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Douglas H. Meal[*]

ABSTRACT AND INTRODUCTION

In August 2022, the Federal Trade Commission ("FTC") commenced a lawsuit against Kochava, Inc. ("Kochava") in the United States District Court for the District of Idaho.[1] The FTC's lawsuit contains a single count, which claims that Kochava, by its sale of customized geolocation data feeds that allow purchasers of those feeds to identify and track specific mobile device users at "sensitive locations," is engaged in an "unfair" trade practice towards consumers in violation of Section 5(a) of the FTC Act.[2] In its press release announcing the lawsuit, the FTC explained the theory of its unfairness claim against Kochava as follows:

> Kochava's sale of geolocation data puts consumers at significant risk. The company's data allows purchasers to track people at sensitive locations that could reveal information about their personal health decisions, religious beliefs, and steps they are taking to protect themselves from abusers. The release of this data

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[1] Complaint, FTC v. Kochava, Inc., No. 2:22-cv-00377 (D. Idaho Aug. 29, 2022) [hereinafter *Kochava* Complaint].

[2] *Kochava* Complaint, *supra* note 1, at 10–11; 15 U.S.C. § 45(a).

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> could expose them to stigma, discrimination, physical violence, emotional distress, and other harms.[3]

Commentators immediately recognized that the "unfairness" theory at the heart of the FTC's lawsuit represented a departure from the FTC's prior practice of focusing its privacy violation inquiries on whether a company's data collection practices are "deceptive" towards consumers, due to procedural failures like inadequate privacy notices or a failure to obtain required consumer consents. They rightly characterized the FTC's action as being a groundbreaking one that could have widespread implications for businesses collecting consumers' geolocation data, as it had the potential for prohibiting the collection of geolocation data outright—rather than merely prohibiting such collection from being done deceptively. They also questioned whether the FTC could meet its burden of proving a Section 5(a) violation on the theory that these collection efforts are "unfair" towards consumers within the meaning of Section 5.[4]

The District Court has subsequently rendered two rulings on the legal sufficiency of the unfairness theory being advanced by the FTC against Kochava—the first on May 4, 2023[5] ("*Kochava I*"), and the second on February 3, 2024[6] ("*Kochava II*" and, jointly with *Kochava I*, the "*Kochava* Rulings"). Among other issues,[7] the *Kochava* Rulings address whether the

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[3] *FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations*, FED TRADE COMM'N (Aug. 29, 2022), www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other.

[4] *See, e.g.*, Nancy L. Perkins, Kristina Iliopoulos & Jason T. Raylesberg, *FTC Files Complaint Against Data Broker Kochava Inc. for Sale of Geolocation Data*, ARNOLD & PORTER (Sept. 27, 2022), www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2022/09/ftc-files-complaint-against-data-broker.

[5] FTC v. Kochava, Inc., 671 F. Supp. 3d 1161 (D. Idaho 2023) [hereinafter *Kochava I*].

[6] FTC v. Kochava, Inc., 2024 U.S. Dist. LEXIS 21583 (D. Idaho Feb. 3, 2024) [hereinafter *Kochava II*]. On February 3, 2025, as this Article was being readied for publication, the District Court rendered a third such ruling, which purported to address the criticisms that the then-unpublished version of this Article advances regarding the District Court's rulings in *Kochava I* and *Kochava II*. *See FTC. v. Kochava, Inc.*, 2025 U.S. Dist. LEXIS 20804 (D. Idaho Feb. 3, 2025) [hereinafter *Kochava III*]. As shown below, *Kochava III* ignores most of those criticisms and is unpersuasive in regard to those that it does address. *See infra* notes 24, 33, 42, 43, 78, 89, and 119.

[7] The *Kochava* Rulings also address (1) whether the FTC had adequately alleged that Kochava's challenged practice is ongoing, such that Kochava "is violating, or is about to violate," Section 5, as required by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), *Kochava I* at 1168; (2) whether, in order to challenge Kochava's alleged practice as being unfair under Section 5(a), the FTC need allege that the

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FTC's claim against Kochava is affected by Section 5(n) of the FTC Act,[8] the first sentence of which provides that the FTC "shall have no authority under" Section 5 of the FTC Act to declare an act or practice unlawful on the grounds that such act or practice is "unfair" within the meaning of Section 5(a) "unless the act or practice (1) causes or is likely to cause substantial injury to consumers (2) which is not reasonably avoidable by consumers themselves and (3) not outweighed by countervailing benefits to consumers or to competition."[9] Specifically, the District Court in the *Kochava* Rulings determined that:

- An intangible injury such as "invasion of privacy" can constitute "substantial injury" to a consumer within the meaning of Section 5(n)'s first prong.[10]
- An act or practice is "likely" to cause an injury to a consumer within the meaning of Section 5(n)'s first prong where it creates a "significant risk" that the consumer will incur that injury.[11]
- An act or practice is sufficiently alleged to fail the cost-benefit test inherent in Section 5(n)'s third prong merely by alleging that the cost of safeguards to prevent the consumer injury threatened by the act or practice would be "reasonable."[12]
- Evidence sufficient to satisfy the three prongs of Section 5(n) is in and of itself sufficient to establish that the act or practice in question is "unfair" to consumers within the meaning of Section 5(a).[13]

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practice is "immoral, unethical, oppressive, or unscrupulous," *id.* at 1171; (3) whether the FTC's proposed injunction was impermissibly vague by requiring Kochava to cease providing geolocation data to its customers that allowed consumers to be tracked at "sensitive locations," *id.* at 1176 n.9; and (4) whether application of Section 5(a) to Kochava's challenged practice would be unconstitutional as violating fair notice requirements, principles of separation of powers, the nondelegation doctrine, and/or the major questions doctrine, *id.* at 1176–80. This Article does not address and takes no position regarding the correctness of any of the *Kochava* Rulings' resolutions of those issues.

[8] 15 U.S.C. § 45(n).

[9] 15 U.S.C. § 45(n); *Kochava I*, 671 F. Supp. 3d at 1169.

[10] *Kochava I*, *supra* note 5, at 1173–74; *Kochava II*, *supra* note 6, at *11.

[11] *Kochava II*, *supra* note 6, at *9–11.

[12] *Kochava I*, *supra* note 5, at 1176.

[13] *Kochava I*, *supra* note 5, at 1169–71. The *Kochava* Rulings also found that the FTC had adequately alleged, as required by the second prong of Section 5(n)'s three-prong test, that the "substantial injury" caused by Kochava's challenged practice was "not reasonably avoidable by consumers themselves." *See Kochava I* at 1176. The District Court based that ruling on the factual allegation in the

Each of the District Court's four above-described Section 5(n) rulings embraced an interpretation of Section 5(n) advanced by the FTC and rejected a contrary interpretation advocated by Kochava. Moreover, as described in greater detail below, each of these rulings either represented a "first-ever" judicial ruling on the issue in question or contradicted at least one other prior judicial ruling that had already addressed that issue. As a result, it is little wonder that the *Kochava* Rulings led one leading commentator to remark that the court's decision "would be a game changer in the consumer protection realm, if it continues to hold water later in this case and across other courts,"[14] and prompted a Democratic-appointed FTC Commissioner to state publicly that the *Kochava* Rulings' backing of the unfairness theory advanced by the FTC in *Kochava* is a "very big deal" for the FTC and in the data privacy community generally.[15]

Unfortunately, as discussed below, the *Kochava* Rulings' interpretations of Section 5(n) of the FTC Act are not only novel but also—at least in this author's view—incorrect. Those rulings therefore stand as a "potential game changer" and as a "very big deal" for all the wrong reasons. If the District Court's misinterpretations of Section 5(n) in *FTC v. Kochava* are upheld in that case as it moves forward and/or are followed in other cases by other courts around the country, the FTC will have achieved a dramatic—albeit legally indefensible—expansion of its unfairness authority under Section 5(a) not only in the consumer data privacy realm, but in all other consumer contexts. It is vitally important, then, for courts and litigants alike

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FTC's complaint that consumers did not know that their geolocation data was being used to track them at "sensitive locations" and thus could not reasonably have avoided the injury caused by such tracking by simply not consenting to having their geolocation data collected in the first place or disabling collection of geolocation data on their mobile devices. *Id.* Whether the FTC can make that allegation stand up as the *Kochava* case moves forward seems to be questionable, but the District Court did not err in treating that allegation as true for purposes of ruling on Kochava's motion to dismiss and thus did not err in finding that satisfaction of Section 5(n)'s second prong had been adequately alleged by the FTC.

[14] Cobun Zweifel-Keegan, *A View from DC:* FTC v. Kochava—*License to Litigate*, IAPP (Feb. 9, 2024), iapp.org/news/a/a-view-from-dc-ftc-v-kochava-license-to-litigate.

[15] Allison Grande, *FTC Won't Overlook 'Unanticipated' Harms, Slaughter Says*, LAW360 (Apr. 3, 2024, 11:16 PM), www.law360.com/cybersecurity-privacy/articles/1820671?nl_pk=237ef87f-ca0e-4775-817b-278ffe182ca6&utm_source=newsletter&utm_medium=email&utm_campaign=cybersecurity-privacy&utm_content=2024-04-04&read_more=1&nlsidx=0&nlaidx=0 (reporting on comments made by FTC Commissioner Slaughter at the IAPP Global Privacy Summit on April 3, 2024). Notably, one of the Republican-appointed FTC Commissioners voted against the FTC's filing of its lawsuit against Kochava, *see supra* note 3, so the theory of "unfairness-based" Section 5 liability being advanced by the FTC in that lawsuit does not enjoy universal support even within the FTC itself.

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to understand how badly the *Kochava* Rulings misinterpret Section 5(n), so they can prevent those misinterpretations from taking hold more widely and causing even more mischief than they have already caused for Kochava. This Article seeks to provide such an understanding.

I. THE *KOCHAVA* RULINGS' MISINTERPRETATION OF SECTION 5(N)'S "SUBSTANTIAL INJURY" REQUIREMENT

Under Section 5(n) of the FTC Act, as noted above, the FTC may not declare an act or practice to be "unfair" within the meaning of Section 5(a) of the FTC Act unless the act or practice causes or is likely to cause "substantial injury" to consumers.[16] In *Kochava*, the FTC has advanced two theories of "substantial injury" within the meaning of Section 5(n). First, the FTC asserts that Kochava's collection and sale of consumer geolocation data relative to "sensitive locations" causes substantial injury to consumers by invading their privacy.[17] Second, the FTC asserts that Kochava's collection and sale of such consumer geolocation data is likely to cause substantial injury to consumers because it exposes them to "secondary harms" such as stigma, discrimination, physical violence, and emotional distress.[18]

With respect to the FTC's first theory of "substantial injury," both *Kochava* Rulings considered whether an intangible injury such as "invasion of privacy" could, as a matter of law, constitute "substantial injury" within the meaning of Section 5(n); each time, the District Court held that it could.[19] In reaching this conclusion, the District Court employed a two-step inquiry. First, the District Court asked whether an invasion of privacy constituted an "injury" within the plain meaning of that word; it found that it did, largely based on precedent that made "invasion of privacy" an actionable injury at common law and a concrete injury for purposes of creating Article III standing.[20] Next, the District Court asked whether the invasion of consumer privacy alleged by the FTC in *Kochava* was sufficiently "severe" to be

[16] 15 U.S.C. § 45(n).

[17] First Amended Complaint paras. 88–96, FTC v. Kochava, Inc., No. 2:22-cv-00377-BLW ("*Kochava* FAC"), (D. Idaho, filed June 5, 2023) [hereinafter *Kochava* FAC].

[18] *Kochava* FAC, *supra* note 17, para. 97–106.

[19] *Kochava I*, *supra* note 5, at 1173–74; *Kochava II*, *supra* note 6, at *11.

[20] *Kochava I*, *supra* note 5, at 1173–74; *Kochava II*, *supra* note 6, at *10.

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"substantial" within the meaning of Section 5(n).[21] In *Kochava I*, the District Court held that it was not, but gave the FTC leave to amend its complaint to allege the requisite severity.[22] In *Kochava II*, after the FTC's amendment, the District Court held that the alleged invasion of consumer privacy was now sufficiently "severe" to be substantial, based on the FTC's new allegations that Kochava's challenged conduct involved (1) the geolocation data of millions of mobile device users and (2) Kochava's provision to its customers of inferences regarding consumers that Kochava itself had drawn from both the geolocation data it had collected and the apps the consumers were using when their geolocation data was collected.[23]

The District Court's analysis went badly off the rails at the first step of its inquiry, where it concluded that an intangible consumer injury can, standing alone, be a "substantial injury" within the meaning of Section 5(n). As noted above, *Kochava I* reached this conclusion based on precedent that made "invasion of privacy" (1) an actionable injury at common law and (2) a concrete injury for purposes of creating Article III standing.[24] As to the first point, the injury made actionable by the common-law tort pointed to in *Kochava I* (namely, "public disclosure of private facts"[25]) requires "publicity," meaning communication to "the public at large," of facts "concerning the private life of another" that are *so* private that their public disclosure "would be highly offensive to a reasonable person."[26] The injury alleged by the FTC in *Kochava*, however, did not involve any *public* disclosure on Kochava's part. Nor, as the District Court recognized, did it involve any disclosure of private facts (much less facts that were so private that their disclosure would be highly offensive to a reasonable person).[27] The injury alleged by the FTC in *Kochava* therefore *would not* have been

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[21] *Kochava I*, *supra* note 5, at 1174–75; *Kochava II*, *supra* note 6, at *11–14.

[22] *Kochava I*, *supra* note 5, at 1174–76.

[23] *Kochava II*, *supra* note 6, at *11–14.

[24] *Kochava I*, *supra* note 5, at 1173–74; *Kochava II*, *supra* note 6, at *11. In *Kochava III*, the District Court essentially abandoned the first of these arguments, asserting instead that the mere fact of the FTC's failure to plead an injury actionable at common law did not prevent the FTC from pleading "substantial injury" within the meaning of Section 5. *Kochava III*, *supra* note 6, at *8.

[25] *Kochava I*, *supra* note 5, at 1174.

[26] RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

[27] *Kochava I*, *supra* note 5, at 1175 ("[T]he data Kochava sells is not, on its face, sensitive or private. On the contrary, any private information that is revealed in Kochava's data bank can be ascertained only by inference.").

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actionable under the common-law tort pointed to by the District Court. Turning to the second point, a mere disclosure of an individual's private information does not suffice to create Article III standing unless that disclosure bears a close relationship to a disclosure that would in and of itself be actionable at common law.[28] As just discussed, this is not the case with respect to the disclosures alleged by the FTC in *Kochava*,[29] so the disclosure alleged by the FTC in *Kochava would not*, in fact, have sufficed to create Article III standing had a consumer affected by Kochava's challenged practice tried to make a federal case out of that alleged disclosure.[30]

The *Kochava* Rulings thus erred in concluding that the consumer injury alleged by the FTC in *Kochava* would be actionable at common law and would suffice to create Article III standing. Even had the *Kochava* Rulings been correct on one or the other (or even both) of these points, however, the *Kochava* Rulings still would have been wrong in deeming a consumer injury to be a "substantial injury" for Section 5(n) purposes merely because it is actionable at common law and/or suffices to create standing for Article III

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[28] *See* TransUnion, LLC v. Ramirez, 594 U.S. 412, 425 (2021).

[29] *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977); *see also* TransUnion, LLC v. Ramirez, 594 U.S. 412, 425 (2021).

[30] *See* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 146 (3d Cir. 2024); Nabozny v. Optio Sols. LLC, 84 F.4th 731, 732–33, 735–37 (7th Cir. 2023); Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 826–29 (10th Cir. 2022); Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1241–50 (11th Cir. 2022) (en banc) (all holding that an intangible injury not involving public disclosure of the allegedly private facts at issue can never bear a "close relationship," within the meaning of *TransUnion*, to the injury made actionable by the common-law tort of public disclosure of private facts); *but see* Bohnak v. Marsh & McLennan Cos., 79 F.4th 276, 286 (2d Cir. 2023) (holding, in the data breach context, that the intangible injury inherent in having one's personal information accessed without authorization in a cyberattack bears a "close relationship," within the meaning of *TransUnion*, to the injury made actionable by the common-law tort of public disclosure of private facts, even where there has been no public disclosure of the personal information in question).

One federal district court has found Article III standing based not on Kochava's *disclosure* of consumers' "sensitive" geolocation data, but rather based on Kochava's *collection* of that data, on the theory that such collection constitutes an "intrusion" on the consumers' privacy. *See* Greenley v. Kochava, Inc., 684 F. Supp. 3d 1024, 1037 (S.D. Cal. 2023). The injury made actionable by the common-law tort of intrusion upon seclusion is an "interference with [a person's] interest in solitude or seclusion, either as to his person or as to his *private* affairs or concerns, of a kind that would be highly offensive to a reasonable man." RESTATEMENT (SECOND) OF TORTS § 652B (Am. L. Inst. 1977) (emphasis added). As the District Court acknowledged in *Kochava I*, "the data Kochava sells is not, on its face, sensitive or private," 671 F. Supp. 3d at 1175, so any intangible injury a consumer might be said to suffer from Kochava's mere collection of that data does not, as would be required under *TransUnion* for that injury to sustain Article III standing, bear a close relationship to the injury made actionable by the common-law tort of intrusion upon seclusion.

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purposes. The FTC itself has long recognized that the test for a "substantial injury" differs from the test for an injury that is actionable at common law and/or is sufficient to create an Article III injury. For example, a small economic harm that affects only a small number of people is clearly both actionable at common law[31] and sufficient to create Article III standing,[32] but, as the FTC has long recognized, such an injury is not a "substantial injury" for purposes of being the predicate for a Section 5 unfairness claim.[33] Thus, the *Kochava* Rulings further erred in imagining that the path for determining whether a consumer injury alleged by the FTC constitutes a "substantial injury" within the meaning of Section 5(n) is to inquire whether the injury is actionable at common law and/or sufficient to sustain Article III standing.

The principal failing, however, in the District Court's conclusion that an intangible consumer injury can, standing alone, be a "substantial injury" within the meaning of Section 5(n) was the District Court's failure to take into account the FTC's own statements, prior to the enactment of Section 5(n), as to the meaning of the term "substantial injury" in the Section 5 consumer context. Section 5(n) was "intended to codify, as a statutory limitation on unfair acts or practices, the principles of the FTCs December 17, 1980, policy statement on unfairness, reaffirmed by a letter from the FTC dated March 5, 1982."[34] As shown below, the FTC

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[31] Indeed, at common law the general rule is that a plaintiff need show no actual damages, and can instead claim merely nominal damages, to bring an action for violation of a legal duty owed to him or her. Uzuegbunam v. Preczewski, 592 U.S. 279, 289 (2021) (quoting 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 71 (7th ed. 1880)) ("The prevailing rule, 'well established' at common law, was 'that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.'").

[32] Katz v. Pershing, LLC, 672 F.3d 64, 76 (1st Cir. 2012) (requiring only "[a] relatively small economic loss—even an identifiable trifle" for Article III standing).

[33] *FTC Policy Statement on Unfairness*, FED. TRADE COMM'N (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [hereinafter 1980 Policy Statement], at n.12 (requiring that "a large number of people" be impacted before a "small harm" qualifies as "substantial"), *appended to* In re Int'l Harvester Co., 1984 FTC LEXIS 2, *300–18, *307 (1984). In *Kochava III*, the District Court ignored this point and continued to assert, without citing any supporting authority, that an intangible injury is a "substantial injury" for Section 5 purposes as long as it is a "concrete injury" for Article III standing purposes. *Kochava III*, *supra* note 6, at *7-8. As shown in text, that assertion is wrong as a matter of law according to the FTC's own long-standing interpretation of Section 5.

[34] S. REP. NO. 103-130 (1993), 1993 WL 322671, at *12 [hereinafter 1993 Senate Report] (citing 1980 Policy Statement, *supra* note 33; and then citing Letter from FTC Chairman J.C. Miller, III to

"principles" that are reflected in those documents, and that Section 5(n) intended to codify, directly addressed the meaning of the term "substantial injury" for purposes of Section 5's unfairness prong. As the District Court recognized in *Kochava I*, "[w]hen Congress borrows terms of art" like "substantial injury," the courts "presume that Congress knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."[35] Therefore, the plain meaning of the term "substantial injury" as used by Congress when it enacted Section 5(n) in 1994 must be derived not from the plain meaning of the separate words "injury" and "substantial" (as the District Court attempted to do in the *Kochava* Rulings), but rather from the FTC's then-operative definition of the term "substantial injury" for Section 5 purposes as set forth in the FTC's prior policy statements to Congress on this very question.[36]

Unfortunately, in rendering the *Kochava* Rulings the District Court failed to take into account the FTC's pre-Section 5(n) policy statements regarding the meaning of "substantial injury." That failure made all the difference as to where the District Court came out on this point, because those statements make clear that, as of the enactment of Section 5(n), the FTC defined a "substantial injury" for Section 5 purposes to require a tangible injury to the consumer(s) in question. Specifically, the 1980 Policy Statement stated in its discussion of the meaning of the term "substantial injury" that "[e]motional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair,"[37] and then clarified that "emotional effects might possibly be considered as the basis for unfairness" only "where tangible injury could be clearly demonstrated."[38] Similarly, the 1982 Policy

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Senators Packwood and Kasten (Mar. 5, 1982), *reprinted in* 42 BNA ANTITRUST & TRADE REG. REP. 1055, at 568–70 (Mar. 11, 1982) [hereinafter 1982 Policy Letter]).

[35] *Kochava I*, *supra* note 5, at 1173 (quoting United States v. Ornelas, 906 F.3d 1138, 1143 (9th Cir. 2018)).

[36] *See* United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992) (quoting Florida Nat'l Guard v. Federal Labor Rel. Auth., 699 F.2d 1082, 1087 (11th Cir. 1983) ("Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning.").

[37] 1980 Policy Statement, *supra* note 33, at *308.

[38] *Id.* at n.16.

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Letter stated that, "as a general proposition"—i.e., as a rule[39]—substantial injury "does not cover subjective examples of harm."[40] Thus, as then-FTC Commissioner Olhausen testified as recently as in 2012, the FTC's pre-enactment policy statements "specifically advised Congress that absent deception, it will not enforce Section 5 against alleged intangible harm."[41] That being so, and with Congress thereupon having codified those policy statements by means of Section 5(n), the *Kochava* Rulings are untenable insofar as they purport to allow the FTC to enforce Section 5's unfairness prong against an intangible harm to consumers such as "invasion of privacy."

Indeed, even if the FTC's pre-enactment statements were not dispositive as to the plain meaning of Section 5(n)'s term "substantial injury," the *Kochava* Rulings' interpretation of that term as including intangible injury would still fail under traditional rules of statutory interpretation for two reasons. First, the *Kochava* Rulings' interpretation is at odds with Section 5(n)'s legislative history, which states expressly that intangible injuries cannot *by themselves* constitute "substantial injury" under Section 5(n).[42] Second, that interpretation is at odds with language in the

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[39] *See General Proposition*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/general%20proposition (last visited Sept. 29, 2024) ("general proposition" is a "universal proposition" or a "law or principle).

[40] 1982 Policy Letter, *supra* note 34, at 570.

[41] *The Need for Privacy Protections: Perspectives from the Administration and Federal Trade Commission: Hearing before the S. Comm. on Com., Sci., and Transp.*, 112th Cong. 3 (2012) (Statement of Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm.); *see* Maureen K. Olhausen, Acting Chairman, Fed. Trade Comm'n, Opening Keynote at the ABA 2017 Consumer Protection Conference (Feb. 2, 2017) (acknowledging that: "The agency should focus on cases with objective, concrete harms such as monetary injury and unwarranted health and safety risks. The agency should not focus on speculative injury, or on subjective types of harm.").

[42] *See* 1993 Senate Report, *supra* note 34, at 13 ("Emotional impact and more subjective types of harm alone are not intended to make an injury unfair."). In *Kochava I*, the District Court characterized the quoted sentence from the 1993 Senate Report as stating that emotional impact and other more subjective types of harm are "ordinarily insufficient" to constitute "substantial injury," *Kochava I*, *supra* note 5, at 1174. Based on that characterization, the District Court concluded that the legislative history of Section 5(n) "do[es] not limit Section 5(n)'s reach only to tangible harms." *Id.* With all due respect to the District Court, the quoted sentence from the 1993 Senate Report quite plainly states that emotional impact and other more subjective types of harm are intended to be *always*, not merely "ordinarily," insufficient, standing alone, to constitute "substantial injury." That being the case, the legislative history of Section 5(n) in fact *does* limit Section 5(n)'s reach only to tangible harms. In *Kochava III*, the District Court shifted ground on this point, arguing that not all "intangible" injuries are "subjective" injuries and that, accordingly, non-subjective intangible injuries can qualify as "substantial injury" for Section 5 even if subjective intangible injuries cannot. *Kochava III*, *supra* note 6, at *7–*8. In advancing this argument, the District Court repeated its mistake of conflating the test for "substantial injury" for Section 5 purposes

subsequently enacted Gramm-Leach-Bliley Act that evinces a congressional understanding that "substantial injury" does not include intangible injury.[43]

Finally, the *Kochava* Rulings' interpretation that intangible injury can constitute "substantial injury" within the meaning of Section 5(n) does not hold water because adoption of that interpretation would create nightmarish practical problems in applying Section 5(n) going forward. For one thing, as the District Court recognized, even if intangible injury can be "substantial injury" for Section 5(n) purposes, not every imaginable intangible injury constitutes "substantial injury."[44] Some sort of test or standard would therefore need to be devised to separate those intangible injuries that qualify as "substantial injury" from those that do not. The *Kochava* Rulings attempt to articulate such a standard by holding that an intangible consumer injury can only be a "substantial injury" where it is "sufficiently severe" to be worthy of being labeled "substantial."[45] But the *Kochava* Rulings cite no authority for the "sufficiently severe" test they purport to employ to decide whether an intangible consumer injury is a "substantial injury" within the meaning of Section 5(n). Nor do they articulate any principles or guidelines that govern the "sufficiently severe" inquiry that they embrace. Rather, the *Kochava* Rulings' "sufficiently severe" inquiry ultimately boils down to a wholly subjective "eye-of-the-beholder," "I-know-it-when-I-see-it" standard that in actuality is no standard at all and only serves to establish the wholly subjective nature of the injury being examined.[46] As such, the *Kochava*

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with the test for "concrete injury" for Article III standing purposes. *Id.*; *see supra* note 33 and accompanying text. The District Court also ignored that both the FTC's pre-enactment statements and the legislative history of Section 5(n) make clear that both the FTC and the Congress used the terms "subjective injury" and "intangible injury" interchangeably as having identical meanings. *See supra* notes 36–41 and accompanying text.

[43] *See* F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 248 (3d Cir. 2015) (noting that the Gramm-Leach-Bliley Act, which the FTC enforces, "relieves some of the burdensome [Section 5(n)] requirements for declaring acts unfair" because it permits the FTC to establish standards protecting not only against "substantial harm," but also against "inconvenience" to consumers). In *Kochava III*, the District Court ignored this argument all the additional interpretive arguments made in the remainder of Part I of this Article, including most notably the Eleventh Circuit's ruling on this issue in *LabMD*. *See infra* note 54 and accompanying text.

[44] *See Kochava I*, *supra* note 5, at 1175.

[45] *Id.* ("Where, as here, a privacy intrusion is the alleged injury, the Court must determine whether the privacy intrusion is sufficiently severe to constitute 'substantial' injury.").

[46] *Compare Kochava I*, *supra* note 5, at 1175 (conclusory holding that "the [privacy] intrusion alleged by the FTC is not sufficiently severe to constitute 'substantial' injury"), *with Kochava II*, *supra* note 6, at *11–14 (conclusory holding that the very same privacy intrusion now did "rise[] to the requisite

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Rulings only serve to prove up the wisdom of Congress's expressed intent in enacting Section 5(n) of codifying the FTC's previous policy statements that subjective consumer injuries of this sort should be outside the scope of Section 5(n) and therefore should not be actionable under Section 5(a)'s unfairness prong.

In addition to creating huge practical problems in applying Section 5(n)'s "substantial injury" requirement, reading that requirement to encompass intangible consumer injuries such as "invasion of privacy" would create enormous difficulties in applying the cost-benefit test that is, as discussed in Part III below, inherent in Section 5(n)'s separate requirement that an act or practice may not be declared unfair unless the substantial injury it causes or is likely to cause to consumers is "not outweighed by countervailing benefits to consumers or to competition."[47] Generally speaking, "cost-benefit analysis" involves tallying up the projected dollar value of all expected costs of a project or decision and subtracting that amount from the total projected dollar value of all the expected benefits of the project or decision. Where intangible costs or benefits are relevant to the cost-benefit analysis in question (as they potentially would be in a Section 5(n) cost-benefit analysis under the *Kochava* Rulings' holding that an intangible consumer injury can be a "substantial injury" for Section 5(n) purposes), those intangibles like all relevant costs and benefits must be taken into account by assigning a dollar value to them.[48] But, exactly as one would expect, assigning dollar values to intangible costs and benefits for purposes of a cost-benefit analysis is far more difficult than doing so for tangible costs and benefits. Specifically, to assign a dollar value to intangible costs and/or intangible benefits for cost-benefit purposes, economists normally use a method called "contingent valuation," which involves "surveying individuals to determine how much they would be willing to pay to avoid the negative consequences of a project or business" (in the case of an intangible cost) or

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level" of being substantial because the FTC had now expressly alleged that Kochava provided its customers with geolocation data relating to millions of consumers' mobile devices and with Kochava's own inferences, drawn from that data and other data, regarding those consumers' behaviors).

[47] *See* 15 U.S.C. § 45(n).

[48] *See* Jennifer Simonson, *How to Conduct a Cost-Benefit Analysis*, FORBES (Feb. 16, 2024, 12:00 PM), https://www.forbes.com/advisor/business/software/cost-benefit-analysis/; Tim Stobierski, *How to Do a Cost-Benefit Analysis and Why It's Important*, HARV. BUS. SCH. ONLINE (Sept. 5, 2019), online.hbs.edu/blog/post/cost-benefit-analysis.

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to "receive the benefits of a project or business" (in the case of an intangible benefit).[49] The *Kochava* Rulings' holding that intangible consumer injury can constitute "substantial injury" for Section 5(n) purposes thus carries with it the inevitable, and highly undesirable, collateral consequence that in any case in which the FTC's theory of "substantial injury" is predicated on an alleged intangible consumer injury (for example, in the *Kochava* case itself), the FTC and the defendant will both have to undertake the expensive and time-consuming burden of engaging a trained economist to conduct a statistically valid survey of the allegedly affected consumers so as to be able to use the contingent valuation method to determine the dollar value of the intangible consumer injury in question.

Given the above-discussed theoretical and practical problems in the *Kochava* Rulings' holding that intangible consumer injury can constitute "substantial injury" within the meaning of Section 5(n), it is not particularly surprising that the *Kochava* court cited to only one case that (at least according to the *Kochava* court) supported that ruling: *FTC v. Roca Labs*.[50] In *Roca Labs*, as noted in *Kochava I*,[51] the United States District Court for the Middle District of Florida stated that, in order to establish "substantial injury" within the meaning of Section 5(n), "neither the legislative history nor the current law requires proof of tangible harm to the exclusion of intangible harm."[52] But that statement was pure dictum, as in *Roca Labs* the FTC's unfairness theory was predicated on alleged *tangible* injury, namely, allegations that "some consumers paid hundreds of dollars for the Roca Labs products and unsuccessfully sought refunds because of Defendants'" allegedly unfair acts and practices.[53] Moreover, that statement disregards the analysis of this very question by the Eleventh Circuit (which encompasses

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[49] *See Assigning Dollar Value to Intangible Costs and Benefits: A Guide for Economic Decision-Making*, ECONOMATIK (May 20, 2023), https://economatik.com/news/1005233/assigning-dollar-value-to-intangible-costs-and-benefits.

[50] *Kochava I*, *supra* note 5, at 1174 (citing FTC v. Roca Labs, Inc., 345 F. Supp. 3d 1375 (M.D. Fla. 2018)).

[51] *Id.*

[52] 345 F. Supp. 3d at 1395.

[53] *Id.* In addition to being dictum, the *Roca Labs* court's statement to this effect is perplexing, because in the sentence immediately preceding that statement *Roca Labs* had quoted the Section 5(n) legislative history that expressly *does* state that intangible injury, standing alone, cannot constitute substantial injury. "Emotional impact and more subjective types of harm alone are not intended to make an injury unfair." (quoting 1993 Senate Report, *supra* note 34, at 13).

the Middle District of Florida) in *LabMD, Inc. v. FTC*. There, in granting LabMD's motion to stay the FTC's unfairness finding pending appeal, the Eleventh Circuit considered the Section 5(n) legislative history cited above and held that "LabMD has thus made a strong showing that the FTC's factual findings and legal interpretations may not be reasonable" because "it is not clear that a reasonable interpretation of [Section 5(n)] includes intangible harms like those that the FTC found in this case."[54]

The *Kochava* Rulings likewise gave no consideration to the Eleventh Circuit's analysis in *LabMD* of the meaning of the term "substantial injury" as used in Section 5(n). Had they done so, one would expect that the *Kochava* court, after looking at the Section 5(n) legislative history that it unfortunately overlooked in the *Kochava* Rulings, would have come out differently on the issue of whether an intangible consumer injury can be a "substantial injury" for Section 5(n) purposes. Hopefully, the *Kochava* court will eventually correct its mistaken holding on this issue. Moreover, and whether or not such a correction occurs, hopefully other courts in other cases will not repeat the *Kochava* Rulings' error in finding that an intangible consumer injury can be a "substantial injury" for purposes of Section 5(n) of the FTC Act.

II. THE *KOCHAVA* RULINGS' MISINTERPRETATION OF THE WORD "LIKELY" AS USED IN SECTION 5(N)

Under Section 5(n) of the FTC Act, as noted above, the FTC may not declare an act or practice to be "unfair" within the meaning of Section 5(a) of the FTC Act unless the act or practice "causes or is likely to cause" substantial injury to consumers.[55] In *Kochava*, the FTC has advanced two theories as to how its allegations against Kochava satisfy Section 5(n)'s "causes or is likely to cause" element. First, the FTC asserts that Kochava's collection and sale of consumer geolocation data relative to "sensitive locations" "causes" substantial injury to consumers by invading their privacy.[56] That theory, as shown in Part I above, is fatally flawed and should have been rejected by the District Court because the consumer injury alleged by the FTC in advancing that theory—i.e., "invasion of privacy"—is an intangible injury that as a matter of law cannot constitute a "substantial

[54] LabMD, Inc. v. FTC, 678 Fed. Appx. 816, 820–21 (11th Cir. 2016).
[55] 15 U.S.C. § 45(n).
[56] *Kochava* FAC, *supra* note 17, paras. 88–96.

injury" within the meaning of Section 5(n). Second, the FTC asserts that Kochava's collection and sale of such consumer geolocation data is "likely to cause" substantial injury to consumers because it exposes them to "secondary harms" such as stigma, discrimination, physical violence, and emotional distress.[57] That second theory, as shown below, is fatally flawed and should have been rejected by the District Court because it is predicated on an incorrect reading of the word "likely" in Section 5(n).

In the *Kochava* Rulings, the District Court took the position that an act or practice is "likely" to cause substantial injury to a consumer, within the meaning of Section 5(n), where it creates a "significant risk" of the consumer's incurring that injury.[58] To support that position, the District Court cited the Ninth Circuit's decision in *FTC v. Neovi*.[59] But the issue of the meaning of the word "likely" in Section 5(n) was not raised in *Neovi*,[60] and the *Neovi* court's statement that "[a]n act or practice can cause 'substantial injury' . . . 'if it raises a significant risk of concrete harm,'" was made in the context of evaluating whether the consumer injury pled and proven by the FTC was "substantial"—not whether it was "likely"—within the meaning of Section 5(n).[61] So *Neovi* is neither precedential nor persuasive as to the meaning of the word "likely" in Section 5(n).[62]

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[57] *Id.* paras. 97–106.

[58] *Kochava I*, *supra* note 5, at 1172 (holding that to allege that Kochava's practice is "likely" to cause substantial injury to consumers, the FTC must "allege that Kochava's practices create a 'significant risk' that third parties will identify and harm consumers"); *Kochava II*, *supra* note 6, at *11 (holding that, by alleging Kochava's sale of "'massive amounts of private and encyclopedic information' that puts consumers at a significant risk of suffering secondary harms," the FTC had adequately pled a practice by Kochava that is "likely" to cause substantial injury to consumers.).

[59] FTC v. Neovi, 604 F.3d 1150 (9th Cir. 2010). *See Kochava I*, *supra* note 5, at 1172.

[60] Brief of Appellants at 10-20, FTC v. Neovi, 604 F.3d 1150 (No. 09-55093) (raising only whether injury alleged by FTC was proven to have been both substantial and caused by the defendants).

[61] *Neovi*, 604 F.3d at 1157 (quoting Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 972 (D.C. Cir. 1985)).

[62] Neither is *American Financial Services*, the case *Neovi* cited on this point. 767 F.2d at 972. The statement from that case that *Neovi* later quoted was likewise made in the context of evaluating whether the FTC had pled and proven a substantial injury—not whether the injury alleged by the FTC was "likely" within the meaning of Section 5(n). *Id.* Indeed, Section 5(n) had not even been enacted when *American Financial Services* was decided, so the statement in *American Financial Services* that was later quoted in *Neovi* quite plainly cannot have been an interpretation of Section 5(n)'s use of the word "likely." 15 U.S.C. § 45(n) (amending 15 U.S.C. § 45 (1994)). Moreover, that statement was made in reliance on a footnote in the 1980 Policy Statement that discussed the "meaning" of "substantial injury"—not how probable a potential future substantial injury must be to be actionable as being "unfair" within the meaning of Section 5(a) of the FTC Act. 1980 Policy Statement, *supra* note 33, at n.12. Indeed, the question of how probable

Given that *Neovi* was inapposite, and given the absence of any other controlling Ninth Circuit case law on point, the *Kochava* Rulings should have interpreted the meaning of the phrase "likely to cause" in Section 5(n) by starting with the ordinary English meaning of the word "likely."[63] The plain meaning of "likely" is "having a high probability of occurring," or "in all probability."[64] At a bare minimum, "likely" means "more likely than not, and that includes a fifty-one percent chance of a result one way against a forty-nine percent chance of a result the other way."[65] As the Eleventh Circuit recognized in *LabMD*, given the dictionary definition of the word "likely," the phrase "likely to cause" in Section 5(n) cannot reasonably be read "to include something that has a low likelihood."[66]

Yet the *Kochava* Rulings do precisely that by deeming substantial injury to be "likely" whenever an act or practice creates a "significant risk" of its occurring. In *Kochava I*, the District Court held that "more than a mere possibility of consumer injury" must be shown for a "significant risk" of that injury's occurrence to be established, but the District Court never said how much more than "merely possible" an injury needed to be in order for a consumer to be at "significant risk" of suffering that injury, and thus left room for improbable injuries to be found "likely" within the meaning of Section 5(n).[67] And in *Kochava II*, while the District Court held that the new allegations of the FTC's amended complaint now established that consumers were at "significant risk" of suffering the secondary harms posited by the FTC, the District Court made no finding that any given consumer "probably"

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a potential future substantial injury must be to be actionable under Section 5(a)'s unfairness prong is never addressed in the 1980 Policy Statement, so that document provides no assistance in interpreting Section 5(n)'s requirement that such a future injury be "likely" to be so actionable.

[63] United States v. McLymont, 45 F.3d 400, 401 (11th Cir. 1995) (per curiam). "In interpreting the language of [a] statute, [the] Court must assume that Congress used the words of the statute as they are commonly and ordinarily understood . . . ."

[64] *Likely*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/likely (last visited Oct. 19, 2024).

[65] FTC v. Watson Pharms., 677 F.3d 1298, 1312 (11th Cir. 2012) (citing United States v. Frazier, 387 F.3d 1244, 1280–81 (11th Cir. 2004), *rev'd on other grounds by* FTC v. Actavis, Inc., 570 U.S. 136, 138 (2013). *See also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2024, https://ahdictionary.com/word/search.html?q=likely (last visited Oct. 19, 2024) (primary definition of "likely" is "probable").

[66] LabMD, Inc. v. FTC, 678 Fed. Appx. 816, 821 (11th Cir. 2016).

[67] *Kochava I*, *supra* note 5, at 1172.

or "more likely than not" would suffer any of those harms.[68] Nor could the District Court have made any such finding, for in its amended complaint the FTC made no such allegation; instead, it merely alleged that Kochava's challenged practice "expos[es]" consumers to secondary harms that have on occasion actually occurred when engaged in by other data brokers.[69] In *Kochava II* the District Court found those new FTC allegations to be sufficient to increase from a "mere possibility" to "significant" the risk of consumers suffering those secondary harms as a result of Kochava's challenged practice.[70] But the mere fact that an act or practice "exposes" a consumer to an injury does not make the consumer's suffering that injury "probable" or "more likely than not"; nor does the mere fact that the injury in question has on occasion actually been incurred by consumers when others have engaged in that act or practice. And nothing in *Kochava II* creates any reason to think that the District Court thought the FTC's allegations established a *probability*, rather than a mere "significant risk," that Kochava's challenged practices would cause consumers to suffer the secondary harms posited by the FTC. Thus, if as per the plain meaning of the word "likely" the District Court had inquired not merely whether the FTC had pled a "significant risk" of a consumer's incurring the secondary harms it had posited, but rather whether the FTC's allegations established that an affected consumer "probably" or "more likely than not" would suffer those harms, it would have had to reject the FTC's second theory as to how its allegations against Kochava satisfy Section 5(n)'s "causes or is likely to cause" element.

The *Kochava* Rulings' reading of the word "likely" in Section 5(n) as meaning "significant risk" fails not only because it disregards the plain meaning of the word "likely," but also because that reading is incoherent and incapable of being objectively applied in practice. The *Kochava* Rulings provide no quantification of what the chances of a consumer injury must be for the risk of the injury's happening to be as least "significant" (as opposed to its probability merely being "possible" or "remote" or "insignificant" or something else less than "significant"). Nor does the word "significant" in

[68] *Kochava II*, *supra* note 6, at *10–11.
[69] *See Kochava* FAC, *supra* note 17, paras. 98, 101, 104–05.
[70] *See Kochava II*, *supra* note 6, at *10–11.

and of itself provide any such quantification.[71] What, then, is to prevent a one percent chance, or even a one-in-a-million possibility, from being deemed "significant" in *Kochava* or in any other case? In the absence of any objective standard by which to determine whether the risk of a consumer injury is "significant," the District Court's "significant risk" test for whether a consumer injury is "likely" is not a legal standard at all. Instead, that test (like the District Court's "sufficiently severe" test for whether an intangible consumer injury is a "substantial injury" within the meaning of Section 5(n)[72]) is another conclusory "eye-of-the-beholder," "I-know-it-when-I-see-it" test that, if it stands, would allow the courts and the FTC to use the conclusory label of "significant" to find a "likely" consumer injury in any and every case if that is the outcome they subjectively desire in the particular case at hand. Such a result under Section 5(n) would run directly counter to the congressional purpose of putting strict limitations on the FTC's Section 5 unfairness authority by means of Section 5(n).[73]

Finally, the *Kochava* Rulings' handling of the FTC's second theory as to how its allegations against Kochava satisfy Section 5(n)'s "causes or is likely to cause" element is flawed not only in their interpretation of the word "likely," but also in their tacit assumption that all the ostensibly likely "secondary harms" to consumers posited by the FTC constitute "substantial injury" within the meaning of Section 5(n).[74] According to the FTC's amended complaint, Kochava's challenged practice is "likely" to cause consumers the following secondary harms: "stigma, discrimination, physical violence, [and] emotional distress."[75] But with the exception of "physical violence," all these alleged secondary harms constitute intangible consumer injuries and thus should have been disregarded by the District Court in deciding whether the FTC had alleged that Kochava's challenged practice is

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[71] *Significant*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/significant (last visited Oct. 7, 2024) (defining significant to mean "of a noticeably or measurably large amount").

[72] *See supra* notes 45–46 and accompanying text.

[73] 1993 Senate Report, *supra* note 34, at 12 (1993) (describing Section 5(n) as "limiting the FTC's authority" and codifying "a statutory limitation on unfair acts and practices").

[74] *See Kochava I*, *supra* note 5, at 1171–73; *Kochava II*, *supra* note 6, at *9–11 (both assuming that the first prong of Section 5(n) would be satisfied if the "secondary harms" alleged by the FTC could be found to be "likely" within the meaning of Section 5(n)).

[75] *Kochava* FAC, *supra* note 17, paras. 97 & 106; *Kochava II*, *supra* note 6, at *9–10 (reading the FTC's amended complaint as alleging these "secondary harms" are likely to be caused by Kochava's challenged practice).

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likely to cause substantial injury within the meaning of Section 5(n)'s first prong.[76] And as regards "physical violence," the FTC's amended complaint offers no example where physical violence against consumers actually has occurred and/or actually does occur as a result of other data brokers engaging in practices similar to Kochava's challenged practice.[77] The FTC's amended complaint thus fails to make, as to the alleged secondary harm of "physical violence," the allegation that was the linchpin of the District Court's conclusion that the FTC's amended complaint succeeded where its original complaint had failed in alleging "likely" consumer injury as a result of Kochava's challenged practice.[78]

Happily, as the case has not yet gone to judgment, there is still time for the District Court to correct the *Kochava* Rulings' erroneous interpretation of the phrase "likely to cause" in Section 5(n) of the FTC Act.[79] Hopefully, the District Court will do so, and, upon doing so, hopefully it will reject the FTC's second theory as to how its allegations against Kochava satisfy Section 5(n)'s "causes or is likely to cause" element. Whether or not such a correction and ensuing rejection prove to be forthcoming in *FTC v. Kochava*,

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[76] *See supra* Part I (demonstrating that intangible consumer injuries as a matter of law cannot constitute "substantial injury" within the meaning of Section 5(n)); *Kochava* FAC, *supra* note 17, paras. 101 and 104–05 (failing to allege that consumers had incurred any out-of-pocket monetary losses or physical injury to person or property on occasions when they allegedly actually suffered the secondary harms alleged by the FTC by reason of other data brokers engaging in practices similar to Kochava's challenged practice).

[77] *Kochava* FAC, *supra* note 17, paras. 97–106.

[78] *See Kochava II*, *supra* note 6, at *10–11 ("Unlike the original Complaint, the Amended Complaint contains allegations that the targeting of consumers based on geolocation data 'has and does occur'. . . . By demonstrating that harms have resulted from the sale of similar mobile device data, the FTC supports its claim that Kochava's practices are likely to cause consumer injury."). In *Kochava III*, the District Court rejected the argument made in Part II of this Article by quoting this passage from *Kochava II* and asserting that Section 5(n)'s "likely to cause" language "does not require an allegation that Kochava has already caused such harms, nor that Kochava itself will cause the ultimate injury." *Kochava III*, *supra* note 6, *10–11. Of course, neither Kochava nor this Article makes any argument that such an allegation is necessary to satisfy Section 5(n)'s "likely to cause" language. Rather, both Kochava and this Article argue that the FTC's does not allege facts that plausibly show the secondary harms posited by the FTC are "likely" within the ordinary English meaning of that word. *Kochava III* unfortunately ignores all the arguments Kochava and this Article actually make on this point, most notably the District Court's plainly erroneous ruling that an unlikely injury can be found to be a "likely" injury within the meaning of Section 5(n) as long as there is a "significant risk" of the injury actually occurring.

[79] *See* Fed. R. Civ. P. 54(b) (providing that "any order or other decision, however designated, that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities").

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however, the *Kochava* Rulings' erroneous interpretation of the phrase "likely to cause" in Section 5(n) of the FTC Act should not be followed by other courts in other cases, should the FTC urge such other courts to embrace that erroneous interpretation.

III. THE *KOCHAVA* RULINGS' MISINTERPRETATION OF THE "COST-BENEFIT" PRONG OF SECTION 5(N)

As noted above, under the so-called "third prong" of the unfairness test set forth in the first sentence of Section 5(n) of the FTC Act, the FTC may not declare an act or practice to be "unfair" to consumers within the meaning of Section 5(a) of the FTC Act unless the act or practice is "not outweighed by countervailing benefits to consumers or to competition."[80] In a rare outbreak of unanimity among the three branches of government, the courts, the Congress, and the FTC itself all understand the third-prong of Section 5(n)'s unfairness test as imposing a "cost-benefit test."[81] There is also agreement that the "benefits" side of the analysis required by the third prong looks to "the probability and expected size of reasonably unavoidable harms to consumers" that would be prevented through cessation of the challenged act or practice,[82] while the "costs" side of that analysis looks to the costs to the parties and to the public at large of bringing about that cessation.[83] The bottom line, then, is that under the third prong of Section 5(n)'s test, an act or practice may not be declared unfair "unless it is injurious in its net effects."[84]

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[80] 15 U.S.C. § 45(n).

[81] *See* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 255 (3d Cir. 2015) (Section 5(n)'s "countervailing benefits" prong "informs parties that "the relevant inquiry [under Section 5(n)'s countervailing benefits prong] is a cost-benefit analysis"); 1993 Senate Report, *supra* note 34, at 13 (Section 5(n)'s countervailing benefits prong requires "that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence"); Opinion of the Commission, *In the Matter of LabMD, Inc.*, at 11 (July 29, 2016), www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf [hereinafter FTC *LabMD* Opinion] (agreeing with *Wyndham* "countervailing benefits" prong of the Section 5(n) test requires a "cost-benefit" analysis of the allegedly unfair act or practice).

[82] *Wyndham*, 799 F.3d at 255; FTC *LabMD* Opinion, *supra* note 81, at 11.

[83] 1980 Policy Statement, *supra* note 33, at *309.

[84] FTC *LabMD* Opinion, *supra* note 81, at 26 (quoting 1980 Policy Statement, *supra* note 33, at *309).

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In *Kochava I*, the District Court considered whether the FTC had alleged facts that, if proven, would meet the FTC's burden of establishing that Kochava's challenged practice fails the cost-benefit test imposed by Section 5(n)'s third prong.[85] The FTC's allegations on this point were sparse, to put it mildly. First, the FTC alleged that Kochava could cease its allegedly unfair practices by implementing "safeguards" that would remove from the geolocation data feeds provided to its customers data as to consumers' visits to "sensitive locations."[86] Second, the FTC alleged that "[s]uch safeguards could be implemented at a reasonable cost and expenditure of resources.[87] That was it—nothing more than that was offered by the FTC on this particular point.[88]

Kochava I holds that, because "the FTC seeks only an injunction requiring Kochava to 'implement safeguards to remove data associated with sensitive locations from its data feeds,'" the FTC had alleged facts sufficient to show that Kochava's challenged practice failed Section 5(n)'s cost-benefit test.[89] This holding was error. The mere fact that the FTC's complaint "only" seeks to require the defendant to cease and desist from its allegedly unfair practice says nothing whatsoever as to whether the challenged practice fails Section 5(n)'s cost-benefit test. Nor does the FTC's follow-on assertion that *Kochava* could cease including in its geolocation data feeds data associated with consumers' "sensitive locations" by implementing "safeguards" that would have a "reasonable" cost. That assertion merely re-states the legal conclusion that the costs of ceasing Kochava's challenged practice do not outweigh the benefits expected to be derived from such a cessation.

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[85] *See Kochava I*, *supra* note 5, at 1176.

[86] *Kochava* Complaint, *supra* note 1, para. 32.

[87] *Id.*

[88] The amended complaint subsequently filed by the FTC made no effort to enhance these particular allegations. *See Kochava* FAC, *supra* note 17, para. 111.

[89] *Kochava I*, *supra* note 5, at 1176. In *Kochava III*, the District Court merely repeated this conclusory holding regarding Section 5(n) cost-benefit element, without addressing either Kochava's or this Article's arguments that the FTC had failed to plead any facts that would (as required) plausibly sustain this legal conclusion. *Kochava III*, *supra* note 6, at *11–12. Plainly, the supposed "narrowness of the proposed remedy" sought by the FTC does not (as claimed by the FTC and the District Court) in and of itself show anything about whether, much less plausibly establish that, the costs of imposing that remedy are less than the benefits of doing so. As shown in Part III of this Article, in actuality the FTC's complaint alleges no facts that would plausibly establish either the costs or the benefits of declaring Kochava's challenged practice unfair within the meaning of Section 5.

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As the District Court recognized in *Kochava I*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[90] Thus, as *Kochava I* states, "dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."[91] Moreover, as the District Court further recognized in *Kochava I*, while Rule 12(b)(6) "does not impose a probability requirement" in deciding whether there exists an absence of sufficient facts alleged, it does "'call[] for enough facts to raise a reasonable expectation that discovery will reveal evidence' of the truth of the allegations."[92]

Had the District Court applied these bedrock pleading principles to the FTC's allegations regarding Section 5(n)'s third prong, it would have found those allegations insufficient and dismissed the FTC's complaint on that ground. On the cost side of the required cost-benefit analysis, the District Court recognized that side of the analysis needed to take into account "the potential costs that the proposed remedy would impose on" Kochava.[93] Accordingly, the District Court should have insisted that the FTC allege *facts* both specifying and substantiating as plausible the alleged actual estimated amount of the supposedly "reasonable cost" of the "safeguards" that the FTC's complaint hypothesized Kochava could employ to eliminate from its geolocation data feeds data associated with consumers' "sensitive locations" (whatever the term "sensitive locations" is supposed to mean[94]). Moreover,

[90] *Id.* at 1168 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
[91] *Id.* (quoting Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008)).
[92] *Id.* (quoting *Twombly*, 550 U.S. at 556).
[93] *Id.* at 1176.
[94] The supposed objective meaning of this term is never set forth in either the original or the amended complaint filed by the FTC in *Kochava*, so the FTC has provided neither Kochava, nor the District Court, nor future targets of this particular FTC unfairness theory with any objective test that might be employed to figure out which consumer locations cannot (according to the FTC) lawfully be included in geolocation data feeds of the sort that Kochava sells to its customers. Instead, the FTC asserts that locations are "sensitive" if "sensitive characteristics" about consumers (such as "gender identity, ethnicity, religion, political activity, and medical issues") can be inferred from visits to those locations. *Kochava* FAC, *supra* note 17, para. 92. But no standard is articulated by the FTC for how to decide, objectively, whether a particular consumer characteristic is "sensitive" or, if it is, whether that characteristic can be inferred from a consumer's visit to a particular location. Rather, the decision-making approach on these issues seems to be wholly subjective, as reflected by the Democrat-controlled FTC's somewhat amusing inclusion of "likely Republican voter" in the "sensitive characteristics" bucket, *id.* para. 93, and its consequent inclusion of the locations of "Republican focused political events and events and venues affiliated with conservative topics" in the "sensitive locations" category, *id.*, evidently on the theory that

the District Court should have also insisted that the FTC allege facts both specifying and substantiating as plausible the estimated collateral costs, such as lost sales, that Kochava would be expected to incur from such a data elimination; such collateral costs could amount to millions of dollars so far as one can tell from the facts alleged by the FTC but are never even mentioned, much less factually specified and substantiated, in the FTC's complaint. The District Court accordingly should have dismissed the FTC's complaint simply by reason of its wholly inadequate allegations as to the cost side of Section 5(n)'s cost-benefit analysis.[95]

Further, and even more fundamentally, on the benefit side of the required cost-benefit analysis, the District Court should have insisted that the FTC allege facts specifying and substantiating as plausible the alleged actual estimated value of the otherwise unavoidable substantial consumer injury that would be avoided by cessation of Kochava's challenged practice of

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"likely Republican voters" are likely to be stigmatized, discriminated against, and suffer emotional distress and even physical violence, *id.* para. 97, were they to be identifiable as such based on their geolocation data.

[95] The FTC might attempt to argue in *Kochava* or in some future Section 5(a) unfairness case that it needs discovery to calculate the costs to the defendant of ceasing its allegedly unfair act or practice, so the FTC cannot be expected to allege the amount of those costs in its complaint. Any such argument should be rejected. Sections 6 and 9 of the FTC Act give the FTC broad authority to investigate potential unfair or deceptive acts or practices before commencing an administrative proceeding or a civil action seeking to have a company ordered to cease a given act or practice. 15 U.S.C. §§ 46, 49. Under Section 20 of the FTC Act that authority includes issuance of civil investigative demands compelling the company that is the target of such a pre-litigation investigation to produce documents, to submit written reports and answers to questions, and/or to provide sworn testimony. 15 U.S.C. § 57b-1(c). The FTC thus has ample tools to obtain from the investigation's target, *before litigation*, whatever evidence it may need to be able to include in its complaint factual allegations sufficient to sustain any Section 5(a) unfairness claim it may decide to assert against the target. That being the case, the FTC would have no basis for contending that it needs post-litigation discovery to make the factual allegations required by *Twombly*. *See* FTC v. Swish Mktg., 2010 WL 653486, at *6 (N.D. Cal. Feb. 22, 2010) ("In light of the [FTC]'s broad investigatory power and its ability to obtain discovery prior to the commencement of this litigation, requiring it to advance some factual connection between [a defendant] and the alleged deceptive acts should not represent an unreasonable or impractical expectation."). This is particularly so where, as in *Kochava*, the FTC has actually conducted a substantial pre-litigation investigation of the target's allegedly unfair act or practice. *See* FTC v. D-Link Systems, Inc., 2017 U.S. Dist. LEXIS 152319, at*15 (N.D. Cal. Sept. 19, 2017) (dismissing Section 5(a) claim under *Twombly* for failure to allege facts to support asserted "likely" consumer injury and noting that "[t]he lack of facts indicating a likelihood of harm is all the more striking in that the FTC says that it undertook a thorough investigation before filing the complaint. . . ."); Memorandum in Support of Motion to Dismiss First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 12 n.3, FTC v. Kochava, Inc., 671 F. Supp. 3d 1161 (D. Idaho, filed July 5, 2023) (Case No. 2:22-cv-377) (noting that in the FTC had conducted a six-month investigation of Kochava prior to filing its complaint).

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including in its geolocation data feeds data associated with consumers' "sensitive locations" (again, whatever that term is supposed to mean). *The FTC's complaint is wholly silent on this crucial issue*. Thus, for all one knows from reading the FTC's complaint, and thus for all the District Court could have known from doing so, the FTC is valuing the avoided consumer injury that would flow from Kochava's cessation of its challenged practice at $100 for each of the 125 million mobile device owners[96] who are allegedly suffering the alleged "invasion of privacy" caused by that practice. If so, that would equate to at least $12.5 *billion* of alleged substantial consumer injury being, in the FTC's estimation, avoided by Kochava's cessation of its challenged practice. That in turn would mean that the costs such cessation would be expected to impose on Kochava would in the FTC's estimation be "reasonable" (to use the wording of the FTC's complaint) as long as they came in at or below that $12.5 billion figure. Because it says literally nothing as to its estimated value of the otherwise unavoidable substantial consumer injury that would be avoided by cessation of Kochava's challenged practice, the FTC's complaint says literally nothing that enabled the District Court to evaluate the plausibility of the FTC's allegation that the expected benefits of such cessation would exceed their expected costs.[97] For this independent reason, the FTC's complaint should have been dismissed by the District Court.

As the foregoing discussion makes clear, absent factual allegations in the FTC's complaint both specifying and substantiating as plausible the

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[96] *See Kochava* Complaint, *supra* note 1, para. 11.

[97] Nor does the FTC's complaint say anything about the consumer *benefits* that would be forgone if Kochava were ordered to cease its practice of including geolocation data as to consumers' "sensitive locations" in the data feeds it provides to its customers. It should have. As the third prong of Section 5(n)'s unfairness test inquires whether the challenged act or practice "is injurious in its net effects," FTC *LabMD* Opinion, *supra* note 81, at *359 (quoting *Int'l Harvester Co.*, 1984 FTC LEXIS 2, 309 n.17 (F.T.C. 1984)), the cost-benefit test demanded by that prong must account both for consumer injury that would be avoided *and* the consumer benefits that would be lost from cessation of the defendant's challenged act or practice, by netting the former out against the latter. Had the FTC done that in *Kochava*, the impact likely would have been dramatic: certainly in the overwhelming majority of cases geolocation data as to consumers' "sensitive locations" is used by Kochava's customers not to stigmatize, discriminate against, commit physical violence against, or cause emotional distress to, the consumers in question (as alleged by the FTC), but rather to help those consumers by providing them with advertising that they would find useful or beneficial. The FTC's complaint's effort to satisfy Section 5(n)'s third prong thus fails for the further reason that the FTC's cost-benefit analysis does not specify and substantiate the value of the consumer benefits that would be lost from ordering cessation of Kochava's challenged practice.

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amounts of the expected costs and the expected benefits of the cessation of the defendant's allegedly unfair act or practice, it is impossible for any court (and was impossible for the District Court in *Kochava*) to have any idea whether, much less to have the *Twombly*-required "reasonable expectation" that, discovery will reveal evidence establishing the truth of the FTC's assertion that the act or practice in question fails Section 5(n)'s cost-benefit test. In any and every Section 5(a) unfairness case, then, the court *always* should insist that the FTC's complaint include such factual allegations in order to state a claim under Section 5(a).[98] The District Court's failure to

[98] The 1993 Senate Report states that Section 5(n) mandates that the FTC conduct a cost-benefit analysis in every unfairness case (Section 5(n) "require[s] . . . that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence"), but it also qualifies that statement by saying that "the Committee does not intend that the FTC *quantify* the detrimental and beneficial effects of the practice in every case" because "[i]n many instances, such a *numerical* benefit-cost analysis would be unnecessary; in other cases, it may be impossible." 1993 Senate Report, *supra* note 34, at 13 (1993) (emphasis added). The FTC might point to the 1993 Senate Report's qualification to claim, contrary to the assertion made in the text above, that the FTC need not *always* prove or allege in a quantified or numerical fashion the costs and/or the benefits of ordering the defendant in a Section 5(a) unfairness case to cease its allegedly unfair act or practice. Such a claim should be rejected. All agree that by its plain language, the third prong of Section 5(n)'s test requires a cost-benefit analysis in every case. *See supra* notes 81–84 and accompanying text. And a cost-benefit analysis, *by definition*, requires *quantification* of (i.e., assigning a *numerical* monetary value to) all the costs and benefits of the project or decision being evaluated. Tim Stobierski, *How to Do a Cost-Benefit Analysis and Why It's Important*, HARVARD BUSINESS SCHOOL ONLINE (Sept. 5, 2019), https://online.hbs.edu/blog/post/cost-benefit-analysis ("Generally speaking, cost-benefit analysis involves tallying up all costs of a project or decision and subtracting that amount from the total projected benefits of the project or decision. . . . Once you've compiled exhaustive lists of all costs and benefits, you must establish the appropriate monetary units by assigning a dollar amount to each one."); Jennifer Simonson, *How to Conduct a Cost-Benefit Analysis*, FORBES (Feb. 16, 2024), www.forbes.com/advisor/business/software/cost-benefit-analysis. Thus, given that cost-benefit analyses are inherently quantified, the 1993 Senate Report is, with due respect, incoherent in on the one hand asserting that a cost-benefit analysis is in every case required but on the other hand asserting that a *quantified* cost-benefit analysis is not necessarily required in every case. Given that the 1993 Senate Report is itself internally inconsistent on this point, basic rules of statutory interpretation would require giving preference to the plain language of Section 5(n) itself, which language as noted above is unanimously understood as *always* requiring a cost-benefit analysis establishing that the benefits of ordering cessation of the challenged act or practice are not less than the costs of such cessation. *See supra* notes 81–84 and accompanying text. But even if the language of Section 5(n)'s third prong might be read in light of the 1993 Senate Report to embed an exception for situations where a "quantified" cost-benefit analysis is either "unnecessary" or "impossible," as a practical matter that exception would be so narrow as to be for all intents and purposes non-existent. When would a *quantified* version of the cost-benefit analysis required by Section 5(n) be unnecessary? The author of this Article cannot think of a case other than one where the defendant conceded that its challenged act or practice failed Section 5(n)'s third prong. And when would a *quantified* version of the cost-benefit analysis required by Section 5(n) be impossible? The author of this Article cannot think of any such case, given that cost-benefit analyses can and do quantify *all* costs and benefits expected to be brought about

insist that the FTC do that in *Kochava* was error on its part and should be corrected. Even more important, other courts in future cases should decline to follow the District Court's holding in *Kochava I* that a defendant's challenged practices can be sufficiently pled to have failed Section 5(n)'s cost-benefit test by allegations of the sort the FTC has made in *Kochava*.

IV. THE *KOCHAVA* RULINGS' MISINTERPRETATION OF THE WORD "UNFAIR" AS USED IN SECTION 5

In moving to dismiss the FTC's complaint in *FTC v. Kochava*, Kochava argued that to plead and prove an "unfairness" claim under Section 5(a) of the FTC Act, the FTC had to plead and prove that Kochava's allegedly "unfair" practice not only satisfied the elements set forth in Section 5(n)'s three-prong test, but also violated some other "well-established" law or public policy.[99] In advancing this argument, Kochava relied on the decision of the Eleventh Circuit in *LabMD, Inc. v FTC*.[100] In *LabMD*, the FTC claimed that LabMD, a medical laboratory, engaged in an unfair act or practice in violation of Section 5(a) of the FTC Act by failing to implement adequate data-security measures.[101] LabMD responded by arguing that the Section 5(a) claim should have been denied because to make such a claim the FTC must not only satisfy the three prongs of Section 5(n), but also make an additional showing of culpability that the FTC had not in fact made.[102] The FTC countered by arguing that no such showing of culpability had to be made to sustain the FTC's unfairness claim, because pleading and proving that LabMD's acts and practices satisfied the elements of Section 5(n)'s three-prong test in and of itself sufficed to make those acts and practices "unfair" within the meaning of Section 5(a).[103] The Eleventh Circuit agreed with

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by pursuing the decision or project under consideration, including those that are contingent and/or intangible. *See* Stobierski, *supra*. In any event, the existence or non-existence of any such exception is moot in the context of the *Kochava* case, as there the FTC's complaint and briefing made no argument that a quantified version of the cost-benefit analysis required by Section 5(n) was either unnecessary or impossible.

[99] *See Kochava I*, *supra* note 5, at 1169.

[100] *Id.* at 1170 (citing LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018)).

[101] *LabMD*, 894 F.3d at 1225.

[102] *See* Brief of Petitioner at 26–28, *LabMD*, 894 F.3d 1221 (No. 16-16270).

[103] *See* Brief of the Federal Trade Commission at 39–40, LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018) (No. 16-16270).

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LabMD that to be "unfair" an act or practice had to meet *both* Section 5(n)'s three-prong test *and* a separate culpability requirement.[104] The Eleventh Circuit went on to define that culpability requirement as necessitating a showing that the defendant's challenged conduct violates a "clear and well-established" law or public policy, which meant that "an act or practice's 'unfairness' must be grounded in statute, judicial decisions—i.e., the common law—or the Constitution."[105] Thus, said the Eleventh Circuit, "[a]n act or practice that causes substantial injury but lacks such grounding is not unfair within Section 5(a)'s meaning."[106] Rather, according to the Eleventh Circuit, "an 'unfair' act or practice is one which meets the consumer-injury factors listed above *and* is grounded in well-established legal policy."[107]

In *Kochava I*, the District Court "decline[d] Kochava's invitation to follow the Eleventh Circuit and add a predicate-violation requirement to Section 5(a)."[108] It did so for two reasons; first because of supposedly binding Ninth Circuit precedent rejecting the Eleventh Circuit's position, and second because the plain language of Section 5 ostensibly defeats the Eleventh Circuit's reading.[109] However, neither of those reasons withstands scrutiny.

A. Ninth Circuit Precedent

In *Kochava I*, the District Court concluded that, under binding precedent from the Court of Appeals for the Ninth Circuit in *FTC v. Neovi* and *Davis v. HSBC Bank Nevada*, pleading and proving that a defendant's acts and practices satisfied the elements of Section 5(n)'s three-prong test in and of itself suffices to make those acts and practices "unfair" within the meaning of Section 5(a).[110] But in *Neovi*, the issue was never raised whether a Section 5(a) unfairness claim must be grounded in an additional culpability

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[104] 894 F.3d at 1229.
[105] *Id.*
[106] *Id.*
[107] *Id.* (emphasis added).
[108] *Kochava I*, *supra* note 5, at 1170.
[109] *Id.*
[110] *Id.* (first citing FTC v. Neovi, 604 F.3d 1150, 1155 (9th Cir. 2010); and then Davis v. HSBC Bank Nevada, 691 F.3d 1152, 1168 (9th Cir. 2012)).

element such as a violation of a well-established law or public policy,[111] and the Ninth Circuit certainly made no express ruling on that issue. *Neovi* therefore hardly can be considered "precedential" on the point. And in *Davis* the issue likewise was neither raised nor ruled upon; moreover, if anything, the language the court used in quoting Section 5(n) seems to acknowledge that satisfaction of Section 5(n)'s three-prong test is necessary, but not in and of itself sufficient, to make an act or practice "unfair" within the meaning of Section 5(a).[112]

In *Kochava I*, the District Court sought to bolster its reading of these two Ninth Circuit decisions by asserting in footnote 4 that "[n]umerous district courts within the Ninth Circuit have also described the test under Section 5(a) as containing just three elements, without mentioning any requirement for an underlying violation of law or public policy."[113] But none of the cases cited by the District Court in footnote 4 of *Kochava I* actually addresses the issue whether satisfaction of Section 5(n)'s three-prong test is sufficient, or instead merely necessary, for an act or practice to be found unfair under Section 5(a). Indeed, *FTC v. Amazon.com, Inc.*[114] is the only decision cited in *Kochava I* that emanated from a court within the Ninth Circuit and that actually addressed this issue.[115] There, the court rejected the argument that Section 5(n) merely sets forth necessary conditions for unfairness liability on the ground that the Third Circuit had rejected that very argument in *FTC v. Wyndham, Inc.*[116] But the *Amazon.com* court badly misread the *Wyndham* decision on this point. In point of fact, far from rejecting the argument, the *Wyndham* court *agreed* that, "[a]rguably, § [5](n) may not identify all of the requirements for an unfairness claim" and found that the FTC had sufficiently alleged any additionally required element.[117] Given that *Amazon.com* relied heavily on a clear misreading of *Wyndham*,

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[111] *See* Unopposed Application for Leave to Resubmit Appellants' Opening Brief at 10–20, *Neovi*, 604 F.3d 1150 (No. 09-55093) (raising only whether injury and causation of injury were proven).

[112] *See* 691 F.3d at 1168 (stating that an act or practice is "unfair" for Section 5(a) purposes "only if"—not "if"—the act or practice satisfies the three prongs of Section 5(n)).

[113] *Kochava I*, 671 F. Supp. 3d at 1170 n.4.

[114] FTC v. Amazon, Inc., No. 2:14-cv-1038, 2016 WL 10654030 (W.D. Wash. July 22, 2016).

[115] *Kochava I*, *supra* note 5, at 1170.

[116] FTC v. Amazon, Inc., No. 2:14-cv-1038, 2016 WL 10654030, at *6 (W.D. Wash. July 22, 2016) (citing FTC v. Wyndham, Inc., 799 F.3d 235 (3d Cir. 2015)).

[117] 799 F.3d at 244; *see also id.* at 259 ("The three requirements in § [5](n) may be necessary rather than sufficient conditions of an unfair practice. . . .").

Amazon.com is not the persuasive precedent on this point that it was treated as being in *Kochava I*.[118]

B. Plain Language of Section 5

In *Kochava I*, the District Court rejected the *LabMD* holding on the additional ground that "the Eleventh Circuit's approach does not square with the text of the FTC Act" because "[n]either Section 5(a) nor Section 5(n) makes any reference to underlying violations of existing law or policy" and, as a result, "[t]here is simply no support in the statutory text for imposing a predicate violation requirement under Section 5(a)."[119] But this is incorrect. As acknowledged by *Kochava I* and by every other court that has addressed this issue, Section 5(n)'s three prongs "are written as negative limitations on

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[118] In *Kochava I*, the District Court also cited two out-of-circuit cases that addressed this issue and, like the court in *Amazon.com*, held that a Section 5 unfairness claim could be made merely by satisfying the three-prong test in the first sentence of Section 5(n) and without making any additive culpability showing. *Kochava 1*, *supra* note 5, at 1170 n.3 (citing FTC v. Accusearch Inc., 570 F.3d 1187, 1194 (10th Cir. 2009)) & 1171 (citing FTC v. Walmart Inc., 664 F. Supp. 3d 808, 830–35 (N.D. Ill. 2023)). However, *Accusearch* gave no consideration to the points made in Part I.B below regarding the text of Section 5, the legislative history of Section 5(n), and the FTC's own pre-5(n) and post-5(n) statements regarding the scope of its unfairness authority. Moreover, *Accusearch* was decided before *Wyndham* and *LabMD* and thus did not have the benefit of the analyses of Section 5(n) put forward in those decisions. And *Walmart*, while being decided after both *Wyndham* and *LabMD*, misread *Wyndham* as "treating the § 5(n) factors as the test for unfairness under § 5(a)," *Walmart*, 664 F. Supp. at 833, which as shown above in text is certainly not the case, and it took no account of the legislative history of Section 5(n) or the FTC's own 1982 Policy Letter regarding the scope of its unfairness authority, both of which are discussed in Part I.B below. Moreover, the *Walmart* court acknowledged that the FTC's reading of Section 5(n) was "contestable" and ultimately granted Walmart's motion asking that the court's denial of Walmart's motion to dismiss the FTC's Section 5 claim be certified for interlocutory appeal by the Court of Appeals for the Seventh Circuit. *See* Docket Nos. 68 and 92, FTC v. Walmart Inc., No. 22-CV-3372 (N.D. Ill., filed July 20, 2023, and Oct. 18, 2024, respectively). Neither case, then, represents a particularly persuasive precedent on the question whether satisfaction of Section 5(n)'s three-prong test is sufficient, or instead merely necessary, for an act or practice to be found unfair under Section 5(a), especially when held up against the contrary precedents represented by *Wyndham* and *LabMD*.

[119] *Kochava I*, *supra* note 5, 671 F. Supp. 3d at 1170–71. In *Kochava III*, the District Court repeated this conclusion and, on that basis, rejected Kochava's argument that violation of an established public policy must always be proven for an act or practice to be declared unfair under Section 5. *Kochava III*, *supra* note 6, at *9–10. This Article does not dispute this narrow point. *See infra* note 130. Notably, however, *Kochava III* nowhere addresses the core argument in Part IV of this Article, namely, that the plain language of the word unfair in Section 5(a), coupled with the plain wording of Section 5(n) as a negative limitation on the FTC's unfairness authority, expressly imposes a requirement that an act or practice not only satisfy Section 5(n)'s three-prong test, but also be "marked by injustice, partiality, or deception," in order to be found unfair. *See infra* notes 120–31 and accompanying text.

the FTC's authority rather than as an exhaustive list of elements."[120] Thus, by their plain language, those prongs *do not* set forth such an exhaustive list. This is made even clearer by the second and third sentences of Section 5(n), which expressly authorize the FTC to "consider established public policies," and to make such policies a basis (though not a primary basis), for "determining whether an act or practice is unfair."[121] The authority granted to the FTC by those two sentences would be illogical if Section 5(n)'s three-prong test were indeed intended to be "exhaustive" of the elements necessary to establish "unfairness" under Section 5(a).[122] Finally, even if the plain language of Section 5(n) itself were not clear on this point, the plain language of Section 5 as a whole would be. Section 5(a) prohibits "unfair" act or

[120] *Kochava I*, 671 F. Supp. 3d at 1171 (citing Section 5(n)'s wording that the FTC "shall have no authority under" Section 5 to declare an act or practice unfair "unless" the act or practice meets the three-prong test set forth in Section 5(n)'s first sentence); *accord*, *Wyndham*, 799 F.3d at 244, and *Walmart*, 664 F. Supp. 3d at 832; *see* 15 U.S.C. § 45(n).

[121] 15 U.S.C. § 45(n).

[122] The *Walmart* court sought to evade this point by arguing that the last two sentences of Section 5(n) merely authorize the FTC to use public policies as a tool in pleading and proving satisfaction of the first sentence's three-prong test. 664 F. Supp. 3d at 835. With due respect, this argument fails for three separate reasons. First, the language of the last two sentences of Section 5(n) plainly states that public policies *in and of themselves* can be *part of the basis* (just not *the primary basis*) for an unfairness finding. *See* 15 U.S.C. § 45(n). Second, if Congress merely intended public policies to be tools the FTC could employ to establish the elements of Section 5(n)'s three-prong test, why reference public policies at all in Section 5(n), especially as Section 5(n) nowhere references any of the other many tools the FTC has authority to use in trying to satisfy that test? Third, reading the last two sentences of Section 5(n) in this fashion makes little sense, as public policies do not have any readily obvious relevance to any of the test's three prongs and thus would not logically have been called out in those sentences simply to enable the FTC to use them in order to try to satisfy that test. *Compare Walmart*, 664 F. Supp. 3d at 835 (asserting that, but never explaining how, "[p]ublic policy can inform the kind or degree of injury at issue [or] can express some of the costs or benefits of an act or practice"), *with LabMD*, 894 F.3d at 1229 n.24 (refusing to "take this ambiguous statement [i.e., the last two sentences of Section 5(n)] to mean that the [FTC] may bring suit purely on the basis of substantial consumer injury" and instead interpreting those two sentences as giving public policies independent significance in evaluating whether the defendant's challenged conduct is unfair). The reality is that the last two sentences of Section 5(n) were included in the provision so as to hold the FTC to its promise in the 1980 Policy Statement and the 1982 Policy Letter not to use "public policy" as the *sole* basis for a finding of unfairness. *See* H.R. REP. NO. 103-617 (1994) (Conf. Rep.), WL 385368, at *12 (describing the last two sentences of Section 5(n) as being "derived from the 1980 policy statement of the Commission regarding unfairness, the Commission's 1982 letter on the same subject, and from subsequent interpretations of and applications to specific unfairness proceedings by the Commission"); 1993 Senate Report, *supra* note 34, at *13 (describing the purpose of Section 5(n) as being "to prevent a future FTC from abandoning the principles of the December 17, 1980, and March 5, 1982, letters"). Those sentences should, accordingly, be read to mean what they plainly say, namely, that public policies may in and of themselves be part of the basis for an unfairness finding, as long as they are not the primary basis for that finding.

practices, i.e., acts or practices that, *by definition*, are "marked by injustice, partiality, or deception."[123] Section 5(a) therefore, *by definition*, does not prohibit acts or practices that merely satisfy the three prongs of Section 5(n)'s first sentence, because acts or practices can satisfy those three prongs without being "marked by injustice, partiality, or deception" and thus without being within the plain meaning of the word "unfair."

Even if the plain language of Sections 5(n) and 5(a) did not itself make it clear that meeting the three prongs of Section 5(n)'s first sentence does not suffice to make an act or practice "unfair" within the meaning of Section 5(a), that conclusion is inescapable given the legislative history of Section 5(n) and the FTC's own statements regarding the scope of its unfairness authority both before and after Section 5(n) was added to Section 5 of the FTC Act in 1994. As the Eleventh Circuit pointed out in *LabMD*, the 1980 Policy Statement made clear that, *at least as far as the FTC was concerned*, "an act or practice's 'unfairness' must be grounded" not only in the injury that it causes, but also the defendant's culpability in causing that injury, with the result being that "[a]n act or practice that causes substantial injury but lacks such grounding is not unfair within Section 5(a)'s meaning."[124] Confirming what the 1980 Policy Statement said (and what *LabMD* read the 1980 Policy Statement as saying) on this point, two years later the 1982 Policy Letter acknowledged that the consumer injury test that twelve years later became embodied in the first sentence of Section 5(n) is merely "*one of* the most crucial elements in finding an act or practice to be unfair."[125] It was against

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[123] *See Unfair*, MERRIAM-WEBSTER.COM ONLINE DICTIONARY, www.merriam-webster.com/dictionary/unfair (last updated Oct. 23, 2024) (defining "unfair" to mean "marked by injustice, partiality, or deception"); *Wyndham*, 799 F.3d at 245 (using the Merriam-Webster definition to evaluate whether the FTC's unfairness claim met the additional requirements that Section 5 "may impose" above and beyond Section 5(n)'s three-prong test).

[124] 894 F.3d at 1229.

[125] 1982 Policy Letter, *supra* note 34, at 570 (emphasis added). The FTC's pre-enactment acknowledgments of this separate requirement for establishing Section 5 unfairness liability defeat the District Court's argument in *Kochava I* (*see* 671 F. Supp. 3d at 1170) that "Congress easily could have added such a requirement when it enacted Section 5(n), but it did not." Under well-established principles of statutory interpretation, "Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992). Here, then, having not "affirmatively act[ed] to change" the FTC's "existing interpretation" of the additional unfairness requirements when it enacted Section 5(n), Congress must be deemed, and should have been deemed in *Kochava I*, to have

this background of the FTC's long-standing interpretation of its Section 5 unfairness authority that Section 5(n) was added to Section 5 in 1994. As the legislative history of Section 5(n) makes clear, Congress made that addition in order to *limit* the FTC's unfairness authority—not to *expand* that authority by eliminating the FTC's previously acknowledged need to ground unfairness findings on meeting elements of "unfairness" above and beyond the consumer injury test.[126] Thus, subsequent to the enactment of Section 5(n), the FTC never walked back its statements in the 1980 Policy Statement and the 1982 Policy Letter regarding the additional elements of an unfairness claim separate and apart from those set forth in the consumer injury test. And consistent with the ongoing vitality of those previously acknowledged additional elements after the enactment of Section 5(n), when in subsequent years the FTC began to exercise its unfairness authority in regard to companies' privacy and cybersecurity practices, it *always* inquired not merely whether the practices in question satisfied Section 5(n)'s three-prong test but also whether those practices met the additive requirement of being "unreasonable."[127]

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The *real* interpretive question regarding the legal test for unfairness under Section 5(a), therefore, is not *whether* an additional culpability requirement exists above and beyond the three requirements specified in the first sentence of Section 5(n) but rather *what* that additional culpability requirement is. But as to this question as well, Section 5's plain language provides the answer. Specifically, as noted above, Section 5(a)'s plain language teaches that to be "unfair" an act or practice must be "marked by injustice, partiality, or deception," and the plain language of Section 5(n)'s second and third sentences teach that where, in addition to satisfying the three

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adopted that interpretation. Unfortunately, *Kochava I* does not address either the legislative history of Section 5(n) or the FTC's own prior statements regarding the scope of its unfairness authority.

[126] *See* H.R. REP. NO. 103-617, (1994) (Conf. Rep.), WL 385368, at *11–12 (stating Section 5(n) was amended "*to limit* unfair acts or practices to those that" satisfy the three prongs (emphasis added)); 1993 Policy Report, *supra* note 34, *12 (describing 5(n) as a "new subsection *limiting* the FTC's authority" (emphasis added)).

[127] *See, e.g.*, FTC *LabMD* Opinion, *supra* note 81, *30–31 (July 29, 2016) ("we evaluate whether LabMD's data security practices, taken together, failed to provide reasonable and appropriate security for the sensitive personal information on its computer network, ***and*** whether that failure caused or was likely to cause substantial injury that consumers could not have reasonably avoided and that was not outweighed by benefits to consumers or competition") (emphasis added).

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prongs of Section 5(n)'s first sentence, an act or practice violates an established public policy (and thus would be "marked by injustice"[128]) it can be found unfair. Consistent with Section 5's plain language, in *Wyndham* the Third Circuit held that Wyndham's allegedly unfair acts and practices were also alleged to have violated Section 5's deception prong and thus were sufficiently "marked by deception" to satisfy any additional culpability requirement imposed by Section 5 above and beyond Section 5(n)'s three-prong test,[129] and in *LabMD* the Eleventh Circuit assumed *arguendo* that LabMD's allegedly unfair acts or practices were negligent and thus satisfied the additional culpability requirement imposed by Section 5 above and beyond Section 5(n)'s three-prong test because they allegedly violated an established public policy.[130] In *Kochava*, then, the District Court should have insisted, and as that case moves forward the District Court should insist, that the FTC's unfairness claim be grounded not only in satisfying Section 5(n)'s

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[128] *See Injustice*, MERRIAM-WEBSTER.COM ONLINE DICTIONARY, www.merriam-webster.com/dictionary/injustice, 2024 (last updated Oct. 25, 2024) (defining "injustice" as "violation of right or of the rights of another").

[129] *See* FTC v. Wyndham, Inc., 799 F.3d 235, 245–46 (3d Cir. 2015).

[130] *See* LabMD, Inc. v. FTC, 894 F.3d 1221, 1229–31 (11th Cir. 2018). The *Walmart* court takes the Eleventh Circuit's *LabMD* decision to task for holding that establishment of a Section 5 unfairness claim *always* requires proof of a violation of a well-established public policy on the ground that this holding cannot be squared with the language of the second and third sentences of Section 5(n), which provide that public policies "may" (not "must") be considered and made a basis (though not a primary basis) for an unfairness finding. FTC v. Walmart Inc., 664 F. Supp. 3d 808, 833 n.27 (N.D. Ill. 2023) (first citing *LabMD*, 894 F.3d at 1229 n.24 & 1231 n.28; and then quoting 15 U.S.C. § 45(n)). The Eleventh Circuit may indeed have gone too far in reading what both it and the *Walmart* court considered to be the "ambiguous" language of those two sentences in Section 5(n) to mean that proof of a violation of a well-established public policy is the *only* way to meet the Section 5 unfairness culpability requirement that is additive to those requirements specified in Section 5(n). As noted above and in *Wyndham*, the plain meaning of "unfair" encompasses acts and practices "marked by injustice [*or*] partiality *or* deception" (emphasis added) and thus includes at least *some* acts or practices that, while being culpable, are not culpable by reason of being violative of a well-established public policy. But the *LabMD* decision assuredly *did not* go too far in refusing to "take this ambiguous statement [i.e., the last two sentences of Section 5(n)] to mean that the [FTC] may bring suit purely on the basis of substantial consumer injury," see 894 F.3d at 1229 n.24, because as discussed above the plain language of Section 5, as confirmed by the legislative history of Section 5(n) and the FTC's own pre- and post-5(n) statements regarding its Section 5 unfairness authority, leave no doubt that in addition to satisfying the Section 5(n) three-prong test *some* additional culpability showing must be made for an act or practice to be found "unfair" within the meaning of Section 5(a). On the other hand, the *Walmart* court clearly *did* go too far in reading the last two sentences of Section 5(n) to mean that *no* such additional culpability showing is required to state a Section 5(a) unfairness claim, 664 F. Supp. at 833 n.27, because as shown above *some* such showing undoubtedly is required, even if what must be shown is not necessarily a violation of a well-established public policy.

three-prong test, but also in alleging and proving that Kochava's allegedly unfair practice is marked by injustice, partiality, or deception.[131] The District Court's failure to so insist up to now is, unfortunately, error on its part, which error other courts addressing Section 5(a) unfairness claims in the future should take care not to repeat.

CONCLUSION

The District Court's interpretations of Section 5(n) of the FTC Act in *FTC v. Kochava* are erroneous in the four crucial respects described above. If those misinterpretations are upheld in that case as it moves forward and/or are followed in other cases by other courts around the country, the FTC will have achieved a dramatic, albeit legally indefensible, expansion of its unfairness authority under Section 5(a) of the FTC Act not only in the consumer data privacy realm but in all other consumer contexts as well. It is vitally important, then, for courts and litigants alike to understand how the *Kochava* Rulings misinterpret Section 5(n) so they can prevent those misinterpretations from taking hold more widely and causing even more mischief than they have already caused for Kochava. This Article has, hopefully, provided such an understanding.

[131] Whether the FTC could actually make such allegations and present such proof if called upon to do so in *Kochava* is open to question on the current record. Unlike what the FTC alleged in *Wyndham*, in *Kochava* the FTC has pled no deception-based Section 5 claim and thus has no obvious way to allege and prove that Kochava's allegedly unfair practice is "marked by deception." And unlike the case in *LabMD*, in *Kochava* the FTC's allegations do not independently plead the elements of common-law negligence or of a violation of any other readily apparent well-established public policy, so the FTC has no obvious way to allege and prove that Kochava's allegedly unfair practice is "marked by injustice" either.

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