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

Office of Commissioner
Andrew N. Ferguson

Concurring Statement of Commissioner Andrew N. Ferguson

Joined by Commissioner Melissa Holyoak

In the Matter of NGL Labs, LLC, et al.
Matter Number 2223144
July 9, 2024

Today, the Commission approves the filing of a complaint and proposed consent order in the U.S. District Court for the Central District of California against NGL Labs, LLC and two of its cofounders. The defendants run an anonymous internet messaging service marketed to teenagers and children under 13. They are alleged to have violated Section 5 of the Federal Trade Commission Act[1] by sending fake anonymous messages to teenage users for the purpose of upselling those users on a paid membership that would supposedly allow them to discover the identity of the senders. They are also alleged to have violated the Restore Online Shoppers Confidence Act[2], various provisions of the Children's Online Privacy Protection Act, and the Commission's rule implementing that Act.[3] I support, without reservation, charging these counts.

Count II is a separate Section 5 claim that presents a novel theory. It claims that the defendants violated Section 5 by marketing an anonymous messaging app to children and teenagers despite knowing that anonymous messaging apps are harmful to these groups. I vote to approve this complaint because I agree that it was unfair to market *this* anonymous messaging app to teenagers in the way that the defendants marketed it. If the allegations in the complaint are true, NGL sent fake, anonymous, and distressing messages to minors specifically designed to make them doubt their social worth, as part of a fraudulent scheme to convince those minors to pay for the ability to see who sent the messages. This alleged conduct, tailormade to manipulate the vulnerable teenage psyche, was reprehensible and unfair. I write separately to make clear, however, that it does not follow that Section 5 categorically prohibits marketing *any* anonymous messaging app to teenagers.

Offering internet messaging services to children does not, on its own, violate Section 5. For better or for worse—and increasingly, it seems, for worse—the internet is "the modern public square"[4] and Congress has allowed social media companies to serve teenagers and, with parental permission, to serve children under the age of 13.[5] Internet messaging platforms like iMessage, Instagram Direct, Snapchat,

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[1] 15 U.S.C. § 45(a).
[2] 15 U.S.C. §§ 8401–05.
[3] 15 U.S.C. §§ 6501–05; 16 CFR Part 312. Co-plaintiff, the State of California, also accuses NGL of violating California false advertising and consumer-protection laws.
[4] *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).
[5] See Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6502 (requiring parental consent for permission to collect, use, or disclose the personal data of children); 15 U.S.C. § 6501 (at (1) defining children to be individuals under the age of 13, and at (4)(B) defining disclosure of data to include, in addition to public posting of the information, use of the data for email and messaging).

Signal, and WhatsApp are ubiquitous on the phones of American teenagers. The federal government and the States subject these platforms to intense scrutiny under multiple statutory and common-law regimes.[6] But, to my knowledge, none has ever proceeded on the theory that merely offering messaging services to teenagers violates the law. Such a theory would be in serious tension with the recognized First Amendment rights of minors[7] as well as Congressional policy on their use of internet services.

Anonymity complicates the issue. On the one hand, anonymity is an important constitutional value. "Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[8] The Anglo-American tradition of anonymous speech is ancient and rich.[9] The most eloquent statement of American political theory—what we today call *The Federalist Papers*—was written as a series of pseudonymous essays (as were many of the works of their prescient antifederalist opponents).[10] The Supreme Court has elevated anonymous speech, at least in some circumstances, to protection under the Speech Clause.[11] It has also treated anonymity as a necessary ingredient for the "corresponding right to associate with others"—a right "implicit in the right to engage in activities protected by the First Amendment."[12]

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[6] *States sue Meta claiming its social platforms are addictive and harm children's mental health*, Associated Press, Oct. 24, 2023, https://apnews.com/article/instagram-facebook-children-teens-harms-lawsuit-attorney-general-1805492a38f7cee111cbb865cc786c28; *Iowa is the latest state to sue TikTok, claims the social media company misrepresents its content*, Associated Press, Jan. 17, 2024, https://apnews.com/article/tiktok-lawsuit-iowa-7866cbc30e1a75b384fec1aae04afd8e; *New Hampshire sues TikTok, saying platform hurts kids' mental health*, CBS News, June 25, 2024, https://www.cbsnews.com/boston/news/new-hampshire-sues-tiktok-kids-mental-health/; Press Release, Fed. Trade Comm'n, *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False*, May 8, 2014, https://www.ftc.gov/news-events/news/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were-false.

[7] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975) ("[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." (internal citations omitted)).

[8] *Talley v. California*, 362 U.S. 60, 64 (1960).

[9] See also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360–67 (1995) (Thomas, J., concurring in the judgment) (describing rich tradition of anonymous speech pre-dating the founding of the Republic); see also *Talley*, 362 U.S. at 64-65 (similar).

[10] *McIntyre*, 514 U.S. at 360–67 (describing contemporaneous debate about the anonymous publishing of the Federalist and Anti-Federalist Papers) (Thomas, J., concurring in the judgment).

[11] See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down an ordinance making it a misdemeanor to engage in door-to-door advocacy without a registration and a permit because, among other reasons, it violated the right to anonymous speech); *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 199–200, 204 (1999) (holding that a Colorado law infringed on First Amendment when it required those paid to seek signatures for a citizen's initiative to surrender their anonymity by wearing an identification badge and being publicly listed); *McIntyre,* 514 U.S. at 342 ("an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"); *Talley*, 362 U.S. at 65 (striking down as a violation of the First Amendment an ordinance prohibiting the distributing of handbills that did not on their face identify their author and distributor).

[12] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); see, *e.g.*, *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 616–17 (2021) (finding unconstitutional a regulation for, among other reasons, requiring disclosure of a non-profit's donors); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (holding that a subpoena requiring disclosure of the members of a local race relations association, on suspicion of connections to communism, violated the First Amendment right to freedom of association); *Bates v. City of Little Rock*, 361 U.S. 516, 523–24 (1960) (striking down an ordinance requiring disclosure of the membership lists of voluntary associations, including the NAACP); *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (similar).

On the other hand, no reasonable person can deny that anonymity aggravates the risk of injury and harm to children online. People say and do things online behind the veil of anonymity, sometimes truly vile things, that they would never do under their real names. Bad actors can more easily conceal their identity as they target children and teenagers for nefarious purposes, including sexual exploitation and fraud.[13] That is what happened here. As the Commission alleges, a for-profit company used its anonymity to lie to minors—lies about the sorts of things that trouble the youthful psyche—in order to induce them to buy a product.[14] Nothing in our constitutional structure permits using anonymity as a cloak for fraud.[15] And Section 5 forbids it no differently than it forbids other forms of deception.

It does not follow, however, that the marketing of anonymous messaging services to minors necessarily violates Section 5. Indeed, I strongly believe it does not. Insofar as language in the complaint suggests the contrary,[16] I do not think it correctly states the law, and my vote for this complaint and proposed consent order should not be understood to suggest it does. Anonymous speech is a right protected by the Speech Clause, and the Speech Clause protects children's speech (if not necessarily to the same extent as an adult's speech).[17] Interpreting Section 5—or any law—to deny anonymous messaging apps to minors categorically would create grave constitutional concerns. We should not interpret Section 5 to create those concerns.[18]

It would also be very bad policy. Online anonymity for children and teenagers has real benefits. Commissioner Holyoak correctly observes that it can be used to encourage at-risk teenagers to reach out for help that they might not otherwise feel comfortable seeking.[19] It can also be used to protect teenagers

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[13] Unfortunately, current law severely limits the obligations of Internet companies to police their platforms for such risks. Section 230 of the Communications Decency Act has been interpreted to immunize internet service operators from liability for user-generated content. 47 U.S.C. § 230(c)(1). *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that AOL was not liable for defamatory content posted in its chat rooms, even when it failed to remove the content down after receiving notice of it). In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), 47 U.S.C. § 230(e)(5), abrogating Section 230 immunity for some civil and criminal child-sex-trafficking claims. But the only U.S. court of appeals to have addressed the question held that abrogation applies only to knowing violations of child sex trafficking laws by the platforms themselves, not by their users, and that culpable inaction by the platform is protected by Section 230. *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1141–43, 1145 (9th Cir. 2022) (affirming the dismissal of a complaint because "these allegations suggest only that Reddit 'turned a blind eye' to the unlawful content posted on its platform"). Congress cannot loosen the restrictions of Section 230 fast enough.

[14] Complaint For Permanent Injunction, Monetary Judgment, Civil Penalty Judgment, And Other Relief ("Complaint") at 7–11. Examples of such messages included "are you straight?", "have you ever cheated", "I know what you did", "when was the last time you wet the bed", and "one of your friends is hiding something from u". *Id.* at 8.

[15] *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (explaining that First Amendment has never been understood to protect "fraudulent speech").

[16] See, e.g., Complaint ¶ 77 ("In connection with the marketing, promotion, distribution, or sale of the NGL App and NGL Pro, Defendants have specifically targeted children and teens knowing that use of anonymous messaging apps by these groups causes substantial injury.")

[17] *City of Jacksonville*, 422 U.S. at 212 ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults"); but see *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011) (Thomas, J., dissenting) (arguing that the original understanding of the First Amendment does not include a right to speak to children without their parents' permission).

[18] Dissenting Statement of Commissioner Andrew N. Ferguson, joined by Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule at 32–34 (June 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-matter-non (explaining that the Commission must read Section 5 in light of the canon of constitutional avoidance).

[19] Concurring Statement of Commissioner Melissa Holyoak.

from the maw of cancel culture.[20] In recent years, huge swaths of our society have taken far too kindly to ruining people's personal and professional lives for expressing unpopular views.[21] An adult posting a disfavored opinion online under his own name risks his livelihood and access to banking. But the mob has not confined itself to adults. It has gone after people for expressing disfavored views during their childhood.[22] For immature teenagers, whose brains and ability to assess risk are still developing,[23] cancel culture is a recipe for disaster. A single youthful lapse in judgment can trigger the cancelling mob for a lifetime. Anonymity is one way teenagers can protect themselves against that mob.

Subject to these reservations about Count II, I concur in the Commission's decision to file this complaint and proposed consent order.

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[20] See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995) ("The decision in favor of anonymity may be motivated by … concern about social ostracism").

[21] Meghan Cox Gurdon, *'The Canceling of the American Mind' Review: Shut Up, They Said*, Op-Ed, Wall Street Journal, Oct. 8, 2023. Zac Kriegman, *I Criticized BLM. Then I Was Fired*, The Free Press, May 12, 2022, https://www.thefp.com/p/i-criticized-blm-then-i-was-fired; *White principal fired for post about "Black Lives Matter"*, Associated Press, Oct. 19, 2020, https://apnews.com/article/ddb8251472b5a7bf0817faaa32010614.

[22] Samantha Pfefferle, *"Cancel culture" crew nearly got me "expelled" before I'd even started college*, July 28, 2020, https://nypost.com/2020/07/28/cancel-culture-crew-nearly-got-me-expelled-before-id-even-started-college/; Dan Levin, *Colleges Rescinding Admissions Offers as Racist Social Media Posts Emerge*, N.Y, Times, July 2, 2020, https://www.nytimes.com/2020/07/02/us/racism-social-media-college-admissions.html.

[23] See E. Balocchini, G. Chiamenti, & A. Lamborghini, *Adolescents: which risks for their life and health?* J. Prev. Med. Hyg. 2013, 54: 191, 193 ("With an immature prefrontal cortex, even if teens understand that something is dangerous, they may still go ahead and engage in the risky behavior.").