UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak

Mobilewalla, Inc., FTC Matter No. 2023196

December 3, 2024

Since arriving at the Commission, I have supported law enforcement actions against data brokers that sold precise geolocation data revealing consumers' religious beliefs, political leanings, and medical conditions.[1] Such enforcement actions have been particularly important where they help preserve Americans' freedoms and are consistent with the FTC Act, such as in a separate case the Commission brings against Gravy Analytics today. But the instant complaint and proposed settlement with Mobilewalla colors well outside the lines of the Commission's authority. Indeed, the Chair is seeking to effectuate legislative and policy goals that rest on novel legal theories well beyond what Congress has authorized. We should not use our enforcement powers this way.[2] Because core aspects of this case are misguided, I dissent. I briefly explain some of my concerns below. And I anticipate and welcome robust comment on the proposed order before it is finalized.

Several background considerations also inform my approach and dissent in this particular matter. First, this matter uses a settlement to effectuate policy objectives that political leadership at the Commission has sought for years but failed to achieve through regulation.[3] No matter how much political pressure Chair Khan and the Bureau Director may feel with the shot-clock running out, the Commission should not use complaints and orders to score political points that stem from misuse of our statutory authorities. Second and related: Chair Khan's decision to proceed runs directly afoul of recent Congressional oversight from several of the FTC's authorizing Committees

---

[1] *See, e.g.*, Concurring Statement of Comm'r Melissa Holyoak, *Kochava, Inc.*, FTC Matter No. X230009 (July 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-7-15-Commissioner-Holyoak-Statement-re-Kochava-final.pdf; Concurring Statement of Comm'r Melissa Holyoak, Joined In Part By Comm'r Alvaro M. Bedoya (Section I Only), *In re Gravy Analytics, Inc.*, FTC Matter No. 2123035 (Dec. 3, 2024).

[2] *Cf., e.g.*, Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In re Rytr, LLC*, FTC Matter No. 2323052, at 1 (Sept. 25, 2024) ("As I have suggested recently in other contexts, the Commission should steer clear of using settlements to advance claims or obtain orders that a court is highly unlikely to credit or grant in litigation. Outside that crucible, the Commission may more readily advance questionable or misguided theories or cases. Nevertheless, private parties track such settlements and, fearing future enforcement, may alter how they act due to a complaint's statement of the alleged facts, its articulation of the law, or how a settlement order constrains a defendant's conduct. In all industries, but especially evolving ones . . . misguided enforcement can harm consumers by stifling innovation and competition. I fear that will happen after today's case, which is another effort by the Majority to misapply the Commission's unfairness authority under Section 5 beyond what the text authorizes. Relatedly, I believe the scope of today's settlement is unwarranted based on the facts of this case." (citations omitted)), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-rytr-statement.pdf.

[3] *See* Press Release, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices* (Aug. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices.

that explicitly cautioned against this type of endeavor.[4] Choosing to proceed undermines our institutional legitimacy and will engender even more distrust from Congress—trust that current leadership at the Commission has repeatedly broken.[5]

* * *

With that larger context in mind, I will briefly describe some of my concerns on the merits. According to the Complaint, Mobilewalla has relied primarily on information it collected from real-time bidding exchanges (RTB exchanges) to build its portfolio of consumers' geolocation data.[6] These exchanges facilitate advertisers' bids to place content in front of specific consumers, whose information has been sent to the exchange to enable the bidding.[7] Mobilewalla would retain information collected from RTB exchanges, including a consumer's "precise geolocation information, if the consumer had location sharing turned on," even if the bid were unsuccessful.[8]

The Majority erroneously declares Mobilewalla's collection of consumer information from the RTB exchanges is unfair. Specifically, the Complaint alleges that the practice of *collecting* data was unfair in part because it caused or is likely to cause substantial injury.[9] But the Complaint's allegations are remarkably sparse when it comes to establishing how the *collection itself caused* substantial injury, and its related allegations do not otherwise satisfy what Section 5 requires for unfairness.[10] For the Majority, the mere collection of data implausibly "causes or is likely to cause" substantial injury and lacks countervailing benefits that Section 5's cost-benefit analysis requires assessing.[11] Such a theory of unfairness—assertions about a particular practice without facts alleged reflecting causation of injury to consumers—is contrary to black-letter unfairness law. Of course, none of these observations about the limits of our *unfairness* authority mean Mobilewalla had clean hands under *contract law*, where Mobilewalla's agreements with RTB exchanges barred collection and retention of consumer data for unsuccessful bids.[12] But—contrary to what those keeping score may conclude from this case and settlement—a business-to-business breach of

[4] *See, e.g.*, Letter from Senator Ted Cruz, Ranking Member, Committee on Commerce, Science, and Transportation, to Lina Khan, Chairwoman, Fed. Trade Comm'n (Nov. 7, 2024) (cautioning that the FTC should "focus only on matters that are uncontroversial and would be approved unanimously by all Commissioners"); Letter from Representative Jim Jordan, Chairman, Committee on the Judiciary, to Lina Khan, Chair, Fed. Trade Comm'n, at 1 (Nov. 14, 2024) (the "FTC should also cease all partisan activity"); Letter from Representative Cathy McMorris Rodgers, Chair, Committee on Energy and Commerce, to Lina Khan, Chair, Fed. Trade Comm'n (Nov. 6, 2024) ("As a traditional part of the peaceful transfer of power, the FTC should immediately stop work on any partisan or controversial item under consideration . . . .").

[5] Accordingly, this case illustrates how leadership at the Commission has vocally *claimed* to be acting on consumers' behalf over the past several years, but then—where it has effectively usurped the legislative branch—has actually harmed the Commission's legitimacy and long-term ability to serve the American people.

[6] *See* Compl. ¶¶ 9-10.

[7] *Id.*

[8] *Id.* ¶¶ 10, 33.

[9] *See id.* ¶¶ 70-71. The factual predicate appears to be that if the data had never been collected in the first place, consumers could never have been harmed later through its alleged misuse.

[10] *See id.* ¶¶ 7-16, 33-37.

[11] *See* 15 U.S.C. § 45(n).

[12] Compl. ¶ 10.

contract that may have potential effects on consumers does not automatically give rise to an unfairness claim under Section 5.[13]

Count II, for "Unfair Targeting Based on Sensitive Characteristics," is also misguided. The practice this Count alleges is unfair is the "*categorization* of consumers based on sensitive characteristics derived from location information."[14] But there is nothing intrinsically unfair about such categorization, on its own. Instead, each unfairness claim needs to be assessed in a granular way for both substantial injury and countervailing benefits.[15] For example, and contrary to any lop-sided framing of harms concerning abortion[16]: a mother considering her pregnancy may experience significant benefits if data analysis and categorization mean she ultimately receives tailored advertisements from crisis pregnancy centers offering prenatal and postnatal care for her and her child.[17] And a significant benefit would accrue to the unborn child: her survival.[18] Put simply, categorization does not automatically violate Section 5. But today's case sends the opposite message.[19]

Count V, for "Unfair Retention of Consumer Location Information," also falls short of what Section 5 requires. The Complaint alleges that Mobilewalla "indefinitely retains detailed, sensitive information about consumers' movements, including consumers' location information."[20] But there is minimal analysis as to how the practice of indefinite retention lacks potential countervailing benefits.[21] For example, as the Complaint makes clear, Mobilewalla facilitates advertising and data analytics.[22] To the extent Mobilewalla's information enables building and optimizing predictive models, or better tailoring advertisements over time to particular consumers, it seems likely Mobilewalla's indefinite retention of data may mean consumers correspondingly experience higher benefits. We will never know whether the practice

---

[13] Accordingly, the Commission should not seek to use a novel Section 5 theory to support what looks like a remedy for breach of contract, as it does in Provision II of the Order. *See* Provision II ("Prohibition on Collection and Retention of Covered Information from Advertising Auctions").

[14] Compl. ¶ 69 (emphasis added).

[15] *See, e.g.*, Concurring Statement, *In re Gravy Analytics*, *supra* note 1, at 6 ("We should not conflate our concern about deceptive advertising (the bogus treatment) *with the lawful act of categorizing and targeting based on sensitive data*, lest we undermine the ability to connect women with life-saving care." (emphasis added)). To the extent there is harm here, it could of course stem from wrongful *disclosure* of certain information in certain circumstances—for example, disclosure of location to government agencies circumventing Fourth Amendment protections. But the mere categorization of consumers does not necessarily violate Section 5, and it may have significant countervailing benefits.

[16] *Cf.* Compl. ¶¶ 56-57; *see also* Compl., *In re Gravy Analytics*, ¶¶ 67-68 (similar allegations); Compl., *Fed. Trade Comm'n v. Kochava*, *Inc.*, 2:22-cv-00377, ¶¶ 107-08 (D. Idaho, July 15, 2024), ECF No. 86 (similar allegations).

[17] *See* Concurring Statement, *In re Gravy Analytics*, *supra* note 1, at 6 ("We also need to disentangle any objections to the content of an advertisement from the practices of categorization and targeting generally.").

[18] This example illustrates the fraught nature of the Commission determining on its own—without Congressional authorization—what advertising content is harmful, discriminatory, and so on. Absent clear statutory authority, Commission enforcement on such matters becomes a tool driven by preferences of unelected officials.

[19] Compl. ¶ 69 (alleging "categorization of consumers based on sensitive characteristics *for marketing and other purposes* is an unfair act or practice" (emphasis added)).

[20] *Id.* ¶ 74.

[21] We should be considering such potential benefits, however. *Cf.* Melissa Holyoak, Remarks at National Advertising Division, *A Path Forward on Privacy, Advertising, and AI*, at 6-7, 9 (Sept. 17, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-NAD-Speech-09-17-2024.pdf.

[22] Compl. ¶ 19.

has net benefits or not, since the Majority simply ignores that step and summarily condemns the practice.

A final point today, about how my approach in this case relates to my support for *Kochava*, where I concurred in filing a second amended complaint. It is one thing to use our unfairness authority to directly address specific acts or practices of "disclos[ure]" or "the revelation of sensitive locations implicating political, medical, and religious activities," where there is an appropriate "focus[] on *sales* of precise geolocation data and related sensitive information,"[23] and where there has been a lack of consumer consent.[24] The facts pled in *Kochava* relating to disclosure and sale in that case led me to believe that the particular "act or practice" of selling precise geolocation data had a direct connection—caused or was likely to cause—substantial injury to consumers.[25]

In contrast, and in focusing on other types of acts or practices—such as the relevant data's collection, its use for categorization, or its indefinite retention—that are analytically removed from and did not themselves necessarily cause any alleged injury based on the facts pled, today's complaint fails to show how these acts or practices *themselves* satisfy what Section 5 requires.[26] On their own, the categorization, collection, or indefinite retention could certainly be factual predicates that *precede* substantial injury. But, at least as pled in this case, such practices themselves lack the causal connection to substantial injury. And, stepping back, there are certainly innocuous or beneficial instances of related data collection, its categorization, and its indefinite retention. Thus, this case's theories go far beyond the rationale that led me to support amending the complaint in *Kochava*.[27] In fact, the claims in this case seem designed to lead directly to minimizing access to data, limiting the practice of drawing inferences from it, and setting particular boundaries around data retention. This case's regulatory implications are therefore far broader than those in *Kochava*.

* * *

Privacy is a vital policy topic. But unless and until the Commission receives new authorities, we must follow the law as Congress actually wrote it, not as some Commissioners or the Bureau Director might amend it if they were elected legislators.[28] Robust enforcement

---

[23] *See* Concurring Statement, *Kochava*, *supra* note 1, at 2-3 (emphasis added).
[24] *Id.* at 3.
[25] *See* 15 U.S.C. § 45(n); *see also* Compl., *Fed. Trade Comm'n v. Kochava*, *Inc.*, *supra* note 16, ¶ 132 (bringing a single count for "Unfair Use and Sale of Sensitive Data," and alleging that Defendants "used and *disclosed* data" from consumers (emphasis added)). The framing of *Kochava*'s unfairness count resembles the framing of the first count in this Complaint against Mobilewalla, for "unfair sale of sensitive location information," related to how Mobilewalla "sells, licenses, or otherwise transfers precise location information . . . that reveal[s] consumers' visits to sensitive locations." *See* Compl. ¶¶ 66-67. But this Complaint's misguided use of the Commission's unfairness authority goes well beyond *Kochava*'s sole count.
[26] *See* 15 U.S.C. § 45(n).
[27] Again, I "support[ed filing the second amended complaint in *Kochava*] . . . because I agree[d] that the complaint adequately alleg[d] a likelihood of substantial injury in the *revelation* of sensitive locations implicating political, medical, and religious activities" Concurring Statement, *Kochava*, *supra* note 1, at 2 (emphasis added).
[28] *See* Concurring Statement, *In re Gravy Analytics*, *supra* note 1, at 6 ("As we consider these type of difficult privacy questions in the future, it is of paramount importance that we challenge only unfair or deceptive conduct,

consistent with our statutory authorities can have salutary deterrent effects. But robust enforcement that is *inconsistent* with our statutory authorities can also have profound ramifications on how markets function, and how market actors proceed—including in ways that harm the American people. And it can undermine our legitimacy in the eyes of not just Congress, but the public.[29] Privacy's tradeoffs should be resolved by Congress, not unelected Commissioners. I do not believe Section 5, as drafted, authorizes us to act as a roving legislator, writing law through complaints and settlement orders drafted to suit our purposes or political expediency. I dissent.

supported by specific facts and empirical research, rather than demonizing the entire digital advertising industry. *And until Congress acts to address privacy directly through legislation, it is vital we recognize and abide by the limited remit of the Commission's statutory authority*." (emphasis added)).

[29] It is no coincidence that the number of constitutional challenges questioning our legitimacy has correlated with the Chair's general dismissal of the Commission's basic norms and integrity. *See, e.g.*, Justin Wise, *FTC's Targets Take Cues From High Court in Tests of Agency Power*, Bloomberg Law (Sept. 26, 2024), https://news.bloomberglaw.com/antitrust/ftcs-targets-take-cues-from-high-court-in-tests-of-agency-power.