



March 13, 2023

**VIA CERTIFIED MAIL**

Andrew Katsaros, Inspector General  
Federal Trade Commission  
Office of Inspector General  
Room CC-5206, 600 Pennsylvania Ave., NW  
Washington, DC 20580

**Re: Request for Investigation of FTC Chair Lina Khan and FTC Bureau of Consumer Protection employees for abusive and unlawful misconduct against Twitter and Elon Musk**

Dear Inspector General Katsaros:

America First Legal Foundation (“AFL”) is a national, nonprofit legal foundation working to promote the rule of law, prevent executive overreach, protect due process and equal protection, and educate Americans about the individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, all to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

On March 7, 2023, the U.S. House of Representatives, Committee on the Judiciary and Select Subcommittee on the Weaponization of the Federal Government, released a staff report on the FTC’s harassment of Twitter after Elon Musk took control.<sup>1</sup> It accused the FTC of abusing its authority by seeking information about Twitter’s personnel decisions, Elon Musk-related communications, and communications with

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<sup>1</sup> COMMITTEE ON THE JUDICIARY AND THE SELECT SUBCOMMITTEE ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT U.S. HOUSE OF REPRESENTATIVES, THE WEAPONIZATION OF THE FEDERAL TRADE COMMISSION: AN AGENCY’S OVERREACH TO HARASS ELON MUSK’S TWITTER, (Mar. 7, 2023) (available at <https://bit.ly/3yvb8vD>) (hereinafter “Committee Report”).

journalists, among other matters.<sup>2</sup> The FTC’s presumptive justification for these investigations is that they are necessary to the enforcement of its consent order with Twitter.<sup>3</sup> Yet according to the House Judiciary Committee, the FTC’s actions represent a gross abuse of government authority as well as a threat to the First Amendment.<sup>4</sup>

AFL believes that the evidence strongly suggests that the actions taken by Chair Lina Khan and her enforcement staff against Twitter and Mr. Musk are unlawful abusive misconduct, based on improper considerations, and in retaliation for his disclosure of facts demonstrating collusive censorship and other unlawful conduct by the Biden Administration and its allies.<sup>5</sup> Your office is responsible for investigating allegations of abuse or misconduct involving FTC employees, and criminal, civil, and administrative violations of laws and regulations.<sup>6</sup> Accordingly, we request an immediate investigation of Chair Khan and her enforcement staff, including but not limited to attorneys James Kohm, Reenah Kim, Laura Koss, Jamie Hine, and Andrea Arias. As discussed below, AFL believes that this investigation should include at least the three areas of concern raised by Congress:

1. Chair Khan and her enforcement staff’s apparent abusive misconduct in excess of the FTC’s lawful authority;
2. Chair Khan and her enforcement staff’s apparent violations of the Administrative Procedure Act’s prohibition on *ex parte* communications; and

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<sup>2</sup> Committee Report, *supra* note 1 at 1. *See* Committee Report, *supra* note 1 at 5 (citing Letter from FTC Staff Attorney, FTC Division of Enforcement to Counsel for Twitter, Twitter, Inc., No. C-4316 (Dec. 13, 2022)) (concerning access to journalistic communications); Committee Report, *supra* note 1 at 10 (citing Letter from FTC Staff Attorney, FTC Division of Enforcement to Counsel for Twitter, Twitter, Inc., No. C-4316 (Nov. 30, 2022)) (concerning communications relating to Elon Musk); Committee Report, *supra* note 1 at 9 (citing Letter from FTC Staff Attorney, FTC Division of Enforcement to Counsel for Twitter, Twitter, Inc., No. C-4316 (Dec. 13, 2022)) (concerning Twitter’s personnel decisions and other operational activities); Committee Report, *supra* note 1 at 2 (citing Letter from FTC Staff Attorney, FTC Division of Enforcement to Counsel for Twitter, Twitter, Inc., No. C-4316 (Dec. 9, 2022)) (concerning Twitter’s termination of Jim Baker); Committee Report, *supra* note 1 at 2 (citing Letter from FTC Staff Attorney, FTC Division of Enforcement Regarding Twitter Blue and Resignations to Counsel for Twitter, Twitter, Inc., No. C-4316 (Nov. 10, 2022)); Committee Report, *supra* note 1 at 2, (citing Request 3(d), Letter from FTC Staff Attorney, FTC Division of Enforcement to Counsel for Twitter, Twitter, Inc., No. C-4316 (Nov. 21, 2022)) (requesting information about when Twitter “first conceived of the concept for Blue Verified”).

<sup>3</sup> Ryan Tracy, *FTC Twitter Investigation Sought Elon Musk’s Internal Communications, Journalist Names*, WALL STREET J. (Mar. 8, 2023), <https://on.wsj.com/41TPWN8>, (Statement from FTC Chair Lina Khan); *accord.* Twitter, Inc., Decision and Order, C-4316, FTC (2022); *see also United States v. Twitter, Inc.*, No. 3:22-cv-3070 (N.D. Cal. May 26, 2022), ECF No. 11 (Stipulated Order).

<sup>4</sup> Committee Report, *supra* note 1 at 1.

<sup>5</sup> *See generally* Alana Goodman, *FTC Hires Anti-Musk Activist Amid Agency’s Investigation of Twitter*, THE WASHINGTON FREE BEACON (Mar. 10, 2023), <http://bit.ly/3Tdhdg8>.

<sup>6</sup> FED. TRADE COM., *Office of Inspector General* (last accessed Mar. 10, 2023), <http://bit.ly/3yvOXFE>.

3. Chair Khan and her enforcement staff's apparent violations of Twitter's Paperwork Reduction Act rights between November 2022 through February 2023.

## **I. The FTC has exceeded its lawful authority**

The FTC's data privacy authority does not extend to Twitter's discretionary decision to disclose to the media and to the American public internal communications between Twitter employees and federal agencies engaging in censorship, election interference through information suppression, and other wrongful acts.<sup>7</sup> According to the Committee Report, the FTC's purported legal justification for its investigation of Twitter – a consent decree – “is a pretext.”<sup>8</sup> On May 4, 2022, months before the FTC's late 2022 investigations of Twitter, Representative Jim Jordan wrote to FTC Chair Lina Khan concerned that the Open Markets Institute “may be trying to leverage its close relationship with you to take action to further limit free speech online.”<sup>9</sup> Such allegations, if true, demonstrate that Chair Khan and her enforcement staff have knowingly abused the FTC's authority and violated the law.<sup>10</sup>

## **II. Chair Khan and her enforcement staff have engaged in prohibited *ex parte* contacts**

The May 26, 2022, Order in the Northern District of California required the “reopening of the proceeding in FTC Docket No. C-4316.”<sup>11</sup> As a result, the FTC's Twitter inquisition is an “agency proceeding” under 5 U.S.C. § 557(a), subject to the Administrative Procedure Act's prohibition of *ex parte* contacts. The law provides that “no interested person outside the agency shall make or knowingly cause to be made to any employee who is or may reasonably be expected to be involved in the decision process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding.”<sup>12</sup> It similarly prohibits FTC's enforcement attorneys from making or knowingly causing to be made to any interested person outside the agency, an *ex parte* communication relevant to the merits of a proceeding.<sup>13</sup> Finally, it obligates FTC officials and enforcement attorneys to place *ex parte* communications into the public record of the relevant proceeding.<sup>14</sup>

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<sup>7</sup> See 15 U.S.C. § 45.

<sup>8</sup> Committee Report, *supra* note 1 at 13.

<sup>9</sup> Letter from Ranking Member Jim Jordan (House Judiciary) to Chair Lina Khan (FTC), (May 4, 2022) at 1, (available at Committee Report, *supra* note 1 at App'x 2).

<sup>10</sup> 5 U.S.C. § 706(2)(A).

<sup>11</sup> Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief at 3, *U.S. v. Twitter*, No. 3:22-cv-03070 (N.D. Cal. May 26, 2022).

<sup>12</sup> 5 U.S.C. § 557(d)(1)(A) (cleaned up).

<sup>13</sup> 5 U.S.C. § 557(d)(1)(B).

<sup>14</sup> 5 U.S.C. § 557(d)(1)(C)(i)-(iii).

The Committee Report presents evidence that outside persons and entities, including several Senators and the Open Markets Institute, influenced the FTC’s decision to investigate Twitter and Mr. Musk.<sup>15</sup> Presently, it is not clear whether and to what extent the demands made by the Senators or by the Open Markets Institute (or by undisclosed others) were dispositive. Nevertheless, because the consent decree was the purported basis for the FTC’s ongoing investigation, it was obligated to place these and all other similar communications on the public Twitter docket.

### **III. Chair Khan and her enforcement staff have violated Twitter’s Paperwork Reduction Act rights**

The FTC’s pretext for its actions against Twitter and Mr. Musk is the claim that Twitter violated the Federal Trade Commission Act by disclosing, via the Twitter Files, internal communications between Twitter employees and federal agencies engaging in censorship, election interference through information suppression, and other wrongful acts.<sup>16</sup> However, for the FTC to lawfully collect information from Twitter employees, it must use a formal process – either a grand jury subpoena or an OMB-approved information collection in compliance with the Paperwork Reduction Act.<sup>17</sup> The Committee Report identified precisely why Congress enacted the Paperwork Reduction Act: to prevent government overreach from creating a “substantial burden on [a] company’s operations.”<sup>18</sup> The lack of an appropriate procedural process here is a clear red flag suggesting that the FTC is acting in bad faith and abusing its authority.

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<sup>15</sup> Committee Report, *supra* note 1 at 15; see Barry Lynn, *OMI Statement on Elon Musk and Twitter, Open Markets Institute*, OPEN MARKETS INSTITUTE (Apr. 26, 2022) (available at <https://bit.ly/3LftWqa>); Letter from the Open Markets Institute to Jonathan Kanter, Asst. Att’y Gen. for the U.S. Dep’t of Just. Antitrust Div., Jessica Rosenworcel, Chair of the Federal Communications Commission, and Lina Khan, Chair of the Federal Trade Commission (Nov. 16, 2022) (available at Committee Report, *supra* note 1 at App’x 13).

<sup>16</sup> Committee Report, *supra* note 1 at 1 (citing Letter from FTC Staff Attorney, FTC Division of Enforcement to Counsel for Twitter, Twitter, Inc., No. C-4316 (Dec. 13, 2022)).

<sup>17</sup> The Paperwork Reduction Act provides due process-type protection for individuals and companies subject to federal agency investigations. 44 U.S.C. § 3502 et seq. It requires prior OMB review and approval whenever the FTC collects information from “ten or more persons.” 44 U.S.C. §§ 3502(2), 3506(c), § 3507(a). The applicable regulations define information collections “contained in a rule of general applicability” to be “deemed to involve ten or more persons.” 5 CFR § 1320.3(c)(2). A consent order is necessarily a rule of general applicability. 5 U.S.C. § 552(a)(1)(D). Therefore, the FTC was required to obtain OMB’s prior approval and to provide public notice of its proposed information demands in advance of the collection, among other things.

<sup>18</sup> Committee Report, *supra* note 1 at 10.

Thank you in advance for your cooperation. If you have any questions about this request, please do not hesitate to contact us at [info@aflegal.org](mailto:info@aflegal.org).

Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation