoing review of the relevant literature *see* J. Haidt, Z.Rausch, & J. Twenge, Social Media and Mental Health: A Collaborative Review (ongoing), https://docs.google.com/document/d/1w-HOfseF2wF9YIpXwUUtP65-olnkPyWcgF5BiAtBEy0/edit..Empirical work on addiction includes Hunt Allcott, Matthew Gentzkow, & Lena Song, *Digital Addiction*, 112 AM. ECON. REV. 2424 (2022).

[38] For example, there is evidence that until a certain point, screen time may be beneficial to mental health, and that this point may vary by activity and gender. *See*, *e.g.*, Andrew K. Przbylski & Netta Weinstein, A Large-Scale Test of the Goldilocks Hypothesis: *Quantifying the Relations Between Digital-Screen Use and the Mental Well-Being of Adolescents*, 28 PSYCHOLOGICAL SCI. 204 (2017).

[39] *See* Guy Aridor, *Market Definition in the Attention Economy: An Experimental Approach* (Oct. 9, 2023), at http://www.guyaridor.net/files/jmp_latest.pdf; Avinash Collis & Felix Eggers, *Effects of Restricting Social Media Usage on Wellbeing and Performance: A Randomized Control Trial Among Students*, 17 PLOS ONE e0272416 (2022).

[40] 5 U. S. C. § 706(2)(A). *See* Motor Vehicle Manufacturers Ass'n v. State Farm, 463 U.S. 29 (1983).

The difficulties with the policies discussed above nest into several plausible and likely statutory impediments.

In the absence of adequate consideration given to the costs and benefits of the rule, the rule is likely to fall on the wrong side of the "arbitrary and capricious" line set out by the APA. The APA provides for judicial review of agency actions.[41] The standard of review is well-known. A court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42] The APA does not invite courts to substitute their judgment for that of agencies, but whether a rule is being established, withdrawn, or changed, it creates a presumption "against changes in current policy that are not justified by the rulemaking record."[43] The Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm* articulated it further:

> The agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, at 285; *Citizens to Preserve Overton Park v. Volpe, supra*, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[44]

The failure to fully examine and digest the relevant research discussed above to evaluate the net impact of the proposed rule changes on children's welfare could well fall afoul of these considerations.

Each of the provisions highlighted in this comment is in varying degrees at odds with the COPPA statute, exposing a finalized rule that is unchanged to legal attack, under the "not in accordance with law" prong of the APA judicial review provision.

A. The Exemption from Coverage for Internal Operations, Poorly Supported by the Statute, May Not Cross into Speech Restriction

For sensible reasons, the present COPPA rule exempts identifiers used "for the sole purpose of providing support for the internal operations" from the VPC requirement. There are

[41] 5 U.S.C. § 704.
[42] 5 U.S.C. § 706(2)(A).
[43] Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 42 (1983) (italics omitted).
[44] *Id*. At 43.

no privacy impacts when an identifier can inform operators about their products and services without affecting their knowledge of any identifiable person. Elements of that exemption, however, crossed a line when created from privacy control—insulating people from having data about them gathered—to speech control—insulating people from receiving certain types of communications. The definition of "support for the internal operations of the Web site or online service" made "behavioral advertising" a mode of targeting communications that would be excluded from acceptable "support" functions. This was a decision about a type of speech being disfavored.

The Commission might have done better to determine that such identifiers, not permitting the physical or online contacting of any individual, do not fall within the definition of "personal information." Such identifiers are generally not "individually identifiable information"—the statutory definition of "personal information"[45]—as they permit only collection of a series of characteristics, such as clicks, content views, and other interactions, that can nowhere else be correlated to an individual. Unless and until they are connected to a more statistically meaningful identifier such as a name, email address, or account number, they should probably not be considered individually identifiable.

That path, at least, would have had statutory support. The exemptions from VPC in the statute that have any similarity to this one are for website security and integrity, liability precautions, responses to the judicial process, and public safety investigations.[46] The statute does not give the FTC open-ended authority to create additional exceptions, and the "internal operations" exemption does not have much similarity to those Congress created. The FTC's reasons may be sensible, but its authority is slim indeed. So the FTC is on very thin ice using this regulation to shape the speech of regulated entities. The weakness of doing so is articulated further in First Amendment terms below.

B. The Statute Does Not Support the Expansion of Data Minimization to Entire Sites and Services

Congress required the FTC to bar operators from conditioning a child's participation in games and similar activities on disclosing more personal information than is reasonably necessary. Were the Commission to move forward with language expanding the meaning of the word "activity" to encompass the entirety of a website or service, that expansion would exceed the authority given by Congress.

The statute prohibits conditioning fairly cabined types of activities: "participation in a game, the offering of a prize, or another activity." The ejusdem generis canon of statutory construction holds that general words following an enumeration apply to things of the same kind or class. So in *Circuit City Stores v. Adams*,[47] for example, the Supreme Court held that a provision of the Federal Arbitration Act referring to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" did not include workers in retail electronics stores, despite the apparent catchall "any other class of

[45] Children's Online Privacy Protection Act, Pub. L. No. 105-277, § 1302(8), 112 Stat. 2681-729.
[46] Children's Online Privacy Protection Act, Pub. L. No. 105-277, § 1303(b)(2)(E), 112 Stat. 2681-729.
[47] 532 U.S. 105 (2001).

workers." The Court wrote, "There would be no need for Congress to use the phrases 'seamen' and 'railroad employees' if those same classes of workers were subsumed within the meaning of the 'engaged in . . . commerce' residual clause."[48] The listed items created a class, which limited the catchall.

Here, the third item listed, "another activity," cannot be used to bring the entirety of sites or services within the ambit of the bar on conditioning participation in unreasonable data collection. The listed activities illustrate the class of activities that can't be so conditioned: those that are particularly attractive or related to enticing elements of a site or service.

The Commission should be chary of expanding the limitation of Section 312.7 for another reason. Aggressive limits pressed by the Commission on what is "reasonably necessary" for participation in activities could make nugatory the notice-and-consent scheme that is the heart of COPPA. The statute does not specifically assign responsibility for determinations of reasonableness to the agency. When parents have been notified of information practices and consented to them, this is strong evidence of what is reasonable to the people with the most acute interest in the well-being of their children. If the Commission uses the authority to police a line very near to its general "unfair and deceptive" authority, there should be little problem. There may be cases in which truly irrelevant information collections exist, snuck into parental notice. But treating Section 312.7 as roving authority to make fine decisions about what is reasonable would be at odds with the statutory scheme, which puts parents in control of deciding for their children what is or is not reasonable.

Had Congress determined to write a broadly applicable data minimization law, it would have had ample knowledge of how to do so. The Organisation for Economic Co-operation and Development produced "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data" in 1980,[49] eight years before the passage of COPPA. Principles articulated in that document regarding collection limitation, data quality, and purpose specification collectively amount to data minimization, though the phrase was adopted later. Many jurisdictions did adopt data minimization laws and policies in subsequent years. Save in narrow respects, the US Congress did not.

C. Duplicative Consent Requirements Are Unsupported by the Statute

The proposal to require an additional consent from parents for sharing with third parties has a weakness similar to those discussed above. It also has no congressional pedigree. "Consent," a common noun, has a plural form, "consents," which Congress undoubtedly knew of at the time the COPPA statute was drafted. Congress did not use the plural. It instructed the agency to require "notice"—singular—of information collection, use, and disclosure. And it instructed the agency to require the obtaining of "consent"—singular—to such information practices.

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[48] *Id*. at 114.

[49] Organisation for Economic Co-operation and Development, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

"Consent" is a legal term of art, and in a contractual or quasi-contractual context like this one, it is a unitary concept. Consent can only be given by one who is sufficiently informed and practicing decision-making agency. (Consent is vitiated when one is under duress, is under undue influence, or is a victim of misrepresentation.) This makes it metaphysically impossible for a second consent to be given after a first, valid consent exists. To be valid, the first consent must be based on full information. A second round of consenting, concerning a particular subpart of something already consented to, does not constitute consent. Consent given to the information practices listed in the COPPA statute at Section 1303(b)(1)(A) must be given in whole because a consent based on part of it is not consent.

A second, consent-like process can have only one purpose, and that is to dissuade parents from continuing with the consented-to activity. In exercising editorial choice to treat sharing with third parties as requiring extra consideration, the Commission makes judgments about what information flows it prefers. That placement of a thumb on the scale by which parents choose for their children is a decision about speech, which is constitutionally suspect, as discussed further below.

The FTC may be concerned with various things, such as "overuse" of sites and services, but it cannot deviate from the authorities given by Congress in the COPPA statute to address them. If Congress wants the FTC to address these problems, it can provide specific statutory authorization.

III. FIRST AMENDMENT CONCERNS

The proposed revisions to COPPA would limit operators' ability to collect, share, and use information about their users, in some cases limiting use even after the user receives parental consent. This will cause needless conflict with the First Amendment.

As an initial matter, privacy laws that restrict the collection or sharing of data implicate the First Amendment by burdening speech (or, at least, critical predicates of effective speech) for the very purpose of suppressing communications and information flow.[50] Thus, although COPPA may have the end goal of supporting the safety and financial security of children, the means by which it achieves those goals are necessarily speech restricting and must take care to stay within First Amendment bounds.

Each of the three proposed rule modifications that we highlight here have significant First Amendment problems.

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[50] *Sorrell v. IMS Health Inc*., 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of First Amendment."); *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 336 (2010) ("[L]aws enacted to control or suppress speech may operate at different points in the speech process.") *Fields v. Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings and for this protection to have meaning the Amendment must also protect the act of creating that material. There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them.") (internal citation omitted); *ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) ("[T]here is no fixed First Amendment line between the act of creating speech and the speech itself.").

A. Requiring Parental Consent Prior to Uses That Will Induce or Optimize Engagement

The proposed modifications would prohibit the use of children's data for the purpose of creating engaging speech. The FTC is motivated to address what it sees as a public health problem akin to addiction, but the actual target of the law is speech. Terms like "engagement" or "attentional resources" can create some rhetorical distance from free speech, but in fact, *all* speakers try to maximize the engagement of their listeners. Engagement is necessary for the noble goals of political discourse, education, and exchange of ideas as well as for the ignoble-but-necessary goal of paying for the effort to create all that speech. If Congress were to pass legislation prohibiting Hollywood from conducting focus-group research and producing highly engaging blockbuster movies as a result, such a statute would self-evidently violate the First Amendment. The fact that the movie industry might pursue this path for financial gain is beside the point. As Samuel Johnson said, "No man but a blockhead ever wrote, except for money."[51]

The "basic principles" of the First Amendment "do not vary when a new and different medium for communication appears."[52] Thus, restrictions on the collection or use of data for optimizing engagement are regulations of pure speech, and they would have to survive First Amendment scrutiny.

1. Vagueness

The term "engagement" is relatively new and undefined, so this proposed modification may violate the First Amendment on that basis alone. (See the discussion of the vagueness doctrine in the subsection below.)

2. Failing Intermediate Scrutiny

Even if "engagement" could be defined and understood consistently across contexts, the proposed rules' prohibition would fail intermediate scrutiny largely for the same reasons that California's laws prohibiting the sale of violent video games to minors were struck down in *Brown v. Entertainment Merchants Association*. The Court in *Brown* applied strict scrutiny since the law made a content-based distinction between violent and nonviolent video games. The proposed COPPA amendments may be analyzed under intermediate scrutiny if the difference between content "optimized for engagement" and content that is not so optimized is process based rather than content based. In this case, courts would apply intermediate scrutiny.[53] (But even if the proposed rules are content neutral, they would fail the intermediate scrutiny test because the government's interest is arguable, and the rules are poorly tailored to whatever legitimate interest it may have.)

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[51] James Boswell, Life of Samuel Johnson 4 (1791).
[52] *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011).
[53] *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994).

3. Questionable Government Interest

In *Brown,* the Court found that the law forbidding the sale of violent video games to minors without consent was not solving an "actual problem" because the studies linking video games to acts of violence or other social ills was contested. Similarly, as discussed above, the FTC does not have sufficient evidence to support a sweeping intervention into free speech for harms that have not been well-defined or measured against countervailing benefits.[54]

For the reasons described above, courts will have serious doubts about the scale or existence of the public health problem cause by speech that has been "optimized for engagement." The government has no interest in preventing listeners from accessing content that they are interested in, as evidenced by their own behaviors and viewing preferences. The Supreme Court has made clear that the government does not have a legitimate purpose when it seeks to make some speakers less effective or persuasive. Generally speaking, "the fear that speech might persuade provides no lawful basis for quieting it."[55]

4. Poor Tailoring

Even if it were possible to identify a subset of content that is engaging and also harmful because of its appeal, the proposed regulation would be severely overinclusive and underinclusive.

The rule would be overinclusive because it burdens all optimized content even though only a small and mysterious portion of it would be harmfully "engaging." The First Amendment is premised on a strong supposition that most content listeners and readers wish to spend time with is beneficial to them and to society (or, at least, benign).[56]

The rule is also likely to be underinclusive because if it were possible to identify what sorts of highly engaging content are particularly harmful for young viewers and readers, many of them (possibly even most) could attract and engage an audience without having to be "optimized" using personal data. Viral videos, for example, will attract attention without having to be optimized for any particular user.

B. New Data Minimization Requirements

Expansion of the definition of "activity" for the purpose of data minimization would require firms to avoid collecting any data that is not reasonably necessary to perform the service of the whole website (even if it *is* necessary for one supplemental or constituent part). This change presents the most serious First Amendment problems because the term "reasonably necessary" is hopelessly vague and because the resulting mandate—a complete restriction on a type of speech—violates the overbreadth doctrine.

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[54] *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015); *PETA v. North Carolina Farm Bureau*, 60 F.4th 815 (2023).
[55] *Sorrell v. IMS Health*, 564 U.S. at 576.
[56] *Stanley v. Georgia*, 394 U. S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas").

1. Vagueness

The Supreme Court has consistently found that vague statutes applying to communications and speech activities must satisfy a higher standard for clear notice.[57] Laws that required promises of "loyalty"[58] or that prohibit the transmission of "indecent" speech[59] have been struck down. The failure to provide notice through the phrase "reasonably necessary" of what is or is not permissible is so vague that it will cause overcaution and chill legitimate expressive activities.

Creators of children's content and apps who want to incorporate the user's data into their services or content will be deterred from doing so out of fear that use of the data is not "reasonably necessary" for a feature or service or that the feature or service is not "reasonably necessary" to the entire website. The term "reasonably necessary," which separates the permissible from the impermissible, is so vague that it will invite subjective and arbitrary application—much like the term "indecent."

2. Overbreadth

The First Amendment requires courts to strike down any law that is likely to restrict speech well beyond the bounds of legitimate application.[60] Given that the proposed language can be read to prohibit the use of data for *any* feature or service that is not critical to the website's overall purpose, the unjustified restriction on the collection of data (and thus on the use of that data for content creation and other expressive purposes) is expansive, and it sweeps much further than achieving the legitimate purpose of reducing wasteful and needlessly risky data collection.

Each of these—vagueness and overbreadth—would permit the proposed regulations to be challenged and struck down on their face and without a full analysis of constitutional scrutiny. The proposed laws would also fail intermediate scrutiny given the large range of protected and socially valuable speech that would be prohibited (even, it seems, over parents' consent).

C. Duplicative Consent Requirements

Finally, the proposed regulations add new consent requirements for data that has already been collected with consent when it is shared with third parties. Because parents have already consented to data collection, sharing, and use, these additional real-time notice-and-consent requirements are a needless burden. The FTC's goal in requiring another round of consent is to slow or deter the shifting of data outside the setting in which it was originally collected, but there

[57] *NAACP v. Button*, 371 U.S. 415, 432 (1963).
[58] *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).
[59] *Reno v. ACLU*, 521 U.S. 844, 870–874 (1997).
[60] *United States v. Stevens*, 559 U.S. 460, 464, 482 (2010).

is little reason to speculate that these secondary collections and uses—which were already subject to notice and consent—will cause harm.[61]

The proposed regulations sweep much more broadly than they would in preventing the potential privacy harms that may occur when a parent is not consulted multiple times before the transfer of data. To the extent the regulations would protect privacy interests at all (which is modest, given that the information disclosed is already collected and in use by the first-party company), those benefits are outweighed by the burdens on expression.

IV. CONCLUSION

The proposed modifications to the COPPA rule discussed in this Comment are likely to reduce the quantity and quality of online services for children. To justify a regulatory intervention of this scale, the FTC cannot merely assume that any reduction in online engagement improves children's welfare. Rather, it must conduct a rigorous cost-benefit analysis that engages the extant empirical literature or conduct its own analysis. As it stands, the NPRM simply fails on this count.

While there may be legitimate reasons to be concerned about children spending too much time on screens, Congress did not design COPPA to address this concern, instead leaving that in the hands of parents. Modifications to the COPPA rule adopted to address these concerns go beyond congressional authorization as found in the COPPA statute and also run into First Amendment trouble. Restrictions that reduce children's ability to receive online content and to communicate online violate the First Amendment unless they are narrowly tailored to address an important government interest. Absent validating research of the kind called for above, the FTC will have serious difficulty convincing a court that encouraging "engagement" (i.e., more speech) is categorically harmful, and the proposed rule modifications that would interfere with engagement will be struck down for failure to identify a government interest.

[61] *See Wollschlaeger*, 848 F.3d at 1312 (striking down a Florida law limiting doctor speech related to gun ownership in part because the privacy problem consisted of "six anecdotes and nothing more. There was no other evidence, empirical or otherwise, presented to or cited by the Florida Legislature."); *ACA Connects - America's Communs. Ass'n v. Frey*, 2020 U.S. Dist. LEXIS 118293, at *17 (D. Me. July 7, 2020) (holding that the government should thoroughly weigh privacy concerns alongside other concerns); *Individual Reference Services Group, Inc*., 145 F. Supp. 2d at 42–43 ("[T]he record indicates that the agencies have carefully weighed the benefits and harms of imposing the privacy-based regulations.").