Testimony of Lee A. Hepner
Senior Legal Counsel, American Economic Liberties Project

Hearing on
"Your Data, Their Profit: The Consumer Cost of AI Surveillance Pricing"

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Chairman Hawley, Ranking Member Durbin, and Members of the Subcommittee,

Thank you for the opportunity to testify before you today. I currently serve as Senior Legal Counsel at the American Economic Liberties Project, a nonprofit and nonpartisan research and advocacy organization that promotes accountability in the face of the abuse of corporate power. For over a decade, I have served in and out of government studying corporate power and, in turn, developing legal theories and policies to confront its various forms..

Most relevant for today's hearing, over the past several years, I have studied emerging technology platforms and surveillance pricing, or the targeting of discriminatory prices at individual consumers or consumer segments based on their private, personal information. I have been part of teams that have crafted legislative responses to this phenomenon, variations of which have been introduced in dozens of jurisdictions at the local, state and federal levels.

I want to start with a quote about airline pricing. "Selective price gouging, non-cost justified discounts for big customers, and secret rebates seem to favor the large organized interests with competitive alternatives at the expense of the unorganized, uneducated, or captive passenger." These tactics are "contrary to basic American precepts of justice."

That quote is from the Heritage Foundation's Mandate for Leadership in 1980, the guidebook used by the Reagan administration.

In America, we have built a society based on the idea that prices for the same goods and services should be relatively equal to all-comers. "The Price Is Right" was the longest running game show in American history precisely because we decided that a common price was one thing that buyers and sellers should all know about a market.

Fairness, a term strewn across our statutes, is in part about making sure that one party cannot exploit its superior access to information or power to discriminate against weaker market participants.

The compilation of dossiers of data on every single person in America, and their use to organize surveillance pricing, represents a break from this fundamental conception of fairness. There are many technical and economic aspects of surveillance pricing, but I want to start by noting that it is first and foremost a moral issue, and a non-partisan one at that. A recent poll conducted by the American Economic Liberties Project found support for new laws curbing surveillance pricing at or near 78% among Republicans, Democrats, and Independents.[1]

I believe it is imperative that Congress act to protect consumers and small businesses from this intrusive and exploitative form of economic discrimination that threatens to widen economic inequality and entrench a two-tiered economy.

1. Introduction

Surveillance pricing has evolved in just a matter of years from a speculative threat to a near-ubiquitous feature of the consumer retail economy, particularly online. Firms today, including a cottage industry of third-party pricing services that encroach on the competitive pricing decisions of otherwise independent retailers, are capable of analyzing vast amounts of personal information to determine individualized demand, need, or even *desperation* for goods and services – and to price those goods and services accordingly.

For example, former Federal Trade Commission (FTC) Chair Lina Khan warned that airlines may offer higher airfares to travelers who need to attend an upcoming funeral.[2] In their January 2025 interim staff report on surveillance pricing, the FTC describes how new parents may intentionally be shown higher priced baby thermometers based on their time of purchase or because selecting rushed delivery has caused them to be profiled as less price-sensitive.[3] Gambling sites may offer special pop-up deals

[1] "New Poll: Colorado Voters Overwhelmingly Support Banning Surveillance-Based Pricing and Wages," American Economic Liberties Project (Apr. 21, 2026), https://www.economicliberties.us/press-release/new-poll-colorado-voters-overwhelmingly-support-banning-surveillance-based-pricing-and-wages/.

[2] Ann-Louise Jackson, "Lina Khan says the FTC is investigating surveillance pricing," Fast Company (Sept. 23, 2024), https://www.fastcompany.com/91195551/lina-khan-ftc-federal-trade-commission-chair-surveillance-pricing-explained-what-is-it

[3] "FTC Surveillance Pricing 6(b) Study: Research Summaries, A Staff Perspective," Federal Trade Commission (Jan. 2025),

triggered by a customer moving their cursor to close out a browser window. As traditional efforts to meet consumer demand bleed into preying on desperation and addiction, some have characterized the price-setting function as “pain point pricing”[4] or “desperation finance.”[5]

Price discrimination is not a new or even recent phenomenon. In his oft-cited 1989 article *Price Discrimination*, Hal Varian, who would go on to serve as Google’s chief economist for over two decades, described it as a “ubiquitous phenomenon” and “one of the most prevalent forms of marketing practices.”[6] Profit-maximizing firms had long sought to understand how much they are leaving on the table in any given consumer transaction, and to capture as much of that “consumer surplus” as possible. Varian cites student discounts and senior citizen discounts as popular examples of retail price discrimination.The profit-maximizing imperative to “perfect” price discrimination, however, has transcended these rudimentary, bona fide discounts. On a recent earnings call, one airline executive described their newfound ability to target consumers with the right price and at the right time as the “Holy Grail” of pricing.[7].

AI-based pricing tools have supercharged the practice of individualized price discrimination. Data brokers and other market middlemen provide access to troves of consumer data – including personal information like online browsing habits, precise location data, device type, biometric data, and purchase histories – and technologies able to process that data instantaneously have facilitated a new era of ubiquitous and optimized price discrimination.

Today, Google’s advertising platform enables the instantaneous, automated targeting of customized prices at narrow consumer segments based on their estimated income level, as determined by online behaviors, social networks, purchase histories, YouTube viewing habits, home address, and other personal information collected from third parties.[8] Google’s Universal Commerce Protocol, a Gemini-powered ad service and

https://www.ftc.gov/system/files/ftc_gov/pdf/p246202_surveillancepricing6bstudy_researchsummaries_redacted.pdf.

[4] Katy Marquardt Hill, “Your next airline ticket could be priced by AI,” University of Colorado Boulder (Aug. 20, 2025), https://www.colorado.edu/today/2025/08/20/your-next-airline-ticket-could-be-priced-ai

[5] Persis Yu, Mike Pierce, “The Financialization of Desperation Across Trump’s Economy,” Protect Borrowers (June 18, 2026), https://protectborrowers.org/the-financialization-of-desperation-across-trumps-economy/

[6] Hal Varian, “Price Discrimination,” Handbook of Industrial Organization, Vol. 1, Ch. 10, at 598, 646 (1989).

[7] Dave Dayen, “Prices in the Machine,” The American Prospect (Dec. 2, 2025) https://prospect.org/2025/12/02/prices-in-the-machine-ai/.

[8] Google’s Customer Match tool allows sellers to target various consumer segments, or “audiences,” including consumer segments based on estimated household income. Google estimates household income through several different methods, including Google Account user preferences, activity on Google

open protocol to facilitate surveillance pricing for merchants across the economy, heralds a new economic paradigm where ubiquitous surveillance pricing is the new norm.[9] Google has indicated it may even start helping its advertisers choose prices for customers.

This new era risks upending existing legal regimes designed to protect consumers, drive competition, and enhance affordability. As courts grapple with the reach of existing laws, lawmakers have a role to play in correcting an emergent power asymmetry that leverages new technologies to exploit consumer vulnerabilities while inflating corporate profits.

2. Market Power and Surveillance Pricing

As a threshold matter, price discrimination is only made possible through the exercise of some degree of market power. Otherwise, competition limits a firm's ability to charge different consumers different prices. Even in a market with multiple competitors, lack of access to the consumer information necessary to engage in price discrimination, or the refusal to use consumer information accordingly, may leave unexercised market power on the table.[10]

Access to consumer information can create its own form of competitive advantage, or, by the same token, competitive *dis*-advantage for those firms without such access. As such, access to consumer data can create barriers to market entry for competing firms, while reinforcing the market power of incumbent firms.[11]

In their 2024 paper *Personalized Pricing and Competition*, Andrew Rhodes and Jidong Zhou identify asymmetrical access to personalized pricing as a source of higher firm profits and worse consumer outcomes.[12] In such a mixed market, firms that are able to

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properties, activity on third-party apps and websites, and website publisher data. Sellers may customize advertisements shown to different audiences, including by customizing price offers. *See* "About Customer Match," Google (accessed Aug. 3, 2026), https://support.google.com/google-ads/answer/6379332.

[9] Google launched its Universal Commerce Protocol in early 2026 with major retail partners including Walmart, Visa, Mastercard, Shopify, Gap, Kroger, Macy's, Stripe, Home Depot, Lowes, and American Express. *See* Matthew Stoller, "Will Google Become Our AI-Powered Central Planner?," The Big Newsletter (Jan. 16, 2026), https://www.thebignewsletter.com/p/will-google-organize-the-worlds-prices.

[10] Jean-Pierre Dubé, Sanjog Misra, "Personalized Pricing and Consumer Welfare," NBER Working Paper 23775 (2017).

[11] "Investigation of Competition in Digital Markets," at 31, Majority Staff Report and Recommendations, Subcommittee of Antitrust, Commercial, and Administrative Law, U.S. House of Representatives, 117th Congress (July 2022) (citing Maurice E. Stucke and Allen P. Grunes, "Big Data and Competition Policy," 163 (2016).)

[12] Andrew Rhodes & Jidong Zhou, Personalized Pricing and Competition, 114 Am. Econ. Rev. 2141, 2163 (2024).

personalize prices can poach consumers from competitors by offering a lower price. Yet, even in the event of “lower” price offers, which are elusive in a marketplace where prices are maximally oriented toward the highest price a given consumer would pay for a good or service, Rhodes and Zhou find that asymmetrical access to information allows for sellers to better segment the market, while increasing profits and capturing the most consumer surplus.

Recent federal enforcement of the antitrust laws has identified superior access to data as a barrier to marketplace entry. In *United States v. Google (Search),* for instance, the court identified Google’s access to scale data as a “critical input that directly improves quality” by allowing Google to deliver more relevant results in response to search queries.[13] More directly relevant to the surveillance pricing context was the evidence in *Fed’l Trade Comm’n v. Meta* that the social networking company targeted quality-adjusted price increases - including higher ad loads - at users who it perceived to be less likely to leave its platform in response.[14]

While antitrust law presents a useful tool for confronting the ways in which dominant firms wield access to consumer information to exclude competitors or abuse their power, asymmetrical access to data also creates a financial incentive for smaller firms to delegate their competition pricing authority to third party cartel managers. Such delegation creates a heightened risk of collusion, compounding the exercise of market power inherent in price discrimination itself. To little surprise, platforms and third party pricing services that offer “smart pricing tools” to independent sellers have also come under scrutiny for facilitating coercive pricing cartels.[15]

Courts have only recently begun to recognize this paradigm-shifting impact of AI-based pricing technologies. Just last week, the U.S. Court of Appeals for the Third Circuit issued a landmark ruling in a case involving allegations of algorithmic price fixing among various casino-hotels in Atlantic City.[16] While collusion is a separate, if not unrelated pricing ill, the Third Circuit’s characterization of AI-based pricing technologies holds broader significance:

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[13] *United States v. Google LLC*, 747 F. Supp. 3d 1, 50 (D.D.C. 2024).
[14] Georgios Petropoulos, Geoffrey G. Parker, “What the FTC v Meta Case Teaches Us About Big Tech Harms,” ProMarket (June 5, 2025), https://www.promarket.org/2025/06/05/what-the-ftc-v-meta-case-teaches-about-big-tech-harms/.
[15] *See, e.g., Casciani, et al. v. Knowledge Support Systems d/b/a Kalibrate, et al.*, No. 2:26-cv-02211-CSK (E.D. Ca. June 2026).
[16] *Cornish-Adebiyi, et al. v. Caesars Entertainment, Inc., et al.*, No. 24-3006, 2026 WL 2182291 (3d Cir. July 29, 2026).

> "AI programs that provide 'dynamic pricing' algorithms can also facilitate anticompetitive behavior. Historically, successful collusion may have been hindered by gaps in communication and the cost of ensuring compliance. Today, these algorithms have the capacity to bridge any such gaps. This makes it possible for firms to collude in ways that were inconceivable in 1890."[17]

a. Consumer Protection and Surveillance Pricing

Surveillance pricing may violate consumer protection laws, where recent enforcement, mostly at the state level, is testing the boundaries of the law. While such laws vary in scope and specificity from state to state, generally speaking they prohibit unfair, deceptive, fraudulent, or abusive business practices. In the context of offered prices, firms may violate state consumer protection laws where, for instance, hidden "junk" fees are tacked on to a shelf price, or where a shelf price does not match the actual price at the point of sale. In some states, false advertising laws, laws against locality discrimination, and regulation of weights and measures offer variations on the consumer protection theme.

Surveillance pricing creates at least two interesting wrinkles for consumer protection law. First, rampant price discrimination renders the "prevailing market price" more challenging - if not impossible - to discern. Absent any disclosure that a consumer is being offered a different price than other consumers in the same marketplace, a reasonable consumer may be misled to believe that *their* price is in fact the prevailing market price, even where it may be higher than any other price in the marketplace. In the absence of any discernible or standard price, all prices become a signal of deception.

Second, to the extent a legitimate discount demands comparison to a "non-fictitious" comparison price that is actually offered to consumers, rampant price discrimination may induce a consumer to purchase at a price that is higher than that offered to 90% of other consumers in the market. The erosion of a prevailing market price, either through surveillance pricing, rapid dynamic pricing or other form of price experimentation, arguably renders all prices - including "lower" prices - deceptive or misleading.

For example, where a seller represents to one consumer that the prevailing price of a good or service is $15, while other consumers pay between $12 and $18, the omission

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[17] Id.,at 1.

of an available lower price may create an "overall impression"[18] that the advertised price was misleading, even where other consumers were offered a higher price.

i. Recent enforcement of consumer protection laws against surveillance pricing

While intuitively suited to address the fundamentally misleading and deceptive nature of surveillance pricing, consumer protection laws have been seldom enforced against the practice. Two noteworthy cases - against Target and Farmers Insurance - warrant mention.

In early 2022, seven District Attorneys in California filed a lawsuit against Target, alleging that the major retailer violated various state consumer protection laws when it used the geolocation of consumer shopping within Target's app to offer higher prices to consumers once they entered a store's perimeter.[19] In some instances, consumers were offered $100 more when in close proximity to a Target store, based on a prediction of their likelihood to defect to a competing store.

The lawsuit alleged that Target's pricing scheme violated various state laws, including weights and measures regulations against "charging any amount greater than the lowest price posted on the commodity itself,"[20] and the "untrue or misleading" provisions of the state's false advertising law.[21] The case did not allege a violation of a separate provision of state law passed in 1941 prohibiting "locality discrimination."[22] The case was settled prior to any adjudication of the merits, providing immediate injunctive relief to Californians, but little in the way of an evolution in the law.

In 2015, a class of California-based plaintiffs alleged that Farmers Insurance violated various state laws when it hiked insurance premiums for customers deemed less sensitive to price changes. Farmers Insurance had allegedly partnered with a third party software provider who offered "predictive analytics" to "identify … areas where clients

[18] *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) ("A misleading impression created by a solicitation is material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'") *See also* FTC Statement on Deception, 103 F.T.C. 174, 178 (1984) (In determining whether an advertisement, including its format, misleads consumers, the Commission considers the overall "net impression" it conveys.)
[19] *The People of the State of California v. Target Corporation,* Civil Case No. SCV-270231, Sonoma Super. Ct. (Jan. 2022).
[20] Cal. Bus. & Prof. Code § 12024.2(a)
[21] Cal. Bus. & Prof. Code § 17500.
[22] Cal. Bus. & Prof. Code § 17031.

can raise prices without impacting customer retention."[23] While a clear-cut case of surveillance pricing, the case was bolstered by state insurance regulations which had separately deemed "any use of Price Optimization in the ratemaking/pricing process or in a rating plan [] unfairly discriminatory."[24] A customer's willingness to pay higher premiums fell outside an "actuarially sound estimate of the risk of loss."

The case against Farmers Insurance alleged that the use of individual elasticity of demand to inform price - or surveillance pricing - violated the state's Unfair Competition Law, which prohibits "any unlawful, unfair, or fraudulent business practice."[25] Emphasizing the fraudulent nature of Farmers' conduct, the lawsuit alleged that price discrimination "was likely to deceive, and did in fact deceive, Plaintiffs and the Class."

The cases against Target and Farmers Insurance offer glimpses into the applicability of consumer protection law to surveillance pricing. Arguably, the more explicit violation of state insurance regulations was responsible for tilting the case against Farmers Insurance toward settlement. Inasmuch as both cases were settled short of a decision on the merits, which may have provided clarity as to the application of generalized consumer protection laws to surveillance pricing, the line between permissible and illegal price discrimination remains unclear.

ii. Enforcing against "fake" discounts

A comparatively robust area of litigation has developed around the offering of "fake discounts," or inducing consumers to purchase a good or service by representing that the offered price is lower than a comparison price that no one pays. In 2026 alone, cases have been filed against major retailers like Old Navy, Nike, Skechers, Ulta Beauty, Ralph Lauren and Macy's, alleging various forms of fake discounting, including inflating reference prices to create the false impression of a good deal, or repeatedly extending "limited time offers" to create a false sense of urgency.

California has emerged as an epicenter of fake discounting litigation, and state law expressly prohibits the advertisement of any "former" price - or comparison, reference, or prior price - that was not the "prevailing market price" within the three months preceding the advertised discount.[26] But many other states, from Ohio to Missouri to Idaho, have analogous laws with varying degrees of specificity.

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[23] Complaint at 8, *Harris , et al. v. Farmers Insurance Exchange, et al.,* No. BC 57948 (Cal. Super. Ct., Oct. 29, 2015).
[24] *Id.*, at 7.
[25] Cal. Bus. & Prof. Code § 17200, *et seq.*
[26] Cal. Bus. & Prof. Code § 17501.

Among the most detailed regulations prohibiting fake discounts was promulgated by the Massachusetts Attorney General in 2010, pursuant to authority granted under the state's Consumer Protection Act.[27] The Massachusetts regulation prohibits the offering of a discount without reference to a "comparison price." Firms qualify for a safe harbor where they can show, for example, that the prevailing comparison price was actually charged on at least 40% of sales during the prior six months.

iii. Pending litigation: *JetBlue* and *The Washington Post*

The boundaries of generally applicable consumer protection laws are being tested in the courts. Recent class action litigation against JetBlue Airways, for instance, alleges that the airline's unauthorized interception of personal information, and the sharing of that information with third parties for the purposes of setting individualized prices, violates various civil and criminal provisions of the Electronic Communications Privacy Act, federal wire fraud law, common law trespass, and the unfair and deceptive prongs of New York State's Deceptive Trade Practices Act.[28]

Yet, enforcement of New York State law against alleged surveillance pricing by JetBlue may face legal turbulence in the form of federal preemption. The 1978 Airline Deregulation Act broadly prohibits state regulation "related to a price, route or service of an air carrier," and courts have summarily declared other state consumer protection laws unconstitutional as applied to air carriers.[29]

With respect to alleged violations of the ECPA, federal wire fraud law, or common law trespass, the capacity of those laws to address surveillance pricing more broadly may be undermined where the sharing of personal information is "consensual," even where "consent" is coerced or buried in a lengthy privacy policy.

The class action lawsuit against The Washington Post similarly alleges that surveillance pricing in the context of subscription-based products violates general consumer protection laws.[30] The case alleges that starting in the mid 2010s, following its acquisition by Amazon founder Jeff Bezos, the Post began collecting "deeply personal data" that it would later "weaponize to determine how much more money it could extract from each Subscriber to maximize its profits."[31] The Post may have also collected

[27] 940 Mass. Code Regs. 6.05.
[28] *Phillips v. JetBlue Airways Corp.*, No. 1:26-cv-02405 (E.D.N.Y. Apr. 22, 2026) (*JetBlue*).
[29] *Air Transp. Ass'n v. Cuomo*, No. 07-5771-cv, 2008 WL 763163 (2d Cir. March 25, 2008), rev'g 528 F. Supp. 2d 62 (N.D.N.Y. 2007).
[30] *Blink v. WP Company LLC d/b/a The Washington Post*, No. 2026-CAB-004031 (D.C. Super. Ct. June 11, 2026) (*Washington Post*).
[31] Complaint at 2, Dkt. No. 1, *Washington Post*.

personal data from subscribers through Amazon, which, when combined with other affiliate data, it used to "build[] detailed profiles that could be used to assess, segment, and monetize readers through individual pricing and throttled content."[32]

The allegations against The Washington Post originated from a New York State law mandating disclosure of any retailer's use of an algorithm to set prices based on personal data. If successful, the case would represent the clearest application of consumer protection law to surveillance pricing.

3. How to Ban Surveillance Pricing

Across legal and policy discussions, the exploitation of personal information to set individualized prices represents a new frontier. Any optimism that legal efforts to apply existing legal regimes to the contemporary scourge of surveillance pricing leaves ample room for lawmakers to make matters clear.

Well over a dozen state and local jurisdictions have introduced new laws to curb the use of personal information as an input in the price-setting process.[33] No ban has yet passed into law A nation-leading effort in Colorado was unceremoniously vetoed, while a signed effort in Maryland only purports to address surveillance pricing, while blowing a hole in the state's century-old consumer protection law.[34] But in each instance, the legislative process has shed light on the most common legislative pitfalls and the best practices for addressing good faith concern.

a. Limited exceptions define the rule; broad exceptions swallow it.

Model legislation banning surveillance pricing begins with a broad general prohibition against the use of personal information to set or inform either personalized prices or prices targeted at consumer segments. "Personal information" or "surveillance data" is defined broadly to mean any data that is reasonably linkable to an identifiable individual, including personal characteristics, online behaviors, and biometric data.

The necessary breadth of that general prohibition necessitates careful consideration of exemptions, to accommodate known forms of price discrimination that may enhance rather than undermine fair price competition.

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[32] *Id.*, at 5.
[33] "The Fair Price Fight: Surveillance Pricing," American Economic Liberties Project (accessed Aug. 3, 2026), https://www.thefairpricefight.com/surveillance-pricing.
[34] Lee Hepner, Stephanie Nguyen, "How to Actually Ban Surveillance Pricing," Capitol Forum (Jul. 11, 2026), https://thecapitolforum.com/the-forum/the-forum-newsletter-july-11-2026/how-to-actually-ban-surveillance-pricing/.

Acceptable forms of price discrimination are well understood and derive from a pre-surveillance pricing economy where the inability to discriminate more efficiently gave rise to broadly advertised, transparent forms of discounts. Model legislation includes specific exemption, for instance, for publicly-advertised discounts aimed at broadly recognized groups of consumers, like seniors, students, or veterans. Further exemption should be made for differences in price based on different delivery costs, which necessitates the exchange of personal information in the form of an address.

Further exemption may be made for loyalty programs, provided that any benefits through the program are offered on equal terms to all enrollees or participants in the loyalty program. By contrast, blanket exemptions risk creating new vectors for rampant price discrimination under the veil of loyalty program rewards. In 2024, the Consumer Financial Protection Bureau issued a memorandum to law enforcement agencies warning against “bait-and-switch” rewards programs, where rewards may be susceptible to different valuation for different consumers.[35] Another study describes how loyalty programs can operate as a “Trojan horse.”[36]

The exemptions described here are not finite, and are better understood in the context of Colorado’s leading model to address surveillance pricing (and discriminatory wage-setting, inasmuch as a “wage” is the price of labor.)[37] But they share common principles that are easily codified. In each instance, discounts or differences in price tend to be publicly advertised, pursuant to criteria that are accessible, and subject to consistent application across all consumers. Any exchange of personal information is knowing and consensual – not coerced, mandatory, or unknown – and for the limited purpose of availing oneself of the applicable offer.

The risk associated with regulating emerging technologies like AI-based surveillance pricing is the risk that practitioners of surveillance pricing perceive the legislative process as an opportunity to relitigate settled areas of existing laws. In this respect, sweeping exemptions - e.g., for “lower prices” for “personalized discounts,” neither of which have any legitimacy in a marketplace characterized by ubiquitous price discrimination - threaten to swallow the rule.

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[35] “Consumer Financial Protection Circular 2024-07,” Consumer Financial Protection Bureau (Dec. 8, 2024), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-07-design-marketing-and-administration-of-credit-card-rewards-programs/.

[36] Stephanie T. Nguyen, Sam Levine, “The Hook, the Hack, and the Hike,” Vanderbilt Policy Accelerator (Oct. 20, 2025) https://vanderbiltpolicyaccelerator.substack.com/p/the-hook-the-hack-and-the-hike

[37] Colorado HB26-1210, 2026 Regular Session (“Prohibit Surveillance Price & Wage Setting”), https://leg.colorado.gov/bills/HB26-1210.

Model legislation can anticipate the threat of overbroad exemptions with a savings clause that prevents any limitation on consumer protection, antitrust, or other longstanding and potentially overlapping legal regimes. Lawmakers may also grant specific rulemaking authority to allow for greater clarity and evolution of the law through the administrative process.

b. Protecting discounts, not prohibiting them.

Lawmakers should also be vigilant against industry efforts to appropriate the language of affordability to advocate for permissive frameworks for ongoing surveillance pricing. Practitioners of surveillance pricing have, for instance, repeatedly stated that surveillance pricing regulations would "ban" discounts and loyalty programs. These representations chafe against the purpose and black letter text of surveillance pricing regulations.

To the contrary, surveillance pricing bans seek to *protect*, not prohibit, bona fide discounts and loyalty program rewards. Responsible regulation accomplishes this through narrow exemptions, grounded in clear principles that advance predictable, transparent, and competitive pricing.

Even so, rigorous policymaking has not prevented practitioners of surveillance pricing from exploiting the language of affordability to preserve the use of technologies fundamentally designed to maximize prices and inflate profit margins.

c. Banning surveillance pricing as a first step toward market fairness

It is equally important to recognize what surveillance pricing bans do not address. As AI-based pricing technologies have weaponized personal data to deceive consumers and flood markets with innumerable price offers, the same technologies have been used to engage in rapid dynamic pricing and other price experiments. Online pricing is susceptible to constant adjustment based on input data that does not include consumer personal data at all.

When Instacart faced recent allegations that it had engaged in surveillance pricing to set different prices for shoppers at the same store, the online grocery delivery platform responded that the allegations had blurred the line between dynamic pricing, A/B price tests, and alleged surveillance pricing.[38]

[38] Blog Post, "The Truth About Pricing Tests on Instacart," Instacart (Dec. 18, 2025), https://company.instacart.com/updates/the-truth-about-pricing-tests-on-instacart.

There is a significant kernel of truth to this response: That is, consumers who are offered wildly different prices on different devices or prices that are different from those offered to family members or neighbors, or who experience sudden inexplicable changes in price on a rideshare app - for consumers, the distinction in pricing methodology is one without a difference.

Surveillance pricing is just one of many ways in which AI-based pricing tools are obscuring the very notion of a market price, eroding consumer price sensitivity, and enabling corporations to increase profits at consumer expense.[39] In this sense, curbing surveillance pricing is not only important, but a starting point for restoring market fairness to the economy.

4. The Price of Inaction: A Two-Tiered Economy

Congress need not wait. Multiple bills have been introduced in Congress, including broadly applicable surveillance pricing bans led by Rep. Greg Casar[40] and Sen. Ruben Gallego.[41] Nor is there any need for these efforts to be partisan.

The economic and social effects of this evolution in price-setting technology are staggering. The erosion of trust between consumers and sellers mirrors the erosion of a prevailing market price.[42] Surveillance pricing undermines the right of consumers to be treated fairly in the marketplace of goods or services. As corporations seek higher margins through discriminatory pricing, segmentation of the marketplace risks leaving swaths of consumers excluded from the store altogether, amplifying the emergence of a two-tiered economy.[43]

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[39] Gregory Meyer, Emily Herberg, "America's biggest companies report 'rock solid' profits as consumers face higher costs," Financial Times (Aug. 2, 2026), https://www.ft.com/content/b4f150ea-9ea3-4bb4-b1e0-014cf1f0df26?syn-25a6b1a6=1.

[40] H.R. 4640, 119th Congress ("Stop AI Price Gouging and Wage Fixing Act of 2025"); Press Release, "Congressman Greg Casar Introduces New 'Stop AI Price Gouging and Wage Fixing Act,'" Office of Congressman Greg Casar (Jul. 23, 2025), https://casar.house.gov/media/press-releases/news-congressman-greg-casar-introduces-new-stop-ai-price-gouging-and-wage

[41] S. 3387, 119th Congress ("One Fair Price Act of 2025"); Press Release, "Gallego Introduces Bill to Crack Down on Surveillance Pricing," Office of Senator Ruben Gallego (Dec. 9, 2025), https://www.gallego.senate.gov/news/press-releases/gallego-introduces-bill-to-crack-down-on-surveillance-pricing/

[42] Press Release, "Gartner Marketing Survey Finds 68% of Consumers Report They Feel Taken Advantage of When Brands Use Dynamic Pricing," Gartner Marketing (Dec. 16, 2024), https://www.gartner.com/en/newsroom/press-releases/2024-12-16-gartner-marketing-survey-finds-68-percent-of-consumers-report-they-feel-taken-advantage-of-when-brands-use-dynamic-pricing.

[43] Jonnelle Martin, "Top 10% of Earners Drive a Growing Share of US Consumer Spending," Bloomberg (Sept. 16, 2025), https://www.bloomberg.com/news/articles/2025-09-16/top-10-of-earners-drive-a-growing-share-of-us-consumer-spending.

In 2025, *Bloomberg* reported that consumers in the top 10% of the income distribution account for nearly 50% of total spending, while the bottom 80% of consumers have seen their purchase power stagnate, according to Federal Reserve data.[44] Amid soaring stock prices, consumer confidence in the economy is waning. As price discrimination obscures the fair market price of goods and services, metrics like the Consumer Price Index fail to measure actual consumer sentiment.

The flip side of price discrimination is algorithmic wage discrimination, a growing phenomenon for "on-demand" or gig workers.[45] Whereas surveillance pricing measures a consumer's willingness to pay a higher price, surveillance wage discrimination measures a worker's willingness to accept a lower wage. Pinched on the way in and on the way out, labor's share of overall productivity reached a new record low according to data that has been collected since 1947.[46]
The broader contribution of price discrimination is to maximize profit margins on targeted consumer segments, while excluding a greater share of consumers from the marketplace altogether.[47] Compare this to the non-discriminatory, fixed-price marketplace, where marginal consumer price sensitivity – that is, the willingness to pay of lower-income or lower-need consumers – drives down prices for *all* consumers. By contrast, the ability of sellers to service debt by extracting greater surplus from higher income consumers reduces their incentive to increase revenues by expanding output at a lower average price to all consumers.

To the extent that consumer surplus has historically been shielded by a technological inability to implement individualized price discrimination at scale, AI-based price discrimination threatens to eviscerate that shield. The erosion of predictable, transparent, and fair pricing calls for a new regulatory shield.

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[44] Jonnelle Marte, "Top 10% of Earners Drive a Growing Share of US Consumer Spending," Bloomberg (Sept. 25, 2025) https://www.bloomberg.com/news/articles/2025-09-16/top-10-of-earners-drive-a-growing-share-of-us-consumer-spending
[45] Veena Dubal, "On Algorithmic Wage Discrimination," 123 Colum. L. Rev. 1929 (2023).
[46] Ben Holland, "Labor's Share of US GDP Drops to Record Low in Data Back to 1947," Bloomberg (Jan. 9, 2026), https://www.bloomberg.com/news/articles/2026-01-09/labor-s-share-of-us-gdp-drops-to-record-low-in-data-back-to-1947
[47] *Supra* n. 12, Rhodes & Zhou, at Personalized Pricing and Competition, 114 Am. Econ. Rev. 2141, 2163 (2024).